IN THE SUPREME COURT OF THE UNITED STATES

STANLEY MARKS, MARRY MOHNEY, GUY WEIR, AMERICAN AMUSEMENT COMPANY, INC., and AMERICAN NEWS CO., INC.	:
Petitioners,	:
v.	:
UNITED STATES OF AMERICA,	:
Respondents.	:

Washington, D. C.,

Tuesday, November 2, 1976

The above-entitled matter came on for argument at 10:00 o'clock, a.m.,

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. B RENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

Same as above.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Marks against the United States.

Have you completed your presentation, Mr. Smith?

MR. SMITH: Yes.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BORK: Mr. Chief Justice, and may it please the Court:

It has become apparent by now the Government has confessed error on two of the three issues in this case. And we think that it is clear that we were required to do so, and I'll explain why briefly.

The prosecution here, of course, took place after the decision of this Court in Miller against California. But it was for conduct that occurred prior to the Miller decision. That was at a time when the governing law in this area was that announced in Roth against the United States, and substantially modified by Memoirs against Massachusetts.

In a word, petitioners acted at a time when the law required that their materials, their films, be shown to be utterly without redeeming social value. But the jury was charged under the Miller standard, which requires that the work, taken as a whole, lack serious literary, artistic,

political, or scientific value.

That there is a difference between the two standards is evident, and that was recognized in the Miller decision itself, which said that the Memoirs represented a sharp break with Roth. And that was recognized again in Hamblin against United States.

It was also clear that Miller represented a swing back towards the original understanding of the Roth decision, although it refined the Roth standards greatly. And it seems clear, therefore, that the petitioners were tried under a standard that gave the prosecution less of a burden -- considerably less of a burden -- than the law provided at the time they acted.

It has been suggested that the test enunciated by the three judges in Memoirs never became the law, because it never commanded the adherence of a majority of this Court. Therefore it is said, Roth remained the law, and since Miller is like Roth, petitioners got the jury instruction they were entitled to, or something close to it.

That argument, I must say, unhappily, seems to me not to hold water. If the Memoirs plurality was not the law, then one of two things would have followed; and I think either is inadmissible. Either there was no law at all between Memoirs and Miller, in which there would be no basis for any prosecution of conduct occurring during those

eight years, or Roth remained the law, despite the fact that any conviction obtained under Roth would be reversed, because three justices adhered to Memoirs, and two justices thought that no obscenity conviction could stand up.

Moreover, in Redrup against New York, and the cases thereafter up to Miller, this Court reviewed allegedly obscene materials on the basis of the differing views of the justices, and reversed in over thirty cases. So it is plain that there was law during that period. And I think it's plain, therefore, that it consisted effectively of the plurality opinion in Memoirs. Moreover, I think that the opinion of Hamblin against the United States, which sustained a conviction of pre-Miller conduct, also shows that Roth-Memoirs was the law during the period.

Now, even though that is Court-made law, it is effectively read into the statute. And I don't think there is any way that a charge that the change that occurred in Miller could be retroactively be applied to these petitioners. That would deny them due process of law.

Both the district court and the Court of Appeals tried to distinguish Bouie against City of Columbia. And I don't think the principles in these two cases can be distinguished because here Miller relaxed the constitutional rules which had previously been applied, and that has the effect -- is indistinguishable from reading a statute to

cover conduct which it previously did not cover. And for that reason, the Government thinks the petitioners are entitled to a new trial with a properly instructed jury.

QUESTION: Well, Mr. Solicitor General, as I understand the state of the law on this particular question, when it comes here from the Sixth Circuit, the Government had this case and another court of appeals decision with it, several other courts of appeals decisions against it. Don't you think the Solicitor General has some responsibility under the adversary system when there's a plausible argument to be made in support of affirming a judgement that has gone in favor of the government to make that argument, rather than simply adopt what he thinks is the law?

MR. BORK: I do indeed, Mr. Justice Rehnquist. And we have considered this case, this principle, for at least three years now. And if I thought there were a plausible case to be made for applying Miller standards to pre-Miller conduct I would certainly make that argument.

QUESTION: Well, what you're saying then when you say you don't think a plausible case can be made is that two courts of appeals presumably consisting of judges appointed by the president and confirmed by the Senate, have reached a totally implausible result. The Government is unwilling even to argue in favor of it in this Court.

MR. BORK: That, in effect, is correct, Mr. Justice

Rehnquist. Those courts of appeals, quite unfortunately from my point of view, because I would like to be able to argue to uphold these convictions, and I deplore the waste of resources that has gone into some prosecutions that must now be re-prosecuted --

QUESTION: Well, how --

MR. BORK: But nothing in those courts of appeals, Mr. Justice Rehnquist, opinions gave me any -- I thought -- any intellectually defensible way to defend the convictions here.

QUESTION: Well, how is this Court supposed to function in that kind of a situation? We are supposedly the beneficiaries of an adversary process. And I am sure we would look with great scepticism if Mr. Smith had come here in the position that you are now, and said he represented his clients, and he realized he had a couple of courts of appeals cases going for him, but he just couldn't in good conscience say that their judgement should be reversed.

MR. BORK: Well, I think the answer can only be that the government feels it has an obligation not only to the adversary process but also to the law and to justice. And in a case where it thinks an injustice has been done, and that there is no intellectually defensible way of supporting a conviction, I think that the Government must say so.

QUESTION: But isn't that ultimately the responsibility

of this Court? To decide whether or not an injustice has been done, or whether or not a particular conviction should be upheld or reversed?

MR. BORK: It is indeed, Mr. Justice Rehnquist --

QUESTION: And aren't we best served by an adversary presentation in making that determination?

MR. BORK: Well, I trust we also have an obligation to the Court to tell it when we think there is no adversary case that can be made. That has been done many times by the Solicitor General's office, and there have been occasions when the confession of error has been rejected by this Court.

QUESTION: I take it your position, Mr. Solicitor General, is not intended to impinge upon our ultimate authority to decide the case the way it's being decided?

MR. BORK: It is certainly not so intended, Mr. Chief Justice, and I am certain it will not have that effect.

QUESTION: Mr. Solicitor General, is the policy of confessing error when you find there's no intellectually defensible way of defending the result below, is this a new policy that the Solicitor General's office has just adopted, or is this something that has gone on for many, many years?

MR. BORK: Mr. Justice Stevens, it has gone on since the memory of man runneth not to the contrary.

QUESTION: Do you know whether you apply a different standard in making these determinations than has been applied in the past?

MR. BORK: I believe that I apply the standard that most Solicitor Generals applied, but some have deviated. My stand is, that if the Government has a respectable position, I will defend it regardless of my personal view in the matter. My personal views in this case are that I would dearly love to defend this conviction. I don't think I can.

QUESTION: Do you consider this practice of your office different from the practice of some defense counsels from time to time of filing Anders briefs?

#521

Is it not true that defense counsels sometimes feel in good conscience they have no appealable point, and therefore in effect, so acknowledge to the Court?

MR. BORK: I think the private bar does that, Mr. Justice Stevens --

QUESTION: And professionally, is there any difference between the two in your judgement?

MR. BORK: No, I think there is less -- if I may say so, there is no difference in the professional obligations. I think the government obviously has slightly less pressure than some members of the private bar may feel. But I think there is no difference, ultimately, in the obligation to the Court.

QUESTION: Do you know of any other cases where the Government has come to the Court in this posture where there are splits among the courts of appeals?

MR. BORK: I do not recall offhand, Mr. Justice.

QUESTION: Have you ever heard of a private counsel doing it in these circumstances?

MR. BORK: I have not heard of it.

QUESTION: And I doubt if you will either.

QUESTION: I trust, Mr. Solicitor General, that you're aware of the reaction of federal courts of appeals judges when the United States Attorney has prosecuted a case, and it is then affirmed, only to have the rug pulled out from under them up here?

MR. BORK: Mr. Justice Blackmun, I'm aware of the reaction of the courts. I'm also aware of the reaction from United States Attorneys. I've been made aware of that. Nevertheless, it seems to me I have an obligation to do this. And, unpleasant as it may be for me and for the Court and for the U.S. Attorney, I do do it. Three years ago, I decided that this was the rule of law, and communicated that fact. Unfortunately, that decision was not communicated apparently to the United States Attorneys. So that some of them --

QUESTION: Do you think it might have been a good idea had we appointed counsel to argue in your stead?

MR. BORK: It might have been, Mr. Justice Rehnquist. We confessed error in the brief. So that I think it comes as no surprise at all that we would take this position here this morning.

QUESTION: And you are taking it, I gather, from reading in the newspapers, in similar cases around the country?

MR. BORK: Oh, yes. We -- there are some prosecutions, for example, in Memphis.

QUESTION: Yes.

MR. BORK: Which will be affected by this.

I think our position on that is adequately explained by what I've said, and adequately explained in our brief. I reiterate that were there an argument to be made the other way, I would -- in my opinion, I would gladly make it.

I think the remaining two points are rather simpler. We think the Court of Appeals was required as a statutory matter -- I don't think the constitutional question need be reached -- was required as a statutory matter to look at these materials. Now there are undoubtedly cases in which that is not true. But here, there was really almost no descriptive matter in the record about the nature of these films, except that contained in the affidavit made by an F.B.I. agent in obtaining search warrants, an ex parte statement not subject to cross-examination, not required to put the

matters into context. So that if there was to be any effective appellate review in this case, I think in this case the court of appeals is required to look at the materials.

There may be cases in which there are stipulations, there may be cases in which the testimony is sufficient without viewing the materials. But in this case, neither of those is true. 28 U.S.C. 91 provides for an appeal, and that takes up all issues that are properly reserved. And I don't see how that could be decided on the basis of the record here, except by viewing the films.

Now, I don't -- we have said in our brief that normally that's sufficient. There is no need for this Court to review such materials unlessthey specifically take the case up in order to do so.

The petitioners -- and I'm relieved, if I may say, to come to a point where I disagree with the petitioners -- have argued that the trial court's instruction to the jury to assess the films in accordance with the contemporary standards of the community standards generally held throughout the Eastern District of Kentucky, was erroneous. Because the jury should have been instructed to apply the standards of the Cincinnati metropolitan area from which -- where some of them lived, and some of them worked.

I should say that there argument does not support that conclusion. Because the Cincinnati metropolitan area

is certainly no more relevant in any sense than is the Eastern District of Kentucky. The jurors here did not live throughout the Cincinnati metropolitan area any more than they lived throughout the Eastern District of Kentucky.

Moreover, they were drawn from a pool which included a widespread geographic -- had a widespread geographic distribution of available jurors. If the panel did not have as widespread a distribution as petitioners would have liked, certainly no objection was made to that at the time.

But I think in any event, I don't think that an objection would have been availing, nor do I think it should have been. The issue is simply not one of constitutional dimensions. The Hamblin decision indicates that normally the relevant community will be the judicial district in which the trial takes place.

Jenkins against Georgia referred to an instruction which it did not disapprove of which merely referred to community standards without defining the community.

QUESTION: You say that was approved or disapproved, that --

MR. BORK: Without disapproval, I said.

QUESTION: Without disapproval.

MR. BORK: It was merely referred to, Mr. Justice Stewart, without disapproval.

I think these cases could be easily made absolutely

impossible if every obscenity conviction -- or prosecution -- involved a search for the single relevant community. There are endless numbers of possibly relevant communities. Suburb cities, countryside, one could define in a way. And one could turn these into a search for the definition of the relevant community which would make market definition in an anti-trust case look simple.

QUESTION: Of course in this particular case anybody familiar with the Cincinnati community knows that Newport, Kentucky, is part of greater Cincinnati, and that is the community.

MR. BORK: That is true.

QUESTION: Accepting your proposition that in many cases it would be difficult, and lead off to a wild goose chase, in this particular case, it really isn't for anybody familiar with the greater Cincinnati community.

MR. BORK: Well, Mr. Justice Stewart, I don't know why the jurors who lived throughout -- who do not live througout the greater Cincinnati community --

QUESTION: Well, anybody who lives in Newport does.

MR. BORK: Throughout the vicinity?

QUESTION: No, anybody who lives in Newport, Kentucky, lives in the greater Cincinnati --

MR. BORK: It's in the metropolitan area, I understand that. But I was -- he equally lives in the Eastern District,

and I suppose there would be variations in community standards throughout the metropolitan area of Cincinnati, just as there may be throughout the Eastern District of Kentucky.

QUESTION: But I take it that would be no more true in that setting than it would be to say that Arlington is part of the metropolitan Washington area?

MR. BORK: I take it that would be true, Mr. Chief Justice, but I --

QUESTION: Or in Alexandria, it's very comparable. Although Newport,Kentucky is not quite like Arlington or Alexandria.

MR. BORK: I --

QUESTION: Or vice versa.

MR. BORK: -- think the point of the relevant community, or the community whose standard, in a constitutional sense, is that the main function of requiring a reference to community standards is to give the jurors some standard extrinsic to themselves to which they may refer to attempt, insofar as the law can by instructions in any jury case, to make sure that peculiar or perhaps idiosyncratic sensibilities of individual jurors does not control the case, but that the juror is referred to a wider community.

And in that sense, I think, the function -- that function, which is the main function, I think, of that standard, was served here by this instruction as well as it could have

been by choosing another possibly relevant community.

QUESTION: Well, Mr. Solicitor General, I'm a little puzzled. Is the purpose of the community standard to draw on the frame of reference that the juror normally looks to, such as the district from which the venire is drawn; or is it to look at the market -- the economic market in which the challenged film is exhibited. Which would be the more relevant?

MR. BORK: Well, the economic market, Mr. Justice Stevens, I'm not -- I think the function -- I think the primary function is to refer the juror to something outside his own sensibilities. Secondarily, it is to provide him with a community with which he is more or less familiar, and to have that community surrounding the area in which the films are shown. And I think all of those functions were served here by this instruction.

QUESTION: Well, the problem is that I think that the many people who are familiar with it would say that the Eastern District of Kentucky simply is not a community. Community involves the word common, people who have something in common. And --

MR. BORK: Well, of course --

QUESTION: -- the Cincinnati community is a community. The Eastern District of Kentucky very arguably is not one. It s residents within its borders just do not -- by -- since

they do not share something in common, they -- it's not a community.

MR. BORK: Mr. Justice --

QUESTION: It's a geographic accident.

MR. BORK: Well, I suppose in some sense, Mr. Justice Stewart, so is the State of California a geographic accident. Certainly it contains within itself widely disparate kinds of communities. And an instruction applying California wide community standards has been upheld by this Court. In Jenkins against Georgia, a reference simply to community standards, without defining which community, went by. Hamblin, of course, suggests that normally it will be the judicial district from which the venire is -- comes which will provide the community standards. I have no desire to say that there is any -- in a case there is any single community which controls -- and I think indeed it would become impossible if that were to become the rule.

QUESTION: Mr. Solicitor General, let me put the same question just a little differently. I know the record does not show this, but your reference to the anti-trust relevant market raised the question in my mind. Supposing the evidence here included a market study which showed that everybody who attended this theater was a resident of Cincinnati. Would you then say that the Kentucky District would be an appropriate frame of reference to judge the films by?

MR. BORK: Would it have been inappropriate?

QUESTION: Would the instruction have been all right under that situation?

MR. BORK: I think it would have been, Mr. Justice Stevens. I think it would have also been possible to use the Cincinnati metropolitan area as a community.

QUESTION: I understand. You say that would be an

#672 alternative.

But even if no one came from the community which is used as a frame of reference, you say that would still comport with the test?

MR. BORK: Well, I don't know that no one comes --

QUESTION: No one who saw the films that are challenged did.

MR. BORK: Oh, you mean to say that, although the films were shown in the Eastern District of Kentucky --

QUESTION: If nobody who attended the theater happened to come across the river from Cincinnati on the night that they were seized, just to take an extreme example.

MR. BORK: Or take a more extreme example, I suppose -- ever. That people always came --

QUESTION: Yeah.

MR. BORK: That is a question that seems to me to drive us to the ultimate question of what the obscenity laws are designed to do. I think one answer would suggest

that the Eastern District of Kentucky was not the proper area; that is, the obscenity laws in some part are intended to control the effect of the obscenity upon the people who view it.

But there's a second function of the obscenity laws, which is, I think, the sense of outrage and moral disapproval, in a sense, that something is going on in their community of which they deeply disapprove, even if none of them actually go to the theater. And in that function of the obscenity laws -- which I think is a legitimate one -- would suggest that you might use the Eastern District of Kentucky even if nobody from that District came there.

QUESTION: Isn't the hypothesis one that could not be supported unless you had someone standing outside the door of the theaters at all times taking census of the location and address of the persons entering the theater?

MR. BORK: Oh, I think it's _-

QUESTION: That is, is it anything that can be determined by a market survey the way we determine that -- or try to determine it -- in an anti-trust case?

MR. BORK: No, I think Mr. Chief Justice that's quite right. It could not, as a practical matter, be done. Moreover, I would doubt very much if nobody from further out in the Eastern District ever goes to these films. But I took it be a question designed to probe the philosophical

underpinnings of my argument, and I have just responded with such philosophical underpinning as I could muster.

I have no further statement to make in the case.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Smith, do you have anything further?

REBUTTAL ARGUMENT OF ROBERT EUGENE SMITH, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SMITH: Yes, briefly. Mr. Chief Justice, and may it please the Court:

This Court, in Miller v. California opinion, authored by the Chief Justice, talked on page 32 in part, it is neither realistic nor constitutionally sound to read the First Amendment as requiring people of Maine or Mississippi to accept public depiction of conduct found tolerable in Las Vegas or New York City. And then the Court went on to say people in different states vary in their taste and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.

We suggest that by carving out an artificial district and saying the Eastern District of Kentucky, that that is in effect what courts are doing, and we suggest ignoring what I think the words of this Court were in Miller. I think that the concept of Jenkins was a sound one, that is to say, talking in general terms of the community, where social

intercourse occurs, where people feel a sense of belonging to the community. But to say the Eastern District of Kentucky, as broad as it is geographically and as broad as it is in attitudes, we suggest is an improper uniform standard that's just too absolute and should be rejected in this instance.

QUESTION: That statement you read -- or I'll put it as a question -- did not that statement that you read reflect essentially Chief Justice Warren's expression in, I think, either the Roth or the Memoirs case, that there cannot realistically be such a thing as a national standard?

MR. SMITH: I think that it does. But it's your words -- it's the Chief Justice here's words suggesting that you're making a contrast between states and between cities. I mean it isn't all as broad as all states. The Court did not say, the people of Maine or Mississippi versus Las Vegas and New York State. It talked about states versus cities. And we think that that --

QUESTION: That wasn't an effort to define a standard but --

MR. SMITH: I understand. To make an observation.

QUESTION: -- to reflect a thought, a general proposition

MR. SMITH: But the Court did go on to say that the people should not be -- because of the variation the people should not be strangled by the imposition of an absolute standard in terms of the geographic -- I suggest -- I

read it to mean an absolute geographical standard. And I say that that's what I find intolerable here.

Of course Justice Rehnquist in his argument -- or his opinion of this Court in the Hamblin case, did allow the Court to suggest that the trial judge would have some discretion in allowing evidence of community standards in communities other than that from where the jury is sitting. Mr. Justice Stevens asked about the concept of community standard in terms of a market research program where you find out that everybody came from another community. Well, there are cases that are working their way up in the federal system where the film, let's say, is delivered from California to Memphis, Tennessee, and has never been shown in Memphis, Tennessee. It was not designed to be shown in Memphis, Tennessee. Absolutely no evidence that it had anything more than it touched that area from the standpoint of distribution. Now, what community do we put there? In the concept? Do we put the community from which it came? The community where it was intended to be shown? And if you're going to put geographical limits, you're going to have these problems that present themselves. So I think it's not just philosophical, to answer Mr. Justice Stevens' question. There are cases where there is no showing that the film has ever been depicted or exhibited in that community, none whatsoever, yet that's the community standard

that has been employed.

And so, with that I'll rest.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:32 o'clock, a.m., the case in the above-entitled matter was submitted.]

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