ORIGINAL

In the

Supreme Court of the United States

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WESLEY WARD,

Appellant,

v.

STATE OF ILLINOIS,

Appellee.

No. 76-415

April 27, 1977

Pages 1 thru 47

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WESLEY WARD, Appellant, v. STATE OF ILLINOIS, Appellee.	No. 76-415

Washington, D. C.,

Wednesday, April 27, 1977.

The above-entitled matter came on for argument at 10:12 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, 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:

J. STEVEN BECKETT, ESQ., Reno, O'Byrne & Kepley, 501 West Church, Champaign, Illinois 61820; on behalf of the Appellant.

MELBOURNE A. NOEL, JR., ESQ., Assistant Attorney General of Illinois, 188 West Randolph Street, Suite 2200, Chicago, Illinois 60601; on behalf of the Appellee.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in 76-415, Ward against Illinois.

Mr. Beckett, you may proceed whenever you're ready.

ORAL ARGUMENT OF J. STEVEN BECKETT, ESQ.,

ON BEHALF OF THE APPELLANT

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

This case is an appeal from a decision of the Illinois Supreme Court affirming the defendant's conviction after a bench trial under the Illinois Obscenity Statute. The defendant was tried in March of 1972, and he was charged under a complaint by a police officer with offering to sell and selling two allegedly obscene magazines, "Bizarre World" and "Illustrated Case Histories".

His conviction was affirmed by the Illinois Appellate Court for the Third District, and the case was then appealed by Petition for Leave to Appeal to the Illinois Supreme Court.

That court considered the case, after it had considered a case called People vs. Ridens or Ridens II, which was a case on the remand from this Court in 1973, which was decided at the same time of Miller vs. California.

In Ridens II, the Illinois Supreme Court, on the remand, held that the Illinois Obscenity Statute was still constitutional, even in light of this Court's decision in

Miller vs. California.

The defendant attacked the validity of the Illinois Obscenity Statute under principles announced in Miller vs. California, and that attack was rejected by the Illinois Supreme Court in an opinion below.

The court also held that the publications at issue in this case were not protected under the First Amendment to the Constitution of the United States.

While his case was pending in the Illinois Supreme Court, a three-judge federal court was convened in Chicago to consider the identical argument concerning the constitutionality of the Illinois Obscenity Statute.

On May 14, the Illinois Supreme Court announced its decision in People vs. Ward below.

On May 28th, after having the opportunity to review the opinion of People vs. Ward, that three-judge federal court held the Illinois Obscenity Statute unconstitutional and entered a permanent injunction against its enforcement, in a case entitled Eagle Books vs. Reinhard.

QUESTION: Has the Illinois Legislature made any changes in the Illinois law since the Miller decision?

MR. BECKETT: The Illinois Legislature enacted a law that was vetoed, that would have changed the definition of obscenity under Miller; but that law was vetoed. So the practical effect is there has been no change in the Illinois

Obscenity --

QUESTION: There has, in fact, been no change.

MR. BECKETT: There, in fact, has been no change.

The --

QUESTION: I suppose not every State needs to change its statutes because of Miller; is that true?

MR. BECKETT: This Court, in Miller and also in -- in footnote 6 in Miller and also in United States vs. 12 200-foot Reels of Film, indicated that existing obscenity laws, as construed heretofore or hereafter, may well be valid. And in Hamling, the Court said that that statement meant that we weren't saying that all obscenity laws were unconstitutional; but in announcing Miller, this Court said that State courts, on the remand, must authoritatively construe those statutes.

As demonstrated in our briefs, many States have done so, and, as such, have held their statutes constitutional.

QUESTION: Has Illinois now construed its existing statute?

MR. BECKETT: The Illinois Supreme Court has construed its statute, but in such a way as to not meet the Court's remand order in Miller.

In Ridens, the Court said that, in response to the specificity attack, that the statute as written, because it defines prurient interest as a shameful or morbid interest in nudity, sex or excretion, provides the specificity that this

Court has required under Miller, under part (b).

That question was addressed by the three-judge court and they rejected the State of Illinois' contention that the Illinois Supreme Court in fact engrafted onto its statute the examples of sexual conduct under part (b) that this Court set forth in the Miller opinion.

Additionally, that Court noted that the Illinois Supreme Court did not rely on prior judicial opinions, as so many other States have done.

In other words, this Court did not say in Miller what an authoritative construction was. But appellant submits to the Court that an authoritative construction is fixing words in the statute just as if the Legislature had amended it, but in this situation, based on prior decisions which had given a limiting effect to the statute.

And in Illinois, that is not the case.

QUESTION: How do you think your case is different from People vs. Enskat, the way the California courts treated their obscenity statute?

MR. BECKETT: In Enskat, the California Appellate Court indicated that "our past decisions" -- and they specifically listed past decisions, and said that "our past decisions under Section 311 of the California Penal Code have limited the application of our statute to hardcore sexual conduct, and that nudity is not proscribed" and some other rather definite

statements.

The Illinois Supreme Court has never done this.

QUESTION: But your opposing counsel, at least, contends that in earlier decisions of the Supreme Court of Illinois similar limitations were placed on the Illinois Statute. You disagree with that?

MR. BECKETT: Oh, I definitely disagree with that.

Moreover, the Illinois Supreme Court did not accept that argument.

I think the decision -- the specific decision that I think he is referring to is City of Chicago vs. Geraci, and that Court's decision there has to be analogized to this Court's decision in United States vs. Hamling.

This Court said, "our past decisions in considering constitutional attacks on federal obscenity statutes and in interpreting those statutes have given them a limited effect, a limiting effect, that we then really codified in Miller with those examples. And so we have no difficulty engrafting Examples A and B onto those federal obscenity statutes; and we said we were going to do so in United States vs. 12 200-foot Reels of Film."

However, the Illinois case, City of Chicago vs. Geraci, was not interpreting the Illinois Obscenity Statute; as a matter of fact, it was interpreting an ordinance of the City of Chicago.

And, second, the discussion that mentioned the specific sexual conduct in that opinion was not talking about an interpretation of the term "obscenity" or any derivative thereof, it was talking about the constitutional status of the publications.

QUESTION: Would it be your contention that either the opinion in question or the text of the statute itself must appeal to the prurient interest?

MR. BECKETT: No. The Geraci case, in fact, demonstrates the problems that people such as the appellant Ward and those in Illinois have in this situation. The statute of the law in 1971, with respect to obscenity, as the Court is well aware, is what Justice Brennan has called hopeless confusion.

In this specific Geraci case, the Illinois Supreme Court took categories of publications and said, for example, that the United States Supreme Court, in Central Magazine Sales, has looked at publications similar to these and they depict bondage, et cetera, and that Court said that no matter what test you apply to obscenity, those publications are entitled to constitutional protection; and therefore the categories of magazines that we have here are protected under the First Amendment.

Then the Court went on to consider a magazine, the depictions of which are mentioned in the State of Illinois'

brief, and said: Well, we can't find any cases that are exactly on this, but the United STates Supreme Court has looked at sado-masochistic materials in Michigan and affirmed convictions under that. But under Avenceno vs. New York? and Sheppard vs. New York? and Friedman vs. New York, the United States Supreme Court has reversed convictions in Redrup type decisions.

And then they go on to say: Well, however you can interpret those cases, we're going to say that these magazines appeal to a prurient interest, et cetera, and that they are obscene, and that they are not constitutionally protected, rejecting the defendant's contention.

QUESTION: Do you contend that the material sold by your client here, that the statute gave no fair warning that that was included, or do you contend that the statute was required to have specific enumerations or else decisions to have it, and so whether your client's material was warned about is immaterial? Or do you contend both?

MR. BECKETT: I think I contend both.

QUESTION: What was the date of the Geraci decision? If I have the name right.

MR. BECKETT: It was in 1970. It was prior to --

QUESTION: Pre-Miller.

MR. BECKETT: Pre-Miller, prior to the date of the dissemination of materials that alleged -- that is alleged to

be a crime in this case.

The question under Miller is, as Mr. Justice Rehnquist has said, a question of notice, a question of notice to the defendant, appellant Ward and to those similarly situated in Illinois.

As we have set forth in our brief, decisions of State courts, after this Court's decision in Miller, demonstrate that those courts have taken a look at their statutes as written, have taken a look at their previous judicial interpretations and constructions of those statutes, and determined one of three things: they have determined that their past decisions have limited the scope of that statute and that there was fair warning to the defendant, the statute is constitutional, his conviction is affirmed.

They have determined that their prior decisions did not provide a limiting effect on the statute, that it would be unfair to this defendant to apply what they are now going to construe into the statute under Miller, and therefore they would construe the statute to conform with Miller, but they would give it prospective effect only.

Finally, some States have looked at their past decisions, found no limiting construction, and held that to change the statute now would be a form of legislation, our statute is unconstitutional.

Illinois, I submit, has done none of the above.

The State of Illinois contends that the Illinois Supreme Court incorporated this Court's Miller examples, parts (a) and (b), in its decisions in Ridens II, People vs. Gould.

The State then contends that the opinion below is of no moment, because the court had already included the (a) and (b) examples. The opinion below, however, demonstrates fully and finally that the Illinois Supreme Court has not done so.

In the opinion, which is -- the portion which I'm referring to, which appears at page 30 of my brief, the Court reviewed the history of the Ridens case, the Court noted that the defendant was claiming that the statute did not provide specificity and that specificity had not been supplied, and the Court stated that in Ridens"we noted that the statutory definition of obscenity includes within the scope of the 'prurient interest' a 'shameful or morbid interest in nudity, sex, or excretion'."

In answer to the defendant's contention that that wasn't enough, that Miller required specificity, the Court concluded by saying "We again express our opinion that the Illinois statutory definition is sufficiently clear to withstand constitutional objections."

The statutory definition, I submit, has no specificity. As a matter of fact, the construction placed upon the statute, in response to the remand order in Miller, allows nudity to be

proscribed in Illinois. The categorization is nudity, sex, or excretion.

This Court's holding in Jenkins, of course, says: nudity is not enough under those Miller standards.

I submit to you that the three-judge court's interpretation of Illinois law is persuasive on this Court, under Gooding vs. Wilson, and that court has completely accepted our contention as to what the Illinois Supreme Court has done.

QUESTION: Well now, you wouldn't suggest that the three-judge district court's interpretation of Illinois law should be taken in preference to the interpretation of the Supreme Court of Illinois, would you?

MR. BECKETT: I think if Mr. Justice Rehnquist would look at the opinions of the Illinois Supreme Court, you would see that they have missed the thrust of your opinion in Miller. They have said that an obscenity statute is a general-term statute, not unlike an anti-noise ordinance that was considered by this Court in Grayned vs. City of Rockford, or like a disorderly conduct ordinance.

Their decision is not based upon obscenity cases, it's based on general-term statutes, and --

QUESTION: That would be a federal constitutional objection to the Illinois conviction. But I thought you said that we should prefer the three-judge district court's

interpretation of Illinois law to that of the Supreme Court of Illinois.

MR. BECKETT: I think you have to look at both of them, and I think the three-judge court gave, of course in my client's view, a more objective review of what the Illinois Supreme Court had done.

Three times now, the Illinois Supreme Court has been asked to correct their misconceptions about Miller, and they have always said, you know, Well, we think we know what we're doing, and we're doing it this way.

And it's what that court has done that I believe I'm asking the Court to accept today.

QUESTION: I thought the three-judge federal court had accepted the construction of Illinois law -- of the Illinois statute put upon it by the Illinois Supreme Court.

MR. BECKETT: And said that that discretion --

QUESTION: And held that that was unconstitutional.

MR. BECKETT: That's correct. And that's what I'm saying.

In other words, I think what the Attorney General in this case is asking you to do is what the Illinois Supreme Court did not do.

QUESTION: Well, do you think the Illinois Supreme Court believes that it is acting consistently with Miller? It seems to.

MR. BECKETT: Yes, I think they do believe that.

QUESTION: And if you read Miller to require that a State will follow, or include in its laws the specifics of patent offensiveness -- if that's the way you read Miller, if it's so plain, I would think it would be plain to the Illinois Supreme Court. And if its intention is to follow Miller, why don't you accept that?

MR. BECKETT: Because they haven't followed Miller.

QUESTION: Why haven't they?

MR. BECKETT: I wish I knew.

QUESTION: Well, how do you know they haven't?

MR. BECKETT: Because the opinion below and the other opinions show that they feel specificity is on the statute as written, nudity, sex, or excretion; and I don't believe that's what Miller said.

QUESTION: I know, but they read -- they are purporting at least to adhere to the patent offensiveness standard of Miller.

MR. BECKETT: That's correct.

QUESTION: And all Miller did was say let it -- it went on to give some examples of patent offensiveness.

MR. BECKETT: That's correct.

QUESTION: So if the Supreme Court had said, of Illinois, had said: We agree with the patent offensiveness standard as explained by the Supreme Court of the United States.

Would you accept that?

MR. BECKETT: I think they would have to be a little more specific. If you look at the decisions of the other States, they were not that casual about their approach.

QUESTION: Well, they may not have been, but there are different styles, I guess.

QUESTION: We said in Hamling that Miller wasn't intended as a drafting manual, that you didn't have to simply repeat word for word the type of thing that was set out in Miller.

MR. BECKETT: That's correct. But where the attempt to construe a statute in accordance with Miller is including nudity, then not only have they misconceived the thrust of Miller, but they have also gone beyond this Court's holding in Jenkins.

QUESTION: Did not the Miller opinion state categorically that the Court was neither competent to nor -- that is judicially competent in terms of power -- or undertaking to draft a statute or to tell the States how to draft a statute, but merely to furnish some broad guidelines that would indicate the boundaries within which States must act; isn't that in the Miller opinion?

MR. BECKETT: That's correct. First Amendment standards, as the Court said. And it's appellant's position that the Illinois Supreme Court has not met those standards.

The Illinois Supreme Court had a further opportunity to look at this problem, this conflict, after the three-judge court rendered its decision in a petition for rehearing, and denied that petition for rehearing, in this case.

QUESTION: And your position in this regard really doesn't depend on whether the materials at issue here are protected under the Miller standard or not?

MR. BECKETT: That's correct. It's not unlike Lewis vs. New Orleans.

QUESTION: Yes, unh-hunh.

MR. BECKETT: Where a remand order of this Court to this --

QUESTION: This would be an overbreadth, I think, yes.

MR. BECKETT: Remand order of the Court, that's correct. Remand order of the Court was not followed by the Louisiana Supreme Court, and the case came back up here, and you said that it matters not what the conduct was that was involved here.

But I do think the materials here are illustrative of the problem in Illinois of no guidelines. Those materials are not unlike materials that this Court in Redrup type cases held protected under whatever test of obscenity you apply. It's very hard to get any guidance, of course, from those Redrup cases, but in Marks recently you said that when a

fragmented court decides a case, we should look to the narrowest ground. I submit, in those cases the narrowest ground was that those specific materials were constitutionally protected.

QUESTION: But Miller succeeded whatever doctrine may have evolved in the Redrup era, did it not?

MR. BECKETT: I don't think there was a doctrine in the Redrup cases.

QUESTION: I mean, your client is not complaining of a pre-Miller conviction, is he?

MR. BECKETT: Well, he is complaining of a pre-Miller conviction by saying, you know, the Illinois Obscenity Statute has never given notice, and this Court recognized that kind of problem in Miller, and said that a statute must be written or construed authoritatively to satisfy those notice problems.

QUESTION: When was your client tried?

MR. BECKETT: March 1972.

The prior decisions of the Illinois Supreme Court are, as I said, unlike Hamling, the Court's consideration of Roth, Ginzburg, Manual Enterprises vs. Day, because those decisions concern an ad hoc determination of the materials at issue in those cases, and do not involve interpretation or construction of the Illinois Obscenity Statute.

Indeed, at least one-half of the cases cited by the

State in their brief are cases decided by Illinois Appellate Courts after the defendant Ward was arrested. And it's hard to see how they would supply the type of notice that the State contends that they do about his dissemination of materials after he was arrested.

QUESTION: Do you see any difference between notice and overbreadth?

MR. BECKETT: Yes, I --

QUESTION: Isn't overbreadth curable by a post-transaction court decision, whereas the fair notice requirement is not?

MR. BECKETT: That's correct.

In Ridens, I think the Illinois Supreme Court, in the opinion, indicated that it knew, under Miller, it was supposed to look to its prior decisions, and that it did so, and concluded from those prior decisions that there was no limiting effect of those decisions on the statute.

Because in the case they used the phrase, "we must authoritatively construe", and then they said: The first question we want to answer is what community standard are we going to use under our obscenity guidelines?

And they said, in People vs. Butler, which was decided before Miller, before Ridens, we set a Statewide standard, and so we're going to adhere to that again today.

But, at the same time, they did not say that our

prior decisions have limited the effect of our statute under Miller. And, indeed, Justice Davis, who had written the first Ridens decision, in dissent pointed out that those prior decisions did not have that effect.

The whole purpose, I think, of a properly drawn obscenity statute, written or judicially construed, is that people such as my client can take the statute and compare it with the materials that they have, and they can say: Page 43, page 27, page 85, page 64, et cetera, while there's a type of portrayal there that may render this patently offensive, and I'm going to have to make my determination as to whether or not I can disseminate this material without -- with or without the risk of prosecution.

In a sense, then, the Illinois Supreme Court has conflicted with decisions of this Court because they say nudity is enough. And if that's true, of course, anything that is available on the market today of the Playboy type magazine would be held obscene or could be held obscene in Illinois.

I'd like to reserve --

QUESTION: You say the Illinois Supreme Court has expressly said nudity is enough?

MR. BECKETT: The Illinois Supreme Court in the opinion below and also in the Ridens opinion said that we complained that the statute was not specific enough, however, we note that prurient interest is defined as nudity, sex, or

excretion. That's the quote that I told you was on page 30 of our brief.

QUESTION: That it was what, a morbid or shameful --

MR. BECKETT: "A shameful or morbid interest in nudity, sex, or excretion."

QUESTION: Yes.

QUESTION: But that's not quite saying nudity is enough, is it?

MR. BECKETT: It's adding "shameful or morbid" onto nudity.

QUESTION: Well, that doesn't say nudity is enough, though.

MR. BECKETT: "Shameful or morbid", nudity is enough.

QUESTION: Or "shameful or morbid interest in nudity".

MR. BECKETT: And the point is, by saying that, have you said -- has the statute defined sexual conduct? Has the statute defined sexual conduct, as you said it must in Miller?

I'd like to reserve my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Beckett.

Mr. Noel.

ORAL ARGUMENT OF MELBOURNE A. NOEL, JR., ESQ.,

ON BEHALF OF THE APPELLEE

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

In response to the key questions raised in this appeal, the State of Illinois submits that chapter 38, section 11-20(b), its Obscenity Statute definition, has been construed by Illinois courts, both prior to and after this Court's decision in Miller vs. California, so as to limit its definition of obscenity to patently offensive portrayals of specific sexual conduct. Thus giving proper notice of the offense of selling obscene materials, and allowing the application of the statute under the constitutional standards enunciated in Miller.

Now, this case, of course, presents the post-Miller problem of what States have to do in order to comply with the constitutional requirements of Miller vs. California.

There were many different approaches taken by the States after 1973, in trying to bring themselves into line with the Miller requirements. The different kinds of approaches have been alluded to, both in the appellant's and the appellee's briefs. Very often legislation was employed, more often some sort of construction of statutes by the State high courts was involved.

And even within those group -- that group of States,

that decided to reconstrue their statutes to satisfy Miller, there was a great diversity of opinion as to how this should be properly accomplished. And what this case presents, it focuses on one technique employed to construe a State statute into line with Miller, one technique out of an entire spectrum of techniques employed.

And it asks you to decide whether or not this is a proper construction of the Illinois statute, in line with Miller, or whether the Illinois Supreme Court missed the boat, they used the wrong words, they should start over again and perhaps follow some other technique.

And I think it's true to say that in the spectrum of attempts to comply with this Court's Miller requirements by construing State statutes, you have -- you start at one end with those States that took the approach which apparently is adopted by the appellant here and was adopted by the court, the three-judge court in the Eagle Books case in the Northern District of Illinois, that is the very literal approach; that in order to do it right the State court has to sit down and say: Here are the Miller examples, here are the Miller requirements; we do now hereby incorporate those requirements and those examples into our State statute as providing the limitations as to what can be prosecuted under that statute.

That's the literalest approach. And several States

took that approach, notably Florida and Alabama and Texas.

Then there is, I think in the middle, the Illinois approach, where the examples are reprinted, the standards are mentioned, and there's a blanket statement that: We construe the Illinois statute as incorporating these standards and examples.

Then, on the far other end of the spectrum, you have some State courts that atte mpted to accomplish this purpose merely by making an oblique reference to the Miller standards, as, for example, the Oklahoma court did in Field vs. Hess, when they simply noted the -- they bowed in the direction of the Miller standards, and they said: Well, of course, whenever our statute is applied, the Miller standards are implied. Without getting into any specifics or reprinting them at all.

And so you have this entire spectrum, and the center of the spectrum, I think, the Illinois appreach, is the one that Your Honors are requested to decide at this time.

QUESTION: Do I understand you to say that Illinois Supreme Court said that what we decided before Miller was not changed by Miller?

MR. NOEL: The only Supreme Court -- yes, I think that's their position. I think that's their position. I think that -- and this is -- I think there are two --

QUESTION: But they didn't spell it out, though.

MR. NOEL: Well, what they did was, Your Honor, I believe, state that the Illinois statute was constitutional following this construction, and I think they also expressed the opinion that the statute gave the required specificity.

Admittedly, as I say, they did not take the literalest approach, and I don't think we would be here today if they had taken the literalest approach. But I think that it is not necessary for them to have taken that literal approach in order to have complied with Miller.

QUESTION: But the Legislature thought so.

MR. NOEL: I really don't know, Your Honor, if that's correct or not. I cannot speak for --

QUESTION: But they did pass an Act.

MR. NOEL: They did pass an Act, yes, Your Honor. I don't know if there was any -- if that was a comment on what they thought the Illinois Supreme Court had done or not; I have no basis for saying that.

But I think this points up -- this question that you've just asked points up what I think -- I think there are two fundamental weaknesses in the approach of the appellant in this particular case.

First of all, I think the appellant ignores the plain intent and even some of the wording of the Illinois Supreme Court when it decided the relevant cases of People vs. Ridens the second time around, Ridens II, and People vs. Gould.

I think they ignore the statements of the court and the plain intent of the court in those cases.

Secondly, and to me much more unexplainable, is the complete failure to recognize a long and detailed history of obscenity law construction in Illinois prior to and at the time of Miller by the Illinois Supreme Court and the Illinois Appellate Courts.

It is not true to say that the Illinois Supreme Court had only considered one case prior to 1972, in limiting its statute, or that it only considered cases involving city ordinances. In our brief, Part III, pages 18, 19, 20 and 21, we have collected no fewer than ten different decisions of Illinois reviewing courts dealing with construction and application of the Illinois Obscenity Statute.

The earliest of these cases is People vs. Sikora, a 1965 cases, which dealt with a number of books that were brought before the court, and in which they held that certain specific kinds of acts -- and I don't want to offend anybody's sensibilities by going through them, they are listed on page 19 -- including sadism and masochism, --

QUESTION: Page 19 of your brief?

MR. NOEL: Yes, Your Honor, page 19 of our brief.

-- including sadism and masochism, were obscene. These descriptions in these books were obscene under the federal approach at that time and under the Illinois statutes.

This was followed by -- and that was under the Illinois Obscenity Statute, not a State ordinance or a city ordinance, this was followed by the City of Blue Island vs. DeVilbiss, which was a review of a city ordinance which was exactly identical to the State statute; and the Illinois Supreme Court noted that in the decision and proceeded to deal with the two -- or proceeded to deal with the ordinance as if it were dealing with the statute; they were indistinguishable, that one had simply copied the other.

And in that court they added -- in that case they added some other specific types of action that were considered to be obscene under the statute.

Then you get to the case of the City of Chicago vs. Geraci, which my opponent mentioned, that's the third case down the line from the Illinois Supreme Court, and yet that occurred only in 1970, as far back as 1970.

Now, in that case, truly there was only a municipal ordinance that was concerned. But the definition of obscenity in that ordinance was much broader than the Illinois statutory definition, and the court's concern -- it used cases interchangeably between ordinance consideration and statute consideration, and the Illinois Supreme Court's concern clearly was: Does this material fall under constitutional protection or doesn't it?

And I would submit to Your Honors that is the proper

approach to take in applying any obscenity statute regardless of whether it's a State statute or an ordinance, and regardless of what its wording is.

And the reasoning of the Geraci case applies directly to the type of situation we have and to the application of a State statutory situation. In fact, Justice Schaefer, who decided that case, quoted liberally from his Sikora opinion earlier, which involved the State statute. And then, without going through all the -- and there are a host of other cases, decided prior to and during 1972 and '73 some -- not half of them from the appellate court, fewer than that; and there are cases, at least three, prior to the time of this arrest in this case, where the Supreme Court said certain things are not -- are not -- prohibited by the obscenity statute. And one of the things, interestingly, they said in Geraci was that nudity was not prohibited by the State statute.

QUESTION: Did the three-judge district court discuss People v. Sikora?

MR. NOEL: I do not think they did, Your Honor; I can't recall specifically. My recollection is that they did not specifically discuss any of the old Illinois cases prior to Ridens II, Ridens I and Ridens II. And I think that is a problem with that opinion. I think that's why they reached the conclusion they did, is that they failed to go back into

this prior history of Illinois decisions, which, of course, the Illinois Supreme Court had, I think, in mind when they wrote the Ridens II case, but did not lay out.

QUESTION: General Noel, I have two questions, if I may. Is the heart of the Sikora decision that you think is applicable here, the reference to sadism and masochism?

MR. NOEL: Yes, Your Honor.

QUESTION: Do you think those terms are perfectly clear and specifically what they meant? I get some uncertainty as to the difference between the exact meaning of those terms.

MR. NOEL: Well, Your Honor, first of all, --

QUESTION: Particularly in Hamling, the neurotic and prurient interest.

MR. NOEL: In the later Geraci case, Your Honor, that was elaborated a little bit more, because in Geraci they were dealing with magazines of the sado-masochistic character and the court described the magazines, Justice Schaefer described them in a part of that,of the Geraci opinion, and indicated his belief that -- and he described the magazines as sado-masochistic magazines which contain photographs portraying lesbianism, rape, whippings, beatings, bondage, axing, and other abnormal sexual conduct.

And so he spelled it out a little bit more in Geraci, and he said that -- he indicated by the negative, by saying

that this was -- he said: the appellants says that this is not hardcore pornography; we disagree.

So he's indicating that it was hardcore pornography.

QUESTION: My second question is: Presume the State statute says -- our State Legislature says our statute shall prohibit everything in the examples given in Miller, and also sadism and masochism, and give four or five other specific concrete examples, and then says: And in addition, anything which is patently offensive and as the general standard of -- in other words, it has the general category and it lists the specifics as examples that the Miller opinion dealt with. Would that satisfy Miller, do you think?

MR. NOEL: I think it would, Your Honor. I would think that would go --

QUESTION: In other words, all you need is an example, you don't need any limitation?

MR. NOEL: Well, I think, Your Honor, that this gets -- pushes me back to the point of having to admit that I think it is impossible to have a complete scientific catalog of all of the types of actions which are cataloged as obscenity and are prohibitable.

QUESTION: Then that --

MR. NOEL: Because I think the mind of man goes beyond --

QUESTION: Well, accepting that, what is the purpose

of the specificity requirement? Why isn't just the general language sufficient?

As long as you have a catch-all, general pick-up clause, what more do you need?

MR. NOEL: I think that the statute -- I think that the addition of these specific examples that this Court gave in Miller, and that the Illinois Supreme Court has talked about and that many courts have set up exactly as you say. For example, the New Hampshire Supreme Court, in the case that my opponent cited in their brief.

I think the purpose is to cover the most common -- to very specifically cover the most common types of obscenity, to provide the kind of notice to a bookseller that the appellant here is concerned about. He can look at these examples, these statutes, these cases, and he can go down and he can tick off what he finds in his magazines or books, and he can probably decide 99 percent of the cases on the basis of these examples, because they, while not completely all-inclusive, I think they probably do cover the most common, most frequent types of obscenity that is going to be prosecuted and that the bookseller is going to come into contact with.

There may be borderline situations that these examples cannot cover, as with the drug situation -- well, I won't mention that.

But, as the mind of man invents new types of actrivity, there are going to be borderline cases the courts are going to have to rule upon. And I think this Court recognized that in Miller, and recognized it in Hamling, and specifically said that that by itself, that fact, is not sufficient to render these statutes unconstitutional.

QUESTION: Could I ask if the -- there were two publications involved here?

MR. NOEL: Yes, Your Honor.

QUESTION: Were they both in one count, on information or indictment?

MR. NOEL: Yes, they were, Your Honor.

QUESTION: And your contention is that both of them, each of them satisfies the Miller standards?

MR. NOEL: Yes, Your Honor.

QUESTION: Let's assume we disagreed with you on one of them.

MR. NOEL: I think you could still uphold the conviction, Your Honor.

QUESTION: Why is that?

MR. NOEL: Because I think the -- because they were lumped together, it's one offense, and I think that, especially in light of the very small sentence that was put down, one day in jail and a $200 fine, and I think in light of -- if he was peddling one magazine that was obscene out

of the two, he was guilty of a violation of the Illinois Obscenity Statute, which is all the count charges. I mean, it's not divided into two counts.

QUESTION: Is that the Illinois law, that -- suppose the Supreme Court of Illinois had decided that one of these publications was not obscene, would the Illinois law have called for affirmance nevertheless?

MR. NOEL: I can't mention a specific case, Your Honor, to answer that question. My belief is that it would be something -- they would apply something like the Harmless Error Doctrine, to say that the conviction was founded on a violation of obscenity, and therefore it will stand. As long as the sentence does not reflect a feeling that there was a lot of offensiveness here and that society had to punish in some outrageous fashion, I think the sentence reflects a minimal --

QUESTION: Now, under which one of the specifics given in Miller do these publications fall under?

MR. NOEL: That's a very good question, Your Honor, because, of course, the Miller examples do not mention sado-masochism specifically.

I think that if we look at the examples --

QUESTION: So if the court believed that those -- that the specific examples in Miller limited the category of patent offensiveness to those kinds of things, then you're in

trouble?

MR. NOEL: No, I don't think so, Your Honor. Because I think --

QUESTION: Well, under which --

MR. NOEL: -- I think under these examples, the examples themselves are not meant to be a catalog of everything. I think that there are different kinds of activity that come under these somewhat general terms in the examples. And I would say that this kind of material that you will see in these two magazines, "Bizarre World" and "The Study of Sado-Masochism", can come under either of two examples here in Miller: patently offensive representations of ultimate sexual acts perverted, actual or simulated.

I think that it's fair to say that sado-masochistic actions of the type described here, certainly by definition, sado-masochism is designed to arouse sexual interest and sexual pleasure.

It's a kind of sex-related act which is a perverted version of an ultimate sex act, and I think it could come under that.

Secondly, in every one of these types of pictures, and there are many, many times throughout these magazines that this occurs, you have nudity exhibition of the genitals; it's almost impossible, in the type of magazines that these are, for you to have the pictorial content without having

lewd exhibition of the genitals. And so I think it comes under that example also.

There are two possibilities. And I think there's plenty of authority for the proposition that it's pretty well accepted that sado-masochism comes under these examples, because, for example, in my opponent's brief, when he talks about the New Hampshire Supreme Court decision, that court said: We are going to take the Miller examples and they are going to become the limits of New Hampshire law; but we are going to spell out what they include.

And the following paragraph, the New Hampshire Supreme Court said: Those examples include sado-masochistic abuse.

Similarly, the statutes that have been passed by very conscientious legislatures, in attempting to catalog precisely what --

QUESTION: You're speaking of the Harding case?

MR. NOEL: Yes, Your Honor, the Harding case.

And secondly, the legislative examples that have followed Miller, where they have tried to be as specific as they can, the ones that we've had brought to our attention here, for example, the Louisiana statute that's also quoted in my opponent's brief, the Oregon statute which this Court quoted with approval in the Miller case, they all mention sado-masochistic abuse as being a type of obscenity. And

so they, all these legislatures, think that it falls within the examples that Your Honors gave in the Miller case.

QUESTION: Mr. Noel, could I follow up on the questions I asked before?

As I understand your argument, you say that the examples given by the Illinois Supreme Court in prior cases as well as adoption of the Miller examples include about 99 percent of those which --

MR. NOEL: That would be a rough guess.

QUESTION: That would be about one percent not getting --

MR. NOEL: Well, I wouldn't want to be held to one percent, Your Honor; but I think that's a rough proportion.

QUESTION: But the one percent is not specifically defined within the general description. As I understand it, the Illinois Supreme Court has never said there may not be a prosecution for the one percent, there may be prosecutions for these 99 percent examples.

MR. NOEL: It has -- the Illinois Supreme Court, I may answer you this way, Your Honor, if I can, the Illinois Supreme Court has stated which types of conduct are not obscene. In cases that -- and so have the Appellate Courts -- in case which came up and said this is a borderline situation, is it obscene or isn't it?

QUESTION: Well, what they've done, they've given us 99 percent in specific examples, and they've given us some that are not within the 100 percent.

MR. NOEL: The other side, that's right.

QUESTION: There is still a one percent that is potentially subject to prosecution under the general definition, because Illinois has never said: We've listed these and this is all that can be subject to prosecution.

MR. NOEL: I would say, Your Honor, no one has ever said that; no one.

QUESTION: Well, if a Legislature, for example, give a list and said this is all there is, that would be all right.

MR. NOEL: I don't think that would suffice, either, Your Honor. I would be willing to bet that if we took the most specific statute in the land and went down it with an obscenity expert, he could come up with possible combinations or versions of an act that would not be specifically covered in that list.

QUESTION: But would nevertheless be prosecutable?

MR. NOEL: Which would be prosecutable until some court said: Here is the definition, here is the act, it does or does not apply.

QUESTION: How do you read, on page 27 of the Miller opinion, the sentence: "Under the holdings announced

today, no one will be subject to prosecution for the sale or exposure of materials unless these materials -- and so forth -- depict offensive hardcore sexual conduct specifically defined by the regulating State law as written or construed." As I understand what you're saying is one percent may be prosecuted, but not no one.

MR. NOEL: Well, I think that what that means is that there has to be a definition, there has to be a substantial definition --

QUESTION: In 99 percent of the cases?

MR. NOEL: The 99 percent definition, yes.

QUESTION: But then how do you -- the words "no one" apparently were not -- you say the Court didn't mean what they said in that.

MR. NOEL: Well, no, I didn't say that at all. I think what that means is that at some point in any given -- of course anybody can be prosecuted for anything; the question is, what will the court do with the prosecution, will it throw it out or not. I think that opinion must leave open the possibility of judicial review and application of the definitions to whatever the prosecuting attorney is charging with being obscene. That's all I'm saying.

And I'm saying that as with most other Statutes, it is impossible to be 100 percent certain that every possible example of what you're prohibiting is cataloged in that

statute.

QUESTION: And therefore the ultimate test is the general tripartite standard and the requirement of specificity merely is a -- all you need is a group of illustrations?

MR. NOEL: The ultimate test is what a court of the State or federal government, and ultimately this Court, believes is included within the specific examples given, or is not included. I think that's the ultimate test. And I don't think it's possible to remove that function from the Courts. I don't think it's possible to set up an autonomous little operation, with the Legislature and the prosecuting attorney, so that each one knows exactly everything that is prohibitable and that which is not.

I think you have to rely on the courts for the ultimate fine tuning.

QUESTION: Is it not correct, though, that some of the other States have in effect said: The only things which may be subject to prosecution are those identified specifically?

MR. NOEL: Yes, and then they've adopted the Miller examples.

But, as we have already indicated, --

QUESTION: Yes, but Illinois has not done that.

MR. NOEL: -- the Miller examples themselves are not a very long catalog, and they have many possible types of

conduct that could be arguably included under them.

QUESTION: But isn't there this difference between Illinois and these other States: they have at least said the statute is limited to certain examples. Illinois has never said that.

MR. NOEL: Illinois has -- that's true, that's why I say Illinois has not taken the literalest approach; but Illinois has said more than some other States. Illinois has said that it has specifically, in Ridens II the Court reprinted at length large portions of this Court's Miller opinion and said: after further discussion, we now construe the Illinois statute as incorporating parts (a) and (b) of the Miller test, which included, in their reprint, specific examples of Miller obscenity.

And then later, in People vs. Gould, Chief Justice Ward went on to reprint this whole item again, and he said: We have construed our statute to incorporate parts (a) and (b) as I have set out above in the above quotation.

Again referring to the examples. They have done this in addition to the constructions that they've already placed on the statute.

So, in my opinion, what they have done, I think, admittedly, my job would be much easier if they had spelled all this out; but I think a fair reading of their prior decisions, with the Ridens II and the Gould decisions,

indicates that what they have done, they have taken this Court's Miller standards and examples and added them on to the prior decisions of the Illinois Supreme Court and the Illinois Appellate Courts for an amalgam standard constitutional standard of obscenity.

I think they've said that we're going to stick by what we've done in the past, because it was correct; in addition, we're going to inform the public that we are adding on the Miller requirements and Miller examples, and the combination of this will be applied as the Illinois Obscenity Statute in the future.

QUESTION: As I understand it, the Supreme Court of Illinois continued to construe the statute to reach materials that were utterly without redeeming value --

MR. NOEL: That's correct, Your Honor. They were careful to avoid part (c) of this Court's Miller test, which reduced the "utterly without redeeming value test", they said that that was already in Illinois law, and that they were going to keep that until such time as the Legislature spoke otherwise.

So that we do have in this one particular standard that is more strict, and that was the standard, by the way, that was applied to this particular case.

I think that it's totally incorrect to say that under the Illinois statute, even on its face, that mere nudity

could be prosecuted in Illinois. Other than the fact that the Supreme Court said in Geraci that it can't, there is the simple fact that the Illinois statute requires -- and the comments to the statute, that we reprinted in the first part of our brief, I think are very illuminating as to what the intent of the Legislature was, back in 1961 when it passed the statute. And they stated -- and it's written in the statute that the matter, being accused of being obscene must go substantially beyond customary limits of candor.

Certainly in this day and age no Illinois court is going to say that mere nudity goes beyond the customary limits of candor. That element is written into the statute, to prohibit the kind of thing that was suggested here. There is no way that nudity can be prosecuted under Illinois statute, either under the face of the statute or under the Illinois decisions that have come down following it.

I think that the State's position is that there is support for the Illinois construction of this statute in Ridens II and in People vs. Gould, direct support for it in this Court's opinion in Hamling vs. United States.

I think substantially the same approach was taken by this Court as by the Illinois Supreme Court. This Court being a little bit more specific, but I think the approach is the same.

There is also direct precedental support in the

State vs. Watkins, which was one of the cases like Ridens, which this Court vacated and remanded and sent back to South Carolina fater the Miller decision was announced.

The State Supreme Court reaffirmed its prior ruling and, in a technique not too dissimilar to the Illinois technique, said that we are going to limit our statute to types of obscenity such as those listed in the Miller examples.

That case came back up to this Court on appeal, and the appeal was dismissed for want of a substantial federal question.

So I think those are two direct precedents that are very closely analogous in justifying the decision of the Illinois Supreme Court in Ridens and in Gould.

Secondly, I would simply like to state that I do not believe it's true that this Court -- well, we're not presented, this Court is not presented here with the question of whether the Illinois Supreme Court failed to obey the remand of a case. The case thatwas remanded by this Court after Miller was People vs. Ridens, Ridens vs. Illinois in this Court. That case, of course, went through the mill again with the Illinois Supreme Court, and it came up again on a cert petition, making the same allegations that are being made today before this Court about the statute, and this Court denied certiorari by a five-to-four vote.

This case, the Ward case, comes long after that situation, and of course we are not dealing with the remand situation here.

I don't think there's any question, Your Honors, that, upon reviewing the two publications involved in this case, that they are obscene under any definition of hardcore pornography. The only publication that there seems to be dispute about, even between the parties to this cause, is a publication called "Bizarre World", and I would submit to Your Honors that the main part of that publication is a 16-page full-color pullout, quote-unquote, called "Dungeon Domination", and in that particular little item, between pages 14 and 43, there are many examples of torture with apparent blood on the victim and torture and lewd exhibition of the genitals.

And I would submit that if sado-masochism itself can be prohibited by obscenity laws, then this indeed is obscenity and is properly considered prohibitable in Illinois.

The other publication, there doesn't seem to be too much disagreement between the parties. I think that it's -- that there can be no problem of retroactivity here. I think if he had consulted counsel in 1971, before he purchased and sold these magazines, if he'd looked at the many decisions, prior decisions of Illinois courts which deal with sado-masochism, Mr. Wesley Ward would have known that he

was selling magazines that were prohibitable under Illinois law, and he should have taken warning, if he had looked and noted that; he should have had proper notice that this was prohibited conduct, and he would not have done it.

I think there is no question here but that the prior construction of Illinois statutes gave Wesley Ward sufficient notice that he could be constitutionally charged and convicted of the offenses that were contained in this indictment.

Thank you very much, Your Honors.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Beckett?

REBUTTAL ARGUMENT OF J. STEVEN BECKETT, ESQ.,
ON BEHALF OF THE APPELLANT

MR. BECKETT: Just a couple of remarks, Your Honor.

First of all, let's assume for the moment, because it is true that Mr. Ward did consult counsel back in 1971 or prior thereto, and the status of Illinois law was just like the status of obscenity law throughout the nation: hopeless confusion. As emphasized, I think, in thag Geraci opinion, where the Court said: We really don't understand why the Supreme Court of the United States said material like this is constitutionally protected, but we're going to say it's not constitutionally protected.

And I submit that in that situation you're very hard-pressed to say that these particular materials, which are not hardcore materials -- they are not the type of materials that this Court described in Hamling vs. United States, you do not have explicit sexual activity.

In the one magazine, "Illustrated Case Histories", there may be suggestions of sexual activity, but in the other one there are no suggestions of sexual activity.

The Illinois Supreme Court has, in effect, in Ridens, in Gould, in Ward, reenacted the Illinois Obscenity Statute, and they have done so not by engrafting any examples of obscenity or any specificity --

QUESTION: What do you think the Court should do, if it disagreed with you on everything except on the issue of the obscenity of one of these items?

MR. BECKETT: I think it would be a violation of the First Amendment to allow a conviction for one constitutionally protected magazine to stand. In this situation, the State can certainly charge obscenity in two separate counts. So you've got the effect of a general verdict, without knowing which magazine the judge relied on, if at all.

In other words, the judge may have looked at "Illustrated Case Histories" and determined it was not obscene, but the other one was, and still convicted.

And now we get up to the United States Supreme Court and they say: Well, that judge was wrong; the other one is obscene.

QUESTION: Was it a bench trial or jury?

MR. BECKETT: Yes, it was a bench trial.

The other one's obscene, and the other one is constitutionally protected.

QUESTION: Was there any request made for the equivalent of a special verdict?

MR. BECKETT: No, there was not.

QUESTION: Well, then do you think your standing to raise that issue is unimpaired at this stage?

MR. BECKETT: No, I don't. I think, certainly under -- I believe under the First Amendment, I don't think we should be allowed to be and remain convicted, if one magazine is not obscene.

QUESTION: You mean "yes, I do", not "no, I don't."

MR. BECKETT: Yes.

Part (b) of Miller doesn't require a State to give examples; part (b) of Miller requires a State to give specificity. If you have the one percent that Mr. Justice Stevens was talking about, that material may not be prosecutable.

QUESTION: Yes, but the most that would happen -- even if we agreed with you on that, would be that we would

remand, vacate the judgment and remand for resentencing, or possible resentencing?

MR. BECKETT: I think that if you agreed with me, then you would say that the statute and the cases have never --

QUESTION: No, no. Even if we -- if we disagreed with you on everything except the --

MR. BECKETT: Oh, the obscenity vel non?

QUESTION: Of one magazine. Then the most we would do, even if we agreed with you on that point, would be to remand, wouldn't it? For resentencing. Vacate. We wouldn't set aside -- we wouldn't say that the conviction couldn't stand entirely, would we?

MR. BECKETT: My position is that under the First Amendment I don't think he should be allowed to remain convicted for disseminating material that is protected under the First Amendment.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:11 o'clock, a.m., the case in the above-entitled matter was submitted.]

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