ORIGINAL

In the

Supreme Court of the United States

CLAUDE D. BALLEW,

Petitioner,

vs

STATE OF GEORGIA,

Respondent.

No. 76-761

Washington, D. C.
November 1, 1977

Pages 1 thru 39

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v.	:	No. 76-761
STATE OF GEORGIA, Respondent.	:	

Washington, D. C.,

November 1, 1977.

The above-entitled matter came on for argument at 11:12 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:

MICHAEL CLUTTER, Esq., 1409 Peachtree Street, N.E., Atlanta Georgia 30309; on behalf of the Petitioner.

LEONARD W. RHODES, Esq., Assistant Solicitor General, Room 53, State Court Building, 160 Pryor Street, S.W., Atlanta, Georgia 30303; on behalf of the Respondent.

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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 will hear arguments next in 76-761, Ballew v. Georgia.

Mr. Clutter, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF MICHAEL CLUTTER, ESQ.,

ON BEHALF OF THE PETITIONER

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

I would first of all like to apologize both on my own behalf and on behalf of Mr. Smith for the lateness of the motion which allowed me to argue this case. Mr. Smith is involved in another matter and it was only at the end of last week that it became apparent that that might interfere with argument here. I apologize again for the lateness of that and any inconvenience that may have caused the Court.

MR. CHIEF JUSTICE BURGER: It is no inconvenience to the Court at all.

MR. CLUTTER: Thank you, sir.

This case involves a conviction in the state court of the State of Georgia of two counts of distributing obscene material. The two counts are both predicated upon the same material and involves two exhibitions of the film "Behind the Green Door" in the same theatre on two different dates.

The petitioner was tried on these two different counts

before a five-person jury pursuant to the authority of the Georgia constitutional provision which we challenge here. He was convicted. The judgment of conviction was affirmed in the Georgia Court of Appeals in the opinion and judgment which we challenge here.

There are three arguments on this petition for certiorari. I think in all candor that only two of them are susceptible to any elucidation on oral argument. The third question relates to the obscenity of the films involved in this case. We certainly do not abandon that argument or in any way retreat from it, but I don't think that it could really be expounded upon much in oral argument. We submit that qustion on the arguments submitted in the brief, and I would not choose to present any oral argument on that unless the Court has any specific questions.

The other two questions involved are the five-person jury, the constitutionality of the five-person jury before whom the petitioner was tried, and the constitutionality of the jury instructions which allowed a conviction on the basis of not only actual knowledge of the materials but constructive knowledge of the materials.

The five-person jury question was one which was specifically reserved by this Court -- five persons or less was specifically reserved by this Court in Williams v. Florida, which approved a six-person jury and said that did not violate

the Sixth Amendment right as applied to the states through the Fourteenth, reserving the question of whether any lesser number might so violate it.

As is argued in the brief, I think there is just one point that needs emphasis in this case which differentiates it from cases like Williams, and that is that we are dealing with a determination of obscenity and we are concerned in this case thus not only with whether a five-person jury is as equally able to determine guilt or innocence as a six or as a twelve-person, but whether a five-person jury is equally as able to delineate the applicable community standards in their determination of obscenity.

I think that since the First Amendment arguments here differentiate this case from those like Williams, those are not the only values upon which this argument is predicated, but I think they are a separate and distinct line of argument.

QUESTION: Then you are suggesting that this claim about less than twelve jury is focused just in First Amendment cases, is that it?

MR. CLUTTER: I am suggesting alternative arguments to support the petitioner's position, Your Honor, that even if the Court were to find that five-person juries might be constitutionally acceptable as a Sixth Amendment matter in cases not involving the First Amendment, that it should find that five-person juries are not constitutionally acceptable in First

Amendment cases involving a determination of community standards.

QUESTION: Because that is not an appropriate representative of a cross-section of the community?

MR. CLUTTER: That's correct, Your Honor, that position is espoused, pursuant to this Court's --

QUESTION: Could you make that argument equally that in effect 24 would be more constitutional, even though we have never used 24-member juries?

MR. CLUTTER: I don't know if more constitutional would be the appropriate word to describe that.

QUESTION: I am not sure either.

MR. CLUTTER: I think --

QUESTION: But you are saying that it is not constitutional to use less than twelve in a First Amendment case?

MR. CLUTTER: We are submitting the argument that it is not constitutional to use less than twelve in a First Amendment case. In the event that the Court finds that argument without merit, that the drop in the number from six to five is even more important and even more suspect in a First Amendment case than it would be in another case.

QUESTION: Well, would this suggest, Mr. Clutter, that bench trials would be inappropriate in a determination of obscenity, a single judge cannot?

MR. CLUTTER: Your Honor, should a defendant invoke his right to a jury trial, we would most surely submit --

QUESTION: What if he didn't?

MR. CLUTTER: If he didn't, he certainly has the right to submit a determination of his guilt or innocence to a single judge.

QUESTION: Well, don't you have bench trials in Georgia that determine obscenity, not in a criminal case but in some kind of civil cases?

MR. CLUTTER: Yes, sir.

QUESTION: What about that, would a single judge be able to determine an obscenity case?

MR. CLUTTER: Yes, sir, pursuant to the civil statutes present in Georgia, a single judge --

QUESTION: But you don't think that would present any First Amendment problem?

MR. CLUTTER: I think it does, Your Honor, but I have to admit again that --

QUESTION: Well, that is because of the waiver of the constitutional right.

QUESTION: I am talking about a civil case.

MR. CLUTTER: In civil proceedings, even without a waiver, I believe, although I can't state with certainty, that it is possible to over a civil defendant's objection to try an obscenity case before a judge and not before a jury.

QUESTION: I thought we had had cases from Georgia precisely of that kind, a judge trial and determination of

obscenity for purposes other than criminal.

MR. CLUTTER: Your Honor, the only case I know of in that regard that was here is Paris Adult Theatre v. Slaton. In that particular case, which Robert Smith did argue before the Court, I believe the defendant waived his right to a jury trial. I am not sure, I am not positive of that, and I don't wish to state that as a fact, but I believe that in that case it was in the nature of what we would call a test case. He wanted to determine the constitutionality of --

QUESTION: Well, a nuisance case in almost any state, a nuisance case addressed to an equity court would very likely be a single judge enjoining the display of film or book, would it not?

MR. CLUTTER: Most probably, Your Honor. I know of no nuisance statute that is still extant that is held constitutional. The nuisance statute we have in Georgia as applied to obscenity has been held unconstitutional by the Georgia Supreme Court, and I think that nuisance statutes as applied to First Amendment materials have met a similar fate in all the other states that I know of. I don't know of any that remains. I know they have been struck down in Michigan, Kentucky, Indiana, Illinois, Colorado, California, Nebraska, perhaps other states. I don't know again whether juries were available in those other jurisdictions. All I know is that under Georgia's perhaps a single judge could determine it, even over a defendant's

objection, but that statute is no longer in existence.

QUESTION: Of course, there is at least one dissent in this Court, Kingsley Books, back in '56 or '57, that was a civil case --

MR. CLUTTER: Yes.

QUESTION: -- where it was suggested that the determination of obscenity ought always to be, bench trial or otherwise, by a jury --

MR. CLUTTER: Yes.

QUESTION: -- because of its function in a cross-section of the community. As far as I know, that idea has not caught on.

MR. CLUTTER: Your Honor, I think that argument has taken on more significance post-Miller with the determination by this Court that it is not a national community standards but perhaps one person could as easily guess at as a group of six or even twelve from a local community, when that standard has been replaced by a standard of the local community, especially with this Court's ruling that no evidence on those community standards need be submitted to the jury, to bring that into the jury room with them, they live in the community and they bring their own knowledge of community standards to the room with them. With that standard being applicable as opposed to some national standard which they might only hear evidence on and guess on, I think that group deliberations are even more

important, even more constitutionally mandated.

QUESTION; Wasn't your argument made and rejected in McKinney v. Alabama by a majority, where we are dealing with a civil nuisance statute?

MR. CLUTTER: I don't believe that question was addressed in McKinney. I think McKinney dealt only with the applicability of a civil determination to another litigant.

QUESTION: Well, you may be right.

MR. CLUTTER: And --

QUESTION: Well, I think Brother Rehnquist was right because at least -- I have forgotten whether it was concurrence or dissent. It addressed it, but it was not raised.

MR. CLUTTER: No, sir.

QUESTION: It was not decided by the Court.

MR. CLUTTER: As far as I know, McKinney dealt only with the applicability of determination of obscenity of a criminal litigant later in foreclosing that question to him in a later criminal obscenity case.

In the Court's enunciation in Williams, it did not make any -- it did not focus upon or decide the case on the basis of historical analysis, but instead examined the purposes of the right to trial by jury. And as submitted in the brief, I believe, in light of those purposes, both as to the determination of guilt or innocence of this defendant and as to the determination of the community standards in a First Amendment

area that the decrease from six to five or indeed from twelve to five, since this is the first time the First Amendment issue has ever been presented, is constitutionally suspect. If the right to a trial by jury is, as is said in Williams, safeguard against an overzealous or corrupt prosecutor and it separates the defendant from a compliant, biased or eccentric judge, I think that those values are little served if the compliant or corrupt, biased or eccentric judge is only replaced by such a jury. And I think that the slipper slope argument, which is recognized in Footnote 22, is squarely presented here, and I just ask Your Honors to hold that time has been reached to get off the slippery slope, as the Court suggested that it would do at the appropriate time in that footnote.

QUESTION: Are you asking that Williams v. Florida be overruled?

MR. CLUTTER: No, sir, I don't think it is necessary to overrule Williams v. Florida. I think that there are two alternative grounds for this particular question, either to hold that Williams is inapplicable as applied to First Amendment cases, where pursuant to Miller a jury determination -- excuse me, a determination of community standards must be made, I think that even with Williams extant, the Court might merely hold that the further step down the slope that was recognized in that case in '65 is inappropriate but it certainly is not necessary in either instance under either argument submitted by

this petitioner to overrule Williams.

The other question presented relates to the constitutionally accepted minimum standard of scienter in obscenity cases. This question arises because the judge instructed the jury in this case, pursuant to Georgia statute, that the defendant could only be convicted for knowing distribution of obscene material, that knowing in this context -- and these are the words of the statute -- includes both actual and constructive knowledge, and a person has constructive knowledge if he has knowledge or facts or circumstances that would put a reasonable and prudent man on notice as to the suspect nature of the material.

QUESTION: Wasn't the charge constructive knowledge of obscene content?

MR. CLUTTER: Yes. Again, that is from the wording of the statute, is what it says. The scienter requirement in Georgia under the statute is worded as either actual or constructive knowledge of the obscene content.

QUESTION: Well, I thought it was of a suspect content.

MR. CLUTTER: Well, Your Honor, under the wording of the statute -- and it is set forth in the appendix, it is stated that constructive knowledge is knowledge of facts or circumstances -- I'm sorry, Your Honor, it is not in the appendix, but the wording of it --

QUESTION: Well, I thought it quite important that the charge was that the constructive knowledge was to be of a suspect quality, not of the obscene quality.

MR. CLUTTER: Yes, Your Honor --

QUESTION: That is quite a difference --

MR. CLUTTER: Yes, it is --

QUESTION: -- and you made an argument based upon that.

MR. CLUTTER: Yes, sir, but both the constructive knowledge of the obscene content and of the suspect nature of the material is set forth in words in the statute, but what the statute says is that one must have knowledge of the obscene content of the material as a term of art --

QUESTION: Were those the instructions to the jury?

MR. CLUTTER: The instructions to the jury were that that element could be met.

QUESTION: Which element, of a suspect nature?

MR. CLUTTER: No, Your Honor, the element of knowledge of the obscene content of the material.

QUESTION: Where are the instructions here?

MR. CLUTTER: Your Honor, it is at the bottom of page 11, that the word "knowing" as used in the statute is actual or constructive knowledge of the obscene content --

QUESTION: I see.

MR. CLUTTER: -- but that element could be met merely

by showing knowledge or facts or circumstances that would put a reasonable person on notice as to the suspect nature of the material.

QUESTION: I see.

MR. CLUTTER: So that it is applied both to the actual and the constructive knowledge standard.

QUESTION: I got lost. You are reading from page 11 of what?

MR. CLUTTER: The brief of the petitioner, Your Honor.

QUESTION: Thank you.

MR. CLUTTER: The bottom of page 11 and the beginning of 12, the beginning of the argument section of the brief. I would like to --

QUESTION: So the instruction was, wasn't it, that he was charged with constructive knowledge that the material is obscene if there was enough information to put a reasonable and prudent man on notice that the material was simply suspect?

MR. CLUTTER: That's correct, Your Honor, they were allowed to convict him on that basis and, again, that is the wording of the statute.

QUESTION: You don't seem in your brief or so far in your oral argument to make much of -- unless I misunderstood you -- of the word "suspect."

MR. CLUTTER: Your Honor, I think, in light of this Court's decision in Hamling, I think that all that the Georgia

statute means in that is that the defendant need not have knowledge of the legal status of the material as obscene, and we don't submit that he need --

QUESTION: Or even constructive knowledge that it is obscene, only constructive knowledge that it is suspect --

MR. CLUTTER: Yes, sir.

QUESTION: -- which is quite a different word from obscene, it means quite a different thing, doesn't it?

MR. CLUTTER: Yes, sir. All I wish to state, and the reason that particular element was not stressed in the brief is that the petitioner does not here contend that he must constitutionally be found to have had knowledge of the legal status of the material as obscene, and that ignorance of the law or failure to brush up on the law of obscenity would not protect him, that he must merely have found to have knowledge of the content of the material, and that falls within the classification that it might be obscene.

But what the petitioner asserts in this case is that he must have actual knowledge of those materials, not merely that he finds himself in a circumstance where a jury might conclude that someone else should have taken further inquiry.

QUESTION: Do you think there is any further difference in the standard to be applied for constitutional purposes to a book store proprietor as opposed to a movie house owner?

MR. CLUTTER: Your Honor, yes, in the sense that the

basic thrust of this argument is one of the chilling effects. I think that the chilling effect in the distribution of books would be even greater, because of the longer time required for a cautious bookseller to familiarize himself with his material than for a cautious movie purveyor to sell movies. However, I am not aware of the factual circumstances under which movies are distributed.

QUESTION: Well, I would think typically a book store might well have several thousand titles in it at any given time, whereas --

MR. CLUTTER: That's correct.

QUESTION: -- a movie theatre presumably shows one or two shows per night, doesn't it?

MR. CLUTTER: Some movie theatres, I guess with the possibility of double-features and the multiple theatres that I assume are present here may have six to twelve movies at any given time. But the chilling effect argument as put forth by this petitioner would relate not to his exhibition of the film but his original selection of it. If a man is sitting in Atlanta and is trying to decide whether or not to order a film to show in his theatre, a film with a title such as "Carnal Knowledge," which Your Honors are aware of because of Jenkins v. Georgia, he might well under this statute not even order that film unless he has a chance to see it, and he might not have a chance to see it before he orders it. And if under this

statute he is worried that the mere presence of that title would suscept him to -- would make him susceptible to criminal prosecution, then he might well refrain from ordering that film and exhibiting it in his community and thus deprive those members of his community of a chance to see that film merely because that title might later be held by a jury to have put him where he were a reasonable and prudent man on notice as to some suspect nature of the material, so that it may occur even before he orders the material.

QUESTION: I notice in your brief that you describe this film as a nationally acclaimed movie. That suggests an awareness by somebody of what the movie was all about or would the answer to that be that you didn't take a look at the movie until after the case was brought?

MR. CLUTTER: There is no evidence in this record of when he took account of it. If we were to go outside the record, I could submit, as a member of the court, he did in fact not look at it, but I don't think that is important to this decision. It was nationally acclaimed in the same way that "Carnal Knowledge" was nationally acclaimed, but any individual defendant may not have seen that material or been made aware of circumstances that might later be held to put him on notice --

QUESTION: He was first relying on hearsay --

MR. CLUTTER: He was relying on hearsay as to the

general course of the film, he certainly wasn't -- and I'm not even sure how specific that hearsay was. The national acclaim of this film certainly didn't arise until after it had been exhibited for sometime, and whether that was present at the time he ordered the film or not, I am not sure. But even if it were, it was not specific enough, I would submit, to satisfy the constitutional minimum standards of scienter, even were he aware of that hearsay.

QUESTION: Is it a fact that this petitioner had been arrested a couple of times for showing this film?

MR. CLUTTER: Yes. This conviction -- excuse me -- this case invclves two different counts of distributing the film. The first was on November 9, 1973, and the second was on November 27, 1973. Those were a couple of weeks apart. The film after his first arrest was continued to be shown and he was in the theatre and under the prosecution's theory was the manager of the theatre during that period of time encompassing both of those dates.

QUESTION: Which one of those arrests is before us today?

MR. CLUTTER: Both of them, Your Honor. They were combined for a joint trial. He was arrested, he was sentenced to one year under each count, but those sentences were to run concurrently. He was fined, however, $1,000 on each count, so that we have a punishment attaching to each count separately as

it relates to the fines, not as it relates to the time to be served, however.

The prosecutor has submitted in his brief that this question has already been answered by this Court, and I think I would just like to state briefly why I think it has not. His main reliance is upon Mishkin v. New York and Ginsberg v. New York, that involve two different New York obscenity statutes.

The first of those was Mishkin v. New York, and involved the question by the petitioner very similar to the question presented here, asks this Court to delineate the constitutional acceptable minimum standard of scienter because the wording of the statute there, which was section 1411 of the New York statute, was fairly similar and authorizing conviction on the basis of constructive knowledge.

Howver , before that issue was addressed by this Court, the New York Court of Appeals decided, People v. Finkelstein, which is cited in this Court's opinion in Michigan, and People v. Finkelstein decided that limited the scienter requirement to what this Court described as a very stringent element of scienter and required knowledge on those who are accused, only those who are in some manner aware of the character, not should be aware, not aware of facts or circumstances to put them on notice, but were aware of the content, the character of the material are subject to prosecution, and

it is aimed thus not at innocent, even stupidly innocent, but calculated purveyance of filth.

With that limitation upon the statute, upon section 1411 of the New York Penal Code, this Court did not reach, and it specifically says at page 511 of its opinion that it doesn't have to reach the constitutional minimum, that this statute as limited in this way to those who have knowledge is clearly constitutionally acceptable.

That same result was reached in Ginsberg v. New York a couple of years later, that involved section 484 of the New York Penal Code. The only difference from that and the original Mishkin case was 484 dealt with distribution of material which, although not obscene when judged against standard of adults, was obscene when judged against a standard of its appeal to children. It was specifically addressed to what today might be called child porn or material which might appeal to children. That had a scienter requirement again very similar to that before this Court, and that was that knowingly means knowledge or reason to know, belief or ground for belief.

I would admit that that is very similar to the standard here. Again, that question was not reached in Ginsberg because, again, People v. Finkelstein glossed on the statute, was held by this Court to require that under that gloss that actual knowledge, those who are in some manner aware of the character of the material are subject to prosecution. With that

gloss, this again, the Court again states at page 644 and 645 of its opinion, it is not necessary to decide whether or not a constructive knowledge requirement is sufficient because in this case there was an actual knowledge requirement. Now, neither of those cases reach that issue.

The only other case cited by the Solicitor in support of his position in this regard is Rosen v. United States, a 19th Century prosecution under the federal statutes, in which the Court said the issue was -- the inquiry was whether a paper which was mailed was obscene, lewd and lascivious, and whether it was deposited in the mails by one who knew or had notice of its content.

I think, however, taken in context, if you read on from the quotation in the case which is cited by the Solicitor, the following phrase is thus someone can be convicted even though he did not regard it as forbidden. I think all this really is in Rosen is a statement that was repeated by this Court in Hamling, that one need not be aware of the legal status of material as obscene. And I just wish to repeat that the petitioner here does not put forth that position and does not suggest that that position is even necessary to support him in this case.

QUESTION: Mr. Clutter, do I understand you to take the position that if the defendant can honestly testify that he never saw the movie, has avoided seeing it, that he will always

have that defense?

MR. CLUTTER: No, sir. As stated in here, we admit two things: First, the state certainly has the right to prove knowledge on the basis of circumstantial evidence; and, as this Court said in Smith, that the judicial process and its ability to ascertain truth is not foreclosed by someone's denial, that it may well be that a jury could find that a defendant knew the contents of a film, whether he saw it or not. All we submit is that that knowledge has to be actual, rather than constructive knowledge. I think that people know a great many things without seeing them, and may know the content of material -- someone who purposely, for instance, purposely refuses to view films before showing them could well be held by a jury to say that the reason he refused to look at them was indeed exactly because he knew what was in them. And all we are arguing in this case is that, although that may be sufficient --

QUESTION: One other question, Mr. Clutter. You have explained why Michigan and Hamling are not important. What is the strongest case supporting your position on this matter, this issue?

MR. CLUTTER: Your Honor, as it relates to constructive knowledge, I know of none that specifically address the question. I think that the wording of Hamling as it goes toward knowledge I think supports the position of petitioner. But most strongly I think is Smith v. California. The reasoning

of Smith is equally applicable to this case, although admittedly to a less degree. The chilling effect may not be as strong if someone has no say in the requirement and can't distribute any material unless he actually reads it. What we have here is a chilling effect that results in suppression of material which even in the slightest way may allude to sex and thus scare off the cautious bookseller, the cautious film purveyor, until he actually has personal knowledge of the film or the book he distributes.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Rhodes.

ORAL ARGUMENT OF LEONARD W. RHODES, ESQ.,

ON BEHALF OF THE RESPONDENT

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

My colleague has already expounded on the questions involved. I will go right into the five-person jury question. And under Georgia law, as authoritatively construed in numerous cases, it has been held that all juries must return a unanimous verdict, whether that be a civil case or a criminal case, and irrespective of the size of the jury. This means that in the case at bar, the jury was in fact charged that they must return a unanimous verdict and that they must find all of the elements of the crime beyond a reasonable doubt, so that this means that this jury found that Mr. Ballew in this particular case

participated in the exhibition of this motion picture, that the film was in fact obscene, that he knew it was obscene or was aware of facts which would put a reasonable and prudent person on notice as to the suspect nature of the film, which under the Georgia law constitutes notice, and that he intended to commit the crimes on both occasions.

Now, how many jurors are necessary to afford a fair trial. As has already been discussed, the case of Williams v. Florida, six was held to be sufficient in a case, a felony case, where the accused was charged with the offense of robbery, was tried for the offense of robbery and was sentenced to life imprisonment.

In the case at bar, the maximum imprisonment is twelve months for each count, a misdemeanor offense.

QUESTION: What was the sentence?

MR. RHODES: Twelve months on each count.

Now, in Footnote 28 of the majority opinion in the Williams case, it was written "we have no occasion in this case to determine what minimum number can still constitute a jury, but we do not doubt that six is above that minimum." Now, it follows that if six is above the minimum, five just cannot be below the minimum. There is no number in between.

QUESTION: The question should have been decided then. You say this question was decided right then and there?

MR. RHODES: If we apply the Williams case to all

criminal cases, yes, sir.

QUESTION: But the Court later said the question was open, didn't it?

MR. RHODES: Well, I am not familiar with that, Your Honor. That may very well be.

In Georgia, the Constitution or the Constitution of the State of Georgia provides that not less than five jurors may be used to try misdemeanor cases. The Criminal Code of Fulton County, which has since been changed to the State Court of Fulton County, and in the court in which this defendant was tried, by statute, statute permitted by the Georgia Constitution allowed misdemeanor cases to be tried by five-person juries. That has since been changed. It was changed before this case was on appeal, but it has been changed and now the minimum in that court -- and I know of no other court in Georgia which has fewer than six -- the same court --

QUESTION: Well, if this petitioner were brought to trial today then in Georgia, how many people would be on the jury?

MR. RHODES: In this court would be six. As a matter of fact, he was brought to trial this year in another case and he had six persons on the jury.

In the case of Johnson v. Louisiana, 1972, the Court there approved the legal maximum that the burden of proof by state -- that the state can require a burden of proof by more

jurors in a more serious case. In other words, the lesser the seriousness of the offense or the less serious punishment by a smaller jury and the more severe cases by a larger jury, and that system, which the Court apparently approved, provided for a unanimous verdict in juries of five where less serious crimes were involved, by nine of twelve where more serious crimes and more severe punishment was involved, and the unanimous verdict of twelve in the most severe cases.

There has been considerable studies made in recent years on jury size and rule of decision, and I would be the first to admit that they fall on both sides of the fence.

There will be a list of numerous studies which will be published this month, and I have been notified by authors Tanke & Tanke, a husband and wife team out in San Francisco, Mr. Tanke being a lawyer and his wife being a psychologist, that they have formulated an annotated list of some of these studies. It would be printed by the American Psychological Association.

QUESTION: Do you think we should withhold our decision until that comes out?

MR. RHODES: No, Your Honor. There are some already out that I would note here: The Journal of Personality and Social Psychology, in 1975, Volume 32, pages 1 through 14, a study of six and twelve-person juries, involving unanimous and two-third majority rules, reported that neither size nor rule decision affected the decision distribution.

In the University of Michigan Journal of Law Reform, 1973, a report that minority jurors in six-member juries participated more in the jury deliberations than did minority jurors in twelve-member juries. The same publication in a before and after study of a change from twelve to six-member juries, reported that there were substantial similarity in the results of the verdicts.

In a publication Jury Verdicts, "The Role of Group Size and Social Decision," by Michael J. Sachs, of Boston College, copyrighted this year, having been assigned the Library of Congress Catalog Card No. 76-44569, Mr. Sachs reported that there were no significant differences occurring in the conviction/acquittal ratio or the proportion of hung juries as a function of jury size; but he did report that smaller juries will lead to a decrease in the number of convictions, or at least his studies and report made a suggestion that the smaller juries would lead to a decrease in the number of convictions.

QUESTION: This is all psychology.

MR. RHODES: Right. And, as I say, they --

QUESTION: And it has what bearing on us?

MR. RHODES: Well, empirical data, Your Honor, Mr. Justice Marshall. I am simply citing -- I know that there are others on the other side of the fence, but these appear to bear out my contention that a five-member jury is sufficient.

I call the Court's attention to the case of Sanders v. Georgia, which this Court denied Servian on the identical question one year before the question was -- cert was granted on the question in this case. That was reported at 424, US 393. Sanders was tried in the same court, a five-person jury, appealed and cert was denied.

On the question of scienter, as has already been stated, the Georgia law requires that in obscenity cases the defendant have knowledge of the obscene nature. The law further provides that knowledge can be actual or constructive, and that constructive knowledge is either knowledge of facts which would put a reasonable and prudent person on notice of a suspect nature of the material.

QUESTION: Well, that removes it one step, doesn't it? This jury was instructed under the statute, as I understand it, correctly constructed as far as the statute went that a person has knowledge of the obscene content of the material if he has constructive knowledge of the suspect nature of the material. That is two big steps, isn't it?

MR. RHODES: The statute provides --

QUESTION: Not if he has constructive knowledge of the obscene nature of the material, if he has -- he was instructed that he knows what the material is if he has reason to know that it is suspect, not that he has to reason to know what it is.

MR. RHODES: Well, the Georgia law provides what was charged.

QUESTION: I know that, and so the --

MR. RHODES: If he is aware --

QUESTION: The instructions were in accord with the Georgia statute --

MR. RHODES: That's correct.

QUESTION: -- but the question, of course, is whether or not that is a sufficient instruction in view of the First Amendment, isn't it?

MR. RHODES: That's the question, yes. The petitioner concedes that knowledge, while being required to be actual, can be proved by circumstantial evidence. Now, we submit --

QUESTION: But this jury is instructed that he knew it was obscene if he had constructive knowledge, not that it was obscene, but that it was suspect.

MR. RHODES: Well, I fail to see a great deal of difference --

QUESTION: The two certainly have quite different meanings, those two words, don't they, even in this context?

MR. RHODES: Well, our position is that if he is aware of facts which would put him on notice of the suspect nature of the material. In this instance, on both occasions he was aware that he was working in an adult theatre, he was the manager, the film was advertised as being a triple-X movie,

signs not allowing anyone under the age of 18 or 21, I don't recall the exact age factor -- we contend that those are facts or circumstantial evidence which in effect warrant the inference that he knew that it was obscene and that --

QUESTION: No -- but the jury's instructions was that it could and should find him guilty if he had reason to know it was suspect, and if it is something suspect, it may or may not be obscene. The jury was instructed that they were to find that he knew it was obscene if he had simply reason to know that it was suspect.

MR. RHODES: Of a suspect nature, the material.

QUESTION: Yes.

MR. RHODES: That's correct.

QUESTION: Mr. Rhodes, suppose he knew that the name of the film were "Carnal Knowledge," that would satisfy the intent requirement under the statute, even though the film in fact is not obscene, wouldn't it?

MR. RHODES: Not --

QUESTION: Because that would put him on notice that it was suspect.

MR. RHODES: Not today, I don't think it would.

QUESTION: Well, before this Court's decision in holding that it was not obscene, he should by just knowing that was the name of the film, that would put him on notice, wouldn't it?

MR. RHODES: I don't think so.

QUESTION: You don't think so --

MR. RHODES: I just --

QUESTION: Wouldn't that raise a suspicion, wouldn't that make a man suspicious that it might be obscene?

MR. RHODES: I think it would raise a suspicion, and it should --

QUESTION: Well, isn't that exactly what the statute requires, just exactly that?

MR. RHODES: Well --

QUESTION: It says knowledge of a fact, namely that it is named "Carnal Knowledge," which would put a reasonable prudent man on notice of a suspect nature material.

MR. RHODES: Well, I --

QUESTION: And under the statute and under the instructions then, the jury is told to convict him.

MR. RHODES: Well, I would still contend and submit that to prove that would also prove his knowledge of the obscenity by circumstantial evidence.

QUESTION: Mr. Rhodes, I notice that the Georgia Court of Appeals, page A.5 and A.6 of the petition devoted only one paragraph to this claimed error in the instructions, and at the top of page A.6 of the petition, it says one charge complained of was a quotation of the definition of obscene material as set forth in section 26-2101, which I think is the

one that petitioner refers to.

Is there any place other than in the record itself where there would be available a complete text of the trial judge's charge?

MR. RHODES: It is here in the joint appendix, at page --

QUESTION: In the joint appendix, the full charge is in the joint appendix?

MR. RHODES: Page A.7 of the joint appendix.

QUESTION: Thank you.

MR. RHODES: Now, I would like just briefly to make a comparison of a number of the cases that Mr. Clutter has already mentioned.

In Rosen v. United States, notice of its contents, notice of its contents was held sufficient. In Smith v. California, circumstances may warrant the inference that he was aware of what a book contained. It was held that eyewitness testimony that he had read the book was not necessary, but circumstances which would warrant the inference that he was aware of what the book contained, despite his denial.

In Mishkin v. New York, it was held that in some manner aware was sufficient, in some manner aware of the character of the material. In Ginsberg, reason to know, reason to know, and we think that knowledge of facts which would put a reasonable and prudent person on notice of the suspect nature

would be the same as reason to know, or some manner aware.

QUESTION: Reason to know what?

MR. RHODES: Reason to know the nature of the material.

QUESTION: Suspect, he is guilty if he has reason to know that it is suspect, then under the instructions he is guilty of knowing that it was obscene. That hardly follows just as a matter of rational inference, does it?

MR. RHODES: Well, these cases I am citing, Mr. Justice Stewart, make these statements, having notice or being aware of the character of the material --

QUESTION: Yes, but not being aware that the material is suspect.

MR. RHODES: Well, I fail to see a great deal of difference.

QUESTION: Mr. Rhodes, does the same statute govern both, apply to both book stores and motion pictures?

MR. RHODES: Yes, it does, Your Honor.

In the case of California v. Kuhns, which cert was denied by this Court, it is reported 61 California Appeals, 3d, page 735, had a similar provision that is determined by the appellate courts of California, be aware of the character of the matter was the required.

In Hamling v. United States, it approved the reasoning in Mishkin and Ginsberg, and that was in some manner aware

or reason to know, reason to know. Now, to me, reason to know is still the same as having knowledge effects, it would put a reasonable and prudent person on notice.

QUESTION: Well, one has to ask reason to know what? Let's assume, to take a ridiculous case, that your legislature said that if you have reason to know that a book contains paper and printing on it, then that is constructive knowledge that it is obscene, and that clearly would be wholly irrational and invalid law under the First Amendment.

MR. RHODES: Well --

QUESTION: Now, they don't say -- and here they say if you have reason to know it is suspect, then you know it is obscene. They don't say if you have reason to know it is obscene, then you know it is obscene.

MR. RHODES: Well, I think here they are saying that if he has reason to know it is obscene, if he has reason to know --

QUESTION: The instructions does not say that and the statute does not say that.

MR. RHODES: But in here, in these cases, Ginsberg and some of the others that I have cited, he has reason to know, and if he has reason to know that it is suspect, he has some knowledge of it either way.

QUESTION: Suspect, if he has reason to know it is suspect, he has constructive knowledge that it is suspect.

MR. RHODES: Well, if he has reason --

QUESTION: But these instructions didn't say that.

MR. RHODES: Well, I might go one step further and say that he would be put on notice and he would be required under the Georgia law, and I think under these other cases where it says reason to know, would be put on notice to look further into the matter and to make an analysis of what he is doing to determine whether or not he should continue what he is doing.

QUESTION: May I ask one further question on this subject. Do you think if Georgia had a law that said a man is absolutely liable for distributing obscene material if it is in fact obscene, regardless of whether he had any knowledge whatsoever about its contents, that would be consistent with the First Amendment?

MR. RHODES: No, Your Honor.

QUESTION: You don't?

MR. RHODES: No. I think he must of necessity be aware in some manner of what he is doing, he has to have some intent to distribute or exhibit obscene material.

QUESTION: I have one other question. On your five-man jury point, are there other -- how many other states have five-person juries, of which you are aware, do you know?

MR. RHODES: The only one right off is Louisiana that I can say.

QUESTION: That is the only other one?

MR. RHODES: I am sure there are others, but -- I believe there were others discussed in the Louisiana case or in the footnote. I believe there were a number of states mentioned that had less than twelve.

Now, the third question is the question of whether or not the film was obscene. If you have seen it, you already know what it contains. If you have not, you will find that it is hardcore pornography under any standards.

As the Court of Appeals of Georgia said, it was replete with all sorts of explicit sexual acts, there is nothing left to the imagination. It contains acts of masturbation, sexual intercourse, normal and perverted, cunnilingus, fellatio, lesbianism, anal sodomy. If it has been devised, it is contained in that movie.

This film has already had one adjudication of obscenity, at least one, possibly more. But in a civil case brought in the Northern District Court of the Northern District of Texas, Judge Robert Hill was wrestling with the problem of whether or not it was obscene in a copyright --

MR. CHIEF JUSTICE BURGER: I think we will resume there at 1:00 o'clock, counsel, if you have anything further.

[Whereupon, at 12:00 o'clock noon, the Court recessed until 1:00 o'clock p.m.]

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Clutter, do you have anything further?

Have you submitted, counsel? You have some time left.

MR. RHODES: If I may in conclusion say that we ask the Court to reaffirm that obscene material is not protected by the First Amendment. We ask that the Court view this film and rule that it is obscene as has been so ruled on three occasions in the trial court in this case, by the Appellate Court, the Court of Appeals of Georgia, and by the Northern District Court of Texas, and that you make it plain to those people in this country that deal in this matter that they do so at the risk of being prosecuted in the applicable state and federal jurisdictions.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Clutter, do you have anything further?

ORAL ARGUMENT OF MICHAEL CLUTTER, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. CLUTTER: One or two brief points related to that issue of scienter.

QUESTION: If you win on any one of your issues, need the Court go any farther?

MR. CLUTTER: No, sir. If the scienter standard was

fact constitutionally insufficient --

QUESTION: How about the jury?

MR. CLUTTER: And if the jury in fact was constitutionally insufficient, I think, although it might be helpful in a retrial of this matter to know whether the instructions should be given again, it certainly is not necessary at this point for the Court to reach the question of what jury instructions would be proper should petitioner be retried before a six-person jury. That would I guess in a technical sense --

QUESTION: Well, if he is retried, he is automatically tried before a six-member panel.

MR. CLUTTER: That's correct, Your Honor. There may be other counties in the state that --

QUESTION: Well, what would happen if we just decided that the movie was obscene?

MR. CLUTTER: That would remove our -- if you decide as a matter of law that the movie is obscene --

QUESTION: We have to reach another question then, don't we?

MR. CLUTTER: Yes, sir. With all due respect --

QUESTION: Would you have a retrial?

MR. CLUTTER: With all due respect, what the petitioner is interested in is the opinion of a properly instructed jury on whether it is obscene, and before the question even reaches Your Honors on whether or not the jury determination is

constitutionally acceptable and what we contend in this case, that we don't have a properly instructed jury, nor do we have a properly constituted jury to make that determination in the first instance, before the question ever gets to this Court.

Thank you.

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

[Whereupon, at 1:05 o'clock p.m., the above-entitled case was submitted.]

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