

ORIGINAL

In the

Supreme Court of the United States

LO-JI SALES, INC.,

Petitioner,

v.

NEW YORK,

Respondent.

No. 78-511

Washington, D.C.
April 16, 1979

Pages 1 thru 59

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will next hear argument in 78-511, Lo-Ji Sales, Inc. v. New York.

Mr. Berkman, I think you may proceed now whenever you are ready.

ORAL ARGUMENT OF BERNARD A. BERKMAN, ESQ.,

ON BEHALF OF THE PETITIONER

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

There are a multitude of reasons why the searches and seizures in this case are constitutionally tainted. Any one of them ought to be sufficient to require a reversal of the conviction below.

First of all, the warrant under which the search was conducted was invalid both because it was issued without probable cause and because it failed to identify with particularity the items which were to be seized.

Second of all, the search was an exploratory limitless general search. Third, the magistrate failed to focus searchingly on the obscenity of the seized items before seizure; and, fourth, because the seizure was so general, so pervasive, so massive that it affected a restraint which required an adversary hearing on the question of obscenity in advance of seizure.

We contend that the presence of the magistrate on

the premises not only failed to cure the constitutional violations but actually intensified them, and we urge that the Fourth Amendment protects the petitioner against the general search and mass seizure which took place here.

QUESTION: If you say that the presence of the magistrate on the premises didn't even not only didn't cure the problems to which you have alluded but actually intensified them, how would the state go about handling this sort of a situation?

MR. BERKMAN: Well, the state went about handling it --

QUESTION: How would it, I said, in a constitutional means?

MR. BERKMAN: It would seem to me that the entry onto the premises, assuming no further rights any customer might have to the purchase or the observation of material which would not involve the authorization of an invalid warrant to search and to seize and without the massive seizure that took place here might be an acceptable way of dealing with the situation. Heller I think demonstrates the manner in which this Court has held the seizure of material after a careful focusing upon the entirety of the materials involved was done and handled apparently properly at least.

QUESTION: Are you suggesting that the proper procedure was for the officer, for an officer, not a judge but

an officer to go on the premises of the store and buy selective pieces of materials, books and films, then take them back and show them to the magistrate or the judge as the basis for getting a warrant at a later point?

MR. BERKMAN: As I read your decision in Heller, Your Honor, it seems to me that that might have been appropriate, but there are a number of other ways in which a prosecution --

QUESTION: Well, that is, you concede that is an appropriate way, though, under Heller and other cases?

MR. BERKMAN: Yes, Your Honor, and it seems to me there are a number of other ways in which a criminal prosecution might originate. It might be that some citizen might make a purchase which he regards to be inappropriate and seeks law enforcement. It seems to me that the state has myriads of ways without violating both the First, Fourth and Fourteenth Amendments in which they might appropriately deal with the question of obscenity.

QUESTION: I had understood that the magistrate's premise, that the magistrate's presence here was in order to assure that before seizure some neutral and detached magistrate would have examined the material. You say that simply exacerbates the situation.

MR. BERKMAN: Your Honor, there are a couple of things wrong with the position which has been taken by the

State of New York. One is in our judgment the seizure was accomplished before the magistrate did anything. The seizure was accomplished when eleven representatives of the law enforcement agencies went upon the premises, some of them in uniform, filtered throughout the store, manned themselves in front of the entrance, took the names and otherwise intimidated persons who might have entered the store, kept the place under virtual seige for approximately six hours, ransacked the entire premises, took out all of the films that were on the premises, took out all the projectors that were on the premises, not only took out certain articles of clothing which apparently had certain sexual connotations but also took the mannequins upon which they were displayed, and under those circumstances it seems to me that the seizure was effected at the time that they encircled and laid seige to that little book store. That is when it occurred. It occurred before the judge even got an opportunity to focus searchingly on anything.

QUESTION: Then the magistrate's presence neither improves nor detracts from your case.

MR. BERKMAN: I would only say, Your Honor, that that may well be true, but the problem is that when somebody who appears to be a magistrate or a judge and someone to whom an ordinary citizen might go for constitutional relief actually appears on the scene as an executing officer and for

a warrant which he himself has issued, you have problems of perhaps an even more serious kind when he goes beyond the role that the judge assumed in the Heller case by merely going on to the scene and viewing the material and not exercising his prerogative as an authority to make such a search.

QUESTION: Would you have any problem whether it was 11 or 22 or 33 officers entering the premises and buying books, films and then either altogether or one by one leaving the premises and taking them to a magistrate?

MR. BERKMAN: Your Honor, I think the facts would depend on each particular circumstance. I think that a massive number of law enforcement authorities may themselves be an intimidating and controlling factor. In this situation, it was --

QUESTION: What is the impact -- let's assume that the proprietor is somewhat intimidated, what has that got to do with what they buy and take to the magistrate?

MR. BERKMAN: Well, I think if they make a purchase and if they act with no greater right than a customer might, then that might be appropriate. But it seems to me that it is possible under certain facts for a large number of people that actually take over and effectuate a seizure of the entire store by their presence and control and domination of the place before they have an opportunity to take anything back to a magistrate, and under those circumstances you might

have a seizure which is premature under the circumstances that you suggest.

QUESTION: In this connection, does not count two relate in part at least to the two films that one officer had purchased?

MR. BERKMAN: Yes, Your Honor.

QUESTION: Well, does that stand up?

MR. BERKMAN: No, Your Honor. It seems to me that the entire search has got to be looked at under circumstances in which the entirety is considered. The search --

QUESTION: Those films were purchased before the search ever took place.

MR. BERKMAN: But, Your Honor, there were other copies of the same film which were actually acquired during the course of --

QUESTION: I am speaking about the two that were taken, that were purchased by the officer.

MR. BERKMAN: Yes, Your Honor, and I am suggesting that there were additional copies of those very same films seized in the raid of which we complain.

QUESTION: Well, suppose we invalidate that seizure, aren't you still stuck with count two with respect to the two purchased films?

MR. BERKMAN: I would urge not, Mr. Justice, because it seems to me that if you have a massive seizure then

there is no deterrent or propylactic effect at all if you merely invalidate that part of it which goes beyond the appropriateness, because what happens then is that police officers are on notice that if they exceed the bounds of the First and Fourth Amendment and in this instance with respect to the states as applied through the Fourteenth, then all that will happen in the event that it turns out that they have been excessive in their zeal is that that portion of the material which is exceeded will be returned, but the original invasion, the original violation of the constitutional provisions will still have not been remedied.

QUESTION: Mr. Berkman, suppose after this case is over the same **two policemen** go in and buy two films, could he be prosecuted?

MR. BERKMAN: I'm sorry, Your Honor?

QUESTION: Two policemen go in and buy two more films.

MR. BERKMAN: Two more films.

QUESTION: Could he be prosecuted?

MR. BERKMAN: It would seem to me that if those films are then focused searchingly on by a detached and neutral magistrate, then perhaps that might be --

QUESTION: I said to give to any magistrate.

MR. BERKMAN: Yes, Your Honor.

QUESTION: Then why isn't the original seizure good?

MR. BERKMAN: Well, it seems to me, Your Honor, that there has to be an arrangement in which there is a focusing upon the material --

QUESTION: I thought we had it here. The two policemen brought in two films --

MR. BERKMAN: Yes, Your Honor.

QUESTION: -- and said we want action to the magistrate and he said that is gone.

MR. BERKMAN: Well, the --

QUESTION: Or do I misquote you?

MR. BERKMAN: I'm sorry, Your Honor. If that is subjected to a judicial scrutiny which passes constitutional muster --

QUESTION: No, I am talking about on the record of this case.

MR. BERKMAN: Yes.

QUESTION: Does that count stand?

MR. BERKMAN: It seems to me that it cannot, Your Honor, because it is --

QUESTION: Because of what happened after that?

MR. BERKMAN: It is all part and parcel of the --

QUESTION: If it is done afterwards, it is all right?

MR. BERKMAN: It may be, assuming that --

QUESTION: Well, I want to know the difference

between pro and after.

MR. BERKMAN: Well, when you have a mass seizure such as took place here, my understanding of the teaching of the cases is --

QUESTION: That **cleans** the whole slate?

MR. BERKMAN: It seems to me that --

QUESTION: Does that clean the whole prior slate?

MR. BERKMAN: Yes, sir, I think it does.

QUESTION: Well, why didn't it clean the future slate while it is at it?

MR. BERKMAN: Well, I think that each case has to stand on its own, Your Honor.

QUESTION: Under my Brother Marshall's question, had there just **been** a purchase of two items, there wouldn't have needed to be a magistrate at all, **there** could have just been a prosecution based upon those two items and it would have been up to the jury and the instructions of the judge and all.

MR. BERKMAN: That's quite right.

QUESTION: There wouldn't have been a search or seizure, there would have just been the purchase of two items, wouldn't there?

MR. BERKMAN: That's quite right, Your Honor.

QUESTION: I don't really -- what was the purpose, do you suppose, of this warrant which was signed on the

morning of June 25, 1976, even providing for the seizure of items one and two, since those two items had already been purchased and were in the possession of the prosecuting authorities?

MR. BERKMAN: Your Honor, it is quite right, they were evidence which was already available to the prosecuting authorities --

QUESTION: It was already in their possession, wasn't it?

MR. BERKMAN: Pardon me?

QUESTION: It was already in the possession of the prosecuting authorities?

MR. BERKMAN: Of course, it was, and it seems to me that the only purpose that there could have been for seizing multiple copies of that film and for seizing other things in the store was to actually close the operation and prevent the exhibition and to block distribution of materials without a prior adjudication. In our judgment, it seems to us that the record demonstrates --

QUESTION: That is not this case, is it? He was convicted, wasn't he?

MR. BERKMAN: Yes, Your Honor, he was convicted, but that is this case. What happened here, Your Honor, was that after having --

QUESTION: I, for example, can see where you have

made a very good argument for action for damages, but I couldn't see necessarily that that was a defense in the lawsuit.

MR. BERKMAN: Well, Your Honor, it seems --

QUESTION: Now straighten me out.

MR. BERKMAN: It seems to me, first of all, that in this case there was a search and seizure which followed the purchase of two films. Those two films dealt with only one count. There were three counts upon which a conviction was obtained, based upon the refusal of the court below to grant the motion to suppress evidence because over 400 films appear in count one which involve material which was taken solely as a result of what we contend was a defective warrant and a massive search and seizure. And with respect to the third count, that involves the seizure of all the projectors and a number of other items, none of which were in the possession of the police officers prior to the search.

Now, it seems to me that with respect to the films that were involved in count two, there were a multitude of films which were involved apart from the two which had originally been seized and, as a matter of fact, multiple copies of those two had been seized as a result of the search and seizure. And so it is our contention that the bulk of the basis for the prosecutions on all the counts came as a result of what we contend was an illegal search and

seizure.

QUESTION: How did the conviction come about, what did it rest on?

MR. BERKMAN: The conviction occurred after the motion to suppress was denied --

QUESTION: And then what?

MR. BERKMAN: -- and the parties pleaded guilty.

QUESTION: Yes. So --

MR. BERKMAN: Under New York procedure, it is possible to seek appellate review of a denial of the motion to suppress even after a plea of guilty.

QUESTION: Now then, going back to the suggestion or questions of several other of my colleagues, suppose we agreed with you as to counts one and three and disagreed with you as to count two, which if I have the numbers correct is the one -- count two rests on two films which standing alone you don't question.

MR. BERKMAN: Your Honor, count two rests on those two films plus hundreds of others.

QUESTION: 400.

QUESTION: 472.

MR. BERKMAN: Yes. And so consequently we are saying that those are among them, but it may well be that those that were taken were the ones upon which the conviction was based. So it seems to me that they are inseverable.

QUESTION: Wait a minute. If they have tried this case, there would be more of a problem, but if they are going to jury verdict based on all of the films, the two plus all the hundreds of others, here is a guilty plea with respect to the two plus others under count two, is there not?

MR. BERKMAN: Yes, there is, Your Honor.

QUESTION: Then how do you justify challenging the two that were properly in the possession of the police?

MR. BERKMAN: Because the count itself, for reasons which I do not know and which were based upon determinations of the law enforcement authorities of New York, they included in one count not only the two films which were purchased but also hundreds of others. Now, it may well be that the guilty plea --

QUESTION: Where is the count you are talking about, is it 3(a)?

MR. BERKMAN: Yes.

QUESTION: Well, how do you know that the two that were seized were included in count two?

MR. BERKMAN: Well, they were identified in the seizure of materials.

QUESTION: Well, doesn't a guilty plea waive any defect in the information of indictment?

MR. BERKMAN: Well, we are not claiming that there is a defect in the information or indictment. We are

claiming that the materials upon which the information and indictment are bottomed were themselves obtained by illegal search and seizure, and under New York procedure even after a guilty plea you are permitted to seek appellate review and I am referring --

QUESTION: But you concede that two items were not, I take it?

MR. BERKMAN: Two of the hundreds of items in count two had been acquired by a purchase of the police officers and had been viewed in advance by the magistrate prior to the seizure involved here, yes.

QUESTION: And he pleaded guilty with respect to those two, along with others?

MR. BERKMAN: Yes, Your Honor, with the understanding -- and it was done after the motion to suppress had been denied and under the provisions of section 710.70, subsection 2 of the New York Criminal Procedure Code.

QUESTION: In addition to the two individual items that had been purchased, I suppose under the purported authority of the search warrant several duplicate copies were seized under paragraphs one and two of the search warrant, weren't they?

MR. BERKMAN: Yes, sir.

QUESTION: The same items?

MR. BERKMAN: Yes, Your Honor.

QUESTION: The search warrant does, by using the plural "reels" in both cases, authorize the seizure of duplicate copies, doesn't it?

MR. BERKMAN: Right. In fact, everything that was on the premises by way of a duplicate of those two films were seized in the course of the --

QUESTION: Where do you find that the two copies that were purchased are included in count two?

MR. BERKMAN: Well, the films appeared in count two and the books appeared in the first count.

QUESTION: I know, but tell me how you know that among the 474 movie reels mentioned in count two, how do you know that the two that were bought were --

MR. BERKMAN: I cannot tell that, Your Honor, and that --

QUESTION: Suppose they weren't?

MR. BERKMAN: Well, then --

QUESTION: Then you have no problem at all?

MR. BERKMAN: None at all.

QUESTION: Well, how do you know they are even in there?

MR. BERKMAN: I don't know that.

QUESTION: I thought you could do that by a process of going over the inventory.

MR. BERKMAN: Only by going over the inventory, but

it is true, Your Honor, that insofar as --

QUESTION: Well, how would you know which is which?

MR. BERKMAN: You can't tell that. And it seems to me that because of the ambiguity there that --

QUESTION: If the officer bought them and they were his, it is a strange way then to say to charge somebody with possessing. Maybe he did possess them at one time.

MR. BERKMAN: Yes, Your Honor, but if he did possess them, he possessed other copies of the same films which were seized during the course of the raid of which we complain.

QUESTION: Right.

QUESTION: And we have said before that that is one appropriate way to go about it, to seize a sample of the particular item, one sample. Now, as to two films, it is clear that that was done, is it not?

MR. BERKMAN: No, Your Honor.

QUESTION: It is not?

MR. BERKMAN: I don't think that is clear, because what happened as a result of this was that the entire inventory of the store was ransacked on the basis of what we can't contend to have been an excuse employed in order to make it appear as though there was a search under a warrant. Once you have two films, it seems to me that the necessity of acquiring two more from a law enforcement standpoint is nil. The only reason for acquiring two more --

QUESTION: Unless you want to charge him with **the** crime of possession, because if you have them he no longer possesses them.

MR. BERKMAN: Yes. On the other hand, it seems to me that there are abundant opportunities to charge a store owner under these circumstances with either these films or others on the basis of the condition of the store and its inventory.

QUESTION: Well, there is nothing wrong with him going back and buying eight or ten more books.

MR. BERKMAN: No.

QUESTION: And I suppose if the search warrant procedures were validated, there would be nothing wrong with -- properly carried out, there would be nothing wrong with seizing them under a search warrant if those procedures were proper.

MR. BERKMAN: I think that is right. As a matter of fact, in view of the fact that only three counts were brought, there would be no limitation upon the law enforcement power of the State of New York in terms of what it was that it was doing **under** these circumstances in controlling the distribution of what it claimed to be obscenity.

Now, we urge further that the Fourth Amendment protects the petitioner against the general search and mass seizure which took place here. That just because the

petitioner opened its store to invite customers into his premises to buy merchandise does not mean, as the State of New York now contends, that its entire expectation of privacy is forfeited to the occupation of its premises by a police force.

QUESTION: Suppose this had been done by one officer, without the ten --

MR. BERKMAN: It seems to me that it depends upon what he did. If he came --

QUESTION: Well, suppose one officer did everything that the eleven officers did.

MR. BERKMAN: It would seem to me then that it would still not be sufficient, Your Honor, for the reason --

QUESTION: The eleven or one is not really crucial to the case?

MR. BERKMAN: No. I think that the massive number only has to do with a part of the facts involving the pervasive seizure and control and domination of the entire enterprise. The fact is that these police officers did not limit themselves to the position of a customer on the premises. Indeed, if a customer on the premises had come in and ransacked the material and taken the books off the display shelves and put them on the floor and torn off the cellophane covers and stood in front and stopped customers from coming in and taken their names and addresses and rummaged through

business records and had done all of the things that these police officers did, this store proprietor in my judgment would have had the right to call these very policemen and eject them and to bring actions against them for trespassing. And so consequently they do not stand in the shoes of a normal customer and for that reason it seems to me that the store proprietor does not lose his expectation of privacy with respect to the fact that there will not be a police force which will do the things which have been done here.

Now, it seems to me, Your Honor, that we must first take a look at the warrant. The warrant itself demonstrates nothing by way of probable cause with respect to any other item than the two films themselves which were purchased and reviewed by both the judge and the police officer. There is a list of things to come, predictions of things to come in section three of the warrant which says that there are a bunch of other items that are to be seized as well, but they were absolutely blind at the time of the search and seizure.

QUESTION: Do you think that if a magistrate accompanies an investigator to a store and he examines books on the shelves and looks at them as much as he wants and then goes back to the office and issues a search warrant to seize one copy of each of the following titles as evidence, and he says I have searchingly focused on the issue of obscenity and think there is probable cause to believe they

are obscene?

MR. BERKMAN: So long as he does not use his judicial authority to effectuate a search during the time that he is examining the material. If he acts in the way that the judge in Heller v. New York did, then we would have no objection to that.

What occurred here, however, is that they took possession of the store and seized its entire contents before any of that judicial review occurred. And there is another problem, too, and that is that when a magistrate issues a warrant after himself has participated in a search and seizure, he becomes a part of --

QUESTION: If he comes to the store and if he does nothing in the store that any other member of the public could not do, if he does nothing but what a member of the public could do, that is all he did, that would be different.

MR. BERKMAN: And if he has not used the force of his judicial office and he has not effectuated a search.

QUESTION: Well, he didn't have to put in a quarter to view the movie reels, did he?

MR. BERKMAN: As a matter of fact, that is what the record does reflect, Mr. Justice Rehnquist. On the other hand, however, at the time that the police officers arrived in force, they came and announced that this individual was under arrest. They read him his Miranda rights, they also announced

that they were going to search the premises and they produced what purported to be a warrant and under those circumstances it seems to me that he was acquiescing to authority and not consenting to anything that would have any constitutional import. He was not a free agent under any circumstances during the six-hour period when he was on the premises. The officer quite candidly admitted that he was not free to leave, he was under arrest and he was in a situation where a number of officers were all over the store and it would seem to me that the interest of safety and concern might have caused him to make such a comment without in any way having it to be voluntary consent.

QUESTION: But that wouldn't be -- that wouldn't reach taking the cellophane or the plastic wrappers off the books?

MR. BERKMAN: There was never any purported consent of any kind to that. They just came in and took the merchandise off the shelves, piled it on the floor, tore off the covers because there is a cellophane seal on them which prevents anyone from opening the package and looking inside, and consequently there was no suggestion that anyone offered an invitation to the officers to open those seals, nor to look at business records nor to do the myriad other things that occurred during the course of this record.

QUESTION: Mr. Berkman, for the constitutional

purposes of this case and laying aside for the moment the special consideration given to books which we have indicated in our opinions, is this case any different from what it would be if a warrant had been issued to pick up two sample cans of spinach on the ground they had information or had reason to believe that they might be contaminated and the two cans of spinach were seized and then all the things that happened here with reference to the other merchandise occurred, all of the canned goods in a grocery store, all the bread and everything else was taken, is it fundamentally any different?

MR. BERKMAN: Well, it would seem to me that it is fundamentally different because of the First Amendment implications.

QUESTION: Well, except for that, laying that aside.

MR. BERKMAN: Also it is unclear when a criminal prosecution occurs as to whether or not the cans of spinach are even involved. I would think that that would be a substantial difference. I think that if there is probable cause to seize the spinach in the numbers that you suggest, that that in itself suggests no Fourth Amendment problems, and so long as the materials are particularly described I don't see that that raises any question.

QUESTION: Well, the Food and Drug Administration does make seizures at times, do they not?

MR. BERKMAN: I understand that.

QUESTION: But I take it from your point of view that they can't seize all the spinach in the store until they determine on the basis of sampling that some of it is contaminated.

MR. BERKMAN: Except for the considerations of probable cause in particularity, Your Honor, which are requirements with respect to all Fourth Amendment seizures. It would seem to me that you have special prior restraint problems when you have First Amendment material which doesn't apply to spinach.

QUESTION: But so far as the Fourth Amendment is concerned, there is no difference, is there?

MR. BERKMAN: So long as particularity and specificity and probable cause requirements are met, it would seem to me. And then, of course, I think it would depend upon whether or not a warrant were required in all of those considerations.

QUESTION: Isn't one of the reasons -- isn't the principle reason they had cellophane wrappers over the books to prevent free-loaders from reading them without buying them?

MR. BERKMAN: Well, there is nothing in the record on that subject, but I would suppose that that might be a factor.

QUESTION: Well, are you saying then that a police officer has to buy the book before he can inspect it?

MR. BERKMAN: I think that either he has to acquire

it in some lawful way or it may well be that a customer or somebody else has acquired certain materials --

QUESTION: But you say a police officer cannot inspect a book on the premises by tearing the cellophane cover off?

MR. BERKMAN: It seems to me that he is limited to performing in the way that a customer would be permitted to perform. If he exceeds that, then he is acting as a policeman and not as a customer and exceeds any such responsibility, and I think that becomes a seizure.

Now, I think the fact --

QUESTION: The mere tearing off the wrapper becomes a seizure?

MR. BERKMAN: Yes, I think as this Court has indicated in Terry and recently in Delaware v. Prouse, very little is required in order to effectuate a seizure either of a person or --

QUESTION: In effect, it would be like breaking the can of spinach open with a can opener?

MR. BERKMAN: A can of spinach, indeed, Your Honor, or opening the trunk of Mr. Chadwick in the Chadwick case. You know, any of those items it seems to me effectuates a seizure.

QUESTION: There is a real difference between a customer and a policeman in that a customer has money.

MR. BERKMAN: Well --

QUESTION: Isn't that the real difference?

MR. BERKMAN: Well, apparently --

QUESTION: A customer buys something and pays for it.

MR. BERKMAN: That's right, Your Honor. That's right, Your Honor, but he acquires it in a lawful manner and that, of course, is a touchstone which I think has constitutional implications.

QUESTION: Whether it is lawful or not, but it is money. The policemen didn't put out a nickel while they were in that place, did they?

MR. BERKMAN: Except for the two books that they originally purchased.

QUESTION: No, I mean when the others went in with the magistrate.

MR. BERKMAN: That's right. That's right, they did not.

QUESTION: Nobody spent a nickel. Isn't that the real difference?

MR. BERKMAN: Well, I think the difference is because of legal acquisition and acquisition by something other than the authority of the state which makes the constitutional difference.

The attempt by the state to deal with the warrant

by after the fact, adding 14 pages to a two-page warrant, demonstrates the importance of their concern that the warrant be the basis upon which they attempted to search.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Berkman.
Mr. Parker.

ORAL ARGUMENT OF RICHARD L. PARKER, ESQ.,
ON BEHALF OF THE RESPONDENT

MR. PARKER: Mr. Chief Justice, and may it please the Court: My name is Richard Parker, and I am an Assistant District Attorney from Goshen, New York, a small upstate county.

The legislature of the State of New York has declared in uncertain terms how are public policy to be the protection of moral decency and in furtherance of this public policy it has authorized the various units of the state to prosecute criminal possession of promoting obscene material. In order to effectuate this police policy against a commercial establishment which has a large number of obscene items and obscene material, we have tried after studying this Court's decisions to come up with a procedure which on one hand will protect First Amendment rights and on the other hand gives us an opportunity to effectuate this legislative policy.

In effect, what we have tried to do is find a fair

middle ground. What we did in this case was have a police officer go to the store and look around the store. He then bought a small sample of two items. And to clarify for the record, Mr. Mandakis, the clerk of the store, was charged for possessing with intent of promoting these two items on the day that these items were sold. The officer --

QUESTION: Where do you see that?

MR. PARKER: No.

QUESTION: Where do you see that charge in the appendix?

MR. PARKER: No, that is a footnote I believe in my brief. Mr. Mandakis' case is not on appeal.

QUESTION: I see.

MR. PARKER: He subsequently pleaded guilty to disorderly conduct, was given a conditional discharge.

QUESTION: For possessing those two items on the day they were purchased.

MR. PARKER: Well, promoting those two items on the day they were purchased.

QUESTION: Promoting.

MR. PARKER: Yes.

QUESTION: They aren't included in this 400-and-some films?

MR. PARKER: The same films are included but those two are not --

QUESTION: How do you know they are?

MR. PARKER: From the inventory. The inventory in the search warrant tells you, the inventory lists all 472 items, the reels of the film, lists all the magazines and lists the names of all the films that were --

QUESTION: Well, you certainly wouldn't list these two items that had been bought on a search warrant or on an inventory of things that had been seized in a search warrant because they weren't seized in a search warrant.

MR. PARKER: No, but other copies that were --

QUESTION: I know, but I am talking about these two copies.

MR. PARKER: Right, it wasn't these two copies, that's right.

QUESTION: So those are out.

MR. PARKER: Yes, that is --

QUESTION: That is all I wanted to know.

MR. PARKER: Yes. I want to clarify that.

QUESTION: So the only ones on which this conviction rests are the ones that were seized in the search and seizure under the warrant?

MR. PARKER: Yes, and if you look at the criminal charges, the basis of these charges are for promoting the items on June 20th, the date of this seizure.

QUESTION: Let's assume that when these two films

were bought, they were brought back to the judge, suppose the judge had looked at them and said I have now focused on the nature of these articles, I have read them from cover to cover, there is probable cause to think that they are obscene, I hereby authorize you to go back to the store and seize all other copies of these two books. Tell me what case in this Court would warrant that.

MR. PARKER: I don't believe any case in this Court would warrant that alone.

QUESTION: As a matter of fact, there are cases that would say that would be forbidden?

MR. PARKER: Yes, but I think there is an important distinction in this case, and that was that when we went into this book store and before there was any seizure, we entered the store, it was open to the public, and when we went in there the clerk was given a warrant and was told that he had the right to an immediate adversary hearing as soon as he would be ready or the owner of those materials --

QUESTION: I know, but before the hearing, whenever the hearing was, even if it was tomorrow or this afternoon, you took all copies out of circulation.

MR. PARKER: Temporarily we did, yes.

QUESTION: Well, tell me some case that warrants that.

MR. PARKER: I believe under Kingsley Books we can

do that. In Kingsley Books, it was a case where more than one copy of the book was taken.

QUESTION: I thought there had to be an adversary hearing before you completely remove from circulation all copies of materials like this.

MR. PARKER: I don't believe -- I believe Kingsley Books, the Court held that you could temporarily take those items and then hold an adversary hearing after the --

QUESTION: Kingsley Books was an interim injunction, it wasn't a seizure.

MR. PARKER: Well, it was--

QUESTION: What we are talking about is Marcus and Quantity Books.

MR. PARKER: I believe this is different from Marcus and Quantity Books.

QUESTION: Different from what my Brother White has just been suggesting?

MR. PARKER: Yes.

QUESTION: How is it different?

MR. PARKER: It is different because before the items were taken as evidence, a judge had viewed the items and made a probable cause determination, plus it is different because after they were taken --

QUESTION: But Marcus and Quantity Books said you can't seize the whole group without having the adversary

proceeding first.

MR. PARKER: Well, they said you cannot seize them for destruction purposes. We were seizing them for evidence purposes to bring a criminal prosecution and we were going to bring that as soon as we possibly could. And I should add that at no time did the petitioner in this case ever ask for any hearing as to the obscenity. As a matter of fact, he pleaded guilty as to the obscenity of all of the items.

QUESTION: After you denied his motion to suppress. He took advantage of your New York statute which permitted him to do that.

MR. PARKER: That's right, but under our New York statute he could have had a trial on the issue of obscenity and --

QUESTION: I know, but your New York statute permitted him to do just exactly what he did.

MR. PARKER: That's right, but it certainly didn't in any way inhibit him from also having a trial as if he thought the items were not obscene. He could have had that trial also.

The reason I feel that this procedure is fair and proper is because we have the safeguards of having a prior judicial officer look at the material before it is seized, the officer had -- the judicial officer first had --

QUESTION: The judicial officer spent six hours in

there. Was he a judicial officer or was he a biased person?

MR. PARKER: I think that --

QUESTION: After being in there and looking at the material for six hours, wouldn't he be influenced one way or the other?

MR. PARKER: I believe the material may influence him --

QUESTION: Wouldn't he be influenced one way or the other?

MR. PARKER: I believe that material may influence him but I don't think it changes his being biased. I think the record shows that at all times he did what he thought should be done. He was leading the party. In other words, he made the determinations of what should be taken and what should not be taken. He made the determination of whether or not an item should be taken even towards the end, I think it is clear from the record.

QUESTION: And if you had a hearing, who would preside over the hearing?

MR. PARKER: Well, at the hearing there would have been a different judicial officer presiding.

QUESTION: Well, he authorized it after the fact, that's the problem.

MR. PARKER: Well, I don't believe --

QUESTION: They would break the cellophane and bring

the book to him and he would say, okay, add to that, yes, that's okay, seize that, but they had already seized it.

MR. PARKER: I disagree that they had already seized anything. As a matter of fact, I feel that the judge had gone through this entire store and determined that everything --

QUESTION: Wasn't the testimony that he wasn't free to leave, that he was under arrest?

MR. PARKER: The testimony was that he was told that there was a warrant for his arrest, he was free to move freely throughout the store, he was bought a meal, he moved freely around the --

QUESTION: What do you mean when you say he moved freely throughout the store? Doesn't it mean he is not free to move outside?

MR. PARKER: Yes, he would not have been free to move outside and our --

QUESTION: It was a seizure when they walked in there, wasn't there?

MR. PARKER: There was a seizure of his person but not a seizure of the materials.

QUESTION: Well, what do you need eleven for?

MR. PARKER: Well, the reason --

QUESTION: Was he a rough man or something?

MR. PARKER: No, I think the reason that you had all

of these people here was to try to do the search --

QUESTION: These weren't people, these were police. They are different from people.

MR. PARKER: Well, I have always considered a policeman a person, Your Honor.

QUESTION: They are different from the average person. I wonder if they had a gun.

MR. PARKER: Yes, they did.

QUESTION: That is different from -- do you have a gun?

MR. PARKER: No, sir.

QUESTION: Well, that is different, isn't it?

MR. PARKER: Yes.

QUESTION: Well, when you say there are eleven police in there and you say it is not seizure, I want to know what is it, a visit? A friendly visit?

MR. PARKER: I think the reason you had the number of these people is so you can expedite the procedure as quickly as possible. We have people there -- you have one person who was there who was recording what the judge was doing, you had other people there who were gathering the items that the judge had told them to seize, you had other people there who would put things in order so the judge could review them as quickly as possible, you had other people who were at the front of the store to find out --

QUESTION: Well, the things that they put together for the judge, were they seized?

MR. PARKER: No, they weren't, I don't believe.

QUESTION: What were they, detained?

MR. PARKER: Well, they were in the store, they were left in the store, they were in a pile, and they were --

QUESTION: Could the owner take them away from them?

MR. PARKER: I suppose he could have if he wanted to but he didn't.

QUESTION: If he was big enough.

MR. PARKER: What?

QUESTION: If he was big enough.

MR. PARKER: I don't think they would have fought him. There was no indication of that, but --

QUESTION: You see, my problem is that a warrant by definition is a prior authorization. It is a prior authorization issued upon probable cause, particularly describing the place to be searched and the thing or things to be seized, and there was not a prior authorization here. Here it says the judge in the store there first ordered the police to rip off the sealed plastic which completely enclosed each of the magazines and many of the books in the store. Then he looked through them. But that is not a prior authorization. There was a seizure before the authority to do it.

MR. PARKER: Well, I think if you look at --

QUESTION: That is the problem, because a warrant by definition is a prior authorization.

MR. PARKER: The State of New York has upheld this, which is in effect an oral warrant, and they have upheld under these circumstances when we are dealing with books and films and magazines where you have to have a judge go in and look at it prior. They have said --

QUESTION: And that is the reason this case is here, because the New York courts upheld it.

MR. PARKER: Yes, but they --

QUESTION: Mr. Parker, when you are making a search incident to an arrest and you find a gun on a man, you don't have to pay the man the price of the gun, do you?

MR. PARKER: No, you don't, Your Honor. But the point I would like to make there is that what we have -- the function of the warrant, the purpose of a warrant, as you have stated, Mr. Justice --

QUESTION: Is prior authorization.

MR. PARKER: -- is, one, to have prior authorization of probable cause, and, two, to limit the police discretion by particularly describing what they should take.

QUESTION: Right.

MR. PARKER: This judge looked at the material and --

QUESTION: After it had been seized.

MR. PARKER: Well, I submit it wasn't after it had

been seized because I -- in other words, I submit that there was no seizure of material that was left in the store. There were many items that he looked at and determined were not obscene and he left them in the store.

QUESTION: But how about taking the cellophane off of a book, isn't that a search?

MR. PARKER: In a way it is a search, but --

QUESTION: In a way? You certainly can't just pat it down like you can if -- and tell if it is obscene.

MR. PARKER: Well, you see, these magazines --

QUESTION: Sometimes you can pat people down and see if there are -- but you can't search them. Here they took the cellophane off the packages and actually looked at the books.

MR. PARKER: But they were taking the cellophane off the books which had obscene photographs on the front of the book which is almost identical to seeing a bulge outside someone and patting him down. I believe that the judge, given the nature of this market, would have had the right, after seeing an obscene photograph, ask the police --

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon, at 12:00 o'clock noon, the Court was recessed until 1:00 o'clock p.m.)

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Counsel, you may resume.

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

I respectfully submit to the Court that the seizure of more than one copy does not invalidate the entire search. It must be remembered that under New York law, a person is prosecuted not for merely possessing the item but for promoting the item. Now, obviously this is a commercial --

QUESTION: That is an understatement for seizing more than one, isn't it? You seized them all.

MR. PARKER: No, we did not seize everything. We left many magazines and all of the books.

QUESTION: I know, but did you seize all the copies of any magazine?

MR. PARKER: Yes. Yes, any time --

QUESTION: So it was an understatement.

MR. PARKER: Any time the judge, after viewing the item, felt that there was probable cause for seizing all of the --

QUESTION: You seized all of the items?

MR. PARKER: -- he seized every copy in that store. But there was never any claim made that this person did not have access to other items or could not bring them in the next day.

QUESTION: But he couldn't sell those particular items.

MR. PARKER: He could not sell those items, that is correct.

QUESTION: Wouldn't that have some resemblance to prior restraint?

MR. PARKER: Obviously --

QUESTION: If you took all of the books of a particular category, they couldn't sell them.

MR. PARKER: He could not sell them. That doesn't mean they were not available to the public in the area. There were other stores --

QUESTION: I am talking about restraint on him.

MR. PARKER: Yes, there was, but that was --

QUESTION: He has been restrained from selling those books.

MR. PARKER: Right, but that restraint I submit was a temporary restraint and he had the right to a full hearing and also that restraint was for a valid evidentiary purpose, to show that he was promoting the item. Under our law, there is a presumption that if you possess six or more of the same items, it is presumptive evidence that you possess with the intent to promote. And what we had to show, aside from the fact that the items were themselves obscene, that this person was promoting obscenity on the day in question, so there was

a valid evidentiary reason to seize them and --

QUESTION: But you didn't have to seize them all to show that. There could actually just have been testimony.

MR. PARKER: Obviously there could be testimony, but the best evidence would be showing the jury the fact that you have these many items.

QUESTION: If you wanted to be a little more sure, maybe you would take one plus six.

MR. PARKER: Well, as you can see from our brief, very few, I think only on one or two occasions did they seize more than six. Most of the items, the vast majority, only one item was seized and then there are some where they took two of the items. Mostly one or two items were seized. In very few were there more than six being seized or more than five being seized.

Now, the other method -- another point should be made that you have three separate pleas of guilty and under the third count for the films and the peep shows, there were no duplicate seizures there. That count was entirely separate. That was the first part of the search, and there were no duplicates. The only thing that was seized was one copy of the film that was being displayed to the public.

QUESTION: Could that be that there weren't any duplicates?

MR. PARKER: What?

QUESTION: Could it be that there weren't any duplicates?

MR. PARKER: There weren't duplicates. There was one copy that was there and that was seized.

QUESTION: That's right.

MR. PARKER: Yes, sir.

QUESTION: So if there were more there, they would have seized them, wouldn't they?

MR. PARKER: Probably.

QUESTION: And the projectors were seized, weren't they?

MR. PARKER: Yes, the projectors were seized again to show promotion. Now, the other method that has been suggested is to go in and to buy the item, but unfortunately in a small upstate county like we have, we don't have the funds to go in and buy all the obscene items that **are** being commercially displayed and exploited to the public because the affidavit of petitioner, in support of his allegations for a search warrant, he said that we took \$15,000 worth of material. That is what he said his costs were. I have never totalled it up, but assuming his figure is correct, our entire investigatory budget for the whole county to fight all crime in our county is only \$20,000. We wouldn't have enough funds, public funds to go and expend to buy all of the obscene material that is being promoted. So the only --

I mean, we cannot go in there and buy one or two copies, buy one copy of each item there, there is just **not** enough money in our budget to do it. This is really the only effective way we have to enforce our legislative policy.

QUESTION: What was the -- there was a plea of guilty?

MR. PARKER: Yes.

QUESTION: There never was a sentence?

MR. PARKER: Yes, the sentence was a fine of \$1,000 on each count.

QUESTION: On each separate count?

MR. PARKER: Yes, each separate count had a fine of \$1,000. That fine has been paid.

QUESTION: How many counts were there?

MR. PARKER: Three, three separate counts.

QUESTION: So now you have \$23,000.

MR. PARKER: No, we don't get that fine money, that goes to the state.

I submit that the procedure we employed here is a limited procedure which protects First Amendment rights.

QUESTION: Protects them?

MR. PARKER: Yes, and I -- first of all, the entry into the store under this procedure is limited to stores when they are open to the public, the items that are being viewed are limited to the judge viewing items that are being openly

displayed to the public, you have a judge or a judicial officer who is viewing the items before anything is taken from the store --

QUESTION: After he rips it open.

MR. PARKER: Yes, after it has been ripped open. But you have a cover on this which gives them, I submit, probable cause to make further inquiry to see if the item is obscene, especially after a police officer has gone in, has found out that this --

QUESTION: Eleven police officers.

MR. PARKER: No, initially one police officer goes in, he bought a small sample --

QUESTION: He needed the support of ten others.

MR. PARKER: To make the search.

QUESTION: Yes.

MR. PARKER: He needed that support in order to make it as quick as possible so that there would be the least amount of restraint as possible.

QUESTION: Restraint?

MR. PARKER: Well, restraint in the sense that it takes time. If you have one judge, if the judge goes in by himself, it is going to take him much longer to go over everything, to look at everything and to gather it up and take it out of the store. So then the petitioner would claim that it was a longer restraint.

QUESTION: It took them six hours, didn't it?

MR. PARKER: It did take them six hours because he had to --

QUESTION: I guess if it was only one, it would be a couple of days, wouldn't it?

MR. PARKER: I believe it would take much longer. I can't tell you how long it would take.

QUESTION: I gather no member of the public would have the privilege of going in and looking at all these movies and these machines?

MR. PARKER: Certainly they would have the privilege of going in and looking at the movies in the machines.

QUESTION: But for a quarter.

MR. PARKER: Yes, and the judge in this case, and the record clearly indicates that the judge offered to put a quarter in every machine and the clerk of the store said it won't be necessary, I can turn them on so it will be quicker and he voluntarily turned them on.

QUESTION: And you say that wasn't a search?

MR. PARKER: I am saying that the viewing --

QUESTION: That wasn't a search because any member of the public could have done it with a quarter?

MR. PARKER: What I am saying is that the viewing of the material which is openly displayed to the public, there is no reasonable expectation of this petitioner that

the public will not see this material. I am saying that that viewing is not --

QUESTION: Well, there is in the cellophane packages unless the public buys it and pays the money.

MR. PARKER: Yes, but in other words these items are not being hidden from the public. When you think of the word "search," you think of looking for something that is being hidden. This is not material that is being hidden. This is material that is being displayed openly to the public in areas of the store open to the public. At no time did any member of the law enforcement or this judge ever go into a store room or to see what was not being displayed to the public. It was limited to the public areas, that items that were openly displayed to the public.

QUESTION: What happened to the business records?

MR. PARKER: The business records were seized to show --

QUESTION: They were not in the public area, were they?

MR. PARKER: They were behind the front desk, I believe.

QUESTION: You say everything was out in the public area.

MR. PARKER: Everything that he was charged with possessing under this statute, under this information was

limited to public areas.

QUESTION: But they did go into the private areas?

MR. PARKER: They went behind the counter, yes.

QUESTION: By what right did they go behind the counter?

MR. PARKER: Because that is where the clerk of the store had stationed himself.

QUESTION: If I understand, up to now you said the only thing they did, the only place they went was where the public went.

MR. PARKER: Yes.

QUESTION: Now you admit that they did go to some places that the public didn't go.

MR. PARKER: The clerk was there --

QUESTION: Is that right?

MR. PARKER: The clerk --

QUESTION: Is that right?

MR. PARKER: They went behind to arrest the clerk.

QUESTION: And the public didn't go behind the counter.

MR. PARKER: No, I don't believe the public would go behind there. They did go behind there to arrest him, the clerk.

Now, I would say at the time of entry, based upon the fact that the officer had learned from the clerk that the

store was selling this sex type material on June 20th when he bought two items, and the judge had in fact reviewed two of those items in their entirety, that the judge certainly had probable cause to believe there were going to be other items in the store of a commercial, being exploited on a commercial nature which were sexually obscene material, and I think this may give him another basis. I am not claiming this was the basis he used but I am claiming that he certainly had reason to look at other items in the store and had a reason to believe that in this type of market, which is exclusively selling sexually explicit material, that he certainly had a right to look at whatever was being displayed to the public, to make an initial screening so that he could determine for himself whether or not there was probable cause for the seizure.

QUESTION: Now let me get it clear. Do you say that all of the movies, movie reels in count two are different?

MR. PARKER: Not all are different. There are some duplicates.

QUESTION: Well, any one that he looked at that he thought was obscene, he seized all copies of that film?

MR. PARKER: Yes.

QUESTION: Okay.

MR. PARKER: Yes, he did. But the issue of the way

he focused on the material which had been raised by counsel has to be -- it must be emphasized that this focusing, the market where this was done, that the judge had first seen two short films in their entirety, had then gone into the booths and seen parts, and I say a substantial part of many of each of these films and continuously would see films which were just depicting one sex act after another. I submit that in this type of market, a judge could do enough initial search without having to see the entire item to know that there is probable cause to believe it is obscene and to bring it into court so there can be a criminal prosecution --

QUESTION: Are there any cases -- I think there is a case or two that involve projectors, seizing projectors. Do you know of any case that involves the seizure of all projectors so that the person in the business of showing movies has to order a new projector in order to show anything?

MR. PARKER: No, Your Honor, I am not aware of any.

QUESTION: I think you left him some films, didn't you?

MR. PARKER: I don't believe he was left any films. I believe all the films were taken out of the store. There were books and magazines left in the store.

QUESTION: But if he wanted to show some films that weren't obscene, he still wouldn't have any projectors, would

he?

MR. PARKER: He would not have, no. But I think throughout the procedure that we were not trying to suppress the material or try to close this store down. What we tried to do from the beginning was find --

QUESTION: You closed down the moving picture part of the store, for sure.

MR. PARKER: We did it temporarily, but the point was from the beginning we tried to do this in such a way that we could effectively carry out the legislative mandate to protect moral decency, but we did it in such a way that this individual was first of all given written notification of his right to an immediate hearing before any seizure at all. That was in the warrant.

QUESTION: Well, what did you have after you seized 400 films that you wouldn't have had if you had only seized ten?

MR. PARKER: Well, what you would have --

QUESTION: Say you had seized ten and one projector and then you went to trial on that, what would you have had then?

MR. PARKER: You would not have a judicial ruling on whether or not the other 390 or the other 280 different films, whether or not those were obscene. Each film was a different film.

QUESTION: You run the risk that those particular ten would be found to be not obscene, I suppose.

MR. PARKER: If they are found not obscene then he can display them openly and promote them to the public, if there is a ruling that they are not obscene. We have no -- we don't mind that. What we are trying to do in effect is find an effective way to protect moral decency, given the fact that we have a large commercial store which is selling a vast number of obscene items, we want to bring all these items into court as quickly as we can, as efficiently as we can, so we can get a full prompt judicial review as to each of these items to determine that they are in fact obscene, and before we do that we ask a judge to give us an initial determination that they were in fact obscene or there was probable cause to believe they were obscene and then we gave them the right to litigate.

QUESTION: On this basis you didn't need more than one copy of each book?

MR. PARKER: You did need it because they were being brought in for criminal purposes and the criminal law is not mere possession, it is promoting, and we have to also show promotion unless there is going to be a stipulation as to promoting.

QUESTION: Well, if you have evidence as to how many there were, you don't always disbelieve witnesses there

in Goshen, do you?

MR. PARKER: No, they don't, but the best evidence is always having the actual material there. And I would submit that since they had the right to have a hearing immediately as soon as they were ready, that a temporary restraint of this sort would not invalidate the entire search. Perhaps the court would order that the other materials should have been returned, but if the violation of the law in this case is that they took too many copies under the First Amendment, then I think the appropriate remedy would not be exclusion under the Fourth Amendment of the entire search but would be to order -- the court order the police to return the extra copies and then let the conviction stand.

Now, I think that in looking at the entire procedure that we followed in order to try to find a fair middle ground to bring all these items into court, that this is the only procedure, fair procedure that you can use, there is no other procedure that would effectively work to bring the vast number of items into court. You can't subpoena the items because if you try a subpoena you come to the exact same situation, that if you wait for the issue to be joint, you run the risk that the items are going to disappear, they will claim that they have been sold in due course, or in this case where you deal with a corporation, it is an out-of-state corporation that rents a store, that if we subpoena,

make the subpoena duces tecum against that corporation, as in fact happened in this case, he changes corporate identity and there is further delay so we lose the --

QUESTION: Suppose you seized a copy of a book of which there were a hundred copies in the store, and you had a trial two days later, an adversary trial and it was determined to be obscene, you can go back and get all the rest of them.

MR. PARKER: That's correct.

QUESTION: And what would be the -- if they were still there.

MR. PARKER: That is the problem, if they are still there.

QUESTION: Well, what is the harm if they are not still there?

MR. PARKER: Well, the harm if they are not still there is that what we have done is we have allowed the --

QUESTION: Suppose they convicted him in this two-day trial.

MR. PARKER: Okay. You are allowing him in the interim to continue to sell the material which was --

QUESTION: He doesn't have any more, in my hypothesis they have gone out of state, now how is your state hurt by that?

MR. PARKER: No, they haven't gone, they don't have

to go out of state. The corporation, all they have to do is change the corporate name, they rent a building, an out-of-state corporation comes in and says we are running it.

QUESTION: By changing the name, have they moved the books?

MR. PARKER: Well, now you have a new corporation that you have to go after, you have to start all over again, which means that there is going to be judicial delay which means that material can be sold in the interim.

QUESTION: And you have been inconvenienced.

MR. PARKER: I think that --

QUESTION: And you have been inconvenienced.

MR. PARKER: Yes, I think --

QUESTION: In the prosecution.

MR. PARKER: It would be much more difficult certainly.

QUESTION: You would be inconvenienced.

MR. PARKER: Certainly because of what is involved in that. But I think --

QUESTION: Do you ever consider civil remedies against these people, to get an injunction against operating?

MR. PARKER: Getting an injunction would not be completely analogous. In order to insure that the evidence was there, you would have to get a temporary restraining order. To get the temporary restraining order to keep them

there, you would have to I would submit bring the judge to the store to at least make that initial determination that the reason to get the restraining order so you are going to restrain --

QUESTION: Well, why not just subpoena the material if you file a civil suit, couldn't you?

MR. PARKER: Because if you subpoena the material -- well, if you subpoena the material, you have judicial delay, you have the problem that if you subpoena you have to have a reason to subpoena it, so you have to have initial determination --

QUESTION: Why do you need a reason to subpoena if you have got a couple of copies that are obscene?

MR. PARKER: But then you are going to have to subpoena the other copies which are in the store and you haven't reviewed them initially yet, unless you get a judge to go in and initially review them so you have probable cause to --

QUESTION: You don't have discovery in New York?

MR. PARKER: No, we could not --

QUESTION: You don't have discovery in New York?

MR. PARKER: We couldn't discover it like that. We would have to have a judge initially review it, get a temporary restraining order to maintain the status quo and then join issue, and that is really what we did here. We took it,

we temporarily had it in our possession and the issue was joint.

QUESTION: In the State of New York, is there any other procedure that allows a magistrate to do what was done here?

MR. PARKER: I'm sorry, Your Honor, I don't follow, when you say --

QUESTION: Well, when you have got a bucket shop running, can the magistrate go to the bucket shop and open up the books and look at them?

MR. PARKER: I believe if you have a booking shop, the magistrate would not have to because the police officer could do that.

QUESTION: I didn't say a booking shop, I said a bucket shop.

MR. PARKER: Bucket?

QUESTION: Yes, where you sell stocks and bonds over the telephone.

MR. PARKER: Okay.

QUESTION: Is there any other place that you can go in like this other than a pronographic store?

MR. PARKER: I would think a judge would have a --

QUESTION: Give me one now, let me see which one you come up with.

MR. PARKER: There is nothing written by statute,

but I think a judge --

QUESTION: That's right.

MR. PARKER: That's correct, it is not written in statute.

QUESTION: For example, you wouldn't go to a race track in Goshen and do that, would you?

MR. PARKER: To go in there and --

QUESTION: In Goshen, you wouldn't go to that race track and go in there and seize all their books, would you?

MR. PARKER: If what they were doing, if there was probable cause to believe --

QUESTION: That they were selling dirty books?

MR. PARKER: Or if they --

QUESTION: What other things?

MR. PARKER: Well, let's assume that the race track was illegally gambling, taking bets illegally.

QUESTION: Name me an instance where it happened.

MR. PARKER: I cannot name you another instance, Your Honor.

QUESTION: Any place in New York?

MR. PARKER: I cannot name you another instance that I am personally aware of.

QUESTION: Any place else in the United States?

MR. PARKER: I cannot name you an instance of that, Your Honor.

MR. CHIEF JUSTICE BURGER: Your time is expired,
counsel.

MR. PARKER: Thank you, Your Honor.

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

(Whereupon, at 1:19 o'clock p.m., the case in the
above-entitled matter was submitted.)

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