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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-778

TITLE MARYLAND, Petitioner V. BAXTER MACON

PLACE Washington, D. C.

DATE April 17, 1985

PAGES 1 thru 34



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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 MARYLAND, :
4 Petitioner :
5 v. : No. 84-778
6 BAXTER MACON :
7 -----x

8 Washington, D.C.

9 Wednesday, April 17, 1984

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 1:57 o'clock p.m.

13
14 APPEARANCES:

15 DEBORAH H. K. CHASANOW, ESQ., Assistant Attorney
16 General of Maryland, Baltimore, Md. ;
17 on behalf of Petitioner.
18 BURTON W. SANDLER, ESQ., Towson, Md. ;
19 on behalf of Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Ms. Chasanow, you may proceed whenever you're ready.

ORAL ARGUMENT OF DEBORAH H. K. CHASANOW, ESQ.
ON BEHALF OF THE PETITIONER

MS. CHASANOW: Mr. Chief Justice and may it please the Court:

The primary issue in this case is whether the purchase of magazines in an adult bookstore by an undercover vice squad officer can ever be an unconstitutional seizure.

The facts are simple. On May 6th of 1981, Detective Ray Evans went to the Silver News Bookstore, an adult bookstore in Prince George's County, Maryland. He browsed through the magazines and he selected a package of two of them. He took them to Respondent and purchased them with a \$50 bill whose serial number had been recorded. He received his change and the magazines and he left the store.

In a nearby parking lot, Detective Evans met two other experienced vice squad officers, Detectives Sweitzer and Fickinger. The three of them examined the magazines in their entirety. They concluded that there was probable cause to believe that these two magazines were in fact obscene.

1 The three then went back into Silver News,
2 arrested Respondent, and retrieved the \$50 bill used to
3 effect the purchase.

4 QUESTION: Was that for the purpose of
5 ensuring they'd have the evidence that they were paid
6 for?

7 MS. CHASANOW: Yes, Mr. Justice, that's what
8 the detectives testified, that they retrieved the money
9 as evidence of the purchase.

10 QUESTION: Well, it seems to have ricocheted
11 on them, hasn't it?

12 MS. CHASANOW: Yes, it definitely did. The
13 \$50 bill was not in fact introduced into evidence at the
14 trial, as it turned out. That was, however, the
15 justification for the seizure.

16 QUESTION: Did they give back the change?

17 MS. CHASANOW: No, the change is still in
18 police custody as of this moment.

19 QUESTION: Earning interest.

20 MS. CHASANOW: Yes.

21 (Laughter.)

22 QUESTION: Does the record show what magazines
23 these were?

24 MS. CHASANOW: Yes. The names were "Limited
25 Edition," I think "No. 10," and "Diamond Collection No.

1 1," are the names of the magazines. They are in the
2 charging document.

3 The Respondent was allowed to close the
4 bookstore. This arrest occurred about 7:20, 7:30 in the
5 evening. He was taken to the police station where a
6 statement of charges was filed. He was presented before
7 a commissioner who determined probable cause, and
8 Respondent was released on his own recognizance within
9 approximately three hours of the arrest.

10 Respondent's motion to suppress the magazines
11 was denied by the trial judge and, as I said, the
12 magazines but not the \$50 bill were introduced at the
13 jury trial.

14 After conviction and on direct appeal, the
15 Maryland Court of Special Appeals reversed the
16 conviction, finding that the magazines were the fruit of
17 a constructive seizure, a seizure rendered illegal by
18 Respondent's warrantless arrest and the retrieval of the
19 purchase money. The Court of Special Appeals held that
20 the exclusionary rule required suppression of the
21 magazines under these circumstances.

22 The State contends that there are two reasons
23 why the Court of Special Appeals' decision is wrong, and
24 if this Court finds in our favor on either of these
25 grounds reversal of the Court of Special Appeals is

1 required.

2 First, the magazines were purchased before any
3 alleged illegality occurred. The warrantless arrest and
4 retrieval of the money, even if illegal, occurred after
5 the magazines were purchased by the police, and thus the
6 magazines cannot be the tainted fruit of any poisoned
7 tree.

8 Our second argument is that the warrantless
9 arrest and the retrieval of the money were in fact
10 constitutional, so that there is no poisoned tree to
11 taint anything. Only if both of these arguments are
12 rejected will the Court need to reach the secondary
13 double jeopardy issue.

14 The exclusionary rule, which of course is a
15 judicially designed device, is intended to deter
16 unlawful police conduct by denying government the fruit
17 of its own unconstitutional behavior. Here the Maryland
18 Court of Special Appeals has twisted that rule, using it
19 to punish the government for alleged illegal conduct by
20 excluding from evidence something that is not the fruit
21 of the alleged illegality.

22 It held that the purchased magazines must be
23 suppressed to deter the police from making warrantless
24 obscenity arrests in the future. It has in essence
25 created a seed of the poisonous tree doctrine. That is,

1 but for this purchase there would have been no later
2 warrantless arrest and in their view no illegality.

3 The court has invalidated the conduct of an
4 officer who merely entered a bookstore open to the
5 public, browsed through magazines offered for sale,
6 selected a package of two of them, and bought them with
7 United States currency, all because it found that some
8 later police conduct was unconstitutional.

9 But we think that later arrest, even if
10 illegal, should not trigger a backward-looking fruit of
11 the poisonous tree or seed of the poisonous tree
12 analysis. This Court has made crystal clear that the
13 exclusionary rule is meant to return the government to
14 the same position it would be in had there been no
15 illegal conduct. It is not meant merely to punish the
16 government.

17 The police may not benefit from their
18 misdeeds; however, we should neither be put in a worse
19 position than we would have been had there been no
20 warrantless arrest even if that arrest is illegal.

21 The police here could have purchased the
22 magazines as they did and not returned to arrest
23 Respondent without a warrant. The blunder, if indeed
24 there was one, did not affect the obtaining of this
25 evidence. The exclusionary rule does not apply under

1 these circumstances --

2 QUESTION: None of the evidence educed at
3 trial was the product of the arrest?

4 MS. CHASANOW: It's our position absolutely
5 nothing came in that was the fruit. There was no
6 statement uttered by Respondent at the time of the
7 arrest that came in. The money did not come into
8 evidence. So no, nothing that transpired at or after
9 the arrest was produced as evidence.

10 The detective testified about the purchase and
11 the magazines were introduced.

12 QUESTION: But you took the money.

13 MS. CHASANOW: Yes, we did. We seized the
14 money as evidence and once it's no longer --

15 QUESTION: You took it, but you didn't use it
16 as evidence.

17 MS. CHASANOW: That's correct.

18 QUESTION: But you did take it.

19 MS. CHASANOW: We did seize the money as
20 evidence in this case.

21 We submit there was no search and no seizure
22 when Detective Evans went into the bookstore and bought
23 the magazines, even if he intended to follow the
24 purchase with a warrantless arrest. He entered only the
25 public area of the bookstore and observed only what any

1 patron could see.

2 In selecting the package of magazines, he did
3 what a normal customer could do. There was no privacy
4 interest infringed by the actions of Detective Evans,
5 and unless there is an invasion of a protected privacy
6 interest, this Court has said there is no search.

7 Similarly, the purchase did not interfere with
8 Respondent's possessory interest in the magazines, the
9 necessary predicate for finding a seizure. Whatever
10 possessory interest he had in the magazines was
11 voluntarily relinquished when he sold those magazines to
12 Detective Evans.

13 Thus, we submit the magazines were not
14 obtained as the fruit of a Fourth Amendment violation or
15 a Fourth Amendment intrusion in any sense, and without
16 the threshold of a Fourth Amendment invasion there is no
17 need to examine the reasonableness of that conduct in
18 light of any heightened First Amendment protection.

19 To emphasize, the purchase was complete here
20 before any asserted illegality took place. The purchase
21 itself did not implicate the Fourth Amendment. There
22 was no search and no seizure. To that point, the
23 officer had done no more than any ordinary paying
24 customer could have done, and it is simply a distortion
25 of the exclusionary rule to apply it to the purchase of

1 these magazines.

2 If it is necessary to reach the issue of the
3 constitutionality of the arrest, we further submit that
4 the First Amendment does not prohibit an otherwise
5 permissible and validless warrantless arrest for the
6 unlawful distribution of obscene material. The only
7 reason that it would is if the warrantless arrest
8 effected a prior restraint that would not have occurred
9 with an arrest pursuant to a warrant.

10 A prior restraint, of course, is something
11 that brings to an abrupt halt an orderly and
12 presumptively legitimate distribution or exhibition. In
13 this case there was no restraint on the distribution of
14 the two magazines, as they had already been sold to the
15 officer.

16 There are arguably two other aspects to the
17 claimed First Amendment restraint here: first, the
18 restraint that allegedly occurred when Respondent closed
19 the store at around 7:30 in the evening upon his arrest;
20 and secondly, the potential chilling effect on others
21 who hear of the prosecution in this case. Neither
22 singly nor together do those concerns justify
23 prohibiting all warrantless arrests on obscenity
24 contexts.

25 The warrantless arrest, unlike a warrantless

1 seizure of items, does not go unreviewed for very long.
2 When the police seize an item without a warrant, the
3 burden both legally and practically is on the aggrieved
4 party to bring some action for its return. When the
5 police arrest a defendant, however, without a warrant,
6 they must bring that person before a judicial officer
7 expeditiously.

8 A warrantless arrest is a temporary seizure.
9 In this case, the time between arrest and release was
10 less than three hours. This temporary interference with
11 Respondent's liberty interest simply cannot be equated
12 with the permanent seizure of all of the books in a
13 bookstore. This warrantless arrest did not effect a
14 prior restraint.

15 QUESTION: May I ask one question. I take it
16 your argument in essence is that even if the arrest was
17 unconstitutional in some way, the wrong remedy was
18 applied because they should not have suppressed the
19 material that had previously been purchased.

20 MS. CHASANOW: That is correct.

21 QUESTION: So that we can assume for purpose
22 of analysis that maybe there was a violation of the
23 First Amendment or something by making that arrest. Is
24 it conceivable, because I notice the Court of Appeals
25 relied on Hawaii cases and Texas cases and all, that

1 your Court might say, well, as a matter of state law we
2 think we'd like to impose this remedy as a preventative
3 against future things of this kind?

4 Is there any Maryland body of law at all on
5 whether they do impose their own remedies in these
6 situations?

7 MS. CHASANOW: Maryland has not even fashioned
8 its own exclusionary rule under our Article 26 of the
9 Declaration of Rights. We had a statute pre-Mapp that
10 dealt with an exclusionary rule for unlawful search and
11 seizure. That has been repealed in the wake of Mapp.
12 So our courts have never indicated a propensity toward
13 developing an exclusionary rule absent a command from
14 this Court under the federal Constitution. So no, there
15 is no indication that our court would do it independent
16 of the First and Fourth Amendments.

17 QUESTION: Of course, there's nothing -- we
18 couldn't prevent them from doing it if they wanted to?

19 MS. CHASANOW: No. There is nothing, however,
20 in this opinion which remotely indicates an independent
21 state ground for their decision.

22 QUESTION: So what you're really asking us to
23 decide is that there's no federal constitutional
24 requirement that there be exclusion on these facts?

25 MS. CHASANOW: Absolutely, yes.

1 As to the second potential restraint, it is
2 true that the fact of any prosecution will deter some
3 others from distributing similar magazines, and I think
4 we hope that it does. The purpose of the criminal
5 justice system, furthered by the public nature of the
6 proceedings and any sentence handed out, is to deter
7 others from violating the same law.

8 General deterrence is part of the criminal
9 justice system. We want people to be persuaded not to
10 violate the law because of the fear that what has
11 happened to others who have violated the law will also
12 happen to them.

13 But this Court recognized in Miller that the
14 inherent deterrent effect of making the distribution of
15 obscenity illegal is not an impermissible chill on First
16 Amendment rights. The protections in the criminal
17 justice system guarantee a forum to adjudicate obscenity
18 issues, and a single warrantless arrest is not the
19 equivalent of a system of informal censorship. It need
20 not be flatly prohibited in order to protect First
21 Amendment rights.

22 The making of a warrantless arrest for a
23 misdemeanor committed in the police officer's presence
24 is ordinarily permissible under the Fourth Amendment,
25 and we submit there is no need to alter that rule under

1 the circumstances of this case.

2 The primary defect in the Court of Special
3 Appeals' decision is to use the Fourth Amendment
4 exclusionary rule to punish the police for conduct
5 occurring after the purchase. That distortion must be
6 corrected. There is a fruit of the poisonous tree
7 doctrine; there is no seed of the poisonous tree
8 doctrine.

9 The secondary error was to hold that the
10 warrantless obscenity arrest here was unconstitutional.
11 We feel that is an unnecessary extension of the
12 protections of the First Amendment, protections required
13 for the seizures of material in other circumstances.

14 We ask that this Court reverse the judgment of
15 the Court of Special Appeals.

16 I'd like to reserve my remaining time.

17 CHIEF JUSTICE BURGER: Mr. Sandler.

18 ORAL ARGUMENT OF

19 BURTON W. SANDLER, ESQ.,

20 ON BEHALF OF RESPONDENT

21 MR. SANDLER: Mr. Chief Justice, may it please
22 the Court:

23 I might respectfully suggest that the factual
24 situation in the case that's before you at this time is
25 a little more complicated and a little more elaborate

1 than my adversary has suggested to you. I think that in
2 order for the Court to consider the application of the
3 legal philosophies that have emanated from this Court in
4 connection with the factual situation here, I would be
5 failing in my duty if I didn't advise you of some
6 additional facts.

7 This situation involving the Respondent in
8 this case arose as a result of police investigation in a
9 particular area of Maryland, Upper Marlboro-Prince
10 George's County, of alleged sale or distribution of
11 obscene material in what's called adult bookstores.
12 Prior to the arrest in the situation involving the
13 Respondent, there occurred approximately 40, as I recall
14 it, situations where the police had allegedly made
15 purchases of what they felt was obscene material.

16 The arrest of the Respondent culminated in the
17 completion of the investigation, which took place for
18 about two months. And in the joint appendix we have the
19 transcript of testimony of the police officers and the
20 other individuals involved in the case.

21 But the important fact in connection with this
22 case is this. The police had themselves, in connection
23 with this investigation, designed a procedure that they
24 felt that they would follow in searching for or looking
25 for or obtaining material that was obscene.

1 QUESTION: How do we find that in the record?

2 MR. SANDLER: Your Honor, that would

3 appear --

4 QUESTION: You say they designed a pattern. I
5 take it you're addressing the question of paying for the
6 magazine and then taking the money back?

7 MR. SANDLER: Well, it went a little beyond
8 that, Your Honor. In the joint appendix, references to
9 the pages of the transcript and reproductions of the
10 pages of the transcript of the officers' testimony at
11 the suppression hearing appear. There is additional
12 testimony that appears in our brief with reference to
13 the pages appearing in the actual transcript that
14 weren't included in the joint appendix.

15 QUESTION: Whatever the plan, was there a
16 consummated sale of the two magazines when the officer
17 handed the bill to the clerk and the clerk handed him
18 the books? Was that the sale of the magazines?

19 MR. SANDLER: Superficially, Your Honor,
20 without arguing the intent of the officer or the intent
21 of the clerk, I would have to for the purposes of
22 argument agree with you that at that point --

23 QUESTION: What has the intent of the clerk
24 got to do with it, or of the officer?

25 MR. SANDLER: I think the intent of the clerk

1 and the intent of the officer are important in
2 determining whether or not there was in fact a real
3 sale.

4 QUESTION: Well, suppose they paid for it by a
5 check and three days later the check had been returned
6 NSF.

7 MR. SANDLER: Then we might be involved in an
8 element of fraud, obtaining merchandise without the
9 intention of paying for it.

10 What I'm suggesting to you, Mr. Chief Justice,
11 respectfully here is this: that there are some facts
12 leading to this conduct that you refer to as a sale that
13 I think are important for the Court to consider in
14 reaching the finer conclusion as to: whether or not, A,
15 we have an unconstitutional search here in violation of
16 certain precedents; and B, whether or not we have an
17 unconstitutional seizure here; and C, whether or not we
18 have an unconstitutional arrest in light of First
19 Amendment principles.

20 QUESTION: Well, if it was a legal sale do you
21 have any case?

22 MR. SANDLER: I would think that if that was
23 the only factual situation that the Court had to reach
24 in coming to a conclusion, then obviously I would not
25 have a case. And if the parties were different, in

1 light of the precedents of this Court, I think we would
2 not have a case.

3 Your Honor, the facts that I would like to
4 bring to your attention, with your permission, are that
5 prior to the time that the officer actually paid for the
6 material that he selected he went into the store and
7 found two magazines. They were in plastic. The
8 testimony that's referred to in the joint appendix
9 indicates -- and in the Petitioner's brief -- that he
10 saw it was unsealed and he took the magazine out of the
11 plastic and read it from cover to cover.

12 At that point he put it back in the plastic,
13 went up, paid for it, it was placed in a paper bag, he
14 took it out to two other detectives that were waiting
15 outside, and they again took it out of the paper bag --
16 the plastic, and reviewed it from cover to cover, and at
17 that point they all converged into the store and
18 arrested the Respondent, he was placed in handcuffs,
19 customers were required to leave, and the store was
20 closed.

21 Now, what I am suggesting to Your Honor is
22 that the Court of Special Appeals of Maryland in its
23 opinion, which appears in the joint appendix, indicated
24 that it limited its decision to First Amendment issues
25 only. I would -- we are under the impression, Your

1 Honor, that a long line of decisions coming from this
2 Court and federal courts and state courts agree with the
3 proposition that there is a different procedure that
4 must be followed by states in attempting to regulate the
5 alleged distribution or sale of obscene material because
6 of the First Amendment intertwining with the Fourth
7 Amendment.

8 And because that procedure has been by court
9 decree, I respectfully suggest, then the state cannot
10 create their own procedures in attempting to regulate
11 the distribution of obscene material. When they do
12 that, they run counter to the precedents emanating from
13 this Court in order to preserve First Amendment
14 freedoms.

15 This case is a classical situation with facts
16 almost identical to the facts that occurred in Roaden
17 versus Kentucky, and in that case, Your Honor, the Court
18 did refer to the fact that the Court of Appeals of
19 Kentucky declined to specifically follow a decision of a
20 three-judge federal court in Ledesma versus Perez that
21 held unconstitutional warrantless arrests and
22 warrantless seizures of allegedly obscene material.

23 That three-judge federal court, Your Honor,
24 made a comment that I think -- and I say this
25 respectfully -- might be applicable to the situation

1 here, and that is that -- and as the Respondent also
2 agrees -- we appreciate the rights of the states to
3 regulate the distribution of obscene material. But the
4 courts have held that in order to do that there must be
5 a procedure that focuses searchingly on the issue of
6 obscenity.

7 In other words, Roaden held that material such
8 as are involved in the situation here are presumptively
9 protected under the First Amendment. The setting in
10 which they're distributed or exhibited is presumptively
11 protected.

12 And in order to evaporate or lift that
13 presumption of the material, as opposed to the
14 presumption of innocence of the individual, there must
15 be a judicial process, not an adversary hearing but an
16 ex parte scrutiny by a neutral and detached judicial
17 officer who determines the probable cause that the crime
18 of obscenity is being committed.

19 When that happens, a police officer who is
20 looking for or gathering evidence of a crime is armed
21 with the necessary probable cause to be able to
22 determine that a crime is being committed in his
23 presence and then make an arrest without a warrant and a
24 seizure without a warrant.

25 In this case, Your Honor, the Fourth Amendment

1 exclusionary rule is triggered by the unlawful search in
2 the beginning when the officer went into the store, took
3 the magazine out of the plastic, and read it from cover
4 to cover. Your Honor --

5 QUESTION: That was unlawful?

6 MR. SANDLER: That was an unlawful
7 unconstitutional search without a warrant.

8 QUESTION: Why?

9 MR. SANDLER: Because, Your Honor, in the case
10 of Lo-Ji Sales, I think the implication of this Court in
11 that case as a result of the conduct of police officers,
12 in view of a town justice who had accompanied them to
13 the store based on a warrant that he had issued for the
14 search and seizure of two films they had purchased and
15 he had reviewed --

16 QUESTION: But that's not this case.

17 MR. SANDLER: No, sir. But the legal
18 precedent in that case, the Court said --

19 QUESTION: He gave a \$50 bill.

20 MR. SANDLER: They gave him a \$50 bill.

21 QUESTION: A \$50 bill.

22 MR. SANDLER: Yes, sir. And then after
23 they --

24 QUESTION: They took the change.

25 MR. SANDLER: They took the \$50 and kept the

1 change.

2 QUESTION: That's right.

3 MR. SANDLER: Yes, sir. And then after they
4 kept the change --

5 QUESTION: Is that any different from Roaden
6 and any other case?

7 MR. SANDLER: It's different, Your Honor, in
8 that context, that they kept the -- they got the \$50
9 bill back.

10 QUESTION: Well, whatever conduct that is,
11 they never seized the magazines.

12 MR. SANDLER: It would be my impression, Your
13 Honor --

14 QUESTION: They didn't seize them. Do you
15 recognize the difference between seizing and buying?

16 MR. SANDLER: Yes, sir. I would be under the
17 impression that when a customer goes into a store, he
18 doesn't take the owner's property without due process of
19 law.

20 When the police officers kept the money, the
21 change, and then took the \$50 bill back, at that
22 point --

23 QUESTION: That was after he was arrested.

24 MR. SANDLER: Yes, sir. At that point there
25 was a seizure that wasn't incident to a lawful arrest.

1 They impounded something without due process of law.

2 QUESTION: The \$50 bill?

3 MR. SANDLER: The \$50 bill, the change, and
4 the two magazines.

5 QUESTION: Well, but the \$50 bill was never
6 offered in evidence, I take it.

7 MR. SANDLER: The prerogative -- I believe,
8 and I say this respectfully, Your Honor, the reason it
9 wasn't offered is because under the Maryland statute a
10 charge of distribution of obscene material doesn't
11 necessitate --

12 QUESTION: A purchase?

13 MR. SANDLER: -- money. It's transfer of
14 possession with or without consideration.

15 QUESTION: But if it wasn't offered in
16 evidence, there's no Fourth Amendment problem because
17 the exclusionary rule is designed to suppress evidence
18 that might be used at trial.

19 MR. SANDLER: The magazines were offered into
20 evidence.

21 QUESTION: Yes. But your Court of Appeals
22 didn't rest its decision on the fact that it felt that
23 the magazines hadn't been validly purchased.

24 MR. SANDLER: Yes, sir, it did. They felt
25 that the purchase of the magazine was a preconceived

1 seizure and they held it to be a constructive seizure of
2 presumptively protected material, because of the fact
3 that when the officer went into the store he was
4 instructed to look for material that was distasteful to
5 him.

6 And they felt that the combination of all the
7 facts of the 40 arrests and 40 alleged purchases in
8 totality represented a preconceived scheme to circumvent
9 the warrant requirements that emanated from Roaden and
10 from Heller, Marcus, and A Quantity of Books versus
11 Kansas.

12 QUESTION: Well, I didn't read their opinion
13 as turning on the fact that the \$50 bill was taken back
14 by the police after the purchase.

15 MR. SANDLER: They discussed the fact that the
16 \$50 bill was taken back, found in the cash register
17 drawer. A search for that was made and they kept the
18 change.

19 They also felt that the impoundment of the
20 magazines plus the money amounted to a constructive
21 seizure.

22 QUESTION: Well, of course, if the magazines
23 were purchased you don't have any question of
24 impoundment. You can keep what you buy. A policeman
25 can do it the same as any ordinary citizen.

1 MR. SANDLER: I could agree with you -- I
2 couldn't agree with you more wholeheartedly, Your
3 Honor. You can keep what you buy. But you can't take
4 something and keep the money which you paid for it in
5 the same process and give due process of law to the
6 owner of the material.

7 And the fact that they're police officers I
8 wouldn't think changes the situation. I don't argue
9 with the fact that there has to be some undercover
10 operation to secure evidence. But we have a First
11 Amendment situation here, Your Honor, and this Court has
12 been consistent in holding. The money's not an
13 important issue here before the Court, nor was it really
14 an important issue before our appellate court.

15 QUESTION: But Mr. Sandler --

16 MR. SANDLER: Yes, sir.

17 QUESTION: -- but your argument seems to me to
18 depend entirely on the \$50.

19 MR. SANDLER: No, sir. I don't take that \$50
20 bill into consideration at all. It's not important to
21 my argument at all, Your Honor.

22 QUESTION: Is it important to your argument
23 that the police retrieved -- not only kept the magazines
24 and the change, but retrieved the \$50 bill?

25 MR. SANDLER: It's important to my argument

1 only to the extent that once they kept or retrieved the
2 \$50 bill and kept the change that they already had and
3 then retained the magazine, at that point there was a
4 seizure.

5 I might suggest to Your Honor, so that you
6 might get the impact of what I'm saying, I'm suggesting
7 that in this case there was an initial search without a
8 warrant that's in violation of --

9 QUESTION: Well, tell me, Mr. Sandler, suppose
10 before going back to the store the officers had gone to
11 a local magistrate and asked his view of the obscenity
12 or not of those magazines, and he had said, yes, he
13 thought they were. Then they went back and everything
14 else had followed.

15 Would you be here?

16 MR. SANDLER: I don't think so.

17 QUESTION: Even though they took back the \$50
18 bill and kept the change? Why wouldn't there have been
19 a seizure then under your theory?

20 MR. SANDLER: Your Honor, I will -- if they
21 had gone to a magistrate and he had made a determination
22 of probable cause and they went back with a warrant and
23 arrested the Respondent, then I wouldn't think that I
24 would have any argument in connection with the issue of
25 arrest. I still feel, though, that I would have an

1 argument under Roaden and in Heller in connection with
2 the search and seizure without a warrant.

3 My suggestion, if you wil, is that there is a
4 First Amendment due process issue involved in these
5 cases that places special constraint on the Fourth
6 Amendment. And the only way to apply those -- and
7 Justice Marshall, in connection with your inquiry as to
8 the factual situation here as opposed to Roaden, the
9 facts in Roaden were that the deputy sheriff paid an
10 admission to go to an outside, outdoor theater. He
11 viewed a film, and after he viewed the film it was his
12 opinion that it was obscene.

13 He went up into the projection room and he
14 arrested the clerk, the manager first, and then he
15 seized one copy of the film because in his opinion the
16 film was obscene.

17 QUESTION: I know the facts in the case.

18 MR. SANDLER: The only difference in Roaden
19 and in our case is that the sheriff didn't take back the
20 money that he paid to go see the film.

21 QUESTION: That's why I've asked the question
22 three times here.

23 MR. SANDLER: In this case they took back --

24 QUESTION: And if you haven't gotten it by now
25 it's too late.

1 MR. SANDLER: Yes, sir. What I'm suggesting
2 is that when that did happen, then the seizure or
3 constructive seizure of the magazines appears in this
4 case as well as it did in Roaden.

5 But the problem that's presented in this case
6 is that Roaden and Heller and Lo-Ji and all of their
7 progeny stand for the proposition that the heavy
8 burden --

9 QUESTION: Isn't one of the differences with
10 Roaden that in Roaden they seized it after they
11 arrested?

12 MR. SANDLER: The argument in Roaden was there
13 was a seizure --

14 QUESTION: And this was rather that they
15 bought it --

16 MR. SANDLER: -- incident to an arrest.

17 QUESTION: -- before they arrested him.

18 MR. SANDLER: Yes, sir.

19 QUESTION: And you don't see any difference?

20 MR. SANDLER: I do see a difference.

21 QUESTION: Oh, you do. Thank you.

22 MR. SANDLER: I see, Your Honor, in this case
23 a search before an arrest and a seizure after an
24 arrest. In addition, I see a search before an arrest, a
25 search after an arrest, and a seizure after an arrest.

1 QUESTION: You said there was a search as soon
2 as he tore the transparent plastic envelope?

3 MR. SANDLER: Yes, Your Honor. In the case of
4 Walters versus U.S., 447 U.S. 649 -- which is not cited
5 in our brief, Your Honor, by the way -- that's a case
6 where some boxes of allegedly obscene material were
7 shipped and reached a private party by mistake. And
8 they opened it and found what they thought to be obscene
9 material and they called the FBI, but they had placed
10 the material that they saw back in the box before the
11 FBI got there.

12 When the FBI got there, they took the material
13 and they took it out of the box, put it on a projector,
14 and viewed it. They obviously -- in that case, the
15 court held that they were in lawfully in possession of
16 it.

17 But the viewing of it or the screening of it
18 amounted to, because of the First Amendment, an unlawful
19 search without a warrant, and the Fourth Amendment
20 exclusionary rule was triggered as a result of the
21 expansion of the private search.

22 What I am suggesting here is that even if the
23 officer was lawfully in possession of the magazines as a
24 result of the purchase, then the viewing or the
25 screening by the officer which gave him evidence to

1 believe he could make an unlawful arrest is the
2 violation and the fruit of unlawful police conduct that
3 the Fourth Amendment, in light of the First Amendment,
4 excludes the use of.

5 I am only, Your Honor, for the sake of
6 argument agreeing that the purchase was the vehicle
7 whereby the officer lawfully obtained the material. The
8 Court of Special Appeals didn't feel that the purchase
9 was a purchase. They felt it was constructive seizure.
10 For the purposes of the answering the question and only
11 for that purpose assuming for the sake of argument it
12 was legal.

13 But under the Walters theory, if the officers
14 got the material lawfully they didn't have the right, as
15 a result of Roaden and Heller, to screen it or view it
16 without taking it to a magistrate, neutral and detached,
17 who could focus searchingly on the issue of obscenity,
18 make the probable cause determination, and then at that
19 point issue a warrant to either seize it and arrest the
20 violator.

21 I suggest, Your Honor, that in the case of
22 Roaden, when they referred to that three-judge court in
23 Ledesma versus Perez, that court recognized that
24 unlawful arrests and unlawful seizures without a warrant
25 in light of the First Amendment were unconstitutional.

1 They suggested that the state has a right to regulate
2 the distribution of obscene material, but that they
3 might have to incorporate in those regulations
4 provisions immunizing alleged violators for any criminal
5 conduct prior to a judicial determination ex parte, if
6 you will, by a neutral and detached judicial officer,
7 eroding or evaporating the presumption of protected
8 expression in light of that individual's conduct,
9 because it's his conduct that we're considering, not the
10 magazine.

11 And if the magazine, under the theory of
12 Roaden, is presumptively protected and the setting in
13 which it's distributed is presumptively protected prior
14 to the erosion or evaporation by the judicial process,
15 how can his conduct constitutionally by operation of law
16 be criminal, and how can that give rise to probable
17 cause for a crime committed in the presence of a police
18 officer?

19 I would think, Your Honor, that to allow
20 police officers to make the initial determination that
21 material is outside the ambit of the First Amendment for
22 the purposes of either search, seizure or arrest places
23 a heavy burden on police officers who come from
24 different environments and have different thought
25 processes and different desires and different tastes.

1 That's why the courts have been consistent in requiring
2 the intervention of a neutral and detached judicial
3 officer to focus searchingly on the issue of obscenity
4 and provide the vehicle, the constitutional vehicle, for
5 the prosecution or the criminal process to begin.

6 Without that, to allow what happened in this
7 case under the rubric of a purchase, where you have 40
8 such situations, where the police officers had decided
9 with their superiors that they were going to send
10 someone in to look for material distasteful to them,
11 which is certainly contrary to the concept of Miller
12 versus California or Roth, which define the guidelines
13 that must be used in determining materials outside the
14 ambit of the First United States, if we allow this to
15 happen and if the Court of Special Appeals' opinion is
16 reversed, what will happen is that police officers of
17 varied tastes can go into department stores, pick up a
18 magazine, pick up a book, and in his opinion find it
19 distasteful to himself, make an arrest without a
20 warrant, close the store down, and make a seizure of the
21 material.

22 That hasn't existed in light of the First
23 Amendment, based on the precedents that are to date.
24 And all we're suggesting, in conclusion, Your Honors, is
25 that what the police did in this case, looking at all of

1 the facts, was to devise a method to secure evidence for
2 obscenity prosecutions.

3 They only needed one magazine and one
4 prosecution to get a conviction. They didn't need 40 or
5 18. But this was the culmination of two months of
6 investigation and alleged purchases and alleged arrests
7 that resulted in this case coming to this Court. What
8 they did was totally contrary to all of the theories
9 that have emanated from this Court and other courts in
10 connection with the preservation of First Amendment
11 rights as it revolves around the Fourth Amendment.

12 A police officer has never been allowed, other
13 than in exigent circumstances, now or never
14 circumstances, to make the initial determination of
15 obscenity or probable cause for obscenity. He can't
16 determine by operation of law that a crime is being
17 committed in his presence to either arrest without a
18 warrant, search without a warrant, or seize without a
19 warrant.

20 And this case has the elements of a search, of
21 an arrest, contrary to all constitutional law, and for
22 that reason I respectfully suggest the Court of Special
23 Appeals' opinion should be sustained.

24 Thank you.

25 CHIEF JUSTICE BURGER: Do you have anything

1 further, Ms. Chasanow?

2 REBUTTAL ARGUMENT OF
3 DEBORAH H. K. CHASANOW, ESQ.,
4 ON BEHALF OF PETITIONER

5 MS. CHASANOW: I just do want to clarify for
6 the Court that the Court of Special Appeals' holding was
7 that the warrantless arrest was the unconstitutional
8 behavior, that that arrest should not go unremedied, and
9 so in this case the only remedy available was to
10 suppress the magazines obtained in connection with that
11 arrest.

12 We submit that that, of course, was in error.
13 Those magazines were purchased prior to any possible
14 illegality and were therefore properly admitted into
15 evidence.

16 Thank you.

17 CHIEF JUSTICE BURGER: Thank you, counsel.
18 The case is submitted.

19 (Whereupon, at 2:34 p.m., argument in the
20 above-entitled case was submitted.)

21 * * *

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BY Paul A. Richardson

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