ORIGINAL

In the

Supreme Court of the United States

WILLIAM WALTER,

PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

ARTHUR RANDALL SANDERS, JR.
ET AL.,

PETITIONERS

V.

UNITED STATES OF AMERICA,
RESPONDENT

No. 79-67

No. 79-148

Washington, D. C.
February 26, 1980

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UNITED STATES OF AMERICA, Respondent		
ARTHUR RANDALL SANDERS, JR. ET AL., Petitioners	v.	No. 79-148
UNITED STATES OF AMERICA, Respondent		

Washington, D. C.

Tuesday, February 26, 1980

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

BEFORE:

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

APPEARANCES:

GLENN ZELL, ESQ., Suite 620, 66 Luckie Street, N.W., Atlanta, Georgia 30303; on behalf of the Petitioners

W. MICHAEL MAYCOCK, ESQ., Penthouse Suite, 10100 Santa Monica Boulevard, Los Angeles, California 90067; on behalf of Petitioner

ELLIOTT SCHULDER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Walter v. the United States and consolidated case Sanders v. the United States.

Mr. Zell, you may proceed whenever you are ready.

ORAL ARGUMENT OF GLENN ZELL, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This is a certiorari from the Fifth Circuit Court of Appeals involving a conviction of the two Petitioners and two corporations for distribution of obscene materials in interstate commerce.

The issues that I will argue this morning involve search and seizure. To outline the facts very quickly, the FBI was called to Leggs Company; it is a stocking manufacturer. They had received several boxes of films misdirected to them by Greyhound bus terminal. Upon opening the boxes by the Leggs Company they discovered they were not stockings but films, 871 and 25 different specific kinds of films.

They called the FBI, the FBI came out; Mr. Mandyck, I think his name is, told them to hold it for him and he came back in five days and seized the entire shipment, took it to the FBI office.

Thereafter, two months later he viewed them in the

office. Approximately two years from the initial seizure the Petitioners went to trial. No notification either publication or directly was given to Petitioners, no warrant was ever gotten, and of course during the trial the District Court overruled the motion to suppress based on several grounds. The jury found the films obscene, found the Petitioners guilty, appealed to the Fifth Circuit and there was a strong dissent by Judge Wisdom which laid out our issues very clearly and succinctly; and thereafter, we filed a certiorari to this Court.

QUESTION: When did your clients first learn that the FBI had taken possession of the film?

MR. ZELL: Well, Your Honor, in the transcripts it appears that there was some information conveyed by one of the employees of Mr. Grassi to Mr. Sanders about a month or several days or several weeks after the initial seizure, or after the FBI seized them, just from hearsay. And he said they heard that was turned over to the FBI. But they weren't sure, there is no date in the record and it was not verified or he didn't know where to go, what to do, and he turned it over to his lawyer, which of course was me.

QUESTION: Did your client ask for the return of the films?

MR. ZELL: No, he did not. We did not know where they were. Mr. Walter testified he didn't know where they

were himself. He was never sure, he was never directly told; Mr. Sanders was just told in hearsay that the FBI might have had them. We never heard anything from the FBI until of course the indictment. When the grand jury met, we were notified.

And that time of course we filed a motion to return the property.

QUESTION: I take it there is no issue as to the obscene character of some of the films?

MR. ZELL: Well, I can see as a trial attorney that it is a factual disposition to the jury. We litigated the case, we presented several expert witnesses and the jury after being out over a day found against us on that issue, apparently. So we did not raise the issue of obscenity in this case; not that we conceded or agreed with the jury verdict but we argued it and fought it. It was a factual determination. And I think that rests that issue in this particular case as far as it goes.

QUESTION: Your client's shipment was a nom de plume type of thing, wasn't it, or not the client's real name as sender and the consignee was not a real person.

MR. ZELL: That is correct. On the box it said "will call." And, "hold it at the Greyhound terminal." The reason for this is not that they were giving up their right of privacy as the Fifth Circuit alleged or argued and the

District Court found was in the testimony in the record from Walters and Sanders that they had repeated shipments being stolen and missing. Apparently whenever the Greyhound bus terminal man seized the name of the sender or gets used to it where it is going at a certain terminal warehouse it apparently is broken into and the shipment is taken or parts are taken out of it.

I might point out in U.S. v. Kelly it was the same problem. I think his last seven shipments had been missing or misdirected. Apparently the workers, the employees at these common carriers get used to what the shipments are about and I guess they decide to just pilfer them. So because of that problem we did not put the name of the sender or who would pick it up, because we felt the employees would find out about it, the common carrier. And that has been done on a regular basis; it has been done before, with no problem. Many people travel, movie stars, under assumed names, not that they give up their right of privacy but because they want privacy. And that is the reason why it was done.

QUESTION: There are not many that travel under the name of "Leggs."

MR. ZELL: No, no; that happened to be the nickname of the girl who was the manager of the warehouse in Atlanta where the shipment was destined for. She is a very tall girl and that is what her nickname came from.

QUESTION: You used the word "seize" several times in your statement of facts. Do I correctly have the impression that the outfit to whom -- the hosiery manufacturer to whom the delivery was made wanted to get rid of the stuff?

MR. ZELL: That is correct.

QUESTION: And you equate that with the seizure by the FBI.

MR. ZELL: For this reason. Apparently the Fifth Circuit District Court ruled on the Burdeau v. McDowell case about a third party. That is true contraband cases involving marijuana, sawed-off shotguns. But here you have presumptively protected materials, reels of film that have never been determined to be obscene, they are perfectly legal at that point.

Now, the Leggs Company decides that they are not in that business, it is not theirs. They don't have the authority to consent to give it to anyone. They should return it to the common carrier. They are perfectly legal materials, not contraband because third party equates with plain view, it is contraband, you see it and you take it, whether it be drugs or stolen goods or a sawed-off shotgun. But here you have films, so the FBI had no right to take it nor to seize it. They were still the property of the sender and all they could have done and should have done was when they saw this film and looked at the boxes is go to a magistrate to get a warrant

to seize these films.

QUESTION: Why do you say they were the property of the sender? Why not the property of the consignee, the recipient?

MR. ZELL: That is correct. I would agree with that also. Either way.

But still they were not the property of Leggs Company and Leggs Company did not even have the authority to give it to the FBI. That was perfectly legal property such as other magazines -- National Geographic or Carnal Knowledge, print of Carnal Knowledge that was held -- a case litigated in this Court, Jenkins v. Georgia.

As far as the FBI was concerned those were legal materials and when they took them that was, in our opinion -- we argue a seizure.

QUESTION: Well, what if they had simply been stolen by a thief in transit, they certainly wouldn't have beenthe property of the thief, even arguably.

MR. ZELL: That is correct.

QUESTION: And what if the thief had voluntarily given them to the FBI, would you have a Fourth Amendment violation? You had a larceny but would you have had a constitutional violation?

MR. ZELL: Probably not because you don't have the First Amendment issue involved.

QUESTION: As much as you do here.

MR. ZELL: Well, the goods are stolen. They are not presumptively protected. They are not stolen.

QUESTION: They are presumptively protected by the First and Fourteen Amendment?

MR. ZELL: Yes. These films are.

QUESTION: Yes. And that is true whether it is a thief who takes them or whether it was the Leggs -- that is Leggs, the stocking company.

MR. ZELL: That is correct.

And I would still argue that they had no right to keep them. They either should have published by publication or technically notified the sender or the shipper. It could be easily found out because the record shows people came by to ask for it: "Where was it?" "Can we pick it up?" And you have got 871 films,and the FBI just sitting on them, involving 25 different prints. As a matter of fact in the indictment they only indicted on 5 films.

QUESTION: Let me change slightly Mr. Justice Stewart's hypothetical to you.

Suppose they had been pilfered as he suggested by thieves in transit. And then rather having the thieves turn them over to the FBI the thieves -- the FBI catches the thieves for some over matter and find them in possession of the material. Do you say that is a seizure by the FBI?

MR. ZELL: No, because it was a third party I wouldn't consider it as a seizure under those facts. But under the facts we have presumptively protected materials and you have strict procedural requirements. Under Heller and Roaden that would become a seizure. The First Amendment is a fundamental amendment and to allow the FBI to sit on such a massive amount of material without going to a magistrate I think is a danger in a free society.

QUESTION: Would your position be different if the FBI had kept the 25 samples or the 5 and turned all the others over to your clients?

MR. ZELL: Yes, I think the procedural safeguards require that. They don't need 871 films, each one different kinds.

QUESTION: You say then you wouldn't be here.

MR. ZELL: Well, if they had been properly notified, went to a magistrate to determine they were obscene so they could keep them, if they had been returned, the films they didn't need and kept the only ones they felt were obscene of course if that is what I think, as I understand it, your procedural safeguards that you set out in your opinions require. In the Sherwin case, for example, that the Fifth Circuit sites, the majority opinion, there the agents saw two magazines. They didn't take the shipment and just take it to their office. They immediately went and got a warrant.

There was a very limited, if any, prior restraint; and they came back with a warrant.

Now, in Kelly they held it was a seizure from the common carrier because it was a seizure, it was First Amendment-protected materials and there was no procedural safeguards involved. I think you read the First and the Fourth together. It is a dangerous thing to allow this to happen. And as I point out, in the indictment there was only five films alleged to be obscene. Twenty were not even alleged to be obscene.

QUESTION: Mr. Zell --

MR. ZELL: Yes, Your Honor.

QUESTION: -- you say that you had through hearsay that these films were in the possession of the FBI. Why as a practical matter didn't you demand them?

MR. ZELL: Well, as a practical matter we weren't sure, that is the client's, that is, weren't sure --

QUESTION: There wouldn't have been any difficulty to demand them even if you weren't sure.

MR. ZELL: Theoretically they could have demanded them. They could have after they found out --

QUESTION: Did you make a conscious decision not to demand them?

MR. ZELL: We weren't sure; we weren't sure where the films were.

QUESTION: You had a pretty good idea where they were.

MR. ZELL: I don't know about "pretty good idea." We didn't know where -- we thought they had been stolen first, at least my clients did because they were used to pilferage. Then they were told it was the FBI.

QUESTION: Did you make any effort to --

MR. ZELL: No.

QUESTION: -- locate them?

MR. ZELL: To answer your question: No, they did not.

After about a month or two they said they would turn up at some litigation or it was just lost.

Usually they take a negative attitude because there is so much stealing and why they use these fictitious names is that it has been stolen. That was their general attitude. It happened so often before. They just take and get used to that occurrence, as they point out in Kelly where 7 of the last shipments have been stolen. They just assumed that it was stolen, didn't take it seriously, or for whatever reason. I don't know what was in their minds. But we thought they were just gone.

QUESTION: You made a pointed distinction between films and firearms, sawed-off shotguns. A good many people think the Constitution gives presumptive constitutional

protection to bear arms.

Is that not so?

MR. ZELL: That is frivolous, that argument. I think this Court has already decided that by protecting the militia. I think it was Miller v. United States you have already allowed gun laws and statutes to regulate different types of weapons so I find that argument analagous and also it has been decided by this Court very clearly that arms can be regulated by the State and Federal Governments.

QUESTION: In other words, in each case it is a presumptive protection but a presumption that can be overcome?

MR. ZELL: Yes. In particular when you have the First Amendment in suppressing materials. And particularly where they entirely suppress completely.

QUESTION: You make that higher than to bear arms?

MR. ZELL: Well, it is the First Amendment.

But, no, I think in a free society ideas, communication is fundamental, so fundamental. And the right to bear arms involves the militia and I don't -- I feel it is -- the Government has a right to regulate weapons. I don't think there is any doubt about it, this Court has decided. Not only this Court but the State of Georgia has decided, the Supreme Court of Georgia, so there is no problem with that.

Then they viewed the films two months later. There was no continuing search. Why didn't they get a warrant at

that time?

Ten months later they looked at the covers and conceived for argument purposes they had probable cause. Why did they get a search warrant then?

It is like the case of Michigan v. Tyler, the fire case. The police were on the property and later on they came and said, "Let's go back and search it." This was held at a separate search. So even if you assume it was not a seizure, going a month or two months later with their probable cause to get a warrant, they don't do it. That is certainly a search of the films, and they didn't do it. There is no exigent circumstances. Clearly as in the Hães case we cite no brief, I think it was in the Eighth Circuit. They held to view the films was a search and clearly the FBI could have gotten a warrant at that point.

And then of course we analogize this to the Arkansas v. Sanders and Chadwick v. United States -- luggage, boxes, compartments. Here is a compartment, 871 of them. There is probable cause that they may be obscene. Why wouldn't they require a warrant as you did in Chadwick and Sanders?

QUESTION: Mr. Zell, what was going to happen with films if they had gone on their intended route?

MR. ZELL: There is no question in my mind they would have been sold and distributed in Atlanta.

QUESTION: Did your client then retain an expectation that they would not be publicy viewed; what kind of privacy interest did he retain?

MR. ZELL: Well --

QUESTION: Did he anticipate that they would be shown to people that --

MR. ZELL: They would be distributed, yes; they would be shown --

QUESTION: And exhibited publicly?

MR. ZELL: No, no, these were 8-millimeter reels, of course I am not familiar with them, and they were purchased by a customer, taken out of the store. They are only 200 feet long, thereabouts. And you go in the store and purchase them and take them out to your home or whatever to view them.

QUESTION: I can understand sort of an unfair competition kind of privacy, somebody shouldn't be looking at stuff you intended to sell. But is there a constitutional privacy interest in not having somebody see that which is being offered for sale, in effect?

MR. ZELL: Well, again you must read the First and the Fourth Amendments together. They are keeping the films. They want to look at them.

QUESTION: Your clients didn't want to look at them any more, did they?

MR. ZELL: I am sorry, Your Honor?

QUESTION: Did your clients want to look at them any more?

MR. ZELL: Well they -- well --

QUESTION: I mean --

MR. ZELL: I guess not in that particular -- no, they want to sell them. I realize what you are saying but all we are --

QUESTION: It was like a privacy interest in a billboard or something like that?

MR. ZELL: Yes but keeping them; they want to keep them. The FBI wants to seize them and if you want to seize them after looking at them and search, you must --

QUESTION: Well, if we go by the seizure I understand your point that when they got in the FBI's possession.

I am directing my question really at screening, at viewing them, when as I understand the whole purpose of the shipment was for someone other than your clients to view them.

MR. ZELL: Well, my clients of course -- in the store they are not viewed by people, they must buy them first before they are viewed.

QUESTION: Well, as I said, there is a commercial interest there.

MR. ZELL: Yes.

QUESTION: I understand that.

MR. ZELL: And you must buy the film before you could review it. And in this case of course the FBI just took them illegally and then viewed them illegally. They had no right; they didn't purchase them. If they want to view them for purpose of prosecution I think they should get a warrant. It is like a seizure. It is like you go in a store and you take the film off the counter without paying for it and you decide to look at it. That would be in a sense a search and a seizure as well.

MR. CHIEF JUSTICE BURGER: Mr. Mayock.

ORAL ARGUMENT OF W. MICHAEL MAYOCK, ESQ.,

ON BEHALF OF THE PETITIONER

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

What I would like to do at this time is to address a couple of points which I believe should be brought to the Court's attention involving what I ascertain to be misstatements of fact contained in the Government's brief. And one in particular I think is incredibly significant, found on page 37 and thereafter, wherein it is indicated that the Petitioners in this case had decided to return the films to a warehouse for storage. In fact there is nothing in the record to indicate that the purpose of the shipment to Atlanta was for storage. It could well have been that the purpose of that transportation was in fact to sell these particular

films in Atlanta which as I understand has the highest per capita homosexual population outside of San Francisco.

There are two other points that I would like to bring to the Court's attention. They relate to the films themselves which are 8-millimeter film that are so small that they cannot be viewed by the naked eye. There is apparent representation to the effect that people at Leggs Products, Inc. had already ascertained what it was that was on these films when in fact all they had ascertained was the nature of the box cover which contained a depiction in cartoon fashion of two nude males from the waist up embracing and kissing and a description purporting to represent but not necessarily representing whatever it was that was contained in the films. Obviously the FBI did not believe that this was necessarily what was contained in the films because that was the very reason they screened them, was to find out what it was that was contained on these films.

QUESTION: Was the description prepared by your clients a kind of cover for the films?

MR. MAYCOCK: As it turned out, Your Honor, the films were pretty much as described in the blurb contained on the box covers. The box covers incidentally were not charged as being obscene; only the films themselves which were later screened about two months subsequent to the time that they were initially taken by the FBI.

What I would like to do is to address rather briefly several points which I feel are significant which have not been addressed at this point by Mr. Zell.

First of all I would address the Court's attention to the scienter issue. There was clearly ample proof provided that my client Mr. Walter was engaged in a business which dealt in sexually explicit material. However, I would suggest to this Court that in accordance with the dictates of Hamling and Smith that there has to be some proof of knowledge showing that in fact he had information of the nature, character and content of the particular films, that he knew they were being shipped interstate and that he knew that a common carrier was being used for that purpose.

There is nothing other than a silent record to indicate that Mr. Walter was involved in this operation from a point in time two months prior to this shipment to a time two months subsequent to it. The Government has argued that there was evidence showing that he participated directly in the day-to-day affairs of this particular business. However, there is no evidence showing that any of these other shipments purportedly made interstate involved obscene material. And as this Court well knows, Roaden v. Kentucky requires the presumption to be made that material not adjudicated to be obscene is to be presumed not obscene. Hence the only material properly brought before the Court and the jury in this case

involved the films in question and as far as those films were concerned there was nothing giving any sort of nexus to Mr. Walter in those particular films as far as the element of scienter is required.

Turning to the point raised in the brief in connection with the requirement that the Court instruct in accordance with the dictates of the Pinkus case that person is to mean adult, it need be pointed out that on at least five separate proposed jury constructions the defendants sought to have that sort of definition be made known. I think it is clear to anyone who understands the English language that the word "person" subsumes the class "children" and accordingly the instructions given by the Court were fatally defective for the reasons earlier enunciated in Pinkus. And the only thing that we can do, and this is what the Government would have us do, is to assume that obviously this jury forgot about children because of the instructions given and only applied the attributes of the average person. However, an average person includes people of all ages. Hence, that particular argument is not effective and moreover to assume that the jury did not follow the directions of the Court and use the standard of the average person would be to do an injustice to the jury and its understanding of the law as given it by the Court and moreover since the jury verdict was a general one there is no way that we can know that in fact that jury did

not exactly what was forbidden by Pinkus, that being to include children within the community.

While we are talking about jurors, very briefly I would point out that insofar as one of the jurors was involved in this case there is testimony -- in fact the record by the trial judge indicates that one of the jurors had to be directed to put away a book or magazine on the only occasion on which he viewed the film. Subsequently the jury did not view the film again in the jury room.

The trial judge observed that sufficient attention had been paid by this particular juror in that he observed that juror watching the film on 7 of 10 occasions. There were proffers of proof made that members of the press in attendance at the trial would have observed that this particular juror did not watch the film for substantial periods of time.

QUESTION: Do you think it would be a ground for reversal in this Court if there were a proffer of evidence that a juror had dozed off during the testimony of a witness in a case perfectly orthodox toward a contract case?

MR. MAYOCK: I think if a sufficient record establishing that fact is made that that may well be the case. But where we have an observation by the District Judge saying that on 7 out of 10 times he watched -- in other words 77 percent of the time he was watching a film, which the dictates

of Miller v. California require that the work be "taken as a whole" that there is no way he could have taken it as a whole watching only 70 percent.

QUESTION: Well, boy, you would have a lot of reversals if you required a juror to give his undivided attention from 10:00 to 12:00 and 1:30 to 4:30 five days a week, whenever the court sat, if you required that of everyone of the 12 jurors.

MR. MAYCOCK: Well, Your Honor, I understand that is what we try to do when we select a jury. In fact one of the proffered voir dire questions to this panel was whether they could view this film with an open mind and open eyes. And that proffered voir dire question was not asked of the prospective panel. And in fact it turned out to be very critical because this juror obviously chose not to view substantial parts of the film.

QUESTION: Well, is the issue of obscenity before us?

MR. MAYOCK: Pardon?

QUESTION: Is the issue of obscenity before us?

MR. MAYOCK: No, it is not. It has not been raised directly. It was raised in the Fifth Circuit.

Insofar as the --

QUESTION: You don't think the -- you don't think any of your claims of error subsume a claim that any

conviction of this statute is unconstitutional?

MR. MAYOCK: I am not sure I understand. I would obviously take the posture that the statute itself is unconstitutional. However, that issue has not been presented to the Court.

QUESTION: Right.

MR. MAYOCK: Insofar as --

QUESTION: So your answer is no, that question is just not here.

MR. MAYOCK: That is correct, Your Honor.

At this time, Your Honor, I would like to reserve my remaining time.

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

Mr. Schulder.

ORAL ARGUMENT OF ELLIOTT SCHULDER, ESQ.,

ON BEHALF OF THE RESPONDENT:

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

I would like first to respond to some of the factual question from the bench and some of the statements by counsel concerning facts of this case.

First of all Chief Justice Burger asked when Petitioners actually discovered that the FBI had the films. On pages 8 and 9 of our brief we refer to the record wherein we state that about 2 to 3 weeks after the transfer of the films

from the Leggs Hosiery Company to the FBI co-defendant Grassi, Michael Grassi called the Leggs Company and discovered that the films had been transferred to the FBI. The record also shows that Grassi then informed Petitioners Walter and Sanders that the films were in the FBI's possession. Furthermore, I believe Petitioner Sanders testified or there was testimony to the effect that Petitioner Sanders informed his employees to destroy any bills of lading or other documents that would connect him or the corporations to these films.

In response to Mr. Justice Powell's question --

QUESTION: Do you suggest that there was some kind of a constructive abandonment?

MR. SCHULDER: Well, part of our Fourth Amendment argument is that Petitioners essentially relinquished or abandoned any reasonable expectation of privacy in the shipment of films. But we don't seek to use their destruction of bills of lading or other documents to support that, because that occurred after the films were transferred to the Government.

Mr. Justice Powell asked whether there is any evidence that Petitioners made a conscious decision not to demand the films from the FBI. Well, there may not be testimony to that effect but I believe the record of the suppression hearing indicates that Petitioner Sanders' attorney, Mr. Zell, candidly explained to the District Court that the reason that Petitioner did not come forward to claim

the film was that he did not want to identify himself to the Government and connect himself with those films. So that it seems clear that the failure to request an adversary hearing rests entirely on Petitioners. They had actual notice that the Government had the films and yet they didn't come forward and make any request either for return of the property or for an adversary judicial determination of obscenity.

QUESTION: You think then that the Government or the FBI could just have kept the films and never done anything with them? They didn't belong to the FBI and the shipping didn't belong to the Leggs Company from where the --

MR. SCHULDER: I believe that the First Amendment would not have required the Government to do anything.

QUESTION: I didn't ask you about the First Amendment particularly. I just said in general was the United States entitled to keep these films.

MR. SCHULDER: I believe so. Unless there was a request for their return by someone who had a --

QUESTION: You just generally are a repository for unclaimed goods at shipping lines or what?

MR. SCHULDER: No, not necessarily. But the Government --

QUESTION: Well, you know where they came from. You know what shipping company had them, didn't you?

MR. SCHULDER: That is correct.

QUESTION: What business was it of yours to keep the property?

MR. SCHULDER: Well, the Government kept the films as evidence in a criminal investigation and prosecution.

QUESTION: Well, I know. But that is after you thought they were evidence, after you had looked at them.

QUESTION: Would they not be subject to an action in conversion if the Petitioners had wanted to bring such an action?

MR. SCHULDER: That is possible, Your Honor. I don't really --

QUESTION: Taking of property without compensation?

MR. SCHULDER: I assume so, I don't really know the answer to that question.

QUESTION: I can't conceive of a procedure by which you would just keep property and not prosecute or do anything with it.

MR. SCHULDER: Well, what occurred in this case was that the Government did prosecute and initiate charges.

QUESTION: But the question was was it possible that you could just keep it and not do anything with it. And you said they could. And I don't see how you could keep it and not do anything with it.

MR. SCHULDER: Well, I assume unless a claim could be made --

QUESTION: And then you tell me where you would keep it.

MR. SCHULDER: I assume that unless a claim had been made for these goods the Government could have either kept it or used it as evidence to initiate a prosecution.

QUESTION: Well, how could they just keep it?

QUESTION: Well, was there a claim made?

MR. SCHULDER: Well, there was no claim made until after indictment.

QUESTION: Well, that goes to the common law, doesn't it, as to whether someone to whom goods are delivered who does not own the goods is obligated to return them to someone he knows, whether a demand has to be made and that sort of thing. That is more a civil law, that type of question.

MR. SCHULDER: That is correct; that is correct, Your Honor.

I would like to turn now to the suppression issue that has been raised. As far as the other issues we have divided the questions in this case into two general categories for purposes of convenience. The first deals with the question whether Petitioners may seek suppression of the films because of alleged violations of the Fourth and First Amendments.

And the second category of issues we place within the District Court's conduct of the trial referring to jury instructions, jury voir dire scienter issue and as to these

latter issues we essentially rely on our brief. We begin with the Fourth Amendment claims that are raised by petitioners. They argue that the acquisition of the films from Leggs and the subsequent inspection of the films by the Government violated their rights under the Fourth Amendment and require application of the exclusionary rule in this case.

At the outset we would like to note that only the individual petitioners here, Walter and Sanders, may properly raise this issue before the Court. As the Court of Appeals noted the corporate petitioners, that is Trans-World American and Gulf Coast News never moved for suppression of these films from evidence in the District Court. They therefore waived any right to suppression under Rule 12 of the Rules of Criminal Procedure and we submit that they are foreclosed from raising the suppression issue here.

At least since the Court's decision in Katz v. the United States the touchstone of the Court's analysis in the Fourth Amendment area has been whether an individual's legitimate expectation of privacy has been invaded by an unreasonable governmental intrustion. A recurrent theme of our Fourth Amendment analysis in this case is that Petitioners Walter and Sanders did not have an expectation of privacy protected by the Fourth Amendment with respect to the packages of films. What actually occurred here was that Petitioners used the common carrier to ship a large quantity

of pornographic films across State lines using fictitious names for both the shipper and the consignee and giving a false address for the shipper and no address for the consignee. Under these circumstances we submit Petitioners knew or should have known that the shipment might inadvertently come into the possession of an innocent third party, in this case a legitimate business, Leggs Hosiery Company.

It was also foreseeable and Petitioners assumed a risk that once Leggs inspected the contents of the package they would contact law enforcement authorities and on their own initiative turn the shipment over to the Government for possible prosecution. The fact that Petitioners may have obtained a property interest in these goods does not affect the Fourth Amendment analysis in this particular case because we submit they had no legitimate expectation of privacy with respect to the films.

Now, it may be that if Petitioners had chosen to possess these films at home and to use them they would be protected.

QUESTION: Well, what if had them in a commercial establishment and had them on the shelves for sale?

MR. SCHULDER: If they had them in a commercial establishment for sale there would be no expectation of privacy in the contents of the films necessarily. After all --

QUESTION: But until you had a proceeding and had

then declared to be obscene finally, you couldn't take out of circulation all copies of the film. Maybe you could have one of them for evidence.

MR. SCHULDER: Well, clearly the Government could not seize the films from a commercial establishment without a warrant issued by a neutral magistrate and a subsequent determination at the request of the bookstore or establishment owner for a determination of obscenity under the Heller case.

But as far as any claim of privacy is concerned with respect to the films, we don't see that there is any special privacy claim simply because they may argue there would be a First Amendment protection involved here.

QUESTION: Well, I suppose part of the suppression argument is based on the First Amendment.

MR. SCHULDER: That is correct, part of their First Amendment argument is based on the First Amendment. But we submit that before you even analyze the case in terms of the First Amendment and Fourth Amendment interplay you first have to make a determination whether the Fourth Amendment applies at all.

QUESTION: Suppose what you had seized from Leggs or that you had taken deliver of from Leggs was a locked trunk and you had probable cause you thought to believe that it conbained obscene films. Could you open the box

without a warrant?

MR. SCHULDER: Well, for a locked trunk you would be in a situation very similar to the Chadwick and Sanders situation.

QUESTION: Well, what about -- could you tell what these films were without screening them?

MR. SCHULDER: Well, it was clear from the exteriors of the individual film cartons what the films in fact depicted; the cartons gave graphic and detailed descriptions of the action portrayed in the films. So that clearly you could tell by looking at the cartons themselves what was inside the carton.

QUESTION: And so you didn't need to screen them; but you did, I suppose.

MR. SCHULDER: Well, we submit that the screening itself did not amount to a search simply because there was no longer any expectation of privacy with respect to --

QUESTION: You think that because the cartons indicated to you that the films were obscene that just because of your own determination without submission to a judge or anybody else you were entitled to hold all copies of the film?

MR. SCHULDER: Not exactly. We are not --

QUESTION: Well, what is your exact claim?

MR. SCHULDER: Claim that the contents or the

descriptions on the boxes gave the Government probable cause to believe the films were obscene.

QUESTION: In your judgment, in the judgment of the FBI.

MR. SCHULDER: The argument is not probable cause but it is a lack of a legitimate expectation of privacy in the contents of the film.

QUESTION: You said it gave you probable cause to keep them, to believe that they were obscene; is that it?

MR. SCHULDER: No, we are not saying that at all. It is as if -- the same argument would be made if we had a transparent plastic bag containing white powder which the police suspected was drugs. We submit that there would be no legitimate expectation of privacy in the contents of that bag and that the police would not need a warrant to open the bag and inspect the contents and perhaps test the contents in the laboratory.

QUESTION: Suppose that as a matter of law the Government should have returned all but 25 samples as was intimated in Heller. What effect would that have on the 25 that were retained?

MR. SCHULDER: Well, our submission is that the 25 that were retained would still be admissible in evidence as --

QUESTION: The Government might be subject to some kind of a civil claim for --

MR. SCHULDER: Perhaps. Perhaps. But that should not affect the right of the Government to go ahead with a criminal prosecution. The Courts of Appeal are unanimous in holding that any prior restraint by the Government in holding onto films without obtaining an adversary proceeding with respect to obscenity does not require suppression of films from evidence in a criminal prosecution.

QUESTION: So this is sort of a claim, an argument you just had what was obviously or what gave you probable cause to believe was obscene material in violation of the law and it had been delivered to you and you could keep it. You don't think that the case is any different than if you -- just because the First Amendment is involved you don't think there is any difference in your plastic bag and drugs.

MR. SCHULDER: Well, Mr. Justice White, we don't rely on the plain view doctrine to justify the Government's acquisition of the films.

QUESTION: I know that. But how about keeping it?

MR. SCHULDER: Well, our submission as far as keeping the films is that --

QUESTION: What would you have done -- what would you have done if you -- if after you screened the film it turned out that the designations on the box were completely

false? Suppose that you had screened the films and completely innocent, what would you have done with them: just put them in the basement? Or would you try to give them back to somebody?

MR. SCHULDER: I suppose that the Government -- if the Government were able to discover the true owners of them --

QUESTION: I hope you would.

MR. SCHULDER: -- the Government would have returned them.

QUESTION: Mr. Schulder, could I ask you about the argument that there is no expectation of privacy. As I understand it you make two separate arguments on that point. One is because of the manner the packages were labeled there was never any expectation. They waived their right because it was very probable that some third party would get access to them. Now, if that is true it doesn't matter whether they are guns or personal business records, anything like that. Somebody just sends a package to a fictitious person in a way that there is a fair chance it will get lost and gives up all Fourth Amendment interest in it.

Do you have any authority for that proposition? That is a rather extreme position. I just wonder --

MR. SCHULDER: Well, we have no specific authority

with respect to precisely this type of situation but we have analogized in our brief to other --

QUESTION: All right.

MR. SCHULDER: -- situations.

QUESTION: Your second theory, which is quite different, is that there was sufficient indicia of what the contents were on the outside of the box to give up any expectation of privacy.

Now, on that theory I suppose if someone shipped a briefcase in which he said on the outside of it: "Records of Transaction in Swiss Bank Account Between Mr. A and Mr. B," who had previously denied they ever had a Swiss bank account, you could open that without a warrant? Because by the outside of it you know the contents had something illegal in it, or you would have probable cause to believe they had.

MR. SCHULDER: Well, as I said in addressing Mr. Justice White's question I am not sure that probable cause is really the --

QUESTION: Well, your submission I take it is. But if you have probable cause from the outside of a package to know the contents are illegal you can go ahead and open it without a warrant.

MR. SCHULDER: That is correct.

QUESTION: Well, then, if you don't have probable cause you couldn't get a warrant. So that absolutely removes

the requirement of a warrant from ever inspecting parcels that come into your possession, that you don't expect to get. You would never need a warrant. On the one hand if you don't have probable cause you can't get a warrant. If you do have probable cause you are saying you don't need a warrant.

MR. SCHULDER: Well, our submission is that once the container clearly demonstrates --

QUESTION: By "clearly demonstrate," do you mean that demonstrates more clearly than just giving probable cause? Clearly it didn't have proof beyond reasonable doubt or you never would have had to view the films. You viewed them to be sure they were what you thought they were and then they would be proof of guilt. Now, what you are saying is, as I understand your position, is that probable cause dispenses with the need of a warrant.

MR. SCHULDER: That is not exactly what we are saying. In fact we state in our brief that if we discuss the Chadwick and Sanders cases, that clearly in Chadwick and Sanders there was probable cause to believe that the luggage in those cases contained marijuana. At least in Chadwick, the dog sniffing out the suitcase gave a clear indication --

QUESTION: The problem caused here is in labels on the packages themselves. That is what -- you know, the

cartoons and all that.

That is what justifies, as I understand your position, your viewing them is just like opening another package, I suppose. I am not quite clear; I am not sure I understand your theory.

MR. SCHULDER: Well, there are two related strains to what we are saying here. The first is that film cartons generally are not like luggage, not like a closed foot locker in Chadwick or a suitcase in Sanders. They are not ordinarily repositories for personal effects.

And second, the exteriors of these particular containers indicated clearly just as if they had been transparent bags showing what was inside what exactly was contained within the containers.

QUESTION: Well, but your analogy to the transparent bag, how clearly did it indicate; did it indicate beyond a reasonable doubt or did it give you probable cause to know what was in it? Or is there some middle ground; are we developing a new concept of something more than probable cause and something less than evidence sufficient to convict?

MR. SCHULDER: I am not really certain what the answer is and we are not --

QUESTION: Are the items which appear in the footnotes of the Court of Appeals opinion the descriptions that

were found?

MR. SCHULDER: That is correct. The Court of Appeals has a footnote --

QUESTION: Did that leave anyone in doubt about the pornographic nature of the materials?

MR. SCHULDER: We don't believe so.

QUESTION: Well, isn't that the answer to the question, then? That the description gave probable cause, the description prepared by the Petitioners of their own materials, gave probable cause in abundance.

MR. SCHULDER: The description gave probable cause or perhaps more than probable cause as to what was contained inside of these film cartons.

QUESTION: Counsel, may I ask this question: Wouldn't all of these close and difficult Fourth Amendment questions evaporate if the Government had reasonable cause to believe that the Petitioners here had consented to the FBI keeping the films and looking at them?

If the Petitioners had been standing beside the FBI agent and said nothing when he opened the packages and looked at the film, would that constitute consent? Now you infer that consent existed?

MR. SCHULDER: Not necessarily.

QUESTION: Why not? Would you stand by and allow somebody to open something in which you had a reasonable

expectation of privacy and say nothing?

MR. SCHULDER: Well, which containers are you talking about?

QUESTION: I am talking about anything that --

MR. SCHULDER: Well, we have two types of containers. We have the packages in which individual --

QUESTION: I am talking about let us say viewing the film.

MR. SCHULDER: We submit that the consent of these Petitioners is irrelevant in terms of --

QUESTION: Why do you make that -- they did consent it is --

MR. SCHULDER: If they did consent we don't have to reach the other --

QUESTION: Well, don't you agree that consent may be implied as well as expressed?

MR. SCHULDER: Yes, we do.

QUESTION: Well, I wonder why you don't argue that. You told us at the outset of your argument that Petitioners knew the FBI had the film and that counsel said at the suppression hearing that the reason they hadn't claimed them was his clients did not want to get implicated into this.

MR. SCHULDER: That is correct.

But your question had to do with the viewing of the film.

QUESTION: Well, I would apply it to both, keeping them and viewing them. Is it unlikely that the FBI would keep them

without viewing them?

MR. SCHULDER: No, not at all. The viewing may have proceeded in this case the time period at which the Petitioners actually received notice that the Government had possession of the films. But we would argue certainly that once they did have notice and they didn't come forward and request the films or claim them they, in effect, did consent to the Government's keeping them. Or, putting it another way, they abandoned or relinquished their interest in the films to that extent.

QUESTION: Right.

But a short answer to my first question is that if we conclude from the record that there was implied consent (1) to retaining the films and (2) to viewing them, that answers all the other questions.

MR. SCHULDER: I believe so.

QUESTION: All those questions about the difficult Fourth Amendment issues in this case, would you agree with me there isn't as bright a line as might be implied between the simple suitcase or steamer trunk which one has reason to believe might contain contraband and say a pistol holster with the outlines of a pistol in it,aas to whether that may or may not be plain view. You can't actually see the pistol and yet the chances are 99 out of 100 that it does have a pistol?

MR. SCHULDER: Certainly. Certainly.

QUESTION: Mr. Schulder, assume that mis-delivery occurred

of a carton in the same fashion you had here and it got into the hands of the FBI and the carton had a label on it. This box contains the records of my purchases and sales of firearms and somebody's name on the bottom of it and the man was not a registered firearm dealer.

Could the Government open that carton without a warrant, in your view?

MR. SCHULDER: In our view, yes.

QUESTION: On what theory, because there is probable cause to believe it contained it?

MR. SCHULDER: Well, the exterior of the carton itself provides ample probable cause, ample basis.

QUESTION: And all the Government needs to open a container that comes into its possession is probable cause, that is your submission?

MR. SCHULDER: Well, I don't want to take that position, because the Court explicitly rejected it in Chadwick.

QUESTION: Well, then, it seems to me what you are saying in substance is that your position in the final analysis rests precisely on the grounds rejected in Chadwick. That is what what I am trying to find out.

MR. SCHULDER: I don't think so. As I was trying to say earlier, in Chadwick the exteriors of the --

QUESTION: Well, I have given you an example of a carton that had exteriors that gave you probable cause to believe

there was evidence of illegal gun transactions within the container. I am asking if you need a warrant. And you said, no, you don't. I am not quite sure how you square that with Chadwick.

MR. SCHULDER: Because when the person places his items within that container and writes on the outside what the container actually contains he is in effect opening up the container to anyone who wants to look at the contents.

QUESTION: What if he puts right below that "no stranger may open, third parties please do not open, this notice for my secretary's guidance," or something like that?

You can inadvertently make known what it is inside something that you don't intend to be public.

MR. SCHULDER: That is correct but there has to be a clear enough indication that the person is retaining some kind of privacy interest in the contents of the package or container.

QUESTION: In the container.

Well ---

MR. SCHULDER: The question is whether there was a sufficient indication that he wished to retain privacy interest in your hypothetical. In our case we submit there clearly was no such indication.

QUESTION: Well, these descriptions on these films went considerably beyond simply saying these are guns purchased.

They were explicit in describing the actual content of the film if the Fifth Circuit accurately recited them the footnotes.

MR. SCHULDER: That is correct and I believe counsel for one of Petitioners has indicated that the descriptions were in fact accurate in terms of what actions were portrayed on the films.

QUESTION: Well, that gives -- certainly provides probable cause but that is not the end of the problem, as my brother brother Stevens has indicated in his questions.

MR. SCHULDER: Well, we submit though that --

QUESTION: I assume there is ample probable cause as the question the Chief Justice indicated that there was but that is not the end of the problem.

MR. SCHULDER: But here the information that gave the agents probable cause was placed either by Petitioners or it was left by Petitioners on the outside of the container.

QUESTION: Well --

MR. SCHULDER: And by that we submit by doing that, by allowing these films to be shipped with that explicit description on the covers they, in effect, abandoned any privacy interest in the --

QUESTION: They abandoned the films also as well as consented.

MR. SCHULDER: That is correct.

QUESTION: And then the problems would disappear just as they would have had they consented to the search?

MR. SCHULDER: Certainly.

QUESTION: But you certainly don't claim that they abandoned any property interest. They claimed their film and wanted it suppressed and wanted it back.

MR. SCHULDER: Well, they didn't claim the film until after they were indicted.

QUESTION: Well, all I say is they didn't abandon their property interest.

MR. SCHULDER: Well, so far as the Government knew, prior to the indictment or prior to the motion to suppress, by all appearances it did seem as if they had abandoned any --

QUESTION: That was more than a year, was it, the time lapse from the time the FBI got them until they demanded them back?

MR. SCHULDER: That is correct.

QUESTION: Nearly two years as I recall the record.

MR. SCHULDER: Well, it is nearly two years between the initial shipment and the actual trial itself. There were almost 20 months between the time that Petitioners discovered that the Government had possession of the films and the time they actually made any kind of request for either return of the films or an adversary hearing.

QUESTION: At the time of -- was there a suppression motion?

MR. SCHULDER: Yes.

QUESTION: At that time did the judge determine that there was probable cause to believe the films were obscene?

MR. SCHULDER: Well, the judge did not make a determination on the obscenity question.

QUESTION: Well, was there ever prior to conviction any judicial -- any searching judicial look at the film?

MR. SCHULDER: What happened was the suppression hearing concluded the day before trial and the District Court stated on the record that since the Court did not believe that there was any prior restraint here, since there was no evidence that Petitioners didn't have other copies of the films and that there was no evidence that the films were being --

QUESTION: How many copies did you have of all these films?

MR. SCHULDER: There were 871.

QUESTION: Of the same film or --

MR. SCHULDER: Well, there were 25 different titles and so most of them were in fact duplicates.

QUESTION: Yes.

MR. SCHULDER: But what the District Court did was it decided that since the trial was to commence the following

day it would await the trial before any determination of obscenity would take place. And Petitioners so far as I believe the record shows did not make any objection to that disposition.

Thank you.

QUESTION: How many of the titles were -- of the 25 titles were determined to be obscene? Were they all? I can't remember.

MR. SCHULDER: Well, the indictment charged five.

QUESTION: Five was --

MR. SCHULDER: Yes.

QUESTION: We don't know about the other 20, then?

MR. SCHULDER: No. Thank you.

REBUTTAL ARGUMENT OF W. MICHAEL MAYCOCK, ESQ.,

ON BEHALF OF THE PETITIONERS

QUESTION: Will you tell us about the descriptive matter that is in the Footnote 4 on page 10 of the Court's opinion in your appendix. Is that the material that would be made available to the customers on the shelf presumably to induce them to buy the film?

MR. MAYOCK: What was contained on the box covers was to be viewed by potential customers, yes, Mr. Chief Justice.

QUESTION: This was the come on to get them interested in the contents of the package?

MR. MAYOCK: It was.

QUESTION: Did you say that it overstated or understated?

MR. MAYOCK: I suppose like anything else, like the expression "You can't judge a book by its cover," I think the film would have to speak for itself as to whether it was an overstatement or understatement. Some may be and some might not be.

What I would like to address very briefly is the issue of implied consent, to suggest that the record there is ample evidence that the Petitioners herein exercised every reasonable means to try to retrieve the particular films as soon as they discovered they had been misdirected. First of all, as far as their legitimate expectation of privacy in relationship to this I must say that what we have is a situation analagous to one sending a letter to one's self and that the same individuals are the consignor and the consignee in this particular situation, that they wrapped the boxes very carefully, that they had made previous shipments using the same name, Leggs, Inc., that they had no reason to expect that a person who (1) claimed no entitlement to the shipment itself and (2) refused to pay for it and so indicated, as the testimony of Mr. Fox from Leggs Products, Inc. indicates. Moreover, I would suggest that Leggs Products indicated that this is a rather unusual shipment.

Then we have a five-day hiatus between the Friday

when the shipment is mis-delivered to the Wednesday when the FBI finally stops by Leggs Products and picks them up. During the intervening time people from the Petitioners' offices have gone to the various terminuses of Greyhound, both the originating and ending terminus, they have made contact with individuals trying to run down the packages --

QUESTION: As I understand it on the third call the woman finally left her name but on no calls did they leave their address where they could be reached.

MR. MAYOCK: That I believe is what the record reflects, Mr. Justice Rehnquist. But I would suggest that there is also evidence on the record indicating that the FBI was the one in fact supervising the activity that occurred in that they were telling people such as Mr. Askew at the Greyhound terminus to find out the names and addresses of these people, that they were advising people at Leggs Products, Inc. not to tell the defendants in this case that in fact the FBI had acquired possession of the property and so in sum I think what we have is a situation presenting an earnest, good faith attempb by the Petitioners to try to get their property back.

QUESTION: When did the Petitioners demand from the FBI the return of the film?

MR. MAYOCK: Approximately two years after it was taken from them at the time of the trial.

QUESTION: And you could be -- could it be said that up to that time you had abandoned it?

MR. MAYOCK: No, I don't believe that that was the case. I think perhaps --

QUESTION: What was it?

MR. MAYOCK: The situation was --

QUESTION: Lack of interest in it?

MR. MAYOCK: Well, perhaps lack of interest in being prosecuted for what turned out to be a Federal case.

QUESTION: Abandonment would stop prosecution too, wouldn't it?

MR. MAYOCK: I don't know if that would be the case.

QUESTION: Well, wasn't that what you were working on?

MR. MAYOCK: That it was abandoned?

QUESTION: Yes. Weren't you trying to prevent prosecution by abandoning it?

MR. MAYOCK: To the extent that until such time I guess as the prosecution was initiated it would be unclaimed.

QUESTION: Why were the bills of lading instructed to be destroyed?

MR. MAYOCK: They were not. I think that is a misstatement. I looked particularly in the record in the parts cited by the Government and I could not find anything reflect-

ing that the bills of lading had been destroyed.

QUESTION: Or that there were any instructions to that effect?

MR. MAYOCK: That is correct.

What I would suggest is that what we have here is a clear situation involving a prior restraint where the burden is attempted to be placed upon the Petitioners to demand property of which they have been dispossessed and that all notions of procedural due process would indicate that that was inappropriate under these circumstances.

Thank you.

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

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