OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CLYDE OSBORNE, Appellant V. OHIO

CASE NO: 88-5986

PLACE: Washington, D.C.

DATE: December 5, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

CLYDE OSBORNE,

Appellant

v. : No. 88-5986

OHIO

Washington, D.C.

Tuesday, December 5, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

S. ADELE SHANK, ESQ., Columbus, Ohio; on behalf of the Appellant.

RONALD J. O'BRIEN, ESQ., City Attorney, Columbus, Ohio; on behalf of the Appellee.

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PROCEEDINGS

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 88-5986, Clyde Osborne v. Ohio.

Ms. Shank.

ORAL ARGUMENT OF S. ADELE SHANK

ON BEHALF OF THE APPELLANT

MS. SHANK: Mr. Chief Justice, and may it please Court:

The issues in the present case are three. First, can an unconstitutionally, overbroad statute be construed on appeal and then retroactively applied to affirm the Appellant's conviction?

Second, may this state, consistent with First Amendment rights, prohibit the private, in-home possession of depictions of child nudity, where the nudity consists of either a lewd exhibition or involves a graphic focus on the genitals?

And third, has the Ohio Supreme Court successfully limited Ohio's child nudity statute to bring it within constitutional limitations?

Clyde Osborne was charged under an Ohio statute prohibiting the possession of pictures of nude children. This statute was unconstitutionally overbroad on its face and as applied to Mr. Osborne. The statute prohibited

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simple possession and mere viewing.

It failed to include an element of scienter, as required by this Court's decisions in Smith v. California and New York v. Ferber. It failed to specify the age below which children could not be depicted, also as required by New York v. Ferber, and it prohibited depictions of mere nudity, contrary to this Court's decisions in Erznoznik v. Jacksonville and Ferber.

Mr. Osborne challenged the constitutionality of the statute prior to trial. The court denied his motion, and the trial proceeded under the statute as written. Only at the close of evidence did the trial court rule that the statute applied to depictions of those under the age of 18.

Mr. Osborne was convicted.

On appeal, the Tenth District Court of Appeals affirmed 18 as the age of minority, and construed nudity to mean a lewd exhibition of the genitals.

The Ohio Supreme Court redefined nudity on review to drop the requirement that genitalia by depicted; nudity now means, under that court's interpretation, either a lewd exhibition or, in the alternative, a depiction involving a graphic focus on the genitals. The court added an element of scienter, recklessness, and again affirmed that 18 is the upper limit of the age of

minority.

Mr. Osborne's conviction was affirmed under this new construction and he moved for rehearing on the ground that this retroactive conviction violated his right to due process. His motion was denied.

Clyde Osborne stands today convicted under a statute wholly different from the one under which he was charged and tried. And this is the basis of our first issue.

The statute in this case, as I previously noted, was unconstitutional on its face and due to its unconstitutionality was invalid. A conviction obtained under such a statute is a nullity, and the conviction cannot be brought to life by a subsequent constitutionalizing construction of the statute.

This principle is well established in precedent from this Court. In Lovell v. Griffin, Thornhill v. Alabama, and Shuttlesworth v. BIrmingham, this Court has held that an unconstitutional statute is in fact invalid on its face, that no one is required to comply with such a statute, and that a subsequent construction will not succeed in criminalizing preconstruction conduct.

This is, in fact, the essence of the overbreadth doctrine.

QUESTION: How old was the child in question

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here?

MS. SHANK: There was hearsay testimony that the child was either 13 or 14. However, no finding of fact on that issue was made, and the jury was instructed only to find that the child was under the age of 18, Your Honor.

QUESTION: Any question that what Mr. Osborne -- Mr. Osborne knew the age?

MS. SHANK: Your Honor, Mr. Osborne did testify that he had been told that the age of the child was 14, however, he had no actual or personal knowledge, and this was brought out in the course of the presentation of evidence at trial.

As I was saying, the essence of the overbreadth doctrine is that when a statute is unconstitutional on its face and one challenges the unconstitutionality of that statute, when the challenge has been -- successful, the appellant cannot then be convicted under new and constitutionalizing construction of the statute.

QUESTION: Well, correct me if I'm wrong, please, but those cases were not ones, were they, in which this Court or any other court held they were susceptible of being sustained under a narrowing construction?

MS. SHANK: Well, Your Honor --

QUESTION: Or am I incorrect about that?

MS. SHANK: In Shuttlesworth v. Birmingham, the

court had in effect already given a narrowing construction -- this is the second Shuttlesworth v. Birmingham, because there are two of the same name -- had already been construed by the court by the time -- by the lower state court by the time it reached this Court, and the Court accepted, for purposes of that case, that the new construction was constitutional, but still held that conviction under the old unconstitutional statute was not allowable.

QUESTION: But -- but that wasn't because the statute was a nullity, was it?

MS. SHANK: Yes, Your Honor. The statute was invalid on its face. The court didn't --

QUESTION: Well, did -- did -- the court held it had to be reenacted by the legislature?

MS. SHANK: No, because, in the interim, it has been subjected to a new constitutionalizing construction, which the court --

QUESTION: Well, then, if you say -- then, if you say it a nullity, it seems to me that's a term that's not -- the definition of which is not self-evident. It certainly wasn't a nullity in the sense that the legislature didn't have to reenact it.

MS. SHANK: Well, I think one of the clear points that demonstrates that it was a nullity --

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QUESTION: I am right about that.

MS. SHANK: Excuse me, Your Honor?

QUESTION: The legislature did not have to reenact it; it was still on the books with the narrowing construction after the state narrowed it.

MS. SHANK: That's true. However, the Court did say in Shuttlesworth that under the statute, as it was written in its unconstitutional form, even though Shuttlesworth had applied for a permit, that he had been under no obligation to do so because of the statute's invalidity. And it would completely unfair to say that a person had no obligation to comply with the statute because it was invalid, and then to subject them to a conviction, simply because it had later on been construed.

And so I think the fact that that -- there was no requirement to comply with the invalid statute is a clear indication that it was in fact a nullity, because the Court wouldn't say you didn't have to comply with a valid statute.

In addition to -- excuse me, Your Honors -- in addition --

QUESTION: Excuse me. That -- that means that the only way a statute can ever be narrowed, the only way you can ever give a narrowing construction to a statute is to have a prosecution of someone who -- who is not smart

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enough to challenge it facially on constitutional grounds, or perhaps who is, but the court -- the court throws out the case against that defendant, because the statute really doesn't mean what it seems to mean. Is that the only way you can get a narrowing construction?

You see, I'm worried about what you're saying. I don't understand how it -- how -- how can state courts given narrowing constructions, then, if, whenever they give one, the defendant gets off? Then it's not a holding. Then it's not a holding at all, it's just dictum.

MS. SHANK: Well, I think that the court can do just what you said and say we cannot prosecute this particular defendant because the statute is unconstitutional.

QUESTION: And all the rest is dictum?

MS. SHANK: I don't think that that would necessarily be true, because oftentimes the courts --

QUESTION: No, the -- the court then goes on and says, but, if you bring us another defendant, right --

MS. SHANK: That -- this is how --

QUESTION: -- under this same statute, in the future, this is how we would interpret it. And that new defendant is on -- is on notice. Isn't that -- all that dictum?

MS. SHANK: Well, but, Your Honor, it's no different than when the court makes that same determination at the appellate level. It doesn't mean that the decision is mere dictum, it stills says that the defendant is excused from liability and the court's holding is still the next interpretation of the statute that binds everybody else who is prosecuted.

In addition, if I understood your question, I think there is a different kind of situation where the court can narrow. And that is the one that is frequently cited in Dombrowski, the famous footnote, Dombrowski Number 7. And that is where the essential problem with the statute is not its overbreadth, but the overriding problem with the statute is its vagueness.

And in those circumstances, that's the kind of case where this Court has held many times that that person who falls within the hard core of what the statute addresses doesn't have -- can't succeed under a narrowing type of construction, but --

QUESTION: Ms. Shank, in -- in your view, could the State of Ohio constitutionally apply this statute, now that the supreme court has construed it, to another defendant?

MS. SHANK: Well, Your Honor, our third issue is that we do think that it's still prescribes protected

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materials and that it is -- fails to serve a compelling state interest. But were it, now, successfully made constitutional, yes, it would be applicable to those in the future.

QUESTION: Well, so, in that sense, as Justice Kennedy points out, there may be some problem with calling it a nullity, if it can be applied to people in the future after the living -- after the limiting construction?

MS. SHANK: I understand what you're saying, Your Honor, and I thought about that in terms of whether or not it would be better to try to address the question of void/voidable, but this Court's own language has always been either that it was invalid or that the statute itself was void.

And I think that that makes the most sense, in terms of accepting the Federal Constitution as the basis upon which all laws must be built. If it violates that foundation of the Constitution, it should not have any validity.

And so from that perspective, I think that -- that void is an appropriate term.

And I wanted to point out, Your Honors, that the policy behind allowing this is truly the core of the overbreadth doctrine, which allows one, whose own -- whose own conduct may not be protected, to challenge a statute.

Because if one, whose own conduct wasn't protected, could not challenge a statute for its overbreadth and succeed, if in fact all that he could achieve would be a narrowing construction and then a subsequent conviction, there would be no point to him ever raising the challenge.

QUESTION: It's a possession statute, right?

MS. SHANK: Yes, Your Honor, it is.

QUESTION: Well, is it -- is it clear that we would apply the overbreadth doctrine to this? Is -- what is -- what is the expression? What is the First Amendment expression protected by this?

MS. SHANK: What's being prohibited --

QUESTION: He's not expressing this photograph to anybody, it's -- it's his own photograph, he could have taken it himself for his own delight, right?

MS. SHANK: That's true, but it's just like a book that you buy for yourself or a diary that you write for yourself, it's -- it's a communication that you hold.

QUESTION: To yourself?

MS. SHANK: Well, certainly. And when one holds a book and then subsequently reads it, it's still a communication. And when one holds a picture and subsequently views it, it's still a communication.

QUESTION: If there were restrictions upon the distribution of that book to you, those restrictions would

relate to the First Amendment, to communication. But if the restriction is just something you do in the privacy of your own room, I don't see how that's a First Amendment communication interest and how the overbreadth doctrine would even apply to it.

MS. SHANK: Well, Your Honor, I think that anything that one uses -- and now we're moving towards the issue of the privacy interest in your own home --

QUESTION: Right.

MS. SHANK: -- anything that one uses in one's own home, whether you want to characterize it as eliciting feelings or as being communicative or generating new thought processes, it's all protected by the First Amendment. As this Court said in Stanley v. Georgia, the state has no interest in controlling the thoughts of any person or controlling what one person has -- or in even viewing into the contents of one's library.

And I think under that analysis, it definitely is a First Amendment, protected-type of communication.

QUESTION: A lot of water has flowed under the bridge since Stanley, Ms. Shank. You know the Court really narrowed Stanley (inaudible) and cases like that. And -- and here the state, I would think, has considerable interest in preventing any access to child pornography in a way it wouldn't have to just obscenity.

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MS. SHANK: Well, one of the things about this case is I don't believe that the state has demonstrated any kind of compelling interest in regulating the materials addressed in this statute, at least with regard to those that depict children under the age of 18 and over the age of 15.

QUESTION: Well, why does the state -- why does the state have to demonstrate a compelling interest?

MS. SHANK: Well, even if the Court wanted to say it was merely substantial, but we are talking about fundamental constitutionally guaranteed rights --

QUESTION: A fundamental, constitutionally guaranteed to have child pornography?

MS. SHANK: No, it's not a right to child pornography. It's a right to have -- to receive communications, it's the right to privacy in your home --

QUESTION: Well, but -- but you're -- in this case, this man was convicted of having pictures of nude, minor males in his possession, so as to apply it to him, it's a right to receive child pornography, isn't it?

MS. SHANK: It would be -- that -- that would be included within that broad right, yes, Your Honor, it would be.

QUESTION: That's -- that's the interest the state has to show some -- you say a compelling interest,

but perhaps that isn't the test; that's the interest the state is protecting here.

MS. SHANK: Well, the state does claim to be protecting its right to stop sexual abuse of children, which it says is necessarily involved in production of these types of pictures. However, the State of Ohio, at least with regard to those over the age of 15, permits sexual conduct.

It's legal for any adult to have sex with a child over the age of 15 in the state. Fifteen is the age of consent, and under Ohio revised code 2907.04, corruption of a minor, adults may have sexual conduct -- that is, any kind of sexual activity with one 15 years of age or older.

And I think before the state can claim that it has an interest in stopping sexual abuse of children by invading people's homes and privacy and controlling the regulating -- regulating this type of depiction, it first must try to stop what it alleges to have a compelling state interest in stopping, that is, sexual abuse, by making that actual conduct illegal.

QUESTION: I think having -- having sexual relations with a -- with -- with a minor under -- what is it, under -- 15 is the age?

MS. SHANK: Yes.

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QUESTION: I mean, I assume that if you didn't make 15 the age, or you would -- you might be convicting many 18-year-olds for having sexual relations with -- with 17-year-olds. That's quite a different interest in protecting minors than the interest in protecting minors from being used as the -- as the subject matter of pornographic distributions.

I mean, isn't that -- isn't that a different interest?

MS. SHANK: Well, it is a different interest, and the states recognize that different interest in other statutes. There is a statute that says that you cannot have sexual contact, which is any kind of sexual touching short of intercourse with one who is between the ages of 13 and 15 unless there is a four year or less difference in the age of the older partner and the child contacted.

So when Ohio has chosen to make that kind of age differentiation, that you just mentioned, be critical, they have put it into the statute. That's not what happened with the age of consent. The age of consent statute makes no limitation. Any adult may engage freely in sexual conduct, which is all types of sexual activity, with anyone over the age of 15.

If the State of Ohio, if the general assembly believed that sexual conduct constituted sexual abuse,

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they would have made it illegal to engage in that activity. Trying to then assert a state interest in stopping that activity to justify the regulation of private, in-home possession of such depictions makes no sense, when the state has yet to try to stop the activity by overtly prohibiting it.

QUESTION: I'm saying the activity is different from being in the career of portraying the activity. You can think it is worse to bring a child into the career of being a porno star than you can think it is to have sexual relations with a child on one occasion. Isn't -- isn't that quite a different thing?

MS. SHANK: I see what you're saying, Justice Scalia, and I do think that there's a difference between a commercialized drawing in of a child into a life of pornography and the things that are dealt with in this statute. This statute does not address commercial production, distribution. This statute is completely limitless in terms of the types of materials that can be used.

QUESTION: (Inaudible) but the evil at which it's directed is that. I mean the state asserts that the only way to dry up all of these things, to dry up that kind of activity, child -- the child pornography business, is to simply make it illegal to -- to have this kind of

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material, just -- just as you stop, you know, elephant poaching by making it illegal to have ivory.

MS. SHANK: Well, the state certainly has an obligation, before it starts trying to allege that it's working towards that goal, to make the activity involved in such depictions illegal, and it has not. And it goes much further, it allows all kinds of sexual conduct.

And in addition, if the state truly is interested in stopping that kind of activity, it would not have created the exceptions that exist in this statute. Parents are now permitted to possess depictions of children that are lewd exhibitions or involve a graphic focus on the genitals under the state supreme court's decision.

Parents are now, under this interpretation of the statute, permitted to give consent for the use of their children for the production of this type of material or to give their consent to others possessing it. And the State of -- and the statute, as construed, allows people to keep pictures like this for artistic purposes.

If, in fact, these pictures are of sexual abuse of children, there is no interest that legitimizes letting those exceptions exist.

As this Court said in Florida Star v. B.J.F., when the state creates a statute that is underinclusive

and leaves a broad area of the activity it supposedly has an interest in stopping, unprohibited, the state has demonstrated its lack of a compelling interest in dealing with that subject matter.

And for that reason, I think the State of Ohio has failed to demonstrate that it has a compelling interest either in prohibiting the private, in-home possession of these materials or in prohibiting, in the broader question of the overbreadth of the statute, in bringing it into a narrowly-tailored stance that serves a compelling state interest.

QUESTION: Do you read our cases as saying a compelling state interest is required before the state or the Federal Government may enact a law prohibiting the sale of obscenity?

MS. SHANK: I read Stanley v. Georgia --

QUESTION: I think the answer to that is no, that obscenity is just deemed not to be protected speech.

MS. SHANK: That's true, but I believe that when you go to the point of prohibiting the private, in-home possession, as noted in Stanley v. Georgia, and there, are again attacking or invading the fundamental rights to privacy to receive information and to think thoughts, you have again moved into the area of fundamental rights and a compelling interest is in fact required.

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Now, again, and the third issue in our case is that we do not believe that these pictures fall within a category of unprotected speech. In New York v. Ferber, this Court said that in order to constitute child pornography, the depictions must include characterization -- pictures of sexual conduct. That's not required in this statute.

And depictions of sexual conduct or sexual activity of any kind are regulated by two other statutes, the two that immediately precede this one, Ohio Revised Code 2907.321 and 322.

In fact, these still regulate depictions of mere nudity.

Now, this Court in Ferber did say that graphic or -- lewd exhibitions of the genitals, so long as that phrase was not construed too broadly, would qualify as sexual conduct. But in this case, the Ohio Supreme Court has limited the requirement that genitalia be depicted, and this construction is the only statute in the many that deal with this type of material that doesn't at least require that genitalia be depicted, and for that reason, brought it into the definition of nudity, which is included in 2907.01(H). That includes depictions of breasts, buttocks, the pubic area, as well as genitals.

So even under the state supreme court's statute

and even under the broadest characterization of the kind of materials this court felt could be characterized as unprotected in New York v. Ferber, this statute falls.

And as I previously pointed, out, this statute does not address depictions that are commercial in nature. It also includes mere possession and viewing -- simple viewing of these photographs. And Ferber dealt with the production and distribution of this type of material.

For that reason, we do not believe that it falls within the Ferber definition, and as I previously pointed out, I do not think that it fits the state -- that the state has demonstrated a compelling state interest in prohibiting the possession of these materials.

I reserve the rest of my time for rebuttal.

QUESTION: Very well, Ms. Shank.

Mr. O'Brien, we'll hear from you.

ORAL ARGUMENT OF RONALD J. O'BRIEN

ON BEHALF OF THE APPELLEE

MR. O'BRIEN: Mr. Chief Justice, and may it please the Court:

Ohio has adopted a comprehensive statutory scheme dealing with child pornography, which deals with production, distribution and possession, and it goes on a continuum from material that is involving a minor, whether the material is obscene under Miller, to material that

depicts sexual conduct, typically vaginal intercourse, anal or oral intercourse, and then finally, what's involved in this case, material that depicts child-oriented nudity.

The Ohio Supreme Court, and prior to that, the Tenth District Court of Appeals -- we have ten Ohio appellate judges looking at this statute, and all of them concluding and giving a proper narrowing construction -- the statute -- when you consider the entire scheme in pari materia, when you consider the exceptions and exemptions is -- is directed at the lewd exhibition or the graphic focus on the genitals.

Ferber itself in the New York statute in question in Ferber permits, as a description of unprotected speech as child pornography, lewd exhibition of the genitals.

It's the State's position that the statute, both on its face and as applied, was -- was constitutional with respect to the defendant Osborne.

The statute itself, when you -- when you read it, and the Ohio courts made this clear, is directed at the kind of material the court was concerned with in Ferber and found that to be unprotected speech.

Ohio, along with 18 other states, has also concluded that you need to address this problem not just

with respect to production, not just with respect to distribution, but it's also necessary to get to the point of prohibiting possession of material that fits -- fits the definition, and that possession follows a continuum in those three state statutes, not only with respect to the lewd exhibition of the genitals, but also with respect to the obscene and/or the actual sexual conduct depicted in the -- in the materials.

The state thinks that the defendant in this Court is extending what this Court has repeatedly said should be viewed narrowly, and that is the -- the Stanley decision from 1969. Stanley obviously predated Ferber, and the Court, I think, when the Court factors in the Ferber decision with Stanley, and looking at Stanley itself, it said, where -- where compelling reasons exist, the state can enter into the home and prohibit certain possessory offenses involving printed, filmed or recorded material.

That this case is an exception to Stanley in that regard, that this -- this case is a case that does present compelling reasons, as the Court recognized in the -- in the subsequent Ferber decision.

The child pornography in question, and I think the record in this case amply reflects we're not talking about mere nudity here, we're talking about almost

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gymnastic poses with a young man, which the defendant admitted, and I think in response to one of Justice Blackmun's questions, we should point out the evidence of the defendant's knowledge of this young man -- young man's age, apart from just looking at the photographs themself, was the defendant's admission that when they were given to him, he was told the boy was 14.

On the back of State's Exhibit 1D there is a notation that says "Tommy-13." So the evidence was clear with respect, apart from looking at the photograph, that the evidence was clear that it is a young man. It is the kind of material the Court, and I think the 18 states in addition to Ohio that have prohibited possession, is concerned about.

The gymnastic-type poses involved in this case concentrate graphically on the stretched anal area of the boy, the boy having a -- all parts of his body exposed, his genitalia turgid -- how the defendant himself described it. In one of the photographs there is a dildo which -- which the defendant admitted he recognized as a dildo, which is placed to the man's anus.

So I think when the defendant -- appellant in this court describes the statute as dealing with mere nudity, I think we have to look at it in the context of the material that he was prosecuted for possessing, and

that material I think clearly is within the confines of Ferber.

And when we look at the state interest that justifies going into the home, prohibiting that possession, and I think I agree with Justice Scalia when he made reference to. We're not talking about pure speech, we're not talking about core First Amendment expressive type of conduct, we're talking about a possessory offense dealing with certain kind of material that has the visual depictions of the minor engaged in this kind of specified sexual conduct, or the lewd exhibition of the genitals.

And I --

QUESTION: Mr. O'Brien, what do you do about the overbreadth contention that -- I mean the -- the defense's argument here is that Mr. Osborne had every reason to read this statute and say, that's a ridiculous statute; it's -- it's just too broad. You mean somebody can't have a picture of a nude child? You know, what about parents? Obviously, the statute is too broad, since it's too broad, I know the Supreme Court law, it's -- well, it can't be imposed against me.

What do you do about that?

MR. O'BRIEN: Well, I think, Justice -- Justice Scalia, I think that the defendant, or anyone else like

him, looking at this statute, even before the Ohio Supreme Court construed it could look at that the continuum I mentioned earlier, look also specifically at this statute that prohibits the possession of nudity-oriented material, except under the following circumstances, and the statute itself sets forth the kinds of circumstances that would be exempted or accepted.

And it seems to me that the defendant in this case knew that the kind of material he possessed is the kind of material the statute was directed -- directed at.

QUESTION: Oh, I'm sure he knows. But that's often the case when a defendant is prosecuted under -- that's what the overbreadth statute means, even if you're in the core of what the legislature was obviously directing its guns at, if they've -- if they've drawn too -- too wide a -- an area, it's too bad.

MR. O'BRIEN: Well, I think the -- the Ohio Supreme Court, in addressing that, is how I believe I should respond, and that is looking at the statute as a whole, and looking at the exemptions and exceptions in there, that it did give fair notice, fair warning to Mr. Osborne and others that this is the kind of material that it was designed to address, and not just mere nudity.

Otherwise, there is no reason for the legislature to have inserted in the statute the exceptions

and exemptions for artistic, medical, proper -- other proper purposes that are in the statute itself. Otherwise there's no reason for them to be in there if the defendant would take it to mean we're only dealing with mere nudity, which obviously is not the type of conduct that can be proscribed, mere nudity.

QUESTION: I'm not sure I understand what you're saying. Are you saying that the only issue in this case is whether he had sufficient notice? And that so long as -- as a court narrows the statute when it's brought before it for construction, the only question presented is whether the defendant had sufficient notice that what he was doing was unlawful?

MR. O'BRIEN: Not the only question, but I think it's one of the questions that would be before the Court, and I think that the Court would say, looking at the --

QUESTION: I know it's one of them. What -- is it the only one? If it isn't the only one, then -- then the other one is, was it overbroad?

MR. O'BRIEN: Well, I think the Court would ask -- yes, it was overbroad on its face before it was construed by the state court.

QUESTION: It was?

MR. O'BRIEN: Correct.

And I think the Court addressed that in Oakes

last year, that the defendant may raise the defense, that doesn't mean that he wins when he raises that overbreadth defense. And it --

QUESTION: But didn't the majority of the -- the members of the Court in Oakes want to look at the statute as it was originally written and -- and wouldn't accept a subsequent mooting of the case?

MR. O'BRIEN: Well, that was a legislative mooting, Justice O'Connor --

QUESTION: Well, but, nonetheless, the focus was on the statute as originally written?

MR. O'BRIEN: That's correct.

QUESTION: And what if that is done here?

MR. O'BRIEN: I think if that is done here that, looking at the statute as -- as originally written, it seems to me that when you consider the proper purposes, exceptions and the other exceptions and exemptions in the statute, and the entire statutory scheme, it seems to me that it is not overbroad, even before the narrowing construction.

QUESTION: But what if a majority of this Court thinks that it is overbroad as originally written, as apparently the members of the Ohio Supreme Court thought? Suppose we think that's right. Now, where does that leave you?

MR. O'BRIEN: Well, I think that would leave us, if a -- if a majority of the Court thinks the statute as written prior to being narrowed is overbroad, at least five members of the Court in the Oakes case would say that the statute was a nullity from the beginning and that it is a proper method to say the defendant's conduct was lawful at the time committed, and therefore can raise that overbreadth defense and have the conviction reversed. And it would, I suspect, also result in the defendant's discharge if that's the Court's view.

I think the Court would --

QUESTION: Is that inconsistent with Shuttlesworth?

MR. O'BRIEN: I -- I think, Your Honor, it's our position that even if the Court would look at the overbreadth argument and say it's invalid on its face, the conduct was lawful, the statute not applicable, that the defendant may be entitled to have the conviction reversed, and be retried, but not discharged.

I think I would make the distinction between a reversal of the conviction with a remand for a new trial, as opposed to a reversal of the conviction and a discharge by the defendant, because the statute was invalid on its face and -- in toto, in -- right from the beginning.

QUESTION: (Inaudible) a state court where --

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where an overbreadth objection to a conviction is urged and the -- the state supreme court says, well, that isn't what the statute means at all; it's not overbroad at all because here is what that statute means. We're not a legislature and we can't change the terms of the statute, but we construe what the legislature meant. Is that what the Ohio Supreme Court did?

MR. O'BRIEN: That's what my position is, Your Honor, they took a statute, not only the Ohio Supreme Court, but --

QUESTION: They just construed it?

MR. O'BRIEN: Correct.

QUESTION: This is what it's always meant?

MR. O'BRIEN: I believe that's -- that's my view of what they did.

QUESTION: And if you -- and if you think it meant something else, you're wrong?

MR. O'BRIEN: That's -- that's my view of what they did, yes, Your Honor, and I think it was a proper and rational decision by them, looking at the statute, what -- what its purposes are in the context of all the statutes that deal in this area, together with what the legislature was trying to get at, including the exceptions and exemptions.

I don't think any other conclusion could have

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been reached by them or any other reasonable person.

QUESTION: But for a person who is confronted with that statute, ex ante, before the supreme court has adopted that construction, for him to be bound by it, surely he has to be able, reasonably, to predict that kind of construction?

MR. O'BRIEN: I -- I agree with that, Your Honor. And I think looking at the Ohio statute in this case, that the defendant could reasonably predict that the kind of material we were trying to proscribe was not "mere nudity," but was that which was something more than mere nudity.

QUESTION: Well, wouldn't you go further than that and say that the state must also put in the -- those elements of the statute as part of its case, which you didn't do? You didn't show intent --

MR. O'BRIEN: I think --

QUESTION: -- you didn't show lewd exhibition. The jury was charged in those terms.

MR. O'BRIEN: Well, I think I would make a distinction as to -- as to whether the state proved it and whether there was a jury instruction on it. The state clearly proved there was a lewd exhibition of the genitals by virtue of marking, identifying and having -- admitting into evidence the photographs themselves, which speak for

themselves.

QUESTION: But the jury wasn't charged on that.

MR. O'BRIEN: The jury wasn't charged on that, and the Ohio Supreme Court, I think, Your Honor, addressed that by saying, we agree that jury was not charged on this issue, we are not going to relieve the state from that burden. We will look at this material, and it's clear, beyond per adventure, when you look at the material, we're dealing with a lewd exhibition of the genitals.

Had the jury been charged in that regard, the jury could not have come to any other conclusion. Therefore, using the plain error doctrine, or harmless error, that it was not reversible error --

QUESTION: The case is so obvious we don't really need a jury trial?

MR. O'BRIEN: No, I'm not saying that, Your Honor.

QUESTION: That's, in essence, what the appeals court is saying, right?

MR. O'BRIEN: I don't think so, Your Honor.

QUESTION: The jury never found it, but it's so obvious that any jury could find it. I mean we could get rid of a lot of jury trials that way.

MR. O'BRIEN: Well, I don't think that's what happened in this case, Your Honor. I think what -- what

was presented to -- to the jury and I -- I must say that --

QUESTION: But the jury was never asked to find it, and the jury never did find it, did it?

MR. O'BRIEN: No --

QUESTION: The jury never found it?

MR. O'BRIEN: No, Your -- no, Justice Scalia, they did not. But I think the -- the plain error doctrine, in that instance, the court will say that unless the manifest miscarriage of justice will occur, and the Ohio Supreme Court addressed that in this case, that -- and I assume that had they felt that a manifest miscarriage of justice would occur if the defendant's conviction would be affirmed under those circumstances --

QUESTION: Did the -- did the defendant request any -- any charge on intent?

MR. O'BRIEN: The defendant did not request a scienter intent charge or did not request a limiting instruction with respect to the lewd exhibition of the genitals that was later the narrowing construction by the Ohio Supreme Court.

QUESTION: Do you think the -- do you think the Ohio Supreme Court's opinion really means that they said that, to the extent this statute reaches mere nudity and other things, it is unconstitutional and -- but we'll just

declare it unconstitutional to that extent? Is that what they did, or did they just say the statute has always meant this?

MR. O'BRIEN: I -- I read it, Justice White, as saying that we are construing this statute, and this is what it meant when it was enacted and when it was adopted, and that's what it's directed at. And -- and that's -- that's how I read the decision, and they were not doing anything other than construing that statute in that regard.

QUESTION: So that's different than a legislative revision of the statute pending appeal?

MR. O'BRIEN: In my view it is, because in a tradition of common law, the courts, on appeal, have that option of construing statute, and I think it's different than a subsequent legislative amendment changing the elements of the offense, particularly with respect to what happened in Oakes. I would make that distinction.

I think, with respect --

QUESTION: Suppose the defendant here had asked that -- that the jury be charged with reference to intent, and the trial judge had refused the instruction, the same result, a valid trial?

MR. O'BRIEN: And when you say intent, you mean regarding a lewd exhibition of the genitals or --

QUESTION: Yes.

QUESTION: Scienter.

MR. O'BRIEN: If the defendant had requested it and it had been denied, I would agree there would be a problem, yes.

QUESTION: Well -- how is that different from what we have here?

MR. O'BRIEN: I think it's different from what we have here because at first the defendant didn't request it, and -- and (inaudible).

QUESTION: Well, I mean, why -- why do you say there's a problem? It's just denying the defendant the satisfaction of having the jury consider something, which you now say it doesn't have to consider anyway?

MR. O'BRIEN: Well, I guess, just in my own mind, in terms of making a record, I would -- I would think the defendant would be better off had that requested instruction been made, had it been denied and then they were claiming that was error.

QUESTION: But you -- you acknowledge that there is a real problem if he request the instruction and it's not given. And I assume that's because the jury verdict is somehow inaccurate as a reflection of what the statute requires. And I don't see how that's any different from his failing to -- to ask for something which the -- which

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was not in the statute until the court later construed it.

MR. O'BRIEN: Well, I guess it just seems to me that the defendant would be better positioned to argue that -- that it was error and -- and reversal of his conviction is justified had he requested it and had it been denied.

And maybe I'm wrong in that regard, but it just seems to me that that would be a better position for the defendant to be in than to not have requested it, not have it denied and have the matter go up on appeal and raise it for the first time in an appellate court, and -- and say that -- that it was a problem.

QUESTION: Does Ohio have any doctrine that the courts will imply an intent requirement? About 40 years ago this Court decided a case called United States against Morrisett, where we said that even thought the statute punishing someone criminally did not say that there was an intent requirement, one would be implied on common law principles.

And so the federal courts have frequently implied the existence of an intent requirement, even though the statute didn't say so.

Does Ohio have any similar doctrine, do you know?

MR. O'BRIEN: Yes, Mr. Chief Justice, 2901.22 of

the Ohio Revised Code, and it's discussed in the Ohio Supreme Court opinion in this regard, says that when a statute is silent with respect to intent or scienter that unless the -- the criminal proscription plainly indicates that strict liability is to be imposed, that you pick up another statute with a minimum culpable mental state of recklessness, which -- which, at least in this regard, is -- is the perverse -- the disregard of a known risk.

QUESTION: So a defendant defending a prosecution under this statute would have presumably been justified in asking for an instruction on recklessness in this case, on the basis of that statute?

MR. O'BRIEN: That would be my view, Mr. Chief Justice. And there have been two Ohio Supreme Court opinions, one in 1980 and one in 1984, which I cite at page 37 of the brief, that -- that have -- have done that, with respect to the child-endangering statute, and with respect to certain prostitution offenses, where there is no mental state in the statute itself, but they pick up the recklessness statute.

And we argue that both the statute, which is 15 years old, and those existing Ohio Supreme Court decisions did give an indication that that was, you know, an element of scienter.

With respect to -- to Stanley, and that is an

issue that not only Ohio, but the other 18 states that have possession offenses on -- on the books in the various states have great concern, and that is whether Stanley would preclude the application of a possession offense when we're dealing with the defendant's own home.

It's our position that the Court found in -- in Ferber that there are a number of interests the state has in controlling and regulating child pornography, mainly because of the harm caused to children through its production, distribution and use. That harm being physical, psychological, emotional mental, physiological, and that that interest in proscribing possession of the material is the same as it is in a production and distribution.

The permanent record of harm which the Court was concerned with in Ferber is ongoing and continues, while the possession occurs in the privacy of the home.

And I must note that -- that it, either in the District of Columbia here or in -- anywhere across the country, you cannot walk into a stand, or what might be called adult bookstore, and purchase child pornography, simply because the -- the distribution statutes and this Court's decision in Ferber, it has been driven underground.

The only method -- or an additional method that

the state needs in that underground child pornography market is that possession offense if we're going to dry up the market. That is an interest I believe the state has, in addition to the interest of avoiding that continuing haunting fear on the child who's been used in this kind -- in producing this kind of material.

The Court was concerned with -- and noted in Ferber itself that that permanent record was evidence of ongoing harm due to the psychological and emotional distress to the youngster. Just by knowing the fact that it's out there, many times it's used to blackmail the youngsters, the fear of subsequent public exposure or use in commercial distributions all cause that child, in trying to recover from the original abuse, the child's sexual abuse, trying to recover, that is what the experts say a severe problem in addressing it.

And I think the possession statute, in -- by just merely saying it is illegal to possess it, goes a very long way in -- in fighting the problem, which has been -- has gone underground, in trying to dry up that market, which I think the state has a very strong interest in doing.

QUESTION: The fact -- let me just ask -- the fact that it's gone underground, I don't see why that makes efforts to prohibit the sale or the commercial

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distribution unlawful, though. I mean, that's still an effective way of attacking this problem, isn't it?

MR. O'BRIEN: It's an effective way, Justice Stevens, but I -- I believe that the states need that additional tool of a possessory offense. If they are -- they are denied that possessory offense and are told you must only prosecute people in this industry or pedophiles who are interested in collecting or keeping this material, if you are only permitted to prosecute those who produce or sell it or otherwise distribute it, I think we're going to have a serious problem in trying to -- to continue to address it, simply because the production is always surreptitious.

QUESTION: Well, but that's true of a lot of criminal activity. Producing narcotic drugs, for example, is surreptitious and the sale is surreptitious, but they make lots of arrests of people who do that sort of thing.

MR. O'BRIEN: And many of the arrests are on possession offenses.

QUESTION: Right.

MR. O'BRIEN: And because you are able to arrest those people on possession offenses, you are able to even move up the ladder to those involved in the sale and distribution.

QUESTION: But -- but you seem to talk about the

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fact that it's underground means that -- that the prohibition against sale and production is meaningless, but I just don't quite follow.

MR. O'BRIEN: No, it's not meaningless, Your Honor. In fact, we still have two good statutes that we will use when we can prove production and distribution. What I'm saying is, is because it's underground and you can't walk into Paul Ferber's bookstore in Manhattan and buy child pornography today, that because it's underground that the additional tool of having a possession offense is necessary to address the problem.

And that the state does have an interest in going to that possessory offense and applying it to -- to the home or anywhere else that it might be possessed.

So I guess what the state's interest, besides that is, is as we pointed out in our briefing materials, not only the permanent record of harm that exists, but we can attempt to dry up the problem with that additional tool.

And finally, the materials used to -- to continue that cycle of child sexual abuse that -- that the Court addressed in Ferber, by means of seducing other children to engage in activity, and we have cited in our brief an extensive background regarding how the material is used to further additional sexual abuse, to condition

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children to the use.

I guess, in comparing those interests with the defendant's interest, I think that's what the Court needs -- needs to do, and the defendant's interests to receive information or ideas, it seems to me are de minimis compared to what the state's interests are.

And I fail also to see what idea or information is conveyed by the four photographs in question here. It seems to me we're not discussing the merits of -- of sexual conduct with children or debating that. It seems to me that the -- the idea communicated or the items in the library that's supposedly infringed is -- is very minimal compared to the state's interest in -- Justice Stevens, do you have a question?

QUESTION: Another question I had. We talked about a scienter requirement in this, what is it in the way of scienter that has to be proved under the --

MR. O'BRIEN: It would be recklessness under the --

QUESTION: Reckless -- what sort of recklessness? I mean, in what regard was --

MR. O'BRIEN: Well, there is -- there is a specific definition. There are four culpable mental states in Ohio, purposely, knowingly, recklessly, and negligently.

QUESTION: Well, purposely -- say it's purposely knowing. What does the -- what does the defendant have to purposely know?

MR. O'BRIEN: He has to perversely disregard a known risk is the statutory language.

QUESTION: Well, but -- but, risk of what? I mean, he knows it's a picture of a child. Is that all that's required?

MR. O'BRIEN: Well, it seems to me, he has to know it's a picture of a minor, he has to know that it is a minor which is nude, and not only nude but involving a lewd exhibition or graphic focus on the genitals.

QUESTION: And the defendant contends he didn't know any of these things, is that what it amounts to?

MR. O'BRIEN: I'm not sure he contends he didn't know those things; I think he's contending that the statute, at the time, before its construction, would not lead him to believe that.

QUESTION: Not --

QUESTION: He's contending at least that the jury -- that the jury didn't find that he knew those things?

MR. O'BRIEN: I -- I think that's correct, Justice Scalia.

And, in conclusion, the -- the State of Ohio

would --

QUESTION: Would that apply if he was blind?

MR. O'BRIEN: I would say not, because there's no way the state could prove that he -- that he knew the material that he possessed depicted the visual depiction of a minor and that the depiction was a --

QUESTION: (Inaudible) Ohio (inaudible) with the possession of one marijuana cigarette are you guilt of a crime?

MR. O'BRIEN: One marijuana cigarette would be what is known in Ohio as a minor misdemeanor, and particularly with respect to marijuana if the amount is less than I believe 100 grams, which is approximately three ounces. It's not a criminal offense.

QUESTION: Isn't the usual statute possession with intent to distribute?

MR. O'BRIEN: There are statutes like that, but in addition to that, Justice Marshall, there are also simple possession statutes. Possession has to be a knowing thing. If someone walked up and put something in my pocket and I didn't know it was there, and I got stopped, you know, I didn't knowingly possess it, even though it was on my person.

And it seems to me, however, that is different from, you know, knowingly possessing an item, whether it's

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a marijuana cigarette or photos.

QUESTION: So your main idea is to protect the children?

MR. O'BRIEN: Correct, Your Honor.

QUESTION: Where were these children from?

MR. O'BRIEN: The record in this regard, Justice Marshall, indicates that the defendant obtained them from a man -- in Columbus he obtained them -- from a man in Florida who was charged with federal postal mailing of child pornography.

QUESTION: And what -- what interest does Ohio have to protect the children in Florida?

MR. O'BRIEN: Well, there's no evidence that the photographs were taken in Florida. The photographs were delivered to Clyde Osborne by Jack Smith in Columbus, Ohio.

QUESTION: Were the pictures taken in Ohio?

MR. O'BRIEN: The record says the pictures could have been taken anywhere. However, Justice Marshall, I believe the State of Ohio has an interest --

QUESTION: Including Egypt?

MR. O'BRIEN: The pictures, according to the records, could have been taken anywhere.

QUESTION: I don't see how you protected the children in Ohio.

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MR. O'BRIEN: Well, I -- I think that protecting the children in the State of Ohio --

QUESTION: Wouldn't you call that overbroad?

MR. O'BRIEN: I don't think I would, Your Honor. I see the red light is on, so I will conclude my remarks.

Thank you.

QUESTION: Thank you, Mr. O'Brien.

Ms. Shank, you have seven minutes remaining.

REBUTTAL ARGUMENT OF S. ADELE SHANK

ON BEHALF OF THE APPELLANT

MS. SHANK: I think one of the remarks that was made close to the end of Mr. O'Brien's comments is telling about the effects of this statute. He noted that when the state finds that it is able to, it will use its other two statutes on production and distribution to go after people who have this type of depiction.

Those two statutes already prohibit possession of those kinds of depictions that constitute obscenity in Ohio and that depict sexual activity as it's defined under the Ohio law.

Mr. O'Brien's acknowledgement that those statute will be used -- used to go after these people is a clear indication that the construction of this statute has moved it from what it originally was intended to be by the Ohio legislature, which was a prohibition against depictions of

mere nudity, and changed it into a child pornography statute, which is what those other two statutes, Ohio Revised Code 2907.321 and 322 are.

QUESTION: (Inaudible) the supreme court's opinion, they -- they say this is what the statute always meant. They construe the statute and say this is what it's -- this is what it's -- what it's always meant. They don't -- they -- they deny that it's ever been overbroad.

MS. SHANK: Well, Your Honor, I know that they do claim that it is not overbroad. I am not sure they go quite as far as saying that they had absolutely -- that it was clear that that's what it meant.

In fact, on page 42 of the joint appendix, the beginning of the first full paragraph, the court acknowledges that it is true that the statute does not expressly limit the prohibited state of nudity to allude exhibition or graphic focus on the genitals.

QUESTION: Not expressly, but then they say if you take into consideration the other aspects of the statute, it doesn't cover just nudity.

MS. SHANK: I agree that they do say that, but they say it in a very --

QUESTION: Well, that's the construction.

MS. SHANK: It's a -- Your Honor, I have to -- I simply point out to the Court that their language is kind

of back and forth, and that at the conclusion of that little discussion, they do then say, and that's -- this is in the center of the final full paragraph, again, on page 42 of the joint appendix, that as -- authoritatively construed that day by the court.

So, I think that although the court does waffle on the point, I think it's very clear from its own opinion that it acknowledges that that wasn't the case and that it's construction that day is what brings the statute into what it hopes to be constitutional lines.

Another point that was raised by Mr. O'Brien is the fact that he alleges that 18 other states have statutes that are very much like ours. In fact, that's not true. None of the 18 state statutes cited by Mr. O'Brien or in the amicus brief from the Ohio Attorney General include viewing as a potential for conviction.

Every other statute requires that there be a depiction of the genitals. A number of those statutes, although they prohibit possession -- prohibit possession for specific purposes, some of them for distribution. Essentially, there is not a single statute that replicates the Ohio statute. Ours is the broadest statute in the country.

Mr. O'Brien suggested that a retrial would be appropriate in this case, and it would not.

QUESTION: Excuse me. Is that before or after the --

MS. SHANK: That's after the construction.

QUESTION: After the construction.

MS. SHANK: Yes, because even after the construction, Ohio still includes mere viewing, and Ohio includes possession without any restriction for why it's possessed, and Ohio does not require that genitals be depicted.

With regard to whether or not this should go back for retrial, the answer is no. Even though the statute was construed, and even though the state contends that there might have been sufficient evidence, which we do not acknowledge at this point, to get a conviction, had it been dealt with properly, you can never make up for the fact that the defendant didn't have notice at the time he acted of what conduct was prohibited.

When a statute uses --

QUESTION: But if -- if the state supreme court has construed it more narrowly, surely the defendant must have been given notice by the language of the statute of everything he possibly could have been subjected to, and perhaps more?

MS. SHANK: Well, in fact, I believe that what you're saying is the essence of the concept of overbreadth

again.

QUESTION: No, it's the essence of the contest -- concept of fair notice.

MS. SHANK: Exactly, which is part of what the problem --

QUESTION: Well, no. No, fair notice and overbreadth are two quite different things I had thought. One -- one is the doctrine of vagueness, and the other is that the statute covers too much ground.

MS. SHANK: Well, and I understand what you're saying, Chief Justice Rehnquist. But -- and Paul (inaudible) has addressed this exact issue. When the language of the statute literally includes within its meaning, conduct that is clearly, constitutionally protected, it, in effect, gives no notice that any conduct is prohibited.

And for that reason, there is no notice when you have a statute that's overbroad on its face. And this was noted by this Court in the Shuttlesworth decision. It was also noted in another case we've cited in our brief, Ashton v. Kentucky. In both of those cases the Court found that the statutes were invalid on their face and noted that the language used in the statutes fell within parameters that this court had held in other cases was -- were unconstitutional.

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QUESTION: Does it make a difference that Shuttlesworth was a prior restraint case?

MS. SHANK: I don't believe it does, because the same principles were followed, as I just noted, in Ashton, which was not. That was simply a criminal libel statute. And the same principles were followed in Thornhill v. Alabama. That was a loitering statute which was -- prohibited picketing in the site of a labor dispute -- anywhere near the site of a labor dispute.

So this type of decision has not been limited to situations where there was a licensing or permit requirement.

In addition to the fact that you can't make up for the fact that there was no notice, another aspect that I think negates against a retrial in this case is the fact that Mr. Osborne was denied the opportunity to have a fair trial or -- and -- and goes against -- I notice my time is up.

QUESTION: Thank you, Ms. Shank.

MS. SHANK: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 1:59 p.m., the case in the above-entitled matter was submitted.)

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NO. 88-5986 - CLYDE OSBORNE, Appellant V. OHIO

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BY Lora M. May

(REPORTER)