

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1288

MARVIN MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON APPEAL FROM THE APPELLATE DEPARTMENT OF
THE SUPERIOR COURT OF THE COUNTY OF ORANGE,
STATE OF CALIFORNIA.

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**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

- October 12, 1970 Petitioner’s judgment of conviction affirmed by the Appellate Department of the Superior Court of the State of California, County of Orange.
- November 2, 1970 Petitioner’s petition for rehearing/certification denied by Appellate Department of the Superior Court of the State of California, County of Orange.
- November 6, 1970 Petitioner’s notice of appeal to the United States Supreme Court and application for stay pending appeal.

■

MINUTE ORDER

In the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

Court convened at 10:00 A.M., October 12, 1970, present HON. HERLANDS, J.; HON. MURRAY, J.; HON. THOMPSON, P.J.; H. J. Gallagher, Deputy Clerk; no Deputy Sheriff; no Reporter, and the following proceedings were had;

AP 872 PEOPLE VS MILLER, Marvin

This matter having heretofore been under submission, the Court now rules; the judgment is hereby affirmed and the cause remanded to Municipal Court. ENTERED 10-12-70.

■

MINUTE ORDER

In the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

Court convened at 10:00 A.M., November 2, 1970, present HON. HERLANDS, J.; HON. MURRAY, J.; HON. THOMPSON, P.J.; H. J. Gallagher, Deputy Clerk; no Deputy Sheriff; no Reporter, and the following proceedings were had:

AP-872 PEOPLE VS MILLER, Marvin

Petition for rehearing and in the alternative, Petition for certification to the Court of Appeal, Fourth Appellate District having been received and considered, the Court now

rules: the Petitions and each of them are hereby denied.
ENTERED 11-2-70.

■

**NOTICE OF APPEAL TO THE
UNITED STATES SUPREME COURT
AND APPLICATION FOR STAY PENDING APPEAL**

In the Appellate Department of the Superior Court,
County of Orange, State of California.

No. AP-872 (Lower Court: OCMC, Harbor No.
M50760)

PEOPLE OF THE STATE OF CALIFORNIA, Respond-
ent, vs. MARVIN MILLER, Appellant.

Notice of appeal and application for stay pending appeal to the United States Supreme Court is hereby given by Marvin Miller, Petitioner and Appellant herein, from the Order of this Court dated October 12, 1970, by which it affirmed the judgment of the court below. On November 2, 1970, this Court denied Petitioner/Appellant's Petition for Rehearing and in the Alternative, Petition for Certification to the Court of Appeal, Fourth Appellate District.

This Appeal is taken *inter alia* on the following grounds, without intent to enumerate all of his defenses, that Petitioner/Appellant by his appeal and his Petition for Rehearing/Certification:

1. Challenged the constitutionality of the application of a "statewide" standard in judging obscenity under Penal Code § 311.2 under the First and

Fourteenth Amendments;

2. Challenged the constitutionality of the application of an unscientific survey to qualify an expert witness to testify as to the “community standards” requirement in the legal definition of obscenity pursuant to Penal Code § 311.2 in contravention of the First and Fourteenth Amendments.
3. Challenged the prosecution under Penal Code § 311.2 for mailing obscene material as a contravention of the doctrine of Federal Pre-emption and the Supremacy Clause of the United States Constitution.
4. Challenged his conviction under the amended language of Penal Code § 311. as an application of an *ex post facto* law;
5. Challenged his prosecution and conviction for mailing obscene material in that under the Fifth Amendment’s prohibition against double jeopardy the state was collaterally estopped from claiming that the material was obscene.

This appeal is being prosecuted pursuant to the authority of Title 28 U.S.C. § 1257(2), and

That the Order of this Court, dated October 12, 1970, and reading as follows: “Affirmed,” and the denial of Appellant’s Petition for Rehearing/Certification constituted a finding that Penal Code § 311.2 of the State of California was constitutional on its face and as applied, and Appellant hereby gives his Notice of Appeal from that finding.

DATED: November 6, 1970.

MARKS, SHERMAN & LONDON

BY: BURTON MARKS

Attorneys for Appellant

[PROOF OF SERVICE BY MAIL annexed, showing service on the Respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Beverly Hills, California, addressed as follows:

CECIL HICKS, District Attorney
P. Q. Box 808
Santa Ana, California.

MUNICIPAL COURT OF THE ORANGE
COUNTY JUDICIAL DISTRICT - HARBOR
567 West 18th Street
Costa Mesa, California 92626.

Executed on November 6, 1970, at Beverly Hills, California.]

■

CALIFORNIA PENAL CODE

§ 311. Definitions

As used in this chapter:

(a) “Obscene matter” means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) “Matter” means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) “Person” means any individual, partnership, firm, association, corporation or other legal entity.

(d) “Distribute” means to transfer possession of whether with or without consideration.

(e) “Knowingly” means being aware of the character of the matter or live conduct.

(f) “Exhibit” means to show.

(g) “Obscene live conduct” means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance.

§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state

(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to:

A motion picture machine operator acting within the scope of his employment as an employee of any person exhibiting motion pictures pursuant to a license or permit issued by a city or county provided that such operator has no financial interest in his place of employment, other than wages.

■

TRANSCRIPT OF TESTIMONY AT TRIAL

[R.T. Vol. III, Sec. I, p. 72]

going to be asked to give an opinion as to whether something is utterly without social redeeming importance; is that correct, as far as you understand?

A As far as I understand, yes.

Q What is your definition as to something having social importance?

MR. CHATTERTON: Once again, objection. This is proper for cross examination; as to the basis of his opinion with you as to qualifications, it certainly isn't proper.

THE COURT: Sustained.

BY MR. SHERMAN: Q Professor, why do you think you have the qualifications to be qualified in this area to determine what is or is not socially important?

A I would base my opinion on the necessity to be in touch with all parts of the United States over the last ten years, through editing journals, through reading the literature that is being produced, from being a consultant of a number of publishing houses, including the illustrations as well as the text room matter.

Q Well, in taking -- let's take each of these items one at a time.

Do you think that you have the ability to give such an opinion because certain people submit certain books to you; is that correct, or certain publishing houses submit to you?

[R.T. Vol. III, Sec. I, p. 86]

A I see.

Q Would you, if it helps you in testifying, refer to which number that you are specifically talking about and then the jury later on will be able to look at that also?

A Fine. I found in 2A nothing to redeem it; in 2B, I was referring to the artwork, which was purportedly an illustrative history of pornography. All of the illustrations seem to be by the same rather bad artistic hand, certainly bad in the inadequate printing job to consider; as almost no literary text, and it is only a series of pictures and listings of books. It is hard to see that this has social merit.

2D; the first sentence of the text is one of the sentences I would use to illustrate the total illogicality of the writing.

Q Would you read that sentence for us? It would keep my interest anyway.

A “By publishing this book the subject is followed up which sex orgies this picture has had.” (period)

Q Okay. Thank you. In Exhibit 2F?

A Contains an ad on both the front and the reversal and in no case do I find such text that has content in any way socially redeeming. I should return to Exhibit 2B, which does have a two-column reprint, “purchase bodily an introduction from the history of pornography;” and this

[R.T. Vol. III, Sec. I, p. 87]

is not all that badly written and does have some content, that backside of 2B. Might have some usefulness.

Q But in considering the totality of what it is,

that's before you, People's 2, your opinion that it's utterly without socially redeeming value?

A That is correct, in spite of some advertising claims that appear to the contrary.

MR. CHATTERTON: I have nothing further.

THE COURT: Any cross?

Cross Examination

MR. SHERMAN: Now, I will move, first, to strike all of the testimony of the witness that he has just given, in that he never explained why he reached his opinion.

THE COURT: Motion denied.

MR. CHATTERTON: I'm not sure whether this would be out of order, though I understand People's 1 was not admitted into evidence – I think the Court noted yesterday that it is an exact copy of People's 2.

THE COURT: I did not so note it. The only thing I noted –

MR. CHATTERTON: My point was for the jury to understand and appreciate the testimony. Perhaps it might be beneficial to let them have a quick look at it in so that they will have some idea what the testimony relates to. It has been admitted into evidence, and it might be of some benefit to them in having them to determine this difficult

[R.T. Vol. III, Sec. I, p. 115]

assigning all other divisional vice units of which the City of Los Angeles has 18 different divisions of police. Each one of these divisions has a vice unit.

The administrative vice has jurisdiction over the entire city, reports directly to the chief of police; and I negotiate, inspect, and control over designated vice units.

It is our responsibility or my responsibility then to assist divisional vice units, to advise divisional vice units, and to inspect divisional vice units.

Q Now, in the course of your employment in the field of vice and specifically the administrative vice vicinity, have you received communication from citizens regarding obscene materials?

A I have.

Q And could you give us the approximate number?

A Well, in the past six years, I would estimate in excess of 100,000.

Q And in receiving ~~those~~ complaints, have you had an occasion to review the subject matter involved, and – that's it.

A I have.

Q And what would be the range or the scope of the communications you have received dealing with what types of subject matter?

MR. SHERMAN: Your Honor, excuse me. I will object. I don't see the relevancy and materiality of this

[R.T. Vol. III, Sec. I, p. 116]

line of questioning.

THE COURT: Overruled.

THE WITNESS: The amount of complaints that are received by citizens is pertaining to material that is sent unsolicited through the United States mail, dealing in nudity, sex, different types of sexual devices, et cetera, all in a field of the – all areas of obscenity that go through the United States mail would be the largest scope of complaints – of complaints received by our department.

Complaints are also received and investigated pertaining to conducting violations, locations that are exhibiting total nudity, et cetera; complaints regarding what's being displayed and sold in newsstands, the so-called adult books, et cetera.

BY MR. CHATTERTON: Q Now, in addition to your – those duties, have you talked with groups or individuals relating to their feelings about obscenity and about pornography?

A I have on numerous occasions.

Q Could you give us a brief rundown of whom you have talked with?

A Yes. For the past four and a half years I have been the department spokesman or speaker on speaking engagements relative to obscene type matter, which is assigned to me by the chief of police. I would estimate that approximately 10,000 people I have spoken before

[R.T. Vol. III, Sec. I, p. 117]

through speaking engagements. I have also talked to many thousands of complainants who complain pertaining to different types of material of which they feel are below standard and are obscene.

I have conducted a survey throughout the State of California where we talked to several thousand people and actually polled 1,902 people who filled out questionnaires pertaining to various areas in the field of obscenity.

Q Now, let me ask ~~you~~ a question about the survey itself. What were the questions and what was the procedure used in your surveying these people?

A Well, first, the procedure was to contact people

to be surveyed. These people were contacted in different areas throughout the State of California. They were explained the reason for Los Angeles police officers being for the jurisdictions. The explanation was that in November of 1968, a decision came down from the United States – pardon me, from the California State Supreme Court known as the Giannini Iser Decision that required an expert to testify before a jury that material did or did not go beyond contemporary community standards of the local jurisdiction; that the standard was a state-wide standard, encompassing the entire State of California. This was explained to the people.

The questionnaire was explained to the

[R.T. Vol. III, Sec. I, p. 124, ll. 9-26]

Q Would you estimate for us in addition to the 1,902 which you surveyed the number of people whom you have discussed throughout the state the subject of obscenity, prurient interest, customary limits of candor, et cetera?

A Well, I am constantly in contact with law enforcement agencies throughout the State of California.

I am advisor on the Attorney General of the State of California commission or committee on obscenity, which is composed of 15 district attorneys from 15 different counties and law enforcement members and members from the Department of Justice.

I am constantly in meetings with these people. They meet throughout the State of California. I have been constantly traveling throughout the State of California, testifying in different jurisdictions throughout the State

of California.

I am constantly, daily, in contact with district attorneys, city attorneys, and law enforcement

[R.T. Vol. III, Sec. I, p. 125, l. 1]

officials throughout the State of California.

[R.T. Vol. III, Sec. I, p. 126, ll. 5-8]

We are presently working with people of the Department of Justice. This particular committee was chaired by Attorney General Lynch, and the investigation of organized crime in the field of obscenity --

[R.T. Vol. III, Sec. I, p. 127, ll. 3-16]

BY MR. CHATTERTON: Q Have you participated in meetings of the League of Cities regarding obscenity?

A I have.

Q And would you explain to the jury and the Court what that entailed?

A California League of Cities is composed of approximately 400 different cities throughout the State of California, who in the particular meeting of which I was invited and participated, was in drafting certain types of ordinances relative to the field of obscenity, which was given the power to these local jurisdictions in November of 1969 by the California legislature. The meeting was to draft certain types of ordinances that could be used in regulating certain type of conduct.

[R.T. Vol. III, Sec. I, p. 128, ll. 4-10]

Q Have you seen any polls conducted by others in the field of obscenity?

A I have.

Q And what polls would those be?

A This was the Gallup poll, which was conducted, using 300 localities throughout the nation, conducted May 16th through 19th, 1969.

[R.T. Vol. III, Sec. I, p. 128, ll. 18-26]

BY MR. CHATTERTON: Q You can continue with your answer on the Gallup poll.

A Yes. This poll was conducted, as I stated, using 300 localities throughout the United States, including the State of California; and it was conducted May 16 through 19th, 1969. And it asked certain relative questions regarding the field of obscenity. And then it used percentages to depict how many people answered one way, how many people answered another way.

[R.T. Vol. III, Sec. I, p. 129, ll. 15-23]

BY MR. CHATTERTON: Q Now, have you traveled about the state and observed what materials were being offered to the public by way of literature and stuff like that?

A I have.

Q Approximately how many counties have you traveled in?

A I believe I have been in 28 different counties throughout the State of California.

[R.T. Vol. III, Sec. I, p. 130, ll. 4-26]

Have you ever testified as an expert in this field before?

A I have testified in the last – or since February of last year on 26 occasions throughout the State of California.

Q Have you ever been qualified in the Superior Courts?

A I have.

Q Have you ever been qualified in any municipal courts?

A I have.

MR. SHERMAN: Excuse me.

BY MR. CHATTERTON: Q What counties?

MR. SHERMAN: Excuse me. Excuse me. I will object to the last two answers of the witness's being qualified in the past as being irrelevant and immaterial to the Court decisions in this case.

THE COURT: Overruled.

THE WITNESS: I have qualified as an expert in San Mateo Superior Court, San Mateo County. I have qualified as an expert in the Superior Court of Orange County. I testified as an expert on numerous occasions in Los Angeles County, Sacramento County, San Francisco

[R.T. Vol. III, Sec. I, p. 131, ll. 1 - 2]

County, Merced County, Santa Clara County, several other counties that I cannot recall offhand.

[R.T. Vol. III, Sec. II, p. 8, ll. 1-4]

hundred and fifty people from Orange County were surveyed

because the law says the entire State of California. So we didn't particularly bother about one area. So we never totaled one area. We totaled them in as a jurisdiction.

[R.T. Vol. III, Sec. II, p. 11]

procedure you used?

A Well, I don't know if this would be classified as a scientific. First of all, we decided we would take a cross-section of the state by population versus urban versus rural. Now, we took all the larger areas to encompass in the state; such as, Sacramento, San Francisco, Los Angeles, San Diego; these being the larger cities in the State of California.

We then went population-wise of different states, pardon me, different counties throughout the state to show populations of under 21 – in a particular area 25,000; in the range of 25 to 50,000; in the range of a hundred to 200,000 – trying to get different media that was there instead of going strictly to the larger areas where we could get more people. But we wanted to get the rural versus the metropolitan areas of the State of California. We did this.

We asked and researched people from different groups from the Jewish religion, the Catholic religion, et cetera, different groups, church groups, such as this, were interviewed. Different fraternal organizations were interviewed; people from the PTA, who make up a pretty good cross-section of the citizens who have children, who are interested in their schools and community affairs, were interviewed, coming from many walks of life. Naval Reserves, to show a younger type of person who the – generally who

[R.T. Vol. III, Sec. II, p. 12]

are committed to reserve duty were interviewed; to try and capture people in this range and who are -- many who were in school.

We tried, and I admit that it isn't very scientific, but that's the best that I can do. And that is basically the way we conducted the survey, asking for assistance in other jurisdictions, lining us up in a cross-section. Then we talked to American groups. We talked to people who are in San Francisco who are millionaires. We tried to hit the range full-fold.

Q Now, basically you relied on other people to help you get a cross-section; is that correct?

A No, we did not. We relied on them in a sense, in what you're saying is true, in lining up different groups. We sent them a letter and explained that we wanted to talk to them. We did not want one group. We wanted a variety to begin with, different people; but we were assisted by other people, yes, sir, in lining up the groups.

Q Now, Sergeant, you are basing -- well, can you give more weight to the survey than anything else as helping you to determine what the community standards are for the State of California?

A I give quite a bit of weight to the survey, but a lot more. I give weight to my past six years in the field of obscenity and the talking to many, many people and running across a few people that state that some things --

[R.T. Vol. III, Sec. II, p. 13]

there's film being accepted in a community -- I don't

think we see it in any other location throughout the United States; and if films are being accepted, this is a rare occasion, actual acts, sexual intercourse, et cetera; this is a rarity because it has never been accepted. I don't think –

MR. SHERMAN: Excuse me. I move to strike the last answer of the witness.

THE COURT: Give us your opinion.

That will be stricken.

BY MR. SHERMAN: Q Now, in the survey you interviewed 1,902 people? Now, out of this 1,902 you can't break down the ages for us?

A No, sir.

Q Can you break down the economic disparity of the people?

A No, sir. And if I might answer that, after I say no, sir, enlarge on it – the reason that we did not even take that into consideration, but I can tell you –

Q The answer is you did not break it down?

A And I'd like to explain about –

Q Please explain.

A Well, the reason it wasn't put in there was because we felt it had no basis to be in there, a man being an average person whether he is rich or poor; and we loading our questionnaire by all rich men or all poor men. It

[R.T. Vol. III, Sec. II, p. 14]

wouldn't be as valid as if we took a wide spectrum.

I can testify personally that I saw the people I surveyed, and they were from all categories.

Q Did you ask them how much money they earned?

MR. CHATTERTON: Objection. It has been asked and answered.

MR. SHERMAN: No. He has testified –

THE COURT: Overruled.

BY MR. SHERMAN: Q First of all, let me ask you this, Sergeant. It's your opinion that the economic status of a person makes no difference; is that correct?

A I think in going to apply to this particular field that you can be rich or you can be poor and you can still have an opinion as you can still with an average person in this field. It differs from fields of economics and status in the community. I don't think status in a community has anything to do with whether a person thinks that this type of material is bad or good.

Q Sergeant, I don't want to dwell on these kinds of points; but this is the basis of your opinion in developing a survey; is that correct?

A That was the basis of what we didn't ask them, how much their financial and worth was, to put it into a basis; because it was none of our business, and we thought it didn't have anything to do with asking them what they thought the community standard was.

[R.T. Vol. III, Sec. II, p. 15]

Q Now, prior to making determinations like which questions to ask and which questions not to ask, because you would not feel it was relevant or irrelevant to your survey, how did you go about to get this kind of information? Was that from Professors Brown and Lacornon(?)?

A No. This particular questionnaire was drafted by myself and by a member of the Department of Justice, State

of California. We had a combination of 14 years in the field of obscenity; and we asked attorney generals – pardon me -- district attorneys or deputy district attorneys from Los Angeles – the city -- attorneys from Los Angeles and from Santa Clara County to go over these prior to them being written up.

Then we were submitted to an Attorney General committee prior to having a survey being conducted to write to 15 district attorneys to look at the different questionnaires and make comments that they thought it was a good questionnaire.

We then commenced the physical portion of asking people to fill out the questionnaires.

THE COURT: It's about time we take our afternoon recess.

I will admonish the jury do not discuss this case, any feature of it, and personnel involved amongst yourselves, or with anyone else. Do not form an opinion as to any matter that has been presented to you in this

[R.T. Vol. III, Sec. II, p. 20]

which they are asked in any way reflects your prior biases?

A No, sir. I do not.

Q Now, you have indicated that this survey was prepared on the basis of visiting 15 counties?

A 18, I believe.

Q 18 counties? Excuse me. How many counties are there in the State of California?

A 58.

Q And none of the -- no questionnaires were sent to the other 40 counties -- that is, part of this survey?

A No, sir.

Q Now, I take it that the counties you went to included cities which – there is: Los Angeles and San Francisco and San Diego --

A That is correct. The survey was made up of 90 per cent of the population of the State of California.

Q Do you have -- you mean to tell me 90 per cent of the population lives in 18 of the counties --

A That is correct, of the ones we surveyed. You have got counties that have an extremely population like 25,000; some counties where -- Los Angeles has, I think, the latest count was over 7,000,000 people. There's just 19.8 million people in the State of California. And Los Angeles has almost over a third in it.

Q Now, taking Los Angeles County for the moment. Of these 1,902 people, how many people were

[R.T. Vol. III, Sec. II, p. 21]

surveyed in Los Angeles County?

A I don't have that -- that count with me. I never counted how many people in each different jurisdiction.

Q Well, you would agree, would you not, that if you were going to prepare scientific surveys you would take in a third of the people living in Los Angeles County to make it fair? You would take a third of the people in Los Angeles?

A No, I would not; not in this particular field. And I might state the reason why. To take a third of the people of only one jurisdiction would weight the poll, I believe, more population-wise. We have area-wise too, that has to be reflected in this particular survey. We could have taken only the people of the City of Los Angeles and said, "Well, we

captured a third of the State of California.”

But we felt that that was not what the survey itself, area-wise -- what is being shown in these particular areas? What is being condoned in these particular areas; what the people think in the particular area. That is of as much importance as the population.

Q Well, Officer, would you agree that if you took 2,000 people in the State of California, 750 were from Sacramento County, and 250 people from Los Angeles City, that that would be out of proportion?

A I would say that it would be, yes, sir.

[R.T. Vol. IV, Sec. I, p. 35]

BY MR. SHERMAN: Q Well, if you just had the text here of this exhibit and none of the paintings, you wouldn't consider the text without social redeeming value, would you?

A I would have to see this before I could so testify. There is nothing -- nothing in this material that would lead me to suppose that there would be much value than even the full text.

Q Well, there is an article on the back of one of those exhibits --

A Yes.

Q -- Exhibit 1F. Have you read that article?

A Yes, I have.

Q Now, if you had just seen that article and nothing else, would you then come into court and say that article was utterly without social redeeming value?

A No. As I testified yesterday, the one point, in fact, that I must make is that this article does have some content, whereas everything else is totally without value.

Q So, the article has some value to you?

A Correct. It has some content, and it does have reason to presentation.

Q Now, what your major objection to these brochures is are the pictures?

[R.T. Vol. IV, Sec. I, p. 40]

BY MR. SHERMAN: Q My difficulty, Professor, is understanding the value you place in assistance in making your determination. So what I am trying to inquire from you is do you consider this work without redeeming value because of its artistic quality or because of its subject matter? This is my real concern. Is it the subject matter, the artistic matter that bothers you –

MR. CHATTERTON: Excuse me, your Honor. He has been asked and answered the reason he finds it without social redeeming value. He said the pictures, the writing, the content, the printing. Now, he is attempting to change or misstate the testimony.

THE COURT: Sustained.

BY MR. SHERMAN: Q Do you find this subject matter of these paintings to be utterly without social redeeming value?

A I believe I covered my opinion in that area clearly in speaking of Portnoy's Complaint. The subject of masturbation would be considered a taboo subject. It has been in many cultures and in our own culture for many times, per se. I do not find that subject matter improper for artistic use. I do, however, ask that it be artistic use that has a reason for being. That it has some,

you may use those abused terms, “social value.”

Portnoy’s Complaint has this, and I find the book not objectionable. Picasso’s collection of erotic

[R.T. Vol. IV, Sec. I, p. 41]

paintings may have this. It has been so testified to by some fine artistic critics. This packet of material to which I am testifying – I find to have no social value.

Q But you agree that men and women in poses such as this and doing such as these things do have social redeeming value if done by artists that you might respect?

A Again, I cannot answer in the yes or no way. I think I just answered the question in the best way I have; answering, that the subject matter, per se, is not at issue; the fact that men and women have intercourse in a variety of ways. These are human; and human acts make them a subject for human discussions, presentations, artistic treatments – the question is how is it presented? What is the particular theme when I look at the totality? I can only judge the totality.

Q Now, in determining whether a particular subject matter has social redeeming value, you are talking about social redeeming value to the whole culture, are you not, rather than just one aspect of the culture?

A I would assume social would cover the entire society.

Q So, for instance, if we wanted to know about, let’s say, the American culture of 1970, we have to look at the mystery novels as well as the poem?

A Correct.

Q And we have to look at works such as Picasso

[R.T. Vol. IV, Sec. I, p. 45]

utterances.

Q Well, for instance, these books that you are talking about that are sold in underground. These are books that are sold, I assume, in great quantities?

A I assume there is money in it or the people wouldn't bother.

Q All right. Now, if that being so and they are accepted by a segment of our population, from that point of view would those works then have some socially redeeming value merely by the fact that they are being accepted and are a part of our culture?

A No. The facts of their acceptance would be all the value they have. In and of themselves they might have no value at all.

Q In other words, if they are accepted, that alone may mean they have social redeeming value?

A No. I said the fact that such are sold in an X quantity in a given society may be the total significance and value. The thing itself may be without value.

Q Let's be precise. Are you familiar with one of these novels called The Hungry Pussy?

A I have been asked to read that on occasions, and I found it without any merit except that it was such a collection of pornographic things as perhaps to have some measure of the diseased imagination of the writer, but I

[R.T. Vol. IV, Sec. I, p. 54]

A Yes, I am.

Q And Doctor, for the jury, would you indicate to

us your educational background?

A I have a B.A. in English Literature from Los Angeles State College and an M.A. in English Literature from UCLA and a Ph.D. in American Literature from UCLA.

Q At the present time are you teaching?

A Just an extension course at this time.

Q And where is that extension course being taught?

A UCLA.

Q And what subject matter are you teaching?

A The novel as written by and for women.

Q For women?

A Yes.

Q Now, in the past five years, can you tell us each and all of your teaching jobs or positions?

A I'll try. After I received the Ph.D. from UCLA, about seven years ago, I taught full time at UCLA for two years; and then after the birth of my second child, I taught mainly an extension for UCLA, but in various sections of the city.

Q Could you tell us which courses you taught at UCLA?

A I taught a course of Frenchman Composition and Frenchman Writing and Frenchman Literature, from the

[R.T. Vol. IV, Sec. I, p. 56]

Q So, it would be a wide variety of people?

A Yes.

Q Now, when you obtained your Ph.D. in American literature, did you write a dissertation?

A Yes, I did.

Q And on what subject?

A The Hollywood novel.

Q And can you explain to the jury a little bit about your dissertation -- what you mean by the Hollywood novel?

A The Hollywood novel is a novel written about Hollywood with Hollywood characters as the main characters of the novel. There are several written by very well-known American writers, and then hundreds written by not so well-known American writers. And I tried to read all of them I could find and come to some conclusions about American life in terms of its vision of Hollywood.

Q Have you written any articles or books?

A Yes, I have.

Q And what books and articles have you written?

A I wrote a scholar article on the basis of my dissertation about the mystery novel as it takes place in Hollywood, which was published by the Southern Illinois University Press.

I write regularly for West Magazine, the Sunday supplement of the Los Angeles Times; and regularly

[R.T. Vol. IV, Sec. I, p. 57]

for TV Guide, and not so regularly for Los Angeles Magazine; and Status Magazine; and since just last week, Cosmopolitan Magazine.

Q Have you written a novel?

A A chapter of my novel was just bought by Cosmopolitan, and then in two months I have a novel coming out.

Q And what is the name of this novel?

A The Rest is Done With Mirrors. And it's published

by Little, Brown.

Q Now, this book is coming out, you say, about two weeks?

A Two months.

Q Two months? And is this a novel, I take it?

A Yes.

Q Is it the first novel that you are going to have published?

A Yes.

Q Now, have you ever qualified in this particular municipal court as an expert in the area of obscenity?

A Yes, I have.

Q And when was that?

A I believe it was about six months ago, and with regard to these brochures; but I don't know the exact date.

[R.T. Vol. IV, Sec. I, p. 59]

and writers of some of these books and wrote to publishers of the books and, let's say, speak to everyone I could in short that -- that had anything to do with this business.

Also, people in stores where these books were sold on newsstands to see how they sold -- how much they sold.

At that time I wrote letters to colleagues in universities or junior colleges or colleges in Berkeley, San Francisco, Sacramento, Fullerton, Riverside, and San Diego, asking them just exactly what was for sale and could they find these books around town. They said they could.

Then at two other times West Magazine bought the article but decided after a year or so not to use it. They gave it back to me. And at two other times in the last four years

other magazines have suggested that they would want it, and I have updated it and do the same thing with regards to my colleagues in those places.

Then last summer with regard to these brochures I wrote my colleagues again in these universities and asked them if they could find comparable material, comparable graphic material such as this in universities, libraries, public libraries, legitimate bookstores as well as newsstands; and they all wrote me back their findings.

Then besides that, I have had some informal contact with people who live in smaller towns through the state, asking them much the same kind of questions.

[R.T. Vol. IV, Sec. I, p. 60]

Q And this has been something that you have been doing for the last three or four years?

A Since 1966, but this more organized way of doing it where they went to both – well, to not only the newsstands, but the legitimate bookstores and the libraries and the university libraries only since last summer, when the question came up of state-wide standards.

Q Now, for what period of time have you been testifying as an expert in this area?

A I am not sure of the exact date, but I think it's from 1966.

Q And on how many occasions have you testified?

A I would say about 30 times.

Q And in every case in which the Court requested expert testimony and permitted expert testimony have you qualified on each and every occasion?

A Yes.

Q Now, was there anything else that you know of that would qualify you as an expert in this particular area you haven't covered? That's a great general question. I take it you reviewed personally materials such as this and other materials forming whatever conclusions you have?

A I would say the only thing I could think of would be kind of a consuming interest in the so-called popular forms of art, popular forms of entertainment, I guess, television and the movies and light novels as well as

[R.T. Vol. IV, Sec. I, p. 65]

Q I see. That was yesterday?

A Right.

Q Now, in considering what your qualifications are for judging what the contemporary standards are throughout the state, I take it then, that you visited Sacramento and you have talked with people there?

A I – sent out letters more or less, not continuously, but from time to time to my colleagues in various universities who in turn went out mainly to see what was available for sale in the various cities and towns.

Then last summer besides seeing what was available in libraries as well as just for sale, what was available in university libraries and public libraries openly and bookstores; I'm getting to it. Am I answering the question?

Q I am not sure whether you are or not, but go ahead.

A Oh, I visited San Francisco and San Diego and interviewed various people on the street as well as topless dancers and people of that sort.

Q I see. Now, is it your understanding that it being offered to the public is an indication of what the contempor-

rary community standards are as far as obscenity is concerned?

MR. SHERMAN: Objection, your Honor. Irrelevant and immaterial as to her qualifications.

[R.T. Vol. IV, Sec. I, p. 66]

THE COURT: Overruled.

THE WITNESS: I think it would be a question not of what's -- what's being offered but what they buy that's offered.

BY MR. CHATTERTON: Q All right. Now, specifically have you done any studies on what was purchased?

A Yes, yes.

Q Okay. Now, when you made these studies, did you ever receive copies of what it was that was being purchased?

A Yes, because I approached the matter -- rather I did talk to various sellers; but I also talked to distributors and asked them for this article in West Magazine about how much money they made and from what books; and they gave me the books and showed me and said so and so much money. "This is a big moneymaker." "This wasn't a big moneymaker." So that I did have an idea of the kind of things that were sold.

Q I see. Now, when you wrote to your colleagues seeking their help, by colleagues you mean personal friends of yours or people who also teach in the English area or what?

A Personal friends of mine that I had been through graduate school with who had gone to -- to teach school in San Diego State, in Berkeley, and San Francisco

[R.T. Vol. IV, Sec. I, p. 72]

Q By random sampling, do you include the people

whom you talked to in Sacramento? Did you go out on the street corner?

A No, again, this would be simply in the course of a conversation; and so it would include, for instance, a lot of my daughter's friends, who have been 15, 16; and a lot of my mother's friends, who would have been 50 or 60; and a lot of my father's friends, some of them whom are 70.

Q We'll assume your mother and father live in Sacramento?

A No.

Q Well, let's say the people in Sacramento. Where were you when you talked with them?

A At the home of Dan Phillips's during – at one time during a – like a wedding party for one of his cousins.

Q All right. And what was the age range there?

A A lot of parents and a lot of sisters and brothers and nephews and cousins; and again, it would go from people who are old enough to be at a wedding without making a fuss to all the way up.

Q And when you talked with them, I take it, you showed them erotic pictures and asked them what they thought of them?

[R.T. Vol. IV, Sec. I, p. 74]

MR. CHATTERTON: I have nothing further.

THE COURT: Any redirect?

MR. SHERMAN: Nothing, your Honor.

MR. CHATTERTON: I would at this time object that there hasn't been sufficient qualifications, your Honor.

MR. SHERMAN: I am offering, your Honor, for all three purposes. I think her background and training and her

Ph.D., of course, would permit her to testify as she has testified on some 30 other occasions as to the social importance of the material.

THE COURT: I want to clear up one point for the purpose of the record – Dr. Cee, is it?

THE WITNESS: Yes, sir.

THE COURT: When you said that you were qualified in this court on previous occasions, that was before another judge, was it not?

THE WITNESS: I believe so, sir.

THE COURT: So, it was simply in this courtroom for some other judge?

THE WITNESS: I took it to mean in this building.

THE COURT: It was another judge, that's right?

THE WITNESS: I believe so. I don't recognize you.

MR. CHATTERTON: Excuse me, your Honor. Might I ask one question with regard to – regarding that specific

[R.T. Vol. IV, Sec. I, p. 111]

Q Why don't you take them as a whole; and if it is necessary, we can go into them individually?

A Well, as a whole I notice there seems to be an emphasis on things that we ordinarily consider as deviant sexual stimulants, and things which we feel, I mean, as people are somewhat immoral; and by these things I mean, such things as orgies, bestiality, homosexuality, and in some cases exaggeration of phallic and genital areas; and in some of them evidence of sadism, and in general all the things which I personally associate with the harmful type of aphrodisiac or harmful type of pornography.

And if I were to consider these as socially redeeming,

from my own viewpoint as a physician --

Q Excuse me. I hadn't quite gotten to that question yet.

A I am sorry. Okay.

Q Right. Now, I am merely concerned with the prurient interest and the shameful or harmful effect that goes upon an average person. Were there any other comments?

A I should also mention that even though some things like oral genital contacts are practiced by a lot of people that if exposed to the public then they make us feel shameful. I should mention those too.

Q And in what manner would they make the public feel shameful?

A Well --

[R.T. Vol. IV, Sec. I, p. 115]

psychiatrist why the average person feels shameful or has a morbid interest in sex, nudity, or excretions, upon viewing it; that the reasons are explicit and are called for in his opinion.

THE COURT: Objection overruled.

BY MR. CHATTERTON: Q You may answer, Dr. Wagner.

A Well, when a human being looks at any of these pictures, why the pictures invite you to take part in a sex act. You take part by just looking yourself; but the degree to which -- if you just throw the picture down, don't look at it any more, this is one thing you still may remember, what you saw; but when you are looking at the picture, well, you are looking also at an invitation; and so you have to fantasize just like if you read a book. You may identify with the hero

or even the villain or with somebody, you know, whatever we look at or read. If we see a movie, why the people watching the movie sort of take part in the action by fantasizing that. This is happening to them but not within reality.

So with these pictures, if you are involving yourself with them, you have to fantasize or imagine that you are participating in some of these activities.

And I think most people know deep down in terms of orgies, which started this question, that basically orgies are destroyant of human love and close

[R.T. Vol. IV, Sec. I, p. 116]

human relationship; because if instead of developing your love, your tender love feelings toward your partner, you tend to spread it around – and orgies, you are just saying that sex and love aren't really connected; that love means nothing; that you can pass it around, and you don't have to stick to any one person – well, what I have seen happen to a number of people who involved themselves in orgies, even small orgies by wife swapping, or large orgies – they have orgy clubs and orgy groups – is that invariably these people end up getting divorced and running off with somebody else in the orgy.

Some people of the orgies even stimulate a mental breakdown. If they have had rigid attitudes about sex and they have been brought up very straight-laced and have good morals, well the orgy itself is very demeaning; and it causes breakdowns of the love relationships between two people. And ordinarily it is sort of tempting, especially if the people haven't even slowed down in their sexual life or had any difficulties at all, why the thought of an orgy is very forbidden and very tempting.

And so looking at a picture like that, starts a controversy in somebody's mind. And they are both attracted and repulsed; and therefore, they develop anxieties. Then they feel usually very ashamed, usually disgusted; and sometimes they are still interested in looking again, though not infrequently.

[R.T. Vol. IV, Sec. I, p. 117]

Looking at pictures of this type, if one is this way, looking might resolve in masturbation; and as I say, most people have a lot of guilt feelings about masturbation in our society. And I am not trying to say if that is right or wrong from a psychological point of view. I am just saying that this is a reality of human beings in our society and -- so, that's all my answer about that actually.

Q Now, let me ask you this. Referring to the evidence which you have in front of you, the five documents, again, listed under People's 1, in examining that as a whole, do you see anything -- strike that.

Do you have an opinion as to whether or not it is utterly without social redeeming value from a medical point of view?

MR. SHERMAN: Objection, your Honor. Irrelevant and immaterial from a medical point of view. It is a general standard.

THE COURT: I am going to sustain the objection but on the basis as you have stated, from the medical point of view -- is general. Objection sustained. Strike the words from a medical point of view.

Do you have an opinion as to whether or not it is utterly without social redeeming value?

THE WITNESS: I have an opinion.

BY MR. CHATTERTON: Q And what is that opinion?

[R.T. Vol. IV, Sec. I, p. 118]

A I don't feel that it is of any social redeeming value.

MR. CHATTERTON: And I have nothing further.

THE COURT: Cross examination.

MR. SHERMAN: Thank you.

THE COURT: I think before we get into cross examination, we will take a recess for this afternoon. Before we take a recess, however, obviously this is not going to be through tonight; so we will have to set this matter over to next week.

I was brought in here for a three-day case. We are now on our fourth day. So I had made arrangements for the three days.

I will be available on the following days only. Monday afternoon, Tuesday afternoon, all day Wednesday, Thursday afternoon, all day Friday.

MR. SHERMAN: Your Honor, I unfortunately was supposed to be scheduled for two trials in Federal Court.

THE COURT: Well, you are in trial right now; and you are going to stay in trial.

MR. SHERMAN: I would ask if the Court -- would ask the Court to inform the Federal Court judge of my position.

THE COURT: All right.

MR. SHERMAN: Well, if the Court is going to cover for me, well, I am available.

[R.T. Vol. IV, Sec. II, p. 18]

this material has no social value -- don't you mean by that

that it has no beneficial value? Isn't that another word for social value?

A Yeah, I think that could be another term for it.

Q And would you agree that a beneficial value could be hedonistic pleasures?

A Well -- maybe beneficial immediately, but beneficial in the long run, I don't believe so. I don't believe anybody can have better sex as a result of looking at pictures. They have got to have better sex by having sex.

Q And this might increase their sexual conduct towards each other, mightn't it?

A Yes, but not in a -- in a good sort of way.
The love is part of sex pleasure.

Q Didn't you just say that people increase their sex life by having sex? Now, my question is that this may help some people have more frequent sex?

A I meant by having normal sex. I didn't mean by concentrating on one of the partial impulses, which is actually classified as a sexual abnormality.

Q I didn't get that at all. Could you repeat that?

A Well, the certain partial sexual impulses, which a person could get hung up; therefore, it is an

[R.T. Vol. IV, Sec. II, p. 20]

goal, but that is not the long-range tool that you would use. You understand what I mean?

A Well, I wouldn't give an alcoholic morphine because he might get addicted to the morphine; and I would hate to give a person who is having problems with sex this form of sexual relief.

Q Doctor, you know I am not asking for your

analogies and your interpretations of my questions and then putting them into extremes because you don't want to answer the questions. I understand you can make analogies all day long to make my questions look ridiculous. I don't want you to do that, you know, because I am not asking you to make extremes. I am just asking simple questions.

MR. CHATTERTON: Excuse me, your Honor. If he has a legal objection, he can make it without the speech.

THE COURT: Overruled. Go on.

BY MR. SHERMAN: Q Now, my question is isn't a part of therapy to use certain short-ranged tools in going towards a long-range solution?

A That -- put it this way. As --

THE COURT: I am going to ask you to either answer that yes or no; and then if you want to explain your answer, you will have the opportunity. Make that a yes or no answer, one way or the other, and then you can explain it.

THE WITNESS: Well, my answer would be no.

BY MR. SHERMAN: Q Your answer would be no?

[R.T. Vol. IV, Sec. II, p. 24]

BY MR. SHERMAN: Q Now, my next question -- if you understand what I mean by a short-range method -- is if you agree with the principle that sometimes it is beneficial, thereapeutical to use short-range methods to obtain a long-range good --

MR. CHATTERTON: Objection, your Honor. Assumes facts not in evidence.

THE COURT: Overruled.

MR. CHATTERTON: May I explain the nature of my objection?

THE COURT: Yes.

MR. CHATTERTON: He is assuming that shock treatments are a short-range tool, and there has been no evidence to that effect. I think he should find out about that, if there is going to be any indication to them at all.

THE COURT: Same ruling.

BY MR. SHERMAN: Q You may answer, Doctor. Do you understand my question now?

A No, because -- see, unfortunately you didn't choose --

THE COURT: Just a moment, if you don't understand it.

MR. SHERMAN: Will you explain it to him?

THE COURT: I think it is about time for recess. We have gone an hour. We will take a recess at this time.

Admonish the jury do not discuss this case,

[R.T. Vol. IV, Sec. II, p. 25]

any feature of it, or any personnel of it involved with others, with anybody. Do not determine any opinion as to any matters that you have heard in this trial.

Take about a 15-minute recess.

Sometime I am going to ask one of the jurors to repeat that. I know you must have memorized it by now.

(Short recess.)

THE COURT: People vs. Miller. Again stipulate that the jury is all present and in their proper places?

MR. SHERMAN: So stipulated, your Honor.

MR. CHATTERTON: Yes.

THE COURT: You may continue.

BY MR. SHERMAN: Q Doctor, it is your opinion,

isn't it, that these pictures are harmful because they create anxieties in people? One of the reasons you feel they are harmful?

A That is one reason, yes, sir.

Q And it creates anxieties in people because you feel that an average person can look at this picture and identify with the people in the pictures?

A This, among other reasons, yes.

Q All right. Now, is it also possible that an average person could look at these pictures and not identify them —

MR. CHATTERTON: Objection. It is irrelevant, your Honor. May I be heard again? I think we are right

[R.T. Vol. IV, Sec. II, p. 26]

back to the same thing the Court ruled on before.

THE COURT: I think the objection is well taken.

BY MR. SHERMAN: [Q] Well, you feel that they are utterly without social redeeming values because they are harmful, don't you?

A I think my answer would be positively yes on that.

Q All right. So they are utterly without social redeeming value because they create anxiety in people, in your opinion, in the average person?

A That's not the only reason. That is one of the reasons.

Q One of the reasons?

A Yes.

Q Now, isn't it a truth that the average person could look at these pictures and not identify them and, therefore, not have the anxiety?

A You are still just referring to this one set of pictures

here?

Q No, just the brochure in general.

A Oh.

Q All the pictures together.

A I think that the average person who looks at those is going to feel anxious and guilty. I don't see any other way out of it.

Q All right. And you feel the anxiety is to

[R.T. Vol. IV, Sec. II, p. 27]

such an extent that this diminishes whatever social value they may have? This makes them utterly without social redeeming value?

MR. CHATTERTON: Excuse me. I will object that he misstates the witness's testimony. He said that one of the reasons that he found it without –

THE COURT: Objection sustained.

BY MR. SHERMAN: Q All right, Professor – or Doctor, there are many other kinds of pictures that create anxiety in people other than pictures that deal with sexual matters, aren't there?

A Very definitely, yes.

Q All right. A person may look at someone stabbing people; and there he might – he might have certain anxiety about that?

A There are some pictures I have seen of stabbing people that make people feel very anxious, yes.

Q All right. And would the same be true of pictures about violence?

A Yes, especially violence.

Q Now, would you say that because pictures about

violence create anxiety in people that, therefore, those pictures become utterly without social value or obscene –

MR. CHATTERTON: Objection, your Honor. It is irrelevant.

[R.T. Vol. IV, Sec. II, p. 28]

THE COURT: Sustained.

BY MR. SHERMAN: Q Well, would they, therefore, be without social redeeming value because they create anxiety also –

MR. CHATTERTON: Objection.

THE COURT: Objection sustained.

MR. SHERMAN: I have no other questions, your Honor.

THE COURT: Okay.

MR. CHATTERTON: I have just one – I have two questions.

Redirect Examination

BY MR. CHATTERTON: Q Number one, other than the fact that those pictures represent or appear to you to have some harmful effect, what other reasons have you considered in forming your opinion that they are without social redeeming value?

A Well, I didn't see any positive values. You mentioned the negative value that I saw. I didn't see positive value in that they would be especially useful in teaching people to have sex or in treating people. I mean, that's just from my own standpoint as a physician. Because of my experience in treating people that have sex problems, I haven't found books and things like that and pictures to be useful.

Q Thank you. And you were asked previously

[R.T. Vol. IV, Sec. II, p. 30]

A That is correct, correct.

MR. SHERMAN: I have no further questions.

THE COURT: That is all, Doctor. Thank you very much.

MR. CHATTERTON: Thank you, Doctor.

People would rest at this time, your Honor.

Excuse me. Were there any other items of evidence which are pending in motion at this time?

THE COURT: I believe Dr. Cee was on the stand.

MR. SHERMAN: Your Honor, may we – of course, I am going to have certain motions to make. Should we put her back on the stand and then take them after the testimony?

THE COURT: Yes.

Caroline C. Sturak,

called as a witness by the Defense, and having been previously duly sworn, was examined and testified as follows:

THE COURT: You have been sworn.

MR. CHATTERTON: I believe, your Honor, that the Court deemed her qualified in all three areas, the prurient interest, the social redeeming value, and the contemporary community standards; is that correct?

THE COURT: Yes.

MR. CHATTERTON: Just for the record, would it be possible to put it on the record in what respect the Court feels that she is competent to testify about prurient interest?

[R.T. Vol. IV, Sec. II, p. 32]

MR. CHATTERTON: Excuse me, your Honor. I am going to object. If the term comparable has a legal definition, I am not sure if that is what Mr. Sherman is getting at or not. If so, it calls for a legal conclusion. It's strictly a legal question, which the Court considers before the admissibility of any evidence.

THE COURT: Objection sustained.

BY MR. SHERMAN: Q Well, Dr. Cee, let me show you the brochures and ask you if in your expert opinion -- if you feel these brochures are utterly without social redeeming value?

A I don't think they are utterly without social redeeming value.

Q Can you explain before the jury the basis for your opinion?

A There are specific reasons for each brochure; and I think also the general reason would be that each of the brochures, as they advertise the particular book for sale, tell us -- can't help but tell us a great deal about the society from which the books sprung, the culture, the way we live, the place we live, some of our concerns; and that's the general, the main general reason.

Q You made a study, have you not, of the contemporary works that are being written today?

A Yes, I have.

Q And this is your particular area of concern?

[R.T. Vol. IV, Sec. II, p. 33]

A One of my -- yes, would be of my feelings.

Q And in doing that study, you had an occasion to see many, many works of art?

A Yes, indeed.

Q Now, I am going to leave aside for a moment the redeeming value of these works and talk about community standards.

Have you formed an opinion as to whether these works go substantially beyond contemporary standards?

A Yes, I have.

Q And what is your opinion?

A That they don't go substantially beyond community standards.

Q And can you explain to us the basis of that opinion?

A Yes. There are books speaking of the graphic material. First of all there are books for sale in legitimate conservative bookstores, which contain not only a good deal of pictures with the same subject matter treated in the same way; but in some cases some of the identical pictures, which are, if not in the brochures, in the books which they advertise.

Q And have you bought such books that depict material similar as this?

A Yes, I have.

Q And have you brought some of those books with

[R.T. Vol. VI, p. 78]

The question is whether we should change exhibited to distributed.

MR. SHERMAN: Yes.

THE COURT: That's all right?

MR. SHERMAN: Yes.

THE COURT: All right. Now, on 77?

MR. SHERMAN: No, on page 76, a definition of knowingly -- and I think any definition of knowingly, which is apparently contrary to the Penal Code definition of knowingly, would be improper. This is about -- well, the first full paragraph on page 77 -- and you will notice that the definition of knowingly on page 76 is having knowledge that the matter is obscene. After the definition of knowingly seems to be drastically altered.

MR. CHATTERTON: There are two cases which support that, your Honor. The Campus is one cited in the instructions. People vs. Pinkus is another one. It is 256 Cal.App.2nd Supp. at 950; both of those cases stand for the proposition that the legislature would not have passed a statute defining knowingly in such terms to be taken literally because it would make the section unprosecutable; that it doesn't come forth with the obvious intention of the legislature.

THE COURT: One question. Were these drawn up after this? Are these two cases drawn up after the definition for obscenity, what is in the code?

MR. CHATTERTON: Yes, your Honor. They both

[R.T. Vol. VI, p. 79]

interpret -- they both deal with the definition in the code; that is, they say knowingly. Knowingly means knowing that the matter is obscene; does not mean what it says it means or what it literally says it means. And they do discuss what the legislature intended when they adopted that.

And I might add two things: Number one, that the law was checked to conform with the -- more literally with these court decisions; also Smith vs. California, which I am sure the Court is aware of; the case in which the bookseller was being

prosecuted under a Los Angeles Municipal Code, which made the strict liability to sell obscene matter whether the person knew the contents of the book or not. This satisfies *Smith vs. California*. The only thing that they're really interested in is it that the person has knowledge of the obscene character. He doesn't have to know that it would be found by a court or a jury to be obscene at some subsequent time.

THE COURT: Anything further?

MR. SHERMAN: Only, your Honor, I think the fact the Statute was changed indicates an admission on the part of the legislature that the law was different before the change. I personally haven't read these two cases; but I think since the Statute has a definition of knowledge, which seems to be quite clear, that a judicial interpretation which is contrary to the Statute, would be improper.

THE COURT: Just a moment. That's my understanding.

[R.T. Vol. VI, p. 80]

I will keep that in there as a definition, not as a definition, but as a wording of the courts and their interpretation of the section.

MR. SHERMAN: I would object if you are going to leave that in, "in some manner," and strike those words and "saying and being aware of the obscene character" --

MR. CHATTERTON: I think that comes directly from the case. Might I also add for the record, your Honor, that these instructions, as they sit before you, were the ones approved by the municipal court judges throughout the state; that is, they had their conference, and these are the ones they drew up as being the most accurate in defining and explaining the laws; that it applies to 311.2 under the Statute, which we

are now concerned with now in this trial.

THE COURT: This may be a very critical point to the instructions. You have stated that this is the correct citation and the wording here is in the citation? Now, if that's the case – I am not sure whether I read that case or not – I have read some of them. If you are sure that's in the citation; leave it in; but if it isn't, why it would be a very critical point.

MR. CHATTERTON: I would agree, your Honor. Let me read to the Court and for the Counsel's benefit.

THE COURT: No. You had better read it for your benefit first to yourself; because if you're wrong –

MR. CHATTERTON: Then I had better agree that “in

[R.T. Vol. VI, p. 81]

some matter [*sic*]” come out because here is what the Court says: “Awareness of the contents of a matter in that it is of an obscene character or nature” is all that was intended and all that was in the Constitution required. I take it the three words “in some manner” were the ones that were stricken.

THE COURT: That's what you were asking about?

MR. SHERMAN: I am asking the whole thing go out.

THE COURT: Otherwise it will stay in.

MR. SHERMAN: Did they use the word character? I don't know what that word means either. I think we should have a definition of character.

MR. CHATTERTON: Well, that's something that can certainly be argued. Yes, they use the word obscene character or nature.

THE COURT: Suppose we put it in like that?

MR. SHERMAN: Obscene what?

THE COURT: Character or nature.

MR. CHATTERTON: Yes.

THE COURT: Go to the next page now. 78, first paragraph only stays in.

MR. CHATTERTON: Okay.

THE COURT: And the last one – first paragraph only stays in; second paragraph is omitted.

MR. CHATTERTON: Excuse me. That's the one you crossed out?

THE COURT: Yes.

■

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on **SEPTEMBER** , 1971, I served the within **APPENDIX (Miller v. People - No. 1288)** on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

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Costa Mesa, California 92626
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on **SEPT.** , 1971, at **HUNTINGTON BEACH, CALIFORNIA.**

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