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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.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

Appellant, after a trial by jury, was convicted of distributing obscene matter in violation of California Penal Code Section 311.2. The material consisting of five advertising leaflets is before the court and speaks for itself.

At the trial, the evidence showed that the five leaflets had been received in Orange County by an Orange County resident. Doctor Sears, Professor of English, testified that in his opinion the leaflets were utterly without redeeming social importance [R.T. III, pp. 4-114, IV, pp. 12-50]. Doctor Wagner, a psychiatrist, testified that in his opinion the materials were utterly without redeeming social importance and appealed to the prurient interest of the average person in the com-

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munity [R. T. IV, pp. 77-142, Sec. II, pp. 24-29]. Sergeant Shaidell of the Los Angeles Police Department, testified that the items went substantially beyond the limits of candor of the community [R.T. III, Sec. I, pp. 114-142; Sec. II, pp. 4-93]. Appellant's expert Doctor Caroline Stuark, presently a part-time teacher of extension classes, testified that the materials had some redeeming social importance because the materials by advertising a certain type of books "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" [R.T. IV, Sec. II, p. 32].

This appeal followed the conviction in the above case.

SUMMARY OF THE ARGUMENT.

1. While several Justices of the United States Supreme Court have expressed the opinion that evidence relating to standards of the community, prurient appeal and redeeming social importance should be introduced in a state obscenity trial, in no instance has it ever been suggested that the introduction of national experts at a state trial be made a constitutional requirement. In *Smith v. California,* 361 U.S. 147, some of the Justices in fact remarked that a defendant should be allowed to introduce expert testimony *by way of defense.* In *Jacobellis v. Ohio,* 378 U.S. 184, This Honorable Court concluded that on appeal the Court should make an *independent* constitutional determination of obscenity of the materials before it. *Ginzburg v. United States,* 383 U.S. 463, points out that ordinarily This Honorable Court has regarded the materials as sufficient in themselves for the determination of the question.

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2. There is no merit to Appellant's contention that the introduction of Statewide standards at an obscenity trial violates Article I, Section 8, Cl. 7 of the United States Constitution since the Federal Government does not have the right to control the morals of citizens under the commerce clause. Such power, if anything, has historically resided in the States and not in the Federal Government. (*Roth v. United States,* 354 U.S. 476).

3. *In re Giannini,* 69 Cal. 2d 563 properly held that a statewide standard is proper in matters of local concern and in the case before the Court there is no evidence that the material, consisting of advertising leaflets was intended for anything other than local distribution. Moreover, Appellant at the trial level never even suggested that the material was intended for other than local distribution, nor did he ever contend that a national standard would differ from a state standard.

4. Expert testimony presented by Respondent at the trial tended to relate to a national rather than a state social community while Appellant's expert witnesses spoke in terms of a state wide community. Since Respondent's experts applying national standards found the materials to be substantially beyond the limits of candor of the community, utterly without redeeming social importance and appealing to the prurient interest, while Appellant's experts, applying statewide standards, found that the materials did not go beyond the limits of candor of the community and had some redeeming social importance, the application of statewide standards rather than national standards, benefited rather than injured Appellant.

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5. Since what was prosecuted in this case was the dissemination of obscenity to a California resident and not the *mailing* of obscene matter no pre-emption issue is present.

6. Since Appellant entered a plea of "not guilty" and has not properly raised the issue of double jeopardy in the trial court, he may not raise the issue of double jeopardy on appeal.

7. Since the Court instructed the jury according to the law as it existed at the time of offense there was no retroactive application of law as contended by Appellant.

8. The materials consist of a collection of depictions of cunnilingus, sodomy, orgies and other sexual acts. The depictions are utterly void of social importance and represent hard core pornography under any conceivable test.

I.

The Presentation of National Expert Testimony Is Not a Constitutional Requirement.

In setting forth the proper test of obscenity, in *Roth v. United States,* 354 U.S. 476, 1 L. Ed. 2d 1498, 1509, this Honorable Court approved the following jury instruction:

> ". . . The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called wordly-wise and sophisticated indifferent and unmoved. . . .
>
> "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those

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> whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.

The then Chief Justice Warren, in his concurring opinion, went on to point out:

> The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached.

Mr. Justice Harlan's concurrence to the rationale used in disposing of the *Alberts* case, stated:

> Since the domain of sexual morality is pre-eminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality. It seems to me that nothing in the broad and flexible command of the Due Process Clause forbids California to prosecute one who sells books whose dominant tendency might be to "deprave or corrupt" a reader. I agree with the Court, of course, that the books must be judged as a whole and in relation to the normal adult reader.

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In his dissent to the rationale used in disposing of the *Roth* case the same Justice found protection from censorship in the existence of varying state standards since what will be found obscene in one state will not necessarily be found to be so in another:

> Different States will have different attitudes toward the same work of liteature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.
>
> Quite a different situation is presented, however, where the Federal Government imposes the ban. The danger is perhaps not great if the people of one State, through their legislature, decide that "Lady Chatterley's Lover" goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard.

The first and only comment on evidentiary proof of community standard is found in Mr. Justice Harlan's concurring opinion in *Smith v. California,* 361 U.S. 147, where in discussing the trial court's exclusion of appropriately offered testimony through duly qualified witnesses regarding "the literary and moral criteria by which books relevantly comparable . . . are

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deemed not obscene," he advocates the admission of expert testimony and states:

> The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process—"using that term in its primary sense of an opportunity to be heard and to defend [a] . . . substantive right," *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 US 673, 678, 74 L ed 1107, 1112, 50 S Ct 451—requires a State to allow a litigant in some manner to introduce proof on this score. While a State is not debarred from regarding the trier of fact as the embodiment of community standards, it is not privileged to rebuff *all* efforts to enlighten or persuade the trier.

However, Mr. Justice Harlan there concludes by cautioning against imposing on the states the necessity of *proving* their case by the introduction of any particular kind of evidence:

> However, I would not hold that any particular kind of evidence must be admitted, specifically, that the Constitution requires that oral opinion testimony by experts be heard. There are other ways in which proof can be made, as this very case demonstrates. Appellant attempted to compare the contents of the work with that of other allegedly similar publications, sold and purchased, and which received wide general acceptance. Where there is a variety of means, even though it may be considered that expert testimony is the most convenient and practicable method of proof, I think it is going too far to say that such a method is constitutionally compelled, and that a

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> State may not conclude, for reasons responsive to its traditional doctrines of evidence law, that the issue of community standards may not be the subject of expert testimony. I know of no case where this Court, on constitutional grounds, has required a State to sanction a particular mode of proof.

In *Jacobellis v. Ohio,* 378 U.S. 184, the Court, for the first time inquired into the true meaning of "community standard." The Justices Brennan and White declared themselves in favor of a *national* standard. The Justices Clark and Warren argued in favor of a local standard and stated:

> It is my belief that when the Court said in Roth that obscenity is to be defined by reference to "community standards," it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable "national standard," and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a "community" approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities through the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals.

Respondent, however, respectfully submits that the two views expressed in *Jacobellis, supra,* do not deal with the necessity of expert testimony at a state trial.

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Jacobellis in fact deals primarily with the Supreme Court's power of review over obscenity and with the standard to be used in exercizing this power of review. The primary concern of *that* standard of review is the protection of the dissemination of ideas. The standard in *Jacobellis* thus has or should have primary reference to the third yet most important element which must coalesce before a work can be declared obscene—namely the existence of social redeeming importance. And in dealing with that element it seems eminently proper to apply a national standard. In dealing with elements of proof of prurient appeal and of limits of candor on the other hand, the concern is with individual physical reactions rather than with abstract ideas, and a standard local in nature is far more apt to adequately reflect the physical reactions of other beings within the same basic culture. More important, *Jacobellis* does *not* in any way set forth the requirement for the type of testimony to be presented to the jury for it fully realizes that no matter *what* kind of expert testimony is presented to the jury, the jury will make its decision within the more limited scope of the jury's own experience. And it is for this reason and this reason alone that *Jacobellis* imposes on the Appellate Courts the duty to protect free expression by making an *independent* constitutional determination of obscenity of the materials before it. And it is in setting forth the standard to be used by the Appellate Courts that *Jacobellis* speaks of a non-local standard. The Court states:

> Hence we reaffirm the principle that, in "obscenity" cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of

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> the case as to whether the material involved is constitutionally protected.
>
> The question of the proper standard for making *this determination* has been the subject of much discussion and controversy since our decision in Roth seven years ago.

The court goes on to say:

> It has been suggested that the "contemporary community standards" aspect of the Roth test implies a determination of the *constitutional question* of obscenity in each case by the standards of the particular local community from which the case arises. This is an incorrect reading of Roth. (Emphasis added).

And the court concludes:

> We thus reaffirm the position taken in Roth to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard.

That this is the intent of the opinion is further made clear by the statement at note 3:

> "It may be true . . . that judges 'possess no special expertise' qualifying them 'to supervise the private morals of the Nation' or to decide 'what movies are good or bad for local communities.' But they do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standards for obscenity. If freedom is to be preserved, *neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression.* Their decisions must be subject to effective, independent review, and

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> we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court."

It is further supported by the fact that in obscenity cases this Honorable Court in most instances looks only to the material in question (*Cf. Ginzburg v. United States,* 16 L. Ed. 2d 31, 383 U.S. 463).

What appellant is now attempting to do is apply the dictates of *Jacobellis* and to make them a Constitutional requirement of the type of evidence to be presented to the jury. Respondent submits that this impossible requirement is a far cry from the *Smith* opinion where even the most liberal members of the Court advocated *allowance* of such evidence by way of defense.

Additionally, in light of *Jacobellis,* how has appellant or any defendant been injured by the presentation of state experts at an obscenity trial? And of what meaning would be the testimony of nationwide experts? Had national experts been presented and had the appellant been found guilty would the Court of Appeals be *bound* by the opinion of the experts? In light of *Jacobellis* the answer is clearly in the negative. In obscenity cases where the "weight and sufficiency" of the evidence have nothing to do with the finding of the "Constitutional fact" of obscenity, a constitutional requirement that any expert evidence be presented at the trial would seem meaningless. As pointed out in *Ginzburg v. United States,* 16 L. Ed. 2d 31, 383 U.S. 463:

> In the cases in which this Court has decided obscenity questions since Roth, it has regarded the materials as sufficient in themselves for the determination of the question.

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Accordingly Respondent submits that this Honorable Court's requirement of a *national* standard in making a Constitutional determination of obscenity does not carry with it the Constitutional requirement of presenting the jury with national or state experts.

II.

The Use of a State Wide Standard Was Not in Violation of Article I Section 8 of the United States Constitution.

Appellant seeks to support his contention that a national standard is required by arguing that use of a state wide standard collides with the commerce clause. The fallacy in this argument lies in the assumption that the powers of the United States Supreme Court to oversee obscenity stems from the commerce clause. Constitutionally, however, the Court's duty to oversee obscenity exists *only* to safeguard the guarantees of the First Amendment. For a conflict to arise because of the commerce clause, there would have to exist in the Federal Government the right to control the morals of citizens under the commerce clause. The non-existence of such right is amply set forth in *Roth v. United States, supra,* where the court states:

> We therefore hold that the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art 1, § 8, cl 7.

The interrelation of Federal versus State power is also quite clearly there set forth in Mr. Justice Harlan's dissenting opinion:

> But in dealing with obscenity we are faced with the converse situation, for the interests which ob-

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> scenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric.

And in *Jacobellis* the Court reiterates its concern with *dissemination* of ideas, not with *commercial dissemination:*

> It would be a hardy person who would sell a book or exhibit a film anywhere in the land after this Court had sustained the judgment of one "community" holding it to be outside the constitutional protection. The result would thus be "to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly."

There is accordingly no merit to appellant's contended violation of the commerce clause.

III.

The Evidentiary Requirements Set Forth by the California Supreme Court in In Re Giannini, 69 Cal. 2d 563, Do Not Infringe Appellant's Constitutional Rights.

In *In re Giannini,* 69 Cal. 2d 563, the California Court, for the protection of the defendants found it necessary to impose on the People the heavy burden of producing evidence on community standards. Such requirements, however, are not Constitutionally necessary and merely seek to give guidance to the jury. They

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are thus clearly not binding on the Court upon which rests the duty of determining obscenity in the Constitutional sense under the guidance of this Honorable Court.

Moreover, in the *Giannini* case, the Court is only speaking of subjects intended for local consumption and dissemination and specifically refuses to determine the applicability of national standards to books or films by stating:

> But we need not, in the instant case, reconcile this contention with the practical problems of producing evidence of national standards. Iser's dancing is purely local in nature, a subject matter obviously not intended for nationwide dissemination. Since the decision as to whether to stage a "topless" dance rests solely on local considerations, the problem that unduly restrictive local standards may interfere with dissemination of and "access to [such] material" as books or film does not arise in the instant case.

Respondent submits that a local standard on local subjects is always proper (See *In re Giannini, supra*).

In the case at hand the items involved are *not* books nor films nor other items obviously meant for national distribution, but consist of advertising leaflets. Appellant at the trial presented no evidence whatsoever as to distribution or intent to distribute other than on a purely local or at best statewide basis. Under the circumstances Respondent submits that it would require imagination to surmise that the advertising leaflets were intended for other than local distribution.

Moreover, California is the most populous state in the United States. Statistics of which this Court can

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take judicial notice show California to be one of the most sophisticated states in the country. Contemporary community standards of the State of California would thus be far more liberal than those of the national community. Additionally since the population of the State of California compares favorably in the national socio-economical scale and represents approximately 10% of the national community, the standards of the California community would adequately reflect the national standards.

Finally, Appellant himself throughout the trial *never* once contended that the national standard was different from the California standard nor did he present evidence that the national standard was different. Rather he limited himself to presenting evidence of the California Standard. He cannot now, at this stage of the proceedings, complain because evidence of national standards was not presented.

IV.

The Expert Testimony Presented by Respondent Adequately Informed the Jury on the Issue of Obscenity.

A comparison between the expertise and testimony of Appellant's experts with those of Respondent's shows that the text used by Appellant's witnesses to determine the standards was incorrect. It further shows that Appellant was, if anything, benefited by the use of state rather than national standards.

Doctor Cee, Appellant's principal expert, has a B.A. from Los Angeles State College, and an M.A. and Ph.D. in English Literature from U.C.L.A. Her experience consists of two years teaching at U.C.L.A. and part time teaching of extension courses [R.T. IV,

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p. 54]. She has published a novel and a scholarly article and writes regularly for T.V. Magazine, West Magazine and Status Magazine [R.T. IV, pp. 56-57]. In addition Doctor Cee has apparently asked several personal friends [R.T. IV, p. 66] whether materials similar to the leaflets involved herein are available in any of the stores and libraries in her friend's area [R.T. IV, pp. 59-60]. In determining contemporary *state* community standards she relies on the street interviews (numbers unknown) with members of the public [R.T. IV, p. 65], although most of her interviews, however, seem to have consisted of general casual conversations with friends [R.T. IV, pp. 72, 74]. She determined community standards "by what they (the public) buy that's offered," and concluded that the materials were not utterly without redeeming social importance because:

> 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, tells 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 [R.T. IV, Sec. II, p. 32].

She found that the leaflets did not go substantially beyond community standards because:

> A. 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

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> some cases some of the identical pictures, which are, if not in the brochures, in the books which they advertise [R.T. IV, Sec. II, p. 33].

By contrast Doctor Sears, one of Respondent's experts on redeeming value, whose experience, scholarly qualifications and publications are too lengthy to set forth here [R.T. III, pp. 5-66, Peoples F13], asked why he felt qualified to determine the redeeming social importance of the leaflets in question, replied:

> 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 textroom matter [R.T. III, p. 72].

After stating his opinion that the materials were *utterly* without social redeeming importance [R.T. III, pp. 86, 87, IV, p. 35], he went on to show by what means he had come to have this opinion and explained:

> A. . . . 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 [R.T. IV, p. 41].

Time and again he pointed out that it is only within the context of a text or of a totality that materials can

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be judged in the sense that the same language, scene, depiction, photograph, painting or graphic presentation of sexual material can be utterly without redeeming social importance in one context and yet have redeeming social importance in another. Speaking of *Portnoy's Complaint* as an example, he stated:

> . . . 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 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 [R.T. IV, pp. 40-41].

And asked whether acceptance by some segment of the society is of itself sufficient to show redeeming social importance he replied:

> 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 [R.T. IV, p. 45].

From the above testimony and the tests set forth by the Court in *Smith* and *Jacobellis,* it can be clearly seen

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that the standard applied by Doctor Sears is reached by application of the test advocated by this Court whereas the standard applied by Appellant's expert in attributing redeeming social importance to the items here in question is totally inadequate. The result reached by Appellant's experts is thus meaningless.

Additionally, Doctor Wagner's testimony, as well as that of Doctor Sears related to American *society* as a whole while Appellant's witnesses related their testimony to the State of California.

Doctor Wagner's background [R.T. IV, pp. 78-82, 85-95] speaks for itself. Significantly he has been licensed to practice as a psychiatrist in California, Washington State, Texas, Missouri and Illinois and has come in contact with patients in all of those states. After studying the leaflets he stated that in his opinion they definitely appealed to a prurient or morbid interest in sex, nudity and or excretions, and concluded:

> 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 [R.T. IV, p. 111].

The reasons why, as a doctor and a psychiatrist he finds the materials to be not only utterly without redeeming social importance but in fact harmful are set forth in terms of the mental and psychological reac-

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tions of human beings conditioned by a particular society—American society [R.T. IV, p. 115]. Doctor Wagner analyzes the harmfulness of the leaflets in terms of conflicts between the sexual desires which arise in the average person in viewing the material, and the guilty feeling created by the environmental training of the average person in today's society [R.T. IV, pp. 115-118]. Because he based his conclusion not on his observations and study of California men but of men in American society, his testimony is sufficient whether the standard to be applied be local or national.

While Doctor Sears and Doctor Wagner testified in terms of society as a whole and concluded that the materials were utterly without redeeming social importance and appealed to the prurient interest, Appellant's own witnesses who limited their testimony to the State of California, on the other hand, found the materials to have some redeeming social importance and to have no appeal to the prurient interest of the average California person. Respondent submits that the evidence thus supports its contention that Appellant, if anything, was benefited rather than injured, by the application of local standard in this case and any error in instructing the jury in relation to state wide standards was thus harmless beyond a reasonable doubt.

Appellant's contention that Doctor Wagner testified that the material had some redeeming social importance is based on the following statements by Doctor Wagner:

> Q. Doctor, would you say that this material has no social value—don't you mean by that that

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

Respondent submits that Appellant's contention is unfounded as to the content of the above statements in light of the doctor's previous and repeated denial of redeeming social importance of the material [See *e.g.* R.T. IV, Sec. II, pp. 20, 26, 28]. A reading of even a portion of Doctor Sears' testimony serves to wholly negate Appellant's contention that Doctor Sears attributed redeeming social importance to the material.

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V.

The Testimony of Sergeant Shaidell Was Properly Admitted.

Appellant attacks the testimony of Officer Shaidell by assuming an invalid premise, *i.e.* that Officer Shaidell's qualifications stem only from a survey. Officer Shaidell testified as follows:

1. In the last six years he had reviewed approximately 100,000 communications from members of the public dealing with materials involving sex and nudity. The bulk of those communications involved materials sent through the mail [R.T. Vol. III, Sec. I, p. 115, lines 3-24, p. 116, lines 3-9].

2. He is in constant contact with law enforcement personnel who tell him the complaints they have received [R.T. Vol. III, Section I, p. 124, lines 9-26; p. 125, line 1; p. 126, lines 5-8].

3. He is a participant in the League of Cities [R.T. Vol. III, Section I, p. 127, lines 3-16].

4. He has traveled throughout the state and observed what was being offered to the public [R.T. Vol. III, Section I, p. 129, lines 15-23].

5. He is familiar with the Gallup Poll's survey concerning the same subject matter [R.T. Vol. III, Section I, p. 128, lines 4-11 and 18-26; p. 129, lines 1-3].

It should be further noted that he has qualified as an expert on 26 prior occasions [R.T. Vol. III, Section I, p. 130, lines 4-26; p. 131, lines 1-3].

In addition to the above, Officer Shaidell and others conducted a survey throughout the state. The questionnaire used was prepared by Shaidell and members

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of the Department of Justice; reviewed by 15 deputy District Attorneys; submitted to a committee of the Attorney General; and also reviewed by two marketing professors at U.C.L.A. [R.T. Vol. III, Section 2, p. 15, lines 6-18; p. 8, lines 1-4]. It was taken to 18 of the State's 58 counties. Those counties represent 90% of the State's population [R.T. Vol. III, Section 2, p. 20, lines 15, 16]. There were 1,902 people surveyed; 105 different occupations.

In light of the above qualifications, can there be any doubt that Officer Shaidell had some special knowledge that could aid the jury?

VI.

Federal Law Has Not Pre-empted the Field and the States Have the Right to Prosecute the Dissemination of Obscene Matters Within Their Borders.

In *Roth v. United States,* 354 U.S. 476, 1 L. Ed. 2d 1498 this Honorable Court stated:

> ". . . The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions. . . ." *Railway Mail Asso. v. Corsi,* 326 U.S. 88, 96, 89 L. Ed. 2072, 2078, 65 S. Ct. 1483.

Clearly the power of the Federal Government to legislate in this area is thus limited by the power granted to it by the Constitution. As pointed out in *Roth, supra:*

> ". . . The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and

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> the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. . . ."

And the "power" in cases involving obscene matter is set forth in *Roth, supra,* at note 32:

> In *Public Clearing House v. Coyne,* 194 U.S. 497, 506-508, 48 L. Ed. 1092, 1097, 1098, 24 S. Ct. 789, this Court said:
>
> "The constitutional principles underlying the administration of the Post Office Department was discussed in the opinion of the court in *Ex parte Jackson,* 96 U.S. 727, in which we held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded. . . . It may . . . refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy. . . . For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked. . . ."

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The prosecution under the California statute for distributing obscene matter in this case obviously in no way "imposes a burden or interferes with the Federal postal functions."

VII.

There Was No Violation of Appellant's Right to Be Free From Double Jeopardy.

Appellant's plea was "not guilty." If his contention was former jeopardy, his plea was not in accordance with California Penal Code Section 1017. However, when the plea of former jeopardy is not made before the trial court, it cannot be raised for the first time on appeal. *People v. Martinson,* 179 Cal. App. 2d 164; *People v. Fairchild,* 254 Cal. App. 2d 831.

Finally, the case which appellant cites apparently did not go to trial, and did not involve the brochures mailed to the Orange County victim.

VIII.

The Amended California Statute Was Never Invoked Against Appellant.

In the instant case, the trial court instructed the jury according to the law as it existed at the time of the offense. The court did not use Penal Code Section 311(e) as it presently exists; rather, it instructed the jury as follows:

> "Knowingly means having knowledge that the matter is obscene." The word "knowingly" as used in these instructions, imports a knowledge of the contents of the material, and being aware of its obscene character or nature. (*People v. Campise,* 242 A.C.A. 713.)

There was a lengthy, in chambers discussion, prior to instructions being given that shows the reasons

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for the instruction [R.T. Vol. VI, pp. 78-81, lines 1-18].

In addition, it should be noted that the trial court gave an instruction that benefited the appellant more than the alleged instruction could have prejudiced him. It read as follows:

> In order to find the defendant guilty you must find beyond a reasonable doubt and to a moral certainty that said defendant knew not only the contents of the brochures, but that he also knew they appealed to a prurient interest in sex, that they went substantially beyond contemporary standards of candor in sexual matters and that they were utterly without redeeming social value. (Defendant's proposed jury instruction No. K—given as modified.)

IX.
The Materials Involved Are Obscene as a Matter of Law.

The materials involved are a collection of depictions of cunnilingus, sodomy, buggery and other similar sexual acts performed in groups of two or more. As pointed out in *Ginzburg v. United States,* 383 U.S. 463, 16 L. Ed. 2d 31, 55, by Mr. Justice Stewart, there does exist a class of materials easily identified as hard core pornography:

> ". . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format

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> grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. . . ."

Respondent submits that the materials here in question are merely advertizing leaflets which come within Justice Stewart's definition of hard core pornography and are obscene as a matter of law.

Conclusion.

For all the above reasons, respondent urges this Honorable Court to affirm the judgment of the trial court.

Dated this 11th day of June, 1971.

Respectfully submitted,

CECIL HICKS,
District Attorney, County of Orange, State of California,

MICHAEL R. CAPIZZI,
Assistant District Attorney,

By ORETTA D. SEARS,
Deputy District Attorney,
Attorneys for Respondent.

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