In the

Supreme Court of the United States

WILLIAM L. HAMLING, et al.,

Petitioners

vs

UNITED STATES OF AMERICA

No. 73-507

Washington, D. C.
April 15, 1974

Pages 1 thru 48

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WILLIAM L. HAMLING ET AL, Petitioners	:	
v.	:	No. 73-507
UNITED STATES	:	

Washington, D.C.

Monday, April 15, 1974

The above-entitled matter came on for argument at 11:43 o'clock a.m.

BEFORE:

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

APPEALRANCES:

STANLEY FLEISHMAN, ESQ., Suite 718, 6922 Hollywood Blvd, Hollywood, California 90028 For Petitioners

SAM ROSENWEIN, ESQ., 4255 Agnes Avenue, Studio City, California 91604 For Petitioners

ALLAN A. TUTTLE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530 For Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-507, Hamling against the United States.

Mr. Fleishman, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF STANLEY FLEISHMAN, ESQ.

ON BEHALF OF PETITIONERS

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

I stand on behalf of Petitioner, Mr. Hamling and the corporate petitioners herein. Mr. Rosenwein represents the other petitioners.

Mr. Hamling has been given a prison term of four years. The corporate defendants have been fined, including Mr. Hamling, $87,000 for mailing a brochure that hurt no one. The brochure advertised a book, a book with plain, serious, political value.

The book is an illustrated version of a government report which basically held or concluded that the law of obscenity in a free community such as ours, requires that willing adults be permitted to make their own choice with regard to whether or not they will or will not expose themselves to sexually explicit material.

The brochure follows the line of the book. The

government's own witness called the brochure "a miniature of the book."

Petitioners, of course, have been caught --

Q Was the original report illustrated, Mr. Fleishman?

MR. FLEISHMAN: No, sir, it was not. But we called, however, one of the commissioners, Commissioner Larsen, who testified that the book that we put out with its illustrations made the book more valuable with the pictures.

We also called the executive director and the director of research for the Commission Report. He similarly said that the illustrations made the report more valuable, not less.

The Petitioners were caught, please --

Q Did they enlarge on that?

MR. FLEISHMAN: Yes, they did, your Honor.

Q How did they?

MR. FLEISHMAN: They explained that for informed people to know what the issue was about, that they ought to be able to look at what the explicit material was that was being litigated and both witnesses testified, those who were in favor of the proposal of the Commission and those who were opposed to it, both would be better informed by looking at the pictorial material which accompanied the text.

The government stipulated that every picture --

every picture in the report, was related in some reasonable fashion to the work that the Commission had, in fact, developed.

Q Is there any reason why the jury wouldn't be free to disbelieve these witnesses, just as they would any other witness?

MR. FLEISHMAN: On that score, I believe not, your Honor, because they simply didn't know. If we believe that experts have a place in a trial,then if they are honest people, no one ever disputed their honesty, when they talk in an area in their expertise, then I think that a jury should listen, because a commissioner, who spent two years on the commission report, the executive secretary spent two years there, simply has an opinion that is better than a lay jury.

Q But juries do disbelieve experts for a number of reasons, don't they? And there has been no rule of law that says they have to believe them.

MR. FLEISHMAN: Yes, your Honor.

In any event, opposition on this score is that both the book had serious political value and therefore is a matter of law, constitutional law, is protected by the First Amendment and that the brochure similarly has serious political value and is absolutely protected by the First Amendment.

Q Are there not a number of holdings of both state and federal courts to the effect that the jury has wider latitude in accepting or rejecting expert testimony than other testimony?

MR. FLEISHMAN: On this issue, your Honor, whether the work has serious political value, that is a matter of First Amendment law and has nothing to do with either the acceptance or the rejection of the expert witness, so that on our score, in terms of whether it has serious political value, a book which urges a major change in policy and brochure which urges major change in policy has to, in a free society, be recognized as containing the requisite serious political value in our judgment.

Now, if the Court please, the Petitioners have been caught, as everyone recognizes, in a period of transition. They are caught in a no man's land.

Under similar circumstances, three courts at least, the First Circuit in Palladino, the Tenth Circuit in Friedman and a different panel of the Ninth Circuit in Henson held that it was simply unfair to send a person to prison, to brand him as a felon where the law has changed, as it has in this case. And I would call to the Court's attention the fact that the opinion of the court of appeals in this case is under a heavy cloud by reason of the fact that another panel in Henson has reached the opposite conclusion and

perhaps equally important is the fact that in another case mentioned in my reply to the government, the government's opposition to our petition for certiorari at page 2, in London Press, the identical brochure was involved and there the Ninth Circuit granted a rehearing en banc, or ordered a rehearing en banc and that matter has been put over since this Court has now granted certiorari.

The point I make is that the Ninth Circuit itself has expressed a very serious doubt as to the correctness of the judgment in this case.

Our basic point, your Honor, is that the federal statute, Section 1461, on its face and as construed to pre-Miller conduct simply fails to meet constitutional muster. It does not afford fair notice. It does not afford the concrete guidelines which this Court said every obscenity statute would have to have before anyone would be subjected to any criminal prosecution and the defect in the statute as it existed prior to Miller, is tri-fold.

First of all, the statute plainly does not have the specificity which this Court said was an absolute essential to the validity of an obscenity statute. One need only look at the words of the statute to see they talk only in terms of obscene, lewd, lascivious, indecent, filthy and the like.

It is equally plain that this Court had not

heretofore, before Miller, had a saving construction of the statute.

If there is -- if there be a saving construction of the statute, it would be in footnote 7 in 12 Reels of Film and there the court only said that it was prepared in the future to read Miller into the federal statute and if the court was prepared in the future to do so, it follows inevitably that the court had not theretofore had the Miller specificity in the statute.

And so, the statute was simply unconstitutionally vague because it did not have what this Court said every obscenity statute would have to have if it was to meet constitutional requirements.

Secondly, if the Court please, the authoritative construction of 1461, at the time that the Petitioners herein were tried and convicted, was that national standards had to be used. National standards had to be used with regard to patent defensiveness. National standards had to be used with regard to prurient interest.

But this Court has said that there are no national standards. They are unascertainable. They are unprovable. They are unrealistic. They are abstract and the Court has said that a jury, trying to answer the question of obscenity within the framework of national standards, was engaged in an exercise in futility.

Therefore, the Petitioners here were convicted of offending standards that simply, on the Court's own terms, do not exist.

The statute, in the first place, is defective because that is the authoritative construction of the statute as of the time of the trial and the conviction and having read the national standards into the statute and following the logic -- not the logic, the teachings of Miller, we know that national standards simply do not exist.

The statute is also unconstitutionally vague, pre-Miller because of the utilization of the utterly without redeeming social value test and with that regard, the Court said that the test was ambiguous, that it was unworkable.

The government reads the Court's opinion somewhat differently, but as we see it, it makes no difference. The government says that the utterly without redeeming social value test was rejected because it imposed an impossible burden upon the government, that the government could never obtain a constitutionally-valid conviction under that standard.

If that be so, the argument really is that the utterly without redeeming social value test is so all-encompassing that it effectively nullifies 1461 and if that be so again, one cannot say that the Petitioners had fair notice or concrete guidelines as to what kind of conduct

would make them felons and punishable by heavy jail terms.

And, finally, if the Court please in this regard, at the time of the conduct herein, and at the time of trial, the opposite test in determining obscenity was the Redrup test.

Everybody agrees on this bench, as I understand it, that that was no test at all. It was nothing but a subjective test in which any five members of this Court, using their separate tests, their own intuitions, would come to a conclusion. In short, all that the Petitioners had to know was, how would five justices look at the material at the time that he came before you.

Now, if that be a rule of law, if that is a test that meets due process, I respectfully submit, then, due process has a meaning quite different from anything that I had understood before.

I had always thought that in a free society, a person subject to a law would have to know with reasonable certainty, in advance, what made his conduct criminal or not criminal and if the rule be that whatever five or nine justices believe is bad, then, I submit, your Honors, that there has not been a compliance with due process.

But, even if the Court is not prepared to hold that the statute is unconstitutional in the respects that we have set forth, I respectfully submit, your Honor, that the indictment in this case is fatally infirm.

The indictment is fatally infirm because the indictment follows the statute word by word. There is nothing in the indictment which in any way clarifies the ambiguity in the statute itself. So if the words, obscene, lewd, lascivious, et cetera, by themselves do not give fair notice and concrete guidelines, then they do not give the fair notice that the Sixth Amendment requires in giving the accused fair notice of that which he is required to defend against.

Now, the government, if the Court please, has moved to Palladino as the case to point the direction to the solution of the trial here, the case herein. The government, recognizing that it is unfair to convict a person on a serious charge if he is caught in midstream, says, let's follow Palladino.

Well, if we follow Palladino, we are entitled, of course, to a reversal because in Palladino, there was a conviction and after remand by this Court, the First Circuit said that fairness required that the issue be submitted to the jury and, of course, there there was a national standard.

I put aside whether it is correct to submit it to the jury on a national standard or a local standard. The simple fact is that it was recognized in Palladino that there had to be a submission of the issue to the jury.

Now, it is interesting that in Friedman, where

there was also the same conclusion reached by the Tenth Circuit, the Tenth Circuit in Friedman took the view that there had to be a submission to the jury because local standards were to be applied in federal cases.

Now, this is the position that the government urges for federal prosecutions, the utilization of local standards.

Our view of it is that if, in fact, local standards are to be used in federal proscecutions, plainly, the petitioners were not tried or convicted under the local standards.

Indeed, as we pointed out in our reply brief, our attempt to put evidence in with regard to local standards was excluded.

We, for example, had called the witness, who had made a survey in the San Diego area with regard to the identical brochure in question and on a scientific basis, she asked 718 people their opinions with regard to the brochure. Overwhelmingly, as the record shows, they were of the view, essentially, that the brochure, as it stood, should be allowed to be circulated to the American people generally.

That evidence was excluded, however, solely on the ground that the only test that was applicable was the national standards and not the local standards.

So that, if, again, we are to follow the suggestion of the government that local standards are to be used, then,

plainly, there has to be a reversal in this case.

If we agree that there are national standards that are the appropriate remedy in a federal court, at least until such time as Congress speaks, then it seems to us that this Court's ruling that there are no national standards has the practical effect of invalidating the federal statute, at least in the utilization of national standards.

If the Court please, I would like to reserve the balance of my time till after Mr. Rosenwein, who is representing the other Petitioners.

MR. CHIEF JUSTICE BURGER: Mr. Rosenwein, I think we'll not ask you to divide your time on a minute and a half. We'll let you begin after lunch.

[Whereupon, at 11:59 o'clock a.m., a recess was taken for luncheon until 1:00 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Rosenwein.

ORAL ARGUMENT OF SAM ROSENWEIN, ESQ.,

ON BEHALF OF PETITIONERS

MR. ROSENWEIN: Mr. Cheif Justice and may it please the Court:

The issue that I am devoting myself to is the issue of scienter, expression of guilty knowledge and what is the mental element requisite for a constitutionally permissible prosecution.

Now, the record as brought down below was something like this and on a motion for a bill of particulars, with respect to the indictment, we have charged that the Petitioners knowingly mailed and used the mails and mailed this obscene brochure.

In answer to a motion for our bill of particulars, the government stated it was not claiming that these defendants knew, in fact, that the material was obscene. All it was claiming was that they knew the contents of the brochure and that was sufficient to satisfy the scienter requirement.

Q Do you suggest, Mr. Rosenwein, that in order to make out a case, the handler of the material must acknowledge that it is obscene before he exposes it or exhibits it?

MR. ROSENWEIN: My contention is simply this, that one has to prove beyond a reasonable doubt that he knew the contents and that he knew the obscene nature and character of the contents, and with that knowledge, intentionally disseminated the material with a specific intent to appeal to a prurient interest.

That, I think, is a burden that is upon prosecution in an obscenity prosecution and we asked the court below thereto instruct generally along those lines.

In answer to that, the court instructed the jury and said to us, that it would say no more than that the knowledge of contents of the envelope in which the brochure was contained was all that was required in this case.

He would charge, said the trial court, that the defendants are required -- that the government has to prove, it has to be shown that the defendants knew the nature and character of the material.

Trial counsel said to the trial court, "What do you mean by 'nature and character of the material? Will you tell us does that mean dealing with sex or sexually-oriented? Or does it mean obscene nature in character?'"

The trial court said, "I am going to instruct the nature and character and it means what it says." And that is all he ever instructed the jury.

So what this jury found was that the Petitioners

in this case knew the contents or the nature and character of the contents in the sense that -- and one can only suppose, since obscenity was ruled out of the instructions. It says, "A knowledge of obscenity of the material or the non-obscenity of the material was told to the jury as being irrelevant."

It followed, therefore, that the jury found that they knew that the contents of this brochure dealt with sex and that was enough to establish the guilty knowledge that resulted in the imposition of the sentences.

Now, what we have contended, simply, is this. The indictment charged us with knowingly mailing an obscene brochure. What is an obscene brochure? What are the qualities that go into a brochure that makes it obscene?

At the time when we were tried, there were three elements. One, that it exceeded contemporary community standards, that it appealed to a prurient interest and was utterly without social value.

Those were the qualities that made it obscene. Obviously, if those are the elements of the offense, this is true in any criminal case, it must be shown that that the particular accused knew those elements, knew those facts, he knew the quality of that material exceeded contemporary standards, appealed to prurient interests and was without value.

Well, we have never contended that the government is required to show that the accused knew what the law was. We have never contended it was required to show they knew what the standards were that were enunciated by this Court. We have not contended that there is any necessity for direct proof of the awareness. It can be by circumstantial evidence but whatever the proof is that is necessary, we have contended that it must be shown by direct or circumstantial evidence that the accused was in some way aware that this material went beyond contemporary standards, appealed to a prurient interest and had no value.

And it was up to the jury to decide without improvised presumption, without judicial notice. It was for them to decide whether or not, under those circumstances, the accused knew.

We contend that it is illogical -- it offends empirical evidence that one can point to, to say that today one can look at some materials dealing with sex and simply say, from knowing that its contents deal with sex or are sexually oriented, that he knows that that material is obscene, that he knows that that material necessarily goes beyond standards and appeals to a prurient interest and has no value.

Time after time, juries, judges have said, "Why, this is hard-core pornography. This is dirt for dirt's sake,"

only to find that appellate courts, upper courts, and this Court itself have held, no, this material is not obscene. It is constitutionally protected.

Now, the lawyers who are asked for advice today, whether it is films or motion pictures or books or magazines, have difficulty in saying to a client that this matter dealing with sex necessarily is or is not obscene, or it offends some jury in Albany, Georgia.

Prosecutors and judges and juries have difficulty in determining this.

A whole period has passed since the 1896 decision in Rosen in which a virtual sexual revolution has occurred and for anyone to say today, logically, or any other way, that one looks at a book or a magazine or a film and by looking at its contents and saying, well, this deals with sex, I know one can tell just from that that he knows it is obscene, would seem to us to be irrational and illogical and so we have contended that under the circumstances, the standard for judging scienter -- and I think one has to keep in mind that this is a federal offense. It is a statute that punishes with five years, $10,000 fine or $5,000 fine. The second offense is 10 years, $10,000. Anyone who is convicted, your Honors know, is immediately dubbed with the stigma of smut-lover.

Now, that is a serious thing, both from a

criminal charge and from the viewpoint of reputation.

Therefore, the need before you put somebody in jail, of proving the guilty mind is important. It is essential and it seems to us not too much of a burden. We have not placed too much of a burden on the prosecutor to prove a case if, by direct or circumstantial evidence, he merely establishes that the accused knew the obscene nature and character of the contents before he is found guilty.

Now, the next point that I want to direct myself to is, the government has consistently argued that knowledge of contents is sufficient. We contend that the proof in the record here is absolutely barren of any proof that these Petitioners knew the contents of this particular brochure.

We have analyzed it in the record. I can't, within the time limits, go too far, but enough to say this, that if you take Petitioner Wright, you will find that she is absolutely, described even by the government as -- the evidence against her is very attenuated, admittedly, an office manager ans so forth.

The material here, the brochure here, was mailed some 250 miles away from Los Angeles, in North Hollywood. It was put in the mails. It was inserted -- the brochures were inserted in envelopes by two people who knew nothing about these Petitioners and never heard from them.

They received the brochures from someone called

"Regent House" who were named as unindicted conspirators, never called by the government as witnesses. They -- the brochure was printed in North Hollywood and the printer was named as unindicted coconspirator, never called by the government.

As a result, there is nothing in this record to show that these Petitioners, Kemp or Wright or Thomas or Hamling, had anything to do with the preparation or mailing of this particular brochure and that was the only charge that was made against these Petitioners.

They were not charged with being, as described by the government, pivotal characters flocked together -- the government talks about conspiracy here and what is the conspiracy? Well, they all were in business together. They were concerted.

Well, if a conspiracy is made out by simply people working together in a publishing house, then all motion picture studios, all corporate bodies are in danger, a newspaper establishment is in danger if some president signs a check in payment for a bill, the government says, you can't hide behind these things. There is nothing in the record to show any hiding behind anything.

The fact of the matter is that this case was tried under the theory and with the purpose of doing away with scienter all together. That is the point of this case.

The government does not want to prove any guilty knowledge. It wants to try it like a traffic offense. All you have to do is put it in the publication, give it to the jury and let them return a verdict and that, with respect to a criminal trial.

In a federal court, the administration of criminal justice is, we submit, essentially unfair.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Tuttle.

ORAL ARGUMENT OF ALLAN A. TUTTLE, ESQ.,

ON BEHALF OF RESPONDENT

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

Petitioners have raised a number of issues in their petition and here in oral argument. We believe the central issue in this case is the impact of this Court's decision in Miller versus California and companion cases, decided last term, upon federal obscenity convictions which occurred before Miller was decided.

In assessing this impact, I invite the Court to consider the material which is here for review.

In the first place, it is not the book, not the illustrated version of the President's -- the report of the President's Commission on Obscenity and Pornography which the

jury found obscene. The jury did not return a verdict on that issue. What the Petitioners were convicted of was mailing out an obscene advertisement.

Now, the evidence shows that some 55,000 of these brochures were mailed indiscriminately around the country to various unsuspecting recipients, many of whom found the brochure to be quite offensive.

The brochure consists of a single page. On one side is a photograph of the cover of the illustrated report, together with a coupon indicating where copies can be obtained.

The other side consists entirely of a collage of photographs showing a variety of sexual scenes, including group sex scenes, heterosexual and homosexual intercourse, sodomy, bestiality and masturbation.

This is hard-core pornography by any definition and judged by the standards of any community.

The Petitioners nonetheless say that that their conviction should be reversed. They argue that Miller teaches us that the federal obscenity statutes were unconstitutionally vague, at least until Miller was decided and those statutes were authoritatively construed and narrowed by 12 200-foot Reels of Film.

Now, we find no such implication in the Miller decision or in the companion cases. Miller reshaped the

standards for judging obscenity in a number of ways, some of which arguably broadened the class of punishable pornography and some of which arguably narrowed that class.

For example, when the Court substituted the requirement of lack of serious literary, artistic, political or scientific or artistic purpose for the Roth definition of obscenity as utterly lacking in social value, it is arguable that the Court expanded the class of punishable obscenity because it is at least conceivable that something could be not utterly without redeeming social value and still lack a serious artistic or literary purpose.

Now, at the time these brochures were mailed, Roth/Memoirs was the prevailing definition of obscenity and the Petitioners were tried and convicted and their convictions were affirmed under the Roth/Memoirs definition.

It is our feeling that to the extent, if at all, which Miller expanded the class of punishable pornography, it might be unfair to review their convictions under that expanded definition and it is, therefore, our suggestion and our belief that these convictions should be reviewed under the stricter definition of obscenity contained in Roth versus the United States and Memoirs versus Massachusetts.

Of course, as I have indicated, they were convicted under those standards and their convictions were reviewed under those standards and their convictions were

affirmed under those standards. We are only suggesting that this Court should do the same.

Now, on the other hand, there are aspects --

Q Mr. Tuttle?

MR. TUTTLE: Yes?

Q I want to be sure I understand that. In last June's decisions in this Court, as I understood them, it was held that the Roth standards were constitutionally deficient. Isn't that correct?

MR. TUTTLE: That is not my understanding of the Miller decision. As I read Miller, the Court found that the Roth definition or some aspects of the Roth definition, for instance, the "utterly without redeeming social value" test was a constitutionally unnecessary and difficult to prove, if not impossible to prove, burden on the government and the Court formulated a different formulation.

But I don't take it -- I don't take the Court to be saying, when it decided that Miller would be the standards for judging obscenity in the future, that all the prior convictions using the Roth definition were unconstitutional or unconstitutionally obtained or that the formulation under which they were obtained made the convictions void.

Now, there are other aspects --

Q And those cases went on to say that in order not to be deficient constitutionally, statutes had to be very

specific.

MR. TUTTLE: Yes, Mr. Justice. I was going to say that on the other hand, there is an aspect of Miller which arguably enhances the First Amendment protections available for defendants in obscenity cases and that is, precisely as you mentioned, Mr. Justice, the requirement in Miller that the obscenity statute be limited to depictions of sexual conduct, specifically described in applicable state law.

Now, it is our position that to the extent that Miller created new First Amendment protection for defendants in obscenity cases, that these should be made available to Petitioners or to any defendants whose convictions are non-final.

In 12 200-foot Reels of Film, the federal obscenity statutes were given the limiting construction which was required in Miller and it was said that those statutes would be construed as applying to those depictions of hard-core sexual conduct which were given as examples in Miller versus California.

Q I don't have the language in front of me or even precisely in my mind, but I think you are referring to a footnote in that --

MR. TUTTLE: Footnote 7 in the --

Q -- or in the Orito case.

MR. TUTTLE: Yes.

Q Which said something along the lines that we are prepared to construe or some such language as that. Am I misrecollecting?

MR. TUTTLE: It says -- I could probably quote it to you.

Q Well --

MR. TUTTLE: It says, "If and when a serious doubt is raised as to the vagueness of the federal statutes, we are prepared to construe them as limited to the examples of hard-core sexual conduct"and, in point of fact, the statute here --

Q That can't very well be done after a conviction, can it?

MR. TUTTLE: Well --

Q I mean, you run into all the concepts of Bouie -- against Bouie in South Carolina, all those cases.

MR. TUTTLE: It is our feeling, of course. We are precisely trying to consider the Bouie kind of fair notice problem in our suggestion that the Defendants should not be subjected to a definition of obscenity which was more inclusive than the one that obtained. In other words --

Q No, no, we are not talking about the requirement of the explicitness of the statute.

MR. TUTTLE: Well, and I am trying to make,

Mr. Justice, a distinction between the aspects of Miller which arguably make a more inclusive category than obscenity, and those aspects which narrow a statute because it seems to us that when the statute is authoritatively narrowed, you are not faced with the fair notice problems that are faced in Bouie when a statute is after-the-fact broadened to include what the defendants did because it is our contention that this conduct and this publication falls so clearly within the statute as authoritatively narrowed or falls so clearly, if you will, within the Miller examples of hard-core pornography, that as applied to them, the statute was constitutional and we argue this because on the one hand you have a concession, indeed, a stipulation that the material here is of sexual conduct, sexual activities.

Now, the Miller examples refer to patently offensive depictions of sexual activities. But here we have a jury finding that these depictions which were concededly of explicit sexual conduct depicted that activity in a patently offensive way.

Therefore, we say there is a finding here in the court below that this particular publication fell within the statute as it is suggested that it should be narrowed in Miller versus California and, therefore, we say, as applied, it was clearly constitutional.

Now, to say that it is vague as applied -- to say

that it is not vague as applied and to say that the Defendants' conduct fell within the specificity requirement in the examples of Miller, is in no way to imply that the statute was vague on its face prior to the decision in Miller versus California and we think that there have been a number of decisions of this Court, beginning with Roth and as recently as three years ago in Reidel, where the Court held that the statute prior to Miller was not vague on its face and as Mr. Justice Stewart mentioned a moment ago in speaking of the footnote in 12 200-foot Reels of Film, there the Court said, "If and when a serious question as to vagueness is raised with respect to these statutes, then we will be prepared to construe them in this narrowing fashion," and we suggest that the Court's use of the term "if and when" suggests that such a doubt as to the facial validity of the statute has not yet been raised and the examples themselves, the Miller examples which the Court said that it was prepared to read into the statute were themselves taken from this Court's experience under the statute and its regular and settled application and therefore, we believe, that these examples in Miller don't change the sweep of the statute but are simply in accord with the settled meaning of the statute.

We contend, therefore, that the statute was neither void on its face prior to Miller nor was it unconstitutional as applied to these defendants, because their conduct fell

clearly within the statute as it has now authoritatively been construed and it fell within those examples because the material was conceded to be explicit sexual material.

Q Mr. Tuttle, I expect it may not be significant in your submission, but that footnote did not deal with the statute under which these convictions were obtained.

MR. TUTTLE: That is quite correct. We don't think it is significant because it dealt with the forfeiture statute, 1305 and the interstate commerce statute, 1462, which used the language, "Obscene and lewd," which is exactly the same language which you will find in 1461.

Q That may be, but, explicitly, we haven't dealt yet with 1461, have we?

MR. TUTTLE: Well, of course, explicitly you haven't dealt with those statutes, either because that is an if and when proposition. But I take it that it is perfectly clear. The only reason that I can see that the Court mentioned only those two statutes was because those were the statues before the Court in Orito and 12 200-foot Reels of Film.

I haven't any doubt that if you had a 1461 case that that would have been part of the Court's footnote and I believe that it is -- to me, anyhow, perfectly clear that the Court would encompass that interpretation, would encompass Section 1461 within that interpretation.

Now, the trial judge charged the jury that it was to apply a national community standard in judging the obscenity of these materials. It seems to us that it was clearly proper for the judge to have done so, at the time because this case occurred and was tried prior to Miller and, in fact, in Miller, this Court spoke of a national standard of First Amendment protections as being correctly regarded as limiting prosecutions under controlling case law and, in fact, Petitioners here today have agreed with us that the Court was correct in applying a national standard. But they go further and they say, the application of that national standard, the concededly correct application of that national standard made the statute unconstitutionally vague as applied to them.

They seem to be saying that no pre-Miller conduct, no pre-Miller obscenity could possibly be convicted, could possibly be the subject of a valid conviction because, they say, the national standard should be applied, but the national standard made the statute vague and therefore, there can be no constitutionally valid obscenity prosecution prior to Miller.

Q Do you understand, Mr. Tuttle, that the Court held in the cases last June that even under a federal statute of national application that the test to be applied is one of local mores?

MR. TUTTLE: Well, I think to say that it was a

holding might go too far. I think the Court made it clear that it found that a test of obscenity judged by contemporary community standards was, as the Court said, constitutionally adequate and since the First Amendment would seem to us to apply equally to state and to federal prosecutions, that at least it would be constitutionally permissible for the federal prosecutions to proceed on the basis of a local standard and the Court, of course, went further in Miller.

Q And even under statute worded as 1461 is, which is quite contrary to what I read in Miller, statutes had to say.

MR. TUTTLE: I'm sorry, Mr. Justice --?

Q Well, Miller, as I read it, and I haven't reread it recently, said that state statutes -- Miller was a state case -- state statutes had to be very specific in what they prohibited. Do you agree with that?

MR. TUTTLE: Of course I agree with that. That is what the case said.

Q That is what I thought it said.

MR. TUTTLE: And in 12 200-foot Reels of Film, the Court indicated that it was prepared to find that specificity in the federal statutes and that was the footnote example that --

Q Was prepared to, if, as or when, or whatever it was.

MR. TUTTLE: If, as or when the vagueness was found.

Q And in other similar statutes but not in this one, that it was prepared to. But now, then, you are saying that even if federal statutes -- you understand the Court held -- should have different meanings and different federal judicial districts?

MR. TUTTLE: The Court said in Miller, we do believe that the clear implication of Miller is that the federal -- that a federal jury, trying a case under federal law, 1461 or one of the other laws, would have to apply or should apply or would be constitutionally privileged to apply contemporary community standards because the Court's discussion of national standards in Miller seems to us to be as forceful in regard to a federal prosecution as a state prosecution.

Q Well, Miller was dealing with a state law which would have no wider scope than state-wide but here we are dealing with a federal law. This would be -- if somebody in the Solicitor General's office stood up and told us that the Internal Revenue Code was to have different meanings and different judicial districts, it would be absolutely irrational. But you are telling us that the Court held that a federal statute is to have a different meaning, depending on what judicial districts --

MR. TUTTLE: There are, of course, many federal statutes which -- or some federal statutes -- which do have a different impingement, depending on the geographical area where the conduct is undertaken. The Travel Act, for instance, keys its concept of illegality to the jurisdiction in which the unlawful activity is undertaken.

Our reason for feeling that what the Court said in Miller, or the clear implication of Miller is that local community standards, or community standards, whatever the appropriate geographical boundaries of that community might be, should be applied is the Court's -- to our mind -- holding that in discussing the state statute where they said that the nation was too big and too diverse for the formulation of a single standard.

Q Well, it follows from that, then, that the Congress shouldn't pass any laws in this area if the nation is too big to have one law for the whole nation.

MR. TUTTLE: Well, Congress passed a law forbigging the mailing of obscene material and I don't think that one can find in the Congressional background of the case, any attempt or any suggestion that the Court had in mind a national standard, such as a few members of this Court spoke of in Jacobellis and in Manual Enterprises.

Congress was concerned with the mailing of obscenity and I would imagine they expected it to be tried

in whatever jurisdiction the material was mailed in or wherever it was received or wherever it found its way into the public domain.

When the Court says that the quest for a national standard has been unrealistic and that national standards are hypothetical -- and the Court said, unascertainable, those considerations, it seems to us, apply equally to a federal statute and a state statute and I believe that the reason why the Court returned to contemporary community standards in a state case was because it found that the jury's efforts to articulate and grasp the national standard had not been wholly successful.

If that is true, it is equally true with respect to a jury attempting to judge a federal obscenity prosecution.

Conversely, if there had been no difficulty in articulating a national standard, I submit the Court very likely would have followed the teachings of Jacobellis and applied a national standard in state cases.

Q Well, I suppose when Congress enacted the Assimilative Crimes Act it chose to incorporate the law of various states into the Federal Criminal Statute perhaps for the same reason it was difficult to find a national standard.

MR. TUTTLE: I think that is probably a better example, Mr. Justice, than the Travel Act example. It seems to me that --

Q But that wasn't done when this statute was passed, was it?

MR. TUTTLE: What wasn't done, Mr. Justice?

Q Intended to apply on a local basis.

MR. TUTTLE: I don't think Congress --

Q There was no assimilating in there at all when this statute was passed, when 1461 was passed, they didn't know about Miller, did they?

MR. TUTTLE: They didn't know about Jacobellis, either.

Q Well --

MR. TUTTLE: And it was the Court that imported the concept of a national standard into the obscenity laws.

Q But my point is that Congress, all of these statutes --

Q Didn't the First Amendment have something to do with the national standards?

MR. TUTTLE: I mean, Mr. Justice Douglas, of course, the Court construing the First Amendment, developed a requirement of a national standard.

All I am saying is, in response to Mr. Justice Marshall's question was that Congress, I don't think had in mind either a local or a national standard. They had in mind obscene material as a jury would find it and that, again, is the lesson of Miller.

Q I suppose it is true that running an unlicensed still in Kentucky or some of the other states might get a different reaction from jurors than it would in yet other states where it is not so much a way of life, yet the statute would be the same statute, would it not?

MR. TUTTLE: Yes, there are a number of crimes. In fact, I would say in most instances where the crime is analyzable in terms of concrete and readily demonstrable objectively and scientifically provable elements where the federal statute would have absolutely equal application in all places. It has --

Q Well, would you say that in the State of New York, a still is not a still?

It is either a still or it is not a still. It is the same still in New York that it is in Kentucky.

MR. TUTTLE: I -- I quite agree, Mr. Justice Marshall and that was why I said, in those instances.

Q But in this you can have "Carnal Knowledge" is a still in Kentucky and not in New York.

MR. TUTTLE: "Carnal Knowledge" is -- may be -- exceed the limits of candor of Albany, Georgia and "Carnal Knowledge" may, in fact, be found to appeal to the prurient interest of the average person in Albany, Georgia, but it still lies with this Court to determine whether or not it has redeeming social value.

Q Mr. Tuttle, my only quarrel is, I thought you inferred that this statute was intended and I am saying that what you are trying to say is that Miller changed the statute determination.

MR. TUTTLE: I don't think -- Miller was simply a -- if you will, a --

Q Well, let me ask, what did Miller do to the statute?

MR. TUTTLE: Miller -- the statute speaks only of obscene material.

Q Right.

MR. TUTTLE: The Court has, since Roth, undertaken to give content to what that means and in each of these cases, the Court's formulation has been a slightly different formulation. Miller gave a formulation which has been recited today and Miller said that with respect to the community standards element, reference should be had to the contemporary community standards of the forum community.

Q Well, would you be able to advise a client whether to plead guilty or not, to explain to him whether this particular book or article is obscene?

Is it sufficiently clear or is it so obscure that it is open just to guesswork?

MR. TUTTLE: I think that it is quite evident, Mr. Justice, that the concept of obscenity does not lend

itself to the precise kinds of measurement that many other elements of criminal statute do.

Q Under this federal statute you could be innocent but be active mailing it from New York -- could be innocent and the act of receiving it and selling it in California would be a crime. Is that right?

MR. TUTTLE: It is conceivable that a jury -- it is conceivable -- we would be speculating to know but it is conceivable, yes. The judgment of criminality would turn on the place in which the matter is disseminated and the crime is committed.

Q Mr. Tuttle, the Court, over the period of the last 15 years, has had at least three different definitions. There is nothing new about altering these definitions, is there? Going back from Roth to Jacobellis to the other cases down the line it has been a process of evolution, hasn't it?

MR. TUTTLE: It has been a continuing effort to attempt to formulate manageable standards.

No, there is nothing new, but every time, if it happens, we are faced with the question of what is the impact of that? That is why this case is here for the Court to determine what the relation of that definition is going to be to conduct which antedated it.

Q Mr. Tuttle, are you suggesting that before Miller there was a third requirement that the material be

utterly without redeeming social value? What cases do you refer to for that?

MR. TUTTLE: I would rely on Memoirs versus Massachusetts.

Q How many votes did that test have there?

MR. TUTTLE: That test had three votes. But our reason for saying --

Q Under what case did it ever have five?

MR. TUTTLE: Memoirs is the case and the reason --

Q Well, it didn't have five votes.

MR. TUTTLE: -- and the reason why, I think that there were five votes is that you had two members of the Court who would not have punished -- who would have found the publication constitutionally protected under any circumstances and you had three members of the Court who would have found it constitutionally protected unless it was shown to be utterly without redeeming social value.

Thus, as a practical matter, any person who kept his conduct within the Memoirs definition --

Q The fact remains that at no time did five members of the Court subscribe to that test.

MR. TUTTLE: That is quite true. Only three members of the Court -- that it became -- in our view, and I think, in the view of the public and the Bar, an operating definition. It let us know, or let members of the Bar

advising publishers know, what it was -- what was the limit that could not be transgressed.

Q Well, there were two members of the Court who had a clearer definition than the three.

Q In what case was it, Mr. Tuttle --

MR. TUTTLE: They always have, Mr. Justice.

Q -- in what case was it that Chief Justice Warren said that there could not be a national standard? Was that Jacobellis?

MR. TUTTLE: That was the Chief Justice's dissent in Jacobellis.

Q Do you suppose, Mr. Tuttle, that all of this discussion suggests that maybe even Miller isn't the last word in this very troubled area?

MR. TUTTLE: Miller gave us --

Q No, I guess that's not my question. My question is whether you think Miller is necessarily the last word in this area.

MR. TUTTLE: Miller, of course, is not the last word because even -- we're here today and we are here today with some problems but our problems relate to the application of Miller. We are not here to question the standards of obscenity articulated in Miller, but we are merely attempting to determine whether a pre-Miller conviction can be sustained under that definition.

Now, we don't believe that the criticism of local standards, which is contained in Miller versus California necessarily applies, that all federal obscenity prosecutions antedating Miller have to be voided. We don't think the Court had any such idea in mind.

In the first place, there have been, since Miller, a large number of cases which have been remanded to courts of appeals for reconsideration in the light of Miller and these are federal cases where the jury was charged to use a national standard, as was the jury here and we believe that if the use of a national standard had made the statute unconstitutionally vague prior to Miller, we would have had reversals and not remands and to say that the standard is hypothetical is not to say that it can't be ascertained, that is to say, the national standard. It is to say that it is, to some extent, supposititious and speculative and that we are asking the jury to engage in a kind of generalizing which the Court found, generally speaking, unfruitful and not wholly successful but it doesn't follow that it was constitutionally deficient when it was done as required by the decisions of this Court.

Indeed, as one federal court has suggested, since Miller, the effort to identify a national standard seems to differ only in degree from the effort which was authorized and required in Miller to determine a statewide

standard of a state as large and variegated and populous as the State of California.

I would finally say that if there is a question of applicable standards and if there is any question that the defendant was incorrectly tried under a national standard, we would say it was harmless error because this material is obscene under any standards and there is no community whose limits of candor are not exceeded by the Petitioner's publication.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Fleishman.

ORAL ARGUMENT OF STANLEY FLEISHMAN, ESQ.,

ON BEHALF OF PETITIONERS

MR. FLEISHMAN: Mr. Chief Justice, I'd like to start with the last and that is, the brochure simply is not obscene. It is not obscene under national standards. It is not obscene under local standards and in any event, we were not tried under any local standards and I assume that from all that has been said that at a minimum, Petitioners are entitled to a trial by a jury. The Prosecution says it is obscene by any standards. I would remind the Court that a film "Deep Throat" which was thought to be obscene by any standards has been found to be not obscene continuously throughout the country by local juries.

I would like to focus, if I may, on the indictment, because I think the discussion we have had here

demonstrates the inadequacy of this indictment in this case, which is merely in statutory language.

Now, it is true, of course, that where a statute has a clear, well-defined meaning one can incorporate that by using statutory language but as every justice on the Court has mentioned here, we do not have one single clear definition of obscenity. There are three, four or five.

In Orito, this Court sent the case back for an investigation as to the sufficiency of the indictment. The Government, in its brief, states that since Miller and 12 Reels of Film had incorporated new specificity requirements into the statute, it would be necessary to consider the sufficiency of the indictment in light of those cases.

Okay. Look at the indictment. Is the specificity there? No, it is not.

The Government then says that the words obscene, lewd, lascivious, indecent, filthy and vile simply means the materials come within the legal definition of obscenity.

Well, isn't that begging the issue? What was the legal definition of obscenity at the time that the indictment came down? Justice White suggests that "utterly without redeeming social value" was not part of it.

For the present purpose, I don't care whether it was or was or was not part of the definition. I don't care whether it was a local standard or a national standard. I

don't care whether you measure prurient interests by national, local standards or no standards. I do say that where you have a statute which is so up in the air as this one is, absolutely the irreducible minimum is, that we are entitled to have in our indictment what the charge is and not have these vague words, lewd, lascivious and the like and say everybody knows what that is, of course. We've always known what that is.

Now, we do have other points and I have a moment and I would like to emphasize, if I may, some of the vices that came from the infirmity of the indictment.

For example, we were charged, in statutory language only, in response to a bill of particulars, we were told that the material was offensive because it appealed to the prurient interests of the average person and yet, we were tried with regard to a Michigan theory. The jury was told that they could convict, if it appealed to the prurient interest of the average person or a clearly-defined sexually-deviant group.

When we complained to the Court of Appeals, the Court of Appeals said we were right, that it should have been solely measured by the average person, but it was harmless error and now the Government says no, the Court of Appeals was wrong, that it should have been tried on a clearly-defined sexually-deviant group.

Again, my point here is, first, that it had to be in the indictment and, secondly, on the merits, there wasn't the slightest basis for the use of a Michigan instruction.

Pandering, also. There isn't a word of pandering in the advisement, nothing in the bill of particulars and yet the jury was instructed that they could convict on a pandering doctrine without the slightest evidence of any pandering. There isn't a case that I know of which holds that an advertisement can pander itself and yet that is what the --

Q What was the situation in the Ginzburg case, Mr. Fleishman, was there anything there?

MR. FLEISHMAN: No, in Ginzburg, your Honor, as I read Ginzburg, the Court held that the books involved were rendered obscene because the brochure advertising them, in effect, said that they were obscene and therefore, that could be taken into account but Ginzburg did not at all suggest that the advertisement could pander itself. It is logically inconsistent because in this case, if the brochure was mailed, either it is obscene or it is not obscene. It does not in any way lend itself to a pandering instruction and we did, as a matter of fact, call the Court's attention to the fact that there were cases which held at a minimum, one would have to plead that in the indictment if it was not so pleaded.

Thank you very much.

Q Mr. Fleishman, does the record show how the mailing list of 55,000 people was compiled?

MR. FLEISHMAN. It does not, your Honor. What we do have is, for sure, that 12 people were offended. That is all we know, that 55 to 58,000 were mailed and that 12 people were offended. That is all the record shows.

Q Does the record show whether any of the 55 to 58,000 people had requested the brochure?

MR. FLEISHMAN: The record is silent on that point, your Honor.

Q Does the record show whether it was received by any minors?

MR. FLEISHMAN: The record does show that it was not received by any minors at all. The record also shows that there was total 100 percent compliance with Section 3008, which is the pandering law. That is to say, that in every single instance -- that is, in every single instance of the 12 persons, the addressees had gone to the post office and said that they had received a brochure which they thought was sexually arousing to them and they didn't want to receive any more mail from the Library Service.

In every instance, they testified that they never received another piece of mail from Library Service or there was total, complete, 100 percent compliance with the

only statute that Congress had passed which was on this issue at the time because it should be remembered that after Ginzburg, Congress passed two laws.

First there was Section 3008, which was found to be constitutional in Rowan and, secondly, they passed, the next year, the sexually-oriented ad section which we find in 39 U.S. Code Section 30 and 10.

Now, that law was not yet in effect at the time that we mailed. That law was going into effect about a month later. It became effective on February the 12th, 1971 and the last mailing that we had was January 12, 1971.

Had that law been in effect, 3010, then if there was a charge under that, we would have an entirely different situation but, as it stands now, we have the situation where there was full compliance with the only specific Congressional act that had been enacted dealing with the mailing of sexual material and that was Section 3008, which was the section involved in Rowan.

Q I suppose there was no way to tell the number of children in the 55,000 homes into which this brochure was mailed?

MR. FLEISHMAN: No, but I would say this, since we are supposing, your Honor. I know that the list was purportedly a list of persons who had previously indicated a desire to receive sexually explicit material. Those are

the only mailing lists that are worth anything because one tries to mail to those persons who are interested. If you want to sell cat food, you want to mail materials to people who have cats so the truth of the matter is that the brochure was mailed, as fully as one could, to those adults who had indicated that they did want it.

Now, that is not in the record. I don't want to mislead the Court, but I think that is the true answer as to who was, in fact, the recipient of the ads.

We have, as I say, 12 people who were offended. There are 12 people who were offended by receiving many political brochures too, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Fleishman.

MR. FLEISHMAN: Thank you very much, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:51 o'clock p.m., the case was submitted.]