In the

Supreme Court of the United States

ROY SPLAWN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

No. 76-143

Washington, D.C.
March 23, 1977

Pages 1 thru 44

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v.	:	No. 76-143
PEOPLE OF THE STATE OF CALIFORNIA, Respondents.	:	

Washington, D. C.

Wednesday, March 23, 1977

The above-entitled matter came on for argument at 1:49 o'clock, p.m.

BEFORE:

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

APPEARANCES:

ARTHUR WELLS, JR., ESQ., Wells & Chesney, Inc., 125 Twelfth Street, Suite 157, Oakland, California, 94607, for the Petitioner.

WILLIAM D. STEIN, ESQ., Deputy Attorney General of the State of California, 6000 State Building, San Francisco, California, 94102, for the 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 76-143, Splawn against California.

Mr. Wells.

ORAL ARGUMENT OF ARTHUR WELLS, JR., ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here because the Petitioner has been convicted of violation of California obscenity law. The facts are quite simple.

In 1969, the Petitioner ran a store in Northern California from which he sold books and films with sexual content. Prior to the events that occurred which led to the conviction, police had become aware of the store and purchased material for sale regularly in the store, but apparently none of this material was the type that they felt was suitable for prosecution. So, they sent in someone who was a part-time policeman and otherwise a carpetlayer who was seeking, in his words, "hard-core material," by which --

QUESTION: Is there any dispute or issue remaining about whether this is obscenity in this case? I thought that was out of the case.

MR. WELLS: No, I don't think the issue whether it's obscenity is out of the case. I didn't raise the issue of

whether the material was obscene or not because, as I understand Miller, the only question as to the content of the material is whether or not it is the type that could be found by a properly instructed jury to be obscene.

The two films here graphically display ultimate sexual acts. They are not simulated and, therefore, they are the type that could be found obscene if the jury were properly instructed.

In this case, we claim that evidence was improperly introduced and that the jury was not properly instructed and that's why there was a conviction. But it is because of the holding in Miller that we have not raised at this point a claim as to the content of the material.

I might also point out that the term, "hard-core," as used in this case by the participants was not a concession that the material was obscene but only that the material graphically displayed ultimate sex acts. In other words, in 1969 and 1970, the state-of-the-art was, what was publicly for sale, was simulated. That is borne out by the record and I would refer you to pages 515 through 517, 574, 619, 683 and 684 and 762, in which all of the people who had anything to do with the store and Mr. Drivon, the policeman, indicated that they were talking about material which actually showed sex acts, rather than which showed simulated sexual acts.

In any event, Drivon, in order to accomplish the task of acquiring some hard-core material, some material which

graphically displayed sexual behavior, was required to make six contacts with the store. Only one of those contacts was with the Petitioner, Mr. Splawn. And I think it is significant that at that contact the Petitioner told Mr. Drivon that he could go to San Francisco and get these films himself if he wished and Mr. Drivon begged off from that invitation.

Finally, then, after six contacts, Drivon purchased two films for $70 for which Petitioner was convicted. He had been tried not only for the crime of displaying and distributing obscene material, but also on the felony conspiracy charge with his twin brother and the clerk, and there was an aquittal on the felony charge.

After trial, certain instructions were given which were based on Ginzburg v. United States and are commonly referred to as instructions that are based on the pandering doctrine. And there were other instructions which I will discuss the contents of more specifically later.

In any event, the case presents three issues. The first issue arises because the pandering law of California which was incorporated into instructions was not in effect at the time that the Petitioner sold films for which he was subsequently convicted.

QUESTION: I take it your argument about equal protection is not before us?

MR. WELLS: No. You did not grant cert on that issue

and I did not brief that issue in the brief, and I do not intend to address myself to that question.

You limited your grant of certiorari to the first four questions.

Because the law was not in effect at the time, an ex post facto issue was raised. Similarly, the California Supreme Court less than two years before the sale which is the subject matter of this lawsuit had ruled that pandering was not part of California law.

Therefore, question arises under the Due Process Clause and Bouie v. Columbia as to whether there was a new and novel and unfair application of state law to this defendant such that he was denied due process.

The behavior engaged in by the Petitioner in this case displays no more than a simple sale. The Court of Appeals' opinion which is here in question refers to no behavior by the Petitioner except that of a simple sale.

Under the circumstances, a question is raised about whether the pandering instructions, both based on the law and as given by the court in this case, should have been given at all because, in Petitioner's view, these instructions are lop-sided. They do not fairly represent the proposition they are supposed to support. Instead, they represent only a prosecution view.

Third, on the assumption that it was proper to give

instructions on the subject of the context and the behavior rather than just on the subject matter of the material, the question is presented as to whether these instructions are proper.

I would like to discuss these matters in reverse order.

I think Miller, if it teaches us one thing, says that local juries and local jurisdictions are going to have a lot more to say about what is and what is not obscene.

This Court sits not to find what is obscene, but just as a check to determine what is not obscene.

I think if you are going to have rules which say that you are going to have a not completely defined local community as a community by which to judge what is obscene, and if you are going to have a rule that requires no evidence at all except the material itself be introduced to support a conviction, then what you have to insist on is a properly instructed jury.

I urge this Court to elaborate on and adopt its recent remarks in Footnote 11 of Marx v. U.S. which is to the effect that there is no substitute for a properly instructed jury.

I think this is especially important in a case like this because what we are talking about is the content of books and movies and other material which, by the way, is pure speech. This is in a picketing case. This is an O'Brien situation.

This isn't anything but pure speech.

And I think what we are talking about is questions of aesthics, questions of taste and questions of social value. And we are trying to convey to a group of laymen what it is that they have to do to make a judgment which could rise to the level of a constitutional judgment.

Now, I think then what we need is as much clarity and precision as we can get. Otherwise we have no insurance that the jury, located some place else and without the necessary guidance of any evidence but the material itself and applying a local community, is going to do what you nine people want it to do, or what a larger group than that want it to do.

Therefore, I think it is very important to stick to what we have if that's what we have to live with.

Now, the worst, most glaring example of error, I think, of the instructions, as given, is the instruction that says that the jury is permitted to look to the sexually provocative aspects of the matter to determine if the material lacks value, and that if they find the material is sexually provocative that fact alone is enough to find that the material lacks value.

This, to me, is an extremely insidious instruction for the following reason. The core thing in the obscenity field, the thing that has been with us since law is the notion of prurience.

If there is any governmental interest at all in this field, if there is any reason for the state to be in it at all, it is only because this material, on some theory or supported by some set of facts, is harmful, is unhealthy. And that's what prurience means. Prurience indicates this obsessive compulsion with the unhealthy aspects of sex.

Provocativeness is an entirely different thing. Provocativeness has to do with arousal, being aroused, being excited, being provoked, and that is not necessarily unhealthy.

Now, what happens is this: Prurience, as far as I can see, is a difficult concept. It's a difficult term because you are dealing in health and lack of health and a large community of people who you have to judge it by. And I don't think the layman, the common juror, is acquainted with the term "prurient," uses it or thinks in terms of those notions.

On the other hand, provocativeness, especially sexual provocativeness, is something that we all grow up with. Chewing gum, cars, there is nothing that is not sold partially on the basis of provocativeness and usually sexual provocativeness. Cigarettes for years were sold with implied -- and still are on billboards but not on television -- implied sexual attractiveness from smoking.

I, therefore, think that what happens if you permit the type of instruction given here and what, indeed, probably did happen here, is that the jury says to itself, "Well, we are

supposed to deal with this notion of prurience, but I am not too sure what it is,and under Miller, maybe, we don't have any evidence regarding it, but the judge said something about provocativeness. Maybe I'll look at it and see if I think it is provocative. If it is provocative, then I don't have to worry about the rest." And so they substitute provocativeness or a judgment about whether the material is provocative for a judgment about whether the material is prurient.

That is the worst possible thing that can be done in this field for the reason that the only reason for having the rules about obscenity, if there are any reasons, is that the material is unhealthy. And if the judgment is made on the basis of provocativeness rather than prurience, then you are not making the judgment on the basis that the material is unhealthy, but just that it excites or arouses somebody.

And the fact something arouses or excites somebody is probably one of the reasons why it should have First Amendment protection, not one of the reasons that it shouldn't.

And, of course, the other thing about the term "sexual provocativeness" is that it is vague, vague in both the senses that it is not final enough that we can draw a line so that we can protect protected speech and not protect not protected speech, and vague in the sense that you, by using the term, can't tell me what I am supposed to do, and so I don't have any real notice about what I am supposed to do and a jury

has no real notice about what it is supposed to do.

The other fundamental error in the instructions in this case was the instruction which permitted the jury to look again at the material, after it had supposedly applied the three tests which at that time were applicable, the Memoirs test, and judge it in terms of the intent of the creator.

Whatever may be the value of such a test, it has never been applied by this Court in the case of a retail seller. Hamling was a producer. Ginzburg was a producer. Redhoon, who in 1940 was the person about whom Learned Hand wrote the opinion which you said was a good opinion in Ginzburg was the man who made and mailed out the fliers in that case, and it has never been applied to a person. In any event, the man isn't on trial, that is to say, the publisher is not on trial.

So, what you do is you look again at the material and you say, "Well, what is the intent of the person who made this material?"

Now, that should never be the judgment about whether the material is obscene or not because what we are trying to do is get to an objective standard. We are trying to apply a standard which is a standard of lack of health, unhealthiness. And the motives of the creator are not what we are talking about when we are talking about prurience. If you want to get the creator of the material, then you use the investigative facilities to arrest him -- and on this type of theory, I

suppose you would try him for something like attempt to make a dirty book or attempt to make obscene books, then you are talking solely about his motives.

Under this, you have a subjective standard instead of an objective standard and, once again, it redefines any of the tests laid down by this Court and because it is easier for the jury to apply that kind of a test, "Just look, oh, oh, we know what he was trying to do." And they are going to substitute that kind of test for the law.

Now, the next point is the question about whether these instructions should have been given at all.

To this extent, I think Ginzburg is a confusing case. What happened in Ginzburg is that there was a holding back. Context was important, but the context of that case was that a publisher exploited his material.

The question is whether you are going to have a rule which permits the context to be considered or not. In this case, what California did is, first of all, it passed a statute that didn't say consider the whole context. It said see if the guy is misusing the material. And, I admit, that was part of Ginzburg v. United States, but that's only because of the facts of Ginzburg which are entirely different from the facts here, mainly because you have a publisher in control there and you don't have one here.

Here, what you have is a retailer and if you don't

limit the rules, somehow, and let him know what he can do and not do, there is no way he is going to have any idea. And I think it's really going to lead to a self-censorship thing. Merely --

QUESTION: Is there any evidence in the record here, Mr. Wells, as to whether this retailer ran a totally, what you might call, adult bookstore, or whether he had an adult section and non-adult section?

MR. WELLS: There is no direct evidence in the record. The fact of the matter is he did run an adult bookstore. The pictures that were introduced as a matter -- Exhibit 4 -- which were introduced on a pandering theory show the inside of the store and they show magazines displayed and their covers.

I would urge -- I am reading over my brief. I see that while I complained a lot that the conviction was improper, I did not suggest what would be an appropriate rule. And I think the object -- the Court's opinion, if it reaches this issue, should be to limit the application of this rule if you are going to have it at all to a very finite, definite, set of circumstances, because, otherwise, in a field where I feel that you are at your limits of possible use of words to be able to convey ideas, you just can't go any further.

I would point out that Ginzburg permitted the use of this doctrine as a rebuttal tool. It was strictly a question, in that case, or it could be read to be, of the integrity of the

process.

Ginzburg had been out in Middlesex and Blue Ball, Pennsylvania, going crazy with this material. It wasn't the material itself. He was exploiting it. Okay. And then he ran into court and said, "Oh, this is really pure stuff."

Now, as a mere factual rebuttal to that, the Government said, "Now, wait a minute. You said one thing out there. Just to show that you are not credible, that you are not to be believed, a different thing should be permitted to be shown here."

I would urge you to limit the application of the rule to that. If you are not going to do that, if you are going to go further, then I would say that you should limit it to behavior which is unambiguous exploitation, because what you have to do is draw the distinction between commercial exploitation and commercial behavior.

If you don't permit some behavior in this field, then you are going to cut everything out. People are not going to do anything in this field.

Now, the only good analogy I can think of, and it isn't really right on point, is to refresh your recollection about the clear and present danger test. That is the other test that's used to determine if protected speech should not be protected because of the context in which it is used.

Here, if you have material which is borderline, or

material which is not, which the Government, apparently, doesn't feel it can be made obscene without reference to the context, and therefore it is going to use the context, the question should be whether the behavior of the defendant was such that it is clear and immediate that there was exploitation of the unhealthy aspects of the material, rather than support of the material that has value.

Okay.

You've had these kinds of rules before and to go not too far afield, that is to say, in the criminal law field, I point out to you that you have a warrant requirement and that you require warrants to go into premises unless you have exceptions. And the exceptions are only that wide.

The one I think of that's useful here is the exigent circumstances. In order to get around a warrant by saying -- a warrant requirement by saying exigent circumstances permitted us not to get the warrant, the behavior has to be clear and unambiguous.

There are a host of Court of Appeals cases that so hold. In Wong Sun, for instance, as I recall it, it is a case where the man knocking on the door, or the policeman knocking on the door and footsteps are running away, and that is still held to be ambiguous, and therefore not a sufficient exigent circumstance.

Here, you should require a specific unambiguous act

which you've had in the cases that have been before you. You have had specific advertising which have emphasized the prurient, salacious aspects of material. So to formulate such a rule doesn't require you to withdraw or cut back or overrule any cases.

Lastly, I would address myself to the issue of -- to the ex post facto issue. I think the key here is the question of what does this pandering rule do to a natural trial of an obscenity case. And I think it is rather clear that it fundamentally changes the focus and that it makes a whole different ball game than you would have when you just looked at the four corners of the material.

The Government and the Court of Appeals tend to treat this as a rule of evidence, and I think that's just putting a label on something and I don't think it is doing -- I don't think it is solving the problem.

There are lots of different kinds of evidence rules. There are evidence rules that shift the burden of proof, that deal with the burden of who has to go forward and knock, that deal with the quality of evidence. Some kinds of judgments can be made, you have to have percipient evidence. Other kinds you have to have -- I mean hearsay is adequate. There probably are a couple where double hearsay would be adequate.

There are rules of evidence that govern who can give evidence and who can't give evidence. But a rule that actually

defines what is material in a given case is that kind of rule of evidence that is a substantial contributor to the parameters of a trial.

For instance, if you changed the rule of evidence to permit the question -- Well, if you use narcotics, that might be relevant in a custody case. If you change the rules of evidence in a breach of contract case to permit evidence that someone used narcotics on the theory that people who use narcotics are less likely to perform contracts, that would be a change in a rule of evidence that would seem to be material enough that you couldn't apply it retroactively.

Here, I think, there was a clear change which was a big surprise because of People v. Noroff in which, by my view, the California Supreme Court clearly said, "We are not going to have a pandering law unless the legislature passes it."

I would like to save the rest of my time for rebuttal, if there are no questions.

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

MR. WELLS: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Stein.

ORAL ARGUMENT OF WILLIAM D. STEIN, ESQ.,

FOR THE RESPONDENTS

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

I am William Stein, representing the people of the

State of California in this obscenity prosecution, an area in the law which, I submit, we've all probably written and read way too much.

I believe that Petitioner's argument today is based on an erroneous premise, and that is that he has been convicted, somehow, of advertising or promoting the sale of obscene matter.

It is true that California recognizes an offense of that nature, but Petitioner was not charged nor convicted of that. He was convicted, simply, of the act of selling obscene material.

At trial, the prosecution introduced evidence of the circumstances of the production and dissemination of these two films as material in the question of whether they were obscene under the then Roth-Memoirs definition of obscenity, a definition under which the prosecution and the juries of California still labor.

Now, Petitioner has a clever way of phrasing this. He uses the -- He refers to this evidence of dissemination and production as evidence of pandering, and then argues that the instructions relating it to the definition of obscenity resulted in his conviction for pandering, a crime with which he claimed he was not charged, concededly.

I submit that we can establish that the jury was not confused in this matter, very simply. The Petitioner was not charged alone. Petitioner had a twin brother, Don, who was

charged with the same offense. And, as a matter of fact, on all of the occasions when Mr. Drivon went to the book store to talk about purchasing these films, as Petitioner pointed out a few minutes ago, he talked mainly with Don. And Don was charged with selling obscene material. Don was acquitted.

The evidence that Petitioner refers to as pandering was mainly the statements of Don. If the jury was going to be confused and somehow thought that this evidence made it a crime to pander, they would have convicted Don along with Roy. But the twin brother, Don, was acquitted.

Why? Because the jury understood exactly what the judge told them. The evidence only went to the issue of social value, one of the three definitional elements of obscenity in California at that time.

Selling obscene material is a simple crime. It has, as I see it, only two elements: the knowing sale of obscene matter. All of this other evidence goes to the three definitional requirements of obscenity.

So, we submit, the Petitioner was convicted solely of the act of selling obscene films, and that by using this phrase "pandering" as a verb he attempts to distract us from this very simple fact.

I had believed that, after all these years, there was little confusion between the parties as to what the facts in the case were. I think there is general agreement, and I only had

one thing that struck me during Petitioner's argument. That's when he said that the defendant told Mr. Drivon, the officer who purchased the film, that if he really wanted these things he could go to San Francisco and get them.

I refer to the transcript, at page -- of trial, page 37, lines 24 through 26.

Question to Mr. Drivon. Mr. Drivon talking about the conversations he had, states:

"He (referring to the twin brother, Don) did suggest that if I was in a real hurry to obtain some films that he could go to San Francisco to get them."

I submit the reference is not that he, Mr. Drivon, could go to San Francisco, but that if he was in a real big hurry, Don Splawn would be willing to satisfy him by going to San Francisco, about thirty miles up the road, and get these films and bring them right back.

It would have made no sense, of course, for Mr. Drivon to go to San Francisco since the book store here was in the suburban community of California, our bedroom community, San Mateo County. And that's where the prosecution was attempting to limit the distribution of this material.

Okay.

The brief also states that -- and Petitioner makes point of the fact that Mr. Drivon had to come back again and again as though he was the moving force in this and was somehow

entrapping, if you will, Petitioner.

If you read the record, in every one of those instances, every time he comes back there is more -- the more pandering is done by Petitioner or his brother and his employee.

I think, in answer to Mr. Justice Rehnquist's question, I wanted to point out there was an additional exhibit here consisting of forty-one photographs that were taken of the interior of the bookstore, at the time the arrest was made, which establishes the, sort of, the nature of the place where this activity was taking place, where the statements as to the films were being made which was evidence of the distribution --

QUESTION: Am I right in thinking that Redwood City is the county seat of San Mateo County?

MR. STEIN: That's correct. Redwood City is the county seat.

Okay.

It is important -- Two procedures happened during the trial which, I think, are very important to the outcome of the case.

Before the trial was made -- Before the trial was held, Petitioner made the non-statutory motion, recognizing California, under People v. Noroff, to have the case dismissed on the grounds that, as a matter of law, these films were not obscene. That motion was denied.

The case went to trial. At the close of the

prosecution case, defendant made a motion, under our statutory provision, for a directed verdict of acquittal on the specific grounds -- and the reference to this is in the transcript at page 495 -- that there had been no evidence introduced that these films lack social value. That motion was also denied, the reason being, of course, that the prosecution had introduced evidence this Court had recognized in Ginzburg as probative on the definitional elements of obscenity as they were laid down in Roth-Memoirs.

Because evidence of production and dissemination is relevant to this definition, the jury was instructed that in determining whether the films were utterly without redeeming social importance -- and as a sidelight I would say most of this evidence in all these instructions went to social importance, as opposed to prurient appeal.

Okay. They could consider the circumstances of sale and distribution, particularly whether such circumstances indicated these films were commercially exploited by Petitioner for the sake of their prurient appeal. They were informed such evidence was probative with respect to the nature of the films and can justify the conclusion that they were utterly without redeeming social value.

The weight of any of the evidence, of course, was left to the jury, specifically instructed.

Now, the jury, with respect to social importance of

sexual provocativeness, a point Petitioner made during his oral argument--the jury was further instructed that evidence of the circumstances of production and dissemination were relevant for determini whether social importance claimed for the film was in the circumstances pretense or reality and if they concluded that the purveyors' sole emphasis, sole emphasis was on the sexual provocative aspect of these films, that fact would justify the conclusion that the matter was utterly without redeeming social importance.

Roy Splawn was not trying to sell Lucky Strike cigarettes or anything else by having a pinup girl. He was making -- the purveyor was making sole emphasis on the sexual aspect of these films. That's recognized as relevant to social value and that's how the jury was instructed here.

QUESTION: Mr. Stein, before you leave the instructions, do you submit the instruction was proper, as given?

MR. STEIN: I do, yes.

QUESTION: And the instruction, as I read it, says that simply on the basis of emphasis, sole emphasis -- you emphasize that word -- of the sexually provocative aspect of the publication, that fact -- and I assume that means that fact alone -- could justify the conclusion that the matter is utterly without redeeming social value.

That would mean even if he were selling Time Magazine

that would justify it. Would you say that is a correct statement of the law, or do I misread it?

MR. STEIN: That's correct. If they concluded that his sole emphasis was on the sexually provocative aspect of the film, it could justify the conclusion that it was utterly without redeeming social value. That was the way they were instructed, yes.

QUESTION: Do you think that's a correct statement?

MR. STEIN: I think it is in the sense that this case where they were further instructed, of course, that, as in the Roth-Memoirs definition -- I don't want to bore the Court by rereading Roth-Memoirs -- but they had to find lack of social importance beyond a reasonable doubt. And I think taken all together in its entire scope, the instructions read together, I don't think they were allowed, that this allowed them to just look to nothing else and find lack of social value. I don't know if I'm --

QUESTION: But it says it, doesn't it? It says that's all they need.

If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, in other words, there is a picture on page 37 that is sexually provocative. That fact can justify the conclusion that the matter is utterly without redeeming social importance.

Doesn't that say that if one sells Time Magazine by

emphasizing a particular picture on a certain page, that that would be enough to justify a jury conclusion that that issue of Time Magazine was utterly without --

MR. STEIN: Oh. Okay. Now I am focusing on your problem. Sure. And that would not be a proper statement of the law. We would all agree to that, but that cannot happen in California. And the reason that that cannot happen in California is Time Magazine, with a single picture in it that may be provocative, or what else, would never survive a Noroff motion which was made here.

You see, Time Magazine or many -- Most material in this area falls into one of three categories. It is either obscene as a matter of law, and I can't think of an example, but I am sure there are some, or it's constitutionally protected which Time Magazine would be. In which case, the motion made here under Noroff -- that's why I said that procedure was important -- would block the prosecution and never get past that first motion.

QUESTION: I suppose there are three kinds of material: obscene as a matter of law --

MR. STEIN: Not obscene, clearly protected. I think that is important to remember.

QUESTION: An area in between that's arguably protected and arguably obscene. Is that what we have here?

MR. STEIN: By a definition, that's what we have here,

at least that.

QUESTION: Do we assume that it is in that area since the judge said it was --

MR. STEIN: Not only do you have to assume it, I think you are bound to, you have to because under the California procedure --

QUESTION: In an arguable area. We don't have Time Magazine, but we have Playboy, something that's much closer to the line, then if there is a mixture there of articles and pictures, and so forth, would it not be true that this instruction would justify the finding of at least the third element of the test of obscenity just on the basis of one picture?

MR. STEIN: That's correct, but as you point out -- that's correct. As to social impprtance of the material, true, but no matter how salacious or how outrageous the pandering of the material is, as you point out, Roth-Memoirs requires two other elements: that it be beyond customary limits of candor in the community and that it appeal to prurient interests, both of which have to be proven beyond a reasonable doubt.

So, I think, taking the instructions together, it is an appropriate statement of the law.

QUESTION: Do you agree with your opponent that there is a distinction between sexually provocative material and prurient material?

MR. STEIN: Oh, sure.

QUESTION: That they are entirely separate elements. And this instruction only talks about the sexual provocative, it doesn't talk about prurient.

MR. STEIN: That's correct, and the jury was specifically instructed. This instruction only went to the social value, not to the prurience of the material.

QUESTION: Right.

MR. STEIN: He can't make it prurient by telling you it's prurient.

QUESTION: And, am I also correct in my understanding that in California this social importance aspect of the three parts of the test is a question of fact for the jury?

MR. STEIN: That's correct.

QUESTION: Each of the three parts of the test are questions for the jury, and unlike the federal system -- and before I came here I tried to read the instruction given in Hamling. I couldn't find that from my contacts, but I did talk to a U.S. attorney in Southern California who had an instruction that they gave in a similar case and he assured me it was close. And I noticed right away that the issue of close case under the federal instructions is strictly a jury question.

We show the film, or whatever, and we put in all this Ginzburg evidence and everything and we leave it to you. Not so, under California. You have to get past that Noroff motion.

It has to be unprotected. As a matter of law, it has to be outside the First Amendment, then we go to the jury.

Okay?

In the federal system -- and that's the instruction that was affirmed in Hamling -- as I understand it, it goes to the jury and then you tell them to look at the evidence and look at the Ginzburg test and if you can't resolve these three things from the face of the material, itself, then you look at this evidence of dissemination and production and you come out with an answer at the end.

QUESTION: Could you clarify again for me the preliminary motion? Does the judge rule that, as a matter of law, it is unprotected or does he rule that it is not protected as a matter of law? There is quite a difference. Is he just saying, "I will not rule," that the case must be dismissed? Or is he saying there is an issue of fact for the jury to decide?

MR. STEIN: He has to rule that the material is outside the protection of the First -- No. He has to rule, yes, that it, the matter is -- He hasn't dismissed the prosecution, if the material is not obscene as a matter of law.

QUESTION: Right.

MR. STEIN: As a matter of law. And, of course, that test re-comes up --

QUESTION: But if he denies the motion, he does not

rule, as a matter of law, that it is unprotected?

MR. STEIN: No, the defense may be able to show that although the matter is outside the First Amendment, they didn't treat it in a manner which renders it within the Ginzburg -- the Roth-Memoirs definition of obscenity.

QUESTION: You go to the jury and you get this instruction and you lose because you had one picture in a magazine.

MR. STEIN: Not at all, because if there is only one picture in the magazine the prosecution wouldn't get over the Noroff. It would be protected as a matter of law.

QUESTION: Well, assuming the judge did --

MR. STEIN: Well, we go on appeal. He is entitled to the same standard as the trial judge has to use under Noroff, to review the material on appeal, and, as I understand it --

QUESTION: Is he entitled to appeal from the ruling of the judge at that stage of the hearing?

MR. STEIN: No, but he is entitled to raise it on appeal as though he did.

QUESTION: That's right. Entitled to raise it.

MR. STEIN: And he is entitled to one more before he gets to appeal which --

QUESTION: Sort of censorship, isn't it?

MR. STEIN: Censorship?

QUESTION: Judicial censorship.

MR. STEIN: We are censoring material that's outside the First Amendment in California and we would intend to continue to do that.

But it is important to remember he gets another bite of the apple. After the prosecution puts all its evidence in, he made the statutory motion to acquit for failure of the proof. And that was denied, and that's reviewable on appeal.

QUESTION: If this case had arisen before the 1969 amendment to California law, do you think the instructions given would have been appropriate at that time?

MR. STEIN: Yes. Oh, yes. I don't think -- I think the evidence was relative and it was probative as recognized in Ginzburg and maybe even before, so that the statute merely recognizes the relevance of the evidence. All relevant evidence was admissible in California prior to that.

QUESTION: And instructions like this could have been given. Do you know whether or not they were given?

MR. STEIN: No. I am not aware of any case in which they were given prior to this, one way or the other. I have not been active in the trial of obscenity cases, only in the appellate level and after this amendment was introduced.

QUESTION: Do you read the instructions as merely identifying evidence that is probative?

MR. STEIN: Is probative on the definition -- the

Roth-Memoirs definition of obscenity, yes.

QUESTION: Mr. Stein, your opponent says the Noroff -- I haven't read the Noroff case. I suppose I should have by now, but -- He says that case held that the pandering evidence would not have been admissible. So, if the evidence wasn't even admissible, how could the instruction have been given?

MR. STEIN: I disagree with that reading of Noroff and I'll leave it to your -- to read it and analyze it yourself, but basically I'll tell you what happened.

It was a matter that was protected as a matter -- within the First Amendment, as a matter of law, was prosecuted.

Okay?

And the California prosecutor said the United States Supreme Court has come down with Ginzburg which allows us to bootstrap this material out of the First Amendment into the area of obscenity on the -- because of the way this fellow pandered it.

And California says you might be able to do that in California if you had the same statute that the Federal Government has -- which you have a statute about advertising in the mail statute, advertising and pandering a matter as obscene.

But in California, we didn't have that statute. They said absent that statute, there is no way you can get protected material up into -- or out of the First Amendment and

down into the area of obscenity, on the use of this evidence. So they threw it out and the trial judge's dismissal of the prosecution was affirmed in People v. Noroff, thus leaning to the non-statutory motion that is made in every obscenity case since, that this indictment has to be dismissed because the matter is protected as a matter of law.

QUESTION: In other words, this argument assumes that the pandering evidence was proper in a federal prosecution because of the federal statute?

MR. STEIN: Yes.

QUESTION: But the Memoirs -- the last section of the Memoirs case suggests the contrary, doesn't it? Are you familiar with the last section of that opinion in which the Lady Chatterly's -- whatever the name -- That's not the one, but anyway the Old English work was held to be, have social value, and then there is a section that says if we don't have any evidence of pandering before us. That's the state case.

I don't understand how you can rely on a federal statute as the only basis, under Ginzburg and Memoirs, for pandering evidence being relevant, which I understood you to argue.

I guess my question is pretty bad.

MR. STEIN: I am afraid I --

QUESTION: What I am suggesting, I think the last part of the Memoirs opinion is contrary to your argument, and if

it is then I wonder if we don't have a California ruling that said, as a matter of state law, this evidence was not then admissible and, therefore, isn't your opponent correct that this instruction would have been improper?

MR. STEIN: No. The Noroff decision says that if the matter is within constitutional protection, in the First Amendment, there can be no prosecution in California, because there is no statute that allows prosecution for the advertising of non-obscene matter, as obscene.

QUESTION: Well, therefore -- This is also a state prosecution. Wouldn't it follow from that case that the pandering evidence in this case would also have been inadmissible?

MR. STEIN: No, because the predicate of Noroff is that the material is non-obscene, entitled to First Amendment protection. Okay?

Here, that is not the fact because --

QUESTION: And the First Amendment protection cannot be lost by pandering evidence.

MR. STEIN: That's right. And if this material is within the First Amendment, pandering evidence could not have been admitted. We couldn't even have gotten past the motion to dismiss stage. But, because it is outside, and I don't believe Noroff --

QUESTION: Well, but isn't Noroff then saying that

pandering evidence cannot make the difference between material being protected and being unprotected?

MR. STEIN: Sure, that's the point.

QUESTION: And here it did make the difference, if the jury followed the instruction.

MR. STEIN: Pandering evidence can't convict the defendant of a crime he didn't commit. The only crime here is selling obscene matter. The pandering evidence goes to whether the matter is obscene or not.

Maybe I am not making myself -- I realize I am not getting across. We didn't make a crime that didn't exist. Selling obscene matter has been a crime in California as far back as I could trace in the statute.

He knew that selling obscene matter was -- What he is saying is --

QUESTION: Why in this prosecution was any evidence of pandering put in or why did you need the pandering instruction, then? What function did it play in this trial?

MR. STEIN: Oh, the function that it plays is -- You have recognized the difficulty placed on the prosecution by Roth-Memoirs to prove a negative beyond a reasonable doubt. The prosecutor has to prove utterly without redeeming social value, beyond a reasonable doubt.

We would all say -- and if I was trying the case again, I might say, "Well, these films are so bad that I don't

need any other evidence. Roll the projector and I'll make an argument to the jury."

But the prosecutor is faced with the problem that he has lost ten of these in a row and he has got this bookstore down in Redwood City and he says, "Well, I am going to try the best I can and Ginzburg says this evidence is relevant on the test of obscenity as to social value. And I am going to take the whole shot I can."

QUESTION: Under Miller, this is no longer relevant, is it?

MR. STEIN: But, unfortunately, California still labors under the Roth-Memoirs test. Under Miller, this would not be a problem. And we believe that you have recognized in Hamling that the instruction was properly given in a pre-Miller federal prosecution. We would ask for the same consideration for the state prosecutors who still toil.

QUESTION: Was the state's evidence here on pandering in response, in fact, to the effort of the defendant to show that there was a redeeming social value to this material?

MR. STEIN: No. The evidence came in on the case in chief, on direct, and as a matter of fact the only -- the defense moved at the close of the case.

QUESTION: You just said that you have the burden of proof in your case in chief to prove --

MR. STEIN: That's correct.

QUESTION: -- the absence of social value. So that would be the place where it could come in.

MR. STEIN: Where you would have to put it in, right.

QUESTION: You are anticipating, in effect, that aspect of California's burden of proof under your --

MR. STEIN: At the close of the people's case, if we have not proven, if we have not at least raised the jury issue on social value, his motion to dismiss would have been granted and we -- well, we wouldn't be here.

QUESTION: But you don't, in California, need any more proof than the materials, do you?

MR. STEIN: No. We still recognize, as this Court recognized --

QUESTION: Hard to fail in your proof, isn't it? Unless on its face, the material --

MR. STEIN: If the projector bulb doesn't fail, we have a prima facie case.

Petitioner pointed out,and it's a point I would like to emphasize, that this Court decides obscenity cases not merely to rule upon the alleged obscenity of the material, but to guide lower federal courts, state courts, legislators and prosecutors.

In Miller, you recognized the difficulty of the burden that's been placed on us under the Roth-Memoirs test.

You recognized in Ginzburg that this kind of evidence is relevant to that test. We still have it in California. We are not about to get rid of it, apparently. We believe we were entitled to produce the evidence and give these instructions which you've recognized as proper in Hamling, which we think --

QUESTION: You still have the Roth-Memoirs test in California. Is that a matter of state constitutional law?

MR. STEIN: State statutory law. Our statutes were periodically reenacted following this Court's decisions. It stopped at Roth-Memoirs and it has been hung there.

QUESTION: Ran out of ink.

MR. STEIN: Pardon me?

QUESTION: Ran out of ink.

MR. STEIN: It's all in the magazine business.

QUESTION: Let me -- I am not sure I didn't leave a subject before I fully understood it.

On this instruction, the one picture in Time Magazine problem. Supposing that one picture is clearly, patently offensive, clearly appeals to unhealthy, prurient interests and then the question is whether the -- the only remaining issue then is whether the work, as a whole, is utterly without redeeming social value?

And on that issue, that instruction would let that magazine be found obscene.

MR. STEIN: They are instructed, though, that they would have to find the material -- I'll read the whole thing, but the material taken as a whole must be utterly without redeeming social value.

QUESTION: But that issue, they can resolve that issue solely on the basis of evidence that was sold by reason of appeal to the --

MR. STEIN: And they would find, under that instruction, that it was utterly without redeeming social value, and then could they say, taken as a whole?

QUESTION: That instruction would permit them to.

MR. STEIN: It goes to social value. I am not sure that they could say it was taken as a whole. But, even if they could, they have to still find taken as a whole, it appeals to prurient interests and taken as a whole goes beyond the customary limits of candor of the community, acceptable to the community.

QUESTION: I see your point.

MR. STEIN: The Bible cannot be elevated out -- It is a negative we are talking about -- It can't be removed from the First Amendment and made, somehow, obscene, no matter how he portrays it, or how he -- what he tells me this thing is -- because of the three-part test, and beyond a reasonable doubt and the work taken as a whole. And these instructions went just to the evidence of dissemination and production.

Now, as far as the fact that Mr. Splawn was not the creator, I doubt that Hamling created the photographs that he put together and assembled in this thing and disseminated. Hamling was the disseminator. Ginzburg was the disseminator. Roy Splawn is the disseminator. The creator of the materials' motives are important to determining whether that material is what it purports to be.

I took a few minutes off the other day and went down to the Hirschorn Museum. When you stand in front of the pictures, what comes to mind? You are trying to think: what is the intent of the creator of this picture? The intent of -- The creator,himself, doesn't have to be on trial. We've got the film. You can look at the film. They were created by -- And what was his intent? That's important to determining the social value of the material, what he was intending to do.

Roy Splawn -- There is testimony he made a phone call. He'd seen the movie. He knew what was in them. And so I think the fact that Roy Splawn didn't create the movies, and there is no evidence that he did, doesn't preclude giving these instructions or preclude the prosecution from using this evidence.

I think it is important, too, to point out that the jury was never instructed that they could substitute this evidence for any of the definitional requirements of Roth-Memoirs. They were instructed that the purveyor's emphasis was

on the sexually provocative aspects of the film, the motive of the creator was an appeal to sexual curiosity and appetite, by animating sensual detail as to give the film a salacious cast.

That was evidence that the films were obscene but they were never instructed they could jerk that -- You know, if we can't understand the Roth-Memoirs test, we will just junk that and go to this evidence.

That's not in those instructions fairly read. They merely advise the jury that the evidence of the circumstance of the production and dissemination were probative with respect to Petitioner's claim of redeeming social value and could justify the jury's conclusion that his claims were pretense for litigation, not the way he sold these materials to Armand Drivon.

I would just say the imbalance that -- The statute is cast in terms of the prosecution evidence. The prosecution bears the burden. But Ginzburg recognizes the probative value of the evidence and if the defendant had introduced evidence that he treated these films seriously, I concede that he would be entitled to a similar instruction that the jury could consider the way he considered the film as probative of social value.

The instructions are weighed in favor of the prosecution because that's all the evidence there was, and the

fact that the statutes weighed in favor of the prosecution doesn't mean only evidence that they are being treated in a pandering manner is admissible evidence or those instructions.

I want to thank the Court for your attention.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Wells?

MR. WELLS: Yes, I have brief rebuttal, which will be shotgun, for which I apologize.

REBUTTAL ORAL ARGUMENT OF ARTHUR WELLS, JR., ESQ.,
ON BEHALF OF THE PETITIONER

MR. WELLS: The reference in the record to the statement where Mr. Splawn told Mr. Drivon he could go up and get them himself is at page 338, and I don't think Don Splawn's acquittal means anything because a very large issue in this case was the issue of entrapment. Mr. Drivon was in constant contact with Don and I think that provides one reason and the general rule is one finds all reasons in favor of the judgment. That should apply in this case.

As I understand California law, there is a case,-- I think it is Scher v. Municipal Court. I am sorry I do not have the citation -- which holds that where a publication has discreet -- and I use that to mean separate and not in its other meaning -- items, you can look at any one of the items to determine whether it fulfills the relevant constitutional tests or statutory tests for obscenity, and, if so, the material can be

found obscene.

Scher ran the Berkley Bard and that's why I recall that's the case. I could get that citation if you wish. Therefore, it would be my view that in the Time Magazine case if there was one obscene picture, one picture that had the qualifications which you suggested it might have, the magazine could be found obscene and Noroff motion wouldn't save it.

I think the Noroff motion -- These cases arise mostly in the municipal court. And what happens is in California you don't have any preliminary type hearing to get rid of the chaff, like you would with a felony. You don't have a preliminary hearing and the Noroff motion is, frankly, a substitute to get rid of the stuff that shouldn't be going to trial at all.

Now, I don't think you can characterize this rule fairly, these pandering rules, as merely evidence rules, because what they are, they are part now of the definition in California.

I will say, however, that under the holding in Marx v. United States, I think that Mr. Splawn will always be entitled to Roth-Memoirs standards and I think for him they are constitutional standards.

Hamling is an entirely, as I read what you quoted in Hamling, an entirely different set of instructions which were much fairer. There the court said if it is a close case, look at all the circumstances, and didn't say anything about sexual

provocativeness and didn't say anything about the motives of the creator.

And I will say that while the distinctions between producers and creators may not be significant, the point was that Ginzburg was on trial for behavior that he did and Hamling was on trial for behavior that he did and Splawn is on trial for what the creator did, and there is no connection between them.

QUESTION: Did you object to all of the instructions that you are now telling are --

MR. WELLS: Yes. There is a general instruction. What happened, this was covered in the, everything was gone through in chambers, and then there was a general blanket instruction. The matter was covered by the Court of Appeals, specifically, and I think, therefore, all of these issues are before you because under Jenkins v. Georgia it hadn't been raised below and the fact that it was considered by the Court was deemed adequate.

I would leave you with this point. For the very reason that he suggests, that there is evidence of pandering in this record, is the very reason why you have to formulate a rule limiting it.

This is a case where a policeman had asked four or five times for hard-core material and then because Mr. Splawn said, "Hey, you know, I can get in trouble for this stuff,"

that statement is now being used to say that he pandered the material, when it was perfectly clear that Drivon wanted the material already, that the sale, in effect, had been consummated, even though the money hadn't changed hands, and it was perfectly obvious that it was a nervous seller who wasn't usually doing this and that what he was doing was just trying to urge the guy not to spread it around.

It is not evidence of pandering and any set of rules that permits it to be used as such is an unfair set of rules.

Thank you, very much.

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

(Whereupon, at 2:45 o'clock, p.m., the case in the above-entitled matter was submitted.)