In the

Supreme Court of the United States

WILLIAM PINKUS, DOING BUSINESS AS
" ROSSLYN NEWS COMPANY" AND "KAMERA",
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT.

No. 77-39

Washington, D. C.
February 28, 1978

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WILLIAM PINKUS, doing business as "ROSSLYN NEWS COMPANY" and "KAMERA", Petitioner, v. UNITED STATES OF AMERICA, Respondent.	No. 77-39

Washington, D. C.

Tuesday, February 28, 1978

The above-entitled matter came on for argument at 11:35 a.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:

BERNARD A. BERKMAN, ESQ., 2121 The Illuminating Building, 55 Public Square, Cleveland, Ohio 44113, for the Petitioner.

JEROME M. FEIT, ESQ., Criminal Division, Department of Justice, Washington, D. C. 20530, for the Respondent

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 77-39, Pinkus against the United States.

Mr. Berkman, you may proceed whenever you are ready.

ORAL ARGUMENT OF BERNARD A. BERKMAN

ON BEHALF OF PETITIONER

MR. BERKMAN: Mr. Chief Justice, and may it please the Court: This is a Federal prosecution and conviction for mailing obscene brochures, magazines and films. It comes to this Court raising important questions as to substance and procedure in Federal obscenity trials, questions which require this Court's constitutional interpretation and the exercise of its Federal supervisory power.

The first question which is presented has to do with the jury charge in the court below -- in the trial court, I should say -- which included sensitive persons and children in the community against whose average prurient appeal and patent offensiveness the jury was to apply its measurements.

With respect to the charges, they made it clear that although the jury was not to judge by the effect on particularly sensitive or insensitive persons in the community, it was clear that the community as a whole, which included both sensitive and insensitive persons, and with respect to children, with respect to young and old, with respect to

educated and uneducated, religious and irreligious, men, women, and children from all walks of life, all of those persons at the periphery of the community as a whole were to be included in the jury's consideration.

It seems to me that the analysis of the prejudice involved in a series of charges of this kind must be considered against the context of the record, must be considered on the basis of the fact that there was no contention by the Government at the trial, in fact there was a stipulation in open court at the time of the voir dire of the jury that there were no mailings to children involved in this case, and as a matter of fact, the jury was so instructed by the court on the basis of an oral stipulation reached in front of the jury.

It should also be noted that there was considerable interest among the jury at the voir dire of this case with respect to the question as to whether or not the materials were available to children. There was one question from a juror during the time of the interrogation of the jury, in determining whether or not he could properly sit, whether or not the material was available to children. As a matter of fact, during the course of the interrogation another juror agreed that explicit sex portrayals ought to be kept from children. And with respect to the summation by the Government in this case, it was emphasized many times that children were part of the total community, also that the total community included

sensitive and feeble-minded people and in advising the jury how to behave in the jury room on the basis of the instruction which had been given, the Government attorney indicated that you cannot focus on the child alone or sensitive or insensitive persons alone, but he said, "What you have to do is add them all up and then come up with a middle range." That appears in the reporter's transcript at page 726. And it seems to me that on the basis of such an arrangement, if this Court's admonition that the reading habits or materials which are available to be examined by adults is not to be reduced to the level of children, it seems to me that particularly in a case in which there is no contention that the materials were in fact mailed or distributed or disseminated in any way to children, that that kind of a charge has the most far-reaching and prejudicial and detrimental effect.

It seems to me that if you notice the other factors in the case which pointed the finger at children, even though there was a stipulation that there were no children involved in the distribution of this material, the error is compounded.

It should be noted that during the course of both cross-examination of the defense witnesses and examination of the rebuttal witness, the trial court permitted, over objection of the defense, Government testimony regarding the adverse consequences of distribution of pornography to children.

It should be noted further that during the time

that the Government's rebuttal witness, Dr. Rue, testified with respect to some of his experiences, when he testified, over objection of the defense, that he knew of an episode in which there had been an incestuous (sic) molestation (sic) of a father by his daughter as a result of having examined material in an adult book store, and after strenuous objection was interposed and a demand for mistrial was made and overruled, it seems to me that that factor, added to the rest, indicates the prejudicial potential of the jury charge in this regard.

If you add to that the fact that not only was this charge given but also corrective charges which were sought by the defense that it is the adult community whose prurient appeal and patent offensiveness ought to be measured, which charges were denied by the trial court, and if you also note that the defense asked for a charge that the defendant had not violated any law with respect to minor children or that the jury ought not to assume from the fact that there might have been testimony concerning minor children, that the defendant is in any way associated with the issue concerning children, and that charge was denied.

QUESTION: The judge did give the instruction in terms of whether it was utterly lacking in social value or importance, did he not?

MR. BERKMAN: Yes, he did.

QUESTION: He went on to say if it has a minimum --

a minimum -- of artistic or other social value, then it is not obscene. That was a very favorable -- more favorable than the most recent opinions authorize, was it not?

MR. BERKMAN: I think one of the reasons that that was argued -- that's quite right, Mr. Chief Justice. But one of the reasons that was so is that the case was originally reversed by the Ninth Circuit Court of Appeals after it had been tried on the basis of Miller standards even though the events which were involved in the indictment had occurred prior to Miller. And when the case was returned, it was with full appellate instructions that the trial court try the case under the Memoirs standards. And I think that the court did. But in the particular instance which the Court has cited, it had to do with the third prong, that is, with respect to social value, and not with the places in which we contend the error occurred, which is with prurient appeal and with patent offensiveness, which involved the community as a whole, charge which was offered here under circumstances in which we think that the reference and the emphasis upon sensitive persons and children ought not to have been dwelled upon to permit the kinds of summation and the kinds of other events which occurred during the course of the trial to have happened.

I would add one word to the argument, to this particular argument, and that is that the Government apparently has indicated in its brief, as the court below indicated, that

it was somewhat dissatisfied with the charges in this case and contends that somehow or other the balance of the charge, the overall charge, somehow cures the deficiency of which the defense complained.

We suggest to the Court that that is not the case, that if you examine the overall charge, the only thing that it does is to indicate again that it is the total community which is involved and to suggest that the jury cannot focus particularly on a section of the community.

Now, it seems to me that under circumstances in which population statistics indicate some 30 percent of the entire population involves persons under the age of 18, that to suggest that a particular area ought to be included without being focused upon is at best confusing and at worst dangerous to the determination of sensitive tools which are necessary in this First Amendment area. It is sort of like asking a person to stand in the corner and not think of a white bear. I think the psychological response to that is obvious.

I turn now to the second question, which has to do with the admission of comparable materials. It will be recalled by the Court that there were two films, "Deep Throat" and "Devil in Miss Jones," which have been offered by the defense as a part of its case with respect to demonstration of reasonably similar explicit sexual candor, with respect to films which had played regularly and for a considerable

period of time in the Los Angeles area which was part of the central district community, films which on the basis of evidence which was permitted in laying the foundation indicated that the number one film during the period of 81 weeks in Los Angeles was "Deep Throat," and that was compared to not only films of sexual orientation but general run films such as"Billy Jack"and "Last Evening in Paris," "Paper Moon" and other motion pictures.

During that period of time, by dividing the number of dollars that had been received in gross receipts by the $5 charge per person, some 655,000 persons had actually viewed that particular film. And somewhere in the vicinity of about half that number had viewed the other film which was offered as comparable.

It should be noted that these were the only films that were offered as comparable materials. It seems to us that the foundation was appropriately laid to meet the two criteria which have flowed since Womack and which have guided the Ninth Circuit and other circuits in this country, which is that there must be a reasonable resemblance between the alleged comparable material and that material which is charged and that there must be a reasonable degree of community acceptance.

Now, it seems to us --

QUESTION: Didn't the Court of Appeals find a lack

of comparability?

MR. BERKMAN: Well, the answer to that, Mr. Justice Stewart, is yes and no. The Court of Appeals held that with respect to count 9, which involved the film that was charged in this case, that it was reasonably similar, but with respect to the other items charged, which included brochures and magazines which had still pictures as distinguished from motion pictures, that the medium was sufficiently different that so far as he was concerned there was not the degree of comparability.

Our position is that when you are depicting sexual candor in a motion picture or you clip a frame from that motion picture and show a still picture, so far as we understand the temper of this Court in Kaplan, which has indicated that the medium does not make that much difference and that if you are talking about the degree of sexual explicitness of the material, then so far as we were concerned, we think that the Court of Appeals was wrong in making that arbitrary determination and that so far as all eleven counts are concerned, including the advertising, including the film, including the picture book, that all of them were reasonably similar so that that first standard would be met.

And, of course, the Court of Appeals never reached the question of whether or not there had been community acceptance of the material, because --

QUESTION: Mr. Berkman, isn't it true that the Court of Appeals didn't say one way or the other as to whether the other nine counts had the same degree of explicitness?

MR. BERKMAN: Well --

QUESTION: You are telling us, but how do we know that other than that?

MR. BERKMAN: So far as the Court of Appeals' opinion is concerned, they made much of the notion that the medium was different.

QUESTION: I understand. And you say that's wrong, but then don't we still have to know whether or not there is the same degree of explicitness in the other counts?

MR. BERKMAN: Well, the materials are before the Court, and so far as we are concerned, your Honor, we think that --

QUESTION: That we should make that determination de novo?

MR. BERKMAN: That determination is before you; it is a matter for independent determination by the Court, and we think that all the materials are available to the Court to make that judgment.

QUESTION: You think normally that is the kind of determination that this Court should make in the first instance?

MR. BERKMAN: Well, ordinarily it doesn't happen because ordinarily the Court of Appeals and other courts that preceded this Court --

QUESTION: But they didn't do it here.

MR. BERKMAN: -- would have made that determination, because of the determination which the Court made on this point and also on the concurrent sentence doctrine so that it didn't reach the question of community acceptance.

It is true that for the first time since the trial court the matter is before this Court. And I would agree that that is somewhat unusual. But I would agree with the suggestion made by the Government, which was that the issue is fully developed here and it is possible, if the Court wishes to make its independent judgment, to make it.

QUESTION: Supposing we don't wish to do so, what would you think the proper course is?

MR. BERKMAN: Under those circumstances, your Honor, it would seem to be necessary to remand the case back to the Ninth Circuit with instructions to consider that issue, or as a matter of fact, those two issues, with respect to the application of the material so far as similarity is concerned as to the other ten counts, and furthermore, the question of community acceptance.

We think that so far as the question, we know that we have a burden with respect to the admissibility of evidence.

We understand as a result of the decision in Hamling and other cases that in the first instance the trial court can decide how much material is confusing or burdensome to the jury, but we submit that in this instance the situation is clear, that under the circumstances there were two expert witnesses who testified for the defense and they testified only with respect to the issues of prurient appeal and social value. They did not testify with respect to the issue which is central to the proofs that were sought to be introduced by the defendant with respect to the comparable materials, which is contemporary community standards with respect to patent offensiveness.

In addition, there were a couple of questions that were allowed, after a lot were thrown out by the trial court, with respect to a couple of survey questions that were permitted on the question of patent offensiveness. But we submit that the record was not burdened, that the jury would not have been confused. Only two films were offered and they were films which had had widespread community acceptance and we think that under the circumstances, because of the constitutional dimension which is involved in allowing a defendant to make his proofs as to relevant matter, that we were entitled to have these films introduced and that the prejudice is obvious because it is quite clear that this was central to the defense of the defendant in this particular

instance.

We turn now to the third question, which has to do with the charge which was offered by the Court to the jury to consider the appeal of the charged material, not only to the prurient interest of the average person, but also to the deviant groups. And we suggest to the Court that we understood the rule to be as it was enunciated by this Court in Michigan v. New York, in which the Court said that where the material is designed for and primarily disseminated to a clearly defined deviant sexual group rather than the public at large, then and under those circumstances, the prurient appeal charge may be enlarged so that the jury may consider the dominant theme of the material as it appeals to the prurient interest of members of that deviant group as well as to the average person.

QUESTION: In the absence of expert testimony that would require deviant members of the jury, wouldn't it?

MR. BERKMAN: Well --

QUESTION: Unless some members of the jury belonged to one or more of these deviant groups, unless they understand the question.

MR. BERKMAN: Unless there is some external evidence -- the suggestion that you make, Mr. Justice Stewart, involves somebody determining somehow on the basis of something other than mere guesswork and speculation --

QUESTION: Then under the Michigan test that would be a peculiar case where expert testimony would be desirable, wouldn't it?

MR. BERKMAN: It would be desirable. But in addition to that, it would seem to me that you could even have non-expert testimony with respect to the manner in which the manufacturer or distributor of the material designed his material and how it was primarily disseminated and to what groups other than the public at large. It would seem to me that that kind of evidence could come and even without expert testimony, but to fill a void, a vacuum, if you will, so that the jury would have some evidence rather than their own guesswork, their own tendency, their own emotional feelings about this material, which is a constant problem to deal with. And it would seem to me that not only the expert evidence, but in addition to that, all of the evidence of the manner in which the material was distributed, which is clearly laid out in Michigan.

I would point out that so far as the facts as well as the rule of law, which we have just dealt with in Michigan, it is buttressed by those facts in Michigan because there there was an abundance of evidence in which the authors of the material that were charged were instructed as to the kinds of deviate materials which were to be drafted so that their appeal would be clear and it was obvious that they were to be

disseminated to particularized groups and not to the public.

In this instance we have none of that kind. And the Government dwells a great deal upon the fact that there are little snippets of evidence in various places in the record which indicate that on cross-examination of defense witnesses and on the basis of testimony by Dr. Rue in rebuttal for the Government that some suggestions as to appeal to deviant interest appear in the record.

But that isn't the point. Appeal to deviant interest,is not designed for and primarily disseminated to a group which is not the public at large, and there was no evidence of anything of that kind in this record, because all that went in was the stipulation as to the fact that the petitioner in this case did with knowledge distribute this material, to whom it was distributed, the name of the person, the occupation of such person, and the place where he lived. Nothing more.

QUESTION: If the evidence were only that this material appealed to people, even under the most stringent tests that this Court has ever formulated, it's not a criminal offense to write something that appeals to people, is it?

MR. BERKMAN: Not that we are aware of, your Honor. Nevertheless, we have a petitioner who stands before you waiting four years in the penitentiary for that among other things. So it ought not to be, and that is one of the reasons

we are here.

QUESTION: That "among other things" covers quite a bit of territory, doesn't it? The "among other things" you referred to covers quite a bit of territory.

MR. BERKMAN: Indeed. Indeed. But we think that if there was error which is of a substantial nature, then this Court ought to reverse because the proceedings under which this petitioner was convicted are so tainted that a new trial is in order.

QUESTION: Mr. Berkman, is there any difference, and if so is it significant, between the word "deviant" and the word "deviate"?

MR. BERKMAN: I have been trying to figure that out myself in preparation for this case, your Honor. I am not sure there is. And I am certainly not an expert in that arena sufficiently to know.

QUESTION: I notice Mr. Justice Harlan used "deviate" rather than "deviant" in Manual Enterprises. Is it commonly understood in this area of litigation that homosexuals are a deviate group?

MR. BERKMAN: There has been testimony -- as a matter of fact, there is testimony in this case that this is not what would be called a deviant group because of the fact that there are persons who occupy such a position of sexual preference and who are of sufficient numbers and who are of

sufficient -- let me use the word "lack of correctibility" for want of a better phrase -- so that they would not be a deviate group because of their own sexual preference. There was testimony from --

QUESTION: In the trial of this case, there was some emphasis, I believe, that some of this material was -- at least there was a box to check if you wanted homosexual material, something like that.

MR. BERKMAN: Yes, your Honor.

QUESTION: Was it assumed before the jury that homosexuals were a deviate group?

MR. BERKMAN: Well, it was argued by the Government and it was argued -- and I believe it was testified to quite frequently and with some verve by the rebuttal witness, Dr. Rue, that that was a fact. The defense testimony was to the contrary.

Now, in the few moments that remain, I would like to --

QUESTION: I should know from the instruction, but what about the judge's instruction. Did he identify whether homosexuals were deviate or not?

MR. BERKMAN: No, there was no such definition. And I believe in candor there was no such definition asked for nor received nor offered to the jury.

QUESTION: By either party?

MR. BERKMAN: I think that's right.

Now, with respect to the last argument which has to do with the pandering argument, the pandering charge, which was given to the jury, our argument takes two forms: First of all, it is our contention that because of the amount of evidence that was in the record, there was no reason to give a pandering charge at all in this case; and, secondly, that after the pandering charge was given --

QUESTION: I'm not sure I follow you there. You mean the evidence was so overwhelming that you didn't have to show that it pandered?

MR. BERKMAN: No, that wasn't the position I intended to take, your Honor.

QUESTION: It was not?

MR. BERKMAN: No. No. Our position basically is that if this Court were to sustain a charge of pandering in a case of this sort, then it would have gone far beyond the fact situations in either Michigan or Ginzburg v. United States in permitting yet another line of attack, so to speak, by the Government in order to attempt to obtain a conviction. There has been no case so far as we know in which this Court has permitted on the basis of one thing which we contend to be in the record at all which even relates to the question of pandering, and that is the fact that the materials, the brochures, the advertisements did indicate the sexually

provocative nature of the materials which were being offered for sale. There is no indication of mass mailing in this case; there is no indication the materials were mailed to people who did not wish to have it, that it was thrust upon anybody; there is no indication of anything except the brochures and the materials which were charged themselves and which were offered to the jury to show that indeed there was an appeal to the sexually provocative nature of the material.

QUESTION: At some point I take it you will deal with the concurrent sentence aspect in relation to this problem, not necessarily now. Do it at your own time.

MR. BERKMAN: Yes.

MR. CHIEF JUSTICE BURGER: I think we will recess until 1 o'clock.

MR. BERKMAN: All right. Thank you.

(Whereupon, at 12 noon, the oral argument was recessed, to reconvene at 1 p.m. the same day.)

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: You have about five minutes remaining. You may use it as you wish.

ORAL ARGUMENT OF BERNARD A. BERKMAN

ON BEHALF OF PETITIONER (RESUMED)

MR. BERKMAN: Thank you, your Honor.

I believe just before the lunch break your Honor asked a question with respect to the concurrent sentence doctrine, and the response that I would give to that is this:

The concurrent sentence doctrine was invoked in the court below only with respect to the comparison evidence issue. If the Court is suggesting that that could conceivably be invoked with respect to the pandering issue, I would only suggest to the Court that the pandering charge was specifically sought to be repeated by the jury in this case and that shortly after the pandering charge was regiven or reread to the jury, they returned with a conviction. It would seem to me that the possibilities of prejudice are clear from the record such that in the event the Court should find there was error, that that error would be of prejudicial proportions.

QUESTION: In any event, that branch of the argument is applicable to all the counts, isn't it?

MR. BERKMAN: Of course.

QUESTION: Your client was fined on each count.

MR. BERKMAN: Our client was fined on each count. The Government has conceded the concurrent sentence doctrine is not applicable here. In addition to that, all of the reasons that were dealt with in Benton and in Sibron with respect to the prejudice that flows from multiple convictions would apply in this instance, and we think that really that issue is foreclosed so far as this Court is concerned.

The Court of Appeals, of course, did not review the comparable materials issue;for that reason we think they were wrong in that regard, and I think the Government so concedes.

QUESTION: They just concede it doesn't apply to one count, don't they?

MR. BERKMAN: That's right. That's right. Their concession is not the entire case --

QUESTION: So what if the Government said, "We will give you back the fine on that count?

MR. BERKMAN: It seems to me that there are a number of reasons why --

QUESTION: Then you are up against whether the doctrine should just be rejected.

MR. BERKMAN: We are up against the question of whether it should be rejected or if the Court does not wish to reach that broad issue, it is perfectly possible to conclude that the taint infected all of the counts, or to

conclude that because of the fact that the materials in all of the counts, even though of a different medium, were sufficiently similar so that the error, if any, was applicable to all the counts and that therefore the concurrent sentence doctrine would not be applicable at all.

So there are a number of ways in which the Court might resolve the issue.

Returning to the pandering question, we have dealt with some of the reasons why we think that the Court ought not to have given the pandering charge at all. And it seems to me that there was proof only of mailing to seven or eight different people in this case. There was no proof beyond that. Compare that with the millions of pieces of material that were sent out in Ginzburg, and it would seem to me that the differences are monumental, they are of kind rather than degree, and it seems to me that there has been no proof that the materials were unsolicited. And all you have in this case --

QUESTION: Mr. Berkman, isn't it perfectly obvious from the materials themselves that they were designed to solicit business?

MR. BERKMAN: Well, I presume that they were, and I don't think that the emphasis was on the sexually provocative nature of the materials to solicit business.

I know of no case in which this Court has taken

the position that that amount of evidence is sufficient to allow a charge of pandering in a case of this kind. It would have to go beyond what is done in Michigan and in Ginzburg in order to accomplish that. It would have to broaden those cases in order to do that, I believe, your Honor.

Now, the other part of the pandering issue is a question which we have not yet dealt with, and that is that after giving the charge, the Court instructed the jury to consider , that it might consider, as examples the manner of distribution, circumstances of production, circumstances of sale, advertising, and editorial intent. And except for the advertising itself, we contend that there was no proof of any of these items in the record for the jury to consider. They were left to speculate; they were left to make up their own minds; they were left to guess with respect to matters of circumstances of production and distribution which were not even before them. And it seems to me that under the circumstances in which the emotional concern in this particular area is of monumental variety anyway, that this kind of charge is of a very dangerous nature and does away with not only concerns in the First Amendment area, but with respect to all of legitimate criminal due process. It seems to us as a consequence that for either or both of these reasons the pandering charge ought not to have been given, was of a prejudicial kind, and therefore should have been rejected.

This Court has clearly instructed us that community outrage cannot be substituted for the sensitive tools of careful analysis and rigorous procedural safeguards in the regulation of obscenity. We think that in this case this Court's admonition has not been followed for the reasons which we have advanced here and in our briefs and consequently we urge that this conviction should be reversed.

I would like to reserve the remainder of my time for rebuttal.

Thank you.

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

Mr. Feit.

ORAL ARGUMENT OF JEROME M. FEIT ON BEHALF OF RESPONDENT

MR. FEIT: Mr. Chief Justice, and may it please the Court: Before turning to the principal question in the case as to the instructions of the trial judge, I would like to state the Government's position with regard to the concurrent sentence question. I would like to give some background.

The district judge initially determined that the two films were not relevant to the printed material on the theory that as courts of appeals have held, a change in milieu, et cetera, make the moving picture not the same as the still. No one spelled out the reasons as to the film itself except to say -- he saw the 8 millimeter film -- except to say he

doesn't want the jury to see it, or the jury should not see it.

The case got to the court of appeals; the court of appeals affirmed the determination, as I read the opinion, of the district judge that the films, the alleged comparable films, were not comparable to the printed material. The court of appeals did, however, determine that it was comparable or similar to the other film "613." However, in invoking the concurrent sentence doctrine -- and we have been under the mistaken impression that it was applicable and that the fines were concurrent just as the prison term -- the court of appeals said, 'We don't have to reach the question of community acceptance because it's not applicable to the printed material; the concurrent sentence doctrine applies."

Our position here is that we were in error in asserting to the court that the concurrent sentence doctrine was applicable since there were cumulative fines. We further suggest, however, that the court in the interest of judicial economy,can make the only determination that it has to make, which was not made by the court of appeals, namely, whether the film "Deep Throat" and 'Devil in Miss Jones" were comparable to "613" in terms of community acceptance rather than community tolerance.

We would prefer this route because of the judicial economy notion. However, of course, that is ultimately up

to the Court.

Let me turn then --

QUESTION: Mr. Feit, you are suggesting we should disagree with the court of appeals on "613."

MR. FEIT: I am suggesting that the court of appeals rested its determination on erroneous impression of the record of the convictions, which may well have been our fault. I think that this Court can correct that determination by holding that neither the printed materials nor "613" required comparison --

QUESTION: And what if we were to agree or hold that the films were comparable?

MR. FEIT: Our position would be that at most two or one fine would go from this conviction.

QUESTION: That's all.

MR. FEIT: That's all.

QUESTION: So that the concurrent sentence doctrine would support the rest.

MR. FEIT: Right.

QUESTION: There were separate fines on each count.

MR. FEIT: There were separate cumulative fines on each count.

QUESTION: You don't concede the concurrent --

MR. FEIT: Oh, no.

QUESTION: You don't concede the concurrent sentence

doctrine isn't applicable in this case at all?

MR. FEIT: We say --

QUESTION: It was implied in what you said.

MR. FEIT: Excuse me?

QUESTION: It's what you indicated. I take it you hold that at least the concurrent sentence doctrine is applicable here except with respect to this one count.

MR. FEIT: With respect to this one count.

May I get to the issue which is --

QUESTION: I'm puzzled. What else does the concurrent sentence doctrine --

MR. FEIT: I made a mistake. I'm not clear I understand. The only relevance-- let me return to Justice White's question -- the only relevance of the films that were sought to be introduced as comparative films go to two counts. They don't in fact relate to anything else,in our judgment.

QUESTION: That's because the film is of a different medium than brochures.

MR. FEIT: Right. And as we see it, therefore, if the Court doesn't -- there is no concurrent sentence doctrine, in our judgment, as to the remaining counts.

QUESTION: Am I not correct in saying the concurrent sentence doctrine should be -- is totally out of this case, because the only thing it was relied on for was

that one count.

MR. FEIT: My error. I am sorry.

QUESTION: So we just forget about concurrent sentences.

MR. FEIT: Right.

QUESTION: A separate sentence was on each count.

MR. FEIT: Right.

QUESTION: You raised it in the court of appeals.

QUESTION: Mistakenly.

MR. FEIG: Excuse me, Mr. Justice --

QUESTION: You raised it in the court of appeals mistakenly.

MR. FEIT: Mistakenly.

QUESTION: Now it comes to us.

MR. FEIT: Our position as stated was that the concurrent sentence doctrine has no application to anything else but the counts involving the "613", and to that extent you lose two counts at best if it's sent back. Beyond that, the concurrent sentence doctrine does not apply.

I would like to turn to what we deem to be the most significant issue in the case, the alleged offending portions of the instructions, which is set out at the Appendix 57 and 58. And essentially there were two aspects of them. One is the dealing with the sensitive or the insensitive. And the court said, "You are to judge these

materials by the standard of the hypothetical average person in the community, but in determining this average person, you must include the sensitive and the insensitive."

The second, which is at the top of 58, the Court again said, "In determining community standards, you are to consider the community as a whole, the young and old, educated and uneducated, the religious and the irreligious, men, women, and children, from all walks of life."

I think, as our representation in our brief makes clear, we recognize that this is a difficult and not to be praised instruction in our view. As the court below recognized, this creates a grave danger, or some danger, potential danger, that the jurors would determine the question of obscenity in terms of the young. And clearly they can't do that.

In Roth, this Court, its departure point was that the very thing it wished was to avoid the basic error of Hicklin, namely, you look at part of the material and you consider it in terms of the most susceptible.

There is no question in our mind this is a red flag word. And we do not urge this Court to suggest to district courts or courts of appeals that this instruction should be followed.

Having said all that, the question it seems to us narrows to whether this case requires reversal because

of the instruction that was given.

The court of appeals felt that it couldn't act on the matter, that it didn't constitute reversible error, but it was for this Court to determine, resting on an earlier statement in Ginzburg, which I will get to in a moment. But it felt differently, interestingly enough, with regard to the sensitive. It had no difficulty with the sensitive. It had great difficulty with the young.

It seems to me, that if you look at the totality of the instructions regarding the average person in a community at large, there were nine references by the district judge to average person in the community at large.

In addition, after the court had given these challenged instructions, on page 60 through 61, he gave the instruction recommended by Devitt and Blackmar.

It seems to us that on this record, and we recognize that there is danger. The Government counsel during the trial, we think impermissibly, but not reversibly, referred to is the child rendered unhealthy by reading such material. And the defense witness said, "Yes."

But we say if you look at the record as a whole, it cannot be realistically said that the judge intended or did impress upon the jury that it apply his instructions in an impermissible way.

On the contrary, what the instructions did --

young, old, men, women, religious, irreligious, all walks of life -- essentially was the way the judge defined the entire community. Perhaps he should have not defined it, as the Devitt and Blackmar instructions suggest. The Department recommends an instruction which essentially says, "This judgment must be made, of course, in light of the community standards as applied by the average person with an average and normal attitude toward an interest in sex. If you conclude beyond a reasonable doubt that the average person applying contemporary community standards would find the material taken as a whole has the tendency described above, you should find that the film appeals to prurient interest."

Essentially, we think you should not define in terms of persons. You might say all persons from all walks of life, all males and females. Beyond that I think the Department feels, lends itself -- not in this case, we think -- but lends itself to the kinds of danger that you want to avoid by rejecting Hicklin.

As an illustrative example, in Ginzburg, Mr. Justice Brennan referred to the district court's assessment of how one determines obscenity as indicating that the court is not accepting it. In that case the district court spoke of the feeble-minded, the psychotic, and the most susceptible.

That's not this case. Perhaps even the most telling factor here is that this very instruction was the kind

given in Roth. Now, it's true that Roth came up on specified questions concerning the constitutionality of statutes, both Federal and State, but the Court in its opinion in referring to this instruction said, "(the district court) followed the proper standard and used the proper definition of obscenity."

The only other case I am aware of in the Federal system is a case called Manarite out of the Second Circuit which has also approved this type of charge.

In sum, while we recognize the danger, we urge this Court to take this case as a whole in terms of the instructions in terms of Roth and consider not whether this instruction is the one that should be given in the future, but whether in this case the petitioner was prejudiced to such an extent as to require reversal.

QUESTION: Mr. Feit, as I understood you, and you correct me if I am wrong, you are almost conceding that -- well, you are conceding that these were far from perfect instructions.

MR. FEIT: No question about it.

QUESTION: And you are almost asking the Court not to approve them as such, but simply to affirm this conviction.

MR. FEIT: I think essentially, realistically our position is that we had difficulty with such an instruction, although we think here the judge in the way he handled the instruction plus the Devitt and Blackmar charge, plus the

Roth consideration, plus the kind of evidence -- I might point out the Court will have the opportunity to view the material. It's described in our brief. Even defense counsel during the time of instructions recognized this was hard core line material. As a matter of fact one of the reasons he didn't want a pandering instruction was because this was not borderline material.

That's essentially what I am saying. We are not urging the Court to promote this instruction.

QUESTION: You say you have difficulty with the instructions. With which aspect do you have the most difficulty?

MR. FEIT: I think --

QUESTION: Dealing with children or dealing with sensitive people?

MR. FEIT: Dealing with children, because it's interesting, the court of appeals had very little difficulty with sensitive, as you are obviously aware when you read the opinion. But they had great difficulty, a much more difficult time,with the young.

The reason this is a red flag and that this concerns us is that this is the very thing that Hicklin said, the young and the very old.

QUESTION: And the impressionable.

MR. FEIT: And the impressionable, the most

impressionable, the most susceptible.

QUESTION: Of course, Butler v. Michigan was the case that would cause anybody concern when you have instructions talking about children, when in fact there is no evidence that this material was distributed to any children.

MR. FEIT: On the contrary, the stipulation was that it was not.

QUESTION: To adults, all adults.

MR. FEIT: What actually I am saying, if you read the language, it's quite clear that the court was concerned about the overall community. There is no question he wasn't telling the jury, "Apply the standard of a child." If that were the case, I think we would confess error. I think what he was saying in this case was, "I am attempting to spell out for you what I deem to be a standard of the various groups in the community in all walks of life." We agree it was an awkward way to say it. Perhaps it's better off not to have referred to the individual groups, but having done so in this case does not in our mind warrant a reversal of the conviction given the nature of the material.

QUESTION: Mr. Feit, have you ever seen a perfect instruction?

MR. FEIT: On the contrary, I must say that the Devitt and Blackmar instruction is hardly perfect. The Department of Justice recommendation is hardly perfect. The

trial judge, I am sure, quite understandably, had an awfully difficult time to formulate an appropriate instruction.

I might add in connection with that, it's another feature that seems to me this Court should sustain the conviction. This is an area of great difficulty, admittedly. How does one present that question to the jury? I think what the judge did here -- in retrospect maybe the Department thinks he shouldn't have used the word "young" -- nevertheless was an obvious attempt for the jury to look at the community as a whole.

That is essentially our position.

QUESTION: Mr. Feit, can I ask you -- again, you will probably say in the context as a whole it's not significant. But on the pandering instruction, would the Department not also agree that the reference to circumstances of production, sale, and advertising contained an instruction that there was no evidence in the record --

MR. FEIT: Advertising?

QUESTION: At least the production, circumstances of production. He makes a point that part of the pandering instruction had no relevance whatsoever to anything in the record.

MR. FEIT: First of all, I would say that the jury was instructed that they would only consider the pandering if they needed it to convict. It's true they came

back for a reinstruction on pandering. After that reinstruction they were out for an hour and a half.

More specifically directed to your question, at best it doesn't introduce evidence in the case. The only evidence of what they had was these circulars, brochures, advertisements were mailed. The stipulation pointed that out. So you are right, there was no evidence of production.

QUESTION: To that extent the instruction was really clearly erroneous, wasn't it?

MR. FEIT: It said too much. It didn't implicate --

QUESTION: Isn't it one of the errors that trial judges sometimes make, he is instructing on something that there is no evidence in the record on.

MR. FEIT: It may be, but I don't think that necessarily -- I am not clear if you are suggesting that that's reversible.

QUESTION: No, I'm just saying, you say judge everything in the instructions as a whole. I say I think there are probably some other errors in these instructions.

MR. FEIT: After that instruction it's quite clear that there was advertising, as the Court will see when it looks at the material. It was somebody advertising the material we charged for.

QUESTION: Wasn't the advertising advertising something else?

MR. FEIT: No. The counts charged, except in three instances, that the advertising material itself was obscene. It wasn't as if the advertising material told you where to get an obscene publication.

QUESTION: If the advertising material itself was obscene, what is the relevance of the pandering instruction as to that material?

MR. FEIT: Well, the relevance of the pandering instruction , it seems to me, is that pandering is not, as the court pointed out, pandering is not a crime. Pandering is evidence that --

QUESTION: Maybe I can put it a little differently. As I understand it, that material could be said to be pandering something else. But what evidence was there that they were pandering that material?

MR. FEIT: I guess the material itself was evidence that it was being pandered. It worked two sides of the line; it worked both to pander and to be obscene. I guess they come together.

QUESTION: Mr. Feit, my question may not be too clear because some of these things I have had difficulty in understanding for many years now. But isn't it true that whether or not there has been so-called pandering becomes important only if the material itself is marginal and is irrelevant if the material is, as you submit it is, hard core,

and therefore, that any pandering instruction, even if erroneous, was inevitably harmless error since this was, if you are right that this was, so-called hard core material.

Pandering as I -- and you tell me if I am wrong in my understanding, and I may well be -- becomes relevant only to sustain a conviction of marginal material.

MR. FEIT: That's the way it was developed in Ginzburg, in Hamling and Splawn.

QUESTION: That's the way it was developed as I understood it.

QUESTION: But had not some of the cases also indicated it goes to the question of intent and scienter, whether the producer, the seller of this material knew what it was he was selling, by looking at the alleged pandering material. Isn't that in the case also?

MR. FEIT: That is in the case, too. Yes, your Honor.

As I understand petitioner, that is not what he is arguing. It seems to me what he is saying is that the more the material is clearly obscene on its face, pandering evidence becomes somehow less relevant and then somehow more prejudicial. The closer it is to the line, for example the Ginzburg material, the pandering becomes more significant.

And I find that, as the Chief Justice indicated, a fairly strange analysis that somehow evidence becomes less

relevant because -- unless it's so damaging -- becomes less relevant the harder core the material becomes.

QUESTION: Under the cases it's just the opposite, isn't it?

MR. FEIT: Right.

QUESTION: And scienter is something else. But pandering as identified in the Ginzburg case was the element that, as I understood it at the time, allowed a conviction in that case of more or less marginal material, isn't that correct?

MR. FEIT: What the instructions say in Hamling and Ginzburg runs that line, that is, if you feel as you look at the material itself and if you feel it's close to the borderline, you may then --

QUESTION: Then you may consider pandering.

MR. FEIT: -- consider pandering.

QUESTION: But if it's hard core material, as you submit this is, then pandering vel non is irrelevant, isn't that right under the cases?

MR. FEIT: I assume it's irrelevant, but hardly prejudicial.

QUESTION: Mr. Feit, I wasn't here at the time of Ginzburg, so I can't make the same statement that my brother Stewart just made as to how he understood it, but I am inclined to agree with your earlier statement that if

something is relevant in a marginal case, taking it over the margin, it surely doesn't lose its relevancy in a less marginal case.

MR. FEIT: See, it's not -- I think what Justice Stewart was saying to me was by definition if it's obscene, you don't have to show any more.

QUESTION: It would be harmless error.

MR. FEIT: But what you are saying, I think that the Government has every right to in any criminal case, except that the Court thinks --

QUESTION: It would be overtrying its case.

MR. FEIT: It would be overtrying its case. If that is what the argument is, overtrying its case, that's something else, it seems to me.

I don't understand the argument that somehow it's immaterial the more -- not immaterial, but somehow something else happens to it when the material itself is hard core.

QUESTION: Right. Right. Now, in this case what was clear was that this material was commercially advertised and sold -- or it was sort of a commercial operation. Beyond that was there any evidence whatever of the kind of pandering that the Ginzburg opinion talked about?

MR. FEIT: Yes. I think you will find it's spelled out in our brief -- you mean apart from the advertising?

QUESTION: Yes.

MR. FEIT: No, except for the fact --

QUESTION: Nothing except it was a commercial operation.

MR. FEIT: Commercial operation. There was no evidence -- I think in Hamling they said the intent of the editor, that might be evidence of something, too, and the advertiser. But that was --

QUESTION: We don't know who received these.

MR. FEIT: It's in the stipulation.

QUESTION: That's all we know. They are all adults.

MR. FEIT: They are all adults. As I understand it three mailings were to a postal inspector who sorts the mailings, eight of the mailings were just mailings to people either on lists or indiscriminately.

QUESTION: Well, a mailing to eight people is advertising? That's like advertising the Hope diamond.

MR. FEIT: I think it depends, if you are saying is it a lot of advertising, I would say maybe not. But as to those eight people I assume it means that we are trying to sell you a product.

QUESTION: I am sorry, but I don't think any of that is in this case.

MR. FEIT: Advertising?

QUESTION: No, no. The amounts that were mailed

out. It's not crucial is it?

MR. FEIT: No. The only thing in this case about advertising was in the brochures which accompanied the allegedly obscene material which was sent either to buy something or --

QUESTION: Was also obscene.

MR. FEIT: Yes. But the pages -- you would turn one page, as the Court will find out or has found out upon looking at the record, there will be descriptions. To use the word "sensuous", that is clearly this case removed from Ginzburg in time but certainly very appropriate in terms of the --

QUESTION: Doesn't that automatically get over into pandering?

MR. FEIT: Does that automatically? Yes.

I would like to quickly address myself to the deviant appeal argument. As I understand petitioner's brief, they don't argue that the instruction on deviant appeal -- by the way, Mr. Justice, "deviate" is the noun and "deviant" is the adjective. They mean the same thing except as parts of speech they are somewhat different.

QUESTION: Thank you.

MR. FEIT: OK.

The court instructed the jury, correctly we submit, that -- I think this flows directly from Hamling that if it

finds petitioners guilty, if the intended and probable recipients, was an appeal to the prurient interests of the average person of the community as a whole or the prurient interest of the members of a deviant sexual group at the time of the mailing.

This clearly, if one looks at this material, the deviant nature of the persons to whom some of this material was advertised clearly fall with any accepted class of deviates or deviant appeal out of decisions of this Court. I think this is made clear by Hamling, and I rely on Hamling, clear by Splawn, I rely on Splawn, and finally clear in Ward v. Illinois where something called "Bizarre World" and "A Study of Sado-Masochism" and testimony of a police officer justified a deviant instruction.

I would like to say something, Mr. Justive Stevens, if I may, I think it was your question as to whether that audience of the average normal person, it is not clear who made the -- this Court can judge deviant material properly. In Paris Adult Theater v. Slaton case, this Court had a footnote to that effect. They were concerned that in some way out, very bizarre fetish -- that's not this case. This case fits the traditional deviant notion, if there is such a thing as a traditional deviant notion.

QUESTION: That's what I was going to ask. How is the jury supposed to determine whether or not the material

has a prurient appeal to the non-average person?

MR. FEIT: I say, Mr. Justice -- I guess this is a cop-out -- that's the intractable problem of obscenity that Mr. Justice Harlan talked about.

I think it's a very difficult job. I think they go to their communities and make a judgment of what the overall feeling there is and come away as well as they can. That they cannot draw precise lines, I fully agree.

QUESTION: You say they can't draw precise lines. How do they even get their foot on first base?

MR. FEIT: I think most people --

QUESTION: By hypothesis your jury is disqualified, it seems to me, from understanding what would appeal to persons different from them.

MR. FEIT: The Court in Hamling rejected that proposition.

QUESTION: So what you are saying in effect is even if it's a totally irrational holding, we should just follow it.

MR. FEIT: No. I'm saying that if it's a totally way out deviant question, that is open, in Paris Theater. But if it deals with the kind of -- I hate to say traditional -- the kind of regularized material in the deviant category, as dealt with in Michigan, sadomasochism, bondage, pedophilia, it's all in this case. They are all here. And I don't think

it's that hard for a jury to look at that kind of material.

QUESTION: Let me ask one other. Is it well settled that the homosexual group is a deviant group within this category of cases?

MR. FEIT: I guess -- there was no instruction as to the category of what deviant -- I think the answer is the Court did not instruct the jury that deviant appeal has to be homosexual, group sex, or whatever. It said a deviant. I think it depends upon what that community, here the central district of California, determines to be deviant. If the central district of California, according to the jurors of this case, determine that homosexuality is deviant, I assume it's deviant.

QUESTION: So the community standards qualification or test, or whatever it is, that also is controlling in determining what is deviant.

MR. FEIT: Yes. I think that's right.

QUESTION: Has the Court ever said that?

MR. FEIT: I think in effect it said so in Hamling, yes, as I read it.

For the reasons stated, the Government respectfully submits that the judgment of conviction should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: You have 30 seconds left, Mr. Berkman.

REBUTTAL ARGUMENT OF BERNARD A. BERKMAN

ON BEHALF OF PETITIONER

MR. BERKMAN: I don't know what I can do with that, but let me just say this to the Court: Apparently because there are difficulties involved, the Government urges that the Government's position ought to be understood and that the Court tried as a matter of bona fides to do the right thing.

There were a number of errors that were admitted by the court of appeals, admitted by the Government, and Mr. Pinkus, the petitioner here, stands convicted and plans to spend four years in the penitentiary because of these errors. It seems to me this Court has an obligation to right these wrongs and make sure that everybody gets a fair trial whether he is a pornographer or a person in high places so that the words on the outside of this building "Equal Protection For All" will be given some meaning.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen,

The case is submitted.

(Whereupon, at 1:37 p.m., oral argument in the above-entitled matter was concluded.)