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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

MARVIN MILLER,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

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

# JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Superior Court of the State of California, County of Orange, entered on October 12, 1970, which affirmed the conviction of appellant in the Municipal Court of the Orange County Harbor Judicial District, State of California. On November 2, 1970, the Superior Court of the State of California, County of Orange, denied appellant's petition for certifica-

tion to the Court of Appeal, Fourth Appellate District, and also appellant's petition for rehearing. (C.T. 280). Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial federal question is raised.

## OPINIONS BELOW

There were no reported opinions below. We are attaching hereto as an appendix: (1) the decision of the Appellate Department of the Superior Court of the State of California, County of Orange (Appendix p. 1; C.T. 212); (2) notice of denial of appellant's petition for certification to the Court of Appeal, Fourth Appellate District, and the denial of his petition for rehearing (Appendix p. 1; C.T. 280).

## JURISDICTION

This was a criminal prosecution wherein, during the course of trial and on appeal, there was drawn in question the validity of the statutes of the State of California as hereinafter noted, on the ground that they were repugnant to the United States Constitution and laws. The affirmation of the judgment of conviction by the Appellate Department of the Superior Court constituted a decision in favor of the validity of the statutes challenged.

The judgment of the Appellate Department of the Superior Court was entered on October 12, 1970 (Appendix p. 1). The timely petition for rehearing was denied on November 2, 1970 (Appendix p. 1). Notice of appeal was filed on November 6, 1970 (Appendix p. 2).

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(1), (2). If this is treated as a petition for certiorari, jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Cases which support this appeal are: *Giaccio v. Pennsylvania,* 382 U.S. 399 (1966); *Screws v. United States,* 325 U.S. 91 (1943); *Lanzetta v. New Jersey,* 306 U.S. 451 (1939); *Connally v. General Constr. Co.,* 269 U.S. 385 (1926).

## QUESTIONS PRESENTED

1. Whether in a prosecution for the distribution of obscene printed materials, pursuant to California Penal Code § 311.2, the use of a "state-wide" standard to establish the "customary limits of candor" component of the *Roth-Memoirs*[1] test for obscenity is violative of the First and Fourteenth Amendments.

2. Whether the determination of the "customary limits of candor" of a relevant community, for the purpose of establishing obscenity, if based upon expert opinion which is substantially derived from an unscientifically designed survey which is not purged of economic and ideological bias and which is not administered in such a way as to reflect "state-wide" opinion, is violative of the First and Fourteenth Amendments.

3. Whether the state prosecution under California Penal Code § 311.2 for distributing obscene materials, where the distribution was in fact a "mailing" of the

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1 *Roth v. United States,* 354 U.S. 476 (1957); *Memoirs v. Massachusetts,* 383 U.S. 413 (1966).

materials, constituted a violation of the doctrine of federal pre-emption and was thus in direct conflict with the Supremacy Clause of the United States Constitution.

4. Whether the conviction of appellant for violation of California Penal Code § 311.2 was egregious error because, as a matter of constitutional law, the materials were not obscene.

5. Whether appellant's conviction for mailing obscene material must be reversed under the Fifth Amendment's guarantee against double jeopardy because the state was collaterally estopped from claiming that the material was obscene.

6. Whether the state may convict the appellant under the language of a statute which was amended after the offense for which the appellant was charged took place, and which imposed a *scienter* definition which was easier for the prosecution to establish, without violating the constitutional prohibition against *ex post facto* laws.

## STATUTES INVOLVED

Section 311 and 311.2 of the California Penal Code has been set forth in the appendix attached hereto (Appendix p. 5).

## STATEMENT OF THE CASE

Appellant was convicted of causing to be mailed obscene matter in violation of California Penal Code Section 311.2. The allegedly obscene matter consisted of five advertising brochures for various books and a movie. The

pictures on the brochures were in no way more explicit than comparative material which was contained in books sold throughout the state of California in reputable bookstores. Some of the pictures on the brochures were identical to those sold in the state. (C.T. 175-176).

The prosecution's witness on the issue of redeeming social value admitted that the materials at issue in this case had "some content" and some usefulness (C.T. 176). The appellant's witnesses both explicitly detailed the value of the materials (C.T. 177).

On the issue of contemporary community standards the prosecution put on only one "expert" witness, a police officer Shaidell who was assigned to the vice division of the Los Angeles Police Department. The officer made no representation that his alleged expertise extended beyond his ability to testify as to community standards in the state of California (C.T. 172-175).

The officer had conducted a "survey" on people's reactions and viewpoint toward obscenity in the state of California (C.T. 173). It is clear that even though officer Shaidell had been a vice officer, his greatest credibility as an expert to speak about "state-wide" standards was based upon the survey which he had conducted. The testimony of officer Shaidell was replete with admissions that pointed to the defectiveness of his survey (C.T. 173-175). The officer was not sure if his survey was even scientific (C.T. 174). Moreover, it was abundantly clear that his method of gathering a cross-section of people to survey was not objective and was decidedly overweighted to show the attitude of groups who would be more likely to have conservative views. Neither did officer Shaidell try to get a balanced

socio-economic representation in his survey. (C.T. 174-175).

Thus, not only was there not a national standard applied to measure "contemporary standards" but even the use of state standards was tainted in this case by the fact that the prosecution's only expert witness on this issue was allowed to bootstrap himself into credibility by relying on the results of a survey which could only muster a pathetic semblance of objectivity.

In fact, the prosecution was never able to produce unequivocal evidence from its own witnesses which would support the conclusion that the materials involved here were obscene (C.T. 174-177).

## THE QUESTIONS ARE SUBSTANTIAL

The issues raised by this appeal are not only of importance to this appellant but are of transcendental importance in that they involve important issues as to the distribution of regulatory power between the states and the federal government as well as the issues which go to the very heart of the survival of First Amendment guarantees.

The question as to the appropriate standards to apply in obscenity litigation has been raised myriad times in various courts across the country. Part of the reason for volume of litigation in the area of obscenity is due to the fact that this Court has left open many critical questions. One such open question is whether or not the First Amendment demands the utilization of a national standard for the determination of the "community standards" component of the *Roth-Memoirs* test. In the instant case the need for this Court to announce with unequivocal clarity that only a national

standard is appropriate is especially urgent.

In this case we are dealing with printed materials. It is clear that in such a case only a test of nation-wide uniformity with regard to the "community standards" component of the obscenity test is appropriate. The utilization of any lesser standard raises the constant spector (realized in this case) of a threat to the federal system, by allowing the individual states to interdict the free flow of materials in inter-state commerce, or to affect inter-state commerce in some adverse way. This is an especially important problem due to the great volume of printed material which is in circulation in the country. Thus, we are dealing with a problem that has a considerable impact upon inter-state commerce. See, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520.

The California case of *In re Giannini,* 69 Cal.2d 563 (1968), held that a state-wide standard was appropriate in the determination of obscenity *in the context of live topless dancing.* However, even that court admitted that in the context of books or magazines, a non-national standard could run afoul of the First Amendment (68 Cal.2d at 579). This reflected a sensitivity on the part of the California Supreme Court to the fact that in the realm of printed materials the dictates of federalism and the various emanations of the Supremacy Clause dictated that regional interests yield to national interests.

Later cases in the California appellate courts have not ever held that the state-wide standards made applicable by *Giannini* to live dancing could be transposed to non-live performance contexts. In *People v. Rosakos,* 268 Cal.App. 2d 497, the court reversed a conviction involving photographs

because there had been *no expert testimony adduced at all. Cf. People v. Bonanza Printing Co.,* 271 Cal.App.2d Supp. 871, 874, where the court came to the same result in the context of magazines. In *People v. Cimber,* 271 Cal.App.2d Supp. 869, a conviction involving films was reversed because the expert testified about *local* standards; the court held that this was *too narrow* a standard. The court did not have to decide what the correct standard would be.

The instant case is a paradigm illustration of the intolerable results that can occur when an individual state attempts to deal with the problem of obscenity without a view to the implication its peculiar solution has upon the federal system. Some of these results will be more specifically demonstrated.

First of all, based on the number of *per curiam* reversals by this Court based on *Redrup v. New York,* 386 U.S. 767, it is clear that the materials upon which appellant's conviction rested were no worse than comparable materials which this Court has on numerous occasions found protected. Thus, in this case we have a conviction based on non-obscene materials.

Secondly, under state law, *In re Giannini, supra,* the prosecution was compelled to introduce "expert" testimony as to what the "customary limits of candor" were for the state of California. In this case the expert, who was a vice division police officer, indisputably gathered the greatest part of his credibility and persuasiveness from a survey which he had administered throughout the state. This Court has before sounded a cautionary note when confronted by survey results. *Witherspoon v. Illinois,*

391 U.S. 510, 517-518 (1968). Here, the survey was pathetically inadequate, administered by a police officer who revealed himself as such to the people being questioned, and the large proportion of the survey group consisted of members of fraternal groups and other organizations which had requested that the officer speak on the problem of obscenity. There was therefore a strong likelihood that these people would be less tolerant than the community as a whole. In any case, there is no way of knowing how much weight the jury gave to officer Shaidell's credibility because of the authority of this survey, and in such a case it is hard to say that the introduction of his testimony was harmless error.

Thirdly, the state here convicted the appellant for distribution of allegedly obscene materials, which was effectuated through the mails. It is clear that Congress intended that all prosecutions for the distribution of obscene materials through the mails be controlled by federal law. 18 U.S.C. §§ 1461, 1462, 1465.

Recent decisions of the Court have illustrated the precision that is necessary in laws which seek to penalize an individual for distribution of allegedly obscene materials through the mails. Even obscene materials may, under some circumstances, be permissibly transmitted through the mails.

In the light of a pre-emptive federal plan, as exists in this context, the state of California should not be permitted to erode the Congressional desire for uniformity by the simple expedient of arguing that the state has the power to control "distribution" and that nothing in the state statute explicitly refers to "mailing."

The state is clearly empowered to control the "distribution" of obscene materials within its borders; however, "dis-

tribution" is a portmanteau term which encompasses many possible activities, *e.g.*, mailing, shipping, handing out, etc. Here, we are precisely concerned with an impermissible application of "distribution" so that it can be used to regulate "mailing."

When the federal government has passed legislation which controls one method of distribution, then, to that extent, the federal law pre-empts the state power to adopt or enforce laws which seek to regulate that specific method of distribution.

In addition to the above errors there were several other errors which single this case out as particularly worthy of full review by this Honorable Court.

There was the application of an *ex post facto* law which resulted in the imposition of a different *scienter* requirement on the appellant than the *scienter* test that existed when he committed the allegedly illegal acts. (C.T. 188-189). *Calder v. Bull,* 3 U.S. 386 (1798).

Moreover, the appellant continuously asserted that he was being subjected to double jeopardy in that the state was collaterally estopped from prosecuting him for distributing material which had been previously adjudged to be *not obscene. Ashe v. Swenson,* 397 U.S. 436; *Waller v. Florida,* 397 U.S. 387. (C.T. 189-91).

The existence of this *prior* judicial determination of the non-obscenity of the materials involved in this case is not only important *vis-a-vis* the collateral estoppel and double jeopardy issue but is also crucial as regards *scienter. Smith v. California,* 361 U.S. 149. If the appellant relies

upon the determination by a court as to the non-obscenity of the materials, he cannot later be said to have the *scienter* that he *knew* the materials were obscene. Thus, such a subsequent conviction would be violative of the First and Fourteenth Amendments.

Appellant contends that the decisions below failed to adequately or correctly deal with these critical questions. Appellant feels that the questions presented by this appeal* are substantial and merit a fuller exposition and that the decisions below are in error and in conflict with those of this Court.

Respectfully submitted,

BURTON MARKS of

MARKS, SHERMAN and
LONDON

*Attorneys for Appellant-Petitioner.*

*If this appeal is improvidently taken, it is respectfully requested that this statement be treated as a petition for certiorari.

## APPENDIX

## MINUTE ORDER



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

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

AP 872 PEOPLE VS MILLER, Marvin

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

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## MINUTE ORDER

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

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

AP-872 PEOPLE VS MILLER, Marvin

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

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

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

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

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

PEOPLE OF THE STATE OF CALIFORNIA, Respondent, vs. MARVIN MILLER, Appellant.

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

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

1. Challenged the constitutionality of the application of a "state-wide" standard in judging obscenity

under Penal Code § 311.2 under the First and Fourteenth Amendments;

2. Challenged the constitutionality of the application of an unscientific survey to qualify an expert witness to testify as to the "community standards" requirement in the legal definition of obscenity pursuant to Penal Code § 311.2 in contravention of the First and Fourteenth Amendments;

3. Challenged the prosecution under Penal Code § 311.2 for mailing obscene material as a contravention of the doctrine of Federal Pre-emption and the Supremacy Clause of the United States Constitution;

4. Challenged his conviction under the amended language of Penal Code § 311. as an application of an *ex post facto* law;

5. Challenged his prosecution and conviction for mailing obscene material in that under the Fifth Amendment's prohibition against double jeopardy the state was collaterally estopped from claiming that the material was obscene.

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

That the Order of this Court, dated October 12, 1970, and reading as follows: "Affirmed," and the denial of Appellant's Petition for Rehearing/Certification constituted a finding that Penal Code § 311.2 of the State of California was constitutional on its face and as applied, and Appellant

hereby gives his Notice of Appeal from that finding.

DATED: November 6, 1970.

MARKS, SHERMAN & LONDON

BY: BURTON MARKS

Attorneys for Appellant

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

CECIL HICKS,
District Attorney
P. O. Box 808
Santa Ana, Calif.

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

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

• • •

**§ 311. Definitions**

As used in this chapter:

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

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

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

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

(c) "Person" means any individual, partnership, firm,

association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

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

(f) "Exhibit" means to show.

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

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

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

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

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

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

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

STATE OF CALIFORNIA )
) ss.
County of Orange )

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

My business address is 322 Main Street, Huntington Beach, California 92648, that on JANUARY 28 1971, I served the within JURISDICTIONAL STATEMENT on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California addressed to said parties at the addresses as follows:

ATTORNEY GENERAL
STATE OF CALIFORNIA
600 State Building
Los Angeles, California 90012
(3 copies)

SOLICITOR GENERAL OF
THE UNITED STATES
Washington, D. C. 20543
(3 copies)

DISTRICT ATTORNEY
COUNTY OF ORANGE
700 Civic Center Drive West
Santa Ana, Calif. 92701
(1 copy)

APPELLATE DEPT.
SUPERIOR COURT
ORANGE COUNTY
County Courthouse
Santa Ana, California
(1 copy)

MUNICIPAL COURT
HARBOR JUDICIAL DISTRICT
567 West 18th Street
Costa Mesa, California 92626
(1 copy)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JANUARY 28th 1971, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer