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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 582

SAMUEL ROTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1956 (Pet. App. 62; R. 125). An order by Mr. Justice Harlan was entered on October 9, 1956, extending the time for filing the petition for a writ of certiorari to and including November 17, 1956.[1] The petition was filed on November 16, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] Mr. Justice Harlan at the same time (October 8, 1956) granted petitioner's application for bail.

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QUESTIONS PRESENTED

1. Whether the federal obscenity statute is unconstitutional.

2. Whether petitioner had a fair trial.

STATUTE INVOLVED

18 U. S. C. 1461 as it read at the time the crimes charged were alleged to have been committed provided:[2]

> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—
>
> Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and
>
> Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any

[2] The 1955 amendment to the statute, c. 190 §§ 1, 2, 69 Stat. 183, deleted the fifth paragraph and changed the first paragraph to read as follows:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and——."

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kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The term "indecent," as used in this section includes matter of a character tending to incite arson, murder, or assassination.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York on four counts (10, 13, 17, 24) charging mailing of

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obscene, indecent and filthy matter in violation of 18 U. S. C. 1461 (R. 2a–3a, 4a–27a). Count 10 involved Exhibit 2, which was a circular advertising *Photo and Body, Good Times, Vol. 1, No. 10* (R. 13a). Count 13 involved Exhibit 4, which was a circular advertising *Good Times, Vol. 1 No. 8* (R. 16a). Count 17 involved Exhibit 11, which was a circular advertising *American Aphrodite No. 13* and *Good Times, Vol. 1, No. 5* (R. 20a). Count 24 involved Exhibits 7, 8, 9 and 10. Exhibit 7 was a form, Exhibits 8 and 9 were advertising circulars and Exhibit 10 was a book entitled *American Aphrodite, Vol. 1, No. 3* (R. 25a).[3]

On February 7, 1956, petitioner was sentenced to five years' imprisonment and fined $5,000 on count 10 (R. 2a). On counts 13, 17 and 24, petitioner was sentenced to five years' imprisonment and fined $1 on each count (R. 3a). The prison sentences on all counts were made to run concurrently and the $1 fines on counts 13, 17 and 24 were remitted.

On appeal the conviction was unanimously affirmed (R. 125; Pet. App. 62) upon a finding of clear evidence of obscenity (Pet. App. 2288).

ARGUMENT

1. All three judges in the Court of Appeals agreed that the materials mailed in this case were pornographic—obscene within the hard-core meaning of that term under the prevailing standards of all segments of our society. In attacking the constitutionality of the statute on this set of facts, petitioner is asking this Court to hold that it is totally beyond the power of Congress to ban from the mails materials no matter how obscene.

[3] A chart of government exhibits is listed on R. 63.

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The constitutionality of statutes excluding obscene matter from the mails has for so long been assumed settled, at least since *Rosen* v. *United States,* 161 U. S. 29, that it would seem no longer to be an open issue. See *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146, 158; *Public Clearing House* v. *Coyne,* 194 U. S. 497, 507–508; *Ex parte Jackson,* 96 U. S. 727, 736. 18 U. S. C. 1461 has survived attacks upon its constitutionality as follows: *Schindler* v. *United States,* 221 F. 2d 743 (C. A. 9), certiorari denied, 350 U. S. 938 (freedom of the press); *United States* v. *Rebhuhn,* 109 F. 2d 512 (C. A. 2), certiorari denied, 310 U. S. 629 (vague and indefinite); *Coomer* v. *United States,* 213 Fed. 1 (C. A. 8) (due process); *Tyomies Publishing Co.* v. *United States,* 211 Fed. 385 (C. A. 6) (freedom of the press and vague and indefinite); *Rinker* v. *United States,* 151 Fed. 755 (C. A. 8) (cruel and unusual punishment). See also *Besig* v. *United States,* 208 F. 2d 142 (C. A. 9) (relating to the prohibition on importing "obscene" matter in 19 U. S. C. 1305 (a)); *Doubleday & Co., Inc.* v. *New York,* 335 U. S. 848, where this Court affirmed a conviction under a state obscenity statute against the contention that the statute was unconsitutional because it violated the guarantees of free speech under the First and Fourteenth Amendments.

In ruling on the constitutionality of a state statute denouncing the use of offensive words in public, this Court said in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572:

> * * * There are certain well-defined and narrowly limited classes of speech, the prevention

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> and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

See also *Beauharnais* v. *Illinois,* 343 U. S. 250, 266, where in ruling that the "clear and present danger" test does not apply at all to the prohibition of utterances not within the area of constitutionally protected speech the opinion states, "Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

Recent cases involving obscenity issues, which petitioner cites (Pet. 11–12; 33–35) as indicating a disposition to reexamine the constitutional issue generally, involved far different questions from the one petitioner must on these facts make, *i. e.* that Congress has no right at all to punish the mailing of obscene literature. It has long been recognized that there is a difference between prior restraint on publication and punishment for a completed act. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 503–504; *Gitlow* v. *New York,* 268 U. S. 652, 667; *Patterson* v. *Colorado,* 205 U. S. 454, 462. State movie censorship statutes dealing with prior restraint thus have no bearing here, where the statute imposes no prior restraint. Other

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cases, such as *Winters* v. *New York,* 333 U. S. 507, and *Butler* v. *Michigan,* No. 16, this Term, recently argued before this Court, involve phraseology beyond the terms "obscene", "incident" and "filthy" which have been defined and given content by years of judicial construction.[4]

The argument that the statute is vague because its application may vary in particular cases (Pet. 15–20) has no significance to this case. As noted, all three judges in the court below agreed that the materials here involved were obscene by any meaning which the word has in our society. The possible existence of borderline cases does not render a statute unconstitutionally vague when there is a hard core of cases to which the statute unquestionably applies. *United States* v. *Harriss*, 347 U. S. 612, 618; *United States* v. *Petrillo,* 332 U. S. 1, 7.[5]

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[4] There are presently before this Court two appeals from state court rulings in which the Court has not yet noted probable jurisdiction. *Kingsley Books, Inc.* v. *Brown*, No. 107, involves the constitutionality of a New York statute under which the Corporation Counsel of the City of New York obtained an injunction to restrain appellants from distributing past and future issues of an obscene publication. The sole issue in the case is whether the statute is unconstitutional as imposing a "prior restraint" on free speech. In *Alberts* v. *California*, No. 61, involving a state conviction, appellant, although arguing that the words "obscene and indecent", are indefinite, is also contending that since he used the United States mails to distribute his wares, the state statute is void as applied because it conflicts with federal plenary power over the mails.

[5] Petitioner contends (Pet. 35–39) that the statute is rendered indefinite and hence unconstitutional because of the definition of "indecent" in the last paragraph of the statute to include matter "tending to incite arson, murder, or assassination." He argues

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The argument (Pet. 21–32) that, even if obscenity can be regulated, only the states may do so is frivolous. It is too well established to need discussion that Congress may exercise its power over interstate commerce and the mails in aid of state law enforcement (*United States* v. *Hill,* 248 U. S. 420, 425), and may on its own prohibit the use of the mails for the transmission of socially undesirable materials. *Ex parte Jackson,* 96 U. S. 727, 736. See also *Donaldson* v. *Read Magazine,* 333 U. S. 178; *Public Clearing House* v. *Coyne,* 194 U. S. 497.

2. The existence of a large body of decisions by this Court and others upholding the right of both the Federal Government and state governments to regulate obscenity may not fully answer petitioner. The petition for certiorari must be read as a request that the Court now reconsider what has long been taken as settled. Petitioner frankly asks the Court to overrule a long line of cases and to declare invalid legislation of seventy-five years' standing. This request, in the light of Judge Frank's concurring opinion below, cannot be considered as frivolous. But it is submitted that the reasons advanced do not justify the reconsideration requested.

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that this paragraph limits the meaning of the word "indecent" and that the District Court erred in not charging the jury to that effect. By its very terms, this provision enlarges, rather than limits, the definition as theretofore judicially interpreted. See *United States* v. *Davidson,* 244 Fed. 523, 532–534 (N. D. N. Y.). It has no bearing on this case where there was no allegation or intimation that the evidence in the case tended to incite arson, murder or assassination.

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Two basic reasons are put forward as to why the Court might wish to reexamine the validity of laws on obscenity. The first of these is that, despite the numerous decisions of this Court upholding convictions under obscenity laws, the Court has produced no opinion which discusses at length the underlying theory and philosophy. The second reason advanced is that social and scientific studies now being made question the existence of a causal relationship between the reading of obscene material and subsequent delinquency or immoral conduct. Neither reason warrants the review now sought.

That the Court has written no lengthy opinion on the constitutionality of obscenity legislation is hardly a ground for reconsidering its validity. On the contrary, the very fact that no member of the Court over the years has felt the necessity of detailed discussion of the reasons why freedom of the press does not extend to obscenity indicates recognition of the soundness of the rule. Dissenting opinions and labored discussion have frequently been put forward as grounds justifying a reappraisal of constitutional issues. The lack of difficulty which the Court has had with this question in the past is not a ground for requesting reconsideration but rather a basis on which it should be denied.

Current social and scientific studies of the causes of juvenile and sexual delinquency referred to in the petition for certiorari (Pet. 13–15) and discussed in the Appendix to Judge Frank's concurring opinion (Pet. App. 2310–2321) do not provide a basis for upsetting the established validity of obscenity legislation. A generally recognized body of

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scientific opinion which undercut the factual basis for a legal conclusion would justify a reexamination of that conclusion. But no such situation exists here. In the first place, the power to exclude obscene material from the mails does not depend upon any factual assumption that the obscene material will cause immoral or illegal conduct. Obscenity, like libel, fails to be accorded constitutional protection because of the content of the statements themselves, not merely because the statements may lead to action which may be prohibited. Secondly, even should Congressional ability to exclude obscene material from the mails be thought to depend upon a factual assumption as to the likely consequences of reading obscene material, there is now no generally accepted body of scientific opinion inconsistent with that factual assumption. As petitioner and Judge Frank point out, the experts disagree. Some believe that the unrestricted distribution of obscene and pornographic material would increase immoral conduct and juvenile delinquency. Others doubt it. Such diversity of views does not provide the kind of body of opinion which might justify upsetting decisions and laws of such long standing.

3. Petitioner contends that his trial was unfair in that (a) the charge to the jury was confusing and erroneous in its definition of statutory terms, (b) he was entrapped because his circular advertisements were answered by postal authorities, and (c) government counsel made inflammatory and prejudicial remarks.

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(a) . The judge gave all the instructions requested by petitioner and no exceptions were taken to the charge as finally given (R. 37a–38a). He shows no error in the charge which would warrant reversal under Rule 51, F. R. Crim. P.

(1). Petitioner argues that the trial court's charge confused the jury and that this confusion was manifested by the jury's choice of counts upon which it convicted (Pet. 48–51).

The trial court properly charged the jury that with respect to the counts involving circulars (Counts 1 through 17, excepting 12), the jury should consider whether the circular was obscene on its face, and if it gave information where and how obscene matter might be obtained (R. 35a). Since the remaining counts involved material actually advertised in these circulars, the court next charged the jury (R. 35a):

> It follows, of course, if you were to find the defendant not guilty on all of the first seventeen counts, you would have to find him not guilty on the remaining counts.

This portion of the charge was so favorable to the petitioner that, when the jury asked for a clarification the government urged the court in chambers to charge the jury affirmatively (R. 40a):

> * * * that if they find that the exhibits are obscene, they must find that the circulars which advertised those exhibits are also obscene.

The court, however, declined to re-word the charge and had the stenographer read the same portion to the

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jury as originally charged. After this portion was re-read to the jury, the court inquired (R. 45a):

> After listening to that, does that help any? Or do you have any specific question in addition to that that you want to ask the Court?

A juror then responded (R. 45a):

> I think that answers the question that we had, as far as I am aware. That was the only question, and that answers it fully.

After further brief colloquy the court asked: "Does that answer your question? Does that clear it up?", and the record shows that the jury nodded assent (R. 46a).

Nothing in the record shows any confusion, and the portion of the charge complained of is as favorable to the petitioner as it possibly could be.

Petitioner further argues that the four counts on which the jury convicted manifest the jury's confusion. The jury found petitioner guilty on Count 24 which involves a book entitled *American Aphrodite, Volume I, Number 3* (Govt.'s Ex. 10). It also found him guilty on Counts 10, 13 and 17, each of which involved advertising circulars. Petitioner argues that the verdict is inconsistent because Counts 11 and 12 on which petitioner was acquitted were identical to Count 10 on which he was convicted.

Petitioner is mistaken in his facts. Although the mailing charge in the indictment is the same, the exhibit in Count 10 (Govt.'s Ex. 2) contains a circular advertising *American Aphrodite, Volume I, Number 3* while no such circular is in the exhibits relating to Counts 11 and 12 (Govt.'s Exs. 3 and 29). The jury

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might have found the petitioner guilty on any circular count because the circular was obscene on its face without regard to what it actually advertised. See *United States* v. *Traub,* 229 F. 2d 120 (C. A. 3). And in any event consistency in a verdict is not required.[6]

(2). Petitioner also contended that the court created vagueness in the statute by misdefining the word "filthy" found therein (Pet. 57). The matter was dealt with fully by the Court of Appeals (Pet. App. 2286–2288). As there pointed out, the definition is in accord with settled law. *United States* v. *Limehouse,* 285 U. S. 424, 426; *Tyomies Publishing Co.* v. *United States,* 211 Fed. 385, 390 (C. A. 6).

(b). Petitioner claims error in entrapment because his advertisements were answered by government representatives (Pet. 39–44; Exhibits 7, 8, 9, 10 and 11). This method of obtaining evidence was specifically approved in *Rosen* v. *United States,* 161 U. S. 29, 42, and has been usual at least ever since. *Ackley* v. *United States,* 200 Fed. 217, 222 (C. A. 8) (Pet. App. 2289).

(c). Petitioner contends he was deprived of a fair trial because of inflammatory and prejudicial remarks on the part of government counsel (Pet. 51–55). Petitioner then quotes small passages from the government's summation interspersed with his own comments.

This case was tried on a somewhat different theory than most criminal cases in that the entire defense

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[6] Defense counsel had argued that many of the counts dealt with the same printed matter and that the Government was "piling it on" (R. 13).

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was predicated not on whether or not the petitioner committed the acts complained of, but rather on the effect of the material on the community at large. The general tenor of the instant petition follows the same pattern. For this reason the trial court properly allowed both counsel considerable latitude in arguing about the effect of the evidence on the community. An examination of both the government's opening (R. 1–8) and summation (R. 52–61) in proper context reveals no impropriety. The Court of Appeals disposed of this contention summarily by saying, "The government's summation in the case was within the scope of the evidence * * * (Pet. App. 2289).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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