UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff and Appellee vs. IRA ISAACS, Defendant and Appellant	No. 13-50036 Central District of California No. CR 07-732-GHK

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE GEORGE H. KING, CHIEF DISTRICT JUDGE, PRESIDING

PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,)	No. 13-50036
)	
Plaintiff and Appellee)	Central District of California No.
)	CR 07-732-GHK
vs.)	
)	
IRA ISAACS,)	
)	
Defendant and Appellant)	
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PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

This proceeding involves questions of exceptional importance: (1) in a criminal jury trial involving the alleged distribution of obscene matter where the defense is that the matter is not legally obscene and therefore is protected by the First Amendment to the United States Constitution may the District Judge bar the defendant from offering his opinion as to whether the material in question lacks serious artistic merit (where the defendant wishes to testify

either as an expert or offer his lay opinion) or may the District Court interfere with the defendant's testimony by badgering and warning him to keep his testimony short and (2) in such a case are the defendant's right to effective assistance of counsel and right to closing argument violated by constant and repeated interruptions by the government attorney and by the District Court in response to counsel's "references to matters of popular knowledge. . . ."

I INTRODUCTION

Defendant and Appellant Ira Isaacs (hereinafter "Isaacs") was initially indicted in 2007 for allegedly distributing obscene movies to consenting adults. The First Amendment to the United States Constitution provides, in part, as follows:

> "Congress shall make no law . . .
> abridging the freedom of speech ...."

The United States Supreme Court in Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974) held that motion picture films are protected by the First Amendment (because motion picture films are a form of "speech"), unless the movies are obscene. Although the United States Constitution contains no obscenity exception Congress adopted an obscenity statute which the Supreme Court has upheld.

The unresolved but important issues in this case relate to the special role

freedom of speech plays in the United States of America. That is, our Supreme Court has regularly created special rules for obscenity cases that are different than regular criminal cases. For example, in Jenkins v. Georgia, supra, the United States Supreme Court reviewed the evidence and overturned a state court jury's factual determination and factual determination of the Georgia Supreme Court. In cases not involving obscenity or the First Amendment the Supreme Court of the United States does not reject factual determinations by the trial court and by the highest court of the state. Thus, the United States Supreme Court created an exception in the case of obscenity litigation.

Likewise, the Supreme Court created an exception to the general rule involving the seizure of contraband incidental to an arrest. Although contraband in plain view is normally seizable by the police especially incidental to an arrest, the Supreme Court ruled that with respect to the seizure of material presumptively protected by the First Amendment a search warrant must be utilized. Roaden v. Kentucky, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973).

Likewise, although the states have broad authority under their police power to declare the possession of certain items to be a crime, the United States Supreme Court created a special exception for obscenity. Although the

states are free to declare the private possession of narcotics to be a crime the states are not permitted to declare that private possession of obscenity is a crime. See Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.ED.2d 542 (1969).

Because of the importance of the First Amendment should our judiciary be more sensitive to criminal procedure in obscenity cases? This case involves communicating to the jury by both the defendant himself through expert and lay testimony and through the attorney for the defendant during closing argument. The United States Supreme Court has determined,

> ". . . The defense should be free to introduce appropriate expert testimony, see Smith v. California, 361 U.S. 147, 164-165, 80 S.Ct. 215, 224-225, 4 L.Ed.2d 205 (1959) (Frankfurter, J., concurring) . . . ." Kaplan v. California, 413 U.S. 115, 37 L.Ed. 2d 492, 93 S.Ct. 2680 (1973).

Not only does this case implicate the First Amendment and free speech, it also involves other constitutional issues including the right of a defendant to testify before a jury, the right to a jury trial, and the right to effective closing argument (effective counsel under the Sixth Amendment).

The Memorandum Decision in this case pays no attention to these fundamental attributes of the First Amendment in terms of criminal procedure.

The panel simply ignores the importance of the First Amendment and treats this obscenity case without the special care that the First Amendment requires.

II STATEMENT OF FACTS

The procedural facts of this case are not really reviewed by the panel decision. The underlying facts regarding the "crime" itself were not disputed. Isaacs stipulated to the facts. The only issue was whether the films in questions lacked serious artistic or scientific merit.

This case was originally tried by Ninth Circuit Chief Judge Alex Kozinski. Judge Kozinski conducted a Daubert hearing (ironically it was then Circuit Judge Kozinski's opinion in the Daubert case which was reviewed by the U.S. Supreme Court) thus, the author of the Ninth Circuit Daubert decision himself conducted the Daubert hearing in this case. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Judge Kozinski concluded that Isaacs could testify as an expert on the artistic issues presented by the case . In addition, Judge Kozinski determined that a psychiatrist, Dr. Nair, could testify as an expert regarding psychiatric issues. Unfortunately for Isaacs, Judge Kozinski declared a mistrial over Isaacs' objection and recused himself because the Government insisted upon pursuing a recusal motion which was unjustified.

When the Los Angeles Times broke the story about Judge Kozinski's alleged prior pornography web site, the media descended upon the courtroom. Judge Kozinski preferred that there be a delay and the Government prosecutor from the since disbanded obscenity unit in Washington, D.C. told Judge Kozinski that the prosecution needed a few days to consult with his superiors in Washington, D.C. regarding what to do. Isaacs' defense attorney wanted to go forward because of his concern about the availability of expert witness Dr. Nair. More important, Isaacs defense attorney attempted to persuade Judge Kozinski that he had done nothing wrong, that his privacy had been invaded, and that federal judges, like other citizens, should enjoy certain privacy rights. Isaacs himself told his attorney to agree to a delay until the following Monday when things could be sorted out. Little did Isaacs know, his agreement to accommodate Judge Kozinski would harm Isaacs and that Isaacs would lose the benefit of Judge Kozinski's pretrial ruling that Isaacs could testify as an expert on the artistic issues presented by the case. Because Isaacs accommodated Judge Kozinski out of Isaacs' concern for the well being of Judge Kozinski, Isaacs, a human being with no criminal record in his mid 60's, is facing four years in federal prison for distribution of allegedly obscene movies to consenting adults in a country that professes to provide freedom for

its citizens. In his recent plurality opinion for the Supreme Court in Shaun McCutchen v. Federal Election Commission, ___ U.S. ___, 2014 DJDAR 4187 (2014) Chief Justice Roberts said, ". . . If the First Amendment protects flag burning, funeral protests, and Nazi parades - despite the profound offense such spectacles cause - it surely protects political campaign speech despite popular opposition. . . .."

Isaacs was forced to stand trial a second time after this Court rejected his double jeopardy dismissal motion on appeal and after the United States Supreme Court denied certiorari. See United States v. Isaacs, 359 F. Appx. 875 (9th Cir. 2009), cert.den. 130 S.Ct. 3519 (2010).

With Isaacs being able to testify at the second trial and with his attorney being free to argue to the jury, the jury hung resulting in a second mistrial.

Determined to pursue Mr. Isaacs as though he was an international terrorist, the Government took him to trial a third time. District Judge King (now Chief District Judge), determined that he was not bound by Judge Kozinski's ruling on the ability of Isaacs to testify as to his opinions. Judge King revisited the issue and determined that Isaacs would not be allowed to give his opinion regarding the movies. He would be precluded from testifying

either as an expert or even giving his lay opinion. [1]

District Judge King attacked and intimidated Isaacs just before Isaacs took the stand to testify on his own behalf. Judge King, without any prompting by the Government, lectured Isaacs and told him that he clearly crossed the line during his testimony at the second trial. Judge King acknowledged that the Government had not objected to Isaacs' testimony in the second trial but stated that even in the absence of an objection Judge King wanted Isaacs to obey his ruling that he could not testify as an expert and could not give his opinion regarding the movies in question. Again, without objection by the Government, Judge King told Isaacs not to testify in narrative form. He told Isaacs not to do it again and that Judge King would stop him.

Judge King stated,

> "And we can move this along fast if we are not sitting here taking, you know, art lesson 101 from Professor Isaacs." (TR Vol. IV, p. 32 (ER 71).

After additional threats by the Court, the defense expressed concern that the Court's warning prior to Isaacs even testifying and without an objection by the Government was "chilling" the defense's right to present a defense

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[1] A more detailed description of Isaacs' Daubert testimony is set forth at pages 7 through 13 of the Opening Brief.

(Transcript of proceeding, p. 33; Excerpt of Record, p. 72).

The defense again expressed its concern that it was being chilled by the threats and warnings of the District Court. Disturbed that the judge might say something that would influence the jury the defense expressed concern that the defense could be prejudiced by comments the judge might make. The District Court responded by stating that the defense should not do anything that would cause the Court to do that. Again, all this is spelled out in the Opening Brief at pages 17-19.[2]

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[2] Isaacs had already stipulated to all of the evidence in order to keep the trial short. His only defense would be his opinion testimony regarding the artistic nature of th films. The following passages are illustrative of the District Court's treatment of Isaacs.

> The Court: I have ruled that he is not an expert, and he may not testify as to what is art or what isn't art. He can testify solely within the context of what inspired him, what motivated him to create what he created. That's it. And we can move this along fast if we're not sitting here taking, you know, art lesson 101 from Professor Isaacs. That's not the point. He is not an expert, I ruled. So your questions to him last time left wide open so he would go on for minutes and minutes and minutes in a narrative purporting effectively to be an expert, which is contrary to my ruling. Do not do that again. I will stop that.
> Do you understand what I'm saying?

Later after the defense protested, the Court purported to modify its position:

> "Fine, he can say, why am I motivated, "i'm motivated because I want to be a shock artist" or whatever it is he's going to say. That's fine. But he's not going to be giving us any lessons that say well look at -- unless some of these things actually inspired him, including the urinal, including these things that he can refer to, he can say "oh, these things inspired me." But he's not going to give us a history lesson on art. It's a very simple thing."

However, when Isaacs attempted to provide his "inspiration," the Court cut him off when it sustained the Government's objection (at pages 59 and 60 of Reporter's Transcript):

> "...and intended meaning of the "hollywood scat amateur number 7" and the "hollywood scat amateur number 10"?
> A. okay. This is probably one of the first shock art pieces. Fortunately, for me, I live in a time where there's a lot of media, and I can read things and find out about things. And this piece has been a very important piece. What this is is a urinal. A urinal that this artist went to a store in 1917 and bought. He can't sculpt the urinal. He didn't paint it. All he did was write a name "r. Mutt 1917." Now, the story of "the urinal" -- there was a show in New York in 1917 called "the big show" and what it was it was an art -- Mr. King: objection, your honor.
>
> The court: sustained."

Isaacs' testimony came after repeated warnings from the District Court without any request by the Government. Isaacs' testimony was constantly interrupted by the Government and the Court. He was barred from giving his opinion regarding the artistic value of the movies. The Court repeatedly sustained Government objections throughout Isaacs testimony. See Opening Brief page 19. The Court told Isaacs that he was not in Court "to give a lecture."

When Isaacs attempted to discuss "post modernism" the Court immediately sustained an objection by the Government. Isaacs was cut off by the Government's objection and the Court's sustaining that objection when Isaacs attempted to discuss an art exhibit. Please see page 19 of Isaacs Opening Brief.

None of these facts that occurred in open Court and are in the record was discussed by the three judge panel Memorandum Decision.

The intimidation of Isaacs by the District Court judge extended to the closing argument by Isaacs' defense counsel. Although closing argument is

considered part of the defendant's constitutional right to have counsel argue on his or her behalf, Herring v. New York, 422 U.S. 853 (1975), the intimidation by the defense was repeated when Isaacs defense attorney attempted to argue the case to the jury.

As critical as closing argument is in general it is even more important in obscenity cases where expert testimony is not needed. The Supreme Court has determined that the materials themselves are sufficient for a determination of obscenity. See Kaplan v. California, 413 U.S. at 121; 93 S.Ct. at 2685. When expert testimony is not provided by either side closing argument becomes even more important. The Supreme Court in ruling that expert testimony is not needed in an obscenity case essentially determined that closing argument is even more important. How else can the jury decide the obscenity question without closing argument?

During the prosecution's initial closing argument the prosecutor mentioned Thomas Jefferson and quoted from him. The prosecutor did so notwithstanding the fact that Thomas Jefferson did not testify in the trial and nobody testified as to anything that Thomas Jefferson allegedly said or did. Believing that such references are appropriate the defense of course did not object to the prosecutor's reference to Thomas Jefferson. However, when the

defense then began its closing argument the defense wanted to use the Thomas Jefferson reference to assist the defense's closing argument. The record demonstrates that throughout the defense closing argument the Government constantly interrupted with objections and derailed the defense's closing argument. All of this is set forth in detail in the Opening Brief at pages 23 through 29.

The District Court judge constantly sustained objections on the alleged ground that the defense attorney was going "beyond the record."

During oral argument before the three judge panel Circuit Judge Graber did express some concern about the basis for the Government's objections. The panel did briefly touch upon this argument. The Court stated at page 4 of its Memorandum Decision,

> ". . . Many of these objections were made in response to Isaacs' references to matters of popular knowledge....

It is not one hundred percent clear from this passage that the panel actually was concerned about the sustaining of the objections. It appears that the three judge panel reluctantly conceded that this was improper conduct by the Government and by the District Court in sustaining the objections on the ground they were references "beyond the record." Specifically, the Court's

Memorandum Decision follows the one sentence quoted above with the following two words,

"Even so. . . ."

The panel did not actually come out and concede that a reference to popular knowledge is a permissible technique in closing argument.

The defense tried to argue the impact on average persons. The defense was not permitted to argue to the jury based upon the movies themselves that the movies were obviously not intended to be watched in a public setting with strangers. This was fair argument based on the record and human experience.

The panel decision whitewashed the conduct of the district judge in this case. Neither the district court judge nor the three judge panel treated this case as a special case because of the First Amendment aspect.[3]

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[3]. Senior District Court Judge George H. King, then an Assistant United States Attorney, argued an obscenity case for the Government in United States v. Pinkus, 551 F.2d 1155 (1977). The Ninth Circuit's decision affirming the obscenity conviction was reversed by the United States Supreme Court, Pinkus v. United States, 436 U.S. 293, 98 S.Ct. 1808, 56 L.Ed.2d 293 (1978), and Judge King then argued the case on remand before this Court a second time, United States v. Pinkus, 579 F.2d 1174 (9th Cir. 1978).

III ARGUMENT : EITHER THE PANEL OR THE EN BANC COURT SHOULD REHEAR THIS MATTER BECAUSE TRIAL COURTS IN OBSCENITY CASES SHOULD BE GIVEN GUIDANCE AS TO DEFENSE TESTIMONY AND CLOSING ARGUMENT

There are two main issues to be decided by an en banc court. Of course, Isaacs has no objection if the three judge panel wishes to reconsider its own Memorandum Decision. What Isaacs is seeking now is justice.

Isaacs is acutely aware that rehearings by panels and rehearings en banc are rarely granted. This is true in ordinary cases. However, when the First Amendment is implicated our judicial tradition requires that special care be afforded the criminal defendant charged with distribution of presumptively protected material to consenting adults.

Indeed, Chief Justice Roberts recently noted in his plurality opinion in Shaun McCutchen v. Federal Election Commission, that our First Amendment protects unpopular speech. What the population of the world knows is that the United States of America stands for freedom. Indeed, it is the freedom we value and enjoy which commands the respect of the population of the world.

Isaacs knows full well that this Court is not in a position to overrule

U.S. Supreme Court precedent regarding obscenity law. However, this Court would fully act within its own authority by emphasizing that the importance of the First Amendment requires special consideration and care. The mistake made by the District Court and by the three judge panel was to treat this case as an ordinary run of the mill criminal matter without regard to the special importance the First Amendment plays in our system of justice. As noted earlier, the Supreme Court has gone out of its way to establish special rules and adopt special procedures for cases involving obscenity. In Jenkins v. Georgia, supra, the Court did something that it almost never does - reexamine factual decisions made by the jury and by a State Supreme Court. In Stanley v. Georgia, supra, the United States Supreme Court struck down a state statute that made it illegal to possess obscenity. This is not something a court normally does because the police power of the state ordinarily allows the state to declare what is criminal. In Roaden v. Kentucky, supra, the Supreme Court essentially promulgated a special rule regarding search and seizure law in obscenity cases. A search warrant is needed to seize obscene material even though obscene material is theoretically contraband. The Supreme Court established a special rule because of the importance of the First Amendment.

Here, Isaacs respectfully suggests that neither the District Court nor the

panel paid the appropriate respect to the nature of this case, a case involving speech.

Even in an ordinary case a district court judge should not take such a hostile attitudes towards the defendant who is about to testify. The right of a defendant in a criminal case to testify in front of the jury is a fundamental right. What made this case outrageous was the District Court's hostility towards Isaacs. The District Court went out of its way to threaten Isaacs. He was constantly interrupted and intimidated throughout his testimony.

Unfortunately, for the defense, the hostility of the District Court extended into closing argument by defense counsel. Although the constant interruption by the Government was unsettling and destroyed the flow of closing argument, the rulings by the District Court and the threats to the defense counsel during closing argument made effective closing argument impossible. In a case like this, where there is no expert testimony, it is especially important to allow leeway in closing argument. Indeed, defense counsel did not even really ask for leeway. Upon occasion he made references to popular culture or things that human beings know about each other. For example, the defense attorney attempted to argue that the movies were not intended to be shown to a jury of 12 strangers in a well lit courtroom. The

defense believed and still believes, that such an argument can fairly be made. Indeed, it appears to have been self evident, yet the trial court sustained the Government objection that there was no evidence in the record to support such an assertion. The interruptions were constant and completely destroyed the flow of closing argument. The technique of constant interruption is well known to skillful prosecutors.

With no expert or even lay testimony permitted and with warnings against such testimony, the case essentially came down to closing argument. The Government did not produce an expert witness nor did it attempt to do so. Given the rulings and admonitions by the District Court regarding Isaacs' testimony, all the defense had was closing argument. Yet closing argument, which the Supreme Court has said is essential in criminal cases, was gutted by constant interruptions. It did not help the defense to be criticized by the District Judge during closing argument because the District Court felt the defense attorney was fighting too hard for his client.

Isaacs understands that a rehearing is a long shot but somewhere in this wonderful country of ours we must have justice. Given the importance of the First Amendment it was essential that the District Court and the three judge panel consider the First Amendment aspect of the case. In refusing to do so

both the District Court and the panel erred.

Either the panel should grant rehearing or this Court, en banc, should grant rehearing in order to give the proper weight the judiciary should give to criminal cases involving the First Amendment.[4]

IV CONCLUSION

For the foregoing reasons, Defendant and Appellant Ira Isaacs respectfully asks that the panel reconsider its ruling or, in the alternative, that the Court, en banc, rehear this matter.

Respectfully submitted,

"S/ROGER JON DIAMOND"
Attorney for Defendant & Appellant Isaacs

[4] Even in a non obscenity case or any case not involving the First Amendment the defense (the defendant and his attorney) should not be treated as it was treated in this case.

CERTIFICATE OF COMPLIANCE WITH FRAP 32(c)(2)AND WITH CIRCUIT RULE 40-1

1. This petition complies with the type-volume limitations of the Federal Rules of Appellate Procedure (Rules 32 and 35) and Circuit Rule 40-1 because:

X This petition contains 3,880 words (which is less than the 4,200 word limit specified in Circuit Rule 40-1), excluding the parts of the petition exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

__ This brief uses a monospaced typeface and contains 937 lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P.32(a)(6) because:

X This petition has been prepared in a proportionally spaced typeface using Corel Word Perfect in 14 point Roman type, or

__ This brief has been prepared in a monospaced typeface.

Dated: 04/07/2014 ____

Respectfully submitted,

"S/ROGER JON DIAMOND"

Attorney for Defendant/Appellant