1976

State of Utah v. International Amusements, Dba, Adult Book And Cinema Store, Stuart Lee, David Andrew Pauly, Hersel Richardson, Jr., And Kenneth Blair Cleveland : Brief of Appellants

Utah Supreme Court

BEN E. RAWLINGS and C. REED BROWN; Attorneys for Defendant-Respondent Duane Hall TruckingWilliam s. Richards D. Michael Jorgensen; Attorneys for Plaintiffs from the judgment of the District Court of the Second Judicial District in and for the County of Weber, State of Utah, Honorable John F. Wahlquist, presiding

IN THE SUPREME [illegible]

OF THE STATE OF [illegible]

STATE OF UTAH,

Plaintiff and Respondent,

vs.

INTERNATIONAL AMUSEMENTS [illegible]
ADULT BOOK AND CINEMA [illegible]
STUART LEE, DAVID [illegible]
HERSEL RICHARDSON, JR.,
KENNETH BLAIR CLEVELAND,

Defendants and [illegible]

Appeal from the [illegible]
Second Judicial [illegible]
State of Utah, [illegible]

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IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

Case No.
14535

INTERNATIONAL AMUSEMENTS, dba,
ADULT BOOK AND CINEMA STORE,
STUART LEE, DAVID ANDREW PAULY,
HERSEL RICHARDSON, JR., and
KENNETH BLAIR CLEVELAND,

Defendants and Appellants.

BRIEF OF APPELLANTS

Appeal from the judgment of the District Court of the Second Judicial District in and for the County of Weber, State of Utah, Honorable John F. Wahlquist, presiding.

FLORENCE AND HUTCHISON

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Defendants and Appellants.

Case No. 14535

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF CASE

Appeal from a jury verdict of guilty and sentence of each defendant for distributing pornographic material.

DISPOSITION IN LOWER COURT

Each appellant has been separately charged for distributing pornographic material in violation of Utah Code Annotated, 76-10-1204, 1953, as amended. The case was tried to a jury which entered a verdict of guilty against each defendant. Each defendant was subsequently sentenced by the Honorable John F. Wahlquist presiding.

RELIEF SOUGHT ON APPEAL

Appellants respectfully request this Court to set aside the convictions on the grounds that the Court erred in its instructions to the jury.

STATEMENT OF FACTS

Appellants were convicted by a jury and sentenced by the Honorable John F. Wahlquist for having distributed pornographic material in violation of Utah Code Annotated, Section 76-10-1204, 1953, as amended.

At the conclusion of the evidence, the Judge gave the following instructions to the jury:

> INSTRUCTION NO. 4
>
> Before you can convict the defendant HERSEL RICHARDSON, JR., of the offense charged you must find all the following elements proven beyond a reasonable doubt.
>
> 1. That on or about the 9th day of December, 1975, the defendant did sell State's Exhibit 1P within Weber County, State of Utah.
>
> 2. That the Exhibit is in fact illegal pornography. Illegal pornography is defined as material that contains the following elements:
>
> A. That the material is offensive under local contemporary community standards, when taken as a whole, and it appeals to the prurient interest in sex.
>
> B. It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sado-masochistic abuse, or excretion.
>
> C. Taken as a whole, it does not have serious literary, artistic, political, or scientific value.

All reasonable doubt in favor of the publication should be resolved so as to promote freedom of speech and expression, then

If you find both of the above elements proven beyond a reasonable doubt, it is your duty to convict the defendant; if you do not so find, it is your duty to acquit the defendant, HERSEL RICHARDSON, JR.

INSTRUCTION NO. 5

Before you can find defendant STUART LEE guilty of any of the counts in question, you must find all the elements of that count proven beyond a reasonable doubt.

COUNT IV

1. That on or about December 9, 1975, there was sold and displayed for sale State's Exhibit 4P within Weber County, State of Utah, by the defendant.

2. That the Exhibit is in fact illegal pornography. Illegal pornography is defined as material that contains the following elements:

A. That the material is offensive under local contemporary community standards, when taken as a whole, and it appeals to the prurient interest in sex.

B. It is patently offensive in the description of nudity, sexual conduct, sexual excitement, sado-masochistic abuse, or excretion.

C. Taken as a whole, it does not have serious literary, artistic, political or scientific value.

All reasonable doubt in favor of the publication should be resolved in its favor so as to promote freedom of speech and expression, then

If you find both of the above elements proven beyond a reasonable doubt, it is your duty to convict the defendant; if you do not so find, it is your duty to acquit the defendant. Each count is to be considered separately as though it was an independent case.

INSTRUCTION NO. 6

Before you can find the defendant KENNETH BLAIR CLEVELAND guilty of the offense charged as either to Count II or Count III, you must find the following elements proven beyond reasonable doubt.

1. That on or about the 5th day of December, 1975, the defendant did sell State's Exhibit 2P within Weber County, State of Utah or as the count considered may be.

A. That on or about the 5th day of December, 1975, the defendant did sell State's Exhibit 3P within Weber County, State of Utah.

2. That the exhibits in fact are illegal pornography. Illegal pornography is defined as material that contains the following elements:

A. That the material is offensive under local contemporary community standards, when taken as a whole, and it appeals to the prurient interest in sex.

B. It is patently offensive in the description of nudity, sexual conduct, sexual excitement, sado-masochistic abuse, or excretion.

C. Taken as a whole, it does not have serious literary, artistic, political or scientific value.

Such must be true as to the books considered separately as to Counts II and III.

All reasonable doubt in favor of the publication should be resolved in its value so as to promote freedom of speech and expression, then

If you find both of the above elements proven beyond a reasonable doubt, it is your duty to convict the defendant; if you do not so find, it is your duty to acquit the defendant. Each count is to be considered separately as though it was an independent case.

INSTRUCTION NO. 8

Before you can find DAVID ANDREW PAULY,

defendant, guilty of any of the counts in question, you must find all the elements of that count proven beyond a reasonable doubt.

Count I.

1. That on or about December 9, 1975, there was sold and displayed for sale State's Exhibit 1P within Weber County, State of Utah; and that he was the manager of the corporation and knew or should have known that such a book was displayed for sale, and that persons were employed for the purpose of the sale.

2. That the Exhibit is in fact illegal pornography. Illegal pornography is defined as material that contains the following elements:

A. That the material is offensive under local contemporary community standards, when taken as a whole, and it appeals to the prurient interest in sex.

B. It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sado-masochistic abuse, or excretion.

C. Taken as a whole, it does not have serious literary, artistic, political or scientific value.

Count II.

The elements are the same as above except the alleged sale was on December 5, 1975, State's Exhibit 2P, is to be considered.

Count III.

The elements are the same as above except the alleged sale was on December 5, 1975, State's Exhibit 3P, is to be considered.

Count IV.

The elements are the same as above except the alleged sale was on December 9, 1975, State's Exhibit 4P.

If you find any of the Counts proven, that is both elements thereon, it is your duty to convict of that count; if you do not so find, it is your duty to acquit of that count. Each count should be considered with the same dignity and diligence that you would consider if it were the only charge.

INSTRUCTION NO. 9

Before you can find the defendant corporation INTERNATIONAL AMUSEMENTS dba ADULT BOOK AND CINEMA STORE, guilty of the offense charged, you must find all of the following elements proven:

Count I.

1. That on or about December 9, 1975, there was sold and displayed for sale State's Exhibit 1P within Weber County, State of Utah; and that the corporation's local managing authorities knew or should have known that such a book was displayed for sale, and that persons were employed for the purpose of the sale.

2. That the Exhibits are in fact illegal pornography. Illegal pornography is defined as material that contains the following elements:

A. That the material is offensive under local contemporary community standards, when taken as a whole, and it appeals to the prurient interest in sex.

B. It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sado-masochistic abuse, or excretion.

C. Taken as a whole, it does not have serious literary, artistic, political or scientific value.

Such must be true as to the books considered separately as to the Count I.

Count II.

The elements are the same as above except the alleged sale was on December 5, 1975, State's Exhibit 2P, is to be considered.

Count III.

The elements are the same as above except the alleged sale was on December 5, 1975, State's Exhibit 3P, is to be considered.

Count IV.

The elements are the same as above except the alleged sale was on December 9, 1975, State's Exhibit 4P.

If you find any of the above counts proven, that is both elements thereon, it is your duty

to convict of that count; if you do not so find, it is your duty to acquit of that count. Each count should be considered with the same dignity and diligence that you would consider if it were the only charge.

INSTRUCTION NO. 14

Contemporary community standards means those current standards in the vicinage where an offense alleged under this action has occurred.

Nudity means the showing of the human male or female genitals, pubic area, or buttocks, with less than an opaque covering, or the showing of the female breast with less than an opaque covering, or any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernably turgid state.

Sexual conduct means acts of masturbation, sexual intercourse, or any touching of a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is a female, breast, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent or actual sexual stimulation or gratification.

Sexual excitement means a condition of human male or female genitals when in a state of sexual stimulation or arousal, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

Sado-masochistic abuse means flagellation or torture by or upon a person who is nude or clad in undergarments, a mask, or in a revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

INSTRUCTION NO. 15

The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment,

> the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved.
>
> The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.
>
> In this case, members of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience, you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious--men, women and children.

Appellants submitted jury instructions to the Court which do not appear in the records filed with the Utah Supreme Court, but do appear as having been submitted on Page 166 of the transcript of the trial.

Furthermore, the appellants objected to the instructions as given on pages 171 through 173 of the transcript of the trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN ITS INSTRUCTIONS NO. 4, 5, 6, 8 AND 9 IN FAILING TO INSTRUCT THE JURY ON THE CONSTITUTIONALLY MANDATED AND STATUTORILY REQUIRED ELEMENT OF SCIENTER.

In Smith v. California, 361 U.S. 147 (1959), the United States Supreme Court invalidated a California statute which made it unlawful for a bookseller to have obscene material in his possession, even though he had no knowledge of its content or character. In expressing the fear that the elimination of scienter would inhibit and curtail free expression, the Supreme Court declared:

> "By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. * * * And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus, would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.

> Through it, the distribution of all books, both obscene and not obscene, would be impeded." -- 361 U.S. at 153-154.

In Mishkin v. New York, 383 U.S. 502 (1966), the Supreme Court affirmed the conviction of a book publisher under a New York obscenity statute which ostensibly contained no scienter requirement. Although the statute appeared to impose strict liability, the Court noted that the New York Court of Appeals had interpreted the statute to require the vital element of scienter. The Court quoted the New York Court's interpretation which held that:

> A reading of the [New York] statute. . . as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. . . 383 U.S. at 510.

The Court concluded that this construction foreclosed a challenge to the statute based on Smith v. California, supra.

Most recently, the Supreme Court in Hamling v. United States, 418 U.S. 87 (1974), declared:

> "We think the 'knowingly' language of 18 U.S.C. §1461, and the instructions given by the District Court in this case satisfied the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that a Defendant had knowledge of the contents of the materials he distributes, and that he knew the character and nature of the materials." 418 U.S. at 123.

In line with these pronouncements of the United States Supreme Court, numerous state courts have held that a Defendant cannot be convicted of an obscenity offense unless the prosecution proves beyond a reasonable doubt that the Defendant had knowledge of the material's contents. State v. Locks, 97 Ariz. 148, 397 P. 2d 949 (1964); State v. Oman, 265 Minn. 277, 121 N.W. 2d 616 (1963); State v. Richardson, 506 S.W. 2d 488 (Mo.App. 1974). Of course, such knowledge can be inferred by the jury based on the circumstances surrounding the distribution or sale. Parrish v. State, 521 S.W. 2d 849 (Tex. Crim. App. 1975); State v. American Theatre Corp., 193 Nebr. 289, 227 N.W. 2d 390 (1975).

The Utah legislature has also recognized that knowledge of the material's contents is an essential element of distributing pornographic material. Utah Code Annotated, Section 76-10-1204, 1953, as amended, states:

> (1) A person is guilty of distributing pornographic material when he knowingly. . . .

The word "knowingly" is defined in Utah Code Annotated, Section 76-10-1201 (4), 1953, as amended, as:

> An awareness, whether actual or constructive of the character of material, or of a performance.

Yet, despite the opinions of the United States Supreme Court and the declaration of the Utah Legislature that knowledge of the material's contents is an essential

element for conviction under §76-10-1204, Utah Code Annotated, the trial court failed to so instruct the jury. A glance at the jury instructions given with respect to the defendants Richardson, Lee and Cleveland demonstrates that the jury could have determined guilt without giving any consideration as to whether these defendants had any knowledge of the contents of the material. Jury instructions nos. 4, 5, and 6 are identical:

> That on or about the 9th day of December, 1975, the defendant did sell state's exhibit. . . .

No mental element precedes the word sell in the instructions. Liability appears to be strict. Nor was the statutory definition of 'knowingly' given in instruction 14 where numerous other statutory definitions found in 76-10-1201, Utah Code Annotated, are set out.

The almost identical situation faced the Kentucky Court of Appeals in Keene v. Commonwealth, 516 S.W. 2d 852 (Ky. Ct. App. 1974). In Keene, the trial court failed to instruct the jury that the defendant could be found guilty only if the prosecution proved beyond a reasonable doubt that the defendant had knowledge of the material's obscenity. In reversing, the Kentucky Court of Appeals stated:

> Appellant asserts that prejudicial error was committed in the instructions given to the jury. We are forced to agree. KRS 436.101 provides in pertinent part:

> "Any person who, having knowledge of the obscenity thereof. . . exhibits . . . any obscene matter is punishable." The trial judge failed to instruct on the required element of knowledge, which is an essential part of the statutorily created offense. The error was properly preserved for review. The instructions were otherwise acceptable against a claim of prejudicial error. For the omission of an element of the crime from the instructions, the judgment must regretably be reversed for a new trial. On a new trial the jury will be instructed as our statute plainly requires that they must believe that the defendant "had knowledge of the obscenity of the film."

See, also, Cohen v. State, 125 So. 2d 560 at 563 (Fla. 1960).

Turning to jury instructions 8 and 9, which defined the elements of liability to convict the defendants Pauly and International Amusements, Inc., it is obvious that once again the trial court failed to instruct the jury on the essential element of knowledge as defined in 76-10-1201 (4), Utah Code Annotated. While these instructions do require that Pauly (jury instruction no. 8), and the local managing authority of International Amusements, Inc. (jury instruction no. 9), have knowledge or reason to know the materials were offered for sale, neither instruction requires any knowledge of the character or content of the material.

The failure of the court to instruct the jury on both the constitutionally mandated and statutorily required element of the offense was prejudicial error and as such the defendants

are entitled to a new trial. See, Cohen v. State, supra; Keene v. Commonwealth, supra; State v. Hartley, 16 Utah 2d 123, 396 P. 2d 749 (1964); 23 C.J.S. §1194.

II. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THE MATERIAL WAS TO BE JUDGED BY A STATEWIDE STANDARD.

Jury instruction no. 14 states:

> Contemporary community standards means those current standards in the vicinage where an offense alleged under this action occured.

Obscenity is to be judged by community standards. Miller v. California, 413 U.S. 15 (1973); State v. Phillips, 540 P. 2d 936 (1975); §76-10-1204, Utah Code Annotated. But, the Supreme Court in Miller or in any subsequent decision dealing with obscenity has not defined the exact "meets and bounds" of the community. This task was left up to the individual state courts and legislatures. Jenkins v. Georgia, 418 U.S. 153 (1974). The clear majority of state high courts considering the issue have held that a material's obscenity must be judged by a statewide community standard. Court v. State, 63 Wis. 2d 570, 217 N.W. 2d 676 (1974); State v. J-R Distributors, Inc., 82 Wash. 2d 584, 512 P. 2d 1049 (1973); People v. Heller, 352 N.Y.S. 2d 601, 307 N.E. 2d 805 (1973); Pierce v. State, 292 Ala. 472, 296 So. 2d 218 (1974); People v. Tabron, 544 P. 2d 380 (1976); People v. Thomas, 346 N.E. 2d 190 (Ill. Ct. App. 197

The logic behind employing a statewide community standard was clearly spelled out by the Alabama Supreme Court in Pierce v. State, supra.

> Alabama would be faced with many problems in determining the exact scope of the community if it were smaller than the state as a whole. On first impulse, one would think that the county would be an appropriate geographical unit for establishing standards because one assumes a natural relationship between the county and the jury vicinage. However, this assumption is not always accurate, for in Alabama, there are a number of counties that have judicial divisions separating geographical areas in a county with separate courthouses for each such area. Prospective jurors that are assembled for trial selection in such counties come from within the bounds of such geographical divisions and cannot be representative of the entire county. Such judicial geographical divisions (which are even applicable to the circuit courts) within such counties present problems pertaining to localized standards on a countywide basis.
>
> Assuming for the sake of argument that standards will vary from county to county, then arguably, the standards may also vary from city to city. Moreover, taking the assumption one step further, there may be within a given city different standards, say in residential neighborhoods as opposed to the areas surrounding a college campus and, perhaps, a trial court judge would have to deal with a number of standards. This myriad of possibilities for standards, coupled with the temporal requirement that standards be "contemporary" clearly demonstrates the burden which would be placed on the

> judicial system in trying to determine which standards are applicable at which location at which time.
>
> Furthermore, if community is construed to be an area smaller than the state, then the problem arises as to whether standards must be proven by extrinsic or expert testimony, or whether the trier of facts (jury or trial judge) will make the determination without special proof of standards. If a jury is deemed to be the embodiment of the community, then proof of standards for the jury's sake would be superfluous. If a judge without a jury is allowed to make the same determination under the same concept then there would be no need of proof of standards. But how would a reviewing appellate court be informed as to what standards were applied below? Under this alternative method an appellate court could make no independent determination of the issue of obscenity vel non. The results under such a system would cause many disparities in criminal convictions. While under our system of federalism it is fundamental and desirable for the national government to allow the states to develop their own standards, there is no underlying constitutional or policy basis mandating deference to "local communities" and to do so most certainly would lead to abuse of criminal process. 296 So. 2d at 224.

A state obscenity statute must employ a statewide community standard.

> The legislature has provided us with a definition of community standards that lacks clarity. The appellant contends, and rightly so, that anything less than a statewide standard is unworkable when state obscenity statutes are involved. It is fundamentally unfair that any person would be called upon to undergo a trial that would entail criminal

> penalties for the violation of a state obscenity statute without knowing what the standard is that will determine his guilt or innocence. The random decision of a judge or jury cannot be the standard, and the state statute should not be construed in a different manner in Denver, Littleton, Grand Junction, Colorado Springs, and Aspen. People v. Tabron, 544 P. 2d at 381 (1976).

In the present case, a look at jury instruction no. 14 indicates that the jury was given no guidance and clarity as to the relevant community. Thus, it would have conceivable determined the defendants' guilt by considering the impact of the materials on a community more limited than the state of Utah. More than likely, the material was judged by its effect on citizens of Ogden. But, what would have been tolerated in Salt Lake City might have been deemed shocking in Ogden. The failure of a trial court to instruct the jury on a statewide community standard has been held to be reversible error by numerous courts. Dumas v. State, 131 Ga. 79, 205 S.E. 2d 119 (Ga. App. 1974); People v. Andrek, 375 N.Y.S. 2d 40 (N.Y. Supreme Ct. 1975). The defendants would urge this Honorable Court to follow the logic of these courts and reverse the convictions, since jury instruction no. 14 was an unclear and erroneous statement of the law.

III. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IN EVALUATING THE CONSCIENCE OF THE COMMUNITY, THEY COULD CONSIDER CHILDREN AS PART OF THAT COMMUNITY.

Jury instruction no. 15 states in part:

> In this case, members of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious--men, women and children.

A state is free to adopt more stringent controls on communicative materials available to youths than adults. Ginsberg v. New York, 390 U.S. 629 (1968); Erzoznick v. City of Jacksonville, 422 U.S. 205 (1975). Thus, as to some materials, sales to adults may be a constitutionally protected activity, while sales of the same material to minors may be barred and punished. State v. Siegel, 354 A. 2d 103 (N.J. Super. 1976).

> Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of a State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults. Ginsburg v. New York, 390 U.S. at 636.

Were the materials in the present case sold or made available to children, there is no doubt that the jury could hav

considered the impact of the material on juveniles. But, from the record, it is crystal clear that not a scintilla of evidence was ever presented to show sale or availability of the material to minors. Indeed, the defendants were never charged with distribution of obscene materials to minors. It takes little common sense to realize that material which may be "highly prurient" to children will in some cases not even phase an adult. Yet, under jury instruction no. 15, the jury was permitted to judge the material as to its possible effect on children.

While the United States Supreme Court has recognized that certain special obscenity instructions may be given with regard to standards, there must be evidence to support such instructions. In Mishkin v. New York, supra, the Court held that where evidence established that books were marketed for a clearly defined deviant group, the prurience of the material could be measured by the effect on members of that group. In Ginzberg v. United States, 383 U.S. 463 (1966), evidence of pandering was admissible to establish the element of prurience.

Unlike the above two cases, there was no evidence before the court to justify an instruction which allowed the jury to speculate as to the material's effect on children. Indeed this portion of the jury instruction was contrary to §76-10-1203 (2), Utah Code Annotated, which states:

> In any prosecution dealing with an offense relating to pornographic material or performance, or dealing

> in harmful material, the question whether material or a performance appeals to prurient interest in sex shall be determined with reference to average adults or average minors as the case may be.

The statute makes it clear that where sales are alleged to be solely to adults, the relevant community in determining prurienc is an adult one.

As given, jury instruction no. 15 was not supported by the evidence, contrary to the direction of §76-10-1203 (2), and prejudicial to the defendants. Its damaging effect requires that the defendants be granted a new trial.

CONCLUSION

The appellants' convictions should be reversed and a new trial granted to each of them for the Court's failure to properly instruct the jury.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foreoing Brief of Appellants, postage prepaid, to Vernon B. Romney, Attorney General, State Capitol Building, Salt Lake City, Utah 84114, on this 27th day of August, 1976.

EILEEN BRONSON, Secretary