

2009

Utah v. Eric Leon Butt, Jr.: Brief of Appellant

Utah Court of Appeals

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ORIGINAL

IN THE UTAH STATE COURT OF APPEALS

STATE OF UTAH,

Appellee,

v.

ERIC LEON BUTT, JR.,

Appellant.

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Appeal No. 20090655

OPENING BRIEF OF APPELLANT

ON APPEAL TO THE UTAH COURT OF APPEALS FROM A
DECISION OF THE SEVENTH JUDICIAL DISTRICT COURT

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UTAH APPELLATE COURTS

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V.)

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IN THE UTAH STATE COURT OF APPEALS

STATE OF UTAH,)	
)	
Appellee,)	
)	
v.)	
)	Appeal No. 20090655
ERIC LEON BUTT, JR.,)	
)	
Appellant.)	

JURISDICTION

UT. CODE ANN. §78A-4-103(3) and UT. R. APP. P. 3(a) provide this Court with jurisdiction over this appeal from the *Minutes Jury Trial Sentence, Judgment, Commitment* entered on July 20, 2009 (the “**Judgment**”) by the Seventh Judicial District Court, San Juan County, State of Utah.

**CONSTITUTIONAL AND STATUTORY PROVISIONS, STATEMENT OF
ISSUES PRESENTED ON APPEAL, AND STANDARD OF REVIEW**

ISSUE #1: *Was the evidence presented sufficient to establish the element of dealing harmful material to a minor beyond a reasonable doubt?*

STANDARD OF REVIEW: “We review the legal sufficiency of factual findings, . . . and ‘examine the conclusions of law arising from those findings under a correction-of-error standard, according no particular deference to the trial court.” Kimball v. Kimball, 2009 UT App 233, ¶14, 217 P.3d 733 (citations omitted). “The beyond a reasonable

doubt standard is a requirement of due process...” Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). “Constitutional issues, including that of due process, are questions of law reviewed for correctness.” Vigil v. Division of Child and Family Services, 2005 UT App 43, 107 P.3d 716, *citing* U.S.C.A. CONST.AMEND 14.

ISSUE #2: *Was the evidence presented sufficient to establish beyond a reasonable doubt that the “material” would be harmful to a minor?*

STANDARD OF REVIEW: “We review the legal sufficiency of factual findings, . . . and ‘examine the conclusions of law arising from those findings under a correction-of-error standard, according no particular deference to the trial court.” Kimball v. Kimball, 2009 UT App 233, ¶14, 217 P.3d 733 (citations omitted). “The beyond a reasonable doubt standard is a requirement of due process...” Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). “Constitutional issues, including that of due process, are questions of law reviewed for correctness.” Vigil v. Division of Child and Family Services, 2005 UT App 43, 107 P.3d 716, *citing* U.S.C.A. CONST.AMEND 14.

ISSUE #3: *Was the evidence sufficient to establish beyond a reasonable doubt that the alleged “material” would be “patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors” as required in UTAH CODE ANN. §76-10-1201(5)(a)?*

STANDARD OF REVIEW: “We review the legal sufficiency of factual findings, . . . and ‘examine the conclusions of law arising from those findings under a correction-of-error standard, according no particular deference to the trial court.” Kimball v. Kimball,

2009 UT App 233, ¶14, 217 P.3d 733 (citations omitted). “The beyond a reasonable doubt standard is a requirement of due process...” Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). “Constitutional issues, including that of due process, are questions of law reviewed for correctness.” Vigil v. Division of Child and Family Services, 2005 UT App 43, 107 P.3d 716, *citing* U.S.C.A. CONST.AMEND 14.

ISSUE #4: *Were Butt’s 5th Amendment rights violated when he was subjected to custodial interrogation at the jail absent his Miranda rights?*

STANDARD OF REVIEW: “The Utah Supreme Court has mandated that appellate courts review custodial interrogation determinations for correctness, giving no deference to the trial court’s decision.” *See State v. Levin*, 2006 UT 50, ¶¶42-43, 144 P.3d 1096. *State v. Doran*, 2007 UT App 119, ¶9, 158 P.3d 1140.

ISSUE #5: *Did the prosecutor or the trial court fail to adequately instruct the jury on the elements of the crime when it failed to instruct the jury as to which community standard applied?*

STANDARD OF REVIEW: “This court reviews the trial court’s jury instructions on elements of a crime under a correctness standard.” State v. Stevenson, 884 P.2d 1287, 1290 (Utah App.1994), *cert. denied*, 892 P.2d 13 (Utah 1995). However, jury instructions to which a party failed to object at trial will not be reviewed absent a showing of manifest injustice. UTAH R. CRIM. P. 19(c); State v. Perdue, 813 P.2d 1201, 1203 (Utah App.1991) *aff’d*, 900 P.2d 1093 (Utah 1995). Failure to give an elements instruction for a crime

satisfies the manifest injustice standard under Rule 19(c) and constitutes reversible error as a matter of law. State v. Jones, 823 P.2d 1059, 1061 (Utah 1991).

ISSUE #6: *Did the trial court err by failing to determine the material at issue was not the kind anticipated by UTAH CODE ANN. §76-10-1206 and, by this failure, further err by failing to determine the statute was unconstitutionally vague?*

STANDARD OF REVIEW: “Constitutional challenges to statutes present questions of law, which we review for correctness.” State v. Ansari, 2004 UT App. 326, ¶5, 100 P.3d 231 *citing* Provo City Corp. v. Thompson, 2004 UT 14, ¶5, 86 P.3d 735. “Additionally, ‘legislative enactments are presumed to be constitutional,’ and ‘those who challenge a statute or ordinance as unconstitutional bear the burden of demonstrating its unconstitutionality.’” State v. Green, 2004 UT 76, 99 P.3d 820 *citing* Greenwood v. City of N. Salt Lake, 817 P.2d 816, 819 (Utah 1991); *see also* State v. MacGuire, 2004 UT 4, ¶8, 84 P.3d 1171. “[V]agueness questions are essentially procedural due process issues...” *Id. citing* State v. Morrison, 2001 UT 73, ¶13, 31 P.3d 547 (citation and quotation omitted).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

- A. UTAH CONST. ART. I §§7 and 12
- B. U.S. CONST. AMEND. XIV
- C. UNITED STATES CONST. AMEND. V and VI
- D. UTAH CODE ANN. §76-10-1206

STATEMENT OF THE CASE

On November 26, 2008, Eric Leon Butt, Jr., (“**Butt**”) was charged by *Information* with two (2) counts of Dealing in Harmful Material to a Minor, both third-degree felonies, in violation of UTAH CODE ANN. §76-10-1206(1). R0001-0002. On December 15, 2008, Butt pled not guilty to the charges. R0014. Also on this same date, the preliminary hearing was held, whereat the trial court inferred from the evidence that there was a sexual connotation in regards to the material that was inappropriate and harmful. R0015. The trial court ordered Butt to be bound over for trial. R0017.

Trial was held on July 15, 2009. R0026. Butt submitted the statutory definition of “harmful to minors,” the statute setting forth the elements of Dealing in Harmful Material to Minors, and the statutory definition of prurient interests using community standards as jury instructions. R0043-0045. Butt further submitted the following instructions:

To find that the Defendant attempted to distribute material harmful to a minor you must find that he intentionally took a substantial step to distribute it. If you find that the Defendant’s actions in addressing a letter to his wife, that he knew would be screened by correctional officers, were intended to create a filter that would screen materials that others might find inappropriate, then you must find him not guilty.

As a juror in this case you are required to utilize the perspective of the average person and in the process put aside your own particular tolerance or lack thereof of the material in question. You must apply the community standard without you [sic] own sensitivities so coloring your perspective as to render the notion of a community standard meaningless.

The state has the burden of proving beyond a reasonable doubt that the material has violated the community standard. If any particular juror determines that he or she cannot arrive at a community standard, or determines that one does not exist, then that juror must acquit.

R0046-0048.

On July 15, 2009, the jury found Butt guilty on both counts of Dealing in Harmful Material to a Minor (the “**Verdict**”). R0050. Butt waived the time for sentencing and the trial court sentenced Butt to 0-5 years for each offense, to be served concurrently but consecutively to Butt’s present sentence (the “**Sentence**”). R0070. On August 11, 2009, Butt timely filed his *Notice of Appeal*.

STATEMENT OF FACTS

A. Testimony of Alan Freestone.

Alan Freestone (“**Freestone**”) has been a deputy sheriff for San Juan County for eighteen years. Tr. at p. 49. Freestone is the jail commander responsible for the operations of the jail and has held this position for eight to nine (8-9) years. *Id.* Freestone testified concerning a mailbox on the wall in the jail that the inmates have access to during the day in which they deposit their letters. *Id.* The inmates may also place letters in the window of the blocks they are in, which officers will pick up at night. Tr. at pp. 49-50. The graveyard shift removes the mail from the box and processes the mail, whereby they log it into the computer under the inmate’s name and indicate to whom the mail is addressed. Tr. at p. 50. Incoming mail is opened and logged the same way. *Id.*

Butt was in San Juan County Jail on November 14, 2008, and November 17, 2008. *Id.* Freestone received a photocopy of a letter written by Butt from Corporal Black (“**Black**”), who indicated in a note to Freestone his concern about the type of material being sent out in the mail by Butt. Tr. at p. 51. However, Black had only photocopied the letter and had let it proceed through the jail’s mail process. *Id.* Freestone testified he was

also concerned after looking at the letter so, “I went to the outgoing mail and retrieved that letter for investigation.” *Id.*

Freestone identified State’s Exhibit 2, which had Butt’s name and address in the San Juan County Jail in the upper left hand corner (the “**First Letter**”). *See*, State’s Exhibit 2. This letter is addressed to Cammy Butt, Butt’s wife. Freestone opened the letter, which had previously been inspected by the jail as evidenced by the taping on the right hand side. Tr. at p. 52. Freestone cut the tape to get the original letter and to review it. *Id.* Freestone filled out a confiscation slip on the letter, notified Butt it was being confiscated, and informed him that Freestone was contacting the county attorney. Tr. at p. 55. Freestone testified he spoke with Butt concerning the letter on November 14, 2008, and advised him the letter was being confiscated. Tr. at p. 56. Freestone also advised Butt that the reason for confiscation was listed as “contained material to a minor child that is considered harmful.” *Id.* Freestone testified Butt admitted the letter was his, thought Freestone was blowing things about out of proportion, and that this was the way he joked around with his kids. *Id.* Freestone testified Butt had said his daughter requested the picture of himself. *Id.* Freestone testified he asked Butt why he would send a hand-drawn naked picture of himself to his five (5) year old daughter, and Butt said because his daughter requested it. Tr. at p. 61.

Freestone next spoke with Butt on November 17, 2008, in reference to another letter Butt had deposited in the mail box. *Id.* Freestone then identified State’s Exhibit 1, which has Butt’s name and address in San Juan County Jail and addressed to Cammy Butt (the “**Second Letter**” and collectively, the “**Letters**”). Tr. at p. 62. Freestone

testified he became aware of the Second Letter in the same manner as the First Letter. *Id.* Freestone testified that jail policy provides that all outgoing mail has to indicate it is mail of the San Juan County Jail, a complete address and the name of the inmate, and the inmate's name/number on the envelope. Tr. at p. 63.

Freestone testified he again met with Butt on November 17, 2008, and indicated to him the Second Letter had been confiscated. Tr. at p. 64. Freestone testified he again expressed his concern about Butt sending this type of picture to his five (5) year old daughter. Tr. at p. 65. Freestone testified the picture shows Butt naked holding a small child to his mouth, with balloons that read, "Oh, your butt tastes so good," and "Ouch daddy, don't bite so hard, giggle, giggle." *Id.* Freestone testified Butt told him it's a game him and his daughter play, that he bites her and tickles her. *Id.*

Freestone testified the picture was addressed to Butt's daughter, Sage, and there was no indication Butt did not know who Sage was. *Id.* Freestone also testified there was no indication Butt did not know who Kade was. *Id.* Freestone testified Butt admitted the Letters were produced by him. Tr. at p. 66. Freestone testified that, when he spoke to Butt about the Letters, they spoke about Sage and Kade in terms of them being Butt's daughter and son. *Id.*

Freestone testified that, once inmates drop off their mail, the inmates cannot retrieve it. *Id.* Freestone testified that, once the mail is in the jail's mail box, the mail is considered sent. Tr. at pp. 66-67. Freestone testified he reviews the record of the mail inmates send out. Tr. at p. 67. Freestone testified that, when he went to retrieve the First

Letter, he retrieved it from the front office of the jail. Tr. at p. 68. Freestone testified the Letters were addressed to Cammy Butt. *Id.*

B. Motion to Suppress.

Outside the hearing of the jury, Corrections Officer Martha Johnson (“**Johnson**”) was examined as a witness to ascertain whether a *Miranda* warning was necessary when Butt was interviewed in the San Juan County Jail. *See*, Tr. at pp. 70-85. Johnson had been a corrections officer for eighteen (18) years. Tr. at p. 85. Johnson testified she had a conversation with Butt about the ages of his children. *Id.* Johnson testified the conversation took place in November of 2008. Johnson testified she asked Butt about the ages of his children because Freestone had requested she do so. Johnson testified that, later on, she became aware of letters Butt had written. Tr. at p. 88. Johnson testified she did not read Butt his *Miranda* rights before questioning him. Tr. at p. 89.

At this point, counsel for Butt requested Freestone and Johnson’s testimony be suppressed based upon their failures to advise Butt of his *Miranda* rights. Tr. at p. 90. The trial court determined the following:

So I think the standard has to be exactly the same standard as it is if someone is out on the street. Are they going to consider that they are under arrest for this thing you’re asking about, and if they are, then you have to give them the warning. If they’re actually under arrest, or if they – a reasonable person would think they’re under arrest for this, you have to give them the warning.

In this case, they are nowhere near that point. There was no accusatory questioning. It doesn’t appear that he was brought in and put under the lights or brought into an office and forced to visit there. It appears that the officers went to where he was and just asked him a question without telling they thought he was lying.

So I don't think a *Miranda* warning was required here. It wasn't a custodial interrogation. I'll note its interesting we're having all this discussion when we probably could find lots of witnesses who could testify as to the ages of his children. There may be someone in the courtroom right now. If that's the only reason for Martha Johnson to testify, I wonder why we have to have the issue arise at all.

Tr. at p. 92.

C. Testimony of Martha Johnson.

Johnson testified she had occasion to speak with Butt concerning his children's ages. Tr. at pp. 93-94. Johnson testified Freestone asked her to ask Butt what the names and ages of his children were, which he indicated were Sage, his daughter, five (5) years old, and Kade, his son, eight (8) years old. Tr. at p. 94. Johnson testified she was asked to do this sometime in the winter months of November or December. Tr. at p. 95. Johnson testified she either placed her note indicating Butt's children's ages in Freestone's box or handed it directly to Freestone, and she did so on the same day she questioned Butt. *Id.*

D. Motion for Directed Verdict.

Counsel for Butt requested a directed verdict, arguing the State failed to make a prima facie case. Tr. at p. 97. Butt argued the State failed to establish the age of the minor. *Id.* Butt further argued the State failed to meet the criteria of showing "that the material, taken as a whole, appeals to the prurient interests of the minor, or is patently offensive to prevailing standards in the adult community, what is not taken as a whole has serious value for minors." *Id.* Butt argued the material anticipated under the harmful material statute did not apply to the instant case and relied upon the United States Supreme Court Case *Miller*, which indicates the material has to be "hard core" types of

conduct. Tr. at p. 98. *Miller* was adopted by State v. Taylor, 644 P.2d 439 (Utah, 1983). *Id.* Butt argued the statute anticipated hard core pornography and the State had an additional burden of establishing what the community standards were. Tr. at p. 99. Butt requested the trial court to find that the material in the instant case was not the kind anticipated by the harmful material statute or, alternatively, that it find the harmful material statute unconstitutionally vague. Tr. at pp. 99-100.

The State argued the material, taken as a whole and whether it is patently offense to prevailing standards in the adult community as a whole, was a question for the jury. Tr. at p. 100. The State argued it had made a prima facie case. Tr. at p. 101. Butt argued that, for the material to patently offensive, the State had to have hard core pornography. Tr. at p. 102. Butt relied on Taylor in arguing the material was not hard core pornography and could not fall under the prurient interest section. *Id.*

In its denial of Butt's Motion for Directed Verdict, the trial court stated the following:

[I]t's obvious to me that the standard for what you can legally show an adult is very different from what you can legally show a minor...So, to argue that *Miller v. California* defines what can be harmful to minors is a complete non-starter with me. I think I have to deny the motion for a directed verdict and allow the jury to decide – I think there's good law that you don't have to have an expert on community standards. The jurors themselves, when you have eight of them, are certainly capable of being aware of what community standards are and applying those standards.

There's adequate instruction in the statute and which the Court will give as to the boundaries for determining what crosses the line. So I'm denying the motion for directed verdict.

Tr. at pp. 103-104.

E. Testimony of Eric Butt.

Butt was arrested on September 20, 2008, and resided in the San Juan County Jail until January 30, 2009. Tr. at p. 105. Butt testified that his arrest leading up to jail was for two (2) theft by receiving stolen properties and two (2) theft of services, charges wholly unrelated to the instant case. *Id.* Butt testified that he did send the Letters, addressing them to his wife, Cami. Tr. at p. 106. Butt testified he tried to write his family every day because he missed them and it was the first time they had been apart for quite some time. *Id.* Butt testified he had frequent contact with his family, speaking with them on the phone a couple of times a week, and having visits. *Id.* Butt testified his family still visited him, which includes his wife and children. *Id.*

Butt testified he drew the picture because his daughter asked for him to draw it. Tr. at p. 107. Butt testified they had watched a documentary on cave dwellings and his daughter asked him to draw a picture of himself “like on the cave walls.” *Id.* Butt testified they had watched this documentary earlier in the Summer. *Id.* Butt testified his daughter had asked why the people in the documentary were naked, and he had responded that it was just how they did it back then. Tr. at p. 108. Butt testified the drawings in the documentary depicted the male penis. *Id.* Butt testified he did not have any sexual intent in drawing the picture; Butt testified he did not intend for it to arouse his daughter, himself, or anyone else. *Id.*

Butt testified he knew his wife would see it and, since she reads everything to the kids, he figured she would get a laugh out of it and think “[i]t’s a pretty pathetic

drawing.” Tr. at p. 109. Butt testified the way the letter comes out of the envelope is the way he placed it in originally. *Id.*

Concerning the Second Letter, Butt testified the reason for the drawing in it involved a tickling game he played with his daughter. Tr. at p. 110. Butt testified he would tickle her stomach and, if she rolled over he would say, “[r]oll back over or I’m going to bite your butt cheek.” *Id.* Butt testified that, once he said this, she would roll back over. *Id.* Butt testified it was just a game that his daughter laughs and giggles through it. *Id.* Butt testified the Second Letter was not intended to arouse his daughter, himself, or anyone else. Tr. at p. 111.

Butt testified he would cover himself if his daughter came in while he was showering. *Id.* Butt testified he does not shower with his daughter. Tr. at pp. 111-112. Butt testified that, since his daughter and son used to take baths together, she probably saw her brother’s penis, and nothing in the Letters would have caused her alarm. Tr. at p. 112.

Butt testified that, although the sections of the Letters are segregated for when his wife read the letter aloud to the children, it was his intention for the children to see the pictures. Tr. at p. 113. Butt testified he was not hiding anything from his children or else he would not have sent them. *Id.* Butt testified the picture would not be appropriate for a ten (10) or twelve (12) year old girl but, due to his daughter’s innocence, it would have been nothing to her. Tr. at p. 114. Butt testified that, until an adult explains otherwise, children do not think that way. *Id.* Butt testified the Second Letter was meant as a joke

and his daughter would understand it, especially since she would know that “butt” does not taste “good.” Tr. at p. 115.

F. The Jury Instructions.

The trial court determined that the State was required to prove all three (3) of the subsections of the harmful material statute. Tr. at p. 120. Without objection by either counsel, the trial court stated the State would have to prove the following:

For something to be harmful to minors, it has to, ‘Taken as a whole, appeal to the prurient interest in sex of a minor, be patently offensive to prevailing standards in the adult community and as a whole with respect to what is suitable material for minors, and taken as a whole, not have any serious value for minors.’

Tr. at p. 120. The trial court also allowed the definition of “prurient” to be included. Tr. at pp. 122-123. The Instructions defined “prurient” as “marked by or arousing an immoderate or unwholesome interest or desire.” Tr. at p. 124.

The trial court stated, “I’d like to give the instruction on utilizing the perspective of the average person, and the community standard. That’s I think, what the law is.” Tr. at p. 123. The trial court continued as follows:

So I’m just going to add three instructions. The elements offense from the State, the defense’s definition of harmful to minors, and then adding as another definition the definition of prurient from Merriam-Webster, and then an instruction that says, “As a juror in this case, you are required to utilize the perspective of the average person, and in the process put aside your own particular tolerance or lack thereof of the material in question. You must apply the community standard without your own sensitivities so coloring your perspective as to render the notion of a community standard meaningless.”

Tr. at p. 124. Counsel herein found the State’s definitions of the statutory terms to be acceptable. *Id.*

Counsel herein did not object to the community standard as defined by the trial court; however, counsel did object to the trial court refraining from instructing the jury that, if any particular jury determines that he or she cannot arrive at a community standard or determines that one does not exist, then that jury must acquit, as found in Taylor. Tr. at pp. 124-126. The trial court, in noting the objection, stated, “I don’t think you have to keep repeating, ‘If you don’t find one of the elements you vote to acquit.’ We say that one time. That’s the truth, and you can mention as much as you want in your argument[.]” Tr. at p. 127.

G. The Verdict and Sentence.

The jury found Butt guilty on both counts of dealing in harmful material to a minor and a poll of the jurors determined their Verdict to be unanimous. The trial court pronounced sentence on the same date of the trial and Verdict, sentencing Butt to 0-5 years for each offense, to be served concurrently but consecutive to his present sentence. Tr. at p. 158.

SUMMARY OF ARGUMENT

“No person accused in the United States may be convicted of a crime unless each element of the offense has been proven beyond a reasonable doubt.” State v. Reyes, 2005 UT 33, ¶11, 116 P.3d 305. “A person is guilty of dealing in material harmful to minors when, knowing ... a person is a minor, ... the person intentionally: (a) distributes...to a minor...any material harmful to minors[.]”UT. CODE ANN. §76-10-1206(1). The State failed to produce sufficient evidence on the elements that Butt distributed harmful

material to a minor beyond a reasonable doubt. Such failure contradicts Butt's conviction. *See, Reyes* at ¶11.

"Distribute" is defined by statute as, "to transfer possession of materials whether with or without consideration." UTAH CODE ANN. §76-10-1206(3). To convict a defendant of *attempted* dealing in material harmful to a minor, the State has to prove that, knowing the person at issue is a minor, the defendant "intentionally took a substantial step to distribute to a minor any material harmful to minors. *State v. Hopkins*, 2009 UT App 165, ¶2, ---P.3d---.

In the instant case, Butt did not commit any substantial step to "distribute" the material to a minor, as that term's ordinary and accepted meaning implies. To convict him of distributing harmful material to a minor, the State must prove the Butt *intentionally* took a substantial step towards distributing the material to his daughter, which he did not do. UT. CODE ANN. §76-10-1206(1).

The State further failed to prove beyond a reasonable doubt the material at issue was "harmful." The Letters are not patently offensive to prevailing standards in the adult community. Under *Miller v. California*, our U.S. Supreme Court describes patently offensive material as hard core sexual content as it applies to the test for obscenity for adults. *Ibid.*, 413 U.S. 15, 27, 93 S.Ct. 2607 (U.S. Cal. 1973). The Letters do not depict hard core sexual conduct. As testified to at trial, the reason Butt drew the first picture was because of his daughters' request after watching a documentary on cave dwellers, and he drew the second picture because of the tickling game he plays with his daughter. Neither

of these drawings were patently offensive or displayed any type of hard core sexual conduct.

Additionally, the State failed to demonstrate beyond a reasonable doubt that the material was patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors. No evidence at trial was introduced indicating the Letters were patently offensive, which is the State's prerogative; however, the jury should have relied upon the average person's view from their community for making this determination. Furthermore, as discussed herein, the Letters were not patently offensive; hence, the Letters could not have offended the prevailing standards in the adult community, as a whole, with respect to what is suitable for minors. Additionally, the Harmful Materials Statute is vague as it applies to this case. The material in this matter was not the kind anticipated by the statute at issue, as it forbids, as a whole, hard core sexual conduct that is patently offensive.

U.S. CONST. AMEND. V. and UT. CONST. ART. 1, §12 indicates that a defendant shall not be compelled in any criminal case to be a witness against himself. This Court has held, "...the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." State v. Hayes, 860 P.2d 968, 971 (Utah App.,1993) *citing* Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). This Court has held the custody factors as found in Mirquet are inadequate to determine whether an incarcerated suspect is in custody for *Miranda* purposes. *See, State v. Swink*, 2000 UT App. 262, ¶10, 11 P.3d 299.

Hence, Swink determined, “[f]or persons incarcerated at the time of interrogation, the custody question generally turns on the ‘added imposition’ analysis outlined in Cervantes.” *Id. citing Id.* at 428 (further citations omitted.)

In U.S. v. Cadmus it was determined as follows:

Furthermore, the coercion inherent in custodial interrogation derives in large part from the knowledge of the accused that he cannot escape his interrogator, and that the questioning can continue until the desired answer is obtained. *See Miranda*, 384 U.S. at 468, 86 S.Ct. at 1624; *see also Murphy*, 104 S.Ct. at 1145-46. In *Murphy*, the Court discussed the situation where “a suspect ... is painfully aware that he literally cannot escape a persistent custodial interrogator.” 104 S.Ct. at 1146. It would be hard to conceive of a situation where the accused was less able to escape his interrogator than in a prison setting. *Compare Berkemer*, 104 S.Ct. at 3149-50 (motorist stopped for traffic stop reasonably expects to be free to continue on his way in short order). Indeed, in this case, Cadmus had already spent seven days in detention. There was no way for him to know when he might at least be able to return to his home.

Ibid., 614 F.Supp. 367, 372 (D.C.N.Y.,1985).

As an inmate in the San Juan County Jail, Butt was clearly not free to leave. Swink at ¶11. However, Freestone and Johnson’s investigation of Butt placed further limitations on him than normal. *Id.* Johnson was acting as Freestone’s investigator to further determine Butt’s alleged criminal conduct – conduct Freestone clearly found so concerning he tracked down the First Letter from further processing – and any questioning should have been prefaced with the *Miranda* warning. Cadmus at 371-372.

Lastly, the incorrect community standard was relied upon in this matter. “Contemporary community standards” is defined as, “those current standards in the vicinage where an offense alleged under this part has occurred, is occurring, or will occur.” UT. CODE ANN. §76-10-1201(2). The Utah Supreme Court has determined:

Miller and subsequent cases also make clear the manner in which the community standards test is to be applied. The jury is to judge the material as the “average person” would judge the material. The primary concern with requiring a jury to apply the standard of “the average person, applying contemporary community standards” is to be certain that, insofar as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. *See Miller, supra; Mishkin v. New York*, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966); *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). The U.S. Supreme Court has stated:

This court has emphasized on more than one occasion that a principal concern in requiring that a judgment be made on the basis of “contemporary community standards” is to assure that the material is judged neither on the basis of the juror’s personal opinion, nor by its effect on a particularly sensitive or insensitive person or group.

Hamling v. United States, 418 U.S. 87, 107, 94 S.Ct. 2887, 2902, 41 L.Ed.2d 590 (1974). The Utah Supreme Court has approved jury instructions in pornography cases which incorporate these requirements that the jury look beyond their personal perspective to the community as a whole. *See, e.g., State v. Pierren*, Utah, 583 P.2d 69 (1978); *State v. International Amusements*, Utah, 565 P.2d 1112 (1977).

Contrary to the appellant’s analysis, the “average person” need not necessarily share the community consensus on what is obscene, but rather must be able to apply that community standard without his or her own sensitivities so coloring his perspective as to render the notion of community standard apart from the person’s own perspective meaningless. A juror must be able to utilize the perspective of the “average person,” and in the process put aside his or her own particular tolerance or lack thereof of the material in question.

State v. Taylor, 664 P.2d 439, 448-449 (Utah 1983). Accordingly, the jury in this matter was required to rely on the local current standards in the vicinage where Butt’s crimes occurred. UT. CODE ANN. §76-10-1201(2). The jurors were entitled to draw on their own knowledge of the views of the average person in their community to make the required

determination of whether Butt distributed harmful material to a minor. Summarily the errors in this matter amount to reversal below and any further action this Court deems appropriate and necessary.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT BUTT COMMITTED THE CRIMES BEYOND A REASONABLE DOUBT.

UT. CODE ANN. §76-10-1206 (1) states as follows:

A person is guilty of dealing in material harmful to minors when, knowing or believing that a person is a minor, or having negligently failed to determine the proper age of a minor, the person intentionally: (a) distributes or offers to distribute, or exhibits or offers to exhibit, to a minor or a person the actor believes to be a minor, any material harmful to minors;...[.]

The Utah Supreme Court has stated, “[t]his Court has in numerous cases stated that in presenting defenses in criminal cases a defendant does not bear the burden of persuasion. It is sufficient for acquittal that the evidence or lack thereof creates a reasonable doubt as to any element of the crime.” State v. Torres, 619 P.2d 694, 695 (Utah, 1980) *citing* State v. Wilson, Utah, 565 P.2d 66 (1977) (further citations omitted). This Court has held, “[g]enerally, the function of a reviewing court is limited to insuring that there is sufficient competent evidence as to each element of the charge to enable a jury to find, beyond a reasonable doubt, that the defendant committed the crime.” State v. Pearson, 1999 UT App. 220, ¶13, 985 P.2d 919 *citing* State v. James, 819 P.2d 781, 784 (Utah 1991) *quoting* State v. Warden, 813 P.2d 1146, 1150 (Utah 1991) (internal quotations omitted).

The Utah Supreme Court has held the following concerning the elements of the offense and the beyond a reasonable doubt standard:

No person accused in the United States may be convicted of a crime unless each element of the offense has been proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The Supreme Court has assigned this standard of proof constitutional status, linking it to both the Fifth Amendment right to due process of law and the Sixth Amendment right to a jury trial. *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *Winship*, 397 U.S. at 362, 364, 90 S.Ct. 1068. The degree of certainty of guilt that we insist be held by those entrusted with judging the fate of persons charged with crimes before we will permit the State to wield its power to punish is not only a measure of evidence, but also in a more fundamental sense a gauge of our nation's conscience. The measure of certainty the law demands before finding guilt reflects the balance we are willing to strike between ensuring that all of the guilty are brought to justice and preventing the conviction and punishment of the innocent.

State v. Reyes, 2005 UT 33, ¶11, 116 P.3d 305. Accordingly, this Court reviews “the legal sufficiency of factual findings, . . . and ‘examine the conclusions of law arising from those findings under a correction-of-error standard, according no particular deference to the trial court.’” Kimball v. Kimball, 2009 WL 2619225, *citing Cummings v. Cummings*, 821 P.2d 472, 476 (Utah Ct.App.1991).

In the instant case, Butt argues the evidence was insufficient on the elements of the Harmful Material Statute to convict him of the charges beyond a reasonable doubt. *See, Torres* at 695. As further detailed below, the State failed to produce sufficient evidence on the elements that Butt distributed harmful material to a minor beyond a reasonable doubt. Such failure supports overturn of Butt’s conviction. *See, Reyes* at ¶11. To allow the Verdict in this matter to stand allows for a lesser degree of certainty of guilt than the standard of beyond a reasonable doubt suggests, infringing upon Butt’s Fifth and Sixth Amendment rights. *Id.* The State has inappropriately wielded its power in this matter. The measure of certainty in this case reflects an imbalance of the prevention of

conviction and punishment of the innocent. *See, id.* Accordingly, as the evidence was insufficient to support the Verdict on several elements beyond a reasonable doubt, this Court must vacate the Verdict.

A. The evidence was insufficient to establish beyond a reasonable doubt the elements of Dealing in Harmful Material to a Minor.

“Distribute” is defined by UTAH CODE ANN. §76-10-1201(3) as, “to transfer possession of materials whether with or without consideration.” UTAH CODE ANN. §76-4-101 governs Attempting to Distribute Harmful Materials and states as follows:

For purposes of this part, a person is guilty of an attempt to commit a crime if he: (a) engages in conduct constituting a substantial step toward commission of the crime; and (b) (i) intends to commit the crime; or (ii) when causing a particular result is an element of the crime, he acts with an awareness that his conduct is reasonably certain to cause that result. (2) For purposes of this part, conduct constitutes a substantial step if it strongly corroborates the actor’s mental state as defined in Subsection (1)(b).

In State v. Hopkins, the Utah Court of Appeals discussed what must be proven to convict someone of attempting to deal harmful material to a minor and stated as follows:

To convict Hopkins of attempted dealing in material harmful to a minor, the State had to prove that knowing the person was a minor or “having negligently failed to determine the proper age of a minor,” *he intentionally took a substantial step to “distribute[] ... to a minor any material harmful to minors.” Id.* [UTAH CODE ANN. § 76-10-1206(1)(a), [UTAH CODE ANN. §] 76-4-101.

Ibid., 2009 UT App 165, ¶2 (emphasis added).

In the instant case, Butt dropped the letters *addressed to his wife* in the mail box that is provided for inmates at the San Juan County Jail. When Butt’s letters were discovered by jail officials, they were confiscated. Freestone told Butt he was concerned about the content of the letters, and that he believed such content would harm Butt’s

daughter. Butt testified he did send the Letters and addressed them *to his wife*. Butt testified he knew his wife would see the pictures and, since she reads everything to the kids, he figured she would get a laugh out of it, stating, “[i]t’s a pretty pathetic drawing.” Butt indicated he intended for his children to see the pictures. Tr. at p. 113.

Butt did not commit any substantial step to “distribute” the material to a minor, as that term’s ordinary and accepted meaning implies. He did not transfer the drawing directly to his daughter. UTAH CODE ANN. § 76-10-1201. He transferred the letters to his wife. Butt addressed the Letters *to his wife*, knowing each Letter would be screened by both corrections officials and his wife before his daughter ever saw it. He specifically mentioned the drawing to his wife in the Letters asking her whether it was appropriate to provide it to the daughter. To convict him of distributing harmful material to a minor, the State must prove he *intentionally* took a substantial step towards distributing the material to his daughter. UT. CODE ANN. § 76-10-1206(1). Butt did not complete any substantial step in distributing the Letters. Butt simply granted his daughter’s request—although he indicated to the mother that he was unsure why she had requested such drawings—and left it up to the mother as to whether his daughter would even be allowed to see the drawings. *See*, State’s Exhibit #2, the First Letter. He did nothing to intentionally transfer the Letters to his daughter. To intentionally transfer the letters to his daughter, Butt would have needed to address the letters directly to her thereby circumventing her mother’s review of such letters. This did not occur. He sent the letters to his wife and allowed her to determine whether the children could see the drawings.

Butt relinquished his possession of the Letters to another adult to whom the Letters were addressed. This is not a crime. He did not mail the Letters directly to his daughter, nor did he ensure she would have possession of the contents. Butt anticipated that his wife would preview the contents first and, if she did not feel the contents were appropriate, would not show the child the drawings. The Letters were directed and transferred to his adult wife. Accordingly, Butt's distribution of the material to another adult does not meet the elements for dealing harmful material to a minor as set forth in UTAH CODE ANN. §76-10-1206. The material was distributed to another adult, causing no violation of the law. The evidence was thus insufficient to establish Butt "distributed" harmful material to a minor beyond a reasonable doubt. *See, Pearson* at ¶13.

B. The evidence was insufficient to establish beyond a reasonable doubt that the "material" was such that it would be either harmful to a minor or appeal to a minor's prurient interests in sex.

UT. CODE ANN. §76-10-1201(5) defines "Harmful to minors" as follows:

(a) "Harmful to minors" means that quality of any description or representation, in whatsoever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it: (i) taken as a whole, *appeals to the prurient interest in sex of minors*; (ii) is *patently offensive* to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; *and* (iii) taken as a whole, *does not have serious value* for minors. (b) Serious value includes only serious literary, artistic, political or scientific value for minors.

(Emphasis added). "Material" is defined as, "anything printed or written or any picture, drawing, photograph, motion picture, or pictorial representation, or any statue or other figure, or any recording or transcription, or any mechanical, chemical, or electrical reproduction, or anything which is or may be used as a means of communication." UTAH

CODE ANN. §76-10-1201(7). Under subsection (10)(a) the term “Nudity” is defined as “the showing of the human male or female genitals, pubic area, or buttocks, with less than an opaque covering[.]”

In analyzing whether a work or expression may be subject to state regulation, our United States Supreme Court determined that the “[p]ermissible scope of regulation of any form of expression is confined to works which depict or describe sexual conduct, and that conduct must be specifically defined by the applicable state law, as written or authoritatively construed.” Miller v. California, 413 U.S. 15, 23-24. 93 S.Ct. 2606-2607, 2615. 37 L.Ed.2d 419 (1973). “A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Id.* The U.S. Supreme Court laid the following foundation in Miller for trial courts to determine whether an expression is subject to state regulations, which mimics the definition of “harmful material” found within our code, *supra*, at issue herein:

The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. 413 U.S. at 24-25, 93 S.Ct. at 2615 (citations omitted). In Miller, having recognized the difficulty in determining a constitutional provision distinguishing between a willing adult and a willing minor, the U.S. Supreme Court concluded as follows:

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.

Id., 413 U.S. at 27, 93 S.Ct. at 2616-2617 (citations omitted).

Our Utah Supreme Court has determined the following concerning “harmful material:”

The authority that we considered dispositive here and that reflects a legislative purpose to keep harmful materials away from minors simply because they are minors and where adults may not be affected because of maturity is *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). The Supreme Court in that case, quoting from another equally apposite case, *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 271 N.Y.S.2d 947, 218 N.E.2d 668 (1966), said:

[M]aterial 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 the 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.

“The statute before the Court in *Broderick* and extant at the time of *Ginsberg* is almost the same as that in our own state.” *State v. Burke*, 675 P.2d 1198, 1199-1200 (Utah 1984).

In *Jenkins v. Georgia*, the United States Supreme Court stated that, “[e]ven though questions of appeal to the ‘prurient interest’ or of patent offensiveness are ‘essentially

questions of fact, it would be a serious misreading of [Miller] to conclude that juries have unbridled discretion in determining what is ‘patently offensive.’” *Ibid.*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (U.S.Ga. 1974). Jenkins involved a movie theater showing a film that was alleged to be obscene, and which the U.S. Supreme Court determined was not obscene under the Miller standard, *supra*. Jenkins undertook the following analysis of the definition of “obscene material,” and also provided insight into the definition of “prurient interest,” which is not defined in the applicable Utah Code at issue herein:

‘Material is obscene if considered as a whole. applying community standards, its predominant appeal is to prurient interest, that is. a shameful or morbid interest in nudity, sex or excretion. and utterly without redeeming social value and if. in addition, it goes substantially beyond customary limits of candor in describing or representing such matters.

Id., 418 U.S. at 154-155.

Although our Utah Legislature opted not to define “prurient interests,” our appellate courts have sought to do so. The Utah Supreme Court indicated that “the definition of ‘prurient interest’ raises conceptual and definitional difficulties. . .[a]lthough contemporary community standards provide the legal point of reference for determining prurient interest, mere nudity or simple reference to or discussion of sex does not, as a matter of law, appeal to the prurient interest.” City of St. George v. Turner, 860 P.2d 929, 934 (Utah 1993). “A prurient interest in sex under the law is not the same as a candid, wholesome, or healthy interest in sex.” *Id.*, citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498, 105 S.Ct. 2794, 2798-99, 86 L.Ed.2d 394 (1985); State v. Bartanen, 121 Ariz. 454, 591 P.2d 546 *cert. denied*, 444 U.S. 884, 100 S.Ct. 174, 62

L.Ed.2d 113 (1979). “[W]hen determining whether a work appeals to the prurient interest, it must be judged as a whole, and not on the basis of its isolated parts.” *Id.*, citing Miller, 413 U.S. at 24; Roth v. United States, 354 U.S. 476, 489, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). “The context in which the sexual material is presented must also be considered.” *Id.*; see, Kois v. Wisconsin, 408 U.S. 229, 231, 92 S.Ct. 2245, 2245-46, 33 L.Ed.2d 312 (1972).

In the instant case, two drawings are at issue. The first depicted a crude drawing of Butt in the nude. See, State Exhibit #2. The Second picture shows Butt nude holding a small child to his mouth, with balloons that read, “Oh, your butt tastes so good,” and “Ouch daddy, don’t bite so hard, giggle, giggle.” See State’s Exhibit #1. Butt drew the picture in the First Letter because his daughter asked for it based upon a documentary on cave dwellings they had watched. Butt testified at trial he did not have any sexual intent in drawing the picture and he did not intend for it to arouse his daughter, himself, or anyone else. The reason for drawing the second picture was because of a tickling game he played with his daughter. Butt testified he would tickle her stomach and if she rolled over he would say, “[r]oll back over or I’m going to bite your butt cheek.” Butt testified at trial that the Second Letter was not intended to arouse his daughter, himself, or anyone else. The trial court allowed the definition of “prurient” to be included in the instructions to the jury. Tr. at pp. 122-123. The Instructions defined “prurient” as “marked by or arousing an immoderate or unwholesome interest or desire.” Tr. at p. 124.

While this Court will surely recognize the jury impliedly determined the Letters appeal to the prurient interest by its Verdict, the jury did not have unbridled discretion in

determining what is patently offensive. Jenkins at 160. The Letters were not such that they depicted a “shameful or morbid interest in nudity, sex or excretion,” or were “utterly without redeeming social value” or went “beyond customary limits of candor in describing or representing such matters.” Jenkins, *supra*, 418 U.S. at 154-155. Thus, the Letters do not meet the United States Supreme Court’s accepted definition of appealing to the “prurient interests.” However, Miller requires us to look to state regulations to determine whether the actions undertaken by Butt were considered a violation of those regulations or, in this case, the elements contained under UT. CODE ANN. §76-10-1206. However, the Letters at most are a crude depiction of nudity and, as a matter of Utah law, thus do not appeal to the prurient interest. Turner, *supra*. Additionally, the United States Supreme Court has all but guaranteed that no defendant will be subjected to prosecution for the exposure of obscene or harmful materials unless they depict or describe patently offensive ‘hard core’ sexual conduct. Miller, *supra*. Clearly the Letters do not rise to such in that they do not even depict *sexual* conduct, as argued further below, let alone anything that which would be considered “hard core” under the Miller standards.

In the instant case, no evidence was presented concerning the material’s “harmful” nature as implied by statute. Although the drawings contained in the Letters were most definitely material as defined under statute, the State has failed to show how such drawings appealed to the prurient interest in sex of minors, or how it is patently offensively to the standards of the community located in San Juan County, Utah, or in Salt Lake City, Utah, where the child resides. The State failed to show how such

drawings were harmful beyond a reasonable doubt to Butt's daughter. UT. CODE ANN. §76-10-1201(5).

The State has presented no evidence that meet the elements set forth in UT. CODE ANN. §76-10-1201(5). While the Letters may be construed as inappropriate by some standards, there was no evidence that they met the definition of "harmful material," which language under the Utah Code stems from Miller's analysis of what is considered obscene materials. The Letters did not meet either the state or federal courts' definitions of "prurient interest" and could thus not be considered "harmful material" with respect to the crime charged herein. Thus, Butt was unlawfully convicted on a standard below that of "beyond a reasonable doubt" and his conviction should thus be overturned.

C. The evidence was insufficient to meet the element beyond a reasonable doubt that the "material" would be "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors."

Many states have statutes prohibiting the exhibition, distribution, or sale to minors of material that is either "harmful to minors" or "obscene as to minors." The test in most laws is parallel to the current obscenity test for adults. *See*, ALA.CODE 1975 §13A-12-200.1; A.R.S. § 13-3501(1) (Arizona); 11 Del. C. § 1365; Florida Statutes § 847.001(3); Code, 16-12-102(1) (Georgia); Hawaii Revised Statutes § 712-1210(7); Idaho Code § 18-1514(6) (Idaho); Indiana Code § 35-49-2-2 (Indiana); V.A.M.S. 573.010(10) (Missouri) ("pornographic to minors"); Montana Code § 45-8-205(1) (Montana); NEB.REV.ST. § 28-807(6); N.C.G.S.A. § 14-190.13(1); NDCC, 12.1-27.1-02; GEN.LAWS 1956, § 11-31-10(b) (Rhode Island); SDCL § 22-24-27(4) (South Dakota); T.C.A. § 39-17-901(6)

(Tennessee); *U.C.A. 1953 § 76-10-1201(11) (Utah)*; 13 V.S.A. § 2801(6) (Vermont) (emphasis added). UT. CODE ANN. §76-10-1203(1) states what material or performance is pornographic and what of such material constitutes material that is harmful to minors. It states as follows:

(a) The average person, applying contemporary community standards, finds that, taken as a whole, it appeals to prurient interest in sex; (b) It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sadomasochistic abuse, or excretion; and (c) Taken as a whole it does not have serious literary, artistic, political or scientific value.

The United States Supreme Court has given two (2) examples of conduct that may constitute material that is patently offensive: “(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated: (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals.” Miller v. California, 413 U.S. 15, 27, 93 S.Ct. 2607 (U.S. Cal. 1973). Miller made plain that “no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct.” Jenkins, supra, at 160 citing Miller at 27. UT. CODE ANN. §76-10-1201(14) defines sexual conduct as:

[A]cts 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.

In the case of State v. Taylor, a case further detailed *post*, Miller is relied upon in its determination that, in part (b) of the Miller test for obscenity, the material would have to be “hard core” to be patently offensive. *See, State v. Taylor*, 664 P.2d 439, 448 (Utah

1983) *citing* Smith v. United States, 431 U.S. 291, 300-01, 97 S.Ct. 1756, 1763, 52 L.Ed.2d 324 (1977).

“Contemporary community standards” is defined as “those current standards in the vicinage where an offense alleged under this part has occurred, is occurring, or will occur.” UT. CODE ANN. §76-10-1201(2). The Utah Supreme Court has held that, “[t]he wording the statute clearly establishes a local standard as opposed to a statewide standard” according the statute’s plain language. State v. International Amusements, 565 P.2d 1112, 1113 (Utah 1977). International Amusements continued as follows:

A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a “reasonable” person in other areas of the law.

Id. at 1114, *quoting* Hambling v. U. S., 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

The United States Supreme Court has determined the following concerning community standards:

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the ‘prurient interest’ or is ‘patently offensive.’ These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether ‘the average person, applying contemporary community standards’ would consider certain materials ‘prurient,’ it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact

to draw on the standards of their community. guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national ‘community standard’ would be an exercise in futility.

Miller at 30.

In the instant case, the State failed to present any evidence to the prevailing standard in the adult community that would deem the Letters “patently offensive” except for Freestone’s own personal concern about them. Freestone testified he was concerned after looking at the letter so “I went to the outgoing mail and retrieved that letter for investigation.” *Id.* Freestone similarly testified concerning the Second Letter.

The factors for determining whether material or performance is pornographic are identical to determining whether material is harmful to a minor. *See*, UT. CODE ANN. §76-10-1203(1) and UT. CODE ANN. §76-10-1201(5). Obscenity will not be prosecuted unless it is patently offensive “hard core” sexual conduct Jenkins at 160 *citing Miller* at 27. The nature of the drawings in the Letters at issue herein would not be considered patently offensive to the adult community. The Letters do not depict hard core pornography, or even a sexual act. The drawings are merely crude stick figures attempting to depict nudity, but ***do not*** depict any sexual acts, masturbation, or lewdness. UT. CODE ANN. §76-10-1201(14).

The Letters depict simple stick figures that were drawn based upon a documentary watched by a father and daughter and based upon a game played by a father and daughter. Parents in Utah are allowed to accompany minors into R-rated movies depicting images of actual sex and nudity without fear of prosecution. It is axiomatic that

the Letters are completely harmless in comparison and depict only those things a child would see in books about the human anatomy, but in a much more crude and less decipherable manner.

The contemporary community standards to be applied in this matter was that of the vicinage wherein the offenses alleged occurred. UT. CODE ANN. §76-10-1201(2). The jurors in this matter were entitled to draw on his or her own knowledge of the views of the average person in their community for making this determination, just as he or she would be entitled to draw on his or her knowledge of the propensities of a reasonable person in other areas of the law. International Amusements at 1114. Miller determined a jury should rely on local standards of what the community would consider obscene. *Id.* at 26. The community standards throughout the State of Utah have been recognized by the Legislature to be diverse; hence, the triers of fact were asked to decide whether the average person, applying contemporary community standards, would consider the Letters patently offensive. *See, Miller* at 30. The average person would most likely not find the drawings patently offensive. Thus, the element respecting patent offense to the community standards could not be proven in this matter beyond a reasonable doubt and the conviction should thus be overturned.

II. APPELLANT'S FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS SUBJECTED TO CUSTODIAL INTERROGATION IN JAIL WITHOUT *MIRANDA*.

U.S. CONST. AMEND. V. and UT. CONST. ART. 1, §12 indicate that a defendant shall not be compelled in any criminal case to be a witness against himself. This Court has held, "...the prosecution may not use statements, whether exculpatory or inculpatory,

stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” State v. Hayes, 860 P.2d 968, 971 (Utah App.,1993) *citing* Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Such safeguards “...come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.” *Id.*, *citing* Rhode Island v. Innis, 446 U.S. 291, 300, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *see also* State v. Mirquet, 844 P.2d 995, 997 (Utah App.,1992) (“[a]s a matter of federal law, an individual’s right to the protections afforded in *Miranda* are triggered the moment the individual is subject to custodial interrogation.”). Mirquet further continues as follows:

We concluded [in *State v. Sampson*, 808 P.2d 1100 (Utah App.1990)] that Utah courts place “a great deal of emphasis on the form of the questioning” in assessing whether the defendant is in custody. *Id.* If questioning is “merely investigatory, courts have not found custody.” *Id.* (*citing* *State v. Kelly*, 718 P.2d 385 (Utah, 1986). However, the moment the questioning becomes accusatory “custody is likely and *Miranda* warnings become necessary.” *Id.* (*citing* *Carner*, 664 P.2d at 1170; *Kelly*, 718 P.2d at 391). The court identified the change from investigatory to accusatory questioning as happening when the ““police have reasonable grounds to believe that a crime has been committed and also reasonable grounds to believe that the defendant has committed it.”” *Id.* 808 P.2d at 1106 (*quoting* *Carner*, 664 P.2d at 1171).

State v. Mirquet, 844 P.2d 995, 998 (Utah App., 1992) (alteration to the original).

This Court has held the custody factors as found in Mirquet are inadequate to determine whether an incarcerated suspect is in custody for *Miranda* purposes. *See*, State v. Swink, 2000 UT App. 262, ¶10, 11 P.3d 299. Hence, Swink determined, “[f]or persons incarcerated at the time of interrogation, the custody question generally turns on the

‘added imposition’ analysis outlined in Cervantes.” *Id. citing Id.* at 428; (further citations omitted.) Swink held as follows:

In any *Miranda* analysis, whether the encounter occurs on the street, or within the walls of a correctional facility, we must consider whether the individual was “deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612. Since a prisoner in a correctional facility is obviously not free to leave the facility, we must look for “a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement,” or “some act which places further limitations on the prisoner.” *Cervantes*, 589 F.2d at 428. The *Cervantes* court offered the following four relevant considerations to be viewed from the perspective of a reasonable prisoner: (1) the language used to summon the inmate, (2) the physical surroundings of the interrogation, (3) the extent to which the inmate is confronted with evidence of his guilt, and (4) the additional pressure exerted to detain the inmate. *See id.*

Id. at ¶11. Swink determined that, since the questioning at issue was not part of an “extraordinary event” but was “part of the administrative procedures used when any individual is brought to the facility,” Swink was not deprived of his freedom of action in any significant way. *Id.* at ¶12. This was supported by, “[t]he only evidence of Swink’s guilt in committing the crime came from Swink himself. The purpose of the interview was to find out information that would assist the staff in housing Swink at the facility, not to present him with evidence of his culpability in the vehicle theft.” *Id.* at ¶13. Hence, Swink determined he was not subjected to any additional restraint when he made the incriminating statements and, after considering the totality of the circumstances, concluded a reasonable prisoner in Swink’s position would not feel that there were any additional impositions on his freedom relating the interview to a degree that would necessitate the interview be preceded by *Miranda*. *Id.* at ¶15.

The Fourth Circuit has stated the following:

A different approach to the custody determination is warranted in the paradigmatic custodial prison setting where, by definition, the entire population is under restraint of free movement. The Ninth Circuit has taken the position that “restriction” is a relative concept and that, in this context, it “necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement.” *Cervantes*, 589 F.2d at 428. Thus, the court looked to the circumstances of the interrogation to determine whether the inmate was subjected to more than the usual restraint on a prisoner's liberty to depart.

U.S. v. Conley, 779 F.2d 970 (4th Cir. 1985). Thus, a reconciliation of *Miranda* must be made in inmate cases. In U.S. v. Cadmus, it states as follows and sheds some further light on this issue:

The court in *Cervantes* rejected a per se rule that any investigatory questioning inside a prison requires *Miranda* warnings. 589 F.2d at 427. In determining that the questioning involved had not occurred while the defendant was in custody, the court in *Cervantes* held that an “added imposition on [the inmate’s] freedom of movement” is necessary to constitute “custody” within the principles of *Miranda*. *Id.* at 428. *See also Scalf*, 725 F.2d 1272 (adopting reasoning of *Cervantes*). Moreover, the courts analogized the interrogations involved to on-the-scene questioning. *Scalf*, 725 F.2d at 1276; *Cervantes*, 589 F.2d at 429. Recognizing that the Court in *Miranda* had explained that “[g]eneral on-the-scene questioning as to facts surrounding a crime ... is not affected by our holding.” 384 U.S. at 477, 86 S.Ct. at 1629, the courts in *Cervantes* and *Scalf* held that *Miranda* warnings were not required. This Court, however, does not find the reasoning of these cases persuasive.

Ibid., 614 F.Supp. 367, 370 (D.C.N.Y.,1985). Cadmus found, “that prison interrogation, whether by an investigator concerning prior potentially criminal conduct, or by a prison guard regarding prison crime immediately after its discovery, is custodial within the meaning of *Miranda*.” *Id.* at 371-372. In support of this determination, Cadmus continued:

A rule that persons in prison are in custody and must be advised of their rights prior to questioning is fully consistent with the logic underlying

Miranda and *Mathis*. *Miranda* established a prophylactic rule intended to ensure that suspects are not coerced into confessing. See *Berkemer*, 104 S.Ct. at 3147; see also *Henry*, 447 U.S. at 273-74, 100 S.Ct. at 2188. The rule was designed for situations believed to be intrinsically coercive and susceptible of abuse. See *Miranda*, 384 U.S. at 467, 86 S.Ct. at 1624 (“inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely”); see also *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 1144, 79 L.Ed.2d 409 (1984). Prison is certainly a “police dominated” surrounding that is inherently coercive. See *Berkemer*, 104 S.Ct. at 3150, 3150 n. 28. *Miranda* recognized the powerful psychological effect on a person confined, alone with his interrogator, which often induces the individual to reach for aid. 384 U.S. at 448-55, 86 S.Ct. at 1614-17. This powerful influence is certainly present when the individual is confined in prison. See *Henry*, 447 U.S. at 273-74, 100 S.Ct. at 2188. Furthermore, the coercion inherent in custodial interrogation derives in large part from the knowledge of the accused that he cannot escape his interrogator, and that the questioning can continue until the desired answer is obtained. See *Miranda*, 384 U.S. at 468, 86 S.Ct. at 1624; see also *Murphy*, 104 S.Ct. at 1145-46. In *Murphy*, the Court discussed the situation where “a suspect ... is painfully aware that he literally cannot escape a persistent custodial interrogator.” 104 S.Ct. at 1146. It would be hard to conceive of a situation where the accused was less able to escape his interrogator than in a prison setting. Compare *Berkemer*, 104 S.Ct. at 3149-50 (motorist stopped for traffic stop reasonably expects to be free to continue on his way in short order). Indeed, in this case, Cadmus had already spent seven days in detention. There was no way for him to know when he might at least be able to return to his home.

Id. at 372.

In the instant case, Freestone received a photocopy of a letter written by Butt from Black. Tr. at p. 51. Freestone testified he was concerned after looking at the letter so “I went to the outgoing mail and retrieved that letter for investigation.” *Id.* Freestone testified he spoke with Butt concerning the letter on November 14, 2008, and advised him the letter was being confiscated. Tr. at p. 56. Freestone next spoke with Butt on November 17, 2008, in reference to the Second Letter. *Id.* Freestone testified he became

aware of the Second Letter in the same manner as the First Letter. Tr. at p. 62. Freestone testified he indicated to Butt the Second Letter had been confiscated. Tr. at p. 64.

Johnson testified she had a conversation with Butt about the ages of his children. Tr. at p. 85. Johnson testified the conversation took place in November of 2008. Johnson testified she asked Butt about the ages of his children because Freestone had asked her to do so. Johnson testified Freestone did not tell her why to ask about Butt's children's ages until after she asked him. Tr. at p. 87. Johnson testified that, later on, she became aware of letters Butt had written. Tr. at p. 88. Johnson testified she did not read Butt his *Miranda* rights before questioning him. Tr. at p. 89. Johnson testified she asked Butt what the names and ages of his children were, which he indicated were Sage, his daughter, five (5) years old, and Kade, his son, eight (8) years old. *Id.* Johnson testified she either placed her note indicating Butt's children's ages in Freestone's box or handed it directly to Freestone and she did so on the same day she questioned Butt. Tr. at p. 95.

In its denial of Butt's Motion to Suppress in regards to *Miranda*, the trial court determined the following:

So I think the standard has to be exactly the same standard as it is if someone is out on the street. Are they going to consider that they are under arrest for this thing you're asking about, and if they are, then you have to give them the warning. If they're actually under arrest, or if they – a reasonable person would think they're under arrest for this, you have to give them the warning.

In this case, they are nowhere near that point. There was no accusatory questioning. It doesn't appear that he was brought in and put under the lights or brought into an office and forced to visit there. It appears that the officers went to where he was and just asked him a question without telling they thought he was lying.

So I don't think a *Miranda* warning was required here. It wasn't a custodial interrogation. I'll note its interesting we're having all this discussion when we probably could find lots of witnesses who could testify as to the ages of his children. There may be someone in the courtroom right now. If that's the only reason for Martha Johnson to testify, I wonder why we have to have the issue arise at all.

Tr. at p. 92.

As an inmate in the San Juan County Jail, Butt was clearly not free to leave. Swink at ¶11. However, Freestone and Johnson's investigation of Butt placed further limitations on him than normal. *Id.* Johnson was acting as Freestone's investigator to further determine Butt's criminal conduct – conduct Freestone clearly found so concerning he tracked down the First Letter from further processing – and because of this increased limitation, any questioning should have been prefaced with the *Miranda* warning. Cadmus at 371-372.

Miranda was intended to ensure suspects are not coerced into confessing as it was designed for situations believed to be intrinsically coercive and susceptible to abuse. *Id.* at 372. Butt was faced with such a situation by simply being in jail when he was questioned by Johnson. *See, id.* By being in jail, Butt would not have been able to “escape” his interrogators and the questioning would have continued until Freestone obtained the desired answers. *Id.* Butt resided in the San Juan County Jail from September 20, 2008, until January 30, 2009. Tr. at p. 105. He was questioned by Johnson in November of 2008. Clearly he would have been unable to avoid Freestone or Johnson because he resided in the jail. *See, Cadmus* at 372. He was in a situation that could have

caused abuse and been coercive simply because he was in jail and had no where else to go to avoid any questioning. Cadmus at 371-372.

However, should this Court remain unpersuaded by Cadmus, a *Miranda* warning was still required. Freestone was clearly investigating Butt for criminal conduct, a fact the trial court acknowledged stating, “[t]hat seems absurd to me. Of course [the deputies] were wondering whether he committed a crime.” Tr. at p. 78. The trial court continued, “They’ve looked at these drawings. They look offensive to them. They think a crime was committed. They may have even consulted the code book...but clearly, Deputy Freestone had it in his mind. ‘I think this may be a crime.’...They were seriously thinking yes, there was a crime.” Tr. at pp. 78-79

The record is silent as to precisely when Johnson questioned Butt in order to ascertain the ages of his children. However, the Letters were sent November 14 and 17, 2008, respectively, and the *Information* was filed on November 26, 2008. Freestone spoke with Butt upon the Letters’ discovery and, sometime before the filing of *Information*, Johnson obtained the necessary statement in order for the State to file charges. Such conduct necessarily requires a *Miranda* warning as Butt was clearly subjected to custodial interrogation without the privilege of being warned against self-incrimination. Hayes at 971. He was not informed that he did not have to answer Johnson’s questions if such responses could be used against him. *Id.*

Johnson subjected Butt to express questioning by asking him the ages of his children. This information was used to produce criminal charges. Furthermore, Freestone used Johnson to obtain the information he required for the State to file criminal charges

against Butt. Johnson's questions were accusatory because Freestone had reasonable grounds to believe crimes had been committed and reasonable grounds to believe Butt had committed them. Mirquet at 998. Therefore, a *Miranda* warning was required and in its absence, Butt was compelled to be a witness against himself in violation of his federal and state constitutional rights. U.S. CONST. AMEND. V. and UT. CONST. ART. 1, §12.

III. THE JURY UTILIZED THE INCORRECT COMMUNITY STANDARD.

"Contemporary community standards" is defined as "those current standards in the vicinage where an offense alleged under this part has occurred, is occurring, or will occur." UT. CODE ANN. §76-10-1201(2). The Utah Supreme Court has held that, "[t]he wording the statute clearly establishes a local standard as opposed to a statewide standard" according to the statute's plain language. State v. International Amusements, 565 P.2d 1112, 1113 (Utah 1977). International Amusements continued:

A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.

Id. at 1114 *quoting* Hambling v. U. S., 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

In its determination of "obscene" material, the United States Supreme Court determined the following:

The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, supra, 408 U.S., at 230, 92 S.Ct., at 2246, *quoting* *Roth v. United States*, supra, 354 U.S., at 489, 77 S.Ct., at 1311; (b) whether the work depicts or

describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607 (U.S. Cal. 1973). Miller further held:

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. *See Roth v. United States*, *supra*, 354 U.S., at 491-492, 77 S.Ct., at 1312-1313. *Cf. Ginsberg v. New York*, 390 U.S., at 643, 88 S.Ct., at 1282. If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then ‘hard core’ pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, Mr. Justice Douglas contends.

...

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the ‘prurient interest’ or is ‘patently offensive.’ These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether ‘the average person, applying contemporary community standards’ would consider certain materials ‘prurient,’ it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national ‘community standard’ would be an exercise in futility.

Id. at pp. 27-28. 30. Miller summarily reaffirmed “that obscene material is not protected by the First Amendment;” held. “that such material can be regulated by the States, subject to the specific safeguards enunciated above, without a showing that the material is

‘utterly without redeeming social value’;” and held, “that obscenity is to be determined by applying ‘contemporary community standards[.]’” *Id.* at pp. 36-37.

The Utah Supreme Court analyzed the question of whether a trial court must instruct the jury in a pornography case that if they are unable to determine a community standard they must acquit the defendant. State v. Taylor, 664 P.2d 439, 447 (Utah 1983). Taylor argued such an instruction is necessary as it requires the State to meet its burden of proving the existence and content of a community standard and because it ensure that convictions will only result where there exists a community standard sufficiently “knowable” to give a defendant prior notice of what the law commands or forbids. *Id.* at 448. Taylor cited to the Miller test of whether material may be prosecuted as obscene under the First Amendment. *Id.* Taylor continued as follows:

The phrasing of the *Miller* test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve. The *Miller* opinion indicates that patent offensiveness is to be treated in the same way. The fact that the jury must measure patent offensiveness against contemporary community standards does not mean, however, that juror discretion in this area is to go unchecked. Both in *Hamlin* and in *Jenkins v. Georgia*, 418 U.S. 153 [94 S.Ct. 2750, 41 L.Ed.2d 642] (1974), the Court noted that part (b) of the *Miller* test contained a substantive component as well. The kinds of conduct that a jury would be permitted to label as “patently offensive” in a §1461 prosecution are the “hard core” types of conduct suggested by the examples given in *Miller*.

Id. citing Smith v. United States, 431 U.S. 291, 300-01, 97 S.Ct. 1756, 1763, 52 L.Ed.2d 324 (1977). Taylor determined as follows:

Miller and subsequent cases also make clear the manner in which the community standards test is to be applied. The jury is to judge the material

as the “average person” would judge the material. The primary concern with requiring a jury to apply the standard of “the average person, applying contemporary community standards” is to be certain that, insofar as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. *See Miller, supra; Mishkin v. New York*, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966); *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). The U.S. Supreme Court has stated:

This court has emphasized on more than one occasion that a principal concern in requiring that a judgment be made on the basis of “contemporary community standards” is to assure that the material is judged neither on the basis of the juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group.

Hamling v. United States, 418 U.S. 87, 107, 94 S.Ct. 2887, 2902, 41 L.Ed.2d 590 (1974). The Utah Supreme Court has approved jury instructions in pornography cases which incorporate these requirements that the jury look beyond their personal perspective to the community as a whole. *See, e.g., State v. Pierren*, Utah, 583 P.2d 69 (1978); *State v. International Amusements*, Utah, 565 P.2d 1112 (1977).

Contrary to the appellant's analysis, the “average person” need not necessarily share the community consensus on what is obscene, but rather must be able to apply that community standard without his or her own sensitivities so coloring his perspective as to render the notion of community standard apart from the person's own perspective meaningless. A juror must be able to utilize the perspective of the “average person,” and in the process put aside his or her own particular tolerance or lack thereof of the material in question.

Id. at 448-449. Accordingly, *Taylor* held, “[t]he State does have the burden of showing that the material has violated the community standard.” *Id.* at 450. *Taylor* states, “If the State chooses, as is its option under U.C.A., 1953, §76-10-1203(3), not to put on expert testimony, or any evidence, as to the community standard, it assumes the risk of a juror's not being able to arrive at such a community standard and voting to acquit a defendant.”

Id. at 449-450. The Utah Supreme Court has upheld, “[w]e have previously held that the jurors themselves are to determine the community standards.” State v. Piepenburg, 602 P.2d 702, 708 (Utah, 1979) *citing* State v. Pierren, Utah, 583 P.2d 69 (1978).

In the instant case, the trial court stated, “I’d like to give the instruction on utilizing the perspective of the average person, and the community standard. That’s I think, what the law is.” Tr. at p. 123. The trial court continued:

So I’m just going to add three instructions. The elements offense from the State, the defense’s definition of harmful to minors, and then adding as another definition the definition of prurient from Merriam-Webster, and then an instruction that says, “As a juror in this case, you are required to utilize the perspective of the average person, and in the process put aside your own particular tolerance or lack thereof of the material in question. You must apply the community standard without your own sensitivities so coloring your perspective as to render the notion of a community standard meaningless.”

Tr. at p. 124.

Counsel herein did not object to the community standard as defined by the trial court; however, counsel did object to the trial court refraining from instructing the jury that, if any particular juror determines that he or she cannot arrive at a community standard or determines that one does not exist, then that jury must acquit, as found in Taylor. Tr. at pp. 124-126. The trial court, in noting the objection, stated, “I don’t think you have to keep repeating, ‘If you don’t find one of the elements you vote to acquit.’ We say that one time. That’s the truth, and you can mention as much as you want in your argument [.]” Tr. at p. 127.

In his Motion for Directed Verdict, Butt argued the statute anticipated hard core pornography and the State had an additional burden of establishing what the community

standards were. Tr. at p. 99. Butt requested the trial court to find that the material in the instant case was not the kind anticipated by the harmful material statute or, in its absence find the harmful material statute unconstitutionally vague. Tr. at pp. 99-100. The State argued the material, taken as a whole and whether it is patently offense to prevailing standards in the adult community as a whole, was a question for the jury. Tr. at p. 100. The State argued it had made a prima facie case. Tr. at p. 101.

The Instructions defined “prurient” as “marked by or arousing an immoderate or unwholesome interest or desire.” Tr. at p. 124. Butt also proposed the following for instructions to the jury:

In determining whether something appeals to prurient interests using community standards, you should consider if the material:

- (a) Stimulates sexual response.
- (b) The predominate theme is sex for sex’s sake.
- (c) Whether expert witnesses have established the prurient intent.
- (d) Whether surveys have established community standards.
- (e) Whether it is ‘patently offensive’ in its depiction of sexual conduct.
- (f) It lacks serious artistic, political, scientific or literary value.

R0045.

Accordingly, the jury in this matter was required to rely on the local current standards in the vicinage where Butt’s crimes occurred. UT. CODE ANN. §76-10-1201(2). The jurors were entitled to draw on their own knowledge of the views of the average person in their community to make the required determination of whether Butt distributed harmful material to a minor. International Amusements at 1114. For material to be obscene, it must depict or describe patently offensive hard core sexual conduct. Miller at 27. Whether the Letters were patently offensive was a question of fact for the jury in this

matter to decide. *Id.* at 30. While such determination has appeared to have occurred in this matter in light of the jury's verdict, the jury was required to draw on the standards of their community. *Id.*

Taylor further upheld the standard the jury in this matter should have relied on was the impact of the Letters on an average person. *Ibid.* at 448. Hence, the jury could not rely on their personal opinion or its effect on a particularly sensitive or insensitive person or group. *Id.* Accordingly, the jury was instructed "to utilize the perspective of the average person, and in the process put aside your own particular tolerance or lack thereof of the material in question. You must apply the community standard without your own sensitivities so coloring your perspective as to render the notion of a community standard meaningless." Tr. at p. 124.

However, the jurors were required to apply the community standard without applying his or her sensitivities affecting the outcome. Taylor at 449. The State had the burden of showing the Letters violated the community standard. *Id.* at 450. The State in this matter declined to evidence any kind of community standard, leaving the determination of the standard to the jury. *Id.* at Pipenburg at 708. The jury

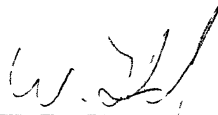
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was required to measure the Letters' patent offensiveness against contemporary community standards and, such juror discretion does not go unchecked. Taylor at 448. The community standard given to the jury should have included the kinds of conduct that amount to patently offensive, which are the hard core types of conduct given in Miller. Not simply stick drawings that are not hard core conduct or patently offensive. Therefore, as such was absent, the jury did not rely upon the proper community standard and error occurred.

CONCLUSION

WHEREFORE, based upon the foregoing, Appellant respectfully requests that this Court reverse the Judgment and in this matter and take any such further action as this Court deems necessary.

DATED this 10th day of November, 2009.



William L. Schultz
Attorney for Eric Leon Butt

CERTIFICATE OF MAILING

I hereby certify that on this 10th day of October, 2009, I mailed, first class postage prepaid, true and correct copies of the foregoing *Opening Brief of*

Appellant to:

Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

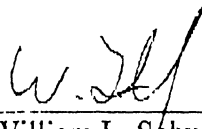
William J. H.

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CONCLUSION

WHEREFORE, based upon the foregoing, Appellant respectfully requests that this Court reverse the Judgment and in this matter and take any such further action as this Court deems necessary.

DATED this 14th day of November, 2009.



William L. Schultz
Attorney for Eric Leon Butt

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of October, 2009, I mailed, first class postage prepaid, true and correct copies of the foregoing *Opening Brief of Appellant* to:

Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

William J. G.

~Addendum A~

7TH DISTRICT COURT- MONTICELLO
SAN JUAN COUNTY, STATE OF UTAH

JUL 20 2009

CLERK OF THE COURT

Filed By: _____

STATE OF UTAH, : MINUTES
Plaintiff, : JURY TRIAL
 : SENTENCE, JUDGMENT, COMMITMENT
 :
vs. : Case No: 081700097 FS
ERIC LEON JR BUTT, : Judge: LYLE R. ANDERSON
Defendant. : Date: July 15, 2009

PRESENT

Clerk: mickiev

Prosecutor: CRAIG C HALLS

Defendant

Defendant's Attorney(s): WILLIAM L SCHULTZ

DEFENDANT INFORMATION

Date of birth: May 30, 1973

Audio

Tape Count: 9:11:18

CHARGES

1. DEALING IN MATERIALS HARMFUL TO MINOR - 3rd Degree Felony
Plea: Guilty - Disposition: 07/15/2009 Guilty
2. DEALING IN MATERIALS HARMFUL TO MINOR - 3rd Degree Felony
Plea: Guilty - Disposition: 07/15/2009 Guilty

ARRAIGNMENT

Defendant waives time for sentence.

TRIAL

COUNT: 9:11:18

Prospective jurors are welcomed and the first 16 are called, sworn, and questioned. Voir dire process is completed and the final jurors are sworn to the second oath. Jurors are admonished and excused and court continues outside the

presence of the jurors. Counsel and defendant are present. Mr. Halls states concerns regarding jurors knowing that the defendant was incarcerated at the time of this offense. Mr. Schultz states that he and his client are aware of this concern

and have no problem having it known to the jurors. Court is in recess 10:08:21 Court resumes and all members of the jury, counsel and defendant are present. Jury instructions and information are read.

COUNT: 10:30:

Mr. Halls gives opening statement. Mr. Schultz moves to exclude witnessess and all potential witnesses are excused from the

Case No: 081700097
Date: Jul 15, 2009

presence of the court. 10:43:49 Alan Freestone is called, sworn, and examined by Mr. Halls and cross-examined by Mr. Schultz.

COUNT: 11:11

Jurors are admonished and excused and court continues outside the presence of the jury. Mr. Schultz addresses court regarding statutory regulations determining the ages of the defendants children.

COUNT: 11:37

Deputy Martha A. Johnson is called, sworn, and examined by Mr. Schultz outside the presence of the jurors. Counsel moves court to suppress testimony of Ms. Johnson and to strike Mr. Freestone's testimony. Court denies request.

COUNT: 11:46

Jurors are brought back into the courtroom and all jurors are present. Mr. Halls cross-examines Ms. Johnson and Mr. Schultz re-directs. 11:51 Members of the jury are admonished and excused and court continues outside the presence of the jury.

Mr. Schultz makes a motion of prima facie and states reasons. Court denies motion for directed verdict. 1:01:30 Court resumes. Mr. Schultz waives opening statement. Eric Leon Butt Jr. is called, sworn, and examined by Mr. Schultz and cross-

examined by Mr. Halls. 1:20:18 Juors are excused and court continues outside the presence of the jury. Jury instructions are debated. 1:34:19 Court is in recess.

COUNT: 1:59:

Court is back in recession and all members of the jury, counsel and defendant are present. Additional jury instructions are read. 2:05:25 Mr. Halls and Mr. Schultz both give closing arguements.

2:30:50 Mr. Halls delivers final closing argument.

COUNT: 2:36

Bailiff oath is given and jurors are excused for deliberation. 3:53:48 Court is back in session. Counsel and defendant are present. Jurors are escorted back into the courtroom and all accounted for. The verdict is read, jurors are polled and excused.

COUNT: 4:00

Mr. Halls makes recommendations and Mr. Schultz states that his client would like to waive time for sentencing. Court sentences the defendant to 0-5 years in prison for each offense, to be served concurrently. These 2 counts are to be served

consecutively with the current prison sentencing. Defendant is remanded over to the Department of Corrections for transportation to the Utah State Prison where the defendant will be confined.

4:12:03 Court is in recess.

Case No: 081700097
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SENTENCE PRISON

Based on the defendant's conviction of DEALING IN MATERIALS HARMFUL TO MINOR a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of DEALING IN MATERIALS HARMFUL TO MINOR a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

COMMITMENT is to begin immediately.


To the SAN JUAN County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

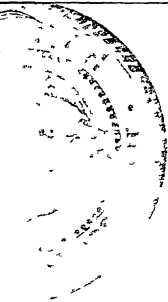
Counts 1 and 2 are to be served concurrently and are to be served consecutively with current prison sentence.

Date:

July 20, 2009



LYLE R. ANDERSON
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 081700097 by the method and on the date specified.

Encl

~~FAX:~~ DEPT OF CORRECTIONS

S.O. cert copy

Encl

~~FAX:~~ CRAIG C HALLS (435) 678-3330

Encl

~~FAX:~~ WILLIAM L SCHULTZ (435) 259-6194

Date: 7-20-09

Claire J

Deputy Court Clerk