

1982

State of Utah v. Robert Jordan, Jr. : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff and Respondent,)	
)	
-v-)	Case Nos.
)	
ROBERT JORDAN, JR. and)	18235 and 18236
TERRY FULLMER,)	
)	
Defendants and Appellants.)	

APPELLANTS' BRIEF

Appeal from Judgment of the Fourth Judicial District
Court in and for Utah County

Honorable J. Robert Bullock, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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ROBERT JORDAN, JR. and)	
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Defendants and Appellants.)	

APPELLANTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

Appellants appeal from convictions of violations of Section 76-10-1206.5 U.C.A. (1953) as amended. Appellants claim this statute is unconstitutionally overbroad and unconstitutionally vague in that the statute infringes on their rights to free speech under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 15 of the Constitution of the State of Utah. Appellants also claim that the physical evidence obtained from searches of the persons and property of the defendants was obtained in violation of the rights of defendants under the Fourth and Fourteenth Amendments to the United States Constitution, Article I, Section 14 of the Constitution of Utah, and Utah Code Annotated 76-10-1212. Trial was held in this matter before the Honorable J. Robert Bullock, sitting with our a jury, on December 9, 1981. The verdict of guilty was brought in by the Judge, after taking the matter under advisement,

on December 14, 1981, and the judgment and sentence was rendered on January 22, 1982.

DISPOSITION IN THE LOWER COURT

The case was tried to the Honorable J. Robert Bullock of the Fourth Judicial District Court of Utah, in and for Utah County, sitting without a jury. Defendants appeal from a judgment of guilty entered by Judge Bullock and from the evidentiary rulings made by the Judge.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the judgment and conviction and a declaration by this Court that Section 76-10-1206.5 U.C.A. is unconstitutional on its face and as applied to these defendants. In the alternative, appellants seek a remand to the District Court for retrial, with instructions to suppress all physical evidence obtained from defendants as a result of the unlawful search and seizure.

STATEMENT OF FACTS

Appellants are an unmarried couple who had lived together as husband and wife for some period prior to September 15, 1981. For about two years, defendants had been friendly with Holly Wilkerson (date of birth: January 8, 1966) and on occasions prior to this date they had told her of their interest in photography. Specifically, they had occasionally taken pictures of each other, and one or two other friends, in the nude. They had also told her that they had had some financial trouble and pawned their camera. The evidence at trial showed that during

the period of this relationship, up to and including September 15, 1981, Holly Wilkerson deliberately led defendants to believe that she was considerably older than she really was, out of fear that they would not consider her as close a friend if they knew her true age (T. 134-136). The effect of this evidence was controverted by the testimony of Judith Wilkerson, Holly's mother, who testified that she had told defendant, Terry Fullmer, either in late June or early July of 1980, that her daughter was, at that time, only fourteen (T. 143-144).

Sometime around the first of September, 1981, defendant Terry Fullmer, asked Holly Wilkerson if she could borrow Holly's Polaroid instant camera, and indicated that she would probably want to use it for some nude photography. There was also some discussion at that time as to whether Holly would be interested in posing in the nude, but apparently no decision was made. On September 15, Holly went to the home of defendants with her camera and was asked again if she would be interested in posing in the nude. She said she was willing, and various pictures were taken in which she, and each of the defendants, appeared nude, either separately or together (T.122-127). The State alleged that several of the pictures contained "simulated sex acts", but the Court appears to have made no ruling on that contention. The evidence was uncontroverted that no pressure of any kind was brought to bear on Miss Wilkerson to pose, that no actual sex acts took place involving her and either of the defendants on that date, and that no discussions were had concerning commercial use of the

photographs (T. 136-137).

On or about November 1, 1981, a search warrant was issued for the residence of defendants based upon information from a confidential police informant which resulted in the seizure of 265 photographs (T. 128-129), unexposed film, flash cubes, a cloth sack, and a General Electric color television set (T.85). Thirty of the photographs were offered and received as evidence over the objection of the defendants (T. 132-133). (Although the Court reserved ruling on the admissibility of the photographs as to defendant Jordan, in view of the Court's finding of guilty it is assumed that the Court received those exhibits as to Jordan as well.) As a result of that visit, a search warrant was obtained, and defendants were arrested and prosecuted under an Information which recited as follows:

The undersigned, Pete Hanson, under oath states on information and belief that the defendants committed the crimes of:

SEXUAL EXPLOITATION OF A MINOR, a second degree felony, at Utah County, Utah, on or about September 15, 1981, in violation of Section 76-10-1206.5, Utah Criminal Code, as amended, in that they, at the time and place aforesaid, knowingly and intentionally used, persuaded, induced or enticed Holly Wilkerson, a minor, to pose in the nude for the purpose of photographing, filming, recording, or displaying sexual or simulated sexual conduct.

Defendants were each convicted under that Information, and from those convictions, they appeal.

ARGUMENT

POINT I

SECTION 76-10-1206.5 U.C.A. IS INVALID ON ITS FACE AS AN UNCONSTITUTIONAL INFRINGEMENT OF THE RIGHT OF FREE SPEECH.

The 1979 session of the Utah Legislature passed Section 76-10-1206.5 as a part of a nation-wide drive to prohibit the use of minors in pornographic photographs and films. That section was amended by the 1981 Legislature to broaden the language so as to prohibit the photography of minors in the nude. That section reads as follows: (1981 amendments are underlined)

Section 76-10-1206.5. Sexual exploitation of minors.

(1) A person is guilty of sexual exploitation of a minor who knowingly employs, uses, persuades, induces, entices or coerces any minor to pose in the nude for the purpose of sexual arousal of any person or for profit or to engage in any sexual or simulated sexual conduct for the purpose of photographing, filming, recording or displaying in any way the sexual or simulated sexual conduct.

(2) Any person who photographs, films, or records in any way minors in the nude for the purpose of sexual arousal of any person or for profit or engaged in any sexual or simulated sexual conduct is guilty of sexual exploitation of a minor.

(3) Any person who displays, distributes, possesses for the purpose of distributing, or sells material depicting minors in the nude or engaging in sexual or simulated sexual conduct is guilty of sexual exploitation of minors.

(4) It is not a defense to this section that the person who is charged with sexual exploitation of a minor is parent, legal guardian or other person exercising legal control of the child who was the subject of the exploitation.

(5) A violation of this section is a felony of the second degree.

The Information under which defendants were charged and convicted appears to be a conglomeration of the new and old language in subparagraph (1). The exact nature of the conduct charged against these defendants, and that proven at trial, will be examined later.

For the present, however, it is sufficient to note that a finding that the defendants knowingly used a minor to pose in the nude for either the sexual arousal of any person or for profit, while photographing her, is enough to obtain a conviction for violation of this code section. Defendants contend that the broad language of the statute renders it invalid on its face, whether or not the conduct of these defendants could have been constitutionally proscribed by a narrowly drawn statute.

In the case of Doran vs. Salem Inn, Inc., 422 U.S. 930(1975), the United States Supreme Court affirmed a temporary injunction issued against enforcement of a town ordinance prohibiting topless dancing. Plaintiffs, who sought declaratory relief against the ordinance of a town in New York State, were the operators of three bars, dispensing alcoholic beverages and providing topless dancing as entertainment for its customers. The Court, in sustaining the injunction against enforcement of the ordinance, referred to its previous decision in California vs. LaRue, 409 U.S. 109(1972). That decision held that the powers of the states to regulate the sale of alcoholic beverages under the Twenty-first Amendment, outweigh any First Amendment interest in nude dancing and that a state can therefore ban such dancing in bars, under its power to license the dispensing of liquor. The Court, nevertheless, indicated preliminarily that it was proper to enjoin the enforcement of this law, because of its overbreadth. The Court observed:

In the present case, a challenged ordinance applies not merely to places which serve liquor, but to many other establishments as well. The District Court observed, we believe correctly:

"The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in 'any public place' with uncovered breasts. There is no limit to the interpretation of the term 'any public place'. It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the 'Ballet Africains' and a number of other works of unquestionable artistic and socially redeeming significance." 364F Supp., at 483.

We have previously held that even though a statute or ordinance may be constitutionally applied to the activities of a particular defendant, that defendant may challenge it on the basis of over-breadth if it is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court. As we said in Grayned vs. City of Rockford, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972):

"Because over-broad laws, like vague ones, deter privileged activity, our cases firmly establish Appellant's standing to raise an overbreadth challenge." 422 U.S. at 933.

Appellants in this case, then, clearly have the right to challenge the statute in question, even if the acts alleged by the State in this particular instance could be validly prohibited.

A long line of cases on both the State and Federal level have made it clear that photographs, movies and other forms of artistic expression, come within the purview of the First Amendment protection against infringement of free speech. Also, a long line of cases on the Federal level indicate that the Federal prohibitions against infringement of free speech apply to the States, under the Fourteenth Amendment. Utah, of course, has its own similar prohibition, in Article I, Section 15. The United

States Supreme Court has dealt with the question of what limits States may put on artistic expression in books, photographs and films, on several occasions. In Roth v. United States, 354 U.S. 476 (1957) the Court stated:

All ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - have the full protection of the (First Amendment) guarantees, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. 354 U.S. at 484

The Supreme Court, in that case, set standards under which the Court could ban production or distribution of books, photographs and films, as obscene. Those standards, however, were found to be difficult to apply, and the Court re-examined them and set more concrete standards in the case of Miller v. California, 413 U.S. 15 (1972):

State statutes designed to regulate obscene materials must be carefully limited. (citations omitted). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. 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.

The basic guideline 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, (citations omitted); (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. 413 U.S. at 23 through 24.

The Court went on to indicate that some freedom of definition was to be accorded to individual states, and to give examples of what a state might regulate, as follows:

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

(a) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated. (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. 413 U.S. at 25.

And, for one further clarification as to what types of materials could be excluded from the public, the Court stated thusly:

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. 413 U.S. at 27.

The Legislature of the State of Utah, then, has taken an act that was originally designed to protect minors against their use in pronography, and greatly expanded the types of material prohibited. This expansion makes the law unconstitutionally overbroad. The Court in Miller v. California clearly stated the standards of sexual conduct, the depiction of which may be prohibited, which standards do not exist in the law as modified by the 1981 Legislature.

How far the statute at issue here goes beyond the limits allowed by Miller v. California is illustrated by the definition of nudity contained in Section 76-10-1201 (6) U.C.A. (1953) as

amended. The definitions, as part of Title 76, Chapter 26, Part 12 of the Criminal Code, are meant to be used with all portions of that part. That section reads as follows:

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

Reading that definition into the statute renders the statute not only hopelessly overbroad, but absolutely ridiculous and foolish. The statute prohibits, on its face, even a parent from taking a picture of a three month old daughter wearing nothing but a diaper, and then submitting it to any kind of a photography contest where prizes (profit) are offered. To further illustrate the breadth of the statute, counsel for appellants purchased a greeting card during the month of April, 1982, in a Grand Central store in Salt Lake City. A copy of that greeting card is included in the Brief as appendix A. Obviously, the person on the first page of the greeting card is a female. If, as is only a guess, the child on the inside of the greeting card is also a female, "any person who displays, distributes, possesses for the purpose of distributing, or sells" this card in the State of Utah is guilty of a violation of the same act for which defendants have been convicted. Under this law, many uses of children in advertising, especially products for babies, would be banned in this state. That may not have been what the Legislature intended to accomplish, but that is the clear meaning of the act. In the 1968 case of Ginsberg vs. New York, 390 U.S. 629, the U.S. Supreme Court upheld a New York

State law which protected minors from the sale of books and magazines, including "girlie magazines", which were not obscene for adults. In doing so, the Court upheld the concept of "variable obscenity". In that case, the Supreme Court upheld a law prohibiting the sale to minors of pictures that were "harmful to minors" and had:

that quality of. . . representation . . . of nudity . . . (which) . . . (i) predominately appeals to the prurient, shameful or morbid interest of minors, and (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) is utterly without redeeming social importance for minors. 390 U.S. at 633.

The Court there, in effect, found that the State of New York was within its rights in defining pornography more broadly for minors, than for adults. The Court went on to say, however, that the New York State of Appeals had defined the term "harmful to minors" as "virtually identical to the Supreme Court's most recent statement of the elements of obscenity." 390 U.S. at 643.

The Ginsberg case was decided the same day as its companion case of Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676,⁽¹⁹⁾ While upholding the New York law, the Supreme Court struck down a Dallas City ordinance which prohibited a motion picture exhibitor from admitting children under 16 to films classified by a motion picture classification board as "not suitable for young persons." That term was defined in the ordinance as including films which described or portrayed:

Nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be,

in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest. 390 U.S. at 681.

The Court there found that definition to be unconstitutionally vague and quoted Judge Fuld in People vs. Kahan, 15 N.Y.2d 311, 258 N.Y.S.2d 391 (1965) in pointing out:

"It is, however, essential that legislation aimed at protecting children from allegedly harmful expression -- no less than legislation enacted with respect to adults -- be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application. 258 N.Y.S.2d at 393, 390 U.S. at 689.

What both statutes had in common was that they attempted to prohibit exposure of children to materials involving nudity in a way that was unfit for people of their age. Obviously, exposure to nudity itself, was insufficient, or the Court would have upheld the Dallas ordinance as well.

That children may not be protected from all nudity was made very clear and firm in a much later Supreme Court case, that of Erznoznik vs. City of Jacksonville, 422 U.S. 205 (1975). In that case, the City of Jacksonville, Florida, passed the following ordinance:

330.313 Drive-in theaters, films visible from public streets or public places. It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the city to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a class C offense.

The City of Jacksonville cited several grounds on which the ordinance could be upheld, despite admitting that it went "far beyond the permissible restraints on obscenity . . ." 422 U.S. 208. The Court found no merit in any of the grounds, including its attempts to protect children. The Court addressed this issue by saying:

Appellee also attempts to support the ordinance as an exercise of the city's undoubted police power to protect children. Appellee maintains that even though it cannot prohibit the display of films containing nudity to adults, the present ordinance is a reasonable means of protecting minors from this type of visual influence.

It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youth than on those available to adults. (citations omitted) Nevertheless, minors are entitled to a significant measure of First Amendment protection, (citations omitted), and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. (citations omitted).

In this case, assuming the ordinance is aimed at prohibiting youth from viewing the films, the restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus, it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even to minors. (citations omitted) Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youth nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. 422 U.S. 212-214.

Clearly, the Legislature of the State of Utah has overstepped the bounds set by the U.S. Supreme Court in its attempts

to protect minors in this constitutionally protected area. Section 76-10-1206.5 U.C.A. is overbroad in its entirety, and must be invalidated in its entirety.

The Utah statute at issue here is one of many child pornography laws which have been enacted, mostly within the last three years. As of March, 1981, forty-six states had passed similar laws. (The material set forth herein as to the survey of various state laws was obtained primarily from the brief of Herald Price Fahringer, Paul Cambria and Barbara Davies Eberal, dated March, 1981, and submitted to the New York Court of Appeals in the case of People vs. Ferber, to be discussed later. Most of the information, with the exception of case law, contained therein about laws of other states has not been independently verified by counsel.) In addition, Congress passed a Sexual Exploitation of Children law in 1978. The federal law punishes anyone who "employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct . . ." and who then transports the material in interstate or foreign commerce. (18 USCS Section 2251). The federal requirement that the conduct be sexually explicit is defined in 18 USCS Section 2253 to parallel the requirements for obscenity as set forth in Miller vs. California. Twenty-five of the forty-six states enacting child pornography laws have similar definitions of sexual performance, limiting such laws in their effect to material that is legally obscene. Of those states that did not

have obscenity requirements, none had yet been upheld as valid by their state's highest court, as of March, 1981. Two of the twenty-one state statutes not requiring sexual explicit conduct of the sort outlined in Miller vs. California have been struck down. The Texas law was declared unconstitutional in Graham vs. Hill, 444 F.Supp.584 (W.D.Tex. 1978). In that case, the owner and manager of a movie theater and bookstore sued in Federal Court for injunctive and declaratory relief from Section 43.25 of the Texas Penal Code which provided, in part, as follows:

(a) A person commits an offense if, knowing the content of the material, he sells, commercially distributes, commercially exhibits, or possesses for sale, commercial distribution, or commercial exhibition any motion picture or photograph showing a person younger than seventeen years of age observing or engaging in sexual conduct.

The Court, in ruling that section unconstitutional, referred to several of the cases cited by appellants above, and then stated:

It is apparent that the statute could be applied to a variety of works which, taken as a whole, very plainly would not be the type of 'hard core' pornography referred to in the Supreme Court's opinion in Miller. 444 F. Supp. at 592.

In light of the total failure to require that the material proscribed by Section 43.25 be obscene, the Court cannot avoid the conclusion that the statute clearly is overbroad and that its deterrent effect on protected conduct is both real and substantial, especially considering the severe sanctions for violation of the statute. 444 F.Supp. at 593.

The New York State Child Pornography Law includes two parallel sections which read as follows:

Section 263.10 N.Y. Penal Law (McKinney) Promoting an obscene sexual performance by a child. A person is guilty of promoting an obscene sexual performance by a child when knowing the character and content thereof, he

produces, directs or promotes any obscene performance which includes sexual conduct by a child less than sixteen years of age.

Section 263.15 Promoting a sexual performance by a child. A person is guilty of promoting a sexual performance by a child when knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.

While no attack has been made against the constitutionality of Section 263.10, Section 263.15 has been declared unconstitutional by two Courts. In St. Martins Press, Inc. vs. Carey, 440 F.Supp. 1196 (S.D. N.Y. 1977) the publisher of a book to be used by parents for educating their children about sex filed an action for declaratory judgment in Federal Court. That Court issued a preliminary injunction against the enforcement of the ordinance with regard to the book published by plaintiff, saying that there was a serious question as to whether the state law was overbroad in its application. That case was reversed on appeal in St. Martins Press, Inc. vs. Carey, 605 F.2d 41 (2nd Cir, 1979) and plaintiff's Complaint was dismissed, on procedural grounds only, without reaching the merits of the overbreadth contention.

That same New York law was once again attacked and declared unconstitutionally overbroad in the case of People vs. Ferber, 52 N.Y. 2d 674, 439 N.Y.S.2d 863 (1981). The New York Court of Appeals found the State's interest in protecting minors from harmful performances was insufficient to overcome the First Amendment issues involved, and explained its holding by saying:

By the same token the effect on freedom of expression is the same whether the government bluntly seeks to censor what it finds offensive, or more benignly acts

to protect the health and welfare of the performers. Thus, no matter what the government's objective, First Amendment standards remain applicable whenever the effect of a government regulation is to curtail protected modes of expression. 439 N.Y.S.2d at 865.

In short, the statute discriminates against films and other visual portrayals of non-obscene adolescent sex solely on the basis of their content, and since no justification has been shown for the distinction other than special legislative distaste for this type of portrayal, the statute cannot be sustained.

We merely hold that those who present plays, films, and books portraying adolescence cannot be singled out for punishment simply because they deal with adolescent sex in a realistic but non-obscene manner. 439 N.Y.S.2d at 866.

The statute struck down in the Graham and Ferber cases were less all-inclusive than the statute here in Utah. Where exactly the line may properly lie between First Amendment rights and the State's interest in protecting children has not yet been fully decided. In fact, the United States Supreme Court has accepted the New York case for argument, and that case may yet be overruled. There is little doubt, however, that the line is well short of the overbroad provisions of the Utah Act.

The same legislative session that passed the statute at issue here also passed Section 76-10-1229 U.C.A. (1953) as amended. That section states, in part, "No person, including a franchisee, shall knowingly distribute by wire or cable any pornographic or indecent material to subscribers." Indecent material is defined by Section 76-10-1227 U.C.A. (1953) as amended, which was passed by the 1979 Legislature. Indecent material is defined as either "description or depictions of illicit sex or sexual immorality" or "nude or partially denuded figures". This act was enjoined by

the Federal District Court for the District of Utah before it went into effect. On January 12, 1982, that statute was declared unconstitutionally overbroad and the injunction was made permanent by Judge Bruce Jenkins in the case of Home Box Office, Inc. vs. Wilkinson, Civil No.C81-0331J (D.Utah1982).Some of Judge Jenkins' comments are appropriate to review here:

Construing Section 76-10-1229 according to the fair import and even the plain meaning of its terms, it becomes readily apparent that it seeks to deal with the subject matter beyond hard-core pornography -- to go beyond Miller -- and to do so without any of the safeguards mandated by Miller.

For example, through the definitions adopted by reference from Section 76-10-1227(2), 'nude or partially denuded figures' are encompassed within the reach of Section 76-10-1229(4), it is well settled that nudity falls within the protection afforded by the First Amendment, Jenkins vs. Georgia, 418 U.S. 153, 161 (1974); Schad vs. Mt. Ephriam, 452 U.S. _____, 101 S.Ct. 2176 (1981), even when viewed by minors. Erznoznik vs. City of Jacksonville, 422 U.S. 205, 213 & n.10 (1975). To that extent, the statute is clearly encroaching upon protected expression in an unconstitutional manner and is facially defective. pg. 12

A court must look at the context of the material in the manner specified by Miller. Yet under Section 1229(4) sex and unprotected obscenity are made synonymous. It is elementary that merely calling something obscene doesn't make it so. Merely labeling something indecent doesn't make it so.

Counsel for the State argues that such a broad extension of legislative authority heretofore proscribed areas may be justified by the State's interests in protecting children, and that materials accessible to children should be governed by standards more strict than the Miller standards. Cf. Ginsberg vs. New York, 390 U.S. 629 (1968)

While in Ginsberg vs. New York, the Supreme Court adopted a variation of the then current test of obscenity announced in Roth vs. United States, supra, and Memoirs vs. Massachusetts, 383 U.S. 413 (1966) (plurality opinion) counsel cites no case in which the

court has had opportunity to consider that issue in light of Miller. See Erznoznik vs. City of Jacksonville, supra, 422 U.S. at 213 n.10. Since Ginsberg, the Court has expressed the view that 'minors are entitled to a significant measure of First Amendment protection', see Tinker vs. Des Moines School Dist., 393 U.S. 503 (1969), and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them . . . Erznoznik vs. City of Jacksonville, supra, 422 U.S. at 212-213. pg. 13.

Section 76-10-1229(1) and (4) is unconstitutionally overbroad as to minors. It is unconstitutionally overbroad as to everyone. pg. 14.

Even though many of us may not approve or enjoy the forms of expression that occur along the borderline that has been drawn by the United States Supreme Court, we tolerate them. pg. 22.

Like the statute struck down by the Federal Court last January, this statute is unconstitutionally overbroad as to everyone. The State Legislature does not have the power to protect minors, or anyone else, from constitutionally protected freedom of expression simply by calling it "indecent", and does not have the power to prohibit the conduct sought to be prohibited in Section 76-10-1206.5. This Court has no choice but to declare the statute unconstitutionally overbroad on its face and to reverse the convictions of defendants herein.

POINT II

SECTION 76-10-1206.5 U.C.A. IS INVALID ON ITS FACE AND AS APPLIED TO THESE DEFENDANTS AS AN UNCONSTITUTIONAL INFRINGEMENT UPON THEIR RIGHT TO PRIVACY.

As indicated above, the Act at issue, in its original form, was intended to fight the commercial and sexual exploitation of minors. Most of the case law dealing with matters at issue have to do with commercial production and dissemination of allegedly

sexual materials. In this case, the conduct which took place was between friends, in the privacy of the home of defendants, and was not done for commercial use or profit. While no direct evidence was introduced to the effect that anyone involved was "sexually aroused", it would appear from the Court's rulings that a finding of sexual arousal was made by the Court. It is clear that the decision to pose for the pictures was made voluntarily by the minor involved (T.136-137). The United States Supreme Court had occasion to rule on the right to privacy regarding possession of alleged pornographic material in the case of Stanley vs. Georgia, 394 U.S. 557 (1969). The defendant in that case was convicted for possession of obscene matter, and argued that a state may not punish mere private possession of obscene matter. The Supreme Court agreed, and commented:

This right to receive information and ideas, regardless of their social worth (citations omitted) is fundamental to our free society. Moreover, in the context of this case -- a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home -- that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted government intrusions into one's privacy. 394 U.S. at 564.

He is asserting the right to read or observe what he pleases -- the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from State inquiry into the contents of his library. Georgia contends that Appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess . . . but we think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties granted by the First and Fourteenth Amendments. Whatever may be the justifications for

other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. 394 U.S. at 565.

Admittedly, this case differs from the Stanley case in that the acts complained of here involve more than one person, one of whom is a minor. It appears, however, that the minor herself may be constitutionally protected when engaging in private conduct in the home of a friend, as much as the defendants may, in their own home. It appears quite clear that minors, at least under some circumstances, are entitled to guarantees of free speech, much as adults are. In Tinker vs. Des Moines School District, 393 U.S. 503 (1969) the United States Supreme Court held that high school students, aged 13, 15, and 16, were entitled to First Amendment protection against a school district rule which prohibited them from wearing arm bands to protest the war in Vietnam. In Gambino vs. Fairfax County School Board, 564 F.2d 157 (4th Cir. 1977) high school students were granted an injunction against their school board, prohibiting the interference of the school board with their publication of an article about birth control in a school newspaper. In the case of Shanley vs. Northeast Independent School District, Bexar County, Texas, 462 F.2d 960 (1972) the Court invalidated a school board policy prohibiting the dissemination of an unofficial "underground" student newspaper which was published and distributed off campus, but only to students.

It should be noted here once again that the statute under which Appellants were convicted prescribes the same penalties for a parent or legal guardian of a child who photographs his nude child, as for a stranger. This is in contrast to Section 76-10-1206 which prohibits distributing harmful material to a minor, and exempts parents or legal guardians from its prohibitions. It is the contention of Appellants herein that the statute is also overbroad in that it prohibits acts done between consenting people in the privacy of their homes, which do not amount to the promotion of obscenity; and also that it interferes illegally with the relationship of a parent to his child. Returning once again to the Tinker case, the Southern California Law Review in its analysis of the case, found it to be one in which the state was prohibited from unwarranted interference in the family relationship. In describing the Tinker matter as a family rights case, the Law Review found that:

The students' decision to wear arm bands, according to the Court, was reached at a meeting of both adults and students, and the petitioners' parents concurred in the decision. In those circumstances the students' rights to advocate a particular position gains considerably more strength, having behind it not merely the weight of childish ratiocination and commitment, but also the support of parental counsel on which the students quite justifiably are entitled to rely. It is not merely 'a symbolic battle between adults, each using children as sacrificial pawns,' for the children do have an interest in the matter. But that interest is inextricably bound up in familial ties: it is the right to be brought up, and to behave despite state objection, in a way that parents have experienced and found valuable. 51 S.Cal. L.Rev. 769 at 784.

Other Courts have also been faced with attempted State interference in the relationships of parents with their children,

and other minors in their home. Courts in several states have not only found that state prohibitions against serving alcohol to minors did not apply to either parents or those who have had minors as guests in their home. In the case of People vs. Martell, 16 N.Y.2d 245, 264 N.Y.S.2d 913, (N.Y. 1965), the New York Court of Appeals had occasion to construe a state statute which made guilty of a misdemeanor a person who "sells or gives away, or causes or permits or procures to be sold or given away to any child actually or apparently under the age of eighteen years any alcoholic beverages as defined by the Alcoholic Beverage Control Law", 16 N.Y.2d 246 at 247. The defendant in that case has served alcoholic beverages to four children under the age of eighteen years several times over a period of six months. She contended that the statute did not prohibit private acts done in her home, despite the literal language. The Court sidestepped the issue of the constitutionality of a prohibition on such private activities, by saying:

We need not go to the question of whether a statute would be constitutional which made criminal the service of alcoholic beverages, in a residence, to the children of the house or to guests under eighteen years of age. This appeal can be disposed of by simply holding that subdivision three of Section 484 cannot reasonably be read as making criminal such dispensing of drinks in the home. 16 N.Y.2d 246 at 248. See also People vs. Bird, 138 Mich. 31, 100 N.W. 1003 (Mich. 1904) and State vs. Hammons, 59 W.Va. 475, 53 S.E. 630 (W.Va. 1906).

The interest of parents in making decisions for their children was recognized by Ginsberg Court. The Court there found that the state's attempts to keep certain materials from children was done in support of that parental right. The Court stated:

First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' (citations omitted). The Legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for childrens' well-being are entitled to the support of laws designed to aid discharge of that responsibility. Indeed, subsection 1(f)(ii) of Section 484-h expressly recognizes the parental role in assessing sex-related material harmful to minors according 'to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.' Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children. 390 U.S. at 639.

The statute at issue here is overbroad and constitutionally invalid because it interferes with the right of privacy of both children and adults, and interferes with their freedom of expression. Moreover, it interferes with the relationship between parents and children, and is an unconstitutional infringement in an area where the state has no valid right to regulate.

POINT III

SECTION 76-10-1206.5 U.C.A. IS VOID FOR VAGUENESS.

As referred to in the Statement of Facts at the beginning of this Brief, the Information charged the defendants with using "a minor, to pose in the nude while simulating sexual conduct..." Arguments have been presented regarding the insufficiency of nudity as a grounds for suppression of the behavior. The State's position, of course, appears to be that the nudity in itself was a sufficient violation of the law to justify conviction. The Supreme

Court, in its Miller vs. California decision indicated that among the types of material that could be suppressed as obscene were "patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated." 413 U.S. at 25. Obviously, the restrictions put on the types of material to be prohibited in the Miller vs. California decision are tighter than those in the Utah Code. The point to be made here, however, is the additional requirement of the Miller vs. California case that the depiction not only be "patently offensive" but that it be of "sexual conduct specifically defined by the applicable State law." 413 U.S. at 24. The Utah Code does indeed define "sexual conduct" in Section 76-10-1201(7). Nowhere, however, does it define "simulating sexual conduct," the conduct charged here. At trial, when the prosecutor introduced thirty (30) photographs as evidence of the crime, counsel for defendant Jordan objected to the introduction of certain of the photographs, which did not appear to include sexual or simulated sexual conduct (T. 128). Counsel for defendant Fullmer did not join in that objection because of our contention that the charge of nudity was sufficient to invalidate the charges in their entirety. At any rate, counsel for both parties participated in separating those in which simulated sex acts might have occurred, and those in which no such acts could have occurred, because only one person was in those photographs. No admission was made by anyone representing the defense that any of the photographs did indeed show "simulated sexual conduct" (T.131). In our final argument,

it was our contention, and it remains our contention here, that the term "simulated sexual conduct" is one that does not exist in Utah law, and that defendants could not have known what conduct was proscribed, due to the lack of definition.

It is a settled rule of law that a statute written so vaguely that it does not set out a clear standard of the behavior prohibited is void as the denial of due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Constitution of Utah. That standard was set out, among other places, in Champlin Refining Company vs. Corporation Commissioner, 286 U.S. 210, 52 S.Ct.559 (1932) where the United States Supreme Court said:

In light of our decisions it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be no rule or standard at all. (citations omitted) 52 S.Ct. at 568.

In a Utah case involving the regulation of massage parlors, Jensen vs. Salt Lake City Board of Commissioners, 530 P.2d 3 (Utah 1974) this Court invalidated a county ordinance on the basis of vagueness:

The trial Court was of the opinion that the language of the ordinance was so vague and uncertain as to render it invalid. We conclude that the determination by the trial court was correct. A person who might wish to enter the field covered by the ordinance would be unable to determine from this wording what qualifications or skill would be necessary to qualify for a license. It is noted that the ordinance uses the term 'massage therapist' but nowhere is that term defined. 530 P.2d at 4.

In the instant case, sexual conduct is defined by Section 76-10-1201(7) as follows:

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

The undisputed testimony at trial was that there was no sexual activity between the minor and either of the defendants on the day in question (T.137). The definition of sexual conduct requires a 'touching' of certain parts of the body of another. One would have to assume that "simulated sexual conduct" might require a "simulated touching", but such a term is almost impossible to understand. If that term were construed to mean "almost touching" the situation is only made worse, for lack of guidelines as to how far away the two people could be, and still be "almost touching". The total lack of guidelines, along with the apparent difficulty in using a "common sense" approach to the meaning, renders the term "simulated sexual conduct" without meaning under the law. If this term does not have a precise meaning, as it would appear the United States Supreme Court has said it must, defendants cannot be held responsible for violating the statute prohibiting it.

Thus, even without the obvious overbreadth, the statute must fail for vagueness on its face, and as applied in the instant case. While there was some attempt at trial in this matter to separate those photographs which might have involved that conduct (simply because there was more than one person in the photograph) and those that could not have, no evidence was ever put on that the activity portrayed in any photograph was "simulated sexual

conduct" and the Court appears to have made no ruling thereon. For these additional reasons, the law must be invalidated and the charges dismissed.

POINT IV

AFFIDAVIT UPON WHICH SEARCH WARRANT WAS ISSUED WAS INSUFFICIENT TO SUPPORT THE ISSUANCE OF THE SEARCH WARRANT.

The Affidavit supporting the issuance of the search warrant in the present case was made by Officer Stewart Winn of the Orem City Police Department on the 3rd day of November, 1981. Paragraph 2 of said Affidavit recites as follows:

That in that capacity on or about the 3rd day of November, 1981, I received information from a confidential informant, whose code name is "Gorgo", that a quantity of nude photographs, commonly referred to as "child pornography" is being secreted at the address of 754 South 50 East, Orem, Utah County, Utah. The pornography is in the possession of Terry Fullmer, a white female and of Robert Jordan, a black male. The minor individual is a 15 year old female runaway by the name of Holly Wilkerson.

Further in paragraph 4, the Affidavit recites:

...They then showed him a stack of approximately fifty polaroid snapshots. They all showed Holly Wilkerson, Terry Fullmer and Robert Jordan engaging in, or simulating sex acts... (T. 3-4).

There was no representation in any of the allegations set forth in the Affidavit where the affiant states that he has seen the materials sought to be seized nor are the photographs described with particularity sufficient to give the Magistrate probable cause to believe the materials sought are pornographic.

Utah Code Annotated, Section 76-10-1212 provides procedural requirements which must be met prior to the issuance of a warrant

or the seizure of materials alleged to be pornographic. At Section 76-10-1212(1), the statute provides:

An affidavit for search warrant shall be filed with the Magistrate describing with specificity the material sought to be seized. Where practical, the material alleged to be pornographic shall be attached to the affidavit for search warrant so as to afford the Magistrate the opportunity to examine this material.

This Court considered the foregoing statute in State v. Piepenburg, 602 P.2d 702 where the defendant alleged that the issuing Magistrate must personally view the alleged pornography before a valid warrant could issue, 602 P.2d at 705. The Court ruled that a personal viewing of the alleged pornographic materials is not required where the police officer's affidavit and accompanying memorandum are sufficiently detailed to give the issuing Magistrate an opportunity to "searchingly focus" on the issue of obscenity.

In the present case, the Affidavit does not describe with particularity the nature of the materials sought to be seized. In fact, the affiant had not seen any of the photographs, but relied upon the conclusions of the confidential informant. Those conclusions constitute double hearsay in addition to their conclusory nature.

The United States Supreme Court has held a search warrant based solely upon conclusory assertions of a police officer to be constitutionally infirm. In Lee Art Theatre, Inc. vs. Virginia, 392 U.S. 636, two films were seized by authority of a warrant issued by a Magistrate on the basis of an affidavit which stated

only the titles of the films and the officer's conclusion that they were obscene based upon the officer's personal observation of the materials. At 392 U.S. 637, the Court stated:

However, we need not decide in this case whether the Justice of the Peace should have viewed the motion picture before issuing the warrant. The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the Justice of the Peace into the factual basis for the officer's conclusions was not a procedure "designed to focus searchingly on the question of obscenity", *id.* at 732, 81 S.Ct. at 1716, and therefore falls short of constitutional requirements demanding necessary sensitivity to freedom of expression.

It would not have been of value for the Magistrate to have made inquiry of the officer-affiant in the present case to determine the basis of his conclusions since the officer-affiant had not personally viewed the materials sought to be seized, but was only reporting the conclusions of a third party.

Such an affidavit fails to meet the requirements of Utah Code Annotated, 1953, as amended, Section 76-10-1212(1), as well as the procedures set forth in State vs. Piepenberg, *supra*, and the U.S. Constitutional requirements set forth in Lee Art Theatre, Inc. vs. Virginia, *supra*, and the evidence obtained by authority of the warrant issued in the present case should have been suppressed.

POINT V

THE WARRANT WHICH WAS ISSUED IN THE PRESENT CASE WAS CONSTITUTIONALLY DEFECTIVE SINCE IT DID NOT DESCRIBE WITH SPECIFICITY THE ITEMS SOUGHT TO BE SEIZED BUT LEFT THE DECISION TO DISCRETION OF THE OFFICERS EXECUTING THE WARRANT.

The search warrant issued for the seizure of materials in the present case describes the items to be seized as follows:

NOW, THEREFORE YOU AND EACH OF YOU are hereby directed to conduct an immediate search during the daylight hours of an apartment on the south side of the upper level of a red brick four-plex, further identified by the number 754 by the door, said apartment being located at 754 South 50 East Street, Orem, Utah County, Utah, for the presence therein of child pornography, and other evidence of sexual exploitation of a minor. (Emphasis added) (T. 6).

The decision concerning whether particular materials, in this case photographs, were pornographic and therefore subject to seizure, was left entirely to the discretion of the persons executing the search warrant. The warrant did not limit the seizure even to the photographs briefly described in the Affidavit as depicting "sex acts", but broadly authorized the seizure of "child pornography and other evidence of sexual exploitation of a minor", leaving to the mind and imagination of the police officers as to which items to seize.

The inventory of property taken by the authority of the warrant in this case indicates the extent to which the constitutional restrictions upon such searches may be abused by police officers when given such broad discretion. The officers seized a quantity of "assorted instant photographs" (actually 265 "nude" photographs only 30 of which pictured the juvenile and only ten of those which could be claimed to picture "simulated sexual conduct") , "unexposed 35 mm. film", "flash cubes", "cloth sack", "unexposed polaroid film" and a "General Electric color television set".

It is difficult to imagine what relevance unexposed film, a cloth sack and a television set would have to do with "child pornography or evidence of sexual exploitation of a minor". Further, the seizure of 265 photographs, the majority of which do not picture the minor at all, would appear to exceed even the broad discretion set forth in the warrant.

Such a warrant has been determined to be constitutionally defective. In Marcus v. Search Warrants of Property at 104 East Tenth Street, Kansas City, Missouri, et al., 367 U.S. 717, the Court considered a seizure by warrant of various magazines alleged to be obscene. The directions in the warrant as to items seized was "...to search the said premises...within 10 days after the issuance of this warrant by day or night, and...seize...(obscene materials) and take the same into your possession..." 367 U.S. 722.

Following an in depth review of the historical development of the law regarding the issues in this area, the Court concluded:

We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure non-obscene material the constitutional protection to which it is entitled. Putting to one side the fact that no opportunity was afforded the appellants to elicit and contest the reasons for the officer's belief, or otherwise to argue against the propriety of the seizure to the issuing Judge, still the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the Judge of any materials considered by the complainant to be obscene. The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complainant specified no publications, and left to the individual judgment of each of the many police officers involved in the selection of such

magazines as in his view constituted "obscene... publications".

... In consequence there were suppressed and withheld from the market for over two months, 180 publications not found obscene. The fact only one-third of the publications seized were finally condemned strengthens the conclusion that discretion to seize allegedly obscene materials cannot be confined to law enforcement officials without greater safeguards than were here operative. Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantee. 367 U.S. 731, 732. (Emphasis added)

Further, in Lo-Ji Sales, Inc. vs. New York, 442 U.S. 319, the Court, upon considering a similar warrant stated:

Based on the conclusory statement of the police investigator that other similarly obscene materials would be found at the store, the warrant left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The Fourth Amendment does not permit such action. 442 U.S. 325.

In the present case, where the officers executing the warrants were left totally to their own discretion in what items to seize, and where, in fact, they seized numerous items which were not obscene or related to "child pornography", the search was violative of the defendants' Fourth Amendment protections and the evidence obtained thereby should have been suppressed.

POINT VI

THE EVIDENCE SEIZED BY OFFICERS SHOULD HAVE BEEN SUPPRESSED FOR FAILURE OF THE STATE TO MEET THE REQUIREMENTS OF UTAH CODE ANNOTATED, SECTION 76-10-1212(3), REQUIRING A HEARING TO DETERMINE WHETHER THE MATERIALS SEIZED ARE, IN FACT, PORNOGRAPHIC.

Utah Code Annotated, 1953, as amended, Section 76-10-1212(3) provides:

In the event that a search warrant is issued and material alleged to be pornographic is seized under the provisions of this Section, any person claiming to be in possession of this material or claiming ownership of it at the time of its seizure may file a notice in writing with the Magistrate within ten days after the date of the seizure, alleging that the material is not pornographic. The Magistrate shall set a hearing within seven days after the filing of this notice, or at such other time as the claimant might agree. At this hearing evidence may be presented as to whether there is probable cause to believe the material is pornographic, and at the conclusion of the hearing, the Magistrate shall make a further determination of whether probable cause exists to believe that the material is pornographic. A decision as to whether there is probable cause to believe the seized material is pornographic shall be rendered by the Court within two days after the conclusion of the hearing. If, at the hearing the Magistrate finds that no probable cause exists to believe that the material is pornographic, then the material shall be returned to the person or persons from whom it was seized.

The defendant Jordan filed a Notice of Claim that Material Seized is not Pornographic on the 9th day of November, 1981, well within the ten day limitation of the statute (T.7). However, no hearing was held by the Magistrate as required, nor was any hearing ever held other than the trial which addressed the requirements of Section 76-10-1212(3).

This Court considered the above-cited statute in State vs. Piepenburg, supra, 602 P.2d 702, at 706, where the Court found that the defendant could not assert the failure to hold a Section 76-10-1212(3) hearing as error where he did not comply with the statute by filing the notice. In the present case, the notice was filed timely as provided by the statute.

The United States Supreme Court in Heller vs. New York, 413 U.S. 483, held that no right existed to a prior hearing to determine obscenity in all cases, but did recognize a right to a prompt judicial determination of obscenity issues after the seizure. In the present case, the procedures established to afford a prompt determination were not complied with and no determination was actually made prior to trial.

The failure of the State to comply with the statutory and constitutional safeguards required by Heller vs. New York, and Utah Code Annotated, 1953, as amended, Section 76-10-1212(3) constitutes a substantial denial of the Fourth Amendment rights of the defendants, especially in the present case where only a limited number of items seized could conceivably come within the perimeters of the statute under which the defendants were charged and where only a few of the materials seized were admitted as evidence at the trial. Defendants' Motion to Suppress Evidence should have been granted by the trial court.

CONCLUSION

The judgment and verdict of the trial court should be reversed because the law under which the defendants were convicted is unconstitutionally overbroad and unconstitutionally vague; and the law should be declared null and void. In the alternative, this Court should reverse the trial court on the grounds that the photographic evidence used at trial was illegally seized and

illegally held pending trial, and therefore should have been suppressed.

Respectfully submitted this 7th day of June, 1982.

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DELIVERY CERTIFICATE

I hereby certify that I delivered two true and correct copies of the foregoing Appellants' Brief to DAVID L. WILKINSON, Utah Attorney General, at 236 State Capitol Building, Salt Lake City, Utah, this 4 day of June, 1982.

Donna L. White

APPENDIX A







T.M.



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