1982

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

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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STATE OF UTAH Plaintiff and Respondent, vs. ROBERT JORDAN, JR. and TERRY FULLMER Defendants and Appellants,	:	Case Nos. 18235 and 18236

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APPELLANTS' REPLY BRIEF

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

Honorable J. Robert Bullock, Judge

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TABLE OF CONTENTS

Cases Cited

Page

Cases Cited

Page

Statutes and Constitutional Provisions Cited

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ADDITIONAL STATEMENT ON APPEAL

Since the filing by Appellants of their original brief in this matter, the United States Supreme Court has made a major ruling affecting, to some degree, the issues involved in the matter at hand. In addition to other cases relied on by Appellants in their original brief, we cited the New York Case of People vs. Ferber, 52 N.Y.2d 674, 439N.Y.S.2d 863 (N.Y. 1981) and other similar cases in which "child pornography laws" were struck down by various courts as being overbroad. As has been referred to at some length by Respondents, People vs. Ferber, was recently reversed by the United States Supreme Court in New York vs. Ferber, __U.S.__, 31 Cr.L.R. 3139 (1982). It is to further examine the New York vs. Ferber opinion, and answer other contentions made by Respondent, that Appellants file this reply brief.

ARGUMENT

POINT I

THE RECENT UNITED STATES SUPREME COURT CASE OF NEW YORK VS. FERBER DOES NOT AFFECT THE ARGUMENTS OF APPELLANTS THAT THE STATUTE AT ISSUE IS INVALID ON ITS FACT AS AN UNCONSTITUTIONAL INFRINGEMENT OF THE RIGHT OF FREE SPEECH.

The case of New York vs. Ferber, Supra:

> arose when Paul Ferber, the proprietor of a Manhattan bookstore specializing in sexually oriented products, sold two films to an undercover police officer. The films are devoted almost exclusviely to depicting young boys masturbating. Ferber was indicted on two counts of section 263.10 and two counts of section 263.15, the two New York laws controlling dissemination of child pornography. After a jury trial, Ferber was acquitted of the two counts of promoting an obscene sexual performance, but found guilty of the two counts under 263.15, which did not require proof that the films were obscene. 31 Cr.L. at 3140.

Mr. Ferber appealed his conviction to the Appellate Division of the New York State Supreme Court, which affirmed (72 A.D.2d 558, 424 N.Y.S.2d, 967) and then to the New York Court of Appeals, which reversed, holding that section 263.15 violated the First Amendment to the United States Constitution. The New York Statute at issue provides:

> 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.

The New York Court of Appeals found the statute unconstitutionally overbroad "because it prohibited the distribution of

materials produced outside the state, as well as materials, such as medical books and educational sources, which 'deal with adolescent sex in a realistic but non-obscene manner.'" 52 N.Y.2d 681. The United States Supreme Court granted the State's Petition for Certiorari for the purpose of presenting the single question:

> To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene? 31 Cr.L. at 3141.

In answering the question, the Court first sets out the line of cases previously discussed in Appellants' original brief in which the Court has held that "obscenity is not within the area of constitutionally protected speech or press." Roth vs. United States, 354 US 476 at 485 (1957). The Miller standard the current standard by which allegedly pornographic materials are judged, is discussed, and then the Court makes the following observation:

> Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy. For the following reasons, however, we are persuaded that the states are entitled to greater leeway in the regulation of pornographic depictions of children. 31 Cr.L. at 3142.

The Court, in presenting the question for decision, and in making

the comment referred to above, uses the terms "sexual conduct" and "child pornography." The Court then finds that:

> The prevention of sexual exploitation and abuse of child constitutes a government objective of surpassing importance . . . . The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to physiological, emotional, and mental health of the child. 31 Cr.L. at 3142

The Court then goes on to find that allowing the dissemination of such "pornographic materials" involving the depiction of "sexual activity by juveniles" contributes to the harm described above. The Court explains why the use of the Miller standard is not satisfactory in this situation:

> Thus, the question under the Miller test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. 31 Cr.L. at 3143

Further, the Court states:

> The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary

> performance or scientific or educational work. As the trial court in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative. 31 Cr.L. at 3143.

In deciding that the states are to be given more leeway handling the problems of child pornography than in handling ot allegedly "obscene" materials, produced by and aimed at adul the Ferber Court still sets some stiff standards:

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combatted requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of 'sexual conduct' proscribed must also be suitably limited and described.
>
> The test for child pornography is separate from the obscenity standard enunciated in Miller, but may be compared to it for purpose of clarity. The Miller formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection. As with obscenity laws, criminal responsibility may not be imposed without

> some element of scienter on the part of the defendant. (citations omitted) 31 Cr.L. at 3144.

Further, the Ferber Court observes that, in section 263.15:

> The forbidden acts to be depicted are listed with sufficient precision and represent the kind of conduct that, if it were the theme of a work, could render it legally obscene: 'actual or simulated sexual intercourse, deviant sexual intercourse, sexual bestiality, masturbation, sadomascastic abuse, and, or lewd exhibition of the genitals. Section 263.3. The term "lewd exhibition of the genitals" is not unknown in this area and, indeed, was given in Miller as an example of a permissible regulation. 413 U.S., at 25. . . .
>
> We hold that section 263.15 sufficiently describes a category of material the production and distribution of which is not entitled to first amendment protection. It is therefore clear that there is nothing unconstitutionally 'underinclusive' about a statute that singles out this catagory of material for proscription. 31 Cr.L. at 3144.

The court, at the end of the last statement cited, inserts a footnote that is of extreme importance to the case at issue here:

> Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), relied upon by the Court of Appeals, struck down a law against drive-in theaters showing nude scenes if movies could be seen from a public place. Since nudity, without more is protected expression, id., at 213, we proceeded to consider the underinclusiveness of the ordinance. The Jacksonville ordinance impermissably singled out movies with nudity for special treatment while failing to regulate other protected speech which created the same alleged risk to traffic. Today, we hold that child pornography as defined in Section 263.15 is unprotected speech subject to content-based regulation. Hence, it cannot be underinclus-

> ive or unconstitutional for a State to do precisely that. (Footnote) 31 Cr.L. at 3144.

A review of the statements made by the Supreme Court in deciding the Ferber matter easily refutes the contentions of Respondent in Point I and III of its brief. Respondent argues that the Ferber case means that "there are no speech or expression issues involved in the act of sexual exploitation of a minor" (Respondent's brief page 6) and that "the Appellants have no standing to raise first amendment arguments." (id.) Again on page 10 of respondent's brief is the statement:

> There are, however, no speech or expression activities involved in employing, using, persuading, inducing, enticing, or coercing a minor to pose in the nude for the purpose of sexual arousal or for profit, or to engage in sexual or simulated sexual conduct anymore than there are speech or expression activities involved in rape, robbery, or murder.

In fact, the Supreme Court in the Ferber matter, says exactly the opposite. The court clearly describes the production and dissemination of child pornography as "unprotected speech" (31 Cr.L. at 3144). The court recognizes (id.) that legislation in this area is still within the "sensitive area" of first amendment regulation. Because of that fact, the court puts clear "limits" on such legislation. The most notable limit is that the material must involve "sexual conduct" and it appears that the conduct must be the kind of conduct "that, if it were the theme of a work, could render it legally obscene" (id.). In fact, the court

most clearly excludes nudity (without more) stating that such nudity is "protected expression" (id.). Thus, the opinion of the United State Supreme Court in New York v Ferber reinforces the arguments of appellants in their original brief, and does not take the conduct of the appellants out of the first amendment area, as stated by respondents. Appellants have argued, and continue to argue, that the inclusion of nudity as proscribed conduct renders the statute here hopelessly overbroad. The conduct proscribed by section 76-10-1206.5 goes well beyond the sexual activity of the kind that could render it legally obscene. In fact, counsel for appellants has observed numerous violations of the statute on public television and in popular movies shown in Utah, since the filing of the original brief. The makers of "Huggies" and "Luvs" diapers regularly show females under the age of 18 with exposed breasts in their television commercials (or at least they appear to be females with the names "Michelle", "Katy", "Maggie", and "Sarah"). The movie China Seas, shown on Channel 20 (KSTU Television, Salt Lake City) on September 10, 1982, showed a baby, completely naked from the rear, while being bathed. The movie Superman II, shown at many theaters in Utah, showed a very young boy completely naked, from a frontal view, at the beginning of the movie. Such examples continue to abound, and are clear violations of the statute, as worded. It is assumed, of course, that very few people involved in the production and distribution of such films and commercials were sexually

aroused in the process. Perhaps, however, a trial would be necessary to prove or disprove that assumption. It is equally clear, of course, that the production and distribution of the films and commercials were done for profit. Respondent scoffs at the mention of such examples by appellants as a "parade of horribles" and states that appellants have no standing to raise such examples (respondent's brief page 13). Appellants admit that it is highly unlikely that these corporate law violators will ever be brought to answer for their conduct. In fact, it appears that the alleged misconduct of appellants was brought to the attention of the authorities by a frustrated narcotics investigator who had sought unsuccessfully to obtain evidence against appellants in other crimes (R. 4). Certainly the "parade of horribles," cited by respondent, of the spectre of reputable businessmen being arrested for violation of this statute will never occur. Perhaps it will only be used against those who already have incurred the wrath of the authorities for living supposedly "deviant" life styles. It is just that highly questionable use of the enforcement apparatus which appellants protest.

POINT II

AS APPLIED TO THESE APPELLANTS, THE STATUTE IS BOTH UNCONSTITUTIONALLY VAGUE AND UNCONSTITUTIONALLY OVERBROAD.

Respondent, in Point II of its brief, contends that even if the statute at issue here is overbroad as to some potential defendants, it is not as applied to these defendants, and

appellants therefore have no standing to assert the rights of others in this action. As already indicated in Point I of this Reply Brief, the recent decision in New York v Ferber destroys the argument of Respondent that we are dealing in an area outside traditional forms of speech, and outside the protections of the First and Fourteenth Amendments to the United States Constitution. In fact, the guidelines given by the Supreme Court in that case show that the State of Utah went too far in its prosecution of these Defendants, and the law is indeed overbroad as applied to these Defendants. In the Information the Defendants are charged with having:

> . . . used, persuaded, induced, or enticed Holly Wilkerson, a minor, to pose in the nude. . . . (emphasis added) (R. 2).

In fact, it is clear from the record that the claim of nudity was an important part of the state's case. At pre-trial hearings, the State's counsel argued long and hard that "this is not a pornography case" (R. 109). In referring to the statute, counsel for Plaintiff stated "all it says is that you can't take nude pictures of a minor engaging in simulated sexual conduct" (emphasis added) (R. 110). Again, at the end of the State's case in chief, during arguments on Defendants' motions to dismiss, there occurred this exchange between the Court and the prosecutor:

> THE COURT: Not used in the Information. All right. I think your word is 'used,' used 'a minor.' And then you go, 'to pose in the

nude -- ' No, used her to engage in 'simulated sexual conduct for the purpose of photographing.'

MR. WATSON: Yes, your Honor.

THE COURT: Now, that in a nutshell, is what you are claiming, is that so?

MR. WATSON: And, 'in the nude.' (R. 153).

In his summation, the prosecutor stated "the evidence is clear that both of these defendants used the person of Holly Wilkerson to pose in the nude while simulating sexual conduct (emphasis added) (R. 169).

In support of its case, the state introduced thirty Kodak instant pictures proporting to show the minor nude, and some of which allegedly involve the simulating of sexual conduct. Many of the photographs were objected to (R. 131) by Defendant Jordan as not showing simulated sexual conduct, as charged. The Court took that objection under advisement, and never did rule on it. It appears, however, in the end, that all of the photographs were considered as evidence of the crime charged.

The evidence at trial was uncontroverted in that there was no sexual activity involved between the minor and either of the Defendants (R. 137). While it may appear that there was "simulated sexual conduct," that cannot be determined because of the failure of the state to specify what simulated sexual conduct is. The Ferber Court, (Supra), stated "as with all legislation in this sensitive area, the conduct to be prohibited must be

adequately defined by the applicable state law, ... 31 Cr.L. at 3144. The New York Statute defined the term "simulated," and the Supreme Court found that definition adequate. (See NY Penal Law [McKinney] Section 263.00). Since we have not been told what constituted "simulated sexual conduct" and since it is impossible to tell from the record whether the nude photography or the photography of the alleged "simulated sexual conduct" was the conduct for which appellants were convicted, the conviction cannot stand.

POINT III

APPELLANTS DO HAVE THE STANDING TO RAISE FACIAL OVERBREADTH OF THIS STATUTE AS A DEFENSE TO PROSECUTION.

Respondents further claim that appellants have no standing to attack the validity of section 76-10-1206.5 citing the general principle:

> . . . that no one should be entitled to challenge the statute and have it declared void because it may unjustly affect someone else, but could properly do so only if his own rights are adversly affected. State v Phillips 540 P.2d 936 (Utah 1975).

Respondents dismiss the case cited by Appellants in their original brief (Doran v Salem Inn, 422 U.S. 930) as applying only to declaratory judgment actions. Respondents, in so doing, totally ignore the reasons for the adoption, by many jurisdictions, of declaratory judgment statutes. These statutes have been enacted in an effort to allow those who might be

charged with a crime to litigate the validity of a law without first having to be arrested and take the chance of going to jail. The adoption of these statutes, however, did not replace an arrested person's right to contest the validity of a law in a criminal proceeding. While respondents are correct in their citing of the general rule, there is a long line of cases (both criminal and noncriminal) indicating that this rule does not apply in first amendment cases. Since the Ferber Court (in a criminal case) clearly upheld Appellants' contention that this is a First Amendment case, the rule which applies to First Amendment cases must be carefully examined. The Court state, in regard to the general principle:

> What has come to be known as the First Amendmendment overbreadth doctrine is one of the few exceptions to this general principle and must be justified by "weighty countervaling policies." (citations omitted). The doctrine is predicated on the sensitive nature of protected expression: "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." (citations omitted). It is for this reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requsite specificity. (citations omitted).
>
> The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking a statute

> down on its face at the request of one whose conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort." (citations omitted). We have, in consequence, insisted that the overbreadth involved be "substantial" before the statute involved with be invalidated on its face. 31 Cr.L. at 3145.

The United States Supreme Court, back in 1949, recognized that even a person whose activity may be constitutionally regulated may argue that the statute under which he is convicted or regulated is invalid on its face. The Court, in Terminiello v City of Chicago, 337 U.S. 1, was faced with an appeal by a man convicted of disorderly conduct for a speech given at a rally. The Court commented:

> Accordingly a function of free speech under our system of government is to invite dispute. That is why freedom of speech, (citations omitted) is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far beyond public inconvenience, annoyance, or unrest. 337 U.S. at 4.
>
> The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.
>
> As we have said, the gloss which Illinois placed on the ordinance gives it a meaning and application which are conclusive on us. We need not consider whether as construed it is defective in its entirety. As construed and applied it at least contains parts that

> are unconstitutional, the verdict was a general one; and we do not know on this record, but what it may rest on the invalid clauses. 337 U.S. at 5.

As in the Terminiello case, even if only parts of the statute are invalid, it is impossible in this case to tell whether the conviction rested on the invalid clauses.

In the 1960 case of the United States v Raines, 362 U.S. 17, the Court further elaborated on the First Amendment overbreadth doctrine. The Court there said:

> For example, where, as a result of the very litigation in question, the constitutional rights of one not a party would be impaired, and where he has no effective way to preserve them himself, the Court may consider those rights as before it. 362 U.S. at 22.

In the case of Village of Schaumberg v Citizens For a Better Environment, 444 U.S. 620 (1980), the Court held:

> Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the Court. 444 U.S. at 634.

Appellants in this case seek to exactly that. The reasons for the overbreadth doctrine were explained more fully in the case of Dombrowski v Pfister, 380 U.S. 479 (1965). The Court there explained:

> A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. (citations omitted). When the statutes also have an

> overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutionally rights is unfounded in such cases. (citations omitted). Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression -- of transcendent value to all society, and not merely to those exercising their rights -- might be the loser. (citations omitted). For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. (citations omitted). We have fashioned this exception to the usual rules governing standing, (citations omitted) because of the ". . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." (citations omitted). If the rule were otherwise, the contours of regulation would have to be hammered out case by case -- and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation. 380 U.S. at 486, 487.

In the 1974 case of Parker v Levy, 417 U.S. 733, the Court reiterated that the same standards under the First Amendment overbreadth doctrine apply in defense of criminal prosecution as in civil enforcement or actions involving a declaratory judgment. (See 417 U.S. 733 at 760.) The Court there repeated the principal earlier enunciated in the case of Broderick vs. Oklahoma, 413 US 601 (1973) that:

> "Where conduct and not merely speech is involved" the overbreadth must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 417 US at 760; 413 US, at 615.

The Ferber Court recognizes that the use of children to make sexually explicit materials for distribution is conduct as well as speech (see 31 CrL at 3146). The Court there simply finds that the New York Statute that prohibits commercial distribution of the specific material discussed in that case is not substantially overbroad. In finding so, the Court makes the following observation:

> While the reach of the statute is directed at the hardcore of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical text books to pictorials in National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of the section 263.15 in order to produce educational, medical or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. (emphasis added)(31 Cr.L. at 3146.)

The Court's action, then, in upholding the New York Statute on its face and as applied to Paul Ferber is done very clearly because, while the statute may have some unconstitutional applications, those applications will never amount to more than "a tiny fraction of the materials within the statute's reach." (supra). Because the statute at issue here is so broad as to

include a wide range of artistic, educational and scientific works, the same treatment cannot be given this statute as was given the New York Statute. Additionally, it should be noted that "the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial." 31 Cr.L. at 3146. The penalties set forth by section 76-10-1206.5 may be appropriate when "directed at the hardcore of child pornography" (supra). But they are not appropriate for the many kinds of conduct well short of "the hardcore of child pornography" proscribed by the statute at issue here. In fact, the trial judge found the conduct of Appellants herein as not meriting the harsh treatment of the statute, and so granted motions by both Appellants to sentence under the next lowest category of offense, which was as far as he could go in using his discretion to diminish the punishment.

It should be noted here that the expression of the Court in Ferber that the impermissible reach of the statute would only amount to "a tiny fraction" of the materials covered was followed by what amounts to a warning. The New York Statute, unlike Utah's, prohibits the use of children for "lewd exhibition of the genitals." The Court warned (at P. 3146):

> Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition[s] of the genitals.

What the Court was warning New York not to do was precisely what Utah has done, and what it cannot do.

CONCLUSION

The Ferber court limited the question at issue to a determination of whether the legislature could protect "children who are made to engaged in sexual conduct for commercial purposes." Nobody in this case was made to do anything she had not volunteered to do, and no commercial purposes whatsoever were involved. While, then, the New York "child pornography" law was not substantially overbroad, the Utah Law, which is not a pornography law at all but far more (R. 109) is indeed substantially overbroad and should be struck down by this Court so a proper one can be written. The Supreme Court in the Ferber case has made it abundantly clear that a law can be written to protect minors from sexual abuse without abusing the rights of a large segment of the adult population. Utah has not done this, and should be instructed by this Court to get that job done.

Respectfully submitted this 21st day of October, 1982.

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DELIVERY CERTIFICATE

I hereby certify that I delivered two true and correct copies of the foregoing Appellants' Reply Brief to DAVID L. WILKINSON, Utah Attorney General, at 236 State Capitol Building, Salt Lake City, Utah, this 29th day of October, 1982.