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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff/Respondent, vs. HEATHER S. AMICONE, Defendant/Appellant.	)	SUPREME COURT NO. 19184

BRIEF OF APPELLANT

APPEAL FROM DECISION RENDERED BY THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, THE HONORABLE HOMER F. WILKINSON, PRESIDING

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	SUPREME COURT NO. 19184
	)	
HEATHER S. AMICONE,	)	
	)	
Defendant/Appellant.	)	
	)	
	)	

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff/Respondent, vs. HEATHER S. AMICONE, Defendant/Appellant.	SUPREME COURT NO. 19184

STATEMENT OF THE CASE

This case involves an obscenity conviction pursuant to U.C.A. §76-10-1204 for the exhibition of an allegedly obscene film to an audience of consenting adults at the Studio Theatre in Salt Lake City, Utah.

LOWER COURT DISPOSITION

The instant appeal arises out of a decision rendered by the District Court of the Third Judicial District in and for Salt Lake County, wherein the Honorable Homer F. Wilkinson affirmed the judgment of conviction of the Circuit Court, Salt Lake Department, Salt Lake City.

RELIEF SOUGHT ON APPEAL

Appellant does not seek a reversal of her conviction but, instead, seeks an order remanding this case to the trial court for resentencing free of the stricture of U.C.A. §76-10-1204(2) which purports to require a mandatory minimum jail sentence of 7 days without possibility of probation or suspension of sentence in any way.

JURISDICTIONAL STATEMENT

This Court's appellate jurisdiction is invoked pursuant to U.C.A. §78-3-5.

PRELIMINARY STATEMENT

The sole issue raised in the present appeal is whether or not the mandatory jail requirement for first time obscenity violators contained in U.C.A. §76-10-1204(2) is constitutional,

on its face and as applied to the appellant. Appellant does not otherwise attack any portion of the state obscenity statute or otherwise challenge the validity of her conviction. Appellant's challenge to the mandatory jail requirement of U.C.A. §76-10-1204(2) is based upon the four grounds set forth below:

1. U.C.A. §76-10-1204 (2), which requires mandatory jail sentences for first time violators of Utah's obscenity statute, impermissibly chills the exercise of protected expression, in violation of the free speech guarantees of the First and Fourteenth Amendments to the United States Constitution and, independently, of Article I, §15 of the Constitution of Utah.

2. Where, as here, a requirement of a mandatory jail sentence is applied to a relatively minor first time offense by a non-managerial employee, and where, as here, mandatory jail sentences are not required by Utah law for any other comparable offenses, and where, as here, mandatory jail sentences are not required for first time obscenity violators in any other state, such a requirement deprives the appellant of her right to due process of law, secured by the Fourteenth Amendment to the United States Constitution, which right includes the right to be free from cruel and unusual punishment as most recently articulated by the United States Supreme Court in Solem v. Helm, 103 S.Ct. 3001 (1983). The mandatory jail requirement independently violates the cruel and unusual punishments clause of Article I, §9 of the Constitution of Utah.

3. Where, as here, mandatory jail sentences are not required under Utah law for first time violators of any comparable offenses, and particularly where, as here, the State's only mandatory jail requirement for a relatively minor offense is directed at those engaged in a medium of communication which is presumptively protected by the free speech guarantees of the state and federal Constitutions, the mandatory sentencing provision of U.C.A. §76-10-1204(2) violates the equal protection guarantee of the Fourteenth Amendment to the United States Constitution and the parallel requirement of Article I, §24 of the Constitution of Utah providing that all laws of general nature should have uniform operation.

4. The mandatory sentencing requirement of U.C.A. §76-10-1204(2) violates the constitutional requirement of separation of powers by depriving a trial court of its traditional judicial function of determining whether, under the circumstances of a particular case, a sentence would more appropriately be suspended pending successful completion of probation.

STATEMENT OF THE FACTS

1. On the date alleged in the complaint in this case, appellant was employed as a ticket taker at the Studio Theatre, located at 228 South State Street, Salt Lake City, Utah. In that capacity, appellant sold a theatre ticket to a police officer and was subsequently charged with a violation of U.C.A. §76-10-1204 (Utah's obscenity statute), a Class A misdemeanor.

2. On July 6, 1982, the appellant entered a plea of guilty before Circuit Judge Eleanor S. Lewis.

3. Under general provisions of Utah law applicable to all Class A misdemeanors, the maximum possible sentence is one year in jail [U.C.A. §76-3-204(1)] and a $1,000 fine [U.C.A. §76-3-301(3)]. However, under U.C.A. §76-10-1204(2), a <u>mandatory</u> minimum sentence of seven days <u>must</u> be imposed by the court upon <u>all</u> first-time violators of this one particular Class A misdemeanor offense.

4. Prior to the time of sentencing, appellant argued that the mandatory jail requirement of U.C.A. §76-10-1204(2) was unconstitutional. Nonetheless, on August 30, 1982 the Court sentenced the appellant to pay a fine of $1,000.00 and to serve one year in jail, all but seven days of the jail sentence to be suspended (as required by U.C.A. §76-10-1204(2)).

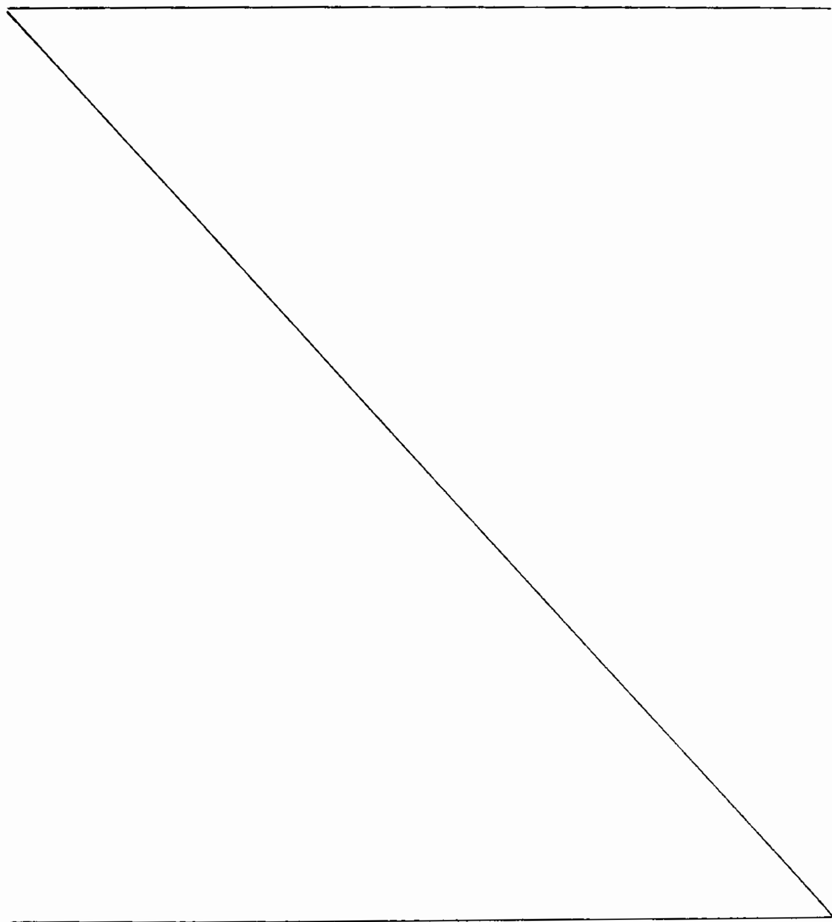
5. The appellant, a first offender, was in all respects a good candidate for probation, but was sentenced to seven days in jail solely because of the requirements of the statute.

6. Appellant filed a timely notice of appeal to the Third District Court in and for Salt Lake County and challenged in that Court only the terms of her sentence, not the validity of her conviction. Each of the grounds of appeal set forth herein was asserted before the District Court.

7. On March 10, 1983, the Honorable Homer F. Wilkinson, Judge of the District Court, in a two-page opinion, rejected appellant's challenge to the mandatory sentencing requirements of U.C.A. §76-10-1204(2). Thereafter appellant filed a timely

notice of appeal to this Court.

8. Pursuant to the order of the judge who sentenced the defendant, the Honorable Eleanor S. Lewis, imposition of the appellant's seven day jail sentence has been stayed pending her appeal to this Court.



ARGUMENT

I

U.C.A. §76-10-1204(2), WHICH REQUIRES MANDATORY JAIL SENTENCES FOR FIRST TIME VIOLATORS OF UTAH'S OBSCENITY STATUTE IMPERMISSIBLY CHILLS THE EXERCISE OF PROTECTED EXPRESSION, IN VIOLATION OF THE FREE SPEECH GUARANTEES OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND, INDEPENDENTLY, OF ARTICLE I, §15 OF THE CONSTITUTION OF UTAH.

To the knowledge of appellant's counsel, the issue raised herein is one of first impression nationwide, i.e., does the First Amendment [1/] tolerate a legislative requirement of mandatory jail sentences without possibility of parole for first time violators of a state's misdemeanor obscenity statute.

At the outset, it is crucial to point out that this First Amendment challenge by appellant is separate and distinct from any other arguments against mandatory sentences that are raised

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[1/] For purposes of this brief, appellant will use the term "First Amendment" as a shorthand reference to the free speech rights guaranteed by the First and Fourteenth Amendments to the United States Constitution as well as by Article I, §15 of the Constitution of Utah.

elsewhere in this brief.

U.C.A. §76-10-1204 establishes the offense of "distributing pornographic material" as a class "A" misdemeanor. Subdivision (2) of that statute provides as follows:

> "(2) Each separate offense under this section is a class A misdemeanor punishable by a minimum mandatory fine of not less than $100 plus $10 for each article exhibited up to the maximum allowed by law and by incarceration, without suspension of sentence in any way, for a term of not less than 7 days, notwithstanding any provisions of Section 77-35-17." (Emphasis added.)

At the time of the conduct alleged in the complaint in this case, the above-quoted statute was the only one in the Criminal Code (Title 76 of the Utah Code Annotated) of the State of Utah which required a mandatory jail sentence for a non-capital offense [2/]. It is respectfully submitted that the sole reason why this mandatory sentence requirement was enacted by the Legislature was to chill and inhibit the exercise of protected expression by those working in bookstores or theatres dealing in constitutionally protected, though sexually oriented, media materials. In its recent opinion in Minneapolis Star v. Minnesota Com'r of Revenue, ___ U.S. ___, 103 S.Ct. 1365, 1369 (1983), the United States Supreme Court authoritatively

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[2/] Although the Criminal Code has recently been amended to add mandatory sentences for a number of non-capital felony offenses, it is appellant's belief that there are no other misdemeanor offenses in the Criminal Code which require mandatory sentences nor does any provision of state law require mandatory sentences for as comparatively innocuous an offense as a first-time obscenity violation by a non-managerial employee.

construed its previous opinion in Grosjean v. American Press Co., Inc., 297 U.S. 233, 56 S.Ct. 444 (1936), as standing for the proposition that an improper legislative motive is enough, standing alone, to invalidate a statute where the attack is based upon the First Amendment, even in the absence of evidence that the effect of the statute would otherwise violate the First Amendment.

Independent of the argument of legislative intent described above, the effect of the mandatory sentencing requirement of U.C.A. §76-10-1204(2) upon protected expression, if upheld by this Court, will be severe indeed. The statute will not only chill the exercise of protected expression by the appellant, but, more importantly, will severely chill such speech by other bookstore and theatre employees throughout the state. Employees in adult motion picture theatres and in adult bookstores are engaged in businesses presumptively protected by the First Amendment and each and every item sold or exhibited therein is also presumptively protected by the First Amendment until judicially proven to the contrary in a final judgment.

That the materials contain sexual depictions does not guarantee that the items will exceed the limits of a community's tolerance when exhibited or distributed in the context of an adults-only theatre or bookstore. Indeed, the United States Court of Appeals for the Second Circuit recently affirmed the judgment of a federal district court in New York which ruled that the motion picture "Deep Throat" and numerous other motion pictures of comparable or greater explicitness

were not obscene as a matter of fact and law. United States v. Various Articles of Obscene Merchandise, Schedule No. 2102, 709 F.2d 132 (2nd Cir. 1983). While it is of course true that community standards of tolerance may vary from one community to another and can also vary over time, no one can conclude, even in a city such as Salt Lake City, that a particular sexually oriented film or magazine, even of the "hardcore" type, will ultimately be found legally obscene and thus, without constitutional protection. 3/

By mandating a minimum non-suspendable jail sentence of seven days in every case, U.C.A. §76-10-1204(2) [hereinafter "the statute"] severely intimidates those theatre or bookstore employees who have no financial interest other than their hourly wages from fully and robustly selling or exhibiting sexually oriented materials which are in fact constitutionally protected. It is respectfully submitted that, were this statute to be upheld by the Court, the effect on the communication media would be such that it would become impossible to find employees willing to risk the possibility that a particular film or book which they knew to be presumptively constitutionally protected would ultimately be

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3/ Indeed, proof of the inability of a layperson such as a ticket seller or even a police officer, to accurately determine obscenity prior to a final judicial determination comes from the Supreme Court's decisions in Roaden v. Kentucky, 413 U.S. 496, 93 S.Ct. 2796 (1973) and Lee Art Theatre v. Virginia, 392 U.S. 636, 88 S.Ct. 2103 (1968) where the Court held that police officers are not even qualified to make a determination of obscenity for probable cause purposes prior to a seizure of materials.

found obscene. Consequently, the inevitable effect of this statute will be to cause the closure of these businesses and virtually eliminate all constitutionally protected sexually oriented media materials from the State of Utah.

While traditional criminal punishments providing for jail sentences in the discretion of the court no doubt have their own chilling impact [4/], it is respectfully submitted that the degree of chilling impact inherent in a mandatory sentencing law upon a first time offender who acts simply in the capacity as a clerk or ticket taker is so great as to compel its invalidation under the First Amendment.

The differential impact of a mandatory, versus a non-mandatory, sentencing statute on a non-managerial clerk is indeed substantial. As a factual matter, the courts in this and most other jurisdictions with which counsel is aware, almost always exercise their discretion to suspend a jail sentence for a first-time obscenity violator who simply works in the capacity as a ticket taker or clerk. This is no doubt due to the awareness of these courts that obscenity is difficult to ascertain notwithstanding the fact that the Supreme Court has

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[4/] The Supreme Court acknowledged this point in Smith v. California [361 U.S. 147, 154-155, 80 S.Ct. 215, 219 (1959)] where it struck down an obscenity statute which was unduly chilling due to its lack of a scienter standard. The Court stated:

> "Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self censorship and have some inhibitory effect on the dissemination of material not obscene . . . ."

narrowly upheld such statutes against vagueness attacks.

As evidence of the inherent inability of a clerk or ticket taker to know in advance what will or will not be found obscene, compare the holdings in the following cases: Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750 (1974), [where both a Georgia jury and the Georgia appellate courts had found the major-release film "Carnal Knowledge"(featuring such Hollywood stars as Jack Nicholson, Ann Margaret and Art Garfunkel) legally obscene while the United States Supreme Court found the film constitutionally protected]; Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) [where the Fifth Circuit Court of Appeals found an issue of Playboy Magazine constitutionally protected but found an issue of Penthouse Magazine to be legally obscene-the District Court had found both magazines to be constitutionally protected!]; State v. Walden Book Company, 386 So.2d 342 (La. 1980) [where the Louisiana Supreme Court, while citing and applying the exact standards used by the Fifth Circuit in McAuliffe, supra reached the opposite conclusion and held that a particular issue of Penthouse Magazine was in fact constitutionally protected]; United States v. Various Articles of Obscene Merchandise, Schedule #2102, supra, 709 F.2d 132 (2 Cir. 1983) [where the Second Circuit, as mentioned previously, affirmed the District Court's conclusion that the films "Deep Throat", "The Opening of Misty Beethoven", "Debbie Does Dallas", "Wide World of Spurts", "The Ecstasy Girls", and "Behind The Green Door", among others were not obscene in violation of federal customs

laws].

Obviously, the point to be drawn from these authorities is that it is impossible for any hourly wage employee in a theater or bookstore or anyone else to predict in advance whether a particular item will ultimately be found obscene in the courts. Under a statute which gives a court discretion to suspend a sentence, a first time violator can point to the inherent vagueness of these censorship laws and entertain a very realistic expectation of leniency from a sentencing judge. By contrast, a mandatory sentencing statute, if upheld by the courts, will have a much more chilling effect upon non-managerial employees because they will know that a sentencing judge will be powerless to take into account their good faith, their lack of a financial interest, or any other mitigating circumstances.

On numerous occasions, the United States Supreme Court has recognized that First Amendment rights are extremely fragile ones that "are vulnerable to gravely damaging yet barely visible encroachments." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66, 83 S.Ct. 631, 637 (1963). It is respectfully submitted that a mandatory jail sentence requirement for all first time violators of the state censorship law is the epitomy of an encroachment on First Amendment rights which is "barely visible" but "gravely damaging".

Furthermore, the mere fact that mandatory sentences may be found permissible when applied in other contexts where such sentences will have no impact on First Amendment rights is no

basis for a conclusion that such laws are permissible punishment for censorship violations. In Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959), the Supreme Court held unconstitutional an ordinance which authorized the conviction of a book seller for possession of an obscene book without proof of scienter. The Court stated:

> "Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedoms of expression, by making the individual the more reluctant to exercise it. Id. at 150-151, 80 S.Ct. at 217.
>
> * * *
>
> [O]ur holding in Roth, does not recognize any state power to restrict the dissemination of books which are not obscene . . . ." Id. at 152, 80 S.Ct. at 218.
>
> * * *
>
> The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power." Id. at 155, 80 S.Ct. at 220 (emphasis added).

Simply because the state has the power to punish obscenity violations with traditional criminal sentences including the possibility of jail time, it does not automatically follow that there is no constitutional barrier to the state's implementation of that power by the uniquely stifling practice of mandatory jail sentences for first time offenders.

Although the present case is one of first impression, the appropriate method for analyzing the validity or not of the statute was articulated most clearly in Speiser v. Randall, 357

513, 520, 78 S.Ct. 1332, 1339 (1958) as follows:

> "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which [illegitmate] speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." (Emphasis added.)

The "method by which [illegimate] speech is sought to be restrained" in the present case is the utilization of mandatory jail sentences for every first time violation of the state's censorship laws. As Speiser, supra, teaches, the "effect" of this "method" "must be subjected to closed analysis and critical judgment". The effect of this method of punishment, if upheld by this Court, will undoubtedly be the virtual elimination of all constitutionally protected sexually oriented media material throughout the state because of the inability of bookstore and theater owners to find employees willing to risk certain jail time in the event that they make an incorrect guess as to whether a particular film or magazine will ultimately be found obscene.

In Thomas v. Collins, 323 U.S. 516, 529-532, 65 S.Ct.315, 322-323 (1945), the Supreme Court stated:

> "This case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our [constitutional] scheme to the great, the indispensible democratic freedoms secured by the First Amendment. [Citations omitted.] That priority gives these

> liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice." (Emphasis added.) Id. at 529-530, 65 S.Ct. at 322.
>
> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation." (Emphasis added.) Id. at 530, 65 S.Ct. at 322-323.

As the cases above teach, legislation which otherwise enjoys a presumption of validity, loses this favored presumption when an attack is made thereon on First Amendment grounds. As a result, the burden is clearly on the State to justify the need for mandatory jail sentences.

It is respectfully submitted that the only conceivable reason for these sentences was to create a sufficiently strong deterrent that no clerk or ticket taker would dare sell or exhibit any sexually oriented media material, even though it might well be constitutionally protected.

The cost of eliminating obscene books, films and magazines from the State of Utah is the certain elimination of all material which deals with sex. Notwithstanding the rulings of the learned District and Circuit Courts, our Constitution compels a rejection of that cost as being much too high.

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II

THE MANDATORY JAIL SENTENCE REQUIREMENT OF U.C.A. §76-10-1204(2) CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION [AS INTERPRETED IN SOLEM v. HELM, 103 S.CT. 3001 (1983)] AND, INDEPENDENTLY, ARTICLE I, §9 OF THE CONSTITUTION OF UTAH.

Under Utah law, it was within the discretion of the trial court to impose a jail sentence of up to one year for the offense committed by appellant if the trial court thought such a sentence would be warranted under the circumstances of this particular case. Appellant does not challenge in any way the potential statutory maximum sentence of one year. Rather, it is exclusively the mandatory, non-suspendable minimum seven day jail sentence required by the statute in every case no matter what the present mitigating factors might be, that renders this statute violative of the state and federal constitutional guarantees against cruel and unusual punishments.

Subsequent to the district and circuit courts' rulings on this point, the United States Supreme Court handed down a landmark Eighth Amendment decision which totally rejects the reasoning relied upon by the State in the lower courts. In Solem v. Helm, ___ U.S. ___ , 103 S.Ct. 3001 (1983), the United

States Supreme Court squarely held that the Eighth Amendment's prohibition of "cruel and unusual punishments" "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." 103 S.Ct. at 3006. In overturning a life sentence, the Court articulated a new three part "proportionality analysis" that must be applied in every case where an Eighth Amendment challenge is raised.

Before analyzing U.C.A. §76-10-1204(2) under the Supreme Court's newly required "proportionality analysis", it is extremely signficant to the present case to note that the Supreme Court expressly concluded that even a one day jail sentence could be impermissible. At 103 S.Ct. at 3009, the Court stated:

> "But no penalty is per se constitutional. As the Court noted in Robinson v. California, 370 U.S. at 667, 882 S.Ct. at 1420, a single day in prison may be unconstitutional in some circumstances." (Emphasis added.)

Thereafter, the Court summarized the provisions of its newly decided three part test for proportionality:

> "In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." 103 S.Ct. at 3010-3011.

Appellant respectfully submits that U.C.A. §76-10-1204(2) must fall when measured under the three part test set out above.

//

A. The Gravity of the Offense and the Harshness of the Penalty.

The offense of selling a ticket to a consenting adult patron to view an obscene film [4/] in an enclosed theatre can hardly be considered a "grave" offense in any sense of the word. There are no specific victims for this type of a crime and the only conceivable harm suffered by society is the legislatively presumed injury to public morals. Where the defendant is simply a ticket taker rather than a manager or an owner of such a business, the gravity of the offense is even more minimal. While the one year maximum jail sentence is concededly within constitutional limits, a mandatory minimum seven day jail sentence applicable in every case regardless of any mitigating circumstances is an extremely harsh penalty for so comparatively minor an offense.

B. Applicable Sentences Under Utah Law for Other Offenses.

As previously noted herein, at the time the offense herein was committed, there was no other mandatory jail sentence in the Utah Criminal Code (U.C.A. Title 76), even for felony offenders, unless the offense was a capital offense.

[4/] It must be remembered that only when the case at bar is final will the obscenity of the film in question be determined--obviously, substantially after the fact of the conduct in question.

Recently, a number of [illegible] added to the Criminal Code. However, [illegible] counsel, these mandatory [illegible] felonies and not to misdemeanors. In any event, appellant [illegible] state with reasonable certainty that the Utah Legislature punishes censorship violations far more harshly than any other offense of comparable gravity.

C. <u>Laws in Other Jurisdictions</u>.

Counsel are unaware of mandatory jail sentence requirements for first-time obscenity violators in any other jurisdictions. To the extent that the State may find any states with such a requirement, it is respectfully submitted that they would be in the extreme minority of jurisdictions.

For all the reasons set forth above, it is respectfully submitted that the mandatory nature of the statute's minimum jail sentence is extremely harsh and disproportionate as applied to a first-time violator of the state's misdemeanor censorship laws who is simply working as a ticket seller and who had no financial interest in the outcome of the business other than her hourly wages. For these reasons, this case should be remanded to the Circuit Court for resentencing in a procedure where the trial court, being apprised of all relevant circumstances, may impose a sentence proportionate to the gravity of the offense herein.

III

WHERE, AS HERE, UTAH LAW DOES NOT REQUIRE MANDATORY JAIL SENTENCES FOR OFFENSES OF COMPARABLE SEVERITY, AND PARTICULARLY WHERE, AS HERE, THIS DISCRIMINATORY TREATMENT IS DIRECTED AT THOSE WHO ENGAGE IN A MEDIUM OF CONSTITUTIONALLY PROTECTED SPEECH, THE MANDATORY SENTENCING PROVISION OF U.C.A. §76-10-1204(2) VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE PARALLEL REQUIREMENT OF ARTICLE I, §24 OF THE CONSTITUTION OF UTAH.

In U.C.A. §76-3-204(1), the Utah Legislature set forth the terms of imprisonment to apply to all class A misdemeanors. That statute provides that the sentence of imprisonment in the case of a class A misdemeanor shall be "for a term not exceeding one year". By imposing the additional harsh requirement of a mandatory minimum seven day jail sentence in all cases arising under the state censorship statute, the Legislature has treated differently and more harshly the violators of that particular class A misdemeanor than those who violate any other class A misdemeanor arising under the Criminal Code (Title 76 of Utah Code Annotated).

By treating those who violate this particular class A

misdemeanor much more harshly than those that violate most, if not all, other class A misdemeanor provisions, the Legislature has unquestionably imposed discriminatory punishment against the class of individuals who violate the state's censorship law.

Appellant concedes that under a mere rational basis test, the Legislature might be entitled to pick and choose and impose greater punishments for certain offenses than for other offenses of the same classification. However, where, as here, the equal protection claim is raised in the context of a discrimination applicable to those engaged in ongoing businesses fully protected by the First Amendment and where, as here, the effect of these harsh penalties is to prospectively stifle and chill the exercise of First Amendment rights by extremely harsh mandatory jail sentences, a standard of strict judicial scrutiny is required. As the Supreme Court held in the case of Erznoznik v. City of Jacksonville, 422 U.S. 205, 215, 95 S.Ct. 2268, 2275-2276 (1975):

> "This court frequently has upheld under-inclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression."

By requiring harsh mandatory minimum jail sentences only for those class A misdemeanor defendants who are engaged in presumptively protected speech, the Legislature has clearly based its discriminatory treatment upon a classification which turns on the subject matter of expression. Because of the

prospective chilling impact of these harsh sentencing laws on the future ability of theatres and bookstores to sell or exhibit presumptively protected materials, it is no answer for the state to contend that a rational basis test should apply simply because in any given case the sentence will be imposed only after a finding of obscenity.

Under the test of strict scrutiny applicable to this discriminatory treatement, the State cannot possibly justify its harsh and discriminatory treatment of first-time violators of its censorship statute as being necessary for the effectuation of any legitimate and compelling state purposes. Although, no doubt, such sentences will quite effectively serve a legitimate state interest in deterring obscene expression, the statute's extreme deterrent impact upon protected expression renders these harsh penalties impermissible in violation of the state and federal constitutional guarantees of equal protection and freedom of speech.

IV

THE MANDATORY SENTENCING REQUIREMENT OF U.C.A.§76-10-1204(2) VIOLATES THE DOCTRINE OF SEPARATION OF POWERS MANDATED BY ARTICLE V, §1 OF THE CONSTITUTION OF UTAH BY DEPRIVING A TRIAL COURT OF ITS TRADITIONAL JUDICIAL FUNCTION OF DETERMINING WHETHER, UNDER THE CIRCUMSTANCES OF A PARTICULAR CASE, A JAIL SENTENCE WOULD MORE APPROPRIATELY BE SUSPENDED PENDING SUCCESSFUL COMPLETION OF PROBATION.

Article V, §1 of the Constitution of Utah states:

> "Section 1. (Three departments of Government).
>
> "The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial, and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." (Emphasis added.)

While it is no doubt the province of the Legislature to determine the range of permissible punishments for the violations of criminal statutes, it has always been a traditional judicial function to choose between a range of legislatively prescribed punishments or to determine whether, under the facts of a particular case, the ends of justice would be more

appropriately served by suspending execution of a sentence pending successful completion of a term of probation.

Evidence of the traditional "judicial" nature of the act of sentencing is provided by U.C.A. §77-18-1, which provides, in pertinent part, as follows:

> "<u>§77-18-1. Suspension of Sentence--Probation--Period--Conditions--Revocation</u>. (1) On a plea of guilty or no contest or conviction of <u>any</u> crime or offense, if it appears compatible with the public interest, the court may suspend the imposition or execution of sentence and place the defendant on probation for such period of time as it determines." (Emphasis added.)

It is respectfully submitted that the decision of whether a particular criminal defendant should qualify for suspension of sentence or for a term of probation is a traditional judicial function and the Legislature's attempt to deprive the courts of this function by enacting U.C.A. §76-10-1204(2) is an impermissible exercise of judicial powers in violation of the express requirements of Article V, §1 of the Constitution of Utah.

CONCLUSION

It is respectfully submitted that the Legislature intended to accomplish censorship of both protected as well as unprotected expression in enacting U.C.A. §76-10-1204(2). Its intent is amply evidenced by the fact that, at the time it was enacted, the statute's mandatory jail requirement was the only mandatory sentencing requirement in the Utah Criminal Code for

non-capital offenses. While such a requirement will no doubt deter the exercise of unprotected expression, it must be equally clear that it may well also completely eliminate the distribution of protected expression which is sexually oriented. Simply stated, no hourly wage clerk or ticket taker in the state will have the sort of vested interest necessary to justify the risk of a mandatory seven day jail sentence in the event that he or she misjudges whether a particular publication will subsequently be found obscene. The pall of fear and timidity which will be established if this Court upholds these mandatory jail requirements is too great a price for a free society to pay to preclude the possibility that a seller of a ticket to an obscene film might receive a suspended jail sentence upon being convicted for his or her first offense.

Given the fact that Utah has a comparatively stiff maximum sentence of one year for first-time offenders, subject to the sentencing discretion of the trial court, there is no legitimate governmental interest in depriving sentencing judges of their traditional discretion in determining whether, under the facts of a particular case, sufficiently mitigating factors exist to suspend imposition of a sentence to a first-time violator of the State's inherently imprecise obscenity laws.

For all these reasons, it is respectfully submitted that this case be remanded to the Circuit Court for resentencing under the general sentencing provisions applicable to all class A misdemeanors and that the Circuit Court be freed of the

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restrictions on its discretion presently embodied in U.C.A. § 76-10-1204(2).

DATED: August 12, 1983

Respectfully submitted,

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By ______________________
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Attorneys for Appellant

VERIFICATION

(check applicable paragraph)

I have read the foregoing document and know its contents. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

a partner of _______________,
and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I have read the foregoing document and know its contents. I am informed and believe and on that ground allege that the matters stated in it are true

one of the attorneys for _______________,
a party to this action. Such party is absent from the county of aforesaid where such attorneys have their office, and I make this verification for and on behalf of that party for that reason. I have read the foregoing document and know its contents. I am informed and believe and on that ground allege that the matters stated in it are true

Executed on _______________, 19____, at _______________, California.

I declare under penalty of perjury that the above is true and correct

____
(Signature)

Subscribed and sworn to before me this _______________ day of _______________, 19____.

Notary Public in and for said County and State

ACKNOWLEDGMENT OF RECEIPT

Received copy of the within document on _______________, 19____.

____
(Signature)

PROOF OF SERVICE BY MAIL

Evangelina Frances Cardenas _______________, am a resident of/employed in the county aforesaid; I am over the age of 18 years and not a party to the within action; my business/residence address is:

433 North Camden Drive, Suite 900
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On August 13 19 83 I served the within Brief of Appellant
(set forth the exact title of the document served)

two copies
by placing ~~true copy~~ thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at

Beverly Hills, CA

addressed as follows:

See Attached Mailing List

Executed on August 13 19 83 at Beverly Hills, California.
(check applicable paragraph below)

(State) I declare under penalty of perjury that the above is true and correct

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Evangelina Frances Cardenas
Evangelina Frances Cardenas
(Signature)

GS2/47ph-6

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