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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

APPELLANT'S REPLY BRIEF

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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FILED
NOV 10 1983
Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff/ Respondent,	SUP. CT. NO. 19184
vs.	APPELLANT'S REPLY BRIEF
HEATHER S. AMICONE, Defendant/ Appellant.	

PRELIMINARY STATEMENT

In her opening brief, appellant challenged the mandatory minimum jail sentence of U.C.A. §76-10-1204(2) on four distinct grounds which, in abbreviated notation, are as follows: the First Amendment, the Eighth Amendment, equal protection and separation of powers. While appellant continues to rely on all four of these grounds, appellant's oral argument as well as this Reply Brief will focus exclusively on the first two of these grounds.

I

THE MANDATORY MINIMUM JAIL SENTENCE REQUIRED BY U.C.A. §76-10-1204(2) VIOLATES THE FIRST AMENDMENT AS APPLIED TO A FIRST OFFENSE BY A NON-MANAGERIAL CLERK WHO SOLD TICKETS FOR THE EXHIBITION OF A FILM SUBSEQUENTLY DETERMINED TO BE OBSCENE.

In support of their contention that the First Amendment is not violated by mandatory minimum jail sentences for first time violators of a state's obscenity law, the State asserts the following arguments:

1. The State implies that a defendant has the ability to know ahead of time whether or not particular material is obscene or constitutionally protected. (B.O.R. [1/] 15.)

2. The State asserts that once material is shown to be obscene, the State can punish the offense by whatever procedures and in whatever manner it sees fit. (B.O.R. 14-15.)

3. The State asserts that Ms. Amicone's guilty plea "totally removed any 'dim and uncertain line' which may have existed as to the obscenity of the material." (B.O.R. 15.)

[1/] The designation "B.O.R." shall be used hereinafter to refer to specific page numbers from the Brief Of Respondent filed by the State herein.

4. The State asserts that the lack of judicial precedent on the narrow issue raised herein demonstrates that appellant's contention is without merit. (B.O.R. 16.)

5. The State asserts that Utah's mandatory sentencing law has had and will have no chilling effect on protected expression. (B.O.R. 16-17.)

As will be demonstrated below none of these assertions has merit.

The State sophistically asserts that the Supreme Court's upholding of obscenity legislation against vagueness challenges is dispositive of the question of whether or not any layman can determine in advance whether or not particular material is obscene or constitutionally protected. (See B.O.R. at 15.) The absurdity of this contention is thoroughly demonstrated by the cases cited in Appellant's Opening Brief at p. 12, where films as "tame" as "Carnal Knowledge" are found obscene by some courts while films as explicit as "Deep Throat" are found not obscene by other courts. Indeed, in two of the cases cited in Appellant's Opening Brief, the United States Court of Appeals for the 5th Circuit and the Louisiana Supreme Court, applying identical legal approaches, differed in their conclusions as to whether or not Penthouse Magazine is constitutionally protected as a matter of law. Perhaps the most realistic appraisal of the inability of any individual to know ahead of time whether or not a particular work is obscene or not was given by the en banc 5th Circuit Court of Appeals in Universal Amusement Co., Inc. v. Vance, 587 F.2d 159 (5th Cir. en banc 1978); aff'd. on

other grounds, 445 U.S. 308, 100 S.Ct. 1156 (1980). In that case, the majority of the en banc 5th Circuit held unconstitutional a Texas statute which authorized the issuance of a prospective injunction against exhibition of unnamed "obscene" films upon proof that an individual had exhibited obscene films in the past. In striking down the statutory provision authorizing such an injunction, the Court stated:

> "Incorporation of the statutory definition of obscenity - usually a listing of forbidden sexual acts or acrobatics - merely begs the question, for few of us have the omniscience to determine, in advance of a final judicial ruling, whether a film is legally obscene. Moreover, it is possible that a film containing many of the acts listed in the statute may eventually be held not to be obscene, since the work must be taken as a whole, Miller v. California, supra, and since State law cannot define the 'contemporary community standards' that must be applied by the fact finder. Smith v. United States, 431 U.S. 291, 97 Sup.Ct. 1756 (1977). [Some emphasis added, some in original] 587 F.2d at 169.

Although the Supreme Court has upheld obscenity legislation by a narrow 5-4 margin against constitutional challenges based upon vagueness, that court has never presumed that obscenity can be determined by anyone prior to a final judicial determination. Indeed, as mentioned in footnote 3 of Appellant's Opening Brief (at p. 10) the Supreme Court has held that police officers lack the ability to determine what is or is not obscene, and, as a result, they are prohibited from even making probable cause determinations of obscenity for purposes of seizing allegedly obscene materials.

Because of the undeniable inability of anyone to know in

advance whether particular material will be found obscene or constitutionally protected, it is crucial in order to prevent an undue chilling of protected speech that sentencing judges retain discretion to weigh the degree of any defendant's culpability when sentencing that defendant. Certainly where, as here, there is no evidence that the defendant ever actually saw the film in question and there is no evidence that the defendant had any financial interest in the business other than her presumed hourly wages as a non-managerial clerk, a 7 day mandatory jail sentence is not only uncalled for, but, if upheld by this Court, will have a stifling self-censorship effect throughout the state.

The State has also asserted that once a court finds particular material to be obscene, there are no applicable safeguards to prevent punishment in whatever degree and whatever manner the State sees fit. (<u>See</u> B.O.R. 14-15.) Although the constitutionality of mandatory minimum jail sentences for first time obscenity violators is an issue of first impression, the State's position has been rejected in a very analogous context by nearly every court to have considered it. Specifically, numerous states, acting pursuant to the assumption posed by the State herein, have passed laws authorizing either the padlocking of a theater or bookstore or the revocation of its business license upon proof of a prior obscenity violation or conviction. As noted by Chief Judge Aldon J. Anderson in <u>Cornflower Entertainment, Inc. v. Salt Lake City</u>, 485 F.Supp. 777 (D. Utah 1980), the few courts which have upheld these laws

did so based upon the reasoning that "the shutdown was a penalty for past abuses and therefore did not constitute a prior restraint." 485 F.Supp. at 786. However, as noted by Judge Anderson, the vast majority of courts have adopted the better reasoned rule which recognizes that conviction for an obscenity violation does not give a state cart blanche to punish the offense in any manner and by whatever procedures it desires. [A list of the numerous cases striking such padlocking and license revocation laws as unconstitutional is set forth in the margin. 2/]

2/ The following cases have found nuisance laws unconstitutional which provide for the padlocking of businesses where obscenity offenses have occurred in the past: Universal Amusement Co., Inc. v. Vance, 587 F.2d 159, 164-166 (5th Cir. en banc 1978) [as to this particular point, all 14 judges of the en banc court were in agreement], aff'd. on other grounds, 445 U.S. 308, 100 S.Ct. 1156 (1980); People ex rel Busch v. Projection Room Theater, 17 C.3d 42, 130 Cal. Rptr. 328, 550 P.2d 600 (1976), cert. den. 429 U.S. 922, 97 S.Ct. 320 (1976); General Corp. v. Sweeton, 320 So.2d 668 (Ala. 1975), cert. den. 425 U.S. 904, 96 S.Ct. 1494 (1976); Kansas v. Motion Picture Entitled "The Bet", 219 Kan. 64, 547 P.2d 760 (1976); Gulf States Theaters of Louisiana v. Richardson, 287 So.2d 480 (La. 1974); New Riveria Arts Theatre v. Davis, 219 Tenn. 652, 412 S.W.2d 890 (1967); Society to Oppose Pornography, Inc. v. Thevis, 255 So.2d 876 (La.App. 1972); Giarrusso v. D'Iberville Gallery, 295 So.2d 891 (La.App. 1974); State ex rel Blee v. Mohney Enterprises, 289 N.E.2d 519 (Ind.App.1973); Sanders v. State, 231 Ga. 608, 203 S.E.2d 153 (1974); State ex rel Field v. Hess, 540 P.2d 1165 (Okla. 1975); Commonwealth ex rel Davis v. Van Emberg, 347 A.2d 712 (Penn. 1975); City of Minot v. Central Ave. News, Inc., 308 N.W.2d 851 (N.D. 1981); Parish of Jefferson v. Bayou Landing Ltd., Inc. 350 So.2d 158 (La.1977), overruling La.App., 341 So.2d 23; Mitchem v. State ex rel Schaub, 250 So.2d 883 (Fla.1971). See also Nihiser v. Sendak, 405 F.Supp. 482 (N.D.Ind.1974), vacated and remanded, 423 U.S. 976, 96 S.Ct. 378 (1975), order re-entered August 16, 1976 (unpub.), aff'd 431 U.S. 961, 97 S.Ct. 914 (1977); Huffman v. Pursue, Ltd, 420 U.S. 592, 612, n.23, 95 S.Ct. 1200, 1212, n.23 (1975); cf. Speight v. Slaton, 415 U.S. 333, 94 S.Ct. 1098 (1974); State ex rel Ewing v. "Without a Stitch", 307 N.E.2d

The cases cited in the margin clearly reject the State's assertion that First Amendment protections become inapplicable once material is proven obscene. Indeed, as articulated by the Florida Supreme Court in Mitchem v. State ex rel Schaub, 250 So.2d 883 (Fla. 1971), supra, both the operation and the effect of statutes regulating obscenity must be carefully scrutinized to insure against undue chilling of protected expression.

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(footnote continued from previous page)

911 (Ohio 1974).

The following cases have held unconstitutional laws which allow a permit to be either revoked or denied upon a prior obscenity violation: Entertainment Concepts Inc. III v. Maciejewski, 631 F.2d 497, 506 (7th Cir. 1980); Genusa v. City of Peoria, 475 F. Supp. 1199, 1207-09 (C.D.Ill. 1979), aff'd 619 F.2d 1203, 1217-1220 (7th Cir. 1980); Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F.Supp. 777 (D.Utah 1980); Bayside Enterprises, Inc. v. Carson, 470 F.Supp. 1140 (M.D.Fla. 1979); San Juan Liquors v. Consol. City of Jacksonville, 480 F.Supp. 151 (M.D.Fla. 1979); Natco Theatres Inc., v. Ratner, 463 F.Supp. 1124 (S.D.N.Y. 1979); Yuclan Enterprises Inc. v. Arre, 488 F.Supp. 820 (D.Hawaii 1980); Avon 42nd Street Corp. v. Myerson, 352 F.Supp. 994(S.D.N.Y. 1972); Oregon Bookmark Corp. v. Schrunk, 321 F.Supp. 639 (D.Oregon 1970); Perrine v. Municipal Court, 5 C.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert. den. 404 U.S. 1038, 92 S.Ct. 710 (1972); Kuhns v. Santa Cruz Co. Bd. of Sup'rs., 128 Cal.App.3d 369, 374-375, 181 Cal.Rptr. 1, 3-4 (1982); City of Seattle v. Bittner, 81 Wash.2d 747, 505 P.2d 126 (1973); Alexander v. City of St. Paul, 303 Minn. 201, 227 N.W.2d. 370 (Minn.1975); City of Delevan v. Thomas, 31 Ill.App.3d 630, 334 N.E.2d 190 (1975); Hamar Theatres Inc. v. City of Newark, 150 N.J.Super. 14, 374 A.2d 502 (1977); People v. J.W. Productions, 413 N.Y.S.2d 552 (N.Y.C.Cr.Ct. 1979); cf. Marks v. City of Newport Ky., 344 F.Supp. 675 (E.D.Ky.1972); Chulchian v. City of Indianapolis, 477 F.Supp. 128, 131-132 (S.D.Ind. 1979), aff'd., 633 F.2d 27, 30 (7th Cir. 1980).

> "The 14th Amendment of the United States Constitution requires that regulation of obscenity conform to procedures that will insure against the curtailment of constitutionally protected expression or publication. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S.Ct. 631 (1963). The operation and effect of the method by which sale of publications is to be restrained must be very carefully defined. Cf. Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332 (1958)." Mitchem v. State ex rel Schaub, supra, 250 So.2d at 886.

As demonstrated by the extensive authority cited above and in Appellant's Opening Brief, the First Amendment does indeed restrict the power of the State to impose punishment even after a judicial determination of obscenity has taken place.

At B.O.R. 15, the State asserts that Ms. Amicone's guilty plea "totally removed any 'dim and uncertain line' which may have existed as to the obscenity of the material." This statement evidences a total misunderstanding of the First Amendment principles applicable to this case. As both this Court and the Supreme Court have frequently held, it is not a required element in an obscenity prosecution to prove that the defendant actually knew that the material in question was legally obscene. A mere "awareness . . . of the character of material" will suffice under the Utah statute. [U.C.A. §76-10-1201(4).] Indeed, under the code section just described, even proof of a "constructive knowledge" of the character of the material will suffice to support a conviction. In short, Utah law carries no requirement of proof that the defendant has ever even seen the material in question. Accordingly, absolutely nothing can be inferred about the defendant's

mental state vis-a-vis this offense from the mere fact that she entered a plea of guilty. [3]

More importantly, even if this Court were to adopt the State's suggestion and construe the appellant's guilty plea as a belief on her part that the film in this case was obscene, such a belief could and would be nothing other than guesswork because, as noted by the Supreme Court 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), and by the en banc 5th Circuit in Vance, supra, it is impossible for any individual to know in advance whether particular material is legally obscene or constitutionally protected prior to a judicial determination.

The State has also asserted that the lack of judicial precedent on the narrow issue raised herein demonstrates that appellant's contention is without merit. (See B.O.R. 16.) This assertion again is without merit. By the State's own admission, there is only one other state in the Union besides Utah which has a mandatory minimum jail sentence for first-time obscenity violators (e.g. Tennessee). The mere fact that there has been no Tennessee or Utah case where this issue was presented is simply no indication whatsoever of the strength or weakness of this appeal.

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[3] Moreover, as this Court is no doubt aware, guilty pleas frequently represent compromises wherein a defendant may give up certain potential defenses for any of a number of reasons not in the record.

Finally, the State asserts that Utah's mandatory sentencing law has had and will have no chilling effect on protected expression. (See B.O.R. 16-17.) This assertion is contradicted not only by the State's own examples but also by the judgment of courts in analogous cases.

First of all, the State mistakenly indicates that James Piepenburg, the defendant in State v. Piepenburg, 602 P.2d 702 (Utah 1979), was the president and a director of the corporation which operated the Studio Theatre, the theatre where Ms. Amicone was employed in the present case. (See B.O.R. 16-17.) In fact, Mr. Piepenburg was the president and director of the corporation which operated the Gallery Theatre in Salt Lake City and not the Studio Theatre. Although the State's error was no doubt unintentional, it is extremely revealing. Following Mr. Piepenburg's conviction and sentence to jail, the Gallery Theatre permanently closed down as a direct consequence of Mr. Piepenburg's jail sentence!

In addition to Mr. Piepenburg's example, the State has gone outside the record and asserted that four other cases resulted in convictions at the Studio Theatre. The State then argues that the fact that the theatre is still open for business is "proof" that the minimum mandatory seven day jail sentence has no chilling impact on the exercise of First Amendment rights. It is respectfully submitted that this argument is not supportable from the evidence presented and has no merit. First of all, it should be pointed out that none of the individuals who were sentenced to jail time in the cases cited

the State returned to employment at the Studio Theatre after serving their sentences. Furthermore, with the possible exception of Mr. Taylor who was a manager at the theatre, all the other convicted defendants had quit their jobs even <u>prior</u> to their sentencing. Presumably, the filing of criminal charges against those defendants made them aware of the existence of Utah's mandatory sentencing requirement and played a substantial, if not controlling, role in their decisions to terminate their employment prior to sentencing. [4/] Whether or not the <u>Studio Theatre</u> can continue to show films, <u>these convicted defendants</u> were sufficiently deterred from any further exhibitions of constitutionally protected films.

Second, it is not clear from the State's brief which, if any, of the cases there cited involved the sort of facts where, but for the statutory seven day sentence, the defendant would have received no jail time at all.

Third, it is reasonable to expect that the chilling effect upon an hourly wage non-managerial clerk would be substantially greater than that on a manager who, because he has a greater stake in the success of the venture, is willing to take greater risks.

Fourth, no published opinion in this state has yet upheld the mandatory minimum sentence against a constitutional challenge. It is quite possible that theatre employees could

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4/ Presumably, the defendants were also deterred by the risk of a mandatory <u>30</u> day sentence for a <u>second</u> conviction (as required by U.C.A. §76-10-1204(3))!

have been advised that this statutory mandatory minimum had not yet been tested in court and may not be enforceable. Certainly, the chilling effect of this provision will be much greater if this Court were to affirmatively endorse it.

Finally, as the State's example of the Gallery Theatre's Mr. Piepenburg aptly demonstrates, jail sentences do have an undeniable chilling impact upon the ability of a theatre to remain open. Indeed, it is hard to imagine any other reason why the Legislature might have passed such a law if it did not intend to bring about such a result. While the convictions of Studio Theatre employees have, thus far, deterred only those employees, and not the theatre itself, from continuing to show constitutionally protected films, an affirmance from this Court of mandatory minimum sentences upon first time non-managerial violators will undoubtedly heighten the chilling impact of the obscenity laws upon protected expression. If this Court upholds this mandatory minimum jail requirement, it is respectfully submitted that no theatre in Utah would be able to find the clerical employees necessary to allow it to continue to display constitutionally protected adult films to consenting adult audiences.

The State's assertion that its mandatory minimum jail sentence for first time offenders has no chilling effect is also refuted by the decisions of courts faced with analogous statutory provisions. In Universal Amusement Co., Inc. v. Vance, supra, 587 F.2d 159, 166 (5th Cir. en banc 1978), the en banc 5th Circuit struck down two obscenity-nuisance provisions of

the State of Texas. The first of these laws allowed the placement of a padlock for one year upon the doors of any business which had been convicted of an obscenity violation. The portion of the Vance opinion striking this padlocking law demonstrated that the First Amendment does indeed limit the extent of punishment which can be imposed on one convicted of an obscenity violation.

However, the second portion of the Vance opinion is even more analogous to the present case. In that portion, the court held unconstitutional a statutory provision which allowed a court to impose an injunction against future unnamed obscene films where the defendant was found to have shown any obscene films in the past. The court's rationale for striking down this form of punishment for past violations of the obscenity law is directly apposite to the issue presented herein. Specifically, the court found that the chilling effect of an injunction against future unnamed obscene films was an impermissible punishment for past violations of the obscenity law because it would encourage "a theatre operator to steer wide of the danger zone by avoiding borderline films that are nonetheless protected under the first amendment." 587 F.2d at 166. As the court went on to note:

> "The line between obscenity and protected speech is 'dim and uncertain' Bantam Books, Inc. v. Sullivan, supra, 372 U.S. at 66, 83 S.Ct. 631, and difficulty in locating that line leads to self-censorship, a particularly subtle and most insidious form of the malady." 587 F.2d at 166.

In conclusion, appellant respectfully asserts that while a seven day sentence may not seem severe when compared to the otherwise permissible maximum statutory sentences, it is extremely severe when it is made mandatory punishment for every first time non-managerial clerk whose only crime is having sold a ticket to a film that they probably have never even seen. [5/] If this law is upheld by the Court, it will no doubt be a short period of time before the pall of fear and timidity which closed the Gallery Theatre causes the same result at every other theatre in the State of Utah which attempts to exhibit constitutionally protected adult films to consenting adult audiences.

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[5/] Due to the provisions of U.C.A. §76-10-1201(4) defining constructive and actual knowledge, it is not necessary for the State to even prove that the defendant has actually seen the film in question. Furthermore, in most cases there would seem to be no reason why the ticket seller would ever leave her booth to view the films inside the theatre.

II

<u>THE STATE HAS FAILED TO JUSTIFY THE MANDATORY JAIL SENTENCE OF U.C.A. §76-10-1204(2) UNDER THE PROPORTIONALITY ANALYSIS REQUIRED BY SOLEM v. HELM, 103 S.CT. 3001 (1983).</u>

A. <u>The State Has Failed To Demonstrate That The Offense Is Of Sufficient Gravity To Warrant The Harshness Of A Mandatory Seven Day Jail Sentence For All First Time Violators.</u>

In addressing the first of the three prongs of the proportionality analysis required by <u>Solem v. Helm</u>, 103 S.Ct. 3001 (1983), the State relies primarily on the decision of an Oklahoma appellate court rendered in <u>Hunt v. State</u>, 601 P.2d 464 (Okla. Cr. 1979). Not only did the <u>Hunt</u> case not involve a statutorily required minimum sentence, but the very language from the opinion which the State chose to quote indicates that the Oklahoma court's holding is entirely inconsistent with the Supreme Court's recent decision in <u>Solem</u>, <u>supra</u>. Specifically, the State quotes from that portion of the <u>Hunt</u> opinion which states:

> "While these data do indicate that Oklahoma's obscenity laws are severe, this is the sort of argument one would make to the Legislature in seeking to have the law changed, rather than to this Court in seeking to have a conviction under the law voided. Severe is not cruel. To constitute cruel and unusual punishment, a penalty must serve no valid legislative purpose." <u>Hunt v. State</u>, 601 P.2d at 467.

The language above, upon which the State relies, is utterly inconsistent with, and has been overruled by, the opinion of the Supreme Court in Solem v. Helm, supra. While the Hunt Court concedes that Oklahoma's obscenity laws are "severe", it concludes that severity is not a proper argument to be made to a court under the 8th Amendment but, instead, is strictly an argument that should be made to a legislature. The Supreme Court in Solem expressly made an analysis of the severity of the punishment a central element, indeed the first element, of its three part proportionality analysis. It is astonishing that the State would place its primary reliance upon a case that has been so thoroughly repudiated by controlling Supreme Court case law.

Second, the Hunt opinion expressly concedes that Oklahoma's obscenity laws are severe, yet even those laws do not require a minimum mandatory jail sentence for first time offenders, whereas Utah's obscenity laws do.

The State next argues that both the United States Supreme Court and the State Legislature have determined that obscenity laws are necessary for the protection of "serious" state interests. (B.O.R. at 12.) In support of this assertion, the State refers this Court to the Supreme Court's opinion in Paris Adult Theatre v. Slaton, 413 U.S. 49, 93 S.Ct. 2628 (1973) and U.C.A §76-10-1208(2). Neither of these references supports the conclusion that obscenity is a particularly serious crime. The language quoted from Paris (see B.O.R. at 18) says nothing more than that the states have a legitimate interest in

regulating obscenity and does not even purport to suggest that, in the scheme of things, an obscenity violation is a particularly serious offense. Indeed, further on in its opinion in Paris, supra, the Supreme Court suggested that the optimal treatment of obscenity might be not to punish it as a crime unless, prior to the exhibition of the film there had been a prior civil judicial determination of the obscenity of that film. The Court's comments on such a procedure are set forth below:

> "[S]uch a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment . . . .*" 413 U.S. at 55, 93 S.Ct. at 2634.
>
> "* This procedure would have even more merit if the exhibitor or purveyor could also test the issue of obscenity in a similar civil action, prior to any exposure to criminal penalty." Id., n.4.

Obviously, the language above indicates that while the Supreme Court concedes that states may have a "legitimate" interest in regulating obscenity, it is certainly not considered by the Court to be a particularly serious offense.

Not only did the Supreme Court in Paris fail to treat obscenity as a particularly serious crime, in Solem v. Helm, supra, it expressly made clear that, for 8th Amendment purposes, "nonviolent crimes are less serious than crimes marked by violence or the threat of violence". 103 S.Ct. at 3011.

Similarly, the mere fact that the Legislature has not granted ticket takers an exemption from obscenity laws, (as

evidenced by the provisions of U.C.A. §76-10-1208(2), supra), is no indication whatsoever that the Legislature considered an obscenity violation by a ticket taker to be a particularly serious offense.

Finally, in an attempt to persuade this Court that appellant herein has indeed committed a serious offense, the State asserts (at B.O.R. 12) that the appellant had "knowledge of what the film contained". However, as pointed out previously, the constructive knowledge provisions of Utah's obscenity law do not require that a defendant had ever viewed a film he or she was alleged to have exhibited. Furthermore, even if the defendant had in fact viewed the entire film, (and there is, of course, no evidence of this) the case law previously cited herein uniformly recognizes the undeniable fact that no one can know with any certainty whether or not a particular film is obscene prior to a judicial determination which applies the ever varying concept of contemporary community standards of tolerance. In sum, the State's assertions have utterly failed to establish that this offense was one of particular gravity.

B. The State Has Virtually Conceded That It Punishes Obscenity Violations Far More Severely Than Any Other Offenses Of Comparable Gravity.

In Appellant's Opening Brief, she pointed out that, at the time the offense herein was committed, there were no other man-

datory jail sentences in the Utah Criminal Code (U.C.A. Title 76), even for felony offenders, unless the offense was a capital offense. (A.O.B. at 19.) The State has not disputed this.

Appellant further pointed out that, although some mandatory sentences have recently been added to the Criminal Code, these sentences apply exclusively to various felonies and not to misdemeanors. The State has not challenged that statement in any way except to point out that mandatory sentences have been added for three other obscenity-related offenses. (See B.O.R. at 12-13.) Accordingly, the State concedes that no misdemeanors in the Criminal Code other than obscenity-related offenses are punished with mandatory minimum jail sentences. This concession is dispositive of the second prong of the proportionality analysis required by Solem, supra.

Not only does the Utah Legislature fail to require minimum mandatory jail sentences for other misdemeanor offenses, the sentences actually imposed by the District Court in the two week period contemporaneous with the date of appellant's sentencing indicate that persons convicted of much more serious offenses were frequently given sentences which were fully suspended. [See list attached as Exhibit "A". [6/]] This disparate

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[6/] Although this material is, admittedly, not in the record, the State cannot object to it on that ground because the State (at p. 17 of its Brief) discussed the circumstances of numerous cases involving employees of the Studio Theatre which were also not in the record. Moreover, all the sentencings shown in Exhibit "A" herein are a matter of public record.

treatment provides further evidence of the impermissibility of this mandatory sentence when measured under the second prong of the Solem test.

C. The State's Own Evidence Clearly Establishes That, With But One Exception, Utah Is The Only State In The Union To Require Mandatory Minimum Jail Sentences For First Time Obscenity Violators.

In appellant's opening brief, appellant's counsel pointed out that they were unaware of mandatory jail sentence requirements for first-time obscenity violators in any other jurisdictions and that if such existed, they would be in the extreme minority of jurisdictions. (Brief of Appellant at 20.) The State has obviously conceded the truth of this position because it could find only one state, i.e. Tennessee, which, like Utah, has a mandatory minimum jail sentence for first time obscenity violators.

The fact that only two states out of fifty have mandatory minimum jail sentences for first-time obscenity violators is damning evidence of the disproportionate nature of this statutory punishment.

D. Summary.

In the present case, all three of the indicia for disproportionate punishments articulated in Solem v. Helm are present. Moreover, the punishment in the present case not only

fulfills all three elements of the Solem proportionality test, but it also is clearly among the type of punishments which the 8th Amendment was designed to prevent. Following its articulation of the three factors discussed herein, the Supreme Court in Solem advised courts that in applying these tests, they should make "[c]omparisons . . . of the harm caused or threatened to the victim or society, and the culpability of the offender". 103 S.Ct. at 3011.

In the present case, the defendant is convicted of a crime without a specific victim, and, since films at the Studio Theatre are shown only to consenting adult audiences, the offense must be considered at the very low end of offenses harmful to society. Furthermore, because of the inability of anyone to know in advance whether or not a particular film is legally obscene, and because the appellant was a non-managerial ticket seller who had no reason to even view the film in question (and there is no evidence that she ever did), the degree of her culpability must be at the very lowest level for any crime in the Criminal Code. Additionally, where 48 other states do not consider this offense serious enough to require mandatory minimum jail sentences for first-time offenders, and where Utah itself does not require mandatory minimum jail sentences for any other misdemeanor crimes which are not obscenity-related, it can only be concluded that the punishment inflicted upon appellant is disproportionate in violation of the 8th and 14th Amendments' prohibition against disproportionate punishment as articulated in Solem, supra.

CONCLUSION

For all the reasons stated above, this case should be remanded to the Circuit Court so that that Court can resentence Ms. Amicone based upon the true degree of her culpability as found by the trial court, free of the mandatory sentencing requirement of U.C.A. §76-10-1204(2).

DATED: November 9, 1983

Respectfully submitted,

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EXHIBIT "A"

MOONEY & SMITH

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801 364-5636

JEROME H. MOONEY

STEPHEN R. SMITH, JR.

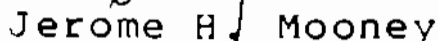
October 20, 1983

Randy Garrou
BROWN, WESTON & SARNO
433 North Camden Drive
Suite 900
Beverly Hills, California 90210

Dear Randy:

Please find enclosed a recap of the sentencings that took place in the District Court for one week in each direction of Heather Amicone. District Court sentencings were chosen as opposed to Circuit Court sentencings because records are available in one location according to dates, which is not the case in the Circuit Court. Also the offenses are of a more serious character and thus, give a better picture of evenhandedness. Unfortunately, we have no way of confirming whether a prior record existed in those cases where rap sheets were not available in the file. It is likely that the majority of those cases involved no prior records. I hope this is of some assistance.

Thank you,



Jerome H. Mooney

JHM:lah
Enclosure

NAME	CASE #	OFFENSE	SENTENCE	RECORD*
Tuesday, 24 August 1982:				
[illegible] A. Ward	81-226	Attempted dist of controlled subs.	probation	Misd's
Richard P. PRICE	82-959	Burglary	Probation, serve 6 mo.	
	(note: Price was a 19 year old transient with no employment or residence.)			
Keith R. MILLINER	82-877	DUI (Misd)	17 days	Misd's
Michael R. GARCIA	82-925	Att Ag Assault	Probation	
Lamar SMITH	82-750	Unlawful Sexual Intercourse	Probation, serve 6 mo.	
	(note:Psych eval indicated that Smith was engaged in several on-going molestations.)			
Earl GIBSON	81-1056	Felony Theft	Probation	Misd's
Wednesday, 25 August 1982				
Richard WAKEFIELD	82-365	Felony Theft	Probation	Misd's
Scott HOLLIDAY	82-880	Robbery	Probation, serve 30 days	
Kenneth JAMESON	82-782	Retail Theft(Misd)	1 yr in SL County Jail	
Ronald ROMERO	82-851	Att Burglary, Concealed Wpn.	Probation	
Raymond WATSON	82-982	Felony Theft	Probation	
Jack A. BILLS	82-636	Felony Theft	Ut St Prison	Felonies
Thursday, 26 August 1982				
Ronald D. COLLINS	82-162	Assault on Police Officer (Misd)	Probation	
Gerald MARX	82-653	Forcible Sexual Abuse	Ut St Prison	Felonies
Rosalio PINTERIA	82-842	Veh. Burglary	Probation	
John R. CASE	82-155	Forcible Sexual Abuse	Ut St Prison	
Friday, 27 August 1982				
James HAGLER	80-971	Felony Theft	Probation	
Monday, 30 August 1982				
Stephanie KALLAS	82-890	Burglary	Probation	
Rodney J. PITT	82-919	Att Burglary	Probation	
Paul D. HUNT	82-611	Att Obtaining a Cont Subs by Fraud	Probation	Felonies
Clifford SHARFNER	82-718	Robbery	Probation	None
Nardia CALL	82-981	Felony Theft	Probation	None

*The majority of files contained no information on prior records.

Tuesday, 31 August 1982

Jeffrey LEE	82-971	Felony Theft	Probation	Felony
[illegible] HIGBEE	82-919	Burglary, Theft	Probation	
[illegible] ARCHULETA	82-975	Burglary	Probation	Misd's
[illegible] BROOKS	82-968	Burglary, Criminal Mischief	Probation	Misd's

Wednesday, 1 September 1982

Jay THOMPSON	82-542	DUI (Misd)	60 days	Misd's
Betty WISEMAN	82-1022	Issuing Bad Checks	Probation	
Dave FOURTNER	82-891	Burglary	Probation	
Wesley MOORE	82-637	Att Ag Assault	Probation	Misd's
Kimberly NANCE	81-1234	Theft	Probation	

Thursday, 2 September 1982

Edward M. PICKETT	82-1017	Felony Theft	Probation
Juanita BROWN	82-1020	Att Forgery	Probation

Tuesday, 7 September 1982

Leon MITCHELL	82-985	Felony Theft	Ut St Prison
	(Note: Out of state theft of automobile)		
Tonia THOMPSON	82-813	Felony Theft	Probation
Douglas HAYES	82-897	Unlawful Dist for Value C.S.(2 Cts)	Ut St Prison
	(Note: Marijuana and LSD)		
Robert FRENCH	82-594	Possession with intent to distr.	Probation

Wednesday, 8 September 1982

Rene SEMRAU	82-42	Theft by Decption	Probation	Misd's
Chris HOINVILLE	82-33	Unlawful Dist for Value of C.S.	Probation	
Sammy MANUMALEUNA	82-825	Burglary	Probation	
Jeffery TAYLOR	81-1343	Att Unlawful Dist for Value of C.S.	Probation	Misd's
Philip RUHRER	82-1034	Unlawful Dist for Value of C.S.	Probation	
James BOGGESS	82-996	Att Burglary	Probation	Felonies
Angel ROMERO	82-387	Felony Theft	Probation	
Steven MAXWELL	82-802	Forcible Sodomy	Ut St Prison	Felonies