No. 12-

In the Supreme Court of the United States

ERIC LEON BUTT, JR.,

Petitioner,

v.

STATE OF UTAH,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Utah

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must jury decisions that material is obscene—either obscene for all viewers or just for minors—be reviewed using the independent appellate review mandated by *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 (1984), and *Jenkins* v. *Georgia*, 418 U.S. 153, 159–61 (1974)? There is a split on this question among state courts of last resort and federal circuit courts.

2. Should this Court provide lower courts with a benchmark precedent about what material is "obscene as to minors" or "harmful to minors," by deciding whether roughly drawn pictures, lacking in sexual content, sent by a father to his wife to be shown to his young child are properly viewed as "obscene as to minors"?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Eric Leon Butt, Jr., respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Utah in this case.

OPINIONS BELOW

The Supreme Court of Utah decision, App. A, *infra*, has not yet been published in the Pacific Reports, but is available at http://www.utcourts.gov/opinions/supopin/Butt1234060812.pdf and on WESTLAW and LEXIS at 2012 UT 34. The Utah Court of Appeals did not render a decision, but instead transferred the case to the Utah Supreme Court. The trial court did not render a written opinion.

JURISDICTION

The opinion of the Utah Supreme Court was handed down on June 8, 2012. This Court has jurisdiction under 28 U.S.C. § 1257(a), because the decision below was a final judgment rendered by the Utah Supreme Court, and petitioner argues that this decision violated the First and Fourteenth Amendments.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part,

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The Fourteenth Amendment to the United States Constitution provides,

> No state shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

A. Petitioner's Conduct

In November 2008, Butt was in a Utah county jail serving a sentence for theft-related charges. To stay in touch with his wife, his eight-year-old son, and his five-year-old daughter, Butt wrote to them nearly every day, and spoke with them by phone a few times a week. Several times, his family visited him in prison.

This case is about two letters that Butt placed in the jail mailbox to be sent to his wife, so that she could read them to his daughter. Each letter contained a hand-drawn picture.

The first picture stemmed from a conversation between Butt and his daughter, and from a Discovery Channel documentary that they had watched together before he went to jail. Butt testified at trial—without contradiction by any prosecution evidence—that the documentary was about prehistoric cave paintings, in which some people were depicted as naked stick figures. "She was laughing about it, this and that, and there was little people naked, big people naked, and she says, 'Why are they naked?' I said, 'That's just how they do it back then.'" Trial Tr. 108, App. B, at 28a.

Butt likewise testified, without contradiction, that his daughter had asked him to draw a picture of himself "naked like on the cave walls":

> Q. Did [the five-year-old daughter] make any other requests about the picture?
>
> A. Well, it—as it says right here [referring to a note in the letter to Butt's wife], "I have no idea why she wanted me to draw my wiener, but she insisted." She wanted me to draw a picture of myself, and she namely said—particularly said, "And draw yourself naked like on the cave walls." We happened to watch this documentary on cave dwellings and stuff, and that's where she was coming from with it.

Trial Tr. 107, App. B, at 28a. Based on this request—and apparently judging that no harm would come of it to the daughter—Butt sent a letter to his wife (reproduced in App. C, at 32a), to be shown and read to the daughter.

Three days later, Butt sent his wife another letter, reproduced in App. C, at 33a. Half the page was addressed to his son, mostly admonishing him to play basketball, and the other half was addressed to his daughter. Both this letter and the first letter alluded to a running joke between Butt and his daughter; as he testified, without contradiction, he would tickle his daughter before bed, "and she'll roll over [laughing and giggling]. I'll say, 'Roll back over or I'm going to bite your butt cheek,' so she'll roll back over. That's all that has ever been said about it, done about it, and it's nothing more than that." Trial Tr. 110, App. B, at 28a.

The jail had a policy of randomly inspecting outgoing prisoner mail. The prison guards in charge of this inspection read the letters, and concluded that the letters were illegal. Several days later, Butt was

charged with two counts of Dealing in Harmful Material to a Minor, a third degree felony in violation of UTAH CODE ANN. § 76-10-1206(1) (West 2009).

B. The Statute

Material that is "harmful to minors" is defined by UTAH CODE ANN. § 76-10-1201(5) as material that:

(1) "taken as a whole, appeals to the prurient interest in sex of minors";

(2) "is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors"; and

(3) "taken as a whole, does not have serious value for minors."

This definition is based on *Ginsberg* v. *New York*, 390 U.S. 629, 632 (1968), and *Miller* v. *California*, 413 U.S. 15, 24 (1973), and is often described as a "variable obscenity" standard or an "obscene-as-to-minors" standard. *Ginsberg*, 390 U.S. at 635 n.4 (describing the standard as a "variable obscenity" standard); *Brown* v. *Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011) (describing the *Ginsberg* statute as "regulating obscenity-for-minors"); *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 213 n.10 (1975) (describing *Ginsberg* as involving "obscenity as to minors"). The definition is commonplace in state and federal statutes. *See, e.g.*, ALA. CODE. § 13A-12-200.1, .5 (2012); COLO. REV. STAT. ANN. § 18-7-501 (West 2012); 720 ILL. COMP. STAT. ANN. 5/11-21 (West 2012); N.Y. PENAL LAW § 235.20 (McKinney 2012); *see also* Child Online Protection Act, 47 U.S.C. § 231 (2012), *held unconstitutional in Ashcroft* v. *ACLU (II)*, 542 U.S. 656, 665 (2004) (holding the Act uncon-

stitutional because it banned not only distribution of the speech to known minors but also commercial display of such speech in any contexts where minors could see it, and therefore unduly interfered with communication to adults).

In *Ginsberg*, this Court upheld a similar "variable obscenity" statute that was limited to distribution of material to minors. *Ginsberg* was decided at a time when the test governing the distribution of obscenity to adults was the one set forth in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418 (1966). Under the *Memoirs* test, material was obscene if "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." The obscenity-as-to-minors statute in *Ginsburg* used the *Memoirs* adult obscenity test but with "for minors" added to each prong: material was punishable under the statute if it "(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors." 390 U.S. at 633 (internal quotation mark omitted).

Then in *Miller*, this Court replaced the *Memoirs* test with a new test, under which material is obscene if

(1) "the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest,"

(2) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and

(3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

413 U.S. at 24 (internal quotation marks and citations omitted). The logic of *Ginsberg*, coupled with the *Miller* test, suggested to many legislatures that a *Miller* test with the phrase "for minors" added to each prong would be a constitutionally permissible way to define the material that may not be distributed to minors. Many lower courts have agreed, upholding such statutes against First Amendment challenge. *See, e.g.*, *American Booksellers Ass'n, Inc.* v. *Virginia*, 882 F.2d 125, 127 & n.2 (4th Cir. 1989); *American Booksellers Found. for Free Expression* v. *Strickland*, 601 F.3d 622, 624, 627 (6th Cir. 2010); *M.S. News Co.* v. *Casado*, 721 F.2d 1281, 1286–87 (10th Cir. 1983); *American Booksellers* v. *Webb*, 919 F.2d 1493, 1496, 1501 (11th Cir. 1990); *State* v. *Canal*, 773 N.W.2d 528, 531 (Iowa 2009); *State* v. *Burke*, 675 P.2d 1198, 1199–1200 (Utah 1984) (*per curiam*).

C. Trial Court Proceedings

A jury convicted Butt of the charges following a trial on July 15, 2009. During the trial, the state called only two witnesses—the jail commander who had viewed and confiscated Butt's letters, and the corrections officer who had asked Butt about the ages of his children. The only material evidence submitted by the state was the drawings and letters themselves.

The state presented no expert witnesses. Neither of the state's witnesses knew Butt's family, nor claimed any expertise in understanding how such drawings affect children. Butt was the only witness for the defense.

In denying the defendant's motion for a directed verdict, the trial court judge seemed to express some sympathy for the defendant's contention that the speech did not appeal to the prurient interest of the recipient. Trial Tr. 102, App. B, at 29a (stating twice that, "I'm not sure a five-year-old can have a prurient interest"). Nonetheless, the judge ultimately concluded that this was a matter left solely to the jury. Trial Tr. 103, App. B, at 30a ("I think I have to deny the motion for a directed verdict and allow the jury to decide").

The jury convicted defendant of two charges of distributing "harmful to minors" material, and the judge sentenced him to indeterminate sentences of zero to five years in prison, to be served concurrently.

D. Appellate Proceedings

Defendant appealed, and the Utah Court of Appeals certified the case to the Utah Supreme Court under UTAH R. APP. P. 43. Defendant consistently argued in his briefs that the material did not appeal to a "prurient interest in sex of minors," which is both a statutory and a constitutional requirement. Opening Br. of Appellant 24–30; Reply Br. of Appellant 9–11; Supp. Br. of Appellant 6–8. The Supreme Court of Utah affirmed the petitioner's conviction without explaining how the letters supposedly satisfied the "prurient interest in sex of minors" requirement.

REASONS FOR GRANTING THE PETITION

I. State Supreme Court Decisions and Federal Circuit Court Decisions Are Split on Whether to Review Obscenity Findings Using Independent Appellate Review

A. Cases from This Court and from Many Lower Courts Apply Independent Appellate Review

When a jury finds that a defendant's speech falls within an exception to First Amendment protection, appellate courts "must make an independent examination of the whole record so as to assure [them]selves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 (1984) (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964)) (internal quotation marks and citations omitted). There are two main reasons for this requirement: First, "the constitutional values protected by the rule [defining the scope of the First Amendment exception] make it imperative that judges * * * make sure that it is correctly applied." 466 U.S. at 502. Second, "the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication." *Id.* Appellate decisions applying independent appellate review are needed to clarify the constitutional test and to provide more guidance for citizens, judges, and prosecutors.

This requirement of independent appellate review applies to the entire range of First Amendment exceptions. It applies to libel, as in *Bose* and *Sulli-*

van. It applies to fighting words, incitement, and child pornography. *Bose*, 466 U.S. at 505–07 (citing, among other cases, *Street* v. *New York*, 394 U.S. 576, 592 (1969), *Hess* v. *Indiana*, 414 U.S. 105, 108–09 (1973) (*per curiam*), and *New York* v. *Ferber*, 458 U.S. 747, 774 n.28 (1982)). And it applies to obscenity. *Id.* at 506–07 (citing *Miller* v. *California*, 413 U.S. 15, 25 (1973), and *Jenkins* v. *Georgia*, 418 U.S. 153, 159–61 (1974)).

Thus, in *Jenkins* v. *Georgia*, a jury concluded that the film *Carnal Knowledge* met the three-part *Miller* v. *California* standard that defines which material may be banned as obscene. This Court reversed, applying independent appellate review to conclude that the material did not satisfy the second ("patent offensiveness") prong of the *Miller* test. 418 U.S. at 161. "Even though questions of appeal to the prurient interest or of patent offensiveness are essentially questions of fact," this Court stated, "it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion" in resolving whether the evidence satisfies these standards. *Id.* at 160 (internal quotation marks omitted).

Such independent review reflected the statement in *Miller* that the obscenity exception is legitimate precisely because appellate review is available to correct erroneous findings of obscenity. "First Amendment values * * * are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. See *Kois* v. *Wisconsin*, *supra*, 408 U.S., at 232; [other citations omitted]." 413 U.S. at 25. In turn, in *Kois* v. *Wisconsin*, 408 U.S. 229 (1972) (*per curiam*), this Court independently reviewed a jury finding that a sexually themed poem (accompanied

by two photographs containing nudity) was obscene. This Court reversed the conviction, on the grounds that "it can[not] be said that the dominant theme of this poem appeals to prurient interest." *Id.* at 231–32.

Courts of last resort in Alabama, Georgia, Illinois, Louisiana, Minnesota, Missouri, Texas, Washington, and the District of Columbia, as well as the U.S. Courts of Appeals for the Fifth and Seventh Circuits, have faithfully read this Court's precedents as requiring independent appellate review in obscenity cases. For example, in *People* v. *Ridens*, 321 N.E.2d 264 (Ill. 1974), the Illinois Supreme Court acknowledged that courts must "'mak[e an] independent constitutional judgment' in cases involving obscenity," *id.* at 270 (citation omitted), and upheld the conviction because it independently concluded "that the magazines are obscene." *Id.* at 271 (relying on the factual analysis performed in an earlier decision in the case, *People* v. *Ridens*, 282 N.E.2d 691 (Ill. 1972), which in turn engaged in "an independent constitutional judgment as to whether the publications in issue are obscene or constitutionally protected," *id.* at 695 (citation omitted)).

Other cases in the other jurisdictions mentioned above apply virtually the same reasoning. *See Pierce* v. *State*, 296 So. 2d 218, 223 (Ala. 1974); *Dyke* v. *State*, 209 S.E.2d 166, 169–70 (Ga. 1974) (citing *Jenkins*); *State* v. *Walden Book Co.*, 386 So.2d 342, 344 (La. 1980) (citing *Jenkins*); *State* v. *Davidson*, 481 N.W.2d 51, 58–59 (Minn. 1992) (citing *Jenkins*); *McNary* v. *Carlton*, 527 S.W.2d 343, 348 (Mo. 1975) (citing *Jenkins*); *Andrews* v. *State*, 652 S.W.2d 370, 383 (Tex. Crim. App. 1983) (en banc) (court of last resort for criminal cases) (citing *Jenkins* and similar

language from *Jacobellis* v. *Ohio*, 378 U.S. 184, 190 (1964) (Brennan, J.)); *State* v. *Reece*, 757 P.2d 947, 953 (Wash. 1988) (citing a case that cited *Jacobellis*); *Lakin* v. *United States*, 363 A.2d 990, 997 (D.C. 1976) (citing *Jacobellis*); *Penthouse Intern., Ltd.* v. *McAuliffe*, 610 F.2d 1353, 1363–67 (5th Cir. 1980) (citing *Jenkins*); *Amato* v. *Divine*, 558 F.2d 364, 365 (7th Cir. 1977) (citing *Jenkins* and *Jacobellis*). Later intermediate appellate cases in these states naturally follow these state high court precedents, *see, e.g.*, *Kervin* v. *State*, 323 S.E.2d 643, 647 (Ga. Ct. App. 1984) (Deen, P.J., concurring specially); *Gateway Books, Inc.* v. *State*, 278 S.E.2d 728, 729 (Ga. Ct. App. 1981); *People* v. *Anderson*, 473 N.E.2d 1345, 1347 (Ill. App. Ct. 1985); *State* v. *Davis*, 457 So. 2d 91, 92 (La. Ct. App. 1984); *Varkonyi* v. *State*, 276 S.W.3d 27, 36 (Tex. App. 2008); *Castillo* v. *State*, 79 S.W.3d 817, 826 (Tex. App. 2002).

The highest courts of Massachusetts, Ohio, and West Virginia have likewise stated that independent appellate review is required in obscenity cases, though they said this in dictum rather than holding. *See Commonwealth* v. *Bean*, 761 N.E.2d 501, 507 (Mass. 2002) (citing *Bose*); *State ex rel. Pizza* v. *Strope*, 560 N.E.2d 765, 768–69 (Ohio 1990) (citing *Jenkins* and *Bose*); *Butler* v. *Tucker*, 416 S.E.2d 262, 265 (W. Va. 1992) (citing *Jenkins*). Intermediate appellate courts in Massachusetts and Ohio have followed these precedents in their holdings. *See, e.g.*, *Commonwealth* v. *Rollins*, 799 N.E.2d 1287, 1291–92 (Mass. App. Ct. 2003); *State* v. *Jenkins*, No. C–040111, B–0105517–A, 2004 WL 3015091, *11 (Ohio Ct. App. Dec. 30, 2004); *State* v. *Caudill*, 599 N.E.2d 395, 402 (Ohio Ct. App. 1991). And intermediate appellate courts in Indiana, Maryland, and Tennessee have expressed the same view, also in holdings. *See*

Smith v. *State*, 413 N.E.2d 652, 653 (Ind. Ct. App. 1980); *Village Books, Inc.* v. *State*, 323 A.2d 698, 703–04, 708 (Md. Ct. Spec. App. 1974); *State* v. *Davis*, 654 S.W.2d 688, 694–95 (Tenn. Crim. App. 1983)).

As noted *supra*, p. 4, the "obscene as to minors" test is simply a "variable obscenity" standard that adapts the obscenity test to the distribution of materials to minors. Unsurprisingly, therefore, courts have applied the independent appellate review used in ordinary obscenity cases to "obscene as to minors" cases as well. *Andrews* v. *State*, the Texas Court of Criminal Appeals case cited above as applying independent appellate review, itself involved a prosecution for "obscene as to minors" speech. 652 S.W.2d at 386. Likewise, the Appeals Court of Massachusetts applied independent appellate review in an "obscene as to minors" case, citing a Massachusetts Supreme Judicial Court case that called for such review in obscenity cases generally. *Commonwealth* v. *Militello*, 848 N.E.2d 406, 411 (Mass. App. Ct. 2006) ("Cases involving speech under the First Amendment require independent appellate review of the offending material to ensure that protected speech is not infringed."), *citing Commonwealth* v. *Bean*, 761 N.E.2d at 507.

B. Cases from Other Lower Courts, Including the Utah Supreme Court in This Case, Refuse to Apply Independent Appellate Review

Yet despite this Court's holdings requiring independent appellate review, state supreme courts in Delaware, Iowa, Nebraska, and Wisconsin—as well as the court below—have refused to independently

review whether allegedly obscene material meets the first two parts of the *Miller* or *Ginsberg/Miller* standard. Instead, those courts have largely deferred to the jury's or trial judge's decisions in obscenity cases.

In *State* v. *Harrold*, 593 N.W.2d 299 (Neb. 1999), the Nebraska Supreme Court expressly rejected defendant's argument for independent appellate review as to the first two parts of the *Miller* test. The court noted the disagreement among other courts on whether to apply independent appellate review in such cases, and reasoned that, since "the trier of fact is obviously better suited to determine the limits of tolerance in a particular community regarding the 'prurient interest' test and the 'patently offensive' test, a reviewing court should give due deference to the findings of the trier of fact regarding these essentially factual determinations." *Id.* at 312. The court concluded that independent appellate review should apply only to the third, "serious value," prong of the *Miller* test. *Id.*

Likewise, in *Court* v. *State*, 217 N.W.2d 676 (Wis. 1974) (*per curiam*), the Wisconsin Supreme Court held that "[o]nly the last element of the obscenity formula * * * may be determined independently by the appellate court," *id.* at 679, and that "the court in *Miller* intended the independent review to be limited solely to the third element of the test for obscenity," *id.* at 678. In *State* v. *Canal*, 773 N.W.2d 528 (Iowa 2009), which involved an obscenity-as-to-minors conviction, the Iowa Supreme Court held that judgments that certain material is obscene as to minors were not subject to independent review; "our task is not to refind the facts," the court reasoned, but simply to

determine whether "a rational juror could find [defendant] guilty." *Id.* at 532.

In *Gotleib* v. *State*, 406 A.2d 270 (Del. 1979), the Delaware Supreme Court applied the "substantial evidence" test rather than independent appellate review, *id.* at 278. And intermediate appellate courts in Arizona and New Mexico similarly rejected independent appellate review. *See State* v. *Grainge*, 918 P.2d 1073, 1077 (Ariz. Ct. App. 1996) (upholding the trial court's denial of appellant's motion for acquittal on the charge of furnishing obscene or harmful items to minors on the grounds that "[w]e will not disturb the jury's decision if substantial evidence supports it"); *City of Farmington* v. *Fawcett*, 843 P.2d 839, 850–51 (N.M. Ct. App. 1992) (concluding that "deference to the jury findings" is due for the first two prongs of the obscenity test but not for the third, though even as to the first two prongs "the scope of review must be broader than for a conventional factual determination"). "Substantial evidence" review is deferential review, not independent review. *See, e.g.*, *BE & K Constr. Co.* v. *NLRB*, 536 U.S. 516, 538 (2002) (Scalia, J., concurring); *U.S. Dept. of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 755 (1989); *Massachusetts* v. *Upton*, 466 U.S. 727, 728 (1984) (*per curiam*).

In this case, the Utah Supreme Court likewise declined to apply independent appellate review and instead deferred to the jury's conclusions regarding the evidence. The court noted that the statute involved in the case was patterned on the First Amendment *Miller* test. App. 17a–23a. In the process, the court relied on its decisions in *State* v. *Taylor*, 664 P.2d 439 (Utah 1983), and *State* v. *Burke*, 675 P.2d 1198 (Utah 1984) (*per curiam*), which in

turn discussed the First Amendment precedents—*Miller* and *Ginsberg*—in detail.

Yet the court did not "make an independent examination of the whole record so as to assure [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose*, 466 U.S. at 508. Indeed, the very first paragraph of the opinion stated that the court was affirming the conviction "[d]ue to the broad grant of discretion ceded to the jury by the sufficiency of the evidence standard and by the 'harmful to minors' statute." App. A, at 2a. Several paragraphs later, the court likewise stated that it was applying a "standard of review" that "is highly deferential to a jury verdict," App. A, at 5a (quoting *State* v. *Levin*, 144 P.3d 1096 (Utah 2006)).

The court did briefly acknowledge that the First Amendment imposes some limits on jury discretion, stating that, "[j]ust as *Miller* recognizes that the Constitution will not permit a jury to find all material obscene for adults, likewise, the Constitution will inevitably block a jury's impulse to criminalize certain material as harmful to minors," *id.* at 22a. But it immediately followed this by saying, "[d]efendant has not presented a viable argument that *the statute* under which he was convicted exceeds the bounds set by the Constitution," *id.* (emphasis added)—seemingly focusing on the need for the statute to constrain the jury's discretion, and not on any need for appellate courts to independently review the jury's decision. And the court then went on to stress the need to defer to the jury:

> [T]he State presented only the pictures at issue and left the determination of "harmfulness" up to the jury. Because the assessment

> of whether the evidence is "harmful" is a question for the jury, we cannot conclude that the evidence was insufficient to support a conviction. Instead, the State presented the pictures and asked the jury to decide whether they were harmful. The jury, acting within its discretion, decided they were.
>
> As an appellate court, our role in reviewing a sufficiency of the evidence claim is simply to "consider[] the evidence and the inferences that may reasonably be drawn from that evidence to determine whether there is a basis upon which a jury could find the defendant guilty beyond a reasonable doubt." *In a "harmful to minors" case, it is left to the jury to decide for itself what is harmful and what is not.* We therefore conclude that the State's presentation of only the drawings in question falls within the parameters of the "harmful to minors" statute, and that the jury reasonably drew the inference that the material met the elements of "harmful."

App. 24a (emphasis added) (footnote omitted).

And the actions of the court below were consistent with these words. The court never independently considered petitioner's argument that the material was not sexual in nature and thus did not appeal to the "prurient interest of minors." Opening Br. of Appellant at 24–30; Reply Br. of Appellant at 9–11; Supp. Br. of Appellant at 6–8. Petitioner cited *Jenkins* in arguing that the court should not just defer to the jury's discretion, but should instead conclude that "the Letters do not meet the United States Supreme Court's accepted definition of appealing to the 'prurient interests,'" and that "[t]he Letters did

not meet either state or federal courts' definitions of 'prurient interest.'" Opening Br. of Appellant at 27–30. Likewise, petitioner cited *Kois* v. *Wisconsin*—another case that applied independent appellate review, *see supra* p. 9—in arguing that "'[a] reviewing court must, of necessity, look at the context of the material, as well as its content,'" and that the context in this case showed that there was no appeal to the prurient interest. Supp. Br. of Appellant at 7 (quoting *Kois*, 408 U.S. at 231).

Yet the Utah Supreme Court never explained why a rough and unrealistic drawing containing no depiction or description of sexual activity would appeal to a five-year-old girl's "shameful or morbid" interest in sex (which is what "prurient" means in this context, *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985)). The court discussed in some detail the legal difference between the *Miller* adult obscenity and *Ginsberg* obscenity-as-to-minors standards, and concluded (as was noted above) that "Defendant has not presented a viable argument that *the statute* under which he was convicted exceeds the bounds set by the Constitution." App. 22a (emphasis added). But the court did not explain why the *application* of the statute—which was based on the *Ginsberg*/*Miller* constitutional standard—was constitutionally permissible.

The Utah Supreme Court thus showed no sign that it was exercising independent appellate review of the question whether the letters appealed to the "prurient interest in sex of minors." Instead, its analysis reflected its statement that, "[i]n a 'harmful to minors' case, it is left to the jury to decide for itself what is harmful and what is not." App. 24a.

C. The Third Circuit Has Refused to Apply Independent Appellate Review to the "Prurient Interest" Prong of the Obscenity Test, but Applies It to the "Patent Offensiveness" Prong

The uncertainty among lower courts is further compounded by a third approach, taken by the Third Circuit in *United States* v. *Various Articles of Merchandise, Schedule No. 287*, 230 F.3d 649 (3d Cir. 2000). The Third Circuit concluded:

> [W]e hold that we have an independent review of parts (b) ["patent offensiveness"] and (c) ["serious value"] of the *Miller* test. Part (a) of the *Miller* test ("whether . . ., applying contemporary community standards, . . . the work . . . appeals to the prurient interest"), on the other hand, is a particularly factual inquiry that does not, on its own, implicate the First Amendment.
>
> Accordingly, we will review the District Court's factual findings under part (a) for clear error and exercise plenary review over its legal conclusions, and we will also exercise plenary review over the District Court's determinations with respect to parts (b) and (c) of the *Miller* test.

Id. at 653. This approach is halfway between the full independent appellate review used by the cases cited in Part I.A and the appellate review of only the serious value prong used by the cases cited in Part I.B.

D. This Case Illustrates the Need to Resolve This Split, and Is a Good Vehicle for Resolving This Split

This case helps illustrate why independent appellate review matters. Petitioner's letters cannot reasonably be seen as falling within the *Ginsberg/Miller* exception to First Amendment protection, among other things because they did not appeal to the "prurient interest in sex of minors."

As noted above, the letters did not depict sexual activity. They did not describe sexual activity. It is not just that they were not the "hard-core" pornography, *Miller*, 413 U.S. at 27, covered by the adult obscenity exception. They were not any sort of pornography, hard-core, soft-core, or otherwise.

There was no evidence introduced at trial that the petitioner's five-year-old daughter would view the letters as sexually arousing or even sexually disturbing. There was no evidence that the five-year-old daughter had any interest in sex to which the letters might appeal, much less a "shameful or morbid" interest, *Brockett*, 472 U.S. at 498. There was no evidence that the material had the capacity to produce any sexual responses in a five-year-old girl, much less "sexual responses over and beyond those that would be characterized as normal." *Id.*

Indeed, this Court has recognized that not all nudity is obscene even as to minors. "It is clear * * * that under any test of obscenity as to minors not all nudity would be proscribed. Rather, to be obscene 'such expression must be, in some significant way, erotic.'" *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 213 n.10 (1975) (citation omitted). And *Erznoznik* involved a restriction on the usually highly real-

istic nudity shown on drive-in theater screens—not a restriction on rough and unrealistic drawings, in a context in which there was nothing at all "erotic" about them.

There was also no evidence indicating that petitioner had any sexual motivation or wanted the material to awaken any sexual interest on his daughter's part. It is possible that the prosecutor or the jury suspected that petitioner might have had some such motive. And evidence of such a motive might have justified a prosecution for an attempt or conspiracy to lead a child into improper sexual contact, or suggested that petitioner was at least attempting to appeal to the minor's interest in sex.

But there was no such evidence, and in any event petitioner was prosecuted only for distributing "harmful to minors" material, not for any other crime. Under the Utah statute, and under the *Ginsberg/Miller* doctrine, such a conviction could only rest on proof that the material actually does appeal to a shameful or morbid interest of minor *readers* in sex—not on any suspicion that the *writer* had a bad motivation.

Indeed, the trial court expressed skepticism that the letters satisfied the "prurient interest" prong, Trial Tr. 102, App. B, at 29a ("I'm not sure a five-year-old can have a prurient interest"), but erroneously concluded that this was a matter left solely to the jury, Trial Tr. 103, App. B, at 30a ("I think I have to deny the motion for a directed verdict and allow the jury to decide"). Had the Utah Supreme Court applied independent appellate review, it is very likely that it would have correctly concluded that the material did not appeal to a five-year-old's "shameful or morbid" interest in sex.

This is thus the very sort of case in which the teachings of *Bose* and this Court's other independent appellate review cases are most applicable. First, independent appellate review would have helped "make sure that" the *Ginsberg/Miller* test was properly applied, and thus that "the constitutional values protected by the rule" were adequately served. *Bose*, 466 U.S. at 502.

Second, given that "the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication," *id.*, independent appellate review could give parents in Utah—and in other states—a better sense of just what material they may legally show their children, and what material could lead them to a felony conviction. And, relatedly, independent appellate review could give guidance to prosecutors who are deciding which charges may constitutionally be brought, and to judges deciding which cases must be dismissed and which may go forward.

Finally, this case is a good vehicle for resolving the split. The record is brief. Only three witnesses testified at trial. The two prosecution witnesses were prison guards who testified only to petitioner's having sent the letters and to petitioner's statement about the age of his children.

The evidence relevant to whether the speech is constitutionally unprotected consists entirely of the two pages of letters—which this Court can quickly and easily review—and petitioner's trial testimony, which occupied only 13 pages of the transcript, Trial Tr. 105–17. The contents of the letters were undisputed. The defendant's testimony about what the letters were alluding to was undisputed.

The statute under which petitioner was convicted is cast in the language of *Ginsberg* and *Miller*, with no complicating additional elements. Petitioner was prosecuted solely for distributing obscene-as-to-minors material. And resolving the split in petitioner's favor would almost certainly change the outcome of the case.

II. Even Setting Aside the Split Identified in Part I, Reviewing the Decision Below Will Set a Valuable Benchmark for Future Courts

A. Such Benchmarks Are Valuable, Especially in First Amendment Cases, But None Has Been Set in "Obscene-for-Minors" Cases

Even setting aside the value of resolving the split identified in Part I, granting certiorari can helpfully clarify the *Ginsberg/Miller* test for lower courts, prosecutors, and citizens.

As Part I.D noted, when this Court reviews a lower court case, it sets a valuable precedent to which judges and others can compare the facts of future cases. This is especially so when the underlying legal standard cannot be captured using a clear rule.

"[T]he content of" many a rule "is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication." *Bose*, 466 U.S. at 502. In such a situation, "this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance." *Id.* at 503.

"Providing triers of fact with a general description" of what behavior is covered by such a standard

does "not, in and of itself, serve[] sufficiently to narrow the category." *Id.* at 505. Rather, the Court must provide lower courts with benchmarks applying the standard, which the lower courts can use for comparison in future cases.

This of course is exactly what this Court has done with regard to First Amendment doctrines such as obscenity, incitement, libel, and commercial speech. *Jenkins* v. *Georgia*, for example, offers an example of this Court clarifying the obscenity test by explaining why one particular work is not obscene. *Hess* v. *Indiana,* 414 U.S. 105 (1973) (*per curiam*), likewise clarified incitement law by explaining why the incitement test was not satisfied on the facts of that case. *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989), *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979), *Wolston* v. *Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971), *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, 398 U.S. 6 (1970), *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81 (1967) (*per curiam*), and *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966), similarly clarified constitutional libel concepts such as "actual malice," "public figure," "of and concerning [plaintiff]," and the requirement of a false factual statement—generally not by setting forth new legal rules, but by providing precedents that apply existing legal rules to facts. And cases such as *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 130 S. Ct. 1324 (2010), and *Ibanez* v. *Florida Dept. of Business and Professional Regulation*, 512 U.S. 136 (1994), likewise clarified commercial speech law by considering whether particular statements were or were not "misleading."

Yet this Court has never set such benchmarks for the "obscene as to minors" doctrine, because no case has applied the doctrine to a particular fact pattern. *Ginsberg* v. *New York* itself involved only a facial challenge. 390 U.S. at 631. No case since *Ginsberg* has reviewed an obscenity-as-to-minors conviction. Only three post-*Ginsberg* cases, *Virginia* v. *American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988), *Ashcroft* v. *ACLU (I)*, 535 U.S. 564 (2002), and *Ashcroft* v. *ACLU (II)*, 542 U.S. 656 (2004), involved statutes that implemented an obscene-for-minors standard; all three involved facial challenges, which thus provided no holding about whether a particular work was or was not obscene-for-minors. As a result, lower courts, prosecutors, and citizens have no clear guidance about what "prurient interest in sex of minors," "patently offensive to minors," and "serious value for minors" mean.

Granting certiorari and reviewing whether the conviction violated the First and Fourteenth Amendments under the *Ginsberg/Miller* test—or, what amounts to the same thing, reviewing whether there was sufficient evidence to convict in this case, under a statute drawn directly from the *Ginsberg/Miller* test—would help provide such necessary guidance.

B. This Court Has Recognized the Value of Reviewing Lower Court Decisions to Set Benchmarks and Help Clarify the Law, Even in the Absence of a Split

In recent years, this Court has many times reviewed lower court decisions even in the absence of a split among lower courts—often in *per curiam* opinions and with no oral argument. (Each of the *per cu-*

riam cases cited in this section was decided without oral argument.)

Such review may sometimes have taken place simply to effectuate justice. But it may also have taken place because this Court recognized that such review can either reinforce existing rules (thus reminding lower courts of their applicability), or help set useful precedents that clarify the law by providing benchmarks for future courts.

1. Cases from the Last Four Terms

Consider, for instance, cases from just the last four Terms. In *Presley* v. *Georgia*, 130 S. Ct. 721 (2010) (*per curiam*), the Georgia Supreme Court held that defendant's Public Trial Clause rights were not violated even though the trial court excluded the public from viewing the *voir dire* of prospective jurors. *Id.* at 722. The court below concluded that the state had an interest in ensuring that the jurors were not biased by the public spotlight, and that, unless the defendant presented any alternatives to closing *voir dire*, the state was not obliged to consider any alternative means of preventing such bias. *Id.* at 723. But this Court reversed, reasoning that "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials," *id.* at 725, independently of whether the defendant proffered any alternatives of his own, *id.* at 724. The result was a precedent that helped show lower courts how they should conduct the often fact-intensive process of considering limitations on Public Trial Clause rights.

Likewise, in *Wilkins* v. *Gaddy*, 130 S. Ct. 1175 (2010) (*per curiam*), this Court helped clarify Eighth Amendment excessive force law. This Court applied

Hudson v. *McMillian*, 503 U.S. 1 (1992), to the facts of the case, and concluded that the lower court decision "is at odds with *Hudson*'s direction to decide excessive force claims based on the nature of the force rather than the extent of the injury." 130 S. Ct. at 1177.

In two recent *per curiam* opinions, this Court similarly reversed state court decisions that failed to properly follow this Court's precedents on the Federal Arbitration Act. *See Marmet Health Care Center, Inc.* v. *Brown*, 132 S. Ct. 1201 (2012) (*per curiam*) (reversing a state supreme court decision); *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23 (2011) (*per curiam*) (vacating a state intermediate appellate court decision). In another opinion, this Court reversed a state intermediate appellate court decision misapplying this Court's precedents under the Federal Employers' Liability Act. *See CSX Transportation, Inc.* v. *Hensley*, 556 U.S. 838 (2009) (*per curiam*). And this list does not include *per curiam* decisions in death penalty cases, *per curiam* decisions reinstating criminal convictions at the behest of state prosecutors, and *American Tradition Partnership, Inc.* v. *Bullock*, 132 S. Ct. 2490 (2012) (*per curiam*).

2. Recent Cases Providing Benchmarks for the Interpretation of Federal Statutes

Two decisions from 2001 to 2004, involving review of cases applying federal statutes, likewise help illustrate the value of reviewing fact-intensive inquiries in order to set a helpful benchmark for future courts. In *Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268 (2001) (*per curiam*), this Court reviewed the fact-intensive judgment about when an employee could "reasonably believe" that an employer's actions

violated Title VII (so that a complaint about such actions would be protected against employer retaliation). This Court concluded that "[n]o reasonable person could have believed" that the one isolated instance of verbal sexual harassment in that case could have violated Title VII. *Id.* at 271. Since then, many lower courts have cited the case as a useful precedent.

Likewise, in *Ash* v. *Tyson Foods, Inc.*, 546 U.S. 454 (2004) (*per curiam*), this Court reviewed the fact-intensive judgment about what constitutes sufficient evidence of racial animus under Title VII, and what constitutes sufficient evidence of pretext. This Court ruled that the Court of Appeals erred in its analysis, again setting a helpful and oft-cited benchmark for lower courts.

3. Cases Providing Benchmarks for the Application of First Amendment Doctrines

Per curiam decisions elaborating on existing law—with no indication of a split among lower courts—have also been used in many First Amendment cases. Thus, for instance, *City of San Diego* v. *Roe*, 543 U.S. 77, 84 (2004) (*per curiam*), helped clarify the meaning of "public concern" in government employee speech cases by concluding that, on the facts of the case, a police officer's participation in pornographic films was not speech on a matter of "public concern." *El Vocero de P.R.* v. *Puerto Rico*, 508 U.S. 147, 149–50 (1993) (*per curiam*), reaffirmed existing precedents in striking down the closure of preliminary hearings to the public.

Hess v. *Indiana*, 414 U.S. 105, 107–09 (1973) (*per curiam*), noted in Part II.A, helped clarify the meaning of the "incitement" test, concluding that the par-

ticular statements in that case did not constitute incitement. *Norvell* v. *City of Cincinnati*, 414 U.S. 14, 16 (1973) (*per curiam*), helped clarify the meaning of "fighting words," concluding that the particular statements to a police officer did not constitute fighting words under the facts of the case. *Papish* v. *Board of Curators of Univ. of Missouri*, 410 U.S. 667, 670 (1973) (*per curiam*), helped clarify the meaning of "obscenity," holding that the particular university newspaper cartoon in the case did not fit within the obscenity exception. *Kois* v. *Wisconsin*, 408 U.S. 229, 232 (1972) (*per curiam*), discussed above, likewise helped clarify the meaning of "obscenity," by making clear that the particular poem and photographs in the case were not obscene.

Flower v. *United States*, 407 U.S. 197, 198 (1972) (*per curiam*), helped clarify the definition of what government property was open to free speech, concluding that military authorities had—on the facts of the case—chosen not to exclude the public from the street on the military base. *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S 81, 82–83 (1967) (*per curiam*), helped clarify what constituted "reckless disregard of whether [statements] were false or not" for purposes of the *New York Times Co.* v. *Sullivan* "actual malice" test.

4. Cases Reversing Convictions Based on Insufficiency of the Evidence

Other cases from this Court reaffirm the importance of appellate review for sufficiency of the evidence, even in cases where no constitutional right other than the Due Process Clause is involved. *A fortiori*, such review by this Court is especially impor-

tant when the First Amendment mandates independent appellate review.

Consider, for instance, *Fiore* v. *White*, 531 U.S. 225 (2001) (*per curiam*), which held that defendant's conviction and continued imprisonment violated the Due Process Clause once the state supreme court clarified that the crime contained an element that the state conceded had not been proven at trial. *Id.* at 228–29. This holding was just a special case of the principle that, under the Due Process Clause, "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson* v. *Virginia*, 443 U.S. 307, 316 (1979) (cited in *Fiore*, 531 U.S. at 226, 229). Yet, beyond correcting the error below, a decision such as *Fiore* helps reaffirm and clarify the law of sufficiency-of-the-evidence review for future courts. Likewise, two years later, this Court's decision in *Bunkley* v. *Florida*, 538 U.S. 835 (2003) (*per curiam*), reversed a Florida conviction under facts very similar to those in *Fiore*. *Id.* at 839–40 (relying extensively on *Fiore*).

Similarly, in *Vachon* v. *New Hampshire*, 414 U.S. 478 (1974) (*per curiam*), defendant had been convicted for "contributing to the delinquency of a minor" by selling a minor a button with the text "Copulation Not Masturbation." *Id.* The Court concluded that the conviction must be reversed because there was no evidence that the defendant was actually responsible for selling the button, and because "[i]t is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged * * * violate(s) due process." *Id.* at 480 (citation and internal quotation

marks omitted). This too was an application of what would become the *Jackson* v. *Virginia* principle, but it was also a useful signal to courts about how this principle is to be applied. *See also Eaton* v. *City of Tulsa*, 415 U.S. 697, 698 (1974) (*per curiam*) (finding that there was insufficient evidence to convict petitioner of contempt of court for using an expletive not directed at the judge or any officer of the court, because petitioner's conduct did not "constitute an imminent * * * threat to the administration of justice") (internal quotation marks omitted); *Douglas* v. *Buder*, 412 U.S. 430, 431-33 (1973) (*per curiam*) (holding that the Missouri Supreme Court erroneously upheld a judge's revoking of petitioner's probation for failing to report all "arrests" because there was insufficient evidence to support the conclusion that the petitioner's traffic citation fell under the state's definition of an "arrest").

5. Such Review Is Proper in This Case

All these cases illustrate this Court's practice of reviewing cases to reaffirm or clarify important legal rules—the requirement that a conviction rest on sufficient evidence, the various fact-intensive rules of First Amendment law, similarly fact-intensive rules under federal statutes, and other federal constitutional and statutory doctrines, such as those implementing the Speedy Trial Clause and the Eighth Amendment.

As Part II.A noted, such review is especially proper here, even without regard to the deep split among state supreme courts and circuit courts identified in Part I. Petitioner argues that there was insufficient evidence to convict him (as was the case in *Fiore*, *Bunkley*, *Vachon*, *Eaton*, and *Douglas*), but he

also argues that this absence of evidence violated the First Amendment by punishing speech that did not fit within the *Ginsberg/Miller* exception. Granting certiorari would thus help set an important precedent as to the scope of that exception, as well as help resolve the split discussed in Part I.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted, and the case set for oral argument or reversed without the need for argument.

Respectfully submitted.

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SEPTEMBER 6, 2012

APPENDIX

APPENDIX A—THE DECISION OF THE UTAH SUPREME COURT

2012 UT 34

IN THE

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Appellee,

v.

ERIC LEON BUTT, JR.,
Defendant and Appellant.

No. 20090655
Filed June 8, 2012

Seventh District, Monticello
No. 081700097
The Honorable Lyle R. Anderson

Mark L. Shurtleff, Att'y Gen., Ryan D. Tenney, Asst. Att'y Gen., Salt Lake City, for appellee

William L. Schultz, Monticello, for appellant

ASSOCIATE CHIEF JUSTICE NEHRING authored the opinion of the Court, in which CHIEF JUSTICE DURRANT, JUSTICE DURHAM, JUSTICE PARRISH, and JUSTICE LEE joined.

ASSOCIATE CHIEF JUSTICE NEHRING, opinion of the Court:

¶1 Defendant Eric Butt was convicted of distributing harmful materials to a minor when he mailed rudimentary nude drawings of himself to his five-year-old daughter. On appeal, he argues that the evidence was insufficient to support his conviction because the State presented nothing more than the drawings themselves. Due to the broad grant of discretion ceded to the jury by the sufficiency of the evidence standard and by the "harmful to minors" statute, we affirm.

BACKGROUND

¶2 Defendant was incarcerated in the San Juan County Jail on theft-related charges. From jail, he mailed two letters to his family. The letters were intercepted by the County Jail, which allowed inmates to mail letters but reserved the right to randomly inspect any outgoing mail.

¶3 The first letter was addressed to Defendant's wife. The envelope had a large pink heart drawn on it, and inside the heart were three letters: C, K, and S, presumably standing for his wife Cammy, his eight-year-old son K.B., and his five-year-old daughter S.B. Defendant enclosed individual letters to his wife and children. At the bottom of the letter for S.B., he drew a picture of himself naked with a speech bubble stating, "I love you [S.B.]" coming from his mouth. Next to the nude drawing of himself, he wrote, "Love you, Dad" and "I have no idea why she wanted me to draw my w[ie]ner. But she insisted. Scary!!" Corporal Black, the prison guard on duty, intercepted this letter. After inspecting it, he took it to Deputy Alan Freestone, the deputy sheriff for the San Juan County Jail. That same day, Deputy Freestone met with Defendant to discuss the drawing; Defendant freely admitted that he drew the picture

as a joke because his daughter had asked him to do so.

¶4 A few days later, Defendant mailed a second letter to his family. This letter was also addressed to his wife and also contained a drawn heart on it, with C, K, and S inside the heart. This envelope also contained three letters: one each to his wife, son, and daughter. On the bottom of the letter for S.B., Defendant drew another picture of himself naked. This drawing depicted him holding his daughter's buttocks up to his mouth. A speech bubble from her mouth said, "Oouch! Daddy don't Bite so hard Giggle giggle." A speech bubble from his mouth said, "Oh your butt taste so good." Above the drawing, Defendant wrote, "[S.B.], Hi beautiful girl. I miss you so much. I can't wait to bite your butt cheek. This is what it will look like. I love you." A prison guard also intercepted this letter and turned it over to Deputy Freestone. Deputy Freestone met with Defendant in the booking area of the jail to let him know that he did not think the drawing was appropriate. Defendant explained to Deputy Freestone that the drawing depicted a game that he played with his daughter where he bites and tickles her.

¶5 At some point after these letters were intercepted but before any formal charges were filed, Deputy Freestone asked Deputy Martha Johnson to ascertain the ages of Defendant's children. Deputy Freestone never explained why he wanted the ages and did not ask Deputy Johnson to get any other information or conduct any further investigation. Deputy Johnson approached Defendant in his jail cell and asked him how old his children were. He told her that his daughter was five and his son was eight. Deputy Johnson did not read Defendant his *Miranda*

rights during this encounter. Deputy Johnson relayed Defendant's response to Deputy Freestone.

¶6 Defendant was charged with two counts of distributing harmful material to a minor under Utah Code section 76-10-1206. At trial, Defendant testified that he wrote both letters and drew both pictures. He acknowledged that although the letter was addressed to his wife, he intended his daughter to see his drawings. In his testimony, he stated that his daughter was five years old. He stated that he did not find the drawings offensive because his daughter had watched a documentary about cave drawings and asked him to draw a picture of himself naked like those in the documentary. With regard to the second letter, Defendant testified that his drawing depicted a game he played with his daughter involving biting and tickling. The jury convicted Defendant on both counts. Defendant appeals. We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(b).

STANDARDS OF REVIEW

¶7 We first consider Defendant's threshold argument that his Fifth Amendment rights were violated when Deputy Johnson asked Defendant how old his children were without issuing him *Miranda* warnings.[1] We review determinations of custodial interrogation for correctness, giving no deference to the trial court's decision.[2]

¶8 Defendant next contends that the evidence was not sufficient to prove the elements of the statute.

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[1] *See Miranda v. Arizona*, 384 U.S. 436, 437 (1966).

[2] *State v. Levin*, 2006 UT 50, ¶45, 144 P.3d 1096.

> The standard of review for a sufficiency claim is highly deferential to a jury verdict. We begin by reviewing the evidence and all inferences which may be reasonably drawn from it in the light most favorable to the verdict. We will reverse a jury verdict for insufficient evidence only if we determine that reasonable minds could not have reached the verdict.[3]

¶9 Finally, Defendant contends that the jury utilized the incorrect community standard. We conclude that Defendant waived this argument and do not address it on the merits.

ANALYSIS

I. DEFENDANT'S *MIRANDA* RIGHTS

¶10 Defendant asserts that his Fifth Amendment rights were violated when he was not read his *Miranda* rights before being asked the ages of his children—a piece of information that may have been readily attainable through a variety of sources but was nevertheless an element of the crime that had to be proved in order to convict.

¶11 The Fifth Amendment to the United States Constitution provides, "No person shall be . . . compelled in any criminal case to be a witness against himself."[4]

> The Fifth Amendment right to silence is a comprehensive privilege that can be claimed in any proceeding, be it criminal or civil, ad-

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[3] *State v. Workman*, 2005 UT 66, ¶29, 122 P.3d 639 (citation and internal quotation marks omitted).

[4] U.S. CONST. amend. V.

> ministrative or judicial, investigatory or adjudicatory. It protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used.[5]

¶12 "To preserve this right, the U.S. Supreme Court has held that defendants subjected to custodial interrogation are entitled to a *Miranda* warning. Where such a warning is not given, any incriminating statements made by a defendant during the custodial interrogation are excluded from evidence."[6] "[C]ustodial interrogation occurs where there is both (1) custody . . . and (2) interrogation. These two elements are interrelated."[7]

¶13 We have previously evaluated whether a defendant was in custody, noting that,

> A person is in custody when the person's freedom of action is curtailed to a degree associated with formal arrest. The inquiry is objective and considers how a reasonable man in the suspect's position would have understood his situation. A suspect may understand himself or herself to be in custody based either on physical evidence or on the nature of the officer's instructions and questions. Therefore, we focus on both the evi-

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[5] *State v. Gallup*, 2011 UT App 422, ¶14, 267 P.3d 289 (alterations, emphasis, and internal quotation marks omitted).

[6] *State v. Levin*, 2006 UT 50, ¶1, 144 P.3d 1096 (footnote omitted).

[7] *Id.* ¶34.

> dence of restraint and on objective evidence of the officers' intentions.[8]

¶14 We have identified four considerations to aid us in determining whether an individual is "in custody": "(1) the site of interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; and (4) the length and form of interrogation."[9]

¶15 While we have attempted to define custody, we have not yet had the opportunity to consider the meaning of "custodial interrogation" where the suspect is already incarcerated for a different crime. We have therefore combed the nation for guidance on the applicability of *Miranda* in this situation.

¶16 The traditional analysis is impaired when the suspect is already incarcerated, because the person's "freedom of action" is already curtailed. But a person who is incarcerated is not always "in custody" within the meaning of *Miranda*.[10] On the contrary, it is established that "not all instances of prison questioning fall within the protections of *Miranda*."[11] The United States Supreme Court recently explained:

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[8] *Id.* ¶35 (alteration, footnotes, and internal quotation marks omitted).

[9] *Id.* ¶36 (internal quotation marks omitted).

[10] *See Howes v. Fields*, 132 S. Ct. 1181, 1188–89 (2012).

[11] *Cervantes v. Walker*, 589 F.2d 424, 428 n.5 (9th Cir. 1978); *see also United States v. Melancon*, 662 F.3d 708, 711 (5th Cir. 2011) ("[A] prison inmate is not automatically always 'in custody' within the meaning of *Miranda*, although the prison setting may increase the likelihood that an inmate is in 'custody' for *Miranda* purposes.") (alteration in original) (some internal quotation marks omitted)); *United States v. Conley*, 779 F.2d 970,

> To determine whether a suspect was in *Miranda* custody we have asked whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. This test, no doubt, is satisfied by all forms of incarceration. Our cases make clear, however, that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody.[12]

¶17 The test is whether a reasonable person would have felt he was free to leave:

> As used in our *Miranda* case law, "custody" is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. And in order to determine how a suspect would have gauged his freedom of movement, courts must examine all of the circumstances surrounding the interrogation. Relevant factors include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints

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973 (4th Cir. 1985) ("[A] prison inmate is not automatically always in 'custody' within the meaning of *Miranda*.").

[12] *Maryland v. Shatzer*, 130 S. Ct. 1213, 1224 (2010) (citations and internal quotation marks omitted).

> during the questioning, and the release of the interviewee at the end of the questioning.
>
> Determining whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of *Miranda*. We have declined to accord talismanic power to the freedom-of-movement inquiry, and have instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.[13]

The Court summarized that "[w]hen a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted."[14]

¶18 The Court applied this analysis to an inmate who had been removed from his prison cell and taken to a separate room to be interviewed.[15] He was not "restrained or threatened and was interviewed in a well-lit, average-sized conference room, where he was 'not uncomfortable.'"[16] He was offered food and water.[17] The interview lasted between five

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[13] *Howes*, 132 S. Ct. at 1189–90 (alterations, citations, and internal quotation marks omitted).

[14] *Id.* at 1192.

[15] *Id.* at 1193.

[16] *Id.*

[17] *Id.*

and seven hours, but he "was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted."[18] Given these factors, the Court determined that he "was not taken into custody for purposes of *Miranda*."[19]

¶19 This factual scenario differs markedly from on-the-scene questioning, in which an officer spontaneously asks an inmate questions while pursuing another investigation. For example, in *Cervantes v. Walker*,[20] one of the most-cited cases on the issue, the defendant was being moved from one jail cell to another following an altercation with a fellow inmate.[21] En route, he spent some time waiting in the jail library.[22] During his wait, his belongings were searched, pursuant to standard jail procedure when moving inmates.[23] During the search, the officer found a green odorless substance.[24] The officer immediately took the substance to the defendant, and asked him what it was.[25] The defendant promptly replied, "That's grass, man," at which point he was arrested.[26] To determine whether the inmate had been subjected to "custodial interrogation" for *Mi-*

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[18] *Id.* at 1192–93.

[19] *Id.* at 1192.

[20] 589 F.2d 424 (9th Cir. 1978)

[21] *Id.* at 426.

[22] *Id.*

[23] *Id.* at 426–27.

[24] *Id.* at 427.

[25] *Id.*

[26] *Id.*

randa purposes, the Ninth Circuit established four considerations:

> [T]he language used to summon the individual, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and the additional pressure exerted to detain him must be considered to determine whether a reasonable person would believe there had been a restriction of his freedom over and above that in his normal prisoner setting.[27]

Ultimately, the Ninth Circuit concluded that *Miranda* warnings were not required in that case because "this was an instance of on-the-scene questioning enabling [the officer] to determine whether a crime was in progress."[28] Subsequently, the Fourth Circuit embraced and elaborated on the Ninth Circuit's holding in *Cervantes* and evaluated, ultimately, "whether the inmate was subjected to more than the usual restraint on a prisoner's liberty to depart."[29] Likewise following *Cervantes*, the Tenth Circuit similarly determined that *Miranda* warnings were not required where an inmate "was not deprived of his freedom nor was he questioned in a coercive environment."[30]

¶20 These cases give us guidance, but none align exactly with the case before us. Although the record is sparse in its details, the suppression hearing in this case indicates that the questioning here was nei-

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[27] *Id.* at 428.

[28] *Id.* at 429.

[29] *Conley*, 779 F.2d at 973.

[30] *United States v. Scalf*, 725 F.2d 1272, 1276 (10th Cir. 1984).

ther on-the-scene nor did it take place isolated from the general inmate population. It is clear that Deputy Johnson was sent deliberately to ask Defendant a pointed question that elicited a response concerning an element of the crime being investigated. Deputy Freestone, likewise, went directly to Defendant's jail cell to ask him questions about the letters.

¶21 To determine whether Defendant was entitled to *Miranda* warnings under these circumstances, we turn to the ultimate question of whether he "felt he . . . was . . . at liberty to terminate the interrogation and leave."[31] In doing so, we consider the "[r]elevant factors" outlined by the Supreme Court in *Howes v. Fields:* "the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning."[32] Weighing in favor of his liberty to leave are these points: Defendant was not subjected to coercion of any sort. He was not physically restrained in any way beyond being in his cell. He was neither summoned nor presented with evidence of his guilt. The interrogating officers in no way lied or deceived Defendant as to their purpose, although they did not announce their intentions. And the interrogations were extremely brief. Weighing against it, however, is our concern that *no* defendant being interviewed in his prison cell would ever feel "free to leave." A defendant in his cell might, at most, feel free to remain silent, but would clearly not feel "free to leave." And in this case, the interrogations of

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[31] *Howes*, 132 S. Ct. at 1189 (internal quotation marks omitted).

[32] *Id*. at 1189 (citations omitted).

Defendant were so brief, and the questions were so seemingly innocuous, he might not have realized that he *should* remain silent until after he had already answered the critical questions.

¶22 Despite our misgivings that a defendant being interviewed in his cell could feel free to leave, we conclude that the balance tips against requiring *Miranda* warnings in this case. Defendant's liberty was not restrained beyond his usual status as a jail inmate, nor was he coerced in any way. We therefore conclude that he was not "in custody" and *Miranda* warnings were not required.[33]

II. SUFFICIENCY OF THE EVIDENCE

¶23 Next, Defendant challenges his conviction of distributing harmful material to a minor, in violation of Utah Code section 76-10-1206(1). Under that statute, "A person is guilty of dealing in material harmful to minors when, knowing . . . that a person is a

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[33] We are troubled that law enforcement would ask an incarcerated individual a question that they knew shored up an element of a crime without informing the individual of his right to remain silent. Yet the nature of the questions and the information potentially elicited are elements that we would consider if we were analyzing whether Defendant was "interrogated." *See Rhode Island v. Innis*, 446 U.S. 291, 302 (1980) ("[T]he definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." (emphasis omitted)). Because *Miranda* warnings are only required where an individual is *both* interrogated and in custody, *see Levin*, 2006 UT 50, ¶34, and because we conclude that Defendant was not in custody, we do not consider the nature of the questions and answers.

minor, . . . the person intentionally . . . distributes . . . to a minor . . . any material harmful to minors[.][34]

¶24 Defendant first contends that the evidence presented was not sufficient to establish that he "distributed" harmful material to a minor. Second, he contends that the evidence presented was not sufficient to establish that the material was "harmful" to a minor. When we evaluate the sufficiency of the evidence supporting a conviction, we do not sit as a second fact finder.[35] Rather,

> [i]n evaluating the sufficiency of the evidence, an appellate court considers the evidence and the inferences that may reasonably be drawn from that evidence to determine whether there is a basis upon which a jury could find the defendant guilty beyond a reasonable doubt. [A] sufficiency of the evidence inquiry ends if there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made.[36]

¶25 "We will reverse the jury's conviction only if the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the de-

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[34] UTAH CODE § 76-10-1206(1)(a).

[35] *State v. Haltom*, 2005 UT App 348, ¶21, 121 P.3d 42.

[36] *State v. Graham*, 2011 UT App 332, ¶30, 263 P.3d 569 (second alteration in original) (citation and internal quotation marks omitted).

fendant committed the crime of which he was convicted."[37]

A. Whether Defendant "Distributed" Material to a Minor

¶26 Defendant first contends that the evidence was not sufficient to support the element of "distribution." "Distribute" is defined by Utah Code section 76-10-1201(3) as "transfer[ring] possession of materials whether with or without consideration." In order to support a conviction for distributing harmful material to a minor, the State must prove that Defendant:

> (a) engage[d] in conduct constituting a substantial step toward commission of the crime; and
>
> (b)(i) intend[ed] to commit the crime; or
>
> (ii) when causing a particular result is an element of the crime, he act[ed] with an awareness that his conduct [was] reasonably certain to cause that result.[38]

¶27 Defendant argues that the State's evidence was not sufficient to prove that he took any substantial step to "distribute" the material to a minor because he did not transfer the drawings to his daughter, but to his wife, who would see the letters before the daughter and decide whether they were appropriate. He argues that, because of this, the State's evidence was not sufficient to prove that he *intentionally* took a substantial step towards distributing

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[37] *State v. Hales*, 2007 UT 14, ¶36, 152 P.3d 321 (internal quotation marks omitted).

[38] UTAH CODE § 76-4-101(1).

the material to his daughter—that, at most, the evidence proved that he intended for his wife to "open the letter and review the contents inside." However, Defendant never raised this issue in the trial court. "[C]laims not raised before the trial court may not be raised on appeal" unless the defendant demonstrates plain error or exceptional circumstances.[39] Defendant has argued neither. We therefore decline to address the issue on appeal.

B. Whether the Material Was "Harmful to Minors"

¶28 Defendant next contends that the material distributed was not "harmful to minors." "Harmful to minors" is defined by Utah Code section 76-10-1201(5)(a):

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

¶29 The plain language of this statute clearly indicates that a representation of nudity alone may

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[39] *State v. Holgate*, 2000 UT 74, ¶11, 10 P.3d 346.

not be "harmful." Instead, the representation of nudity must meet *each* of the three listed criteria. Defendant targets his argument at the first two of these criteria. He argues that the evidence was not sufficient to meet either subsection (i) or (ii): he contends the material did not "appeal[] to the prurient interest in sex of minors," and was not "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." He does not argue that the material had any serious value for minors. Because the elements are listed in the conjunctive, Defendant's argument will be successful if he can prove that the evidence was not sufficient to prove either subsection (i) or (ii).

¶30 The language of this statute is derived from the United States Supreme Court case *Miller v. California*,[40] in which the Court set forth a three-part test for determining whether obscene material was protected by the First Amendment. In that case, the Court wrote:

> The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[41]

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[40] 413 U.S. 15 (1973).

[41] *Id*. at 24 (internal quotation marks omitted).

We adopted the *Miller* test and applied its rationale in *State v. Taylor*,[42] in which the defendant was charged with violating Utah's pornography statute, Utah Code section 76-10-1203. That statute bans the distribution of pornography, defined as follows:

> Any material or performance is pornographic if:
>
> (a) The average person, applying contemporary community standards, finds that, taken as a whole, it appeals to prurient interest in sex;
>
> (b) It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sadomasochistic abuse, or excretion; and
>
> (c) Taken as a whole it does not have serious literary, artistic, political or scientific value.[43]

¶31 As the term is used in the pornography statute, "'[c]ontemporary community standards' means those current standards in the vicinage [sic] where an offense alleged under this part has occurred, is occurring, or will occur."[44] It is not a statewide standard, but a local standard, dependent on "the jurisdictional area from which the jury was drawn."[45] *Taylor* explains that "contemporary com-

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[42] 664 P.2d 439, 440 (Utah 1983).

[43] UTAH CODE § 76-10-1203(1).

[44] *Id.* § 76-10-1201(2).

[45] *State v. Int'l Amusements*, 565 P.2d 1112, 1113 (Utah 1977).

munity standards," as it is used in the pornography statute, is a question for the jury:

> [E]ach juror makes its own factual determination on the question of whether specific material violates the community standard. The jurors may, and we assume they would, discuss among themselves the community standard and any particular juror might adopt any resulting con[s]ensus or rely upon his or her own understanding of the community standard.[46]

Further, "it is a factual determination in each obscenity case as to whether the particular material violates the community standard as viewed by the average person. There is no requirement of an independent factual determination of what the community standard on pornography is in the abstract."[47] Instead, "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law."[48]

¶32 *Miller* and *Taylor* explain that whether something "appeals to the prurient interest" or is "patently offensive" is also a question for the jury.[49]

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[46] *Taylor*, 664 P.2d at 449.

[47] *Id*.

[48] *Hamling v. United States*, 418 U.S. 87, 104–05 (1974); *see also Int'l Amusements*, 565 P.2d at 1114.

[49] *See Taylor*, 664 P.2d at 448 ("'The phrasing of the *Miller* test makes clear that contemporary community standards take on meaning only when they are considered with reference to the

However, "[t]he fact that the jury must measure patent offensiveness against contemporary community standards does not mean . . . that juror discretion in this area is to go unchecked."[50] *Miller* explained that there were some constitutional limits to material that could be found "obscene," and limited those materials to "hard-core" materials.[51] The goal of those limits was to ensure that "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."[52] *Miller* gave examples of materials that were "patently offensive," including "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and "representation[s] or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[53] The United States Supreme Court later explained that those examples "were not intended to be exhaustive, [but] they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' within the meaning of the obscenity

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underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve. The *Miller* opinion indicates that patent offensiveness is to be treated in the same way.'" (quoting *Smith v. United States*, 431 U.S. 291, 300–01 (1977))).

[50] *Id.* (quoting *Smith*, 431 U.S. at 301).

[51] *Miller*, 413 U.S. at 27.

[52] *Id.*

[53] *Id.* at 25.

test set forth in the *Miller* cases."[54] Inside those limits, however, the question of whether something is obscene is ultimately a question for the jury.

¶33 Defendant argues that we should adopt the "'hard core' sexual conduct" rule to the case at hand and determine that the pictures in this case were not "hard core." We decline to do so. The *Miller* jurisprudence, and in Utah, the cases following *Taylor,* are informative and helpful. But they are not entirely controlling because they addressed the prohibition on adult pornography.

¶34 While the pornography statute is similar to the "harmful to minors" statute, it is not identical. The harmful to minors statute does not ban material that is "patently offensive"—instead, it bans material that "is patently offensive *to prevailing standards in the adult community as a whole* with respect to what is suitable material for minors."[55] Thus, the determination of whether something is "patently offensive" in the context of the "harmful to minors" statute is not determined solely by the *Miller* description of offensive material, but is specifically couched in terms of the community's standards. The language of the statute plainly indicates that the legislature has relinquished its ability to define the scope of words like "harmful," "prurient," and "patently offensive," and delegated that responsibility to the jury. To be clear, a jury may not deem material to be proscribed by section 76-10-1201 without limit. At some point, the Constitution will step in to mark the outer limit of what a jury may find to be criminally actionable.

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[54] *Hamling*, 418 U.S. at 114.

[55] UTAH CODE § 76-10-1201(5)(a)(ii) (emphasis added).

Just as *Miller* recognizes that the Constitution will not permit a jury to find all material obscene for adults, likewise, the Constitution will inevitably block a jury's impulse to criminalize certain material as harmful to minors. However, Defendant has not presented a viable argument that the statute under which he was convicted exceeds the bounds set by the Constitution, and we therefore do not define those parameters today.

¶35 We have previously commented on the policy supporting this statute. In *State v. Burke*, one of the few cases to address this statute, we determined that the phrase "prurient interest in sex of minors" was not unconstitutionally vague.[56] We noted a "legislative purpose to keep harmful materials away from minors simply because they are minors," even though "adults may not be affected because of maturity."[57] We quoted the United States Supreme Court:

> [M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community

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[56] 675 P.2d 1198, 1200 (Utah 1984) (per curiam).

[57] *Id*. at 1199.

> by barring the distribution to children of books recognized to be suitable for adults.[58]

¶36 Here, Defendant contends that the State's evidence was not sufficient to support his conviction. The *only* evidence that the State presented was the letters themselves. The State did not present any evidence of the meaning of "harmful," or any of its subparts, including "prurient" or "patently offensive." Instead, the jury instructions explicitly stated that the determination of "harmful" was exclusively the province of the jury. Defendant has not challenged the jury instructions on appeal.

¶37 The State, of course, carries the burden of showing that the material meets the given elements.[59] By explicit statutory language, however, the State is not required to introduce expert witness testimony as to whether the material is harmful to minors:

> Neither the prosecution nor the defense shall be required to introduce expert witness testimony as to whether the material or performance is or is not harmful to adults or minors or is or is not pornographic, or as to any element of the definition of pornographic, including contemporary community standards.[60]

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[58] *Id*. at 1199–200 (alteration in original) (quoting *Ginsberg v. New York*, 390 U.S. 629, 636 (1968)).

[59] *See, e.g., Taylor*, 664 P.2d at 449 ("The State does have the burden of showing that the material has violated the community standard.").

[60] UTAH CODE § 76-10-1203(3).

¶38 If the State chooses "not to put on expert testimony, or any evidence, as to the community standard, it assumes the risk of a juror's not being able to arrive at such a community standard and voting to acquit a defendant."[61] We have the converse situation in this case: the State presented only the pictures at issue and left the determination of "harmfulness" up to the jury. Because the assessment of whether the evidence is "harmful" is a question for the jury, we cannot conclude that the evidence was insufficient to support a conviction. Instead, the State presented the pictures and asked the jury to decide whether they were harmful. The jury, acting within its discretion, decided they were.

¶39 As an appellate court, our role in reviewing a sufficiency of the evidence claim is simply to "consider[] the evidence and the inferences that may reasonably be drawn from that evidence to determine whether there is a basis upon which a jury could find the defendant guilty beyond a reasonable doubt."[62] In a "harmful to minors" case, it is left to the jury to decide for itself what is harmful and what is not. We therefore conclude that the State's presentation of only the drawings in question falls within the parameters of the "harmful to minors" statute, and that the jury reasonably drew the inference that the material met the elements of "harmful."

III. THE COMMUNITY STANDARD

¶40 Defendant next asserts that "the jury utilized the incorrect community standard." But rather than showing that in fact the jury utilized the incor-

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[61] *Taylor*, 664 P.2d at 449–50.

[62] *Graham*, 2011 UT App 332, ¶30.

rect community standard, he contends that the *jury instruction* incorrectly explained the community standard. Specifically, he argues again that the jury instruction "should have included the kinds of conduct that amount to patently offensive, which are the hard core types of conduct given in *Miller*." He concludes that because the jury instruction did not include this information, "the jury did not rely upon the proper community standard and error occurred."

¶41 The jury instruction was explicit that jurors must apply a community standard, rather than rely on their own individual preferences:

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

¶42 However, Defendant's attack on the jury instruction fails because he did not object to the instruction below. In fact, not only did he not object, but the instruction is identical to the one he proposed on the matter.[63] He cannot now claim error:

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[63] He did, however, object when the trial court refused to instruct the jury that if any particular juror determined that he or she could not arrive at a community standard, then the jury must acquit. The trial judge determined that this instruction was unnecessary because the instructions already stated, "If the State has failed to prove any one of those elements beyond a reasonable doubt, you should find defendant not guilty of that count." In discussing Defendant's objection, the trial court stated, "I think that amounts to telling jurors that they have to de-

> While a party who fails to object to or give an instruction may have an instruction assigned as error under the manifest injustice exception, a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error. Accordingly, a jury instruction may not be assigned as error even if such instruction constitutes manifest injustice if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction.[64]

Defendant is therefore barred from challenging the jury instruction. And he has presented us with no other basis for concluding that the jury actually utilized the incorrect community standard. Accordingly, we reject his argument on this point.

CONCLUSION

¶43 First, Defendant was not "in custody" for purposes of *Miranda* and therefore his *Miranda* rights were not violated. Next, in reviewing the sufficiency of the evidence, our sole responsibility is to consider the evidence and any reasonable inferences drawn therefrom. We conclude that the evidence was sufficient to support the jury's conclusion that Defendant "distributed" the material to a minor. We al-

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cide the case for themselves, and we've already told me that. . . . I don't think you have to tell jurors that if you don't find one of the—I don't think you have to keep repeating, 'If you don't find one of the elements you vote to acquit.' We say that one time. That's the truth, and you [defense counsel] can mention as much as you want in your argument[.]"

[64] *State v. Geukgeuzian*, 2004 UT 16, ¶9, 86 P.3d 742 (citation and internal quotation marks omitted).

so conclude that the evidence was sufficient to support the jury's conclusion that the material was "harmful." Finally, we decline to reach Defendant's argument that the jury used the incorrect community standard. He has challenged the jury instruction on appeal but did not preserve his challenge below, and he has not otherwise presented us with evidence to conclude that the jury in fact used an incorrect community standard. Affirmed.

APPENDIX B—EXCERPTS OF THE TRIAL TRANSCRIPT

[Trial Tr. p. 107:]

Q. Did she [the five-year-old daughter] make any other requests about the picture?

A. Well, it—as it says right here, "I have no idea why she wanted me to draw my wiener, but she insisted." She wanted me to draw a picture of myself, and she namely said—particularly said, "And draw yourself naked like on the cave walls." We happened to watch this documentary on cave dwellings and stuff, and that's where she was coming from with it.

[Trial Tr. p. 108:]

Q. What was the pictures that you saw with your daughter? Was that just out—you saw it live, was it on television?

A. Yes, they were definitely—they were—yeah, it was on the Discovery Channel. They were nude, and I had to explain to her what they were. She was laughing. She—I always watch Discovery Channel stuff. She was laughing about it, this and that, and there was little people naked, big people naked, and she says, "Why are they naked?" I said, "That's just how they do it back then."

[Trial Tr. p. 110:]

A [Butt]. Well, obviously, biting a butt cheek would not taste good, therefore it was a joke. Where that even stems from is from me tickling my children, particularly [my daughter]. Every night before she goes to bed I tickle her. She—I usually—I'm nibble—holding her hands up and nibbling all over her stomach, and she's laughing and giggling, and she'll roll over. I'll say, "Roll back over or I'm going to bite

your butt cheek," so she'll roll back over. That's all that has ever been said about it, done about it, and it's nothing more than that.

[Trial Tr. pp. 102–03:]

[Defendant's counsel:] * * * So if the state can still proceed under the Section 1, the first section that Mr.—that we cited to the Court, that it has to appeal to the prurient interest. "Taken as a whole, appeals to the prurient interest in sex of minors." As Mr. Halls, has indicated, that's problematic. Prurient, as defined by Webster, means—

[The court:] I'm not sure a five-year-old can have a prurient interest.

[Defendant's counsel:] I'm sorry?

[The court:] I'm not sure a five-year-old can have a prurient interest.

[Defendant's counsel] And I agree. That's why I think that this is ripe for a directed verdict. The patently offensive section applies only to hard core pornography. This isn't hard core pornography. It doesn't fall under the prurient interest section. It's excluded from Section 3 as well, because it's not literary, political, scientific things for minors.

I think that this might be stuff that people find disturbing and people that wonder about, and people would appropriately refer to DCFS for investigation, but it's not a criminal action for material harmful to minor. We may say this is poor judgment, maybe we ought to look into this, but you don't prosecute them under this statute. As I indicated before, that's—it's not there.

[The court:] Well, I'm—because you keep referring to *Miller v. California*, I'm having trouble ana-

lyzing your argument, because it's obvious to me that the standard for what you can legally show an adult is very different from what you can legally show a minor.

The use of the word "patently offensive" in that second prong of the statute also says—I'm not sure of the exact language, but considering that it's being shown to minors. "That is patently offensive to prevailing standards with respect to what is suitable material for minors," not patently offensive to adults, and those are two different—completely different questions.

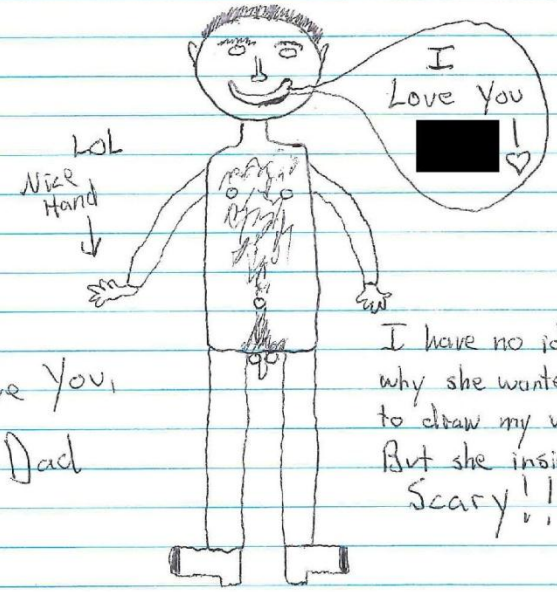
So to argue that Miller v. California defines what can be harmful to minors is a complete non-starter with me. I think I have to deny the motion for a directed verdict and allow the jury to decide * * *.

APPENDIX C—THE DRAWINGS FOR WHICH DEFENDANT WAS CONVICTED

Both drawings are copied from the Addendum included in the closing pages of the Replacement Brief of the State of Utah filed before the Utah Supreme Court. The names of the children were blacked out by the author of this petition.

[redacted]

Hi baby girl, I miss you so much. I can't wait to wrap my arms around you and bite your Butt Cheek. I hope you love school still, do you have lots of friends. I'm sure you do, all you have to do is smile and laugh and everyone will fall in love with you. Well I know you want me to draw my whole body, but I can't draw very good, so this will have to work. I'm smiling right now cause I'm hoping I'll get out soon.



[redacted],

Hey there buddy. I'm still sitting here on my ass waiting for you to come break me out. I keep waiting for this wall to blow up so I can just walk out. I miss you so much, I wish you would play basketball. As long as you're not waiting for me to coach. I know you're sad about me not being there to coach but I wish you would just play so you don't get behind everyone else. Actually, it's ok. You're a good enough athlete that you won't skip a beat. Just keep practicing as much as you can, ok. I'll be home before to much longer. I can't wait. I miss you so much + love you so much.

[redacted],

Hi beautiful girl. I miss you so much. I can't wait to bite your butt cheek. this is what it will look like. I love you.