WALTER F. BUGDEN, JR. (480)
TARA L. ISAACSON (7555)
BUGDEN & ISAACSON, L.L.C.
445 East 200 South, Suite 150
Salt Lake City, UT 84111
Telephone: (801) 467-1700
Facsimile: (801) 746-8600

RICHARD A. WRIGHT (Nevada Bar No. 886)
WRIGHT, JUDD & WINCKLER
Bank of America Plaza
300 South Fourth Street, Suite 701
Las Vegas, NV 89101
Telephone: (702) 382-4004
Facsimile: (702) 382-4800

Attorneys for Defendant

IN THE FIFTH DISTRICT COURT

WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WARREN STEED JEFFS, Defendant.	**DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DECLARE U.C.A. § 76-5-406(11) UNCONSTITUTIONALLY VAGUE** **Case No. 061500526** **Judge James L. Shumate**

ARGUMENT

In accordance with the "void-for-vagueness doctrine… a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357

(1983) (citing *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982); *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926)). Under Utah Criminal Code, a person commits rape by having "sexual intercourse with another person without the victim's consent." Utah Code Ann. § 76-5-402(1) (2006). One instance in which an act of sexual intercourse is deemed to be without consent is when

> the victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the victim to submit or participate.

Utah Code Ann. § 76-5-406(11) (2006). In binding the Defendant over on Counts 1 and 2, the magistrate found probable cause for enticement but ruled, "I specifically do not find coercion." R. at 150. Accordingly, this memorandum will focus on "enticement."

The enticement statute does not provide any meaning as to what constitutes enticing behavior, thus failing to provide sufficient notice for due process, because an ordinary person cannot understand exactly what type of behavior is prohibited. This ambiguity combined with the broad interpretation by the Utah courts allows for "arbitrary and discriminatory enforcement of the law." *Kolender*, 461 U.S. at 357. The statute is thus void for unconstitutional vagueness.

I. AN ORDINARY PERSON CANNOT UNDERSTAND WHAT CONDUCT IS PROHIBITED

If a criminal statute does not sufficiently clarify what type of behavior it prohibits, then it prevents an ordinary person from "reasonably understanding that his contemplated conduct is proscribed." *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (U.S. 1963) (citing *United States v. Harriss*, 347 U.S. 612, 617 (1954)). Such a statute is thus void as "unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment." *Kolender*, 461 U.S. at 353. Essentially, a vague criminal statute violates due process by failing to give adequate notice of what type of behavior constitutes a crime.

In determining whether a criminal statute is unconstitutionally vague, a court must not only consider the statute on its face, but must also examine "'the statute as though it read precisely as the highest court of the State has interpreted it.'" *Kolender*, 461 U.S. at 357 (U.S. 1983) (quoting *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 273 (1940)). While the Supreme Court of Utah has not directly addressed the meaning of the words "entice" and "coerce," the Utah Court of Appeals has applied the following five factors, taken from a Utah Supreme Court case on a similar issue, to determine whether an older individual enticed or coerced a younger victim:

> "(1) the nature of the victim's participation (whether the defendant required the victim's active participation), (2) the duration of the defendant's acts, (3) the defendant's willingness to terminate his conduct at the victim's request, (4) the relationship between the victim and the defendant, and (5) the age of the victim."

State v. Scieszka, 897 P.2d 1224, 1227 (Utah Ct. App. 1995) (quoting *State v. Bishop*, 753 P.2d 439, 482 (Utah 1988) (examining a statute criminalizing the

taking of “indecent liberties” with a minor)). The Court of Appeals has since confirmed that a totality of the circumstances test involving these five factors must be used to determine whether conduct constituted enticement or coercion under section 76-5-406(11). *State v. Gibson*, 908 P.2d 352, 356 (Utah Ct. App. 1995). Yet these factors do not assist an ordinary person in understanding what conduct is prohibited.

To apply the five factors set forth in *Scieszka*, a trial court must inquire into the nature of the young person’s participation, in order to determine whether it was willing or forced. *Scieszka*, 897 P.2d at 1227. The court must determine whether the older individual complied with any request to cease the sexual conduct, *Id.*, which means the court must first determine whether the younger person made any such request. The trial court must consider the age of the younger individual. *Id.* And the court must examine the nature of the relationship between the two parties, *Id.*, which will ultimately depend in part on the past behavior of the younger person. All of the foregoing factors, which constitute four of the five factors set forth by the *Scieszka* Court, inherently require, to one extent or another, an examination of the behavior or characteristics of the alleged victim.

Under § 76-5-406(11), the legislature has stated that a court must determine consent, not by looking for a manifestation of consent on the part of the victim, but rather, by examining the behavior and conduct of the older party, to determine whether that individual enticed the younger person. But the Utah courts have set forth factors that do not sufficiently elaborate upon the type of behavior prohibited by the statute, and

that seem to require, to a large extent, an examination of the behavior and characteristics of the purported victim. An inquiry into the nature of the victim's participation, or whether that individual attempted to stop the conduct, or the nature of the relationship between the victim and the Defendant, or the victim's age, is not illustrative of whether the Defendant's conduct constituted enticement or coercion. An ordinary person has no way of knowing whether it is ultimately the Defendant's or the victim's behavior that determines coercion or enticement, and thus cannot reasonably understand what type of conduct is prohibited by the statute.

In order to determine whether a statute provides sufficient notice to satisfy due process under the void-for-vagueness doctrine, the "statute must of necessity be examined in the light of the conduct with which a Defendant is charged." *National Dairy Products Corp.*, 372 U.S. at 33 (citing *Robinson v. United States*, 324 U.S. 282 (1945)). In the present case, the Defendant is charged as an accomplice to rape, predicated on section 76-5-406(11). The State's theory is that the Defendant conducted a marriage ceremony between the victim and her husband, and later provided the couple with counseling, and that such conduct constituted, or perhaps aided in, the enticement of the victim into submitting to her husband's sexual advances. However, from the statute and its accompanying case law, the Defendant had no notice that his conduct was prohibited.

The Defendant could not have foreseen that his conduct constituted enticing the victim into submitting to her husband against her wishes. Marriage is a legal relationship between two parties that encompasses much more than sexual behavior. Marriage "includes both public and private conduct… extend[ing] beyond the confines of

the home to our society." *State v. Holm*, 2006 UT 31, P57 (Utah 2006) (citation omitted). Thus if the Defendant counseled the couple to remain married, he was encouraging far more than mere sexual conduct. Further, marriage does not serve to render all future acts of sexual conduct between a husband and wife mutually consensual; to the contrary, nonconsensual sexual conduct within a marriage still constitutes rape. Utah Code Ann. § 76-5-402 (2006). Consent thus has nothing to do with the parties' legal relationship, and the Defendant reasonably believed that his role in the establishment and maintaining of a couple's marital relationship would have no bearing on consent "[w]ithin the privacy of the couple's home, [where] marriage means essentially whatever the married individuals wish it to mean." *Holm*, 2006 UT 31 at P57. Moreover, since the statute purports to criminalize only enticed sexual conduct, it was certainly reasonable for the Defendant to believe that the 14-year-old victim was legally capable of consenting to a sexual act with her 19-year-old husband, so long as she was not enticed. By marrying two individuals, or by counseling a married couple, the Defendant could not have imagined that he was encouraging unconsented sexual intercourse.

The factors set forth by Utah's courts in no way alerted the Defendant that he was engaging in illegal conduct. None of the *Scieszka* factors involve marriage ceremonies or couples' counseling. An examination of "the nature of the victim's participation," *Scieszka*, 897 P.2d at 1227, or the duration of the husband's sexual acts, *Id.*, in no way relates to the Defendant's conduct. The marriage ceremony and counseling are irrelevant to whether the victim's husband was willing "to terminate his conduct at the victim's request." *Id.* And while the Defendant certainly knew about the

age of the victim, her reluctance to marry, and her unhappiness with the marriage, this knowledge again seems to have no significant relation to the *Scieszka* factors. The test set forth in *Scieszka* has nothing to do with the Defendant's alleged conduct, and it was reasonable for the Defendant to believe that his conduct was not prohibited by section 76-5-406(11). The application of the statute in the present case is demonstrative of precisely how it is violative of due process by failing to define with sufficient clarity the behavior which it proscribes.

From the vague language of section 76-5-406(11), the Defendant could not have predicted that he was engaging in prohibited conduct by conducting a marriage ceremony or by providing counseling to a married couple. To hold criminally liable the party who conducted the marriage ceremony, or who provided religious and spiritual guidance after the marriage, is not foreseeable from the language of the Utah statute. The Defendant in this case had no notice that his behavior would constitute enticement. Since this violation of due process results from the vague language of the statute, section 76-5-406(11) is void as unconstitutionally vague.

II. THE STATUTE FAILS TO SAFEGUARD AGAINST ARBITRARY AND DISCRIMINATORY ENFORCEMENT

Under the second factor of the void-for-vagueness doctrine, a criminal statute is unconstitutionally vague if it "fails to establish guidelines to prevent 'arbitrary and discriminatory enforcement' of the law." *City of Chi. v. Morales*, 527 U.S. 41, 64-65 (1999) (quoting *Kolender*, 461 U.S. at 357). If a statute does not establish such guidelines, it runs the risk of permitting "'a standardless sweep [that] allows policemen,

prosecutors, and juries to pursue their personal predilections.'" *Kolender*, 461 U.S. at 358 (quoting *Smith*, 415 U.S. at 574) (alteration in original). By failing to define the terms "entice" and "coerce," section 76-5-406(11) fails to guard against such sweeping enforcement, and Utah courts have thus been able to interpret the statute broadly, essentially transforming it into a strict-liability offense to be enforced at will.

Since § 76-5-406(11) seems to criminalize only enticed or coerced sexual conduct, it follows that a legal alternative exists, and that certain conduct would not violate the statute. In other words, on its face, the statute indicates that an individual between the ages of 14 and 18 years is legally capable of consenting to a sexual act with an individual over the age of 18 years, even if the two are more than three years apart. However, the law provides absolutely no guidance as to how the younger person may give consent. In *Kolender v. Lawson*, the U.S. Supreme Court invalidated a statute that "contain[ed] no standard for determining what a suspect has to do in order to satisfy the [statutory] requirement." *Kolender*, 461 U.S. at 358. Likewise, § 76-5-406(11) provides no standard as to what constitutes enticing or coercive behavior, and thus contains no standard for determining whether an underage individual has consented. In spite of appearing to allow some instances of consensual sexual conduct, the statute in fact serves to criminalize virtually any sexual activity between two individuals, so long as they fall into the pertinent statutory age groups.

In *State v. Gibson*, while a 14-year-old girl was sleeping over, the defendant asked her "if she would like to 'cuddle,' to which she responded 'yeah.'" *Gibson*, 908 P.2d at 358. Subsequently, some sexual touching occurred, the exact details of which were disputed at trial, *Id.*, 908 P.2d at 354, and the *Gibson* Court affirmed that there had

been sufficient evidence to support a finding that the defendant had enticed the girl into submission in violation of section 76-5-406(11), *Id.*, 908 P.2d at 357. The *Gibson* Court based its decision on the facts that the girl and the defendant had spent a "considerable" amount of time together, *Id.*, 908 P.2d at 356, that the defendant "befriended her and bought her presents," *Id.*, 908 P.2d at 356-57, and that when the young girl "made improper sexual statements about defendant, he made no objections [and] did [not] attempt to correct her," *Id.*, 908 P.2d at 357. The defendant had also made no objections when the victim referred to herself openly as his girlfriend. *Id.*, 908 P.2d at 357. The defendant, for his part, merely allowed a young girl to believe that she was capable of consenting to an intimate relationship, for which he was found to have enticed or coerced her.

The *Gibson* case is especially troubling since the record showed the victim had often been the one "enticing [the] defendant rather than vice versa." *Id.*, 908 P.2d at 358 (Orme, J., concurring). The young girl made "inappropriate sexual remarks to [the] defendant on a couple of occasions," *Id.*, but the defendant had done nothing to encourage those remarks, *Id.*, and he later claimed to have been embarrassed by her statements, *Id.* Yet because the defendant had purchased a swimsuit for the victim on one occasion, *Id.*, and had not openly objected to her sexual remarks, *Id.*, 908 P.2d at 357, it ultimately made no difference that the girl attempted to consent to at least some level of physical intimacy, *Id.*, 908 P.2d at 354. The defendant allowed the victim to believe they had a relationship, and his failure to rebuff or rebuke her every advance ultimately led to the determination that he had enticed or coerced her into submission.

The *Gibson* Court held that § 76-5-406(11) "says 'no' for [the victim], and others like her, when they… cannot be expected to do so for themselves." *Id.*, 908 P.2d 357. It would seem, however, that in Utah's courts the statute never allows the younger individual to say "yes." In his concurring opinion in *Gibson*, Judge Orme stated that rape had occurred simply because "an adult [had] instigate[d] a sexual encounter with a teenage [girl], without force or cajoling on his part or resistance or protest on her part." *Id.*, 908 P.2d at 358 (Orme, J., concurring). The defendant, according to Judge Orme, did not "cajole" the teenage girl. *Id.* A typical thesaurus entry for "cajole" includes synonyms such as "coax… persuade… [and] seduce." *Roget's New Millennium Thesaurus* (1st ed. (v 1.3.1) 2007), available at http://thesaurus.reference.com/browse/cajole. These very words are equated with enticement by the majority opinion, which held that "'entice' [means] 'to wrongfully solicit, *persuade*… *coax* or *seduce*.'" *Gibson*, 908 P.2d at 356 (quoting *Black's Law Dictionary* 531 (6th ed. 1990)) (emphasis added). If the defendant in *Gibson* truly did not "cajole" the young girl, then it should have been impossible to find that his actions violated section 76-5-406(11). Judge Orme's summary of the majority opinion accurately reflects the way in which Utah's courts have interpreted the vague language of the statute to criminalize absolutely any instance of sexual conduct between a 14 year old with a partner more than three years older, irrespective of actual enticement or coercion, essentially reducing the statute to a strict-liability offense.

Utah courts have attempted to justify this sweeping application of the statute, stating that its purpose "is to create a legal definition of consent for teenagers which is different from the more lenient consent required between adults." *Gibson*, 908 P.2d at

356. There can be no doubt that section 76-5-406(11) was meant to create a different standard of consent for teenagers; but there can also be little doubt that the statute was not meant to create a strict liability standard. First, under the plain language of the statute, the requirement that an actor must entice or coerce the victim in order to constitute a crime would be counterintuitive if the legislature had intended to create a strict liability offense. Second, sexual conduct with individuals under the age of 14 is deemed to be without consent in all cases, regardless of whether the victim consented to the sexual act, Utah Code Ann. § 76-5-406(9). This indicates that the legislature clearly intended to establish a different standard for sexual conduct with individuals who are "14 years of age or older, but younger than 18 years of age." Utah Code Ann. § 76-5-406(11). While the Utah Court of Appeals is correct that the standard of consent for individuals between 14 and 18 years of age was intended by the legislature to be stricter than the standard for older individuals, the legislature did not prohibit consent by imposing a strict liability for this age group, and the cases that have imposed strict liability were wrongly decided.

III. U.C.A. § 76-5-406(11) UNCONSTITUTIONALLY VIOLATES THE FIRST AMENDMENT RIGHT TO FREE EXERCISE OF RELIGION

Utah Code Ann. § 76-5-406(11) is unconstitutional because it is not operationally neutral and it violates the Defendant's federal First Amendment right to free exercise of religion. The First Amendment states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I. The Free Exercise Clause has been interpreted to mean that "if a law that burdens a

religious practice is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling governmental interest." *Grace United Methodist Church v. City Of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006).

The Utah Supreme Court has noted that "[f]acial neutrality is assessed by examining the law's text, [and]…[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *State v. Green*, 99 P.3d 820, 826 (Utah 2004)(citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* 508 U.S. 520, 531(1993)).

In this case, Utah Code Ann. § 76-5-406(11) is facially neutral because it uses secular language, stating that an act of sexual intercourse is deemed without consent when "the victim is 14 years of age or older but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the victim to submit or participate." Utah Code Ann. § 76-5-406(11)(2006).

However, the statute is unconstitutional because it is not of general applicability and it is not neutral because "the object of the law 'is to infringe upon or restrict practices because of their religious motivation.'" *Id*. (citing *Hialeah*, 508 U.S. at 533). Thus, because the statute is being discriminatorily applied, it violates the Defendant's First Amendment rights and is unconstitutional.

IV. THE ENTICEMENT STATUTE IS NOT "OPERATIONALLY NEUTRAL" BECAUSE IT TARGETS THE DEFENDANT'S RELIGIOUS CONDUCT FOR DISTINCTIVE TREATMENT

"Facial neutrality is not determinative," and because the instant statute is being used to target the Defendant's religious conduct, it is not operationally neutral and is therefore unconstitutional. *Hialeah*, 508 U.S. at 534. The United States Supreme Court has held that "official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id*. In other words, "[a]part from the text, the effect of a law in its real operation is strong evidence of its object." *Id*. at 535.

In *Axson-Flynn v. Johnson*, the Tenth Circuit Court of Appeals considered whether the Utah District Court properly granted summary judgment to the defendants, University of Utah acting teachers, who were sued by a Mormon student alleging that her free speech and free exercise rights were violated by the requirement that she say offensive, profane words in a performance. 356 F.3d 1277 (10th Cir. 2004). The court determined that there was a genuine issue of material fact as to whether the adherence to the offensive script requirement was pretextual. *Id*. at 1293. The court based its finding on evidence that the defendants forced the plaintiff to "adhere strictly to the script not because of their educational goals but rather because of anti-Mormon sentiment," and because she felt that "'[t]hey respect other kids' freedom of religion that aren't Mormon. Why won't they respect mine?'" *Id*. Based on the evidence that the defendants were applying a facially neutral rule differently to members of different religions, the court remanded the case because "there is a genuine issue of material fact as to whether Defendants' justification for the script adherence requirement was

truly pedagogical or whether it was a pretext for religious discrimination." *Id*. Thus, the court concluded that "[u]nless Defendants succeed in showing that the script requirement was a neutral rule of general applicability, they will face the daunting task of establishing that the requirement was narrowly tailored to advance a compelling governmental interest." *Id*. at 1294.

The instant case presents the same problem; although the enticement element of the statute appears to be facially neutral, it is being applied as a pretext for religious discrimination because the effect of the law in its operation is to target the Defendant's religion. The Defendant's use of common religious doctrine, during the marriage ceremony and while he counseled the alleged victim, is being used as the only evidence that the Defendant enticed the alleged victim to consent to sexual intercourse with the principal. The State relies on three commonly used religious statements for the proposition that the Defendant enticed the alleged victim. First, the Defendant performed a religious marriage ceremony, and included in the vows language from the Old Testament, that the couple should "go forth and replenish the earth and multiply." Second, when the alleged victim approached the Defendant about problems in her marriage, the Defendant counseled her to "give herself mind, body and soul, to her husband." Finally, the Defendant also counseled the alleged victim to be obedient and submissive to her husband. The State's assertion that the Defendant's religious statements enticed the alleged victim to have sexual intercourse creates the same problems the Tenth Circuit faced in *Axson-Flynn*, because the State is singling out one religious sect and applying a rule differently to the Defendant than it would to other religious groups.

This is because, first, the religious language the Defendant used to perform a marriage ceremony and counsel the alleged victim is common in many Christian faiths, and does not automatically mean that the religious counselor is advising a faithful person to have sexual intercourse against her will. A marriage ceremony, complete with religious vows, creates a complex commitment, as the Texas Supreme Court discussed in 1913 in *Grigsby v. Reib*:

> Marriage was not originated by human law. When God created Eve, she was a wife to Adam; they then and there occupied the status of husband to wife and wife to husband. When God turned the first pair out of the garden, He gave the command: 'Multiply and replenish [people] the earth'-which was enjoined upon their expulsion from the garden. When Noah was selected for salvation from the flood, he and his wife and his three sons and their wives were placed in the Ark; and, when the flood waters had subsided and the families came forth, it was Noah and his wife and each son and his wife, and God repeated to them the command: 'Multiply.'

105 Tex. 597, 608 (1912). The court concluded that "[a]ll of the duties and obligations that have existed at any time between husband and wife existed between those husbands and wives before civil government was formed." *Id*. Like the *Grigsby* court determined, a marriage ceremony that includes language to "multiply and replenish" and to "submit and obey" is a general directive to engage in a marital relationship and may include "all the duties and obligations" of the relationship. *Id*. It does not follow that a religious counselor who performs a marriage and uses religious language to comfort a follower is directing her to have sexual intercourse against her will; this language is more broad and general than that interpretation. Thus, the State's assertion that in this particular case, language that has been used for generations to symbolize the complex commitment between spouses, now means enticement to consent to sexual

intercourse, is a violation of the Defendant's free exercise rights because it is a non-neutral application of Utah Code Ann. § 76-4-206(11).

Second, the United States Supreme Court has held that under the Free Exercise Clause, it is not the place of the courts to regulate or disapprove of religious language, and in this case, the State is asking the court to regulate and criminalize the Defendant's legitimate religious speech. As the Court noted in *Fowler v. Rhode Island*, it is not "it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." 345 U.S. 67, 70 (1953). Moreover, the Court held that Jehovah's Witnesses' speech was "treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one." *Id*. at 69.

The Utah courts' sweeping application of the enticement statute becomes particularly problematic in the present case. The Defendant's religious statements relating to salvation, spousal duties, and the replenishment of the earth with faithful children were often taken directly from FLDS sermons and texts (*In Light and Truth, Home Economics*), as were the statements made by the defendant during his attempts to counsel the victim and her husband. His religious speech is thus constitutionally protected under the First Amendment. See, e.g. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (Sermons cover a wide range and have great diversity; it is unconstitutional for courts to "approve, disapprove, classify, regulate, or in any manner control sermons"). The use of § 76-5-406(11), then, to criminalize the Defendant's speech on such occasions is violative of his First Amendment rights. If the Defendant's speech in this case constituted enticement or coercion, then the statute is void because the

legislature has essentially created a law so vague as to allow the State to "suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). If religious ceremonies and spiritual counseling fall into the vague and sweeping definition of "enticement," then any "'possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). Because the statute is vague, it allows the State to infringe on fundamental, constitutionally guaranteed rights by deeming the defendant's speech to be proscribed by § 76-5-406(11).

It should also be noted that the Defendant is a religious leader in a culture wherein marriage between young individuals is a common and socially acceptable custom. It bears repeating that § 76-5-406(11) on its face recognizes that a teenager between the ages of 14 and 18 years ***may*** consent to sexual conduct with an older individual, even though the statutory language is not clear how exactly this may be done. A statute which purports to allow sexual conduct between such individuals, but in reality criminalizes all such conduct, has the effect of targeting the defendant's culture, where marriages between such individuals is common. The vague statute does not safeguard against this effect, and thus it is used to arbitrarily and discriminatorily persecute members of the defendant's religion and culture. The statute is thus unconstitutionally vague under the second factor of the void-for-vagueness doctrine.

In the instant case, the State is seeking to regulate and classify the Defendant's religious language as criminal and is preferring other religious groups (by foregoing prosecution of other religious leaders) over the Defendant's FLDS church. Moreover, it

is doing so covertly, through an uneven application of a facially neutral statute. The United States Supreme Court has held that this is as unconstitutional as blatant religious discrimination, since the "Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Hialeah*, 508 U.S. at 534 (1993).

Therefore, the instant application of Utah Code Ann. § 76-5-406(11) is unconstitutional because the State asserts that common religious language, that has never been criminalized and of which it is not the province of the courts to regulate, is the sole basis for establishing that the Defendant enticed the alleged victim. This prosecution relying on the "enticement" statute, therefore, violates the Free Exercise clause because it is a non-neutral application of the statute and it is being used as a pretext for government hostility towards the Defendant's religion.

CONCLUSION

Section 76-5-406(11) fails to sufficiently define the term "entice" in a manner that an ordinary person may understand what conduct is prohibited. The factors set forth by Utah courts do not sufficiently clarify the terms of the statute, and instead make the determination of consent under § 76-5-406(11) even more speculative, arbitrary, and difficult to apply. The Defendant in the present case could not have reasonably understood that the religious counseling he gave would constitute criminal enticement, and such lack of notice is violative of due process.

Section 76-5-406(11) also indicates that an individual between 14 and 18 years of age may legally consent to a sexual act with an older person, but the statute fails to establish sufficient guidelines as to how this may be done. Utah's courts have been

able to interpret the statute so broadly that the statute operates as a strict liability offense, and nearly any sexual conduct between two individuals fitting the pertinent age groups violates the criminal law. Because of the sweeping application of the statute, prosecutors and courts may use it to discriminate against members of the Defendant's religion, where marriage between young couples is common. The broad interpretation of the statute also allows the State to infringe on the Defendant's First Amendment rights. For failure to safeguard against such arbitrary and discriminatory enforcement, the statute is void for unconstitutionally vagueness.

Although Utah Code Ann. § 76-5-406(11) is facially neutral, in real operation, it is being applied to target the Defendant's religious speech. For that reason, the application of Utah Code Ann. § 76-5-406(11) is in violation of the Defendant's First Amendment Free Exercise rights and unless the State can meet the "daunting task of establishing that the requirement was narrowly tailored to advance a compelling governmental interest," the statute should be held unconstitutional. *Axson-Flynn*, 356 F.3d at 1294. Because the standard for establishing that the requirement is narrowly tailored to advance a compelling interest is strict, and because the use of the statute is pretextual in this case, the State cannot meet its burden. Thus, the statute is unconstitutional because of the instant non-neutral application to the Defendant's legitimate religious language.

In his concurring opinion in *Gibson*, Judge Orme suggests that, if Utah courts are applying the statute too broadly, "it will be an easy enough matter for the Legislature to revise the statute to better accord with its intent." *Gibson*, 908 P.2d at 358 (Orme, J.,

concurring). But while the State has a legitimate interest in "prosecut[ing] adults who sexually exploit teenage children," *Id.*, that interest "cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity," *Kolender*, 461 U.S. at 361 (citing *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)). In the case of an unconstitutionally vague statute, the courts may not simply stand idly by and wait for the legislature to provide further clarity; instead, the court must invalidate an unconstitutionally vague "criminal statute… even when it could conceivably have had some valid application." *Kolender*, 461 U.S. at 358 (citing *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)). For these reasons, the Defendant asks the court to declare section 76-5-406(11) unconstitutionally vague under the void-for-vagueness doctrine.

DATED this ___ day of March, 2007.

BUGDEN & ISAACSON, L.L.C.

By: _____
WALTER F. BUGDEN, JR.
TARA L. ISAACSON

WRIGHT, JUDD & WINCKLER
RICHARD A. WRIGHT

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that, on the ___ day of March, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Brock R. Belnap	___	HAND DELIVERY
Washington County Attorney	___	U.S. MAIL
178 North 200 East	___	OVERNIGHT MAIL
St. George, UT 84770	___	FACSIMILE:

_____