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WASHINGTON COUNTY FIFTH DISTRICT COURT
STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WARREN STEED JEFFS, Defendant.	STATE'S MEMO OPPOSING MOTION TO DECLARE U.C.A. § 76-5-404(11) UNCONSTITUTIONALLY VAGUE Criminal No. 061500526 Judge James L. Shumate

Utah Code Annotated § 76-5-404(11) is not "void for vagueness" because the statute provides clear notice to the defendant that enticing a child to have illegal sex with an adult is prohibited conduct. Because the statute is clear, law enforcement officers are not left to determine what constitutes criminal conduct based on their personal predilections. Finally, the statute does not violate the Free Exercise Clause of the First Amendment because subsection (11) is a neutral law of general applicability that is rationally related to the legitimate government end of protecting children from illegal sex with adults. Or, "[p]ut another way, the Defendant simply does not have a First Amendment right to attempt to persuade minors to engage in illegal sex acts." *United States v. Bailey*, 228 F.2d 637, 639 (6th Cir. 2000).

STANDARD OF REVIEW

The defendant challenges Utah Code Ann. § 76-5-404(11) as unconstitutionally vague as applied to him and as a violation of his First Amendment right to practice his religion.

"[T]hose who challenge a statute as unconstitutional bear a heavy burden of demonstrating its unconstitutionality." *State v. MacGuire*, 2004 UT 4, ¶ 8 (citations, internal quotations, and ellipsis omitted); *accord State v. Green*, 2004 UT 76, ¶ 42. That is because "legislative enactments are presumed to be constitutional." *MacGuire*, at ¶ 8. As a result, courts will "resolve any reasonable doubts in favor of constitutionality." *State v. Norris*, 2007 UT 6, ¶ 10.

UTAH CODE SECTION 76-5-404(11) IS NOT VAGUE

The defendant is charged with rape as an accomplice. According to the Utah code:

> A person commits rape when the actor has sexual intercourse with another person without the victim's consent.

Utah Code Ann. § 76-5-402(1) (1953, as amended). One instance of sexual intercourse occurring without consent is when:

> (11) 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, under circumstances not amounting to the force or threat required under Subsection (2) or (4)....

Utah Code Ann. § 76-5-406(11).

The defendant contends that the word "entice" is vague because it does not provide him notice that his conduct is prohibited and allows prosecutors to follow their personal predilections

in determining what constitutes a crime. Defense Memo[1], p. 3, 7. However, the meaning of "entice" provides clear notice to the defendant and to prosecutors as to what conduct violates the law.

A. Subsection (11) Provides Clear Warning of the Prohibited Conduct and Does Not Facilitate Arbitrary and Discriminatory Enforcement

Because there is no constitutional right to persuade a child to engage in illegal sex, the defendant cannot show that the consent statute impinges on a First Amendment right. Therefore, the Court must "examine the statute 'as applied' without regard to whether it might be vague in other, hypothetical contexts." *State v. Nieberger*, 2006 UT App 5, ¶ 11 n. 2; *State v. Green*, 2004 UT 76, ¶ 44. To meet his burden that the enticement section of Utah's consent law is vague as applied to him, the defendant must show "either (1) that the statutes do not provide 'the kind of notice that enables ordinary people to understand what conduct is prohibited,' or (2) that the statutes 'encourage arbitrary and discriminatory enforcement.'" *State v. MacGuire*, 2004 UT 4, ¶ 13. Defendant's challenge fails on both points.

1. The Statute Provides Defendant Clear Notice That His Conduct Is Prohibited

If a statute "is sufficiently explicit to inform the ordinary reader what conduct is prohibited, it is not unconstitutionally vague." *MacGuire* at ¶ 14. In this case, the word "entice" and the consent statute as a whole clearly inform the ordinary reader—and the defendant—what conduct is prohibited.

[1] Defendant's Memorandum In Support of Motion to Declare U.C.A. § 76-5-406(11) Unconstitutionally Vague (hereafter "Defense Memo").

In considering the meaning of a statute, the analysis begins with the provision's plain language. *MacGuire* at ¶ 15. The Utah Supreme Court "has a long history of relying on dictionary definitions to determine plain meaning." *State v. Redd*, 1999 UT 108, ¶ 11 (Utah 1999). In assessing a void-for vagueness challenge, "the plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and with other statutes under the same and related chapters." *MacGuire* at ¶ 15 (citations omitted).

Moreover, the court should "not indulge" attempts "to inject doubt as to the meaning of words where no doubt would be felt by the normal reader." *Id.* at 18 (*citing United States v. Powell*, 423 U.S. 87, 93 (1975)). "Such straining is not required by the 'void for vagueness' doctrine." *Id.* Instead, the court should "attribute to the legislature the commonsense meaning of the term [in question]." *Id.*

The Utah Court of Appeals has twice examined the meaning of the word "entice" as used in subsection (11). *See State v. Scieszka*, 897 P.2d 1224 (Utah App. 1995); *State v. Gibson*, 908 P.2d 352 (Utah App. 1995). In both cases, the court turned to the dictionary definition:

> Entice has been defined as: "to lure, to lead on by exciting hope of reward or pleasure; to tempt," Webster's New 20th Century Dictionary (2d ed. 1960), and '[t]o wrongfully solicit, persuade, procure, allure, attract, draw by blandishment, coax, or seduce.... To lure, induce, tempt, incite, persuade a person to do a thing.' Black's Law Dictionary 531 (6th ed. 1990).

Scieszka, at 1226; *accord Gibson*, at 356. In both cases, the court found the definition of "entice" to include "some acts or words intended to cause a person to do something the other person would not otherwise do." *Scieszka*, at 1228; *accord Gibson*, at 356 n. 3.

In light of the commonly-understood meaning of "entice," the Court of Appeals reviewed the consent statute as a whole in connection with the underlying offense and found the statutory language "quite clear." *Scieszka*, at 1227. According to the court, "[t]he statutory section defining the charged crime, as well as the section listing the circumstances under which sodomy occurs without consent, is aimed at prohibiting mature adults from preying on younger and inexperienced persons." *Id.*, at 1227.

The Court of Appeals' conclusion that the enticement statute is "quite clear" when read in conjunction with the underlying crime is supported by Utah case law and decisions from other jurisdictions. For example, the Utah Court of Appeals recently rejected claims that Utah's Internet enticement statute is void for vagueness. *State v. Ansari*, 2004 UT App 326.

The Internet enticement statute provides that "a person commits enticement of a minor over the Internet when ... the person knowingly uses a computer to solicit, seduce, lure or entice a minor..." Utah Code Ann. § 76-4-401. Although the court ultimately determined that the defendants lacked standing to raise the void-for-vagueness argument, the court noted that "even if they were to have standing, we would reject the substance of their challenge .... We are confident that the statute would put normal readers on notice that using the Internet to make sexual advances on a known minor will have criminal consequences. Moreover, the terms of the statute are sufficiently precise that they do not lend themselves to discretionary enforcement." *State v. Ansari*, 2004 UT App 326, ¶ 45, n. 6.

Case law from other jurisdictions also recognizes that the term "entice" is not unconstitutionally vague. *See e.g.*, *State v. Osmundson*, 546 N.W.2d 907, 910 (Ohio 1996)

(child enticement statute not void for vagueness because "[the dictionary] definitions and the commonly understood meaning of 'entice' are specific enough to provide guidance to ordinary citizens and fair notice of what actions are proscribed."); *Leding v. State*, 725 So.2d 1221, 1222 (Fla. Ct. App. 1999) (statute prohibiting enticing a child from parents was not void for vagueness because "[t]he word 'entice' is specific enough to give persons of common intelligence and understanding an adequate warning."); *United States v. Panfil*, 338 F.3d 1299, 1301 (11th Cir. 2003) (holding that Internet solicitation statute was not void for vagueness and that the term "entice" is not "ambiguous or subject to varying standards" and had a "plain and ordinary meaning"); *United States v. Dhingra*, 371 F.3d 557, 562 (9th Cir. 2004) (the term "entice" has "a plain and ordinary meaning that does not need further technical explanation.").

In considering a void-for-vagueness challenge, the Utah Supreme Court has recognized that "words are symbols of communication and as such are not invested with the quality of a scientific formula. It is enough that they can be construed with reasonable certainty. Beyond that it suffices to add that 'one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.'" *State v. Jordan*, 665 P.2d 1280, 1286 (Utah 1983) (*quoting Boyce Motorlines v. U.S.*, 342 U.S. 337, 340 (1952)).

The defense contends that *Scieszka* and *Gibson* inject vagueness into the definition of "entice" by putting forth five factors, four of which address the victim's conduct or characteristics rather than the defendant's. Defense Memo, p. 3-4. This argument misreads both *Scieszka* and *Gibson*. In both cases, the court first defined "entice" and then suggested "five factors" to consider in determining whether the evidence supported a conviction that the

defendant enticed the victim "under a totality of the circumstances." *State v. Scieszka*, 897 P.2d 1224, 1227-1228 (Utah App. 1995); *State v. Gibson*, 908 P.2d 352, 356-357 (Utah App. 1995). As noted in both *Scieszka* and *Gibson*, "considerations of age, mental development, relationship to each other, sophistication or lack thereof and all other factors and circumstances shown by the evidence enter into a determination of whether a child was enticed." *Scieszka*, at 1228, *Gibson*, at 356 n. 3. Contrary to defendant's argument, each of the factors addresses whether the defendant's acts and words enticed the "victim to do something [she] would otherwise not do." *Id.*

The defendant's conduct falls squarely within the commonsense definition of "entice." At the preliminary hearing, the State presented evidence that the defendant required the fourteen year-old victim to submit to a purported marriage with her adult cousin despite her repeated objections and obvious reluctance. Ignoring her protests, the defendant arranged and surreptitiously performed a ceremony that commanded the victim to have children with her adult cousin. The State presented evidence that the defendant knew that sexual intercourse between the fourteen-year-old and her cousin was contemplated and occurring. When the victim told the defendant that she did not like her cousin touching her private parts, the defendant said "yes, he's fulfilling his husbandly duty." Tr. 259:13-19. The victim testified that she "begged [the defendant] to please let me out," and that the defendant said "that I needed to go home and give myself, mind, body and soul to Allen because he was my priesthood head and he knew what was best for me ..." Tr: 149:1-13.

Such exploitation of a minor child is precisely the conduct prohibited by the "enticement" statute. The defendant's conduct involved "acts or words intended to cause a person to do something the other person would not otherwise do." *State v. Scieszka*, 897 P.2d 1224, 1228 (Utah App. 1995). As such, the common sense meaning of the term "entice" provides "the kind of notice that enables ordinary people to understand what conduct is statutorily prohibited." *State v. MacGuire*, 2004 UT 4, ¶ 24. Therefore, the statute clearly gives the defendant adequate warning that his conduct was prohibited.

2. The Statute Defines Prohibited Conduct Sufficiently To Preclude Arbitrary and Discriminatory Enforcement

The void-for-vagueness doctrine requires the legislature to define the crime "in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). When "enforcement depends on a completely subjective standard," it is impermissibly vague. *Grayned v. City of Rockford*, 408 U.S. 104, 113 (1972). However, when "the meaning of a term is readily ascertainable, it does not encourage or facilitate arbitrary and discriminatory enforcement." *State v. MacGuire*, 2004 UT 4, ¶ 32.

In *State v. MacGuire*, the defendant argued that by failing to define "unborn child" in the context of Utah's criminal homicide statute, "enforcement decisions will be made 'at least in part by the prosecutor's own thoughts or beliefs..." *Id.* at ¶ 30. However, the Utah Supreme Court held that "this argument fails for the same reason that defendant's argument concerning adequacy of notice fails." *Id.* at ¶ 31. When prohibited conduct is sufficiently defined, "a prosecutor is not left to speculate as to the statute's meaning." *MacGuire*, at ¶ 31.

As set forth in the previous section, the prohibited conduct in this case is "quite clear" in light of the commonsense meaning of "entice" and the consent statute as a whole. *State v. Scieszka*, 897 P.2d 1224, 1227 (Utah App. 1995). Hence, prosecutors are not left without minimal guidelines.

Moreover, a *scienter* requirement further circumscribes the ability of law enforcement to exercise arbitrary or discriminatory judgment. A "scienter requirement discourages 'unscrupulous enforcement' and clarifies the statute...." *United States v. Panfil*, 338 F.3d 1299, 1301 (9th Cir. 2003) (Internet enticement statute not void for vagueness). *See e.g., Grayned*, 408 U.S. at 113-114 (vagueness of terms "is dispelled by the ordinance's requirements that ...the acts be willfully done."); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 ("a scienter requirement may mitigate a law's vagueness...").

To convict the defendant of rape, the State must prove that he had "an intentional, knowing, or reckless mental state." *State v. Calamity*, 735 P.2d 39, 43 (Utah 1987). Thus, arbitrary enforcement is discouraged because the law "ensures that only those who ... engage in the illegal conduct [with the required mental state] are subject to prosecution." *Panfil*, 338 F.3d at 1301.

In summary, subsection (11) of the consent statute is not void for vagueness because its language "is sufficiently clear to convey warning as to the proscribed conduct when measured by common understanding and practices." *State v. Jordan*, 665 P.2d 1280 (Utah 1983). Moreover, because the meaning of "entice" is "readily ascertainable, its inclusion does not encourage or facilitate arbitrary and discriminatory enforcement." *State v. MacGuire*, 2004 UT 4, ¶ 32.

B. Subsection (11) Does Not Violate the First Amendment Because 1) It is a Neutral Law of General Applicability and 2) The State Has A Legitimate Interest in Prohibiting Adults from Enticing Children to Engage In Illegal Sex

The defendant concedes that subsection (11) of the consent statute is facially neutral, but argues that it violates the Free Exercise Clause of the First Amendment "because the effect of the law in its operation is to target the defendant's religion." Defense Memo, p. 14. However, the consent statute is both operationally neutral and a law of general applicability. Therefore, it is constitutional even if it burdens the defendant's religious practice, because the State has a legitimate interest in protecting children from being enticed into illegal sexual activity.

1. Subsection (11) Is A Neutral Law of General Applicability

According to the Supreme Court, "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 532 (1993). In this case, the enticement statute is neutral and generally applicable because it prohibits enticing minors into illegal sex regardless of whether a person is motivated by religious or secular purposes.

In *State v. Green*, the defendant unsuccessfully argued that Utah's bigamy statute "effectively prohibited religiously motivated bigamy" and as such could not "withstand a challenge under the standards articulated by the United State's Supreme Court in [*Hialeah*]." *Green*, at 16. In *Hialeah*, the Court found an animal cruelty ordinance unconstitutional because it punished religious conduct of Santerians while exempting almost all similar secular conduct. *Hialeah*, 508 U.S., at 534-45.

In this case, the defendant's argument mirrors those rejected in *Green*. In finding Utah's bigamy statute to be generally applicable as well as operationally neutral, the *Green* court held:

> Utah's bigamy statute does not attempt to target only religiously motivated bigamy. Any individual who violates the statute, whether for religious or secular purposes, is subject to prosecution. Thus, Utah's prohibition on bigamy is not a prohibition that our society is 'prepared to impose on [polygamists] but not upon itself.'

State v. Green, 2004 UT 76, at ¶ 31 (quoting *Hialeah*, 508 U.S. at 545).

Similarly, Utah law does not attempt to prohibit only religiously-motivated enticement. Any individual who entices a child into an illegal sexual relationship with an adult, whether for religious or secular reasons, is subject to prosecution. *See State v. Scieszka*, 897 P.2d 1224 (Utah App. 1995); *State v. Gibson*, 908 P.2d 352 (Utah App. 1995). Hence, subsection (11) is a neutral law of general applicability.

Because the enticement statute is a neutral law of general applicability, even if it has an adverse impact on the defendant's religion, "the State need show only that the statute is rationally related to a legitimate government end." *Green*, at ¶ 32.

2. Subsection (11) Is Rationally Related To a Legitimate Government End of Protecting Children From Illegal Sex

The State of Utah has a compelling interest in protecting children from illegal sexual activity. "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *New York v. Ferber*, 458 U.S. 747, 756-757 (1982). In that light, "the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* The sexual exploitation of a minor "is validly proscribed by the state which has a compelling interest in the

healthy development of its youth during the years of their greatest vulnerability." *State v. Jordan*, 665 P.2d 1280, 1285 (Utah 1983).

The purpose of subsection (11) is to "protect youths from improper sexual exploitation from adults." *State v. Gibson*, 908 P.2d 352, 355 (Utah App. 1995). Such an objective is at the very least a "legitimate" objective of the legislature. *State v. Holm*, 2006 UT 31 ¶ 103. "While the state's power to interfere with the private relations of consenting adults is limited, it is well established that the same is not true where one of the individuals involved in the relationship is a minor." *Id.*

Subsection (11) of the consent statute furthers a compelling (and therefore legitimate) state end of protecting children from sexual exploitation during their years of greatest vulnerability. Therefore, subsection (11) is rationally related to a legitimate government end and does not violate the Free Exercise Clause of the First Amendment.

C. The Word "Coerce" Is Not Void-for-Vagueness

The defense memo states that because the magistrate found no coercion at the preliminary hearing, the defense would focus solely on "enticement" in its void-for-vagueness challenge to subsection (11) of the consent statute. Defense Memo, p. 2.

The defense argument implies a view that the State will not be able to present evidence of coercion to the jury. If the defense holds that view, it is incorrect. The magistrate's conclusion does not preclude the State from presenting evidence of coercion and arguing it to the jury. According to the Utah Supreme Court, "the bindover standard is intended to leave the principal fact finding to the jury." *State v. Virgin*, 2006 UT 29, ¶ 21. Thus, while the magistrate did not

find coercion, the jury might. "It is not necessary to actually prove the elements of the crime at a preliminary hearing. Instead, to obtain a bindover for trial... the prosecution must produce sufficient evidence to reasonably conclude the requisite elements were satisfied and that the defendant committed the crime." *State v. Graham*, 2006 UT 43, ¶ 17.

In this case, the "element" at issue is "consent." Lack of consent may be proved through a multitude of different theories. *See* Utah Code Ann. § 76-5-406. According to the Utah Supreme Court, "consent is a matter ... peculiarly within the province of the jury to determine." *State v. Myers*, 606 P.2d 250, 252 (Utah 1980). Moreover, the consent statute "merely defines circumstances in which consent does not exist. As such, it is not a shield for criminal defendants who might be able to characterize their conduct as falling outside the statute." *State v. Salazar*, 2005 UT App 241, ¶ 8.

Therefore, once a magistrate has concluded that there is probable cause on the element of consent, it would be inappropriate to take the decision away from the jury as to what evidence proves lack of consent. "A magistrate's contribution to a felony proceeding is entirely nonadjudicative...." *State v. Humphrey*, 823 P.2d 464, 467 (Utah 1981); accord *State v. Holm*, 2006 UT 31, ¶ 93.

Therefore, the magistrate's findings at the preliminary hearing should not be interpreted by the defense as limiting evidence that the state may present at trial regarding coercion. Consequently, the court should conclude that the use of the word "coerce" also does not render subsection (11) void for vagueness. It is a common word with plain understanding that adequately warns the reader and the defendant of the prohibited conduct. *See e.g. United States*

v. Dhingra, 371 F.3d 557, 562 (9th Cir. 2004) (finding "coerce" to "have a plain and ordinary meaning"); *CISPES v. F.B.I.*, 770 F2d 468, 476-77 (5th Cir. 1985) (finding that "coerce" is "obviously widely used and commonly understood in statutory contexts").

CONCLUSION

The consent statute is not void for vagueness. The word "entice" conveys clear warning to the defendant that persuading a child to have illegal sex with an adult is prohibited conduct. Moreover, there is no First Amendment right to persuade a child to have non-consensual sex with an adult. Therefore, the Court should deny the defendant's motion to declare subsection (11) of the consent statute void for vagueness.

Respectfully submitted this 22nd day of March 2007,

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CERTIFICATE OF DELIVERY

I hereby certify that, on the 22 day of March 2007, I caused a true and correct copy of the foregoing document to be served as follows:

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