IN THE UTAH COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
vs.	:	
	:	Case No. 20140473-CA
XXXXXXX XXXXX,	:	
	:	
Defendant/Appellee.	:	

APPEAL FROM A JUDGMENT OF THE FOURTH DISTRICT COURT
OF UTAH COUNTY, UTAH, HON. FRED HOWARD

BRIEF OF APPELLANT

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TABLE OF AUTHORITIES CITED

CASE AUTHORITY

CONSTITUTIONAL PROVISIONS CITED

STATUTES CITED

IN THE UTAH COURT OF APPEALS
STATE OF UTAH

STATE OF UTAH, Plaintiff/Appellee, vs. XXXXXX XXXXX, Defendant/Appellee.	: : : : : : : : :	BRIEF OF APPELLANT Case No. 20090057-CA

APPEAL FROM A JUDGMENT OF THE FOURTH DISTRICT COURT
OF UTAH COUNTY, UTAH, HON. FRED HOWARD

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to Utah Code Ann.§ 78A-3-102(4).

ISSUES PRESENTED FOR REVIEW

B QUESTIONS OF LAW:

1. Was the trial court correct in its legal ruling that:

a person agreeing to masturbate so that another may watch, for pleasure and in exchange for money, is participating in a sexual activity with that person? R. 82.

[or]

Whether Defendant's conduct, as a matter of law, constituted a violation of Utah Code Ann. § 76-10-1313, in that it constituted an agreement to commit any sexual activity with another person for a fee.

This issue was preserved for appeal by Defendant's Motion to Dismiss , R. 71; and Defendant's Motion to Quash, R. 88. The Court denied both motions, R. 84 and R. 150. This is a question of statutory construction and constitutional interpretation. It is a legal questions that is reviewed for correctness, according no deference to the decision of the District Court. See State v. J.M.S. (State ex rel. J.M.S.), 20111 UT 75, 280 P.3d 410 (Utah 2011); and Bushco v. Utah State Tax Commission, 225 P.3d 153, 2009 UT 73 (Utah 2009).

The Utah Supreme Court has held: "When the review of a [trial] court's denial of a motion to quash a bindover implicates questions of law, we review for correctness, giving no deference to the [trial] court's legal conclusions." State v. Timmerman, 2009 UT 58, ¶4, 114 P.3d 590; State v. Hattrich, 2013 UT App 177, ¶9 (Utah App. 2013).

2. Does the trial court's interpretation of the statute at issue implicate Defendant's rights to due process of law and/or violate Defendant's right to free

expression pursuant to the First Amendment? Defendant contends that the law as construed by the Court denies Defendant due process of law, as applied to this Defendant, in that the law is unconstitutionally overbroad and unconstitutionally vague.

Defendant preserved this issue for appeal in her Motion to Quash, R. 88. The Court denied this Motion. R. 150. This is a question of statutory construction and constitutional interpretation. It is a legal question that is reviewed for correctness, according no deference to the decision of the District Court. See State v. J.M.S. (State ex rel. J.M.S.), 20111 UT 75, 280 P.3d 410 (Utah 2011); and Bushco v. Utah State Tax Commission, 225 P.3d 153, 2009 UT 73 (Utah 2009).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES AT ISSUE

United States Constitution Amendment I

> Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances..

United States Constitution Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. No State shall made or enforce any law which shall abridge the

privileges or immunities of citizens of the Untied States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Utah Article I, Sec. 7.

No person shall be deprived of life, liberty or property, without due process of law.

Utah Code Ann. § **76-10-1313**. **Sexual solicitation – Penalty.**

(1) A person is guilty of sexual solicitation when the person:

(a) offers or agrees to commit any sexual activity with another person for a fee;

(b) pays or offers or agrees to pay a fee to another person to commit any sexual activity; or

(c) with intent to engage in sexual activity for a fee or to pay another person to commit any sexual activity for a fee engages in, offers or agrees to engage in, or requests or directs another person to engage in any of the following acts:

(i) exposure of a person's genitals, the buttocks, the anus, the pubic area, or the female breast below the top of the areola;

(ii) masturbation;

(iii) touch of a person's genitals, the buttocks, the anus, the pubic areas, of the female breast; or

(iv) any act of lewdness.

Utah Code Ann. § **76-10-1301. Definitions.**

For the purposes of this part:

> (5) "Sexual activity" means acts of masturbation, sexual intercourse, or any act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.

STATEMENT OF CASE

NATURE OF CASE

Defendant was charged in an Amended Information with Sexual Solicitation, a Class A Misdemeanor, having been previously convicted of a similar offense; and Possession of a Controlled Substance, heroin, a third degree felony; and Possession of Drug Paraphernalia, a Class B misdemeanor, on March 20, 2013. R. 23. A Preliminary Hearing was held on June 3, 2013. The parties were allowed to brief the issue as to whether the conduct at issue constituted a violation of the statute, as a matter of law. After the briefing, and after Oral Arguments held on August 27, 2014, the Court made the following written ruling:

> a person agreeing to masturbate so that another may watch, for pleasure and in exchange for money, is participating in a sexual activity with that person. R. 82.

As a result of this written ruling, the matter was bound over for trial. Defendant combined a Motion to quash the bindover with a Motion under Rules 52 and 59 U.R.C.P., to amend the previous ruling for legal error. R. 88. On October 1,

2013, the Court denied Defendant's Motion to quash the bindover. R. 148. A formal Order vacating its previous Order and reinstating it, as well as denying the Motion, was signed and entered on October 17, 2013. R. 150. A Petition for Interlocutory Appeal was denied on December 4, 2013. R. 164.

The controlled substances were found in Defendant's vehicle during a search conducted pursuant to arrest for Sexual Solicitation. In order to preserve the issues for appeal, Defendant filed a Motion to Suppress the evidence of drug possession on December 6, 2013. R. 166. The Motion was denied by the Court on March 3, 2014. R. 231.

On May 20, 2014, Defendant entered into a Conditional Guilty Plea on Counts One and Three alleging possession of a controlled substance, and sexual solicitation. Count 2, alleging possession of drug paraphernalia, was dismissed. R. 356. The Statement in Advance of Guilty Plea stated:

> This is a conditional guilty plea with full right of appeal reserved.
>
> If sex solicitation is overturned, State will make motion to dismiss drug charge also. R. 349.

The following proceedings were held:

> THE COURT: And the plea is going to be a guilty plea conditioned upon –

MR. MCCULLOUGH: Conditional on the right to appeal, your Honor.

THE COURT: – right to appeal.

MR. MCCULLOUGH: And, your Honor –

THE COURT: Does she have –

MR. MCCULLOUGH: It will be a no contest plea.

THE COURT: That's what I wondered.

MR. MCCULLOUGH: But, your Honor, let me explain a little further. The agreement that I have with the county attorney is that the appeal will focus on the sex solicitation case. If we should prevail on that case, then the State will voluntarily dismiss the other matter.

THE COURT: Okay.

MR. PETERS: That's correct.

THE COURT: I'll note that stipulation on the record. In the event that she's successful, then that would vacate the plea?

MR. MCCULLOUGH: Yes, sir.

THE COURT: In the event she is not, she'll be subject to the plea?

MR. MCCULLOUGH: Correct.

THE COURT: Do you understand that, Ms. XXXX?

THE DEFENDANT: Yes, I do. R. 379 p. 5-6.

The recorded conversation as set forth in the Statement of Facts below, between the

Officer and the Defendant was transcribed and, with a Declaration of the transcriber, made part of the Record, and was the basis for the entry of the pleas. R. 367.

STATEMENT OF FACTS

Defendant was an escort who was engaged for an appointment by a Payson City police officer, and asked to come to Payson for an appointment at a hotel. The conversation between the officer and Defendant in which she agreed to Payson to meet him was recorded and transcribed. It is partially reproduced below. R. 367:

Defendant: the driver will take me the extra way out Payson, ya know as long as I give her a little bit more gas money and what not and um I have, lets see, I have 10:45 to, lets see, I could be to you, lets see 11, 12, probably (inaudible) . . .

Defendant: Around 12:15

Smith: Okay

Defendant: Would you be okay with doing a half hour appointment? If I can't do the full hour? Cause I have something back in Salt Lake that, at 1:00 pm, scheduled right now, he's gonna see if he can push it back, to do later to give us more time, so we could possibly have an hour, but would you be okay if it was only 30 minutes?

Smith: Yeah, um, do you take outfit requests, and . . .?

Defendant: Well what are you looking for, I can tell you what I got.

Smith: Um, maybe a short dress, or short skirt, show up in that without any underwear on?

Defendant: Okay

Smith: And do you, and I've noticed that you have toys?

Defendant: Uh-huh

Smith: Can I just watch you with toys?

Defendant: Yeah

Smith: Okay

Defendant: And then, um, yeah usually for the half hour I do $250, hour's 300

Smith: Okay

Defendant: So I won't charge you anything extra for the outfit request.

Smith: Okay

Defendant: Then you'll pitch in a little bit for gas money?

Smith: Of course

Defendant: So, um, then you can tip for whatever it was worth for you. For what a good time you had and I will put something fantastic together for you and I will call you when I'm done in Orem and heading towards you in Payson to get the address.

Smith: Kay you're definitely the girl in the ad right? I'm not gonna get...

Defendant: Did you get, is the girl with the lollipop in her mouth? Kinda reddish hair, and did it say Valentine, that's the ad?

Smith: Yeah did it say Valen, uh-huh.

Defendant: Yup, that's me.

Smith: Oh nice, oh I could definitely see a tip there, if it works the way I think it will, so . . .

Defendant: Cool, well I'm excited to meet you, and I'll get your outfit ready and I'll be headin' south pretty soon, so I'll talk to you very shortly.

Smith: Alright we'll see you, thank you

Defendant: yeah no problem, bye

Smith: bye

When she arrived, the officer approached the vehicle and told her that she was being cited for agreeing to masturbate with toys. He then searched the vehicle, incident to the arrest, specifically to find the toys. In the search, he found controlled substances. Defendant is charged, in an Amended Information, with Possession of a controlled substance, and sexual solicitation.

The arresting officer at the Preliminary Hearing on June 25, 2013, testified as follows:

Q. And she agreed, according to you, to come down in a short skirt, no underwear, and to masturbate in front of you with that toy, is that correct?

A. That is correct.

Q. That's what she agreed to do?

A. Yes. (Tr. 12)

Q. And then you decided you were going to search the vehicle. Is that correct?

A. Yes.

Q. For what?

A. For the sex toy that she stated she brought.

Q. The instrument of the crime. Is that correct?

A. That is correct. (R. 377).

SUMMARY OF ARGUMENTS

The plain meaning of the statute does not give a person of ordinary intelligence notice of what is prohibited. The statute, by its "plain language" prohibits only an agreement for "sexual activity with another. The trial court has construed the in a manner which could not have been foreseen by a person of average intelligence. Such a construction renders the statute unconstitutionally vague and/or overbroad.

ARGUMENT

POINT I

DEFENDANT DID NOT, AS A MATTER OF LAW, OFFER OR AGREE TO COMMIT ANY SEXUAL ACTIVITY WITH ANOTHER FOR A FEE.

Defendant was charged in an Amended Information with violation of , Utah Code Ann. § 76-10-1313:

> SEXUAL SOLICITATION, a class A misdemeanor in violation of Utah Code Ann. § 76-10-1313,in that on or about 3/20/2013, in Utah County, XXXX XXXX, after being convicted of a prior sexual solicitation offense, did (a) offer or agree to commit any sexual activity with another person for a fee; (Emphasis added). R. 23.

At issue in this appeal is what constitutes any sexual activity with another person for a fee.

In 1987, the Utah Legislature passed Senate Bill 116, after concern was expressed by the Salt Lake County Attorney that "hand jobs" were not explicitly included in Utah's definition of sexual activity for the purposes of Sexual Solicitation (Utah Code§ 76-10-1313 and Prostitution, (Utah Code Ann. § 76-10-1302). That statute redefined "sexual activity" contained in Utah Code Ann. § 76-10-1301:

> Sexual activity means . . . any touching of a person's clothed or unclothed genitals, pubic area, buttocks, anus, or, if the person is a female, her breast, whether alone or between members of the same or opposite sex, or between humans and animals, in an act of apparent or actual sexual stimulation or gratification. § 76-10-1301(1). (Emphasis added by U.S. District Court).

A group of adult entertainers filed a legal action to invalidate the new law. The U.S. District Court, in Guinther v. Wilkinson, 679 F.Supp. 1066 (D.Utah 1988), entered an injunction striking from the statute those portions which are underlined above. The Utah Attorney General recognized that defining and prohibiting sexual activity that included a solo act created overbreadth problems. Thus, despite the broad language of the previous statute, the State argued there that solo conduct as charged here was not contemplated by the Utah statute. In a Motion to Dismiss the Complaint, the State asked the Court to construe the statute as requiring two (2) actors, in order to save the constitutionality:

> Clearly the elements of prostitution require that the person engage in sexual activity "with another". Actions like an actress touching her own breasts are not prostitution nor could such an act ever be construed to be included in the definition of prostitution contained in the statute. Acting, dancing, and touching oneself during these activities are all outside the prostitution ordinance by its own clear terms. This precise issue was raised in People v. Greene, 441 N.W.S.2d 636 (Crim.Ct. NYC, 1981). The defendant had been charged with prostitution in violation of a New York law, which read:
>
> > A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct another person for a fee.. (Emphasis added).
>
> This provision under New York law is almost exactly the same as § 76-10-1302(1)(a) Utah Code Annotated cited above.
>
> The defendant in Greene, supra, was charged with agreeing to commit a sexual

act involving only herself, that is she agreed to perform an act of masturbation in front of an undercover officer. The Court held that sexual acts performed not "with another" were not covered by the statute. R. 45-46.

The Court, in Guinther, ruled that the underlined language was both unconstitutionally overbroad and vague:

> In the case before us, the Utah prostitution statute applies to "sexual activity" with another person for a fee" Utah Code Ann. § 76-10-1302(1)(a) (emphasis added), but the term "sexual activity" in the underlined portion of the statute under scrutiny embraces acts of touching "whether alone or between members of the same or opposite sex" Utah Code Ann. § 76-10-1301 (emphasis added). The breadth and reach of the statute is clearly too wide, as well as being inconsistent with the prostitution law itself. As written, the statute embraces conduct that very well justifiably may be regulated under the police power of the state, but it is so broad as also to embrace conduct which could not justifiably be so regulated. Whether the particular offending language could be severed, or interpreted as consistent with the pre-existing law, is doubtful. In all events, however, the statute does not pass constitutional muster because it is impermissively (sic) vague. Id. at 1070. (Emphasis added by Court).

As can be easily seen, the present definition of "sexual activity", as contained in § 76-10-1301(5) is considerably more restricted than that struck down by the Court. Utah Code Ann. § 76-10-1313(1) prohibits offering or agreeing "to commit any sexual activity with another person for a fee." And the definition of sexual activity in Utah Code Ann. § 76-10-1301 states:

> (5) "Sexual activity" means acts of masturbation, sexual intercourse, or any act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.

It seems obvious from the text of both statutes that the acts involved require more than one person. Certainly someone who merely watches, is not involved in any of the specific acts prohibited by the statue.

As the District Court also stated in Guinther:

> The law is clear that persons who must conform their conduct to particular requirements are entitled to fair notice of what is permitted and what is proscribed. Village of Hoffman Estates v. Flipside Hoffman Estates, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); Grayned v. City of Rockford, supra; United States v. Salazar, 720 F.2d 1482, 1484-85 (10th Cir. 1983). If a law does not provide standards against which a person's conduct may be measured it is unconstitutionally vague and "incapable of an valid application," Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 604 (1974). The enactment at issue provides no standards against which a person's conduct may be measured and is susceptible to mischievous subjective application. Thus, it is unconstitutionally vague. 679 F.Supp. at 1071.

Both the Utah and Federal constitutions guarantee due process of law. *See* UTAH CONST., art I § 7; U.S. CONST. amends. V and XIV. These due process provisions both require that legislation be sufficiently specific that it provides notice of the proscribed conduct. See the Utah cases of State v. Hoffman, 733 P.2d 503, 505 (Utah 1987); and In re Boyer, 636 P.2d 1085, 1087-88 (Utah 1981). Consequently, a statute is void for vagueness if it "fails to 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 or discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). See also State v. Holm, 2006 UT 31 (Utah 2006) and State v. Archambeau, 820 P.2d 920 (Utah App. 1991). Restrictions must also be expressed in terms susceptible of objective measurement. See I.M.L. v. State, 61 P.3d at 1043. This is so because:

> Vague laws frustrate several principles that have been sturdy pillars of our legal system. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judge, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. . . We therefore invalidate vague criminal statutes when they fail to alert the average person of the prohibited conduct.

Accordingly, it has been generally acknowledged that a statute is unconstitutionally vague for one of two reasons: it either fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or it authorizes or even encourages arbitrary and discriminatory enforcement. See Bushco v. Utah State Tax Com'n, 2009 UT 73, ¶55 ("In order to be unconstitutionally vague, a statute must either (1) fail to give the person of

ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly, or (2) be written in a way that encourages arbitrary and discriminatory enforcement") (internal quotations omitted).

The law, as interpreted by the District Court, is unconstitutional as applied, in that it denies Defendant due process of law; and also that it infringes on Defendant's rights to expression under the First and Fourteenth Amendments. A ruling that a solo act qualifies as "sexual activity with another person" deprives Defendant of the right to a fair notice of what is prohibited. The County Attorney pointed out that "masturbation" is a word that often applies to just such a solo act. But a solo act just as clearly is not an act with another. The context of the statute certainly makes it clear, just as the Attorney General argued, that this is not a solo act. The statute otherwise only prohibits "sexual intercourse, or any act involving the genitals of one person and the mouth or anus of another person". Solo masturbation is not the same kind of act; and such an interpretation does not address the perceived problem of prohibiting "hand jobs."

Separate from the problem of vagueness is that of overbreadth. A "[c]riminal statute is overbroad when it, in a substantial way, prohibits lawful acts as well as unlawful acts." State v. Haig, 578 P.2d 837, 839 (Utah 1978). Indeed, "[s]tatutory

language is overbroad if its language proscribes both harmful and innocuous behavior." Salt Lake City v. Lopez, 935 P.2d 1259, 1263 (Utah App.1997) (quoting case). It is also overbroad if it is an attempt to sanction constitutionally protected activities. See Elks Lodges v. Department of Alcoholic Beverage Control, 905 P.2d 1189, 1203 (Utah1995). "In making this [overbreadth] determination, criminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *Id*. at ¶14.

An act of masturbation by one person in the presence of another is an act of lewdness, but only when done in a public place or under circumstances which the person should know will likely cause affront or alarm. See Utah Code Ann. § 76-9-702(1) and Salt Lake City v. Roberts, 2002 UT 30, 44 P.3d 767 (Utah 2002). The lewdness law is aimed at a form of disorderly conduct, the "affront or alarm" caused when a person disrupts public order with public sexual conduct. A Provo City ordinance, prohibiting a public solicitation for sex, even though the actual activity was to be performed in private, was declared unconstitutional by the Utah Supreme Court in Provo City v. Willden, 768 P.2d 455 (Utah 1989). Criminalizing even an offer or agreement by one person to touching herself for another to watch goes too

far in prohibiting conduct which is clearly protected by the First Amendment, and which is not disruptive of public order.[1] See People v. Haven, 618 N.E.2d 260 (Ill. App. 1992) where the Court prohibited use of a lewdness law to prohibit a performance for a willing audience:

> The objection to this subsection in this form was that the "'audience intent" phrase (emphasized above) could push this provision into the area of obscene acts performed not to the disturbance of, but rather to the delight of, those who witness such acts. The Joint Committee deemed it best to limit this provision to only those exposures which were shocking and disturbing to the immediate audience, leaving commercial erotic display for separate consideration. To this effect, reference to an attempt to stimulate the viewer of the lewd acts was deleted.
>
> Moreover, our supreme court has recognized that the public indecency statute simply is not meant to address that conduct which may involve first amendment protection.

Because this was not a public performance to be viewed by those who would be offended by it, it is not lewd, as a matter of law.

A performance for another person for a fee, while not prostitution, may be "pornographic" (or obscene) under Utah Code Ann. 76-10-1203:

(1) Any material or performance is pornographic if:

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[1] While the Court below assumed that Defendant intended to masturbate for the officer, she actually agreed only to allow the officer to "watch [her] with toys". It is a leap to assume that included masturbation.

(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, sado-masochistic abuse, or excretion; and

(c) Taken as a whole it does not have serious literary, artistic, political or scientific value.

While Utah uses the term "pornographic" instead of "obscene" in its statute, this language is taken from the U. S. Supreme Court case of Miller v. California, 413 U.S. 15 (1973). Obscenity, of course, is a narrow exception to the First Amendment right of free expression. A performance may be obscene, when taken as a whole, if it meets the requirements set forth above. Conceivably, that obscene performance could include the conduct of masturbating for another for a fee. Each performance, however, must be judged as a whole, and AFTER it has been performed. It is a cardinal rule of First Amendment jurisprudence that the State may not engage in prior restraint, or punishment before the act has occurred. See Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) and FW/PBS, Inc. V. City of Dallas, 493 U.S. 215 (1990). There is nothing here to judge. There was only a discussion of a performance in the future. Punishment for a performance that did not occur is a clear violation of the constitutional prohibition on prior restraint.

Nude dancing performances are entitled to the protection of the First Amendment, if they are not obscene. See Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) and Schad v. Mount Ephraim, 452 U.S. 61 (1981). These decisions continue to be quoted with approval, through the most recent nude dancing cases. Federal courts have allowed "reasonable time, place and manner restrictions" on businesses featuring nude dancing. They have not allowed States to ban nude dancing itself, as distinguished from general public nudity laws. See Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) and City of Erie v. Pap's A.M., 529 U.S. 277 (2000). The Seventh Circuit Court, in Schultz v. City of Cumberland, 228 F.3d 831 (7th Cir. 2000), a case decided after City of Erie, said:

> Moreover, "[s]exual expression which is indecent but not obscene is protected by the First Amendment." Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989). Entertainment may not be prohibited "solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment." Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) (citations omitted). 228 F.3d at 839.

The language stricken by the Guinther Court included "any touching of the person's clothed or unclothed genitals . . . in an act of apparent or actual stimulation or gratification". This would include engaging in masturbation of oneself for a fee. Thus there is not, and cannot be, a blanket prohibition on a performance without

reference to the nature, contents and context of the performance. Such a performance cannot be prohibited as the State attempts to do here.

Utah law, in § 76-9-702 prohibits certain specific acts in a public place, or when the actor "should know [the act] will cause affront or alarm"; including "sexual intercourse or sodomy"; exposure of female breasts, buttocks, genitals, or pubic area, or masturbation.[2] The statute then prohibits "any other act of lewdness. A similar law in Arizona had been declared unconstitutionally vague by the Federal District Court in Attwood v. Purcell, 402 F.Supp. 231 (D. Ariz. 1975). The Utah Supreme Court, in State ex rel. A.T., 34 P.3d 228, 2001 UT 82 (Utah 2001) rejected the argument that the phrase "any other act of lewdness" was unconstitutionally vague,; but it narrowly construed the law, ruling that the otherwise vague term must be construed within its context:

> Section 76-9-702's catchall phrase, "any other act of lewdness" must be interpreted to include other acts of lewdness of the same general kind, class, character, or nature to public intercourse, sodomy, exposure of the genitals or buttocks or masturbation. ¶ 13.

See also the recent case of State v. Bagnes, 2014 UT 4, the Supreme Court reversed a conviction of lewdness of a man who pulled down his pants in front of children, to

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[2] The prohibition here does include a solo act.

expose a diaper, but not his private parts; and State v. Serpente, 768 P.2d 994, 997 (Utah App. 1994), where this Court held that act of gross lewdness' as it appears in § 76-9-702.5 refers to an act of "equal magnitude of gravity' as those acts specifically set forth in the statute. The Utah Supreme Court used the same principle of ejusdem generis to interpret that the phrase "otherwise take indecent liberties" in the statute prohibiting forcible sexual abuse, in State v. Kennedy, 616 P.2d 594, 597 (Utah 1980). The Court said the phrase in question "refers to acts of equal magnitude of gravity to those specifically set forth in the statute".

Using the same principles to interpret the term "masturbation" as used in the sexual solicitation statute, it is easy to see that a solo act does not fit in the same category or class as the other sexual acts prohibited by the statute. All require intimate touching between the parties; and the only reading of this term that preserves the context also requires touching between two people.

POINT II

THE ALLEGATIONS AGAINST DEFENDANT INCLUDED ONLY ACTUAL SEXUAL SOLICITATION, AND DID NOT INCLUDE OTHER CONDUCT WHICH INDICATED WILLINGNESS TO ENGAGE IN SEXUAL CONDUCT FOR A FEE.

Defendant acknowledges that the sex solicitation law was amended in 2011 to

allow certain additional actions, including the touching of a person's own genitals, to used as an indication of willingness, under the proper circumstances, to engage in sexual activity with another person for a fee. See the recent case of Bushco v. Shurtleff, 729 F.3d 1294 (10th Cir. 2013). In his brief to the 10th Circuit, the Attorney General explained that certain activities, including solo acts, were not prohibited as prostitution, but that they could be used as evidence of willingness to engage in the acts that are prohibited:

> Rather, and in contrast to the statue at issue in Guinther, section 76-10-1313(1)(c)(i) and (iii) does not directly criminalize such activity when engaged in for a fee; rather this section provides that a crime occurs only if an individual engages in any of those acts "with intent to engage in sexual activity for a fee or to pay another person to commit any sexual activity for a fee." Id. It criminalizes not mere conduct, but conduct performed as part of a plan to engage in prostitution and with specific intent to engage in sexual activity with another for a fee - prostitution. Brief of Attorney General in Bushco v. Shurtleff, Tenth Cir. Case No. 12-4083, R. 96. (Emphasis added)

The Tenth Circuit agreed. The Court rejected a facial attack on the new portions of the statute, ruling that the conduct descriptions included in the new portions were narrowly focused to apply only as an indication of intent to engage in sexual activity with another for a fee:

> Even assuming, without deciding, that the exposure and touching enumerated in the Amendments is constitutionally protected expressive conduct under some circumstances, we nonetheless conclude that the Amendments do not

> reach a substantial amount of protected speech. The Statute only prohibits participation in the enumerated exposure or touching done with the intent to engage in, or pay for, sexual activity for a fee. See Utah Code Ann. § 76-10-1313(1)(c). On the face of the Statute, it does not reach any touching or exposure done without that intent.
>
> In other words, the Sexual Solicitation Statute does not criminalize the enumerated touching or exposure when done without the intent to participate in statutorily defined sexual activity for a fee. Thus, it does not reach the conduct of an actor clasping her breast as part of a stage performance or a wife touching her husband's buttocks during an embrace. The intent requirement contained in the Statute ensures that the Statute only criminalizes the enumerated touching and exposure when done with the intent to participate in, for a fee, statutorily defined sexual activity. Because the Statute is limited only to requesting or performing touching or exposure with the unlawful intent to engage in, or pay for, sexual activity for a fee, the Amendments do not, on their face, reach a substantial amount of free speech. (Emphasis added). 729 F.3d at 1303.

At no time during the proceedings below did the State suggest that the conduct referred to in the recording and at the Preliminary Hearing was a predicate to actual sexual activity involving touching between two people. The District Court ruled that the conduct of one person watching another touch herself, or play with toys, was sufficient to constitute "sexual activity with another", and so the other portions of the statute are not at issue. The simple question remains whether the Court below was correct in its ruling that "a person agreeing to masturbate so that another may watch, for pleasure and in exchange for money, is participating in a sexual activity with that

person." Clearly the Court below misread the statute; and further, the Court's reading renders the statute both vague and overbroad as applied to this Defendant.

"Sexual activity", as defined in Utah Code Ann. § 76-10-1301(5) is prohibited when it is "commit[ed] with another person. The word "masturbation" also appears in Utah Code Ann. § 76-10-1313 (c) (ii), but here it refers to a solo act. The contexts of the two sections make this clear. What is also clear is that the act "with another person" is a crime in itself; while the sole act is only a crime when it is evidence of intent to engage in an act "with another person". The same word is used in the same statute in different ways. Considering the word in the proper context, the two uses can be seen for what they are. It is not hard, however, to see that the two uses can be confused by someone who does not carefully consider the context. The lower court, however, ignored the context entirely and construed "sexual activity with another" to include one person who derived pleasure from watching. There is nothing in the statute that even hints that the act of watching is "sexual activity with another." The lower court made this up in its entirety. That is not legitimate construction of the statute; it is a revision of the statute. As such, it invades the legislative function and violates the separation of powers. Constitution of Utah, Art. V. Sec. 1; and Jenkins v. Jordan Valley Water Conservancy District, 2012 UT App 1 (Utah App. 2012).

The portion of the statute at issue has been in effect since 1987. To date, there is no case that defense counsel has been able to find, that interprets the statute as it has been interpreted here. Defendant therefore is being subject to a prosecution based on a legal interpretation that is unique to this case, and which is obviously in error.

CONCLUSION

The conduct alleged against this Defendant does not constitute a crime under Utah law. Further, the interpretation of the statute by the lower court renders the statute both vague and overbroad as applied to this Defendant. The conviction of Sexual Solicitation must be reversed.

DATED this____ day of October, 2014.

W. ANDREW MCCULLOUGH, L.L.C.

_____

W. Andrew McCullough
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of October, 2014, I did hand deliver two true and correct copies of the foregoing Brief of Appellant, to Laura Dupaix, Attorney for Appellee, 160 East 300 South, Salt Lake City, UT 84111.

_____

ADDENDUM A

The Amended Information

ADDENDUM B

The Court's Ruling on Defendant's Motion to Dismiss.