

2001

Utah v. Hardy : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	
	:	
DALE DEMONT HARDY,	:	Case No. 20010396-CA
	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Consolidated appeal from judgments of conviction for violation of a protective order, a class A misdemeanor offense in violation of Utah Code Ann. § 76-5-108 (1999), in Case No. 991200131 ("Case No. 131"), and two counts of violation of a protective order, third degree felony offenses in violation of Utah Code Ann. § 76-5-108 (1999), in Case No. 991200873 ("Case No. 873"), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Joseph C. Fratto, Jr., Judge, presiding.

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FILED
11/23/2001
Patricia Strong
Clerk of the Court

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW	2
PRESERVATION OF ARGUMENT	3
RULES, STATUTES AND CONSTITUTIONAL PROVISIONS	3
STATEMENT OF THE CASES	3
STATEMENT OF FACTS	5
SUMMARY OF THE ARGUMENT	9
ARGUMENT	

<u>POINT I. THE STATE FAILED TO ESTABLISH THAT HARDY DIRECTLY OR INDIRECTLY CONTACTED OR OTHERWISE COMMUNICATED WITH COURTNEY IN VIOLATION OF THE RELEVANT STATUTORY PROVISIONS.</u>	10
---	----

A. <u>THE RELEVANT STATUTES AND PROTECTIVE ORDER DO NOT PROHIBIT HARDY FROM WRITING TO HIS CHILDREN.</u>	13
---	----

(1) <u>Under the Sufficiency of the Evidence Analysis, this Court Will Begin by Construing the Statutory Provisions at Issue.</u>	13
---	----

(2) <u>The State Charged Hardy with "Contacting" or "Otherwise Communicating" with Courtney. Those Terms Are Not Defined in the Relevant Statutory Provisions.</u>	15
--	----

(3) <u>Section 30-6-4.2(2)(b) Should Be Construed to Prohibit Violent, Abusive, Threatening or Harassing Contact and Communication.</u>	17
B. <u>THE MARSHALED FACTS FAIL TO SUPPORT THE CONVICTIONS.</u>	20
(1) <u>Case No. 991200873 and the Two Felony Convictions.</u>	21
(2) <u>Case No. 991200131 and Entry of the Guilty Plea for a Misdemeanor Offense.</u>	27
<u>POINT II. THE STATUTORY PROVISIONS THAT GOVERN IN THIS MATTER ARE OVERLY BROAD, WHERE THEY INFRINGE ON FREE SPEECH UNDER THE FIRST AMENDMENT, AND THEY ARE VAGUE AND AMBIGUOUS.</u>	31
A. <u>SECTION 30-6-4.2(2)(b) FAILS TO ADEQUATELY DEFINE A CRIME, THEREBY REQUIRING A PERSON TO GUESS AT WHAT CONDUCT IS PROHIBITED.</u>	33
B. <u>THE PROVISIONS ARE SUSCEPTIBLE TO ARBITRARY AND DISCRIMINATORY ENFORCEMENT. THAT IS UNCONSTITUTIONAL.</u>	36
C. <u>THE RELEVANT PROVISIONS SET FORTH IN § 30-6-4.2(2)(b) INTERFERE WITH A PERSON'S RIGHTS UNDER THE FIRST AMENDMENT.</u>	39
(1) <u>The Purpose of the Cohabitant Abuse Act.</u>	40
(2) <u>The State Legislature May Punish Threats of Harm, Domestic Abuse, Violence, Intimidation, and Conduct that Incites Violence.</u>	42

<i>(3) <u>Section 30-6-4.2(2)(b) and the Protective Order Penalize Innocent Conduct.</u></i>	44
<i>(a) The Statutory Provisions and Protective Order Criminalize Conduct that Does Not Relate to the Purposes Served by the Cohabitant Abuse Act.</i>	45
<i>(b) The Statute Is Overly Broad as Applied to Hardy.</i>	46
CONCLUSION	49
Addendum A: Judgments and final orders	
Addendum B: Order of Consolidation	
Addendum C: Text of relevant statutes and constitutional provisions	
Addendum D: Protective Order	
Addendum E: June 7, 1999, letter and recipe	
Addendum F: June 24, 1999, letter and card	
Addendum G: Trial court ruling	

TABLE OF AUTHORITIES

Page

CASES

<u>Allred v. Utah State Retirement Board</u> , 914 P.2d 1172 (Utah Ct. App. 1996)	14
<u>BB & B Transport v. Industrial Commission of Utah</u> , 893 P.2d 611 (Utah Ct. App. 1995)	14
<u>Brinkerhoff v. Forsyth</u> , 779 P.2d 685 (Utah 1989)	14
<u>Broadrick v. Oklahoma</u> , 413 U.S. 601 (1973)	40
<u>Cantwell v. Connecticut</u> , 310 U.S. 296 (1940)	40, 43
<u>Chaplinsky v. New Hampshire</u> , 315 U.S. 568 (1942)	40, 42, 43, 47
<u>City of Seattle v. Camby</u> , 701 P.2d 499 (Wash. 1985)	44
<u>Cohen v. California</u> , 403 U.S. 15 (1971)	29, 39, 43, 45, 47
<u>Edwards v. Louisiana</u> , 372 U.S. 229 (1963)	31
<u>Erznoznik v. City of Jacksonville</u> , 422 U.S. 205 (1975)	41
<u>Gooding v. Wilson</u> , 405 U.S. 518 (1972)	38, 40, 42, 44
<u>Grayned v. City of Rockford</u> , 408 U.S. 104 (1972)	31, 32, 33, 36, 37, 39
<u>Greenwood v. City of No. Salt Lake</u> , 817 P.2d 816 (Utah 1991)	32
<u>Hagner v. U.S.</u> , 285 U.S. 427 (1932)	29
<u>Herndon v. Lowry</u> , 301 U.S. 242 (1937)	38
<u>In the Interest of Clatterbuck</u> , 700 P.2d 1076 (Utah 1985)	18

	<u>Page</u>
<u>Kolender v. Lawson</u> , 461 U.S. 352 (1983)	32, 37
<u>Krauss v. Utah State Department of Trans.</u> , 852 P.2d 1014 (Utah Ct. App. 1993), <u>overruled on other grounds</u> , <u>Child v.</u> <u>Newsome</u> , 892 P.2d 9 (Utah 1995)	26
<u>Lanzetta v. New Jersey</u> , 306 U.S. 451 (1939)	33
<u>Lewis v. New Orleans</u> , 415 U.S. 130 (1974)	44
<u>Logan City v. Huber</u> , 786 P.2d 1372 (Utah Ct. App. 1990)	40
<u>Lyon v. Burton</u> , 2000 UT 19, 5 P.3d 616	19
<u>Maheu v. Hughes Tool Company</u> , 503 P.2d 4 (Nev. 1972)	35
<u>N.A.A.C.P. v. Alabama</u> , 357 U.S. 449 (1958)	39
<u>New York v. Ferber</u> , 458 U.S. 747 (1982)	44
<u>People v. Prisinzano</u> , 648 N.Y.S.2d 267 (N.Y. Crim. 1996)	44
<u>Provo City v. Whatcott</u> , 2000 UT App 86, 1 P.3d 1113	2, 10, 39, 41, 42, 45, 46
<u>Reno v. ACLU</u> , 521 U.S. 844 (1997)	31, 40
<u>Roth v. U.S.</u> , 354 U.S. 476 (1957)	42
<u>Salt Lake City v. Lopez</u> , 935 P.2d 1259 (Utah Ct. App. 1997)	32
<u>Scharf v. BMG Corp.</u> , 700 P.2d 1068 (Utah 1985)	11
<u>Speiser v. Randall</u> , 357 U.S. 513 (1958)	38, 40
<u>State v. Authelet</u> , 385 A.2 642 (R.I. 1978)	43

	<u>Page</u>
<u>State v. Blowers</u> , 717 P.2d 1321 (Utah 1986)	33, 35, 37
<u>State v. Booker</u> , 709 P.2d 342 (Utah 1985)	12
<u>State v. Boyd</u> , 2001 UT 30, 25 P.3d 985	11, 12
<u>State v. Bradley</u> , 752 P.2d 874 (Utah 1985)	2, 11
<u>State v. Bradshaw</u> , 541 P.2d 800 (Utah 1975)	36
<u>State v. Brown</u> , 748 P.2d 276 (Wash. App. 1988)	12, 13, 42
<u>State v. Chaney</u> , 1999 UT App 309, 989 P.2d 1091	12
<u>State v. Chung</u> , 862 P.2d 1063 (Haw. 1993)	42
<u>State v. Cravens</u> , 2000 UT App 344, 15 P.3d 635	12
<u>State v. Crick</u> , 675 P.2d 527 (Utah 1983)	25, 29
<u>State v. Dunn</u> , 850 P.2d 1201 (Utah 1993)	13
<u>State v. Farrow</u> , 919 P.2d 50 (Utah Ct. App. 1996)	14
<u>State v. Gonzales</u> , 2000 UT App 136, 2 P.3d 954	11
<u>State v. Haig</u> , 578 P.2d 837 (Utah 1978)	40
<u>State v. Harman</u> , 767 P.2d 567 (Utah App. 1989)	2, 11
<u>State v. Holgate</u> , 2000 UT 74, 10 P.3d 346	11
<u>State v. Hopkins</u> , 1999 UT 98, 989 P.2d 1065	11
<u>State v. James</u> , 819 P.2d 781 (Utah 1991)	12
<u>State v. Lamm</u> , 606 P.2d 229 (Utah 1980)	12

	<u>Page</u>
<u>State v. Layman</u> , 953 P.2d 782 (Utah App. 1998), <u>aff'd</u> , <u>State v. Layman</u> , 1999 UT 79, 985 P.2d 911	26
<u>State v. Leleae</u> , 1999 UT App 368, 993 P.2d 232	11
<u>State v. Lopes</u> , 1999 UT 24, 980 P.2d 191	18
<u>State v. Lyman</u> , 966 P.2d 278 (Utah Ct. App. 1998)	12
<u>State v. Merila</u> , 966 P.2d 270 (Utah Ct. App. 1998)	13
<u>State v. Mohi</u> , 901 P.2d 991 (Utah 1995)	41
<u>State v. Morrison</u> , 2001 UT 73, 31 P.3d 547	3, 41
<u>State v. Nickles</u> , 728 P.2d 123 (Utah 1986)	12
<u>State v. Ostler</u> , 2001 UT 68, 31 P.3d 528	18
<u>State v. Owens</u> , 638 P.2d 1182 (Utah 1981)	33, 34
<u>State v. Petree</u> , 659 P.2d 443 (Utah 1983)	2, 11
<u>State v. Pierson</u> , 476 N.W.2d 544 (Neb. 1991)	32
<u>State v. Redd</u> , 1999 UT 108, 992 P.2d 986	16
<u>State v. Samter</u> , 479 P.2d 237 (Or. App. 1971)	33
<u>State v. Singh</u> , 819 P.2d 356 (Utah App. 1991)	13
<u>State v. Smith</u> , 927 P.2d 649 (Utah Ct. App. 1996)	2, 11, 13
<u>State v. Span</u> , 819 P.2d 329 (Utah 1991)	12
<u>State v. Thurman</u> , 911 P.2d 371 (Utah 1996)	2

	<u>Page</u>
<u>State v. Valenzona</u> , 992 P.2d 718 (Haw. 1999)	18
<u>State v. Vessey</u> , 967 P.2d 960 (Utah Ct. App. 1998)	11
<u>Stock v. State</u> , 526 P.2d 3 (Alaska 1974)	32
<u>Strollo v. Strollo</u> , 828 P.2d 532 (Utah Ct. App. 1992)	19, 41
<u>Svedberg v. Stamness</u> , 525 N.W.2d 678 (N.D. 1994)	44
<u>T.W. v. State</u> , 665 So. 2d 987 (Ala. Crim. App. 1995)	43
<u>U.S. v. Cicco</u> , 10 F.3d 980 (10th Cir. 1993)	13
<u>U.S. v. Hollis</u> , 971 F.2d 1441 (10th Cir. 1992), <u>cert. denied</u> , 507 U.S. 985 (1993)	13
<u>U.S. v. Levine</u> , 41 F.3d 607 (10th Cir. 1994)	13
<u>U.S. v. Reese</u> , 92 U.S. 214, 23 L.Ed. 563 (1875)	37
<u>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.</u> , 455 U.S. 489 (1982)	32
<u>West Virginia State Board of Education v. Barnette</u> , 319 U.S. 624 (1943)	42

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 30-6-1 <i>et. seq.</i> (1998)	2, 3, 14
Utah Code Ann. § 30-6-1 (1998)	15, 19, 39, 41
Utah Code Ann. § 30-6-2 (1998)	2, 3, 14, 19
Utah Code Ann. § 30-6-3 (1998)	2, 3, 14

	<u>Page</u>
Utah Code Ann. § 30-6-4 (1998)	2, 3, 14
Utah Code Ann. § 30-6-4.1 (1998)	2, 3, 14
Utah Code Ann. § 30-6-4.2 (1998)	2, 3, 9, 10, 14, 15, 16, 17, 18, 19, 20, 26, 33, 34, 35, 36, 37, 39, 41, 44, 45, 46, 49
Utah Code Ann. § 76-5-106 (1999)	15, 16, 20, 41
Utah Code Ann. § 76-5-108 (1999)	15, 34
Utah Code Ann. § 77-36-1 (1999)	2, 3, 14, 15, 19, 39, 41
Utah Code Ann. § 78-2a-3(2)(e) (1996)	1
U.S. Const. amend. I	3, 31, 32, 33, 39, 40, 41, 44, 45
U.S. Const. amend. XIV	3, 39, 45

OTHER AUTHORITIES

Webster's New World College Dictionary 295 (4 th ed. 1999)	17
Webster's New World College Dictionary 407 (4 th ed. 1999)	16

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

DALE DEMONT HARDY,
Defendant/Appellant.

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Case No. 20010396-CA
Priority No. 2

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996), whereby the defendant in a district court criminal action may take an appeal to the Court of Appeals from a final order for anything other than a first degree or capital felony. Appellant Dale Hardy was convicted in two separate cases of violating a protective order. The conviction in the first case, Case No. 991200131 ("Case No. 131"), is recorded as a class A misdemeanor offense under Utah Code Ann. § 76-5-108 (1999). The convictions in the second case, Case No. 991200873 ("Case No. 873"), are recorded as two third degree felony offenses under Utah Code Ann. § 76-5-108 (1999). The Honorable Joseph C. Fratto, Third Judicial District Court, entered judgment in the cases. A copy of each judgment is contained in the attached Addendum A.¹

Case Nos. 131 and 873 were consolidated by order of this Court for purposes of the appeal. A copy of the consolidation order is attached hereto as Addendum B.

¹ At times, other judges were involved in each matter, including the Honorable William A. Thorne (see Case No. 131:14), and Judge Michael Burton. (See Case No. 873:177; Case No. 131:30-31.)

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

The issues presented for review are as follows:

1. Whether the trial court erred in ruling that the state presented legally sufficient evidence, either to support a violation of the plea in abeyance or the new violations of the protective order for the convictions in each case. The statutes applicable to the issue are Utah Code Ann. §§ 76-5-108 (1999); 77-36-1 (1999); and 30-6-1 *et. seq.* (1998).

Standard of Review: The first issue concerns statutory construction, which is reviewed for correctness, State v. Thurman, 911 P.2d 371, 372 (Utah 1996), and the sufficiency of the evidence, which is reviewed as follows:

We reverse the jury's verdict in a criminal case when we conclude as a matter of law that the evidence was insufficient to warrant conviction. State v. Harman, 767 P.2d 567, 568 (Utah App. 1989). Nevertheless, "the standard for reversal is high." Id. We will reverse only if the evidence is so "inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." Id. (quoting State v. Petree, 659 P.2d 443, 444 (Utah 1983)); accord State v. Bradley, 752 P.2d 874, 876 (Utah 1985). We review from a perspective most favorable to the verdict the evidence and all inferences reasonably drawn from the evidence, recognizing that determinations regarding witness credibility are solely within the jury's province. Harman, 767 P.2d at 568.

State v. Smith, 927 P.2d 649, 651 (Utah Ct. App. 1996).

2. Whether Utah Code Ann. §§ 30-6-4.2(2)(b) and 76-5-108 (1999), which prohibit direct/indirect contact/communication, are overly broad, both facially and as applied, and vague in violation of the federal constitution.

Standard of Review: The second issue is a question of law, which this Court will review for correctness without deference to the trial court. Provo City v. Whatcott, 2000

UT App 86, ¶5, 1 P.3d 1113; State v. Morrison, 2001 UT 73, ¶5, 31 P.3d 547.

PRESERVATION OF ARGUMENT

Hardy challenged the sufficiency of the evidence in Case No. 131 at 93:24-29, and the constitutionality of statutory provisions and the protective order at 70-73. See also Case No. 873 at 178:135-42. Hardy made the same constitutional challenges and argued insufficient evidence in Case No. 873 at 159-161, and 178:135-142.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following statutes and constitutional provisions will be determinative of the issues on appeal: Utah Code Ann. § 76-5-108 (1999); Utah Code Ann. § 77-36-1 (1999); Utah Code Ann. §§ 30-6-1 through 30-6-4.2 (1998); and U.S. Const. amends. I, & XIV, sec. 1. The text of those provisions is contained in the attached Addendum C.

STATEMENT OF THE CASES

Nature of the Cases, Course of Proceedings, Disposition in the Court Below.

Case No. 991200131.²

In January 1999, Courtney Hardy, the defendant's estranged wife, obtained a protective order against him. On January 27, 1999, the state charged Hardy with violating

² The pleadings in each case have been separately numbered beginning with page 1 to page 87 in Case No. 131, and page 1 to page 176 in Case No. 873. To avoid confusion in referring to the separate pleadings for each case, Hardy will identify pleadings by referring first to the abbreviated trial court case number as indicated above (Case No. 991200131 is abbreviated as "Case No. 131," and Case No. 991299873 is abbreviated as "Case No. 873"), followed by the page number designated as the record on appeal. For example, Hardy will refer to page one of the pleadings in the case ending in "131" as follows: (Case No. 131:1).

the order. (Case No. 131:1-2.) On April 6, 1999, Hardy entered into an agreement with the state for a plea in abeyance. Hardy agreed to abstain from violating the order for a period of a year; at the end of the year if Hardy was successful, the trial court would enter a “not guilty” plea in the matter and dismiss the case. (Case No. 131:8-12.)

On July 12, 2000, the trial court found Hardy in violation of the protective order, and thus, the terms of the plea in abeyance. Based on that finding, the court entered the guilty plea in Case No. 131 for the original violation in the matter, and bound Hardy over on the charges for the new violations. (Case No. 131:50)

In August 2000, a trial was held on the charges for the new violations. (See Case No. 873 at 178). During trial, counsel for Hardy argued insufficient evidence to support a violation of the plea agreement, and insufficient evidence to support the new charges for violations of the protective order. (Id. at 178:135-142.) Counsel for Hardy also challenged the constitutionality of the relevant statutory provisions governing the matter. The trial court rejected Hardy’s arguments. (Id.)

On March 13, 2001, the trial judge ordered Hardy to serve 365 days in jail for the violation in Case No. 131. On March 23, 2001, the defense filed a motion to amend judgment, which the trial court denied. This appeal followed. (Case No. 131:67-74.)

Case No. 991200873.

In July 1999, the state filed an information against Hardy that was later amended to allege seven counts of violating a protective order. (Case No. 873:1-3, 51-56.) Accor-

ding to the amended information, the violations occurred between January 21, 1999, and June 1999. (Id.) On August 31, 2000, the trial court commenced a jury trial in the case. (Case No. 873 at 178.) At the conclusion of the state's case in chief, counsel for Hardy asked the court to dismiss the charges for insufficient evidence and he challenged the constitutionality of the statutes and the protective order governing the matter. (Case No. 873 at 178:135-142.) The court denied the motions. (Id.) Thereafter, the jury rendered a verdict in the matter and acquitted Hardy on counts I through V and found him guilty on counts VI and VII. (Case No. 873:121-37.)

On March 13, 2001, the trial court ordered Hardy to serve indeterminate prison terms of up to five years at the Utah State Prison for the offenses (Case No. 873:156-57), and on March 23, 2001, the defense filed a motion again asking the court to declare the relevant statutory provisions and protective order unconstitutional (Case No. 873:159-61). The trial court denied the motion (Case No. 873:162), and this appeal followed. This case has been consolidated with Case No. 131. (See Addendum B, hereto.)

STATEMENT OF FACTS

Courtney and Dale Hardy were married on June 30, 1990. (Case No. 873 at 178:80.) They had four children together: Breque, who was born in May 1991; Miquelle, who was born in May 1993; Brighton, who was born in February 1996; and Serena, who was born in January 1998. (Id. at 178:84-85.)

On January 8, 1999, Courtney Hardy obtained an ex parte protective order against

Dale Hardy; and on January 25, the trial court entered a permanent order in the matter.

(Case No. 873 at 178:80-83.) A copy of the permanent protective order is attached

hereto as Addendum D. The judge initialed each paragraph in the permanent protective

order that is identified with an "[x]," as follows:

The Court having reviewed Petitioner's Verified Petition for Protective Order and:
[having received argument and evidence,] and it appearing that domestic violence
or abuse has occurred,

IT IS HEREBY ORDERED

(The Judge or Commissioner shall initial
each section that is included in this Order.)

[x] 1. The Respondent is restrained from attempting, committing, or threatening to
commit domestic violence or abuse against Petitioner.

* * *

[x] 3. The Respondent is prohibited from directly or indirectly contacting,
harassing, telephoning, or otherwise communicating with the Petitioner.

[x] 4. The Respondent shall be removed and excluded, and shall stay away, from
Petitioner's residence, and its premises, located at: 7772 South Brighton Way, Salt
Lake City, Utah 84121, and Respondent is prohibited from terminating or
interfering with the utility services to the residence.

* * *

[x] 7. The Petitioner is awarded temporary possession of the following residence,
automobile and/or other essential personal property: 7772 South Brighton Way,
Salt Lake City, Utah 84121; green 1993 Chevy Suburban 4x4; and, all personal
property belonging to Petitioner and/or the parties' minor child/ren. This award is
subject to orders concerning the listed property in future domestic proceedings.

* * *

[x] 9. An officer from the same law enforcement agency shall facilitate
Respondent's removal of Respondent's essential personal belongings from the
parties' residence. The law enforcement officer shall contact Petitioner to make
these arrangements. Respondent may not contact the Petitioner or enter the
residence to obtain any items.

* * *

Petitioner is granted the following temporary relief (provisions "a" through "l")
which will (expire/be reviewed by the court) 150 days from the date of this order:

[x] a. The Petitioner is granted temporary custody of the following minor children:

Breque (age 7), Miquelle (age 5), Brighton (age 3), & Serena (age 1) HARDY.
[x] b. Visitation shall be [standard schedule under] U.C.A. §§ 30-3-35 & 35.5.
[x] c. The Respondent is restrained from using drugs and/or alcohol prior to or during visitation.
[x] d. The Respondent is restrained from removing the parties' minor children from the state of Utah.

(Case No. 873:178, Exhibit P2.)³

On January 8, 1999, Deputy Vic Siebeneck served the initial ex parte order on Hardy at the family's home on Brighton Way in Salt Lake County. (Case No. 873 at 178:64-65.) At the time of service, Siebeneck discussed paragraph 3 of the order with Hardy and informed him "that he could not directly or indirectly, letters, third party, he could not in any way, shape, or form any contact with the petitioner, in this case Ms. Hardy. And I did – and I did advise him that includes, you know, hanging out in front of the house or watching the girl work or, you know, writing letters and stuff like that. And phone – and phone calls." (Id. at 178:67-68.)

Siebeneck then allowed Hardy to retrieve some personal items and he escorted Hardy from the residence. (Case No. 873 at 178:71-72.) According to Siebeneck, Hardy was "surprised" and "taken aback" at being ordered out of the home. Nevertheless, he was cooperative and peaceful during the process. (Id. at 178:69-72.)

On January 9, Siebeneck again told Hardy that "he could have no contact directly, indirectly, through third party, letters, phone calls, in any way. No communication with

³ All references to exhibits in this matter are to those exhibits that were admitted into evidence at trial in Case No. 873, and are contained in the exhibit envelope on appeal.

[Courtney] whatsoever." (Case No. 873 at 178:69.)

Thereafter, the state filed 7 counts against Hardy, claiming he violated the order in several respects. The jury convicted Hardy on counts VI and VII based on the following:

On or about June 7, 1999, Courtney retrieved a letter from the mailbox addressed to the children at their home on Brighton Way. The letter was from Hardy. (Case No. 873 at 178:111.) The letter talked about Courtney and Hardy's feelings for her, including feelings of sorrow, remorse and devotion. (Id. at 178:111-13; Exhibit P10.) The letter also included a recipe for "stuffed silver rainbow trout." (Case No. 873 at 178:114; Exhibit P10.) A copy of the June 7 letter and recipe are attached hereto as Addendum E. Courtney testified that on June 7, 1999, her children could not read and would not have understood the letter, and they did not cook. (Case No. 873 at 178:113-114.)

Next, on June 24, 1999, Courtney again retrieved a letter from the mailbox addressed to the children at their home on Brighton Way from Hardy. (Case No. 873 at 178:114-115.) Again, among other things, the letter talked about Courtney and Hardy's feelings for her, including feelings of sorrow, remorse and devotion. (Id. at 178:114-117; Exhibit P11.) Courtney testified that the envelope also contained a card for her father with a note that stated, "please forward." (Id. at 178:117-18; Exhibit P12.) A copy of the June 24 letter and card are attached hereto as Addendum F.

Courtney and Hardy were divorced in May 2000. (Case No. 873 at 178:80.)

After the jury found Hardy guilty on counts VI and VII, the judge ordered him to

serve a jail sentence for the misdemeanor conviction in Case No. 991200131, and indeterminate terms of up to five years at the Utah State Prison for the felony convictions in Case No. 991200873. (Case No. 873:156-57; Case No. 131:67; see also Case No. 873 at 179:16-17; Case No. 131 at 94:16-17.)

Hardy is incarcerated. He is appealing from the final order in each case.

Additional facts relating to this appeal are set forth below.

SUMMARY OF THE ARGUMENT

A "petitioner" may obtain a protective order in civil court against a "respondent" upon proof of domestic violence or abuse. Petitioner Courtney Hardy obtained a protective order against Hardy in January 1999. According to the protective order and Utah Code Ann. § 30-6-4.2(2)(b) Hardy was prohibited from directly or indirectly contacting or otherwise communicating with Courtney. In June 1999, Hardy wrote two letters to his children, ages 8, 6, 3, and 1. Hardy expressed his feelings for Courtney in the letters and he expressed remorse, sorrow, and devotion. Courtney testified that the children were too young at the time to understand the letters. Based on that evidence, Hardy was convicted of indirectly/directly contacting or otherwise communicating with Courtney.

Hardy is challenging the sufficiency of the evidence to support the convictions. Specifically, the state failed to prove that the letters were for Courtney; that Courtney believed the letters were for her; that the letters contained information for Courtney's benefit; or that Hardy was somehow using the children to communicate with Courtney.

The evidence failed to show a direct/indirect communication/contact with Courtney. In addition, the letters do not contain criminal content. That is, they are not violent, threatening, harmful, abusive, or harassing. Thus, the convictions must be reversed.

Hardy also is challenging the constitutionality of the statutory provisions applicable in this matter. Section 30-6-4.2(2)(b) makes it a crime for a respondent to *directly* or *indirectly contact* or *otherwise communicate* with a petitioner. The statute fails to define the italicized terms and it fails to otherwise limit application of the provision. Thus, it serves to embrace and criminalize innocent, non-criminal conduct. Because the statute sweeps within its ambit "a potentially huge universe of otherwise legitimate" conduct, Whatcott, 2000 UT App 86, ¶11, it cannot be upheld. It must be stricken as vague, ambiguous and overly broad under the federal constitution.

ARGUMENT

POINT I. THE STATE FAILED TO ESTABLISH THAT HARDY DIRECTLY OR INDIRECTLY CONTACTED OR OTHERWISE COMMUNICATED WITH COURTNEY IN VIOLATION OF THE RELEVANT STATUTORY PROVISIONS.

Hardy was charged with violating a protective order under Utah Code Ann. § 76-5-108. (Case No. 873:51-56.) Evidence relating to the charges prompted the trial judge to withdraw Hardy's plea in abeyance in Case No. 131 and enter a guilty plea against him for a misdemeanor offense. Hardy also was convicted by a jury of two counts of violating the order in Case No. 873. Hardy maintains the evidence was insufficient to

support the convictions in Case No. 873, and the entry of a guilty plea in Case No. 131.

"We reverse the jury's verdict in a criminal case when we conclude as a matter of law that the evidence was insufficient to warrant conviction." *State v. Smith*, 927 P.2d 649,651 (Utah Ct. App. 1996) (quoting *State v. Harman*, 767 P.2d 567, 568 (Utah Ct. App. 1989)). The defendant must overcome a heavy burden in challenging the sufficiency of evidence for a jury verdict. *See id.*; *State v. Vessey*, 967 P.2d 960, 966 (Utah Ct. App. 1998). "We view the evidence in a light most favorable to the jury verdict," *State v. Bradley*, 752 P.2d 874, 876 (Utah 1985), and "will reverse only if the evidence is so 'inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime.'" *Smith*, 927 P.2d at 651 (quoting *Harman*, 767 P.2d at 568 (quoting *State v. Petree*, 659 P.2d 443, 444 (Utah 1983))). However, though the burden is high, it is not impossible. *See id.* "We will not make speculative leaps across gaps in the evidence." *Id.* (internal quotations and alterations omitted). "Every element of the crime charged must be proven beyond a reasonable doubt." *Harman*, 767 P.2d at 568. "To affirm the jury's verdict, we must be sure the State has introduced evidence sufficient to support all elements of the charged crime." *Smith*, 927 P.2d at 651.

State v. Gonzales, 2000 UT App 136, ¶10, 2 P.3d 954; see also State v. Holgate, 2000 UT 74, ¶18, 10 P.3d 346; State v. Leleae, 1999 UT App 368, ¶17, 993 P.2d 232.

To prevail on a claim of insufficient evidence, the defendant "must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." State v. Boyd, 2001 UT 30, ¶13, 25 P.3d 985 (citing State v. Hopkins, 1999 UT 98, ¶14, 989 P.2d 1065).⁴

4 In Case No. 131, the state was required to prove under the "preponderance of the evidence" standard that Hardy violated the protective order. The sufficiency challenge under that standard is similar to the standard above: appellant must "marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

In the event the evidence is contradictory or conflicting, so long as a reasonable interpretation of the evidence supports each element, this Court will not disturb the verdict, or in Case No. 131, the trial court's findings. See Boyd, 2001 UT 30, ¶14.

[W]e do not sit as a second trier of fact: "'It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses.' So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops."

Id. at ¶16 (quoting State v. Booker, 709 P.2d 342, 345 (Utah 1985) (quoting State v. Lamm, 606 P.2d 229, 231 (Utah 1980))); see also State v. Cravens, 2000 UT App 344, ¶18, 15 P.3d 635; State v. Chaney, 1999 UT App 309, ¶30, 989 P.2d 1091 ("We may not weigh evidence or assess witness credibility, but instead 'assume that the jury believed the evidence and inferences that support the verdict'"); State v. James, 819 P.2d 781, 784 (Utah 1991) (the mere existence of conflicting evidence does not warrant reversal).

Also, it is well settled that "a conviction can be based on sufficient circumstantial evidence." State v. Lyman, 966 P.2d 278, 281 (Utah Ct. App. 1998) (quoting State v. Brown, 948 P.2d 337, 344 (Utah 1997)). "'Circumstantial evidence need not be regarded as inferior evidence if it is of such quality and quantity as to justify a jury in determining guilt beyond a reasonable doubt, and is sufficient to sustain a conviction.'" Lyman, 966 P.2d at 281 (quoting State v. Nickles, 728 P.2d 123, 127 (Utah 1986)); see State v. Span, 819 P.2d 329, 332-33 (Utah 1991). This Court will determine whether "the inferences that can be drawn from th[e] evidence have a basis in logic and reasonable human

experience sufficient to prove each legal element of the offense beyond a reasonable doubt.'" Brown, 948 P.2d at 344.

In accordance with the standards identified above, it is the function of a reviewing court to ensure "that there is sufficient competent evidence as to each element of the charge to enable a jury to find, beyond a reasonable doubt, that the defendant committed the crime." State v. Merila, 966 P.2d 270, 272 (Utah Ct. App. 1998) (cite omitted).

In this matter, the state failed to present evidence sufficient to establish the violations of the protective order. As set forth below, the convictions must be reversed.

A. THE RELEVANT STATUTES AND PROTECTIVE ORDER DO NOT PROHIBIT HARDY FROM WRITING TO HIS CHILDREN.

(1) Under the Sufficiency of the Evidence Analysis, this Court Will Begin by Construing the Statutory Provisions at Issue.

In considering the sufficiency of the evidence, it is proper to identify the elements that make up the offense. See State v. Dunn, 850 P.2d 1201, 1215 (Utah 1993); Merila, 966 P.2d at 272; Smith, 927 P.2d at 651 ("We begin our [sufficiency] review by setting out the elements of the crime"); State v. Singh, 819 P.2d 356, 358-59 (Utah App. 1991); U.S. v. Cicco, 10 F.3d 980, 983 (10th Cir. 1993) (in considering the sufficiency of the evidence, "[w]e will utilize the traditional tools of statutory construction in order to determine what conduct constitutes a violation of [the criminal statute]"); U.S. v. Hollis, 971 F.2d 1441, 1447-49 (10th Cir. 1992) (court considers meaning of each element), cert. denied, 507 U.S. 985 (1993); U.S. v. Levine, 41 F.3d 607, 610-11 (10th Cir. 1994)

(sufficiency of the evidence analysis necessarily includes engaging in statutory construction to determine elements of the offense).

To that end, this Court is "guided by the rule that a statute should generally be construed according to its plain language." Brinkerhoff v. Forsyth, 779 P.2d 685, 686 (Utah 1989); State v. Farrow, 919 P.2d 50, 53-54 (Utah Ct. App. 1996); Allred v. Utah State Retirement Bd., 914 P.2d 1172, 1175 (Utah Ct. App. 1996); BB & B Transp. v. Industrial Comm'n of Utah, 893 P.2d 611, 614 (Utah Ct. App. 1995).

The statutory provisions at issue in this case are Utah Code Ann. §§ 30-6-1 *et seq.*; 76-5-108; and 77-36-1. Section 30-6-2 provides the following:

(1) Any cohabitant or any child residing with a cohabitant who has been subjected to abuse or domestic violence, or to whom there is a substantial likelihood of immediate danger of abuse or domestic violence, may seek an ex parte protective order or a protective order in accordance with this chapter, whether or not that person has left the residence or the premises in an effort to avoid further abuse.

Utah Code Ann. § 30-6-2 (1998); see also Utah Code Ann. § 30-6-4.2(1)(a). Also,

(2) A court may grant the following relief without notice in an order for protection or a modification issued ex parte:

(a) enjoin the respondent from threatening to commit or committing domestic violence or abuse against the petitioner and any designated family or household member;

(b) prohibit the respondent from harassing, telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly;

(c) order that the respondent is excluded from the petitioner's residence and its premises, and order the respondent to stay away from the residence, school, or place of employment of the petitioner, and the premises of any of these, or any specified place frequented by the petitioner and any designated family or household member;

(d) upon finding that the respondent's use or possession of a weapon may pose a

serious threat of harm to the petitioner, prohibit the respondent from purchasing, using, or possessing a firearm or other weapon specified by the court;

(e) order possession and use of an automobile and other essential personal effects, and direct the appropriate law enforcement officer to accompany the petitioner to the residence of the parties to ensure that the petitioner is safely restored to possession of the residence, automobile, and other essential personal effects, or to supervise the petitioner's or respondent's removal of personal belongings[.]

Utah Code Ann. § 30-6-4.2 (1998). According to §§ 76-5-108 and 30-6-4.2(5)(a)(i), an intentional/knowing violation of the above provisions constitutes a crime.

Related statutes define terms used in the above provisions, including the terms "abuse," "domestic violence," and "harassment." See Utah Code Ann. § 30-6-1(1) ("abuse" is defined as attempting to cause or causing physical harm or placing another in fear of imminent harm); Utah Code Ann. § 77-36-1 ("domestic violence" is defined as any criminal offense involving violence or physical harm or threats, or any attempt, conspiracy, or solicitation to commit such act; statute lists specific crimes of violence constituting "domestic violence"); Utah Code Ann. § 76-5-106 ("harassment" is defined as follows: "A person is guilty of harassment if, with intent to frighten or harass another, he communicates a written or recorded threat to commit any violent felony"); Utah Code Ann. § 76-5-108. Additional, relevant terms are not defined under the statutes.

(2) *The State Charged Hardy with "Contacting" or "Otherwise Communicating" with Courtney. Those Terms Are Not Defined in the Relevant Statutory Provisions.*

In this matter, the state argued that Hardy violated the protective order and statutory provisions by *contacting* or *otherwise communicating* with Courtney, *directly or*

indirectly. (Case No. 873 at 178:54-55, 84, 187, 192-94; Case No. 131 at 93:9, 22-24, 27.) That conduct is proscribed by Utah Code Ann. §30-6-4.2(2)(b) (stating that "respondent" is "prohibit[ed]" from "harassing, telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly").⁵

The relevant statutory provisions fail to define the terms *direct*, *indirect*, *contact*, or *communicate*. Consequently, this Court will look to the dictionary to define those terms. See State v. Redd, 1999 UT 108, ¶11, 992 P.2d 986 (this court relies on dictionary definitions to determine plain meaning).

According to the dictionary, the term "*direct*" means "with nothing or no one between; immediate; close, firsthand, or personal"; while the term "*indirect*" means "not direct; specifically, a) not straight; deviating; roundabout b) not straight to the point, or to the person or thing aimed at [an indirect reply] c) not straightforward; not fair and open; dishonest [indirect dealing] d) not immediate; secondary [an indirect result]." Webster's New World College Dictionary 407, 727 (4 ed. 1999).

Next, the term "*communicate*" is defined as follows: "1. to pass along; impart; transmit (as heat, motion, or a disease) 2. to make known; give (information, signals, or messages)." Also, it means "to give or exchange information, signals, or messages in any

⁵ There is no evidence to support, and the state did not argue, that Hardy violated Section 30-6-4.2(2)(b) by "telephoning" or "harassing" Courtney. See Utah Code Ann. § 76-5-106 (1999) (defining harassment as an "intent to frighten or harass another" by communicating a "written or recorded threat to commit any violent felony"); (see also Case No. 873 at 178; and Case No. 131 at 93).

way, as by talk, gestures, or writing." Webster's New World College Dictionary 295 (4th ed. 1999). The term "*contact*" means, "1. the act or state of touching or meeting [two surfaces in contact] 2. the state or fact of being in touch, communication, or association (with) [to come into contact with new ideas]." *Id.* at 313.

Thus, a direct/indirect communication/contact may involve an immediate, close, firsthand association, meeting, or exchange of signals, messages, gestures or writings; or a roundabout, deviating, or secondhand association/exchange of signals/information/gestures or writings. Given the imprecise definitions for the relevant terms, § 30-6-4.2(2)(b) must be further construed in accordance with its statutory purpose, and in harmony with other provisions, as set forth below. *See infra* Point I.A.(3).

(3) *Section 30-6-4.2(2)(b) Should Be Construed to Prohibit Violent, Abusive, Threatening or Harassing Contact and Communication.*

In this matter, the protective order provided Courtney with custody of the children while Hardy had supervised visitation rights. (Case No. 873, Exhibit P2.) Also, Hardy was not specifically precluded by the protective order or statutory provisions from associating with or writing letters to his children about his feelings, his relationships, and his regrets. (*See generally*, Case No. 873, Case No. 131, Exhibit P2.) In addition, according to Courtney, in connection with separation and divorce proceedings, the trial court ordered the parties to cooperate and work together to preserve the marital assets, including the house, a trust account, and other properties. (Case No. 873 at 178:127.)

Inasmuch as the parties were required to work together on some matters, and Hardy had rights and responsibilities relating to the children, Hardy's rights and obligations necessarily required some direct/indirect contact/communication with Courtney. See State v. Valenzona, 992 P.2d 718, 722 (Haw. 1999) (recognizing that responsibilities attendant to visitation require some contact between the parents).

Thus, while the plain language of § 30-6-4.2(2)(b) and the protective order seem to prohibit Hardy from all manner of contact or communication with Courtney, that is unreasonable. Indeed, reality dictates some contact /communication at least as it relates to the children. See Valenzona, 992 P.2d at 722.

In that regard, Hardy urges this Court to construe §30-6-4.2(2)(b) to require a showing that the direct/indirect "contact" or "communication" at issue was threatening, harassing, violent or abusive, as those terms are defined by statutory law. (See Case No. 873 at 178:139 (defense counsel argues that law may legitimately proscribe "fighting words, nuisances, problems of that nature").)

Such an interpretation would be appropriate under the rules of statutory construction for several reasons. First, such an interpretation would avoid constitutional problems with the statute. See infra Point II, herein; see also State v. Lopes, 1999 UT 24, ¶6, 980 P.2d 191 (court construes statute in favor of constitutionality); In the Interest of Clatterbuck, 700 P.2d 1076, 1079 (Utah 1985) (court interprets statute to avoid due process concerns); State v. Ostler, 2001 UT 68, ¶10, 31 P.3d 528 (court avoids possible

constitutional problems in construing statute). Second, it would comport with the purpose of the statutory provisions, as recognized by this Court. Strollo v. Strollo, 828 P.2d 532, 534-35 (Utah Ct. App. 1992) (the Cohabitant Abuse Act serves to protect those "who are reasonably in fear of physical harm resulting from past conduct *coupled with a present threat of future harm*"). Inasmuch as the Cohabitant Abuse Act and protective order serve to protect petitioners who fear they may be physically harmed, it would be reasonable to construe § 30-6-4.2(2)(b) to require proof that the "contact" or "communication" at issue was threatening, violent, abusive, or engendered fear of violence or abuse to support a criminal conviction.

Third, the interpretation urged by Hardy would bring the relevant portions of § 30-6-4.2(2)(b) in harmony with other provisions. See Lyon v. Burton, 2000 UT 19, ¶17, 5 P.3d 616 (statute will be construed so that it is in harmony with other provisions). That is, if this Court were to construe § 30-6-4.2(2)(b) to proscribe violent, abusive, or threatening contact or communication, such an interpretation would be in harmony with § 30-6-4.2(1) (allowing for protective order where there is *domestic violence and abuse*); §30-6-4.2(2)(a) and (d) (prohibiting *threats of violence or abuse* and possession of a weapon that may pose a serious *threat of harm*); § 30-6-2(1) (prohibiting *abuse, domestic abuse, and conduct that constitutes an immediate danger of abuse or violence*); §§ 30-6-1 and 77-36-1 (defining *abuse and domestic violence as physical harm, fear, threats, and crimes of violence*); and § 76-1-105 (defining *harassment as a threat of violence*).

Finally, however the statutory provisions and protective order may be construed, they do not prohibit Hardy from otherwise communicating with his children. That is, they do not prohibit Hardy from writing letters to the children discussing his love, regrets and feelings for Courtney. In that regard, the evidence here does not constitute a violation of the protective order, as further explained.

B. THE MARSHALED FACTS FAIL TO SUPPORT THE CONVICTIONS.

In the event this Court construes § 30-6-4.2(2)(b) and the protective order to require a showing that the "contact" or "communication" was violent, threatening, abusive, or engendered fear to support a conviction, the evidence here was insufficient.

By the prosecutor's own admissions, this case is not about abuse or violence. (See Case No. 873 at 178:53 (prosecutor assures jury this case is not about violence/abuse).) In addition, there is no evidence to support that the content of the letters to the children threatened, harassed (see § 76-5-106, defining harassment as a "threat to commit any violent felony"), or harmed Courtney, or caused her to feel fear or intimidation. (See Case No. 873 at 178; Case No. 131 at 93.) Thus, if this Court construes the relevant provision as requested above, see supra Point I.A.(3), the convictions cannot be sustained.

In the event this Court declines to construe the statute as requested, Hardy maintains the relevant statutory provisions and protective order are unconstitutionally vague, ambiguous, and overbroad. See infra, Point II. In addition, the evidence is insufficient to support the convictions, as discussed below. See infra, Point I.B.(1), (2).

(1) Case No. 991200873 and the Two Felony Convictions.

The state's argument that Hardy violated the protective order was based on the following theory: Hardy wrote letters addressed to his children that contained mature content. According to the state, because the children were ages 8, 6, 3, and 1 at the time of the alleged conduct, the letters really served as a communication (direct or indirect) to Courtney. The prosecutor asserted the following: "The State will, through it's witnesses, demonstrate that though the address label says children, the real intended recipient of that communication was Courtney Hardy, not the children." (Case No. 873 at 178:56.)

The marshaled evidence presented at trial consisted of the following: the civil court entered an ex parte protective order against Hardy and had it served on January 8, 1999. (Case No. 873 at 178:64.) The order became permanent on January 25, 1999. (Id. at 178:83). The protective order prohibited Hardy from contacting or otherwise communicating with Courtney, either directly or indirectly (id. at 178:67, 84; see also Exhibit P2), by letter, telephone, third party or "in any way, shape, or form." (Id. at 178:67-69.)

On or about June 7, 1999, Hardy forwarded a letter to the "Courtney and Dale Hardy children" at their home on Brighton Way. It was addressed to the "dearest ones" and signed "yours eternally, your father Dale." (Case No. 873 at 178:111-12.) The prosecutor focused on the following language in the June 7 letter as violating the protective order:

That [inaudible] converse like mommy and I did all that I feel now that I attempted to get to know her. I felt she did not know me well enough but I always wanted her to. She seemed to have [too] much [to do] when I needed to talk or she was tired [when] I [thought] she would be willing to hear me.

* * *

I still believe that your mom would trust me and like me if she would converse with me. That is why I wanted her to go with me on the cruise.

(Case No. 873 at 178:111-13; Exhibit P10; the complete letter is contained in Addendum E, hereto.) The letter also stated, "It has been five months since mommy and I talked." "I would never try to talk her [Courtney] into something or change her mind. I am not that way, nor would I do that with you children." "I think I may have scared mommy when I said that these children are Heavenly Father's, not ours." "Only listen to good about others and never spread bad – this is contention and is not of God. I learned this too late as I always knew when to stop, yet sometimes I was too frustrated and unable to communicate that I just became contentious too." Also,

I know too how she feels now by my threats to leave or [to] make her leave you children, and I do not deserve to see you again. I am so very sorry and will spend my life making it up to her and you some way. Please know that I was not aware of the pain I caused your mommy, but I now know by experience what she only imagined, because I never could have done that and I was very awful [] to have even made such remarks yet I thought she knew me better than she did/does.

(Case No. 873, Exhibit P10.) The envelope also contained a recipe for stuffed trout.

Courtney testified that in June 1999, the children would not have understood portions of the letter and they did not cook. (Case No. 873 at 178:111-14.)

On June 24, 1999, Courtney retrieved another letter from the mailbox at the

Brighton Way home addressed to the "Courtney and Dale Hardy children." (Case No. 873 at 178:114-15.) The letter began, "Dear children" and was signed, "With all my love forever, daddy." (Id.) The prosecutor focused on the following excerpts from the June 24 letter as violating the protective order:

. . . I only wish that I knew what I had done to [have] you treat me this way . . .

* * *

I remember how hurt I felt when mommy stayed away all night and how I wanted her to see you and never leave again. I have now had nearly six months of this yet I cannot understand why one person would want to hurt another person this way. I am too naive or dumb to get it, (one of mommy's friends even said, get a life to me. Just how do I do that?)

* * *

I am going to Vernal today [with Tony Whitaker] to look at some property. Tony and Chris are going to have a baby girl any day now. Did I tell you that Rich and Jen have a baby girl and Glen and Teresa will have a baby at about September 11th?

* * *

I am back to my ideal weight so don't worry that I don't eat much. I go to the spa a lot and [got] some sun. My hair bleached out like it use to when I was younger.

* * *

I cannot help being [in love] and I know that someday you will understand me if you take time to be with me.

* * *

Please forgive me someday and phone or send pictures of you and especially mommy if you can.

(Case No. 873 at 178:114-117; Exhibit P11; the letter is contained in Addendum F, here-to.) The letter also stated, "I keep hoping to hear some sign that you think of me. Father's day passed, my anniversary with mommy will soon pass. Life goes on without me."

I do pray for you and I know you can feel [] my love, is this enough? You might say someday that this is all my fault, but I don't see what I could have done. I can change and do things differently in the future and forget the past. But how do I for-

get my own flesh and blood and my wife that I thought wanted me like I need her? (Case No. 873, Exhibit P11.) Courtney also testified that the envelope addressed to the children may have contained a card for her father with a note that stated, "please forward." (Case No. 873 at 178:117-18; Exhibit P12.)

According to Courtney, her children would not have been able to forward the card, they would not have understood portions of the letter addressed to them, they did not know some of the people/places identified in the letter, and they would not have understood dates or the meaning of September 11. (Case No. 873 at 178:115-118.)

Additional evidence relating to the matter included the following: Hardy's oldest child, Breque, was eight years old when Hardy sent the letters. (Case No. 873 at 178:84.) She had limited reading abilities and suffered from a form of autism. (See id. at 178:84-85.) The second child, Miquelle, was six years old and in kindergarten. (Id. at 178:85.) She was starting to recognize letters and had limited reading abilities. (Id. at 178:85-86.) Hardy's two youngest children could not read at all. (Id. at 178:86.)

At the time of trial, Hardy's children were able to read. (Case No. 873 at 178:85 (the children are now able to read).) In addition, Courtney testified that the children eventually would be able to understand the letters (id. at 178:129) and possibly would like a recipe for stuffed trout (id. at 178:129). Indeed, someday the children may wish to understand the breakup from the perspective of both parents and the letters would facilitate that. Also, Courtney was unable to dispute that Hardy typically talked to the

children about his feelings, as he did in the letters. (Id. at 178:129.)

While the state's evidence supported that letters contained content too mature for the children at their ages, that is not sufficient to support that "the real intended recipient of [the] communication[s] was Courtney Hardy." (Id. at 178:56 (prosecutor identified his theory to the jury).) That is, there was an evidentiary void in the state's case.

The state failed to present evidence to support that the letters were somehow for Courtney. Specifically, there is no indication on the face of the letters that they were a form of communication or contact intended for Courtney, directly or indirectly, where the letters were addressed to the children. (See Exhibit P10 and P11.) In addition, the state failed to show that any part of either letter constituted a contact/communication with Courtney. That is, the state failed to show that Hardy expected the children to communicate any part of the letters to Courtney; it failed to show that Hardy otherwise used the children to communicate indirectly with Courtney; and it failed to show that the letters were in any way for Courtney's benefit. (Case No. 873 at 178.)

Further, there is no indication that *Courtney believed*⁶ the letters were intended for her, either directly or indirectly (see Case No. 873 at 178:111-18, 123-24, (Courtney's testimony regarding the June 7 and 24 letters)). Also, while Courtney may have

⁶ Such a belief would be irrelevant in any respect since, under Utah law, Courtney's beliefs could not be imputed to Hardy. State v. Crick, 675 P.2d 527, 534 (Utah 1983) (recognizing that the mental state of another may not be imputed to defendant; his criminal responsibility will be determined only by his mental state).

disagreed with the content of the letters to the children, that is not sufficient to support that *Hardy directly or indirectly contacted or otherwise communicated with Courtney*.

Finally, based on the evidence presented at trial in this case, it would be inappropriate for the jury to infer that the letters were for Courtney. Specifically, evidence was presented to support that the letters were for the children at a later date, when they could understand the content. (See Case No. 873 at 178:129 (Courtney testified the children eventually probably would be able to understand the letters).) While the jury was at liberty to disregard Courtney's testimony to that effect, such disregard simply would create a void in the matter. The record still lacked evidence to support that the letters were for Courtney. See Krauss v. Utah State Dept. of Trans., 852 P.2d 1014, 1022 (Utah Ct. App. 1993) (while the jury is free to believe or disbelieve evidence presented at trial, it may not make inferences where there is an evidentiary void), overruled on other grounds, Child v. Newsome, 892 P.2d 9, 11 n.4 (Utah 1995); State v. Layman, 953 P.2d 782, 791 (Utah App. 1998) (expressing that Court "must take special care to ensure that our review of the evidence does not encourage the indulging of 'inference upon inference,' or, worse, the indulging of inference upon assumption" where relevant evidence is lacking), aff'd, State v. Layman, 1999 UT 79, 985 P.2d 911; see also infra Point I.B.(2).

In sum, evidence that the letters contained content too mature for the children at their ages was not sufficient to support that Hardy engaged in direct or indirect contact or communications with Courtney. Under § 30-6-4.2, the protective order and other rele-

vant statutory provisions, Hardy was not prohibited from sending letters to the children. Further, he was not prohibited from discussing his feelings with his children even though they may not fully appreciate or understand his letters at their young ages.

While Courtney disagreed with the content of the letters, that is not sufficient to support a crime. The convictions cannot be sustained on the record in this case.

(2) Case No. 991200131 and Entry of the Guilty Plea for a Misdemeanor Offense.

For the same reason this Court cannot sustain the convictions in Case No. 873, it cannot sustain the conviction for the misdemeanor offense in Case No. 131. See supra Point I.B.(1). In that case, the trial judge made the following findings in connection with the entry of the guilty plea on the misdemeanor offense.

. . . Mr. Hardy, I think, any reasonable soul reading these letters and knowing the little we do about your children as described by your wife in response to these questions, would have to conclude that these letters were intended for an audience wider than that to which they were addressed.

And that's an obtuse way of saying, it's clear to me you were writing to your wife, your ex-wife, Courtney Hardy.

(Case No. 131 at 93:28-29.) The trial court's ruling is attached hereto as Addendum G. The marshaled evidence relating to the findings was substantially similar to the evidence set forth above. See supra, Point I.B.(1). It included the following: Courtney obtained a protective order prohibiting Hardy from contacting or communicating with her, either directly or indirectly. (Case No. 131 at 93:8-9.) On June 7 and 24, 1999, letters arrived

from Hardy addressed to the children, ages 8, 6, 3, and 1. (Id. at 93:10-11.) At the time, the oldest child had a "mild form of autism" and the younger children were unable to read. (Id. at 93:11.) The letters "talk[ed] about [Courtney] quite a bit" and contained information, as set forth above. (Id. at 93:12.)

Additional evidence presented in connection with Case No. 131 included the following: Courtney testified that while she assumed the June 7 letter was for the children, "actually [it was] pointed to me. I mean there are -- there's a recipe, et cetera, for my children which don't cook." (Case No. 131 at 93:12.) Courtney also testified that the June 24 letter "says dear children, but again it was a letter that they would not be able to comprehend nor read. It was a letter that I am guessing was directed at me." (Id. at 93:14.) "If it was directed at the children, which I don't believe, it was, it was very inappropriate, and not something they could understand." (Id. at 93:15; see also id. at 93:14.) Also, the letters were not "appropriate for my children. They [were] way beyond their age level of comprehension." (Id. at 93:12.)

Courtney further testified that at the time the letters were sent, the children would not have been able to understand certain references to people and places in the letters, including the reference to a cruise, Vernal, and Hardy's "ideal weight"; and they would not be able to forward the card to her father. (Id. at 93:13-17.)

Lastly, Courtney admitted that the letters were not addressed to her (id. at 93:20).

The evidence in the misdemeanor case differed from the evidence in Case No. 873

in that Courtney testified she believed the letters were for her. Courtney's beliefs do not alter the conclusion that the evidence was insufficient, for three reasons.

First, under the law, Courtney's beliefs about the matter are not sufficient to convict Hardy. Crick, 675 P.2d at 534 (mental state of another may not be imputed to defendant; his criminal responsibility will be determined only by his mental state).

Second, under the law, a letter that is properly directed and placed in a post office creates a presumption that it reached its destination and was actually received "by the person to whom it was addressed." Hagner v. U.S., 285 U.S. 427, 430 (1932) (the presumption is a well-settled rule). The letters in this case were addressed and directed to the "Courtney and Dale Hardy children." (Case No. 131 at 93:19-20) Courtney admitted the letters were not addressed to her; she believed they were for her because she intercepted their delivery. (Id.) That does not support a finding that the letters were for Courtney. See Cohen v. California, 403 U.S. 15, 21 (1971) (Court refused to find that vulgar language, that was not directed to any particular persons, was actionable since persons could protect "their sensibilities simply by averting their eyes").

Third, the state failed to offer any basis in the evidence to support that the letters were for Courtney. That is, while Courtney claimed the children were too young to understand the letters, that is not sufficient. The state did not provide evidence that the letters were for Courtney's benefit. By way of example, Courtney testified that the June 7 letter included a recipe for stuffed trout. She believed the recipe was not for her children

because they did not cook. (Case No. 131 at 93:12.) However, there is no evidence that Courtney cooked and no evidence to otherwise support that the recipe was for her. (See Case No. 131 at 93, generally.)

Also, there was a reference in the June 7 letter to a cruise. The letter stated, "I still believe that your mommy would trust me and like me if she would converse with me – that is why I wanted her to go with me on the cruise." (See Case No. 873, Exhibit P10.) Courtney explained that reference as follows: approximately six weeks after she obtained the January protective order, Hardy "got" a cruise and tried "to convince [her] to go" on it. (Case No. 131 at 93:13.) Significantly, there is no indication that Courtney believed Hardy was still trying to "convince" her of that in the June 7 letter. (See generally, id. at 93.) Thus, there is no basis to find that the statement was a communication to Courtney.

In sum, while the judge determined the letters were not appropriate for the children at their ages, there is no support for the finding that the letters were for Courtney. As set forth above, supra Point I.B.(1), the state failed to prove that Hardy expected the children to communicate any part of the letter to Courtney; that Hardy somehow used the children to communicate indirectly with Courtney; or that the letters were for Courtney's benefit. (Case No. 131 at 93, generally.) For the reasons set forth herein, the conviction should be reversed.

POINT II. THE STATUTORY PROVISIONS THAT GOVERN IN THIS MATTER ARE OVERLY BROAD, WHERE THEY INFRINGE ON FREE SPEECH UNDER THE FIRST AMENDMENT, AND THEY ARE VAGUE AND AMBIGUOUS.

At the conclusion of the state's case in chief, the defense asked the trial court to declare the relevant statutory provisions and protective order unconstitutional. Defense counsel argued that if paragraph 3 of the protective order could be construed to preclude Hardy from writing letters to his children, the provision violated Hardy's right to associate with his children. (Case No. 873 at 178:136.) Defense counsel also argued that the provisions interfered with Hardy's right to free speech and communication, where the communications here were not violent, threatening, abusive or "fighting words." (Case No. 873 at 178:139-40.) Finally, defense counsel argued that the provisions went too far, in that they penalized innocent conduct. (Case No. 873 at 178:140.) The trial judge rejected the arguments and denied defense counsel's motions. (*Id.* at 178:140-42.)

Counsel's arguments relating to the relevant statutory provisions and protective order compel application of the vagueness doctrine. *See Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (vagueness raises special First Amendment concerns because of the obvious chilling effect on free speech); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (in analyzing the constitutionality of a statute, the Court considers whether vagueness interferes with First Amendment freedoms); *see also Edwards v. Louisiana*, 372 U.S. 229, 236-37 (1963) (a statute that affects first amendment rights must be

precisely drawn); State v. Pierson, 476 N.W.2d 544, 546-47 (Neb. 1991) (counsel's argument that statute was overly broad embraced vagueness doctrine); Stock v. State, 526 P.2d 3, 7-8 (Alaska 1974) ("overbreadth" is an aspect of the vagueness analysis).

The United States Supreme Court has articulated a three-part analysis to determine whether a statute is vague or overly broad:

Vague laws offend several important values. 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, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked."

Grayned, 408 U.S. at 108-09 (notes omitted); see also Kolender v. Lawson, 461 U.S. 352, 357 (1983); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982); Greenwood v. City of No. Salt Lake, 817 P.2d 816, 819 (Utah 1991); Salt Lake City v. Lopez, 935 P.2d 1259, 1265 (Utah Ct. App. 1997) (the void-for-vagueness doctrine requires the legislature to define an offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary, discriminatory enforcement).

As set forth below, the statutory provisions and protective order at issue in this

case (1) fail to give fair notice to Hardy and those persons who may be subjected to the provisions, (2) fail to adequately guard against arbitrary and discriminatory enforcement, and (3) fail to provide sufficient breathing space for First Amendment rights. See Grayned, 408 U.S. at 108-09. They must be stricken as unconstitutional.

A. SECTION 30-6-4.2(2)(b) FAILS TO ADEQUATELY DEFINE A CRIME, THEREBY REQUIRING A PERSON TO GUESS AT WHAT CONDUCT IS PROHIBITED.

The first consideration under Grayned is whether the statutory provisions at issue give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may govern himself accordingly. See State v. Blowers, 717 P.2d 1321 (Utah 1986) (finding due process violation where statute failed to adequately define prohibited conduct). The United States Supreme Court and Utah Supreme Court have stressed that the reasonable man is entitled to be informed as to what the law requires or prohibits. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

Also, "[the] determinative factor is whether there is a reasonable degree of common understanding of what is encompassed within the general terms of prohibition." State v. Owens, 638 P.2d 1182, 1183 (Utah 1981) (citing State v. Samter, 479 P.2d 237, 239 (Or. App. 1971)). "[A] criminal violation should be described with sufficient certainty so that persons of ordinary intelligence, desiring to obey the law, may know how

to govern themselves in conformity with it." Id.

In this case, §§ 30-6-4.2(2)(b) and 76-5-108, and the protective order prohibit Hardy from intentionally/knowingly contacting or otherwise communicating with Courtney, directly or indirectly. As set forth above (see supra, Point I.A.(2)), the terms "directly," "indirectly," "otherwise communicating," and "contacting" as used in § 30-6-4.2(2)(b) are not defined in the relevant statutes.

While the dictionary defines the terms ("direct" or "indirect" "communication" or "contact" involves an immediate, firsthand, personal, or a secondhand, roundabout, incidental exchange, meeting, or association of words, signals or gestures), that is not enough. The terms are general and expansive; they embrace and penalize innocent conduct. "[The] broadness of the phrase [is] nowhere limited and nothing [can] be found to indicate that the legislature intended any limitation." Owens, 638 P.2d at 1183 (cite omitted). The statute is unconstitutional both on its face and as applied.

By way of example, as stated above (supra Point I.A., herein), the protective order provided Courtney with custody of the children and it provided Hardy with visitation rights. (See Exhibit P2.) According to Courtney, she and Hardy also were required to cooperate and work together to preserve the marital assets, including the house, trust assets, and other properties. (Case No. 873 at 178:127.)

In the context of this case, some contact or communication was inevitable and necessary between the parties, either direct or indirect, at least as it related to the children

and visitation. Yet, on the face of § 30-6-4.2(2)(b) and the protective order, Hardy was prohibited from engaging in such contact or communication. That is unreasonable. Indeed, in that regard, the statutory provisions and protective order convey confusing and contradicting messages.

In addition, on the face of the provisions, Hardy was prohibited from using a third party (*i.e.* an attorney) to communicate with Courtney about matters relating to the children or visitation since such conduct would constitute "indirect" contact. That is unreasonable. The legislature's failure to place limits on the reach of the statute renders it unconstitutional. It sweeps within its ambit innocent conduct.

The statute and protective order also are vague as applied to Hardy in this matter. While he was prohibited from directly/indirectly contacting/communicating with Courtney, he was not advised that communicating *about* Courtney would constitute an offense. To the extent the statute may be construed to reach the conduct in this case, it did not put Hardy on notice of that fact. See Blowers, 717 P.2d at 1322-23 (conviction for driving under the influence violated defendant's due process rights since he was not on notice that statute could apply to him for riding a horse while intoxicated); see also Maheu v. Hughes Tool Company, 503 P.2d 4, 7-8 (Nev. 1972) (preliminary injunction entered by the lower court ordered appellant to return all books, records, communications and documents that pertained "directly or indirectly" to the operation of appellee's business; on appeal the court ruled that the injunctive order lacked definiteness

and was vague and ambiguous "because it place[d] the recipient of the order, Maheu, in constant jeopardy if he guesse[d] wrong" as to what was required under the order).

This case presents a situation where Utah law fails to adequately define essential statutory terms, *i.e.* "direct," "indirect," "contacting" and "otherwise communicating." Indeed, the terms seem to encompass any and all forms of expression from Hardy that relate to his wife. The provisions are susceptible of multiple meanings and seek to penalize innocent conduct. See State v. Bradshaw, 541 P.2d 800, 801-02 (Utah 1975) (phrase "intentionally interfered with a law officer" was unconstitutionally vague where term "interfered" was capable of more than one meaning). In addition, the provisions prevent a reasonable man from ascertaining whether his conduct conforms to the statute. That is inappropriate. Section 30-6-4.2(2)(b) and the protective order must be stricken under the first prong of the Grayned analysis.

B. THE PROVISIONS ARE SUSCEPTIBLE TO ARBITRARY AND DISCRIMINATORY ENFORCEMENT. THAT IS UNCONSTITUTIONAL.

In this matter, Hardy argued that the protective order was unconstitutional in that it criminalized innocent conduct in its broad sweep. (See Case No. 873 at 178:140.) The trial judge rejected Hardy's argument and ruled that the jury would be allowed to decide whether the conduct in this case constituted a violation of the protective order. According to the trial judge, the jury would decide whether letters to the children about Courtney and about Hardy's feelings of sorrow and apology should be penalized under Utah's criminal

statute. (Id. at 178:140-41.) The trial judge applied an incorrect standard to the matter.

Specifically, the second consideration under Grayned is whether the law provides sufficiently explicit standards for those who apply it in order that it will not be enforced in an arbitrary and discriminatory manner. A vague law impermissibly delegates basic policy matters to police, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary/discriminatory application. Grayned, 408 U.S. at 108-09. Since Section 30-6-4.2(2)(b) and the protective order fail to specify in adequate terms when a person has crossed the line, it impermissibly allows judges, prosecutors and juries to define the limits of the law.

Stated another way, the legislature is required to establish minimal guidelines to govern law enforcement. Otherwise, it has provided a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Kolender, 461 U.S. at 357-58; Grayned, 408 U.S. at 109. Justice Howe identified the hazards of such vague statutes under the second prong of the Grayned analysis, as follows:

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

Blowers, 717 P.2d at 1324 (Howe, J., concurring) (citing, U.S. v. Reese, 92 U.S. 214, 221, 23 L.Ed. 563 (1875)).

Because § 30-6-4.2(2)(b) defines unlawful conduct in broad terms, it serves as a

large net, encompassing innocent as well as criminal conduct, and it invites judges and juries to decide how the law will be applied.

In Gooding v. Wilson, 405 U.S. 518 (1972), the United States Supreme Court considered a Georgia statute that made it a crime for a person to use "opprobrious words or abusive language, tending to cause a breach of the peace." Id. at 519. The Court noted that while the Georgia appellate courts attempted to construe the statute so as to limit its application to "fighting words", those courts actually affirmed jury convictions that should not have been prosecuted in the first place because the utterances at issue failed to rise to a criminal level. Id. at 525. The Supreme Court considered this unacceptable. "We conclude that '[t]he separation of legitimate from illegitimate speech calls for more sensitive tools than [Georgia] has supplied.'" Id. at 528 (citing Speiser v. Randall, 357 U.S. 513, 525 (1958)). The Supreme Court ruled that Georgia's approach to the matter gave Georgia juries license to create their "own standard in each case." Id. (citing Hendon v. Lowry, 301 U.S. 242, 263 (1937)). The legislature's failure to define the prohibited conduct left the standard of responsibility wide open and susceptible to improper application by courts and juries.

The Utah statute is also susceptible to improper and arbitrary enforcement by courts and juries where it fails to define important terms. The statute defines an offense in such broad terms that it allows the courts (and in this case, the jury) to engage in the legislative function of deciding what is prohibited and who will be subjected to

prosecution under the all-encompassing provisions. Given the fact that § 30-6-4.2(2)(b) may be applied/abused in selective and arbitrary ways, it is unconstitutional.

C. THE RELEVANT PROVISIONS SET FORTH IN § 30-6-4.2(2)(b) INTERFERE WITH A PERSON'S RIGHTS UNDER THE FIRST AMENDMENT.

The third consideration under the Grayned analysis is whether the statute inhibits the exercise of "basic First Amendment freedoms." Grayned, 408 U.S. at 108-09; see also Whatcott, 2000 UT App. 86. Speech and association are protected freedoms under the First Amendment. Cohen, 403 U.S. at 18-19 (freedom of expression is guaranteed by the First and Fourteenth Amendments); N.A.A.C.P. v. Alabama, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech").

In the event § 30-6-4.2(2)(b) and the protective order may be interpreted to apply to the matters in this case, the relevant provisions are overly broad and interfere with Hardy's ability to communicate and associate with his children/and or his estranged wife about innocent and necessary matters.⁷

7 Portions of § 30-6-4.2(2)(b) (providing that respondent may not telephone, harass, contact or otherwise communicate with petitioner) may already be unconstitutional under current case law. In Whatcott, 2000 UT App 86, ¶¶14-16, this Court ruled that the telephone harassment statute in part is facially overbroad. The telephone harassment statute is made applicable to the Cohabitant Abuse Act, via §§ 30-6-1(6) and 77-36-1(2)(e). Those provisions define "domestic violence" as including telephone harassment.

(1) *The Purpose of the Cohabitant Abuse Act.*

To begin, under a First Amendment analysis, this Court will consider whether the legislature has enacted a statute that serves a legitimate purpose without imposing unnecessary restrictions on speech and conduct protected under the First Amendment. Reno, 521 U.S. at 875-76. "The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.'" Gooding, 405 U.S. at 521-22 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942)).

Even as to such a class, however, because "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn," Speiser v. Randall, [357 U.S. 513, 525] (1958), "(i)n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom," Cantwell v. Connecticut, [310 U.S. 296, 304] (1940). In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Button, *supra*, [371 U.S. 415, 433 (1963)].

Gooding, 405 U.S. at 522. Also, this Court has stated the following:

A statute will be invalidated for overbreadth only if it "'does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech of the press.'" [Logan City v. Huber, 786 P.2d 1372, 1375 (Utah Ct. App. 1990) (cite omitted)]. "[P]articularly where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well" Broadrick v. Oklahoma, [413 U.S. 601, 615] (1973); *see* State v. Haig, 578 P.2d 837, 841 (Utah 1978). Further, a "'statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction.'" Haig, 578 P.2d at 841 (Maughan, J., concurring in result) (quoting

Erznoznik v. City of Jacksonville, [422 U.S. 205, 216] (1975)). As an overarching principle, we will construe a statute as constitutional whenever possible. *See State v. Mohi*, 901 P.2d 991, 1009 (Utah 1995).

Whatcott, 2000 UT App 86, ¶8; Morrison, 2001 UT 73, ¶6.

The statute at issue in this case prohibits a defendant (identified in the protective order as the "respondent") from communicating in all respects directly or indirectly with a "petitioner," who has obtained a protective order in a civil case on proof of domestic violence or abuse. Utah Code Ann. § 30-6-4.2(2)(b). The provision apparently is aimed at preventing abuse and violence.

Indeed, this Court has recognized that the Cohabitant Abuse Act serves to protect those who are in fear of physical harm resulting from past conduct coupled with a present threat of future harm. Strollo, 828 P.2d at 535; *see also* Utah Code Ann. §§ 76-5-106 (1999) (defining "harassment" as threat to commit a violent felony); 30-6-1 (defining "abuse" and "domestic violence"); 77-36-1 (defining "abuse" and "domestic violence").

Hardy does not dispute that for purposes of this matter, the Cohabitant Abuse Act may serve a legitimate purpose. Thus, the provision here (§ 30-6-4.2(2)(b)) may be upheld if it aims only at evils "within the allowable area of state control." Whatcott, 2000 UT App 86, ¶8. On that point, the statute fails.

It "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or the press." *Id.* It criminalizes conduct that is protected under the First Amendment and it criminalizes conduct that does not serve the

purpose of the statute, as further discussed below.

(2) *The State Legislature May Punish Threats of Harm, Domestic Abuse, Violence, Intimidation, and Conduct that Incites Violence.*

Areas of state control include the following: the state may regulate conduct/speech /expression that is harassing, violent, abusive, threatening, libelous, or obscene, or that constitutes extortion, perjury, conspiracy, or fraud. See Whatcott, 2000 UT App 86, ¶10; State v. Brown, 748 P.2d 276, 279 (Wash. App. 1988) (threats of harm do not fall within the realm of protected speech); State v. Chung, 862 P.2d 1063, 1072 (Haw. 1993) (same); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639 (1943) (freedoms of speech, of assembly and of worship are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect); Roth v. U.S., 354 U.S. 476 (1957) (government has the power to deal with obscene/erotic expression).

The legislature also may "punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression." Gooding, 405 U.S. at 523 (cites omitted). "Fighting words" have been defined as those words that have "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." Chaplinsky, 315 U.S. at 573.

[Fighting words] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."

Id. at 572 (citing Cantwell v. Connecticut, 310 U.S. 296, 309, 310 (1940)).

In Cohen v. California, 403 U.S. 15 (1971), the United States Supreme Court addressed the issue of "fighting words." There, defendant was charged with "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person *** by *** offensive conduct." Id. at 16. Specifically, he was seen in the Los Angeles County Courthouse wearing a jacket that stated, "F___ the Draft." Id. For that offense, defendant was sentenced to 30 days imprisonment. Id.

On review, the United State Supreme Court assessed whether the message on the jacket constituted fighting words. To that end, the Court considered the following: First, whether the jacket was directed at a particular person or group of persons, which it was not, id. at 20; and second, whether the words on the jacket were "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Id. at 20 (citing Chaplinsky, 315 U.S. at 573). Under that analysis, the Court ruled the message constituted free speech; it could not be penalized under the "fighting words" analysis.

In considering the analysis in Cohen, the second factor warrants further discussion. Specifically, the "ordinary citizen" standard is an "objective" standard. See T.W. v. State, 665 So.2d 987, 988-89 (Ala. Crim. App. 1995) ("Clearly, this test 'is an objective one.'" (citing State v. Authalet, 385 A.2. 642, 649 (R.I. 1978))).

It "protects [the defendant] against supersensitive addressees. The addressee's

personal disagreement with or anger over words said to him does not, by itself, mean that the words can be punished as fighting words." City of Seattle v. Camby, 701 P.2d 499, 501 (Wash. 1985) (en banc); see also Gooding, 405 U.S. at 528 (a standard that allows juries to determine "fighting words" gives too much license and is too broad). Also, it is not enough "if words merely offend, cause one to be indignant, or rouse anger in the person hearing the words; they must incite an addressee to breach the peace immediately." Svedberg v. Stamness, 525 N.W.2d 678, 683 (N.D. 1994). "Hence, a state may not punish merely offensive or abusive speech without a showing that the average person under the circumstances, if the target of such words, would be prone to an immediate violent response." People v. Prisinzano, 648 N.Y.S.2d 267, 273 (N.Y. Crim. Ct. 1996).

A third prong in the analysis considers the "words" in the particular context of the case. See New York v. Ferber, 458 U.S. 747, 778 (1982) (Stevens, J., concurring) ("[W]hether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context"); Lewis v. New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring) ("[W]ords may or may not be 'fighting words,' depending upon the circumstances of their utterance").

Applying the three-part analysis articulated above, the statutory provision and protective order here go too far. Thus, they are unconstitutional, as set forth below.

(3) Section 30-6-4.2(2)(b) and the Protective Order Penalize Innocent Conduct.

The Utah provision at issue here "sweeps within its ambit" conduct that is protected under the First and Fourteenth Amendment. Whatcott, 2000 UT App 86, ¶8.

The statute is unconstitutional both on its face and as applied to the facts of this case.

(a) The Statutory Provisions and Protective Order Criminalize Conduct that Does Not Relate to the Purposes Served by the Cohabitant Abuse Act.

Assuming arguendo the Cohabitant Abuse Act serves to protect petitioners -- who are reasonably in fear of physical harm -- from domestic abuse, intimidation, violence, threats, and harassment, Hardy maintains that relevant portions of § 30-6-4.2(2)(b) and the protective order are not carefully drawn so as to serve that purpose. Rather, the provisions are so broadly worded that they sweep within their ambit protected communication.

On the face of § 30-6-4.2(2)(b) there is no attempt to distinguish between criminal communication or contact, and innocent communication or contact. That is, whether the communications are intimidating, threatening, abusive, violent or harassing; whether they engender fear; whether they constitute "fighting words"; or whether they relate to health insurance or visitation issues concerning the children, they are all treated alike, subject to criminal prosecution and penalty under § 30-6-4.2(2)(b). Further there is no attempt to distinguish between communications in public places (*i.e.* in a court conference room with an attorney) and communications at or in the sanctity of the petitioner's residence.

Indeed, the phrase that prohibits direct/indirect communication/contact cannot be said "sufficiently to inform the ordinary person," Cohen, 403 U.S. at 19, that the statute is

meant to distinguish between "allowable area[s] of state control" and "activities that in ordinary circumstances constitute an exercise of freedom of speech." Whatcott, 2000 UT App 86, ¶8. On that basis, the language is overly broad.

By way of specific example, under the plain language of the statute, a respondent is in violation of the law if he communicates with or contacts the petitioner to report information about the children's health insurance or visitation. He is in violation of the law for "indirect" "contact" if he makes arrangements to get mail that was mis-routed to the marital address after service of the protective order; and he is in violation of that same provision if he asks his attorney or a mutual acquaintance to contact his wife or her attorney about such matters.

While each act described above is innocent and protected behavior, the vague language of § 30-6-4.2(2)(b) sweeps such conduct within its prohibitions, and subjects a respondent to criminal prosecution and incarceration for the innocent conduct.

According to the plain language of the statute, a respondent is prohibited from engaging in "a potentially huge universe of otherwise legitimate" conduct, Whatcott, 2000 UT App 86, ¶11, including necessary direct and indirect contact and communication with the petitioner. That makes the statute overly broad on its face. See id. at ¶8.

(b) The Statute Is Overly Broad as Applied to Hardy.

Section 30-6-4.2(2)(b) also is overly broad as applied to this matter. The letters in this case that resulted in a violation of the plea in abeyance and the two felony

convictions do not rise to the level of harassing, violent, obscene, threatening, or abusive conduct. Also, the statements in the letters are not "fighting words" even when the words are considered in the particular context of this case.

Specifically, considering the first prong of the Cohen/Chaplinsky analysis, the addressees in this case were Hardy's children. Courtney admitted the letters were not addressed to her, and that she came into contact with them when she intercepted their delivery. See supra, Point I.B. That is insufficient to constitute "fighting words" under the Cohen/Chaplinsky analysis. See Cohen, 403 U.S. at 21 (if persons, who are not intended addressees, come into contact with the vulgar and offensive message on the jacket, they may protect their "sensibilities simply by averting their eyes").

Next, under the second prong of the analysis, the letters did not contain language that would likely provoke a violent reaction, or that otherwise could be construed to be "fighting words" or criminal words. Rather, the letters contained expressions of sorrow, remorse and devotion: "I feel that she [Courtney] did not know me well enough, but I always wanted her to." "I still believe that your mom [Courtney] would trust me and like me if she would converse with me. That is why I wanted her to go with me on the cruise." "I know too, how she feels now by my threats to leave or [to] make her leave you children, and I do not deserve to see you again. I am so very sorry and will spend my life making it up to her and you some way. Please know that I was not aware of the pain I caused your mommy. . . ." (Exhibit P10.)

Also, "I only wish that I knew what I had done to have you treat me this way." "I remember how hurt I felt when mommy stayed away all night and how I wanted her to see you and never leave again. I have now had nearly six months of this yet I cannot understand why one person would want to hurt another person this way. I am too naive or dumb to 'get it.' One of mommy's friends even said, 'get a life' to me. Just how do I do that?" "Please forgive me someday and phone or send pictures of you and especially mommy if you can." "I cannot help being in love and I know that someday you will understand me if you take time to be with me." (Exhibit P11.)

Finally, even when we consider that Hardy was subject to a protective order entered in civil court, and Courtney was an abused, threatened spouse under the Cohabitant Abuse Act, the statements in the letters do not warrant prosecution as "fighting words." Likewise, they are not threatening, abusive, violent, or harassing as defined under the law. Even when the protective order "history" is factored into the analysis, the conduct giving rise to a criminal prosecution must be more than words of sorrow, devotion and love.⁸

Even for this victim, the letters are innocuous. The constitution requires more before a person may be prosecuted and punished for his actions. To that end, where the

⁸ Significantly, Courtney did not testify that she felt threatened, abused, violated, intimidated, worried, anxious, distressed, harassed, or blackmailed by the June letters. (See generally, Case No. 873 at 178; Case No. 131 at 93.) She never suggested that the letters in any way made her prone to an immediate violent response or breach of the peace. She simply disagreed with the content of the letters.

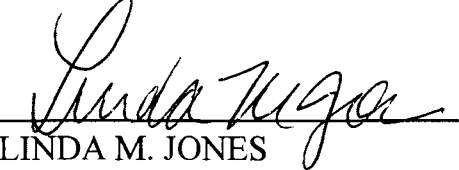
legislature failed to carefully define the conduct giving rise to criminal prosecution, and failed to distinguish between criminal "contact" or "communication," and innocent conduct, the statute is unconstitutional. Section 30-6-4.2(2)(b) sweeps too broadly in its prohibitions and must be stricken.

CONCLUSION

For the reasons set forth above, Hardy respectfully requests that this Court construe the relevant statutory provisions and the protective order in this matter to require proof that the contact/communication was violent, abusive, or threatening to support a crime. In the event the provisions may be construed in that fashion, the evidence in this case is insufficient to support the convictions.

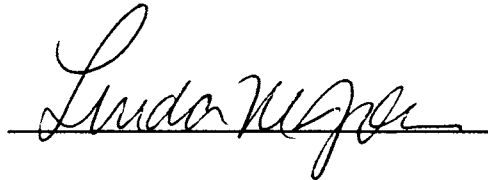
In the event the provisions may not be construed as requested, Section 30-6-4.2(2)(b) and the related protective order are unconstitutional and must be stricken.

SUBMITTED this 23rd day of November, 2001.


LINDA M. JONES
ROBERT HEINEMAN
Counsel for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, 140230, Salt Lake City, Utah 84114-0230 and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 23rd day of November, 2001.

A handwritten signature in cursive script, appearing to read "Linda M. Jones", is written over a horizontal line.

LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals Court as indicated above this ___ day of _____, 2001.

ADDENDA

ADDENDUM A

Third District Court, State of Utah
Salt Lake County, Murray Department
5022 South State, Murray, Utah 84107 (801) 281-7710

State of Utah / ~~Murray City~~

Plaintiff

CRIMINAL JUDGMENT AND SENTENCE

CASE No. 9912000131

Judge Franco

Plaintiff Counsel Day/ink

Defense Counsel Heineman

Interpreter

Date 3-13-01

Tape

vs
Dale Hardy Defendant
7772 So. Brighton Way SLU 84121
Defendants Address
DOB 9.11.60
Age 3-13-01

CHARGES

<input checked="" type="checkbox"/> Guilty/No Contest/Not Guilty/Dism	<u>Violation Protective Order</u>	<u>A</u>	Amended to	()
<input type="checkbox"/> Guilty/No Contest/Not Guilty/Dism		()		()
<input type="checkbox"/> Guilty/No Contest/Not Guilty/Dism		()		()
<input type="checkbox"/> Guilty/No Contest/Not Guilty/Dism		()		()
<input type="checkbox"/> Guilty/No Contest/Not Guilty/Dism		()		()
<input type="checkbox"/> Guilty/No Contest/Not Guilty/Dism		()		()

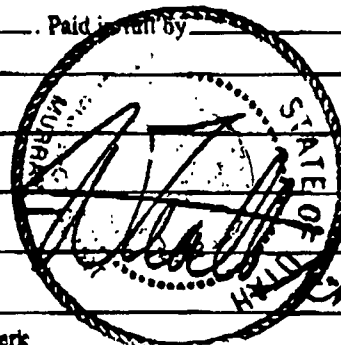
SENTENCE

Jail/Prison <u>0-1</u>	Dy / Mo / Yr <u>Yr</u>	Suspend	Dy / Mo / Yr	Fine	Suspend
Jail/Prison	Dy / Mo / Yr	Suspend	Dy / Mo / Yr	Fine	Suspend
Jail/Prison	Dy / Mo / Yr	Suspend	Dy / Mo / Yr	Fine	Suspend
Jail/Prison	Dy / Mo / Yr	Suspend	Dy / Mo / Yr	Fine	Suspend
Jail/Prison	Dy / Mo / Yr	Suspend	Dy / Mo / Yr	Fine	Suspend
Jail/Prison	Dy / Mo / Yr	Suspend	Dy / Mo / Yr	Fine	Suspend

CONDITIONS

- (a) Probation _____ with () Court () AP&P () ACEC () Other _____
- (b) () No Further Violations. () Follow all conditions set by the Court/Agency.
- (c) Restitution _____ Pay to () Court () Victim () Show proof to court.
- (d) Home Confinement _____ In lieu of Jail.
- (e) Community Service - _____ hours. _____ hrs per month begin _____ Due by _____
- (f) Education/Counseling/Treatment _____
- (g) () Credit to be given towards the fine for costs of programs(s) with proof to the court.
- (h) Plea in Abeyance/Diversion _____
- (i) () Upon Compliance count(s) _____ may be Dismissed/Reduced to _____
- (j) Court Costs _____ Legal Defender Fees _____
- (k) Commerce Serving Jail Sentence _____
- (l) Total due _____, plus interest.
- (m) May work off fine/costs at \$ _____ per hour.
- (n) Pay \$ _____ per month beginning _____ Paid in full by _____
- (o) Other _____

Run Concurrent CTS



Judge/Clerk

ROBERT K. HEINEMAN #5481
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

MURRAY DEPARTMENT

THE STATE OF UTAH,	:	ORDER DENYING MOTION
	:	TO ALTER OR AMEND
Plaintiff	:	JUDGMENT
	:	
v.	:	
DALE HARDY,	:	Case No. 991200131FS
	:	JUDGE FRATTO
Defendant.	:	

Defendant's Motion to Alter or Amend Judgement File March 23, 2001 is denied.

DATED this 27 day of April, 2001.

BY THE COURT STATE OF UTAH

JUDGE FRATTO
Third Judicial District Court

MAILED/DELIVERED a copy of the foregoing to the office of the District Attorney,
231 East 400 South, Salt Lake City, Utah 84111, this ____ day of April, 2001.

THIRD DISTRICT COURT MURRAY COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
	:	
vs.	:	Case No: 991200873 FS
	:	
DALE D HARDY,	:	Judge: JOSEPH C. FRATTO
Defendant.	:	Date: March 13, 2001

PRESENT

Clerk: bonniel

Prosecutor: BLAYLOCK, ROGER

Defendant

Defendant's Attorney(s): HEINEMAN, ROBERT K

DEFENDANT INFORMATION

Date of birth: September 11, 1960

Audio

Tape Number: 01-092 Tape Count: 3419

CHARGES

6. VIOLATION OF PROTECTIVE ORDER - 3rd Degree Felony

Plea: Guilty - Disposition: 08/31/2000 Guilty

7. VIOLATION OF PROTECTIVE ORDER - 3rd Degree Felony

Plea: Guilty - Disposition: 08/31/2000 Guilty

SENTENCE PRISON

Based on the defendant's conviction of VIOLATION OF PROTECTIVE ORDER a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of VIOLATION OF PROTECTIVE ORDER a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the

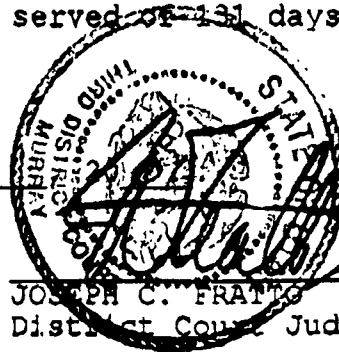
Case No: 991200873
Date: Mar 13, 2001

defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

To run concurrent. Credit for time served of 131 days.

Dated this 16th day of April



JOSEPH C. FRATTO
District Court Judge

ROBERT K. HEINLIMAN #5481
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
MURRAY DEPARTMENT

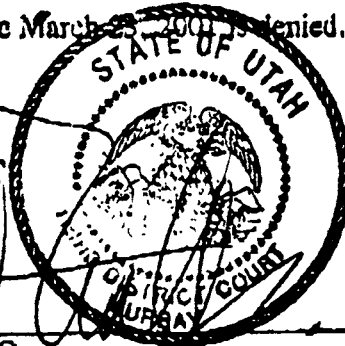
THE STATE OF UTAH,	:	ORDER DENYING MOTION
	:	TO ALTER OR AMEND
Plaintiff	:	JUDGMENT
	:	
v,	:	
	:	
DALE HARDY,	:	Case No. 991200873FS
	:	JUDGE FRATTO
Defendant.	:	

Defendant's Motion to Alter or Amend Judgement File March 23, 2001 is denied.

DATED this 27th day of April, 2001.

BY THE COURT

JUDGE FRATTO
Third District Court



MAILED/DELIVERED a copy of the foregoing to the office of the District Attorney,
231 East 400 South, Salt Lake City, Utah 84111, this day of April, 2001.

ADDENDUM B

FILED
Utah Court of Appeals
OCT 18 2001

IN THE UTAH COURT OF APPEALS

Paulette Stagg
Clerk of the Court

-----ooOoo-----

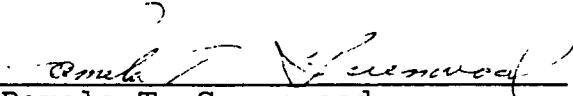
State of Utah,)	
)	
Plaintiff and Appellee,)	ORDER OF
)	CONSOLIDATION
v.)	
)	Case No. 20010395-CA
)	Case No. 20010396-CA
Dale Demont Hardy,)	
)	
Defendant and Appellant.)	

This matter is before the court on a Motion and Stipulation to Consolidate Appeals, pursuant to Rule 3(b) of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the motion is granted and the appeals are consolidated for all purposes. Appellant's opening brief in the consolidated case shall be filed not later than November 11, 2001, and all future filings shall be under Case No. 20010396-CA.

Dated this 10th day of October, 2001.

FOR THE COURT:



Pamela T. Greenwood,
Presiding Judge

CERTIFICATE OF MAILING

I hereby certify that on October 10, 2001, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

ROBERT K. HEINEMAN
LINDA M. JONES
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 E 500 S STE 300
SALT LAKE CITY UT 84111

J. FREDERIC VOROS, JR.
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

Dated this October 10, 2001.

By 
Deputy Clerk

Case No. 20010396-CA

ADDENDUM C

76-5-108. Protective orders restraining abuse of another — Violation.

(1) Any person who is the respondent or defendant subject to a protective order or ex parte protective order issued under Title 30, Chapter 6, Cohabitant Abuse Act, or Title 78, Chapter 3a, Juvenile Court Act of 1996, Title 77, Chapter 36, Cohabitant Abuse Procedures Act, or a foreign protective order as described in Section 30-6-12, who intentionally or knowingly violates that order after having been properly served, is guilty of a class A misdemeanor, except as a greater penalty may be provided in Title 77, Chapter 36, Cohabitant Abuse Procedures Act.

(2) Violation of an order as described in Subsection (1) is a domestic violence offense under Section 77-36-1 and subject to increased penalties in accordance with Section 77-36-1.1.

77-36-1. Definitions.

As used in this chapter:

(1) "Cohabitant" has the same meaning as in Section 30-6-1.

(2) "Domestic violence" means any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a criminal offense involving violence or physical harm, when committed by one cohabitant against another. "Domestic violence" also means commission or attempt to commit, any of the following offenses by one cohabitant against another:

(a) aggravated assault, as described in Section 76-5-103;

(b) assault, as described in Section 76-5-102;

(c) criminal homicide, as described in Section 76-5-201;

(d) harassment, as described in Section 76-5-106;

(e) telephone harassment, as described in Section 76-9-201;

(f) kidnaping, child kidnaping, or aggravated kidnaping, as described in Sections 76-5-301, 76-5-301.1, and 76-5-302;

(g) mayhem, as described in Section 76-5-105;

(h) sexual offenses, as described in Title 76, Chapter 5, Part 4, and Title 76, Chapter 5a;

(i) stalking, as described in Section 76-5-106.5;

(j) unlawful detention, as described in Section 76-5-304;

(k) violation of a protective order or ex parte protective order, as described in Section 76-5-108;

(l) any offense against property described in Title 76, Chapter 6, Part 1, 2, or 3;

(m) possession of a deadly weapon with intent to assault, as described in Section 76-10-507;

(n) discharge of a firearm from a vehicle, near a highway, or in the direction of any person, building, or vehicle, as described in Section 76-10-508; or

(o) disorderly conduct, as defined in Section 76-9-102, if a conviction of disorderly conduct is the result of a plea agreement in which the defendant was originally charged with any of the domestic violence offenses otherwise described in this Subsection (2). Conviction of disorderly conduct as a domestic violence offense, in the manner described in this Subsection (2)(o), does not constitute a misdemeanor crime of domestic violence under 18 U.S.C. Section 921, and is exempt from the provisions of the federal Firearms Act, 18 U.S.C. Section 921 et seq.

(3) "Victim" means a cohabitant who has been subjected to domestic violence.

30-6-1. Definitions.

As used in this chapter:

(1) "Abuse" means attempting to cause, or intentionally or knowingly causing to an adult or minor physical harm or intentionally placing another in fear of imminent physical harm.

(2) "Cohabitant" means an emancipated person pursuant to Section 15-2-1 or a person who is 16 years of age or older who:

- (a) is or was a spouse of the other party;
- (b) is or was living as if a spouse of the other party;
- (c) is related by blood or marriage to the other party;
- (d) has one or more children in common with the other party; or
- (e) resides or has resided in the same residence as the other party.

(3) Notwithstanding Subsection (2), "cohabitant" does not include:

- (a) the relationship of natural parent, adoptive parent, or step-parent to a minor; or
- (b) the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.

(4) "Court clerk" means a district court clerk or juvenile court clerk.

(5) "Department" means the Department of Human Services.

(6) "Domestic violence" means the same as that term is defined in Section 77-36-1.

(7) "Ex parte protective order" means an order issued without notice to the defendant in accordance with this chapter.

(8) "Foreign protective order" means a protective order issued by another state, territory, or possession of the United States, tribal lands of the United States, the Commonwealth of Puerto Rico, or the District of Columbia shall be given full faith and credit in Utah, if the protective order is similar to a protective order issued in compliance with Title 30, Chapter 6, Cohabitant Abuse Act, or Title 77, Chapter 36, Cohabitant Abuse Procedures Act, and includes the following requirements:

- (a) the requirements of due process were met by the issuing court, including subject matter and personal jurisdiction;
- (b) the respondent received reasonable notice; and
- (c) the respondent had an opportunity for a hearing regarding the protective order.

(9) "Law enforcement unit" or "law enforcement agency" means any public agency having general police power and charged with making arrests in connection with enforcement of the criminal statutes and ordinances of this state or any political subdivision.

(10) "Peace officer" means those persons specified in Title 53, Chapter 13, Peace Officer Classifications.

(11) "Protective order" means a restraining order issued pursuant to this chapter subsequent to a hearing on the petition, of which the petitioner has given notice in accordance with this chapter.

30-6-2. Abuse or danger of abuse — Protective orders.

(1) Any cohabitant or any child residing with a cohabitant who has been subjected to abuse or domestic violence, or to whom there is a substantial likelihood of immediate danger of abuse or domestic violence, may seek an ex parte protective order or a protective order in accordance with this chapter, whether or not that person has left the residence or the premises in an effort to avoid further abuse.

(2) (a) A petition for a protective order may be filed under this chapter regardless of whether an action for divorce between the parties is pending.

(b) If a complaint for divorce has already been filed in district court, a petition under this chapter may be filed as part of the divorce proceedings.

(3) A cohabitant, the department, or any person or institution interested in a minor may seek a protective order on behalf of the minor under the circumstances described in Subsection (1), regardless of whether the minor could have filed a petition on his own behalf. If a cohabitant intends to seek a protective order on his own behalf and on behalf of a minor, a single petition may be filed.

(4) The court shall appoint a guardian ad litem to represent the minor if the court considers the appointment necessary for the welfare of the minor.

(5) The county attorney or district attorney, if appropriate, shall represent the department where the department appears as a petitioner.

(6) A petition seeking a protective order may not be withdrawn without approval of the court.

30-6-3. Venue of action.

(1) The district court has jurisdiction of any action brought under this chapter. The juvenile court has concurrent jurisdiction of an action brought under this chapter if a protective order is sought on behalf of a minor unless the petition is filed by a natural parent, adoptive parent, or step-parent of the minor against a natural parent, adoptive parent, or step-parent of the minor.

(2) An action brought pursuant to this chapter shall be filed in the county where either party resides or in which the action complained of took place.

30-6-4. Forms for petitions and protective orders — Assistance.

- (1) (a) The offices of the court clerk shall provide forms and nonlegal assistance to persons seeking to proceed under this chapter.
(b) The Administrative Office of the Courts shall develop and adopt uniform forms for petitions and orders for protection in accordance with the provisions of this chapter on or before September 1, 1995. That office shall provide the forms to the clerk of each court authorized to issue protective orders. The forms shall include:
 - (i) a statement notifying the petitioner for an ex parte protective order that knowing falsification of any statement or information provided for the purpose of obtaining a protective order may subject the petitioner to felony prosecution;
 - (ii) a separate portion of the form for those provisions, the violation of which is a criminal offense, and a separate portion for those provisions, the violation of which is a civil violation, as provided in Subsection 30-6-4.2(5);
 - (iii) language in the criminal provision portion stating violation of any criminal provision is a class A misdemeanor, and language in the civil portion stating violation of or failure to comply with a civil provision is subject to contempt proceedings;
 - (iv) a space for information the petitioner is able to provide to facilitate identification of the respondent, such as social security number, driver license number, date of birth, address, telephone number, and physical description;
 - (v) a space for the petitioner to request a specific period of time for the civil provisions to be in effect, not to exceed 150 days, unless the petitioner provides in writing the reason for the requested extension of the length of time beyond 150 days;
 - (vi) a statement advising the petitioner that when a minor child is included in an ex parte protective order or a protective order, as part of either the criminal or the civil portion of the order, the petitioner may provide a copy of the order to the principal of the school where the child attends; and
 - (vii) a statement advising the petitioner that if the respondent fails to return custody of a minor child to the petitioner as ordered in a protective order, the petitioner may obtain from the court a writ of assistance.
- (2) If the person seeking to proceed under this chapter is not represented by an attorney, it is the responsibility of the court clerk's office to provide:
 - (a) the forms adopted pursuant to Subsection (1);
 - (b) all other forms required to petition for an order for protection including, but not limited to, forms for service;
 - (c) clerical assistance in filling out the forms and filing the petition, in accordance with Subsection (1)(a). A court clerk's office may designate any other entity, agency, or person to provide that service, but the court clerk's office is responsible to see that the service is provided;
 - (d) information regarding the means available for the service of process;
 - (e) a list of legal service organizations that may represent the petitioner in an action brought under this chapter, together with the telephone numbers of those organizations; and
 - (f) written information regarding the procedure for transporting a jailed or imprisoned respondent to the protective order hearing, including an explanation of the use of transportation order forms when necessary.

(3) No charges may be imposed by a court clerk, constable, or law enforcement agency for:

(a) filing a petition under this chapter;

(b) obtaining an ex parte protective order;

(c) obtaining copies, either certified or not certified, necessary for service or delivery to law enforcement officials; or

(d) fees for service of a petition, ex parte protective order, or protective order.

(4) A petition for an order of protection shall be in writing and verified.

(5) (a) All orders for protection shall be issued in the form adopted by the Administrative Office of the Courts pursuant to Subsection (1).

(b) Each protective order issued, except orders issued ex parte, shall include the following language:

“Respondent was afforded both notice and opportunity to be heard in the hearing that gave rise to this order. Pursuant to the Violence Against Women Act of 1994, P.L. 103-322, 108 Stat. 1796, 18 U.S.C.A. 2265, this order is valid in all the United States, the District of Columbia, tribal lands, and United States territories.”

30-6-4.1. Continuing duty to inform court of other proceedings — Effect of other proceedings.

(1) At any hearing in a proceeding to obtain an order for protection, each party has a continuing duty to inform the court of each proceeding for an order for protection, any civil litigation, each proceeding in juvenile court, and each criminal case involving either party, including the case name, the file number, and the county and state of the proceeding, if that information is known by the party.

(2) (a) An order for protection issued pursuant to this chapter is in addition to and not in lieu of any other available civil or criminal proceeding.

(b) A petitioner is not barred from seeking a protective order because of other pending proceedings.

(c) A court may not delay granting relief under this chapter because of the existence of a pending civil action between the parties.

(3) A petitioner may omit his or her address from all documents filed with the court under this chapter, but shall separately provide the court with a mailing address that is not to be made part of the public record, but that may be provided to a peace officer or entity for service of process.

30-6-4.2. Protective orders — Ex parte protective orders — Modification of orders — Service of process — Duties of the court.

(1) If it appears from a petition for an order for protection or a petition to modify an order for protection that domestic violence or abuse has occurred or a modification of an order for protection is required, a court may:

(a) without notice, immediately issue an order for protection ex parte or modify an order for protection ex parte as it considers necessary to protect the petitioner and all parties named to be protected in the petition; or

(b) upon notice, issue an order for protection or modify an order after a hearing, whether or not the respondent appears.

(2) A court may grant the following relief without notice in an order for protection or a modification issued ex parte:

(a) enjoin the respondent from threatening to commit or committing domestic violence or abuse against the petitioner and any designated family or household member;

(b) prohibit the respondent from harassing, telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly;

(c) order that the respondent is excluded from the petitioner's residence and its premises, and order the respondent to stay away from the residence, school, or place of employment of the petitioner, and the premises of any of these, or any specified place frequented by the petitioner and any designated family or household member;

(d) upon finding that the respondent's use or possession of a weapon may pose a serious threat of harm to the petitioner, prohibit the respondent from purchasing, using, or possessing a firearm or other weapon specified by the court;

(e) order possession and use of an automobile and other essential personal effects, and direct the appropriate law enforcement officer to accompany the petitioner to the residence of the parties to ensure that the petitioner is safely restored to possession of the residence, automobile, and other essential personal effects, or to supervise the petitioner's or respondent's removal of personal belongings;

(f) grant temporary custody of any minor children to the petitioner;

(g) order any further relief that the court considers necessary to provide for the safety and welfare of the petitioner and any designated family or household member; and

(h) if the petition requests child support or spousal support, at the hearing on the petition order both parties to provide verification of current income, including year-to-date pay stubs or employer statements of year-to-date or other period of earnings, as specified by the court, and complete copies of tax returns from at least the most recent year.

(3) A court may grant the following relief in an order for protection or a modification of an order after notice and hearing, whether or not the respondent appears:

(a) grant the relief described in Subsection (2); and

(b) specify arrangements for visitation of any minor child by the respondent and require supervision of that visitation by a third party or deny visitation if necessary to protect the safety of the petitioner or child.

(4) Following the protective order hearing, the court shall:

(a) as soon as possible, deliver the order to the county sheriff for service of process;

(b) make reasonable efforts to ensure that the order for protection is understood by the petitioner, and the respondent, if present;

(c) transmit, by the end of the next business day after the order is issued, a copy of the order for protection to the local law enforcement agency or agencies designated by the petitioner; and

(d) transmit a copy of the order to the statewide domestic violence network described in Section 30-6-8.

(5) (a) Each protective order shall include two separate portions, one for provisions, the violation of which are criminal offenses, and one for provisions, the violation of which are civil violations, as follows:

(i) criminal offenses are those under Subsections 30-6-4.2(2)(a) through (e), and under Subsection 30-6-4.2(3)(a) as it refers to Subsections 30-6-4.2(2)(a) through (e); and

(ii) civil offenses are those under Subsections 30-6-4.2(2)(f) through (h), and Subsection 30-6-4.2(3)(a) as it refers to Subsections 30-6-4.2(2)(f) through (h).

(b) The criminal provision portion shall include a statement that violation of any criminal provision is a class A misdemeanor.

- (c) The civil provision portion shall include a notice that violation of or failure to comply with a civil provision is subject to contempt proceedings.
- (6) The protective order shall include:
 - (a) a designation of a specific date, determined by the court, when the civil portion of the protective order either expires or is scheduled for review by the court, which date may not exceed 150 days after the date the order is issued, unless the court indicates on the record the reason for setting a date beyond 150 days;
 - (b) information the petitioner is able to provide to facilitate identification of the respondent, such as social security number, driver license number, date of birth, address, telephone number, and physical description; and
 - (c) a statement advising the petitioner that:
 - (i) after three years from the date of issuance of the protective order, a hearing may be held to dismiss the criminal portion of the protective order;
 - (ii) the petitioner should, within the 30 days prior to the end of the three-year period, advise the court of the petitioner's current address for notice of any hearing; and
 - (iii) the address provided by the petitioner will not be made available to the respondent.
- (7) Child support and spouse support orders issued as part of a protective order are subject to mandatory income withholding under Title 62A, Chapter 11, Part 4, Income Withholding, and Title 62A, Chapter 11, Part 5, Universal Income Withholding — Non IV-D Obligees, except when the protective order is issued ex parte.
- (8) (a) The county sheriff that receives the order from the court, pursuant to Subsection (5)(a), shall provide expedited service for orders for protection issued in accordance with this chapter, and shall transmit verification of service of process, when the order has been served, to the statewide domestic violence network described in Section 30-6-8.
 - (b) This section does not prohibit any law enforcement agency from providing service of process if that law enforcement agency:
 - (i) has contact with the respondent and service by that law enforcement agency is possible; or
 - (ii) determines that under the circumstances, providing service of process on the respondent is in the best interests of the petitioner.
- (9) (a) When an order is served on a respondent in a jail or other holding facility, the law enforcement agency managing the facility shall make a reasonable effort to provide notice to the petitioner at the time the respondent is released from incarceration.
 - (b) Notification of the petitioner shall consist of a good faith reasonable effort to provide notification, including mailing a copy of the notification to the last-known address of the victim.
- (10) (a) A court may modify or vacate an order of protection or any provisions in the order after notice and hearing, except as limited under Subsection (b).
 - (b) Criminal provisions of a protective order may not be vacated within three years of issuance unless the petitioner:
 - (i) is personally served with notice of the hearing as provided in Rules 4 and 5, Utah Rules of Civil Procedure, and the petitioner personally appears before the court and gives specific consent to the vacation of the criminal provisions of the protective order; or
 - (ii) submits a verified affidavit, stating agreement to the vacation of the criminal provisions of the protective order.
- (11) A protective order may be modified without a showing of substantial and material change in circumstances.
- (12) Insofar as the provisions of this chapter are more specific than the Utah Rules of Civil Procedure, regarding protective orders, the provisions of this chapter govern.

**AMENDMENTS TO THE
CONSTITUTION OF
THE UNITED
STATES**

AMENDMENT I

[Religious and political freedom.]

Congress shall make 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.

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

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 wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ADDENDUM D

JOANNA B. SAGERS, #5632
LEGAL AID SOCIETY OF SALT LAKE
ATTORNEY FOR PETITIONER
225 SOUTH 200 EAST, SUITE 200
SALT LAKE CITY, UTAH 84111
TELEPHONE: (801) 328-8849

FILED DISTRICT COURT
Third Judicial District

JAN 25 1999

By *[Signature]* Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

COURTNEY HARDY,

Petitioner,

vs.

DALE DEMONT HARDY,

Respondent.

PROTECTIVE ORDER

Civil No. 994900133CA

Judge Lewis

Comm. Arnett

This matter came for hearing on Jan 25, 1999, before the undersigned. The following parties were in attendance:

☒ Petitioner ☒ Petitioner's attorney Joanna B. Sagers
☒ Respondent ☐ Respondent's attorney _____

The Court having reviewed Petitioner's Verified Petition for Protective Order and:

- ☒ having received argument and evidence,
____ having accepted the stipulation of the parties
____ having entered the default of the Respondent for failure to appear

and it appearing that domestic violence or abuse has occurred,

IT IS HEREBY ORDERED:

(The Judge or Commissioner shall initial
each section that is included in this Order.)

- [Signature]* 1. The Respondent is restrained from attempting, committing, or threatening to commit abuse or domestic violence against Petitioner.

_____ 2. The Respondent is restrained from attempting, committing, or threatening to commit abuse or domestic violence against the following minor children and members of Petitioner's family or household:

TNA X 3. The Respondent is prohibited from directly or indirectly contacting, harassing, telephoning, or otherwise communicating with the Petitioner.

TNA X 4. The Respondent shall be removed and excluded, and shall stay away, from Petitioner's residence, and its premises, located at: 7772 South Brighton Way, Salt Lake City, Utah 84121, and Respondent is prohibited from terminating or interfering with the utility services to the residence.

_____ 5. The Respondent is ordered to stay away from the school, place of employment, and/or other places, and their premises, frequented by Petitioner, the minor children and the designated household and family members. These places are identified by the following addresses:

_____ 6. The Court having found that Respondent's use or possession of a weapon may pose a serious threat of harm to Petitioner, the Respondent is prohibited from purchasing, using, or possessing a firearm and/or the following weapon(s):

TNA X 7. The Petitioner is awarded possession of the following residence, automobile and/or other essential personal effects: 7772 South Brighton Way, Salt Lake City, Utah 84121; green 1993 Chevy Suburban 4x4; and, all personal property belonging to Petitioner and/or the parties' minor child/ren.

This award is subject to orders concerning the listed property in future domestic proceedings.

_____ 8. An officer from the following law enforcement agency: Salt Lake County shall accompany Petitioner to ensure that Petitioner safely regains possession of the awarded property.

TNA X 9. An officer from the same law enforcement agency shall facilitate Respondent's removal of Respondent's essential personal belongings from the parties' residence. The law enforcement officer shall contact Petitioner to make these arrangements. Respondent may not contact the Petitioner or enter the residence to obtain any items.

_____ 10. The Respondent is placed under the supervision of the Department of Corrections for the purposes of electronic monitoring. Within 24 hours of the execution of this Order, the Department of Corrections shall place an electronic monitoring device on Respondent and shall install monitoring equipment on the premises of Petitioner and in the residence of Respondent. Respondent is ordered to pay to the Department of Corrections the costs of the electronic monitoring required by this Order. The Department of Corrections shall have access to Petitioner's residence to install the appropriate monitoring equipment.

RESPONDENT'S VIOLATION OF PROVISIONS "1" THROUGH "10" MAY BE A CLASS A MISDEMEANOR.

Petitioner is granted the following temporary relief (provisions "a" through "I") which will (expire/be reviewed by the court) 150 days from the date of this order:

- TNA X a. The Petitioner is granted custody of the following minor children: Breque (age 7),
Miquelle (age 5), Brighton (age 3) & Serena (age 1) HARDY.
- TNA X b. Visitation shall be as follows: Standard schedule pursuant to U.C.A. §§ 30-3-35
& 35.5.
- TNA X c. The Respondent is restrained from using drugs and/or alcohol prior to or during
visitation.
- TNA X d. The Respondent is restrained from removing the parties' minor child/ren from the
state of Utah.
- _____ e. The Respondent is ordered to pay child support to the Petitioner in the amount of
\$ _____ pursuant to the Utah Uniform Child Support Guidelines.
- _____ f. The Respondent is ordered to participate in mandatory income withholding pursuant
to Utah Code Annotated § 62A-11, Parts 4 and 5.
- _____ g. The Respondent is ordered to pay one-half of the minor child/ren's day care
expenses.
- _____ h. The Respondent is ordered to pay one-half of the minor child/ren's medical
expenses including premiums, deductibles and co-payments.
- _____ I. The Respondent is ordered to pay Petitioner spousal support in the amount of
\$ _____.
- _____ j. The Respondent is ordered to pay Petitioner's medical expenses, suffered as a result
of the abuse in the amount of \$ _____.
- _____ k. The Respondent is ordered to pay the minor child/ren's medical expenses, suffered
as a result of the abuse in the amount of \$ _____.

____ 1. Other: _____

Violation of provisions "a" through "l" may subject Respondent to contempt proceedings.

____ 11. The Division of Child and Family Services is ordered to conduct an investigation into the allegation of child abuse.

____ 12. Other: _____

TNA X 13. Law enforcement agencies with jurisdiction over the protected locations shall have authority to compel Respondent's compliance with this Order, including the authority to forcibly evict and restrain Respondent from the protected areas. Information to assist with identification of the Respondent is attached to the Appendix to this Order.

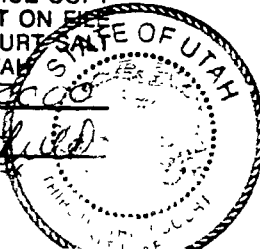
d TNA X 14. Respondent was afforded both notice and opportunity to be heard in the hearing that gave rise to this order. Pursuant to the Violence Against Women Act of 1994, P.L. 103-322, 108 Stat. 1976, 18 U.S.C.A. 2265, this order is valid in all the United States, the District of Columbia, tribal lands, and United States Territories.

15. Three years after the date of this order, a hearing may be held to dismiss the remaining provisions of the order. Within 30 days prior to the end of the three-year period, the Petitioner should provide the court with a current address, which address will not be made available to Respondent.

DATED: Jun 25, 1999

BY THE COURT:

I CERTIFY THAT THIS IS A TRUE COPY
OF AN ORIGINAL DOCUMENT ON FILE
IN THE THIRD DISTRICT COURT, STATE
LAKE COUNTY STATE OF UTAH
DATE August 29, 2000
Michelle H. Hild
DEPUTY COURT CLERK



[Signature]
DISTRICT COURT JUDGE



Recommended by:

Thomas L. [Signature] / 1/25/99
District Court Commissioner Date

By this signature, Respondent approves the form, and accepts service, of this Protective Order and waives the right to be personally served.

1. [Signature]
Respondent

Serve Respondent at:

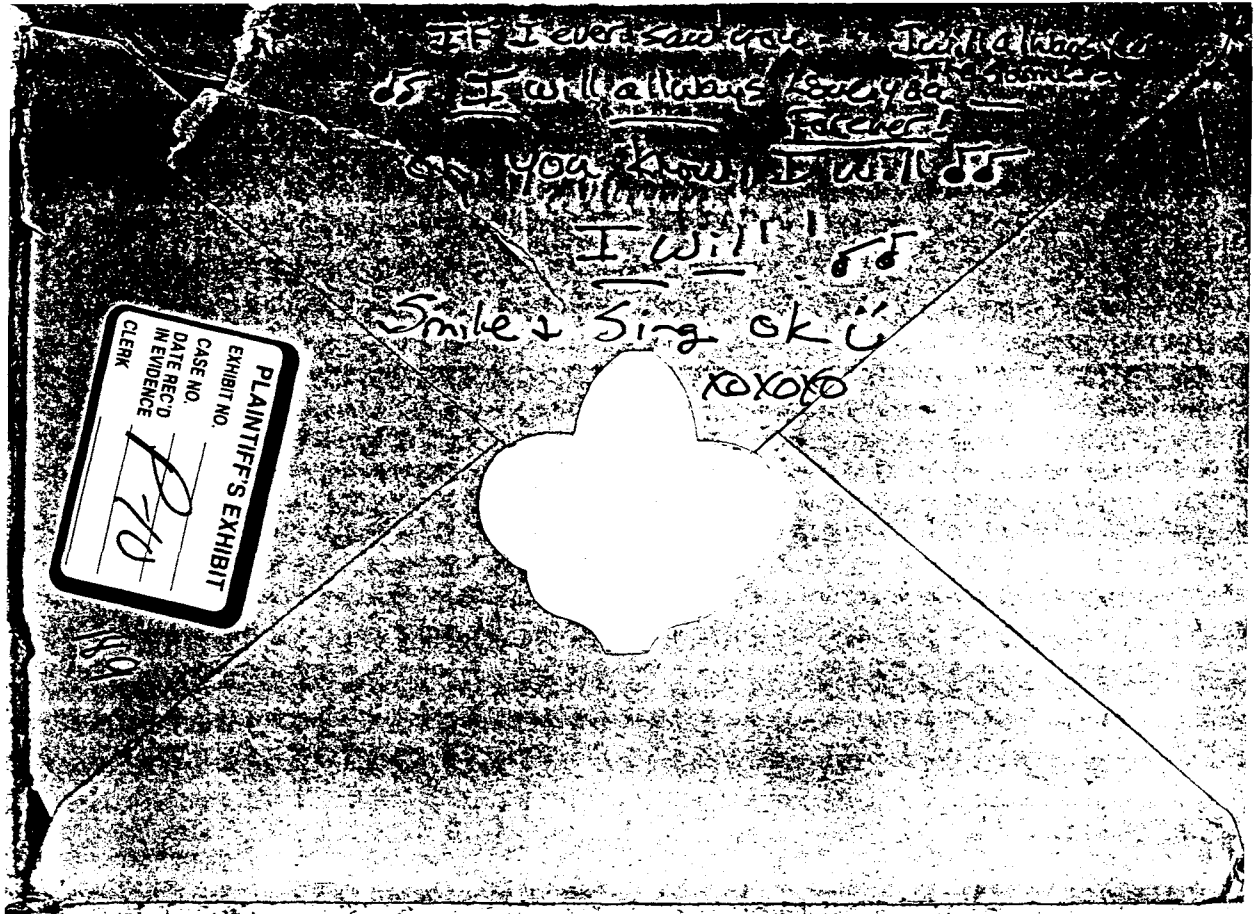
6 { 7683 Winterlake Circle
Salt Lake City, UT
84121

ADDENDUM E



POSTAGE DUE 25

Carthay & Dale Hardy's Children
@ Corkies
7772 So Brighton Way
SLC, UT 84121



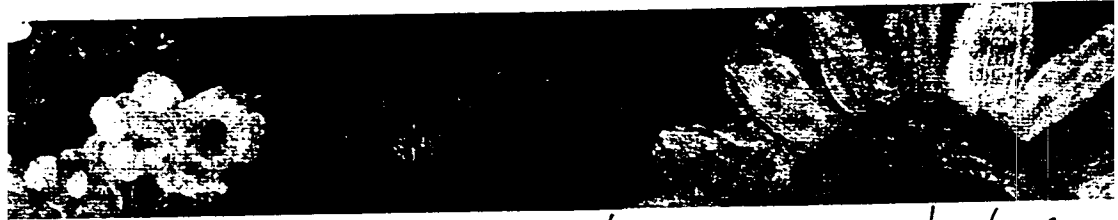
If I ever saw you... I will always love you
as you know I will
I will
Smile & Sing ok U
XOXOXO

PLAINTIFF'S EXHIBIT
EXHIBIT NO. _____
CASE NO. _____
DATE REC'D _____
IN EVIDENCE _____
CLERK _____
870

June 7 1979

PLAINTIFF'S EXHIBIT	
EXHIBIT NO.	23
CASE NO.	
DATE RECD IN EVIDENCE	7-12-00
CLERK	107

My Dearest ones, It has been Five months since Mommy and I ~~Talked~~. I have not aqued since. I discovered something while looking at the picture I am sending to you. I realized that There are very few people that really know me because they have not taken the time to have a conversation with me. I'm not talking about talking ^{at} to me - Hello ~~goodbye~~ stuff. But really converse like Mommy and I did, Although I feel that I attempted to get to know her, I feel that she did not know me well



enough, but I always counted her
to. She seemed to have too much
to do when I needed to talk or
she was tired when I thought she
would be willing to hear me. When
she did listen it was wonderful.

I hope you will always remember
that. The reason I say this is that:
only Perry, Dean, Tom, ^{Bernie} Brian, ^{Grandpa Bryan +} Wayne, ^M
Aunt Jeanne, ^{Now} Grandma Hardy + ^{+ Great Grandpa} Grandpa
Uncle Dee, My Brothers + Sisters, My Bird
except Bishop Christensen and now some therapists
and counselors, old girlfriends + Jeff/Liz, Paul M.
Tony Whitaker - OK well now more - B.

These people know me. and Aunt Betty - ^{Mommy's Friends} Grandpa Jensen. Have never had a conversation
with me, although Tony and Wade expressed
interest last year at the park.



The only one who really knows me well
is Heavenly Father and if you will pray
to Him you will know Him, me or
any one - This will help so much
in your lives - I still believe that your
mommy would trust me and like me if
she would ^{converse with me} ~~talk to me~~ - That is why I wanted
her to go with me on the cruise. I would
never try to ~~take~~ her into something or
change her mind. I am not that way,
nor would I do that with you children.
There are reunions and vacations
coming up and I pray that Mommy
will come with us or let you
come with me, or at least take
you. I think I may have scared Mommy
when I said that these children are
Heavenly Father's hot spots and that



by saying things about her staying some
while we went - This made her feel I would
take you away - I could never take you
from your mother - my mother went through
this and I would rather be alone than
have her fear that I could ever do
such a thing - Jesus would never
allow this to happen and I have to do
with your mother what Jesus
would do - Turn the other cheek,
give my cloak also, or walk 2 mi.
I think Mommy knows this, but
others, that do not know me, have
convinced her of things that are
not true of me - I am me
not. Tony, My Dad, My Brother
or someone on T.V. I Am me



I have no hidden agenda nor am
I a hypocrite? I am a simple man
(like on the lat) I did not know what
mommy and others were saying about
me and Books etc. They were giving
her to convince her that I was
some one else. please don't believe
them children - please pray and
you will always know who and
what you can trust ^{otherwise} - This is how
Satan can get into our minds and
destroy our peace and contentment and
happiness and even our family -
only listen to good about others and
never spread bad - This is contention
and is not of God ~~I feared~~



I learned this too late as I always
flew when to stop, yet sometimes I
was too ~~frustrated~~ and unable to
communicate that I just became
Contentious too. In this sense I was
a hypocrit and I hurt your mommy
and do not deserve her forgiveness
But she is not the type of person
that holds a grudge forever. I know
how she feels now by my threats to
leave or make her leave you children
and I do not deserve to see you
again. I Am so very sorry and
will spend my life making it up
to her and you some way
please know that I was



not aware of the pain I caused
your Mommy but I now know
by experience what she only imagined
because I never would have done that
and I was very awful for to have
even made such remarks yet I thought
she knew me better than she did/does
I will make a friend of the horses
and the people I counsel with and will
always try now to let people know me
and know that I care. I will never
be the same - I will listen ~~and~~ to
understanding and talk ^{only} when inspired.
This is my story for you today -
I will work on finishing the
rest of my thoughts in days to come.

Please remember all the . .
good times we have had
and listen to Heavenly Father
in prayer - He will guide you
and protect you until we
all come to know Him.

- 1 - He Loves you no matter what
- 2 - He forgives you before you ask
- 3 - Each day is a new day to be good
and choose the right - Forget
the past and yesterday - They are gone.
- 4 - Jesus already paid for our mistakes
and pain and sickness.

5 - Just ask and you will get
all the blessings you need and desire

6 - Trust only in God

I Will always Love you
yours ~~Eternally~~
your Father Dale

... This is Good

Stuffed Steelhead Rainbow trout.

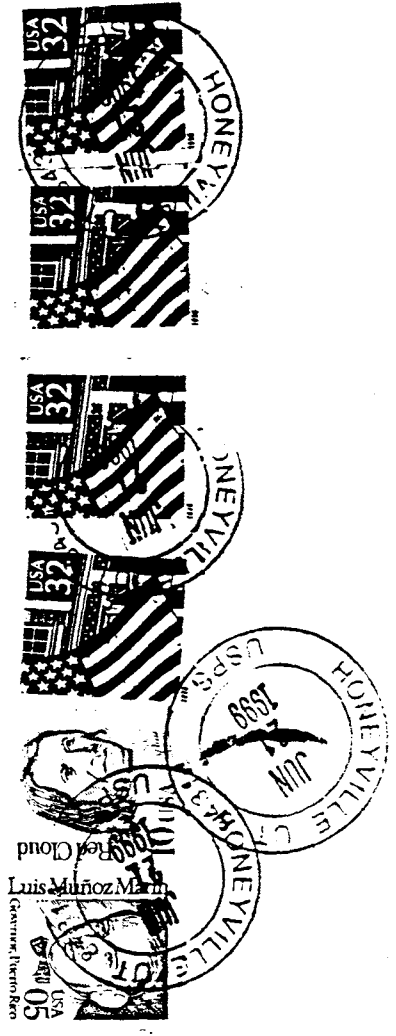
1 Steelhead trout. Split ^{DOWN} ~~de~~
the Center

Stuff with ^{Bacon} Small pieces of ~~ba~~
Season with Cold River Southw
Spice. or Lemon pepper, dash of
garlic powder Squeeze with
fresh lemons.

Smother with
fresh mushrooms, Cream
Cheese Chop green onions
Sprinkle on top Squeeze more
Lemon Juice on top⁰ more ^{GARLI} ge
powder
wrap in foil Cook on of
grill 15-20 mins.

Its the best thing
you ever tasted.

ADDENDUM F



Courtney's Dale Hardy Children
7772 Brighton Way
SLC, UT 84121



June 24, 1999

Dear Children,

I keep hoping to hear some sign that you think of me. Father's day passed, my anniversary with memory will soon pass. Life goes on without me. Even the horse 'Cassy' acts like she has all she needs without me.

I suppose I am different from other people in that I care for and miss contact with loved ones.

I usually have a great calm and peaceful feeling but some days I just miss you. Everyone says I'm not like other men - I don't know why - Can't people see the good in others and in situations? I know what I see and feel and I see actions of those trying to hurt me or be dishonest, yet the actions are not the person and people are what matter!

I have lost all that is precious to me in this life.

I know that Heavenly Father and Jesus care but sometimes I need a kind voice and a warm hug from a real person. When I pray for a long time a warm feeling comes and I know that only Heavenly Father can send such peace.

I only wish I knew what I have done to make you treat me this way.

I'm very busy but the day ends and I am alone again each night hoping for a phone call, I do pray for you and I know you can feel my love, is that enough?

June 24, 1989

- 2 -

You might say, someday, that this is all my fault, but I don't see what I could have done. I can change and do things differently in the future and forget the past. But how do I forget my own flesh + blood and my wife that I thought wanted me like I need her?

You are too young to know what to do unless you follow your feelings of what is right, but I have been kept away by false beliefs and unkind things others have said about me. I cannot defend against a lie, and can only pray for those who have done this to me.

I remember how hurt I felt when Mommy stayed away all night and how I wanted her to see you and never leave again. I have now had nearly six months of this yet I cannot understand why one person would want to hurt another person this way. I am too naive or dumb to "get it". One of Mommy's friends even said "get a life" to me. Just how do I do that?

I only have memories and I start to forget what you look like and I am scared of being alone again.

Please stay close to each other and to Mommy, she has a great ability to write and comfort, I have seen her do it over and over again.

I hope it is ok to write on the days when I am sad and miss you as well as on good

I finished the little apple story several days ago but I don't have a way to type it and I was afraid it would be used against me somehow as the first part was - I guess nobody understands me but me - however, I am sending my "rough draft" for you to keep in your journals, I guess I will never be as good at writing poems and stories as your mommy is - did I ever read the poem she gave me the day she asked me if I was going to make her part of my life? and if so when? She wrote lots of poems I have an compact disk - your mommy is good at so much, I wish I could have been more like her.

I am going to Vernal today with Tony Whitaker to look at some property. Tony and Chris are going to have a baby girl any day now - Did I tell you that Rich and Jenn have a baby girl? and Kylene and Teresa will have a baby at about September 11,

I am back to my ideal weight so don't worry that I don't eat much, I go to the spa alot and get some sun, my hair bleached out like it used to do when I was younger.

I hope you like the little gifts and the pictures please forgive me someday and please send pictures of you and especially mommy if you can - I can not help being in love and I know that someday you will understand me if you take time to be with me - learn to talk instead of T.V. ok, be kind and love each other - for Thanks for listening, I feel much better - with all my Love Forever, Dadd

PLAINTIFF'S EXHIBIT
EXHIBIT NO. _____
CASE NO. _____
DATE REC'D P-12
IN EVIDENCE _____
CLERK _____



please forward

L
A
T
I

12/1

P.S. The wood you gave us
made great looking ~~st~~
shutters on the new ~~stair~~

Dale Nardy

Email: Mountdale @
Voicestream.net

— or —

Mountdale @ Bigplanet.com

↗
This one I have not figured
out yet —

I got to Nampa but didn't have your address

Thank You



Fathers Day
June 20, 1999

Dear "Dad" - you have always had
a kind word for me, encouragement
and a smile - Sometimes my own
father has little of for me - It
is nice to know you care -

I would like to thank you,

and most of all, for sharing
your most precious daughter
with me - There is none like her
and I see her best qualities in
you - She has made me a father
4 times and I can not express
feelings for her for this and all
has done for me - For all this
I will always love you Dad

ADDENDUM G

IN THE THIRD JUDICIAL DISTRICT COURT - MURRAY DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case Nos. 991200873FS
	:	991200131FS
Plaintiff/Appellee,	:	
	:	
v	:	
	:	
DALE DEMONT HARDY,	:	
	:	
Defendant/Appellant.	:	

PRELIMINARY HEARING JULY 12, 2000

BEFORE

THE HONORABLE MICHAEL K. BURTON

ORIGINAL

FILED

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER

AUG 02 2001

1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

COURT OF APPEALS

1 MR. HEINEMAN: I mean, letters aren't just a one time
2 thing intended for one point in time. People frequently save
3 letters. Mr. Hardy was trying to preserve his thoughts and
4 feelings and things he wanted to convey to his children in
5 letter form for them to have, for not only that time but also
6 for the future.

7 And as far as talking about their mother with the
8 children, I mean, regardless of whether we think it's
9 appropriate or not, I don't think it's a violation of the
10 protective order. It's not a contact with the mother. It's
11 not a solicitation for a third party to have contact with the
12 mother on his behalf. And so it just isn't a violation.
13 There's nothing in the contact order that says you can't ever
14 mention the mother to your children.

15 THE COURT: You know, and I agree, Mr. Heineman with
16 about six-tenths of what you say. I mean, I think you're right
17 on, I mean, I think he can talk about his mother or I mean
18 their mother in letters to the kids.

19 But Mr. Hardy, I think, any reasonable soul reading
20 these letters and knowing the little we do about your children
21 as described by your wife in response to these questions, would
22 have to conclude that these letters were intended for an
23 audience wider than that to which they were addressed.

24 And that's an obtuse way of saying, it's clear to me
25 you were writing to your wife, your ex-wife, Courtney Hardy.

1 And so for that reason I believe that the State's shown beyond
2 a preponderance of the evidence in this case that you violated
3 your plea in abeyance. And I believe they've shown probable
4 cause to believe that you committed a violation of a protective
5 order in this other case, the companion to it, and that there
6 is sufficient grounds to believe that you committed the offense
7 and you ought to be bound over for trial.

8 So that's the order today. And I think it would be
9 appropriate that we send all of this to Fratto because I
10 believe the protective order, originally, is Fratto's case. It
11 looks like his signature there.

12 So Fratto will get to handle the - I mean I've made
13 the determination that the violation's occurred but he'll
14 handle the sentencing that should now be imposed on the
15 misdemeanor. And then I guess we should take - I mean, the
16 [inaudible] that comes to mind is now trial on the 31st, but
17 now, Mr. Heineman's suggestion that they all be done together
18 is a thought but I don't know how anybody feels about that. Do
19 you still want them all together?

20 I mean we can hold these for a little while until the
21 others catch up if they do. I don't know how that's done. I
22 haven't really given that a lot of thought.

23 MR. BURMESTER: Your Honor, may I just make one
24 argument and -

25 THE COURT: To keep it going separately?