

2005

# Utah v. Richard Jeremy Mattinson : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

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STATE OF UTAH,

Plaintiff/Respondent,

vs.

RICHARD JEREMY MATTINSON,

Defendant/Petitioner.

Case No. 20050415-SC

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BRIEF OF RESPONDENT

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ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF JURISDICTION .....	1
STATEMENT OF THE ISSUES .....	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES.....	2
STATEMENT OF THE CASE.....	3
SUMMARY OF ARGUMENT.....	6
ARGUMENT .....	7
THE COMMUNICATIONS FRAUD STATUTE IS NOT OVERBROAD UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION .....	7
A. The Overbreadth Doctrine.....	8
B. Application of Overbreadth Doctrine to Section 76-10-1801.....	10
1. The First Amendment Does Not Protect Falsehoods Made Intentionally, Knowingly, or With Reckless Disregard for the Truth. ....	11
2. The “Anything of Value” Provision Does Not Render the Communications Fraud Statute Overbroad. ....	14
CONCLUSION.....	19
ADDENDUM A (OPINION OF THE COURT OF APPEALS)	
ADDENDUM B (ORDER OF THE UTAH SUPREME COURT)	

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>BE &amp; K Constr. Co. v. N.L.R.B.</i> , 536 U.S. 516 (2002) .....	11
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969) (per curiam) .....	15
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973).....	8, 9, 10, 11
<i>Chaplinsky v. State of New Hampshire</i> , 315 U.S. 568 (1942) .....	11, 13
<i>Dennis v. United States</i> , 341 U.S. 494 (1951).....	15
<i>Denver Area Educ. Telecomm. Consortium, Inc. v. FCC</i> , 518 U.S. 727 (1996) .....	16
<i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964).....	12, 13
<i>Houston v. Hill</i> , 482 U.S. 451 (1987) .....	10, 12, 14
<i>Los Angeles Police Dep't v. United Reporting Pub. Corp.</i> , 528 U.S. 32 (1999) .....	9
<i>McConnell v. Federal Election Comm'n</i> , 540 U.S. 93 (2003) .....	9
<i>McNally v. United States</i> , 483 U.S. 350 (1987) .....	17
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964) .....	7, 12
<i>New York v. Ferber</i> , 458 U.S. 747 (1982) .....	8, 9, 11
<i>Schenck v. United States</i> , 249 U.S. 47 (1919).....	14
<i>United States v. Dinwiddie</i> , 76 F.3d 913 (8th Cir. 1996).....	16
<i>United States v. Viefhaus</i> , 168 F.3d 392 (10th Cir. 1999).....	16
<i>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982).....	17
<i>Village of Schaumburg v. Citizens for a Better Env't</i> , 444 U.S. 620 (1980) .....	18
<i>Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976) .....	11

## STATE CASES

<i>DeBry v. Noble</i> , 889 P.2d 428 (Utah 1995) .....	19
<i>Provo City Corp. v. Thompson</i> , 2004 UT 14, 86 P.3d 735.....	passim
<i>State v. Harmon</i> , 910 P.2d 1196 (Utah 1995).....	1
<i>State v. Jordan</i> , 665 P.2d 1280 (Utah 1983).....	10
<i>State v. Mattinson</i> , 2005 UT App 155, 2005 WL 729648 (unpublished memorandum decision).....	3
<i>State v. Norris</i> , 2004 UT App 267, 97 P.3d 732 .....	4, 7, 12, 14
<i>West v. Thompson Newspapers</i> , 872 P.2d 999 (Utah 1994).....	16

## FEDERAL STATUTES

18 U.S.C. 1346 (1988) .....	18
-----------------------------	----

## STATE STATUTES

Utah Code Ann. § 76-10-1801 (West 2004).....	passim
Utah Code Ann. § 76-8-306 (West 2004).....	18
Utah Code Ann. § 76-8-506 (West 2004).....	18
Utah Code Ann. § 78-2-2 (2002).....	1

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STATE OF UTAH,

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vs.

RICHARD JEREMY MATTINSON,

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Case No. 20050415-SC

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BRIEF OF RESPONDENT

\* \* \*

STATEMENT OF JURISDICTION

This case is before the Court on a writ of certiorari to the Utah Court of Appeals. The Supreme Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(5) (2002).

STATEMENT OF THE ISSUES

**Is Utah's communications fraud statute unconstitutionally overbroad on its face?**

*Standard of Review.* On certiorari, the Utah Supreme Court reviews the decision of the Utah Court of Appeals, not the decision of the trial court. *State v. Harmon*, 910 P.2d 1196, 1199 (Utah 1995). Whether a statute is unconstitutionally overbroad is a question of law reviewed for correctness. *Provo City Corp. v. Thompson*, 2004 UT 14, ¶ 5, 86 P.3d 735.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

### § 76-10-1801. Communications fraud--Elements—Penalties.

(1) Any person who has devised any scheme or artifice to defraud another or to obtain from another money, property, or anything of value by means of false or fraudulent pretenses, representations, promises, or material omissions, and who communicates directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice is guilty of:

(a) a class B misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is less than \$300;

(b) a class A misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is or exceeds \$300 but is less than \$1,000;

(c) a third degree felony when the value of the property, money, or thing obtained or sought to be obtained is or exceeds \$1,000 but is less than \$5,000;

(d) a second degree felony when the value of the property, money, or thing obtained or sought to be obtained is or exceeds \$5,000; and

(e) a second degree felony when the object of the scheme or artifice to defraud is other than the obtaining of something of monetary value.

(2) The determination of the degree of any offense under Subsection (1) shall be measured by the total value of all property, money, or things obtained or sought to be obtained by the scheme or artifice described in Subsection (1) except as provided in Subsection (1)(e).

(3) Reliance on the part of any person is not a necessary element of the offense described in Subsection (1).

(4) An intent on the part of the perpetrator of any offense described in Subsection (1) to permanently deprive any person of property, money, or thing of value is not a necessary element of the offense.

(5) Each separate communication made for the purpose of executing or concealing a scheme or artifice described in Subsection (1) is a separate act and offense of communication fraud.

(6)(a) To communicate as described in Subsection (1) means to bestow, convey, make known, recount, impart; to give by way of information; to talk over; or to transmit information.

(b) Means of communication include but are not limited to use of the mail, telephone, telegraph, radio, television, newspaper, computer, and spoken and written communication.

(7) A person may not be convicted under this section unless the pretenses, representations, promises, or material omissions made or omitted were made or omitted intentionally, knowingly, or with a reckless disregard for the truth.



## STATEMENT OF THE CASE

### SUMMARY OF PROCEEDINGS

The State charged defendant with one count of communications fraud or, in the alternative, one count of identity theft for his participation in a scheme to defraud Utah Valley Regional Medical Center out of payment for medical services (R. 1-2). Defendant moved to dismiss the communications fraud charge, asserting that it was unconstitutionally vague and overbroad in violation of the First Amendment to the United States Constitution, and Art. 1, § 15 of the Utah Constitution (R. 59–69). The district court denied defendant's motion (R. 198:132). A jury convicted defendant of second degree felony communications fraud (R. 144; 198:221).

On April 30, 2003, the court sentenced defendant to sixty days in jail and ordered him to pay restitution of \$6,041.41 (R.146–50). Defendant filed a timely notice of appeal to the court of appeals and renewed in that court his claims that the statute was overbroad and vague both on its face and as applied to him (R. 152).

The court of appeals affirmed defendant's conviction. *See State v. Mattinson*, 2005 UT App 155, 2005 WL 729648 (unpublished memorandum decision). With respect to defendant's facial challenges to the statute, the court followed its earlier decision in *State v. Norris*, 2004 UT App 267, 97 P.3d 732, *cert.*

*granted*, 106 P.3d 743, upholding the communications fraud statute against facial vagueness and overbreadth challenges. *See id.* at 1. The court then ruled that defendant's claim that the statute was unconstitutional as applied to him was inadequately briefed. *See id.* at 2. It also decided that even if the court were to reach defendant's as-applied claims, it would reject them because defendant's "conduct clearly fell into an area prohibited by the statute." *Id.* At 3.

This Court granted a writ of certiorari to consider whether "the Communications Fraud Statute, Utah Code Ann. 76-10-1801, is unconstitutionally overbroad on its face." Order of August 18, 2005, Case No. 20050415-SC.

#### SUMMARY OF FACTS

On December 10, 2001, defendant took his girlfriend, Stevoni Wells, to the emergency room of the Utah Valley Regional Medical Center to have her treated for spinal meningitis (R. 198:51, 97, 99, 141–4). Wells had a fever of 105 degrees and was delirious (R. 198:97, 102). She could later recall few details about the process of checking into the emergency room (R. 198:102). She did remember, however, that she checked in under a false name, Stacy Sorenson (R. 198: 99–100). Wells later admitted that she used a fake name to escape paying the medical bill and to prevent her arrest on any outstanding warrants (R. 198:104, 107–08).

Because Wells was delirious, defendant helped admit her to the hospital. Defendant and Wells jointly represented to the triage nurse that they were married (R. 198:145). Defendant told the hospital admissions staff that Wells's maiden name was Wall (R. 147). Defendant also signed Wells's admission form "Jeremy Sorenson" and identified himself as Wells's "spouse" (R. 198:148; State's Ex. No. 1). The personal information on the admission form, including defendant's and Wells's names, addresses, phone numbers, social security numbers, and employment information, was all false (R. 198:72, 75–76, 100–02; State's Ex. No. 1). The admission form indicated that both the patient and the person who signed the form were responsible for the hospital bill (R. 198:79; State's Ex. No. 1). Wells never paid her \$5,867.83 bill, and the hospital was unable to collect on the bill because of the false personal information Wells and defendant provided (R. 198:70–73; State's Ex. No. 4).

Wells later confessed, as part of a guilty plea to forgery, that she lied to the hospital to avoid paying her medical bills and to prevent anyone from discovering that she had outstanding warrants for her arrest (R. 198:99, 107–08). Defendant maintained that he was not concerned about the medical bills or the arrest warrants, but lied only so that the hospital would allow him to remain with Wells during her treatment (R. 198:153, 158).

## SUMMARY OF ARGUMENT

The communications fraud statute is not overbroad on its face. A statute is facially overbroad only if it prohibits a substantial amount of conduct protected by the First Amendment. Utah's communications fraud statute prohibits only false statements made intentionally, knowingly, or recklessly. Such falsehoods receive no First Amendment protection.

Moreover, the communications fraud statute prohibits only statements that are capable of being objectively proved true or false. Thus, the opinions or position statements of political candidates, newspaper editors, and the like are not subject to the statute. Nor are the statements of advertisers who engage in puffery or praise of their wares. The statute only regulates the communication of factual statements made as part of a scheme to defraud another or to obtain something of value.

## ARGUMENT

### THE COMMUNICATIONS FRAUD STATUTE IS NOT OVERBROAD UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The Utah Court of Appeals rejected defendant's facial challenge to the constitutionality of the communications fraud statute by relying on its earlier decision in *State v. Norris*, in which it held “that the communications fraud statute is not overbroad on its face.” *Norris*, 2004 UT App 267, ¶¶ 7-11. The court observed in *Norris* that the statute does not prohibit all falsehoods or material omissions, as argued by defendant, “only those where an individual seeks ‘to defraud another or to obtain from another money, property, or anything of value.’” *Id.* at ¶ 11 (quoting Utah Code Ann. § 76-10-1801(1) (1999)).

The *Norris* court also noted that the statute prohibits only those falsehoods or material omissions that are “made or omitted intentionally, knowingly, or with a reckless disregard for the truth.” *Id.* (quoting Utah Code Ann. § 76-10-1801(7)). The Court observed that the statute thus “draws the distinction between criminal and innocent behavior” with a mens rea consistent with the standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964). *Norris*, 2004 UT App 267, ¶ 11. As such, the court concluded, section 76-10-1801 is not substantially overbroad and should not be invalidated. *Id.*

The court of appeals' decision in *Norris* is currently before this Court in *State v. Norris*, case number 20040880-SC, and *State v. Norris*, case number 20041118-SC. If this Court upholds the communications fraud statute in those cases, it should do likewise in the instant case.

**A. The Overbreadth Doctrine.**

As a general rule, “a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.” *New York v. Ferber*, 458 U.S. 747, 767 (1982[Jeffrey S2]). However, this traditional rule of “standing” has been altered by the U.S. Supreme Court “to permit—in the First Amendment area—'attacks on overly broad statutes . . . .’” *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973[Jeffrey S3]) (citation omitted). As recently explained by this Court, the First Amendment exception for overly broad statutes “gives a defendant standing to challenge a statute on behalf of others not before the court even if the law could be constitutionally applied to the defendant.” *Provo City Corp. v. Thompson*, 2004 UT 14, ¶ 10, 86 P.3d 735 (quoting *Salt Lake City v. Lopez*, 935 P.2d 1259, 1263 n.2 (Utah App. 1997)).

The overbreadth doctrine stems from the concern that “persons whose expression is constitutionally protected may well refrain from exercising their right [to free speech] for fear of criminal sanctions provided by a statute

susceptible of application to protected expression.” *Los Angeles Police Dep’t v. United Reporting Pub. Corp.*, 528 U.S. 32, 38 (1999) (citation omitted). “Because these individuals are never prosecuted, the overbroad statute [would go] unchallenged.” *Thompson*, 2004 UT 14, ¶ 11. The overbreadth doctrine remedies this “chilling effect” on expression, permitting “a party [to] challenge a statute on the basis that it criminalizes protected speech even though that party’s own conduct or speech is not constitutionally protected.” *Id.*

The overbreadth doctrine “is, manifestly, strong medicine” because it “totally forbid[s]” enforcement of a law which otherwise targets “harmful, constitutionally unprotected conduct.” *Broadrick*, 413 U.S. at 613, 615. As a result, it “is not [employed] casually,” *United Reporting*, 528 U.S. at 39, but “sparingly and only as a last resort,” *Broadrick*, 413 U.S. at 613. “The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted.” *Ferber*, 458 U.S. at 769.

Because the overbreadth doctrine is strong medicine, those who challenge a statute as overbroad carry a “heavy burden.” *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 207 (2003). To prevail, an overbreadth claimant must demonstrate that “(1) the statute ‘reaches a substantial amount of constitutionally protected conduct,’ even if the statute also has a legitimate application, and (2)

the statute is not 'readily subject to a narrowing construction.'" Thompson, 2004 UT 14, ¶ 11 (quoting *Houston v. Hill*, 482 U.S. 451, 458 (1987), and *State v. Jordan*, 665 P.2d 1280, 1284 (Utah 1983) (other citations omitted)).

#### **B. Application of Overbreadth Doctrine to Section 76-10-1801.**

Section 76-10-1801(1) provides:

Any person who has devised any scheme or artifice to defraud another or to obtain from another money, property, or anything of value by means of false or fraudulent pretenses, representations, promises, or material omissions, and who communicates directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice is guilty of [communications fraud].

Utah Code Ann. § 76-10-1801(1). At the outset, therefore, section 76-10-1801 falls within those statutes that prohibit “conduct—even if expressive—fall[ing] within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.” See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Defendant recognizes as much, conceding that “the government has a legitimate interest in deterring and prosecuting fraud.” Pet. Brf. at 22. “Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.”



*Broadrick*, 413 U.S. at 615. Such is the case with section 76-10-1801. Indeed, a review of the statute reveals that there is no overbreadth.

**1. The First Amendment Does Not Protect Falsehoods Made Intentionally, Knowingly, or With Reckless Disregard for the Truth.**

The paramount question here is whether the communications fraud statute can “conceivably be applied” to prohibit constitutionally protected conduct or expression. *See New York v. Ferber*, 458 U.S. 747, 767 (1982). It cannot, for it prohibits only those falsehoods or material omissions that are “made or omitted intentionally, knowingly, or with a reckless disregard for the truth.” Utah Code Ann. § 76-10-1801(7). Such falsehoods enjoy no First Amendment protection.

The First Amendment affords a measure of protection to “some” falsehoods in order to provide the breathing space necessary for the exercise of fully protected speech, or “*speech that matters*.” *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 531 (2002) (quoting *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 341-42 (1974)) (emphasis added in *BE & K*). Nevertheless, “[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake.” *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976[Jeffrey S6]). As a result, certain classes of speech “ha[ve] never been thought to raise any Constitutional problem.” *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942). Falsehoods uttered intentionally,

knowingly, or with a reckless disregard for their truth fall within one of those unprotected classes. *See* *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

In *New York Times*, the Supreme Court held that the First Amendment does not permit civil recovery for a defamatory falsehood *unless* “the [false] statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 279—80 (1964). The court of appeals here concluded that because the mens rea requirement for communications fraud is consistent with that required under *New York Times*, the statute “cannot be said [to be] ‘substantially overbroad.’” *Norris*, 2004 UT App 267, ¶ 11 (quoting *Hill*, 482 U.S. at 458). Defendant challenges this conclusion, arguing that the *New York Times* mens rea standard “is clearly limited to its civil context and has no bearing upon the constitutionality of a criminal statute that proscribes speech, including § 76-10-1801.” Pet. Brf. at 20. Defendant’s argument is wrong.

In *Garrison v. Louisiana*—issued the same year as *New York Times*—the U.S. Supreme addressed whether the *New York Times* mens rea standard for civil libel cases also applies in the criminal context. *Garrison*, 379 U.S. at 67. It concluded that it does. *Id.* *Garrison* recognized that “even where [an] utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any *except the knowing or*

*reckless.*” Id. at 73 (emphasis added). The Court concluded that the reasons which led to the knowing or reckless requirement in *New York Times* “apply with no less force merely because the remedy is criminal.” Id. at 74. The Court thus held that “[t]he constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy.” Id.

Although *Garrison* involved a criminal libel statute, the Supreme Court's analysis made clear that knowing or reckless falsehoods enjoy *no* First Amendment protection, whatever the context. The Court recognized that an inaccurate but honest utterance contributes to the “fruitful exercise of the right of free speech.” Id. at 75. On the other hand, calculated falsehoods “put a different cast on the constitutional question” because such falsehoods are “at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.” Id. The Court thus concluded that “[c]alculated falsehood falls into that class of utterances which '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.'” Id. (quoting *Chaplinsky*, 315 U.S. at 572). “Hence,” the Court held, “the knowingly false statement and the false statement made with reckless disregard of the truth, *do not enjoy constitutional protection.*” Id. (emphasis added).

*Garrison* is controlling. As observed by the Court of Appeals in *Norris*, the communications fraud statute imposes criminal sanctions only where the falsehoods are made “intentionally, knowingly, or with a reckless disregard for the truth.” *Norris*, 2004 UT App 267, ¶ 11 (quoting Utah Code Ann. § 76-10-1801(7)). *Garrison* held that such speech enjoys no First Amendment protections. Accordingly, and regardless of any additional element that may define or limit the offense, “it cannot be said that [the communications statute] is ‘substantially overbroad’ . . . .” *Norris*, 2004 UT App 267, ¶ 11 (quoting *Hill*, 482 U.S. at 458).

## **2. The “Anything of Value” Provision Does Not Render the Communications Fraud Statute Overbroad.**

Relying on *Schenck v. United States*, 249 U.S. 47 (1919), defendant claims that the communications fraud statute is overbroad because it requires no “clear and present danger” or harm. Pet. Brf. at 20. Specifically, he argues that because the object of the fraud can be anything of value, the “spectrum of constitutionally protected communications . . . is only as broad as the imagination” and thus encompasses fraudulent schemes that create no clear and present danger or harm. Pet. Brf. at 33. He argues, for example, that the statute prohibits a knowing or reckless falsehood made to preserve a good grade, Pet. Brf. at 17 ( by claiming that “my dog ate my homework”), to receive a kiss, Pet. Brf. at 17, (by saying, “You don't look fat in that dress”), to avoid an unwanted outcome, Pet.

Brf. at 19 (e.g., an arrest), to obtain votes, Pet. Brf. at 32—33 (by misrepresenting position on abortion), or to increase sales, Pet. Brf. at 33 (by puffery in advertising). This claim is meritless.

**(a) The Principle That Intentional, Knowing, and Reckless Falsehoods Are Not Protected Is Dispositive.**

As noted, falsehoods made intentionally, knowingly, or recklessly are not protected, whatever the object of the fraud. It is therefore irrelevant how the statute limits the object of the fraud. Whether the object of the fraud is a kiss, a vote, avoiding arrest, or some other thing of arguable value is irrelevant, because an intentional, knowing, or reckless falsehood is not protected. Defendant's challenge to the “anything of value” provision thus fails.

**(b) In Any Event, the State May Prohibit Frauds Aimed at Depriving Persons of Intangible Rights or Interests.**

Defendant's reliance on *Schenk* and its progeny, including *Dennis v. United States*, 341 U.S. 494 (1951), is misplaced. The “clear and present danger” test articulated in *Schenck* and *Dennis* has evolved into the *Brandenburg* “incitement” test.<sup>1</sup> *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 778

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<sup>1</sup> Under the rule articulated in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

(1996) (Souter, J., concurring)); *United States v. Viefhaus*, 168 F.3d 392, 397 n.3 (10th Cir. 1999). And that test only applies to laws that forbid the advocacy of violence or the violation of law. *See Brandenburg*, 395 U.S at 447; *United States v. Dinwiddie*, 76 F.3d 913, 922 n.5 (8th Cir. 1996). The communications fraud statute is not such a law.

The correct test under the overbreadth doctrine is simply whether “the statute reaches a substantial amount of constitutionally protected conduct.” *Thompson*, 2004 UT 14, ¶ 11 (quotations omitted). Defendant tries to show overbreadth by parading examples before this Court of how the communications fraud statute infringes on protected conduct. *See supra* pages 14–15. But defendant's examples do not demonstrate overbreadth because they either are not prohibited by the communications fraud statute or do not involve protected conduct under the First Amendment.

For example, defendant's hypothetical political candidate who lies about his position on abortion has not committed communications fraud. This Court has recognized that the question of whether a candidate misrepresented his position is not capable of objective verification and, hence, cannot form the basis of a conviction for communications fraud. *See West v. Thompson Newspapers*, 872 P.2d 999, 1019 (Utah 1994) (“Whether West actually intended to dupe voters into electing him mayor by misrepresenting his position on municipal power is

something only West himself knows, not something that is subject to objective verification.”). Likewise, the statement, “You don't look fat in that dress,” is an opinion that is incapable of objective verification.

Defendant's hypothetical example of the advertiser who claims “that drinking beer makes people happy and attractive” is likewise inapplicable. “[I]t is irrelevant whether the ordinance has an overbroad scope encompassing protected commercial speech of other persons, because the overbreadth doctrine does not apply to commercial speech.” *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-97 (1982).

Statements that can be proved true or false are punishable as communications fraud so long as the statement was part of a scheme to defraud or for the purpose of obtaining something of value. The crime of fraud need not be limited to obtaining money or property. “[T]he common law criminalized frauds beyond those involving 'tangible rights'" and “the crime of fraud has often included deceptive seduction, although that crime often includes no property or monetary loss.” *McNally v. United States*, 483 U.S. 350, 371 (1987) (Stevens, J., dissenting).<sup>2</sup> The U.S. Supreme Court has recognized that

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<sup>2</sup> In *McNally*, the U.S. Supreme Court concluded that the federal mail fraud statute was limited to those frauds aimed at causing deprivation of property or money; it did not include fraudulent schemes designed to deprive persons of

“[f]raudulent misrepresentations can be prohibited” and that penal laws can be enacted “to punish such conduct directly.” *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 637 (1980). This power is not limited to those frauds involving money or property.

Thus, a student who lies to a teacher in order to obtain more time to complete an assignment or to earn a better grade could be held legally accountable. He cannot hide behind the First Amendment merely because the object of his falsehood is an intangible benefit. Similarly, the Legislature has properly prohibited falsehoods that obstruct justice such as lying to a police officer about one's identity. See Utah Code Ann. § 76-8-306 (West 2004) (defining crime of obstructing justice that prohibits providing false information about a suspect or witness during a criminal investigation); Utah Code Ann. § 76-8-506 (West 2004) (prohibiting giving false information to a police officer to induce the officer to believe that another has committed an offense). That the

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intangible rights or interests, as in the right to have public officials perform their duties honestly. *Id.* at 358-60. This conclusion, however, was based on the Court's reading of the statute, not on any constitutional limitation. Indeed, the Court invited Congress to amend the law if it wished to expand mail fraud to those schemes involving intangible rights or interests. *Id.* at 360 (acknowledging that “[i]f Congress desires to go further, it must speak more clearly than it has” in the current statute). Congress did so the following year. 18 U.S.C. 1346 (1988) (providing that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services”).



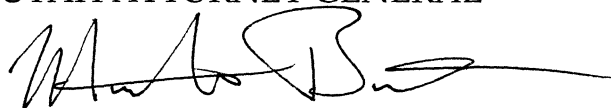
communications fraud statute prohibits falsehoods communicated to attain an intangible benefit does not demonstrate overbreadth because such falsehoods do not enjoy First Amendment protection. Accordingly, this Court should hold that the communications fraud statute is not overbroad on its face, and affirm defendant's conviction.<sup>3</sup>

### CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm the judgment of the court of appeals.

Respectfully submitted November 7, 2005.

MARK L. SHURTLEFF  
UTAH ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'Matthew D. Bates', with a long horizontal flourish extending to the right.

MATTHEW D. BATES  
Assistant Attorney General  
Counsel for Respondent

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<sup>3</sup> This Court granted certiorari only to consider “[w]hether the Communications Fraud statute . . . is unconstitutionally overbroad on its face.” To the extent that defendant argues in his brief that the statute violates his First Amendment rights or is unconstitutionally vague, the arguments are outside the scope of this Court's certiorari grant, and this Court should refuse to consider them. *See DeBry v. Noble*, 889 P.2d 428, 443 (Utah 1995) ((noting that this Court will review on certiorari “[o]nly the questions set forth in the petition or fairly included therein’ and for which certiorari is granted.”) (quoting Utah R. App. P. 49(a)(4)).

## CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2005, I served two copies of the foregoing Brief of Respondent upon the defendant/petitioner, Richard Jeremy Mattinson, by causing them to be delivered by first class mail to his counsel of record as follows:

Jennifer Gowans  
FILLMORE SPENCER, LLC  
3301 North University Avenue  
Provo, Utah 84604

  
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## Addenda

## Addendum A

FILED  
UTAH APPELLATE COURTS  
MAR 31 2005

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20030474-CA
v.	)	
	)	
Richard Jeremy Mattinson,	)	F I L E D
	)	(March 31, 2005)
Defendant and Appellant.	)	2005 UT App 155

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Fourth District, Provo Department  
The Honorable James R. Taylor

Attorneys: Jennifer K. Gowans, Provo, for Appellant  
Mark L. Shurtleff and Matthew D. Bates, Salt Lake  
City, for Appellee

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Before Judges Billings, Greenwood, and Thorne.

THORNE, Judge:

Richard Jeremy Mattinson appeals his conviction of one count of communications fraud, a second degree felony. See Utah Code Ann. § 76-10-1801 (2001). We affirm.

Mattinson challenges the constitutionality of section 76-10-1801, both on its face and as it was applied to him. However, we recently determined that section 76-10-1801 was facially valid, and thus not subject to broad attack on either vagueness or overbreadth grounds. See State v. Norris, 2004 UT App 267, ¶¶8-16, 97 P.3d 732, cert. granted, 106 P.3d 743 (Utah 2004). Mattinson has not presented us with any reason to believe that Norris was clearly erroneous; consequently, we reject his claim that the statute is unconstitutional on its face. See State v. Menzies, 889 P.2d 393, 399 n.3 (Utah 1994) (stating that under the doctrine of horizontal stare decisis, "although it may not do so lightly, a panel may overrule its own or another panel's decision where the decision is clearly erroneous or conditions have changed so as to render the prior decision inapplicable" (quotations and citation omitted)); State v. Thurman, 846 P.2d 1256, 1269 (Utah 1993) ("Although the doctrine is typically thought of when a single-panel appellate court is faced with a prior decision from the same court, stare decisis has equal

application when one panel of a multi-panel appellate court is faced with a prior decision of a different panel.").

Mattinson also argues that the statute is unconstitutionally overbroad and vague "as applied" to this case. We note first that Mattinson's argument fails to comport with rule 24 of the Utah Rules of Appellate procedure because he failed to present or develop any authority that might support his claim.<sup>1</sup> See State v. Green, 2004 UT 76, ¶¶11-15, 99 P.3d 820 (discussing the requirements of rule 24 and the effect of an appellant's failure to comply with the rule). "'It is well established that a reviewing court will not address arguments that are not adequately briefed.'" Id. at ¶15 (quoting State v. Thomas, 961 P.2d 299, 304 (Utah 1998)). Consequently, we decline to entertain Mattinson's "as applied" argument. However, even if we were to examine this claim on its merits, the outcome would remain unchanged.

When analyzing an "as applied" challenge to a criminal statute, we focus first on "whether the statute is sufficiently definite to have adequately warned [the defendant] that his conduct was proscribed." Id. at ¶46. If we conclude that it is sufficiently definite, we then "examine whether the statute is sufficiently definite so as to discourage arbitrary and discriminatory enforcement," which requires that the statute "establish minimal guidelines to govern law enforcement such that it avoids entrusting lawmaking to the moment-to-moment judgment of the policeman on his beat." Id. at ¶50 (quotations and citations omitted). Finally, we note that our examination must focus "on the particular conduct at hand and not on the possible conduct of hypothetical parties." Id. at ¶51.

Section 76-10-1801 prohibits the act of communicating information, either directly or indirectly, to a person "by any means for the purpose of executing a scheme or artifice" to defraud another. Utah Code Ann. § 76-10-1801(1).<sup>2</sup> The gravity

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1. Mattinson presents two cases--both of which center on cruel and unusual punishment--to support his "as applied" argument. Not only are these cases misplaced, but Mattinson neither presented, nor preserved, any cruel and unusual punishment argument below. Therefore, we do not address his cruel and unusual punishment claim on appeal. See State v. Holgate, 2000 UT 74, ¶11, 10 P.3d 346 ("As a general rule, claims not raised before the trial court may not be raised on appeal.").

2. The scheme or artifice to defraud must involve a communication that contains "false or fraudulent pretenses,  
(continued...)

of the offense will be determined, in general, by the monetary value sought through the scheme or artifice to defraud. See id. § 76-10-1801(1)(a)-(d).<sup>3</sup> In State v. Norris we defined each of the material statutory terms expressed above and determined that these terms were best defined by their plain meanings. See 2004 UT App 267 at ¶¶13-15. Applying the plain meaning to the instant case, we conclude that the statutory language is sufficiently clear to have put Mattinson on notice that his conduct violated the statute. Consequently, we turn our analysis to determining whether the statute is drafted to preclude law enforcement from becoming ad-hoc lawmakers. See Green, 2004 UT 76 at ¶50.

Here, Mattinson took his friend Stovoni Wells to the Utah Valley Regional Medical Center when she exhibited symptoms of meningitis. The two agreed that she would be registered under a false name; that he would represent himself as her husband, also using a false name; and that any personal information required by the hospital would also be false. Mattinson then carried out this plan, completing all of the hospital forms with false information, including the form in which he guaranteed, jointly and severally with Wells, payment of all costs incurred as a result of Wells's hospitalization. The eventual costs of Wells's medical care amounted to over \$5000. When Wells was later arrested, apparently on a different matter, she confessed to her participation in this scheme, implicated Mattinson, and stated that she had provided false information to avoid paying the medical costs associated with her hospitalization. Under these circumstances, Mattinson's conduct clearly fell into an area prohibited by the statute, and we cannot say that police officials were improperly left to "decide, in their discretion, that the statute's provisions should not apply." Id., 2004 UT 76

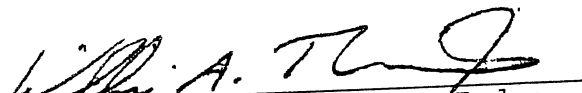
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2. (...continued)  
representations, promises, or material omissions." Utah Code Ann. § 76-10-1801(1) (2001).

3. Mattinson argues that his conviction arose under section 76-10-1801(1)(e), which criminalizes conduct where "the object of the scheme or artifice to defraud is other than the obtaining of something of monetary value." Utah Code Ann. § 76-10-1801(1)(e) (2001). Although the State presented evidence that Mattinson may have been seeking a nonmonetary goal with his scheme or artifice to defraud, i.e., assisting Wells's efforts to avoid arrest, the State also presented ample evidence that the scheme or artifice to defraud centered on avoiding Wells's medical expenses. Consequently, we focus our analysis on Mattinson's avoidance of the medical costs and leave for another day any analysis of section 76-10-1801(1)(e).

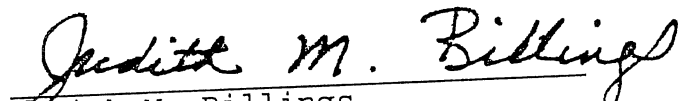
at ¶52. Therefore, we reject Mattinson's "as applied" challenge to section 76-10-1801.

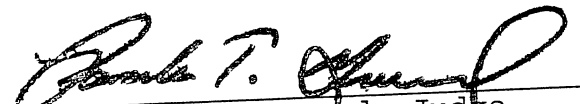
Accordingly, Mattinson's conviction is affirmed.

  
William A. Thorne Jr., Judge

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WE CONCUR:

  
Judith M. Billings,  
Presiding Judge

  
Pamela T. Greenwood, Judge



## Addendum B

AUG 22 2005

APPEALS

FILED  
UTAH APPELLATE COURTS

IN THE SUPREME COURT OF THE STATE OF UTAH

AUG 18 2005

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State of Utah,

Plaintiff and Respondent,

v.

Case No. 20050415-SC  
20030474-CA

Richard Jeremy Mattinson,

Defendant and Petitioner.

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**ORDER**

This matter is before the court upon a Petition for Writ of certiorari, filed on May 5, 2005.

IT IS HEREBY ORDERED, pursuant to Rule 45 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted as to the following issue:

Whether the Communications Fraud Statute, Utah Code Ann. § 76-10-1801, is unconstitutionally overbroad on its face.

A briefing schedule will be established hereafter. Pursuant to rule 2, the court suspends the provision of rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

FOR THE COURT:

August 18, 2005  
Date

Christine M. Durham  
Christine M. Durham  
Chief Justice