

Utah Crime Victims Legal Clinic
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF BOX ELDER, STATE OF UTAH

THE STATE OF UTAH
Plaintiff,
vs.
X, ROBERT A.
Defendant.

OBJECTION TO PLEA AGREEMENT

Case No. X
Judge Ben Hadfield

COMES NOW, Heidi X, on behalf of the minor victim in the above-named case, pursuant to U.C. A. §77-38-9 and files this Objection to the proposed plea agreement.

The Utah State Constitutional Amendment, declaring the rights of crime victims, was passed to ensure a victim's right to due process. Specifically Article 1 §28 (1)(a), provides that victims have the right, "To be treated with *fairness, respect, and dignity*, and to be free from harassment and abuse throughout the criminal justice process." (emphasis added) Ut. Const., 1995. In this case—specifically through the negotiation of the plea agreement—the victim does not feel as if she or her family has been treated with fairness, respect or dignity. Furthermore, it is the position of the victim and her family that the proposed plea agreement—namely, that **five** Third Degree Felony counts of dealing harmful material to a minor be resolved with **one** count of Class A Misdemeanor

attempted dealing of harmful material to a minor to be held in abeyance and subsequently completely dismissed after 1 year—does not serve the public interest; the plea bargain is not reflective of the seriousness of the criminal conduct nor does it provide justice for this young victim and her family.

Because the victim, through her family is opposed the plea offer, we asked to be heard before the plea is considered by the Court; and, ultimately, we ask that the Court reject the plea agreement.

I. The Victim Has A Right to Be Heard Before Any Plea Is Accepted.

In Utah, the Court—neither the prosecutor nor the defendant—makes the “final decision” about a proposed plea agreement. Rule 11(e) of the Utah Rules of Criminal Procedure explicitly states that “[t]he court may *refuse* to accept a plea of guilty” (emphasis added). These words mean what they say. As the Utah appellate courts have recognized, “nothing in Rule 11(e) requires a court to accept a guilty plea.” *State v. Turner*, 980 P.2d 1188, 1190 (Utah Court of Appeals 1998) (quoting *State v. Mane*, 783 P.2d 61, 66 (Utah Ct. App. 1989)).

Before the Court makes the final decision on whether to accept or reject a plea, the law is clear that a victim has the right to be heard — a right to try and “prevent the prosecutor” from cutting a deal which the victim believes is inappropriate and contrary to justice being served. The victims’ right to be heard in that process is enshrined in numerous provisions of state constitutional and statutory law. *See, e.g.*, UTAH CONST., art. I, § 28(1)(b) (victims of crime have the right “to be heard at important criminal justice hearings related to the victim”); UTAH CODE ANN. § 77-38-4(1) (victims of crime have “the right to be heard at the important criminal . . . justice hearings); UTAH CODE

ANN. § 77-38-2(5)(c) (defining important criminal justice hearings as including “any court proceedings involving the disposition of charges against a defendant . . .”); *see also* UTAH CONSTITUTION, art. I, § 28(a) (victims of crime have the right to be treated with “fairness, dignity, and respect.”).

In order for this right to have meaning, the victim must be heard by the Court *before* the plea is even considered by the Court in case their input makes a difference on the Court’s decision. In an article published before the Legislature passed, and the citizens of Utah voted for the Constitutional Amendment affording victims’ right, then Professor Paul G. Cassell wrote, *Balancing the Scales of Justice: The Case for and the Effects of Utah’s Victims’ Rights Amendment*, 1994 Utah L. Rev. 1373 n.*. In this article, Professor Cassell explains that “[t]he constitutional right to be heard suggests that no plea agreement should be accepted without *first* giving the victim the opportunity to express a view on the defendant’s disposition..” *Id.* at 1394 (emphasis added).

Notably, the victim enjoys a “voice” in the plea bargaining process, not a “veto.” The court may still accept the plea over a victim’s objection. However, the court may also be persuaded by the victim that the plea should not be accepted.

II. The Proposed Plea Agreement Should Not Be Accepted.

As stated above, the proposed plea agreement between the State and the defendant is that the five Third Degree Felony Counts of Distributing Harmful Material to a Minor. There are three reasons why the Court should reject the proposed plea agreement between the State and the defendant: First, the agreement does not serve the public interest in serious offenses against minors; Second, the State’s focus on the “credibility” and

character of the minor victim is unfounded and an inappropriate justification to essentially giving the defendant a slap on the wrist; and, Third, this defendant is a serious risk to youth in our community and needs an appropriate consequence for his significant criminal conduct.

A. *The Public Interest Is Not Served by the Proposed Resolution.*

In this case, the allegations include the minor victim being text messaged—via cell phone—on no less than five separate occasions, a picture of the defendant’s erect penis. Notably, at least one of the pictures is shot at an angle where the defendant’s face can also be seen; one of the pictures depicts the penis with what appears to be semen ejaculating from same; and all of the pictures were sent from the cell phone belonging to defendant X with very personal and identifying messages—even sexually explicit proposals.

In Utah, it is a felony crime for an adult to show, send or expose a minor to harmful material including pornography. This crime and the intended penalty reflects the seriousness of our youth being exposed to material which can harm them emotionally and physiologically—or, to introduce them to sexually explicit material before they are old and mature enough to understand the significance of what they have seen. Moreover, with modern technology and instant communication, there are additional hazards for our youth who may not be able to distance themselves from harmfully explicit material by avoiding potentially dangerous situations, when all they have to do is answer their cell phone or email message and suddenly be faced with pornographic pictures.

As parents, adults and criminal justice professionals, we are all faced with the

responsibility to protect our youth. Even if the minor victims do not appreciate or understand the harmful nature of these materials, and may even have an immature curious response to that which they are exposed, the State has an obligation to ensure that the laws are enforced and that there are consequences for perpetrators of this serious crime—if for no other reason than to prevent further perpetrations and additional victims.

Dismissing four felony counts and amending the fifth felony count to a class A misdemeanor--“Attempted Dealing of Harmful Material of a Minor”--and allowing same to be held in abeyance, certain to be dismissed in one year, does not reflect the seriousness of Mr. X criminal conduct; the resolution does not bring justice to the minor victim’s family which has suffered significant consequences as a result of the crime; and does not serve the public interest in taking a formidable stand against such damaging and reckless behavior.

The State has justified its position, in conversations with the minor victims’ family and counsel as well as in representations to the Court that the defendant is getting such lenient treatment essentially because (1) the minor victim voluntarily engaged in a sexual relationship with Mr. X and even allegedly sent him nude pictures of herself via cell phone message; (2) the victim is mature beyond her years; and (3) the defendant is immature and should not be held to an adult standard even though he was over 18-years-old when he sent these text messages to a girl who had barely turned 15 one week before.

1 These justifications are thoroughly challenged below. In sum, however, it must be noted that the crimes for which the defendant has been charged are akin to laws which are categorized as “strict liability” crimes—namely, the laws are not written as “Dealing

1 Notably, the “State” representatives who fashioned the proposed plea resolution worked under County Attorney X. It is hoped that the new County Attorney or representative will at least critically review the case and come to an independent conclusion as to the merits and significance of this case.

Harmful Material to a Completely *Innocent* Minor,” nor is the law classified as a “*Mature Adult* Dealing Harmful Material to a Minor.” If an adult exposes a minor to harmful material it is a crime—a felony crime. Period – No qualifiers.

In sum, the laws are passed to protect minors and the criminal justice system is entrusted by the public to enforce the laws and protect our youth and society from those perpetrators who seek to corrupt. Although some negotiated plea in this case may meet the goals of justice and preserving the public interest, literally giving the defendant ultimate leniency where the consequences are as minor as possible and short lived (namely, in 12 months the crime will be entirely forgiven and not even show on his record),² does not serve the public interest or reflect the seriousness of these crime.

B. *The State Has Inappropriately Placed Ultimate Blame and Responsibility on the Minor Victim and Her Family.*

The primary justification of the State, to give such a lenient resolution in this case, is the perceived “maturity” of this fifteen year-old-victim and that they assess much of the blame on the victim for reciprocating a sexual relationship with the defendant. There are also allegations that the victim lacks credibility because of allegations she made regarding sexual abuse of a grandfather and one other individual. First, the prosecuting agency has never met with this minor victim. They seem to be relying on reports from police officers that she is more mature and physically developed for her age. As undersigned counsel in this case for the victim and her family, I can report to the Court

² The victims were informed by the State that through this plea negotiation, defendant X would have to register for the sex offender registry and that he would be on same for 10 years. In researching the statute it is believed that once the plea in abeyance and charge are dismissed in one year, the defendant will no longer be required to register as a sex offender.

that I have met with the minor and she seems like a typical 15-year-old—namely, she changes her life’s ambitions at a moments will, she has many diverse interests and talents and she is immature and inexperienced when it comes to relationships and sex.

Second, Mr. X has always been the older person in this “relationship” and he bears the responsibility to make mature decisions about engaging in sex and to conform to the law. Essentially, this minor victim believed Mr. X was her friend and she had a youthful crush on him—not untypical for a fourteen/fifteen-year-old girl (she met Mr. X when she was barely fourteen). He took advantage of her feelings and in a vulnerable situation forced himself on her (as evidenced by his adjudication in the juvenile court for *Unlawful Sex with a Minor* -this same victim). The minor victim maintains, as she has always maintain, that the sexual encounter was forced and never consented to—a traumatic event which put her in counseling and has had serious emotional and confusing consequences for this young girl. (please see Appendix A: Minor Victim’s Impact Statement submitted in the juvenile court prosecution). In addition, the victim denies ever having sent the defendant nude photographs. Interestingly, no investigator or prosecutor has ever verified whether the minor victim sent pictures to Mr. X, rather, they have just taken the defendant’s word that she sent these pictures and they believe, based on those allegations, that he deserves leniency. It should be noted that the minor victim’s phone does not have a camera function and that her phone was turned over to the State and they have had plenty of time and opportunity to verify the defendant’s allegations—this verification has never been done.

Finally, the minor victim in this case has made allegations that she has been previously sexually abuse—by a paternal grandfather and one other person. The

investigations of these allegations, to this attorney's knowledge, were never investigated further than interviewing the minor victim about same. Because the investigators believed some of her statements were contradictory, they dismissed her as being a liar and never even interviewed the suspects.³

Notably, the crimes for which Mr. X has been charged do not turn on the credibility of the minor victim. The evidence of the crimes for which Mr. X has been charged are the photographs of Mr. X's penis, sent by Mr. X's phone, with personal messages and solicitations for sex by Mr. X. Further, Mr. X is the one who has admitted to a juvenile court judge and has been adjudicated for having sex with the minor victim when she was barely fourteen-years-old (defendant was 17 at the time). Arguably, Mr. X carries the blame if this victim has become sexualized and if he has exploited any sexual curiosities common for an immature fifteen-year-old. Finally, there has been undo focus, by the prosecution that the defendant and victim are only 3 ½ years in age apart. The development in maturity and life experience between a 14 and 17 year-old or 15 to 18 year-old is significantly different than the same contrast between a 34 and 37 year-old. Teenage years are filled with puberty and dramatic physical, mental and emotional development. This is why, arguably, the laws differentiate between the culpability of minors and that of those who have turned 18-years-old. It is unfair and not in conformance with the law to place the blame for such illegal sexual perpetrations on a youth and is contrary to public interest to pursue a plea bargain based on perceived victim responsibility.

In conclusion, it must be said that the victims' biological mother and step-father

³ Although counsel for the victim has not been privy to the police reports of these allegations, this is a recitation of conclusions as represented to counsel by the prosecuting attorney.

(who has raised the victim since she was three) are appalled and have been very offended at how this case has been handled. (Please see Appendix: Objection to Plea as prepared by the victim's step-father and endorsed by her mother). They have felt excluded from the process and feel as if they were consulted only after the plea agreement had been worked out.⁴

C. The Defendant Requires an Adequate Consequence to Reflect His Criminal Activity.

The State has attempted to justify the plea bargain for the plea in abeyance to one Class A Misdemeanor, because the defendant is not perceived to be a risk to other minor victims and he deserves leniency because of his own immaturity. First, there has been no investigation as to whether the defendant has committed these acts against other girls. Further, if the defendant truly is immature it is foreseeable that relationships with women his own age may fail and he may resort to seeking younger girls with similar maturity or vulnerabilities as the victim in this case. Since this is the second sexual crime for which the defendant has been adjudicated and prosecuted, it seems most prudent to require a psycho-sexual examination and/or require the defendant to plead to a felony where the threat of prison and more serious sanctions can act as a disincentive for future criminal activity.

In conclusion, the victim's family asks this Court to reject the proposed plea in abeyance because it is adverse to the public interest to enforce these serious crimes. The

⁴ Notably, once undersigned counsel got involved, the prosecuting attorney was very willing to meet with counsel and did so on December 5, 2006 for over an hour. This, again, was after the plea agreement had been made.

agreement is based on a false and misplaced emphasis on the victim's responsibility and neglects to consider the potential danger this defendant poses to minors in this community.

DATED January 24, 2011.

Heidi X

CERTIFICATE OF HAND DELIVERY

I certify that I hand delivered a copy of the foregoing Motion to Continue to Defendant or his legal representative and the Box Elder County Attorney's Office on January 24, 2011.

X

X