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BY THE COURT:

DATE SIGNED: June 26, 2019

Electronically signed by Jerilyn M. Dietz
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

vs. Case No. 19 CF 75

TIMOTHY S. HAUSCHULTZ

DECISION ON MOTION TO DISMISS COUNT 2 AS VOID FOR VAGUENESS

On April 20, 2018 in Manitowoc County, Wisconsin, a child whose initials are EJH, d.o.b. 09/13/2010, died. On February 1, 2019, the Manitowoc County District Attorney's Office, on behalf the State of Wisconsin, filed a criminal complaint charging EJH's guardian, Timothy Hauschultz, with offenses related to EJH's death and related to injuries allegedly sustained by a child identified only as Child 1. The State also charged Mr. Hauschultz' 15 year-old stepson, in Manitowoc County Circuit Court Case no. 19CF77, with offenses against EJH and Child 1. Mr. Hauschultz' wife was also charged. A preliminary hearing was held on February 18, 2019, and this court found probable cause and bound Mr. Hauschultz over for trial. An Information was filed on March 12, 2019, and at the March 22, 2019 arraignment, Mr. Hauschultz entered not guilty pleas to each of the eight offenses alleged therein.

On May 21, 2019, the defendant, Timothy Hauschultz, by his attorney, Donna Kuchler, filed a motion to dismiss Count 2 of the Information, arguing that §§ 948.40(1) and (4)(a), as applied to the defendant, are void for vagueness. Incidentally, this same count was challenged in a motion to dismiss for lack of probable cause in the criminal complaint, which was filed on February 11, 2019, and argued and decided on February 18, 2019. This same count was also challenged in a motion to dismiss as duplicitous with Count 4 of the Information, which was filed on March 21, 2019, and that motion was argued and decided on April 22, 2019.

In the current motion, the defendant takes issue with the State having charged him with Contributing to the Delinquency of a Child, contrary to § 948.40(1) and (4)(a), where the child to whose delinquency he is alleged to have contributed is not the child who died. Specifically, Mr.

Hauschultz claims that because the statute does not specify which child's death must result from the delinquency, the statue must be unconstitutionally void.

I) This Court's Competency to Hear this Challenge

The State correctly asserted that the defendant failed to serve the Wisconsin Attorney General with his challenge. As a preliminary matter, the defendant's failure to serve the Wisconsin Attorney General with this motion deprives this court of competency to hear the challenge. §806.04(11), Wis. Stats. requires that any time the constitutionality of a statute is challenged, the Attorney General must be served with the motion. *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 116-17 (1979). Failing to serve the Attorney General's Office deprives the Court of competency over the issue, and the Court may not properly consider the constitutional issue. *Bollhoffer v. Wolke* et al., 66 Wis.2d 141, 143, 223 N.W.2d 902, (1974), *O'Connell v. Blasius*, 82 Wis. 2d 728, 733 (1978); *Kurtz*, 91 Wis. 2d at 117. However, the record reflects that June 10, 2019, Attorney Kuchler did provide, by US Mail, a copy of this motion, so this defect has been addressed and remedied.

II) Burden of Proof

It is well established that separation of powers, a cornerstone to American governance, requires that great deference be given to acts of one branch by another, and that a strong presumption of constitutionality be afforded by the courts to legislative acts. "[The defendant] challenges the constitutionality of legislation and, therefore, has the burden of showing, beyond a reasonable doubt, that the legislation violates the constitution." *Appling v. Doyle*, 2013 WI App 3, ¶ 10, 345 Wis.2d 762, 826 N.W.3d 666, 660 (2012), see also *State v. Carpenter*, 197 Wis. 2d 252, 263, 541 N.W.2d 105 (1995).

"All legislative acts are presumed constitutional and every presumption must be indulged to uphold the law if at all possible (citations omitted)." *Norquist v. Zeuske*, 211 Wis.2d 241, 250, 564 N.W.2d 748, ¶13 (1997). "[I]t is a legislative enactment that is attacked as being unconstitutional, and the cardinal rule of statutory construction is to preserve a statute and to find it constitutional if it is at all possible to do so." *Gottleib v. Milwaukee*, 33 Wis.2d 408, 415 (1967). This burden of proof also applies when the challenge is to a statute *as applied* to a defendant. *State v. Smith*, 2010 WI 16, ¶9, 323 Wis.2d 277, 780 Wis.2d 90, 95.

III) Test for Vagueness

The argument is that the statute is unconstitutionally vague in that it does not define whose death must result from the delinquency to which a defendant, any defendant, is alleged to have encouraged.

Wisconsin courts have oft reiterated the principles to be considered when evaluating whether a statute is unconstitutionally vague. "There is no simple litmus-paper test to determine whether a criminal statute is void for vagueness. The principles underlying the void for vagueness doctrine,

as we explained in *State v. Courtney*, 74 Wis. 2d 705, 709, 247 N.W.2d 714 (1976), stem from concepts of procedural due process. Due process requires that the law set forth fair notice of the conduct prohibited or required and proper standards for enforcement of the law and adjudication." *State v. Popanz,* 112 Wis.2d 166, 172, 332 N.W. 2d 750 (1983).

In *State v. Woodington*, it was stated as thus: "…Is the statute read as a whole so indefinite and vague that an ordinary person could not be cognizant of and alerted to the type of conduct, either active or passive, that is prohibited by the statute?" 31 Wis.2d 151, 181, 152 N.W.2d 810, 143 N.W.2d 753 (1966).

The Wisconsin Supreme Court, in *State v. Courtney*, found additional guidance in long-standing criminal jurisprudence, stating: "The United States Supreme Court, in an often-quoted opinion by Mr. Justice HOLMES, said: '. . . Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.' *United States v. Wurzbach,* 280 U.S. 396, 399, 50 S. Ct. 167, 74 L. Ed. 508 (1930)." *Courtney* at 710.

These standards have coalesced into a two-prong analysis. "The first prong of the vagueness test is concerned with whether the statute sufficiently warns persons 'wishing to obey the law that [their] ... conduct comes near the proscribed area.' *State v. Tronca,* 84 Wis. 2d 68, 86, 267 N.W.2d 216 (1978). The second prong is concerned with whether those who must enforce and apply the law may do so without creating or applying their own standards. *State v. Popanz,* 112 Wis. 2d 166, 173, 332 N.W.2d 750 (1983)." *State v. Pittman*, 174 Wis.2d 255, 276, 496 NW.W.2d 74 (1993).

IV) Analysis

A) Legislative intent behind §948.40

The Wisconsin Supreme Court undertook a detailed analysis of this section in *State v. Patterson*, 2010 WI 130, 790 N.W.2d 909, also cited by the State. There, the Court determined that this section is like many others throughout the criminal code that are not homicide statutes but punish other conduct more severely when death results. *Patterson* at ¶24. The Court continued: "The legislative history confirms what the language of the statute suggests: Wis. Stat. § 948.40(1), (4)(a) is not a type of criminal homicide, but rather a law for the protection of children from egregious conduct with, obviously very serious consequences when that conduct results in a death." *Id*. at ¶31, 790 N.W.2d 909, 920.

Where the intent is to protect a child from delinquent behavior, the legislature clearly recognized that a situation where death is a consequence is far more grave, and the adult who encouraged the delinquent behavior faces more severe punishment. The purpose of this section, then, is not to discourage causing a death specifically. It is to deter an adult from encouraging a child to engage in dangerous behavior that may, in some circumstances, result in the death of a person. The identity of the decedent does not increase or decrease the severity of the offense. The issue is that a death resulted, not whose death.

B) Does the statute sufficiently warn a person of what behavior is barred?

The first question in the current case is whether §948.40(1) and (4)(a) adequately describe what behavior is prohibited. Each section will be addressed separately to ensure completeness.

1) §948.40(1), Wis. Stats.: This section reads: "No person may intentionally encourage or contribute to a delinquency of a child. This subsection includes intentionally encouraging or contributing to an act by a child under the age of 10 which would be a delinquent act if committed by a child 12 years of age or older." As the child alleged to be delinquent in this matter was over the age of 12, the second sentence is irrelevant for our purposes. Definitions of the terms used in this section are readily accessible elsewhere in the statutes and in the applicable jury instruction.

   - Intentionally is defined in section 939.23(3) of the Wisconsin Statutes as "the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'."
   - Intentionally encourages or contributes is defined in Wisconsin Criminal Jury Instruction 2170A as: "… the defendant either had a purpose to encourage or contribute to delinquency or was aware that (his) (her) conduct was practically certain to cause that result."
   - The same jury instruction defines delinquency as "any violation of state criminal law by a child."

The allegation in the criminal complaint and at the preliminary hearing is that Timothy Hauschultz encouraged a child, D.H., who is under the age of 18 but over the age of 12, to commit physical abuse to a child, contrary to §948.03, Wis. Stats. Physical abuse of a child is a crime if committed by an adult and a delinquent act if committed by a child. This section is very clear as to what behavior is proscribed, and very clear as applied to the defendant.

2) §948.40(4)(a), Wis. Stats. is the penalty section for §948.40, Wis. Stats. The section as a whole reads: "(4) A person who violates this section is guilty of a Class A misdemeanor, except:
   (a) If death is a consequence, the person is guilty of a Class De felony; or
   (b) If the child's act which is encouraged or contributed to is a violation of a state or federal criminal law which is punishable as a felony, the person is guilty of a Class H felony."

This segment of the statute determines what the penalty is for a violation of §948.40(1), Wis. Stats. This section does not criminalize any additional behavior or set out a new violation. This section allows the prosecution to determine what level charge this is and, therefore, the maximum penalty facing a person charged with the violation thereof. This section is based on the outcome of the offense. It clearly defines that it is applicable only when death is a

consequence of the delinquent behavior a defendant is charged with encouraging. This section was analyzed by the Wisconsin Supreme Court in State v. Patterson, 2010 WI 130, ¶24, 790 N.W.2d 909, 918, which stated: "Rather than being a homicide statute, Wis. Stat. § 948.40(1), (4)(a) is more akin to other offenses spread throughout the statutes that proscribe certain conduct and impose a more serious punishment where death results."

That Court continued its probe into the legislative history of this section, stating:

> This move to chapter 948, as opposed to chapter 940 which contains the homicide statutes, indicates that the underlying conduct targeted by this statute is contributing to the delinquency of a child, not homicide. We are further convinced by comments to this Act[i], which explain:
> In s. 948.40, which applies only to contributing to the delinquency of a child:
> 4. Subsection (4) revises the penalties for contributing to the delinquency of a child by:
> a. Increasing the penalty where death is a consequence of the act which is encouraged or contributed to from a Class D felony to a Class C felony.
> 1987 Wis. Act 332.
> These comments clarify that Wis. Stat. § 948.40 proscribes contributing to the delinquency of a child, which offense is considered more serious "where death is a consequence."

Patterson at ¶¶33-34. The severity of the offense was modified again in 2001 WI Act 109 and remains thereafter a Class D felony.

This analysis only confirms the conclusion that the offense is described in 948.40(1), Wis. Stats., as contributing to the delinquency of a child. Therefore, it is clear to any person wanting to conform his or her behavior to the requirements of the law what it is that is prohibited. The penalty for this offense depends on the outcome. If a death, to any person, results, the charge is a Class D felony.

C) Can the statute be enforced without creation of individual standards?

Next the court must consider whether the fact that the penalty provided in 948.40(4)(a), Wis. Stats., does not specify whose death must be a consequence of the defendant's contributing or encouraging of a child's delinquency means that enforcement relies on inconsistent or individual standards. This section reads: "If death is a consequence, the person is guilty of a Class D felony." It does not answer the question as to whether it must be the child whose delinquency is encouraged, or may it be a victim of the delinquent act that the defendant encouraged the child to commit, or may it be another person whose death results from the delinquent act the child was encouraged to commit.

As discussed previously, Mr. Hauschultz is accused of encouraging a child, D.H., to commit the crime of physical abuse of a child, contrary to §948.03, Wis. Stats. This requires that D.H. was harmed in that he was encouraged to commit a delinquent act, and the child who was the victim of the physical abuse was harmed in that bodily harm was inflicted. Physical abuse of a child and

encouraging the delinquency of a child are obviously different offenses enumerated in different sections of the statute, but there are similarities worth analyzing here.

Most notably section, like §948.40, carries increased penalties when death is a consequence. However, the language the legislature chose to use in penalizing physical abuse to a child differs, in that the child whose death must result is specified in §948.03(5)(a)1, Wis. Stats. This section states that engaging in repeated acts of physical abuse of the same child is a class A felony "if at least one violation caused the death of **the** child." (emphasis added). *This is not the section applicable to the allegations against Mr. Hauschultz,* but this comparison is helpful to highlight the language used in each statutory section. Contrast this with the penalty section of §948.40(4)(a), which reads "If death is a consequence, the person is guilty of a Class D felony…." If the legislature intended to specify that this section only applies if the child whose delinquency was encouraged dies, it clearly could have done so. The legislature did not. This indicates that the language chosen was intentional, and that the death of <u>any</u> person resulting from the crime of encouraging the delinquency of a child would trigger this penalty section. Law enforcement and prosecution therefore have this consistent standard to apply when confronted with a situation in which they have reason to believe that a defendant has encouraged or contributed to a delinquent act and a person has died as a consequence of that delinquent act.

The application of this section in this way is not specific to Mr. Hauschultz' situation, and does not require that law enforcement create a new enforcement policy or methodology in order to apply this subsection to Mr. Hauschultz, or anyone else. One can easily think of other examples. If the delinquent act the child was encouraged to commit was possession of a controlled substance, and that child died after ingesting the substance, this section would apply. But if the delinquent act the child was encouraged to commit was the delivery of controlled substances to another person, and that other person died as a result of consuming the controlled substance, this section would also apply. If the delinquent act the child was encouraged to commit was intoxicated driving, and that child died, this section would apply. If the delinquent act the child was encouraged to commit was intoxicated driving, and a passenger in the vehicle died, this section would apply. The factor connecting each of these examples is death as a consequence of the delinquent act the defendant is alleged to have encouraged. This standard is easily applied across a wide variety of situations.

This section is not vague. Rather, it appears very intentionally written to address the death of any person as a consequence of the delinquent act a child was encouraged to commit.

V) Conclusion

The defendant faces a very high burden of proof to overcome the presumption that the statutory section he challenges is constitutional. For all of the reasons outlined in foregoing paragraphs, this Court finds that he has failed to meet that burden. Therefore, the defendant's motion is respectfully denied.

[i] 1987 Wis. Act 332, *Analysis by the Legislative Reference Bureau* of 1987 S.B. 203, Legislative Reference Bureau, Madison, Wis.