

**IN THE SUPREME COURT OF MISSOURI**

STATE OF MISSOURI, )  
 )  
 Plaintiff-Respondent, )  
 )  
 v. ) Case No. SC91195  
 )  
 KASIM FARUQI, )  
 )  
 Respondent-Respondent. )

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On Appeal from the Circuit Court of St. Louis County  
Cause No. 08SL-CR00895-01  
Hon. Mark D. Seigel, Circuit Judge

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**OPENING BRIEF OF APPELLANT**

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## **JURISDICTIONAL STATEMENT**

On June 22, 2010, in the Circuit Court of St. Louis County, State of Missouri, the Hon. Mark D. Seigel, after a bench trial, found Appellant Kasim Faruqi guilty of one count of Attempted Enticement of a Child, in violation of Mo. Rev. Stat. § 566.151. On August 12, 2010, Judge Seigel sentenced Appellant to five years imprisonment. Because this appeal addresses the constitutionality of a state statute (Mo. Rev. Stat. § 566.151), this Court has exclusive appellate jurisdiction under Article V, § 3 of the Missouri Constitution.

## STATEMENT OF FACTS

On February 13, 2008, the Prosecuting Attorney for St. Louis County, State of Missouri, filed a single count Complaint charging Kasim Faruqi (“Appellant”) with Attempted Enticement of a Child, in violation of Mo. Rev. Stat. § 566.151, alleging that “between November 6th, 2006 and November 7th, 2006,” Appellant, “for the purpose of engaging in sexual conduct, attempted to entice Erica Stough, who was a police officer masquerading as a minor less than fifteen years of age, by suggesting over the internet that they meet and engage in sexual conduct,” that such conduct was “a substantial step toward the commission of the crime of enticement of a child less than fifteen years of age,” and was done “for the purpose of committing such offense of enticement of a child.” (LF 11)<sup>1</sup> On March 12, 2008, a Grand Jury sitting in the Circuit Court of St. Louis County, State of Missouri, charged Appellant with a single count of Attempted Enticement of a Child, using the same language as in the Complaint. (LF 13)

On April 14, 2008, Appellant filed a Motion to Suppress Physical Evidence and a Motion to Suppress Statement of Defendant. (LF 16-22) On May 1, 2008, Appellant

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<sup>1</sup> Appellant shall use the following abbreviations with regard to the Record on Appeal: “LF” shall refer to the Legal File, “APP” shall refer to the Appendix to this Opening Brief, “STR1” shall refer to the transcript of the suppression hearing held on August 8, 2008, “STR2” shall refer to the transcript of the suppression hearing held on November 12, 2008, and “TR” shall refer to the transcript of the trial held on June 21 and 22, 2008.

filed a Motion to Dismiss the Indictment, alleging that the Indictment failed to charge Appellant under the proper statute and charged Appellant with a crime that does not exist. (LF 23-26) On May 23, 2008, the trial court denied the Motion to Dismiss the Indictment. (LF 27)

On August 8, 2008, the trial court held a hearing on Appellant's motions to suppress. (LF28) The State called as its sole witness Detective Steven Osterloh, a police officer with the Maryland Heights Police Department. (STR1 7) Detective Osterloh testified that on November 7, 2006, his supervising sergeant sent him to "attempt to make contact with a person who had been chatting with one of our police officers" and that the rendezvous would occur "around 7:00 in the evening" in Vago Park. (STR1 8-9) Detective Osterloh witnessed other officers of the Maryland Heights Police Department take Appellant into custody. (STR1 11) Subsequently, Detective Osterloh interviewed Appellant at police headquarters. (STR1 11) Prior to asking any questions, Detective Osterloh advised Appellant of his constitutional rights, after which Appellant signed the warning and waiver form utilized by the Maryland Heights Police Department. (STR1 12-13) Detective Osterloh testified that he alone of the officers involved in the case interviewed Appellant, that at the time of the interview Appellant was in fact under arrest, that Appellant spoke with an accent and that he was a Pakistani citizen. (STR1 28, 33) The waiver form admitted into evidence indicates that Appellant signed the form at 7:48 p.m. on November 6, 2006. (APP 4) At 8:05 p.m., Appellant signed a "Consent to Search" form, authorizing Detective Osterloh and officers of the Maryland Heights Police Department to search the T-Mobile store located at 15028 Manchester Road for a Dell

computer and components, bearing serial number D7XJL51. (APP 5) Detective Osterloh said he had found out from Appellant that he worked as the manager of the T-Mobile store listed on the Consent to Search form. (STR1 21) Prior to obtaining the consent to search, Detective Osterloh never attempted to confirm that Appellant in fact worked for T-Mobile, nor did he attempt to obtain a search warrant or seek consent of T-Mobile to search its premises or seize its computer. (STR1 29-31)

With regard to the initiation of the interrogation, Detective Osterloh gave the following testimony:

Q. Okay. Now, you began your interrogation of Mr. Faruqi by lying to him about fictitious complaints from the parents of a 14-year-old girl, concerning the exploitation of their daughter, is that correct?

A. That's correct.

Q. You told him that the fictitious parents of this imaginary daughter had made a complaint about him trying to have sex with their 14-year-old daughter, which was a lie; isn't that correct?

A. Yes.

Q. It was your intention for him to believe these lies; isn't that correct?

A. Yes.

Q. And by believing those lies, you thought that this would help you in your interrogation of Mr. Faruqi; isn't that correct?

A. Yes.

Q. It was your hope that if he believed these lies and felt sympathy for the parents of this imaginary 14-year-old girl, that he would make admissions to you that would help you convict him; isn't that correct?

A. I don't know that I would say it was my hope. That was the intent.

Q. That was your intention?

A. Yes.

Q. Yes. And that worked, didn't it?

A. Yes.

Q. Yes. You also told Mr. Faruqi that he was being accused of trying to have sex with quote, the girl; isn't that right?

A. Yes.

Q. That was another part of the lie; right?

A. Yes.

Q. You write in your report that you asked Mr. Faruqi about customs of his country; isn't that correct?

A. Yes.

Q. And in your deposition, you stated that the purpose of that question was to determine if he understood the laws, quote, of this country as far as having sex with a minor, unquote. Do you remember giving that answer?

A. Yes, sir.

Q. You also said that this question had no relevance and that you were only, quote, trying to get into Mr. Faruqi's head, unquote. Do you recall saying that to me?

A. Yes.

\* \* \*

Q. So what you were trying to do by your questions, which were lies, contained lies, was to get into his head; correct? Right?

A. And get to the truth.

Q. Yes. Now, you then asked Mr. Faruqi how he, quote, met the girl, when in fact, there was no girl; right? This was another lie?

A. Yes.

Q. So as part of your lies, you were trying to convince Mr. Faruqi that, in fact, there was a girl when, in fact, there wasn't a girl? Isn't that correct?

A. Yes.

(STR1 37-39)

Detective Osterloh continued to interview Appellant; none of the interview was recorded and preserved on either audiotape or videotape. (STR1 27-28) At 9:01 p.m., Appellant signed a Voluntary Statement he completed in his own handwriting. (APP 6-9) Appellant did so upon request of Detective Osterloh. (STR1 16) The original statement Appellant completed failed to include enough "details," so upon request of Detective

Osterloh, Appellant continued to add to his statement until Detective Osterloh deemed it sufficient. (STR1 42-43)

Upon request of the State, the trial court continued the suppression hearing until November 12, 2008, so that the State could have the opportunity to present additional witnesses. (LF 28) The State first called Erica Stough, a police officer with the Maryland Heights Police Department. (STR2 10) Officer Stough stated she had been assigned to conduct online investigations in chat rooms where she masqueraded as a fourteen year old girl with the screen name "Lilly4u2006." (STR2 10-11) On November 6, 2006, she responded to an instant message from a "Kasim786" whom she discovered claimed to be a 33 year old male of Middle Eastern descent. (STR2 12) The conversation became sexual in nature and "Kasim786" asked to meet. (STR2 12) Officer Stough arranged the meeting to take place at 7:30 p.m. in Vago Park. (STR2 13) Other than the previous description, Officer Stough obtained the information that he would be driving a burgundy Mitsubishi Eclipse. (STR2 14) Officer Stough passed this information to her superior, who arranged to have other officers meet "Kasim786" in Vago Park. (STR2 15) Officer Stough watched the officers from a distance and witnessed them arrest Appellant. (STR2 16) Officer Stough testified she never communicated directly with the arresting officers prior to the arrest, and that any information they obtained about the case came from her superior. (STR2 20-22)

The State also called Detective Jeffrey Swatek, a police officer with the Maryland Heights Police Department. (STR2 23) Detective Swatek stated he attended a briefing about an arrest to take place in Vago Park, and that the suspect would be a male, six-foot-

two, 250 pounds, black hair and black eyes, age 33, and would be driving a burgundy Mitsubishi Eclipse. (STR2 24-25) Upon seeing a vehicle matching the description, Detective Swatek approached the vehicle and the driver stated he “was in Vago Park to meet a girl that he had...met on the internet.” (STR2 27) After that “statement,” Detective Swatek placed Appellant under arrest for attempted enticement of a child. (STR2 27-28) The State presented no more witnesses, and the trial court denied the motions to suppress. (LF 29)

On September 9, 2009, Defendant filed a Second Motion to Dismiss the Indictment, alleging that Mo. Rev. Stat. § 566.151 violated the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution in that the statute was unconstitutionally vague and violated the requisites of definiteness and fair notice. (LF 30-34) On September 21, 2009, the trial court issued an Order and Judgment, denying the Second Motion to Dismiss the Indictment. (LF 43-45)

On June 21, 2010, the cause came before the Hon. Mark D. Seigel, Circuit Judge, for trial. (TR 3) Defendant waived his right to a trial by jury and submitted to a bench trial before Judge Seigel. (LF 47; TR 14-19) Appellant raised again as a continuing objection his previous motions to suppress and motions to dismiss the indictment. (TR 20-21) The State first called Officer Stough, who stated she had been an officer with the Maryland Heights Police Department for ten years and on November 6, 2006, she had been assigned to work undercover, going online to pose as a fourteen year old girl in chat rooms for the purpose of discovering offenders. (TR 30-32) Officer Stough utilized the screen name “Lilly4u2006” and received a message at 5:40 p.m. from the screen name

“Kasim786.” (TR 35-36) Officer Stough kept a log of the online chat and saved it as a computer file, which the trial court received into evidence. (TR 39-44) Officer Stough described the chats, stated she never initiated any conversation with “Kasim786” and that “Kasim786” both directed the conversation to matters of a sexual nature and also asked that they meet. (TR 46-52) The following day, November 7, 2006, Officer Stough went online and contacted “Kasim786” to continue the conversation from the previous evening. (TR 53) In the interim, she also had a phone conversation with the individual. (TR 52) The State introduced into evidence two of the phone conversations Officer Stough recorded with Appellant, preceding the meeting at Vago Park. (TR 73-87) The second online conversation led to a planned meeting in Vago Park at 7:30 p.m. (TR 54-55) On cross-examination, Officer Stough confirmed that she had been intentionally lying to Appellant from the start, in that she at no time was a fourteen year old girl but in fact a 33 year old woman. (TR 90-94)

Detective Osterloh testified, and his testimony followed his previous testimony he gave at the suppression hearing. (TR 112-140)

Andrew Hrenak testified he worked as a computer forensic examiner with the Regional Computer Crime Education and Enforcement Group. (TR 142-43) Officer Hrenak stated he examined a computer seized from a T-Mobile store with serial number D7XJL51, specifically looking for “chat artifacts” between “Kasim786” and “Lilly4u2006” which would have occurred on November 7, 2006. (TR 146) His investigation did find chat artifacts associated with the targeted screen names, but he could not identify the dates of the chats. (TR 149-50) However, he did have sufficient

data from the chat artifacts to compare them with the transcripts of the online chats preserved by Officer Stough, and he found the two “very similar.” (TR 157-58)

Appellant opened his case by reading portions of deposition testimony from Detective Osterloh. (TR 168-74) Counsel for Appellant next advised the trial court that Appellant wished to testify, against the advice of counsel. (TR 174-78) Appellant testified he believed he was talking to an adult female, and that it was never his intent to have sex with the person he engaged in these chats. (TR 181-84) When he spoke to the person claiming to be “Lilly4u2006” on the phone, he did not think he was talking to a child but in fact to an adult. (TR 184) Because he thought he had been speaking with an adult, he decided he would go to the park and meet an adult woman. (TR 184)

At the close of the evidence, the trial court immediately found Appellant guilty of the charge of attempted enticement of a child. (TR 197) The trial court also entered this Judgment of Guilt in writing. (LF 71)

On July 8, 2010, Appellant filed a Motion for New Trial. (LF 72-77) On August 12, 2010, the trial court denied the Motion for New Trial. (LF 78)

On August 12, 2010, Appellant appeared in person and with counsel for sentencing. (LF 79) The trial court sentenced Appellant to a term of five years of “flat time” in the custody of the Missouri Department of Corrections. (LF 79-80)

On August 17, 2010, Appellant timely filed his Notice of Appeal in this Court. (LF 82-88)

## POINTS RELIED ON

**I. The trial court erred in denying Appellant’s Second Motion to Dismiss the Indictment because Mo. Rev. Stat. § 566.151 violates the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution in that its internally inconsistent provisions render the statute impermissibly vague. Subsection (1) of the statute requires the State prove the victim was in fact less than fifteen years of age. Subsection (2) prohibits an accused from putting the State to its burden of proof with respect to the age of the victim if the victim happens to be a police officer masquerading as a child. Subsection (2) does not relieve the State of its burden of proof with respect to age in subsection (1), thereby creating the inconsistency – either the State must prove the accused enticed an actual child, rendering subsection (2) meaningless, or the State may prove the accused enticed a police officer masquerading as a child, rendering the age element of subsection (1) meaningless. The internal inconsistency deprives the citizen of fair warning and adequate notice of the prohibited conduct, and encourages arbitrary enforcement that lead to perverse and absurd results.**

*U.S. v. Evans*, 333 U.S. 483 (1948)

*Bd. of Ed. of St. Louis v. State of Missouri*, 47 S.W.3d 366 (Mo. banc 2001)

*Commonwealth v. Gagnon*, 387 Mass. 567, 441 N.E.2d 753 (1982)

*Patterson v. New York*, 432 U.S. 197 (1977)

**II. The trial court erred in denying Appellant's motion to suppress and admitting into evidence over his objection inculpatory statements, including those reduced to writing, obtained from Appellant by Detective Osterloh after he advised Appellant of his rights per *Miranda*, because the statements were procured through a series of misrepresentations by Detective Osterloh that rose to the level of an implied threat, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Detective Osterloh admitted he led Appellant to believe, prior to questioning, that the parents of the alleged child victim intended to pursue charges of sexual assault against Appellant, even though neither the parents, the child nor the assault actually existed. Additionally, Detective Osterloh talked with Appellant about his immigration status and country of origin, planting seeds of worry that non-cooperation could lead to deportation. The implied threat of a charge of sexual assault, combined with discussions about the nationality and immigration status of Appellant who had a diminished understanding of English and no familiarity with the American criminal justice system, created a set of circumstances which coerced Appellant to make incriminating statements.**

*Ex Parte McCrary*, 528 So.2d 1133 (Ala. 1988)

*Lynumn v. Illinois*, 372 U.S. 528 (1963)

*State v. Simmons*, 944 S.W.2d 165 (Mo. banc 1997)

*State v. Wilson*, 755 S.W.2d 707 (Mo. App. 1988)

**III. The trial court erred in denying Appellant's motion to suppress and admitting into evidence over his objection forensic information obtained as a result of an illegal seizure of a computer owned by T-Mobile and located in the store which Appellant managed, in violation of the Fourth and Fourteenth Amendments to the United States Constitution. The police secured a consent to search in writing from Appellant even though they lacked reason to believe Appellant had apparent authority to consent to a search (let alone a seizure) of the computer located at the T-Mobile store. Further, a third party lacking any ownership interest in the private property of another cannot give consent to seize said property, and the police lacked probable cause at the time of the seizure to believe the computer contained evidence of a crime. Finally, the seizure exceeded the scope of consent given by Appellant on the Consent to Search form, in that nowhere in the written form did Appellant authorize the seizure of the computer.**

*People v. Blair*, 748 N.E.2d 318 (Ill. App. 3 Dist. 2001)

*United States v. Luken*, 560 F.3d 741 (8th Cir. 2009)

*Illinois v. Rodriguez*, 497 U.S. 177 (1990)

*State v. Flores*, 920 P.2d 1038 (N.M. App. 1996)

## ARGUMENT

**I. The trial court erred in denying Appellant’s Second Motion to Dismiss the Indictment because Mo. Rev. Stat. § 566.151 violates the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution in that its internally inconsistent provisions render the statute impermissibly vague. Subsection (1) of the statute requires the State prove the victim was in fact less than fifteen years of age. Subsection (2) prohibits an accused from putting the State to its burden of proof with respect to the age of the victim if the victim happens to be a police officer masquerading as a child. Subsection (2) does not relieve the State of its burden of proof with respect to age in subsection (1), thereby creating the inconsistency – either the State must prove the accused enticed an actual child, rendering subsection (2) meaningless, or the State may prove the accused enticed a police officer masquerading as a child, rendering the age element of subsection (1) meaningless. The internal inconsistency deprives the citizen of fair warning and adequate notice of the prohibited conduct, and encourages arbitrary enforcement that lead to perverse and absurd results.**

For his first point on appeal, Appellant asserts that the trial court erred in denying Appellant’s Second Motion to Dismiss the Indictment because Mo. Rev. Stat. § 566.151 violates the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution in that its internally inconsistent provisions render the statute impermissibly vague. “The vice of vagueness in criminal statutes is the treachery they

conceal either in determining what persons are included or what acts are prohibited.” *United States v. Cardiff*, 344 U.S. 174, 176 (1952). “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). “The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute.” *United States v. Harriss*, 347 U.S. 612, 617 (1954). This Court has adopted the same approach to questions of vagueness. *See, State v. Schleiermacher*, 924 S.W.2d 269, 275 (Mo. banc 1996)(“Due process also requires that statutes speak with sufficient specificity and contain sufficient standards to prevent arbitrary and discriminatory enforcement.”); *State v. Stokely*, 842 S.W.2d 77, 80 (Mo. banc 1992)(“One lacks notice if the statute is so unclear that [people] of common intelligence must necessarily guess at its meaning.”).

Mo. Rev. Stat. § 566.151, which criminalizes the enticement of a child, suffers from the very “vice of vagueness” the United States Supreme Court has found fatal to criminal statutes for over a century. As Appellant will explain, subsection (1) of the statute requires the State prove the existence of an actual child victim – and the specific intent to entice an actual child victim – while subsection (2) prohibits the defendant from raising the affirmative defense that the victim was in fact a police officer masquerading as a child. The internal inconsistency created by the interplay of the two subsections (a) fails to give “fair notice of the offending conduct,” *Papachristou v. City of Jacksonville*, 406 U.S. 156, 162 (1972), leaving one to guess at whether the victim must be an actual

child or a police officer masquerading as a child; (b) arbitrarily relieves the State of its burden of proving the age of the victim only in the case of a police officer masquerading as a child; and (c) has the perverse effect of sanctioning enticement uncovered by adults other than a police officer masquerading as a child. Because an ordinary person of common intelligence cannot discern when and under what circumstances enticement requires an actual child victim and proof of the specific intent to entice an actual child, § 566.151 must be deemed void for vagueness.<sup>2</sup>

#### Standard of Review

Appellant submitted his Second Motion to Dismiss the Indictment to the trial court, and the trial court denied the motion. (LF 30-34; 43-45) Appellant renewed his Second Motion to Dismiss the Indictment at trial (TR 20), thereby preserving the issue for review. “Construction of a statute is a question of law, which this Court reviews *de novo*.” *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006). Challenges to the constitutionality of a statute involve special rules of review. First, a “statute is presumed to be valid and will not be held to be unconstitutional unless it clearly and undoubtedly

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<sup>2</sup> Appellant is aware that this Court recently reviewed Mo. Rev. Stat. § 566.151 for certain constitutional challenges in *State v. Pribble*, 285 S.W.3d 310 (Mo. banc 2009). While the defendant in that case did raise a vagueness challenge, he attacked § 566.151.3 and its use of the word “convicted” in the second sentence of the subsection. *Id.* at 314-315. Appellant has raised an entirely different challenge, one of first impression.

contravenes the constitution.” *Lester v. Sayles*, 850 S.W.2d 858, 872 (Mo. banc 1993). “Moreover, a statute will be enforced by the courts unless it plainly and palpably affronts fundamental law embodied in the constitution.” *Id.* “Finally, the burden of proof is on the party claiming that the statute is unconstitutional.” *Id.*

This Court has generally treated vagueness challenges not rooted in the First Amendment only as applied to the facts of the particular case. *See e.g., Prokopf v. Whaley*, 592 S.W.2d 819, 824 (Mo. banc 1980). However, the United States Supreme Court has held more recently that a criminal statute may be held facially invalid on vagueness grounds. *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999)(plurality opinion). The concurring opinions of Justice O’Connor and Justice Breyer would perhaps limit the facial invalidity to situations where the statute “lacks sufficient minimal standards to guide law enforcement officers.” *Id.* at 65-66 (O’Connor, J., concurring in part and concurring in the judgment); *id.* at 72 (Breyer, J., concurring in part and concurring in the judgment). Appellant suggests the Court consider the vagueness challenge to § 566.151 under *both* the facial and as applied standards.

As a final preliminary, an individual charged with attempted enticement of a child may maintain a vagueness challenge to the substantive offense of enticement of a child in § 566.151.1. In *State v. Pribble*, *supra*, 285 S.W.3d at 315-317, this Court considered an overbreadth challenge to the substantive definition of the offense of enticement of a child set forth in § 566.151.1 even though the defendant was convicted of attempted enticement of a child. Given that vagueness and overbreadth are closely related doctrines used to challenge the constitutionality of a statute, *see, Coates v. Cincinnati*, 402 U.S.

611, 614-15 (1971), previous consideration of an overbreadth claim by this Court in *Pribble* similarly supports consideration of the vagueness challenge raised by Appellant.<sup>3</sup>

#### Development of the Vagueness Doctrine

“As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary

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<sup>3</sup> Other state and federal courts have variously considered vagueness challenges to the substantive criminal statute by persons charged only with attempt. *See e.g., United States v. Rudzavice*, 586 F.3d 310, 314-315 (5th Cir. 2009)(defendant charged with attempting to transfer obscene material to a minor under the age of 16); *United States v. Hsu*, 40 F.Supp.2d 623, 625-627 (E.D. Pa. 1999)(defendant charged with attempted theft of trade secrets); *People v. Castro*, 657 P.2d 932, 939 (Col. 1983)(defendant charged with attempt to commit extreme indifference murder). Conspiracy offers another dispositive analogy. The federal conspiracy statute, 18 U.S.C. § 371, makes it a crime for two or more persons to agree to commit any substantive offense in the U.S. Code, and the Supreme Court allows persons charged with conspiracy to raise vagueness challenges to the predicate offense. *See e.g., Skilling v. United States*, 130 S. Ct. 2896, 2927-2928 (2010). If individuals cannot conspire to commit a predicate offense if that predicate offense lacks sufficient definiteness of meaning, it logically follows that one cannot take a substantial step toward the commission of an offense where a person of ordinary intelligence could not understand the conduct that offense prohibited.

and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The doctrine has a long pedigree, originating in the common law.<sup>4</sup> In *Connally v. General Const. Co.*, 269 U.S. 385 (1926), the Supreme Court for the first time expounded in greater detail on the vagueness doctrine and linked it to fundamental due process, declaring that “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates *the first essential of due process of law.*” *Id.* at 391 (emphasis added). “Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.” *Id.* at 393. In *Lanzetta v. New Jersey*, *supra*, the Supreme Court rooted the vagueness doctrine explicitly in the Due Process Clause of the Fourteenth Amendment.<sup>5</sup>

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<sup>4</sup> See, e.g., *United States v. Brewer*, 139 U.S. 278, 288 (1891)(“Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. Before a man can be punished, his case must be plainly and unmistakably within the statute.”).

<sup>5</sup> “The challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment.” *Id.*, 306 U.S. at 458.

Early cases under the Due Process Clause tended to invalidate statutes based on the lack of certainty in definition – for example, the meaning of “gang” in *Lanzetta* or the phrase “current rate of wages” in *Connally*. But two other early cases involving fair notice dealt with the internal inconsistency of the language of the statute. In *United States v. Evans*, 333 U.S. 483 (1948), the Supreme Court considered Section 8 of the Immigration Act of 1917, which provided:

That any person...who shall bring into or land in the United States...[or shall attempt to do so] or shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place...any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 and by imprisonment for a term not exceeding five years, *for each and every alien so landed or brought in or attempted to be landed or brought in.*

*Id.* at 483-484 (italics original). As should seem readily apparent, the absence of the words “concealing” and “harboring” in the italicized portion dealing with punishment created an internal inconsistency – the statute at its outset made “conceal or harbor” an element of the offense, but the statute at its end proscribed no punishment for one who would “conceal or harbor” an alien. The Government conceded “that in [its] terms the section prescribes no penalty for concealing or harboring,” likely a “result of oversight,” but argued that the phrase “conceal or harbor” becomes meaningless if not construed as

“bringing in or landing,” and so the Court “should plug the hole in the statute.” *Id.* at 487. After examining the multiple statutory ambiguities, the Court stated that “to resolve it broadside now for all cases the section may cover, on this indirect presentation, would be to proceed in an essentially legislative manner for the definition and specification of the criminal acts, in order to make a judicial determination of the scope and character of the penalty.” *Id.* at 490-91. The Court rejected this approach, noting the “uncertainty extends not only to the inconsistent penalties said to satisfy the section” but also “includes within varying ranges at least possible, and we think substantial, doubt over the section’s reach to bring in very different acts which conceivably might be held to be concealing or harboring” – a “task outside the bounds of judicial interpretation.” *Id.* at 495. “It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than *make speculation law.*” *Id.* (emphasis added).

In *United States v. Cardiff*, *supra*, the Court examined a section of the Federal Food, Drug and Cosmetic Act that prohibited the “refusal to permit entry or inspection” of federal officers or employees “after first making request and obtaining permission of the owner, operator or custodian” of the plant or factory “to enter” and “to inspect” the premises “at reasonable times.” *Id.*, 344 U.S. at 174-75. In reading the statute, the Court said it “would seem therefore on the face of the statute that the Act prohibits the refusal to permit inspection only if permission has been previously granted.” *Id.* at 176. The Justice Department argued the statute provides entry at any reasonable time and the refusal refers to the refusal to enter at any reasonable time. *Id.* at 175. The Court found

this construction “treacherous because it gives conflicting commands. It makes inspection dependent on consent and makes refusal to allow inspection a crime.” *Id.* at 176. Even the more reasonable “on its face” reading of the statute carried too much uncertainty, as it was not clear whether the prior consent had any relation to the current inspection request. *Id.* As a result, the Court held “it is not fair warning to the factory manager that if he fails to give consent, he is a criminal....We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold.” *Id.* at 176-77.

Certain principles emerge from the development of the “void-for-vagueness doctrine,” including the elements of fair notice, definiteness and non-arbitrary enforcement. Additionally, several of the seminal cases indicate that statutes which contain an irresolvable internal inconsistency violate all elements of the vagueness doctrine. More recent cases in Missouri and other jurisdictions support this interpretation of the vagueness doctrine.

In *Board of Education of St. Louis v. State of Missouri*, 47 S.W.3d 366 (Mo. banc 2001), the Board of Education of the City of St. Louis sought a declaratory judgment to find amendments to Mo. Rev. Stat. § 162.601 unconstitutionally vague. Subsection (6) of the amended statute stated that the Board shall consist of seven subdistricts “established by the state board of education,” while subsection (7) of the amended statute specifically enumerated the composition of each subdistrict. This Court held that the “terms of section 162.601.6 and .7 are of such uncertain and contradictory meaning that this Court is unable to discern with reasonable certainty what was intended.

The lack of legislative power to supplement or correct the identified deficiencies by either the Board or the courts renders these provisions constitutionally void for vagueness.” *Id.* at 368.

The Supreme Court of Georgia recently faced a similar challenge in *Mason v. Home Depot U.S.A., Inc.*, 658 S.E.2d 603 (Ga. 2008). The plaintiffs claimed that two provisions of the Tort Reform Act of 2005, OCGA § 24-9-67.1, were hopelessly contradictory. Subsection (a) of the statute allowed an expert witness to base his opinion on facts or data that “need not be admissible in evidence in order for the opinion or inference to be admitted.” OCGA § 24-9-67.1(a). Subsection (b)(1) of the statute stated that an expert may give his opinion only if “based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial.” OCGA § 24-9-67.1(b)(1). *Id.* at 606, n. 1. The Georgia Supreme Court concluded, succinctly, that “subsection (b)(1) limits experts to relying on potentially admissible facts and data, whereas subsection (a) plainly states that facts and data relied upon need not be admissible. The two provisions cannot be harmonized, and read together, they render the statute unconstitutionally vague.” *Id.* at 608.

And perhaps most apposite, in *Commonwealth v. Gagnon*, 387 Mass. 567, 441 N.E.2d 753 (1982), the Supreme Judicial Court of Massachusetts faced a statute criminalizing distribution of a controlled substance that in its first sentence stated “shall be punished by a term of imprisonment in the state prison for not less than one year and not more than ten years, or by a fine of not less than \$1,000 and not more than \$10,000, or both” and in the following sentence stated that “[a]ny person convicted of violating

this subdivision shall be punished by a mandatory minimum one year term of imprisonment.” *Id.* at 568. The Commonwealth urged an interpretation, culled from the legislative history, “to allow punishment by imprisonment, or fine, or both, and as to provide that no term of imprisonment imposed should be for less than one year although execution could be suspended.” *Id.* at 571. The SJC rejected this approach: “Should we accept the construction urged by the Commonwealth, we would be left with a two-sentence subsection whose second sentence would be contrary to the otherwise clear meaning of the first sentence,” a reading that “would not require us to interpret ambiguous language to make the statute clear *but to ignore the language which makes the statute unclear.*” *Id.* at 573 (emphasis added). Recognizing the “reasonable doubt about the meaning” of the statute flowing from the internal inconsistency of its two sentences, the SJC held it “void for vagueness.” *Id.* at 574. *See also, United States v. Colon-Ortiz*, 866 F.2d 6 (1st Cir. 1989)(finding unconstitutionally vague a similar sentencing statute with an internal inconsistency).

*Board of Education, Mason and Gagnon* – like *Evans* and *Cardiff* – create an unbroken chain with regard to civil and criminal statutes containing internal inconsistencies, collectively holding that such statutes are unconstitutionally vague. Appellant maintains that same internal inconsistency fatally infects the statute at issue in this case and renders it unconstitutionally vague.

Mo. Rev. Stat. § 566.151

The General Assembly enacted § 566.151 in 2002. Though the General Assembly subsequently amended the statute in 2006, that amendment only involved the language

regarding punishment for the offense; the language Appellant challenges has remained intact since the original enactment of the statute. Mo. Rev. Stat. § 566.151 states:

1. A person at least twenty-one years of age or older commits the crime of enticement of a child if that person persuades, solicits, coaxes, entices, or lures whether by words, actions or through communication via the Internet or any electronic communication, any person who is less than fifteen years of age for the purpose of engaging in sexual conduct.
2. It is not an affirmative defense to a prosecution for a violation of this section that the other person was a peace officer masquerading as a minor.

Subsection (1) of the statute sets forth the elements of the offense. As reflected in MAI-CR 320.37.1, the statute requires the State to prove (1) the defendant “persuaded, solicited, coaxed, enticed or lured” the victim by “words, actions or communications,” (2) that the defendant did so for the purpose of engaging in sexual conduct with the victim, (3) that at the time of the alleged incident, the victim was less than fifteen years of age, (4) that defendant knew the victim was less than fifteen years of age or it was the defendant’s purpose to have sexual conduct with a person less than fifteen years of age, and (5) that the defendant was at least twenty-one years of age. Nothing in subsection (1) suggests that the victim need not be an actual child; to the contrary, the plain and ordinary meaning of the subsection reveals that the victim *must be* an actual person less

than fifteen years of age *and* that the defendant knew the victim was less than fifteen years of age.

Subsection (2) of the statute effects no changes to the elements of subsection (1), but introduces a restriction on the defenses available to the defendant. It in essence allows the State to use a peace officer as a proxy for the actual minor child victim set out in subsection (1) and seems to prohibit the defendant from challenging such subterfuge. The approved jury instructions make no mention of this subsection. Critically, subsection (2) by its plain language eliminates an affirmative defense – a restraint on the criminal defendant – but in no way alters the burden of the prosecution to prove all of the elements of the offense set forth in subsection (1). Therefore, though the State continues to have the burden of proving every element in subsection (1), including the age of the victim, subsection (2) makes it impossible for the defendant to challenge the age of the victim when the “victim” in question is really a police officer masquerading as a child.

Age has particular importance in Chapter 566 of the Revised Statutes, the section of the criminal code the General Assembly deems Sexual Offenses. First, age separates the degree of harm in several offenses. For example, statutory rape in the first degree requires the victim be “less than fourteen years old” while statutory rape in the second degree requires the victim be “less than seventeen years old.”<sup>6</sup> The exact same age differences distinguish statutory sodomy in the first degree from statutory sodomy in the

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<sup>6</sup> *Cf.* Mo. Rev. Stat. § 566.032.1 with Mo. Rev. Stat. § 566.034.1.

second degree,<sup>7</sup> and child molestation in the first degree and child molestation in the second degree.<sup>8</sup> Second, age separates the severity of punishment among otherwise similar offenses. For example, forcible rape has a general term of imprisonment of “life imprisonment or a term of years not less than five years,” but when the victim is less than twelve years of age, the punishment becomes mandatory life imprisonment with a minimum sentence of thirty years before any possibility of parole.<sup>9</sup> Similar increases in punishment apply for the crimes of statutory rape in the first degree, statutory sodomy in the first degree, child molestation in the first degree and sexual trafficking of a child.<sup>10</sup> Courts strictly construe these age categorizations; if the State fails to prove the victim met the requisite age, a conviction cannot stand. *See e.g., State v. Dixon*, 70 S.W.3d 540, 545 (Mo. App. 2002)(reversing convictions for first degree statutory rape and first degree statutory sodomy because State failed to prove the victim was less than fourteen years of age at the time of the offense). Enticement of a child and sexual misconduct involving a child (Mo. Rev. Stat. § 566.083) are the only offenses in Chapter 566 that contain exclusions of the affirmative defense that the victim was actually a law enforcement officer masquerading as a child. Given the canon of statutory construction to read

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<sup>7</sup> *Cf.* Mo. Rev. Stat. § 566.062.1 with Mo. Rev. Stat. § 566.064.1.

<sup>8</sup> *Cf.* Mo. Rev. Stat. § 566.067.1 with Mo. Rev. Stat. § 566.068.1.

<sup>9</sup> *Cf.* Mo. Rev. Stat. § 566.030.2 with Mo. Rev. Stat. § 566.030.2(2) and (3).

<sup>10</sup> *See.* Mo. Rev. Stat. § 566.032.2, Mo. Rev. Stat. § 566.062.2, Mo. Rev. Stat. § 566.067.2 and Mo. Rev. Stat. § 566.213.3.

statutes *in pari materia*,<sup>11</sup> it seems that the intent of all the sexual offenses in Chapter 566 is to punish acts and attempts to act involving “real” victims, and not to give the police *carte blanche* to run sting operations for any and every conceivable sex offense, no matter how noble their intentions may be with regard to safeguarding children. At a minimum, if the General Assembly decides it wishes to expand the scope of Chapter 566 to apply to situations where no actual child is involved, the General Assembly must *explicitly say so* by crafting such laws in a manner consistent with due process standards of fair notice, definiteness and the burden of proof. As Appellant will explain, with regard to Mo. Rev. Stat. § 566.151, the General Assembly failed to meet these standards.

#### Why § 566.151 is Unconstitutionally Vague

Mo. Rev. Stat. § 566.151 suffers from an internal inconsistency – subsection (1) requires the State prove the victim was in fact an actual child, and that the defendant had the specific intent to entice an actual child. However, subsection (2) prohibits the defendant from putting the State to its burden of proof with respect to the age of the victim if the victim happens to be a police officer masquerading as a child. While subsection (2) seems to have the purpose of allowing the State to escape its burden of proof as to the age of the actual victim when said victim is actually a police officer

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<sup>11</sup> “All consistent statutes relating to the same subject are *in pari materia* and are construed together as though constituting one act, whether adopted at different dates or separated by long or short intervals.” *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991).

masquerading as a child, the drafting of the statute suggests otherwise – as noted, removing an affirmative defense from the defendant does not relieve the State of its burden of proof on the elements of subsection (1), which includes proving the victim was a child. Moreover, with regard to *mens rea*, nothing in subsection (2) relieves the State of proving the defendant intended to entice an actual child. The statute as written has a patent internal inconsistency – either the State must prove the defendant enticed an actual child, rendering subsection (2) meaningless, or the State may prove the defendant enticed a police officer masquerading as an officer, rendering the age element of subsection (1) meaningless.

The inconsistency with respect to age as an element of the offense and the burden of proof has enormous due process implications. The Due Process Clause “requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.” *Patterson v. New York*, 432 U.S. 197, 210 (1977); *State v. Murray*, 744 S.W.2d 762, 771 (Mo. banc 1988). The definition of the offense of enticement of a child, found in subsection (1), requires the State prove the victim was under the age of fifteen. The drafting of subsection (2) has the effect of precluding the defendant from holding the State to its burden of proof on the issue of the age of the victim when the victim was in fact a police officer masquerading as a child – even though nothing in subsection (2) actually relieves the State of its burden to prove the element of age. Worse, the idea that the State could create an affirmative defense – that the defendant must prove – with regard to the age of the victim unconstitutionally shifts the burden of proof of an essential element of the offense onto

the defendant.<sup>12</sup> Hence, the statute has an added layer of ambiguity because it implies that the defendant would have to prove as an affirmative defense that the victim was not a child under the age of fifteen but instead a police officer masquerading as a child – a burden the Constitution prohibits the State from imposing on the defendant because age is an essential element of the crime.<sup>13</sup> The vagueness of the statute inheres not only in the confusion regarding when the victim must in fact be a child less than fifteen years of age, but also in arbitrarily depriving the defendant of the ability, as required by the Due

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<sup>12</sup> *Patterson* defines “affirmative defense,” for constitutional purposes, as one that “does not serve to negate any facts of the crime which the State must prove in order to convict of” the crime charged. *Id.*, 432 U.S. at 206-07. Relying on *Patterson*, the Fourth Circuit, in *Adkins v. Bordenkircher*, 674 F.2d 279 (4th Cir. 1982), found unconstitutional a West Virginia jury instruction that deemed an alibi defense an affirmative defense which defendant had to prove by a preponderance of the evidence. *Id.* at 282. *See also*, *State v. Powdrill*, 684 So.2d 350, 355-56 (La. 1996)(finding unconstitutional a securities fraud statute that placed upon the defendant the burden of proving knowledge of an “untruth or omission”).

<sup>13</sup> As stated by the Fifth Circuit in *Holloway v. McElroy*, 632 F.2d 605, 625 (5<sup>th</sup> Cir. 1980), in explaining the holding of *Patterson* as it relates to an affirmative defense: “despite a State’s characterization of an issue as being an ‘affirmative defense,’ the State may not place the burden of persuasion on that issue upon the defendant if the truth of the ‘defense’ would necessarily negate an essential element of the crime charged.”

Process Clause, to hold the State to its burden of proof with respect to the age of the victim *if and only if* the victim happens to be a police officer masquerading as a child, even though the statute fails to relieve the State of proving the element of age *even if* the victim happens to be a police officer masquerading as a child.

An experienced attorney licensed to practice law in Missouri, let alone an ordinary person of common intelligence, could not determine whether and under what circumstances § 566.151 requires an actual child victim in order to secure a conviction for the substantive offense or the attempt. Furthermore, if an adult who was not a police officer masqueraded as a child on the Internet and acted entirely as Detective Erica Stough, the State would fail to meet its burden of proof, because in this situation the affirmative defense would not apply and the defendant could challenge the sufficiency of the evidence – an arbitrary and unreasonable result.<sup>14</sup> Plainly, § 566.151 as drafted

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<sup>14</sup> Recently, in *State v. Davies*, No. WD70910 (Mo. App., December 14, 2010) the Western District held that a college intern working for the Buchanan County Sheriff and masquerading as a child on the Internet did not fall within the exception of subsection (2) of the enticement statute and therefore reversed a conviction for enticement. *Id.* at 11. However, the Western District found the defendant guilty of attempted enticement. *Id.* at 12-16. Appellant argues that this holding, consistent with others upholding convictions for attempted enticement of a child, *see e.g., State v. Wadsworth*, 203 S.W.3d 825, 832-33 (Mo. App. 2006), must yield to the constitutional requisites presented by Appellant in this case of first impression.

evinces an internal inconsistency that leaves both the ordinary person and the trained lawyer to guess at the intended meaning of the statute with regard to the age of the victim.

One can further appreciate the error of the General Assembly in drafting § 566.151 by looking to other state statutes that criminalize enticement of a child. For example, Idaho sought to accomplish the same effect as the General Assembly with respect to eliminating the affirmative defense of claiming the victim was instead a law enforcement officer. The statute provides:

- (1) A person aged eighteen (18) years or older shall be guilty of a felony if he or she knowingly uses the internet to solicit, seduce, lure, persuade or entice by words or actions, or both, a minor child under the age of sixteen (16) years *or a person the defendant believes to be a minor child under the age of sixteen (16) years* to engage in any sexual act with or against the child where such act is a violation of chapter 15, 61 or 66, title 18, Idaho Code.
- (2) Every person who is convicted of a violation of this section shall be punished by imprisonment in the state prison for a period not to exceed fifteen (15) years.
- (3) It shall not constitute a defense against any charge or violation of this section that a law enforcement officer, peace officer, or other person working at the direction of law enforcement was involved in the detection or investigation of a violation of this section.

I.C. § 18-1509A (2007)(emphasis added). As the highlighted language indicates, the Idaho legislature altered the elements of the offense so that the prosecution need not prove an actual child victim or the specific intent to entice an actual child victim, but merely a person the defendant believed to be a minor – thereby communicating to the average person of ordinary intelligence that the prohibited conduct could include enticing a person masquerading as a minor so long as the actor believed he was enticing an actual minor. Having eliminated the need to prove an actual child victim in subsection (1), the statute in subsection (3) eliminates the defense that a law enforcement officer masquerading as a minor was the “victim” – an unproblematic declaration since it is consistent with the elements of the offense as set out in subsection (1). Most states have taken this approach.<sup>15</sup> Other states are even more explicit. For example, Tennessee

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<sup>15</sup> See, Alaska Rev. Stat. § 11.41.452 (2008)(“the person believes that the other person is a child under 16 years of age”); Colo. Rev. Stat. § 18-3-405.4 (2008)(“a person whom the actor knows or believes to be under fifteen years of age”); Ind. Code § 35-42-4-6 (2008)(“or an individual the person believes to be a child under fourteen”); Mass. G.L. c. 265, § 26C (2008)(“or someone he believes to be a child under the age of 16”); Iowa Code § 710.10 (2008)(“or entices away a person reasonably believed to be under the age of sixteen”); Fla. Stat. Ch. 847.0135.3(a) (2008)(“a child or another person believed by the person to be a child”); 72 ILCS 5/11-6 (2008)(“a child or one whom he or she believes to be a child”); Me. Rev. Stat. § 17-A-259 (2008)(“knows or believes that the other person is less than 14 years of age”); Mich. Comp. Laws § 750.145d (2008)(“a

makes it an offense “to intentionally command, request, hire, persuade, invite or attempt to induce a person whom the person making solicitation knows, or should know, is less

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minor or is believed by that person to be a minor”); Mont. Code § 45-5-625 (2008)(“or a person the offender believes to be a child under 16 years of age”); Minn. Stat. § 609.352 (2008)(“child or someone the person reasonably believes is a child”); Nev. Rev. Stat. § 201.560 (2008)(“another person whom he believes to be a child who is less than 16 years of age”); N.H. Stat. § 649-B:4 (2008)(“a child or another person believed by the person to be a child”); N.D. Cent. Code § 12.1-20-05.1 (2008)(“or induces a person the adult believes to be a minor”); N.C. Gen. Stat. § 14-202.3 (2008)(“or a person the defendant believes to be a child who is less than 16 years of age”); Okla. Stat. § 21-1040.13a (2008)(“or other individual the person believes to be a minor”); R.I. Gen. Laws § 11-37-8.8 (2008)(“or one whom he or she believes is a person under eighteen”); S.C. Code § 16-15-342 (2008)(“or a person reasonably believed to be under the age of eighteen”); Tex. Penal. Code § 33.021 (2008)(“an individual whom the actor believes to be younger than 17 years of age”); Utah Code Ann. § 76-4-401 (2008)(“or another person that the actor believes to be a minor”); Vt. Stat. Tit. 13 § 2828 (2008)(“or another person believed by the person to be a child under the age of 16”); Va. Code § 18.2-374.3 (2008)(“any person he knows or has reason to believe is a child less than 15 years of age”); Wis. Stat. § 948.075 (2008)(“an individual who the actor believes or has reason to believe has not attained the age of 16 years”); W.V. Code § 61-3C-14B (2008)(“or a person he or she believes to be such a minor”).

than eighteen (18) years of age, *or solicits a law enforcement officer posing as a minor*, and whom the person making the solicitation reasonably believes to be less than eighteen (18) years of age, to engage in conduct” prohibited by law. Tenn. Code. § 39-13-528(a) (2008). Kentucky, Maryland and Nebraska have similar statutes.<sup>16</sup> In sum, nearly every state other than Missouri drafted their child enticement statutes to include as an element of the offense that the victim need not be an actual child but can be an individual the actor believes to be a child – or simply a law enforcement officer masquerading as a minor. Had the General Assembly similarly followed suit, it would have eliminated the constitutional infirmity that plagues § 556.151 now.

In *Evans, supra*, the Supreme Court held that the judiciary may not engage in guesswork when the legislature drafts an internally inconsistent statute without “mak[ing] speculation law.” The statute at issue in this case, § 566.151, mirrors the fatally flawed statutes in *Evans, Gagnon* and *Board of Education* – it contains two irreconcilable subsections that leave the ordinary person and experienced jurist to guess at whether the victim must be less than fifteen years of age. As written, the statute gives the State the impossible task of proving the age of a child victim (as an element in itself and as part of the element of intent) in every case where a police officer masquerades as a child. While

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<sup>16</sup> Ky. Rev. Stat. § 510.155 (2008)(“or a peace officer posing as a minor”); Md. Code. Crim. Law § 3-324 (2008)(“or a law enforcement officer posing as a minor”); Neb. Rev. Stat. § 28-320.02 (2008)(“a peace officer who is believed by such person to be a child sixteen years of age or younger”).

the General Assembly may have intended to allow for sting operations of adults attempting enticement of children on the Internet, it drafted a statute that failed to effect that intent consistent with the guarantees of the Due Process Clause of the Fifth and Fourteenth Amendments. To cure the statute, this Court would have to hold that the General Assembly did not mean what it said with regard to the age of the victim in subsection (1), at least when the victim happens to be a police officer masquerading as a child. But as this Court itself stated in *State v. Young*, 695 S.W.2d 882, 886 (Mo. banc 1985) , “[f]or this Court to convert the statute into a constitutional proscription would be to indulge in statutory revision, a matter within the exclusive province of the General Assembly.” Because § 566.151 suffers from internal inconsistencies which deprive the citizen of fair warning and adequate notice of the prohibited conduct and also encourage arbitrary enforcement that leads to perverse and absurd results, Appellant asserts that the Court should find § 566.151 unconstitutionally vague and reverse Appellant’s conviction and order him discharged.

**II. The trial court erred in denying Appellant's motion to suppress and admitting into evidence over his objection inculpatory statements, including those reduced to writing, obtained from Appellant by Detective Osterloh after he advised Appellant of his rights per *Miranda*, because the statements were procured through a series of misrepresentations by Detective Osterloh that rose to the level of an implied threat, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Detective Osterloh admitted he led Appellant to believe, prior to questioning, that the parents of the alleged child victim intended to pursue charges of sexual assault against Appellant, even though neither the parents, the child nor the assault actually existed. Additionally, Detective Osterloh talked with Appellant about his immigration status and country of origin, planting seeds of worry that non-cooperation could lead to deportation. The implied threat of a charge of sexual assault, combined with discussions about the nationality and immigration status of Appellant who had a diminished understanding of English and no familiarity with the American criminal justice system, created a set of circumstances which coerced Appellant to make incriminating statements.**

For his second point on appeal, Appellant asserts that the trial court erred in denying his motion to suppress and admitting into evidence over his objection inculpatory statements, including those reduced to writing, obtained from Appellant by Detective Osterloh after he advised Appellant of his rights per *Miranda*, because the statements were procured through a series of misrepresentations by Detective Osterloh

that rose to the level of an implied threat, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The United States Supreme Court has “long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.” *Miller v. Fenton*, 474 U.S. 104, 109 (1985). In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court “stress[ed] that the modern practice of in-custody interrogation is psychologically rather than physically oriented,” and that in police manuals “interrogators sometimes are instructed to induce a confession out of trickery.” *Id.* at 448, 453. As a response to these more subtle coercive techniques, the Supreme Court held that, to safeguard the Fifth Amendment right against self-incrimination, “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” *Id.* at 444. “After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement.” *Id.* at 479. The issue of waiver has two distinct dimensions: “First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *Moran v. Burbine*, 475 U.S. 412, 421 (1986). “Only if the ‘totality of the circumstances

surrounding the interrogation’ reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.” *Id. Cf., State v. Simmons*, 944 S.W.2d 165, 173 (Mo. banc 1997)(“The test for whether a confession is voluntary is whether the totality of the circumstances created a physical or psychological coercion sufficient to deprive the defendant of a free choice to admit, deny or refuse to answer the examiner's questions.”)

As Appellant will explain, Detective Osterloh acknowledged at the pre-trial suppression hearing that he began his interrogation of Appellant with a knowingly false pretense – that the parents of the non-existent child victim have threatened to pursue a complaint that Appellant attempted to sexually assault their daughter. Only after manufacturing this patently false threat of parents set on obtaining justice for their child did Detective Osterloh begin to elicit from Appellant the inculpatory statements introduced at the trial of this case. Because such coercive police conduct, when viewed in the totality of the circumstances of a Pakistani resident alien in fear of deportation and possessing only a compromised understanding of English and the American criminal justice system, improperly induced Appellant to speak with Detective Osterloh, neither the waiver by Appellant of his Fifth Amendment right against self-incrimination nor the incriminating statements themselves can be considered the product of “free and rational choice.” The trial court erred in denying the motion to suppress and allowing the State to introduce these illegally obtained statements into evidence.

#### Standard of Review

Appellant filed a Motion to Suppress Statements which the trial court, after an evidentiary hearing, denied. (LF 20-22; 29) Appellant renewed his objections to the admission of any of his statements, whether orally or in writing, at the outset of the trial (TR 20), thereby preserving the issue for review. “When reviewing a trial court's ruling on a motion to suppress, the inquiry is limited to whether the court's decision is supported by substantial evidence.” *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998). The Court generally defers to the trial court for the credibility of the witnesses, but reviews questions of law *de novo*. *Id.* When a defendant challenges the admissibility of a statement as involuntary, the State bears the burden of proving voluntariness by a preponderance of the evidence. *Id.*

#### Police Deception and the Voluntariness of Inculpatory Statements

“The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.” *Spano v. New York*, 360 U.S. 315, 320-21 (1959). In *Spano*, the police selected a childhood friend of the defendant as his interrogator; utilizing a series of factual misrepresentations and false threats that his criminal predicament could result in the loss of his job, his wife and his children, this “false friend” extracted a confession. *Id.* at 322-23. The Supreme Court held the confession involuntary, produced by “official pressure, fatigue and sympathy falsely aroused.” *Id.* at 323.

Since *Spano*, the Supreme Court has repeatedly held that knowingly false statements made by police officers to induce a confession undermine the voluntariness of the confession. In some cases, the subterfuge is one factor weighing against voluntariness. See e.g., *Frazier v. Cupp*, 394 U.S. 731, 739 (1969). In other cases, the subterfuge renders the statement inherently involuntary. See e.g., *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963)(defendant threatened with false statement that she would lose her welfare benefits and custody of her children if she failed to cooperate with police). The closer the police misconduct approaches the threat of a tangible benefit or legal right, the more likely the confession will be deemed involuntary.

Missouri courts have followed a similar path. “The rule in Missouri, as well as in a majority of states, is that statements obtained through subterfuge are admissible unless the deception offends societal notions of fairness or is likely to procure an untrustworthy confession.” *State v. Wilson*, 755 S.W.2d 707, 709 (Mo. App. 1988). “The statements made to the suspect must constitute either a threat or promise of leniency in order to render the confession involuntary.” *Id.*

#### The Suppression Hearing Testimony

Detective Osterloh testified that he alone of the officers involved in the case interviewed Appellant. (STR1, 28) He acknowledged Appellant was at the time under arrest. (STR1, 28) He did administer the *Miranda* warnings prior to conducting the interview, and Appellant waived these rights in writing. (STR1, 12-13) He acknowledged that Appellant spoke with an accent and that he was a Pakistani citizen. (STR1, 28, 33) Questioning next focused on the beginning of the interrogation:

Q. Okay. Now, you began your interrogation of Mr. Faruqi by lying to him about fictitious complaints from the parents of a 14-year-old girl, concerning the exploitation of their daughter, is that correct?

A. That's correct.

Q. You told him that the fictitious parents of this imaginary daughter had made a complaint about him trying to have sex with their 14-year-old daughter, which was a lie; isn't that correct?

A. Yes.

Q. It was your intention for him to believe these lies; isn't that correct?

A. Yes.

Q. And by believing those lies, you thought that this would help you in your interrogation of Mr. Faruqi; isn't that correct?

A. Yes.

Q. It was your hope that if he believed these lies and felt sympathy for the parents of this imaginary 14-year-old girl, that he would make admissions to you that would help you convict him; isn't that correct?

A. I don't know that I would say it was my hope. That was the intent.

Q. That was your intention?

A. Yes.

Q. Yes. And that worked, didn't it?

A. Yes.

Q. Yes. You also told Mr. Faruqi that he was being accused of trying to have sex with quote, the girl; isn't that right?

A. Yes.

Q. That was another part of the lie; right?

A. Yes.

Q. You write in your report that you asked Mr. Faruqi about customs of his country; isn't that correct?

A. Yes.

Q. And in your deposition, you stated that the purpose of that question was to determine if he understood the laws, quote, of this country as far as having sex with a minor, unquote. Do you remember giving that answer?

A. Yes, sir.

Q. You also said that this question had no relevance and that you were only, quote, trying to get into Mr. Faruqi's head, unquote. Do you recall saying that to me?

A. Yes.

\* \* \*

Q. So what you were trying to do by your questions, which were lies, contained lies, was to get into his head; correct? Right?

A. And get to the truth.

Q. Yes. Now, you then asked Mr. Faruqi how he, quote, met the girl, when in fact, there was no girl; right? This was another lie?

A. Yes.

Q. So as part of your lies, you were trying to convince Mr. Faruqi that, in fact, there was a girl when, in fact, there wasn't a girl? Isn't that correct?

A. Yes.

(STR1, 37-39)

#### Why The Confession Was Involuntary

After the police make an accused aware of his constitutional rights per *Miranda*, an accused may opt to waive these rights, but only through a “knowing, voluntary and intelligent” waiver. *Wyrick v. Fields*, 459 U.S. 42, 48 (1982); *State v. Powell*, 798 S.W.2d 709, 713 (Mo. banc 1990). The totality of the circumstances surrounding the interrogation of Appellant suggests that the intentional pattern of deception and implicit threat, combined with the individual characteristics of Appellant, render his waiver and subsequent statements involuntary.

Detective Osterloh admits he had an intentional plan of deceit – he sought to make Appellant believe not only that he communicated with a real fourteen-year-old girl, but also that her parents sought to prosecute him for sexual assault. He admits he had a full awareness of the status of Appellant as a resident alien from Pakistan, and that he inquired of Appellant about the cultural mores regarding sex with minors. He took advantage of the fact that Appellant spoke English poorly and had little understanding of

the American criminal justice system. He frankly states he sought to “get into his head” with the goal of extracting a confession.

The behavior of Detective Osterloh went beyond simple deception and broached the line of implicit threat. Before Appellant began to make any statements, Detective Osterloh convinced Appellant he had to face the wrath of the parents of a teenage girl seeking justice who believed Appellant sexually assaulted their daughter or at a minimum attempted to do so. The idea of a complaint also could imply a civil suit for damages. Hence, prior to engaging in any statements, Appellant already felt coercion from two patently false threats – a (non-existent) sworn complaint by (non-existent) parents of a (non-existent) teenage girl for a (non-existent) sexual assault, that could lead to (non-existent) criminal charges or a (non-existent) civil suit for money damages. Detective Osterloh did more than manufacture evidence; he fabricated and convincingly sold a storyline whose end would result in criminal or civil outcomes against Appellant – knowing the entire time that such a storyline was a factual and legal impossibility – for the express purpose of making Appellant incriminate himself. And he stated on more than one occasion that was his unequivocal intent.

Additionally, Detective Osterloh talked with Appellant about his immigration status and country of origin, planting seeds of worry that non-cooperation could lead to deportation. In *United States v. Russell*, 686 F.2d 35, 41 (D.C. Cir. 1982), the D.C. Court of Appeals faced a similar question in a related context – whether the risk of deportation could vitiate an otherwise voluntary guilty plea. “The serious consequences of involuntary deportation clearly demonstrate how the threat of deportation could be

abused during plea negotiations. It can readily be imagined that some resident aliens might prefer to avoid even the risk of deportation rather than stand trial for crimes of which they believed themselves innocent.” *Id.* Because of these concerns, the Court held involuntary a plea entered pursuant to the prosecutor misleading the defendant about the consequences of deportation. *See also, Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010)(finding plea involuntary where defense counsel misrepresents to defendant impact of plea on immigration status).

The present case seems closest to *Ex parte McCrary*, 528 So.2d 1133 (Ala. 1988). Police officers took the defendant into custody on suspicion of a bank robbery. During questioning, one of the police officers made an “affirmative misrepresentation” to the defendant – that they found a certain Paul Thibodeaux “with a bullet between his eyes.” *Id.* In response, the defendant “swallowed real hard and he said, look, let me tell you something, I didn’t kill the man. I did not pull that trigger; Rubyn Smith did that.” *Id.* Subsequently, the defendant confessed to the robbery. *Id.* The defendant challenged the confession as involuntary, and the Alabama Supreme Court agreed:

We view the statement of Chief Deputy Mims as being an affirmative misrepresentation to the [defendant] that he was suspect of killing Paul Thibodeaux. At the time the statement was made to [defendant], both Henderson and Mims were well aware that Thibodeaux was not dead....It is apparent to us that the interrogating officers in this case were trying to get [defendant] to confess to the robbery at Martin’s Mercantile by suggesting to him that Thibodeaux had been killed, the

implication being that [defendant] might avoid prosecution for the murder of Thibodeaux if he confessed to the robbery....We hold, therefore, that [defendant's] confession must be deemed not voluntary, but coerced.

*Id.* at 1134. As in *McCrary*, Detective Osterloh made an affirmative misrepresentation – indeed multiple affirmative misrepresentations – namely, that the parents of a teenage girl intended to pursue a criminal complaint of sexual assault against Appellant. Like *McCrary*, where the “murder” of Paul Thibodeaux never actually occurred, so too in this case the non-existent parents of a non-existent teenage girl pursuing a criminal complaint for a non-existent sexual assault never actually occurred. In *McCrary*, fear of a more severe (and non-existent) criminal charge of murder induced a confession to a lesser crime of robbery; in this case, fear of a more severe (and non-existent) criminal charge of sexual assault induced a confession to a lesser crime of attempted enticement of a child. Given the essential similarities in the two cases, the outcomes should be the same – the inculpatory statements made by Appellant should be deemed involuntary.

### Conclusion

In this case, Detective Osterloh admitted in his suppression testimony that he knowingly created a non-existent situation – two angry parents filing a complaint against Appellant for sexually assaulting their daughter – to “get into the head” of Appellant and force him to incriminate himself. The implied threat of a charge of sexual assault, combined with discussions about the nationality and immigration status of Appellant who had a diminished understanding of English and no familiarity with the American criminal justice system, created a set of circumstances which coerced Appellant to make

incriminating statements. From *Lynumn* to *McCrary*, courts have consistently held that statements obtained as a result of such intentional police deception rise to the level of an implied threat that vitiates any waiver of rights and renders the confession involuntary under the Fifth and Fourteenth Amendments. The trial court erred in failing to suppress all of the oral and written statements obtained by the State as a result of the custodial interrogation of Appellant, and erred in allowing the oral and written statements into evidence at trial. This Court should find all such statements involuntary and reverse the judgment of the trial court and remand for a new trial free of any illegally obtained statements.

**III. The trial court erred in denying Appellant’s motion to suppress and admitting into evidence over his objection forensic information obtained as a result of an illegal seizure of a computer owned by T-Mobile and located in the store which Appellant managed, in violation of the Fourth and Fourteenth Amendments to the United States Constitution. The police secured a consent to search in writing from Appellant even though they lacked reason to believe Appellant had apparent authority to consent to a search (let alone a seizure) of the computer located at the T-Mobile store. Further, a third party lacking any ownership interest in the private property of another cannot give consent to seize said property, and the police lacked probable cause at the time of the seizure to believe the computer contained evidence of a crime. Finally, the seizure exceeded the scope of consent given by Appellant on the Consent to Search form, in that nowhere in the written form did Appellant authorize the seizure of the computer.**

For his third point on appeal, Appellant asserts that the trial court erred in denying his motion to suppress and admitting into evidence over his objection forensic information obtained as a result of an illegal seizure of a computer owned by T-Mobile and located in the store which Appellant managed, in violation of the Fourth and Fourteenth Amendments to the United States Constitution. “It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.” *Schneckloth v. Bustamonte*, 412 U.S. 218,

219 (1973). “It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.” *Id.* Consent to search is valid “only if it is freely and voluntarily given,” considering the “totality of the circumstances,” by asking whether “an objective observer would conclude that the person giving consent made a free and unrestrained choice to do so.” *State v. Hyland*, 840 S.W.2d 219, 221 (Mo. banc 1992). “In order for a consensual search to be valid, consent must actually be given (either express or implied), and the person giving consent must have (actual or apparent) authority to do so.” *United States v. Williams*, 521 F.3d 902, 906 (8th Cir. 2008). “The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?” *United States v. Santana-Aguirre*, 537 F.3d 929, 932 (8th Cir. 2008), *citing*, *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). The Fourth Amendment protections for searches apply with equal force to seizures. *Soldal v. Cook County*, 506 U.S. 56, 63 (1992).

As Appellant will explain, Appellant signed a “Consent to Search” form provided to him by Detective Oserterloh. The “Consent to Search” form plainly states that Appellant gave consent to officers of the Maryland Heights Police Department to *search* – not *seize* – a Dell Computer located at the T-Mobile store Appellant manages. Even assuming that the police lawfully believed Appellant had apparent authority to consent to a search of a computer owned by his employer, T-Mobile, the seizure of the computer prior to its search and discovery of any contraband went beyond the scope of consent

given by Appellant. Consequently, the seizure of the computer violated the Fourth and Fourteenth Amendments to the United States Constitution, and all forensic information obtained from the seizure of the computer should have been suppressed as fruit of the poisonous tree. The trial court erred in denying the motion to suppress and allowing the State to introduce the forensic derivatives from the computer into evidence.

#### Standard of Review

Appellant filed a Motion to Suppress Physical Evidence which the trial court, after an evidentiary hearing, denied. (LF 20-22; 29) Appellant renewed his objections to the admission of any of the fruits of the illegally seized computer at the outset of the trial (TR 20), thereby preserving the issue for review. “When reviewing a trial court's ruling on a motion to suppress, the inquiry is limited to whether the court's decision is supported by substantial evidence.” *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998). The Court generally defers to the trial court for the credibility of the witnesses, but reviews questions of law *de novo*. *Id.* When a defendant challenges the legality of the seizure of physical evidence, the State bears both the burden of producing evidence and the risk of non-persuasion to show by a preponderance of the evidence that the seizure complied with constitutional standards. *State v. Milliorn*, 794 S.W.2d 181, 184 (Mo. banc 1990); Mo. Rev. Stat. § 542.296.6.

#### Apparent Authority and Third Party Consent

In *United States v. Matlock*, 415 U.S. 164 (1974), the Supreme Court held that “when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that

permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.” *Id.* at 171. “The authority which justifies the third party consent” rests “on mutual use of the property by persons generally having joint access or control for most purposes.” *Id.* at n. 7. “A search is justified without a warrant where officers reasonably rely on the consent of a third party who demonstrates apparent authority to authorize the search, even if the third party lacks common authority.” *United States v. Nichols*, 574 F.3d 633, 636 (8th Cir. 2009), *citing Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990). “Apparent authority is present when the facts available to the officer at the moment...warrant a man of reasonable caution in the belief that the consenting party had authority over the premises.” *Id.* (internal quotations omitted).

In the present case, the State introduced the “Consent to Search” form as Exhibit 2 at the suppression hearing. (STR1, 17-18) The form is dated November 7, 2006, and was signed by Appellant at 8:05 p.m. and witnessed by Detective Osterloh. (APP ) The form reads as follows:

I, Kasim Faruqi, hereby grant my consent to Detective Steve Osterloh and Officers of the Maryland Heights Police Department to search the following:

*Describe area to be searched in detail; e.g., motor vehicle, apartment, house, place of business, etc.*

Business T-Mobil [sic] 15028 Manchester Rd

Computer Dell and all components

Serial # D7XJL51

I understand that I have the right to refuse to consent to the search described above and to refuse to sign this form.

I further state that no promises, threats, force, or physical or mental coercion of any kind whatsoever have been used against me to get me to consent to the search described above or to sing [sic] this form.

(APP 5) When asked what the forms “relate to,” Detective Osterloh stated, “They relate to the consent to search for the computer that was used to do the chat.” (STR1 18) He added that during the interview process he discovered that Appellant worked as the manager of the T-Mobile store listed on the Consent to Search form. (STR1, 21)

The State also introduced Exhibit 1, the Maryland Heights Police Department Statement of Constitutional Rights and Waiver. (STR1, 16) The form was signed by Appellant on November 7, 2006, at 7:48 p.m. and contains the initials of Appellant next to each right of which he was advised and agreed to waive. (APP 4) Detective Osterloh stated he read each of these rights and that Appellant understood these rights. (STR1 13)

The State put on precious little evidence regarding the basis of the search for the computer, and as noted, the State bears both the burden of proof and the burden of persuasion. Detective Osterloh had but seventeen minutes between the time Appellant waived his *Miranda* rights and agreed to speak and the time Appellant signed the Consent to Search form – a scant amount of time to collect any information. The State introduced no evidence to indicate *why* they wanted to search for a computer at the T-Mobile store Appellant managed; it also seems highly unlikely that Appellant would know the serial

number of a computer located at his place of employment, indicating perhaps some of the information on the “Consent to Search” form was added after the execution of the search. The evidence adduced by the State only avers that Detective Osterloh believed the computer might contain evidence of the chats between Appellant and Detective Stough, but Detective Osterloh never explained the factual basis for that suspicion. Notably, when asked whether Detective Osterloh attempted to confirm whether Appellant was actually the manager (or even an employee) of the T-Mobile store targeted on the Consent to Search form prior to obtaining consent, he stated, “No.” (STR1 29-30) Nor did he ever attempt to contact the owner of the T-Mobile store – and the actual seized computer – to obtain their consent to search or seize the computer. (STR1 30-31)

Appellant submits that the State failed to adduce sufficient facts that would establish Detective Osterloh reasonably could believe that Appellant had even apparent authority to consent to search for a computer located at the T-Mobile store listed on the Consent to Search form. Detective Osterloh had not worked on the case involving Appellant until directed by his sergeant to go to Vago Park to arrest an unnamed and unidentified individual driving a burgundy Mitsubishi Eclipse. (STR1 26-27) Lacking any prior knowledge of the case, Detective Osterloh had only the information he obtained from the time he took Appellant into custody until the time he secured a signature on the Consent to Search form. The sum total of that information as presented by the State at the suppression hearing consists of the unconfirmed representation of Appellant that he managed the T-Mobile store listed on the Consent to Search form and that Detective Osterloh had some unarticulated suspicion that he would find a link to the chats with

Detective Stough on a computer at the T-Mobile store – even though Detective Osterloh offered no testimony to explain why he had reason to believe such information would be found on this computer.

In sum, Appellant submits that the State failed to establish by a preponderance of the evidence that an objectively reasonable officer in the position of Detective Osterloh would believe that Appellant had apparent authority to consent to a search of the computer located at the T-Mobile store listed on the Consent to Search form, and therefore, Detective Osterloh lacked the basis to search, let alone seize, the computer as required under *Matlock* and *Rodriguez*.

#### Appellant Lacked Authority to Consent to Seizure of T-Mobile Property

Assuming *arguendo* that Detective Osterloh acted reasonably in believing Appellant had apparent authority to consent to a search of the computer located at the T-Mobile store listed on the Consent to Search form, the State has still another hurdle to overcome – the fact that T-Mobile, and not Appellant, owned the targeted computer. Can an accused employee with apparent authority consent to the seizure of his employer’s property? Appellant believes this is a question of first impression in Missouri – but one resolved by our sister state, Illinois.

In *People v. Blair*, 748 N.E.2d 318 (Ill. App. 3 Dist. 2001), deputy sheriffs of Rock Island County arrested the defendant for disorderly conduct in connection with his videotaping children at a local zoo. With the defendant in custody, the deputies went to the residence of defendant, and his father gave consent to search the common areas of his home. In the basement, the deputies found a computer which belonged to the defendant.

The father testified he had “no ownership interest of any kind” in the computer. *Id.* at 322. He also stated he never consented to the deputies activating the computer and searching its contents, though the deputies testified he did give such consent. *Id.* The deputies seized the computer, and a subsequent forensic search of its hard drive revealed 16 files of child pornography. *Id.* The trial court denied the motion to suppress. On appeal, the appellate court framed the issue: “we must decide, not whether a third party’s common authority gives him the power to consent to a search, but whether that authority may permit government seizure of the property.” *Id.* at 324. The appellate court reviewed Supreme Court precedent, including *Matlock* and *Soldal*, and concluded that the “rationale for third-party consent searches resting, as it does, upon the diminished expectation of privacy attending a third party’s common authority over the premises or effects to be searched, does not provide a sufficient basis for a third party’s consent to the seizure of another’s personal effects.” *Id.* at 325. Consequently, “we hold that the consent of a third party is ineffective to permit the government to seize property in which the third party has no actual or apparent ownership interest. Rather, a seizure is lawful only when the owner of the property consents to the seizure, there is a valid warrant for its seizure, or police are lawfully present and there is probable cause to believe the property is contraband, stolen property, or evidence of a crime.” *Id.* Applying this rule to the facts of the case, the appellate court found no warrant and no probable cause to believe the computer contained evidence of crime, as the deputies viewed no images of child pornography before seizing the computer. *Id.* at 326. *See also, State v. Lacey*, 204 P.3d 1192, 1205-06 (Mont. 2009)(under similar facts, following *Blair*).

Applying *Blair* to the present case, no one disputes that T-Mobile had sole ownership interest of the computer seized by Detective Osterloh or other members of the Maryland Heights Police Department. Appellant had at best access to the computer in his role as manager of the T-Mobile store, but plainly no ownership interest. Therefore, Appellant lacked the authority to consent to a seizure of the property – including the Dell computer – owned by T-Mobile. To sustain the seizure, the State had to produce evidence at the suppression hearing that amounted to probable cause to believe evidence of a crime would be found on the seized computer. As noted, Detective Osterloh offered no articulable facts that explain why he believed he would find some evidence of the chats between Appellant and Detective Stough on the seized computer – at best he offered a single conclusory hunch. Because such a hunch fails to rise to the level of probable cause, the State failed to meet its burden of proof, and the trial court erred in overruling the motion to suppress and allowing all fruits of the seizure to be introduced into evidence at trial.

#### Seizure Outside the Scope of Consent Given by Appellant

Even assuming *arguendo* that Appellant had the authority to consent to a seizure of a computer in which he had no ownership interest, the State still cannot sustain the seizure as constitutional because Appellant authorized only a *search* of the computer, not a *seizure*. As noted above, the Consent to Search form stated in explicit and unambiguous language that Appellant authorized *only a search* of the computer. The word “seize” appears nowhere on the form. *Cf. United States v. Luken*, 560 F.3d 741, 743 (8th Cir. 2009)(upholding consent to seize computer when the defendant signed a

handwritten consent form drafted by the police stating, “On 7-25-06, I, Jon Luken, give law enforcement the permission to seize & view my Gateway computer”); *Unites States v. Kimler*, 335 F.3d 1132, 1135 (10th Cir. 2003)(defendant signed a consent form giving agent “permission to seize and search his computer”); *State v. Norkeveck*, 168 P.3d 265, 267 (Or. App. 2007)(defendant gave “written consent to seize and search his computer”). The omission of the word “seize” is fatal to the efforts of the police to lawfully take custody of the computer.

In *State v. Flores*, 920 P.2d 1038 (N.M. App. 1996), police officers conducted a lawful *Terry* stop of the defendant in his vehicle. The officers asked the defendant for consent to search his vehicle for narcotics, and the defendant gave his consent. *Id.* at 1041. After finding no contraband, the officers took custody of the vehicle and the defendant, transported both to the city warehouse and proceeded to conduct a second and more thorough search of the vehicle which required its essential dismembering. *Id.* In the course of the second search, the police found a stolen firearm. *Id.* The appellate court stated that the defendant “consented to a roadside search of his truck for narcotics. Nothing in the consent form suggests that defendant consented to a search anywhere else or that the police had an interest in anything other than narcotics. There is nothing in the record indicating the defendant subsequently agreed to be transported to a city warehouse for a search lasting two to three hours during which his truck would be partially disassembled.” *Id.* at 1045. The appellate court found the seizure of the vehicle unlawful as “beyond the scope of consent” and that the evidence should have been suppressed. *Id.*

Unlike the defendant in *Luken*, Appellant signed a consent form that only authorized a search of the computer located at the T-Mobile store; the form contained no language authorizing a seizure and the State put on no testimony at the suppression hearing indicating that Appellant orally gave such consent. As in *Flores*, the police in this case went beyond the scope of the consent given by Appellant and seized property where they had no authority to do so. Consequently, the seizure of the computer violated the reasonableness standard of the Fourth Amendment. “A consensual search becomes unreasonable when it goes beyond the scope of a suspect’s consent.” *Id.* at 1045.

### Conclusion

The seizure of the computer is simply fraught with a multitude of Fourth Amendment violations – the police lacked reason to believe Appellant had apparent authority to consent to a search (let alone a seizure) of the computer located at the T-Mobile store; a third party lacking any ownership interest in the private property of another cannot give consent to seize said property; the police lacked probable cause at the time of the seizure to believe the computer contained evidence of a crime; and the seizure exceeded the scope of consent given by Appellant on the Consent to Search form. The State had a significant burden to prove the seizure did not violate the Fourth and Fourteenth Amendments of the United States Constitution, and the State failed to meet its burden of proof. Consequently, all evidence flowing from the illegal seizure must be suppressed as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 486-488 (1963). The trial court erred in sustaining the motion to suppress and allowing the

tainted evidence from the computer to be admitted at trial; this Court should reverse and remand for a new trial free from the taint of the illegally seized evidence.

## CONCLUSION

For the foregoing reasons, Appellant Kasim Faruqi requests this Court reverse the Judgment entered by the trial court, and either order Appellant discharged or order a new trial, and for such further relief this Court deems just and proper.

Respectfully submitted,

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## **RULE 84.06 CERTIFICATE OF COMPLIANCE**

The undersigned certifies that this Opening Brief complies with Rule 84.06(b) of the Missouri Rules of Civil Procedure, and was prepared using Microsoft Word in 13 point Times New Roman font, and has a word count of 15,606 words, exclusive of the cover page, table of contents, table of authorities, this page, and the certificate of service. The undersigned further certifies that the compact disc provided to counsel for Respondent has been scanned for viruses and is virus-free.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned certifies that the original and nine copies of this Substitute Opening Brief of Appellant were filed this \_\_\_\_ day of February, 2011, with the Supreme Court of Missouri; and that two copies and an electronic version of this Opening Brief were sent via first class mail this \_\_\_\_\_ day of February, 2011, to Shaun J. Mackelprang, Attorney for Respondent, P.O. Box 899, Jefferson City, Missouri 65102.

Respectfully submitted,

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