

IN THE SUPREME COURT OF MISSOURI

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

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

REPLY BRIEF OF APPELLANT

MURRY A. MARKS MBN 18269
JONATHAN D. MARKS MBN 47886
Attorneys for Appellant
The Marks Law Firm, LLC
Four CityPlace Drive, Suite 497
Creve Coeur, Missouri 63141
(314) 993-6300
(314) 993-6301 (Facsimile)

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Statutes

§ 566.151 passim

ARGUMENT

I. With regard to the constitutionality of § 566.151 (Point I in the Opening Brief), the State, while conceding that § 566.151 is “amenable to different interpretations,” tries to create a distinction between interpretations that turn on statutory construction and those that turn on constitutional rights – a distinction without a difference, as the principal rule of statutory construction is that all statutes must conform with the Constitution. The State tries to avoid the patent constitutional infirmity of § 566.151 by parading a series of logically and legally absurd arguments:

A. The State misapplies *City of Morales* to the facts of this case; clearly, under *City of Morales*, the Court can – and should – entertain a facial challenge to § 566.151 in this case.

B. The State erroneously tries to distinguish the vagueness of a criminal statute with regard to the completion of the crime it defines and the vagueness of the same criminal statutes with regard to an attempt of the crime; if the supervening criminal statute defining the crime is unconstitutionally vague, the vagueness applies with equal force to the completed crime as to the attempt.

C. The State erroneously argues that the Constitution approves of a criminal statute whose plain meaning sets out the elements of the offense in

one subsection while in another subsection removes as a defense holding the State to its burden of proving one of those elements.

D. Finally, severance would not save § 566.151 as the State contends, and Appellant would be entitled to the same relief with or without severance.

With regard to Point I in the Opening Brief, regarding the constitutionality of § 566.151, the State concedes that “[i]t is true that subsection (2) of” § 566.151 “is poorly worded and is amenable to different interpretations, depending on the rule of statutory construction applied (*i.e.* whether the courts enforce the legislature’s intent or simply apply the plain language),” Resp. Br. at 11, yet argues that problems of interpretation in statutory construction are somehow distinct from problems of interpretation with regard to compliance with the Due Process Clause of the Fourteenth Amendment. *Id.* Quite simply, the State has created a distinction without a difference. The internal inconsistency with regard to the age of the victim created by subsections (1) and (2) of § 566.151 leaves a person of ordinary intelligence unclear whether the victim must in fact be less than fifteen years of age, and is therefore unconstitutionally vague, a vagueness not in any way dependent on the rule of statutory construction applied, but flowing directly from the century old test of vagueness of criminal statutes under the Due Process Clause. Because the statute (a) fails to give sufficiently definite and fair notice as to the actual age of the victim, and (b) conflates the meaning of “affirmative defense” so as to impermissibly shift the burden of proof with regard to the age of the victim onto the defendant, only to shut that door completely by prohibiting this defense whenever the

victim happens to be a police officer masquerading as a child, § 566.151 cannot withstand constitutional scrutiny.

A. *City of Morales* applies in this case and allows the Court to entertain a facial challenge to § 566.151.

The State believes the Court can avoid the facial challenge to § 566.151 urged by Appellant and supported by *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999), because the ordinance at issue in *Morales* “contained no *mens rea* requirement and infringed on citizens’ constitutionally protected right to move about in public places.” Resp. Br. at 16. However, this attempted distinction has no merit. As to the state of mind requirement, if § 566.151 is vague as to the age of the actual victim, as a specific intent crime it is also vague as to the state of mind of the crime. The State makes this mistake itself in its Brief. *See*, Resp. Br. at 14 (State need only prove defendant “communicated with someone he believed to be under the age of 15”). An attempt requires the same state of mind as the completed crime; if the defendant lacks notice as to the requisite age of the victim, the defendant by definition cannot “know” the intent required of the statute. As Appellant has presented the issue, § 566.151.1 requires the victim be less than fifteen years of age and the State must prove both the age of the victim and that the defendant intended to entice an actual person less than fifteen years of age, whereas § 566.151.2 allows the State to avoid proof of the victim as less than fifteen years of age and also that the defendant intended to entice an actual person less than fifteen years of age whenever the victim is a police officer masquerading as a child. In these cases, the State may meet its

burden by relating the testimony of the undercover officer, which will include the *mens rea* that the defendant believed he was enticing a child less than fifteen years of age – a very different *mens rea* from that of § 566.151.1. And as to the question of fundamental rights, the Due Process Clause requirements that (a) “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes,” *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), and (b) the State must “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), are frankly as fundamental as rights can get. See e.g., *In re Winship*, 397 U.S. 358, 364 (1970)(declaring these rights “indispensable” to a concept of ordered liberty). Hence, § 566.151 is indeed “such a law” *Morales* contemplated when it stated, “[w]hen vagueness permeates the text of such a law, it is subject to facial attack.” *Id.*, 527 U.S. at 55. The Court should consider the issue of vagueness as a facial challenge, just as it considered overbreadth a facial challenge in *State v. Pribble*, 285 S.W.3d 310, 315-17 (Mo. banc 2009).

B. If the supervening criminal statute defining the crime is unconstitutionally vague, the vagueness applies with equal force to the completed crime as to the attempt.

The State also contends that the fact that Appellant was charged with attempted enticement of a child, rather than actual enticement of a child, makes a difference for vagueness purposes, arguing that “communicating with a person who [one] believed was 14 years old for the purpose of engaging in sexual conduct” is “‘clearly proscribed’ by Missouri law, specifically the law prohibiting attempted enticement of a child.” Resp.

Br. at 19. The State makes the strange assertion that “Defendant cannot (and does not) contend that the offense he was convicted of violating – attempted enticement – is void for vagueness, nor does he make any effort to explain how the alleged vagueness in the enticement statute affected his case.” Resp. Br. at 19. However, Appellant made this argument explicitly in his Opening Brief. *See*, App. Op. Br. at 24-25. Quite simply, if a person lacks the ability to know what the completed crime of enticement of a child involves, he also lacks the ability to know what acts would qualify as “substantial steps” toward the completed crime of enticement of a child. That was the import of the cases cited by Appellant from other jurisdictions finding the statute defining the completed crime unconstitutionally vague even though the defendant had been charged only with attempt rather than the completed crime. *See*, App. Op. Br. at 25. For example, in *People v. Castro*, 657 P.2d 932 (Colo. 1983), the defendant was charged with attempted extreme indifference murder, and the Court found the phrase “extreme indifference” unconstitutionally vague. The State argues the Colorado Supreme Court erred, that the substantial steps taken toward committing a homicide would have been understood by a person of ordinary intelligence, even though an understanding of the completed crime escaped that same person of ordinary intelligence. The State suggests, essentially, that as long as a person of ordinary intelligence takes steps that place him in the ballpark of some really bad conduct, that suffices against a vagueness challenge for attempt, even though the same would patently fail for the completed crime. The State argues a non sequitur, presumably for the purpose of escaping what it admits are the “different interpretations” created by subsections (1) and (2) of § 566.151. *Castro* and *Skilling v.*

United States, 130 S. Ct. 2896, 2927-28 (2010), are but two cases where the courts have explicitly rejected the rather absurd argument the State offers as a basis to distinguish vagueness in a completed crime from vagueness in an attempt of the same crime. If one cannot understand the conduct that a criminal statute proscribes because the elements remain vague, one cannot ever form the requisite specific intent to commit that ill-defined crime – the same specific intent required for the attempt.

C. The State conflates the meaning of “affirmative defense” and “elements” of a crime, mistakenly arguing a criminal statute can shift the burden of proving an element of the offense onto the defendant and that such a “plain meaning” of § 566.151 cures it of its vagueness.

The State contends, in addressing the vagueness of the statute directly, that it passes constitutional muster because the “plain language” or the legislative intent of the phrase “affirmative defense” is that subsection (2) was intended to mean, “It is not a *defense* to a prosecution for a violation of this section that the other person was a peace officer masquerading as a minor,” a construction the State believes in no way precludes challenging the sufficiency of the evidence that the victim was not in fact under the age of fifteen. Resp. Br. at 21-22. By way of analogy, the State refers to § 566.020.4, which provides that “Consent is not an affirmative defense to any offense under chapter 566 if the alleged victim is less than twelve years of age.” The use of this analogy indicates the fallacy in the State’s argument, which emanates from confusing elements and defenses. The elimination of consent as a defense to certain sex offenses with children under the age of twelve in no way affects the burden of the State to prove all the elements of the

predicate offense, including the age of the victim. By contrast, § 566.151.2 precludes the defendant from raising as an affirmative defense the age of the victim when the victim happens to be a police officer masquerading as a child – which effectively precludes the defendant from putting the State to its burden of proof as to the age of the victim, which is clearly an element of the offense as set out in § 566.151.1. The State sees no problem with a statute that sets out the elements of the offense in its first subsection and in its second subsection effectively insulates the State from proving one or more of those elements by precluding the defendant from raising them as a defense, whether as an “affirmative defense” or a challenge to the sufficiency of the evidence. However, the United States Supreme Court long ago held that such a statute is patently unconstitutional, both for its internal inconsistency and also its failure to hold the State to its burden of proving every element of the offense charged beyond a reasonable doubt. *See, Patterson*, 432 U.S. at 206-07; App. Op. Br. at 37.

The procedural facts of the present case are instructive on this point. Appellant tried to dismiss the case at several points in the proceeding on the basis of a challenge to the sufficiency of the evidence, namely, that the State could not prove an essential element of the charged offense – that the victim was under the age of fifteen – and therefore the charge should have been dismissed. However, the trial court, at each point Appellant raised the issue, cited subsection (2) of § 566.151 as allowing the State to escape its burden of proof whenever the victim is actually a police officer masquerading as a child. The trial court understood subsection (2) as relieving the State of proving an essential element of subsection (1) whenever the victim is actually a police officer

masquerading as a child – in direct contravention of *Patterson* and the many cases of vagueness involving internal inconsistencies. If a criminal statute defines the elements of an offense in one subsection, it cannot later remove one or more of those elements in subsequent subsections – that has been the crux of the argument Appellant has made beginning in the trial court, an argument Appellant sees as very uncontroversial and a fixture of constitutional law for at least a century. The statute at issue in this case, § 566.151, violates that basic fundamental principle of due process of law, rendering it unconstitutionally vague.

D. Severance would not save § 566.151 as the State contends, and Appellant would be entitled to the same relief with or without severance.

As its final argument, the State suggests that the Court could sever subsection (2) from the statute, and that doing so would have “no practical effect.” Resp. Br. at 30. To the contrary, excising subsection (2) would require the State prove an actual child victim; it would not allow the attempt to entice a person the defendant believes to be a child, because the phrase “believes to be a child” is nowhere to be found in the statute – unlike virtually every other state that has a child enticement statute. *See*, App. Op. Br. at 39-43. Severing subsection (2) would give the statute a plain meaning free from any vagueness – by requiring an actual child victim. Should the Court opt to sever the statute as the State suggests, it would still entitle Appellant his requested relief of discharge because the State cannot prove the victim in this case was less than fifteen years of age. Appellant states that he believes the statute as written incapable of satisfying the commands of the Due Process Clause and would suggest the Court simply strike the statute in its entirety

and leave it to the General Assembly to rewrite in a manner that conforms to the constitutional requisites at issue in this case.

II. With regard to the voluntariness of the statements made both orally and in writing by Appellant to Detective Osterloh (Point II of the Opening Brief), the State concedes that material misrepresentations can render a confession involuntary, but mistakenly denies both that Detective Osterloh admitted to the false misrepresentations in his suppression testimony, and that the subterfuge utilized by Detective Osterloh is no different than the subterfuge condemned in *Ex parte McCary*.

With regard to the voluntariness of the statements made both orally and in writing by Appellant to Detective Osterloh (Point II of the Opening Brief), the State argues that (a) the threats of which Appellant complains were the products of his imagination rather than actual or even implicit threats, (b) the statements made by Detective Osterloh were not material misrepresentations but “an accurate recitation of the possible consequences of Defendant’s actions,” and (c) nothing in any of Detective Osterloh’s statements were likely to induce Appellant to confess. Resp. Br. at 36-44. All three contentions of the State misstate both the facts in this case and the law regarding the voluntariness of confessions.

The State first asserts that “despite Defendant’s representation in his brief that he was afraid that he would be charged with sexual assault, would be sued by the ‘girl’s parents,’ or would be deported (App. Br. at 52), nowhere in the record is there any indication that Detective Osterloh or anyone else ever threatened that those things might

happen.” Resp. Br. at 40-41. Immediately before writing this sentence in its Brief, the State quoted verbatim the transcript excerpt Appellant recited in his Opening Brief. Resp. Br. at 38-40. Within this transcript, Detective Osterloh states that he manufactured an actual child victim; that he compounded the lie by telling Appellant 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”; that the design of the lies was to elicit a confession; and that he asked about the customs of his country and their sexual mores. Resp. Br. at 38-40. Hence, contrary to its assertion that Detective Osterloh never made threats or even inquiries regarding his intentionally false tale of an aggrieved (imaginary) victim and her (imaginary) parents, the *very transcript excerpt included by the State in its Brief belies that very statement.*

The State tries to connect its bald misstatement of fact to a second premise: “If Defendant did, in fact, fear prosecution for sexual assault, a civil suit, and deportation, those fears arose from Defendant’s own imagination, not any statement or conduct on the part of Detective Osterloh.” Resp. Br. at 41. The transcript of the suppression hearing – which the State excerpted in its Brief – plainly states that Detective Osterloh made all of the misrepresentations of which Appellant complains; indeed, Detective Osterloh made no effort to minimize or correct any of his reported actions – the very opposite of the approach the State takes in its Brief. Appellant has not conjured up fears from his imagination, as the State suggests, Resp. Br. at 41, but rather relayed his very real and reasonable inferences from the subterfuge Detective Osterloh admitted he utilized in an

attempt to obtain a confession.¹ It is the State who is suffering from an overactive imagination, trying to defeat the asserted involuntariness of the statements obtained from Appellant by pretending Detective Osterloh did not say what he clearly admits to saying in his testimony at the suppression hearing.

The State next argues that, assuming Detective Osterloh said what he testified to saying, that he “had suggested to Defendant that he could face a sexual-assault charge, a possible civil suit, and deportation, such statements would not constitute ‘threats’ that

¹ The State relies in this part of its Brief on *State v. Gray*, 100 S.W.3d 881, 889-890 (Mo. App. 2003), which quoted the following from *Chaney v. Wainwright*, 561 F.2d 1129, 1132 (5th Cir. 1977): “If an intentional and truthful statement must be deemed to be involuntary, merely by reason of imagined dangers conjured up by an apprehensive suspect, a greater burden would be placed on law enforcement than any which judicial solicitude for persons charged with crime has hitherto created.” Beyond the fact the quote represents *dicta*, the facts of *Gray* are distinguishable. *Gray* involved a claim by a defendant who conceded no coercive acts of the police but instead argued “that he suffered from intellectual difficulties, psychological impairments, or drug-induced problems” that led him to believe he had been assaulted or deprived him of the ability to knowingly and voluntarily waive his rights. *Id.* at 889. Unlike *Gray*, where the defendant imagined police misconduct which never took place, this case involves real police acts of misrepresentation and implied threats which the officer in question freely admitted in court actually occurred.

would render Defendant's confessions involuntary because they would merely be an accurate recitation of the possible consequences of Defendant's actions," and that the "threats' about which Defendant complains were all directed at the possible consequences of enticing a child for sexual purposes." Resp. Br. at 42. This point is patently absurd – Detective Osterloh admitted that no child victim existed, rendering it legally impossible for the State to charge Appellant with a sexual assault. Detective Osterloh also admitted no parents of the imaginary child victim existed, rendering it factually impossible for these non-existent parents to press charges criminally or civilly for any act of Appellant. Detective Osterloh therefore threatened Appellant with legal and factual impossibilities – further lies in a web of lies to which Detective Osterloh admitted weaving for the purpose of taking advantage of the ruse originated by Officer Stough to obtain a confession. This case is not like *State v. Barriner*, 210 S.W.3d 285, 303 (Mo. App. 2006), where the interviewing officer mentioned during the interrogation the Sheriff of Ozark County would "like to see him in prison" and the defendant tried to construe this as a threat of physical harm. The Western District found no coercive component to the statement as it accurately reflected the sentiment of the Sheriff who wanted to see the person who *killed his aunt* go to prison. *Id.* Rather, as discussed in the Opening Brief, this case is precisely like *Ex parte McCary*, 528 So.2d 1133 (Ala. 1988), where the Alabama Supreme Court found the threat of punishment for a more severe but imaginary criminal act that induced the defendant to confess to the targeted crime rendered the confession involuntary. *See*, App. Op. Br. at 53-54.

The State submits that “[t]here is no reason to think that a suspect who had not, in fact, engaged in sexual communications with a person he believed to be a 14-year-old girl would be more likely to falsely confess if he was told that the child’s parents were upset about it.” Resp. Br. at 44. The issue in a confession under the Fifth Amendment is not whether the confession was true or false, the issue is whether it was voluntary or involuntary. The facts of this case and the facts of *McCary* both indicate that a defendant, when intentionally misled by police to believe he was suspected of a more serious offense – like sexual assault in this case or murder in *McCary* – will find himself much more inclined to confess to a lesser offense simply to avoid the consequences of the more severe crime. Indeed, the State concedes as much: “It is obvious that falsehoods such as those employed by the investigators in *Spano*, *Lynnum* and *McCary* might induce false confessions – a suspect might decide to falsely admit misconduct to avoid an unpleasant alternative.” Resp. Br. at 45. The State seeks to avoid the force of this concession by denying first the predicate facts for similar falsehoods in this case, and second the force of those predicate facts in compelling Appellant to confess. As Appellant has shown, the State simply cannot escape the predicate facts because Detective Osterloh admitted to the false misrepresentations in his suppression testimony, nor the role the force of those predicate facts played in producing a confession – using a subterfuge no different than *McCary*, Detective Osterloh secured Appellant’s confession. Consequently, the State has offered no legal or factual retort that would undercut the argument that the oral and written confessions by Appellant were obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

III. With regard to the search and seizure of the T-Mobile computer (Point III of the Opening Brief), Fourth Amendment standing no longer applies; the evidence must show only that Appellant had a reasonable expectation of privacy in his workplace computer – which federal and state courts have recognized in numerous cases. Further, the State implicitly concedes that the scope of the search exceeded the consent given by Appellant, in violation of the Fourth Amendment; because the State could not prove one of the elements of its case without the evidence from the computer, the evidence was prejudicial and failure to exclude it was prejudicial.

With regard to the search and seizure of the T-Mobile computer (Point III of the Opening Brief), the State argues that (a) Appellant lacks standing to contest the search and seizure, and (b) even if Appellant has standing, he suffered no prejudice. Resp. Br. at 46-52. Appellant will address each of these contentions in turn.

A. Fourth Amendment standing no longer applies; the evidence must show only that Appellant had a reasonable expectation of privacy in his workplace computer – which federal and state courts have recognized in numerous cases.

The United States Supreme Court abandoned the “standing” doctrine in *Rakas v. Illinois*, 439 U.S. 128, 139-140 (1978), when it held, “we think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.” The present rule requires only that “in order to claim the protection of the

Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable.” *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). This Court has recognized this change; for example, in *State v. Wise*, 879 S.W.2d 494, 504 (Mo. banc 1994), this Court stated that the only key threshold inquiry is whether a defendant has a “legitimate expectation of privacy” in the place to be searched and the item to be seized. Hence, the initial question this Court must address in the present case is whether Appellant had a reasonable expectation in the computer he used as a manager of the T-Mobile store.

In *United States v. Ziegler*, 474 F.3d 1184 (9th Cir. 2007), the defendant was charged with possession of child pornography, and the images were retrieved and retained at his place of employment on his workplace computer. *Id.* at 1187. The Ninth Circuit applied a two prong test: the defendant must have a subjective expectation of privacy in the workplace computer, and said expectation must be objectively reasonable. *Id.* at 1189. The Government did not even contest the first prong, in part because the Supreme Court held, in *O’Connor v. Ortega*, 480 U.S. 709, 716 (1987), that employees retain subjective expectations of privacy in their workplace computers. *Id.* As to whether the expectation of privacy was objectively reasonable, the Ninth Circuit held that principal control over the computer, even though others may have access, was sufficient to create an objectively reasonable expectation of privacy with regard to the personal use of the workplace computer. *Id.*

In *Maes v. Folberg*, 504 F.Supp.2d 339 (N.D. Ill. 2007), the plaintiff sued the defendant under 42 U.S.C. § 1983, claiming a violation of her civil rights, specifically her

Fourth Amendment rights to be free from illegal searches and seizures. *Id.* at 344. The District court held that plaintiff had “an expectation of privacy” in her government issued laptop computer. *Id.* at 347-48.

In *State v. Young*, 974 So.2d 601 (Fla. App. 2008), the defendant was a pastor at a church. As part of his job, he had a workplace computer in his office; however, all workplace computers at the church could be viewed by the church’s IT administrator. *Id.* at 606. The IT administrator believed he discovered child pornography on the computer used by the defendant; he notified the district church supervisor, who said to call the authorities, who in turn searched the computer at issue, which led to an interrogation and consent to search a memory stick found in the office as well. *Id.* at 607-08. The defendant successfully moved to suppress the seized items, and the State appealed. *Id.* at 608. The appellate court noted that, in the absence of a “clear policy allowing others to monitor a workplace computer, an employee who uses the computer” has a legitimate subjective expectation of privacy in the computer. *Id.* at 609. The appellate court upheld the suppression of the evidence. *Id.* at 610.

Based on the foregoing case law, Appellant has established he had a legitimate and objectively reasonable expectation of privacy in the workplace computer. Because Appellant did not testify at the suppression hearing, all evidence regarding any such expectations come from the facts presented by the State; the State established that Appellant managed the T-Mobile store and that Appellant had apparent authority to give consent. Further, the State offered no testimony that T-Mobile had a “clear policy” regarding any monitoring of the workplace computer of the manager; therefore, nothing

in the factual record suggests Appellant lacked a reasonable expectation of privacy in the workplace computer. Indeed, the fact that Detective Osterloh believed Appellant could authorize the search of the workplace computer suggests that whatever conversation took place between Appellant and Detective Osterloh led Detective Osterloh to conclude Appellant had a possessory and privacy interest in the workplace computer. In sum, Appellant believes the evidence adduced at the hearing on the motion to suppress supports a finding that Appellant had a reasonable expectation of privacy in the workplace computer.

B. The State implicitly concedes that the scope of the search exceeded the consent given by Appellant, in violation of the Fourth Amendment; because the State could not prove one of the elements of its case without the evidence from the computer, the evidence was prejudicial and failure to exclude it was prejudicial.

Once past the hurdle of establishing a reasonable expectation of privacy, the State has the burden of establishing the search and seizure of the workplace computer comported with the Fourth Amendment. As the State failed to contest the principal argument made by Appellant – namely, that the scope of the search and seizure exceeded the consent given by Appellant – the State implicitly concedes this point. Appellant indeed signed a “Consent to Search” Form, the language of which explicitly authorized only a *search* – not a *seizure* – of the targeted computer. (APP 5) In his Opening Brief, Appellant explained how the case law supports finding that the absence of the word “seizure” in the consent form precludes the police from doing more than searching the computer at the premises. App. Op. Br. at 64-66. Consequently, once the police seized

the computer, they went beyond the scope of the consent without any probable cause to seize, because the police conducted no search of the computer prior to the seizure. Hence, as the State implicitly concedes, the seizure violated the Fourth and Fourteenth Amendments to the United States Constitution.

As its final argument, the State suggests Appellant suffered no prejudice as a result of the illegal seizure. Resp. Br. at 51-52. Appellant strongly disagrees. Without the computer, the State had no way to verify that the person identified as “Kasim786” was in fact Appellant, and that he communicated with “Lilly4U2006” – only the forensic investigation of the seized workplace computer revealed these connective threads. Remove the material seized from the computer and the State cannot establish that Appellant was “Kasim786” who participated in the chats the State alleged amounted to enticement. Eliminating the ability of the State to prove its case certainly qualifies as prejudice.

CONCLUSION

For the foregoing reasons, and the reasons stated in his Opening Brief, 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,

MURRY A. MARKS MBN 18269
JONATHAN D. MARKS MBN 47886
Attorneys for Appellant
The Marks Law Firm, LLC
Four CityPlace Drive, Suite 497
St. Louis, Missouri 63141
(314) 993-6300
(314) 993-6301 (Facsimile)

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 5,147 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,

MURRY A. MARKS MBN 18269
JONATHAN D. MARKS MBN 47886
Attorneys for Appellant
The Marks Law Firm, LLC
Four CityPlace Drive, Suite 497
St. Louis, Missouri 63141
(314) 993-6300
(314) 993-6301 (Facsimile)

CERTIFICATE OF SERVICE

The undersigned certifies that the original, nine copies and an electronic file on compact disc of this Reply Brief of Appellant were sent via first class mail this ____ day of April, 2011, with the Supreme Court of Missouri; and that two copies and an electronic version of this Reply Brief were sent via first class mail this _____ day of April, 2011, to James B. Farnsworth, Attorney for Respondent, P.O. Box 899, Jefferson City, Missouri 65102.

Respectfully submitted,

MURRY A. MARKS MBN 18269
JONATHAN D. MARKS MBN 47886
Attorneys for Appellant
The Marks Law Firm, LLC
Four CityPlace Drive, Suite 497
St. Louis, Missouri 63141
(314) 993-6300
(314) 993-6301 (Facsimile)