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JURISDICTIONAL STATEMENT

Appellant, Brenda Self, appeals her conviction for failure to cause, Jennifer Self, a child age 15, to attend school on a regular basis pursuant to Sections 167.031 RSMo and 167.061 RSMo. Appellant was convicted after a bench trial in front of the Honorable Byron Luber in the Associate Court of Pemiscot County on October 6, 2003. The Appellant was sentenced to 15 days in the Pemiscot County Jail, execution of the sentence was suspended, and Appellant was placed on 2 years unsupervised misdemeanor probation. (L.F. 7).

Jurisdiction of the Supreme Court is in accordance with Missouri Supreme Court Rule 81.08 (b) and (c) and Rule 30.01 (f) and (g) respectfully requests the Missouri Supreme Court accept jurisdiction to the above case. Jurisdiction of the Supreme Court is based on the fact that this appeal involves the validity of a statute or provision of the Constitution of Missouri and the United States Constitution. Article V, Section 3, Mo. Const. (as amended 1982). This action is one involving the constitutionality of Sections 167.031 RSMo. and 167.061 RSMo. in which the Appellant's rights to due process of law and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 2 and Section 10 of the Missouri Constitution are violated because the statutes which the Appellant has been convicted under are impermissibly and unconstitutionally void for vagueness.

STATEMENTS OF THE FACTS

Appellant, Brenda Self, was charged by misdemeanor information on March 3, 2003 with the class C misdemeanor of failing to cause a child to attend school on a regular basis, punishable upon conviction under sections 167.061, 558.011(7) and 560.016.1(3), RSMo, in that between August 22, 2002 and February 6, 2003, the appellant did fail to cause Jennifer Self, a child age 15, to attend school on a regular basis. This was in case number 03CR752456 in the Associate Circuit Court of Pemiscot County, Missouri. (L.F. 1).

A stipulated bench trial was held in front of Honorable Byron Lubber on October 6, 2003 in the Associate Court of Pemiscot County, Missouri at Caruthersville, Missouri. All parties had agreed that in exchange for waiver of jury and a stipulation to the fact that the juvenile, Jennifer Self, had missed 40.628 days of school, the court would impose no greater sentence than 15 days in the Pemiscot County Jail, suspend the execution of sentence, and place the Appellant on 2 years unsupervised probation. This discussion took place in Judge Lubber's chamber before the Bench trial was held.

A pre-trial motion to dismiss based on the violation of Appellant's rights to due process of law and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 and Section 10 of the Missouri Constitution because the statutes which the defendant has been charged under are impermissibly and unconstitutionally void for vagueness and

invites arbitrary application was overruled and a continuing objection was entered. At trial, the following stipulated evidence was adduced. (Tr. 4,10).

Jennifer Self, age 15, is the daughter of Brenda self, the defendant in this matter. Brenda Self is charged with the care, custody and control of Jennifer Self. Jennifer was born December 24, 1987, making Jennifer 14 and 15 years old during the academic school year of 2002 and 2003. During the Academic school year, Jennifer missed more than the Caruthersville's Accelerated Middle School policy on attendance. (Tr. 3-4).

Caruthersville Accelerated Middle School policy and procedures were introduced into evidence through, State's Exhibit A, Defendant's Exhibit 1 and through live testimony that was given by Paula Deboise. (Tr. 5-6,9). Mrs. Deboise, Juvenile Officer for the Caruthersville School District, testified that the policy of the school district was followed with respect to Jennifer Self's case and to the filing with the Pemiscot County Prosecutor's Office. (Tr. 7). Mrs. Deboise testified that this policy was to send a notification to the parent after three absences, after five absences and then, after ten absences, notification is sent to the Prosecutor's office. On cross-examination Mrs. Deboise testified that it is a subjective review on a case by case basis on whether to report someone to the prosecutor's office for criminal prosecution. (Tr. 8).

Appellant's motions for judgment of acquittal at the close of the state's case and at the close of all the evidence were denied. (Tr. 10). The Honorable Judge Byron Luber found the appellant guilty of the one count of failure to cause child to

attend school. (Tr. 12). Notice of appeal was timely filed to this Honorable Court and this appeal follows.

POINT RELIED ON

I.

The trial court erred in overruling Appellant's motion for judgment of acquittal at the close of all the evidence and thereafter entered a verdict of guilty because the Appellant's rights to due process of law and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 and Section 10 of the Missouri Constitution are violated because the statutes, Sections 167.031 RSMo. and 167.061 RSMo. (2000), which the Appellant has been charged under, are impermissibly and unconstitutionally void for vagueness and invite arbitrary application.

Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955 (Mo. Banc 1999)

Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)

Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)

Murphy v. Carron, 536 S.W.2d 30 (Mo. Banc 1976)

U.S. Const. Amend. V

U.S. Const. Amend. XIV

Mo. Const. Article I, Section 2

Mo. Const, Article I, Section 10

Section 167.031 RSMo.

Section 167.061 RSMo.

I.

The trial court erred in overruling Appellant's motion for judgment of acquittal at the close of all the evidence and thereafter entered a verdict of guilty because the Appellant's rights to due process of law and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 and Section 10 of the Missouri Constitution are violated because the statutes, Sections 167.031 RSMo. and 167.061 RSMo. (2000), which the Appellant has been charged under, are impermissibly and unconstitutionally void for vagueness and invite arbitrary application.

Standard of Review;

The standard of review for a bench tried case is set out in Murphy v. Carron, 536 S.W.2d 30 (Mo. Banc 1976). The judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy, 536 S.W.2d at 32. In a court tried matter we accept as true the evidence and reasonable inferences in favor of the prevailing party and disregard the contrary evidence, State v. Entertainment Ventures I, Inc., 44 S.W.3d 383 citing Gilmartin Bros., Inc. v. Kern, 916 S.W.2d 324, 331 (Mo.App.1995).

In reviewing vagueness challenges, the language is to be evaluated by applying it to the facts at hand. Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955 (Mo. Banc 1999). A valid statute provides a person of

ordinary intelligence a reasonable opportunity to learn what is prohibited. State v. Mahrurin, 799 S.W.2d 840 (Mo. Banc 1990). A statute can be void for vagueness if its prohibitions are not clearly defined. Grayned v. City of Rockford, 408 U.S. 104 (1972).

Argument;

In Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), the United States Supreme Court ruled that the “void for vagueness” doctrine is based upon the principle that a criminal statute is unconstitutional if it does not clearly define the proscribed conduct. Under Kolender, in determining whether a statute is impermissibly vague, the court would apply a two-prong analysis. The statute in question must: 1) define the offensive conduct with sufficient definiteness that ordinary people can discern what acts are prohibited; and 2) define the conduct in a manner which does not encourage arbitrary and discriminatory application. Kolender v. Lawson, 461 U.S. at 357, 103 S.Ct. at 1858, 75 L.Ed.2d 903, (1983). State v. Brown, 660 S.W.2d 694, 697 (Mo. Banc 1983). Although the “vagueness doctrine” focuses on both of these factors, the United States Supreme Court has recognized that the most important aspect of the “void for vagueness” doctrine is the requirement that a legislature establishes minimal guidelines to govern law enforcement. Kolender at 461 U.S. at 358, 103 S.Ct. at 1858. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit “a standardless sweep that allows policemen,

prosecutors, and juries to pursue their personal “predilections.” Id. at 461 U.S. at 359, 103 S.Ct. at 1859.

Section 167.031 RSMo. states in relevant part, that:

1. A parent, guardian or other person in this state having charge, control, or custody of a child between the ages of seven and sixteen years of age shall cause the child to attend regularly some public, private, parochial, parish, home school or a combination of such schools not less than the entire school term of the school which the child attends.

In this case, the state charged the Appellant with failure to cause Appellant’s daughter to attend school on a regular basis.

When determining whether a statute is unreasonably vague, a two prong analysis is used. Vetter v. King, 691 S.W.2d 255 (Mo. Banc 1985) citing Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983). First the court must determine whether or the not the statute in question defines the offensive conduct with sufficient definitiveness that an ordinary person can discern what act is being prohibited. Id. at 461 U.S. at 357, 103 S. Ct. at 1858. The question for the appellant is what does, “shall cause...to attend regularly...not less than the entire school term of the school which the child attends...” really mean? Missouri revised statutes, 2000, does not define “shall cause”, “regular” or “entire school year”. Thus leaving the Appellant and any reasonable ordinary person guessing as to whether Section 167.061 RSMo. would apply to her conduct, or whether certain conduct even constitutes a crime.

The Appellant had received notice that her child had missed several days of school however the notice stating that the Caruthersville Accelerated Middle School had sent anything to the Pemiscot Prosecutor's Office was on February 6, 2003. This notice was supposedly sent after some forty absences. If the appellant had deemed it fit to go look at the statute in question governing this alleged act, she would not have received any notice as to the definition of "shall cause...to attend regularly." The appellant would have to look to her specific school's attendance policy as to what constitutes a criminal infraction. In essence, the statute is leaving it up to the local school district to decide local attendance policy. The Caruthersville Accelerated Middle School attendance policy could range anywhere from to one day to perhaps no more then one absence a week. This ambiguity leaves the definition of this penal statute in the hands of school district employees. No ordinary reasonable person could ever read Section 167.031 RSMo. and discern exactly what act is being prohibited.

The Appellant is also required to define what type of action must be taken on behalf of the Appellant if Jennifer Self did not want to attend school. Under RSMo. 167.031, a parent who has a child who does not want to attend school must take some action to have the child attend school. The question is then what action is required and, perhaps more importantly, what action is enough to satisfy this statute. If nonattendance by a child is really to define whether or not a parent is in violation of these laws, we are lead to absurd conclusions. It therefore follows that the statute does not define the offensive conduct with sufficient definitiveness that

ordinary people could discern what acts are prohibited. This leads the Appellant to the second prong of the analysis. See Kolender v. Lawson, 461 U.S. at 358, 103 S. Ct. 1858 (1983).

The second analysis in determining whether a statute is unreasonably vague, and subsequently does not satisfy due process, is the statute must define the conduct in a manner which does not encourage arbitrary and discriminatory application. Kolender v. Lawson, 461 U.S. at 358, 103 S.Ct. 1858 (1983). These statutes are vague because the specific length of time constituting each offense is not defined. The statute merely states that a person is guilty of a class C misdemeanor if the defendant fails to “cause.....to attend regularly...not less than the entire school term of the school.” Not specifying a definite amount of time in the statute results in reasonable persons differing as to the scope of the conduct proscribed as criminal, and the question of where to draw the line affords so much discretion that it would encourage arbitrary and discriminatory application. For example, county prosecutors could differ in the reasonable interpretation of this language so much that the application of the law will differ from school district to school district, from county to county and from person to person. It therefore follows, that the statutes do not define the proscribed conduct in a manner which does not encourage arbitrary and discriminatory application.

The subjective and arbitrary and discriminatory applications was even testified to by the Juvenile Officer at the stipulated bench trial. Officer Paula Deboise testified to the fact that each incident is reviewed on a case by case basis

and is subjective to not only her but to the school's principle subjective view. The void for vagueness doctrine requires that explicit standard's must be afforded to those who must apply a statute's provisions so as to avoid arbitrary and discriminatory applications. State v. Duggar, 806 S.W.2d 407, 408 (Mo. Banc 1991). Therefore, Sections 167.031 RSMo. and 167.061 RSMo. are impermissibly vague in that they do not provide sufficient guidance so as to avoid arbitrary and discriminatory applications.

CONCLUSION

The trial court erred in overruling Appellant's motion for judgment of acquittal at the close of all the evidence and thereafter entering a verdict of guilty because the Appellant's rights to due process of law and equal protection under the Fifth and Fourteen Amendments to the United States Constitution and Article I, Section 2 and Section 10 of the Missouri Constitution are violated because the statutes, Sections 167.031 RSMo. and 167.061 RSMo. (2000), which the Appellant has been charged under, are impermissibly and unconstitutionally void for vagueness and invites arbitrary application. Therefore, Appellant respectfully requests that this Court find Sections 167.031 RSMo. and 167.061 RSMo. unconstitutionally vague and subsequently reverse her conviction and order her discharged from unsupervised probation.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Garrett C. Andersen, hereby certify to the following. The attached brief complies with the limitations contained in rule 84.06 (a)(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman, size 13 point font. This entire brief, excluding only the cover page and appendix, contains 2,758 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee Virus Scan Program. According to that program, the disks provided to this court and to the Pemiscot County Prosecutor's Office are virus free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief was hand delivered, this 22nd day of March, to Kimberly Davenport, Assistant Prosecuting Attorney, at 509 Ward Ave., Caruthersville, MO, 63830.

Garrett Andersen

