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JURISDICTIONAL STATEMENT

The case was charged and tried in the 21st Judicial Circuit of St Louis County. Because this action addresses the constitutionality of a statute, appellate jurisdiction lies with this Court pursuant to MO. CONST. Article V, § 3.

STATEMENT OF FACTS

Missouri Revised Statute § 566.151, was amended by the passage of House Bill 1698 in 2006. The new version of the statute made the crime of enticement of a child or attempted enticement of a child an unclassified felony. Prior to this bill, Attempted Enticement of a child was a class D felony and Enticement of a Child was a class C felony. Both crimes were probationable and those sentenced to prison were not subject to any special provisions for parole or conditional release. In addition to removing the “D” and “C” classifications, the bill also set a minimum term of punishment at five calendar years with no eligibility for parole, probation, conditional release, or suspended imposition or execution of sentence. The new version of this statute went into effect on June 5, 2006, prior to August 28 of the enacting year.

That same year, the state charged appellant Jacob Pribble in St. Louis County Circuit Court, Cause Number 06CR-5768-01, with one count of attempted enticement of a child. Legal File (LF) at 9. Appellant waived his right to a jury trial and submitted the case to the court for determination based upon a stipulation of facts with attached exhibits. LF, 47-52.

Appellant filed four separate pre-trial motions challenging the constitutionality of the child enticement statute, R.S.Mo. § 566.151. Appellant’s motions challenged the statute on the following grounds: the statute was an

unlawful regulation of protected speech; the statute was overbroad; the statute was void for vagueness and violated due process; the statute was grossly disproportionate and constituted cruel and unusual punishment; the statute was an unlawful retrospective law. LF, 47. The Circuit Court denied all four of the pre-trial motions. LF, 93.

The stipulation of facts (LF, 48-51) is summarized as follows:

Officer Stough of the Maryland Heights Police Department conducted an undercover investigation online where she would enter into chat rooms and pose as a fourteen-year-old female named “Kayla.” Appellant sent an instant message to the officer and they began exchanging messages online. They chatted back and forth for about an hour and twenty minutes. The discussion included topics of a sexual nature.

Eight days later, Appellant contacted the officer via instant message and they again discussed topics of a sexual nature. They also set up a meeting. The two agreed to meet at 1:00 pm at a nearby park. They also spoke briefly on the phone. Officer Stough was dropped off at the park around 12:40 pm and waited for Appellant to arrive. Appellant arrived around 1:00 pm and got out of his car. Appellant walked towards the officer and was taken into custody by other officers without incident.

Appellant was taken to the Maryland Heights Police Department where he was interviewed and gave a statement. Appellant admitted that he had been chatting online with a girl named “Kayla” with Yahoo Instant Messenger. Appellant admitted that these chats became sexual and that “Kayla” told him she was only fourteen years old. Appellant filled out a written statement to this effect.

Based upon the stipulation of facts and the exhibits entered into evidence (LF, 53), consisting of the police reports, the chat log, Appellant’s *Miranda* Waiver, Appellant’s written statement, and Appellant’s consent to search form (54-92), the trial court found Appellant guilty of attempted enticement of a child in violation of R.S.Mo. § 566.151. LF, 93-94. Appellant was later sentenced by the court to six years in the Missouri Department of Corrections. LF, 95-97.

POINTS RELIED ON

- I. THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION TO DISMISS BECAUSE THE STATUTE UNDER WHICH HE WAS CONVICTED IS UNCONSTITUTIONAL IN THAT IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Solem v. Helm 463 U.S. 277, 103 S.Ct. 3001 (1983)

Harmlein v. Michigan, 501 U.S. 957, 111 S.Ct. 2680 (1991)

State v. Lee State v. Lee 841 S.W. 648 (Mo. 1992)

State v. Mubarak, 163 S.W. 3d 624 (Mo. App. 2005)

II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS BECAUSE THE STATUTE UNDER WHICH HE WAS CONVICTED IS UNCONSTITUTIONAL IN THAT IT IS OVERBROAD AND VAGUE.

State v. Carpenter, 736 S.W.2d 406 (Mo. banc 1987)

City of St. Louis v. Burton, 478 S.W.2d 320, 323, (Mo. 1972)

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)

State v. Beine, 162 S.W.3d 483, 487 (Mo. 2005).

III. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS BECAUSE THE STATUTE UNDER WHICH HE WAS CONVICTED IS UNCONSTITUTIONAL IN THAT IT IS AN UNLAWFUL PROHIBITION OF FREE SPEECH.

U.S. CONST. amend. I

Renton v. Playtime Theatres, 475 U.S. 41, (1986)

City of Houston v. Hill, 482 U.S. 451, 459 (1987)

State v. Koetting, 691 S.W.2d 328, 331, (Mo. App. 1985)

IV. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS BECAUSE THE STATUTE UNDER WHICH HE WAS CONVICTED IS UNCONSTITUTIONAL IN THAT IT IS AN EX POST FACTO LAW AND IS RETROSPECTIVE PUNISHMENT.

House Bill 1698

Harvey v. Linvell, 300 S.W. 1066 (Mo. 1928).

Padberg v. Roos, 404 S.W.2d 161 (Mo. 1966)

Schottel v. Harman, 208 S.W.3d 889 (Mo. 2006).

ARGUMENT

- I. THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION TO DISMISS BECAUSE THE STATUTE UNDER WHICH HE WAS CONVICTED IS UNCONSTITUTIONAL IN THAT IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Standard of review:

Appellant submitted his motion to dismiss on these same grounds at the trial court , preserving this issue. L.F. 28. Challenges to the constitutionality of a statute are legal issues that are reviewed *de novo*. *Baldwin v. Director of Revenue*, 38 S.W. 3d 401 (Mo. banc 2001). Furthermore, the rule of lenity requires that ambiguity in a penal statute be construed against the government and in favor of persons on whom the penalties will be imposed. *J.S. Beaird*, 28 S.W. 3d 875, 877 (Mo. banc 2000).

Argument:

Appellant asserts that R.S.Mo. § 566.151 is unconstitutional on its face because the statute’s penalty provision, which requires one to serve at least five years in prison *without* being eligible for probation, parole, or conditional release is grossly disproportionate when compared to the statute’s previous penalty provision that was recently amended. The statute is also grossly disproportionate when compared to other sentences given to other defendants for the same or similar crimes. Specifically, a number of crimes that involve significantly more serious, violent, and

reprehensible conduct are nonetheless punished less harshly than defendants convicted under R.S.Mo. § 566.151.

The Eighth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, states “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹ The Eighth Amendment’s counterpart in the Missouri Constitution, Article I, § 21 is nearly identical: “That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”

In this case, the mandatory minimum five-year prison term is unconstitutional because it is disproportionate. In *Solem v. Helm*, the Supreme Court adopted a three-part test for determining the proportionality of a sentence:

- (1) An examination of the gravity of the offense and the harshness of the penalty;
- (2) A comparison of the sentences imposed on other criminals in the same jurisdiction; and
- (3) A comparison of the sentences imposed for commission of the same crime in other jurisdictions.

463 U.S. 277, 103 S.Ct. 3001 (1983). In 1991, the Supreme Court modified this test in *Harmlein v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680 (1991). As adopted by

¹ U.S. CONST. amend. VIII.

Missouri in *State v. Lee*, “comparison to sentences given to other defendants for the same or similar crime is irrelevant except when the court finds the sentence in question grossly disproportionate.” 841 S.W. 648, 654 (Mo. 1992). The Southern District Appellate Court explained “grossly disproportionate” as “so disproportionate to the offense committed as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances.” *State v. Mubarak*, 163 S.W. 3d 624, 631 (Mo. App. 2005) *citing State v. Brownridge*, 353 S.W. 2d 715 (Mo. 1962).

In applying this test to R.S.Mo. § 566.151, that statute as it reads now is a violation to the Eighth Amendment of the U.S. Constitution and Article I, § 21 of Missouri’s Constitution.

A. Step 1: An examination of the gravity of the offense and the harshness of the penalty

1. Gravity of the Offense

Enticement of a Child is not a violent offense. It involves no weapons or use of force. It is possible to commit Attempted Enticement of a Child without ever even having a live victim. This offense involves a situation where a person “persuades, solicits, coaxes, entices, or lures” a person under age fifteen “for the purpose of engaging in sexual conduct.” R.S.Mo. § 566.151. So, the crime then, is manipulation. Since engaging in sexual contact with a person under age fifteen is itself a crime (*See* R.S.Mo. §§ 566.032, 566.034), then Enticement of a Child is the

crime of persuading the person under age fifteen to agree to that crime. The persuasion then, would logically follow as a less serious offense than the ultimate crime of Statutory Rape (R.S.Mo. §§ 566.032, 566.034).

Also of note, is that the word “threatens” is missing from the statute. This crime does not include an instance where a person can e-mail a child and say “have sex with me or else.”

Section 566.151.2 provides that one can be guilty of this crime even if no child is ever even involved. A person can then chat with an adult police officer that says they are a person under age fifteen and be guilty of this offense.

In summary then, this crime is non-personal, non-violent manipulation; oftentimes, with no actual victim.

2. Harshness of the Penalty

The penalty provisions of R.S.Mo. § 566.151 as amended went into effect on June 5, 2006 to require a minimum prison term of five years without being eligible for “parole, probation, conditional release, or suspended imposition or execution of sentence for a period of five years.” R.S.Mo. §566.151. Therefore, as of June 5, 2006 anyone pleading guilty to or found guilty of Enticement of a Child must serve at least five calendar years at the Missouri Department of Corrections. Prior to this amendment, Attempted Enticement of a Child was a class D felony and Enticement of a Child was a class C felony. The authorized range of punishment for these crimes

was up to four and seven years in prison respectively, and/or a fine of up to \$5,000.00. Once amended, Attempted Enticement of a Child and Enticement of a Child both became felonies that require a minimum of five years “hard time” in the Missouri Department of Corrections.

The conduct required to violate R.S.Mo. § 566.151 has not changed. The essential elements of the crime are identical both before and after the amendment. The only change to the statute was the penalty provision.

Prior to June 5, 2006, defendants violating this section were commonly given suspended imposition and execution of sentences and granted probation. Review of Appendix A from the Missouri Sentencing Advisory Commission’s Biennial Report for the year 2007, which summarizes average sentencing statistics from fiscal year 2000 to fiscal year 2007, reveals that of the five sentences handed down for violation of R.S.Mo. § 566.151, only one of the defendants was actually sentenced to prison by the trial court. The remaining four defendants, or 80% of those pleading or found guilty of attempted enticement of a child, were all granted some form of probation. L.F. 27. Also, the one defendant that was sentenced to prison was released after one year. L.F. 27.

Regardless of each defendant’s specific situation, the exact same conduct, that of typing on a keyboard in an internet chat room with an undercover police officer, was punished much less severely prior to the amendment. The new penalty provision

of R.S.Mo. § 566.151 is glaringly disproportionate when compared to sentences given defendants under the old version of the law.

To illustrate, a defendant on June 4, 2006 could receive a suspended imposition of sentence, successfully complete his probation, serve no jail or prison time, and not even have a felony conviction on his record for chatting online with an undercover police officer. However, on June 5, 2006 the exact same conduct would result in a defendant serving at least five calendar years at the Missouri Department of Corrections. Furthermore, Attempted Enticement of a Child used to be a D felony with a maximum range of punishment of four years in prison. Now, pursuant to the amended version of the statute, one attempting the crime and one actually committing the crime are both subject to the same five-year minimum.

There are major disproportionality problems between the two versions of the statute. This difference, in both regards, is grossly disproportionate and violates defendants' rights to be free from cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments of the United States Constitution and Article I, § 21 of the Missouri Constitution.

B. Step 2: A Comparison Of The Sentences Imposed On Other Criminals

In The Same Jurisdiction

It is this part of the test that *Harmelin* altered. This comparison is only relevant to the extent that the sentence on this crime is grossly disproportionate. *Lee*

at 654. The challenge in the analysis then is in determining what is meant by “grossly disproportionate” and does a mandatory five-year prison sentence meet that definition.

As previously stated, the Appellate Court in *Mubarak* essentially adopted the definition in *State v. Brownridge* as the meaning for grossly disproportionate: “A punishment is not cruel and unusual because of its duration unless so disproportionate to the offense committed as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances.” 353 S.W.2d 715, 718 (Mo. 1962). *Brownridge* cites a case decided in 1900, wherein the Supreme Court reasoned that “in order to determine whether the punishment inflicted by a statute is so great as to infract the Constitution, must depend materially upon the circumstances and nature of the act for which the punishment is inflicted. [Blydenburgh v. Miles, 39 Conn. loc. cit. 497; Cooley Const. Lim. (6 Ed.), 402.]” *State v. Stubblefield*, 58 S.W. 337, 339 (Mo. 1900).

Essentially, if the punishment is morally shocking to reasonable people because of the punishment as it relates to the crime, then it is grossly disproportionate. While Appellant has no caselaw or statute to prove it, it is likely that most reasonable people find it abhorrent for adults to have sexual relations with persons under age fifteen. Most reasonable people would probably agree that committing those offenses and harming a child is worse than alluding to it in an

electronic communication with an undercover police officer. The law, then should reasonably reflect that. However, it does not.

The conduct in § 566.151 does not involve the actual touching of another person. It only involves words. The conduct does not involve sexual contact, sexual intercourse, or deviate sexual intercourse. There is no logical reason that the above conduct, usually comprised of someone chatting online with an undercover officer, should be punished so much more severely than someone who actually subjects a child to sexual contact, sexual intercourse, or deviate sexual intercourse. The following examples serve to illustrate the grossly disproportionate state of the law in this area.

Child molesters, those who subject children under the age of fourteen to “sexual contact,” which is defined as: “any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire” are only subject to the range of punishment for a class B felony.² Child molesters are also eligible for probation, parole, and conditional release. One can sexually abuse a child under the age of fourteen by “subjecting them to sexual contact by the use of *forcible compulsion*” (emphasis added) and

² See R.S.Mo. § 566.010(3).

only be guilty of a class B felony.³ He would also be eligible for probation, parole and conditional release. In contrast, someone chatting over the internet to an undercover officer must serve at least five years of “hard time” at the Missouri Department of Corrections. The difference between the above sentences makes no sense. More dangerous, violent, and harmful conduct is punished much more leniently.

Child molesters are not alone. Rapists are also treated more leniently than those chatting on the Internet. Rapists, those who subject others to “sexual intercourse by the use of forcible compulsion” are only subject to a minimum five-year term.⁴ Although not eligible for probation, a rapist, unlike one chatting online with an undercover police officer, is eligible for parole and conditional release. The same leniency applies to statutory rapists. Those that “have sexual intercourse with a child less than fourteen years old” are only subject to a minimum five-year prison term.⁵ A statutory rapist is even eligible for probation. Again, however, one chatting online with an undercover police officer must serve five years in prison without probation, parole or conditional release.

³ See R.S.Mo. § 566.100.

⁴ See R.S.Mo. § 566.030.

⁵ See R.S.Mo. § 566.032.1(2).

The list does not stop with child molesters and rapists. Most alarmingly, even those that statutorily sodomize children less than fourteen years old are subject to softer sentences than those chatting online with undercover police officers. The crime of statutory sodomy in the first degree occurs when one “has deviate sexual intercourse with another person who is less than fourteen years old.”⁶ Those committing this crime, who subject a child under the age of fourteen to “any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim” are only subject to a minimum five-year term.⁷ Even these offenders are eligible for probation, parole and conditional release. Yet, one chatting online with an undercover police officer must serve five years in prison without probation, parole or conditional release.

Missouri has no other crime in which there is a mandatory minimum five calendar year sentence without eligibility for parole or probation. The only comparable crime is armed criminal action under R.S.Mo. § 571.015. According to this statute, anyone that has committed a felony in Missouri and has used a

⁶ See R.S.Mo. § 566.062(1).

⁷ See R.S.Mo. § 566.010(1).

“dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action.” In that situation, the offender must serve a minimum of three calendar years before eligible for probation or parole. If the defendant has already been convicted of armed criminal action, then, and only then, will the defendant have to serve a mandatory minimum of five calendar years in prison. R.S.Mo. § 571.015.2. This means a person that commits a felony and uses a dangerous or deadly weapon will not serve as much prison time as someone that types on a computer to a police officer.

The disproportionality with regard to one convicted of enticement under R.S.Mo. § 566.151 and the other crimes noted above is obvious and inexcusable.

C. Step 3: A Comparison Of The Sentences Imposed For Commission Of The Same Crime In Other Jurisdictions

To compare Missouri’s statute and penalty provisions with the other forty-nine states, Missouri’s is one of the worst.⁸ At least twenty-nine states have enticement as

⁸ See generally ALA. CODE § 13A-6-110 (2008); ALASKA STAT. § 11.41.452 (2008); ARIZ. REV. STAT. § 13-3554 (2008); ARK. CODE § 5-27-603 (2008); CAL. PENAL CODE §§ 288 and 288.2 (2008); COLO. REV. STAT. § 18-3-405.4 (2008); CONN. GEN. STAT. § 53a-90a (2008); DEL. CODE ANN. tit.11 § 1112A (2008); FLA. STAT. ch. 847.0135 (2008); GA. CODE ANN. § 16-12-100.2 (2008); HAW. REV.

STAT. § 708-893 (2008); IDAHO CODE § 18-1509A (2008); 720 ILL. COMP. STAT. 5/11-6 (2008); IND. CODE § 35-42-4-6 (2008); IOWA CODE § 710.10 (2008); KAN. STAT ANN. §§ 21-3510 and 21-3511 (2007); KY. REV. STAT. § 510.155 (2008); LA. REV. STAT. § 14:81.3 (2008); ME. REV. STAT. tit. 17-A § 259 (2008); MD. CRIM. CODE § 3-324 (2008); MASS. GEN. LAWS. ANN. ch. 265 § 26C (2008); MICH. COMP. LAWS § 750.145d (2008); MINN. STAT. § 609.352 (2008); MISS. CODE ANN. § 97-5-33 (2008); MONT. CODE ANN. § 45-5-625(e) (2007); NEB. REV. STAT. § 28-320.02 (2008); NEV. REV. STAT. 201.560 (2008); N.H. REV. STAT. ANN. § 649-B:4 (2008); N.J. STAT. ANN. § 2C:13-6 (2008); N.M. STAT. ANN. § 30-37-3.2 (2008); N.Y. PENAL LAW § 235.22 (2008); N.C. GEN. STAT. § 14-202.3 (2008); N.D. CENT. CODE § 12.1-20-05.1 (2008); OHIO REV. CODE ANN. § 2907.07 (2008); OKLA. STAT. tit. 21, §§ 1040.13A, 1123 (2008); OR. REV. STAT. § 163.427, 163.435 (2007); 18 PA. CONS. STAT. § 6318 (2008); R.I. GEN. LAWS § 11-37-8.8 (2008); S.C. CODE ANN. § 16-15-342 (2007); S.D. CODIFIED LAWS § 22-24A-4 (2009); TENN. CODE ANN. § 39-13-528 (2008); TEX. PENAL CODE ANN. § 33.021 (2007); UTAH CODE ANN. § 76-4-401 (2008); VT. STAT. ANN. tit. 13, § 2828 (2007); VA. CODE ANN. § 18.2-374.3 (2008); WASH. REV. CODE § 9.68A.090 (2008); W. VA. CODE § 61-3C-14b (2008); WIS. STAT. ANN. § 948.075 (2008); WYO. STAT. ANN. § 6-2-318 (2008).

a probationable offense.⁹ Ten states have misdemeanor provisions for enticement under certain circumstances.¹⁰ As many as nineteen states have the statutory

⁹ ALA. CODE § 13A-6-110 (2008); ALASKA STAT. § 11.41.452 (2008); ARK. CODE § 5-27-603 (2008); DEL. CODE ANN. tit.11 § 1112A (2008); FLA. STAT. ch. 847.0135 (2008); IDAHO CODE § 18-1509A (2008); 720 ILL. COMP. STAT. 5/11-6 (2008); IND. CODE § 35-42-4-6 (2008); KY. REV. STAT. § 510.155 (2008); ME. REV. STAT. tit. 17-A § 259 (2008); MD. CRIM. CODE § 3-324 (2008); MASS. GEN. LAWS. ANN. ch. 265 § 26C (2008); MICH. COMP. LAWS § 750.145d (2008); MINN. STAT. § 609.352 (2008); NEB. REV. STAT. § 28-320.02 (2008); NEV. REV. STAT. 201.560 (2008); N.H. REV. STAT. ANN. § 649-B:4 (2008); N.J. STAT. ANN. § 2C:13-6 (2008); N.M. STAT. ANN. § 30-37-3.2 (2008); N.Y. PENAL LAW § 235.22 (2008); N.D. CENT. CODE § 12.1-20-05.1 (2008); OKLA. STAT. tit. 21, §§ 1040.13A, 1123 (2008); S.C. CODE ANN. § 16-15-342 (2007); S.D. CODIFIED LAWS § 22-24A-4 (2009); TENN. CODE ANN. § 39-13-528 (2008); VA. CODE ANN. § 18.2-374.3 (2008); WASH. REV. CODE § 9.68A.090 (2008); WIS. STAT. ANN. § 948.075 (2008); WYO. STAT. ANN. § 6-2-318 (2008).

¹⁰ These include California, Georgia, Iowa, Kansas, Michigan, Nevada, North Dakota, Oregon, Tennessee, Utah, and Washington. *See supra* for statutory references.

maximum at five years.¹¹ As many as six states do not even have a separate statute that criminalizes enticement by itself, but incorporates this behavior in other offenses.¹²

In conducting the three-step analysis from *Solem*, the statute meets the requirements for disproportionality. The same conduct once punished with probation now requires one to serve five years in prison without probation, parole or conditional release. The statute also subjects offenders who commit Attempted Enticement of a Child and Enticement of a child to the same five year mandatory term. All the while, a person that breaks into a house while the residents are asleep can get probation. If that person breaks into the house with a loaded gun, then he only has to serve three years. But type on a computer and you are considered so dangerous that the state needs to lock you up for five solid years.

¹¹ Six of these states set the five-year maximum for first offenders only: Alaska, Connecticut, Florida, Illinois, Iowa, Nebraska. Other states have a maximum of five years or less: Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, North Dakota, Ohio, Oregon, South Dakota, Vermont, Wyoming. *See supra* for statutory references.

¹² California, Hawaii, Oregon, Pennsylvania, Utah, Washington. *See supra* for statutory references.

The penalty provision of R.S.Mo. § 566.151 is much harsher than penalties given to much more harmful and reprehensible conduct. People are actually violating children in the most vile and disgusting manners possible and receiving softer sentences than people typing in an internet chatroom. Missouri Revised Statute §566.151 is unconstitutional and violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 21 of the Missouri Constitution because it inflicts cruel and unusual punishment that is clearly disproportionate when considered in light of its nature and when compared to the former version of the statute, sentences given for similar—and even worse—crimes, and to other states’ penalties for this same activity.

II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS BECAUSE THE STATUTE UNDER WHICH HE WAS CONVICTED IS UNCONSTITUTIONAL IN THAT IT IS OVERBROAD AND VAGUE.

Standard of review:

Appellant submitted his motion to dismiss on these same grounds at the trial court , preserving this issue. L.F. 28. Challenges to the constitutionality of a statute are legal issues that are reviewed *de novo*. *Baldwin v. Director of Revenue*, 38 S.W. 3d 401 (Mo. banc 2001). Furthermore, the rule of lenity requires that ambiguity in a penal statute be construed against the government and in favor of persons on whom the penalties will be imposed. *J.S. Beaird*, 28 S.W. 3d 875, 877 (Mo. banc 2000).

Argument:

A. RSMo §566.151 Is Overbroad Because It Prohibits Conduct To Which A Person Is Constitutionally Entitled Along With Conduct That A Person Has No Right To Engage In - The Statute Essentially Punishes Innocent Conduct.

The overbreadth doctrine allows a person to contest the constitutionality of a statute even if he was not engaging in constitutionally protected conduct. *State v. Carpenter*, 736 S.W.2d 406 (Mo. banc 1987). Appellant maintains that his conduct in this case was constitutionally protected. However, for purposes of the overbreadth

doctrine analysis, the law in Missouri is clear that it does not matter and that the language of the statute is what is to be considered.

A statute is overbroad when it prohibits conduct a person has no right to engage in and conduct a person has a right to engage in. *City of St. Louis v. Burton*, 478 S.W.2d 320, 323, (Mo. 1972). The statute at issue in this case, R.S.Mo. § 566.151, states in pertinent part:

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.

This statute is overbroad because it treats internet communication and face-to-face communication the same. A statute prohibiting conduct that is allowed and conduct that is not allowed is unconstitutionally overbroad. Internet communication is constitutionally protected activity. Pursuant to *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), internet transmissions of even distasteful and indecent sexual communications are deserving of the utmost freedom from content regulation. Face-to-face enticement of children is not. There is a major difference between communicating on the internet with someone you have never met and hanging out in parks and schoolyards trying to entice children. This statute prohibits both types of

conduct. The internet communication is constitutionally protected, whereas the face-to-face communication on the school yard is not. Thus, R.S.Mo. § 566.151 is unconstitutionally overbroad.

The United States Supreme Court, in the *Reno* decision, discussed the fact that offensive speech alone does not justify suppression.

In evaluating the free speech rights of adults, we have made it perfectly clear that “sexual expression which is indecent but not obscene is protected by the First Amendment.” Where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression. Indeed, *Pacifica* itself admonished that “the fact that society may find speech offensive is not a sufficient reason for suppressing it.”

Id. at 874-875.

Pursuant to the *Reno* decision, sexual communication over the internet is protected activity.

Prohibiting certain communications over the internet is contrary to one of the main and most commonly used purposes of the internet. People communicate in chat rooms on the internet every day and rarely actually meet each other. That is the whole point. When chatting on the internet, you rarely meet the person on the other end of the chat room. The very nature of internet chat rooms is one of fantasy where

people can exaggerate, embellish, and hide certain defects about themselves. Chat rooms are simply used as a means to communicate and suffer no consequences from not telling the truth.

Sexual communications over the internet are not uncommon and have become very common in today's society. It is a booming industry. Internet communication, especially in a chat room, is not as real as face-to-face communication and must be treated differently. Again, communicating in an internet chat room and in a face-to-face manner are completely different.

“The purpose of the overbreadth doctrine is to ensure that a statute does not punish innocent conduct.” *State v. Beine*, 162 S.W.3d 483, 487 (Mo. 2005). Fantasy communication over the internet that may or may not ever result in any real conduct or face-to-face communication is innocent conduct. It is also a multi-million dollar industry that would cease to exist if people could not freely and anonymously communicate about sex over the internet. This situation is comparable to the phone sex commercials that come on late at night. For about \$2.00 a minute, lonely men get to speak on the phone to the beautiful young women that are on the television commercial. It is unlikely that the woman on the other end of that phone is actually the beautiful twenty-four-year-old that is in the commercial. However, this is fantasy talk. The male on the one end of the phone does not care because he is mainly

concerned with what he *imagines* is on the other end of the telephone line, not what actually is there.

R.S.Mo. § 566.151 prohibits two separate types of conduct. One type of conduct is allowed while the other is not. Appellant has no problem with prohibiting perverts on the school yard that entice children to come along with them. However, that situation is completely different than someone typing to another person in a chat room about sex. One is reality, and should be prohibited. The other is fantasy, and should not be prohibited. There is a difference between typing a response to a screen name and directly talking to someone's actual face with spoken words. When a statute "reaches beyond conduct which is calculated to harm and could be used to punish conduct which is essentially innocent," it is overbroad. *Christian v. Kansas City*, 710 S.W.2d 11, 12-14 (Mo. App. 1986). Talking about sex in a chat room on the internet is innocent conduct and should not be punished.

B. R.S.Mo. § 566.151 Is Unconstitutional and Should Be Ruled Void for Vagueness Because Its Prohibitions Are Not Clearly Defined

R.S.Mo. § 566.151 is unconstitutionally vague because its penalty provision fails to give adequate warning. The statute both allows for and disallows someone to receive a suspended imposition of sentence.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *State v. Mahan*, 971 S.W.2d 307, 312 (Mo.

banc 1998). “The void for vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and protects against arbitrary and discriminatory enforcement. *Id.*

“The test in enforcing the doctrine is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.” *State v. Schleiermacher*, 924 S.W.3d 269, 276 (Mo. banc 1996). With regard to criminal statutes as the one in this case, courts employ “greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” *State ex rel. Nixon v. Telco Directory Pub.*, 863 S.W.2d 596, 600 (Mo banc 1993).

R.S.Mo. § 566.151 is unconstitutionally void for vagueness because the statute’s penalty provision, namely § 566.151 (3), is vague and fails to adequately warn a “person of ordinary intelligence...when measured by common understanding and practices.” *Schleiermacher* at 276. Specifically, the statute states in pertinent part: “no person convicted ...shall be eligible for a suspended imposition of sentence.” This wording is contradictory, confusing and vague. The initial portion of the section that states “no person convicted” seems to leave the door open for a defendant to receive a suspended imposition of sentence upon a plea or finding of

guilt. However, the section also states that no person shall be “eligible for suspended imposition of sentence for a period of five calendar years.”

The law in Missouri is clear on this issue. No person receiving a suspended imposition of sentence for a criminal charge is “convicted” of that charge. *In re Shrunk*, 847 S.W.2d 789 (Mo. 1993). As applied to this case, the sentencing provisions of the statute are extremely vague and confusing to “a person of ordinary intelligence.” *Schleiermacher* at 276. The decision to plead guilty or proceed with trial is already a difficult one for any defendant to face. However, the decision is made particularly more difficult when dealing with this statute because it seems to allow for and prohibit probation at the same time. A person of ordinary intelligence cannot make an informed decision due to the statute’s terms.

Much more care should have been taken in drafting R.S.Mo. § 566.151. Other criminal statutes specifically state whether a conviction or a prior plea of guilty is required for certain situations. For example, R.S.Mo. § 558.016, the statute dealing with prior and persistent offenders, specifically states: “A ‘prior offender’ is one who has pleaded guilty to or has been found guilty of one felony.” R.S.Mo. § 558.016 was written this way so that people are put on notice that a prior conviction is not required for someone to be a prior offender. The only requirement is a prior finding of guilt. The same is not true with the statute in this case. R.S.Mo. § 566.151 includes the words “no person convicted under this section.” This wording leads “a

person of ordinary intelligence” to believe that one could plead guilty to violating R.S.Mo. § 566.151 and not receive a conviction. In other words, one could plead guilty and receive a suspended imposition of sentence. *Schleiermacher* at 276.

If the true intent of R.S.Mo. § 566.151 was to require a conviction with every guilty plea, as is stated in the statute, and not to allow for the granting of a suspended imposition of sentence, then the statute should have been worded as R.S.Mo. § 558.016 and clearly stated “no person pleading guilty or found guilty under this section” shall be eligible for a suspended imposition of sentence. That wording would have been precise enough to render a “sufficiently definite warning” as to the sentencing provisions of the statute. *Schleiermacher* at 276. However, as written, R.S.Mo. § 566.151 fails to put a defendant on notice of the sentence he could receive upon a plea of guilty. Due process requires that a defendant be given adequate warning of a statute’s prohibitions and implications. Due process cannot be afforded appellant in this case due to the conflicting and vague wording of R.S.Mo. § 566.151. The statute should be declared unconstitutional due to its being void for vagueness.

III. THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION TO DISMISS BECAUSE THE STATUTE UNDER WHICH HE WAS CONVICTED IS UNCONSTITUTIONAL IN THAT IT IS AN UNLAWFUL PROHIBITION OF FREE SPEECH.

Standard of review:

Appellant submitted his motion to dismiss on these same grounds at the trial court , preserving this issue. L.F. 28. Challenges to the constitutionality of a statute are legal issues that are reviewed *de novo*. *Baldwin v. Director of Revenue*, 38 S.W. 3d 401 (Mo. banc 2001). Furthermore, the rule of lenity requires that ambiguity in a penal statute be construed against the government and in favor of persons on whom the penalties will be imposed. *J.S. Beaird*, 28 S.W. 3d 875, 877 (Mo. banc 2000).

Argument:

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, states in pertinent part: “Congress shall make no law...abridging the freedom of speech.”¹³ The First Amendment’s counterpart in the Missouri Constitution, Article I § 8, provides as follows:

That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say,

¹³ U.S. CONST. amend. I.

write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty.

R.S.Mo. § 566.151.1 and 2 state:

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.

“Regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment.” *Renton v. Playtime Theatres*, 475 U.S. 41, (1986). Special care must be given when a defendant challenges a criminal statute on First Amendment grounds. “Criminal statutes must be scrutinized with particular care...; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.” *City of Houston v. Hill*, 482 U.S. 451, 459 (1987). In order

to regulate protected speech, the government must show an “overriding and compelling state interest.” *State v. Koetting*, 691 S.W.2d 328, 331, (Mo. App. 1985).

The State, in drafting R.S.Mo. §566.151, is attempting to regulate sexual communications over the internet. The very nature of this type of communication, online sexual talk, is one of fantasy and not reality. People discuss sexual secrets and fantasies over the internet all of the time so that they can do so discreetly without the fear of being embarrassed. This type of expression is protected speech that cannot be regulated by statute absent a compelling government interest. As applied to this case, the State is seeking to regulate imaginary conversations that may never materialize into any type of criminal conduct. The State does not have a compelling interest in regulating online fantasy sexual communications. If they did, the multi-million dollar industry would cease to exist.

The State will mention that its compelling justification is to protect children from online sexual predators. However, this is not a valid justification. This reason would make sense if the statute only prohibited actual face-to-face communication. In the online context, more evidence is needed in order to hold someone criminally responsible for exercising their First Amendment rights.

In *State v. Carpenter*, 736 S.W. 2d 406 (Mo. 1987), the Missouri Supreme Court held that a statute outlawing a person from threatening to commit a crime was a violation of the First Amendment. The Court reasoned that “there is no guarantee

under the statute that a substantial likelihood exists that such threatened criminal conduct will ever occur. There maybe situations where the threatened activity will neither be imminent nor likely. Consequently, the statute acts to smother speech otherwise protected by the First Amendment in that “persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.” *Carpenter* at 408, citing *Gooding v. Wilson*, 405 U.S. 518 (1972).

Much like the situation in *Carpenter*, R.S.Mo. § 566.151 regulates speech alone. The content of the speech is about a criminal activity that may or may not ever happen. If it ever does happen, there are already laws in place to deal with those situations. This statute then, is criminalizing someone talking about committing a crime. While it is unfortunate, it is still protected speech. When it comes to electronic communications, it is not imminent. And considering that it is possible for the “child” to actually be a police officer, the spoken-of crime is not only unlikely, as mentioned in *Carpenter*; it is impossible.

Absent an actual direct threat to a child,¹⁴ citizens should be free to exercise their First Amendment rights over the Internet to discuss sex with whomever they choose. Although this may not be a popular view, the essence of the First Amendment is to protect those views that are least popular. Missouri Revised Statute

¹⁴ Threats are criminalized under R.S.Mo. § 565.070. 1(3).

§ 566.151 criminalizes someone talking about committing a crime. Just as it is not illegal to discuss getting drunk then getting behind the wheel of a car; wanting to not pay your taxes; or even what it would be like to rob a bank; so should it not be illegal to talk about wanting to engage in statutory sodomy or rape. Society judges these people for their actions and desires, but the government cannot judge them for their words alone.

IV. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS BECAUSE THE STATUTE UNDER WHICH HE WAS CONVICTED IS UNCONSTITUTIONAL IN THAT IT IS AN EX POST FACTO LAW AND IS REPTROSPECTIVE PUNISHMENT.

Standard of Review:

Appellant submitted his motion to dismiss on these same grounds at the trial court , preserving this issue. L.F. 28. Challenges to the constitutionality of a statute are legal issues that are reviewed *de novo*. *Baldwin v. Director of Revenue*, 38 S.W. 3d 401 (Mo. banc 2001). Furthermore, the rule of lenity requires that ambiguity in a penal statute be construed against the government and in favor of persons on whom the penalties will be imposed. *J.S. Beaird*, 28 S.W. 3d 875, 877 (Mo. banc 2000).

Argument:

R.S.Mo. §566.151 is unconstitutional as an unlawful retrospective law because no valid emergency existed to allow House Bill 1698 to go into effect prior to August 28, 2006 and allowing the bill to go into effect resulted in an ex post facto application to Appellant.

R.S.Mo. §566.151 was amended by the passage of House Bill 1698. The new version of the statute made the crime of enticement of a child or attempted enticement of a child an unclassified felony and set a minimum term of punishment at five years with no eligibility for parole, probation, conditional release, or

suspended imposition or execution of sentence. The new version of the statute went into effect on June 5, 2006.

In order for House Bill 1698 to go into effect *prior* to August 28 of the enacting year, a valid emergency clause is required. Specifically, Article III, §29 of the Missouri Constitution states:

No law passed by the general assembly, except an appropriation act, shall take effect until *ninety days after* the adjournment of the session in either odd-numbered or even-numbered years at which it was enacted. However, in case of an emergency which must be expressed in the preamble of the body of the act, the general assembly by a two-thirds vote of the members elected to each house, taken by yeas and nays may otherwise direct; and further except that, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of the recess.

As applied to this case, no valid emergency existed and House Bill 1698 unlawfully went into effect on June 5, 2006. In order for an emergency measure to be valid it must be specifically authorized by the Missouri Constitution.

A declaration in a bill that it was an emergency measure within the meaning of the Constitution, did not make it so; that the emergency

must appear in fact upon the face of the bill to be within the terms of the Constitution, authorizing an emergency clause which would put the act into immediate effect.

Harvey v. Linvell, 300 S.W. 1066 (Mo. 1928).

This determination, as to whether an emergency measure is in fact an emergency, is left up to the judiciary and not the legislature. *Padberg v. Roos*, 404 S.W.2d 161 (Mo. 1966). With reference to R.S.Mo. §566.151, the legislature has failed to provide any basis whatsoever for the emergency measure. In fact, the Bill merely contains boilerplate language taken straight from the Missouri Constitution, Article III, §52(a) comparable to any other criminal statute in the state. Specifically, House Bill 1698 states:

Section B. Because of the need to protect Missouri citizens from sexual offenders, section A of this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and section A of this act shall be in full force and effect upon its passage and approval.

This general boilerplate clause does not satisfy the requirement that an actual emergency existed such that the statute had to take effect immediately as opposed to the normal “post 90 days after adjournment” requirement of Article III, § 29 of

the Missouri Constitution. A law was already on the books that dealt with the crime of enticement of a child. The legislature did not show, in any way whatsoever, that this law was inadequate such that a new statute was “necessary for the immediate preservation of the public health, welfare, peace and safety...”

Was there a large upswing in defendants attempting to entice or enticing children? Were a number of defendants that had been put on probation for enticing children committing new offenses? Were these defendants that had been put on probation failing at such a rate that a mandatory five year prison sentence was necessary? The answer is that we have no idea because the legislature never provided an actual basis for its emergency. Absent this specific language, the Court must rule that no emergency existed and therefore the legislature was wrong to do away with the standard process that includes a ninety day waiting period. *See* Article III, §29, Missouri Constitution.

As applied to this case, Appellant’s actions that provided the basis for the charge all occurred on August 17, 2006 which is *prior to* when House Bill 1698 should have gone into effect had the standard, nonemergency process been followed. R.S.Mo. § 566.151 was not a valid statute on August 17, 2006 because it was not based upon a valid emergency situation. Therefore, the statute could not legally go into effect until August 28, 2006 which is *after* Appellant’s actions.

Applying the new version of R.S.Mo. § 566.151 to Appellant for his actions that occurred *prior to* the proper effective date as required by the Missouri Constitution is an ex post facto application to the Appellant in violation of the United States Constitution, Article I, § 10 and Article I, § 13 of the Missouri Constitution. With regards to retrospective laws, this Court has found that:

A retrospective law is: “one which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. It must give to something already done a different effect from that which it had when it transpired.

Schottel v. Harman, 208 S.W.3d 889 (Mo. 2006).

As applied here, the new version of R.S.Mo. § 566.151 completely changed the consequences involved for the exact same type of conduct that was already prescribed by the prior statute. Appellant is no longer eligible for any type of probation, parole or conditional release and must serve a minimum of five years “hard time” in the Missouri Department of Corrections.

Had House Bill 1698 gone through the regular legislative process, as it should have since no valid emergency was laid out in the bill, then the bill along with all of the enhanced sentencing provisions would *not* have been valid until August 28, 2006. This date is *after* any of Appellant’s conduct in this case.

When Appellant's conduct took place on August 17, 2006 the proper reading of R.S.Mo. § 566.151 would have classified his conduct as a class C felony as opposed to an unclassified felony with a minimum five-year sentence requirement. Appellant would have been eligible for probation. Appellant would have been eligible for parole. Appellant would have been eligible for conditional release. Appellant would have been eligible for a suspended imposition of sentence. Appellant would have been eligible for a suspended execution of sentence.

Applying the amended version of R.S.Mo. § 566.151 "gives to something already done a different effect from that which it had when it transpired." *Id.* at 892. R.S.Mo. § 566.151 should be declared unconstitutional as an unlawful retrospective law in violation of Appellant's right to due process as guaranteed by Article I, § 10 of the U.S. Constitution and Article I, § 13 of the Missouri Constitution.

CONCLUSION

Because R.S. Mo. § 566.151, as currently enacted, is in violation of the Missouri's protections against cruel and unusual punishment, overbroad and vaguely constructed statutes, free speech protections, and prohibitions against ex post facto and retrospective application of laws, Appellant respectfully requests this Honorable Court declare R.S.Mo. § 566.151 unconstitutional.

CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that two typewritten copies of the above Appellant's Brief and one copy on CD-ROM were mailed by United States Mail, postage pre-paid this 26th day of January, 2009 to each of the Appellant's Attorneys:

Chris Koster
Missouri Attorney General
P.O. Box 899
Jefferson City, MO 63102.

I also certify that the foregoing complies with the limitations contained in Rule 84.06(b) and Local Rule 360, brief consists of 9,083 words, and the CD-ROM has been scanned and contains no viruses.

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APPENDIX

R.S.Mo. § 566.151.....A1

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