

No. SC89473

*In the
Supreme Court of Missouri*

STATE OF MISSOURI,

Respondent,

v.

JACOB PRIBBLE,

Appellant.

**Appeal from the St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable Steven H. Goldman, Judge**

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Appellant was convicted in St. Louis County Circuit Court of attempted enticement of a child. He was sentenced to a six-year term of imprisonment. Because Appellant challenges the constitutional validity of a Missouri statute, this Court has exclusive jurisdiction. MO. CONST. art. V, § 3.

STATEMENT OF FACTS

Appellant, Jacob Pribble, was indicted in St. Louis County Circuit Court on one count of attempted enticement of a child, § 566.151, RSMo Cum. Supp. 2006¹ (L.F. 9). He opted to waive a jury trial and submit the case upon a set of stipulated facts and exhibits to the trial judge, the Hon. Steven H. Goldman (L.F. 47-52, 93-94).

Appellant does not challenge the sufficiency of the evidence to support his conviction. In the light most favorable to the verdict, the evidence showed:

On August 17, 2006, Officer Erica Stough of the Maryland Heights Police Department logged into a Yahoo chat room under the screen name “Daisy4u1992” (L.F. 48, 54). Her user profile indicated that her first name was “Kayla” (L.F. 48, 54). Shortly after 3:00 p.m., Appellant, using the screen name “Highdrow,” sent “Kayla” a message, asking for her “asl” (age, sex, location) (L.F. 55, 79). “Kayla” responded that she was a fourteen-year-old female from Maryland Heights (L.F. 48, 55, 79). Appellant asked, “do you have a picture, sweetie?” (L.F. 48, 55, 79). “Kayla” said that she did not (L.F. 48, 55, 79).

Appellant sent “Kayla” a link to his profile, where she could see his picture (L.F. 48, 55, 79). He told her that “the only other pics I have are naughty ones,” and asked “do you want to see them? Or will your parents find out and ground you for life”? (L.F. 48, 55, 79). Appellant sent her four pictures of his erect penis (L.F. 48, 55, 79). Appellant asked, “do you like the way my dick looks”? (L.F. 55, 80). “Kayla” asked if they all looked like that,

¹ All statutory references herein are to RSMo Cum. Supp. 2006 unless otherwise noted.

and Appellant answered, “for the most part, some aren’t as big, some are bigger. . . do you like it?” (L.F. 80). “Kayla” said she did (L.F. 80).

In the third picture, Appellant’s penis was dribbling semen (L.F. 55, 79). “Kayla” asked what the third picture was, and Appellant replied, “that’s called cum. . . when a guy has an orgasm that comes out of his penis. . . it’s warm and sticky” (L.F. 79-80). Appellant asked if “Kayla” wanted to see more pictures (L.F. 80). He told her that he could “make that white stuff come out by rubbing it for a while” (L.F. 55, 80). He continued, “it feels really good when that happens” (L.F. 80).

Appellant told “Kayla,” “you can have orgasms to [sic] if you play with your vagina” (L.F. 80). “Kayla” said that she had never done that (L.F. 80). Appellant offered, “well maybe I could sometime show you how to do it. . . if you would let me” (L.F. 49, 55, 80). He advised, “you could touch it now and try it if you want,” but added, “just don’t tell your parents” (L.F. 80).

Appellant said, “I’m really horny right now,” and suggested that he might “do what [he] was doing in that picture” (L.F. 55-56, 80-81). “Kayla” asked why (L.F. 81). Appellant said, “because it feels really good . . . they do that because the cum is what gets a woman pregnant . . . and it shoots up inside her when the guy has an orgasm” (L.F. 56, 81). He asked, “could I show you in person sometime how that really works”? (L.F. 56, 81). “Kayla” said she needed to get to know him better (L.F. 81).

“Kayla” asked what else Appellant wanted to chat about (L.F. 81). He said he could not think of anything but seeing her naked (L.F. 56, 81). He suggested that the two of them talk on the phone so they could “play with [them]selves together” (L.F. 82). When “Kayla”

said, “oh I don’t know,” Appellant replied that he would just like her to try touching herself sometime (L.F. 82).

After a few minutes, Appellant said, “ok I’m going to make myself cum. . . we can keep talking while we do it” (L.F. 56, 82). He told “Kayla,” “I want to shoot my cum onto you . . . I would like to shoot it on your butt or your hands or chest” (L.F. 56, 82). “Kayla” asked Appellant what he was doing (L.F. 82). He said, “playing with myself trying to make myself cum” (L.F. 82). Forty-five seconds later, the conversation ended (L.F. 56, 82).

Eight days later, on August 25, 2006, Appellant initiated a second chat with “Kayla” (L.F. 49, 56, 82). He said that he was home alone, “sitting around naked” (L.F. 83). Appellant asked if anyone was home at “Kayla’s” house (L.F. 49, 56, 83). She said that her mom was about to leave (L.F. 56, 83). Appellant said that he wished he could go over to “Kayla’s” house and meet her “for real” (L.F. 49, 56, 83). He told her that he would love to see her with no clothes on (L.F. 56, 83). He also said, “I could show you my penis in person” and that he would like for her to touch it (L.F. 49, 56, 83).

“Kayla” warned that sometime her dad was going to come home for lunch (L.F. 83-84). Appellant asked what time, and “Kayla” said it would be around noon (L.F. 84). Appellant said, “so you’d really do that . . . touch my penis?” (L.F. 84). He said she could also put it in her mouth (L.F. 49, 56, 84). “Kayla” said that she had never done that before and worried whether she would do it right (L.F. 56, 84). Appellant assured her that, “all you have to do is suck on it like a popsicle . . . or you could just lick it . . . it feels really good” (L.F. 56, 84).

Appellant said that he could come over at 1:00 p.m. (L.F. 84). “Kayla” suggested that he pick her up at the park behind her house (L.F. 49, 56, 84). Appellant said that would be fine, but added, “I dunno how we will be able to do this stuff” (L.F. 84). “Kayla” offered that her dad had a rehab house they could go to if someone was at her house, and Appellant said “ok” (L.F. 84). “Kayla” asked him to bring her something to drink because her mouth gets dry when she’s nervous (L.F. 49, 56, 85). Appellant agreed, but asked to talk to her on the phone so he could confirm that she was “a girl and not a cop or some old perverted man” (L.F. 49, 57, 85). “Kayla” called Appellant at the number he provided (L.F. 49, 57, 86). Appellant, apparently satisfied, said he would meet “Kayla” around 12:45 or 1:00 p.m. (L.F. 49, 57, 86).

Officer Stough and a number of other officers went to the park to wait for Appellant (L.F. 50, 58). At approximately 1:00, Appellant pulled into the park in his red BMW (L.F. 50, 58). He circled the parking lot several times, got out of his car, and began walking toward the officer, carrying a bottle of water (L.F. 50, 58). When Appellant got a look at Officer Stough, he turned toward another pavilion (L.F. 50, 58). The other officers approached Appellant and arrested him (L.F. 50, 58).

At the police station, Appellant agreed to waive his *Miranda* rights and provide a statement (L.F. 50, 61, 87). Appellant admitted that he had chatted with “Kayla” online and that the conversation quickly became sexual (L.F. 50, 62, 88). He said that he sent her explicit images of his penis and discussed with her the “process of ejaculation” (L.F. 50, 62, 88). He said, “I suppose it was my own negligence, at this point, to take fully into consideration ‘her’ age (which was 14), and was focusing more on the possibility to teach

someone something new, albeit in a rather inappropriate capacity” (L.F. 51, 62, 88-89). Appellant also admitted that he discussed oral sex with “Kayla,” “particularly having ‘her’ attempt to perform it” (L.F. 62, 89). Appellant noted, “I believe it to be to my credit, however, that upon leaving my house to make this very shameful and regretful journey, I honestly started to feel sick at the reality of the situation” (L.F. 89). He also pointed out that he was disappointed in himself for not realizing that “Kayla” was really a police officer, as several of the details were suspicious and should have been “red flags” (L.F. 62, 90). He opined that, “These details, I suppose, are proof that (some, certainly not all) men will make very poor decisions when an offer of something sexual is presented” (L.F. 63, 90). Appellant told the interviewing detective that he had met with other people he had chatted with, but this was the first time he met with someone so young (L.F. 63). He claimed that this was the first time he met with someone “for the purpose of a sexual encounter” (L.F. 63).

Appellant filed a series of four motions to dismiss the indictment, each attacking the validity of § 566.151 on constitutional grounds. (L.F. 12-38). The trial court denied Appellant’s constitutional claims and, after considering the evidence, found Appellant guilty of attempted enticement of a child (L.F. 93-94). The court sentenced Appellant to six years imprisonment (L.F. 95-97).

STANDARD OF REVIEW

In each of his four points on appeal, Appellant challenges the constitutionality of § 566.151. Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision. *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992). If at all feasible, the statute must be interpreted in a manner consistent with the constitutions, and any doubt about the constitutionality of a statute will be resolved in favor of the statute's validity. *Id.* The party challenging the validity of the statute has the burden of proving the act “clearly and undoubtedly” violates constitutional limitations. *Franklin County ex rel. Parks v. Franklin County Comm’n*, 269 S.W.3d 26, 29 (Mo. banc 2008).

ARGUMENT

I. (cruel and unusual punishment)

The trial court did not violate the prohibition against “cruel and unusual punishment” contained in the United States and Missouri constitutions by sentencing pursuant to § 566.151.3 because the statute’s minimum mandatory five-year sentence is not grossly disproportionate to Appellant’s offense, where he attempted to entice a fourteen-year-old girl to meet him for the purpose of engaging in sexual conduct.

In his first point, Appellant claims that the trial court erred in denying Appellant’s motion to dismiss the charge against him based on his assertion that the penalty provision of § 566.151, which imposes a mandatory five-year prison sentence without the possibility of probation or parole, violates the prohibition against “cruel and unusual punishment” as set forth by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 21 of the Missouri Constitution. App. Br. at 17-31; (L.F. 18-25). Because the mandatory minimum five-year prison sentence is not “grossly disproportionate” to Appellant’s offense, his claim that the statute is unconstitutional must fail.

The Eighth Amendment to the United States Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.² Prior to the United States Supreme Court’s decision in

² The infliction of cruel and unusual punishment is also forbidden by the Missouri Constitution. MO. CONST. art. I, § 21. The respective federal and state clauses are textually

Solem v. Helm, 463 U.S. 277 (1983), this Court held that a term of imprisonment within the range prescribed by a valid authorizing statute cannot, as a matter of law, be deemed cruel and unusual punishment. *State v. Repp*, 603 S.W.2d 569, 571 (Mo. banc 1980).

In *Solem*, the United States Supreme Court held that a prison sentence could violate the Eighth Amendment's prohibition against cruel and unusual punishment if it is disproportionate to the crime for which the defendant was convicted. 463 U.S. at 289-90 (finding a life sentence without the possibility of parole unconstitutionally disproportionate to the offense of passing a bad check for \$100). The Court articulated a three-part test to determine whether a sentence was proportionate to the offense: 1) the court must examine the gravity of the offense and the harshness of the penalty, 2) the court should compare the sentences imposed on other criminals in the same jurisdiction, and 3) the court may consider the sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 290-91. Even in articulating this standard, the Court cautioned that, "outside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare." *Id.* at 289-90. The Court emphasized that courts reviewing a disproportionality claim "should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes" *Id.* at 290.

identical and are considered coextensive. *See State v. Dillard*, 158 S.W.3d 291, 305 (Mo. App. S.D. 2005).

After *Solem*, the United States Supreme Court decided *Harmelin v. Michigan*, 501 U.S. 957 (1991), in which the Court clarified the limited scope of proportionality review. In *Harmelin*, the defendant had been convicted of possession of cocaine and was sentenced to a mandatory term of life imprisonment without the possibility of parole. *Id.* at 961. He claimed that the sentence was “cruel and unusual” both because it was disproportionate to the crime he committed and because it was mandatory—the sentencing judge was statutorily required to impose the life sentence without taking into account the particular circumstances of the crime and of defendant. *Id.* In the split opinion, two justices rejected the defendant’s challenge by holding that the Eighth Amendment contained no proportionality guarantee at all outside the context of capital punishment. *Id.* at 965, 994. They viewed a “constitutional proportionality principle” as merely an invitation for judges to subjectively override the legislative determination that a particular penalty was proportionate. *Id.* at 986. Accordingly, these two justices held that *Solem* should be overruled. *Id.* at 985.

Justice Kennedy, writing in concurrence and joined by two other justices, interpreted the Eighth Amendment as forbidding “only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Id.* at 1001 (Kennedy, J., concurring). In determining whether a prison sentence is “grossly disproportionate” to the offense, the concurring justices advised the application of four principles: 1) that “the fixing of prison terms for specific crimes involved a substantial penological judgment that, as a general matter, is ‘properly within the province of legislatures, not courts;’” 2) that the Eighth Amendment does not mandate adoption of any one penological theory; 3) that “marked divergences in both the underlying theories of sentencing and in the lengths of prescribed prison terms are the

inevitable, often beneficial, result of the federal structure, and; 4) that proportionality review should be informed by “objective factors to the maximum possible extent.” *Id.* at 999-1001 (Kennedy, J., concurring). With respect to the last factor, the concurring justices recognized that the Court lacked “clear objective standards to distinguish between sentences for different terms of years.” *Id.* at 1001 (Kennedy, J., concurring).

Finding that the defendant’s offense, cocaine possession, “threatened to cause grave harm to society,” the concurring justices determined that the state legislature could reasonably conclude that the offense was momentous enough to warrant “the deterrence and retribution of a life sentence without parole.” *Id.* at 1003 (Kennedy, J., concurring). The concurring justices found it unnecessary to compare the defendant’s sentence with the sentences of others within his state or with sentences for the same crime in other jurisdictions, noting that “intra-jurisdictional and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.” *Id.* at 1005 (Kennedy, J., concurring).

In *State v. Lee*, 841 S.W.2d 648 (Mo. banc 1992), this Court adopted the standard set forth by Justice Kennedy’s concurrence in *Harmelin*, recognizing that the comparison of a defendant’s sentence to sentences given to other defendants for the same or similar crimes “is irrelevant except when the court finds the sentence in question grossly disproportionate.” *Id.* at 654. Subsequently, Missouri courts have not hesitated to uphold sentences against proportionality challenges without engaging in intra-jurisdictional or inter-jurisdictional comparisons. *See State v. Hill*, 56 S.W.3d 475 (Mo. App. W.D. 2001) (finding that five-year

sentence was not grossly disproportionate for persistent offender convicted of receiving stolen property); *State v. Dillard*, 158 S.W.3d 291, 302-03 (Mo. App. S.D. 2005) (finding defendant’s claim that concurrent twenty-five-year sentences were grossly disproportionate to his conviction of possession of methamphetamine and marijuana to be “plainly without merit”); *State v. Nixon*, 858 S.W.2d 782, 788 (Mo. App. E.D. 1993) (finding that seventy-seven year sentence was not grossly disproportionate to convictions for rape and sodomy). Similarly, this Court may dispose of Appellant’s Eighth Amendment claim without engaging in cross-jurisdictional comparisons because, as a threshold matter, a five-year minimum sentence³ is not grossly disproportionate to the crime of attempted enticement of a child.

1. *A five-year minimum prison sentence is not grossly disproportionate to Appellant’s offense.*

³ Appellant frames his challenge as an attack not on the proportionality of the six-year sentence he received, but rather on the five-year minimum sentence mandated by § 566.151.3. *See* App. Br. at 17-31. Appellant’s assault on § 566.151.3 generally, rather than on his sentence in particular, does not improve his claim. As Justice Kennedy noted in his *Harmelin* concurrence, the Supreme Court has “never invalidated a penalty *mandated by the legislature* based only on the length of sentence”—to do so would “require rejection not only of the judgment of a single jurist, as in *Solem*, but rather the collective wisdom of the [state] legislature and, as a consequence, the [state] citizenry.” *Harmelin*, 501 U.S. at 1006-07 (Kennedy, J., concurring) (emphasis added).

The five-year minimum prison sentence required by § 566.151.3 cannot be considered grossly disproportionate to Appellant’s offense of attempting to entice a fourteen-year-old girl to engage in sexual conduct with him. As Appellant notes, a sentence is considered “grossly disproportionate” only if it is “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.” App. Br. at 19, 23 (citing *State v. Mubarak*, 163 S.W.3d 624, 631 (Mo. App. S.D. 2005)). Keeping in mind the four guiding principles set forth by Justice Kennedy’s concurrence in *Harmelin*, an examination of the gravity of Appellant’s crime and the length of his sentence does not reveal a disproportionality that would “shock the sense” of all reasonable persons.

a. Gravity of the offense

Appellant characterizes attempted enticement of a minor as “non-personal” and “non-violent,” oftentimes with no actual victim. App. Br. at 20. In fact, Appellant repeatedly describes the offense as nothing more than chatting online with an undercover police officer. App. Br. at 20-27, 30-31. This characterization both factually misrepresents the nature of Appellant’s offense and ignores the grave damage that may be inflicted if an offender who seeks to entice a child for sex succeeds.

As a factual matter, Appellant’s offense consisted of much more than “typing on a keyboard in an internet chat room with an undercover police officer.” App. Br. at 21. First, and most importantly, Appellant did not know he was chatting with a police officer. As he admitted after his arrest, Appellant believed that he was speaking with a fourteen-year-old girl named Kayla (L.F. 50-51, 61-63, 87-90). Moreover, Appellant did not simply “type on a

keyboard”—Appellant sent “Kayla” digital photographs of his erect penis, told her that he wanted her to perform oral sex on him and ejaculate on her buttocks, hands, or chest, and arranged to meet her so they could “do this stuff” (L.F. 49, 55-56, 79, 82-84). And after Appellant persuaded “Kayla” through their online chats to meet him for sex, he showed up at the park to follow through on the acts he described (L.F. 50, 58, 61-63). That “Kayla” was, in actuality, a police officer rather than a vulnerable child is not to Appellant’s credit.

In his *Harmelin* concurrence, Justice Kennedy explained that an offense may be serious not simply because it resulted in significant damage in an individual case, but because the proscribed conduct poses great risks to society. *See Harmelin*, 501 U.S. at 1002 (Kennedy, J., concurring). In *Harmelin*, the defendant was convicted of possession of 650-plus grams of cocaine. *Id.* Like Appellant, the *Harmelin* defendant argued that his offense was non-violent and victimless. *Id.* Rejecting this argument as “false to the point of absurdity,” Justice Kennedy observed that drug possession “threatened to cause grave harm to society” because drug users may have an increased tendency to commit crimes while under the influence, drug users may commit crimes to obtain money to buy more drugs, and violent crime may occur as part of the drug business. *Id.* at 1002-03. In short, defendant’s possession of cocaine was a grave offense not because of the harm that it did, but because of the harm that could have been done.

Similarly, it is the enormous *potential* harm that internet predators pose to children that makes attempted enticement of a child so grave an offense. It takes no imagination at all to realize what would have happened had the undercover officer been a real child—the chat logs expose Appellant’s intentions (L.F. 79-86). The legislature “could with reason conclude

that the threat posed” to society by attempted enticement of a child was “momentous.” *See Harmelin*, 501 U.S. at 1003 (Kennedy, J., concurring).

b. Harshness of the penalty

Section 566.151.3 requires anyone convicted of attempted enticement of a child to serve at least five years in prison without the possibility of parole or probation. Appellant does not attempt to argue that five years (or six, as Appellant received) is “harsh.” App. Br. at 20-22. Instead, he argues only that the penalty is *harsher* than it used to be; Appellant correctly notes that in 2006, the penalty for attempted enticement of a child was increased from a previous maximum of four years imprisonment. App. Br. at 20-22. Appellant observes that, prior to the 2006 change, many defendants who attempted to entice children for sex received no prison time at all. App. Br. at 21. He concludes that “major disproportionality problems between the two versions of the statute” rise to the level of gross disproportionality. App. Br. at 22.

Appellant’s evaluation of the “harshness” of the five-year sentence relies on an irrelevant comparison. As this Court made clear in *Lee*, the harshness of the penalty is considered against the gravity of the offense; whether and how severely the offense was punished in a prior iteration of the law is unimportant to the analysis. *Lee*, 841 S.W.2d at 654; *see also Harmelin*, 501 U.S. at 1001-04 (Kennedy, J., concurring). Furthermore, even if this Court accepted Appellant’s proposed baseline and considered the relative severity of the current penalty when compared to the penalty available for attempted enticement prior to the 2006 amendment, the analysis would reveal nothing about whether the current penalty is too harsh. Accepting *arguendo* Appellant’s assertion that 80% of those who attempted to entice

children online for sex received *no prison time*, the legislature may have concluded that the previous penalty was far too lenient considering the gravity of the offense.

To the extent Appellant argues that the five-year mandatory minimum sentence is “grossly disproportionate” to the offense due to its mandatory nature rather than the length of the sentence, this argument was explicitly rejected by the United States Supreme Court’s decision in *Harmelin*. While much of the *Harmelin* opinion was split, a majority of justices agreed that the mandatory nature of a prison sentence, eliminating the possibility of judicial clemency or probation or parole, was *not* cruel and unusual. *Harmelin*, 501 U.S. at 994-96. As the Court observed, “if petitioner’s sentence forecloses some ‘flexible techniques’ for later reducing his sentence . . . , it does not foreclose all of them, since there remain the possibilities of retroactive legislative reduction and executive clemency.” *Id.* at 996. And as Justice Kennedy added in concurrence, “[i]t is beyond question that the legislature ‘has the power to define criminal punishments without giving the courts any sentencing discretion.’” *Id.* at 1006 (Kennedy, J., concurring). A five-year prison sentence does not become cruel and unusual simply because the offender will be required to serve it.

Guided by the factors set forth by Justice Kennedy in *Harmelin*, it cannot be said as a threshold matter that the statutorily mandated five-year prison sentence is “grossly disproportionate” to Appellant’s crime of attempting to entice a fourteen-year-old to engage in sexual conduct. The determination that a five-year minimum was appropriate for this crime was “properly within the province” of the legislature. *See Harmelin*, 501 U.S. at 998-99 (Kennedy, J., concurring). The legislature was responsible for weighing the gravity of the offense, including the risk that a child might be irreparably damaged if an attempted

enticement was successful. The legislature was free to apply its own penological theories, including the necessary degree of deterrence and incapacitation, in fixing the sentencing range. *See id.* at 999-1000 (Kennedy, J., concurring). Appellant has cited no cases, and Respondent has discovered no cases, in which this or any other Missouri court has overturned a sentence mandated by the legislature as “grossly disproportionate” to the proscribed offense. And considering the gravity of Appellant’s crime, including the possibility that he might have met and engaged in sex with an actual child, a five-year mandatory sentence can hardly be said to “shock the moral sense of all reasonable men.” *See Mubarak*, 163 S.W.3d at 624. Appellant’s challenge should be denied without further analysis.

2. *Intra- and interjurisdictional comparisons further demonstrate that the five-year minimum sentence is not inappropriate for the offense.*

Because the five-year minimum sentence is not grossly disproportionate to the crime of attempted enticement of a child, this Court need not indulge in any comparison to sentences given to other defendants for the same or similar crimes in Missouri or elsewhere. *Lee*, 841 S.W.2d at 654. In any event, such comparison would show that the challenged sentence in this case is reasonable both when compared to other sentences for similar crimes in Missouri and when compared to sentences for the same crime in other jurisdictions.

a. Intrajurisdictional comparison

Appellant argues that crimes that are more severe than attempted enticement of a child are punished more leniently in Missouri. App. Br. at 27. As Appellant notes, child molestation, absent the presence of certain aggravating factors, is a class B felony. App. Br.

at 24-25; § 566.067. The authorized term of imprisonment for a class B felony is five to fifteen years. § 558.011.1(2). Forcible rape, meanwhile, is punished with a prison term of five years to life (although if the victim is a child under twelve, the statute requires a minimum thirty-year sentence without the possibility of parole). § 566.030. And first-degree statutory rape and statutory sodomy each carries a potential sentence of five years to life imprisonment. §§ 566.032 and .062.

At a glance, it is obvious that the mandatory five-year sentence challenged as “grossly disproportionate” in this case is not out-of-line with the typical sentencing range for sex offenses. Each of the offenses Appellant lists is punishable by at least five years imprisonment, as is attempted enticement. And Appellant’s argument that his crime was less severe because it was an attempt (i.e. that his intended target happened to be a police officer) is unavailing—attempts at forcible rape, statutory rape, or statutory sodomy are punished just as severely as are completed offenses. §§ 566.030, .032, .062.

Appellant’s complaint seems to be not that five years is too long a sentence, but that five years without the possibility of probation or parole is unique and therefore inappropriate. First, Appellant’s implication that no other perpetrator of a sex crime is statutorily forbidden probation or parole (at least for a certain number of years) is incorrect—the forcible rape or forcible sodomy of a child under twelve requires the offender to serve at least thirty years (or fifteen if the offender reaches the age of seventy-five); the molestation of a child under twelve involving an injury, a deadly weapon, or a ritual carries a sentence of life without parole. §§ 566.030, .060, .067. And, as noted above, the mandatory nature of a sentence does not create an Eighth Amendment problem. *Harmelin*, 501 U.S. at 994-96.

Further, the legislature may have had good reason to impose a minimum five-year sentence, without the possibility of probation or parole, for enticement and attempted enticement of a child while not imposing such restrictions on other offenses. It may be that the legislature considered enticement of a child more difficult to detect than other sex offenses in which a child has already been physically abused, and therefore it was necessary to impose a greater penalty to achieve optimal deterrence. *See Harmelin*, 501 U.S. at 989 (“crimes that are less grave but significantly more difficult to detect may warrant substantially higher penalties”). Or perhaps the legislature was simply unhappy with the statistic cited by Appellant—that 80% of offenders who attempted to entice a child were given probation. *See App. Br.* at 21. If the legislature believed that sentencing courts were excessively lenient on violators of this particular statute, it may reasonably have opted to withdraw judicial discretion with respect to sentencing for this offense but leave it intact for others. In any event, the five-year minimum sentence imposed upon violators of § 566.151 is well-within the typical range for Missouri sex offenses and cannot be deemed “cruel and unusual” by comparison to those other statutes.

b. Interjurisdictional comparison

Appellant argues that among the fifty states, Missouri’s penalty provision with respect to attempted enticement of a minor “is one of the worst.” *App. Br.* at 27. Appellant supports his conclusion by noting that twenty-nine states have enticement as a probationable offense, ten states have misdemeanor provisions for enticement, nineteen have a statutory maximum

of five years imprisonment, and six do not criminalize enticement separately, but incorporate it into other offenses⁴. App. Br. at 27-30. The diversity in sentencing provisions relating to enticement of a child demonstrates that there is no consensus among the states as to how the offense should be punished. These differences are an “inevitable, often beneficial result of the federal structure,” and do not imply that states that punish more strictly do so in violation of the Constitution. See *Harmelin*, 501 U.S. at 999-1000 (Kennedy, J., concurring).

Moreover, while Missouri is among the states that take a comparatively tough stance on predators who use the internet to entice children for sex, it is not alone in imposing mandatory prison time for those offenders. Arizona and Louisiana, like Missouri, both require a minimum five-year prison sentence, without the possibility of probation or parole. ARIZ. REV. STAT. §§ 13-3554, 13-705 (2008); LA. REV. STAT. § 14:81.3 (2008). Connecticut imposes a five-year mandatory minimum sentence if the intended victim is under thirteen-years-old. CONN. GEN. STAT. § 53a-90a (2008). Virginia, meanwhile, requires a minimum five-year sentence if the intended victim is less than fifteen-years-old and the offender is at least seven years older than the intended victim. VA. CODE ANN. § 18.2-374.3(C)4 (2008). Nevada and Texas impose mandatory minimum sentences of one and two years, respectively. NEV. REV. STAT. 201.560 (2008); TEX. PENAL CODE ANN. § 33.021 (2007). And the federal government punishes enticement of a child (or attempted enticement) more

⁴ These categories overlap somewhat. For example, Alaska is both one of the twenty-nine states that permits probation for enticement *and* one of the nineteen states with a five-year maximum sentence.

severely than any state—anyone convicted under the federal enticement statute faces a ten-year mandatory minimum prison sentence up to a maximum life sentence. 18 U.S.C.A. § 2422(b). Therefore, Missouri has joined the federal government and several other states in requiring some amount of prison time for attempted enticement of a minor. Missouri’s penalty scheme, while stricter than that of many other states, can hardly be considered an outlier.

Appellant was sentenced to six years imprisonment for enticing a person whom he believed was a fourteen-year-old girl to meet him for sexual purposes. His sentence was neither grossly disproportionate to the gravity of his offense nor was it significantly different than a sentence he might have received in any number of other states. Appellant’s claim that the penalty provision of § 566.151 violates the constitutional prohibitions against cruel and unusual punishment should be denied.

II. (overbreadth and vagueness)

The trial court did not err in denying Appellant’s motion to dismiss because the statute under which Appellant was charged and convicted, § 566.151, is neither unconstitutionally overbroad nor vague.

In his second point, Appellant offers two distinct challenges to the constitutionality of § 566.151. First, he argues that the statute is unconstitutionally overbroad because it criminalizes not only conduct that should be limited, but also innocent conduct. App. Br. at 32-36. Second, Appellant argues that § 566.151 should be considered “void for vagueness” because a person of ordinary intelligence would be confused as to the meaning of the word “convicted” in the penalty provision, and thus could not understand which penalties are unavailable for persons “convicted” under the statute. App. Br. at 36-39. For the reasons that follow, both arguments should be rejected.

A. Overbreadth

A criminal statute that “prohibits conduct to which a person is constitutionally entitled along with conduct that a person has no right to engage in” may be considered so overbroad as to render the statute invalid. *See State v. Beine*, 162 S.W.3d 483, 486 (Mo. banc 2005). But this Court has cautioned that “the overbreadth doctrine is strong medicine and must be employed with hesitation, and then only as a last resort.” *State v. Helgoth*, 691 S.W.2d 281, 285 (Mo. banc 1985). Further, as the behavior prohibited by the challenged statute moves from “pure speech” toward conduct (even expressive conduct) that falls within the scope of valid criminal laws reflecting legitimate state interests in preventing harmful, constitutionally unprotected activities, the function of the overbreadth doctrine is attenuated. *Id.* (citing *New*

York v. Ferber, 458 U.S. 747, 770 (1982)). The Constitution does not always require that a statute be struck down even if it is broadly drawn. *State v. Moore*, 90 S.W.3d 64, 67 (Mo. banc 2002). “If the statute may fairly be construed in a manner which limits its application to a ‘core’ of unprotected expression, it may be upheld against the charge that it is overly broad.” *Id.*

Applying this standard in *Moore*, this Court held that § 566.095, which states that one commits a crime if he “solicits or requests another person to engage in sexual conduct under circumstances in which he knows that his requests or solicitation is likely to cause affront or alarm,” was not unconstitutionally overbroad. 90 S.W.3d at 65-69. This Court recognized that there may be certain solicitations—such as a noncommercial sexual invitation from one adult to another—that could not constitutionally be prohibited. *Id.* at 68. But the Court found that by reading a requirement of criminal behavior into the statute its application could be fairly limited to criminalizing unprotected expression (e.g. sexual solicitations that include purposeful threats of bodily harm or that constitute harassment). *Id.* at 69. And as the facts of *Moore* make clear, a solicitation may be considered a crime if the solicited act would violate the law. *Id.* The defendant in *Moore* requested oral sex from a thirteen-year-old girl. *Id.* at 65-69. Noting that the requested sexual conduct would have qualified as first-degree statutory sodomy if carried out, the Court concluded that the solicitation was not just speech, but conduct that could be constitutionally prohibited by law. *Id.* at 68-69.

Similarly, the statute challenged in the present case makes unlawful not just speech, but conduct that, as *Moore* teaches, may be prohibited without running afoul of the Constitution. Specifically, under § 566.151 an adult twenty-one-years-old or older commits

a crime if he or she “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.” Actually engaging in sexual conduct with a child under fifteen is a crime—it may constitute statutory rape, statutory sodomy, or child molestation, depending on the nature of the conduct. §§ 566.010, .034, .064, .068. Because engaging in sexual conduct with a child is a crime, an adult does not have the constitutional right to *solicit* a child for sexual conduct. *See Moore*, 90 S.W.3d at 69. The *only* speech or conduct that § 566.151 makes unlawful is the solicitation of a child. Therefore, the statute is not overbroad because it does not prohibit any speech or conduct that is constitutionally protected.

Appellant admits that the face-to-face enticement of children for sexual conduct is not constitutionally protected. App. Br. at 33. He argues, however, that an adult is constitutionally entitled to entice children over the internet for the purpose of engaging in sexual conduct. App. Br. at 33-36. This argument has no basis in law or in fact and should be rejected.

Citing *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), Appellant makes the blanket assertion that “[i]nternet communication is constitutionally protected activity.” App. Br. at 33-34. This is a vast oversimplification that misunderstands the holding in *Reno*. In *Reno*, the United States Supreme Court struck down provisions of the Communications Decency Act (“CDA”) as overbroad and infringing on internet users’ right to freedom of speech. 521 U.S. at 849. The provisions at issue prohibited the knowing transmission of obscene or indecent messages to persons under eighteen years-of-age and the knowing

display of “patently offensive” messages in a manner that is available to a person under eighteen. *Id.* at 859-60. The Court found that the terms “indecent” and “patently offensive” were too vague to avoid encompassing clearly protected speech, such as “serious discussion[s] about birth control practices, homosexuality. . . or the consequences of prison rape.” *Id.* at 871. The vagueness, the Court concluded, would result in chilling speech that should be entitled to constitutional protection and risk discriminatory enforcement. *Id.* at 871-74. Further, the Court found that, in its efforts to protect minors, the CDA suppressed a “large amount of speech that adults have a constitutional right to receive and to address to one another.” *Id.* at 874.

The Supreme Court’s invalidation of the CDA in *Reno* was based not on the mere fact that the speech to be prohibited was on the internet, but rather on the nearly unlimited scope of the content-based prohibition. In contrast, the challenged statute here is neither vague in defining prohibited acts nor would it suppress *any* speech that adults have a right to receive or send to one another. Under § 566.151, it is unlawful for an adult to persuade, solicit, coax, entice, or lure a child fourteen-years-old or younger for the purpose of engaging in sexual conduct. Nothing about that prohibition is vague or difficult to understand, and Appellant does not suggest otherwise. Furthermore, § 566.151 does not prohibit any speech transmitted between two adults, because the statute explicitly involves only speech that an adult directs at a child. An adult’s attempt to entice a child to engage in sex, which Appellant admits is properly illegal if conducted face-to-face, is not imbued with constitutional protection merely because the offender chooses the internet as his preferred means of communication.

If this Court were to accept Appellant’s broad assertion that “internet communication is protected activity” and therefore conclude that a person who sent messages electronically was automatically immune from prosecution, a number of statutes which prohibit criminal activity conducted over the internet would have to be invalidated. For example, § 573.040, RSMo Cum. Supp. 2008, forbids furnishing pornographic materials to minors, either in person or over the internet. If Appellant is correct and “sexual communication over the internet is protected” without limitation, then the state cannot lawfully prohibit adults from sending children pornography over the internet even if it can forbid the adult from sending the same image (printed out) through the mail. Such a distinction would make no sense. Similarly, Missouri’s criminal harassment law makes it unlawful for anyone to knowingly frighten, intimidate, or cause emotional distress to another person by anonymously making a phone call or any other electronic communication. § 565.090.1(4). If § 566.151 is declared unconstitutionally overbroad merely because the activity it forbids involves messages sent electronically (via the internet), the harassment statute must likewise be declared unconstitutional.

Appellant tries to generally characterize sexual communication on the internet as “fantasy talk,” akin to phone sex services. Appellant’s characterization not only misconstrues the necessary elements of the enticement offense, but also ignores the facts of his own case. To obtain a conviction for enticement of a child (or attempt), the state must prove that the enticement, solicitation, etc. was carried out “for the purpose of engaging in sexual conduct.” § 566.151.1. Mere “fantasy talk” is *explicitly* not prohibited by the statute—the state must prove, beyond a reasonable doubt, that the reason the “talk” occurred

was that the offender’s purpose was to engage in sexual activity with his intended victim. *Id.* Appellant’s own case provides an illustrative example. Not only did Appellant describe the sex acts he would *like* to engage in with fourteen-year-old “Kayla,” he arranged to meet her so they could do the things they talked about (L.F. 55-62, 79-86). This was not a mere fantasy—Appellant’s purpose in talking to “Kayla” was to engage in sexual conduct with her, evidenced not only by the specific arrangements he made, but by his actual appearance at the agreed-upon rendezvous point (50, 58). Section 566.151 makes solicitations like Appellant’s unlawful, but does not prohibit any constitutionally protected speech, on or offline. Accordingly, Appellant’s overbreadth challenge should be rejected.

B. Vagueness

Appellant argues that § 566.151.3, the penalty provision of the enticement of a child statute, is unconstitutionally vague because it employs the word “convicted” in a manner that would be confusing to a person of ordinary intelligence. The provision reads: “Enticement of a child or an attempt to commit enticement of a child is a felony for which the authorized term of imprisonment shall be not less than five years and not more than thirty years. No person *convicted* under this section shall be eligible for parole, probation, conditional release, or suspended imposition of or execution of sentence for a period of five calendar years.” § 566.151.3 (emphasis added). Appellant contends that because a person who receives a suspended imposition of sentence has not, as a matter of Missouri law, been “convicted,” “a person of ordinary intelligence” would be led to believe that one could plead guilty to attempted enticement of a child and not receive a conviction. App. Br. at 39. This argument has no merit.

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. The void-for-vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and protect against arbitrary and discriminatory enforcement. The test for vagueness 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. Nevertheless, neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague.” *State v. Brown*, 140 S.W.3d 51, 54 (Mo. banc 2004) (internal citations omitted). The law will be held valid if any reasonable and practical construction will support it, and the courts must endeavor by every rule of construction to give it effect. *State v. Duggar*, 806 S.W.2d 407, 408 (Mo. banc 1991).

Appellant’s argument that the word “convicted” renders § 566.151.3 unconstitutionally vague fails because it depends not on the ordinary understanding of the word “convicted,” but rather on the technical, legal meaning of the word that would not be familiar to a lay person. Although it is true that Missouri courts have traditionally interpreted the word “conviction” to mean a final judgment following a guilt determination and sentence, this technical interpretation departs from the recognized “ordinary” meaning of the term. *See State v. Frey*, 459 S.W.2d 359, 361 (Mo. 1970) (citing 21 Am.Jur.2d, Criminal Law, s 618 at 568). For purposes of ordinary usage, a person is “convicted” of a crime after he or she has been found guilty. *See id.*; *see also* WEBSTER’S NEW INTERNATIONAL DICTIONARY 584 (2d ed. 1934) (conviction defined as “the proceeding of record by which a person is legally found guilty of a crime, esp. by a jury, and on which the judgment is based);

BLACK'S LAW DICTIONARY 335 (7th ed. 1999) (conviction defined as “the act or process of judicially finding someone guilty of a crime; the state of having been proved guilty . . . the judgment (as by a jury verdict) that a person is guilty of a crime).

Applying the ordinary, popular definition of the word “convicted,” the penalty provision of § 566.151.3 is perfectly clear: anyone who is found to have committed the offense of enticement or attempted enticement of a child must serve at least five years in prison without the possibility of parole, probation, conditional release, or suspended execution or imposition of sentence. *See* § 566.151.3. This straightforward interpretation is strengthened when § 566.151.3 is considered in conjunction with § 559.100, which authorizes circuit courts to impose probation or parole on persons “convicted of any offense over which they have jurisdiction, except as otherwise provided in. . . section 566.151.” § 559.100.1. Moreover, the Missouri Sentencing Advisory Commission (“MSAC”) lists enticement and attempted enticement of a child among those offenses that prohibit probation or parole for a certain period of time. <http://www.mosac.mo.gov> (follow 2007-2008 User Guide at 7, 149). Thus, sections of Missouri law applying to parole and probation and the MSAC’s report both support the ordinary person’s interpretation of § 566.151.3—that an offender found guilty of enticement or attempted enticement of a child is not eligible for probation, parole, or suspended execution or imposition of sentence for five years. *See also State v. Baxter*, No. ED91201, slip op. at 6 (Mo. App. E.D. Mar. 10, 2009) (rejecting defendant’s claim that the word “convicted” as used in § 566.151.3 was ambiguous)⁵.

⁵ The Eastern District Court of Appeals’s opinion in *Baxter* is not yet final.

People of ordinary intelligence would not find the statute's use of the word "convicted" confusing—only lawyers, who may be uniquely aware that "convicted" sometimes bears a technical, out-of-the-ordinary definition, might debate the term's meaning in this context. But a word's susceptibility to alternative interpretations by attorneys does not render it unconstitutionally vague. A statute is void for vagueness only if it is insufficiently clear to persons of ordinary intelligence, not simply because those with specialized training may argue that an esoteric definition should apply to one of its terms. *See e.g. Brown*, 140 S.W.3d at 54. Because the provision gives a person of ordinary intelligence sufficient notice that certain punishment options are unavailable for offenders who entice or attempt to entice children for sex, it is not unconstitutionally void for vagueness.

III. (free speech)

The trial court did not err in denying Appellant’s motion to dismiss because the law prohibiting the enticement or attempted enticement of a child for purposes of engaging in sexual conduct does not abridge Appellant’s right to freedom of speech in that there is no constitutional right to solicit children for sex.

Appellant argues in his third point that the guarantees protecting free expression enshrined in the First Amendment to the United States Constitution and Article I, § 8 of the Missouri constitution extend to his attempt to entice fourteen-year-old “Kayla” to engage in sexual conduct with him. App. Br. 40-44. This point should be denied.

The First Amendment to the United States Constitution guarantees that “Congress shall make no law. . . abridging the freedom of speech.” U.S. CONST. amend. I. The Missouri Constitution contains a similar provision, providing 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, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty.” MO. CONST. art. I, § 8.⁶ But neither

⁶ Appellant does not suggest that the Missouri Constitution provides a broader or more extensive protection of freedom of speech than does the United States Constitution. App. Br. at 40-44. Therefore, for purposes of this appeal, the free speech provisions of the federal and state constitutions will be considered coextensive. *See e.g. State v. Vanatter*, 869 S.W.2d 754, 757 n.1 (Mo. banc 1994) (declining to consider whether article I, § 8 of the Missouri Constitution offered broader protection than did the First Amendment to the United States

the federal nor Missouri constitutions protect speech that consists of nothing more than a solicitation to engage in illegal activity. *See e.g. United States v. Williams*, 128 S.Ct. 1830, 1841 (2008); *State v. Roberts*, 779 S.W.2d 576, 578-79 (Mo. banc 1989).

In *Williams*, the United States Supreme Court upheld the constitutionality of a federal law that prohibited “offers to provide and requests to obtain child pornography.” 128 S.Ct. at 1838. An offender could be convicted under the law even if neither he nor the person with whom he communicated actually had any child pornography—the statute banned the “collateral speech that introduce[d] such material into the child-pornography distribution network.” *Id.* at 1838-39. Noting that “[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection,” the Court held that requests for, or offers to provide, child pornography are entitled to no First Amendment protection. *Id.* at 1841-42. In so holding, the Court analogized the prohibition on requesting or offering child pornography to other constitutionally sound criminal proscriptions (such as laws against conspiracy, incitement, and solicitation) that criminalize speech “that is intended to induce or commence illegal activities. *Id.*

This Court employed a similar analysis in *Roberts*, holding that the state law prohibiting prostitution did not violate the federal or state constitutional guarantees of free speech. 779 S.W.2d at 578-79. In *Roberts*, the defendant was charged with prostitution for agreeing to perform oral sex on a patron (who happened to be an undercover police officer)

Constitution when the party challenging the statute’s constitutionality did not argue that the constitutional provisions should be interpreted differently).

in exchange for \$25. *Id.* at 577. No physical contact occurred nor was any money exchanged. *Id.* The statute under which the defendant was charged provided that a person commits prostitution if “he engages or offers or agrees to engage in sexual conduct with another person in return for something of value to be received by the person or a third person.” *Id.* at 578. The defendant argued that because this statute criminalized “mere words” it could not pass constitutional muster. *Id.*

Recognizing that the federal and state constitutions afford special protection to speech “to assure the free exchange of political and social ideas,” this Court found that “[t]o argue . . . that the constitutional protections afforded the free and unfettered exchange of ideas applies to the words that attend the negotiations between a peddler of sex and its purchaser misunderstands the nature of those protections and demeans their democratic purpose.” *Id.* at 578. The Court noted that Missouri’s criminalization of prostitution was a valid exercise of the state’s police power and concluded that, “[b]ecause the words uttered as an integral part of the prostitution transaction do not have a lawful objective, they are not entitled to constitutional protection.” *Id.*

Like the federal prohibition on pandering or solicitation of child pornography upheld in *Williams* and the state prohibition on prostitution (and its attendant negotiations) upheld in *Roberts*, the statute prohibiting enticement or attempted enticement of a child is directed exclusively at offers to engage in illegal transactions—specifically, requests from adults to engage in sexual acts with children. § 566.151. Such offers, whether conducted over the internet (*Williams*) or in person (*Roberts*) are “categorically excluded” from constitutional protection. *Williams*, 128 S.Ct. at 1841; *Roberts*, 779 S.W.2d 579. As the Sixth Circuit

Court of Appeals observed in upholding the constitutionality of 18 U.S.C.A. § 2422(b), the federal counterpart to § 566.151, “the [d]efendant simply does not have a First Amendment right to attempt to persuade minors to engage in illegal sex acts.” *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000).

Appellant cites *State v. Carpenter*, 736 S.W.2d 406 (Mo. banc 1987), for the proposition that the state cannot regulate speech that simply involves “talking about committing a crime” that may or may not ever happen. App. Br. at 42-43. But as this Court subsequently recognized in *Roberts*, “[c]entral to the decision in *Carpenter* were the broad sweep of the statute and the lack of likelihood of the speech to incite others to immediate violence.” *Roberts*, 779 S.W.2d at 579 (citing *Carpenter*, 736 S.W.2d at 408). In the present case, the challenged statute neither sweeps broadly (*see* Point II, *supra*) nor is directed at activity with a negligible likelihood of leading to actual criminal activity.

Appellant repeatedly argues that the activity prohibited by § 566.151 is just “talk,” harmless discussions of “sexual secrets and fantasies” that are commonplace on the internet. App. Br. at 20-27, 30-31, 34-36, 42. But a review of the necessary elements of enticement or attempted enticement of a child demonstrates the falsity of Appellant’s characterization. Section 566.151 in no way regulates “imaginary conversations that may never materialize” into illicit sexual liaisons. Instead, it is narrowly tailored to prohibit only those communications that actually solicit minors for sex. A person commits enticement or attempted enticement only if he “persuades, solicits, coaxes, entices, or lures” a child. § 566.151.1. Each of these terms necessarily involves prompts to act—a mere fantasy discussion, however sexually explicit, does not persuade, solicit, coax, entice, or lure if no

action is encouraged. *See Williams*, 128 S.Ct. at 1839 (noting that use of verbs “advertises, promotes, presents, distributes, or solicits” suggests an intended transaction of child pornography rather than an abstract advocacy of the subject).

Furthermore, as noted above, the state may not convict any offender for enticement or attempted enticement without proving beyond a reasonable doubt that the communications were undertaken “for the purpose of engaging in sexual conduct.” § 566.151. Notably, the statute does not forbid communications for the purpose of sexual gratification or for the purpose of exploring one’s own fantasies. Thus, the proposition on which Appellant’s argument depends, that § 566.151 criminalizes the online communication of sexual fantasies, ignores the multiple respects in which the statute is tailored to avoid suppression of protected speech. Appellant admits that the state may prohibit face-to-face solicitation of children. App. Br. at 36. Neither the United States nor the Missouri Constitution forbids the state from prohibiting an offender from accomplishing on the internet what he cannot in the schoolyard.

IV. (emergency measure)

The trial court did not err in denying Appellant’s motion to dismiss based on Appellant’s allegation that § 566.151 was an unconstitutional ex post facto law because 1) the law was validly amended as an emergency measure and the amendment took effect prior to Appellant’s offense, and 2) even if the amendment was ineffective as an emergency measure, dismissal of the indictment would have been inappropriate because the indictment was legally sufficient.

Prior to June 5, 2006, an individual convicted of attempted enticement of a child was guilty of a class D felony and faced a maximum sentence of four years imprisonment. § 566.151.3, RSMo Cum. Supp. 2005; § 558.011.1(4), RSMo Cum. Supp. 2005. In June 2006, § 566.151 was revised to strengthen the penalties imposed on violators. *See* § 566.151.3. The act was passed as an emergency measure and took effect immediately when it was approved on June 5, 2006. *See id.*; 2006 Mo. Laws 366.

Appellant argues that the legislature failed to properly enact this revision as an “emergency measure,” and therefore the amended provision was constitutionally barred from taking effect until August 28, 2006, 90 days after the general assembly adjourned. App. Br. at 45-50; MO. CONST. art. III, § 20(a). As charged in the indictment, Appellant committed the attempted enticement offense on August 17, 2006 (L.F. 9). Thus, Appellant contends, charging him with attempted enticement of a child under the amended version of § 566.151 unconstitutionally applied a criminal law retrospectively. App. Br. at 45-50.

Appellant’s point should be denied for two reasons. First, the legislature’s expression of emergency was adequate to satisfy constitutional requirements. Appellant has provided

no basis for this Court to overturn the legislature's presumptively correct determination that there was, in fact, an emergency that justified the law's early effectiveness. Second, Appellant's indictment was sufficient whether or not the 2006 amendment was in effect at the time of his offense because the amendment altered only the penalty provision of § 566.151, not any of the elements of the crime as recited in the indictment.

1. The amended version of § 566.151 was validly enacted as an emergency measure and was effective when Appellant committed the charged offense.

The Missouri Constitution forbids any law, aside from appropriations acts, from taking effect until ninety days after the legislative session adjourns in which the law was enacted. MO.CONST. art. III, § 29. However, the constitution explicitly permits emergency measures to take effect immediately upon approval:

[I]n case of an emergency which must be expressed in the preamble or in 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 [the date upon which the legislation becomes effective].

Id.

When § 566.151 was revised in the 2006 legislative session, the general assembly directed that it become effective immediately upon approval as an emergency measure. 2006 Mo. Laws 366. The bill was intended as a response to the threat sexual predators posed to Missouri families. *Id.* As required by the constitution, the legislature expressed this purpose in the text of the bill:

Because of the need to protect Missouri citizens from sexual offenders, section A of this act [of which § 566.151.3 is a part] 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.

Id.

The legislature's determination that an act is an emergency measure is entitled to great weight, but it is not conclusive. *Osage Outdoor Adver., Inc. v. State Highway Com'n*, 687 S.W.2d 566, 569 (Mo. App. W.D. 1984). Ultimately, the courts possess the authority to determine whether an emergency actually existed such that the emergency act was constitutionally sound. *Id.* "The test of whether an emergency exists is whether the factual situation is such that there is actually a crisis or emergency which requires immediate action for the preservation of the public peace, property, health, safety, or morals." *Id.*

Appellant asks this Court to countermand the decision of the legislature (as it existed in 2006) and hold that the sexual predation of children was not a pressing enough concern to warrant immediate action. But Appellant has not produced *a single fact*, from the record or anywhere else, indicating that the legislature overstated or misidentified the emergency situation in 2006. App. Br. 45-50. Instead, Appellant poses a series of questions (e.g. "Was there a large upswing in defendants attempting to entice or enticing children?") implying without evidence that the legislature lacked a factual basis for its emergency declaration. App. Br. at 48. He asserts that, absent "specific language" in which the legislature provides "an actual basis for its emergency," the Court "must rule that no emergency existed." App.

Br. at 48. This argument misapprehends the constitutional standard for determining the validity of an emergency measure.

The constitution requires an “expression” of emergency, not an explanation. MO. CONST. art. III, § 29. The presence or absence of legislative factual findings in the text of the legislation is irrelevant to the validity of the emergency measure. The constitution does not require them—it simply requires that the act contain an expression of “emergency.” MO. CONST. art. III, § 29. Provided an expression is present, which in this case it is, the validity of the emergency clause depends not on whether elaborate factual findings were included in the act, but whether in fact there was an actual emergency. *See Osage Outdoor Adver.*, 687 S.W.2d at 569.

Appellant claims that the “boilerplate” emergency clause included in House Bill 1698 does not satisfy the requirement that an actual emergency existed. App. Br. at 47. But, as explained above, the emergency clause need only be an “expression” of the emergency, not a detailed report. And as an expression of emergency, the “boilerplate” language in House Bill 1698 was sufficient. This Court’s decision in *Board of Regents v. Palmer*, 204 S.W.2d 291, 295 (Mo. 1947), is instructive. In *Palmer*, at issue was the enactment of a bill authorizing the condemnation of certain buildings on school campuses. *Id.* at 292-95. The bill was approved as an emergency provision, to become effective immediately upon passage. *Id.* at 295. The text of the emergency clause read as follows:

Because of the great increase in the number of students enrolled in state educational institutions as a result of conditions existing after World War II, there is an immediate need for the authority granted by this Act, and this Act being necessary for the

immediate preservation of the public peace, health and safety, an emergency exists within the meaning of the Constitution of the State of Missouri.

Id. The effectiveness of this emergency provision was challenged on the ground that “the reference to the emergency [in the statutory text] is merely a conclusion and no real emergency is set out as existing.” *Id.* This Court upheld the clause, holding that “it cannot be said that this declaration is such a mere conclusion as to invalidate the act as an improper *expression* of an emergency.” *Id.* (emphasis added).

The phrasing of the emergency clause in the present case is very similar to the formulation approved in *Palmer*. Both clauses contain an expression of the basis of the emergency (“growth in student population” and “threat to Missouri citizens by sex offenders”). *See Palmer*, 204 S.W.2d at 295; 2006 Mo. Laws 366. Both clauses state that the act is deemed necessary for the immediate preservation of the public peace, health, and safety. *Id.* And both clauses state that the act is to be deemed an emergency measure in compliance with the Missouri constitution. *Id.* The language in the challenged clause is adequate and does not provide a basis for invalidating the emergency measure.

Recently, the Eastern District Court of Appeals rejected an identical challenge to the effectiveness of § 566.151 as an emergency measure. *State v. Baxter*, No. ED91201, slip op. at 7-8 (Mo. App. E.D. March 10, 2009)⁷. In *Baxter*, the defendant was charged with attempted enticement of a child on facts very similar to those in the present case. *See id.* at 1-2. He argued that the trial court erred in sentencing him under the revised version of §

⁷ This case is not yet final.

566.151 because the statute had not properly been enacted as emergency legislation and thus was not in effect at the time of his offense. *Id.* at 7. In rejecting this challenge, the Court of Appeals noted that the defendant cited no case law “wherein a Missouri court has held an emergency clause to be improper when attached to *criminal* legislation.” *Id.* at 8 (emphasis original). The Court concluded, “[w]e are mindful of the ‘great weight’ that the judiciary owes to a legislative declaration of an act as emergency, and Defendant has not presented any facts that would cause us to believe there was no emergency here. Point denied.” *Id.*

Like the defendant in *Baxter*, Appellant wants the Court to declare that the threat posed by sex offenders in 2006 was so insignificant that the legislative declaration of emergency must be vetoed by the Court. To assist the Court in this determination, Appellant has provided no factual information whatsoever. Instead, he simply states, without citation or explanation, that “no valid emergency” existed in 2006. App. Br. at 45, 48. Weighed against Appellant’s conclusory declaration that no emergency existed is the legislature’s declaration of emergency, the governor’s concurrence (he signed the bill), the Eastern District’s decision in *Baxter* upholding the emergency measure, and the trial court’s judgment (L.F. 93) (taking judicial notice that “the means of communication of the crime charged is readily available” and “the available means to commit this crime upon children justifies the early enactment by the legislature”).

As Appellant is the party challenging the constitutionality of § 566.151, he bears the burden of proving that the statute “clearly and undoubtedly” violates the constitution. *Franklin County Comm’n*, 269 S.W.3d at 29. Given the utter absence of facts presented in support of Appellant’s argument, this Court should not unilaterally overturn the policy

judgment of the legislature that the sexual exploitation of children constituted an emergency justifying the amendment's early effectiveness. The 2006 amendment to § 566.151.3 was validly passed as an emergency measure and was effective beginning on June 5, 2006, more than two months before Appellant first made contact with "Kayla." The trial court did not commit constitutional error in sentencing Appellant under the amended version of the law.

2. *Appellant's motion to dismiss the indictment was properly denied whether or not the 2006 amendment was validly enacted as an emergency measure because the indictment clearly set forth the elements of the charge and the facts of the offense.*

Appellant does not challenge the effectiveness of the 2006 emergency provisions in the abstract—he asserts that the trial court erred in denying his motion to dismiss the indictment based on the legislature's alleged failure to adequately justify its declaration of emergency. But Appellant fails to realize that the 2006 amendment, which altered the penalty for attempted enticement but left the elements of the offense untouched, had no effect on the content or legal sufficiency of his indictment. Thus, even if the 2006 amendment did not become effective until August 28, 2006, Appellant's motion to dismiss the indictment would still have been properly denied because the indictment itself was sufficient.

"The test of the sufficiency of an indictment is whether it contains all the essential elements of the offense as set out in the statute and clearly apprises defendant of the facts constituting the offense in order to enable him to meet the charge and to bar further prosecution." *State v. Strickland*, 609 S.W.2d 392, 395 (Mo. banc 1980). The indictment

charging Appellant with attempted enticement satisfied this test, setting forth the elements of the offense one-by-one, and matching them to the facts of the case (L.F. 9). Appellant's attack on the validity of 2006 amendment had nothing to do with the sufficiency of his indictment, as the amendment changed only the penalty provision, not the elements of the offense. *Compare* § 566.151.3, RSMo Cum. Supp. 2005 *with* § 566.151.3, RSMo Cum. Supp. 2006. Therefore, the trial court did not err in denying Appellant's motion to dismiss the indictment.

CONCLUSION

The trial court did not commit reversible error in this case. Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 11,972 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 26th day of March, 2009, to:

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APPENDIX

Submission by Stipulation and Judgment..... A1

Sentence and Judgment A3