

**IN THE COURT OF APPEALS  
EASTERN DISTRICT OF MISSOURI**

<b>D.M. and J.M.,</b>	}	
Appellants.	}	
v.	}	Cause No. ED89744
	}	
<b>Philip W. Livesay, Juvenile Officer</b>	}	
<b>Tenth Judicial Circuit</b>	}	
Marion County, Hannibal, Missouri	}	
Petitioner/Respondent.	}	

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APPEAL FROM  
THE CIRCUIT COURT OF MARION COUNTY, MISSOURI  
DISTRICT 2 JUVENILE DIVISION  
TENTH JUDICIAL CIRCUIT  
Honorable David C. Mobley  
Case No. 06MR-JU00069

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**D.M. and J.M.'s Appellants' Brief**

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## Table of Contents

Table of Contents .....	1
Table of Authorities .....	2
Jurisdictional Statement .....	3
Statement of Facts .....	5
Points Relied On .....	20
Argument .....	22
Point I .....	25
Point II .....	34
Conclusion .....	43
Certification of Word Count .....	45
Certification of Scanned Disk .....	45
Affidavit of Service .....	46

## Table of Authorities

<i>Bauby v. Lake</i> , 995 SW2d 10, 13 n. 1 (Mo.App. E.D. 1999) .....	35
<i>Hodges v. City of St. Louis</i> , 217 SW3d 278, 279 (Mo. banc 2007) .....	26
<i>Lovell v. Poway Unified School Dist.</i> , 90 F.3d 3867 (9th Cir. 1996) .....	42
<i>Plummer v. City of Columbus, Ohio</i> , 414 U.S. 2, 94 S.Ct. 17, 38 L.Ed.3 (1973) .....	27
<i>State v. Carpenter</i> , 736 SW2d 406 (Mo.banc 1987) .....	20, 25, 26, 27, 28, 29, 31, 32, 33
<i>State v. Chaney</i> , 967 SW2d 47, 52 (Mo. banc 1998) .....	35
<i>State v. Sladek</i> , 835 SW2d 308, 310 (Mo. banc 1992) .....	35
<i>State v. Swoboda</i> , 658 SW2d 24 (Mo.banc 1983) .....	20, 26, 27, 28, 31
<i>State v. Weddle</i> , 18 SW3d 389, 391 (Mo.App. E.D. 2000) .....	35
<i>State v. Werner</i> , 9 SW3d 590, 595 (Mo. banc 2000) .....	35
<i>In Re Winship</i> , 397 US 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	41
<i>United States v. Baker</i> , 890 F.Supp. 1375, 1385 (E. D. Mich. 1995) .....	21, 31, 32, 39
<i>United States v. Alkhabaz</i> , 104 F.3d 1492 (6th Cir. 1997) .....	20, 21, 32, 39
<i>Watts v. United States</i> , 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) .....	20, 21, 29, 30, 31, 36, 37, 38, 39, 42
1 <sup>st</sup> Amendment to the United States Constitution ....	3, 7, 20, 21, 25, 29, 31
5 <sup>th</sup> Amendment to the United States Constitution .....	3, 4, 7, 20, 25
6 <sup>th</sup> Amendment to the United States Constitution .....	4, 20, 21, 32, 39
14 <sup>th</sup> Amendment to the United States Constitution .....	3, 4, 7, 20, 25
Article I, Sections 8 and 10 of the Missouri Constitution of 1945 .....	3, 4, 7, 20, 25
Section 574.010 RSMo. ....	3, 6, 7, 20, 21, 26, 31, 33, 41
Section 211.031.1(2)(d) RSMo. ....	23, 44
Section 211.321 RSMo. ....	23

## **Jurisdictional Statement**

This case arises out of private internet communications between a 16 year old high school student and a classmate. The child, in instant messaging, communicated that he was depressed and wanted to take a gun to school and shoot everyone he hates and then shoot himself. The internet communication was rambling and was punctuated on both sides by “lol” (laugh out loud) and “HAHAHA.” The Trial Court found that the child’s internet communication, if committed by an adult, would have constituted the offense of peace disturbance by “threatening to commit a felonious act against any person under circumstances which are likely to cause a reasonable person to fear that such threat may be carried out.” §574.010.1(1)(c) RSMo. On appeal, the appellants contend that the statute as written and as applied by the Trial Court is unconstitutionally vague and over broad in violation of the 1<sup>st</sup>, 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Article I, Sections 8 and 10 of the Missouri Constitution of 1945. The appellants also contend that the Trial Court erred because there was insufficient evidence to prove a violation of Section 574.010.1(1)(c) RSMo. and that the evidence was insufficient as a matter of law to sustain a finding of delinquency under the statute. Finally,

the child contends that the Trial Court erred by failing to advise the child of his right to counsel and failing to appoint counsel for the child in violation of the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Article I, Sections 8 and 10 of the Missouri Constitution of 1945.

The constitutional questions raised in this case have been previously adjudicated in favor of appellants by decisions of the Missouri Supreme Court. The case is not within the exclusive jurisdiction of the Missouri Supreme Court and jurisdiction lies within the Missouri Court of Appeals Eastern District.

## **Statement of Facts**

### **The Child**

DJM was a 16 year old child born on June 5, 1990. (LF 18). He was a student at Hannibal High School in Hannibal, Missouri. (Tr. 15-16). He suffers from a number of mental disorders. (LF 65; Def. Exb. E). He was under the treatment of a psychotherapist, Gerald Walker, at the time of the occurrence which gave rise to this case. (Tr. 117-119).

One of the child's diagnoses was pervasive developmental disorder NOS. (Def. Exb. E; Tr. 120). Pervasive developmental disorder is on the autism spectrum. (Tr. 120). It is characterized by difficulty with social interaction, engaging with the outer world, struggles with communication, understanding and using language. (Tr. 121). The primary impact is on social relations and communications. (Tr. 121).

In addition, the child was diagnosed and treated for attention deficit/hyperactivity disorder, combined type. (Def. Exb. E; Tr. 120). The symptoms are hyperactivity, impulsivity and distractability. (Tr. 123).

During the psychiatric evaluation at Hawthorn Children's Psychiatric Hospital, the child was also diagnosed with major depressive disorder, recurrent and learning disorder mathematic. (Def. Exb. E). He

had previously been hospitalized for psychiatric disorder. (Def. Exb. E). Medication had been helpful, but had caused excessive weight gain. (Def. Exb. E). **He did not have any history of hurting people.** (Def. Exb. E). His G.A.F. was 30. (Def. Exb. E).

DJM was described as “Goth” by Hannibal High School principal, Darin Powell, and by DJM’s friend, Carly. (Tr. 89 and 33). Carly stated, “It’s when like a person wears extensive amounts of black, and they don’t communicate with other people very much and they just – their appearance makes them very hard to approach.” (Tr. 34). The bangs on his hair were really long and were dyed different colors. (Tr. 34).

### **Pleadings**

The original Petition in this case was filed on October 27, 2006. (LF 1). In Count I, the Juvenile Office alleged

“that the said juvenile, in violation of Section 574.010 RSMo., committed an act that would be the Class A Misdemeanor of Peace Disturbance if committed by an adult, in that on or about the 24<sup>th</sup> day of October, 2006, in the City of Hannibal, County of Marion, State of Missouri, the said

juvenile unreasonably and knowingly disturbed CM by making statements over the internet that he was depressed and wanted to bring a machine gun, and a .357 revolver to school and kill numerous students and then kill himself.” (LF 87).

The parents moved to dismiss on the grounds that Section 574.010 was over broad and unconstitutionally vague in violation of the 1<sup>st</sup>, 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Article I, Sections 8 and 10 of the Missouri Constitution of 1945. (LF 85). On the morning of the trial previously scheduled for December 27, 2006, the Trial Court authorized the Juvenile Office to file an Amended Petition. (LF 3, 57-59). There was no change to the substantive allegations of Count I. (LF 58).

There was a bench trial on February 8, 2007. (LF 3). The parents had requested findings of fact and conclusions of law on December 27, 2006. (LF 3). The Trial Court gave the parties a week to file proposed findings of fact and conclusions of law. (Tr. 142). The Trial Court entered an order on March 2, 2007, which contained extensive findings of fact and conclusions of law. (LF 3, 18-31). The Trial Court found, as a matter of law, that the child had not violated the law as alleged in Counts II

or III of the First Amended Petition. (LF 3, 31). The Trial Court found that the child did violate the State laws alleged in Count I. (LF 31). On April 19, 2007, the Trial Court entered a Judgment and Order of Disposition. (LF 7). This appeal follows.

### **Internet Instant Messaging**

This case arose out of internet instant messaging between DJM and a classmate, Carly. The young people had known each other since the beginning of the 2006 school year. (Tr. 37). From that time until the 24<sup>th</sup> of October, 2006, they exchanged internet communications on a daily basis. (Tr. 37). The instant messaging with DJM took place for as long as one or two hours on some of these occasions. (Tr. 17). They saw each other at school, but did not have any classes together. (Tr. 18). They never saw each other outside of school. (Tr. 18). Carly became a confidant. (Tr. 33 and 38). DJM had disclosed a period of hospitalization for depression. (Tr. 33). The instant messaging which were the subject of this case were communicated privately to Carly. (LF 19). There was no public access to the private communication. (LF 19).

Carly had introduced DJM to a friend who became what was described as a girlfriend for a period of days. (Tr. 18). They were

introduced by Carly on the internet. (Tr. 19). The relationship between DJM and his “girlfriend” included only instant messaging on the internet. (Tr. 21-22).

The instant messages which are the basis for charges in this case occurred on October 24, 2006. There are three different written records concerning the instant messages contained in State’s Exhibit 3. The last nine pages of State’s Exhibit 3 are the same thing as Defendant’s Exhibit A. Defendant’s Exhibit A was the computer record retrieved from DJM’s computer by the police. (Tr. 108). The first four pages of State’s Exhibit 3 are an e-mail from a parent, Leigh Allen, to the Hannibal High School principal, Darin Powell, and is identical to the information contained in Defendant’s Exhibit B. (Tr. 62). Pages five and six of State’s Exhibit 3 are an e-mail from Carly to the Hannibal High School principal, Darin Powell. (Tr. 79). These three documents which were combined into State’s Exhibit 3 contain the written record of the private internet communications which are the subject of this case.

The beginning of the instant messages between DJM and Carly is not contained in any of the exhibits. (Tr. 28). However, Carly summarized the beginning of the internet communication stating that DJM

“really had a crush on Lauren, but he’s Goth, so of course she judged him.

And I asked him out for her and he said yeah and of course even though she doesn’t like him so she dumped him and he’s just so depressed and he wants to take a gun to school and shoot everybody he hates and then shoot himself.” (Tr. 39). Carly continued,

“Q. Okay. He didn’t say that he intended to go do it, did he?

A. No.

Q. What you gathered from listening to him was that he was depressed and that he wanted to do it, he felt like doing it. Is that fair?

A. Yes.” (Tr. 40).

That was the best description Carly was able to give of the conversation up to the point where it is recorded. (Tr. 40).

The most complete record of the instant messaging is contained in Defendant’s Exhibit A. The entries by *someone2003@swb.net* are typed instant message communications by DJM, the child who has been charged in this case. (Tr. 27). The instant message communications by *idontnowwhat2callmysigninname* were instant

message communications by his friend, Carly. (Tr. 27). There is no substitute for reading the nine pages in Defendant's Exhibit A which are included in the Appendix at pages 45-53. Much of the rest of the trial consisted of questions asked by the lawyers to highlight, place in context or characterize the communications contained in Defendant's Exhibit A.

There were messages about who DJM might shoot. (Tr. 32). Carly testified that it was she and not DJM who first sought to identify specific persons who might be shot. (Tr. 42-43). It was Carly, and not the child who has been charged in this case, who brought up who it was that might get shot. (Tr. 43). It is crystal clear and undisputed that Carly, who was receiving the messages, would not be a target. (Def. Exb. A; Tr. 44).

The State attempted to characterize the communications by Carly as "that you played along to try to get him to talk about it some more." (Tr. 30). However, the witness and the transcript, Defendant's Exhibit A, disclose that Carly, and not the child who has been charged was really the one who was initiating and driving the conversation about who might be targets. The conversation contained in pages 1 and 2 of Defendant's Exhibit A by both of the children is offensive, racist and repugnant. Carly's conversation is punctuated with "HAHAHAHA", "lol"

(laugh out loud), and “YAYAYYAY.” (Def. Exb. A, pp. 1 and 2. Carly “tried to take things as lightly as I could because I didn’t know whether he was really thinking about doing this or not.” (Tr. 44). Her testimony continued

“Q. Okay. And so the message that you sent him was laugh out loud, and haha, and - -

A. Yes.

Q. - - YAYAYYAY

A. Yes.

Q. That’s what you told him. And that was the context in which this conversation continued about shooting someone at school, is that fair?

A. Yes.” (Tr. 45).

Carly brought up people who were not even known to DJM. (Tr. 45). When DJM identified someone that Carly did not like, she affirmed stating, “Haha” and “of course.” (Tr. 46). She never at any point expressed any concern to DJM about this. (Def. Exb. A; Tr. 46-47). When DJM stated he would “have to get rid of a few negro bitches,” Carly affirmed, “Well just shoot all of them.” (Def. Exb. A, p. 1; Tr. 48). She continued, “The death of a black

person cracks me up.” (Def. Exb. A, Tr. 48). Carly stated that she was listening to a song. “I’m listening to die negro die.” (Def. Exb. A, p. 2; Tr. 49). The State sought to characterize this as “playing along to try to get some more information.” (Tr. 30). However, Carly was the initiator and the driving force of the conversation speculating about who might be targets. (Def. Exb. A, pp. 1 and 2; Tr. 42-46 and 48-49).

There was evidence concerning and the Trial Court found that DJM did not have a gun and did not have access to a gun. (LF 20). The Juvenile Office presented absolutely no evidence that DJM had a gun. He had told Carly that he did not even know what kind of a gun he might use. (Tr. 42). At one point Carly stated, “im sure he wont do anything tommorrow because he has no gun.” (Def. Exb. B, p. 2). Carly asked what kind of a gun he would use and DJM responded, “i dunno.” (Def. Exb. A, p. 1). The State’s evidence included testimony about guns owned by DJM’s friend, Duncan. The State’s evidence included a confession by DJM including the following, “I asked Duncan if he had a gun and he told me several different guns he had, including a 357 magnum. I asked Duncan about the 357 magnum and he gave me a lot of details about it. I told Duncan he needs to get a bunch of pistols and get some guys to do it, school shooting, with

me.” (State’s Exb. 1). DJM’s friend testified in the case. It turns out the only guns that Duncan had were a BB gun and an air soft gun. (Tr. 99). Duncan’s grandfather had a number of guns including a 357 magnum. (Tr. 95). DJM had told his friend Duncan, “I would bring guns to school to put Hannibal on the map.” However, he never asked Duncan to provide guns for shooting people at school. (Tr. 99). He never asked Duncan to round up or recruit other people to do that. It was never a topic of conversation between Duncan and DJM. (Tr. 100). The Trial Court disbelieved Duncan and placed greater credibility upon the police statement given by DJM. (LF 23).

There was substantial evidence concerning the equivocal aspect of the instant messaging by DJM. In trying to characterize DJM’s messages, Carly stated, “i cant tell if this kid is liek just depressed for one day or what...” (Def. Exb. B). Carly stated that she had asked DJM if he was seriously thinking about his and he said, “Yeah unless i happen not to be depressed in the near future. i may not do it at all unless im still depressed like this.” (Def. Exb. B). Carly stated, “...but i dunno if he would really do it.” (Def. Exb. B). Their conversation ended with DJM stating,

“anyways i’m not going to do that not anytime soon i feel better than i did earlier today.” (Def. Exb. A, p. 7; Tr. 51).

The Trial Court expressly found “there was no evidence to the effect that [Carly] believed the threats were imminent.” (LF 21).

### **Disclosure of the Instant Messaging**

The instant messaging which gave rise to this case were private internet communications. There was no evidence of any public access to the private communication. (LF 19). Carly sent an internet message to an adult acquaintance about the instant messaging with DJM. (Def. Exb. B). Leigh Allen had some experience with a counselor and had been told to always take suicide plans seriously. (Def. Exb. B, p. 3; Tr. 63). Leigh Allen called school officials and ultimately transmitted an e-mail communication to the high school principal, Darin Powell. (Def. Exb. B; Tr. 62). The Hannibal High School principal had a telephone conversation with Carly and Carly ultimately e-mailed pages 5 and 6 of State’s Exhibit 3 to the principal. The principal, Darin Powell, reported it to the Hannibal Police Chief. (Tr. 82). An investigation followed.

DJM was arrested on October 24, 2006. He was given the required warnings and signed a statement received in evidence as State’s

Exhibit 1. He admitted conversations about the internet instant messages. (State's Exb. 1). He stated, "I stopped taking medication in July. When I do get depressed I rant and rave about why I'm depressed and have made comments about killing myself." (State's Exb. 1). He ended the statement, "I do not plan on shooting anyone at school and I was saying it as a joke. I do not have a gun and have no intention of shooting anyone." (State's Exb. 1).

DJM was placed in detention and the Trial Court entered an order of detention on October 30, 2006. (LF 1). DJM remained in detention until he was evaluated at Hawthorn Children's Psychiatric Hospital on November 2, 2006, and was discharged on November 28, 2006. (Def. Exb. E). He was returned from Hawthorn Children's Psychiatric Hospital to detention. The Trial Court held a hearing and continued the child in detention on January 2, 2007. (LF 3). The child was still in detention at the time adjudication hearing was conducted on January 30, 2007. The child was released from detention to his parents by order number 20 which was entered by the Trial Court on February 8, 2007. (LF 31A). In all DJM had been in juvenile detention for a period of 79 days and had an additional 26 days of inpatient psychiatric hospitalization during the course of this case.

## **Counsel**

The parents in this case were represented by attorney Branson L. Wood III. (Tr. 6). The child, DJM, was not represented by counsel. The Trial Court never advised him of his right to counsel and he never waived the right to counsel. He did not testify in the trial of this case. (Tr. 1-142). DJM is still not represented by counsel on appeal.

## **Psychiatric Evidence**

There was psychiatric evidence in this case consisting of the discharge report from Hawthorn Children's Psychiatric Hospital (Def. Exb. E) and testimony from DJM's psychotherapist, Gerald Walker. (Tr. 117-141). The psychotherapist was licensed in the State of Illinois and nationally certified since 1999. (Tr. 118). He had been treating DJM since 2004. (Tr. 119). He stated that DJM's psychiatric diagnosis of ADHD had a significant bearing on the case. (Tr. 123). He further stated that the pervasive developmental disorder overlapped with ADHD in this case. (Tr. 124). DJM would be disposed toward "saying things that are just socially inappropriate." (Tr. 124). The psychotherapist described the dialogue in this case as:

“[H]e’s kind of interpreting it as a - it’s a dialogue of jest, they’re just - they’re just having fun. In other words, they’re not talking about taboo subjects, but it’s fun, it’s a fun subject.

The ADHD thrill seeking part of it leads to taboo in itself. It’s just the, okay, this is outrageous. It would be something stimulating for him to do and interesting to do it. It would be kind of pushing the envelope.” (Tr. 125).

The psychotherapist met with DJM while he was in detention. The psychotherapist described DJM’s response as follows:

“[H]e was appalled that people were taking it so serious, it was a big joke, and that’s the - - that’s the disparity in terms where a lot of people look at that, the dialogue and think, oh my gosh, this is horrible. He’s looking at it and saying how can people be misinterpreting it?” (Tr. 126).

The psychotherapist testified that the child’s difficulty in understanding related primarily to the pervasive developmental disorder. He testified that

DJM would have difficulty in knowing whether or not things he is saying are disturbing or alarming to other people. (Tr. 135).

There is a strong correlation between ADHD and “you know just kind of impulsive outrageous behaviors.” (Tr. 130).

He testified there is a high correlation between ADHD and to some extent PDD in propelling people into the justice system inappropriately. “The things that I noticed was concerns about these individuals getting propelled into the justice system inappropriately.” (Tr. 129). That is why Congress passed the Individual Education Disability Act to attempt to deal with these areas in the education system. (Tr. 130).

## Points Relied On

### I

**The Trial Court erred in failing to dismiss Count I of the First Amended Petition because the statute proscribing the peace disturbance of threatening to commit a felony against a person is over broad and unconstitutionally vague in violation of the 1<sup>st</sup>, 5<sup>th</sup>, and 14<sup>th</sup> Amendments to the United States Constitution and Article I, Sections 8 and 10 of the Missouri Constitution of 1945. The Trial Court so erred because the statute proscribes constitutionally protected free speech and because the Trial Court failed to limit the construction of the statute to avoid the facial over breadth.**

*State v. Carpenter*, 736 SW2d 406 (Mo.banc 1987).

*State v. Swoboda*, 658 SW2d 24 (Mo.banc 1983).

*Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969).

*United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997).

1<sup>st</sup> Amendment to the United States Constitution  
5<sup>th</sup> Amendment to the United States Constitution  
14<sup>th</sup> Amendment to the United States Constitution

Article I, Sections 8 and 10 of the Missouri Constitution of 1945

Section 574.010.1(1)(c) RSMo.

## Point II

**The Trial Court erred in finding that DJM committed a peace disturbance by threatening and the Trial Court so erred because there was not sufficient evidence to support a finding of guilt in that DJM's crude and offensive statement of his depression and frustration with school was not a threat at all and did not rise to the level of a "true threat" because the internet messaging was equivocal, conditional, and did not convey a gravity of purpose and immediate prospect of execution.**

*Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969)

*United States v. Baker*, 890 F.Supp. 1375, 1385 (E. D. Mich. 1995)

*United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997)

Section 574.010.1(1)(c) RSMo.

## **Argument**

### **Introduction**

This case involves the nightmare topic of guns and shooting people at school. The topic itself is one which makes it difficult to reach a fair, detached and objective decision. It is the type of case in which judges are called to “keep your head when all about you are losing theirs ...” In the final analysis, this is a case of mere speech. It was equivocal, indefinite and presented no imminent threat. It was two kids bantering about a topic which is taboo. The words exchanged between them indicated their levity. The case law and the best tradition of the bench call you to rise about the nightmare of this topic, to follow the law and to reverse the adjudication of delinquency in this case.

DJM's parents do not condone his messages. They supported an intervention by authorities. In fact, it was DJM's parents who sought the psychiatric evaluation that was ordered by the Trial Court on the 31<sup>st</sup> day of October, 2006. The parents had DJM involved in counseling even before this occurrence. (Tr. 119). He had a past medical history which included hospitalization. (Def. Exb. 3, p. 2). Under the circumstances of this case, it may well have been appropriate to provide treatment for DJM as a status

offender because behavior of the child was injurious to his welfare or the welfare of others. §211.031.1(2)(d) RSMo. However, the Juvenile Office elected not to seek treatment on these grounds. Instead, they elected to pursue criminal allegations. (LF 57-59).<sup>1</sup>

The parents would have been delighted to collaborate with juvenile officials to provide treatment to their son. However, the issue in this case is whether DJM should be labeled as a criminal within the juvenile system. This is of lifetime significance considering the watered down confidentiality of juvenile proceedings under Section 211.321 RSMo. The conviction reported to school officials and others authorized under the statute has the potential of haunting DJM for the rest of his life.

In light of tragedies such as Columbine and Virginia Tech, officials must take seriously any comments, even those intended to be joking, about shootings at school. However, that is a separate matter from whether such messages constitute a crime. Based upon an objective

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<sup>1</sup>The punitive attitude of the Juvenile Office is highlighted by their actions in the case. The Juvenile Office attempted to elevate the internet banter to a felony assault charge in Count III. There was no evidence to support the charge. (LF 30-31). DJM was incarcerated in juvenile detention for a total of 105 days and the Juvenile Office sought to commit him to the Division of Youth Services on the class B misdemeanor for which the maximum adult punishment is six months in jail. (LF 16).

review of the facts and law, the adjudication of delinquency should be reversed.

## Point I

**The Trial Court erred in failing to dismiss Count I of the First Amended Petition because the statute proscribing the peace disturbance of threatening to commit a felony against a person is over broad and unconstitutionally vague in violation of the 1<sup>st</sup>, 5<sup>th</sup>, and 14<sup>th</sup> Amendments to the United States Constitution and Article I, Sections 8 and 10 of the Missouri Constitution of 1945. The Trial Court so erred because the statute proscribes constitutionally protected free speech and because the Trial Court failed to limit the construction of the statute to avoid the facial over breadth.**

The peace disturbance statute proscribing a threat of a felony against another person is constitutionally over broad because it prohibits mere speech and is not limited as required by prior controlling decisions of the Missouri Supreme Court. The statute is not limited to speech likely to incite others to immediate violence. The statute goes much further than mere “fighting words.” The statute contains no requirement that the speech be unequivocal, unconditional, immediate and specific as to the person threatened. Neither does the statute require a gravity of purpose or immediate prospect of execution. In similar cases, the Missouri courts have refrained from redrafting the statute and have held such statutes unconstitutional. *State v. Carpenter*, 736 SW2d 406 (Mo.banc 1987); *State*

*v. Swoboda*, 658 SW2d 24 (Mo.banc 1983). In both of these cases, the Missouri Supreme Court struck down prior versions of the Missouri peace disturbance statute. The logic of these cases applies with equal force to the portion of the statute which is the subject of this case. The Trial Court erred by failing to hold the statute unconstitutional and dismissing the allegations of Count I.

### **Standard of Review**

Point I challenges the constitutionality of the peace disturbance by threatening statute found in Section 574.010.1(1)(c). “The standard of review for constitutional challenges to a statute is *de novo*.” *Hodges v. City of St. Louis*, 217 SW3d 278, 279 (Mo. banc 2007).

### **Argument**

The Missouri Supreme Court has consistently held similar statutes to be unconstitutional for abridging free speech. Missouri courts have held the statutes abridging speech are constitutional to the extent that they prohibit only that speech as “likely to incite others to immediate violence.” *State v. Swoboda*, supra at 25; quoted with approval *State v. Carpenter*, supra at 408. Section 574.010.1(1)(c) RSMo. is subject to exactly the same criticism by which the Missouri Supreme Court in

*Carpenter* and *Swoboda* held prior versions of the statute to be unconstitutional.

The appellants are authorized to challenge the statute on over breadth and vagueness. The parties are authorized to raise questions concerning vagueness or unconstitutional over breadth regardless of whether or not the statute as applies to DJM may be neither vague or over broad or otherwise invalid. *Plummer v. City of Columbus, Ohio*, 414 U.S. 2, 94 S.Ct. 17, 38 L.Ed.3 (1973); *State v. Swoboda*, supra; *State v. Carpenter*, supra. A criminal statute proscribing constitutionally protected speech is facially invalid even if the statute also may have a legitimate application. *State v. Carpenter*, supra.

The statute on which the charge against DJM is based is not limited in the manner required by clear prior rulings of the Missouri Supreme Court. The statute is not limited to face-to-face words as required in *State v. Swoboda*, supra. In fact, the statute could proscribe written correspondence or internet communications between people who are separated by miles, states or even continents. In this case, as in *Swoboda*, DJM's conduct took place entirely on his own property. In this case, even worse than *Swoboda*, the speech was private internet messages to a

confidant who responded with laughter and encouragement. The application of this statute to DJM is unconstitutional under the holding of the Supreme Court in *Swoboda*.

The statute does not contain any requirement that the speech which is the subject of the complaint be unequivocal, unconditional, immediate and specific as to the person threatened as to convey a gravity of purpose and immediate prospect of execution. These were the limitations which was argued by the dissenting judges in *State v. Carpenter*, supra at 409. The absence of these limitations is well illustrated by the facts in this case.

It is absolutely clear that there was no immediate prospect of execution. The Trial Court expressly found “there was no evidence presented to the effect that [Carly] believed the threats were imminent.” (LF 21). DJM did not even own a gun. (State’s Exb. 1; Tr. 20). Carly knew that he did not have a gun and would not carry out the threat tomorrow. (Def. Exb. A; Def. Exb. B). She clearly stated that she did not know if he was just depressed or if he would really do it. (Def. Exb. B, p. 1). Carly testified that:

“Q. But then he also said, ‘Anyways, I’m not going to do that.’

A. Yes.

Q. Is that correct?

A. Yes.

Q. And he said, ‘Not any time soon. I feel better than I did earlier today.’ That’s how it ended, is that correct?

A. Yes.” (Tr. 51).

Not only was the defendant without a gun, he had no plan to get a gun. (Tr. 56). At most, he had a friend who had a gun. (Def. Exb. B).

In fact, it turned out that his friend only had a BB gun. (Tr. 98). DJM’s friend’s grandfather was the one who actually possessed some guns. (Tr. 99). As applied by the Trial Court, the statute does not require that the utterance be unequivocal, unconditional and immediate as argued by the dissenting judges in *Carpenter*, supra.

The statute is not subject to the “true threat” limitation which has been imposed by the United States Supreme Court. The fact that a criminal statute proscribes threatening conduct does not exempt the statute from 1<sup>st</sup> Amendment restrictions. Although the federal statute proscribing

threats against the president have been held to be facially constitutional, “What is a threat must be distinguished from what is constitutionally protected speech.” *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). In *Watts* the United States Supreme Court adopted the “true ‘threat’ limitation” against enforcement of the statute. In *Watts* the court took into account the context, conditional nature of the statement and reaction of the listeners in determining the defendant’s conduct was not a true threat. The Supreme Court shed little light upon the “true threat” requirement except for listing the factors identified above which were considered in the *Watts* case. It is nevertheless clear that a constitutional limitation on criminal statutes proscribing threatening conduct includes the requirement that the government prove a “true threat.” *Id.*

In *Watts*, the United States Supreme Court ruled that the defendant’s speech threatening to shoot the president of the United States was constitutionally protected. The court held that the speech was a crude and offensive method of stating the defendant’s opposition to the war in Vietnam and the draft. It was not a “true threat” as required by the law. *Watts v. United States*, *supra*.

As argued in Point II hereafter, the context, conditional nature and reaction of the listeners in the instant messaging in this case do not rise to the level of a “true threat.” Because the statute is not so limited it is unconstitutional. In this case, as in prior cases, the court should refrain from any attempt to redraft the statute. *State v. Carpenter*, supra at 408; and *State v. Swoboda*, supra at 26-27.

The “true threat” limitation adopted by the United States Supreme Court in *Watts* has been developed in subsequent case law. At the very least, the statement must “contain some language constructable as a serious expression of an intent to imminently carry out some injurious act.” *United States v. Baker*, 890 F.Supp. 1375, 1385 (E. D. Mich. 1995). This constitutional standard is not satisfied merely by proving a statement that is deviant and upsetting suggesting that the person making the statement may be unstable and likely to act in accordance with the statement at any moment. The statement “may be unsettling or alarming, but is not a true threat for the purposes of the 1<sup>st</sup> Amendment” unless there is something in the statement which indicates some intention to act imminently. *United States v. Baker*, supra at 1386. The discussion of any topic which is taboo is by definition unsettling or alarming. However,

through that discussion may be unsettling or alarming is not sufficient to satisfy the constitutional requirements for a “true threat.” There is no requirement in Section 574.010.1(1)(c) that a substantial likelihood exists that the threatened criminal conduct will ever occur. In fact, there may be many circumstances under the statute in which the activity which is discussed is neither imminent nor likely. For each of these reasons, the statute is overly broad. *State v. Carpenter*, supra.

*United States v. Baker* was reviewed on appeal. *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997). The court recognized that the law does not punish bad intentions standing alone unless accompanied by some proscribed act. The court quoted Shakespear.

“His acts did not o’ertake his bad intent;  
And must be buried but as intent  
That perish’d by the way: thoughts are no subjects,  
Intentions but merely thoughts.” *Id.* at 1494.

The court applied a number of restricting rules including the following: “that proscribable conduct must be communicated either to the threatened individual, to a third party with some connection to the threatened individual. *Id.* at 1494. In addition, the court recognized that threats are

tools that are implied when one wishes to have some effect or achieve some goal through intimidation. *Id.* The court summarized this definition of a threat which had been proscribed by the statute stating,

“A communication must be such that a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm (the mens rea), and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation (the actus reus).” *Id.* at 1495.

In the absence of such a limiting construction, Section 574.010.1(1)(c) is overly broad and unconstitutionally vague. In this case, as in *State v. Carpenter*, the court should refrain from any attempt to redraft the statute. Instead, the statute should be declared facially invalid.

The Missouri Supreme Court has consistently stricken peace disturbance statutes on grounds that apply with equal force to peace disturbance by threatening in the current version of the statute. This court should apply the prior Missouri Supreme Court cases to hold the statute in this case unconstitutional.

## **Point II**

**The Trial Court erred in finding that DJM committed a peace disturbance by threatening and the Trial Court so erred because there was not sufficient evidence to support a finding of guilt in that DJM's crude and offensive statement of his depression and frustration with school was not a threat at all and did not rise to the level of a "true threat" because the internet messaging was equivocal, conditional, and did not convey a gravity of purpose and immediate prospect of execution.**

This Court should hold the statute under which DJM was charged unconstitutional as set out in Point I. In the absence of the limiting conditions discussed in Point I, the statute is facially invalid. Should the Court construe the statute in the way that imposes the limiting conditions and restrictions for a "true threat," then the evidence is insufficient as a matter of law to prove the offense of peace disturbance by threatening. The Court should reverse the adjudication of delinquency and order DJM discharged from further supervision under the juvenile law.

### **Standard of Review**

In Point II the appellants' challenge the sufficiency of evidence. Review of a challenge to the sufficiency of the evidence is limited to determining whether sufficient evidence was presented from which a

reasonable juror could find the defendant guilty beyond a reasonable doubt. *State v. Chaney*, 967 SW2d 47, 52 (Mo. banc 1998); and *State v. Sladek*, 835 SW2d 308, 310 (Mo. banc 1992). The evidence and reasonable inferences are viewed in the light most favorable to the court's finding. *State v. Chaney*, supra. Deference is given to the trier of fact. Despite this deferential review, the Court of Appeals cannot supply missing evidence or give the State the benefit of unreasonable, speculative or forced inferences. *Bauby v. Lake*, 995 SW2d 10, 13 n. 1 (Mo.App. E.D. 1999).

The constitutional question of whether the facts are a "true threat" is a question of law. The question of whether the facts found by the Trial Court amount to a "true threat" is subject to de novo review. *State v. Weddle*, 18 SW3d 389, 391 (Mo.App. E.D. 2000); and *State v. Werner*, 9 SW3d 590, 595 (Mo. banc 2000). The Trial Court's capacity to resolve credibility issues is not dispositive of the "true threat" inquiry. *State v. Werner*, supra.

### **Argument**

The United States Supreme Court adopted a nonexclusive three-point analysis to determine whether a statement is a true threat within

the scope of a criminal statute. *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). The internet communications which were the subject of this case do not constitute a “true threat.” In *Watts*, the U.S. Supreme Court adopted a nonexclusive list of factors to be taken into account including (1) context; (2) conditional nature of the statement; and (3) reaction of the listeners. Each of these factors weigh in favor of DJM in analyzing the internet communications which are the subject of this case.

The context of the utterances were private internet instant messaging which was not publically accessible. (LF 19 ¶6). The instant messaging was sent to a classmate who was a confidant. (Tr. 38). There was no threat to Carly, the intended recipient of the instant messaging. (Tr. 44). In fact, there were no specific targets to the messages until those first mentioned by Carly. (Tr. 42); Def. Exb A. When pressed for a list of victims, DJM’s first response was “well any midget would go.” (Def. Exb. A). That hardly seems to be a serious response.

It was clear that DJM did not have a gun or a plan with which to get a gun. (Def. Exb. B; Tr. 41). When asked which gun he would use, he answered “I dunno.” (Def. Exb. A, p. 1).

There were nine pages of transcript in Defendant's Exhibit A. Only the first page and a half, the bottom half page of 6 and the top half of page 7 even relate to the message which resulted in the charge. These words are interspersed among comments about Christian music, classmates, TV shows, masturbation, piercing and other drivel. At various points he stated, "i may not do it at all unless im still depressed like this." (Def. Exb. B, p. 1). His concluding comment was "anyways i'm not going to do that. not anytime soon i feel better than I did earlier today." (Def. Exb. A, p. 7). In context, the messages do not amount to a threat. Carly analyzed it "i cant tell if this kid is leik just depressed for one day or what . . ." (Def. Exb. B, p. 1). The Trial Court expressly found that "there was no evidence [Carly] believed the threats were imminent." (LF 21). Taken in context, the messages are a crude and offensive method of stating DJM's depression and frustration with school and not a "true threat."

The conditional nature of the statements is the second factor in *Watts* and also weighs in favor of DJM in this case. DJM wrote that he was depressed and **wanted** to take a gun to school and shoot everyone he hates and then himself. (Def. Exb. B). Carly testified that DJM did not say that he intended to go through with it. (Tr. 40). When asked if he was

seriously thinking about this, he stated, “Yeah unless i happen to be not depressed in the near future. i may not do it at all unless im still depressed like this.” (Def. Exb. B, p. 1). He concluded with his comment, “anyways i’m not going to do that. not anytime soon i feel better than I did earlier today.” (Def. Exb A, p. 7). His messages were equivocal and conditional in a manner inconsistent with the second test in *Watts*.

The final test in *Watts* is the reaction of the listeners. This factor weighs heavily in favor of DJM. Carly repeatedly responded with laughter and encouragement. (Def. Exb. A). The reaction clearly demonstrates that neither one of the parties to the instant messaging was taking the conversation seriously. The conversation was punctuated by LOL (laugh out loud), hahaha and YAYAYYAY. When Carly asked DJM who he was going to shoot, he told her “any midget would go.” Carly suggested people that DJM did not even know. (Tr. 45). Carly suggested that DJM should shoot all of the black women stating, “The death of a black person cracks me up.” (Tr. 48). When asked about this, she stated that she did not mean it. (Tr. 48). She was telling DJM things that she did not believe. (Tr. 48). Carly told DJM what she described as a “joke” that she was “listening to Die Nigger Die.” (Tr. 49). Carly was laughing and clearly

encouraging DJM to become even more outrageous. She said she was playing him along to get more information. (Tr. 30).

Even when Carly contacted her adult friend, she expressed her uncertainty about what they had been talking about. She stated, “i cant tell if this kid is liek just depressed for one day or what . . .” (Def. Exb. B, p. 1).

The reaction of the listener ranging from laughing to uncertainty does not indicate a “true threat” within the requirements of *Watts v. United States*.

The “true threat” requirement in *Watts* has been amplified in cases that followed. The limitation was developed in the cases of *United States v. Baker*, 890 F.Supp. 1375, 1385 (E. D. Mich. 1995); and *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997). In the case of DJM there was no “true threat” under the logic of *Baker* and *Alkhabaz*. This has been more fully discussed under Point I and will not be repeated here. The reasoning of *Baker* and *Alkhabaz* illustrates the absence of a “true threat” in this case. There was no imminence to the message. There was no intended effect or goal through intimidation. This is simply not a threat.

At trial, the Juvenile Office erroneously relied upon DJM’s identity as a Goth in support of the charge. In the evidence Goth was described as someone who wears black, does not communicate with other

people very much and their appearance makes them very hard to approach. (Tr. 24). DJM had a haircut with long bangs dyed different colors. (Tr. 34). In suggested findings of fact, the Juvenile Office asked the Trial Court to find that Carly “knew that he lived a ‘Goth’ lifestyle, that is, he dressed in black, had his hair cut in a ‘Goth’ style (short in the back but with long bangs covering his face).” (LF 48). The Trial Court also focused and made an express finding on DJM’s “Goth” lifestyle. (LF 20). The Juvenile Office urged the Trial Court and the Trial Court is apparently punishing DJM because of his physical appearance. That is precisely one of the dangers of overly broad and vague statutes. They are subject to discriminatory application. The fact that DJM wore black clothes and the appearance of his hair is not evidence of a crime. Instead, the fact that the Juvenile Office and the Trial Court mentioned this evidence shows a discriminatory attitude. We would all be offended if a Juvenile Office or a court focused upon racial or ethnic appearance to prove a crime. The attention to clothing and hairstyle is also troubling.

The Juvenile Office failed as a matter of law to prove the knowledge requirement for a peace disturbance by threatening. The statute required the State to prove that DJM “unreasonably and **knowingly**

disturbs or alarms another person.” §574.010.1(1)(c) RSMo. Given Carly’s laughing and encouragement, no one could be expected to know that she was alarmed or disturbed by the instant messaging. In fact, some of the most alarming and disturbing content of the instant message was attributed to Carly and not DJM. She stated, “the death of a black person cracks me up.” (Def. Exb. A, p. 1). She was “listening to die negro die.” (Def. Exb. A, p. 2). No objective receiver of her communication with DJM would have concluded that she was alarmed or upset. The Juvenile Office was required to prove the knowing element of this case. Proof in a juvenile case is required beyond a reasonable doubt. *In Re Winship*, 397 US 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The Juvenile Office did not meet this burden. DJM stated that “I was saying it as a joke.” He suffered psychiatric diagnoses that interfere with his ability to understand if he is disturbing or alarming other people. (Tr. 135-136). As a matter of law, the Juvenile Office has not presented sufficient evidence of the mens rea element of the offense which was charged.

The case relied upon by the Trial Court in its Findings of Fact and Conclusions of Law is clearly distinguishable. The Trial Court referred to the case of *Lovell v. Poway Unified School Dist.*, 90 F.3d 3867 (9th Cir.

1996). (LF 26). *Lovell* was a school discipline case and not an allegation of a criminal offense. In *Lovell*, the student had a face-to-face confrontation with a school administrator. At the end of her patience, the student stated, "I so angry, I could just shoot someone." The student went on, "If you won't give me this schedule change, I'm going to shoot you." *Lovell* was a school discipline case involving a face-to-face threat by a student to shoot the very school administrator to whom she was talking. There is no comparison between *Lovell* and the internet messages exchanged between DJM and Carly. In this case, there was no face-to-face confrontation. In this case, DJM sent no message targeted to the recipient, Carly. *Lovell* provides no support for the finding of the Trial Court in this case.

The evidence in this case is insufficient as a matter of law to prove a "true threat" under the requirements set out by *Watts v. United States* and its progeny. The fact that the Juvenile Office points to DJM's clothing and hairstyle shows how far they were stretching to try to convict DJM of a crime. However, the evidence is not present. The Court should reverse the adjudication of delinquency and order that DJM be discharged from further supervision by the Court.

## **Conclusion**

This is a case in which a child engaged in mere conversation. His topic of conversation involved guns and shooting at school which is taboo and is alarming and disturbing regardless of whether it was a threat. The fact that DJM chose to engage in this conversation might have been considered a status offense for a child in need of care and treatment because his behavior or associates are injurious to his or her welfare or to the welfare of others. §211.031.1(2)(d) RSMo. However, that was not the issue before the Trial Court and is not the issue before this Court. This case involves a criminal charge as to which juvenile offenders may be stigmatized by the disclosure allowed in Section 211.231 RSMo. In a small town such as Hannibal, this information will follow DJM for the rest of his life. It is precisely because of this that the parents oppose Juvenile Court jurisdiction on a criminal offense. The statute as written and applied is unconstitutional. The evidence was insufficient as a matter of law. The adjudication of delinquency should be reversed and DJM should be discharged.

The criminal offense alleged in Count I was a class B misdemeanor upon which an adult would have faced a maximum penalty of

six months in jail and a fine of \$500.00. DJM was in secure detention, including a period of psychiatric hospitalization, for a total of 105 days. In the juvenile system he is detained without bond. This was a penalty exceeding anything that would have happened to an adult in this case. The statute is over broad and unconstitutional. There was not sufficient evidence to support a conviction. This case should be ended by reversing the adjudication of delinquency and discharging DJM from any further supervision by the Juvenile Court.

Respectfully submitted,

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## **Certification of Scanned Disk**

Comes now D.M. & J.M. by the undersigned counsel and certifies that the disk containing D.M. & J.M.'s Appellants' Brief has been scanned for viruses and it is virus-free.

## **Certification of Word Count of Appellants' Brief**

Comes now D.M. & J.M. by the undersigned counsel and certifies that this Brief complies with the limitations contained in Rule 84.06(b), in that the Word Count for D.M. & J.M.'s Appellants' Brief is 8793 words, as calculated by the word count of the word-processing system used to prepare this Brief.

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