No. SC91670

In the Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

DANNY VAUGHN,

Respondent.

Appeal from Scott County Circuit Court
Thirty-Third Judicial Circuit
The Honorable J. Scott Thomsen, Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a judgment entered in the Circuit Court of Scott County dismissing both counts of a felony information that charged Respondent (Defendant) Danny Vaughn with one count of second-degree burglary (with the underlying crime being harassment) and one count of misdemeanor harassment on the basis that the relevant parts of the criminal harassment statute, § 565.090.1(5) and (6), were overbroad and vague in violation of the First and Fourteenth Amendments to the United States Constitution and Article 1 Sections 8 and 10 of the Missouri Constitution. A dismissal of criminal charges based on the unconstitutionality of the underlying statute is a final judgment from which the State may appeal. *State v. Brown*, 140 S.W.3d 51, 53 (Mo. banc 2004). Because this appeal involves the validity of a state statute the Supreme Court of Missouri has exclusive appellate jurisdiction. Mo. Const. art. V, § 3 (as amended 1982).

STATEMENT OF FACTS

In October 2010, the State filed an information in the Circuit Court of Scott County charging Defendant with two related crimes occurring on separate dates; the information read, in relevant part, as follows:

COUNT: I

> In violation of Section 569.170, RSMo, [the defendant] committed the class C felony of burglary in the second degree, . . . in that on or about April 27, 2010, . . . the defendant knowingly entered unlawfully in a building, . . . owned by Retha Vaughn, for the purpose of committing harassment therein.

COUNT: II

> In violation of Section 565.090, RSMo, [the defendant] committed the class A misdemeanor of harassment . . . in that on or about May 10, 2010, . . . the defendant, for the purpose of frightening Retha Vaughn made repeated telephone calls to Retha Vaughn.

(L.F. 4). Defendant filed a motion to dismiss the information on the grounds that subparts (5) and (6) of subsection 1 of § 565.090, which set forth means of committing the crime of harassment, violated his right to free speech under the First Amendment to the United States Constitution and Article 1 Section 8 of the Missouri Constitution in that the subparts were allegedly facially overbroad,

and unduly infringed on Defendant's right to free speech. (L.F. 6-8). Defendant also argued that the statue was unconstitutionally vague under the due process provisions of the Fourteenth Amendment to the United State's Constitution and Article I Section 8 of the Missouri Constitution. (L.F. 8).

Judge J. Scott Thomsen held a hearing on Defendant's motion. At the hearing, the prosecutor informed the trial court that with regards to Count I, second-degree burglary, the State anticipated that the evidence would show that Defendant knowingly entered unlawfully into his former wife's home in order to commit harassment as set forth in subpart (6) of subsection 1 of 565.090. (Tr. 22). That subpart provides:

> A person commits the crime of harassment if he or she:
>
> (6) Without good cause engages in any other act with the purpose to frighten, intimidate, or cause emotional distress to another person, cause such person to be frightened, intimidated, or emotionally distressed, and such person's response to the act is one of person of average sensibilities considering the age of such person.

Section 565.090.1(6).

The prosecutor set forth the facts more specifically as follows: after being repeatedly instructed not to return to the home of his former wife, Defendant entered into her home when she was not there; he intended that the victim would be caught off-guard and scared to find him inside her home; Defendant's

plan worked as intended when the victim came home, became scared, and ran out of the house and down the street where she called the police. (Tr. 23). The prosecutor further stated that certain statements made by Defendant during their prior relationship demonstrated that Defendant knew that breaking into his former wife's home would frighten her. (Tr. 23).

On February 14, 2011, the State filed an amended information that was identical to the original information except that in Count II, it alleged:

COUNT: II

> In violation of Section 565.090, RSMo, [the defendant] committed the class A misdemeanor of harassment . . . in that on or about May 10, 2010, . . . the defendant knowingly made repeated communications with Retha Vaughn knowing that the communications were unwanted, to wit: making repeated phone calls to Retha Vaughn after being told not to call her again.

(L.F. 27).[1]

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[1] In regard to Count II, the amended information more closely followed the 2008 version of the statute, the operative version of the statute at the time of Defendant's crime.

On February 28, 2011, Judge Thomsen entered a judgment dismissing both counts of the information. (L.F. 29-34). The court found that 565.090.1(6), which sets forth for the type of harassment upon which Count I (second-degree burglary) was predicated, was unconstitutional in that it was overbroad. (L.F. 31-32). The court also found that the phrase "without good cause" "infuses vagueness into the statute" which was "compounded" by the failure of the statute to define the terms "frighten," "intimidate" and "emotional distress." (L.F. 32). The court found that § 565.090.1(5) was also facially overbroad on its face and vague. (L.F. 32-33).

STANDARD OF REVIEW

Both of Appellant's points concern the constitutionality of § 565.190. Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision. *State v. Faruqi*, No. 91195, 2011 WL 3298881 at *2 (Mo. banc, August 2, 2011); *State v. Pribble*, 285 S.W.3d 310, 313 (Mo. banc 2009). If at all feasible, the statute must be interpreted in a manner consistent with the constitution, and any doubt about the constitutionality of a statute will be resolved in favor of the statute's validity. *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992). When a constitutional and unconstitutional reading of a statute are equally possible, the court must choose the constitutional one. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007). The party challenging the validity of the statute has the burden of proving that 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).

POINTS RELIED ON

Point I (Section 565.090.1(6))

The trial court erred in dismissing Count I against Respondent Danny Vaughn because section 565.090.1(6) is neither substantially overbroad nor void for vagueness under the First Amendment to the United State's Constitution or Article 1, § 8 of the Missouri Constitution in that it proscribes harmful behavior in objective terms that are sufficiently clear to give adequate notice of what is proscribed and to prevent seriously discriminatory enforcement.

Virginia v. Hicks, 539 U.S. 113 (2003)

U.S. v. Stevens, 130 S.Ct. 1577 (2010)

Planned Parenthood of Kansas v. Nixon, 220 S.W.3d 732 (Mo. banc 2007)

State v. Koetting, 616 S.W.2d 822 (Mo. banc 1981)

Commonwealth v. Welch, 825 N.E. 2d 1005 (Mass. 2005)

Point II (Section 565.090.1(5)

The trial court erred in dismissing Count II of the information filed against Respondent Danny Vaugn because the statute under which Davis was charged, section 565.090.1(5), RSMo, is neither substantially overbroad nor void for vagueness under the First Amendment to the United State's Constitution or Article 1, § 8 of the Missouri Constitution in that it protects the legitimate rights of citizens to be free from unwanted communication, it does so in objective terms that are sufficiently clear to give adequate notice of what is proscribed and to prevent seriously discriminatory enforcement.

Virginia v. Hicks, 539 U.S. 113 (2003)

U.S. v. Stevens, 130 S.Ct. 1577 (2010)

Hill v. Colorado, 530 U.S. 703 (2000)

State v. Koetting, 616 S.W.2d 822 (Mo. banc 1981)

ARGUMENT

I (Section 565.090.1(6))

The trial court erred in dismissing Count I against Respondent Danny Vaughn because section 565.090.1(6) is neither substantially overbroad nor void for vagueness under the First Amendment to the United State's Constitution or Article 1, § 8 of the Missouri Constitution in that it proscribes harmful behavior in objective terms that are sufficiently clear to give adequate notice of what is proscribed and to prevent seriously discriminatory enforcement.

Defendant has never alleged that the conduct for which he was charged was protected speech under the Constitution. Nevertheless, the trial court dismissed Count I of the indictment on the grounds that section 565.090.1(6), which defines the predicate crime of harassment upon which the second-degree burglary count was based, might proscribe some protected speech and was unconstitutionally vague. Because the subpart proscribes mostly, if not entirely unprotected conduct, and because it is sufficiently clear to notify citizens of the conduct proscribed and to prevent discriminatory enforcement, the trial court's ruling was erroneous.

A. The overbreadth doctrine.

The First Amendment doctrine of overbreadth is an exception to traditional rules regarding the standards for facial challenges. *Virginia v. Hicks* 539 U.S. 113, 118 (2003) (citing *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984)).[2] The showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma*, 413 U.S. 601, 615, (1973), suffices to invalidate all enforcement of that law, "until and unless a

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[2] The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Its counterpart in the Missouri Constitution, Article I, § 8, provides: "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."

limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Id.* (*citing Broadrick v. Oklahoma*, 413 U.S. at 613).

The overbreadth doctrine "strike[s] a balance between competing social costs." *U.S. v. Williams*, 553 U.S. 285, 292 (2008). On the one hand, the threat of enforcement of an overbroad statute inhibits the free exchange of ideas by deterring people from engaging in constitutionally protected speech. *Id.* On the other hand, invalidating a law that is constitutional in some of its applications and which prohibits antisocial behavior also has societal costs. *Id.* Moreover, litigants who assert that their conduct is protected speech may not avail themselves of the overbreadth doctrine but must challenge the statute only as applied to their particular conduct. *Virginia v. Hicks*, 539 U.S. 113, 118 (2003). Thus, the overbreadth doctrine is applied to invalidate, rather than merely narrow the application of, laws at the petition of those who, like Defendant, are not being prosecuted for speech that is protected by the First Amendment. *Id.*

As a way of balancing these competing costs, the United States Supreme Court (and subsequently this Court) has limited the application of the overbreadth doctrine in four important ways. First, as a limited exception to the traditional case and controversy requirements, the overbreadth doctrine "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if

expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Broadrick*, 413 U.S. at 614; *Moore*, 90 S.W.3d at 66-67. "Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." *Broadrick*, 413 U.S. at 614.

Following from the first limitation on the application of the overbreadth doctrine is the second limitation that where conduct and not merely speech is involved, the doctrine is only to be applied to invalidate a statute that is *substantially* overbroad "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. 292 (*citing Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989)*; Broadrick, supra*); *State v. Moore*, 90 S.W.3d 64, 66-67 (Mo banc 2002). The application of the overbreadth doctrine to invalidate a law is "strong medicine" that is not to be "casually employed," *New York v. Ferber*, 458 U.S. 747, 769 (1982), but should only be used as a last resort. *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999) (internal quotation marks omitted); *Moore*, 90 S.W.3d at 67. In determining whether a statute's overbreadth is

substantial, a court must "consider a statute's application to real-world conduct, not fanciful hypotheticals." *U.S. v. Stevens*, 130 S.Ct. 1577, 1594 (2010) (citations omitted). "[A]n overbreadth claimant bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists." *Id.* (*citing Virginia v. Hicks*, 539 U.S. 113, 122, (2003) (*quoting New York State Club Assn.*, 487 U.S. 1, 14, (1988)) (internal quotation marks, alterations, and emphasis omitted)). There must be a realistic risk that the First Amendment rights of parties not before the court will have their First Amendment rights significantly compromised in order that a statute may be challenged on overbreadth grounds. *Id.* Additionally, "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner." *Broadrick*, 413 U.S. at 614.

Third, facial overbreadth in not invoked when a limiting construction has been or could be placed on the challenged statute. *Broadrick*, 413 U.S. at 613. "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." *Moore*, 90 S.W.3d 64, 67 (Mo. banc 2002). A narrowing construction is the preferred remedy in First Amendment cases. *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 741 (Mo. banc 2007). Where a narrowed construction that is not inconsistent with legislative intent can be

applied, the statute should be so construed in harmony with the constitution and upheld. *Id*.

The fourth limitation, closely related to the third, is that if a court determines that a part of a statute is improper, the court must decide whether the improper part of the statute or ordinance is easily severable from the rest. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). "[T]he same statute may be in part constitutional and in part unconstitutional, and . . . if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Id*. (citations omitted) *See also Planned Parenthood*, 220 S.W.3d at 741-742 (*citing* Section 1.140, which provides that a court should, as much as is consistent with legislative intent, avoid voiding an entire statute because a portion of the statute is void). Invalidating only the portions of a statute which are improper is a means by which the court can, in keeping with traditional rules regarding case and controversy, draw a constitutional rule that is only as broad as is required by the particular facts to which it is applied. *Brockett*, 472 at 501. Where a limiting construction or severability is appropriate, the bluntness of applying the overbreadth doctrine to invalidate an entire statute's application to admittedly unprotected criminal behavior is both inappropriate and unnecessary.

B. Section 565.090.1(6), proscribes conduct and does not substantially proscribe protected speech.

Subsection 1 of § 565.090, which defines the crime of harassment reads as follows:

> A person commits the crime of harassment if he or she:
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> (1) Knowingly communicates a threat to commit any felony to another person and in so doing, frightens, intimidates, or causes emotional distress to such other person; or
>
> (2) When communicating with another person, knowingly uses coarse language offensive to one of average sensibility and thereby puts such person in reasonable apprehension of offensive physical contact or harm; or
>
> (3) Knowingly frightens, intimidates, or causes emotional distress to another person by anonymously making a telephone call or any electronic communication; or
>
> (4) Knowingly communicates with another person who is, or who purports to be, seventeen years of age or younger and in so doing and without good cause recklessly frightens, intimidates, or causes emotional distress to such other person; or
>
> (5) Knowingly makes repeated unwanted communication to another

person; or

(6) Without good cause engages in any other act with the purpose to frighten, intimidate, or cause emotional distress to another person, cause such person to be frightened, intimidated, or emotionally distressed, and such person's response to the act is one of a person of average sensibilities considering the age of such person.

Section 565.090.1(1)-(6).

Count 1 of the amended information (the dismissal of which is the claim of error raised in the State's first point on appeal) charged Defendant with second-degree burglary with the predicate crime being harassment. (L.F. 27). At the hearing on Defendant's motion to dismiss, the prosecutor informed the court that the evidence would show that with the intent to "scare" the victim, Defendant broke into the her home using a key that she did not know that he had, and that he lay in wait until she came home, and that his actions had their desired effect on the victim. (Tr. 23). The prosecutor affirmed the trial court's suggestion that the State was alleging that Defendant's entrance into and remaining in the victim's home was an act done with the purpose to frighten, intimidate, or cause emotional distress to the victim in violation of section 565.090.1(6).

Section 565.090.1(6), at its core—and construed in harmony with the constitution—proscribes unprotected conduct and does not substantially infringe upon protected speech. At the outset, it does not proscribe, at least not purely, speech. Section 565.090.1(6). Given that the other subparts all explicitly proscribe certain "communications," and that the proscription of "any other act" is the last conduct prescribed in the statute, subpart (6) could be read to proscribe only non-verbal acts. *See, e.g. Planned Parenthood of Kansas*, 220 S.W.3d at 742 (terms "aid" or "assist" in statute which made it a crime to a minor in obtaining an abortion without parental consent are narrowly construed to exclude providing information or counseling so as to avoid invalidating the entire law on First Amendment grounds). At any rate, to the extent that the subsection sanctions constitutionally unprotected, harmful behavior, the justification for applying the overbreadth doctrine to invalidate the entire subsection is attenuated. *See Broadrick*, 413 U.S. at 614.

The section proscribes acts done "with the purpose to frighten, intimidate, or cause emotional distress." Section 565.090.1(6). "The First Amendment and the Missouri Constitution both protect the freedom of speech, but it has long been recognized that these protections are not absolute." *State v. Pribble*, 285 S.W.3d 310, 316 (Mo banc 2009) (*citing State v. Smith*, 422 S.W.2d 50, 55 (Mo. banc 1967)); *Virginia v. Black*, 518 U.S. 343, 358 (2003). The United States Supreme Court had consistently recognized "certain well-defined and narrowly

limited classes of speech" that, precisely because of their content, may be constitutionally prohibited. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571 (1942). The First Amendment permits restrictions upon the content of speech in a few limited areas where the social interest in order and morality outweighs the slight social value that the speech might have as a step to truth. *Black*, 518 U.S. 358 (citations omitted). "[A] state may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id*. (*quoting Chaplinsky, supra* at 572.) The United States Supreme Court has found that intimidating speech is a type of "true threat," a statement meant to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. *Black*, 538 U.S. at 359 (citation omitted). To the extent that § 565.090.1(6), proscribes conduct meant to frighten or intimidate, it constitutionally proscribes conduct for which there is no First Amendment protection. *Id*.

While acts done "with the purpose . . . to cause emotional distress" may not be sufficiently similar to "true threats" to be, in and of themselves, constitutionally proscribable, subpart (6) has important qualifiers which limit the application of the sanction to exclude protected speech from its reach. Reviewing the law from other state appellate courts construing their statutes proscribing harassing speech and conduct as constitutional, the Massachusetts Supreme Court has summarized that permissible statutes usually have some

combination of a list of limiting characteristics: a specific intent element; a requirement that the conduct be "directed at" an individual; a reasonable person standard; a statutory limitation that the conduct have "no legitimate purpose"; and a savings clause excluding from the statute's reach constitutionally protected activity or communication. *Commonwealth v. Welch*, 825 N.E. 2d 1005, 1018 (Mass 2005) (*citing State v. Brown*, 207 Ariz. 231, 233, (Ct. App. 2004)) (harassment statute upheld that includes verbal communication "directed at a specific person which would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person" and excludes "otherwise lawful demonstration, assembly or picketing"); *Bouters v. State*, 659 So.2d 235, 236–237 (Fla. 1995) (stalking statute constitutional where it defined "harasses" as engaging in a course of conduct which is directed at a person, is willful and malicious, causes substantial emotional distress, serves no legitimate purpose, and does not include constitutionally protected activity); *State v. Button*, 622 N.W.2d 480, 482, 485 (Iowa 2001) (harassment statute that includes "oral communication" "inten[ded] to threaten, intimidate, or alarm" upheld due to "constitutional safety valve" that harassing conduct be done "without legitimate purpose"); *State v. Asmussen*, 668 N.W.2d 725, 729–731 (S.D. 2003) (2004) (stalking statute constitutional even though it expressly included "verbal ... communication" where statute required behavior be willful, malicious, directed at a particular

person, and serve no legitimate purpose); *Luplow v. State*, 897 P.2d 463, 465, 467–468 (Wyo. 1995) (statute constitutional that includes verbal communication but is limited to conduct directed at a person; that would cause a reasonable person substantial emotional distress; does cause serious alarm; and does not include lawful demonstration, assembly, or picketing).

The *Welch* court also noted that the inclusion of broad "savings clauses" that except constitutionally protected speech from proscription have been of particular significance to many state courts in upholding harassment statutes. *Id.* (*citing Staley v. Jones*, 239 F.3d 769, 782–783, 793 (6th Cir. 2001) (upholding conviction based on Michigan stalking statute that excluded from definition of "harassment" any "constitutionally protected activity or conduct that serves a legitimate purpose")); *People v. Shack*, 658 N.E.2d 706, 711 (1995) (upholding aggravated harassment statute that criminalizes only those telephone calls made "with no purpose of legitimate communication"); *Bouters*, 659 So.2d at 236 (harassing conduct must "serve[ ] no legitimate purpose" and excludes "constitutionally protected activity"); *Luplow v. State*, 897 P.2d at 465, 467 (statutory exception for "an otherwise lawful demonstration, assembly or picketing" "disposes of any contention that the statute affects constitutionally protected conduct"). *But see State v. Machholz*, 574 N.W.2d 415, 421 n. 4 (Minn. 1998) (savings clause stating that criminal harassment statute excluded harassing conduct that is constitutionally protected was insufficient); *Long v.*

State, 931 S.W.2d 285, 289, 297 (Tex. Crim. App. 1996) (statutory clause providing affirmative defense that conduct was in support of constitutionally protected rights did not save otherwise invalid statute).

Section 565.090.1(6) has several of provisions that limit its provision so that it does not substantially infringe upon protected speech. First, the statute requires that the act be done "without good cause." This phrase is similar to the language in other statutes that the conduct have "no legitimate purpose" and operates as a "savings clause" that will exclude most, if not all protected speech, such as political, religious, journalistic, or educational advocacy and communication. Moreover, the requirement that the behavior be done "without good cause" excludes other innocent, non-malicious behavior that might cause emotional distress, such as conveying distressing news.

Second, the statute has a specific intent requirement. It is not sufficient that frightening-, intimidating-, or emotional-distress-causing behavior occur; the actor must specifically act "with the purpose" to cause those results. Read together with the requirement that the act be engaged in "without good cause," the statute essentially provides that the actor's main, if not sole, purpose must be to frighten, intimidate, or cause emotional distress to another person.[3] And

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[3] Some courts have upheld their statutes by construing them to punish conduct only when the actor's sole intent was to annoy or cause other emotional distress

there is no First Amendment right to inflict unwanted and harassing conduct on another person. *State v. Mott*, 692 A.2d 360, 365 (Vt. 1997) (*citing Rzeszutek v. Beck*, 649 N.E.2d 673, 680-81 (Ind. Ct. App. 1995); *Gilbert v. State*, 765 P.2d 1208, 1210 (Okla. Crim. App. 1988); *and Rowan v. United States Post Office*, 397 U.S. 728, 738, (1970) (statutory prohibition on person using mail to send unwanted information is valid; "[i]f this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient")); *State v. Nye*, 943 P.2d 96, 101 (Mont. 1997) (citations omitted).

Third, the statute requires that the actions be directed at a particular person. This person must be both the object of the actor's specific intent, and must actually suffer the harm anticipated by the statute.

Fourth, the standard for harm is not a subjective one, but an objective one based on "average sensibilities considering the age of such person." Section 565.090.1(6). This language conveys essentially the same meaning as provisions referring to the reactions of a "reasonable person," which have been considered to be limiting constructions which narrow the application of statutes to unprotected conduct. *Luplow*, 897 P.2d at 467–468.

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to the recipient. *McKillop v. State*, 857 P.2d 358, 364 (Alaska App. 1993); *State v. Richards*, 896 P.2d 357, 362 (Idaho 1995).

Construed in harmony with the constitution, § 565.090.1(6) properly proscribes harmful conduct that is not protected from proscription by the First Amendment. As the U.S. Supreme Court has noted, the overbreadth doctrine has a "tendency" "to summon forth an endless stream of fanciful hypotheticals." *Williams*, 553 U.S. at 301. But the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Id*. (*citing Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800, (1984)). Defendant has failed to demonstrate that there is a substantial amount of protected speech which is proscribed by this statute and which cannot be excluded from its scope by narrowing constructions. If any less-than-substantial overbreath exists, it should be cured through case-by-case analysis of factual situations if and when a litigant asserts that the statute is being applied unconstitutionally to his own conduct, or to conduct in which he plans to engage. *Ferber*, 458 U.S. at 773-774 (*citing Broadrick*, 413 U.S. at 615-616). The application of the overbreadth doctrine to invalidate § 565.090.1(6), which, in the vast majority of applications, raises no constitutional problems whatsoever, would be unwarranted and imprudent. Any concerns over the rights of possible litigants in fanciful hypothetical scenarios should not stand in the way of the State prosecuting Defendant for breaking into his ex-wife's house for the purpose of terrorizing her.

C. Section 565.090.1(6) is not void for vagueness.[4]

> Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.

Williams, 553 U.S. at 304 (*citing Hill v. Colorado*, 530 U.S. 703, 732, (2000); and *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)). Nevertheless, the United States Supreme Court has also relaxed traditional standing requirements in the context of the First Amendment to permit facial challenges to the statute on the grounds that it is overbroad because it is unclear whether it proscribes or regulates a substantial amount of protected speech. *Williams*, 553 U.S. at 304 (citations omitted). But "perfect clarity and precise guidance have

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[4] It is not clear from the trial court's order that it found § 565.190.1(6) to be void for vagueness in addition to its application of the overbreadth doctrine to invalidate the subpart. Because its ruling may have been based in part on its erroneous conclusion that certain phrases "infuse[d] the statute with vagueness," Appellant will address this issue.

never been required even of regulations that restrict expressive activity." *Id.* (*citing Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)). "[B]ecause we are 'condemned to the use of words, we can never expect mathematical certainty from our language.'" *Hill v. Colorado*, 530 U.S. 703, 733 (*quoting Grayned*, 408 U.S. at 110).

Defendant argued in his motion, and the trial court held, that the phrase "without good cause" was a source of vagueness in the statute.[5] But Defendant's argument, and the trial court's holding, are in conflict with precedent from this Court. In *State v. Davis*, 469 S.W.2d 1, 4-5 (Mo. banc 1971), this Court considered whether the phrase "without good cause" rendered section 559.353, RSMo 1969, the criminal non-support statute, unconstitutionally vague. This Court noted that the phrase is both frequently used in Missouri law[6] and sufficiently understood that further explanation was not required. *Id.*

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[5] Defendant's motion raised a facial vagueness challenge and not an as-applied vagueness challenge. (L.F. 14-16). Nothing in the trial court's order indicates that it found any part of the statue vague as applied to Defendant's conduct.

[6] For current uses of the phrase, *see e.g.* §§ 67.212, 70.441, 115.637, 178.890, 182.640, 190.294, 190.309, 190.339, 208.041, 208.410, 210.906, 226.585, 288.050, 302.341, 339.532, 376.383, 407.735, 452.130, 510.080, 565.153; Supreme Court Rules 26.029(g), 37.55(f).

This Court's precedent is in accord with the holdings of other state courts that have rejected vagueness challenges, even in the First Amendment context, because of language similar to "without good cause." *State v. Rucker*, 987 P.2d 1080, (Kan. 1999) ("serves no legitimate purpose" limitation on definition of harassing conduct was not constitutionally vague); *People v. Tran*, 47 Cal. App. 4th 253, 260 (Cal. App. 6 Dist. 1996) (same). *But see State v. Norris–Romine*, 894 P.2d 1221 (1995), (phrase "legitimate purpose" in stalking statute was unconstitutionally vague). Moreover, as noted above, other courts have held that the inclusion of a limitation that the act be done for no "legitimate purpose" as a reason to hold that the law is not overbroad, which would undermine the argument that such a phrase makes a law less clear as to whether in includes protected speech.

Defendant also argued in his motion that the phrase "emotional distress" was unconstitutionally vague. (L.F. 16). The trial court found that vagueness in the statute was "compounded" not only by this term, but also by the terms "frighten" and "intimidate." (L.F. 32). Again, the court's holding was in conflict with this Court's prior pronouncement that the terms "frightening" and "disturbing" as set forth in an earlier version of the harassment statute, are "words of common usage and definition." *State v. Koetting*, 616 S.W.2d 822, 825

(Mo. banc 1981). This Court's reasoning depended largely on the fact that the crime was a specific-intent crime, which meant that the defendant would have to act with the purpose to "frighten" or "disturb" thereby necessitating his own notice that his conduct was proscribed by the statute. *Id. See also Culbreath v. State*, 667 So.2d 156, 161 (Ala. Cr. App. 1995) (*abbrograted on other grounds by Hayes v. State*, 717 So.2d 30 (Ala. Crim. App. 1997) ("A specific intent requirement can ameliorate vagueness problems. If an actor has a specific intent to bring about a particular effect, he can be presumed to be on notice that his actions to effect that intent constitute a crime.") (*quoting* Boychuk, M. Katerine, Are Stalking Laws Unconstitutionally Vague or Overbroad?, 88 NW.U.L.Rev. 769, 781 (1994)).

Moreover, terms like "frighten," intimidate" and "emotional distress" are not vague or subjective where they are limited to the reaction of a "reasonable person." *Bouters*, 659 So.2d at 238; *U.S. v. Smith*, 685 A.2d 380, 386 (D.C. 1996) ("[T]he existence of an objective standard by which to measure the victim's reaction to the perpetrator's activities can . . . . help to eliminate any vagueness problems."); *Culbreath*, 667 So.2d at 161. "This 'reasonable person' requirement takes harassment out of the realm of the subjective, providing an objective standard against which to measure potentially harassing conduct." Boychuk, 88 Nw. U.L. Rev. at 781.

The trial court's error stemmed from its tendency to review each term of the subpart in isolation, rather than reading the entire subpart, in the context of the entire statute, to determine if the terms were so vague as to fail to provide fair notice of what is prohibited. The requirements that the actor act with the specific intent to cause fright, intimidation, or emotional distress, together with the requirement that the victim actually suffer fright, intimidation or emotional distress, and that the reaction be one of a reasonable person provides objective standards. These standards put citizens on notice of what behavior is sanctioned and guide police and prosecutors so as to prevent seriously discriminatory enforcement.

The trial court's order dismissing Count I of the information should be reversed.

II (Section 565.090.1(5)

The trial court erred in dismissing Count II of the information filed against Defendant Danny Vaughn because the statute under which Defendant was charged, section 565.090.1(5), RSMo, is neither substantially overbroad nor void for vagueness under the First Amendment to the United State's Constitution or Article 1, § 8 of the Missouri Constitution in that it protects the legitimate rights of citizens to be free from unwanted communication, it does so in objective terms which are sufficiently clear to give adequate notice of what is proscribed and to prevent seriously discriminatory enforcement.

Defendant never alleged that the conduct for which he was charged in Count II was protected speech under the constitution. Nevertheless, he argued that the subpart of the statute with which he was charged, § 565.190(5), could be applied to cover the protected speech of others, and that it was unconstitutionally vague. Because the statute proscribes harmful behavior and, in most of its applications, does not apply to protected speech, it is not substantially overbroad. Moreover, the terms it uses are both objective and sufficiently clear to give a person of average intelligence notice of what conduct is proscribed and to guide the discretion of law enforcement and prosecutors so

as to discourage seriously discriminatory enforcement. For these reasons, the trial court's order dismissing Count II should be reversed.

A. General Law

The general law regarding overbreath and vagueness claims in the First Amendment context is set forth in Appellant's first point.

B. Section 565.090.1(5).

The entirety of § 565.090.1, which sets forth the various means of committing the crime of harassment, is quoted in Appellant's first point. Subpart (5), the basis of Count 2 of the information and the subject of Appellant's second point on appeal is repeated here:

> A person commits the crime of harassment if he or she: . . .
>
> (5) Knowingly makes repeated unwanted communication to another person.

Section 565.090.1(5).

C. Section 565.090.1(5) is not substantially overbroad.

Section 565.090.1(5) is limited in important ways that restricts its application to constitutionally proscribable conduct. First the communication must be made "to another person." This Court could, in keeping with the language of the statute and the intent of the legislature, construe this language to mean that the communication be directed at a particular person. The fact

that the actor must also know that his communication is "unwanted" by the hearer supports a conclusion that he must be directing his communication at a particular person who does not want to be communicated to and who has put the actor on notice that he does not desire further communication. Communication that is focused at a particular person is more likely to substantially infringe on a person's right to be free from such expressions. *Koetting*, 616 S.W.2d at 826. This interpretation should be favored because interpretations that render a statute constitutional are favored over interpretations that do not. *Murrell*, 215 S.W.3d at 102.

Second, this interpretation of the phrase "to another person" together with the requirement that the communication be "unwanted" renders the statute more in harmony with the Constitution because a limitation that the act be focused on a particular person excludes more protected speech. There is no constitutional right to harass an unwilling recipient. *Nye*, 943 P.2d at 101; *See also Rowan*, 397 U.S. at 738 ("no one has a right to press even 'good' ideas on an unwilling recipient"); *Mott*, 692 A.2d at 365.

The United States Supreme Court has recognized a "privacy interest in avoiding unwanted communication." *Hill*, 530 U.S. at 716. Moreover, while this interest is more important "in the confines of one's own home," "the interest in preserving tranquility" in public "may at times justify official restraints" on offensive expression. *Id.* (citation omitted). "The unwilling listener's interest in

avoiding unwanted communication has been repeatedly identified in [United State's Supreme Court] cases. *Id.* Justice Brandeis characterized the "right to be left alone" as "the most comprehensive of rights and the right most valued by civilized men." *Id.* (*citing Olmstead v. United States,* 277 438, 478 (1928) (Brandeis, J. dissenting); *See also American Steel Foundries v. Tri-City Central Trades Council,* 257 U.S. 184 204 (1921) (*cited by Hill v. Colorado, supra*) ("[T]he accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging may become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free.) The right to avoid unwelcome speech can be protected in confrontational settings. *Hill,* 530 U.S. at 716.

Third, the statute requires not only that the communication be unwanted and repeated, but that the Defendant know that the communication is both repeated and unwanted. § 565.090.1(5). Thus, it would be insufficient under this subpart for the actor to know that the recipient of his communication *disagreed*, even vehemently, with the content of the communication. The actor could only be punished by this subpart if he repeated the communication

knowing that the recipient did not want to receive communication from the actor.

In his motion, Defendant raises a number of scenarios which persuaded the trial court that the statute was overbroad. (L.F. 11-12). He raises the scenario of a street preacher repeatedly telling passersby that they need to repent. (L.F. 12). However, this activity would not be proscribed by the statute, properly construed, unless his communication was directed at a particular person, and that person had put the preacher on notice that further communication is unwanted. Defendant also raised the scenario of a protestor standing outside an abortion clinic who is told by a clinic worker that she no longer wants to see the sign. According to Defendant, the protestor would be guilty of harassment under this statute if he returned the next day with the sign. However, the protestor's actions would not be sanctioned under the statute, properly construed, because they would not be directed at a particular person.

Defendant also raises the issue where a party in a contract dispute contacts the other party by letter to demand compliance with the contract after the second party cuts off communication. (L.F. 12). But this action is also not prosecutable under the subsection, as there is no evidence in the factual scenario that there was repeated communication that the first actor knew was unwanted, but rather only a singular unwanted communication. The same problem exists

in Defendant's scenario where a mother calls her teenage son on his cellular phone after he tells her not to call again. (L.F. 12).

But even if one can conceive of some impermissible applications of the subpart of this statute, that does not render it susceptible to an overbreath challenge. *Williams*, 553 U.S. at 301. Defendant has failed to demonstrate that there is a substantial amount of protected speech that will be prohibited by this subpart so that it needs to be facially invalidated rather than narrowly construed on a case-by-case basis. This Court has demonstrated an appropriate reluctance to protect a criminal defendant from prosecution for unprotected behavior due to vague concerns about how the statute may be applied to hypothetical litigants in the future. *See Pribble*, 285 S.W.3d at 316; *Moore*, 90 S.W.3d at 69. Furthermore, this Court has shown a tendency to narrowly construe statutes that may proscribe protected speech rather than invalidating a substantially constitutional statute. *See Planned Parenthood*, 220 S.W.3d at 741. The extremely unlikely scenario that a Missouri prosecutor charges a mother for repeatedly calling her son to demand that he return home after he has informed her that he no longer wants to communicate with her might be an appropriate case for this Court to determine whether the statute, as applied to those facts, proscribes too much speech which is protected under the First Amendment. It does not demonstrate that the statute is so substantially broad

that it cannot be applied to prosecute Defendant for repeatedly making unwanted telephone calls to his former wife.

D. Section 565.090.1(5) is not void for vagueness.

The general law regarding vagueness is set forth in Appellant's first point.

The trial court found that the term "communication" was vague. "Communication" is defined simply as "the exchange of thoughts, messages, or information as by speech, signals, writing, or behavior. THE AMERICAN HERITAGE DICTIONARY 383 (3rd 1996). Communication is a word of common usage that is easily understandable. The terms certainly encompasses any means of transmission or conveyance, but this seems to clarify, rather than obscure the intent behind the statute which was to prohibit repeated unwanted communications transmitted by any means. The trial court also found that the word "repeated" was vague. But to "repeat," another word of common usage, means simply "to say again." THE AMERICAN HERITAGE DICTIONARY 1530 (3rd 1996).

Lastly, the court found that the term "unwanted" was vague because it was unclear whether it meant "undesired" or merely "unsolicited." However, other terms in the subpart answer this question. Because a defendant must know that his communications are unwanted, the communication cannot be merely unsolicited, but must be undesired and expressly so.

The language of § 565.190.1(5) is sufficiently clear so as to give notice of what conduct is proscribed and to prevent seriously discriminatory conduct. Moreover, Defendant does not allege that is conduct, calling his former wife repeatedly on the telephone while knowing that the calls were unwanted, was protected speech. The State should be permitted to prosecute Defendant under this statute which clearly proscribes his conduct.

The trial court's judgment reversing Count II of the information should be reversed.

CONCLUSION

The trial court's judgment dismissing the information should be reversed.

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 7,342 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 software; and

2. The undersigned counsel hereby certifies that a copy of this notification was sent through the eFiling system on September 19, 2011, to:

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