IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC 91670
	)	
DANNY VAUGHN,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF SCOTT COUNTY, MISSOURI
THIRTY-THIRD JUDICIAL CIRCUIT
THE HONORABLE SCOTT E. THOMSEN, JUDGE

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Respondent was charged with burglary in the second degree based upon the underlying crime of harassment, and harassment, Sections 569.170, RSMo 2000, and 565.090, RSMo (Cum. Supp.) 2008. The Honorable Scott E. Thomsen sustained respondent's motion to dismiss both counts, holding that subparts (5) and (6) of Section 565.090.1 are unconstitutionally vague and overbroad, U.S. Const., Amends. I and XIV; Article I, Sections 8 and 10, Mo. Const. The state appeals. This Court has original jurisdiction over challenges to the validity of a statute of Missouri. Article V, Section 3, Mo. Const. (as amended 1982).

STATEMENT OF FACTS

Danny Vaughn was charged by information filed October 8, 2010, with burglary in the second degree, Section 569.170, alleging that he "knowingly entered unlawfully in a building … owned by Retha Vaughn, for the purpose of committing harassment therein." (L.F. 4). He was charged in Count II with the misdemeanor of harassment, and that allegation was that he, "for the purpose of frightening Retha Vaughn made repeated telephone calls to Retha Vaughn." (L.F. 4).

Defense counsel filed a motion to dismiss both counts of the information (L.F. 6). The motion asserted that Section 565.090 is vague and overbroad on its face and as applied to respondent, and infringes upon his rights to free speech (L.F. 6-19). The state's response waived any objection to standing (L.F. 20). An amended information was filed with leave of the trial court following the motion to dismiss hearing to clarify that the state was prepared to prove in Count II that Mr. Vaughn "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).

There was no evidence presented at the motion to dismiss hearing, but the parties argued the motion (Tr. 2 *et seq.*). The trial court pointed out that the word "cause" in the context of "cause such person to be frightened …" in subparagraph (6) did not make sense unless it was read "causes." (Tr. 13). The prosecutor again agreed that Mr. Vaughn had standing to challenge the statute on its face (Tr. 17).

The prosecutor also informed the court that Count II was based on subparagraph (5) of the statute and Count I was based on subparagraph (6) (Tr. 19-22). The prosecutor asserted that "the facts in this case if you read any of the specifics other subparagraphs there is no possible way for it to fit under any of the conduct that is alleged on Mr. Vaughn that none of the conduct actually fits within subparagraphs one through four." (Tr. 22). He agreed that the charge was that his "mere existence in [the victim's house] was an act meant to frighten or intimidate or cause emotional distress" (Tr. 23-24).

The Honorable Scott E. Thomsen entered an order on February 28, 2011, granting the motion to dismiss both counts, specifically holding that Section 565.090.1(5) and (6) are vague and overbroad (L.F. 29). As to Count I under subparagraph (6), the Court found that the statute outlawed many acts that would be constitutionally protected under the First Amendment (L.F. 30). The Court focused on the phrase "engages in any other act" in subparagraph (6) and found it to be substantially overbroad on its face (L.F. 31).

> The number of cases of protected expression which application of this statute would outlaw is substantial. Just a few examples, out of many, of persons or situations where this statute would apply are politicians, preachers, radio and TV commentators, coaches, and certainly many others who engage in communications meant to frighten, intimidate or perhaps even cause some emotional distress in order to motivate others. Moreover, others such as writers of horror novels or movies produce their works with

> the intent to frighten others for entertainment value. These are certainly constitutionally protected activities.

(L.F. 31). The court also found that the phrase "without good cause" made the statute more vague rather than less so, despite the state's argument (L.F. 31-32). This is because it creates a subjective standard left to the discretion of a law enforcement officer or prosecuting attorney (L.F. 32). The court also held that the vagueness of the statue was compounded by the fact that the terms "frighten," "intimidate," and "emotional distress" are not defined (L.F. 32).

As to Count II, charged under subparagraph (5), the court also found the statute vague and overbroad on its face for similar reasons (L.F. 33). The court found "the number of examples where this statute could apply is left only to the imagination of the reader … [including] junk mail, undesired e-mail, eviction notices, perhaps even jury service notifications, etc." (L.F. 33).

> Furthermore, the language of the statute leaves a vagueness a mile wide. First, what is a communication? What is meant by repeated? Could it be communications made fifty years apart? What is unwanted? Does it mean just undesired? or merely unsolicited?

(L.F. 33).

The state filed a notice of appeal on March 7, 2011 (L.F. 1, 35).

ARGUMENT

Standard of review

This Court reviews issues of law *de novo.* ***State v. Justus***, 205 S.W.3d 872, 878 (Mo. banc 2006). A ruling granting a motion to dismiss presents an issue of law. ***State v. Rousseau***, 34 S.W.3d 254 (Mo. App., W.D. 2000). Statutes are presumed to be constitutional. ***Suffian v. Usher,*** 19 S.W.3d 130, 134 (Mo. banc 2000) (citations omitted). This Court will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute. ***Westin Crown Plaza Hotel v. King,*** 664 S.W.2d 2, 5 (Mo. banc 1984). If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted. ***Murrell v. State***, 215 S.W.3d 96, 102 (Mo. banc 2007).

I.a.

Count I overbreadth

Section 565.090.1(6) is substantially overbroad on its face in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Missouri Constitution.

Under Section 565.090.1(6), a person commits the crime of harassment if he or she

> 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.

RSMo (Cum. Supp.) 2008 (App. at A-1). While the Missouri harassment statute was found not to be overbroad in ***State v. Koetting***, 616 S.W.2d 822 (1981), this subsection (6) was not in existence and was not therefore at issue.

The trial court found (L.F. 29), and respondent asserts, that this subsection is constitutionally overbroad on its face, in violation of the First and Fourteenth Amendments to the United States Constitution, and Article I, Section 8 of the Missouri Constitution. A statute may be overbroad in its reach if it prohibits constitutionally protected conduct. ***Grayned v. City of Rockford***, 408 U.S. 104 (1972).

Standing

In general, a person to whom a statute may constitutionally be applied cannot challenge that statute on the basis that it may be applied unconstitutionally to others not before the Court. ***Broadrick v. Oklahoma***, 413 U.S. 601, 610 (1973). An exception has been made in the area of the First Amendment. ***Id***. at 611. Litigants are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the

statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression. ***Id***. The state in this case conceded that respondent has standing to challenge the statute at issue as facially overbroad (L.F. 20, Tr. 17).

Protected speech

An overbroad statute implicates the First Amendment where it implicates constitutionally protected speech. In ***Reno v. ACLU,*** the United States Supreme Court struck down a federal statute which prohibited indecent and patently offensive communications on the internet, because those restrictions were content-based and had a potential chilling effect on free speech. 521 U.S. 844, 871-872 (1997).

A criminal statute must be scrutinized with even more care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application. ***State v. Carpenter***, 736 S.W.2d 406 (Mo. banc 1987). "The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas and images." ***Reno***, 521 U.S. at 872. *See also,* ***Cohen v. California***, 403 U.S. 15 (1971) (California peace disturbance statute held overbroad; challenged by defendant who wore a jacket displaying "Fuck the Draft" in a courthouse corridor); and ***Coates v. City of Cincinnati***, 402 U.S. 611 (1971) (ordinance prohibiting three or more people meeting on the sidewalks and

conducting themselves in a manner annoying to people passing by was unconstitutionally overbroad).

Conduct versus speech

Where conduct and not merely speech is involved, a statute must be "substantially" overbroad in order to be declared unconstitutional. ***United States v. Williams,*** 553 U.S. 285, 292 (2008). A statute is therefore facially invalid if it prohibits a substantial amount of protected speech. ***Id***. Subparagraph (6) of the statute is in fact substantially overbroad, as the trial court found (L.F. 31).

> The number of cases of protected expression which application of this statute would outlaw is substantial. Just a few examples, out of many, of persons or situations where this statute would apply are politicians, preachers, radio and TV commentators, coaches, and certainly many others who engage in communications meant to frighten, intimidate or perhaps even cause some emotional distress in order to motivate others. Moreover, others such as writers of horror novels or movies produce their works with the intent to frighten others for entertainment value. These are certainly constitutionally protected activities.

(L.F. 31). In ***Reno***, *supra*, the United States Supreme Court discussed the substantial overbreadth of that statute with similar examples of the reach of the blanket prohibition on all "indecent" and "patently offensive" messages communicated. 521 U.S. at 878. Compare our statute's language criminalizing

"*any other act* with the purpose to frighten, intimidate or cause emotional distress." Section 565.090.1(6) (emphasis added).

Appellant attempts to sever "cause emotional distress" from what it calls "true threats" – conduct meant to frighten or intimidate (App. br. at 25-26, *citing* ***Virginia v. Black***, 518 U.S. 343 (2003)). This is the original "fighting words" exception. *See* ***Chaplinsky v. State of New Hampshire***, 315 U.S. 568 (1942). Appellant urges this Court to examine factors that have been used to limit a patently unconstitutionally overbroad statute to see if it can be saved in this manner (App. br. 29-30).

In ***Carpenter***, this Court overturned a conviction under Section 574.010.1(1)(c), which criminalized peace disturbance wherein it allowed charges to be brought against a person who threatened to commit a crime. 736 S.W.2d at 407. The statute contemplated punishing a person for any and all utterances that if carried out would constitute criminal offenses under Missouri law. ***Id*** at 407. As in the examples given by the trial court above, this Court held that this punished potentially more than mere "fighting words" and included conduct with a potentially legitimate purpose. ***Id***. at 408. ("Such prohibited offenses could include threatening to publicly display explicit sexual materials ... or even threatening to steal a book from a library. …"). ***Id***. at 407-408.

The ***Carpenter*** Court noted,

> Although a limiting construction would avoid imposition of the facial overbreadth conclusion, there is no indication that such a construction

would be consistent with the intent of the legislature. In fact, the plain language of the statute would indicate to the contrary. We thus refrain from any attempt to redraft the statute.

Id. at 408 n. 1. *See also*, ***State v. Moore***, 90 S.W.3d 64, 69 (Mo. banc 2002) (Teitelman, J., dissenting).

The trial court correctly held that Section 565.090.1(6) is facially overbroad and violates the First Amendment.

I.b.

Count I vagueness

Section 565.090.1(6) is unconstitutionally vague in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 10 of the Missouri Constitution.

Under Section 565.090.1(6), a person commits the crime of harassment if he or she

without good cause engages in any other act with the purpose to frighten, intimidate, or cause emotional distress to another person, cause [sic] 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.

RSMo (Cum. Supp.) 2008. While the phrase in the Missouri harassment statute "for the purpose of frightening or disturbing another person" was found not to be vague in ***State v. Koetting***, 616 S.W.2d 822 (1981), this subsection (6) was not in existence and is distinguishable from that analysis.

The trial court found (L.F. 29, 32), and respondent asserts, that this subsection is unconstitutionally vague, in violation of respondent's right to due process of law under the Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Missouri Constitution.[1] This section fails to give fair notice of the prohibited conduct. What is "without good cause?" What is "emotional distress or emotionally distressed?" And most troubling, what

[1]While vagueness is a due process violation, it implicates First Amendment considerations as well. ***Grayned v. City of Rockford***, 408 U.S. 104, 108 (1972). Appellant calls this a "facial vagueness challenge" and not an "as-applied" challenge (App. br. at 33). "Although ordinarily a person who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," that requirement is relaxed in the First Amendment context. ***United States v. Williams***, 553 U.S. 285 (2008). Respondent will address this as an as applied challenge as well, *infra.*

is "a person of average sensibilities considering the age of such person?" The statute is unconstitutionally vague.[2]

Void for vagueness

A statute which fails to clearly define proscribed conduct violates the Due Process Clause and is void for vagueness. ***Grayned***, 408 U.S. at 108; ***State v. Allen***, 905 S.W.2d 874, 876 (Mo. banc 1995). A statute is unconstitutionally vague if it fails to give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." ***Allen,*** 905 S.W.2d at 877 (*quoting* ***United States v. Harriss***, 347 U.S. 612, 617 (1954)). Secondly, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. ***Grayned***, 408 U.S. at 108. Third, where a vague statute abuts upon the sensitive area of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. ***Id***.

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[2] Appellant questions whether the trial court's ruling reached the vagueness question on subparagraph (6) (App. br. at 32, n. 4). But the judge noted clearly at L.F. 32 that he was ruling that subparagraph vague, although most of his analysis was regarding overbreadth. Since appellant appeals this part of the ruling and given that this issue is subject to *de novo* review, respondent will treat it as fully before this Court.

An example of this sort of statute was that held to be unconstitutional by the United States Supreme Court in ***Coates v. City of Cincinnati***, 402 U.S. 611 (1971). There, the Court struck down a city ordinance making it a criminal offense for three or more persons to assemble on the sidewalks and conduct themselves "in a manner annoying to persons passing by." The ordinance was unconstitutionally vague because it subjected the exercise of the right of assembly to an unascertainable standard and left the standard of "annoyance" to "the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man." 402 U.S. at 613.

Other states have examined their harassment and stalking statutes for vagueness with the guidance of the principles of ***Grayned*** and ***Coates***. In ***State v. Bryan***, 259 Kan. 143 (1996), the Supreme Court of Kansas held the state's stalking statute to be unconstitutionally vague on its face, due to the use of the terms "alarms," "annoys," and "harasses" without any sort of definition or objective standard to measure the prohibited conduct. The Court noted that "at its heart the test for vagueness is a commonsense determination of fundamental fairness." 259 Kan. at 146. The Kansas statute at issue criminalized "intentional and malicious following or course of conduct directed at a specific person when such following or course of conduct seriously alarms, annoys or harasses the person, and which serves no legitimate purpose;" and defined a course of conduct as "evidencing a continuity of purpose and which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial

emotional distress to the person. Constitutionally protected activity is not included within the meaning of 'course of conduct.'"

Missouri's statute has similar language regarding purpose and actually suffering emotional distress. Section 565.090.1(6). But the Kansas Court held that this did not save their statute without a definition of what conduct alarms, annoys or harasses a person. 259 Kan. at 150. Missouri's statute is even broader and less clear, as it criminalizes "*any other act"* which has the purpose to frighten, intimidate, or cause emotional distress.

The Kansas Court also held that the presence of a reasonable person standard was not enough to save the statute, because it went only to the effect of the harassment, not to the definition of those terms. ***Id.*** Appellant significantly has not argued that Section 565.090.1(6) in fact contains a reasonable person standard when it defines the effect of the harassment in terms of the victim's response to the acts as "one of a person of average sensibilities considering the age of such person" although its brief generally argues a reasonable person standard (App. br. at 34-36). In fact, this language is more vague than clear. *See also,* ***Long v. State***, 931 S.W.2d 285 (Tex. Cr. App. 1996) (Stalking statute held void for vagueness, unconstitutional in part because it did not incorporate a reasonable person standard).

In ***People v. Norman***, 703 P.2d 1261 (Colo. banc 1985), the Colorado Supreme Court struck down the state harassment statute because its critical language was impermissibly vague. The statute at issue provided that a person

committed the crime of harassment if "with intent to harass, annoy, or alarm another person," that person "engages in conduct or repeatedly commits such acts that alarm or seriously annoy another person and that serve no legitimate purpose." 703 P.2d at 1266. The Court noted that it had held parts of the statute (dealing with repeated communications, see Point II.B. below), overbroad in ***Bolles v. People***, 541 P.2d 80 (Colo. 1975). ***Norman,*** 703 P.2d at 1266.

The subsection at issue in ***Norman***, as does the one at issue here, prohibited conduct rather than communication. ***Id.*** at 1267. But the Court said:

> In terms of due process analysis, however, this distinction is one which makes no difference. … An actor, a clown, a writer or a speaker all might be subject to criminal prosecution because their acts are perceived by some official to annoy or alarm others. Protection from such unfettered prosecutory discretion is the essence of the due process requirement that offenses be legislatively defined with particular standards which ordinary citizens who must conform their conduct thereto can understand.

Id. The Court concluded that the subsection violated due process. ***Id***. *See also,* ***State v. Williams,*** 144 Wash. 2d 197 (2001) (Statute criminalizing threats to mental health was unconstitutionally vague, in violation of due process, in failing to provide meaningful definition of "mental health."); ***Langford v. City of Omaha***, 755 F.Supp. 1460 (D. Neb. 1989) (Subsection of disorderly conduct ordinance prohibiting a person from purposefully or knowingly causing inconvenience, annoyance, or alarm to others by making unreasonable noise was void for

vagueness; term "unreasonable" was too vague to give adequate notice of what conduct was prohibited, and to ensure against arbitrary enforcement of the ordinance.)

And most recently, in ***Scott v. State***, 298 S.W.3d 264 (Tex. App. 2009), the Court of Appeals of Texas held two subsections of their harassment statute to be unconstitutionally vague on their face. At issue was the phrase "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." 298 S.W.3d at 267. The Court held the statute violated due process requirements, because the statute did not indicate the requisite frequency of repeated communications. ***Id***.

Vague as applied

Only where the statute's language reaches protected speech can a facial challenge be brought; otherwise the person must show that the statute is unconstitutionally vague as applied to him. ***Scott***, 298 S.W.3d at 268. A person who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. ***Id***. But this Court has held that where a statute is void for vagueness and a violation of due process by failing to provide a person of ordinary intelligence of the proscribed conduct, it is not necessary to reach the First Amendment question. ***State v. Young***, 695 S.W.2d 882, 886 (Mo. banc 1995).

In ***Young***, this Court held Section 578.050, RSMo 1978, which prohibited being present at a cockfight, void for vagueness. The Court found that the statute, among other problems, exposed a person to criminal liability without having known that a cockfight had transpired or that the facility was a place used for such activities. 695 S.W.2d at 885. The statute was not sufficiently clear to give reasonable notice of the prohibited conduct and to apprise enforcers of the proper standards for enforcement. ***Id***. at 886. "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." ***Id***., *citing* ***United States v. Reese***, 92 U.S. 214, 221 (1876).

Here, as well, the statute is insufficiently clear to give potential offenders notice of what is proscribed. The charge at issue is actually burglary, with harassment as its object crime (L.F. 27). The prosecutor told the trial court that he was proceeding under subparagraph (6) of the harassment statute, because "there is no possible way for it to fit under any of the conduct" of the other subsections (Tr. 22). According to the prosecutor's recitation of the facts underlying the charge, it was Mr. Vaughn's "just mere existence in that place of going in there and remaining was an act meant to frighten or intimidate or cause emotional distress." (Tr. 23-24).

So Mr. Vaughn was charged with burglary by entering unlawfully with the intent to commit harassment – defined by the prosecutor as *remaining unlawfully*.

This is certainly arbitrary enforcement and lack of true notice. It would be impossible for anyone under those circumstances to be on notice that a trespass could be charged as a burglary if the entry was with the intent to simply be present in the building, because their being there would be frightening to someone.

And to whom? A person "of average sensibilities considering the age of such person." Section 565.090.1(6). No court has defined such a phrase, and the legislature did not attempt to. The lack of an adequate standard for determining who may be included in the class of "victims" is yet another reason why this section is void for vagueness, both facially and as applied. For all of these reasons, the Circuit Court's ruling finding it both vague and overbroad should be affirmed.

II.a.

Count II overbreadth

Section 565.090.1(5) is substantially overbroad on its face in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Missouri Constitution.

Under Section 565.090.1(5), a person commits the crime of harassment if he or she knowingly makes repeated unwanted communication to another person.

RSMo 2000. While the Missouri harassment statute was found not to be overbroad in ***State v. Koetting***, 616 S.W.2d 822 (1981), this subsection (5) was not at issue.

The trial court correctly found (L.F. 29) that this subsection is constitutionally overbroad on its face, in violation of the First and Fourteenth Amendments to the United States Constitution, and Article I, Section 8 of the Missouri Constitution. A statute may be overbroad in its reach if it prohibits constitutionally protected conduct. ***Grayned v. City of Rockford***, 408 U.S. 104 (1972).

Standing

As more fully discussed in Point I.a., respondent has standing, both under the First Amendment and because of the state's concession (L.F. 20, Tr. 17).

Protected speech

As more fully discussed in Point I.a., an overbroad statute implicates the First Amendment where it implicates constitutionally protected speech. ***Reno v. ACLU,*** 521 U.S. 844, 871-872 (1997). Respondent incorporates those discussions into this part of his argument.

Conduct versus speech

Where conduct and not merely speech is involved, a statute must be "substantially" overbroad in order to be declared unconstitutional. ***United States v. Williams,*** 553 U.S. 285, 292 (2008). A statute is therefore facially invalid if it prohibits a substantial amount of protected speech. ***Id***. Unlike the acts criminalized in subparagraph (6), subparagraph (5) actually criminalizes communication.

In ***Provo City v. Whatcott***, 1 P.3d 1113 (Utah App. 2000), the defendant admitted to placing a telephone call to a woman who described the call as "obscene, lewd and lascivious." The Utah Court of Appeals held that the telephone harassment statute was unconstitutionally overbroad. 1 P.3d at 1114. Their statute read:

> (1) A person is guilty of telephone harassment and subject to prosecution in the jurisdiction where the telephone call originated or was received if with intent to annoy, alarm another, intimidate, offend, abuse, threaten, harass, or frighten any person at the called number or recklessly creating a risk thereof, the person:
>
> (a) makes a telephone call, whether or not a conversation ensues;
>
> (b) makes repeated telephone calls, whether or not a conversation ensues, or after having been told not to call back, causes the telephone of another to ring repeatedly or continuously;

(c) makes a telephone call and insults, taunts, or challenges the recipient of the telephone call or any person at the called number in a manner likely to provoke a violent or disorderly response;

(d) makes a telephone call and uses any lewd or profane language or suggests any lewd or lascivious act; or

(e) makes a telephone call and threatens to inflict injury, physical harm, or damage to any person or the property of any person.

(2) Telephone harassment is a class B misdemeanor.

Utah Code Ann. § 76–9–201 (1999). The ***Whatcott*** court recognized that the legislature had a legitimate interest in protecting the public from certain threatening and menacing calls and calls that would provoke a breach of the peace. 1 P.3d at 1115. But the court pointed out that the statute further prohibited a "potentially huge universe of otherwise legitimate telephone calls." ***Id***. The court gave as examples unwanted telephone solicitations to a private home during the dinner hour, a mother checking on her young adult son, a joking call which is profane, or a consumer calling a merchant to complain about a product. ***Id***. at 1115-1116.

In ***State v. Williams***, 26 P.3d 890 (Wash. banc 2001), the Washington Supreme Court found its misdemeanor criminal harassment statute overbroad in violation of free speech rights in criminalizing threats to mental health. Just as our "unwanted communication" is overbroad, the Washington court held that threats

could not be properly characterized as "true threats" to physical safety that would not be protected by the First Amendment. 26 P.3d at 896.

Appellant argues that Section 565.090.1(5) is saved from overbreadth in part because it requires that the communication be made "to another person." (App. br. 38). Appellant asks this Court to "construe" this language to mean that the communication be directed to a *particular* person. (App. br. 38). But that is not the plain language of the statute. As in Point I.a., and as pointed out in ***Whatcott****, supra*, there is a substantial amount of protected speech implicated by this section. It is unconstitutionally overbroad, as the trial court correctly found.

II.b.

Count II vagueness

Section 565.090.1(5) is unconstitutionally vague in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 10 of the Missouri Constitution.

Under Section 565.090.1(5), a person commits the crime of harassment if he or she knowingly makes repeated unwanted communication to another person. While the Missouri harassment statute was found not to be vague in ***State v. Koetting***, 616 S.W.2d 822 (1981), this subsection (5) was not at issue.

The trial court found (L.F. 29, 32), and respondent asserts, that this subsection is unconstitutionally vague, in violation of respondent's right to due

process of law under the Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Missouri Constitution. While vagueness is a due process violation, it implicates First Amendment considerations as well. ***Grayned v. City of Rockford***, 408 U.S. 104, 108 (1972). This section fails to give fair notice of the prohibited conduct.

Void for vagueness

A statute which fails to clearly define proscribed conduct violates the Due Process Clause and is void for vagueness. ***Grayned***, 408 U.S. at 108; ***State v. Allen***, 905 S.W.2d 874, 876 (Mo. banc 1995). A statute is unconstitutionally vague if it fails to give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." ***Allen,*** 905 S.W.2d at 877 (*quoting* ***United States v. Harriss***, 347 U.S. 612, 617 (1954)). Secondly, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. ***Grayned***, 408 U.S. at 108. Third, where a vague statute abuts upon the sensitive area of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. ***Id***.

The trial court found the words "repeated," "unwanted," and "communication" all to be vague, asking "First, what is a communication? What is meant by repeated? Could it be communications made fifty years apart? What is unwanted? Does it mean just undesired? or merely unsolicited?" (L.F. 33).

Other courts have asked these similar questions as well, and found them troubling enough to void a statute.

In ***Scott v. State***, 298 S.W.3d 264 (Tex. App. 2009), the defendant was charged with committing harassment by making repeated telephone calls to the complainant "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, and offend the complainant." 298 S.W.3d at 266. He challenged the subsections at issue as vague and overbroad. ***Id***. Similarly to this case, the defendant in ***Scott*** repeatedly called the complainant late at night and left abusive voice mail messages. ***Id***. at 267.

The court noted that if First Amendment freedoms were not implicated, then Scott had to show that the subsections were unconstitutional as applied to his conduct. ***Id***. at 268. If they were implicated, then he could bring a facial challenge. ***Id***. The court held that the subsections at issue did implicate First Amendment freedoms. As did the trial court here, the ***Scott*** court focused on examples such as political calls made repeatedly during election season where the caller is intending to alarm the recipient concerning a particular candidate. ***Id***. The court distinguished those cases that have held that making harassing telephone calls is not a constitutionally protected right under the First Amendment (even holding that harassment is not "communication"). ***Id***. at 269; citations omitted. But the court noted:

> What these courts have, in essence, held is that the harassment statute cannot implicate the First Amendment because it prohibits what it considers

> to be harassment. … [T]he problem with this argument is that it is the challenged statute itself that defines harassment. Unless the harassment statute is sufficiently clear to withstand constitutional scrutiny, no unlawful harassment exists that would be excluded from First Amendment protection.

Id. at 269-270.

In discussing the vagueness of the terms "annoy," "alarm," and "embarrass," not at issue here, the ***Scott*** court addressed the state's argument that the mens rea saved the section from vagueness. ***Id***. at 271.[3] The court disagreed, because there was no clear nexus between the mens rea and the action – without a clear order to stop, "one would [not] know he is breaking the law." ***Id***.

Further, the ***Scott*** court held the word "repeated" to be unconstitutionally vague.

> We agree that the term "repeated" is unconstitutionally vague because the statute does not indicate the requisite frequency of the repeated communications. (cite omitted). Does "repeated" mean that if a person sends three annoying emails over a five-year period, the person is guilty of the offense of harassment? ... Can we tell from the statute? … One could

[3] Appellant raises a similar argument in Point I, although if it makes it here, it does so only by incorporation (App. br. 43).

make three phone calls over ten years and technically fall under [the statute].

Id. at 273.

Section 565.090.1(5) is void for vagueness as well. The Circuit Court's ruling finding it both vague and overbroad should be affirmed.

CONCLUSION

For the reasons presented, respondent respectfully requests that the ruling of the Circuit Court dismissing the charges against him be affirmed.

Respectfully submitted,

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Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 5,997 words, which does not exceed the 27,900 words allowed for an respondent's brief.

I hereby certify that on this 17th day of November, 2011, an electronic copy of the foregoing was sent through the Missouri e-Filing System to John Grantham, Assistant Attorney General, at john.grantham@ago.mo.gov.

Ellen H. Flottman