IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

STATE OF MISSOURI, Respondent, vs. JOSHUA S. COLLINS, Appellant.	)	No. SD36601

APPEAL TO THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
THIRTY-FIRST JUDICIAL CIRCUIT, DIVISION IV
THE HONORABLE THOMAS E. MOUNTJOY, JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Joshua Collins, appeals his convictions following a jury trial in Greene County, Missouri, of tampering with a judicial officer and harassment in the second degree L.F. 16:1-2. The Honorable Thomas E. Mountjoy sentenced Mr. Collins to two years' imprisonment and a concurrent term of one year in the county jail respectively. L.F. 15:1.

Point I of this brief challenges the constitutionality of Section 565.091, RSMo, the crime of harassment in the second degree. Points II, III, and IV also raise challenges to his conviction for the same offense. If this Court resolves this case based on Points II, III, or IV, jurisdiction lies in the Missouri Court of Appeals, Southern District. Mo. Const. Art. V, Section 3; Section 477.060, RSMo. However, if this Court rejects these points, Mr. Collins requests that this case be transferred to the Supreme Court of Missouri because this Court does not have the authority to declare a statute unconstitutional; only the Supreme Court does. *Kirk v. State*, 520 S.W.3d 443, 448 (Mo. banc 2017); Mo. Const. Art. V, Section 3.

STATEMENT OF FACTS

Mr. Collins filed a motion challenging the constitutionality of Missouri's new harassment statutes, Sections 565.090 and 565.091, RSMo, after he was charged with harassment in the first degree and tampering with a judicial officer. L.F. 3:1-6. Count I alleged Mr. Collins committed the offense of tampering with a judicial officer, Section 575.095, RSMo, in that he, "with the purpose to harass, engaged in conduct reasonably calculated to harass a judicial officer by sending Facebook messages and a voicemail accusing A.G.'s children of engaging in crimes and A.G. was a probation and parole officer." L.F. 2:1. Count II alleged Mr. Collins committed the offense of harassment, in the first degree, Section 565.090, RSMo, in that Mr. Collins, "without good cause, sent Facebook messages and a voicemail accusing A.G.'s children of engaging in crimes, with the purpose to cause emotional distress to A.G., and in so doing, caused A.G. to suffer emotional distress." L.F. 2:1. After a hearing, the trial court denied Mr. Collins's request. L.F. 1:14. The following facts were adduced at trial:

Since January of 2018, A.G. worked as a probation and parole officer for the State of Missouri. Tr. 348. A.G. explained that she was responsible for supervising individuals on probation, and she would notify the court if these individuals were not compliant with the conditions of their probation. Tr. 348.

In January of 2019, she was supervising Joshua Collins on probation. Tr. 350. A.G. testified that as part of his probation, she was required to check on his romantic status and dating life because of the nature of his conviction, domestic assault in the fourth degree. Tr. 350, 373. She said she asked Mr. Collins's friends whether he was "romantically engaged" with other people. Tr. 373. Another condition that was placed on Mr. Collins was that he had to

use an alcohol monitor, which would notify A.G. and the "Command Center" if he consumed alcohol. Tr. 372.

On May 12, 2019, A.G. learned Mr. Collins's alcohol monitor indicated the presence of alcohol, and, as a result, she wanted to speak with him regarding the suspected violation. Tr. 351-52. She testified that when she spoke with him, "he was very upset" and told her "the same types of things that he had sent me on Facebook and that he left on my voice work -- or my voicemail at work, about my adult children." Tr. 352. A.G. told Mr. Collins to stay at home until the monitor read all zeros or she spoke with him again. Tr. 352.

Because Mr. Collins told A.G. that he looked at her Facebook, she checked her Facebook. Tr. 353. A.G. saw that Mr. Collins had sent her a friend request and numerous direct messages. Tr. 353. The State introduced pictures of the messages Mr. Collins sent A.G., which read:

> Hey
>
> I hired a P.I.
>
> Omg you should see what I found
>
> Decided too [*sic*] check you out like you check me out
>
> You should call me cause your sons this selling meth
>
> I got pics
>
> She's doing blow jobs too
>
> Lol
>
> I have much to give [Judge] Jones

Tr. 355; Ex. 1, 2.

A.G. testified that after she read the messages, she felt "nervous, anxious, worried, concerned." Tr. 367. She said that she had never seen this type of conduct in the other people she had supervised. Tr. 368. As a result of

Mr. Collins mentioning her children, A.G. said she notified her children, who are nineteen, twenty-one, and twenty-four, of the situation. Tr. 360. 365. She then notified her supervisor who advised her to contact the police, which she did. Tr. 361.

The next day she went into work and she had received a voicemail from Mr. Collins, which was played for the jury. Tr. 362-64; Ex. 3. The voicemail stated that Mr. Collins wanted to talk with A.G. about her son selling methamphetamine and her other son being a "date raper." Ex. 3. Mr. Collins told her that if she was going to follow him, he was going to follow her. Ex. 3. A.G. said that none of the information contained in the Facebook messages or voicemail was accurate. Tr. 374.

Mr. Collins was found guilty of Count I as charged, but on Count II, he was found guilty of the lesser included offense of harassment in the second degree, Section 565.090, RSMo, which only differed in the fact that it did not require A.G. to actually suffer "emotional distress." L.F. 13:3-4. The jury sentenced Mr. Collins to two years in prison for Count I and one year in the county jail for Count II. Tr. 467; L.F. 10:9-10.

Following the jury's findings, Mr. Collins filed a motion to dismiss, which referenced his pretrial arguments, that Mr. Collins's convictions for Counts I and II are in violation of his right to be free from double jeopardy, in that, harassment in the second degree, Section 565.091, RSMo, is a lesser included offense of tampering with a judicial officer, Section 575.095, RSMo. L.F. 11:3-4, 12:1-13; Tr. 2-10, 475-79. The court renewed its pre-trial ruling and denied Mr. Collins's request to dismiss Count II. Tr. 479. The court executed the jury's recommended sentence and ran the sentences concurrently to each other. Tr. 531-32.

This appeal follows.

POINTS RELIED ON

I.

The trial court erred in overruling Mr. Collin's motion to dismiss Count II because Section 565.091, RSMo, the crime of harassment in the second, is unconstitutionally overbroad, in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 10 of the Missouri Constitution, in that Section 565.091, RSMo, infringes on many constitutionally protected acts and the statute cannot be narrowly construed to apply to a core of unprotected expression.

Broadrick v. Oklahoma, 413 U.S. 601 (1973);

Virginia v. Black, 538 U.S. 343 (2003);

State v. Vaughn, 366 S.W.3d 513 (Mo. banc 2012);

State v. Moore, 90 S.W.3d 64, 66 (Mo. banc 2002);

U.S. Const. amends I and XIV;

Mo. Const. art. I, §§ 8 and 10;

Section 565.091, RSMo, and

Rule 29.11.

II.

Pursuant to Point I, if this Court construes Section 565.091, RSMo, to only apply to conduct and not communication, the trial court erred in overruling Mr. Collins's motion for judgment of acquittal and entering judgment and sentence against him for the crime of harassment in the second degree, in violation of his right to due process of law secured by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because Mr. Collins's Facebook messages and voicemail constitute communication and not conduct.

Jackson v. Virginia, 443 U.S. 307 (1979);

State v. Bateman, 318 S.W.3d 681 (Mo. banc 2010);

State v. Vaughn, 366 S.W.3d 513 (Mo. banc 2012);

U.S. Const. amend XIV;

Mo. Const. art. I, § 10; and

Section 565.091, RSMo.

III.

Pursuant to Point I, if this Court construes Section 565.091, RSMo, to only apply to fighting words, the trial court erred in overruling Mr. Collins's motion for judgment of acquittal and entering judgment and sentence against him for harassment in the second degree, in violation of his right to due process of law secured by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because there was insufficient evidence that Mr. Collins's communications were fighting words.

Jackson v. Virginia, 443 U.S. 307 (1979);

State v. Bateman, 318 S.W.3d 681 (Mo. banc 2010);

State v. Vaughn, 366 S.W.3d 513 (Mo. banc 2012);

U.S. Const. amend XIV;

Mo. Const. art. I, § 10; and

Section 565.091, RSMo.

IV.

The trial court erred in punishing Mr. Collins for tampering with a judicial officer and harassment in the second degree because in doing so the trial court violated Mr. Collins's right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, ad Article I, Section 10 of the Missouri Constitution, and Section 556.041, RSMo, in that harassment in the second degree, Section 565.091, RSMo, is a lesser included offense of tampering with a judicial officer, Section 575.095, RSMo, because it impossible to commit the crime of tampering with a judicial officer without committing the offense of harassment in the second degree.

State v. Derenzy, 89 S.W.3d 472 (Mo. banc 2002);

State v. McTush, 827 S.W.2d 184 (Mo. banc 1992);

State v. Thompson, 147 S.W.3d 150 (Mo. App. S.D. 2004);

U.S. Const. amend V and XIV;

Mo. Const. art. I, §10;

Sections 556.041, 565.091, and 575.095, RSMo; and

Rule 29.11.

ARGUMENT

I.

The trial court erred in overruling Mr. Collin's motion to dismiss Count II because Section 565.091, RSMo, the crime of harassment in the second, is unconstitutionally overbroad, in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 10 of the Missouri Constitution, in that Section 565.091, RSMo, infringes on many constitutionally protected acts and the statute cannot be narrowly construed to apply to a core of unprotected expression.

A. Overview and Preservation

The First Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law ... abridging the freedom of speech." *Virginia v. Black*, 538 U.S. 343, 358 (2003). "The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting." *Id.* However, the protection afforded by the First Amendment are not absolute but courts have limited the State's ability to punish words or language not within a narrowly limited classes of speech. *Id. Hess v. Indiana,* 414 U.S. 105, 107 (1973) (internal quotation marks omitted) (alteration omitted). *See, e.g., Roth v. United States,* 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois,* 343 U.S. 250 (1952) (defamation); *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942) (fighting words); *see generally Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105 (1991) (Kennedy, J., concurring) (listing speech that is tantamount to an otherwise criminal act, an impairment of another

constitutional right, an incitement to lawless action, or "likely to bring about an imminent harm the State has the substantive power to prevent").

Prior to trial, Mr. Collins filed a motion challenging the constitutionality of Sections 565.090 and 565.091, RSMo, which are the crimes of harassment in the first and second degree. L.F. 3:1-6. A hearing was held on the motion and the trial court overruled Mr. Collins's request to declare the statutes unconstitutional. L.F. 1:13-14. Mr. Collins included this claim in his motion for new trial. L.F. 11:2. This claim is preserved for this Court's review. Rule 29.11(d).

Generally, "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). However, an exception applies for the First Amendment, under which 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.* at 612. "Criminal statutes require particularly careful scrutiny, and '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. Moore*, 90 S.W.3d 64, 66 (Mo. banc 2002) (quoting *City of Houston v. Hill*, 482 U.S. 451, 459 (1987)).

When a statute criminalizes conduct, and not merely speech, "a statute must be substantially overbroad, not only in an absolute sense but also relative to the statute's plainly legitimate sweep." *State v. Vaughn*, 366 S.W.3d 513, 518 (Mo. banc 2012) (citing *United States v. Williams*, 553 U.S.

285, 292 (2008)). However, "[i]nvalidation for overbreadth is 'strong medicine that is not to be casually employed.'" *Williams*, 553 U.S. at 293 (quoting *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) (internal quotation marks omitted)).

B. Missouri's Old Harassment Statute

In *State v. Vaughn*, the Supreme Court of Missouri considered an overbreadth challenge to two subsections of Missouri's previous harassment statute, Section 565.090.1, RSMo, Supp. 2008. 366 S.W.3d at 516. The previous harassment statute provided:

> A person commits the crime of harassment if he or she:
>
> (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.*

(emphasis added). The defendant was charged pursuant to subsections (5) and (6) after he entered the house of his ex-wife to scare her when she came home (subsection 6), and then two weeks later he repeatedly telephoned his ex-wife after she told him to stop (subsection 5). *Id.* at 516-17.

The Supreme Court of Missouri noted that the first step in an overbreadth analysis was to construe the statute. *Id.* at 518. "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 at 67. The Court held that it could not construe subsection (5), knowingly making "repeated unwanted communication to another person," without it infringing on a substantial amount of constitutionally protected speech. *Id.* Even when the Court considered the limiting language in the statute, the defendant knew his communication with the victim was both repeated and unwanted, and the communication must be directed at a specific individual, this was not enough to save the statute, because it still had a chilling effect on protected speech. *Id.* at 519-20. For example:

> individuals picketing a private or public entity would have to cease once they were informed their protestations were unwanted. A teacher would be unable to call a second time on a student once the pupil asked to be left alone. Salvation Army bell-ringers collecting money for charity could be prosecuted for harassment if they ask a passerby for a donation after being told, "I've already given; please don't ask again." An advertising campaign urging an elected official to change his or her position on a controversial issue would be criminalized.

Id. As a result, the Court found subsection (5) unconstitutional but it severed this subsection from the others and preserved the unchallenged subsections. *Id.* 520-21.

The Court next turned to subsection (6), which unlike the other five subsections it did not explicitly refer to communications. Subsection (6) applied to "[a]ny other act," and, therefore, the Court construed this subsection to apply "only to conduct" and not communication. *Id.* at 521. However, this narrowing construction did not resolve the overbreadth challenge because conduct may still be expressive or symbolic and is therefore still provided some First Amendment protection. *Id.* ("The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.") (quoting *Black*, 538 U.S. at 358.)

The Court held two additional narrowing constructions in subsection (6) saved it. *Id.* The second narrowing construction the Court noted was that the legislature limited the statute to those acts that were "without good cause," which meant that resulting fright, intimidation, or emotional distress must be *substantial* and the actor must intend for such a result. *Id.*

The third limiting construction is an extension of the second. The Court explained that "[a]cts that cause immediate *substantial* fright, intimidation, or emotional distress are [those] that inherently lend to inflict injury or provoke violence." *Id.* (emphasis in original). The Court opined that such acts are akin to "fighting words" which are unprotected by the First Amendment. *Id.* (citing *Chaplinsky*, 315 U.S. at 570 (upholding a statute barring speech "inherently likely to provoke a violent reaction")).

The combination of three narrowing constructions saved subsection (6): (1) limiting the statute only to conduct, not communication; (2) limiting it only to conduct that both intends and results in *substantial* fright,

intimidation, or emotional distress; and (3) limiting it to conduct that is akin to fighting words, which inherently tend to inflict injury to provoke violence. *Id.* By construing subsection (6) to only conduct that intends and results in a reaction that is likely to provoke violence or injury like fighting words, the Court held the old harassment was not overly broad.

C. Missouri's New Harassment Statute

Here, this Court must consider whether the Missouri's new harassment statute is unconstitutionally overbroad. "Whether a statute is constitutional is reviewed *de novo*." *Vaughn*, 366 S.W.3d at 517 (citing *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008)). Statutes are presumed to be constitutional. *Suffian v. Usher*, 19 S.W.3d 130, 134 (Mo. banc 2000) (citations omitted). "[I]f it is at all feasible to do so, statutes must be interpreted to be consistent with the constitutions." *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992). "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).

As in *Vaughn*, this Court must start by construing statute, which bears resemblance to subsection (6) of the old harassment statute, but it is critically different. *Id.* Section 565.091.1 RSMo, provides that "[a] person commits the offense of harassment in the second degree if he or she, without good cause, engages in any act with the purpose to cause emotional distress to another person." Emotional distress is defined as "something markedly greater than the level of uneasiness, nervousness, unhappiness, or the like which are commonly experienced in day-to-day living[.]" Section 565.002(7), RSMo. Good cause "means a cause that would motivate a reasonable person

under the circumstances under which the act occurred." MAI-CR 433.00; *see also Vaughn*, 366 S.W.3d at 522.

This Court should start with the three narrowing constructions used in *Vaughn* to determine whether this "statute may fairly be construed in a manner which limits its application to a 'core' of unprotected expression." Id. at 518. The first narrowing construction of *Vaughn* weighs against the statute's constitutionality. In *Vaughn*, the Court construed subsection (6)'s "any other act" language to mean conduct, not communication. *Id.* This decision was based on the statutory language in the remaining subsections, which addressed different types of communication and not conduct. *Id.* The current version of the harassment statute does not contain the "any *other* act" language and there are no other subsections that would allow this Court to construe this statute to only apply to conduct and not communication.[1] Therefore, this narrowing construction cannot save this statute.

The second narrowing construction arguably helps save the statute. The *Vaughn* Court construed "fright, intimidation, or emotional distress" to mean "*substantial* fright, intimidation, or emotional distress" because of the statute's "without good cause" language. *Id.* at 521 (emphasis in original). "Without good cause" also is present in the new harassment statute, but unlike its predecessor, Section 565.091, RSMo, does not require the victim to actually suffer emotional distress. Therefore, this fact does not weigh as

[1] As argued in Point II of this brief, if this Court is to construe this statute to apply to conduct, not communication, as it did in *Vaughn*, there is insufficient evidence for Mr. Collins's conviction for Count II because he sent Facebook messages and left a voicemail for A.G., which are communications and are not subject to narrowing construction of Section 565.091, RSMo.

heavily in favor the statute's constitutionality as it did in *Vaughn*, which did require the victim to suffer "fright, intimidation, or emotional distress."[2]

The third and final narrowing construction is even less clear than the second. The *Vaughn* Court construed the statute to apply to acts that inherently tend to inflict injury or provoke violence, which the court opined was akin to fighting words that are unprotected by the First Amendment. *Id.* The Court reasoned that if the actor intends to cause "*substantial* fright, intimidation or emotional distress" and such a reaction results, this is likely to cause some type of violence. *Id.* The new harassment statute, however, only applies to "emotional distress" and does not include "fright" or "intimidation." Typically, if a person is substantially frightened or intimidated, this is likely to provoke a violent reaction out of fear or the perceived need to protect oneself. However, if one is experiencing emotional distress that is something greater than one experiences in day-to-day living that is likely not to provoke the same type of violent reaction as one would experience if they were substantially frighten or intimidated.

Additionally, unlike the old harassment statute, Section 565.091, RSMo, does not even require the victim to suffer fright, intimidation, or emotional distress or that such "response to the act is one of a person of average sensibilities considering the age of such person." Therefore, the act does not even necessarily have to be perceived by the victim and is therefore unlikely to provoke violence or injury. For these two reasons, this narrowing construction that limited the acts to something akin to fighting words does

[2] Section 565.090, RSMo, the crime of harassment in the first degree, does require the victim to suffer emotional distress, but it is not the subject of this challenge.

not help save Section 565.091, RSMo, because such a construction would be inconsistent with the statute's intent.[3]

Section 565.091, RSMo, cannot be construed in a way to limit its application to "core" unprotected expression like subsection (6) of Missouri's old harassment statute. Unlike subsection (6), which was limited acts that are akin to fighting words, here this statute cannot be so narrowly construed for the reasons discussed, *supra*. Instead, this statute applies to all communication and conduct that is intended to cause emotional distress. Such overly broad language touches on many constitutionally protect acts. For example, a protestor who stands outside of an abortion clinic and shouts at patients entering the clinic is certainly trying to cause emotional distress *and* political change, but these acts are protected except for narrowly tailored limitations. *See generally*, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994); *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357 (1997); *Hill v. Colorado*, 530 U.S. 703, (2000). Similarly, this statute applies to other constitutionally protected acts such as neo-Nazi marches in Jewish neighborhoods,[4] cross burning,[5] flag burning,[6] and protests by the Westboro Baptist Church at soldier's funerals.[7] Many people would find these acts operant and likely to cause substantial emotional distress in its victims but such acts are protected by the First Amendment if they intend emotional distress.

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[3] As argued in Point III of this brief, if this Court construes Section 565.091, RSMo, to apply only to fighting words, there is insufficient evidence that Mr. Collins communications constitute fighting words.

[4] *See*, *e.g.*, *Collin v. Smith*, 578 F.2d 1197, 1205-07 (7th Cir. 1978).

[5] *See*, *e.g.*, *Virginia v. Black*, 538 US. 343 (2002).

[6] *See*, *e.g.*, *United States v. Eichman*, 496 U.S. 310 (1990).

[7] *See*, *e.g.*, *Phelps-Roper v. Koster*, 713 F.3d 942 (8th Cir. 2013).

The State may argue that pursuant to the "good cause" language from Section 565.091, all these acts would not be infringed upon because the fact that they are constitutionally protected means they constitute good cause. *See Vaughn*, 366 S.W.3d at 521 ("because the exercise of constitutionally protected acts clearly constitutes 'good cause' the restriction of the statute to unprotected fighting words comports with the legislature's intent.") However, good cause is controlled by a reasonable person standard and many reasonable people hold views that are incompatible with the First Amendment. Therefore, this does not assist the State. Moreover, defendants should not shave to wait for a trial court or a reviewing court to strike down a conviction that violates the First Amendment. The threat of prosecution let alone a conviction will have a chilling effect on free speech. Finally, if the "good cause" language by itself saves the statute, then the *Vaugh* Court would have had no need to look toward other narrowing constructions to save the old harassment statute. For these reasons, this argument would be unavailing.

Taking Section 565.091, RSMo, as a whole, this statute infringes on a great deal of protected acts and it cannot be construed to apply only to core unprotected speech like subsection (6) in *Vaughn*. Therefore, this Court should strike Section 565.091, RSMo, down because it is unconstitutionally overbroad.

II.

Pursuant to Point I, if this Court construes Section 565.091, RSMo, to only apply to conduct and not communication, the trial court erred in overruling Mr. Collins's motion for judgment of acquittal and entering judgment and sentence against him for the crime of harassment in the second degree, in violation of his right to due process of law secured by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because Mr. Collins's Facebook messages and voicemail constitute communication and not conduct.

The Due Process Clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const., Amend. 14; Mo. Const. Art. I, § 10. This impresses "upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused" and thereby symbolizes the significance that our society attaches to liberty. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). There must be more than a "mere modicum" of evidence, because "it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Jackson*, 443 U.S. at 320.

In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and its inferences in a light most favorable to the verdict. *State v. Botts*, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004). The State may rely upon direct and circumstantial evidence to meet its burden of proof. *State v. Howell*, 143 S.W.3d 747, 752 (Mo. App. W.D. 2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to

disregard them. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). But this Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative, or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. *Botts*, 151 S.W.3d at 375. "[T]he relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Bateman*, 318 S.W.3d 681, 687 (Mo. banc 2010).

Section 565.091.1 provides that "[a] person commits the offense of harassment in the second degree if he or she, without good cause, engages in any act with the purpose to cause emotional distress to another person." As explained in Point I, if this Court construes this statute to apply only to conduct and not communication, there is insufficient evidence the Mr. Collins Facebook messages and voicemail are conduct.

In *Vaughn*, the Court considered voicemails communication and breaking into the ex-wife of the defendant's house as conduct. 366 S.W.3d at 516-21. Here, Mr. Collins sent A.G. Facebook messages and left A.G. a voicemail. Ex. 1, 2, 3. Facebook messages and a voicemail are communications, not conduct. Therefore, if this Court construes Section 565.091.1, RSMo, to only apply to conduct and not communication, there is insufficient evidence for this conviction.

III.

Pursuant to Point I, if this Court construes Section 565.091, RSMo, to only apply to fighting words, the trial court erred in overruling Mr. Collins's motion for judgment of acquittal and entering judgment and sentence against him for harassment in the second degree in violation of his right to due process of law secured by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, because there was insufficient evidence that Mr. Collins's communications were fighting words.

The Due Process Clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const., Amend. 14; Mo. Const. Art. I, § 10. This impresses "upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused" and thereby symbolizes the significance that our society attaches to liberty. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). There must be more than a "mere modicum" of evidence, because "it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Jackson*, 443 U.S. at 320.

In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and its inferences in a light most favorable to the verdict. *State v. Botts*, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004). The State may rely upon direct and circumstantial evidence to meet its burden of proof. *State v. Howell*, 143 S.W.3d 747, 752 (Mo. App. W.D. 2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). But this

Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative, or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. *Botts*, 151 S.W.3d at 375. "[T]he relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Bateman*, 318 S.W.3d 681, 687 (Mo. banc 2010).

Section 565.091.1, RSMo, provides that "[a] person commits the offense of harassment in the second degree if he or she, without good cause, engages in any act with the purpose to cause emotional distress to another person." As explained in Point I, if this Court construes this statute to apply only to fighting words in order to uphold the constitutionality of Section 565.091.1, there is insufficient evidence Mr. Collins's communications were fighting words.

Mr. Collins communication consisted of Facebook messages and a voicemail left for A.G. The Facebook messages were introduced into evidence:

> Hey
>
> I hired a P.I.
>
> Omg you should see what I found
>
> Decided too [*sic*] check you out like you check me out
>
> You should call me cause your sons this selling meth
>
> I got pics
>
> She's doing blow jobs too
>
> Lol
>
> I have much to give [Judge] Jones

Tr. 355; Ex. 1, 2. The voicemail stated that Mr. Collins wanted to talk with A.G. about her son selling methamphetamine and her other son being a "date raper." Ex. 3. Mr. Collins told her that if she was going to follow him, he was going to follow her. Ex. 3. A.G. said that none of the information contained in the Facebook messages or voicemail was accurate. Tr. 374.

These communications cannot reasonably construe as fighting words. Fighting words are defined as those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *State v. Wooden*, 388 S.W.3d 522, 526 (Mo. banc 2013) (quoting *Chaplinsky*, 315 U.S. at 571). In *Wooden*, the defendant sent an email with an audio attachment to an alderwoman, which made references to dusting a sawed-off shotgun, that he was going to make "a mess of everything with his sawed-off," referred to himself as a domestic terrorist, and referred to other assassinations of prominent political figures. *Id.* at 524. The Court held that these constitute fighting words and upheld his conviction for harassment under Missouri's old harassment statute. *Id.* at 526.

Here, Mr. Collins's words in context cannot be construed as "fighting words." Given the context, Mr. Collins was clearly frustrated that his probation officer, A.G., was supervising him which included checking on Mr. Collins's personal life. His words, however, cannot be construed as communications that inflict injury or tend to incite an immediate breach of the peace. Therefore, there is insufficient evidence for his conviction.

IV.

The trial court erred in punishing Mr. Collins for tampering with a judicial officer and harassment in the second degree because in doing so the trial court violated Mr. Collins's right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, ad Article I, Section 10 of the Missouri Constitution, and Section 556.041, RSMo, in that harassment in the second degree, Section 565.091, RSMo, is a lesser included offense of tampering with a judicial officer, Section 575.095, RSMo, because it impossible to commit the crime of tampering with a judicial officer without committing the offense of harassment in the second degree.

Following the jury's finding of guilt, Mr. Collins filed a motion to dismiss, which referenced his pretrial arguments, that argued Mr. Collins's convictions for Counts I and II are in violation of right his to be free from double jeopardy pursuant to the Fifth Amendment of the United States Constitution, in that, harassment in the second degree, Section 565.091, RSMo, is a lesser included offense of tampering with a judicial officer, Section 575.095, RSMo. L.F. 12:1-13; Tr. 2-10, 475-79. Mr. Collins also included the claim of error in his motion for new trial. L.F. 11:3-4. The court renewed its pre-trial ruling and denied Mr. Collins's request to dismiss Count II. Tr. 479. This claim is preserved for this Court's review. Rule 29.11(d).

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This provision, pursuant to the Fourteenth Amendment, applies to the states. *State v. McTush*, 827 S.W.2d 184, 186 (Mo. banc 1992) (citing *Benton v. Maryland*, 395 U.S. 784,

794 (1969)). The Double Jeopardy Clause "contains two distinct protections for criminal defendants: (a) protection from successive prosecutions for the same offense after either an acquittal or a conviction and (b) protection from multiple punishments for the same offense." *State v. Flenoy*, 968 S.W.2d 141, 143 (Mo. banc 1998). "Multiple convictions are permissible if the defendant has in law and in fact committed separate crimes." *Id.*

"In resolving a multiple-punishment double jeopardy claim, Missouri courts apply the 'same-element' test, asking 'whether each offense contains an element not contained in the other; if not, the Double Jeopardy Clause bars a successive prosecution.'" *State v. Tremaine*, 315 S.W.3d 769, 777 (Mo. App. W.D. 2010) (quoting *State v. Burns*, 877 S.W.2d 111, 112 (Mo. banc 1994)). Therefore, this Court should look at the elements of the offenses at issue and compare them, and "if both offenses have elements that the other lacks, then the guarantee does not bar the subsequent prosecution." *State v. Kamaka*, 277 S.W.3d 807, 813 (Mo. App. W.D. 2009).

Similarly, Section 556.041, RSMo, prohibits a defendant from being convicted of more than one offense if "[o]ne offense is included in the other, as defined in section 556.046[.]" Section 556.046, RSMo, defines a lesser included offense as an offense that is "established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]" Section 556.041, RSMo. Put simply, "a 'lesser offense is not included in a greater unless it is impossible to commit the greater offense without first committing the lesser.'" *State v. Thompson*, 147 S.W.3d 150, 159 n. 3 (Mo. App. S.D. 2004) (quoting *State v. Kirkland*, 684 S.W.2d 402, 406 (Mo. App. W.D. 1984)); *see also State v. Derenzy*, 89 S.W.3d 472, 474 (Mo. banc 2002).

Here, Mr. Collins was convicted and punished for violating Sections 575.095(4), RSMo, the crime of tampering with a judicial officer, and 565.091.1, RSMo, the crime of harassment in the second degree. L.F. 13:10-11, 15:1-2. The elements of the crime of harassment in the second degree are: (1) the defendant engages in any act with the purpose to cause emotional distress to another person; and (2) that act was without good cause.[8] Emotional distress is defined as "something markedly greater than the level of uneasiness, nervousness, unhappiness, or the like which are commonly experienced in day-to-day living[.]" Section 565.002, RSMo. Good cause "means a cause that would motivate a reasonable person under the circumstances under which the act occurred." MAI-CR 433.00; *see also Vaughn*, 366 S.W.3d at 522.

In comparison, the elements of the crime of tampering with a judicial officer as charged are: (1) the defendant "[e]ngages in conduct reasonably calculated to harass or alarm[;]" (2) a judicial officer or their family; and (3) the purpose was to "harass, intimidate or influence a judicial officer in the performance of such officer's official duties." The Missouri Approved Instructions does not provide an approved instruction for tampering with a judicial officer and Chapter 575, RSMo, does not define the terms of "harass" or "alarm." However, harassment, as explained *supra*, is defined as its own offense under Missouri law. Harassment is also defined similarly in other places in Missouri law. *See* Section 455.010 ("'Harassment', engaging in a purposeful or knowing course of conduct involving more than one incident that alarms or causes distress to an adult or child and serves no legitimate purpose. The course of conduct must be such as would cause a reasonable

[8] Section 565.091.1, RSMo, states: "A person commits the offense of harassment in the second degree if he or she, without good cause, engages in any act with the purpose to cause emotional distress to another person."

adult or child to suffer substantial emotional distress and must actually cause substantial emotional distress to the petitioner or child.") Missouri's definitions are consistent with the common understanding of the meaning of harassment, which this Court should deploy if a word is not defined, *Vaughn*, 366 S.W.3d at 517. *See* HARASSMENT, Black's Law Dictionary (11th ed. 2019) ("Words, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress to that person and serves no legitimate purpose; purposeful vexation.")

The language of Sections 575.095 and 565.091.1(4), RSMo makes it clear that harassment in the second degree is a lesser included offense of tampering with a judicial officer. The only additional element for the crime of tampering with a judicial officer contains that harassment in the second degree does not is that the conduct must be directed towards a judicial officer or their family and is done for the purpose of influencing that judicial officer in their official capacity. The crime of harassment does not contain an element that is not contained tampering with a judicial officer. Therefore, it is impossible to commit the crime of tampering with a judicial officer without committing the crime of harassment in the second degree.

The State may argue as it did at trial that Section 575.095, RSMo, the crime tampering with a judicial officer, requires the state to prove "harass or alarm," while Section 575.091.1(4), RSMo, the crime of harassment in the second degree, requires the State to prove the defendant intended to cause emotional distress and that the conduct was done without good cause. However, this is just another way stating the definition of harassment, which the State has to prove for the crime of tampering with a judicial officer. It is impossible to harass or alarm someone without also causing them emotional

distress. Any definition one adopts whether it be from other Missouri statues, current or former, or just the plain and ordinary meaning of harass, there is always a requirement of emotional distress. Therefore, because it impossible to commit the crime of tampering with a judicial officer without committing the crime of harassment in the second degree, the trial court violated Mr. Collins's right to free from double jeopardy when he was convicted and punished twice for the same offense.

CONCLUSION

For the reasons stated herein, Mr. Collins respectfully requests that this Court reverse his conviction for Count II.

Respectfully submitted,

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Certificate of Compliance

I, Christian E. Lehmberg, 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 in Century, a font not smaller than 13 point Times New Roman. Excluding the cover page, the signature block, this certificate of compliance, and appendix, the brief contains 7,623 words, which does not exceed the 31,000 words allowed for an appellant's brief.

/s/ Christian E. Lehmberg

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Christian E. Lehmberg