IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

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

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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

If this Court reaches the constitutionality of Section 565.091, RSMo, Point I of Mr. Collins's opening brief, Mr. Collins asks that this Court to transfer this case the Supreme Court of Missouri because the constitutional challenge is real and substantial and only the Supreme Court of Missouri has authority to address the constitutionality of a statute. App. Br. 5. Respondent argues this claim is merely colorable because the Supreme Court's opinion *State v. Vaughn*, 366 S.W.3d 513 (Mo. banc 2012) "sufficiently ruled on the constitutionality of the applicable language... such that Defendant's claim is not a matter of first impression." Resp. Br. 15.

The parties agree that if a constitutional challenge to a statute is a matter of first impression or is real and substantial, the case should be transferred to the Supreme Court of Missouri. Resp. Br. 14-15. (quoting *State v. Newlon*, 216 S.W.3d 180, 185 (Mo. App. E.D. 2007)). Although it is more fully discussed in the argument section of Mr. Collins's opening brief and this brief, the Supreme Court of Missouri has yet to address the constitutionality of Missouri's new harassment statute and Missouri's new harassment statute materially differs from the old harassment statute in *Vaughn*. *Compare* Section 565.090.1, RSMo Supp.2008 with Section 565.091, RSMo 2017. As such, this constitutional challenge is a matter of first impressions and is real and substantial. If this Court reaches this constitutional question in Point I, this Court should transfer this case to the Supreme Court of Missouri.

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.

The parties agree that the Supreme Court of Missouri's opinion in *State v. Vaughn*, 366 S.W.3d 513 (Mo. banc 2012), should compel a certain result but the parties dispute what the result should be. As Mr. Collins's opening brief explained, in *Vaughn*, the Supreme Court of Missouri addressed two subsections of Missouri's previous harassment statute, Section 565.090.1, RSMo Supp.2008, and one of those subsections, subsection 6, bares resemblance to the current harassment in the second-degree statute at issue here. App. Br. 15-18. The opening brief explained that the Court applied three narrowing constructions to narrow subsection 6's plain language to save it: (1) the Court limited the subsection to conduct only, which did not include communication; (2) the Court limited it to conduct that both intends and results in substantial fright, intimidation, or emotional distress; and (3) the Court limited it to conduct that is akin to "fighting words," which inherently tend to inflict injury or provoke violence. App. Br. 17-18. Because the Court applied these three-narrowing constructions, subsection 6 survived an overbreadth challenge. *Vaughn*, 366 S.W.3d at 521.

Mr. Collins argued in his opening brief that Section 565.091, RSMo 2017, cannot be construed to apply only to conduct, which was the most important factor in saving the statutory provision in *Vaughn*. App. Br. 19. Additionally, the prior statute required the victim to suffer substantial fright, intimidation, or emotional distress, which this statute does not. App. Br. 19-20. Finally, the Court construed the subsection to apply *only* to conduct that is likely to provoke violence, *i.e.* "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace[,]" which cannot be done here. App. Br. 20 (quoting *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942)). Because the language of Section 565.091, RSMo, is overly broad and applies to all communication *and* conduct that is intended to cause emotional distress, this statute would have a chilling effect on constitutionally protected speech such as protesting a soldier's funeral because the United States tolerates homosexuality, protesting outside of a clinic who performs abortions because the protestor believes the woman is about to terminate an unborn child, or many other constitutionally protected acts, which tend to invoke strong emotions like debates around race, religion, gender, and politics. App. Br. 21-22. As a result, Mr. Collins argues Section 565.091, RSMo, should be struck down as it is unconstitutionally overbroad.

In response to Mr. Collins's first argument, Respondent agrees that this offense, unlike the one in *Vaughn*, applies to both conduct and communication.[1] Resp. Br. 20-21. Respondent argues that nevertheless this statute can still survive "as long as it applies to a limited core of unprotected

[1] The fact that both parties agree that Section 565.091, RSMo 2017, is broader that subsection 6 of the previous harassment statute demonstrates why this constitutional claim is a matter of first impression and is real and substantial.

expression." Resp. Br. 21. Although Respondent agrees this statue is broader than the statute in *Vaughn*, what Respondent seems to gloss over is that this narrowing construction, narrowing the statute to only conduct, was key in subsection's 6 survived but also why subsection 5 did not. *See Vaughn*, 366 S.W.3d at 520–21. As both the Supreme Courts of Missouri and the United States have explained, the further a statute moves away from pure speech and towards conduct, the power of the overbreadth doctrine attenuates. *See State v. Moore*, 90 S.W.3d 64, 67 (Mo. banc 2002); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The reason for this is that the overbreadth doctrine is limited to the First Amendment, and, therefore, "when conduct is at issue, the overbreadth doctrine has a more limited application" because it is no longer primarily concerned with pure speech. *See State v. Jeffrey*, 400 S.W.3d 303, 311 (Mo. banc 2013). Because this statute applies to both conduct and communication, this statute is substantially broader than subsection 6 in *Vaughn* and is less attenuated from the concerns of the overbreadth doctrine.

In response to Mr. Collins's second and third arguments, Respondent agrees that the victim of the conduct does not actually have to suffer emotional distress under Section 565.091, RSMo, unlike subsection 6 in *Vaughn*. Resp. Br. 21-22. Respondent argues, however, Section 565.091, RSMo, is nevertheless constitutional *because* conduct and communication that intends to cause emotional distress tends to also "inflict injury or provoke violence[.]" Resp. Br. 21-22 (citing *Vaughn*, 366 S.W.3d at 521). Therefore, Respondent argues, this statute can still be construed to apply only to fighting words. There are numerous problems with this argument.

First, the Court in *Vaughn* made this comment only in the context of someone whose *conduct* causes emotional distress and not their communication or conduct because subsection 6 only applied to conduct. *See*

366 S.W.3d at 521. Second, the argument that communication, which is intended to inflict emotional injury is unprotected by the First Amendment has been rejected by the Supreme Court of United States. *See Hustler Magazine Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (upholding a statute despite the fact the speech was "patently offensive and ... intended to inflict emotional injury" on the victim); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (holding that the First Amendment prohibited recovery in a civil libel action based on a jury finding that the defendant newspaper published editorials "with [a] bad or corrupt motive" or "from personal spite, ill will or a desire to injure [the] plaintiff"). Third, it is important that the victim suffer emotional distress because if the victim does not, it is unlikely the victim will immediately act violently or some injury will occur, which makes it unlike fighting words.[2] *See Chaplinsky*, 315 U.S. at 573. Fourth, for speech to provoke violence or cause some injury, the communication would have be face-to-face or there is no realistic chance someone's words could cause violence. *See State v. Carpenter*, 736 S.W.2d 406, 408 (Mo. banc 1987) ("[*Chaplinsky*] has held that such offensive language can be statutorily prohibited only if it is personally abusive, addressed in a face-to-face manner to a specific individual and uttered under circumstances such that the words have a direct tendency to cause an immediate violent response by a reasonable recipient."). The Supreme Court of the United State has stressed fighting words "must be likely to incite the reflexive response in the person to whom, individually, the remark is addressed." *State v. Swoboda*, 658 S.W.2d

[2] When the legislature used the words "fright" and "intimidate" in subsection 6, it intended to criminalize that conduct that were akin to fighting words that tend to cause a violent reaction. *Vaughn*, 366 S.W.3d at 521. By removing this language, the legislature was clear they intended the new harassment statute to be broader and not simply encompass speech that would tend to likely cause violence or injury.

24, 26 (Mo. banc 1983) (citing *Gooding v. Wilson*, 405 U.S. 518, 523 (1972)). This Court cannot construe this statute to apply only to face-to-face communications or those communications that cause an immediate violence or injury. For these reasons, this statute is substantially broader than subsection 6 in *Vaughn* and this Court cannot narrow this statute to only "fighting words."

One case Respondent relies on in its brief illustrates how these three narrowing principals from *Vaughn* worked in tandem to save subsection 6 and how they cannot work here to save this statute. In *United States v. Ackell*, the defendant brought an overbreadth challenge to 18 U.S.C. § 22261A, the crime of stalking, which penalized whoever:

> with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that ... causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to [that] person [or an immediate family member, spouse, or intimate partner of that person.]

907 F.3d 67, 72 (1st Cir. 2018) (modifications in original). Like *Vaughn*, the first and most important narrowing construction the court applied to the statute was that it applied to only to "conduct rather than speech" based on the "course of conduct" language in the statute. *Id.* at 73. Because the statute applied to conduct and not communication, the chilling effect was more attenuated, which was the key reason the statute survived. *See id.* at 73-74. Additionally, the statute was construed to apply only to "true threats"

because the statute used the word "intimidate."[3] *Id*. "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id*. (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

Here, the two narrowing constructions used in *Ackell* cannot apply because the plain language of Section 565.091, RSMo, does not support them. As discussed *supra*, Section 565.091, RSMo, cannot be construed to apply *only* to conduct. Respondent agrees. Furthermore, this statute cannot be narrowly construed to apply only to "fighting words," let alone "true threats" for the reasons discussed. Although Respondent is correct that the stalking statute at issue in *Ackell* did not require emotional distress to be caused like the statute here (Resp. Br. 22), this misses the other two narrowing constructions the *Ackell* Court applied to save the statute. If Section 565.091, RSMo, could be construed to apply only to communications and to "true threats" or "fighting words," then the fact Section 565.091, RSMo, does not require the victim to experience emotional distress may not be fatal. But, for the reasons discussed, the other two narrowing constructions are not present here, and, therefore, *Ackell* like *Vaughn* is instructive on why this statute does not survive.

In the end, this Court cannot construe this statute to apply only to "fighting words." Each one of the three narrowing constructions from *Vaughn* and subsection 6 cannot be applied here given that this harassment statute is substantially broader than the previous version. As a result, this new statute touches on *all* conduct and communication, without good cause, that is

[3] Subsection 6 included the word "intimidate" but it was removed in the current statute. *Compare* Section 565.090.1, RSMo Supp.2008, with Section 565.091, RSMo 2017.

intended to cause "emotional distress" and not merely "conduct" or a "course of conduct." This overly broad language touches on many constitutionally protect acts as detailed in the opening brief and the fear of prosecution will have a chilling effect on speech that may be distasteful or hyperbolic but is still constitutionally protected speech. This is because "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate 'breathing space' to the freedoms protected by the First Amendment.'" *See Boos v. Barry*, 485 U.S. 312. 322 (1988) (citing *Hustler Magazine, Inc.*, 485 U.S. at 56).

Respondent's final argument is that any constitutionally protected speech could never be implicated by this statute because *all* constitutionally protected speech is *per se* "good cause" as a matter of law. Resp. Br. 23. As a result, Respondent argues this statute can never implicate core protected speech, and, therefore, this Court should have no concern this statute will have a chilling effect on speech. Resp. Br. 23. There are at least four fatal problems with this argument.

First, the *Vaughn* opinion and Respondent's brief makes it clear it is not so simple. If the "without good cause" language saves the statute by itself, there was no need for Respondent to address all of Mr. Collins's arguments about how this statute is overly broad, criminalizes constitutionally protected speech, and has a chilling effect on speech, but Respondent choose to address those arguments because it is not so clear. Respondent had good reason to do this because in *Vaughn*, the Court did the same thing with the identical "without good cause" language. *See Vaughn*, 366 S.W.3d at 521. If the "without good cause" language would have always saved subsection 6 as Respondent argues here, then there was no need for the *Vaughn* Court to apply additional narrowing constructions to save subsection 6. However, by

looking at these three additional narrowing constructions, the Court made clear the good cause language could not alone save the statute. Therefore, Respondent's overreliance on this language is misplaced as it inconsistent and contradictory with the application of the overbreadth analysis in *Vaughn*.

Second, any person charged under *any* criminal statute can always bring an as applied challenge that the conviction violates or will violate the defendant's constitutional rights. *See Jeffrey*, 400 S.W.3d at 308. Therefore, *if* Respondent is correct that the "good cause" language simply means constitutionally protected acts are not prohibited by this statute, this would be redundant and meaningless language because the constitution already protects against this. This Court must avoid giving no meaning to this language. *See State v. Pierce*, 433 S.W.3d 424, 441 (Mo. banc 2014) (noting "well-established" rules of statutory construction require courts to "avoid interpreting statutes in a way that renders their language meaningless or unreasonable.") Because Respondent's interpretation would render the "good cause" language as repetitive, unnecessary, and meaningless, this Court should reject Respondent's definition.

Third, Respondent treats the "good cause" language as a question of law on whether the defendant's acts are constitutionally protected but the statute and the Missouri Approved Instructions indicate this is a factual element the jury must find. *See* Section 565.091, RSMo, MAI-CR 419.21. If Respondent is correct, then jurors are impermissibly tasked with answering questions of law about whether the defendant's speech was protected by the First Amendment. This conclusion turns the role of our trial by jury system on its head and should be rejected.

Finally, the purpose of the overbreadth doctrine is to protect against the chilling effect an overly broad statute can have on constitutionally protected speech. As the Supreme Court of the United States explained:

> Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, [*Dombrowski v. Pfister,* 380 U.S. 479, 486–87 (1965)]—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.

Virginia v. Hicks, 539 U.S. 113, 119 (2003). Although Respondent is correct that all the acts mentioned in the opening brief would be constitutionally protected following lengthy and time-consuming litigation where the defendant may have to sit in jail as Mr. Collins did before they are vindicated in court, this is true of *any* overbreadth analysis because the constitution always checks against convictions which are obtained in violation of a defendant's rights. But that is not the purpose of an overbreadth doctrine. Instead, it is about the chilling effect an overly broad statute can have on constitutionally protected speech.

For these reasons, this Court should reject Respondent's application of the "good cause" language. Instead, "good cause" means what the *Vaughn* Court said it means: "a cause that would motivate a reasonable person of like age under the circumstances under which the act occurred." *Id.* at 522; MAI-CR 419.21. Therefore, the defendant is left to the whims of prosecutors and jurors who may find that a reasonable person would not have been motivated to do what the defendant did even though it is constitutionally protected. The "good cause" language simply provides very little if any protection to a

defendant's possibly unsavory or unpopular but constitutionally protected speech.

Because Section 565.091, RSMo is substantially overbroad and would have a chilling effect on constitutionally protected speech, this Court should strike this statute down as unconstitutional.

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.

Although both parties believe this Court cannot construe Section 565.091, RSMo 2017, to not apply to communications, the State concedes that *if* this Court construes Section 565.091 to apply only to conduct and not communications, there is insufficient evidence that Mr. Collins's Facebook messages and voicemail are conduct. *See* Resp. Br. 27. For the reasons given in Mr. Collins's opening brief, he asks that this Court find that insufficient evidence for this offense.

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.

Respondent argues that Mr. Collins's Facebook messages and voicemail constitute "fighting words" because these acts are "the sort of acts that inherently tend to inflict injury or provoke violence." Resp. Br. 30. Although the *Vaughn* Court briefly mentioned the definition of "fighting words" from *Chaplinsky*, a more comprehensive discussion of the concept was made by the Court in *State v. Carpenter*, 736 S.W.2d 406 (Mo. banc 1987) and *State v. Swoboda*, 658 S.W.2d 24 (Mo. banc 1983). In *Carpenter* and *Swoboda*, the Supreme Court of Missouri explained that in *Chaplinsky*, the Court held that fighting words are those which are "personally abusive, addressed in a face-to-face manner to a specific individual and uttered under circumstances such that the words have a direct tendency to cause an immediate violent response by a reasonable recipient." 658 S.W.2d at 26; 736 S.W.2d at 408. The Supreme Court of the United State has stressed fighting words "must be likely to incite the reflexive response in the person to whom, individually, the remark is addressed." *Swoboda*, 658 S.W.2d at (citing *Gooding v. Wilson*, 405 U.S. at 523). Given this definition, there is insufficient evidence for this crime for two reasons.

First, as explained in the opening brief, given the standard of review, it was clear Mr. Collins was frustrated and angry with his probation officer, and he made comments about how the victim's children were involved in certain criminal offenses and that if she was going to follow him, he was going to follow her. App. Br. 26-27. As Respondent explained, the evidence also showed that the victim was "scared," "nervous," and "worried[.]" Resp. Br. 29. Respondent argues that this was sufficient to show that these words were "fighting words." Resp. Br. 29. Although the evidence is sufficient to show Mr. Collins intended to cause emotional distress or that the victim suffered emotional distress, it is insufficient to show Mr. Collins's communications could cause immediate violence or injury in a reasonable person, and Respondent fails to explain how violence or injury could possibly be caused immediately from these communications.

The two cases Respondent relies on do not assist its position. Although both *Starkey* and *Wooden* ostensibly are "fighting words" cases, they are better understood at "true threat" cases because in both cases the defendant made credible threats to the victim. *See State v. Starkey*, 380 S.W.3d 636, 643 (Mo. App. E.D. 2012) (holding the defendant made "credible threat" when repeated phone calls to both the judge's home and officer and in one he said, "a whole lot of people are going to need to go to medical facilities" if the judge did not remove "his fraudulent warrants.") *State v. Wooden*, 388 S.W.3d 522, 527 (Mo. banc 2013) (holding that the defendant's communications that referenced dusting off shotguns, domestic terrorism, and the assassination of several politicians to an alderman were unprotected speech). True threats, like fighting words, are unprotected by the First Amendment, but these concepts are importantly different and *Starkey* and *Wooden* seem to conflate them. *See Black*, 538 U.S. at 361. Neither of these cases can be "fighting

words" cases because the defendants' actions could not have a "direct tendency to cause an immediate violent response by a reasonable recipient" and for the second reason there is insufficient evidence.

The second reason there is insufficient evidence is that these communications were not face-to-face, which is necessary for the victim to have a "reflexive reaction that is likely produce immediate violence or injury." *See Chaplinsky*, 315 U.S. at 573; *Carpenter*, 736 S.W.2d at 408; *Swoboda*, 658 S.W.2d at 26. In fact, Mr. Collins's communications did not result in violence or injury. Instead, the victim simply contacted the police. Therefore, there is insufficient evidence that Mr. Collins's Facebook messages and voicemail could be considered "fighting words" as they were in *Chaplinsky*.

For these two reasons, if this Court construes Section 565.091, RSMo, to only "fighting words," there is insufficient evidence Mr. Collins committed the offense of harassment in the second degree.

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.

Mr. Collins's opening brief argued that because the State elected to charge Mr. Collins with tampering with a judicial officer that included an element of "harass" from Section 575.095.1, RSMo, the offense of harassment in the second degree was a lesser included offense of tampering with a judicial officer. App. Br. 28-32. Respondent argues that pursuant to *State v. Hardin*, 429 S.W.3d 417 (Mo. banc 2014), the elements of an offense are not controlled by what elements the State elects to charge from a particular statute, but they are instead gleaned from *all* the elements that are available for the State to select from a particular statute. Resp. Br. 33-38. The State argues that because they could have elected to charge Mr. Collins with tampering with a judicial officer with the purpose to "influence" the judicial officer rather than to "harass" them under Section 575.095.1, RSMo, then tampering with a judicial officer cannot be a lesser included offense of harassment even if the State elects to charge the element of "harass." Resp. Br. 36-38. This argument, however, raises more questions than it answers.

The purpose of a double jeopardy analysis for cumulative punishments is to determine whether the legislature intends for there to be multiple punishment for a single act. *State v. McTush*, 827 S.W.2d 184, 186 (Mo. banc 1992). As both parties acknowledge, in determining whether the legislature intended multiple punishments it is necessary to compare the elements of the charged offense with the elements of the alleged lesser included offense to determine whether the legislature in fact intended such a result. *Id.* at 188. This is known as the same-element or the *Blockburger* test. *State v. Daws*, 311 S.W.3d 806, 808 (Mo. banc 2010). Here, the parties dispute how the court determines what are the elements for an offense to conduct the same-element test.

Respondent argues this Court should look to every alternate element the state may elect from a particular statute to determine the elements for an offense for the purpose of the same element test, but the Supreme Court of Missouri has repeatedly rejected such a broad rule. For example, in *State v. McTush*, the Supreme Court of Missouri considered a challenge to whether the defendant's conviction for assault in the first degree and attempted robbery in the first degree violated the prohibition on cumulative punishments for the same offense. 827 S.W.2d 184, 187 (Mo. banc 1992). The Court noted that its analysis turned on whether "cumulative punishments were intended by the legislature[,]" which starts by examining "the statutes under which appellant was convicted." *Id.* at 186-87.

The Court started by examining the relevant statutory provisions for the crimes of assault in the first degree and robbery in the first degree. *Id. at* 187. The Court recited the language from the specific subsections the State elected in their charging document while disregarding the other subsections under which the defendant was not charged and convicted. *See id* (citing

Sections 565.050.1(1) and 569.020.1(2), RSMo 1986). The Court held each offense as charged required something to be proven that the other offense did not, and, therefore, no double jeopardy violation occurred. *Id.*

The Court explained that robbery in the first degree pursuant to "§ 569.020.1(2) required proof that appellant attempted to forcibly steal property while armed with a deadly weapon" but did not require proof of an injury. *Id.* In comparison, "§ 565.050.1(1) required proof that the appellant knowingly caused serious physical injury to another person, but did not require proof that the appellant used a deadly weapon." *Id.* Therefore, each offense as charged required proof of a fact the other did not. *Id.* However, if the "[h]ad appellant been charged under § 559.020.1(1), stealing by causing serious injury, rather than under § 569.020.1(2)," stealing while armed with a deadly weapon, then stealing would be lesser offense of robbery in the first degree because the offense of stealing by causing serious physical injury is impossible to commit without committing assault in the first degree by causing serious physical injury. *See id.* at 188 n.1. As such, the Supreme Court of Missouri was clear that the subsection or elements the State elects in its charging decision can affect whether an offense is a lesser included of another.

The Court affirmed this approach in *Peiffer v. State*, 88 S.W.3d 439 (Mo. banc 2002). In *Peiffer*, the defendant challenged his conviction for first-degree tampering by possessing an automobile without the owner's consent because he argued it was a lesser included offense of stealing an automobile by retaining possession of it without the owner's consent. *Id.* at 441. The defendant argued, as charged, it was impossible to commit the crime of stealing an automobile without committing tampering with a motor vehicle when the State elected that the offense was based on possessing a stolen

automobile without the owner's consent. *Id.* As such, his conviction for both offenses violated his right to be free from double jeopardy. *Id.*

The Court started its analysis by defining the elements of the offense by reciting the language from Section 569.080.1(2), RSMo 2000, the subsection the defendant was charged under, but it disregarded subsection 1(1) as the State did not elect those elements:

> 1. A person commits the crime of tampering in the first degree if:
>
> ....
>
> > (2) He knowingly receives, possesses, sells, alters, defaces, destroys or unlawfully operates an automobile, airplane, motorcycle, motorboat or other motor-propelled vehicle without the consent of the owner thereof.

Id. at 442. Stealing is defined under Section 570.030, RSMo 2000, as "appropriat[ing] property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion." *Id.* at 443. The defendant argued that because the State alleged in its charging document "that he appropriated an automobile by retaining possession of it without the owner's consent[,]" then stealing was a lesser-included offense because possession is a necessary fact of both retention and appropriation. *Id.* The Court agreed that "[b]ecause first-degree tampering under these facts 'is established by proof of the same or less than all the facts required to establish the commission of' stealing, first-degree tampering is a lesser-included offense of stealing for double jeopardy purposes in this case." *Id.* at 444. However, if the State had alleged another method of tampering, *e.g.* "by receiving, selling, altering, defacing, destroying or unlawfully operating a vehicle," it may have resulted in a different outcome. *See id.* at 444 n.6. In other words, the charging decision of the State does control what elements the court uses for the same-element test.

The Court reaffirmed this approach as recently as 2017 when it held "[i]nvoluntary manslaughter, as defined by section 565.024.1(1), is a nested lesser included offense of second-degree murder as defined by section 565.021.1(1)." *State v. Sanders*, 522 S.W.3d 212, 216 (Mo. banc 2017). The Court stated that when the State elects to charge the defendant with second degree murder under subsection 1 of Section 565.024, RSMo, the crime of murder in the second degree, the only different element between second degree murder and involuntary manslaughter is the mental state the state must prove, *i.e.* reckless versus knowing. *Id.* Conversely, if the defendant is charged with second degree murder under subsection 2, *i.e.* second-degree felony murder, there are numerous elements that exist in that offense that do not exist for the offense of involuntary manslaughter. As such, the charging decision of the State controls whether the offense of involuntary manslaughter is a lesser included offense of second-degree murder. *See id.* Therefore, Missouri case law has been clear for decades that the charging decision of the State does control the elements for the purposes of the same-element test.

In *State v. Hardin*, 429 S.W.3d 417 (Mo. banc 2014), however, the Supreme Court of Missouri seemed to deviate from or at least complicate this approach. In *Hardin*, the defendant challenged whether a violation of an order of protection, Section 455.085.2, RSMo 2000, [4] was a lesser included

[4] A person commits the crime of violating an order of protection when "a party, against whom a protective order has been entered and who has notice of such order entered, has committed an act of abuse in violation of such order." Section 455.085.2.

offense of aggravated stalking, Section 565.225, RSMo Supp. 2009, [5] when the State elects that a violation of an order of protection is an element under subsection 2 of the aggravated stalking statute. *Id.* at 421. The defendant argued that, as charged, it is impossible to commit the crime of aggravated stalking without violating an order of protection. *Id.* at 423. Therefore, the defendant argued violating an order of protection is a lesser included offense of aggravated stalking because the State elected to charge the defendant under subsection 2, which required a showing of a violation of an order of protection. *Id.*

The Court noted that the defendant's argument "assumes that whether the offense of violating a protective order is included in the offense of aggravated stalking depends on how the latter offense is indicted, proved, or submitted to the jury." *Id.* In other words, the defendant assumed each subsection of Section 455.085, RSMo, was a separate and distinct offense from one another. *See id.* The Court rejected this however, because "an indictment-based application of this definition has been expressly rejected" by Missouri before. *Id.* at 424 (citing *State v. Smith*, 592 S.W.2d 165, 166 (Mo. banc 1979)). Instead, one must "compare the Statute of the greater offense with the factual and legal elements of the lesser offense[.]" *Id.* The Court stated that because the State *could* have elected another element of the offense such as a credible threat under subsection 1, instead of a violation of

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[5] A person commits the crime of aggravated stalking if he or she purposely, through his or her course of conduct, harasses or follows with the intent of harassing another person, and:

(1) Makes a credible threat; or

(2) At least one of the acts constituting the course of conduct is in violation of an order of protection and the person has received actual notice of such order; or ...

an order of protection under subsection 2, the crime of violating an order of protection is not a lesser included offense of aggravated stalking. *Id.*

The broadest interpretation of this reasoning, which Respondent adopts, seems to conflict with cases such as *McTush, Peiffer* and *Sanders* which *did* consider the indictment in determining the elements of the offense for the purposes of the same-element test. Therefore, either the Court's more recent opinion in *Sanders* overruled *Hardin* or there is more nuance to the rule than Respondent makes it seem.

State v. Andrews provides some guidance on what the *Hardin* Court meant, but it ultimately raises a separate and more complicated question of whether the rule announced in *Hardin* is workable or good law. *State v. Andrews*, No. ED 108691, 2021 WL 686737 (Mo. App. Feb. 23, 2021).[6] In *Andrews*, the defendant challenged whether unlawful use of a weapon ("UUW"), Section 571.030.1, RSMo, was a lesser included offense of possession of a controlled substance, Section 579.015, RSMo, when the State elected the element that the defendant possessed a firearm while in possession of a controlled substance under subsection 11.[7] *Id.* at *2. The defendant argued it is impossible to commit the offense of unlawful possession of a firearm under subsection 11 while also not in possession the control substance. *Id.* Citing *Hardin* for the proposition that because "courts are to compare only the statutory elements of the offense without reference to how the offense was charged[,]" the State argued, "it is improper to consider

[6] At the time of filing this brief, this opinion is not final and is still pending transfer at the Supreme Court of Missouri.

[7] Under Section 571.030.1 (11), RSMo: "A person commits the offense of unlawful use of weapons, except as otherwise provided by sections 571.101 to 571.121, if he or she knowingly... [p]ossesses a firearm while also knowingly in possession of a controlled substance that is sufficient for a felony violation of section 579.015."

only the particular UUW subsection under which Defendant was charged." *Id*. * at 5.

Andrews rejected the States argument and explained that *Hardin* was distinguishable because the subsections in *Hardin* were "aggravators" and not separate "offenses." *Id*. at *5-6. In other words, the court drew a distinction between when the legislature creates additional offenses like for the separate subsections of UWW and for when the legislature creates aggregators, which are not separate offenses. *See id*. However, the question left unanswered by *Andrews* and *Hardin* is how is one to determine whether a statute creates separate offenses or whether it is a single offense with multiple alternatives for the State to elect without creating a separate offense. In other words, when the legislature provides different elements in a criminal statute for a particular criminal offense like murder in the second degree, assault in the second degree, or tampering in the first degree to name a few, how does a court determine whether the legislature intended there to be multiple offenses or one offense with alternate options. *Hardin*, *Andrews*, nor any recent Missouri case has yet to clearly define how a court is to make such a determination for the purposes of the same-element test.

A clear and workable rule would be that when the legislature uses the word "or" or it is clear they created a disjunction between at least two elements, then the legislature intends to create two separate offenses. For example, in *State v. Lee*, the defendant was convicted of felony resisting arrest under Section 575.150, RSMo, and challenged the sufficiency of the evidence. 498 S.W.3d 442, 456 (Mo. App. W.D. 2016). To find the defendant guilty of the *felony* offense, the evidence had to show either the officer was making an *arrest* for a felony when the defendant resisted, or the defendant fled from an attempted "*arrest, detention or stop* by fleeing in such a manner

that the person fleeing creates a substantial risk of serious physical injury or death to any person[.]" Section 575.150, RSMo (emphasis added). The evidence did not show the officer was intending to arrest the defendant for a felony before the defendant fled or that the defendant's fled in manner that created a substantial risk of death or serious injury. *Id*. Therefore, there was insufficient evidence that the defendant committed the felony of resisting arrest.

As a result, the court considered whether it should impose a sentence for the lesser included misdemeanor offense of resisting a lawful stop or detention because the defendant did flee from a detention or stop. *Id*. 458. The court noted that this was addressed in *State v. Joos,* 218 S.W.3d 543, 550 (Mo. App. S.D. 2007), which also found insufficient evidence for felony resisting arrest. *Id.* The *Joos* Court found resisting a detention or stop is not a lesser included offense of resisting an arrest because there are multiple elements in one offense that are not included in the other like that officer must be intending to stop or detain the defendant but not arrest them. *Id.* In other words, the court found resisting an arrest is a separate offense from resisting a lawful detention or a lawful stop.

Relevant here, the resisting arrest statute is like the tampering with a judicial officer statute but the State's position is inconsistent with cases like *Joos* and *Lee*. Section 575.150, RSMo Supp. 2009. states in relevant parts: "A person commits the crime of resisting or interfering with *arrest, detention, or stop* if, knowing that a law enforcement officer is making an arrest, or attempting to lawfully detain or stop an individual or vehicle..." This is like the "harass, intimidate, or influence" language from the tampering with a judicial officer statute. *See* Section 565.091, RSMo. In *Lee* and *Joos*, the court made clear that despite the use of language "arrest, detention, or stop" these

are separate offenses with different elements. If Respondent is correct, however, these are not separate offenses just like "harass, intimidate, or influence" are not separate offenses. In other words, if this Court adopts Respondent's broad interpretation of *Hardin*, it calls into question many previous cases like *Lee*, *Joos*, and *Peiffer*, which found separate offenses in statutes that were drafted very similarly to Section 565.091, RSMo. Therefore, this Court should adopt Mr. Collins's position that anytime the court uses the word "or" or some other clear indication that legislature intends to creates a separate element or offense, then those elements the State elects for its charging document control for the purposes of the same element test. If this Court adopts Mr. Collins's position, this Court should find a double jeopardy violation for the reasons explained in his opening brief.

Even if this Court rejects Mr. Collins's position, this Court can still find a double jeopardy violation because Section 565.091, RSMo, is more similar to the tampering statute in *Peiffer* and the resisting arrest statutes in *Lee* and *Joos*, than the aggravated stalking statute in *Hardin*. Section 565.091, RSMo, like Section 570.030, RSMo 2000, and Section 575.150, RSMo Supp. 2009, contained the alternative elements with a single provision and not separate provisions like *Hardin*. Therefore, even if this Court does not adopt Mr. Collins's position on how this Court should interpret statutes for the same element test, this Court should still find a double jeopardy violation.

In conclusion, *Hardin* appears to have opened more doors than it closed by not answering how the Court arrived at its conclusion that the legislature did not intend to create multiple offenses although it created five separate subsections or address how its opinion squares with its own prior opinions such as *McTush* or *Peiffer*. Ultimately, the purpose of a double jeopardy analysis is to determine "whether cumulative punishments were intended by

the legislature." *McTush*, 827 S.W.2d at 186. Therefore, it is critical to have a clear and predictable rule not only for courts to determine the legislature's intent but also for the legislature to predict how Missouri courts will interpret its statute. The rule that when the legislature uses the word "or" or some other clear indication of a disjunctive the legislature intended to create a separate offense is a clear and predicable rule. Because the legislature stated the offense of tampering with a judicial officer may be committed if the defendant does something with the purpose to "harass, intimidate, *or* influence" a judicial officer, the legislature intended to create three separate offenses for three separate and distinct acts like when the legislature used the "arrest, detention or stop" for the crime of resisting with arrest. Because the State elected to charge harass, and not intimidate or influence, then harassment in the second degree is a lesser included offense of tampering with a judicial officer.

CONCLUSION

For the reasons stated in this brief and the opening brief, 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 7,535 words, which does not exceed the 7,750 words allowed for an appellant's brief.

/s/ Christian E. Lehmberg

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