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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Oconee County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case Tracking No. 2012-206186

The State, Respondent,

vs.

Anthony Clark Odom, Appellant.

AMENDED INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in taking judicial notice of Appellant's birthdate from the certified records of the Department of Motor Vehicles. Further any issue is not preserved for review on appeal. Additionally, the trial court did not err in instructing the jury to only apply the law given during the trial court's jury instruction and not to consider any legal principal not provided to them in the instructions. Finally, the bulk of the issues raised related to the court's jury instruction are not preserved for review on appeal.

II. The trial court properly denied the motion to dismiss due to alleged prosecutorial misconduct.

III. Section 16-15-342 of the South Carolina Code does not violate the Equal Protection Clause of either the United States or South Carolina Constitutions.

IV. Section 16-15-342 does not violate the Free Speech Clause of either the United States or South Carolina Constitutions.

STATEMENT OF THE CASE

Anthony Clark Odom was arrested May 12, 2006. On June 22, 2006, the Spartanburg County Grand Jury indicted Odom on one count of criminal solicitation of a minor in violation of section 16-15-342 of the South Carolina Code (Supp. 2006). The indictment covered chat room communications from March 12, 2006 through May 4, 2006 with a Spartanburg County Sheriff's Deputy. The Honorable J. Mark Hayes, II, held pre-trial motions hearings on July 9, July 23, and July 24, 2007.

As a result of the hearings, the court suppressed all evidence obtained from Odom's internet service providers through the use of orders signed by the Honorable James W. Johnson, Jr., and the Honorable G. Thomas Cooper, Jr., pursuant to a provision of the Stored Communications Act (SCA), 18 U.S.C.A. § 2703(d). The State filed a timely Notice of Appeal. In March 2009, this Court reversed the decision of the circuit court and remanded the case for trial. See State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009).

Prior to trial in Spartanburg, Odom was notified of the State's intention to seek indictments for criminal solicitation of a minor, in violation of section 16-15-342, based on chat room communications with Officer Mark Patterson of the Westminster Police Department which occurred in Oconee County from May 4, 2006 through May 6, 2006. The State proceeded to trial in Spartanburg before the Honorable J. Mark Hayes, II, and the trial resulted in a hung jury.

The State, through the South Carolina Attorney General's Office, sought to directly indict Odom for two counts of criminal solicitation of a minor based on the May

4 and May 6 chats. The Oconee County Grand Jury true-billed the indictments on April 12, 2010.

The State called the case for trial on June 27, 2011, before the Honorable Alexander S. Macaulay. During pre-trial motion arguments, and before the jury was sworn, Judge Macaulay recused himself on motion by the defense.

The State called the case for trial and Odom proceeded to a trial by jury in front of the Honorable R. Lawton McIntosh. The jury found Odom guilty on one count of criminal solicitation of a minor based on the chats from May 4 through May 5, 2006. The jury acquitted Odom on one count based on the chats on May 6, 2006. Judge McIntosh sentenced Odom to seven years, suspended on five years probation. Judge McIntosh ordered sex offender registration and restrictions during Odom's probation.

Odom filed a motion for a new trial, which the circuit court denied. Odom filed a Notice of Appeal and this appeal follows.

STATEMENT OF FACTS

A detective from the Spartanburg County Sheriff's Office chatted in an undercover capacity using a profile which indicated the person chatting was a thirteen-year-old female named "Melanie." (T.444; R.___). The undercover persona was part of law enforcement efforts to identify and capture adults who prey on children via the Internet. Odom, using the screen name "Danger6552000" which also displayed the name Roge Wilson, contacted "Melanie" online and began chatting with her. (T.444-445; State's Exhibit 6; R.__).

In a chat dated March 21, 2006, "Melanie" indicated she had to leave soon to go to a meeting at school that "all the 7th graders" had to attend. Even after this statement, Danger6552000 encouraged "Melanie" to masturbate, graphically coaching her on how to do it, while saying he is also masturbating. The sexually explicit chats continued on several more occasions including an April 1, 2006, chat in which Danger6552000 discussed meeting with "Melanie" to have sex. (State's exhibit 6, Spartanburg Chats; R.___).

From April 30 until May 4, 2006, they chat specifically about meeting, how to arrange the meet, and what Odom will do to "Melanie" when they meet. The discussions include how "Melanie" will get to the mall to be picked up by Odom on the following Saturday; the car Odom will be driving; the fact Odom will get a hotel room near the mall for them to have sex; and what time "Melanie" must be home to keep from getting into trouble. (State's exhibit 6, Spartanburg Chats; R.___).

The May 4 chat ends with Odom indicating "I need to run for now anyway I will be on tonight." Later that night, Odom, again using the screen name "Danger6552000,"

began chatting with an individual using the screen name "a_upstategurl93." The individual using that screen name indicated she was a thirteen-year-old female from Oconee. Odom stated he was forty years old and in Columbia. He then asked the girl if his age was ok with her. Within five minutes of beginning the conversation, he asks the thirteen-year-old girl "ass bra?" Shortly thereafter, Odom asks the girl if she likes "older guys" and then asks about her clothing—including undergarments. Odom then takes the discussion explicitly sexual, asking first if the thirteen-year-old girl is a virgin, and then asking about her sexual experiences. (T.101; 107-108; State's Exhibit 2; R.___).

The chat between Odom and the thirteen-year-old girl continues with discussions of whether the girl would be interested in performing various sexual acts, including vaginal and anal intercourse. He describes in detail many of the sexual activities he would like to perform with the minor, frequently asking if she would like to try the sexual activity with him. Odom asks the girl if she masturbates and then says: "u should right now as we talk" and asks her to "try once more." Finally, the night ends with Odom again talking about having sexual intercourse with the thirteen-year-old girl and then asking her what she would want them to do. (State's Exhibit 2, Oconee Chats; R.___).

Fortunately, "a_upstategurl93" turned out to be Officer Mark Patterson from the Westminster Police Department. Officer Patterson performed proactive investigations for the Internet Crimes Against Children (ICAC) Task Force acting as a thirteen-year-old girl in Yahoo! chat rooms. Officer Patterson, like Investigator McGraw from Spartanburg, conducted proactive investigations to identify and capture adults who prey on children via the Internet. During his investigation, he chatted with Odom from May 4 through

May 6, 2006, with most of the communications being of a sexual nature. (T.107-108; R.___).

ARGUMENT

I. The trial court did not err in taking judicial notice of Appellant's birthdate from the certified records of the Department of Motor Vehicles. Further any issue is not preserved for review on appeal. Additionally, the trial court did not err in instructing the jury to only apply the law given during the trial court's jury instruction and not to consider any legal principal not provided to them in the instructions. Finally, the bulk of the issues raised related to the court's jury instruction are not preserved for review on appeal.

Appellant contends the trial court erred in taking judicial notice of Appellant's birthdate because one of the elements of the crime is that he must be over the age of 18. Further, he maintains the trial court erred in instructing the jury they may not consider whether a bond is necessary for a municipal police officer to be acting in his "official capacity." The issues are not properly preserved for review on appeal and both fail on the merits.

Preservation

Birthdate

Near the end of the State's case, the State asked the judge to take judicial notice of Appellant's birthdate as found on certified records from the Department of Motor Vehicles (DMV). (T.517-519; R.___). Appellant objected first on the basis of the lack of a records custodian or ability to authenticate the record. After the State argued it was a certified copy from the DMV, Appellant then argued it is an element of the crime and the court could not take judicial notice. The court asked why the document would not be otherwise admissible to the jury and Appellant responded he would have to look as there

are other statutes that apply. (T.519; R.___). The court then stated: "Let's take this up later. I'm gonna give you all a chance to review it, please." (T.520; R.___).

After several witnesses testified, the trial court made its ruling about taking judicial notice. (T.576; R.___). The court specifically stated he was taking judicial notice pursuant to Rules, 201(b)(2), 201(g), and 901(b)(7), SCRE. Further, he referenced the statutes allowing admission of certified records. See S.C. Code Ann. §§ 19-5-10 thru -40 (Supp. 2010).

Counsel made no further argument as the trial court clearly allowed and expected counsel to do, and he never objected to the trial court's ruling or the basis for the trial court taking judicial notice. (T.576; R.___). Further, the trial court stated as part of his jury instruction at the end of trial that he had taken judicial notice of Appellant's birthdate and the jury was to accept that date as true in its deliberations. (T.930; R.___). Again, Appellant never objected to the trial court's instruction or raised any further argument as the trial court clearly anticipated in its initial ruling.

As a result, the issue is not properly preserved for review by this Court as Appellant either did not properly raise the issues or waived the issues by not addressing them when provided the opportunity. There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity. See State v. Brown, 402 S.C. 119, 125 n.2, 740 S.E.2d 493, 496 n.2 (2013) (citing Jean H. Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice In South Carolina, 57 (2nd ed. 2002)); State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) (stating issues must be raised to the trial court and

ruled upon in order to be properly preserved for review on appeal); State v. Roach, 377 S.C. 2, 3, 659 S.E.2d 107, 107 (2008) (noting that issues not preserved for review should not be addressed).

Official Capacity

In regards to the issues related to the judge's jury instruction on official capacity, many of Appellant's arguments are being raised for the first time on appeal. At trial, the jury sent a note indicating a question regarding whether in order to be acting in their official capacity must a police officer be under a bond. (Court Exhibit 10; R.___). The trial court then stated his intention to instruct the jury that the legal principal was not before them because it was not part of his jury charge and so they must not consider it. (T.953-954; R.___). Counsel offered a suggestion to instruct the jury stating: "A suggestion only, Your Honor, would be that you might instruct the jury that, [y]ou have heard all the evidence. I have given you my charge, and I would ask that you continue with your deliberations." (T.954; R.___). The trial court reiterated its intention to remind the jury that they can only consider the law given to them in the judge's charge. Counsel asked his objection be noted.

Later, the jury returned with another note asking to hear testimony of Officer Patterson and Chief Bannister. The jury was asked to specify the testimony if they could and they sought to hear testimony related to official capacity and the bond issue. (Court Exhibits 11 and 12; R.___). The trial court found the testimony, and before having it presented to the jury, again reminded them that he did not charge them on the law of bond and it is not proper for the jury to consider the legal requirement of a bond in making their decision. (T.965; R.___). The only objection raised by counsel was that the

jury did not ask for a charge on the law but merely to hear testimony. (T.964; R.___). When asked if he had any other objection, counsel responded: "No, sir."

At no time did counsel object on the basis of the judge's charge amounting to an improper comment on the fact, nor did he raise any argument regarding the judge invading the province of the jury so as to restrict his right to a fair trial by a jury. Further, counsel never maintained the jury charges undercut his credibility or would cause confusion to the jury. Finally, it is clear from the record, counsel did not contemporaneously assert the judge's charges to the jury had the effect of directing a verdict in the State's favor on these issues. As a result, none of these issues raised in Appellant's brief are preserved for review on appeal. See Brown, 402 S.C. at 125 n.2, 740 S.E.2d at 496 n.2; State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court).

Merits

Birthdate

On the merits, the trial court did not err in taking judicial notice of Appellant's birthdate as presented in the certified copies of Appellant's DMV records. The trial court properly applied Rule 201, SCRE, and took judicial notice of Appellant's birthdate and instructed the jury that they were to accept as conclusive that fact.

"'Judicial notice' takes the place of proof. It simply means that the court will admit into evidence and consider, without proof of the facts, matters of common and general knowledge." Moss v. Aetna Life Ins. Co., 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976). As the North Carolina Court of Appeals has explained: "It is not the law

that facts essential to a judgment can only be established by the testimony of witnesses, by exhibits introduced into evidence, or by a stipulation of the parties; they can also be established by judicial notice and by operation of law." State v. Smith, 327 S.E.2d 44, 45-46 (N.C. App. 1985).

Rule 201 governs the court's ability to take judicial notice of facts and provides:

> (a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.
> (b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
> . . . .
> (d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
> . . . .
> (f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.
> (g) Instructing Jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

"A fact is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available sources of indisputable reliability." Bowers v. Bowers, 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct. App. 2002).

In the instant case, the trial court properly took judicial notice of Appellant's birthdate. The facts were established in certified copies of DMV records of which there should be no contest of their reliability. Further, Appellant never actually challenged the accuracy of the information, simply argued the court should not take judicial notice of the fact. Appellant's birthdate as found in the records on the DMV qualifies as a fact

"capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(b).

Additionally, under Rule 201(g), once the court properly took judicial notice of the fact of Appellant's birthdate, it then was to instruct the jury "to accept as conclusive" that fact judicially noticed. The trial court properly charged the jury:

> [I]n this case, . . . I took judicial notice of the Defendant's date of birth, and you must accept as a conclusive fact the date of birth that I took judicial notice of and that date of birth is June 22, 1973. And by accepting that as a conclusive fact you may not debate it, you shall not debate it, that is his birthday.

(T.930; R.___). The trial court performed his duty under Rule 201(g) to instruct the jury of the judicially noticed fact and instructed them they were to accept the fact as conclusive. Accordingly, the trial court did not err in its judicial notice of the date of birth or in his instruction to the jury.

Further, the court did not take judicial notice of an element of the crime of criminal solicitation of a minor.

> A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen.

S.C. Code Ann. § 16-15-342(A) (Supp. 2010). As a result, the element to be found by a jury beyond a reasonable doubt is whether Appellant is a person eighteen years of age or

older. The judge did not tell the jury not to find this element. Instead, he instructed the jury that Appellant's date of birth was in 1973. Accordingly, the trial court did not take judicial notice of an element, but instead took judicial notice of an adjudicative fact which established the element.

Finally, any error in taking judicial notice is entirely harmless. The certified copies of the DMV records were admissible without further authentication or testimony by a records custodian. The records were certified copies of Appellant's DMV records and were clearly admissible under Rules 901(7) and 902(4), SCRE, as well as sections 19-5-10 and -30 of the South Carolina Code (Supp. 2010). The evidence could have been admitted and would have been the only evidence of Appellant's date of birth before the jury. Also, the jury knew Appellant had a postgraduate degree and could view Appellant in the courtroom to determine on its own that he was a person eighteen years of age or older. (T.809; R.___). Accordingly, any possible error in taking judicial notice of Appellant's birthdate is entirely harmless.

Official Capacity

On the merits, the trial court properly told the jury not to consider in its deliberations any legal requirement that a police officer have a bond. First, the trial court did not instruct the jury on the issue and so any possible legal requirement was not before the jury for its consideration. Second, there is no legal requirement for a municipal law enforcement officer to be bonded. As a result, if the judge were to allow the jury to consider the issue in its deliberations, he would have allowed them to base their decision on an incorrect statement of the law.

As this Court has repeatedly noted, it is the duty of the jury to take the law from the court in the case on trial and "[i]t must be presumed that they do so." State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975); see also, Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999); State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999); State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). The trial court in this case did not charge the jury regarding any necessity of a law enforcement officer to be bonded in order to be considered acting in his official capacity. The jury was to take the law as charged, and only the law charged to it, to make its decision. If the jury ventured outside of the judge's charge, then it would be making its decision on improper grounds. The trial court's instructions after the jury sent out notes regarding the officer's bonding merely reaffirmed the necessity of the jury to consider only the law charged to it by the trial court and to not base its decision on anything outside of that law. Accordingly, the trial court did not err in restricting the jury's decision to the law before it. (T.955; 965; R.___).

Further, had the judge allowed the jury to consider the condition or existence of a bond on Officer Patterson in determining whether he acted in his official capacity, it would be basing the decision on an incorrect legal premise. South Carolina does not require a municipal law enforcement officer to be bonded. While Appellant's counsel elicited testimony from Chief Banniser that he believed the officers needed to be bonded, there exists no legal requirement of a bond. A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 73 (2004).

Specifically, section 5-7-110 addresses the appointment of municipal police officers:

> Any municipality may appoint or elect as many police officers, regular or special, as may be necessary for the proper law enforcement in such municipality and fix their salaries and prescribe their duties.
>
> Police officers shall be vested with all the powers and duties conferred by law upon constables, in addition to the special duties imposed upon them by the municipality.
>
> Any such police officers shall exercise their powers on all private and public property within the corporate limits of the municipality and on all property owned or controlled by the municipality wheresoever situated; provided, that the municipality may contract with any public utility, agency or with any private business to provide police protection beyond the corporate limits. Should the municipality provide police protection beyond its corporate limits by contract, the legal description of the area to be served shall be filed with the State Law Enforcement Division, the office of the county sheriff and the Department of Public Safety.

S.C. Code Ann. § 5-7-110 (Supp. 2010). This statute does not require a bond be in place for municipal officers. The lack of a bond requirement is notable because statutes establishing other law enforcement officers specifically require bonding. See S.C. Code Ann. § 23-7-30 (Supp. 2010) (requiring special state constables appointed under this chapter are required to give and file in the office of the Secretary of State a surety bond); S.C. Code Ann. § 23-13-20 (Supp. 2010) (requiring deputy sheriff provide a bond "before entering upon the discharge of his duty"); S.C. Code Ann. § 23-27-70 (Supp. 2010) (requiring deputy sheriff for unincorporated area to provide bond); S.C. Code Ann. § 23-28-80 (Supp. 2010) (requiring a reserve police officer to be bonded before performing his or her duties). As a result, the trial court would have committed error if he charged the jury that Officer Patterson as a municipal officer had to have a bond to be

acting in his official capacity. Further, the trial court would have committed error if he allowed the jury to make a determination of whether Officer Patterson was acting in his official capacity based on the existence of a bond. Accordingly, the trial court correctly charged the jury they were not to consider the existence or lack of a bond in its determination of whether Officer Patterson was acting in his legal capacity.

II. The trial court properly denied the motion to dismiss due to alleged prosecutorial misconduct.

Appellant maintains the trial court erred in failing to dismiss the case due to prosecutorial vindictiveness. He asserts the evidence creates a presumption of vindictiveness which the State failed to rebut. There is no presumption of vindictiveness due to the prosecution of Appellant in Oconee County. Further, to the extent any presumption of vindictiveness could be established, the State has rebutted the presumption, and there is no showing or claim of actual vindictiveness.

Background Facts

It is important to consider the entire procedural and factual history of this case when analyzing the State's contention the prosecution of Appellant for charges in Oconee was based on a change of trial strategy and not on vindictiveness. Odom was originally indicted for one count of criminal solicitation of a minor due to his chatting with the undercover investigator from Spartanburg County. The chats lasted several months and contained numerous incidences of criminal solicitation. (State's Exhibit 6; R.___). Instead of charging for numerous counts, the State indicted one count covering the full range of charges. All of the investigation into the identity of Danger6552000 through the use of orders pursuant to section 18 U.S.C.A. § 2703(d) ("d-order") occurred as part of the Spartanburg investigation. (Court's Exhibits 4-6; R.___). The search warrant for Appellant's home and computer occurred as part of the Spartanburg investigation. (Court Exhibit 7; R.___). As a result, the bulk of the evidence supporting conviction was established through the Spartanburg investigation.

The trial strategy employed by then lead prosecutor, David Stumbo[1], included admitting the Oconee solicitations and investigation as evidence to show a common scheme or plan, intent, identity, and absence of mistake pursuant to Rule 404(b), SCRE and State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923), in the prosecution based on the Spartanburg solicitations. (7/9/2007T.12-13; R.___). Mr. Stumbo never foreclosed the possibility of prosecution of the Oconee solicitations.

Appellant refers to a hearing in July 2007 prior to trial. The hearing is instructive because it shows the trial strategy being employed by the State and also because it makes it clear prosecution of the Oconee solicitations was a possibility. In the hearing, Mr. Stumbo is arguing regarding the admissibility of the Oconee chats and solicitations as evidence under Rule 404 and Lyle. During the discussion he explains there is no incident report in Oconee County because "we never intended to charge, you know, **at that time** in Oconee County." (7/9/2007T. 13; R.___) (emphasis added). The hearing demonstrates the State did not seek charges in Oconee because of the trial strategy being employed in the Spartanburg trial, and the specific language chosen, notably "at that time," clearly shows the possibility of future charges still exists.

Prior to trial, Appellant moved to suppress the chats as being obtained in violation of the Investigative Standards for the ICAC Task Force and moved to suppress all identifying evidence on the basis it was obtained without a warrant and through the improper use of an order pursuant to 18 U.S.C.A. 2703(d). The trial court suppressed the evidence and the State appealed. This Court reversed the trial court in an opinion dated March 30, 2009. State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009).

[1] David Stumbo has since been elected Solicitor for the Eighth Judicial Circuit of South Carolina. The State will refer to him as Mr. Stumbo instead of Sol. Stumbo throughout the brief so there is no confusion regarding his current position and the position he held at the time being discussed.

During the time of the appeal, the ICAC Task Force with the Attorney General's Office changed lead prosecutors. While the new lead prosecutor, Ms. Wines, participated in the initial hearings on Odom as a third prosecutor, she was not involved in the charging or other decision making process. (T.504-505; R.___). After she took the position of lead prosecutor, she became more involved in this, case as well as the charging decisions in all cases prosecuted by the ICAC unit. (T.505-506; R.___).

After this Court reversed the trial court on appeal, the State began working with Appellant's counsel at that time, to establish a date for trial. A date was determined for trial in August 2009, but prior to that date, Appellant changed his trial attorney. (T.505; R.___). As a result, the State agreed to continue the case to allow counsel to become familiar with the case and established new dates for trial.

Ms. Wines determined it best to continue the same trial strategy Mr. Stumbo employed, which included using the Oconee solicitations and chats as evidence of intent, common scheme or plan, or absence of mistake. Ms. Wines made the use of the chats as evidence known to Appellant and his counsel. As with Mr. Stumbo, Ms. Wines never foreclosed the possibility of pursuing the Oconee charges. (T.497-500; State's Memorandum in Opposition to Motion to Quash; R.___).

In June 2009, Officer Patterson was arrested on a charge of unlawful communication and discharged from the Aiken County Sheriff's Office due to the alleged non-physical dispute with his wife. (11/1/2011T.8; R.___). Andrew Anderson represented him in the criminal case against him. The case resulted in the charges being *nolle prossed*, and an order of expungement issued on December 8, 2009.

Appellant's counsel sought to obtain the records related to Officer Patterson's arrest to determine if they contained anything of significance from a discovery standpoint. Instead of contacting Ms. Wines seeking the records, Appellant's counsel served a subpoena on Mr. Anderson. It was not until Officer Patterson and Mr. Anderson brought the subpoena and attorney/client privilege issues to the attention of the Attorney General's Office did the State learn of Appellant's desire to obtain the documents. (4/9/2010T.14-15; R.___). After learning of the issues, the trial court in Spartanburg ordered a hearing be held pre-trial regarding the attorney/client nature of the records being sought by Appellant's counsel. (6/27/2011T. 85; R.___). This hearing, ordered shortly before trial in Spartanburg was to begin, had the potential to delay trial or cause significant confusion during the Spartanburg trial.

Further, there was discussion regarding the type of subpoenas issued for the documentation. Rule 13 of the South Carolina Rules of Criminal Procedure allows any party to have a subpoena issued requiring a person's attendance or the delivery of documentary evidence for trial. The State believed the subpoenas issued required delivery other than at trial, and required delivery for consideration by Appellant's counsel. As a result, the State correctly indicated Appellant's counsel did not have administrative subpoena powers, but could only have the documents produced for trial.

In addition, Appellant's counsel later admitted he was seeking to go on a fishing expedition. In particular he argued:

> Now, Your Honor, discovery is very much like fishing at Lake Oconee. You put your hook over the water, over the side of the boat, and you see if you can find a fish. When you pull it up, it may be too small. It may not be for you to keep. The analogy is that it might be something that

> is not admissible at trial, that the Rules of Evidence would exclude.
>
> But it, it might be admissible in the defense of Mr. Odom. It also might be something that, although not admissible, would lead me to some other admissible evidence. . . .

(4/12/2011T. 25; R.___). In his brief, Appellant also acknowledges the purpose of the subpoenas was to "find any evidence that may allow impeachment or lead to other evidence useful in the defense of the Appellant." (App. Br. 25). Accordingly, it is clear the subpoenas were issued merely to go on a fishing expedition. See e.g., Biltrite Bldg. Co. v. Adams, 193 S.C. 142, 7 S.E.2d 857, 859 (1940) ("[T]he Courts do not look with favor upon a proceeding in the nature of 'discovery' which is shown to be merely a 'fishing expedition'.").

Further, on their face, it is clear nothing in the dismissed charges could have been used for impeachment of Officer Patterson. Pursuant to Rule 609 of the South Carolina Rules of Evidence a witness may be impeached by the conviction of a crime which carried a sentence of more than one year in prison, or if the crime involved dishonesty or false statement. First, Officer Patterson was never convicted; instead, his conviction was *nolle prossed.* Further, the crime for which he was charged, unlawful communication, would not fall under either category allowing admission for impeachment. Additionally, the information would not have been admissible for impeachment under Rule 608(b) of the South Carolina Rules of Evidence allowing for impeachment based on specific conduct. The conduct in question did not involve a question of truthfulness or untruthfulness and as a result would not be admissible.[2]

[2] This is a determination the trial court would later make. (11/1/2011 T. 27; R.___).

Prior to trial and shortly after learning of the subpoenas, Ms. Wines and Appellant's counsel had several telephone conversations regarding the case. During the conversations, Ms. Wines expressed frustration over Appellant's counsel's request to see Mr. Anderson's attorney file regarding Officer Patterson's charges. Further, she expressed her belief Appellant's counsel did not possess the power to have subpoenas issued to be able to view the evidence or produced at a time and place other than trial. Finally, she informed Appellant's counsel she intended to not have the Oconee solicitations be a point of contention as part of the Spartanburg case, and since much would have to be done prior to a determination of their admission as Lyle evidence, she would alter her trial strategy and indict him separately on the Oconee solicitations. This conversation happened prior to trial in Spartanburg, so it is clear the mistrial which resulted in Spartanburg played no role in the decision to indict Appellant in Oconee. 6/27/2011T.41-54; R.___).

Ms. Wines explained the reason for indicting Appellant:

> At that point I felt like it was becoming too collateral of an issue and it was making the Spartanburg case much more difficult than it needed to be.
>
> I had been following my predecessor's strategy. . . . He was the one who first called the case in Spartanburg for trial back in 2007. And he was at the time lead counsel for the State and he had made the determination of using the Oconee chats as potential Lyle evidence.
>
> . . . .
>
> Beyond that, it is my understanding a prosecutor can change trial strategy. That is exactly what this is. I followed the strategy of my predecessor. It seemed like a fairly reasonable strategy. But when it was becoming so collateral, it did not seem like such a reasonable or intelligent strategy on behalf of the State. So prior to the calling of the trial, I told Mr. Huff that we would send indictments to Oconee County and we would deal with the

> matter of Investigator Patterson's records in Oconee County.

(6/27/2011T. 85-86; R.___).

The case in Spartanburg then proceeded against Appellant from February 22-March 2, 2010. The State did not use the Oconee solicitations as Lyle evidence during the trial. (Order of Judge Seymore, page 3; R.___). The trial ended in a mistrial because of a hung jury.

The State subsequently submitted two indictments to the Oconee County Grand Jury. Each indictment charged Appellant with criminal solicitation of a minor and covered one day of the chats between Officer Patterson and Appellant. The Oconee County Grand Jury true-billed both indictments. (Oconee Indictments; R.___).

On April 7, 2010, Appellant filed a Federal Complaint for Immediate Injunctive and Other Relief. (Federal Complaint Civil Action 2:10-872-MBS; R.___). In the complaint he alleged prosecutorial vindictiveness barred any prosecution by the State, and asked the Federal District Court to enjoin Henry D. McMaster in his capacity as Attorney General as well as all sixteen Solicitors, from prosecuting any case in regard to the Oconee Communications against Odom. (Federal Complaint, page 13-14; R.___). A telephonic hearing was held before the Honorable Margaret B. Seymour. At the hearing, Appellant set forth his allegations of prosecutorial vindictiveness making the same arguments he does before this Court. The State was able to set forth the basis for the change in trial strategy and the reasons for prosecuting Appellant in Oconee. (4/9/2010T. 11-17; R.___).

In August 2010, Judge Seymore issued an Order dismissing the complaint under the Younger abstention doctrine, and specifically found no exception for bad faith stating:

> Plaintiff submits that his prosecution for the Oconee County Communications constitutes retaliation for the exercise of his constitutional rights in defending himself at the Spartanburg Trial. Plaintiff contends that his prosecution for the Oconee County Communications constitutes abuse of prosecutorial discretion due to the oppressive use of multiple prosecutions. Additionally, Plaintiff argues that this case should be allowed to move forward simply because bad faith is an inherent element of his vindictive prosecution claim. McMaster disputes Plaintiff's allegations of prosecutorial misconduct and motivation for bringing charges on the Oconee County Communications, contending that this was a strategic decision. During the pendency of the Spartanburg trial, the position for Chief Prosecutor for the South Caroline Internet Crimes Against Children Task Force changed from David Stumbo to Megan Wines. Because prosecutors have discretion to decide which crimes to prosecute, this personnel change lends support to McMaster's strategy explanation. **The court finds that Plaintiff has failed to prove bad faith.**

(Order of Judge Seymore, page 8; R.___) (emphasis added).

On May 5, 2011, Appellant filed a civil action in state court seeking to enjoin the State from prosecuting him, for the court to declare section 16-15-342 in violation of the Equal Protection Clause, and for monetary relief. The complaint was dismissed and the dismissal was upheld on appeal by this Court on July 18, 2013. Odom v. Wilson, Op. No. 2013-MO-022 (Filed July 17, 2013).

The Oconee case was originally scheduled to proceed to trial several times prior to the November 2011 time in which it actually went forward. The records of Officer Patterson's arrest occupied portions of several hearings, including April 12, 2011, June 1,

2001, June 27, 2011, November 1, 2011, and at the trial itself. As counsel for the State anticipated, the Oconee solicitations would have been a significant issue had the State continued its strategy of using them in the Spartanburg trial.

In June 2011, Judge Macaulay was scheduled to hear the trial. After a jury had been selected but not sworn, Appellant raised the prosecutorial vindictiveness motion. Appellant's civil counsel called Appellant's criminal counsel to testify as to communications with Ms. Wines as counsel on behalf of the State. During the hearing, Appellant's counsel detailed the communication between him and Ms. Wines and, as discussed above, the fact Ms. Wines intended to direct indict Appellant in Oconee instead of pursuing admitting the evidence on the basis of Lyle. Judge Macaulay ultimately recused himself on Appellant's motion because he had knowledge of some of the facts being argued by Appellant. (6/27/2011T.95; R.___).

The records were again an issue before the Honorable R. Lawton McIntosh on November 1, 2011. After reviewing the records themselves, as well as hearing argument from counsel, Judge McIntosh specifically ruled the records were no admissible in evidence at trial. (11/1/2011T.27; R.___). He did allow counsel the opportunity to see them and to utilize them in determining if there is anything impeachable to be discovered, but his conclusion supports the State's arguments prior to the Spartanburg trial.

The case was called before Judge McIntosh in November 2011. Appellant again made the motion to dismiss the indictments based on prosecutorial vindictiveness. (11/8/2011T.490-496; R.___). The State again responded the issue regarding Officer Patterson's records was becoming too cumbersome and that it was no longer prudent to try and admit the Oconee solicitations as prior bad acts. Instead, Ms. Wines argued, it

made more sense to try those crimes separately. (11/8/2011T.497-500; R.___). The State was concerned the Spartanburg trial would be delayed again depending on the records and the outcome of the attorney/client hearing Judge Hayes ordered prior to the Spartanburg trial if the State sought to admit the Oconee solicitations. (11/8/2011T.501-502; R.___). Ms. Wines pointed out she notified Appellant's counsel of the decision to prosecute in Oconee prior to trial in Spartanburg specifically so the outcome of the Spartanburg trial could not be seen as a basis for bringing the charges. (11/8/2011T.507; R.___).

The trial court ultimately concluded regarding the prosecutorial vindictiveness claim:

> Quite frankly, it was a close call, but I don't find that there was established any malice or evidence that would rise to an implied malice or vindictiveness. I think under the circumstances the explanation given by the State was reasonable, and given the wide discretion given to prosecutors, the evidence doesn't amount to the level that would give rise to the draconian remedy of dismissing the warrant. So therefore, I'm denying that motion.

(11/10/2011T.767; R.___).

Law and Argument

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). The Court "is bound by the trial court's factual findings unless they are clearly erroneous." Id. (citing State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)).

"To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" U. S. v. Goodwin, 457 U.S. 368, 372

(1982) (citing Bordenkircher v. Hayes, 434 U.S. 357 (1978)). To establish vindictive prosecution a defendant must prove "that (1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus." United States v. Wilson, 262 F.3d 305, 314 (4th Cir.2001). To establish genuine animus, the defendant may prove actual vindictiveness through direct evidence or raise a presumption of vindictiveness when the prosecutor's actions "pose a realistic likelihood of 'vindictiveness.'" Blackledge v. Perry, 417 U.S. 21, 27, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974).

"A charging decision does not levy an improper "penalty" unless it results solely from the defendant's exercise of a protected legal right, rather than the prosecutor's normal assessment of the societal interest in prosecution." Goodwin, 457 U.S. at 380. "The Supreme Court further stated that an initial decision by the prosecutor should not freeze future conduct, because the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." State v. Dawkins, 297 S.C. 386, 389, 377 S.E.2d 298, 300 (1989) (citing Goodwin, 457 U.S. 368). "The imposition of punishment is the very purpose of virtually all criminal proceedings." Goodwin, 457 U.S. at 372. Therefore, a punitive motivation alone "does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is an impermissible response to noncriminal, protected activity." Id. at 372-73. "A state's punitive motivation does not represent a constitutional violation where, as here, the state sought to punish not for the right exercised, but for the crime committed." Paradise v. CCI Warden, 136 F.3d 331, 336 (2nd Cir. 1998).

As a result, "[t]he presumption of regularity supports" prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15, 47 S.Ct. 1, 6, 71 L.Ed. 131 (1926). "Undoubtedly, the solicitor has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain." State v. Langford, 400 S.C. 421, 436 n.6, 735 S.E.2d 471, 479 n.6 (2012); see also, State v. Fletcher, 322 S.C. 256, 261, 471 S.E.2d 702, 705 (Ct. App. 1996) ("In South Carolina, the solicitor is charged with the responsibility of prosecuting criminal charges, including procurement of the proper indictment from the grand jury."). In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." U.S. v. Armstrong, 517 U.S. 456, 464 (1996); see also, Bordenkircher, 434 U.S. at 364, 98 S.Ct. at 668 ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

Several courts have considered a similar, but more prone to vindictive prosecution, situation in which a defendant is acquitted on one charge and then is indicted on a second charge. This situation actually would seem to be more likely to result in a presumption of vindictiveness than the current situation. The Second Circuit stated: "[W]e join the other courts of appeals that have held that a new federal prosecution

following an acquittal on separate federal charges does not, without more, give rise to a presumption of vindictiveness." U.S. v. Johnson, 171 F.3d 139, 141 (2nd Cir. 1999) (citing United States v. Wall, 37 F.3d 1443, 1449 (10th Cir. 1994); United States v. Rodgers, 18 F.3d 1425, 1430–31 (8th Cir. 1994); United States v. Esposito, 968 F.2d 300, 306 (3d Cir. 1992)); see also, U.S. v. Kendrick, 682 F.3d 974, 983 (11th Cir. 2012) ("[W]e agree with our sister circuits that bringing a second indictment, supported by evidence, against a defendant after an acquittal does not result in a presumption of vindictiveness."). The Johnson Court held no presumption applies when "a new crime is being charged . . . even after acquittal" on the initial charges. Johnson, 171 F.3d at 141. Further, Johnson applied this rule even where the government had the evidence of this new crime before the defendant's jury consideration of the initial charges.

Additionally, in United States v. Esposito, 968 F.2d 300 (3d Cir.1992), the defendant was acquitted of Racketeer Influenced and Corrupt Organizations Act ("RICO") charges, and later indicted for offenses based on the same drug transactions that formed a basis for the RICO charges. The Third Circuit held that it would "not apply a presumption of vindictiveness to a subsequent criminal case where the basis for that case [was] justified by the evidence and [did] not put the defendant twice in jeopardy." Id. at 306. The court noted that creating a presumption in these circumstances would be "tantamount to making an acquittal a waiver of criminal liability for conduct that arose from the operative facts of the first prosecution." Id. The Court concluded: "It fashions a new constitutional rule that requires prosecutors to bring all possible charges in an indictment or forever hold their peace. We reject such a proposition for it undermines

lawful exercise of discretion as well as plain practicality." Id.; see also, People v. Valli, 187 Cal.App.4th 786, 805 (Cal. App. 3 Dist. 2010).

In South Carolina, the South Carolina Court of Appeals recently decided a case of prosecutorial vindictiveness in State v. Blakely, 402 S.C. 650, 742 S.E.2d 29 Ct. App. 2013). In Blakely, the defendant was acquitted of murder. She was then indicted on a charge accessory after the fact. The Court found the charges could have been brought all in one case, but instead the prosecutor exercised appropriate discretion in bringing the charges as separate cases. The Court concluded, based in part on the above cases, there was no presumption of vindictiveness, and she failed to allege or prove actual vindictiveness.

Further, courts have considered whether on re-trial the indictment on additional charges raises a presumption of vindictiveness. This is an analogous situation to the present one where additional charges were indicted. Courts have held there is no presumption of vindictiveness, even when the crimes were related and arose from the same spree in which the original indictments arose. See U.S. v. Mallah, 503 F.2d 971, 988 (2nd Cir. 1974).

In Mallah, the Second Circuit confronted a situation where the appellant was convicted on several narcotics charges involving cocaine. After a successful appeal of his convictions, the prosecution added two charges related to heroin. The appellant maintained the addition of the heroin charges was prejudicial and "a vindictive reaction to appellant's embarrassing disclosure that the U.S. Attorney's Office had promised [a government witness] immunity while purporting not to have done so." Mallah, 503 F.2d at 988. The Court explained:

> This theory might have some force had the government, for example, added to a previous charge of distributing narcotics in violation of 21 U.S.C. § 841 a charge of distributing that same narcotic to a minor in violation of 21 U.S.C. § 845. That is not the case here. **It is one thing to increase a charge from manslaughter to murder, and quite another to charge a defendant, subsequent to a successful appeal, with a second murder.** In the words of Williams, 'Pearce would have application, if a prosecutor . . . charged a defendant whose first conviction had been set aside, with a more serious offense based upon the same conduct.' 436 F.2d at 105. Here, the heroin counts are based upon acts which are distinct from charges previously brought against appellant. The government's decision to prosecute appellant for counts two and six is well within the traditionally broad ambit of prosecutorial discretion.

Id. (emphasis added).

The above examples in Johnson, Esposito, Blakely and Mallah present situations much more indicative of vindictiveness than the facts of this case. Based solely on the prosecution of Appellant, there should be no presumption of vindictiveness. The State had probable cause for bringing the charges, and the decision to initially pursue the Spartanburg charges should not foreclose the ability of the State to bring charges based on the full extent of Appellant's illegal activities.

Further, the facts as detailed above do not "pose a realistic likelihood of 'vindictiveness'" in the indictment of Appellant on the Oconee solicitations. Appellant contends the delay in bringing the Oconee indictments and Ms. Wines decision to prosecute instead of continuing to pursue the use of the Oconee solicitations as Lyle evidence demonstrate the vindictiveness resulting from Appellant's counsel's zealous representation. Additionally, he points to the fact two indictments, instead of a single indictment, were brought against him as additional evidence of vindictiveness.

First, The State never foreclosed the possibility of prosecution for the Oconee charges. The prosecution resulted from a strategic determination that the strategy of using the Oconee solicitations as Lyle evidence in the Spartanburg prosecution became too much of a distraction and collateral issue and could possibly have delayed a trial which had already been continued to accommodate Appellant's counsel. Instead, the State determined the need to review the attorney file of Officer Patterson's attorney, as well as issues regarding Officer Patterson's personnel file were best handled in a case in which the Oconee records served as the basis for the charges instead of merely supportive evidence. (11/8/2011T.504-507; R.___).

The determination by Ms. Wines that the records would prove to be a significant and unnecessary issue in the Spartanburg trial ultimately proved correct, as the issue played a significant part of the Oconee pre-trial discussions and hearings. Further, the State's belief Appellant's counsel was engaged in a mere fishing expedition and was not entitled to the evidence was born out by his counsel's own arguments (4/12/2011T. 24-26; R.___) and the subsequent revelations regarding the existence of Officer Patterson's records which should have been expunged. (Letter to Judge Macaulay dated April 28, 2011; R.___).

Next, the delay is explained by the procedural and factual history detailed above. The identification of Appellant as the person illegally soliciting the minor in Oconee was based on the same d-orders that were the basis of the appeal before this Court. The State could not continue with prosecutions based on either the Spartanburg or Oconee solicitations until the issue before this Court was resolved. As soon as it was resolved, the State began pursuing the same trial strategy it originally employed. Only right before

trial was scheduled to go forward in Spartanburg, Appellant's counsel began demanding the records and files regarding Officer Patterson's arrest, files which the State did not believe he was entitled and files which only were part of a fishing expedition related to evidence only to be used as Lyle evidence in the Spartanburg prosecution. It was only when the State altered its trial strategy that it had reason to pursue the Oconee indictments and so the delay was more than reasonable in this case.

Further, the lead prosecution changed hands during the pendency of the case, and the prosecutor chose to continue the same prosecution and strategy originally begun in the Spartanburg charges. As she explained, the State has learned a lot since 2006 when the Spartanburg charges were initially indicted, and now charges based on each chat that contains a violation of the solicitation statute and not just as a single charge. She determined the method utilized in the Oconee charges made more sense and was less confusing for juries, especially if there was any question of whether the officer was on duty at all times. (11/8/2011T.505-506; R.___).

Accordingly, similar to Blakely, Johnson, Esposito, or Mallah, there should be no presumption of vindictiveness. Even if there is a presumption, the State provided ample evidence to rebut the presumption by showing the charges were the result of proper prosecutorial discretion based on how the cases involved progressed. As a result, there is evidence to support the trial court's findings and they should be affirmed.

III. Section 16-15-342 of the South Carolina Code does not violate the Equal Protection Clause of either the United States or South Carolina Constitutions.

Appellant contends the trial court erred in finding section 16-15-342 is not unconstitutional because it violates the Equal Protection Clause. The section does not violate the Equal Protection Clause because there are clear rational basis for distinguishing between the solicitation of a law enforcement officer and the solicitation of another adult not involved in law enforcement.

This Court has stated:

> This Court has a very limited scope of review in cases involving a constitutional challenge to a statute. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt.

State v. Harrison, 402 S.C. 288, 292-293, 741 S.E.2d 727, 729 (2013) (internal citations omitted).

Section 16-15-342 states in relevant part:

> (A) A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen.
> (B) Consent is a defense to a prosecution pursuant to this section if the person under the age of eighteen, or the person reasonably believed to be under the age of eighteen, is at least sixteen years old.

. . . .

> (D) It is not a defense to a prosecution pursuant to this section, on the basis of consent or otherwise, that the person reasonably believed to be under the age of eighteen is a law enforcement agent or officer acting in an official capacity.

S.C. Code Ann. § 16-15-342 (Supp. 2010). Appellant contends subsections (B) and (D) create two separate classes subject to disparate treatment. He creatively identifies the classes as: 1) the Skywalker class, in which one believes they are communicating with a person under the age of eighteen, but are in fact communicating with someone sixteen or older who is not a law enforcement officer acting in an official capacity; and 2) the Darth Vader class, in which one believes they are communicating with a person under the age of eighteen, but are in fact communicating with someone sixteen or older who is a law enforcement officer acting in an official capacity. (App. Br. 34). As he correctly notes, an individual in class 1 would have the consent defense offered by section 16-15-342(B), while and individual in class 2 would not have the consent defense because of the exception stated in section 16-15-342(D).

The Equal Protection Clause of the United States Constitution provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The South Carolina Constitution provides no "person shall be denied the equal protection of the laws." S.C. Const. art. I, § 3. "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995).

Not all classifications are unconstitutional, however, for "[t]he equal protection clause only forbids irrational and unjustified classifications." Bodman v. State, 403 S.C.

60, 69, 742 S.E.2d 363, 367 (2013). So long as the statute "does not implicate a suspect class or abridge a fundamental right, the rational basis test is used" to determine whether the classification falls into the prohibited group. Id. (citing Denene, Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004)). "A classification does not violate the Equal Protection Clause if: (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis." Curtis v. State, 345 S.C. 557, 574, 549 S.E.2d 591, 599-600 (2001) (citing Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 524 S.E.2d 404 (1999)). "A classification will survive rational basis review when it bears a reasonable relation to the legislative purpose sought to be achieved, members of the class are treated alike under similar circumstances, and the classification rests on a rational basis." Bodman, 403 S.C. at 69, 742 S.E.2d at 367.

As this Court recently explained in Bodman:

> We give great deference to the General Assembly's decision to create a classification. Consequently, those who challenge the validity of one under rational basis review must "negate every conceivable basis which might support it." Furthermore, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." The classification also does not need to completely achieve its purpose to withstand constitutional scrutiny. Moreover, "[t]he fact that the classification may result in some inequity does not render it unconstitutional."

Id. at 69-70, 742 S.E.2d at 367-368 (internal citations omitted). "Accordingly, [this Court's] entire equal protection inquiry revolves around interplay between the specific

classification created and the purported basis for it, with a challenger coming under rational basis review facing a steep hill to climb." Id. at 70, 742 S.E.2d at 368.

In the instant case, the classification of an individual soliciting a law enforcement officer acting in their official capacity versus an individual soliciting any other individual over the age of sixteen does not involve a suspect class. Inherently suspect classifications include those based on factors "such as race, religion, or alienage." Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 429, 593 S.E.2d 462, 469 (2004). The classification in the instant case does not involve any of the suspect classifications.

Further, the classification does not impact a fundamental right. Fundamental rights are those guaranteed by the United States Constitution, and are not implicated by the classification in this case. See e.g., Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right of interstate travel); Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) (rights guaranteed by the First Amendment); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (right to procreate). The right to the unconditional use of a legislatively-created defense requiring certain prerequisites be met is not a fundamental right.

The classification in the case *sub judice*, therefore, must only satisfy the rational basis test. The classification, individuals soliciting law enforcement acting in their official capacity versus those soliciting any other individuals meets the rational basis test. The classification bears a reasonable relation to the legislative purpose sought to be achieved. The purpose is to allow the investigation and criminalization of harm to minors caused when they are solicited for sexual acts or to commit violent crimes. The

classification eliminating a defense of consent when law enforcement is acting as the solicitee furthers the ability to investigate, and subsequently prosecute, those sexual predators seeking to harm minors.

The members of the class are treated alike under similar circumstances. All persons who meet the elements of the crime while communicating with a person they believe to be a child who in actuality is a law enforcement officer acting in their official capacity will be treated the same. They will face the same charge and will not be able to enjoy the legislatively created defense.

Finally, the classification rests on a rational basis. Daily, the children of this state are vulnerable to attack by sexual predators. Our legislature has enacted laws, such as section 16-15-342, to make unlawful these predators' behaviors, which are frequently facilitated through the use of the internet. The language in the statute, and especially the exception to the consent defense, is rationally based on the Legislature's policy decision to promote proactive, undercover investigations by trained law enforcement personnel and to dissuade regular citizens from possibly placing themselves in harm's way by conducting the same undercover investigations.

South Carolina's policy has always been to protect and safeguard the welfare of our children. See e.g., State v. Murrell, 302 S.C. 77, 393 S.E.2d 919 (1990); State v. Cooper, 291 S.C. 351, 353 S.E.2d 451 (1987); Mr. T v. Ms. T, 378 S.C. 127, 138, 662 S.E.2d 413, 419 (Ct. App. 2008) ("Public policy suggests that 'South Carolina, as *parens patriae*, protects and safeguards the welfare of its children.'") (quoting Harris v. Harris, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992)). "Our society now recognizes that crimes against children, such as sexual abuse, occur with alarming frequency." Cooper, 291

S.C. at 356, 353 S.E.2d at 454. The policy of seeking to protect our youth is also reflected in recent legislative enactments and amendments, including sections 16-3-655 and 16-15-342 of the South Carolina Code (Supp. 2010).

The Court of Appeals discussed this policy as it relates to section 16-15-342 in State v. Reid, holding: "Early intervention is appropriate in light of the serious nature of this crime." State v. Reid, 383 S.C. 285, 300, 679 S.E.2d 194, 201 (Ct. App. 2009). Proactive, undercover operations which do not involve placing an actual minor in harm are supported by the wording of section 16-15-342, and particularly subsection (D) and its removal of the consent defense.

The State submits these proactive, undercover operations are the best method of investigating, finding, and apprehending predators hiding behind the anonymity of the internet in their search to solicit minors for sex and other illegal activity. The statute supports the policy of not requiring an actual minor to be subjected to possible harm by not allowing consent to be a defense when either 1) an actual minor is involved who cannot consent, or 2) a trained law enforcement officer is involved who is seeking to protect minors and investigate sexual cybercrimes. See e.g., Reid, 383 S.C. at 299 n.6, 679 S.E.2d at 201n.6 (citing State v. Nesbitt, 346 S.C. 226, 234, 550 S.E.2d 864, 868 (Ct. App. 2001)).

Further, the consent defense operates as a disincentive for non-trained individuals conducting the undercover chat room and other operations. The Legislature determined it did not want vigilantes to be roaming the internet trying to find the dangerous sexual predators. The fact their "investigation" could not be used because the person would have the consent defense is designed to keep them from placing themselves in dangerous

situations. The vigilante, while meaning well, could be exposing his or her location to the dangerous predator. Additionally, the consent defense eliminates the benefit of Dateline NBC style To Catch a Predator set ups which could prove very dangerous for those involved because the person "caught" could have a consent defense under section 16-15-342(B).

Additionally, the distinction created recognizes the likely difference in the reliability of the evidence generated by the two possible parties. On the one hand, trained law enforcement operating in their official capacity will have much better ability to preserve evidence and establish a reliable record of the solicitation. On the other, you have evidence created by a private individual with no oversight, no quality control, no indicia of reliability, and no ability to prove it was not tampered with or corrupted.

As a result, the classification based on the availability of the consent defense clearly has a rational basis in the promotion of the legislative policy of promoting the safety of minors and the investigation, apprehension, and prosecution of predators. The classification encourages trained law enforcement to act in their official capacity to conduct undercover operations to catch online and other predators. At the same time, it provides a disincentive to vigilantes and those looking to make headlines because the individuals may have a consent defense and so the vigilantes or other private citizens will not expose themselves to the dangers of becoming involved in the solicitation. Accordingly, there is no violation of the Equal Protection Clause.

IV. Section 16-15-342 does not violate the Free Speech Clause of either the United States or South Carolina Constitutions.

Appellant contends the trial court erred in denying his motion to dismiss because section 16-15-342 violates the Free Speech Clause of the United States and South Carolina Constitutions. The statute is narrowly tailored to not violate the Free Speech Clause, as this Court previously found in State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012), and the enforcement used by the ICAC Task Force does not lead to a violation of the First Amendment.

As discussed above, this Court has stated:

> This Court has a very limited scope of review in cases involving a constitutional challenge to a statute. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt.

State v. Harrison, 402 S.C. 288, 292-293, 741 S.E.2d 727, 729 (2013) (internal citations omitted). "This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution." State v. Green, 397 S.C. 268, 275, 724 S.E.2d 664, 667 (2012) (quoting State v. White, 348 S.C. 532, 536–37, 560 S.E.2d 420, 422 (2002)).

The First Amendment commands, "Congress shall make no law ... abridging the freedom of speech." The corollary in the South Carolina Constitution reads: "The General Assembly shall make no law . . . abridging the freedom of speech. . . ." S.C. Const. Art. I, § 2. "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, [a statute] is unconstitutional on its face if it prohibits a substantial amount of

protected expression." Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002) (citing Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)). "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." Ashcroft, 535 U.S. at 255. "Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then 'only as a last resort.'" New York v. Ferber, 458 U.S. 747, 769 (1982) (citing Broadrick, 413 U.S. at 613); see also, United States v. Williams, 553 U.S. 285, 292–93, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) ("In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. Invalidation for overbreadth is strong medicine that is not to be casually employed."); Green, 397 S.C. at 277, 724 S.E.2d at 668 (same).

First, as this Court and others have found, there is no protection of speech used to further the sexual exploitation of children. Green, 397 S.C. at 277, 724 S.E.2d at 668. "There is no First Amendment right to persuade minors to engage in illegal sex acts." United States v. Tykarsky, 446 F.3d 458, 473 (3d Cir. 2006) (citing United States v. Bailey, 228 F.3d 637, 639 (6th Cir.2000); United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir.2004) ("Speech attempting to arrange the sexual abuse of children is no more constitutionally protected than speech attempting to arrange any other type of crime.")). Additionally, there is no protection for soliciting any type of violent crime listed in section 16-1-60. As this Court noted in Green, "In fact, the USSC has expressly

stated that '[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection.'" Green, 397 S.C. at 277, 724 S.E.2d at 668. (quoting Williams, 553 U.S. at 297, 128 S.Ct. 1830).

South Carolina's policy has always been to protect and safeguard the welfare of our children. See e.g., State v. Murrell, 302 S.C. 77, 393 S.E.2d 919 (1990); State v. Cooper, 291 S.C. 351, 353 S.E.2d 451 (1987); Mr. T v. Ms. T, 378 S.C. 127, 138, 662 S.E.2d 413, 419 (Ct. App. 2008) ("Public policy suggests that 'South Carolina, as *parens patriae*, protects and safeguards the welfare of its children.'") (quoting Harris v. Harris, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992)). "Our society now recognizes that crimes against children, such as sexual abuse, occur with alarming frequency." Cooper, 291 S.C. at 356, 353 S.E.2d at 454. Additionally, as this Court explicated in Green:

> Moreover, "[c]ourts have recognized that speech used to further the sexual exploitation of children does not enjoy constitutional protection, and while a statute may incidentally burden some protected expression in carrying out its objective, it will not be held to violate the First Amendment if it serves the compelling interest of preventing the sexual abuse of children and is no broader than necessary to achieve that purpose."

Green, 397 S.C. at 277, 724 S.E.2d at 668 (quoting Cashatt v. State, 873 So.2d 430, 434–35 (Fla. Dist. Ct. App. 2004)).

The statute at issue is narrowly written to avoid any unnecessary and improper intrusion into protected speech. Section 16-15-342 only applies to a person who "knowingly contacts or communicates with, or attempts to contact or communicate with" a minor. The statute, therefore, does not apply to a situation in which the person is not intending the communication to result in the minor engaging in sexual activity or some other criminal act. "Thus, it affects only those individuals who intentionally target minors

for the purpose of engaging or participating in sexual activity or a violent crime. Conversely, it does not criminalize any inadvertent contact or communications with minors." Green, 397 S.C. at 278, 724 S.E.2d at 669. "The scienter and intent requirements of the [federal version of our solicitation statute] sufficiently limit criminal culpability to reach only conduct outside the protection of the First Amendment." United States v. Dhingra, 371 F.3d 557, 561-562 (9th Cir.2004) (observing that a family planning provider could not be prosecuted under 18 U.S.C.A. §2422(b) unless it knew that it was persuading minors to engage in illicit sexual conduct).

Further, the method of enforcement or the location of enforcement plays no role in a determination of whether the statute unconstitutionally chills speech. The statute does not target speech in adult chat rooms or any other specific location. The fact speech criminalized by section 16-15-342 occurs in locations where other speech may occur does not render the statute unconstitutional because of a "chilling effect." Consensual speech between adults will still be allowed and is not "chilled" by criminalizing speech intended to harm a minor. Only speech in the adult chat room that occurs between an adult and someone he "knowingly contacts or communicates with, or attempts to contact or communicate with, . . .[a person] who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity . . . or violent crime" is criminalized by the statute." The kind of inimical speech engaged in by Appellant with the thirteen-year-old persona created by Officer Patterson.

Section 16-15-342 of the South Carolina Code, as this Court previously found in Green, does not violate the First Amendment, and this same holding should apply to the

Free Speech Clause of the South Carolina Constitution. The statute does not criminalize protected speech and is narrowly tailored to address a compelling state interest, the protection of the state's children from sexual and other harmful solicitations. As in Green, this Court should conclude "the statute is not unconstitutionally overbroad as any alleged overbreadth is unsubstantial when considered in relation to 'its plainly legitimate sweep.'" Green, 397 S.C. at 278, 724 S.E.2d at 669.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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August 22, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Oconee County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case Tracking No. 2012-206186

The State, Respondent,

vs.

Anthony Clark Odom, Appellant.

PROOF OF SERVICE

I, William M. Blitch, Jr., certify that I have served the within Amended Initial Brief of Respondent and Amended Designation of Matter on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Brian McDaniel, Esquire
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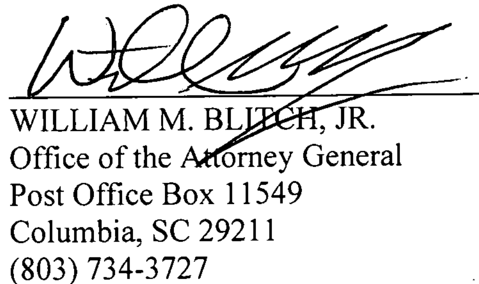
Beaufort, South Carolina 29901

I further certify that all parties required by Rule to be served have been served.
This 22nd day of August, 2013.



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