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IN THE

Supreme Court of Virginia

RECORD NO. 181033

ROBERT LEIGH STOLTZ,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF MATERIAL PROCEEDINGS

On July 20, 2015, Stoltz was charged with attempted indecent liberties with a minor and using a computer to solicit a minor for an incident that happened on November 4, 2014. JA 1. On November 19, 2015, Stoltz filed a motion asking that the court dismiss the solicitation charge because the language of the statute – "knew or *had reason to believe*" – was unconstitutionally vague and overbroad and violated his rights under the First and Fourteenth Amendments to the United States Constitution. JA 3-12 (emphasis added). The trial court denied this motion.

In February 2016, the case was tried by jury and ended in a mistrial because the jury could not reach a verdict. JA 270. On October 31, 2016, another jury was impaneled. On November 3, 2016, the jury found Stoltz guilty of using a computer to solicit a minor and acquitted him of attempted indecent liberties with a minor. JA 856. After less than eight minutes of deliberation, the jury recommended the mandatory minimum sentence of five years. JA 876-77. The trial court denied Stoltz's subsequent motion for a new trial that argued the statute was unconstitutional. JA 22, 883-89. The trial court imposed the mandatory minimum five-year sentence. JA 30.

Stoltz filed a timely notice of appeal in the circuit court and petition for appeal in the Court of Appeals. JA 33. The court granted Stoltz's petition but on June 19, 2018, denied Stoltz's appeal. JA 36-47. Stoltz filed a timely petition for rehearing and on July 10, 2018, the court denied the petition for rehearing. JA 48. On July 16, 2018, Stoltz filed a timely notice of appeal in the court of appeals. JA 49. On February 6, 2019, this Court awarded Stoltz an appeal. This timely brief follows.

ASSIGNMENT OF ERROR

The Court of Appeals erred in affirming the trial court's error of not finding Va. Code § 18.2-374.3 either unconstitutional facially or as applied in violation of the First Amendment and the Due Process clause of the Fourteenth Amendment to the United States Constitution, where there is no child involved, Stoltz reasonably, objectively and correctly believed that the "child" was actually an adult, the jury indicated they believed him, and yet the jury instructions allowed a guilty verdict despite his actual belief.

(Preserved by Stoltz's: November 19, 2015 Motion to Dismiss, JA 3; motion and argument heard on December 4, 2015, JA 53-79; proposed jury instruction G, JA 19; argument on November 2, 2016, JA 643-44; and February 9, 2017 Motion for a New Trial, JA 22); and in the Court of Appeals JA 38-47.

STATEMENT OF FACTS

The Commonwealth's Case

On November 4, 2014, Detective Allbritton of the Fairfax County Police Department's child exploitation unit accessed Craigslist's section for adult-only 'casual encounters.' JA 275, 277. The adult section classifieds require verification that the user is over age eighteen prior to accessing the ads. JA 275, 379. Allbritton initiated contact by replying to Stoltz's post titled, "Can I cum on you, quick shot and heavy load, male for female or man for woman, thirty-four, Northern Virginia." JA 279.

Allbritton and Stoltz initially communicated anonymously via Craigslist generated emails. JA 280-81. In Allbritton's initial email to Stoltz he stated:

> hi, I'm bored, and off of school today, but I'm only thirteen. I know I shouldn't be in there, but I thought your was like cool and stuff [sic], so I thought I'd say hi. I have a pic if you want. If I'm too young, that's okay, and I won't bother you. I can't believe I'm sending this email, Annie.

JA 283. They continued to communicate and Allbritton then sent Stoltz a photo of a 25-year-old Fairfax County Animal Control Officer, and Stoltz responded, "you're very cute." JA 285, 567. At that point they had been communicating about 45 minutes off and on and there

had been no solicitation. JA 388-90. Allbritton asked for a photo of Stoltz and he sent a photo of the actor Joshua Jackson. Allbritton exclaimed "hee hee, you look like the guy from Mighty Ducks." JA 295, 411, 467. The film "Mighty Ducks" came out in 1992. JA 411, 420. Allbritton admitted that after about an hour of conversation he had no idea whether Stoltz believed he was a 13-year-old girl. JA 396. He agreed people sometimes lie about their age in the Craigslist personal section. JA 422.

Allbritton shifted the conversation to Yahoo Messenger using the email address lilannie133@yahoo.com. JA 274, 393, 403. Stoltz googled Littleannie133 and discovered that it had been used several times and in several forums since March of 2013, confirming his suspicions that he was being "scammed." JA 455-57, 461. "Annie" insisted on a phone call, so "Annie" attempted to call Stoltz three times, resulting in a phone conversation during which Detective Wagner, a 39-year-old woman, spoke to Stoltz as "Annie." JA 299, 423.

The Detectives and Stoltz texted about meeting at a Wal-Mart Garden Center in Fairfax County. JA 285-86, 301, 303. Stoltz went to the Wal-Mart but never attempted to meet with "Annie." JA 314-15.

As he left the shopping center Fairfax County officers, including Allbritton, conducted a traffic stop. JA 315. Detective Allbritton told Stoltz why he was there, and Stoltz said he had no clue what he was talking about. JA 316. Stoltz provided Allbritton with permission to look through his cell phone. *Id.* The search of Stoltz's vehicle revealed no condoms, lubricant, or sex toys, despite the fact that "Annie" requested he bring condoms. JA 424-25, 446. Stoltz was released without further incident.

Stoltz was arrested a week later, on November 11, 2014, and was interrogated by Detective Allbritton. Stoltz acknowledged during the interrogation that he was the author of the Craigslist ad. JA 323. Stoltz maintained the he only sought an adult, and knew the person he was communicating with was an adult and thought the person was "scamming" him. JA 455. Stoltz told Detective Allbritton that he had seen "littleannie133" on prior unrelated internet posts and forums going back for several years, that he immediately Googled the name once in Yahoo Chat, and so he knew a scammer was behind this. JA 455-61.

During the call with 39-year-old Detective Wagner, she said she was 13 years old and Stoltz laughed. JA 523. Wagner proposed

meeting at “Annie’s” house but Stoltz declined and they agreed to meet at Wal-Mart. JA 519. Like Detective Allbritton, Wagner agreed, based on her familiarity with Craigslist and the personal section, that people often stay anonymous and they may use different phone numbers or email addresses because they do not want other people in their lives finding out they frequent the Craigslist personal section. JA 524-25. Wagner is familiar with the notion of role-playing in the course of her investigations. JA 525. The court denied Stoltz’s motion to strike after the Commonwealth rested. JA 553-62.

Stoltz’s case

An expert in internet solicitations of minors testified that the conversational tone and pace of communication should be set by the target of the investigation – not the investigator, which is what happened in this case by Allbritton. JA 582-85. The target should initiate the transfer of photos, discussions on what they want to do, and where to meet. *Id*.

Stoltz testified in his defense. Stoltz explained that the “casual encounters” section of Craigslist is a no-strings-attached section where people can feel free to express themselves and engage in fantasy and role playing. JA 595. Thus, identifying information is not

expected to be accurate. *Id.* His own post contained an inaccurate age, a photo of another man, and left out his address and name. JA 595, 597-98. Stoltz unequivocally was not seeking a minor or any individual under age eighteen. *Id*. Stoltz received many responses to his ad, most were people "phishing," meaning they were individuals seeking his personal information to sell to marketers. JA 600-01. He also received vague responses where the communication dwindled, or ended up being a man seeking another man, and responses that were automated. JA 601-02.

"Annie's" first email offered a photo, which was unusual in the casual encounters section. JA 606. Stoltz knew "beyond a shadow" of a doubt from the very first email that "Annie" was not 13 years old. JA 715. Stoltz believed the sender was either playing around or phishing for information. JA 607. The photo "Annie" sent to Stoltz was indisputably an adult woman. JA 608. After receiving the photo, Stoltz initially thought he was talking to somebody with a fetish since the photo was of an adult. *Id.* "Annie's" recognition of the photo Stoltz sent from a movie from the early 90's reinforced his belief that the person he was communicating with was around his age. JA 626-27.

It was also obvious to Stoltz that he was communicating to an adult based on the voice of the 39-year-old detective he spoke to. JA 632. Further, the tone and conversation with the 39-year-old detective was "completely different to the text messages and email" reinforcing his believe that he was speaking to an adult. *Id.* The emails at first contained misspellings and cutesy language, then the spelling errors vanished from the messages. JA 632-33. On the phone call, Detective Wagner referred to Stoltz as "Robert," the cutesy language again vanished, and she reasoned and talked things out. JA 633. Stoltz's takeaway from the phone conversation was that there was definitely more than one person involved in this adult scam given the disjointed and repetitive nature of the conversation. JA 617, 660.

Regarding the visit to Wal-Mart, Stoltz went into Wal-Mart after realizing he could cross some items off his to-do list and spoke to a sales-associate about "fall fertilizer," but Wal-Mart did not have any in stock. JA 671-72. Stoltz was driving a different vehicle, a white BMW SUV, and wearing different clothes than he had identified to "Annie." Because he had "no intentions of meeting anybody." JA 670, 677.

The court denied Stoltz's renewed motion to strike. JA 763, 767.

The Court's Instructions and Closing Arguments

The court denied Stoltz's proffered defense instruction G. JA 642-44. The critical difference between Commonwealth's instruction 17 and Stoltz's instruction G is the language "to know or have reason to believe" versus "to know or believe." JA 19, 643.

During closing, both sides focused on the critical issue: "reason to believe." Stoltz illustrated one of the problems of the "know or has reason to believe" instruction by telling the jury "my name is Judge Penny Azcarate…Okay, I told you that...you've got a reason to believe it now." JA 793-94. On rebuttal, the Commonwealth asserted that Stoltz had "reason to believe" Annie was 13 years old because she "told him she was 13 years old." JA 839.

During deliberation the jury asked for clarification about the exact meaning of "had reason to believe in the context of a minor or not…Specifically, does he have to find the reason credible in order to have reason to believe." JA 847. Defense counsel argued the reason must be a credible reason. JA 848. The court answered the jury "I direct you to look at all the instructions of law that have been given to you in this matter." JA 849.

The jury returned with a verdict of guilty as to Count 1, using a computer to solicit a minor, and not guilty as to Count 2, attempted indecent liberties with a minor. JA 856.

On February 9, 2017, Stoltz filed a motion for a new trial because the jury misunderstood the jury instruction "reason to believe." The motion added that post-trial juror interviews revealed that the jury was confused as to whether the jury instruction meant what Stoltz believed or whether he had *any* reason to believe that the victim was 13 years old. JA 22-24. The court denied the motion.

ARGUMENT

The court of appeals erred in affirming the trial court's error of not finding Va. Code § 18.2-374.3 either unconstitutional facially or as applied in violation of the First Amendment and the Due Process clause of the Fourteenth Amendment to the United States Constitution, where there is no child involved, Stoltz reasonably, objectively and correctly believed that the "child" was actually an adult, the jury indicated they believed him, and yet the jury instructions allowed a guilty verdict despite his actual belief.

Standard of Review

Constitutional arguments are questions of law that this Court reviews *de novo*. *Montgomery Cty. v. Va. Dep't of Rail & Pub. Transp.*, 282 Va. 422, 435 (2011). All actions of the General Assembly are presumed to be constitutional. *Id.* This Court looks at

the evidence in the light most favorable to Stoltz, the proponent of the refused jury instruction. *Lynn v. Commonwealth,* 27 Va. App. 336, 344 (1998) (internal citation omitted); *Commonwealth v. Vaughn* 263 Va. 31, 33 (2002).

Legal Analysis

Stoltz was charged with, *inter alia*, soliciting a child with a communications system, which provides that:

> It is unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any person he *knows or has reason to believe* is a child younger than 15 years of age . . .

Va. Code § 18.2-374.3(C) (emphasis added).

(a) Existence of a *mens rea* requirement is fundamental to due process, with few exceptions

Typically, criminal offenses require both a volitional act and a criminal intent – a *mens rea*. Wayne R. LaFave, *Criminal Law* § 5.1, at 253 (5th ed. 2010). A statute imposes strict liability when it dispenses with *mens rea* by failing to "require the defendant to *know* the facts that make his conduct illegal." *Staples v. United States*, 511

U.S. 600, 606 (1994) (emphasis added).[2] In *Staples*, the Court rejected the Government's argument that a federal statute criminalizing possession of an unregistered machine gun did not require the prosecution to prove that the defendant knew the weapon he possessed had the characteristics that made it a machine gun. *Staples,* 511 U.S. at 602 (citing *Morissette v. United States*, 342 U.S. 246, 250-51 (1952)).

The Court recently extended this rule in *Elonis v. United States*, 135 S. Ct. 2001 (2015), finding that with a statute prohibiting communication of threats in interstate commerce, the government was required to prove that the defendant *intended* to issue threats or *knew* that communications would be viewed as threats. *Elonis* noted that:

> [A] "reasonable person" standard is a familiar feature of civil liability in tort law, but is inconsistent with "the conventional requirement for criminal conduct - *awareness* of some wrongdoing." . . . Having liability turn on whether a "reasonable person" regards the communication as a threat - regardless of what the defendant thinks – "reduces culpability on the all-important element of the crime to negligence," . . . and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes."

Id. at 2011.

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[2] *See also State v. Moser*, 884 N.W.2d 890, 896 (Minn. Ct. App. 2016).

Historically, there were few examples of criminalizing behavior without a *mens rea* requirement. *Morissette*, 342 U.S. at 254. But with social changes, some "public welfare" offenses were subject to criminal penalty under the legal theory of strict liability. *Id.* at 255. Numerous statutes that courts have found not to involve the "public welfare" have been struck down for lack of a sufficient *mens rea*. *See generally*, *Staples*, 511 U.S. at 619; *In re Welfare of C.R.M.,* 611 N.W.2d 802, 810 (Minn. 2000). The *sine qua non* of a public welfare offense are those that place defendants on notice of strict regulation, carry only minimal penalties, and do not subject a defendant's reputation to serious damage. *Morissette*, 342 U.S. at 255-56.

The few select crimes, in addition to public welfare offenses, that have been excluded from the normal *mens rea* requirement are those that make it reasonable to charge the defendant with knowledge of the facts that make the conduct illegal. The classic example is prohibiting sexual conduct with children below the age of consent, where the defendant comes "face to face with the victim and is therefore presumed to be able to ascertain the victim's age." *Moser*, 884 N.W.2d at 899 (citing *Morissette*, 342 U.S. at 251 n.8).

Strict liability has been accepted in only these two narrow areas. *See e.g., Moser*, 884 N.W.2d at 899.

(b) Virginia stands alone in using the vague and overbroad *mens rea* of "reason to believe" without jurisprudential limitation

Virginia and Wisconsin are the only two states in the nation that criminalize internet solicitation of a child with a *mens rea* that fails to require that the defendant himself at least know or believe that the "victim" is a minor.[3] Wisconsin uses "believes or *has reason to*

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[3] *See* Ala. Code § 13A-6-122 (2017); Alaska Stat. § 11.41.452 (2016); Ark. Code Ann. § 5-27-306(a)(1)-(2) (2016); Az. Rev. Stat. Ann. § 13-3560(A); Cal. Pen. Code § 288.2(a) (2016); Colo. Rev. State. Ann 18-3-306(1) (2016); Conn. Gen. Stat. Ann. § 53a-90a(a) (2016); De. Code Ann. Tit. 11, § 1112A(a)-(b) (2017); D.C. Code § 22-3010.02(a) (2017); Fla. Stat. Ann. § 847.0135(3) (2017); Ga. Code Ann. § 16-12-100.2(d) (2016); Haw. Rev. Stat. Ann. § 707-757 (1) (2017); Idaho Code Ann. § 18-1509A(1) (2017); 720 Ill. Comp. Stat. Ann. § 5/11-6(a-5) (2016), 730 Ill. Comp. Stat. Ann. § 5/11-6.6(a) (2016); Ind. Code Ann. § 35-42-4-6(b) (2017); Iowa Code Ann. § 710.10(1)-(4) (2017); Kan. Stat. Ann. § 21-5509(a)-(b) (2017); Ky. Rev. Stat. Ann. § 510.155(1) (2017); La. Stat. Ann. § 14:81.3(A) (2017); Me. Rev. Stat. Ann. Tit. 17, § 259-A (2017); Md. Code Ann., Crim. Law § 3-324(a)-(b) (2017); Mass. Ann. Laws ch. 265, § 26C (2017); Mich. Comp. Laws Serv. § 750.145d(1) (2017); Minn. Stat. Ann. § 609.352(2a) (2017); Miss. Code Ann. § 97-5-27(3) (2017); Mo. Rev. Stat § 566.151(1) (2017); Mont. Code Ann. § 45-5-625(1)(c) (2017); Neb. Rev. Stat. Ann. § 201.560(1) (2017); N.H. Rev. Stat. Ann. § 649-B:4(I) (2017); N.J. Stat. Ann. § 2C:13-6(a) (2017); N.M. Stat. Ann. § 30-37-3.2(A) (2017); N.Y. Penal Law § 235.22 (2017); N.C. Gen. Stat. Ann. § 14-202.3(a) (2017); N.D. Cent. Code § 12.1-20.05.1 (2017); Ohio Rev. Code Ann. § 2907.07 (2017); Okla. Stat. Ann. tit. 21, § 1123 (A)(1) (2017); Or. Rev. Stat. Ann. § 263.432

believe," Wis. Stat. 948-075; and Virginia uses "knows or *has reason to believe*." Va. Code § 18.2-374.3(C). Wisconsin, however, has expressly recognized the constitutional infirmities that attach if the statute is applied as it was in Stoltz's case, and has interpreted its statute to prevent the unconstitutional application that happened here. *Stern v. Meisner*, 812 F.3d 606, 612 (7th Cir. 2016). Virginia thus stands alone in allowing a defendant to be convicted even if the jury finds he did not believe that the victim was a minor, rendering Virginia Code § 18.2-374.3 unconstitutional as applied to Stoltz. Even though no child was involved, and Stoltz reasonably, objectively, and correctly believed that the "victim" was an adult, the jury nevertheless was allowed to find him guilty because the statute used a *mens rea* that was overbroad and criminalized innocent conduct.

The vagueness and overbreadth of the Virginia statute is readily apparent when compared with a recent case dealing with Wisconsin's comparable statute. In *Stern v. Dittmann*, No. 13-CV-

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(2017), Or. Rev. Stat. Ann. § 263.434 (2017); 18 Pa. Cons. Stat. Ann. § 6318(a) (2017); 11 R.I. Gen. Laws § 37-8.8 (2017); S.C. Code Ann. § 16-15-342(A) (2017); S.D. Codified Laws § 22-24A-5 (2017); Tenn. Code Ann. § 39-13-528(a) (2017); Tex. Penal Code § 33.021(a)(1) (2017); Utah Code Ann. § 76-4-401(2) (2017); Vt. Stat. Ann. tit. 13, § 2828 (2017); Wash. Rev. Code Ann. § 9.68A.090 (2017); W. Va. Code Ann. § 61-3C-14b(a) (2017); Wyo. Stat. Ann. § 6-2-318 (2017).

1376, 2015 U.S. Dist. LEXIS 47138, at *1 (E.D. Wis. Apr. 10, 2015), Stern posted a Craigslist ad in the personal's section entitled "Coach seeking boy." An undercover detective posed as a fourteen-year-old boy and exchanged numerous messages with Stern claiming he was fourteen. *Id.* at 2. The undercover detective emailed a picture of a himself *as a child* to Stern. At an arranged meeting at a McDonald's detectives arrested Stern and found a box of condoms and sexual lubricant. Stern's defense was that he knew the "victim" was an adult and did not expect to meet a minor. Stern challenged the jury instruction that used the language "reason to believe" the victim was a minor, rather than actual belief that the "victim" was a minor. *Id.* at 2-3. Stern's motion was denied, he was convicted and lost on appeal.

Stern filed a federal habeas petition challenging, *inter alia*, the constitutionality of the language "reason to believe." The federal district court denied his claim, finding that the state court interpreted its statute such that "if a jury finds that a defendant actually (and correctly) believed the person with whom he was communicating was an adult, it could not find the defendant had reason to believe he was communicating with a minor." *Id.* at 13-14. Stern appealed, arguing

that the "reason to believe" language allows a jury to find a defendant, who reasonably and correctly believed he was communicating with an adult, guilty. The Seventh Circuit rejected that argument, holding "*this result would never happen.* If the jury is convinced of the defendant's credibility and believes the adult defendant was communicating with a consenting adult, then the jury would be precluded from finding the defendant guilty." *Stern v. Meisner*, 812 F.3d 606, 612 (7th Cir. 2016) (emphasis added).

In Stoltz's case, however, the result that the Seventh Circuit stated "could never happen" under Wisconsin law not only was entirely possible, but in fact did happen. This impermissible possibility exists because Virginia does not have a limiting interpretation to make the statute constitutional: instead, in Virginia the jury is told that they merely need to find that a defendant had a "reason to believe" even if the defendant himself did not believe it to be true. As a result, Stoltz's jury was allowed to convict *even if they found that Stoltz believed* "Annie" was not a minor. Virginia's law thus runs headlong into the bedrock principle repeatedly recognized by the United States Supreme Court: an individual should not be convicted of a serious crime without a finding that the defendant

himself had a culpability justifying the stigma and punishment. *Morissette*, 342 U.S. 246; *Staples*, 511 U.S. 600; *Liparota v. United States*, 471 U.S. 419, 430 (1985); *Elonis*, 135 S. Ct. 2001. At least one circuit court in Virginia has recognized this, re-interpreting the statute to avoid an unconstitutional application by finding that the language "'has reason to believe' means 'believes' is a child.'" *Commonwealth v. Baggette*, Case No. FE-2005-1845 (Feb. 24, 2006, Ffx. Cir. Ct.) (J. Keith).[4]

(c) The "reason to believe" *mens rea* is vague and violates the Due Process clause

One can see how this bedrock principle invalidates a statute like Virginia's in another recent internet solicitation case in which the statute similarly did not allow a jury to adequately consider the defendant's *mens rea.* In *State v. Moser*, 884 N.W.2d 890 (Minn. Ct. App. 2016), the court found that eliminating a mistake-of-age defense and imposing strict liability, when applied to an alleged solicitation that occurred over the internet, involved no face-to-face contact between the solicitor and the child, and where the child represented to the defendant that she was 16, violated Due Process. *Id*. at 905-

[4] Pursuant to Supreme Court of Virginia Rule 5A:1(f), this unpublished decision has been filed with this brief.

06. The court held that the statute was not narrowly tailored to serve the state's compelling interest of protecting children from this kind of behavior. *Id.* at 902-03. In addition to finding that the statute was not narrowly tailored and thus overbroad, the court found that the statute's harsh penalties meant that the statute did not fit into the public welfare exception allowing a lack of a *mens rea*. *Id.* at 903. Further, the court found that the child-solicitation statute imposes an unreasonable duty on defendants to ascertain the relevant facts, because the solicitation is not in person. *Id.*

Finally, the court also found compelling as a basis to strike down the statute that the statute seemed to impose strict liability for "the inchoate nature of the crime of solicitation" over the internet. *Id.* at 904. Such acts are "incipient" acts, "in some degree ambiguous," that are only criminal because they are *likely* to lead to the commission of another offense. *Id.*

Similarly, Virginia's statute also does not narrowly tailor to the state's interest in protecting children, because its *mens rea* requirement, whether considered strict liability or negligence, encompasses lawful conduct. The Virginia statute certainly is not a

"public welfare" offense,[5] and in this case punished Stoltz even though he not only made an effort to ascertain the relevant facts, but did so successfully. Stoltz's conviction, therefore, is effectively one of strict liability because Stoltz had ample facts to determine – correctly – that "Annie" was an adult, including a picture and a conversation with an adult, and despite his correct conclusion he was held liable under the statute. *See Liparota v. United States*, 471 U.S. 419, 430 (1985) (Reversing defendant's conviction because, pursuant to the rule of lenity, defendant was entitled to a jury instruction placing the burden of proof on the government to show he intended to commit food stamp fraud. Otherwise the application of the statute, with a *mens rea* of "know," would impermissibly impose strict liability on defendants). This result is particularly abhorrent because of the inchoate nature of Stoltz's offense.

(d) The "reason to believe" *mens rea* is overbroad because it encompasses conduct protected by the First Amendment[6]

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[5] In this case, Stoltz was charged with what is undoubtedly a serious crime, punishable by five to thirty years imprisonment.

[6] The United States Supreme Court has explained that it has "traditionally viewed vagueness [Due Process] and overbreadth [First Amendment] as logically related and similar doctrines." *Kolender v. Lawson*, 461 U.S. 352, 358 n. 8 (1983).

Under the overbreadth doctrine, "[t]he showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate *all* enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'" *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (internal citations omitted) (emphasis in original). Thus, the statute in this case is both unconstitutional as applied to Stoltz and facially unconstitutional.[7]

In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Court ruled that the Communications Decency Act of 1996 ("CDA") was overbroad under the First Amendment because it prohibited internet users from communicating material deemed patently offensive to minors, which included speech that adults have a right to express. Likewise, in *PSINet, Inc. v. Chapman*, 167 F. Supp.2d 878 (W.D. Va. 2001), *aff'd* 362 F.3d 227 (4th Cir. 2004), the

[7] The Court of Appeals claimed that Stoltz "abandoned" his facial challenge at oral argument. Slip Op. at 1 n. 2. Stoltz did not abandon his facial challenge. When asked about the facial challenge at oral argument Stoltz merely replied that "I'm not reaching the facial challenge at all," intending to mean that at argument he was intending to spend his time on the as-applied challenge.

Fourth Circuit ruled that Va. Code § 18.2-391, a criminal statute penalizing material substantially similar to the CDA, violated the First Amendment because it was overbroad and criminalized protected adult speech.

The importance of interpreting Virginia's statute to comport with *Morissette*'s requirement that a statute include a *mens rea* capturing only truly culpable individuals is particularly important in the First Amendment context. In *United States v. X-Citement Video*, 513 U.S. 64 (1994), the Court found that a defendant had to *know* a minor was involved to be convicted under a statute punishing sexual depictions of minors "because nonobscene, sexually explicit materials involving persons over the age of 17 are protected by the *First Amendment*." *Id.* at 72. To avoid constitutional problems, therefore, the Court stated it would interpret the statute to avoid criminalizing otherwise innocent conduct by using the presumption of the scienter requirement articulated in *Morissette*, 342 U.S. 246, *Staples*, 511 U.S. 600, and *Liparota*, 471 U.S. 419. *Id.* at 70-72. The Court held that "[i]n the light of these decisions," a defendant must *know* that the material contained explicit pictures of minors. *Id.* at 73; *see also United States v. Meeks*, 366 F.3d 705, 721 (9th Cir. 2004) (finding

that the federal statute criminalizing solicitation of minor's using the internet was not overbroad because it required that the defendant "actually know or believe" that the target of inducement was a minor).

The Supreme Court's conclusion equally applies to Virginia's statute where the constitutionally protected solicitation of an adult could be prosecuted under the statute because "reason to believe" is interpreted to allow a conviction even where the individual correctly believes that the person he is soliciting is not a minor.[8]

(e) The "reason to believe" *mens rea* is unconstitutional as applied to Stoltz

In the present case, Stoltz placed an advertisement in the over-18 personal sections of Craigslist looking for an adult. A detective answered claiming he was a 13-year-old girl, but over the course of the internet communication the tone and conversation, especially comparing the difference between the text messages and the emails, and the change in language (both written and verbal) from cutesy to formal indicated to Stoltz that it was not, in fact, a 13-year-old girl, but

[8] In *Deecheandia v. Common*wealth, No. 1885-03-2, 2004 Va. App. LEXIS 266, at *6 (Ct. App. June 8, 2004), the Commonwealth's witness, a detective who often posed as a minor on the internet, testified that "'role-playing is very common' on the internet and that 'one of the more popular role-playing [sic] is people pretending to be younger than they are, women in particular.'"

a “scam.” When Stoltz googled the email address used by the detective, he discovered it had been used and recognized online for over two years, again indicating to Stoltz that it was a scam and not a child. The detective provided Stoltz with a picture of “Annie” which was actually a 25-year-old woman. The detective had “Annie” call Stoltz using a 39-year-old female. Stoltz never was willing to actually meet “Annie” in person because he did not believe that it was a sexual encounter, but rather a scam. Thus, when he went to the Wal-Mart he did not bring condoms, sex toys or lubricant, despite being requested by “Annie.” Nevertheless, despite Stoltz’s numerous requests to the trial court, illustrations of the vague and overbroad danger of the statutory language and the jury instruction in this situation, and despite that there was no minor involved and law enforcement literally presented to Stoltz an adult as “Annie,” the jury was instructed to find Stoltz guilty if there was any “reason to believe” . . . “Annie” was a child. And under the instructions given, because the detective stated that “Annie” was 13 years old, no matter how little credibility that assertion held, and regardless of the jury’s belief that Stoltz recognized the statement as false, a conviction was assured because there existed some “reason to believe.”

Predictably the jury was confused given that Stoltz had overwhelming evidence that "Annie" was not a child and yet their given jury instruction did not seem to allow the jury to take that highly relevant fact into account. Thus, the jury asked the very question that Due Process requires: "does he have to find the reason credible in order to 'have reason to believe it?'"[9] But instead of answering "yes" as the Supreme Court has recognized is the correct answer under a century of criminal law jurisprudence, the trial court referred the jury back to the unconstitutional instruction, and the jury convicted. That this was the jury's concern, and the vague and overbroad "reason to believe" language was the clear cause of Stoltz's conviction, is made even more obvious by the jury's split verdict. Stoltz was charged with both computer solicitation of a child and attempted indecent liberties with a child. Both have virtually the same elements, except for intent. JA 772-74. While computer solicitation has a *mens rea* of "reason to believe," JA 772, attempted indecent liberties has a *mens rea* of "knowingly and intentionally attempted to commit the . . . acts with a

[9] While this Court has on occasion found jury questions irrelevant, it has found jury questions important in one particular context: when the jury asks about an incorrect jury instruction. *Orthopedic & Sports Physical Therapy Associates, Inc. v. Summit Group Properties, LLC*, 283 Va. 777, 785 (2012) (finding improper jury instruction not harmless because the jury asked about it).

child." JA 773. The jury found Stoltz guilty of the former and not guilty of the latter.

The United States Supreme Court has stressed that unlike sufficiency of the evidence issues, where a court is to take the evidence in the light most favorable to the government, the constitutional touchstone for a challenged jury instruction is the "reasonable juror." Indeed, where a reasonable juror could have understood a jury instruction in either an unconstitutional or constitutional manner, reversal is mandated because we cannot know which interpretation was used.

In *Sandstrom v. Montana*, 442 U.S. 510 (1979), Sandstrom challenged as unconstitutional the jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts," as a violation of his due process rights. *Id.* at 512. In evaluating the constitutionality of the jury instruction, the Court asked whether "a reasonable juror *could have* given the presumption conclusive or persuasion-shifting effect . . . ." *Id.* at 519. And because of the "*possibility*" that the jurors proceeded on an incorrect interpretation, the instruction was unconstitutional. *Id.* (emphasis

added). The point is not the burden shifting instruction,[10] but the Supreme Court's analysis of asking whether a jury "could have" interpreted its instruction the wrong way, and if that there is any "possibility" that they could have, then the conviction must be reversed.

In *McDonnell v. United States*, 136 S. Ct. 2355 (2016), McDonnell was prosecuted for committing an "official act" in exchange for payment. A main dispute at trial was the definition of "official act." The Court noted its concern that "under the Government's interpretation, the term 'official act' is not defined . . . 'in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Id.* at 2372-73 (citations omitted). The Court noted that without definition or qualification, the term was over-inclusive. *Id.* at 2374. The Court concluded that the instruction was unconstitutional because it "is *possible* the jury thought that a typical meeting, call, or event was itself a 'question, matter, cause, suit, proceeding or controversy.' If so, the jury *could have* convicted Governor McDonnell without finding that he committed or agreed to commit an 'official act,' as properly defined." *Id.* (emphasis added). To

[10] The Court of Appeals misunderstood the purpose of this analysis, Slip Op. at 9.

prevent this problem, the Court ruled that the trial judge should have instructed the jury on a more restrictive definition. *Id*.

Importantly, the *McDonnell* Court did not view the evidence in the light most favorable to the Commonwealth, acknowledging that the evidence was sufficient for a finding of guilt and under a more limited and constitutional definition McDonnell might still be guilty. Instead, the Court noted that while the jury may have correctly found McDonnell guilty "*it is also possible that the jury convicted Governor McDonnell without finding* that he agreed to make a decision or take an action on a properly defined 'question, matter, cause, suit, proceeding or controversy.'" *Id.* at 2374-75 (emphasis added).

The lessons of *Sandstrom* and *McDonnell* for this case are directly applicable. The trial court should have instructed the jury that it could only find Stoltz guilty if it found that *Stoltz believed* the target was a juvenile. Because the instruction was not given as requested, a reasonable juror not only "could have" convicted Stoltz without finding that he believed the target of his communication was a minor, but it appears likely the jurors in this case did so. Because a reasonable juror could have convicted Stoltz under the trial judge's vague and overbroad instruction even though Stoltz reasonably,

objectively, and correctly believed the target was an adult, the statute as applied to Stoltz is plainly unconstitutional.

(f) The Court of Appeals was incorrect

The Court of Appeals incorrectly treated the issue raised as a sufficiency of the evidence issue[11] and ignored and failed to address the issue that Stoltz raised: that the statute is unconstitutional as applied to him because the jury *could have* found that Stoltz himself did not believe the target was a minor, *but still have convicted him*. Rather than discuss or analyze whether the language "reason to believe" is so vague or overbroad as to allow a reasonable juror to *both* find that Stoltz did not believe the target was a minor, but *still* find him guilty because there was a reason to believe the target was a minor, the court started its analysis by incorrectly concluding that "the jury rejected appellant's explanation that he thought he was communicating with an adult, not a minor." Slip Op. at 8; *see also Id.* at 9 ("the jury determined that appellant knew or had reason to

[11] Slip Op. at 7 ("the credibility of his assertion was a factual determination properly made by the jury"); Slip Op. at 8 ("the record is replete with evidence supporting the jury's conclusion."); Slip Op. at 9-10 (Appellant's contention that the statute is unconstitutional as applied to him requires us to find the jury's factual determination concerning his credibility was 'plainly wrong or without evidence to support it.'").

believe he was communicating with a minor, and therefore, no constitutional right was implicated.”). The Court of Appeal’s analysis of *McDonnell*, 136 S. Ct. 2355, is illustrative of the problem. The court found that *McDonnell* “differs” in some way, but failed to explain how or why the *McDonnell* analysis is not applicable. The court noted that the *McDonnell* court found the jury instruction in that case overbroad. Slip Op. at 9. And then instead of explaining whether the “reason to believe” language is vague or overbroad, the court *assumed* it is not overbroad and skipped straight to a sufficiency of the evidence analysis. *Id.*

To uphold Stoltz’s conviction is to allow someone to be convicted of the grave felony of soliciting a minor even where the defendant knows that the very gravamen of the offense – that the victim who he is soliciting is a minor – is not true. The Court in *McDonnell* declined to rely on “Government discretion” to protect against overzealous prosecution, concluding instead that a statute that “can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.” *McDonnell*, 136 S. Ct. at 2372. Similarly, such a vague and overbroad application of the statute in this case cannot stand.

CONCLUSION

Stoltz requests that this Court reverse the erroneous ruling of the Court of Appeals and the trial court and dismiss the case against Stoltz or remand this case for a new trial.

Respectfully
Submitted,

ROBERT STOLTZ
By counsel

/s/ Jonathan Sheldon

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Counsel for Appellant

CERTIFICATE OF SERVICE
IN COMPLIANCE WITH RULE 5:26 OF THE SUPREME COURT

1. The appellant's name is Robert Stoltz. He is currently incarcerated at Coffeewood Correctional Center, 12352 Coffeewood Drive, Mitchells, VA 22729.
2. Counsel for the appellant is Jonathan P. Sheldon, Esq. and Thomas Walsh, Esq. Mr. Sheldon's address is Sheldon, Flood & Haywood, PLC, 10621 Jones Street, Suite 301-A, Fairfax, VA 22030. His telephone number is (703) 691-8410 and his email address is jsheldon@sfhdefense.com. His fax number is (703) 251-0757. His Virginia State Bar Number is 66726. Mr. Walsh's address is 10605 Judicial Drive, Suite A-5, Fairfax, VA 22030. His phone number is (703) 934-9191. His fax number is (703) 934-1004. His Virginia State Bar Number is 36363. His email address is tw@pw-lawfirm.com.
3. The appellee is the Commonwealth of Virginia. Counsel for the appellee is Matthew McGuire, Principal Deputy Solicitor General, Office of the Attorney General, 202 North 9th Street, Richmond, Virginia 23219, (804) 786-7773, email: MMcGuire@oag.state.va.us.
4. Counsel filed by hand three copies of this brief with the Clerk of the Court, Supreme Court of Virginia, 100 North Ninth Street, Richmond, VA, 23219, and emailed a copy to Matthew McGuire, Principal Deputy Solicitor General, Office of the Attorney General, 202 North 9th Street, Richmond, Virginia 23219, (804) 786-7773, email: MMcGuire@oag.state.va.us, this 18th day of March, 2019.
5. Counsel for the Appellant is privately retained.
6. Counsel certifies that this brief is less than 50 pages in length.
7. Counsel certifies that this brief and certificate is in compliance with Rules 5:6 and 5:26.

/s/ Jonathan Sheldon

Jonathan P. Sheldon

Attachment

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Commonwealth of Virginia
Plaintiff / Complainant

V.

Mark Russell Baggette
Defendant

Case No. FE-2005-1845

ORDER

This cause came to be heard on the 24 day of Feb, 2006, on the Plaintiff's / Defendant's motion ~~for~~ to dismiss, or, in the alternative strike unconstitutional provision.

Upon the matters presented to the Court at the hearing, it is **ORDERED** as follows: Va Code §18.2-374.3 is ~~[illegible]~~ not unconstitutionally overbroad or vague. The phrase "... has reason to believe" means "believes" is a child..." Therefore, the statute does not infringe on constitutionally protected speech

A COPY TESTE:
JOHN T. FREY, CLERK
BY: [signature]
Deputy Clerk
Date: 6/28/07
Original retained in the office of the Clerk of the Circuit Court of Fairfax County, Virginia

C
2-27

Entered this 24 day of Feb, 2006

[signature]
Judge

Commonwealth does not agree that "has reason to believe" should be defined as "believes" to the jury.

SEEN: AND OBJECTED TO:
Kate Eckert
Counsel for ~~Plaintiff~~ (s) Commonwealth

OBJECTED TO
[signature]
Counsel for Defendant (s)
STATUTE IS UNCONSTITUTIONAL AS BEING BOTH OVERBROAD AND VAGUE.

If court's ruling is interpreted to strike "has reason to believe" and substitutes "believes" in the indictment or jury instructions, statute is constitutional because this is a possible interpretation of that language.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

December 19, 2005

COMMONWEALTH OF VIRGINIA	)	
	)	INDICTMENT FOR USING A
vs.	)	COMPUTER TO SOLICIT A
	)	MINOR
MARK RUSSELL BAGGETTE	)	

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Fairfax, and now attending the said Court at its November Term, 2005, charges that: On or about the 16th day of August, 2005, and continuing through the 17th day of August, 2005, in the County of Fairfax, Mark Russell Baggette, a person over the age of eighteen (18) years of age, feloniously used a communications system or other electronic means for the purpose of soliciting a minor for activity in violation of §18.2-361 or §18.2-370, knowing or ~~having reason to know~~ believing that such person was a minor.

MLK

Va. Code §18.2-374.3

A True Bill ✓

No True Bill _____

FOREMAN

Witnesses subpoenaed, sworn and available to testify before the Grand Jury:

Det. C. R. Paul, Fairfax County Police Dept.

A COPY TESTE:
JOHN T. FREY, CLERK
BY: _____
Deputy Clerk
Date: 6/28/17
Original retained in the office of the Clerk of the Circuit Court of Fairfax County, Virginia