IN THE CIRCUIT COURT FOR THE
TWENTY-SECOND JUDICIAL CIRCUIT
ST. LOUIS CITY
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	Case No. 1822-CR00642
ERIC GREITENS	)	
	)	
Defendant.	)	

DEFENDANT ERIC GREITENS' MOTION TO
DISMISS AND MEMORANDUM IN SUPPORT

COMES NOW Defendant Eric Greitens, through counsel and moves the Court to dismiss this case. In support of this Motion, defendant's counsel states as follows.

Counsel has been led to believe that there is being presented today an indictment against Defendant alleging violation of either § 565.253.1(1) RSMo. (2015), or § 565.252.1(1) RSMo. (2015). These statutes have a very narrow application which does not and cannot apply to the conduct alleged.

Missouri has adopted a law directed at invasions of privacy. The law prohibits photographs or videotaping by third-parties who take photographs or videotapes in locations where a person is in a partial or full state of nudity and where the victim does not believe he or she is being viewed by another. The law, then, applies to situations such as voyeurs or peeping toms who take photographs in locations such as restrooms, tanning

beds, locker rooms, changing rooms, and bedrooms. The law does not apply to the participants in sexual activity.[1]

No appellate case law exists approving criminal convictions where individuals involved were jointly participating in sexual activity. Nor has case law ever affirmed a conviction where the "victim" was in the home of the other person to engage in private sexual activity with that other person. The background behind the adoption of the statute and its text make clear that it does not apply to the actual participants in joint sexual activity. Any effort to apply it to a situation between two people engaged in consensual sexual activity would be unprecedented, improper, and permit the criminalization of routine activity between consenting adults. It would also be open to abuse by vindictive third-parties.

A. The Statutory Text

Section 565.252.1 states:

> A person commits the crime of invasion of privacy in the first degree if such person:
>
> (1) Knowingly photographs or films another person, without the person's knowledge and consent, while the person being photographed or filmed is in a state of full or partial nudity and is **in a place where one would have a reasonable expectation of privacy**, and the person subsequently distributes the photograph or film to another or transmits the image contained in the photograph or film in a manner that allows access to that image via a computer

Ex. A, § 565.252.1(1) RSMo. (2015) (emphasis added). Similarly, Section 565.253.1 states:

> "A person commits the crime of invasion of privacy in the second degree if:

[1] The law requires a lack of consent and full or partial nudity. This memorandum does not address those elements, although any defendant would prevail in the absence of proof of those elements. Those elements are not discussed herein because the sole focus of this memorandum is the expectation of privacy element.

> (1) Such person knowingly views, photographs or films another person, without that person's knowledge and consent, while the person being viewed, photographed or filmed is in a state of full or partial nudity and is **in a place where one would have a reasonable expectation of privacy** …"

Ex. A-1, § 565.253.1(1) RSMo. (2015) (emphasis added).

The above emphasized text, "place where a person would have a reasonable expectation of privacy," is defined as "**any place where a reasonable person would believe that a person could disrobe in privacy, without being concerned that the person's undressing was being viewed, photographed or filmed by another**." Ex. B, § 565.250(3) RSMo. (2015), (emphasis added).[2] Regardless of the relationship between the parties (the impact of which is discussed in the following section), one cannot have an expectation of privacy in a common area of another person's home. In such a place there is an obvious expectation that one would be viewed by the person she is visiting, or even recorded on devices used for routine security. Not surprisingly, the statute does not criminalize such conduct.

B. The Statute Does Not Apply to Participants in Sexual Activity

Any attempt to apply this statute to prosecute a participant in sexual activity would be without precedent in reported Missouri legal decisions. It would be a complete overreach to attempt to apply the statute to a participant in sexual activity, and no decision in any Missouri appellate court has ever approved such a use of the statute. [3]

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[2] The invasion of privacy law was amended in 2014, effective January 1, 2017. As part of the amendment, § 565.253 was repealed and its substance was combined with § 565.252 and § 565.250 was repealed and its definitions were moved to § 565.002. The amendments related to invasion of privacy were not substantive and further support the idea that no crime is committed when a photograph of a person who knows he or she is being viewed by the photographer.

[3] The only reported decision affirming a conviction under this section of the statute involved an adult placing cameras in the bathroom of a home to videotape minors who were using the bathroom. State v. Browning, 357 S.W.3d 229 (Mo. App. 2012).

1. **<u>The Clear Statutory Text</u>**

When a person engages in sexual activity with another, there is no possible argument that either participant could be "without … concern[] that the person's undressing was being viewed" by another person. The whole point of the sexual activity is to be viewed by the other person and to jointly participate in private activity. Thus, the statute, by its terms, does not apply to a situation where the photographed party knows he or she is being viewed by his or her partner who takes the photograph. The Missouri General Assembly made this clear when it required that the "victim" reasonably believe that he or she was not being "viewed" by another person. There is <u>no</u> definition of "reasonable expectation of privacy" that would apply where the person is aware of being viewed by the other person but is not aware of the photograph. This limitation makes sense because of the potential for abuse and overreach that is obvious if a person could attempt to assert years later that a photograph was taken without consent even when the circumstances of the photograph (or the photograph itself) would clearly show no crime took place.

The statute clearly criminalizes <u>only</u> photographing or videotaping where a person does not believe he or she is being viewed by another. Thus, the statute clearly applies to prohibit wrongful conduct of the type where a person sets up cameras in restrooms, locker rooms, or dressing rooms or is photographing or filming a person from outside a private home and does not believe he or she is being viewed. But there is no doubt that for the provision at issue to apply the "victim" must not believe that he or she is being viewed by another person.

2. **<u>The Clear Purpose of the Statute is to Apply to Third Parties</u>**

Missouri's invasion of privacy law was originally passed in 1995 to "fill[] a void in Missouri law in that no statute **<u>covers the nonconsensual viewing of another person</u>** who is

nude or partially nude in an area that is reasonably believed to be private." Ex. C, Committee Bill Summary, H.B. 160 (1995), Invasion of Privacy, available at https://house.mo.gov/content.aspx?info=/bills95/bills95/HB160.htm (last visited Feb. 18, 2018). Thus, the law, from the very beginning, has been directed at the activities of people (peeping toms and voyeurs) of whom the victim is not aware.

According to the 1995 House Committee Bill Summary for HB 160, "[t]he 'Tanning Bed' cases in Buffalo, Missouri, were cited as glaring examples of this legal loophole" that the invasion of privacy law was intended to fix. Id. In 1994, a prosecutor in Buffalo, Missouri discovered a camera at a tanning salon where his wife was using a tanning bed. Ex. D, Jerry Nachtigal, Tanning Salon Owner Charged in Secret Nude Videotaping, Associated Press, July 18, 1994, available at http://www.apnewsarchive.com/1994/Tanning-Salon-Owner-Charged-in-Secret-Nude-Videotaping/id-bac9025d540b94e9f4d20600228f6d7f, (last visited Feb. 18, 2018). The Attorney General at the time said that charges were not immediately filed because Missouri had no law against secret videotaping. Id. The tanning salon owner was eventually charged under the state's child abuse statute when it was discovered that ten of the victims were under the age of 18. Id. Thus, from the very beginning, the statute has been directed at third-parties and not those who are engaged in face-to-face consensual sexual activities.

However, the statute, as originally drafted, inadvertently criminalized broader conduct. It initially defined the "place where a person would have a reasonable expectation of privacy" as "any place where a reasonable person would believe that he could disrobe in privacy, without being concerned that his undressing was being photographed or filmed by another." Ex. E, § 565.250 RSMo. (1996) (emphasis added noting the lack of 'viewed'). Thus, the law as initially

drafted appeared to have accidentally criminalized photographs and filming even between two participants in sexual activity.

Almost immediately, the law was amended to fix this error. In 1997, the law was changed to explain “that a place where a person has a reasonable expectation of privacy is any place a reasonable person would believe that he or she could disrobe in privacy, without being viewed, photographed, or filmed by another.” Ex. F, Introduced Bill Summary, H.B. 300 (1997), Places of Privacy, available at https://house.mo.gov/content.aspx?info=/bills97/bills97/HB300.htm (last visited Feb. 18, 2018). This clarification was accomplished by **“modif[ying] the definition of ‘place where a person would have a reasonable expectation of privacy’ by adding to what a reasonable person would believe about such a place that he or she was not being viewed by another person.”** Ex. F, Truly Agreed Bill Summary, H.B. 300 (1997), Invasion of Privacy (emphasis added); see also Ex. G, § 565.250 RSMo. (1998). This amendment, then, makes clear that the law is directed at third-party voyeurs filming or photographing people in places like restrooms, hotel rooms, changing rooms, locker rooms, and bedrooms.

If this statute were intended to apply to photographing by a person actively participating in sexual activity, there would have been no reason to amend the statute to make clear that the photographed person needed to "believe … that he or she was not being viewed by another person." Ex. F, Truly Agreed Bill Summary. There is no serious argument to be made that this statute applies where the photographed person was participating in sexual activity in the common areas of another person's home and a photograph was taken by the other participant. The law has never been so applied in any reported case in the more than 20 years it has been in force.

The interpretation described above is consistent with the long-held view of the purpose of the statute as being directed at voyeurs. See, e.g., Ex H, Morley Swingle & Kevin M. Zoellner,

Criminalizing Invasion of Privacy: Taking A Big Stick to Peeping Toms, 52 J. Mo. B. 345 (1996) (describing the statute as directed at "peeping toms" and "voyeurs."). The authorities that have considered the statute also interpret it as a voyeurism statute and not one designed to apply between consenting adults engaged in sexual behavior. See e.g., Ex. I, National District Attorney's Association, Voyeurism Compilation (Updated July 2010), available at http://www.ndaa.org/pdf/Voyeurism%202010.pdf (last visited Feb. 18, 2018); Ex. J, Clay Calvert, et al., Video Voyeurism, Privacy, And the Internet: Exposing Peeping Toms in Cyberspace, 18 Cardozo Arts & Ent. L.J. 469, 535-536 (2000) (describing § 565.252 as directed at peeping toms and voyeurs and observing that the text of Missouri's law does not apply where the victim knows he or she is being viewed by others even if not aware of the photograph).

3. All Doubts are Resolved in Favor of Narrow Interpretations

The statutory text is clear as discussed above and establishes that the law does not apply to participants in sexual activity. Regardless, any doubt about this issue will be resolved in favor of the interpretation described above. Any court interpreting this statute would determine the legislature's intent from the words used and their plain and ordinary meaning. State v. Power, 281 S.W.3d 843, 846–47 (Mo. App. E.D. 2009) (citing State v. Myers, 248 S.W.3d 19, 26 (Mo. App. E.D. 2008)).

If there is any ambiguity in the text, that ambiguity is construed against an expanded interpretation of the statute. Under long-settled Missouri law, “criminal statutes are to be construed strictly; liberally in favor of the defendant, and strictly against the state, both as to the charge and the proof.” State v. Dougherty, 358 Mo. 734, 741 (1949). “If a statute is ambiguous, and ‘the ambiguity cannot be resolved by resort to other canons of construction, the rule of lenity applies, and the statute must be interpreted in favor of the defendant.’” Turner v. State, 245

S.W.3d 826, 829 (Mo. banc 2008).

Thus, even if there was any doubt about legislative intent, that doubt would be resolved in favor of a narrow interpretation of the statute and would firmly establish that the law does not apply to persons engaged in consensual activity. The Court will interpret the statute to apply to voyeurs and "peeping toms" and not to participants.

4. The General Assembly Took a Different Approach to Non-Private Locations

Missouri has decided to protect a person from photography in a location where the photographed person knows other people can view them but may not be aware of a photograph being taken. This is the second section of R.S.Mo. 565.253.1, which protects people even when they know they are being viewed. The criminal conduct that is covered in non-private places, however, is narrow and does not apply to a person who has voluntarily participated in sexual activity. This statute limits criminal prosecution to situations where a hidden camera is used to film "under or through the clothing worn by [the] other person." Id. at § 565.253.1(2).

Indeed, in State v. Cerna, 522 SW.3d 373 (Mo. App. 2017), a police officer filmed adolescents while frisking them using a hidden camera. Because some of this filming was in public places (where the victims knew they were being viewed), the defendant was not charged under the provision quoted above and instead had to be charged with a separate provision that prohibited use of concealed cameras to film "under or through the clothing worn by that other person." Id.; see also Ex. A-1, § 565.253.1(2) RSMo. (defining separate crime). Thus, Missouri has well-defined rules and they prohibit any photographs of nudity where a person does not believe they might be viewed and they prohibit secret photographs where a person knows he or she is being viewed, but only if the photograph is taken under or through the clothing.

Accordingly, this case should be dismissed.

Dated: February 22, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via the Court's electronic filing system, this 22nd day of February, 2018.

/s/