IN THE SUPREME COURT OF OHIO

07-1006

STATE OF OHIO,	:	Case No. _____
Plaintiff-Appellee,	:	
v.	:	On Appeal From The Hamilton County Court of Appeals, First Appellate District
ROBERT J. ANDREWS A/K/A ROB ANDREWS	:	Court of Appeals Case No. C-060545
Defendant-Appellant.	:	Trial No. B-0411815

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT ROBERT J. ANDREWS

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents landmark and boundary-setting constitutional questions regarding just how attenuated speech and actions can be from the *actus reus* of a crime and still be punishable as a crime. More specifically, this case presents the issue of whether, under Ohio law and the federal and state constitutional protections to due process of law, can an attempt to attempt to commit a prohibited act still be considered a crime.

Additionally, this case raises the substantial and important public issue of how far the executive and judicial branches can go in interpreting and actively broadening the specific language of a criminal statute duly enacted by the legislature.

The law in Ohio is clear and explicit that, relevant to the instant case, the crime of importuning can only occur under one of two specific circumstances: an adult solicits sex over the Internet from either a child or else from a law enforcement officer that is posing as a child. R.C. 2907.07(D)(1) and (2). However, in the case *sub judice*, it is undisputed that the recipient of the solicitation was neither a minor nor a law enforcement officer, but an adult citizen acting under the auspices of the group "Perverted Justice."[1] As such, the Defendant-Appellant was charged with *attempted* importuning. However, the Ohio importuning law is already an attempt crime because the importuning statute criminalizes the *solicitation* of sexual activity with a minor, not the action of participating in sexual activity with a minor. Thus, essentially Mr. Andrews was charged with

[1]According to the Court of Appeals below, "Perverted Justice" is a group of private individuals "'dedicated to exposing adults who use the Internet to seek sexual activity with children.' The foundation recruits and trains *adult volunteers to pose as children* in Internet chatrooms." *Ohio v. Andrews* Opinion, at p. 2 (quoting *United States v. Kaye* (E.D. Va. 2006), 451 F.Supp. 2d 775, 777 n.3) (emphasis added).

an attempt to commit an attempt crime. Under the constitutional protections of due process and freedom of speech, such a result cannot stand.

If the resulting conviction in this case is upheld, and an attempt to attempt to commit a crime is deemed punishable as a criminal offense, then any two adults role playing as minors in a sexual scenario are committing a crime. Again, such a result simply cannot withstand constitutional scrutiny in light of the Supreme Court's *Ashcroft v. Free Speech Coalition* decision, discussed in more detail below, in which the Court held that if speech does not involve a real child, it cannot be punished as child pornography.

Furthermore, if the lower courts' decisions in this case are not overturned on due process grounds, and the attempted attempt to do an act is deemed sufficient to commit a crime, then, as was the case herein, any individual or group will be able to act as vigilantes, essentially turning the entire public of the entire state of Ohio into potential pseudo-police officers. This is especially troubling where the legislature has already spoken on the issue by explicitly limiting the circumstances under which the crime of importuning can occur. If the legislature wants to test the constitutionality of expanding the class of citizens who can be solicited in order to constitute importuning, then that is their prerogative. However, the prosecutors of the state of Ohio should not be allowed to unilaterally go beyond the scope of an unambiguous statute to create a crime, nor should the courts of this state condone such actions.

In sum, this case presents two significant constitutional questions: 1) whether a prosecution for attempted importuning is authorized by the relevant statute, and 2) whether an attempt to attempt can be punished as a crime consistent with the constitutional protections of free speech and due process. In addition, by virtue of the widespread media attention it has received and as a result of its unique facts, the case is one of great public interest in the State of Ohio. This Court should

therefore exercise its jurisdiction to ensure that criminal defendants, and particularly those whose cases present important social and cultural questions, are fairly and properly tried in this state within the bounds of the Constitution.

STATEMENT OF THE CASE AND FACTS

There was a solicitation for sexual activity via a chat room on the Internet from Andrews to an adult who was not a police officer, but was a private citizen acting with the group, "Perverted Justice."

As a result, Andrews was convicted in the Hamilton County Court of Common Pleas upon a plea of no-contest to attempted importuning and attempted tampering with evidence. As part of the plea bargain, Andrews was permitted to appeal the trial court's denial of his motion to dismiss the charge of attempted importuning.

On April 27, 2007, the Court of Appeals for the First Appellate District of Ohio affirmed.

Andrews now appeals to this Court to exercise jurisdiction to consider his appeal.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Attempted Importuning is Not a Crime.

Count Five of the Indictment charged Mr. Andrews with attempted importuning as defined by R.C. 2907.07(E), in violation of R.C. 2923.02(A), which is a misdemeanor of the first degree. While the Indictment did not allege whether Mr. Andrews was charged pursuant to (C) or (D) of R.C. 2907.07, the facts of the Bill of Particulars fall under section (D), which criminalizes the solicitation of sexual activity via a communication device, with a person between thirteen and sixteen years old, or with a law enforcement officer that is posing as someone between thirteen and sixteen, and whom the offender believes to be between thirteen and sixteen, if the offender is over eighteen. R.C. 2907.07(D). According to the Bill of Particulars,Mr. Andrews did not "chat" with

a law enforcement officer, but rather with an adult posing as a thirteen-year-old. Based on those facts, R.C. 2907.07(D) was not violated. Because there was no crime of importuning, the State charged Mr. Andrews with attempted importuning.

It is important to understand that the Ohio importuning law is an attempt crime. The importuning statute criminalizes the *solicitation* of sexual activity with a minor, not the action of participating in sexual activity with a minor. Based on this premise, it is difficult to understand the concept of *attempted importuning*, for that charge would be an attempt to commit an attempt crime. This questions the logic of the attempted importuning charges levied against Mr. Andrews.

Several Ohio cases have dealt with the issue of whether you can criminalize an attempt to attempt a crime. *State v. Anderson* (1979), 62 Ohio Misc. 1, 404 N.E.2d 176, held that the defendant in that case could not be charged with "attempted soliciting." The court analyzed both the prostitution statute (R.C. 2907.25) and the soliciting statute (R.C. 2907.24) and held that "the offense of 'soliciting' is in fact an attempt to engage in the offense of 'prostitution.'" The court reasoned that there are many legal actions like standing on a street corner or waiving at a passing car that could be construed by police as conduct that, if successful, would result in the offense of soliciting, but "this is clearly beyond the scope of constitutional permissibility and contrary to the intent of the legislature." *Id.* at 2-3. The *Anderson* case was followed by the Seventh District Court of Appeals in *SEO v. Austintown Township* (1998), 131 Ohio App.3d 521, 527, 722 N.E.2d 1090, 1094, wherein the court held that "[t]here is no such crime as attempted solicitation in the State of Ohio." The court agreed with the *Anderson* court's reasoning and stated that "[t]o permit 'attempted soliciting' would make it a crime to attempt to attempt to engage in the offense of prostitution." *Id.* at 528, 1095; *see also State v. Kettering* (March 29,1993), Montgomery County App. No. 13396, unreported (holding that attempted criminal trespass could not be an offense because "[w]here the 'attempt' crime and

the crime proscribed in the Revised Code itself converge into one, the attempt is not an offense under the general attempt statute, R.C. 2923.02")(citing *Anderson*, 62 Ohio Misc. at 1)).

A similar analysis can be made in the case at bar. Perhaps there are a number of actions that could be subjectively construed by law enforcement officers as conduct that, if successful, would result in importuning, but, those actions by themselves would not be unlawful. For example, it is not unlawful for an adult to speak to a minor about the general subject of sex, or for two adults to converse about having sex with minors, or for two adults to role play as minors having sex. As discussed below, such actions are protected by the First Amendment of the United States Constitution and therefore cannot form the basis of a criminal charges.

Proposition of Law No. II: a Charge of Attempted Importuning Is Unconstitutional Because it Criminalizes Speech That Is Presumptively Protected by the First Amendment.

It is well-settled that all forms of expression, verbal or otherwise, are presumptively protected by the First Amendment. *See* U.S. Const. amend. I; *Rust v. Sullivan* (1991), 500 U.S. 173. Only three limited categories of expression are not entitled to this protection: (1) "fighting words," or words which are likely to provoke an immediate, violent response; (2) child pornography; and (3) obscenity. Absent the application of these exceptions, the First Amendment prohibits governments from enacting a prior restraint on the right to engage in protected expression and expressive conduct by criminally prosecuting individuals who choose to exercise that right.

A legislative intent to protect children from harmful communication does nothing to alter the scope of the First Amendment's protection where no actual child is involved. See *Free Speech Coalition v. Ashcroft* (2002), 535 U.S. 234. In *Free Speech*, the Court astutely held that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech." *Id.* at 255.

Simply put, where the speech in question involves no real minor, the speech is not unlawful and cannot be banned. *Id.*

Application of these principles to the case at bar indicates that the thoughts and ideas allegedly conveyed by Mr. Andrews in the online chat with an unknown adult person posing as a minor are fully protected by the First Amendment and therefore cannot be subject to criminal prosecution. Any attempt by the State to argue that Mr. Andrews' alleged remarks are not constitutionally protected because they simulated or appeared to be a conversation with an actual juvenile is futile. *Free Speech* dealt with an identical argument and rejected it. *See id.* Moreover, in light of *Free Speech* and its unwavering endorsement of First Amendment freedoms, it is unclear whether Mr. Andrews' comments would be punishable even if they had been communicated to a police officer posing as a minor.

The applicable authority regarding importuning is *State v. Tarbay,* (2004) 157 Ohio App.3d 261, 810 N.E. 2d 979. It applies because the conversation at issue in this case is an alleged conversation that occurred between two adults, neither of which were law enforcement officers. In *Tarbay,* the First District Court of Appeals of Ohio clearly stated that "[t]he First Amendment does protect two adults communicating about and soliciting sexual activity." *Id.* at 265. If Mr. Andrews did indeed engage in an Internet conversation with someone posing as a thirteen-year-old, his conversation took place with another consenting adult, who was not a law enforcement officer, and therefore was protected.

While citing an Ohio Third Appellate District opinion, the *Tarbay* Court noted that the Ohio importuning statute does "not restrict 'adults and minors from communicating about sex' or 'speech about adults engaging in sexual conduct with minors.'" *Id.* at 265 (citing *State v. Snyder*, (2003)155 Ohio App.3d 453, 801 N.E. 2d 876). Further, the statute only prohibits "speech that solicits minors

to engage in illegal sexual activity with adults." *Id.* Because, in the instant case, there was no solicitation of an actual minor, and indeed not even a solicitation of a police officer posing as minor, the speech was protected and there can be no crime.

For these reasons, the attempted importuning count of the Indictment cannot stand.

CONCLUSION

This Court should exercise its jurisdiction over Andrew's criminal case to ensure that in its attempt to prosecute sex crimes against children, the State's prosecutors and courts do not overstep the bounds of the legislature unambiguous intent and do not violate citizens' rights to free speech and due process of law by overzealously charging adults for discussing sexual matters with other private adults posing as children.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an exact copy of this document was provided via regular U.S. mail to:

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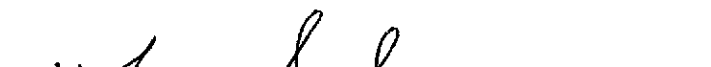
on the 1st day of June, 2007.



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Counsel for Defendant-Appellant Robert J. Andrews

APPENDIX A-1

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-060545 TRIAL NO. B-0411815
Plaintiff-Appellee,	:	
vs.	:	*JUDGMENT ENTRY.*
ROB ANDREWS,	:	
Defendant-Appellant.	:	

This cause having been heard upon the appeal, the record and the briefs filed herein and arguments, and

Upon consideration thereof, this Court Orders that the judgment of the trial court is affirmed for the reasons set forth in the Opinion filed herein and made a part hereof.

Further, the Court holds that there were reasonable grounds for this appeal, allows no penalty and Orders that costs are taxed in compliance with App. R. 24.

The Court further Orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution pursuant to App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on April 27, 2007 per Order of the Court.

By: _____
Presiding Judge

APPENDIX A-2

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-060545 TRIAL NO. B-0411815
Plaintiff-Appellee,	:	*OPINION.*
vs.	:	
ROB ANDREWS,	:	
Defendant-Appellant.	:	

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COURT OF APPEALS

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: April 27, 2007

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Ronald W. Springman, Jr.*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Sirkin Pinales & Schwartz LLP, H. Louis Sirkin and *Candace C. Crouse*, and *Clayton G. Napier*, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

SYLVIA S. HENDON, Judge.

{¶1} Defendant-appellant Rob Andrews was convicted upon a no-contest plea of attempted importuning and attempted tampering with evidence. In return for Andrews' plea, the state dismissed charges of pandering sexually oriented matter involving a minor and illegal use of a minor in nudity-oriented material or performance.

{¶2} Andrews now appeals. In two assignments of error, he argues that the trial court erred in overruling his motion to dismiss the charge of attempted importuning and that the trial court erred in denying his motion to suppress.

Factual Background

{¶3} On November 16, 2004, Hamilton County Sheriff's Detective Rick Sweeney received a telephone call from Cincinnati Enquirer reporter Sharon Coolidge. Coolidge directed Sweeney to a website operated by the organization "Perverted Justice." Perverted Justice is a foundation "that is dedicated to exposing adults who use the Internet to seek sexual activity with children."[1] The foundation recruits and trains adult volunteers to pose as children in Internet chatrooms. The volunteers wait for adults to contact them and engage them in sexually oriented conversations. Perverted Justice often posts transcripts of the volunteers' conversations with Internet predators on its website.

{¶4} Coolidge informed Detective Sweeney that Perverted Justice's website featured a sexually explicit conversation between a Cincinnati attorney and a Perverted Justice volunteer posing as a 13-year-old girl. The Cincinnati attorney, whom Sweeney was later able to identify as Andrews, communicated under the

[1] *United States v. Kaye* (E.D.Va.2006), 451 F.Supp 2d 775, 777, fn. 3.

screen name "manofdarkneedsl951."[2] The Perverted Justice volunteer operated under the screen name "rachel_west90." Sweeney viewed the conversations that Coolidge had identified. The following are excerpts from a conversation between "manofdarkneedsl951" and "rachel_west90" posted on Perverted Justice's website.[3]

{¶5} "Rachel_west90: where do u live?

{¶6} "Manofdarkneedsl951: ohio * * *

{¶7} "Rachel_west90: Im 13 is that ok?

{¶8} "Manofdarkneedsl951: yes

{¶9} "Manofdarkneedsl951: you like to see men jack off?

{¶10} "Rachel_west90: really?

{¶11} "Manofdarkneedsl951: yes * * *

{¶12} "Manofdarkneedsl951: you masterbate

{¶13} "Rachel_west90: yea * * *

{¶14} "Manofdarkneedsl951: you have pics?

{¶15} "Rachel_west90: I have 2

{¶16} "Manofdarkneedsl951: send?

{¶17} "Rachel_west90: ok * * *

{¶18} "Rachel_west90: can you turn on a light

{¶19} "Rachel_west90: I can hardly see

{¶20} "Rachel_west90: wow * * *

{¶21} "Manofdarkneedsl951: you want to meet an older man?

{¶22} "Rachel_west90: maybe * * *

{¶23} "Rachel_west90: whats your e mail

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[2] "A screen name is an appellation used to identify oneself in a chat room when sending instant messages to another computer user. Although it can be the user's real name, it is more often a pseudonym." Id. at 776, fn. 1, quoting *United States v. Mitchell* (C.A.7, 2003), 353 F.3d 552, 554, fn. 3.

[3] The conversation contains various abbreviations and typographical errors. For the sake of clarity, we have not inserted "sic" after each error.

{¶24} "Manofdarkneedsl951: robnaq@yahoo.com

{¶25} "Rachel_west90: ok hold on I'll e mail it [her picture] * * *

{¶26} "Manofdarkneedsl951: which are you? [referring to the picture]

{¶27} "Rachel_west90: Im on the right. I used to live in Texas

{¶28} "Manofdarkneedsl951: I like

{¶29} "Rachel_west90: ty

{¶30} "Manofdarkneedsl951: are you a virgin?

{¶31} "Rachel_west90: yea

{¶32} "Manofdarkneedsl951: you want to change that?

{¶33} "Rachel_west90: maybe

{¶34} "Rachel_west90: will u be gentls?

{¶35} "Manofdarkneedsl951: have you done anything sexually?

{¶36} "Manofdarkneedsl951: yes

{¶37} "Rachel_west90: just kissed * * *

{¶38} "Rachel_west90: whats your name?

{¶39} "Manofdarkneedsl951: rob * * *

{¶40} "Manofdarkneedsl951: you close to cumming

{¶41} "Rachel_west90: no, Ive just been watching u

{¶42} "Rachel_west90: are u?

{¶43} "Manofdarkneedsl951: I can wait for you

{¶44} "Manofdarkneedsl951: you have any pubic hair?

{¶45} "Rachel_west90: wanna talk on the phone for a min?

{¶46} "Rachel_west90: just a little

{¶47} "Manofdarkneedsl951: number?

{¶48} "Rachel_west90: Id have to call u. My mom has caller ID

{¶49} "Manofdarkneedsl951: 513-378-6608"

{¶50} And the following are excerpts from a subsequent conversation between manofdarkneedsl951 and rachel_west90.

{¶51} "Manofdarkneedsl951: you want to see me cum? * * *

{¶52} "Manofdarkneedsl951: are you nude?

{¶53} "Rachel_west90: no * * *

{¶54} "Rachel_west90: why do u like younger gurls

{¶55} "Manofdarkneedsl951: nice and tight * * *

{¶56} "Manofdarkneedsl951: want to suck me?

{¶57} "Rachel_west90: i never done that

{¶58} "Manofdarkneedsl951: want to? * * *

{¶59} "Manofdarkneedsl951: have you seen a man cum? * * *

{¶60} "Manofdarkneedsl951: i want to f**k you to

{¶61} "Rachel_west90: will u come out here to where I am? * * *

{¶62} "Manofdarkneedsl951: will you do all if i do

{¶63} "Rachel_west90: will u use a condom? * * *

{¶64} "Manofdarkneedsl951: yes

{¶65} "Manofdarkneedsl951: i came"

{¶66} After viewing these conversations, Detective Sweeney verified that Andrews was, in fact, manofdarkneedsl951. We discuss the steps that Sweeney took to acquire this verification in detail below. Sweeney obtained and executed two search warrants during his investigation, and Andrews was arrested and indicted for two counts of pandering sexually oriented matter involving a minor, illegal use of a minor in nudity-oriented material or performance, tampering with evidence, and attempted importuning.

{¶67} Andrews filed a motion to suppress all evidence seized during the execution of the two search warrants, arguing that the warrants had been issued without probable cause. He additionally filed a motion to dismiss the charge of

attempted importuning, which he asserted was not a criminal act. The trial court overruled both motions.

Attempted Importuning

1. Attempted Importuning Is a Criminal Offense

{¶68} In his first assignment of error, Andrews argues that the trial court erred in denying his motion to dismiss the charge of attempted importuning. Andrews asserts that the offense of importuning is itself an attempt crime. Therefore, he argues, attempted importuning is not a crime because it would amount to an attempt of an attempt.

{¶69} Importuning is defined in R.C. 2907.07. R.C. 2907.07(D), the subdivision applicable to this case, provides the following:

{¶70} "No person shall solicit another by means of a telecommunications device, as defined in section 2913.01 of the Revised Code, to engage in sexual activity with the offender when the offender is eighteen years of age or older and either of the following applies:

{¶71} "(1) The other person is thirteen years of age or older but less than sixteen years of age, the offender knows that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the other person.

{¶72} "(2) The other person is a law enforcement officer posing as a person who is thirteen years of age or older but less than sixteen years of age, the offender believes that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the age the law enforcement officer assumes in posing as the person who is thirteen years of age or older but less than sixteen years of age."

{¶73} To support his argument that the offense of attempted importuning amounts to an attempt of an attempt, Andrews relies on *State v. Harper*,[4] a case from the Third Appellate District. In *Harper*, the court analyzed the offense of attempted intimidation of a witness. The court reasoned that because the offense of intimidation of a witness was defined as "no person * * * shall *attempt* to influence, intimidate or hinder * * *[a] witness involved in a criminal action * * *," it prohibited both actual and attempted intimidation.[5] The court concluded that attempted intimidation of a witness was not a cognizable crime because it involved an attempt to commit an attempt.[6]

{¶74} Andrews additionally relies on *State v. Anderson*,[7] a 1979 Lucas County municipal court decision that held that the offense of soliciting was an attempt crime. The soliciting statute, R.C. 2907.24, provides that "[n]o person shall solicit another to engage with such other person in sexual activity for hire." The *Anderson* court determined that the offense of soliciting was nothing more than an attempt to engage in the offense of prostitution, defined by R.C. 2907.25 as engaging in sexual activity for hire. The court thus concluded that attempted soliciting was not a cognizable offense.

{¶75} Andrews also directs us to *Seo v. Austintown Township*,[8] which set aside a massage business's license revocation where an employee had been convicted of attempted soliciting. The Seventh Appellate District, apparently persuaded by *Anderson*, held that the revocation could not have been grounded on an attempted soliciting offense. The court held that an attempted-soliciting charge criminalized

[4] 3rd Dist. No 1-05-79, 2007-Ohio-109.
[5] Id. at ¶11 (emphasis added).
[6] Id. at ¶13.
[7] (1979), 62 Ohio Misc. 1, 404 N.E.2d 176.
[8] (1998), 131 Ohio App.3d 521, 722 N.E.2d 1090.

the "attempt to attempt to engage in the offense of prostitution," and that such an offense did not exist under Ohio law.[9]

{¶76} We are not persuaded by Andrews' arguments. Unlike the offense of intimidation of a witness discussed in *Harper*, importuning is not defined by R.C. 2907.07 in terms of an attempt. The word "attempt" appears nowhere in the language of the statute. The offense of importuning prohibits the soliciting of certain persons to engage in sexual activity, not the attempt to solicit such persons.

{¶77} And we are similarly not persuaded by the limited reasoning in *Anderson*. Although importuning requires the soliciting of sexual activity, a charge of importuning does not involve an attempt to engage in the sexual activity that has been solicited. Rather, for the offense of importuning, "the harm is in the asking."[10] Consequently, we hold that the offense of attempted importuning does not amount to an attempt of an attempt and that it is a cognizable crime. And in the present case, the offense was properly charged as such.

{¶78} Ohio's attempt law is codified in R.C. 2923.02, which provides that "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."[11] A criminal attempt occurs when "one purposely *does* or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."[12] A substantial step involves conduct that is "strongly corroborative of the actor's criminal purpose."[13]

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[9] Id. at 528.
[10] *State v. Tarbay*, 157 Ohio App.3d 261, 2004-Ohio-2721, 810 N.E.2d 979, ¶17, citing *State v. Bolden*, 2nd Dist. No. 19943, 2004-Ohio-2315, ¶37.
[11] R.C. 2923.02(A).
[12] *State v. Tarbay*, supra, 157 Ohio App.3d 261, at ¶20, quoting *State v. Woods* (1976), 48 Ohio St.2d 127, 357 N.E.2d 1059.
[13] *State v. Woods* (1976), 48 Ohio St.2d 127, 357 N.E.2d 1059, paragraph one of the syllabus, overruled on other grounds in *State v. Downs* (1977), 51 Ohio St.2d 47, 364 N.E.2d 1140.

{¶79} Andrews solicited sexual activity from a person whom he believed to be 13 years of age. He clearly and unequivocally took a substantial step towards the commission of the offense of importuning. But the person whom Andrews solicited was not an actual 13-year-old. Nor was the person a law enforcement officer posing as a 13-year-old. Instead, Andrews solicited sexual activity from a civilian adult posing as a 13-year-old on behalf of the Perverted Justice Organization. Soliciting from a civilian adult who is not a law enforcement officer is not directly proscribed by R.C. 2907.07(D).

{¶80} The fact that Andrews solicited a civilian adult, rather than a person identified in the statute, is the only factor that made his actions an attempted criminal act, as opposed to a completed offense. We note that "[i]t is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if that offense could have been committed had the attendant circumstances been as the actor believed them to be."[14] Andrews believed that he had been communicating with a 13-year-old female. And he clearly solicited sexual activity from the person whom he had believed to be 13. Had the circumstances existed as he believed them to be, Andrews would have committed the offense of importuning.

{¶81} Consequently, we hold that a defendant may be charged with attempted importuning under R.C. 2907.07(D) when the sole factor making the crime an attempted offense is the fact that the victim is not a child between 13 and 15 years of age or a law enforcement officer posing as a child between 13 and 15 years of age, but rather is an adult civilian posing as a child who is 13 to 15 years of age.

[14] R.C. 2923.02(B).

{¶82} Our conclusion is supported by case law from several states. In *Wisconsin v. Robins*,[15] the Supreme Court of Wisconsin considered whether Wisconsin's child-enticement statute could support a charge of attempt when no actual child victim was involved. Robins had engaged in sexually explicit online conversations with a person whom he had believed to be a 14-year-old boy, but who was actually an agent from the Department of Justice posing as a 14-year-old.[16] Wisconsin's child-enticement statute prohibited certain actions against a child less than 18 years of age. But unlike R.C. 2907.07, the Wisconsin child-enticement statute prohibited not only the completed act of child enticement, but attempted acts as well.[17]

{¶83} Like Andrews, Robins argued that he been charged with "an attempt to attempt a crime."[18] The Wisconsin Supreme Court disagreed and held that "the offense of attempted child enticement * * * may be charged where the intervening extraneous factor that makes the offense an attempted rather than completed crime is the fact that unbeknownst to the defendant, the 'victim' is not an actual child, but, rather, an adult government agent posing as a child."[19] The court thus concluded that child enticement could be charged as an attempt even though the offense had been defined in terms of an attempt.

{¶84} *Adams v. Wyoming*,[20] a case from the Wyoming Supreme Court, is also persuasive. Adams had been convicted of violating two statutes that prohibited various types of sexual conduct either with a child or with a child under the age of 16.[21] Adams had engaged in sexually explicit online conversations with a person he

[15] 253 Wis.2d 298, 2002-WI-65, 646 N.W.2d 287.
[16] Id. at ¶4.
[17] Id. at ¶25. See, also, Wis.Stat. 948.07.
[18] Id. at ¶21.
[19] Id. at ¶45.
[20] 2005-WY-94, 117 P.3d 1210.
[21] Id. at ¶12.

had believed to be a 15-year-old female, but who was actually a law enforcement officer.[22]

{¶85} Adams argued on appeal that the trial court had erred in denying his motion to dismiss because no actual minor had been involved. After noting that the statutes that Adams had been convicted of violating did not criminalize the attempt to commit the crimes described therein,[23] the Wyoming Supreme Court held that "the presence of a minor victim is not a requisite for a conviction of attempted solicitation of a minor under [the statutes that Adams had been charged with violating]."[24]

{¶86} An Indiana appellate court addressed this issue in *Laughner v. Indiana*.[25] Laughner had engaged in online conversations of a sexual nature with, and had attempted to meet, a person he believed to be a 14-year-old boy. But the person Laughner had been communicating with was actually a law enforcement officer. Laughner was convicted of attempted child solicitation. On appeal, Laughner argued that he could not have committed attempted child solicitation because he had not communicated with a child. The court disagreed and held that attempted child solicitation is committed when a defendant "engages in an overt act that constitutes a substantial step toward soliciting someone believed to be a child under fourteen to engage in sexual activity, even if it turns out the solicited person is an adult."[26]

{¶87} Not only the application of the law, but ordinary common sense dictates our conclusion that attempted importuning may be charged when the

[22] Id. at ¶3.
[23] Id. at ¶12.
[24] Id. at ¶16.
[25] (Ind.2002), 769 N.E.2d 1147.
[26] Id. at 1155.

defendant believes that he has solicited a child of a certain age, but the reality is that the person solicited is not one described in the statute defining importuning.

{¶88} Further, strong public policy has resulted in many states enacting child-enticement and importuning statutes to protect children from people like Andrews, those who troll the Internet searching for susceptible victims. It would surely frustrate the intent of Ohio's legislative efforts in this regard if Andrews were to be successful in his argument that he could not be convicted of attempted importuning despite his blatant attempts to solicit one he believed to be a minor for the purpose of engaging in sexual activity.

{¶89} As the United States Supreme Court has noted, "[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people."[27] And this exploitation and abuse of children has been facilitated by the access the Internet provides. While the Internet has indisputably advanced modern communication, it has also provided people who abuse and molest children with a way to reach their victims in a method that is difficult to monitor. These factors give good reason for criminalizing the attempted importuning of a civilian adult whom the offender believes to be a child.

{¶90} In summary, we conclude that attempted importuning does not constitute an attempt of an attempt, and that a defendant may be charged with attempted importuning under R.C. 2907.07(D) when the defendant would have committed the offense of importuning but for the fact that the victim was a person not identified in the statute. The trial court did not err in overruling Andrews' motion to dismiss on the grounds that attempted importuning is not a criminal offense.

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[27] *Ashcroft v. The Free Speech Coalition* (2002), 535 U.S. 234, 244, 122 S.Ct. 1389.

2. The Offense of Attempted Importuning is not Unconstitutional

{¶91} In his first assignment of error, Andrews additionally argues that the trial court erred in overruling his motion to dismiss because attempted importuning criminalizes speech that is presumptively protected by the First Amendment.

{¶92} Relying on the United States Supreme Court's decision in *Ashcroft v. The Free Speech Coalition*,[28] Andrews argues that his online communication was entitled to unfettered First Amendment protection because it did not involve an actual minor. We disagree.

{¶93} This court has already addressed whether the offense of importuning under R.C. 2907.07 infringes upon the right of free speech guaranteed by the First Amendment in the case of *State v. Tarbay*.[29] Like Andrews, Tarbay had communicated online with a person whom he had believed to be a 13-year-old girl. But Tarbay had actually been communicating with a Hamilton County deputy sheriff. Among other offenses, Tarbay was convicted of five counts of importuning.

{¶94} When evaluating Tarbay's claim that the offense of importuning infringed upon his right to free speech, we recognized that the First Amendment does protect discussion about and soliciting sexual activity between two adults.[30] But we also noted that the state had a compelling interest in protecting minors from unlawful sexual contact, and that the offense of importuning "[was] aimed not at preventing the expression of ideas, but at 'prohibiting adults from taking advantage of minors and the anonymity and ease of communicating through telecommunications devices, especially the Internet and instant messaging devices, by soliciting minors to engage in sexual activity.' "[31] With these concerns in mind,

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[28] Id.
[29] *State v. Tarbay*, supra, 157 Ohio App.3d 261 at ¶10.
[30] Id. at ¶9.
[31] Id. at ¶13, quoting *State v. Snyder*, 155 Ohio App.3d 453, 2003-Ohio-6399, 801 N.E.2d 876, ¶19.

we concluded that "there is simply 'no First Amendment right to attempt to persuade minors to engage in illegal sex acts.' "[32]

{¶95} The *Tarbay* court clearly and correctly determined that Ohio's importuning statute does not infringe upon the First Amendment's right to freedom of speech. Consequently, Andrews' argument is without merit.

{¶96} Because attempted importuning is a cognizable offense and does not infringe on the First Amendment, we conclude that the trial court did not err in overruling Andrews' motion to dismiss. The first assignment of error is overruled.

Motion to Suppress

{¶97} In his second assignment of error, Andrews argues that the trial court erred in overruling his motion to suppress the evidence obtained from the execution of the two search warrants issued to Detective Sweeney. Andrews argues that no probable cause existed to support the issuance of the first warrant. And he argues that the second warrant was obtained based on evidence illegally seized during the execution of the first warrant. He does not directly attack the issuance of the second warrant, but raises a "fruit of the poisonous tree" argument.

{¶98} This court's review of a suppression ruling involves mixed questions of law and fact.[33] We must accept the trial court's finding of facts if they are supported by competent, credible evidence. But we determine de novo, without deference to the trial court, whether the facts satisfy the applicable legal standard.[34]

{¶99} When determining whether probable cause existed to support the issuance of a search warrant, this court must accord great deference to the issuing

[32] Id. at ¶17, quoting *United States v. Bailey* (C.A.6, 2000), 228 F.3d 637, 639.
[33] *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8.
[34] Id.

magistrate.[35] Our duty is to ensure that the issuing magistrate had a substantial basis for concluding that probable cause existed.[36]

{¶100} Probable cause is established when an affidavit "contain[s] sufficient information to allow a magistrate to draw the conclusion that evidence is likely to be found at the place to be searched."[37]

{¶101} Following our review of the record, we conclude that the first search warrant obtained by Detective Sweeney was clearly supported by probable cause. Sweeney had gone to great lengths to independently corroborate the information that he had obtained from Perverted Justice.[38] Sweeney's affidavit provided substantial evidence demonstrating that evidence was likely to be found at the place to be searched, including evidence linking Andrews to the screen name manofdarkneedsl951.

{¶102} Sweeney's affidavit stated that, during his conversation with rachel_west90, manofdarkneedsl951 had provided the telephone number 513-378-6608. A Hamilton County Sheriff's detective contacted Cincinnati Bell and obtained information about the subscriber assigned to this telephone number. The subscriber was a Robert Andrews who resided at 3045 Werk Road in Cincinnati, Ohio. A high-speed Internet access was also assigned to the account. A check of the Hamilton County Auditor's records revealed that the property on 3045 Werk Road was owned by Patricia Ann Andrews.

{¶103} Sweeney's affidavit further averred that manofdarkneedsl951 had stated that his email address was robnaq@yahoo.com. Information received from Yahoo revealed that the login name for this email address was robnaq. Yahoo's information also established that the subscriber to this email account was J. Robert

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[35] *State v. George* (1989), 45 Ohio St.3d 325, 330, 544 N.E.2d 640.
[36] See id.
[37] *State v. German*, 1st Dist. No. C-040263, 2005-Ohio-527, ¶13.
[38] *United States v. Tuttle* (C.A.6, 2000) 200 F.3d 892, 894.

Andrews, and it provided an alternate email address of Andrews@sandg.com. The subscriber had provided Yahoo with the following information: the address 3045 Werk Road, Cincinnati Ohio, 45211, the telephone number 513-661-6146, the birth date March 24, 1951, and the business address 2662 Madison, Cincinnati, Ohio 45208.

{¶104} The information provided by Yahoo additionally revealed two IP addresses that had been used by robnaq, 66-161-176-41 and 216-196-129-185. It was determined that the IP address 66-161-176-41 was obtained through Cincinnati Bell and was assigned to John R. Andrews at 3045 Werk Road, Cincinnati, Ohio 45211. The IP address 216-196-129-185 was also issued through Cincinnati Bell and was assigned to [the name of a law firm] at 2662 Madison Road, Cincinnati, Ohio, 45208.

{¶105} Sweeney's affidavit stated that detectives had confirmed that Andrews had been employed as a defense attorney at the named law firm, located at 2662 Madison Road, Cincinnati, Ohio 45208, and that Andrews resided at 3045 Werk Road, Cincinnati, Ohio 45211. The affidavit also contained a summary of, and various excerpts from, the conversations between manofdarkneedsl951 and rachel_west90. And Sweeney attached a copy of these conversations to his affidavit, along with the various information received from Cincinnati Bell and Yahoo.

{¶106} These facts demonstrated that the issuing judge had a substantial basis for determining that there was probable cause to issue a search warrant. The affidavit sufficiently corroborated information linking Andrews to the screen name manofdarkneedsl951, and it clearly supported the conclusion that a crime had been committed and that the place to be searched would contain evidence of such crime.

{¶107} And even if Sweeney's affidavit had been lacking in probable cause, the good-faith exception to the exclusionary rule would not have barred the evidence

seized. The good-faith exception was recognized by the United States Supreme Court in *United States v. Leon*.[39]

{¶108} In *Leon*, the Court acknowledged that the exclusionary rule operates as a deterrent to safeguard the Fourth Amendment rights prohibiting unlawful searches and seizures and to deter police from violating these rights.[40] But the Court recognized that, when the police have acted in good faith, exclusion of evidence does not serve as a deterrent. Accordingly, the Court determined that "[t]he Fourth Amendment exclusionary rule should not be applied so as to bar the use * * * of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid."[41]

{¶109} The good-faith exception to the exclusionary rule thus applies unless one of the following exceptions is present: (1) the magistrate or judge has been misled by false information that the affiant knew or should have known was false; (2) the issuing magistrate or judge has abandoned the judicial role; (3) the police have relied on a warrant based on an affidavit so lacking indicia of probable cause that no official could reasonably believe in its existence; and (4) the warrant is so facially deficient that the officers executing it cannot reasonably presume that it is valid."[42]

{¶110} In this case, the record clearly demonstrates that the law enforcement officers involved had acted in good faith. The record further demonstrates that the issuing judge had not been misled by false information and had not abandoned the judicial role. Moreover, given our conclusion that Detective Sweeney's affidavit was amply supported by probable cause, we cannot conclude that no officer would reasonably have relied on the affidavit or that the warrant was facially deficient.

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[39] (1984), 468 U.S. 897, 104 S.Ct. 3405.
[40] Id. at 906.
[41] Id.
[42] *State v. German*, supra, 2005-Ohio-527 at ¶23.

{¶111} Consequently, had we not determined that the search warrant was supported by probable cause, the good-faith exception would have applied to prevent exclusion of the evidence.

{¶112} Because we have determined that the first search warrant obtained by Detective Sweeney was supported by probable cause, we conclude that all evidence seized during its execution was obtained lawfully. Thus, evidence seized during the execution of the second warrant was not "fruit of the poisonous tree" and was properly held admissible.

{¶113} The trial court did not err in denying Andrews' motion to suppress. The second assignment of error is overruled, and the judgment of the trial court is, therefore, affirmed.

Judgment affirmed.

PAINTER, P.J., and **CUNNINGHAM, J.**, concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.