

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

STATE OF MISSOURI, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ERIC GREITENS )  
 )  
 Defendant. )

Case No. 1822-CR00642  
Div. 16

**STATE’S MOTION TO RECONSIDER AND MEMORANDUM OF LAW REGARDING  
APPLICABILITY OF THE “TRANSMIT” ELEMENT IN § 565.252 TO THE FACTS OF  
THIS CASE**

COMES NOW the Circuit Attorney for the City of St. Louis, by and through Ronald S. Sullivan Jr., Special Assistant Circuit Attorney, and submits this Motion to Reconsider and Memorandum of Law regarding the Court’s Order, delivered from the bench, striking the State’s expert on the issue of “transmit.”

The defense has repeatedly argued that the transmission clause in §565.252 does not apply to Defendant’s conduct and is not satisfied in this case. *See e.g.*, Defendant’s Motion to Strike Robert Zeidman and Nikolaus Baer at 1, 2, 7, 8, 9, 10; Defendant’s Final Motion for Exculpatory Information at 1, 2; Defendant’s Motion for Production of Subpoenaed Records and Second Deposition at 10; Defendant’s Motion to Dismiss Based on False and Misleading Instructions to the Grand Jury at 5, 6. It is quite inferable that the defense will argue this to the jury. While this theory is a demonstrably incorrect statement of the law, the defense’s own repeated motions show how necessary it is that the State be able to respond to this claim when it is argued to the jury. Dr. Zeidman is needed for the purpose. Therefore, the State requests that this Court reconsider its oral Order excluding the state’s expert.

Missouri Statute § 565.252 provides in relevant part that it is a crime to knowingly take photos of a person without their consent and to then “distribute [] the photograph or film to another or transmit [] the image contained in the photograph or film in a manner that allows access to that image via a computer.” Mo. Rev. Stat. § 565.252. As an initial matter, based on the plain language of the statute, and the fact that any other interpretation would render the word “transmit” superfluous, it is clear that “transmit” in § 565.252 does not require transmission to another person. Instead, transmission to another place, which occurs in microseconds on a smartphone, is sufficient. Accordingly, what is effectively required is the instant matter is that the photograph be made accessible via a computer.

Victim K.S. has previously testified that she heard the distinctive sound of an iPhone camera taking a photograph. For two reasons, a photograph taken by any smartphone is covered by the “transmit” clause in § 565.252: a) the very act of taking a photograph with a smartphone transmits it in a way that allows access to the photograph via a computer, and b) any syncing to the Cloud, which is the default on the iPhone, is clearly a transmission according to the statute.

*First*, a smartphone *is* a computer. Furthermore, a photograph taken by a smartphone is automatically and subsequently transmitted *twice* within the smartphone – once to the camera microcomputer and once to the memory for storage. Thus, the very act of taking the photograph with a smartphone sets in motion the transmission of the image in a manner that allows access via a computer. Therefore, the “transmit” element is fulfilled through any photograph taken by a smartphone *qua* computer.

Moreover, beyond a smartphone photograph being accessible via the smartphone *qua* computer, such photographs are also transmitted in a manner that makes it accessible via other

computers. When the word “transmit” was added to the statute, photographs had to be physically transferred from a camera to a computer in order to be accessible via a computer. Thus, the transmit element signified the legislature’s desire to preclude making such photographs readily available. Smartphones changed the game. Now as soon as the photograph is taken it is accessible via any computer around the world. Apple’s smartphone patent is unequivocal about this point. Accordingly, all the State has to show to satisfy the “transmit” element is that Defendant used an iPhone to photograph K.S.

*Second*, even assuming, *arguendo*, that the above is not a transmission, the syncing of the photograph to the Cloud clearly constitutes a transmission. Once on the Cloud, the photograph would be accessible from any computer around the world. Case law from across the federal circuits, common usage in U.S. patents, and other state statutes, are all clear that syncing data constitutes a transmission. The Cloud is another place, not on the iPhone, which stores data. Therefore, syncing to the Cloud, which is the default iPhone setting, is undoubtedly a transmission.

The simple act of taking the photograph with a smartphone is a transmission under § 565.252. If the photograph was synced to the Cloud that would be yet another transmission. Therefore, the State asks that the Court recognize that the charged conduct fulfills this element of § 565.252. This information is not part of the normal ken and requires an expert to help the jury understand the nature of how iPhones operate.

#### **ARGUMENT**

#### **I. “TRANSMIT” DOES NOT REQUIRE A TRANSFER TO ANOTHER PERSON; TRANSFER TO ANOTHER PLACE IS ENOUGH TO SATISFY THE STATUTE.**

“[T]ransmit . . . in a manner that allows access to that image via a computer” includes any taking of a photograph with a smartphone regardless of whether the photograph was transmitted to another person. When interpreting statutes, the Missouri Supreme Court is unequivocal that the

court uses a word's plain meaning as expressed in the dictionary. *See, e.g., Lincoln Indus., Inc. v. Dir. of Revenue*, 51 S.W.3d 462, 465 (Mo. 2001). Black's Law Dictionary defines transmit as "[t]o send or transfer (a thing) from one person *or* place to another." *Transmit, Black's Law Dictionary* (10th ed. 2014) (emphasis added). Thus, to fulfill § 565.252's "transmit" element there is no need for the image to be transmitted to another person.

Moreover, § 565.252 allows for *either* distribution to another *or* transmission. If transmission required transmission to a person, then the distribution clause would be superfluous. Since it is presumed that the legislature did not insert superfluous terms into the statute, *see Turner v. State*, 245 S.W.3d 826, 828 (Mo. 2008), the transmission clause should be read to open the statute not just to transfer to other people, as already covered by the distribution clause, but any conveyance that allows access to the image via a computer. Therefore, to demonstrate that Defendant transmitted the photograph in a manner than allowed access via a computer, the State does not have to prove that the transmission was to another person.

An expert would undoubtedly help the jury to understand the transmission of the image to another, virtual place. The inner-workings of an iPhone is neither intuitive nor a matter within common knowledge. Section 490.065.2(1)(a) (2017); cf. *State v. Blurton*, 484 S.W.3d 758 (Mo.banc), cert. denied, 137 S.Ct. 333 (2016).

## **II. THE ACT OF TAKING A PHOTOGRAPH WITH A SMARTPHONE AUTOMATICALLY CONSTITUTES A TRANSMISSION UNDER § 565.252.**

### ***A. A smartphone is a computer; transmitting a photograph from the smartphone camera to the smartphone allows access to the photograph via that computer.***

When the iPhone's camera takes a photograph, its transfer of that photograph to the iPhone is a transmission that makes the image accessible via a computer—the iPhone itself. Computer is defined as: "the box that houses the central processing unit (CPU), along with any internal storage devices, such as internal hard drives, and internal communication devices, such as internal modems

capable of sending or receiving electronic mail or fax cards, along with any other hardware stored or housed internally. Thus, computer refers to hardware, software and data contained in the main unit. Printers, external modems attached by cable to the main unit, monitors, and other external attachments will be referred to collectively as peripherals and discussed individually when appropriate. When the computer and all peripherals are referred to as a package, the term "computer system" is used. Information refers to all the information on a computer system including both software applications and data." §556.061(5), RSMo 2000 & Supp. The statutory definition is not dissimilar from the more common definition of computer as "[a] programmable electronic device that can store, retrieve, and process data." Merriam-Webster, Inc., *Merriam-Webster's Collegiate Dictionary* 237 (10th ed. 1996).

Apple Inc.'s U.S. Patent No. 8,223,134 (filed Mar. 5, 2012) makes clear that the iPhone stores, '134 Patent at col. 4 l. 10, retrieves, *id.* at col. 11 l. 52, and processes, *id.* at col. 13 l. 56, data. Courts, administrative bodies, academics, and journalists have all reached the conclusion that a smartphone is a computer. *See Riley v. California*, 134 S.Ct. 2473, at 2489 (2014) ("Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."); *U.S. v. Kramer*, 631 F.3d 900 (8<sup>th</sup> Cir. 2011) (holding that a cellphone *is* a computer). *State v. Hinton*, 280 P.3d 476, 491 (Wash. 2012), *rev'd on other grounds*, 319 P.3d 9 (2014) (finding that smartphones are a type of handheld computer); Certain Pers. Data & Mobile Commc'n Devices & Related Software, Inv. No. 337-TA-710, USITC Pub. 4331 (June 1, 2012) (Final) ("The iPhone is a computer-based system. . ."); Sarah

Burstein, *The "Article of Manufacture" in 1887*, 32 Berkeley Tech. L.J. 1, 74 (2017) (“A smartphone is a computer.”); Christina Bonnington, *In Less Than Two Years, a Smartphone Could Be your only Computer*, Wired (Feb. 10, 2015, 3:42 AM), <https://www.wired.com/2015/02/smartphone-only-computer/>.

Moreover, *the image does not have to leave the smartphone for it to have been “transmitted” in common usage*. Patents often claim transmission when data transfers between components within a single device. U.S. Patent No. 9,202,321’s fourth claim includes “transmitting the digital image signals” from a camera to the camera’s built-in control unit. U.S. Patent No. 9,202,321 col. 6 l. 66 (filed Dec. 19, 2013). And U.S. Patent No. 8,111,322’s specifications note that an image signal from the camera’s “image pickup devices” is “transmitted to a camera microcomputer,” all within the camera itself. *See* U.S. Patent No. 9,202,321 col. 5 l. 40 (filed Aug. 10, 2006); *see also* U.S. Patent No. 8,781,206 col. 13 l. 26 (filed Feb. 15, 2013) (specifying that the processing device “transmits the derived image data [ ] to the memory for storage”). Moreover, the act of taking a digital photo transmits light to a photodetector array. *See* U.S. Patent No. 8,781,206 (filed Feb. 15, 2013). Once transmitted within the smartphone, the photograph is readily accessible by the smartphone *qua* computer in any number of ways, including in virtually any application on the smartphone.

To summarize: a) a smartphone is a computer; b) when a person takes a photograph on a smartphone they transmit that photograph within the smartphone itself; and c) transmitting the photograph within the smartphone makes it accessible via the smartphone *qua* computer.<sup>1</sup>

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<sup>1</sup> Beyond the fact that photographs taken on smartphones are transmitted to the smartphone *qua* computer, they are also accessible via any other computer. As explained below, the legislature’s intent was to stop the spread of these illicit photographs. At that time the only way to spread the photographs was to transmit the photographs from the camera to another device. However, smartphones make it “very easy” to send emails with still images from the camera. *See* ‘134 Patent at col. 17 l. 17. Therefore, in addition to smartphone

Therefore, the “transmit” element of § 565.252 is unequivocally satisfied through the use of a smartphone to take the illicit photograph.

None of the foregoing is common knowledge. That a smartphone is a computer is not something that the average juror knows or understands. An expert able to explain the foregoing would aid the jury’s understanding and, thus, is admissible.

***B. The Missouri legislature intended to criminalize taking and storing photographs in a manner that allows access to them via other computers.***

The Court should find that, as a matter of law, the “transmit” element is fulfilled simply by making the photograph accessible via the smartphone *qua* computer – which happens any time a smartphone is used to take a photograph. At a minimum, the Court should permit an expert to testify that a smartphone is a computer and that pictures taken on a smartphone *move* to the smartphone’s computer. However, even if the Court does not accept this rationale, taking a photograph on a smartphone automatically transmits it in a manner that allow access to it via *other* computers too.

The transmission clause makes clear that the legislature was interested in deterring not just distribution of illicit photos but also access to those images on computers. Computers allow the spread of images on the Internet, so it makes sense that the legislature would try to stop that dissemination before it began. The statute was drafted before smartphones were the norm; for an image to be accessible via computer, it had to be transmitted via cord or file from a camera to a computer.<sup>2</sup> But with the advent of the smartphone age, it is clear that transmission occurs nearly

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photographs being accessible via the smartphone *qua* computer they are also accessible very easily from any other computer – exactly what the legislature foreclosed.

<sup>2</sup> The original language of “transmit” in this statute was added back in 2002, when photographs on cameras or cell phones could not be accessed from a computer without a physical wire transmission or, at its most advanced, by an email attachment. *See* Mo. Ann. Stat. 565.252.1(1), SEX OFFENSES—PREVENTION—PROSECUTION, S.B. 855 (Vernon's) (Mo. Legis. Serv. 2002).

instantly after the photo is taken without any other action necessary. As the United States Supreme Court has found, the legal definition of transmission evolves with progressions in technology. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 972 (2005) (holding that “unlike at the time of the DSL order, *substitute forms of Internet transmission exist today*, including wireline cable, terrestrial wireless, and satellite”) (emphasis added). Therefore, because at the moment the camera takes the photograph and transmits it to the phone’s memory and other components, the smartphone’s in-phone-computer allows it to spread the images in exactly the way § 565.252 was intended to deter, such photographs are undoubtedly covered by the “transmit” element.

Apple Inc.’s smartphone patent makes clear the fact that taking a photograph with a smartphone makes for easy transmission. *See* ‘134 Patent at col. 17 l. 17 (explaining that the smartphone makes it “very easy” to send emails with still images from the camera). Although the cameras most-in-use when the statute was written may have also transmitted images to their data banks or to film when a photo was taken, modern smartphone cameras transmit the image in such a way that it is automatically accessible via any computer. From the smartphone itself one can disseminate the photograph in a multitude of ways with virtually no effort expended. There is no need to physically transfer the photograph from the smartphone in order to make it accessible via other computers. Therefore, the very act of taking a photo on a smartphone camera transmits an image in line with the statute.

The above demonstrates that there is no need to show that Defendant sent any photographs of K.S. to anyone else in order to sustain a conviction under § 565.252. K.S. has testified that she heard the sound of an iPhone taking a photograph. This use of a smartphone, by itself, constitutes a transmission under §565.252. A smartphone is a computer. Therefore, taking the photograph



with a smartphone transmits it in a way that makes it accessible via that computer. Moreover, the Missouri legislature intended to criminalize allowing access to photographs via a computer. Unlike at the time the transmission element was added, once a smartphone takes a photograph there is a plethora of ways with which that photograph becomes accessible via other computers.

### **III. SYNCING PHOTOGRAPHS TO THE CLOUD CONSTITUTES A TRANSMISSION.**

As explained above, all the State has to show is that Defendant used a smartphone. However, in addition to simply taking a photograph with a smartphone constituting a transmission, the transmission clause is also triggered by any automatic or willful sync of a smartphone with a cloud server or with a computer. As previously stated, Black's Law Dictionary defines "transmit" as "[t]o send or transfer (a thing) from one person *or* place to another." *Transmit, Black's Law Dictionary* (10th ed. 2014). Likewise, Missouri courts have defined the word "transmit" to mean "to cause to go or to be conveyed to another person or place . . . [it means] to send or transfer (a thing) from one person or place to another. . . the plain and ordinary meaning . . . is conveyance from one place to another." *Union Elec. Co. v. PSC*, 422 S.W.3d 358, 366 (Mo. App. 2013).

When a phone syncs an image to the Cloud, it is conveying the image's data to another place. *See United States v. Thomas*, 74 F.3d 701, 707 (6th Cir. 1996) (holding that movement of electronic signals over the internet counts as transmission from one place to another for sake of criminal statute); *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997) (same). Many smartphones automatically sync to a cloud server. For example, the Apple iPhone has a "Photo Stream" feature that automatically syncs photographs taken by the phone's camera to a cloud server. *See My Photo Stream*, Apple Inc. (Mar. 29, 2018), <https://support.apple.com/en-us/HT201317>. Those photos are then instantly available via the phone owner's computer. *Id.* Photo Stream has been enabled by default in Apple iPhones since at least 2013, two years prior to the

events of the indictment. *See Turn Off "My Photo Stream" to Free Up 1GB+ of Space in iOS*, *Osxdaily.com* (Oct. 25, 2013), <http://osxdaily.com/2013/10/25/delete-my-photo-stream-ios/>. When a smartphone automatically syncs to the cloud, therefore, it is transmitting the image in a manner that makes it accessible via a computer.

Common usage in U.S. Patents makes clear that transmission include syncing images to the Cloud. For example, U.S. Patent No. 9,360,682's first claim includes that its camera is "operable to capture photographs and/or video through the camera lens and [ . . . ] transmit the data over a wireless communication network to a remote server or database." *See* U.S. Patent No. 9,360,682 col. 6 l. 66 (filed May 7, 2015). Its specification makes clear that a remote server includes the Cloud. *See id.* at col. 1 l. 39 ("[T]he device's innovation stems from its capability to capture video of what the wearer is seeing, transmit and save this content on the device or to a cloud-based server."). Many other patents use the word "transmit" to indicate the movement of an image wirelessly to a separate server. *See, e.g.*, U.S. Patent No. 7,161,622 col. 8 l. 35 (filed July 28, 2000) (claiming an electronic camera that "transmits" an image wirelessly to the nearest communication base). Even more patents use the word "transmit" to indicate transfer of data to a cloud server. *See, e.g.*, U.S. Patent No. 9,706,383 col. 2 l. 12 (filed July 10, 2014); U.S. Patent No. 9,648,478 col. 11 l. 57 (filed Dec. 11, 2014).

The word "transmit" is also used in other states' statutes to include syncing to a cloud server. In Indiana, Rhode Island, and Washington, criminal statutes use the word "transmit" to indicate the wireless transfer of data to a data storage space:

Sec. 11. (a) Except as provided in subsection (b), "*transmit*" means to transfer, send, or *otherwise make available* computer software or a computer software component *through a network, the Internet, a wireless transmission, or any other medium, including a disk or data storage device.*

(b) "Transmit" does not include an action by a person who provides:

[ . . . ] (2) *the storage or hosting of computer software* or an Internet web page through which the computer software was made available . . .

Ind. Code Ann. § 24-4.8-1-11 (West) (emphasis added). Although section 11(b)(2) omits actions *by* storage companies, it does not omit actions by transmitters using storage or hosting. In fact, that the legislature felt the need to except data storers indicates that storage of data counts as transmission. The Rhode Island and Washington laws are functionally the same. *See* 11 R.I. Gen. Laws Ann. § 11-52.2-1 (West); Wash. Rev. Code Ann. § 19.270.010 (West). Since dictionaries, patents, and other states all view transmission as including syncing to cloud storage, this Court should construe § 565.252 to include cloud syncing.

The simple act of taking a photograph with a smartphone constitutes transmission that allows access via a computer. Within the smartphone itself, a photograph is transmitted in a way that allows this access. Therefore, there is no need to show that the photograph was transmitted to another person. The legislature intended to criminalize allowing access to such photographs via a computer and Defendant's use of a smartphone falls squarely into this intent.

Regardless, the use of the Cloud to backup Defendant's phone would be yet another transmission. The plain meaning, patent law, and a host of other state statutes all demonstrate that such syncing is a transmission. Similarly, a photograph on the Cloud is easily accessible via a computer which is exactly what the legislature intended to foreclose. Therefore, the State asks this Court to recognize that the Defendant's charged conduct falls squarely within § 565.252.

### CONCLUSION

For the foregoing reasons the Court should permit the State's expert to assist the jury in understanding the foregoing.

Respectfully submitted,  
KIMBERLY M. GARDNER

CIRCUIT ATTORNEY OF THE  
CITY OF ST. LOUIS

/s/ Robert Steele MBE 42418  
Assistant Circuit Attorney  
steeler@stlouiscao.org

/s/ Robert H. Dierker 23671  
Assistant Circuit Attorney  
Ronald S. Sullivan, Jr.  
Special Assistant Circuit Attorney  
1114 Market St., Rm. 230  
St. Louis, MO 63101  
314-622-4941

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by e-mail this 8 day of May 2018.

/s/Robert H. Dierker