ORIGINAL

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

FILED
NOV 21 2008
LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	Appeal No. ED91275
	)	
PAUL WESLEY MCCURRY-BEY,	)	
	)	
Appellant.	)	90021

FILED
MAR 19 2009
Thomas F. Simon
CLERK, SUPREME COURT

APPEAL TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT
FROM THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS, MISSOURI
THE HONORABLE JULIAN L. BUSH, JUDGE AT TRIAL

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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SCANNED

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Jurisdictional Statement

Paul Wesley McCurry-Bey, Appellant, was convicted by a jury in the Circuit Court for the City of St. Louis of Statutory Rape, first degree §555.020, (Count I), Statutory Sodomy, first degree §566.062, (Count II) and Incest §568.020, (Count III) in Circuit Cause # 22051-03966-01, the Honorable Julian L. Bush, presiding. On April 25, 2008, the trial court assessed punishments of twenty (20) years in Count I, twenty (20) years in Counts II, and five (5) years as a persistent offender in III. The trial court ordered all sentences to run concurrently. Notice of Appeal was timely filed on April 30, 2008. As the case is not within the exclusive jurisdiction of the Supreme Court, the Court of Appeals has jurisdiction. Mo. Const., Art. V, sec. 3.

***

The Record on Appeal will be cited to as follows: Legal File (LF) and Transcript (Tr).

Statement of Facts

The state charged Paul Wesley McCurry-Bey, Appellant, with three sexual offenses: Statutory Rape, first degree §566.032, Statutory Sodomy, first degree §566.062; and Incest §568.020 (LF 14-15). The state alleged that Paul had engaged in sexual misconduct with his four year old daughter, PM, between August 6, 2005 and September 12, 2005 (LF 14-15, Tr. 145, 232). On June 11-13, 2007, Paul had a jury trial and was convicted on all counts (LF 6). On July 2, 2007, Motion for Judgment of Acquittal Notwithstanding the Verdict or in the Alternate a New Trial was filed (LF 58-60). On July 27, 2007, the court overruled Paul's Motion for New Trial and ordered that he be committed to the Department of Mental Health for a presentence commitment evaluation pursuant to Section 557.031, and an evaluation of Paul's competency to stand trial pursuant to 552.020 (Tr. 412, LF 81).

On January 17, 2008, Circuit Attorney, Beth Orwick, filed Objection to the psychiatric report from the Department of Mental Health that was filed by Dr. Scott and requested an additional psychiatric examination by a physician chosen by the Circuit Attorney (LF 89-90). On January 18, 2008, the State's request was granted pursuant to Section 552.020 (6) (LF 93-95). On April 4, 2008, the court held a Competency hearing to determine whether Paul was competent to stand trial or competent to be sentenced (Tr. 421-497). Dr. Scott and Dr. Armour found that Paul was incompetent to stand trial and was also incompetent to be sentenced (Tr. 421-489). On April 8, 2008, the court ignored the psychiatric evidence and ruled

that Paul was competent to stand trial and was also competent to be sentenced (LF 98-100). On April 25, 2008, the court sentenced Paul to twenty years on count I, twenty years on count II, and five years on count III with all counts to run concurrently for a total of twenty years (LF 102-105).

PM's Testimony

Six year old PM thought she was going to be in high school, and then she thought she was going to attend Kindergarten; later she thought she had not yet begun school (Tr. 201). When prompted by the prosecutor, she thought she was going to go to preschool (Tr. 201). When asked have you ever had a fruit salad, she responded, "Do you like spinach?" (Tr. 202). She thought telling the truth was "A truth or a lie?" (Tr. 204). After additional probing by the prosecutor about the difference between the truth and a lie, she responded, "Do I have brown shoes?" (Tr. 204). When asked if her dad had done anything to her she did not like, she answered, "stuff I didn't like" (Tr. 204). She thought her Uncle Michael presently lived with her, "but he don't live there anymore" (Tr. 203).When asked about her Uncle Michael, she nodded her head and stated, "He was about to go and bust granny's car window" (Tr. 203). PM told the court that her dad lived by Walter's house...two break-in houses (Tr. 205). The prosecutor begged PM to please say what her dad had done to her that she did not like, and also told PM that she could look at her [the prosecutor] or over there (Tr. 205). Finally PM said, "Sex" (Tr. 206). "He put his stuff in my stuff" (Tr. 206). PM recalled that her cousin, Chico, was there at the time of the sexual assault (Tr. 206). She described Chico as

brown and her dad as black (Tr. 207, 232-233). She identified Paul as her dad indicating that his hair was black and had braids (Tr. 208-209). She remembered that her dad wore braids when he lived with her (Tr. 210). She knew her dad always wore braids, but she told Beverly Tucker, the Interview Specialist for the Children's Advocacy Center, that her dad was big and bald (Tr. 210, 279).

Tonya Phillips

Paul and PM's mother, Tonya Phillips were engaged at some point, but broke up when Phillips was six months pregnant with PM (Tr. 215). Prior to Paul moving in with Phillips, in late 2004 or early 2005, PM told Phillips that she observed her Uncle Mike on top of a girl (Tr.243). Phillips did not ask PM about the details of that incident (Tr. 243).

In August of 2005, Paul went to Phillips' house for a visit and never really left (Tr. 219). When he arrived, he was homeless, unemployed and had no personal possessions with him (Tr. 219, 333). Phillips took a mattress off of her bed, and Paul slept on the floor (Tr. 220). He ate, washed, shaved, and wore anybody's clothes he could fit (Tr. 220). Phillips' mom, Leolia Green, found [odd jobs around the neighborhood] for Paul while he lived there (Tr. 219).

Phillips and Green attended Forest Park Community College together (Tr.221-222). Phillips allowed Paul to watch PM while she and Green attended school (Tr. 222). Paul watched PM at least four times (Tr. 222).

Phillips usually gave PM and her toddler cousin, Tyrell, a bath together (Tr. 222). On Friday evening, Phillips was about to put PM and Tyrell in the tub when

PM said that "her daddy's ding ding was bigger that Tyrell's ding ding" (Tr. 223). At the time, Phillips did not think anything about it (Tr. 223). On the same day this conversation occurred, Paul told Phillips that he was going to get a food stamp card from his sister (Tr. 224). He left early that morning and did not return until Phillips was leaving for work (Tr. 224). As Paul was coming [into the house], Phillips put him out because he had been gone all day (Tr. 224).

Three days later after having a puzzling dream, Phillips asked PM "how she knew how her father looked" (Tr. 156, 225). Even though Phillips did not mention any specific body part, PM spontaneously responded that her daddy "put his ding ding on my coochi" (Tr. 155, 226). PM [instinctively] knew what Phillips was talking about because she was a wise child (Tr. 155).

Phillips sent for Paul and invited him into her house (Tr. 226). She sat him down and told PM to repeat what she had said earlier (Tr. 227). She repeated that "My daddy put his ding-ding on my coochi" (Tr. 227). Initially, Paul did not say anything (Tr. 227). Phillips asked Paul if PM was lying, and Paul said, "Why would I do that? That's my daughter" (Tr. 227). Phillips began hitting Paul with a steel bat until he left (Tr. 227).

During cross examination, Phillips was "kind of laughing at the whole situation" (Tr. 236). She recalled when she was pregnant with PM; she felt Paul was an evil person (Tr. 238). She knew she did not want to be with him (Tr. 238). Her spirit told her that Paul was an evil person, it had nothing to do with her mind; it was her heart and her body that told her that Paul was an evil person (Tr. 239).

Dr. Timothy Kutz

Dr. Kutz was the Director of the Child Protection Program at Cardinal Glennon Hospital (Tr.247-248). Part of his duties required that he examine children with complaints of child abuse (Tr. 249). PM's evaluation included a physical examination, a review of the sexual allegations, past medical records, family social history, and behavioral changes (Tr. 251). At the time that PM was examined in the emergency room, there were no signs of bruising or bleeding (Tr. 259). Dr. Kutz found no evidence of new or healed injury (Tr. 259). PM's hymen, vagina, and genital area were normal (Tr. 259). There was no physical or medical evidence that a sexual assault had ever occurred (Tr. 265).

Dr. Kutz testified that "If a four year old child had an adult penis forced into her vagina, it would likely cause significant injury, bruising, potentially a tear to the hymen, sometimes even a tear through the side of the vagina. That can cause serious injury. If a sexual abuser does not actually force his penis up into the vagina, it may not cause those injuries" (Tr. 259-260). Dr. Kutz speculated that "a penis could have been place [sic] between PM's labia perceived as in and not have physical evidence at the time of our examination" (Tr. 265).

Dr. Kutz testified that young children are typically abused by family members or family friends (Tr. 261). When children are abused by a family member or family friend, they do not receive serious injury (Tr. 261).

Dr. Kutz thought that PM's statements, terminology, and changes in some of her behavior, were similar to what other children of her age used to describe

sexual abuse (Tr. 263). Dr. Kutz emphasized that the vast majority of children who are abused have examinations that are normal (Tr. 263-264). Dr. Kutz concluded that PM's statement, some of her behavior, and physical examination were consistent with a child who has been abused (Tr. 263). He thought PM's statement was consistent with her actually being sexually abused (Tr. 264). He cited published studies that indicated that the vast number of complaints of sexual abuse actually happened (Tr. 264). Dr. Kutz thought the reality is if there is a physical finding of sexual abuse, sexual abuse happened; if there is no physical finding of sexual abuse, sexual abuse happened (Tr. 264).

Beverly Tucker

Beverly Tucker testified that she was an interview specialist with the Children's Advocacy Service (Tr. 160, 279). She interviewed and recorded PM's statement when she was four years old (Tr. 164, 287,-288). She did not ask PM if she knew the difference between the truth and a lie because there is no correlation between knowing the difference between the truth and a lie guarantees that an individual will tell the truth (Tr. 169, 292-293). She asked PM open ended-questions because a four-year old child could be very susceptible to suggestions (Tr. 177, 290). PM indicated that her daddy did it, and described him as big, black, and bald, with black teeth (Tr. 307-308).

Paul McCurry-Bey

Paul was at the hospital when PM was born (Tr. 331). Initially, he believed PM was his child (Tr. 336). Shortly after her birth, Phillips told him that PM was not his daughter (Tr. 332). He left the hospital because he was feeling hurt (Tr.336). Even though PM was not his child, money was taken out of his check for child support because he could not afford a lawyer (Tr. 336-337).

In 2005, Paul was living at the Powerhouse Christian Church where he participated in a drug program that was designed for homeless people (Tr. 333). Paul began the program in June 2005 and remained in the program until October 26, 2005 (Tr. 334). When he was released from the program, he went home to his wife (Tr. 344). During the time he participated in the drug program, he never babysat PM; never had sexual contact with her; and Tonya never beat him with a baseball bat (Tr. 335-337, 346).

Rebuttal Evidence

The State offered the testimony of Manuel Campos (Tr. 352-363) and Henry Turner in rebuttal to Paul's testimony that he was in the Powerhouse Drug Program from June until October 26, 2005 (Tr. 363-367).

Pre-Sentencing Hearing

On July 27, 2007, trial counsel asked the court to delay sentencing and order a 552 evaluation because he had just received records that day from Robert Cambridge, an individual from Options for Justice, that indicated that Paul was mildly mentally retarded with an IQ of 55 (Tr. 401-402). Trial counsel thought

Paul's low IQ explained some of the detrimental decisions he made during trial, particularly his decision to testify (Tr. 402). Trial counsel thought that Paul probably did not understand rebuttal evidence when he explained it to him (Tr. 402). Trial counsel also thought that Paul was good at masking his symptoms (Tr. 402). He believed he had to bring Paul's possible incompetence to the court's attention (Tr. 402).

Robert Cambridge

After Paul was convicted, someone wrote a letter to Options for Justice (Tr. 402-403). Based on that letter, Robert Cambridge went to see Paul, retained his school records, and determined that he was eligible for services (Tr. 402-403). Paul's school records revealed that in 1982 when he was sixteen years old, he had an IQ of 55, and received special services from the Office of Special Education when he attended Vashon High School (Tr. 402-403).

After Mr. Cambridge's testimony, the court ordered Paul committed to the Department of Mental Health for a Presentence Commitment Study pursuant to 557.031, and a competency to stand trial evaluation pursuant to 552.020 (Tr. 412).

Competency Hearing

Dr. Richard Scott

Dr. Richard Scott has a doctorate in clinical psychology from St. Louis University (Tr. 454). He received his post-doctoral supervision for licensure from the St. Louis Psychiatric Rehabilitation Center (Tr. 454-455). He has been a licensed psychologist and a certified forensic examiner since 1992 (Tr. 455). As a

psychologist for the Department of Mental Health, his primary responsibility was to conduct court ordered evaluations (Tr. 455).

Pursuant to the court's order, Dr. Scott conducted a presentence evaluation and competency to stand trial evaluation (Tr. 457). Dr. Scott reviewed a brief letter that introduced the case, the charging complaint, police reports, St. Louis Public School Special Education Records, medical records from Barnes-Jewish Hospital, St. Louis City Justice Center medical records, Regional Justice Information System records, Missouri Uniform Law Enforcement Office System records, National Crime Information records, and Case Net (Tr. 457-458). He interviewed Paul on October 23 and December 11, 2007 for a total of four and a half hours (Tr. 465). He conducted testing to assess Paul's level of intelligence and found that Paul had a full scale IQ of 55 (Tr. 458, 460). Paul's present IQ of 55 matched his IQ of 55 on the Wechsler Intelligence Scale for Children Revised that was administered to him in 1982 (Tr. 461). His 1982 IQ of 55 like his present IQ of 55 placed Paul at the bottom of the mildly mentally retarded range (Tr. 460). While Dr. Scott's testing had minor subset score differences, it was consistent with the IQ testing administered to him in 1982 (Tr. 461).

Dr. Scott's evaluation showed that Paul did not have a general understanding of the [legal] process (Tr. 464). Even though he had been through the trial, he had a lot of difficulty understanding the role of each of the parties (Tr. 464). He confused terms and spoke about the [legal] process in a concrete manner (Tr. 464). Although he appeared attentive to Dr. Scott's questions, he had a lot of

trouble understanding what they were doing (Tr. 464). He thought he needed a lawyer in the present case; he did not understand that he already had a lawyer (Tr. 478). He was unable to keep up with what was going on in his case and interpret information (Tr. 464). He could not make intelligent, knowing decisions about his legal proceedings (Tr. 464-465). He was not able to generate ideas that would mitigate his sentence or refute evidence presented by the prosecutor (Tr. 465). At the time of trial, as a result of his mental retardation, Paul was incapable of understanding the proceedings against him, and was unable to assist his attorney in his defense (Tr. 463). He was also incapable of assisting his attorney as he preceded to sentencing (Tr. 463).

Dr. Michael Armour

Dr. Armour was retained by Circuit Attorney Orwick to offer a second opinion as to whether Paul was competent to proceed pursuant to 552.020 (Tr. 422). He had been a certified mental health examiner for twenty-two years (Tr. 421). Dr. Armour reviewed numerous documents including but not limited to Ms. Orwick's referral question, police reports, Paul's trial testimony, Paul's educational records, Dr. Scott's initial report, and PM's interview summary from the Children's Advocacy Services (Tr. 424). He conducted an interview and evaluated Paul at the Justice Center with the verbal subtests of the Wechsler Adult Intelligence Scale (Tr. 423, 425). He also tested Paul with a validity indicator profile which was invalid, but the computer interpretation indicated that Paul was not trying hard enough or was suffering from mental retardation and poor

language skills (Tr. 431). This interpretation was consistent with Paul's past educational and intellectual assessments (Tr. 431). Based on Dr. Armour's evaluation, he concluded that Paul was not malingering (Tr. 441). He also found that Paul was mildly mentally retarded with a verbal IQ of 58 (Tr. 423, 425).

Paul's poor adaptive skills impaired his ability to function independently (Tr. 426). He had impaired language processing skills and a poor employment history (Tr. 427). His general ability to manage his daily affairs was poor (Tr. 427).. His IQ fell below the first percentile based upon distribution of IQ scores for the general population (Tr. 425). His mental retardation fell significantly below average intellectual functioning (Tr. 426). Individuals suffering from mental retardation are not going to respond to medication (Tr. 428). These individuals can learn some skills, but they are always going to have significant intellectual problem solving abilities (Tr. 428).

Paul had difficulty describing the nature of the charges against him (Tr. 429). He could eventually come up with the idea that he was charged with rape, but he could not describe what sodomy was (Tr. 429). Initially, Paul thought the victim was Tonya Phillips, later he identified PM as the victim (Tr.429). He knew who the judge was, but consistently described the judge's role was to help him (Tr. 429). He also thought the prosecutor's role was to help him, and did not know the title of the prosecutor (Tr. 429-430). His description of how the court works was simplistic and incorrect (Tr. 430). Paul could not explain what a plea bargain was (Tr. 430). He did not understand how he could plead guilty (Tr. 430). Dr. Armour

told Paul that his choices were guilty and not guilty and what that meant (Tr. 430). His description of how the court worked and his ability to understand questions were impaired by his poor language skills and his cognitive deficits (Tr. 430).

Paul could not understand the concept of rebuttal evidence or what the word meant (Tr. 430). Dr. Armour found Paul's trial testimony responses simplistic, difficult to follow, and consistent with his overall opinion (Tr. 430). If questions are rephrased to him in a simple manner and only simple responses are required, Paul can conceal the extent of his impairment (Tr. 432). Individuals suffering from mental retardation will attempt to present themselves like every day, ordinary people (Tr. 432). They will not draw attention to their impairments (Tr. 432). No rebuttal evidence was presented.

Additional facts will be added as necessary.

Points Relied On

I.

The trial court erred when it sentenced Paul because by doing so it violated Paul's rights to right to due process as guaranteed by the Fifth and Fourteenth amendments to the U.S. Constitution and Article I, § 10 of the Missouri Constitution in that uncontroverted evidence showed Paul was mentally retarded with a present full scale IQ of 55 consistent with his 1982 IQ. Paul's chronic and consistent mental deficits rendered him incapable of making intelligent, knowing decisions about his legal proceedings or to generate ideas that would refute evidence presented by the State or mitigate his sentence. The trial court erred by unreasonably assuming Paul was somehow competent to proceed at the time of trial despite his demonstrated, chronic mental retardation and by concluding, against the weight of evidence, that Paul was competent to be sentenced.

Drope v. Missouri, 420 U.S. 162 (1975)

Dusky v. United States, 362 U.S. 402 (1960)

Johnson v. Zerbst, 304 U.S. 458 (1938)

Pate v. Robinson, 383 U.S. 375 (1966)

Mo. Const., Art. I, §10

Mo. Supreme Court Rules 29.11, 29.12 and 30.20

Revised Statutes of Missouri, §§552.020 and 557.031 (2000)

U.S. Const., Amendments V and XIV

II.

The trial court abused its discretion and violated Paul's right to due process and a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, § 10 of the Missouri Constitution when it overruled Paul's objection allowing Dr. Timothy Kutz, an expert in child sexual abuse, to testify that PM's statement, terminology, and behavior changes were similar to what other children her age use to describe sexual abuse; testified without objection that when young children are abused by family members, they do not receive serious injury; testified on cross examination that PM's statement was consistent with her actually being sexually abused, that studies indicate that the vast number of complaints of sexual abuse actually happened, that in reality, if there is a physical finding of sexual abuse, sexual abuse happened; and if there is no physical finding of sexual abuse, sexual abuse happened, because the totality of Dr. Kutz's testimony improperly bolstered and vouched for PM's testimony.

State v. Myers, 382 N.W.2d 91 (Iowa 1986)

State v. Taylor, 663 S.W.2d 235 (Mo. banc 1984)

State v Williams, 858 S.W.2d 796 (Mo. App. E.D., 1993)

United States v. Azure, 801 F.2d 336 (8th Cir.1986)

Mo. Const., Art. I, §10

Mo. Supreme Court Rules 29.11, 29.12 and 30.20

U.S. Const., Amendments V and XIV

Argument

I.

The trial court erred when it sentenced Paul because by doing so it violated Paul's rights to right to due process as guaranteed by the Fifth and Fourteenth amendments to the U.S. Constitution and Article I, § 10 of the Missouri Constitution in that uncontroverted evidence showed Paul was mentally retarded with a present full scale IQ of 55 consistent with his 1982 IQ. Paul's chronic and consistent mental deficits rendered him incapable of making intelligent, knowing decisions about his legal proceedings or to generate ideas that would refute evidence presented by the State or mitigate his sentence. The trial court erred by unreasonably assuming Paul was somehow competent to proceed at the time of trial despite his demonstrated, chronic mental retardation and by concluding, against the weight of evidence, that Paul was competent to be sentenced.

Preservation

On June 13, 2007, trial counsel moved for Judgment of Acquittal at the close of the State's case and again at the close of all evidence (Tr. 308-309, 368; LF 56-57). On July 2, 2007, the Motion for New Trial was filed (LF 58-60). Twenty-five days later, on July 27, 2007, the court overruled Paul's Motion for New Trial and ordered that Paul be committed to the Department of Mental Health for a Presentence Commitment Evaluation pursuant to 557.031, and an evaluation of Paul's competency to stand trial (Tr. 400, 412, LF 81).

Dr. Scott's initial report was dated December 19, 2007 (Tr. 424). On January 17, 2008, Circuit Attorney, Beth Orwick, filed Objection to Dr. Scott's report and requested an additional psychiatric examination by a physician chosen by the Circuit Attorney (LF 89-90). On January 18, 2008, the court granted Ms. Orwick's request pursuant to Section 552.020 (6) (LF 93-95). Ms. Orwick chose Dr. Armour to re-examine Paul for the State (Tr. 422).

On April 4, 2008, the court held a Competency hearing (Tr. 421-497). Dr. Scott and Dr. Armour testified that Paul was incompetent to stand trial and was also incompetent to be sentenced (Tr. 421-489). No rebuttal evidence was presented. On April 8, 2008, the court ruled that Paul was competent to stand trial and was also competent to be sentenced (LF 98-100).

Paul's competency issues were not included in his motion for new trial because hese issues did not occur until after Paul's Motion for New Trial was overruled by the court. Paul's competency hearing and oral argument were on the record; and, as a result Paul believes his competency issues are properly preserved for appellate review. If this Court concludes that the error complained of herein is not preserved for appellate review, Paul requests plain error review. *State v. Wurtzberger*, 40 S.W.3d 893 (Mo. banc 2001); Rule 29.12 and 30.20.

Standard of Review

It violates due process to convict an incompetent defendant. *Pate v. Robinson,* 383 U.S. 375, 378 (1966); *Drope v. Missouri*, 420 U.S.162, 172 (1975); *Dusky v. United States*, 362 U.S.402, 402 (1960). The test for competency is

"whether a criminal defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him."' *Drope*, 420 U.S. at 172 (quoting *Dusky*, 362 U.S. at 402). In *Drope*, it was error for the trial court to have failed to suspend the trial to obtain a competency evaluation in the face of accumulating evidence of incompetency. *Drope*, 420 U.S. at 179-80.

Courts must indulge every reasonable presumption against the waiver of fundamental constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It is recognized that "[i]f a judge at any stage of a criminal proceeding has reasonable cause to believe the accused, as a result of mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his defense, the judge must order a mental examination." *State v. Messenheimer*, 817 S.W.2d 273, 278 (Mo. App., S.D. 1991). *See, also, Drope v. Missouri*, 420 U.S. 162, 180 (1975). This Court must decide "whether a reasonable judge, in the same situation as the trial court, should have experienced doubt about the accused's competencyto stand trial." *Branscomb v. Norris,* 47 F.3d 258, 261 (8th Cir.1995), *cert. denied,* 515 U.S. 1109 (1995).

Analysis

Section 552.020 explicitly recognizes the right of mentally incapacitated persons who cannot understand the proceedings against them or act in their own defense not to be tried for so long as the incapacity endures. The statute sets out the procedures by which a defendant is identified as mentally incompetent, the

steps the trial court must take to determine the nature and duration of the state's subsequent custody of that defendant, and the instances in which the criminal charges against the defendant must be dismissed.

The statute first states that "[w]henever any judge has reasonable cause to believe that the accused lacks mental fitness to precede," he or she must appoint at least one psychiatrist or psychologist to examine the defendant. Section 552.020.2. The appointed medical professional is to provide the court with a report that sets out detailed findings and opinions regarding the mental status of the accused and that recommend a course of action. Section 552.020.2-.3. Upon the recommendation of the medical professional, the court may order the accused to be committed "pending determination of the issue of mental fitness to proceed." Section 552.020.5.

The determination of mental fitness to proceed is made at a competency hearing at which the trial court reviews the reports and testimony of the various examiners. Section 552.020.7-.8. If, after reviewing this evidence, the court determines that the accused is mentally unfit for trial, the court shall commit the accused to the director of the department of mental health. Section 552.020.8.

On April 4, 2008, the court held a Competency hearing (Tr. 421-497). Dr. Scott conducted testing to assess Paul's level of intelligence and found that Paul has a full scale IQ of 55 (Tr. 458, 460). Paul's present IQ of 55 matched his IQ of 55 on the Wechsler Intelligence Scale for Children Revised that was administered to him in 1982 (Tr. 461). His 1982 IQ of 55, like his present IQ score of 55,

placed Paul at the bottom of the mildly mentally retarded range (Tr. 460). While Dr. Scott's testing had minor subset score differences, it was consistent with IQ testing that was administered in 1982 (Tr. 461).

Dr. Scott's evaluation showed that Paul did not have a general understanding of the process (Tr. 464). Even though he had been through the trial, he had a lot of difficulty understanding the role of each of the parties (Tr. 464). He confused terms and spoke about the process in a concrete manner (Tr. 464). Although he appeared attentive to Dr. Scott's questions, he had a lot of trouble understanding what they were doing (Tr. 464). As a result, Dr. Scott thought Paul was unable to keep up with what was going on in his case, interpret information, and actively assist in his defense (Tr. 464). He could not make intelligent knowing decisions about his legal proceedings, or be an active participant in his defense (Tr. 464-465). He was not able to generate ideas that would mitigate his sentence or refute evidence presented by the prosecutor (Tr. 465). As a result of his retardation at the time of his trial, Paul was incapable of understanding the proceedings against him, and was unable to assist his attorney in his defense (Tr. 463). He was also incapable of understanding the proceeding and assisting his attorney as he proceeded to sentencing (Tr. 463).

Dr. Armour was retained by Circuit Attorney Orwick to offer a second opinion as to whether Paul was competent to proceed (Tr. 422). Consistent with Dr. Scott, Dr. Armour found that Paul was mildly mentally retarded with a verbal IQ of 58 (Tr. 423, 425). Paul's impaired adaptive skills impaired his ability to

function independently (Tr. 426). Paul had impaired language processing skills, a poor employment history, and a poor general ability to manage his daily affairs (Tr. 427). His IQ fell below the first percentile based upon distribution of IQ scores for the general population (Tr. 425). His retardation fell significantly below average intellectual functioning (Tr. 426). His intellectual impairments are chronic and consistent (Tr. 428). His mental retardation is not going to respond to medication (Tr. 428). While he can learn some skills, he will always have significant impairment with his intellectual problem solving abilities (Tr. 428).

Paul had difficulty describing the nature of the charges against him (Tr. 429). He could eventually come up with the idea that he was charged with rape, but he could not describe what sodomy was (Tr. 429). Initially, he thought the victim was Tonya Phillips, later he identified PM as the victim (Tr.429). He knew who the judge was, but consistently described the judge's role was to help him (Tr. 429). He also thought the prosecutor's role was to help him, and did not know the title of the prosecutor (Tr. 429-430). His description of how the court works was simplistic and incorrect (Tr. 430). He did not understand questions and how he could plead guilty (Tr. 430). Dr. Armour had to tell Paul that his choices were guilty and not guilty and what that meant (Tr. 430). Paul could not explain what a plea bargain was (Tr. 430). His description of how the court worked and his ability to understand questions were impaired by his poor language skills and his cognitive impairments (Tr. 430). He could not understand the concept of rebuttal evidence or what the word meant (Tr. 430). He could not explain what a plea

bargain was (Tr. 430). Dr. Armour found Paul's trial testimony responses simplistic, difficult to follow, and consistent with his overall opinion (Tr. 430). Paul can conceal or mask the extent of his mental retardation if he is asked simple questions that only require simple answers (Tr. 432). Individuals suffering from mental retardation will attempt to present themselves like every day, ordinary people (Tr. 432). They will not draw attention to their impairments (Tr. 432). No rebuttal evidence was presented.

The Court's Ruling

On April 8, 2008, the court ignored Dr. Scott and Dr. Armour's psychiatric conclusions and ruled that Paul was competent to stand trial and was also competent to be sentenced (LF 98-100). The court respected Dr. Scott and Dr. Armour's opinions, but indicated that their opinions were diminished by the fact the examinations were conducted many months after the trial and that Paul had sufficient intelligence to understand the proceedings and assist counsel, if he was properly educated (LF 99). The court thought it was important that trial counsel was an experienced attorney and never suspected that Paul did not understand the proceedings (LF 99).

The court's ruling is flawed in that trial counsel's level of experience is irrelevant to the issue of whether Paul was incompetent to stand trial due to his mental retardation. There was no evidence presented as to how much general investigation trial counsel did prior to trial. There was no evidence presented that trial counsel investigated Paul's social history which would have revealed his

mental retardation. Trial counsel did not send for Paul's school records and reviewed them for the first time after Paul was convicted of the present crime (Tr. 401-402). Had trial counsel been a psychologist, he would have noticed that Paul could not define what rules meant and used terms without context (Tr. 479). The longer he was in the criminal process; he was picking up terms but did not know how to apply them (Tr. 479). Since trial counsel is not a psychologist, he is not qualified to determine Paul's level of functioning; thus, it is irrelevant that he is experienced in trying cases.

According to Dr. Armour's assessment, Paul functions like a child in that he is incapable of functioning independently (Tr. 426). He has impaired language processing skills, a poor employment history, and a poor general ability to manage his daily affairs (Tr. 427). When he arrived at Phillips home, he was unemployed and had no personal possessions with him (Tr. 219). He slept on a mattress on the floor [in Phillips' bedroom] (Tr. 220). He ate, washed, shaved, and wore anybody's clothes he could fit (Tr. 220). Phillips' mom, Leolia Green, found [odd jobs around the neighborhood] for Paul while he lived there (Tr. 219).

There was no evidence presented that Paul had been properly educated prior to his trial. In fact, there was no evidence presented of what was needed to properly educate Paul or any other mentally retarded individual about criminal proceedings, how long such education would take, or if such education would need to be administered by someone who had been educated in the technique of educating mentally retarded individuals. There was no evidence of trial counsel's

case load when he was representing Paul, or how much time he spent with Paul, how many times he visited Paul, what kind of words he used to explain the legal process to Paul, or the type of response he received from Paul after trial counsel told Paul about rebuttal evidence. According to Dr. Armour, Paul could not understand the concept of rebuttal evidence or what the word meant (Tr. 430). There is no evidence in the record that trial counsel rephrased questions to Paul and then made sure that he understood the process.

Twenty-five years before the present trial, Paul was mildly mentally retarded with an IQ of 55, and IQ testing administered in 1982 match his present full scale IQ of 55 (Tr. 460-461). The fact that Paul's chronic and consistent mental retardation continued many months after the conclusion of his trial (Tr. 423, 425, 460) demonstrates that Paul was mentally retarded before, during, and after his trial. Such evidence destroys the premise that Paul was malingering at the time of his psychiatric testing. It also destroys the idea that he is trainable. This is strong un-rebutted evidence that Paul was mentally retarded at the time of his trial and continued to be retarded at the time of sentencing. Paul may be able to learn some skills, but he will always have significant intellectual problem solving abilities (Tr. 428).

Trial counsel thought Paul's IQ of 55 explained some of the detrimental decisions he made during trial, particularly his decision to testify (Tr. 402). Trial counsel thought that Paul was good at masking his symptoms, that he probably did not understand rebuttal evidence when trial counsel explained it to him, and Dr.

Armour agreed with that analysis (Tr. 402, 430). The court violated Paul's due process rights in that the court's ruling was refuted by the record.

Second, the court relied on its own observations (LF 99). This ruling like the previous ruling is flawed. The court's observation would have been based on Paul's trial testimony. Dr. Armour found Paul's trial testimony responses simplistic, difficult to follow, and consistent with his overall opinion [of incompetency] (Tr. 430). If questions are rephrased to Paul in a simple manner and only simple responses are required, Paul can conceal the extent of his impairment (Tr. 432). Individuals suffering with retardation will attempt to present themselves like every day, ordinary people (Tr. 432). They will not draw attention to their impairments (Tr. 432).

Paul did not draw attention to his impairment. Without Paul's social history, school records, and additional testing, the court's observations would not be dispositive. Since the court felt it important to have Paul evaluated, the court knew it need psychiatric testing to understand the extent of Paul mental functioning. Paul believes the court's observations were colored by the fact that he had already been convicted of statutory rape, sodomy, and incest and that the court's ruling is refuted by the record.

Third, the court thought the fact that Paul attacked the verdict based on retardation indicated to the court that Paul had a degree of guile inconsistent with his inability to assist counsel (LF 99). The court's ruling is erroneous. Had Paul had a degree of guile as stated by the court, he would have told trial counsel about

his school records prior to trial. He would not have wanted to take a chance on being found guilty of statutory rape, sodomy, and incest. Paul did not discuss his school records with trial counsel because he wanted to be viewed as an ordinary person (Tr. 432). He did not want to draw attention to his impairments (Tr. 432, 480-481).

Someone wrote a letter to Options for Justice for Paul because they were concerned about him (Tr. 472, 481). There is no evidence in the record what was said in the letter. After receiving the letter, Mr. Cambridge went to see Paul and, after visiting with him, decided to send for Paul's school records and bring them to court (Tr. 402-403). There is no evidence in the record that it was Paul's idea to get the records or to bring his school records to court. There is no evidence in the record that it was Paul's idea to attack the verdict. After Mr. Cambridge gave the records to trial counsel, trial counsel asked the court to delay sentencing and order a 552 evaluation (Tr. 401-402). Paul is mentally retarded, he had no way of predicting that the trial court would to send him to the Department of Mental Health for an evaluation pursuant to 552.020, and that Dr. Scott and Dr. Armour would both determine that he was incompetent to stand trial and incompetent to be sentenced.

Fourth, because Paul had previous experience with the court system suggested to the court that Paul made malingering responses to Dr. Scott and Dr. Armour (LF 99). This reasoning is unsound and not supported by the evidence. Dr. Scott has a doctorate in clinical psychology from St. Louis University (Tr.

454). He received his post-doctoral supervision for licensure from the St. Louis Psychiatric Rehabilitation Center (Tr. 454-455). He has been a licensed psychologist and a certified forensic examiner since 1992 (Tr. 455). As a psychologist for the Department of Mental Health, his primary responsibility was to conduct court ordered evaluations (Tr. 455). Dr. Armour was retained by Circuit Attorney Orwick to offer a second opinion as to whether Paul was competent to proceed pursuant to 552.020 (Tr. 422). He has been a certified mental health examiner for twenty-two years (Tr. 421).

Dr. Scott and Dr. Armour were both aware of Paul's criminal history and that he had been convicted in the present case (Tr. 424, 457-458) when they concluded that he was incompetent to stand trial and also incompetent to be sentenced. Both of these doctors understood that Paul would have a reason to malinger and neither doctor found that to be true. Dr. Scott did not want his opinion colored by the defense or the prosecutor (Tr. 473). He based his opinion on his experience with Paul, and his assessment of Paul's intelligence, his evaluation of Paul's understanding of how the court works and what Paul's role was within the process (Tr. 473). Dr. Scott thought his diagnosis of mental retardation was well established and had been prior to the legal proceeding (Tr. 483). On rigorous cross-examination, Dr. Armour maintained that Paul was not malingering (Tr. 441). Both of these doctors were in the best position to determine whether Paul was malingering. The court's assessment was refuted the evidence.

The court admitted that it was not convinced beyond a reasonable doubt that Paul was competent at the time of trial, and the State had not even persuaded the court that it was probable that Paul was competent (LF 99). The court felt it did not need to be convinced beyond a reasonable doubt because the burden was on Paul to prove he was mentally retarded by the preponderance of the evidence (LF 99). The court concluded that Paul failed to carry his burden of proof pursuant to Section 552.020.8, and ruled that Paul was competent to be sentenced because trial counsel was fully advised of the nature of the crimes committed, fully advised of Paul's biography and circumstances that could be employed to argue for leniency (LF 99-100).

Preponderance of the evidence is a lower standard of review than beyond a reasonable doubt and, as a result; Paul need only show that it is more likely than not that he was incompetent to proceed at the time of trial, and he has met that burden. All the evidence presented at the competency hearing supported the fact that Paul was incompetent to stand trial and also incompetent to be sentenced. Dr. Armour, the State's rebuttal doctor, like Dr. Scott, reviewed numerous documents, conducted independent testing, and concluded that Paul was not competent to stand trial and was also incompetent to be sentenced. Paul had an IQ of 55 in 1982 at a time when he had no reason to malinger (Tr. 460-461). The court separated incompetent to stand trial from incompetent to be sentenced. This ruling is a distinction without a difference. If Paul is incompetent to stand trial, there is

no reason to decide if he is incompetent to be sentenced because the issue is moot. If he is incompetent to stand trial, he does not reach the sentencing stage.

II

The trial court abused its discretion and violated Paul's right to due process and a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, § 10 of the Missouri Constitution when it overruled Paul's objection allowing Dr. Timothy Kutz, an expert in child sexual abuse, to testify that PM's statement, terminology, and behavior changes were similar to what other children her age use to describe sexual abuse; testified without objection that when young children are abused by family members, they do not receive serious injury; testified on cross examination that PM's statement was consistent with her actually being sexually abused, that studies indicate that the vast number of complaints of sexual abuse actually happened, that in reality, if there is a physical finding of sexual abuse, sexual abuse happened; and if there is no physical finding of sexual abuse, sexual abuse happened, because the totality of Dr. Kutz's testimony improperly bolstered and vouched for PM's testimony.

Preservation

Trial counsel moved for judgment of acquittal at the close of the state's case and again at the close of all evidence (Tr. 263; LF 56-57). Counsel thereafter included in the Motion for New Trial that the court erred in overruling the defendant's objection to the opinion of Dr. Kutz that sexual contact occurred in this case. The opinion invaded the province of the jury and there was insufficient foundation for his opinion in that there was no physical evidence that the rape had

occurred (Tr. 263; LF 59). Paul asserts this issue is fully preserved for appellate review. Rule 29.11. If this court determines that the error complained of herein is not preserved for appellate review, Paul requests plain error review. *State v. Wurtzberger*, 40 S.W.3d 893 (Mo. banc 2001); Rule 29.12 and 30.20.

Standard of Review

Expert testimony should never be admitted unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to draw correct conclusions from the facts proved. *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. banc 1984). The evidence must aid the jury. *Id.* The expert evidence should be excluded if it unnecessarily diverts the attention of the jury from the question to be decided. *Id.* However, an expert may testify as to his/her opinion on an ultimate issue in a criminal case: " '[O]pinions of experts are often admissible upon vital issues which only the trier of fact may decide,' " *id.*, as long as the expert witness does not express an opinion as to whether the defendant is guilty of the charges. Id. Moreover, "[e]xpert opinion testimony is not admissible as it relates to credibility of witnesses." Id. (citing *Beishir v. State* 522 S.W.2d 761, 765 (Mo. banc 1975).

Analysis

General profile evidence of child sexual abuse victims can be a proper topic of expert testimony. Such testimony has been admitted to "assist the jury's understanding of the behavior of sexually abused children, a subject beyond the knowledge of an ordinary juror." *State Newman*, 784 P.2d at 1006 (N.M. App.

1989). "We cannot assume the average juror is familiar with the behavioral characteristics of victims of child molestation. Knowledge of such characteristics may well aid the jury in weighing the testimony of the alleged child victim." *State v. Lindsey*, 720 P.2d 73, 75 (Ariz., 1986).

Other courts have more fully addressed and more specifically affirmed the propriety of general profile testimony in child sexual abuse cases. See *United States v. Azure,* 801 F.2d 336 (8th Cir.1986) (disallowing expert testimony that commented on the credibility of the victim, but allowing general profile testimony); *State v. Moran,* 728 P.2d 248 (Ariz., 1986) (acknowledging that testimony on the general, behavioral characteristics of sexual abuse victims would be allowed); S*tate v. Lindsey,* 720 P.2d 73 (Ariz., 1986); *State v. Newman,* 784 P.2d 1006 (N.M. App.1989) (holding expert testimony of general characteristics of child sexual abuse victims to be admissible to assist jury to understand the child's behavior); *State v. Catsam,* 534 A.2d 184 (Vt., 1987) (upholding admissibility of social worker's expert testimony regarding general profile evidence of child abuse victim, but not allowing opinion evidence that sufferers of syndrome do not fabricate stories); *State v. Myers,* 382 N.W.2d 91 (Iowa, 1986) (allowing general testimony, but disallowing testimony that children "rarely lie," as having effect of directly opining the truth of complaining witness); *Sexton v. State,* 529 So.2d 1041 (Ala.Crim.App.1988) (holding as admissible a clinical psychologist's testimony concerning generally accepted symptoms of child sexual abuse victims including fear and anxiety, increased knowledge of sexual issues, and delayed reporting);

State v. Middleton, 657 P.2d 1215 (Or., 1983) (permitting expert to give testimony on the reaction of the typical child victim of familial sexual abuse but not on whether victim was telling the truth).

Expert testimony that comments directly on a particular witness' credibility, as well as expert testimony that expresses an opinion with respect to the credibility or truthfulness of witnesses of the same type under consideration invests "scientific cachet" on the central issue of credibility and should not be admitted. However, it may be appropriate for an expert to testify that a child demonstrates age-inappropriate sexual knowledge or awareness, and that a child's behaviors are consistent with a stressful sexual experience. *State v. Taylor, 663* S.W.2d at 24.

In *State v. Williams*, 858 S.W.2d 796 (Mo.App. E.D., 1993), Williams was convicted for sodomizing her seven year-old cousin. The physical evidence that the victim had been sexually abused was not in dispute. The only issue at trial was whether the appellant was the abuser. Williams claimed that the trial court committed plain error in allowing Dr. Monteleone, a doctor with expertise in the area of child sexual abuse, to testify that "very rarely do [sexually abused] children lie," that "[i]ncidents of lying among children is very low, less than three percent," that if a child was not asked leading questions, then the child's spontaneous response "declares who it was" who sexually abused her, and that "physical findings and the behavioral indicators can only support what the child says," and the state relied essentially on testimonial evidence of the victim's allegations to prove its case. Williams claimed that Dr. Monteleone's testimony improperly

vouched for the witness' credibility and usurped the function of the jury as the ultimate finder of fact in the case. The court agreed that the testimony was manifestly prejudicial, and granted William a new trial.

In the instant case like *Williams*, the expert witness improperly vouched for the complaining witness' testimony. Six year old PM testified about an event that purportedly happened to her when she was four years old (Tr. 213-214). Her incredible testimony was confusing, erratic, disjointed, and the state relied essentially on PM's testimonial allegations to prove its case.

PM thought she was going to be in high school, and then she thought she was going to attend Kindergarten, later she thought she had not yet began school (Tr. 201). When prompted by the prosecutor, she thought she was going to go to preschool (Tr. 201). When asked have you ever had a fruit salad, she responded, "Do you like spinach?" (Tr. 202). She thought telling the truth was "A truth or a lie?" (Tr. 204). After additional probing by the prosecutor about the difference between the truth and a lie, she responded, "Do I have brown shoes?" (Tr. 204).

When asked if her dad had done anything to her she did not like, she answered, "stuff I didn't like" (Tr. 204). She thought her Uncle Michael presently lived with her, "but he don't live there anymore" (Tr. 203).When asked again about her Uncle Michael, she nodded her head and stated, "He was about to go and bust granny's car window" (Tr. 203). PM told the court that her dad lived by Walter's house...two break-in houses (Tr. 205). The prosecutor begged PM to please say what her dad had done to her that she did not like, and also told PM that

she could look at her [the prosecutor] or over there (Tr. 205). Finally PM said, "Sex" (Tr. 206). "He put his stuff in my stuff" (Tr. 206). PM recalled that her cousin, Chico, was there at the time of the sexual assault (Tr. 206) but Chico did not testify about anything he may have observed. She described Chico's complexion as brown and her dad as black (Tr. 207, 232-233).

PM identified Paul as her dad indicating that his hair was black and had braids (Tr. 208-209). She remembered that her dad wore braids when he lived with her (Tr. 210). She knew her dad always wore braids, but she told Beverly Tucker, the Interview Specialist for the Children's Advocacy Center, that her dad was big and bald (Tr. 210, 279).

Dr. Scott testified that "we can convince a child in a very short, short period of time they've had an experience they have not" (Tr. 485). Dr. Scott based his opinion of a body of research that was done on the veracity of child witnesses which concluded that "kids can fabricate or fill in blanks with false information especially if they're led at all" (Tr. 485). Beverly Tucker testified that a four-year old child could be very susceptible to suggestions (Tr. 177) and Paul submits that is what happened here. PM's mother, Tonya Phillips, laughed about the whole situation during her cross examination (Tr. 236). She recalled when she was pregnant with PM; she felt Paul was an evil person (Tr. 238). She knew she did not want to be with him (Tr. 238). Her spirit told her that Paul was an evil person, it had nothing to do with her mind; it was her heart and her body that told her that

Paul was an evil person (Tr. 239). Such testimony clearly indicates that Phillips was biased against Paul long before the allegations in this case.

Despite the fact Phillips thought Paul was an evil person, four years after she became aware of Paul's evilness, she allowed him to sleep on her mattress and babysit PM four times while she and her mother attended Forest Park Community College (Tr. 222). She only put him out because he left home early in the morning to get a food stamp card and did not return until she was going to work later that day (Tr. 224). This testimony appears to indicate that Phillips felt anger and jealousy toward Paul because she did not know where he was all day.

Interestingly, on the same day that Phillip banished Paul from her house, she learned from PM that Paul's ding ding was bigger that Tyrell's ding ding" (Tr. 223-224). After Phillips had an opportunity to fester over the weekend, she had a puzzling dream that led her to confront PM and this unsupported story of sexual abuse emerged (Tr. 225-227, 259. 265). It is just as interesting, that when PM told Phillips that she observed her Uncle Mike on top of a girl, Phillips did not have a puzzling dream or ask PM details about the incident (Tr. 243).

PM had been exposed to inappropriate sexual abuse from her cousin, Chico, who tried to rape her (Tr. 313). There is no evidence in the record whether Chico had tried to rape her on other occasions. According to Phillip's mother, Leolia Green, she observed that Chico had PM's shorts down and had her turned up in the air as he was taking his pajamas off (Tr. 313). Phillips did not testify that she sought prosecution of Chico because he tried to rape her daughter. Nor did

she testify that she had any nightmares, puzzling dreams, or confronted PM about Chico's attempted rape, and this is an incident Phillips knows is true based on her mother's testimony. PM indicated that her daddy did it, and described him as big, black, and bald, with black teeth (Tr. 307-308). This description was inconsistent with Paul's appearance when he lived with Phillips, and Phillip knew that (Tr. 208-210,279), yet Phillips wanted Paul prosecuted for the sexual assault of his daughter when there was no physical, medical, or credible testimonial evidence to tie Paul to this crime, if there was in fact a crime (Tr. 199-211, 259, 265).

According to Phillips, she sent for Paul and invited him into her house, sat him down, and told PM to repeat what she had said earlier (Tr. 226-227). She repeated that "My daddy put his ding-ding on my coochi" (Tr. 227). Initially, Paul did not say anything (Tr. 227). Phillips asked Paul if PM was lying, and Paul said, "Why would I do that? That's my daughter" (Tr. 227). Phillips began hitting Paul with a steel bat until he left (Tr. 227). This testimony is not evidence that Paul committed this crime; it confirms Dr. Scott's and Dr. Armour's conclusions that because of Paul's poor language skills, he has a lot of trouble understanding and responding to what is going on around him (Tr. 427, 464).

After Phillips and PM's testimony the prosecutor presented the testimony of Dr. Timothy Kutz. Dr. Kutz testified that at the time PM was examined in the emergency room, there were no signs of bruising or bleeding (Tr. 259). When Dr. Kutz examined PM, he found no evidence of new or healed injury (Tr. 259). PM's

hymen, vagina, and genital area were normal (Tr. 259). There was no physical or medical evidence that a sexual assault had ever occurred (Tr. 265).

Dr. Kutz admitted that "If a four year old child had an adult penis forced into her vagina, it would likely cause significant injury, bruising, potentially a tear to the hymen, sometimes even a tear through the side of the vagina. That can cause serious injury. If an adult male does not actually force his penis up into the vagina, it may not cause those injuries" (Tr. 259-260). Dr. Kutz sought to bolster PM's testimony when he speculated that "a penis could have been place [sic] between PM's labia perceived as in and not have physical evidence at the time of our examination" (Tr. 265).

Dr. Kutz knew that PM's father was charged with the statutory rape, sodomy, and incest of his daughter, so Dr. Kutz tried to bolster PM's incredible testimony by telling the jury that young children are typically abused by family members or family friends (Tr. 261). Since there was no medical or physical evidence that PM had been raped (Tr. 259, 265), Dr. Kutz legitimized PM's story by telling the jury that when children are abused by a family member or family friend, they do not receive serious injury (Tr. 261). This is not scientific evidence but mere conjecture.

Dr. Kutz thought that PM's statement, terminology, and changes in some of her behavior, were similar to what other children of her age used to describe sexual abuse (Tr. 263). Dr. Kutz emphasized that the vast majority of children who are abused have [physical] examinations that are normal (Tr. 263-264). Dr. Kutz

concluded that PM's statement, some of her behavior, and physical examination was consistent with a child who has been abused (Tr. 263). **He thought PM's statement was consistent with her actually being sexually abused** (Tr. 264). **He cited published studies that indicated that the vast number of complaints of sexual abuse actually happened (Tr. 264). He thought that in reality, if there is a physical finding of abuse, [sexual] abuse happened; conversely if there is no physical finding of abuse, [sexual] abuse happened (Tr. 264). Dr. Kutz emphasized that if abuse happens to the point there is permanent scarring, then [he] can identify the abuse as real (Tr. 264). If abuse happens to the point that there is no permanent scarring, then [he] has to say what is real (Tr. 264).** Such testimony was immensely prejudicial, defied logic, and did not assist the jurors in understanding PM's behavior. The only purpose of Dr. Kutz's testimony was to improperly bolster and vouch for PM's incredible testimony and to convince the jury that a rape had occurred when there was no physical or medical evidence to support that conclusion. Kutz's testimony was extremely prejudicial in that PM was the sole witness to the alleged sexual abuse.

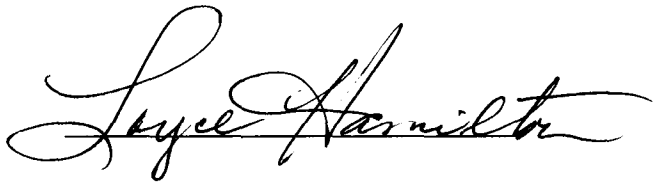
Conclusion

With respect to Point I, the trial erred and violated Paul's rights to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution when it sentenced Paul to twenty years for first-degree Statutory Rape, twenty years for first-degree Statutory Sodomy, and five years for incest in that uncontroverted

evidence was presented at the post-trial competency hearing that Paul is mildly mentally retarded with a full scale IQ of 55, and that as a result of his retardation at the time of his trial, he was incapable of understanding the proceedings against him, and was unable to assist his attorney in his defense, and as a result of the trial court's error, this court should vacate Paul's sentences and commit him to the Department of Mental Health until he is competent to stand trial, and if he cannot become competent to stand trial to release him.

With respect to Point II, the trial abused its discretion and violated Paul's right to due process of law and a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Missouri Constitution when it overruled Paul's objection allowing Dr. Timothy Kutz to testify that PM's statement, terminology, and changes in some of her behavior was similar to what other children her age use to describe sexual abuse, that PM's statement was consistent with her actually being sexually abused; that young children are typically abused by family members or family friends, that when children are abused by a family member or family friend, they do not receive serious injury; and that published studies indicate that the vast number of complaints of sexual abuse actually happened, that in reality, if there is a physical finding of sexual abuse, sexual abuse actually happened; and if there is no physical finding of sexual abuse, sexual abuse actually happened. Dr. Kutz's testimony was improper vouching for the complaining witness, and as a result, this court should vacate the sentence in Counts I, II, and III and remand for a new trial.

Respectfully Submitted,



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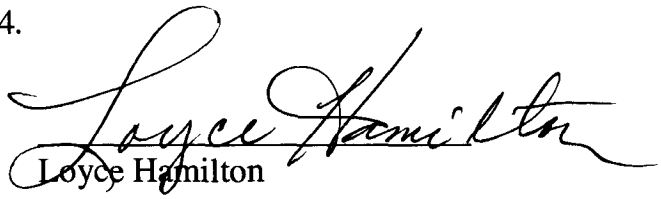
CERTIFICATE OF SERVICE

Two copies of the forgoing Appellant's Statement, Brief, and Argument were mailed to the Attorney General, State of Missouri, Jefferson City, Missouri 65102 on this 21 day of Nov., 2004.

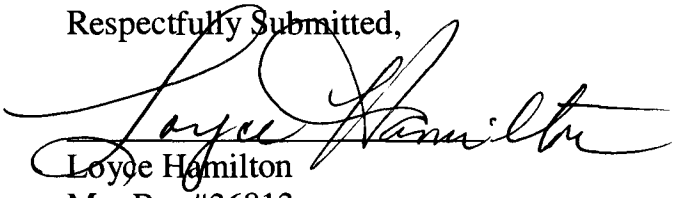


Loyce Hamilton

Certificate of Counsel Pursuant to Local Rule 360 and 361

Pursuant to Rule 84.06, counsel certifies that this brief complies with the limitations contained in Local Rule 360. Based upon the information provided by undersigned counsel's word processing program, Microsoft Word 2007, this brief contains 47 pages, 1,018 lines of text and 10,905 words. Further, a copy of Appellant's brief on floppy disk accompanies his written brief and that disk has been scanned for viruses using MacAfee Virus Scan, with updated virus definitions and is virus-free as required by Local Rule 361.

Respectfully Submitted,



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IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	Appeal No. ED91275
	)	
Paul Wesley McCurry-Bey,	)	
	)	
Appellant.	)	

APPELLANT'S APPENDIX

Sentence and Judgment	A1-A4
Revised Statutes of Missouri	
§552.020, RSMo., 2000	A5-A9
§557.031, RSMo., 2000	A-10

IN THE 22ND JUDICIAL CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI

FILED
APR 25 2008
MARIANO V. FAVAZZA
CLERK, CIRCUIT COURT
BY _____ DEPUTY

Judge or Division: 4	Case Number: 22051-03966-01
	☐ Change of Venue County: _____ Case Number: _____
	Offense Cycle No.:
State of Missouri vs. Defendant: Paul McCurry Bey	Prosecuting Attorney/MO Bar No.: Orwick 52089 Defense Attorney/MO Bar No.: 37847 Estes
DOB: 9/3/66 SSN: 499-72-6860 SEX: M	Appeal Bond Set Date:
☑ Pre-Sentence Assessment Report Ordered ☐ Pre-Sentence Assessment Report Waived	Amount:

(Date File Stamp)

CLERK 2008 APR 30 PM 3:

Judgment

Count No. 1	Count No. 2	Count No. 3
Charge Description: Stat Rape 1st Degree	Charge Description: State Sodomy 1st Degree	Charge Description: Incest
Charge Code:	Charge Code:	Charge Code:
Statute: 566.032	Statute: 566.062	Statute: 568.020
Date of Offense: 8-6-05 to 9-12-05	Date of Offense: 8/6/05 to 9/12/05	Date of Offense: 8/6/05 to 9/12/05
☐ Misdemeanor ☑ Felony	☐ Misdemeanor ☑ Felony	☐ Misdemeanor ☑ Felony
Class ☐ A ☐ B ☐ C ☐ D ☑ Unclassified	Class ☐ A ☐ B ☐ C ☐ D ☑ Unclassified	Class ☐ A ☐ B ☐ C ☑ D ☐ Unclassified
On the above count, it is adjudged that the defendant has been:	On the above count, it is adjudged that the defendant has been:	On the above count, it is adjudged that the defendant has been:
☐ Found Guilty upon a plea of guilty	☐ Found Guilty upon a plea of guilty	☐ Found Guilty upon a plea of guilty
☑ Found guilty by a jury/~~court~~	☑ Found guilty by a jury/~~court~~	☑ Found guilty by a jury/~~court~~
☐ Dismissed/Nolle pros/found not guilty	☐ Dismissed/Nolle pros/found not guilty	☐ Dismissed/Nolle pros/found not guilty

Count No.	Count No.	Count No.
Charge Description:	Charge Description:	Charge Description:
Charge Code:	Charge Code:	Charge Code:
Statute:	Statute:	Statute:
Date of Offense:	Date of Offense:	Date of Offense:
☐ Misdemeanor ☑ Felony	☐ Misdemeanor ☐ Felony	☐ Misdemeanor ☐ Felony
Class ☐ A ☐ B ☐ C ☐ D ☐ Unclassified	Class ☐ A ☐ B ☐ C ☐ D ☐ Unclassified	Class ☐ A ☐ B ☐ C ☐ D ☐ Unclassified
On the above count, it is adjudged that the defendant has been:	On the above count, it is adjudged that the defendant has been:	On the above count, it is adjudged that the defendant has been:
☐ Found Guilty upon a plea of guilty	☐ Found Guilty upon a plea of guilty	☐ Found Guilty upon a plea of guilty
☐ Found guilty by a jury/court	☐ Found guilty by a jury/court	☐ Found guilty by a jury/court
☑ Dismissed/Nolle pros/found not guilty	☐ Dismissed/Nolle pros/found not guilty	☐ Dismissed/Nolle pros/found not guilty

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The defendant has been found beyond a reasonable doubt to be a:

- ☐ Persistent Sexual Offender (558.018 RSMo)
- ☐ Persistent Drug Offender (195.285, .291, .292, .295, or .296 RSMo)
- ☐ Persistent Misdemeanor Offender (558.016 RSMo)
- ☑ Persistent Offender (558.016 RSMo)
- ☐ Persistent Domestic Violence Offender (565.063 RSMo)
- ☐ Persistent Offender (Intoxication-related Traffic Offense) (577.023 RSMo)
- ☐ Aggravated Offender (577.023 RSMo)
- ☐ Not Applicable
- ☐ Predatory Sexual Offender (558.018 RSMo)
- ☐ Prior Drug Offender (195.285, .291, .295, or .296 RSMo)
- ☐ Dangerous Offender (558.016 RSMo)
- ☐ Prior Offender (558.016 RSMo)
- ☐ Prior Domestic Violence Offender (565.063 RSMo)
- ☐ Prior Offender (Intoxication-related Traffic Offense) (577.023 RSMo)
- ☐ Chronic Offender (577.023 RSMo)

on _____ (date).

The court:

- ☑ Informs the defendant of verdict/~~finding~~, asks the defendant whether ~~(s)~~he has anything to say why judgment should not be pronounced, and finds that no sufficient cause to the contrary has been shown or appears to the court.
- ☑ Defendant has been advised of his/~~her~~ rights to file a motion for post-conviction relief pursuant to Rule 24~~.035~~/29.15 and the court has found
  - ☑ Probable cause ☐ No probable cause

  to believe that defendant has received ineffective assistance of counsel.
- ☐ Finds the defendant has pled or been found guilty of a dangerous felony, as defined in Section 556.061 RSMo, and if committed to the Department of Corrections, must serve at least 85% of the sentence.
- ☐ Finds the defendant has pled or been found guilty of an offense for which probation and parole are not authorized.

On count 1, the Court:

☐ Suspends imposition of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.

☑ Sentences and commits the defendant to the custody of Mo DOC for a period of 20 years. Sentence to be served

☑ Concurrent ☐ Consecutive with Counts 2 & 3.

☐ Probation Time Credit: _____.

☐ Suspends execution of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.

☐ Fines the defendant $ _____. The court stays $ _____ with the remainder due by _____ (date).

On count 2, the Court:

☐ Suspends imposition of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.

☑ Sentences and commits the defendant to the custody of Mo DOC for a period of 20 years. Sentence to be served

☑ Concurrent ☐ Consecutive with Counts 1 & 3.

☐ Probation Time Credit: _____.

☐ Suspends execution of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.

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☐ Fines the defendant $ _____. The court stays $ 103 with the remainder due by _____ (date).

On count 3, the Court:

☐ Suspends imposition of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.

☑ Sentences and commits the defendant to the custody of MoDOC for a period of 5 years. Sentence to be served

☑ Concurrent ☐ Consecutive with Counts 1+2.

☐ Probation Time Credit: _____.

☐ Suspends execution of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.

☐ Fines the defendant $ _____. The court stays $ _____ with the remainder due by _____ (date).

The court orders:

☑ The clerk to deliver a certified copy of the judgment and commitment to the sheriff.

☐ The sheriff to authorize one additional officer/guard to transport defendant to the Department of Corrections.

☑ That judgment is entered in favor of the state of Missouri and against the defendant for the crime victims compensation fund for the sum of
☐ $10.00 ☐ $46.00 ☑ $68.00.
☐ Satisfied ☐ Unsatisfied

☐ Judgment for the State of Missouri and against the defendant for appointed counsel services in the sum of $ _____.
☐ Satisfied ☐ Unsatisfied

☑ Costs taxed against Defendant.

☐ Costs waived.

☐ Defendant to report immediately to the _____ Department for fingerprinting. The Defendant is ordered to submit to the fingerprinting, and is further ordered to provide all information necessary for the officer taking the fingerprints to fully complete all identification and photograph portions of the standard fingerprint cards.

☐ §217.785 RSMo Missouri Post Conviction Drug Treatment Program

☐ Non-Institutional ☐ Institutional

☐ §217.362 RSMo Court Ordered Long-Term Substance Abuse Program

☐ §217.378 RSMo Regimented Discipline Program

☐ The court sentences §559.115(2) RSMo General Population Department of Corrections shall provide a report and recommendation whether probation should be granted.

The court recommends placement to:

☐ §559.115(3) RSMo Institutional Treatment Program Department of Corrections shall provide a report and recommendation whether probation should be granted. (Statutory Discharge)

☐ §559.115(3) RSMo Sexual Offender Assessment Unit Department of Corrections shall provide a report and recommendation whether probation should be granted.

☐ §559.115(3) RSMo Shock Incarceration Program Department of Corrections shall provide a report and recommendation whether probation should be granted. (Statutory Discharge)

The court further orders: _____

So Ordered:

9/27/07 A-3

Date Judge

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Cause #: 26051-03966-0

I certify that the above is a true copy of the original Judgment and Sentence of the court in the above cause, as it appears on record in my office.

Issued on 4-25-08
Date

Clerk

X Paul McCurry
DFT

CA 52089

ADFT 3789

RECEIVED
2008 APR 30 PM 3:38
CLERK

#534 Wilkins
Sheriff

Date

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105

Missouri Revised Statutes

Chapter 552
Criminal Proceedings Involving Mental Illness
Section *552.020*

August 28, 2008

Lack of mental capacity bar to trial or conviction--psychiatric examination, when, report of--plea of not guilty by reason of mental disease, supporting pretrial evaluation, conditions of release--commitment to hospital, when--statements of accused inadmissible, when--jury may be impaneled to determine mental fitness.

552.020. 1. No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.

2. Whenever any judge has reasonable cause to believe that the accused lacks mental fitness to proceed, he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, by order of record, appoint one or more private psychiatrists or psychologists, as defined in section 632.005, RSMo, or physicians with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals, who are neither employees nor contractors of the department of mental health for purposes of performing the examination in question, to examine the accused; or shall direct the director to have the accused so examined by one or more psychiatrists or psychologists, as defined in section 632.005, RSMo, or physicians with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals. The order shall direct that a written report or reports of such examination be filed with the clerk of the court. No private physician, psychiatrist, or psychologist shall be appointed by the court unless he has consented to act. The examinations ordered shall be made at such time and place and under such conditions as the court deems proper; except that, if the order directs the director of the department to have the accused examined, the director, or his designee, shall determine the time, place and conditions under which the examination shall be conducted. The order may include provisions for the interview of witnesses and may require the provision of police reports to the department for use in evaluations. The department shall establish standards and provide training for those individuals performing examinations pursuant to this section and section 552.030. No individual who is employed by or contracts with the department shall be designated to perform an examination pursuant to this chapter unless the individual meets the qualifications so established by the department. Any examination performed pursuant to this subsection shall be completed and filed with the court within sixty days of the order unless the court for good cause orders otherwise. Nothing in this section or section 552.030 shall be construed to permit psychologists to engage in any activity not authorized by chapter 337, RSMo. One pretrial evaluation shall be provided at no charge to the defendant by the department. All costs of subsequent evaluations shall be assessed to the party requesting the evaluation.

3. A report of the examination made under this section shall include:

(1) Detailed findings;

(2) An opinion as to whether the accused has a mental disease or defect;

(3) An opinion based upon a reasonable degree of medical or psychological certainty as to whether the accused, as a result of a mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense;

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(4) A recommendation as to whether the accused should be held in custody in a suitable hospital facility for treatment pending determination, by the court, of mental fitness to proceed; and

(5) A recommendation as to whether the accused, if found by the court to be mentally fit to proceed, should be detained in such hospital facility pending further proceedings.

4. If the accused has pleaded lack of responsibility due to mental disease or defect or has given the written notice provided in subsection 2 of section 552.030, the court shall order the report of the examination conducted pursuant to this section to include, in addition to the information required in subsection 3 of this section, an opinion as to whether at the time of the alleged criminal conduct the accused, as a result of mental disease or defect, did not know or appreciate the nature, quality, or wrongfulness of his conduct or as a result of mental disease or defect was incapable of conforming his conduct to the requirements of law. A plea of not guilty by reason of mental disease or defect shall not be accepted by the court in the absence of any such pretrial evaluation which supports such a defense. In addition, if the accused has pleaded not guilty by reason of mental disease or defect, and the alleged crime is not a dangerous felony as defined in section 556.061, RSMo, or those crimes set forth in subsection 11 of section 552.040, or the attempts thereof, the court shall order the report of the examination to include an opinion as to whether or not the accused should be immediately conditionally released by the court pursuant to the provisions of section 552.040 or should be committed to a mental health or mental retardation facility. If such an evaluation is conducted at the direction of the director of the department of mental health, the court shall also order the report of the examination to include an opinion as to the conditions of release which are consistent with the needs of the accused and the interest of public safety, including, but not limited to, the following factors:

(1) Location and degree of necessary supervision of housing;

(2) Location of and responsibilities for appropriate psychiatric, rehabilitation and aftercare services, including the frequency of such services;

(3) Medication follow-up, including necessary testing to monitor medication compliance;

(4) At least monthly contact with the department's forensic case monitor;

(5) Any other conditions or supervision as may be warranted by the circumstances of the case.

5. If the report contains the recommendation that the accused should be committed to or held in a suitable hospital facility pending determination of the issue of mental fitness to proceed, and if the accused is not admitted to bail or released on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending determination of the issue of mental fitness to proceed.

6. The clerk of the court shall deliver copies of the report to the prosecuting or circuit attorney and to the accused or his counsel. The report shall not be a public record or open to the public. Within ten days after the filing of the report, both the defendant and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a psychiatrist or psychologist, as defined in section 632.005, RSMo, or a physician with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals, of their own choosing and at their own expense. An examination performed pursuant to this subsection shall be completed and a report filed with the court within sixty days of the date it is received by the department or private psychiatrist, psychologist or physician unless the court, for good cause, orders otherwise. A copy shall be furnished the opposing party.

7. If neither the state nor the accused nor his counsel requests a second examination relative to fitness to proceed or contests the findings of the report referred to in subsections 2 and 3 of this section, the court may make a determination and finding on the basis of the report filed or may hold a hearing on its own motion. If any such opinion is contested, the court shall hold a hearing on the issue. The court shall determine the issue of mental fitness to proceed and may impanel a jury of six persons to assist in making the determination. The report or reports may be received in evidence at any hearing on the issue but the party contesting any opinion therein shall

have the right to summon and to cross-examine the examiner who rendered such opinion and to offer evidence upon the issue.

8. At a hearing on the issue pursuant to subsection 7 of this section, the accused is presumed to have the mental fitness to proceed. The burden of proving that the accused does not have the mental fitness to proceed is by a preponderance of the evidence and the burden of going forward with the evidence is on the party raising the issue. The burden of going forward shall be on the state if the court raises the issue.

9. If the court determines that the accused lacks mental fitness to proceed, the criminal proceedings shall be suspended and the court shall commit him to the director of the department of mental health.

10. Any person committed pursuant to subsection 9 of this section shall be entitled to the writ of habeas corpus upon proper petition to the court that committed him. The issue of the mental fitness to proceed after commitment under subsection 9 of this section may also be raised by a motion filed by the director of the department of mental health or by the state, alleging the mental fitness of the accused to proceed. A report relating to the issue of the accused's mental fitness to proceed may be attached thereto. If the motion is not contested by the accused or his counsel or if after a hearing on a motion the court finds the accused mentally fit to proceed, or if he is ordered discharged from the director's custody upon a habeas corpus hearing, the criminal proceedings shall be resumed.

11. The following provisions shall apply after a commitment as provided in this section:

(1) Six months after such commitment, the court which ordered the accused committed shall order an examination by the head of the facility in which the accused is committed, or a qualified designee, to ascertain whether the accused is mentally fit to proceed and if not, whether there is a substantial probability that the accused will attain the mental fitness to proceed to trial in the foreseeable future. The order shall direct that written report or reports of the examination be filed with the clerk of the court within thirty days and the clerk shall deliver copies to the prosecuting attorney or circuit attorney and to the accused or his counsel. The report required by this subsection shall conform to the requirements under subsection 3 of this section with the additional requirement that it include an opinion, if the accused lacks mental fitness to proceed, as to whether there is a substantial probability that the accused will attain the mental fitness to proceed in the foreseeable future;

(2) Within ten days after the filing of the report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a psychiatrist or psychologist, as defined in section 632.005, RSMo, or a physician with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals, of their own choosing and at their own expense. An examination performed pursuant to this subdivision shall be completed and filed with the court within thirty days unless the court, for good cause, orders otherwise. A copy shall be furnished to the opposing party;

(3) If neither the state nor the accused nor his counsel requests a second examination relative to fitness to proceed or contests the findings of the report referred to in subdivision (1) of this subsection, the court may make a determination and finding on the basis of the report filed, or may hold a hearing on its own motion. If any such opinion is contested, the court shall hold a hearing on the issue. The report or reports may be received in evidence at any hearing on the issue but the party contesting any opinion therein relative to fitness to proceed shall have the right to summon and to cross-examine the examiner who rendered such opinion and to offer evidence upon the issue;

(4) If the accused is found mentally fit to proceed, the criminal proceedings shall be resumed;

(5) If it is found that the accused lacks mental fitness to proceed but there is a substantial probability the accused will be mentally fit to proceed in the reasonably foreseeable future, the court shall continue such commitment for a period not longer than six months, after which the court shall reinstitute the proceedings required under subdivision (1) of this subsection;

(6) If it is found that the accused lacks mental fitness to proceed and there is no substantial probability that the

accused will be mentally fit to proceed in the reasonably foreseeable future, the court shall dismiss the charges without prejudice and the accused shall be discharged, but only if proper proceedings have been filed under chapter 632 or chapter 475, RSMo, in which case those sections and no others will be applicable. The probate division of the circuit court shall have concurrent jurisdiction over the accused upon the filing of a proper pleading to determine if the accused shall be involuntarily detained under chapter 632, RSMo, or to determine if the accused shall be declared incapacitated under chapter 475, RSMo, and approved for admission by the guardian under section 632.120 or 633.120, RSMo, to a mental health or retardation facility. When such proceedings are filed, the criminal charges shall be dismissed without prejudice if the court finds that the accused is mentally ill and should be committed or that he is incapacitated and should have a guardian appointed. The period of limitation on prosecuting any criminal offense shall be tolled during the period that the accused lacks mental fitness to proceed.

12. If the question of the accused's mental fitness to proceed was raised after a jury was impaneled to try the issues raised by a plea of not guilty and the court determines that the accused lacks the mental fitness to proceed or orders the accused committed for an examination pursuant to this section, the court may declare a mistrial. Declaration of a mistrial under these circumstances, or dismissal of the charges pursuant to subsection 11 of this section, does not constitute jeopardy, nor does it prohibit the trial, sentencing or execution of the accused for the same offense after he has been found restored to competency.

13. The result of any examinations made pursuant to this section shall not be a public record or open to the public.

14. No statement made by the accused in the course of any examination or treatment pursuant to this section and no information received by any examiner or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding then or thereafter pending in any court, state or federal. A finding by the court that the accused is mentally fit to proceed shall in no way prejudice the accused in a defense to the crime charged on the ground that at the time thereof he was afflicted with a mental disease or defect excluding responsibility, nor shall such finding by the court be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

(L. 1963 p. 674 § 2, A.L. 1969 p. 572, A.L. 1971 S.B. 171, A.L. 1980 H.B. 1724, A.L. 1985 S.B. 265, A.L. 1994 S.B. 763, A.L. 1997 S.B. 56)

(1972) Where a copy of report of mental examination was furnished to prosecutor and contained a statement of facts made by appellant to the doctor concerning the crime with which he was charged but there was nothing in record, and appellant pointed to nothing, indicating that prosecutor thereby obtained information concerning the case not otherwise available to him, court did not err in failing to dismiss information. State v. Franklin (Mo.), 482 S.W.2d 420.

(1972) This section does not apply to post trial procedure. A conviction while defendant is legally incompetent violates due process. Brown v. State (Mo.), 485 S.W.2d 424.

(1973) State may not order commitment without express written notice that no other defense exists. Ex parte Kent (Mo.), 490 S.W.2d 649; Cert. denied 94 S.Ct. 596.

(1973) Attempted suicide during trial did not require trial judge to order psychiatric examination under this section. Scope of discretion of trial judge discussed. Drope v. State (A.), 498 S.W.2d 838.

(1973) Held that pretrial psychiatric examination report became a record in the criminal proceeding and court could take judicial notice of its contents when considering a motion to vacate. State v. Conner (A.), 500 S.W.2d 300.

(1975) After receiving report of psychiatric examination indicating defendant's competency, his attorney was under no duty to contest the results and in order to charge his attorney with ineffective assistance defendant movant is required to show some basis for questioning the report. Shubert v. State (A.), 518 S.W.2d 326.

(1975) This section constitutionally adequate to protect rights of accused. Suicide attempt during trial and psychiatric information available prior to trial together with testimony as to "strange behavior" creates a sufficient doubt of competence so as to require further inquiry on the question of competence. Drope v. Missouri (U.S.), 95 S.Ct. 896.

(1975) Magistrate at preliminary hearing has jurisdiction to inquire into accused's mental fitness to proceed. State v. Morgett (A.), 526 S.W.2d 434.

(1976) Held, examination by osteopath who was not a "licensed psychiatrist" met the requirements of this section. State v. Mullen (A.), 532 S.W.2d 794.

(1976) Held, defendant is entitled to a competency hearing even though motion was not filed until day of trial. Motion may be made anytime prior to sentencing. State v. Carroll (A.), 543 S.W.2d 48.

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(1976) Held, that if report is contested the court must hold a competency hearing. State v. Carroll (A.), 543 S.W.2d 48.

(1977) Defense counsel should be allowed to express opinion as to defendant's competency to stand trial. Issue of competency is not waived by going to trial since a mental incompetent lacks capacity to understand a right, much less give it up. State v. Clark (A.), 546 S.W.2d 455.

(1981) The accused, for the purpose of attempting to establish his partial responsibility or his diminished capacity, may introduce evidence obtained in the section 552.020 examination. State v. Strubberg (Mo.), 616 S.W.2d 809.

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Missouri General Assembly

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Missouri Revised Statutes

Chapter 557
General Sentencing Provisions
Section *557.031*

August 28, 2008

Presentence commitment for study.

557.031. 1. In felony cases where the circumstances surrounding the commission of the crime or other circumstances brought to the attention of the court indicate a strong likelihood that the defendant is suffering from a mental disease or disorder, and the court desires more detailed information about the defendant's mental condition before making an authorized disposition under section 557.011, it may order the commitment of the defendant for mental examination.

2. The court may commit the defendant to a facility of the department of mental health or to a hospital and order the defendant examined by such person or persons as the court or that department or hospital may designate. The cost of guarding and transporting any confined defendant to and from any such facility or other place of examination shall be borne by the county. Any commitment shall be for a period not exceeding thirty days unless extended by the order of the court.

3. Within forty days after the order the person or persons making such examination or examinations shall transmit to the court a report thereof including answers to any specific questions submitted by the court. The clerk of the court shall immediately supply copies of the report to the prosecuting attorney and to the defendant or his attorney.

4. Any period of commitment to a facility of the department of mental health or to a hospital for the purpose of this section shall be credited against any term of imprisonment imposed upon the defendants.

(L. 1977 S.B. 60)

Effective 1-1-79

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Missouri General Assembly

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