

**IN THE
SUPREME COURT OF MISSOURI**

No. SC88116

STATE OF MISSOURI,

Respondent,

vs.

MARK E. LEWIS,

Appellant.

**APPEAL FROM THE CIRCUIT COURT OF AUDRAIN COUNTY
TWELFTH JUDICIAL CIRCUIT
THE HONORABLE KEITH M. SUTHERLAND, JUDGE**

RESPONDENT'S SUBSTITUTE BRIEF

**JEREMIAH W. (JAY) NIXON
Attorney General**

**Daniel N. McPherson, Mo. Bar No. 47182
Assistant Attorney General**

**P.O. Box 899
Jefferson City, MO 65102
Telephone: 573-751-3321
Facsimile: 573-751-5391
E-Mail: Dan.McPherson@ago.mo.gov**

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
JURISDICTIONAL STATEMENT	4
STATEMENT OF FACTS	5
ARGUMENT	10
<i>The trial court did not plainly err in refusing to appoint counsel and in allowing Appellant to proceed to trial pro se</i>	10
A. Standard of Review	12
B. Appellant was not entitled to appointed counsel	13
C. Signed waiver of counsel form only applies to express waivers	19
F. No manifest injustice from allowing Appellant to proceed <i>pro se</i> at trial	26
The trial court did not plainly err in allowing State’s Exhibit 8 to be introduced	34
A. Standard of Review	34
B. Appellant wanted the now-disputed evidence to be introduced at trial	35
CONCLUSION	39
CERTIFICATE OF SERVICE AND COMPLIANCE	40
APPENDIX TABLE OF CONTENTS	41

TABLE OF AUTHORITIES

Cases

<i>Argersinger v. Hamlin</i> , 407 U.S. 25 (1971)	25
<i>Deck v. State</i> , 68 S.W.3d 418 (Mo. banc 2002)	27, 38
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963).....	26
<i>Gilmore v. State</i> , 741 S.W.2d 704 (Mo. App. E.D. 1987)	33
<i>Luleff v. State</i> , 842 S.W.2d 895 (Mo. App. E.D. 1992)	14, 16
<i>May v. State</i> , 718 S.W.2d 495 (Mo. banc 1986)	21
<i>State v. Albright</i> , 843 S.W.2d 400 (Mo. App. W.D. 1992)	15, 18
<i>State v. Brethold</i> , 149 S.W.3d 906 (Mo. App. E.D. 2004).....	14, 34
<i>State v. Brock</i> , 778 S.W.2d 13 (Mo. App. S.D. 1989).....	14, 25
<i>State v. Clay</i> , 11 S.W.3d 706 (Mo. App. W.D. 1999).....	20
<i>State v. Davis</i> , 934 S.W.2d 331 (Mo. App. E.D. 1996)	18, 20, 26
<i>State v. Dowdell</i> , 583 S.W.2d 253 (Mo. App. W.D. 1979).....	25
<i>State v. Ehnes</i> , 930 S.W.2d 441 (Mo. App. S.D. 1996)	20
<i>State v. Griffin</i> , 876 S.W.2d 43 (Mo. App. E.D. 1994).....	38
<i>State v. Mills</i> , 723 S.W.2d 68 (Mo. App. E.D. 1986).....	29
<i>State v. Moton</i> , 733 S.W.2d 449 (Mo. App. E.D. 1986)	29
<i>State v. Reasonover</i> , 714 S.W.2d 706 (Mo. App. E.D. 1986).....	32
<i>State v. Schnelle</i> , 924 S.W.2d 292 (Mo. App. W.D. 1996).....	21

<i>State ex rel. Tanzey v. Richter</i> , 762 S.W.2d 857 (Mo. App. E.D. 1989).....	14, 21, 25
<i>State v. West</i> , 949 S.W.2d 914 (Mo. App. E.D. 1997)	20, 21, 22, 33
<i>State v. Williams</i> , 134 S.W.3d 766 (Mo. App. W.D. 2004)	17
<i>State v. Williams</i> , 681 S.W.2d 948 (Mo. App. E.D. 1984).....	27
<i>State v. Williams</i> , 679 S.W.2d 915 (Mo. App. W.D. 1984)	20, 21, 24
<i>State v. Yardley</i> , 637 S.W.2d 293 (Mo. App. S.D. 1982).....	20, 21
<i>United States v. Cronin</i> , 466 U.S. 648 (1984).....	33

Statutes and Constitution

Section 491.075, RSMo 2000.....	33
Section 566.067, RSMo 2000.....	5, 6
Section 600.051, RSMo 2000.....	20, 22
Section 600.086, RSMo 2000.....	14, 15, 16, 19
Article V, § 10, Missouri Constitution (as amended 1982).....	5

Other Authority

Supreme Court Rule 29.11	13, 34
Supreme Court Rule 31.02	25
Supreme Court Rule 83.02	5
18 C.S.R. 10-30.010 (Aug. 30, 2002).....	15, 17, 18
Annual Update of the HHS Poverty Guidelines, 68 Fed. Reg. 6456 (Feb. 7, 2003) ...	18-19
Annual Update of the HHS Poverty Guidelines, 69 Fed. Reg. 7336 (Feb. 13, 2004)	19

JURISDICTIONAL STATEMENT

This appeal is from a conviction obtained in the Circuit Court of Audrain County for child molestation in the first degree, Section 566.067, RSMo,¹ for which Appellant was sentenced as a prior and persistent felony offender to thirty years imprisonment. The Missouri Court of Appeals issued an opinion affirming Appellant's conviction and sentence, and ordering that this case be transferred to this Court pursuant to Supreme Court Rule 83.02. Therefore, jurisdiction lies in this Court pursuant to Article V, § 10, Missouri Constitution (as amended 1982).

¹ All statutory references are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

On January 20, 2005, Appellant was charged as a prior and persistent offender in a second amended information with child molestation in the first degree, Section 566.067, RSMo. (L.F. 10-11).² Appellant was tried by a jury on January 24, 2005, before Judge Keith M. Sutherland. (L.F. 8). Appellant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed:

Appellant began living with Abigail Lewis and her three children in 2000. (Tr. 211-12). The couple married the following year. (Tr. 212). Lewis had two sons and a daughter, A.M., who was born in April of 1996. (Tr. 200-01, 211-12; L.F. 10). The family lived in a mobile home that had a non-functioning toilet. (Tr. 203, 212-14). Plastic bags were placed inside the toilet and would be emptied when they became full of waste. (Tr. 215).

In October of 2003, Lewis worked the night shift at a Pizza Works restaurant. (Tr. 213). She arrived home from work early on the night of October 13th and found her two

² The record on appeal will be cited as follows: Legal File (L.F.); Supplemental Legal File, filed by Appellant on April 13, 2006 (1st Supp. L.F.); Supplemental Legal File, filed by Appellant on April 18, 2006 (2d Supp. L.F.); Third Supplemental Legal File, filed by Respondent pursuant to Rule 30.04(c) and (f) (3d Supp. L.F.); Transcript (Tr.).

sons outside in the rain. (Tr. 216). Lewis was particularly upset because one of the boys was sick and had missed school that day. (Tr. 216). Lewis took the boys inside and dried them off. (Tr. 216). As she emerged from the bedroom, Lewis saw A.M. sitting on Appellant's lap. (Tr. 216-17). A.M., who was dressed in just her underwear, pushed-off of Appellant's lap and ran to her room. (Tr. 217).

As Lewis was getting ready to leave for work the next afternoon, A.M. began screaming and crying, and begged to go to work with Lewis, who relented and let A.M. ride with her to the Pizza Works. (Tr. 218). On the way there, Lewis asked A.M. if anybody was being mean to her. (Tr. 218). A.M. replied that Appellant was mean to her and that he touched her. (Tr. 219). When they arrived at the Pizza Works, Lewis took A.M. into the bathroom and asked her to show where Appellant had touched her. (Tr. 219). A.M. put her hand between her legs and made an up-and-down gesturing motion. (Tr. 220). A.M. also told Lewis that Appellant had made her put "it" in her mouth for a second. (Tr. 220). A.M. told Lewis that these activities happened at night, while Lewis was at work, and while A.M. and Appellant were watching Star Trek on television. (Tr. 221). A.M. also said that Appellant would repeatedly beg her by saying "please, please, please." (Tr. 222). Lewis testified that Appellant used the same tactic when trying to convince her to have sex. (Tr. 222).

After hearing A.M.'s disclosure, Lewis made a hotline call to the Division of Family Services. (Tr. 221). Lewis separated from Appellant the following day and

applied for an order of child protection to keep Appellant away from A.M. (Tr. 213, 222). A DFS caseworker talked with Lewis and arranged for A.M. to be interviewed at the Rainbow House Regional Child Advocacy Center in Columbia. (Tr. 228, 276). A.M. went to the Rainbow House on October 16th for a forensic interview. (Tr. 284). A SAFE exam was also scheduled, and was performed immediately after the forensic interview at the Rainbow House. (Tr. 231-32). The SAFE exam disclosed no specific physical findings of abuse. (Tr. 232-33).

During the forensic interview at the Rainbow House, A.M. used an anatomical drawing to label the penis as a “pee pee,” her genital area as a private, and her buttocks as a bottom. (Tr. 288). A.M. said that after her mother started a new job, Appellant began touching and licking her private, and that he put his “pee pee” in her mouth and also stuck it in her bottom. (Tr. 286). She said that she was lying on her stomach when Appellant stuck it in her bottom. (Tr. 286). A.M. also said that she had seen white stuff come out of Appellant’s “pee pee” when he rubbed it, and that he would ask her to lick it or drink it. (Tr. 287). Appellant told A.M. to drink it because it would be healthy for her. (Tr. 287). A.M. also said that Appellant warned her that she would never see her mother again if she told anyone. (Tr. 288).

The DFS caseworker and an Audrain County Sheriff’s investigator subsequently interviewed A.M. at her school about the events of October 13th. (Tr. 247). A.M. said that Appellant had touched her between the legs, and pointed to her vaginal area. (Tr.

247). She also said that Appellant had told her to go into the bedroom and take her clothes off. (Tr. 247-48). When she refused, Appellant took her clothes off and then touched her. (Tr. 248). Appellant also took his clothes off. (Tr. 248). A.M. said that Appellant had to stop because her mom had come home early. (Tr. 248). A.M. also said that her mom was mad when she got home because one of the boys was outside and he wasn't supposed to be. (Tr. 249).

A.M. also had several meetings with a counselor over a fifteen-month period. (Tr. 255, 256-57). A.M. confirmed to the counselor that Appellant had touched and rubbed her vagina and had put his penis in her mouth and rectum. (Tr. 256). A.M. said these incidents happened several times while her mother was at work. (Tr. 256). A.M. said Appellant often locked her brothers outside so no one else would be present. (Tr. 256). A.M. also said that Appellant had warned that if she told anybody, DFS would take her away so that she would never see her mother again, and that Appellant would kill her grandparents. (Tr. 256).

A.M. and one of her brothers testified at trial. A.M. testified that Appellant touched her in her privates when she was alone with him. (Tr. 203). A.M. pointed to her vaginal area while describing the touching. (Tr. 204). The brother testified that on several occasions when his mother was at work, Appellant would make he and his brother go outside, leaving Appellant and A.M. alone in the house. (Tr. 274).

Appellant's only witness was his son, Michael Lewis. (Tr. 328). Appellant, who was representing himself, attempted to ask him about Abigail Lewis's reputation. (Tr. 329). The State's objection based on lack of foundation was sustained, and Appellant did not attempt to ask any further questions. (Tr. 329).

At the end of evidence, argument, and instruction, the jury returned a verdict finding Appellant guilty of child molestation in the first degree. (Tr. 358; L.F. 8). The trial court had previously found beyond a reasonable doubt that Appellant was a prior and persistent felony offender based on an August 26, 1996 conviction in the Circuit Court of Boone County for receiving stolen property, and a February 6, 1989 conviction in the Circuit Court of Audrain County for possession of a controlled substance. (Tr. 106-07; L.F. 8). The trial court sentenced Appellant on February 28, 2005, to thirty years imprisonment in the Department of Corrections. (Tr. 370; L.F. 8). This appeal follows. (L.F. 9, 58).

ARGUMENT

I.

The trial court did not plainly err in refusing to appoint counsel and in allowing Appellant to proceed to trial *pro se* because Appellant did not qualify for appointed counsel and was adequately admonished on the dangers of self-representation while there was still sufficient time to secure counsel, in that the public defender made a determination of non-indigency which was upheld by the trial court following an appeal and hearing and the record before this Court does not indicate that the public defender or the trial court erred in that determination, and Appellant was advised on two occasions of the nature of the charges and range of punishment and was warned of the adverse consequences of going to trial without counsel, the second such admonishment occurring about six months prior to trial. Further, the record does not reflect that the trial was conducted in such a manner as to create a manifest injustice. (Responds to Appellant's Points I and II).

Appellant raises two claims that the trial court plainly erred in refusing to appoint counsel to represent him. Because the factual and legal issues underlying those two points are interrelated, Respondent will address them in a single point.

The court file in this case was opened with the filing of a complaint in the associate circuit court on December 22, 2003. (2d Supp. L.F. 1). Appellant requested a public defender on December 30, 2003, and that request was denied the following day

based on a determination that Appellant was not indigent. (2d Supp. L.F. 1). Appellant requested an indigency hearing, which was conducted on January 28, 2004. (2d Supp. L.F. 1-2). The docket entry for that date states: “Indigency hearing held. Appeal denied. Defendant’s Motion to Decline Appointment is Heard and Sustained.” (2d Supp. L.F. 2). The following docket entry was made on February 25, 2004: “Court determines that Defendant has waived his right to counsel. Memorandum on Non-Written Waiver of Counsel is executed and defendant is given a copy of the same.” (2d Supp. L.F. 2). The waiver form indicates that the court advised Appellant of the charge and the range of punishment, as well as the dangers and consequences of self-representation. (L.F. 12).

The case was bound over to circuit court on April 7, 2004. (2d Supp. L.F. 2). Appellant filed a motion for discovery on April 12, 2004, and an information was filed two days later. (1st Supp. L.F. 1). Appellant was arraigned on May 3, 2004, where he waived reading of the information and entered a plea of not guilty. (1st Supp. L.F. 1). Appellant appeared in court on July 2, 2004, and indicated that he had not saved enough money to hire a lawyer. (Tr. 7). The court continued the hearing to July 15th, and informed Appellant that the case would be set for trial at that time, whether Appellant had an attorney or not. (Tr. 8).

Appellant appeared at the July 15th hearing without counsel, and told the court that he was not making enough money to hire an attorney. (Tr. 9). Appellant said that his gross income was \$300 to \$400 a week, and that he paid \$74 a month in child support.

(Tr. 9). Appellant also said that he had talked to at least fifteen attorneys. (Tr. 10). The primary response was that they were not interested in taking the case. (Tr. 10). Appellant additionally indicated that some of the attorneys had asked for “more money than I’m able to come up with in any reasonable amount of time.” (Tr. 10). When asked if he had applied for public defender services, Appellant indicated that he had on a couple of different cases. (Tr. 13). An unidentified public defender attending the hearing told the court that the public defender’s office had declined to represent Appellant because he had been able to post a fifty-thousand dollar bond. (Tr. 13). Appellant said that no money had changed hands between he and the bondsman, and the court replied that it understood that. (Tr. 13). The court again advised Appellant of the perils of self-representation, and Appellant indicated that he understood. (Tr. 10-16; L.F. 17). Appellant proceeded to trial without counsel. (1st Supp. L.F. 6).

A. Standard of Review.

Appellant did not file a motion for new trial, despite initially indicating that he planned to do so. (Tr. 361-62, 365). Except for questions of the trial court’s jurisdiction over the offense charged, whether the indictment or information states an offense, and the sufficiency of the evidence, allegations of error in a jury-tried case must be included in a motion for new trial to be preserved for appellate review. Supreme Court Rule 29.11(d). Unpreserved claims can only be reviewed for plain error, which requires a showing that not only was the trial court’s ruling erroneous, but it impacted Appellant’s rights so

substantially that a manifest injustice or miscarriage of justice will result if it is left uncorrected. *State v. Brethold*, 149 S.W.3d 906, 909 (Mo. App. E.D. 2004). Plain error review is to be used sparingly. *Id.*

B. Appellant was not entitled to appointed counsel.

A trial court lacks jurisdiction to appoint counsel for a non-indigent criminal defendant. *State ex rel. Tanzey v. Richter*, 762 S.W.2d 857, 858 (Mo. App. E.D. 1989) *see also State v. Brock*, 778 S.W.2d 13, 15 (Mo. App. S.D. 1989) (a non-indigent defendant who fails to hire a lawyer after appropriate warnings is not denied his constitutional right to counsel). Appellant's claim that the trial court erred in failing to appoint counsel fails if Appellant did not qualify for the services of the public defender.

Section 600.086, RSMo, provides that a person shall be eligible for representation by the public defender:

when it appears from all the circumstances of the case including his ability to make bond, his income and the number of persons dependant on him for support that the person does not have the means at his disposal or available to him to obtain counsel in his behalf and is indigent as hereafter determined.

§ 600.086.1, RSMo 2000. The statute makes clear that the public defender has the initial responsibility to determine eligibility under Chapter 600. § 600.086.3, RSMo; *Luleff v. State*, 842 S.W.2d 895, 898 (Mo. App. E.D. 1992). The judiciary is to intervene only

upon a motion made by the parties to the proceeding. § 600.086.3, RSMo. A person claiming indigency is required to file with the court an affidavit containing information required under the Public Defender Commission's rules for determining indigency. *Id. see* 18 C.S.R. 10-3.010 (Aug. 30, 2002). The defendant bears the burden of convincing the public defender or the court of his eligibility to receive legal services. § 600.086.6, RSMo.

The public defender made a finding of non-indigency when the case was before the associate circuit court. (2nd Supp. L.F. 1). Appellant requested an indigency hearing, which was conducted on January 28, 2004, with the court denying the appeal from the public defender's finding. (2nd Supp. L.F. 2). Appellant complains that there is no basis to determine whether the court's finding was supported by substantial evidence because the indigency hearing was not put on the record. *See State v. Albright*, 843 S.W.2d 400, 402 (Mo. App. W.D. 1992) (public defender and court's determination of non-indigency will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, or the court erroneously declares or applies the law).

Appellant has, however, obtained a letter from the Audrain County Associate Circuit Clerk stating that Appellant did not file the required affidavit for the January 5, 2004 hearing. (Appellant's Brf., Appendix, p. A4). While the letter also states that the court did not request an affidavit from Appellant, the statute contains no provisions requiring the court to make such a request. § 600.086.3, RSMo. The statute instead

places the burden for filing the affidavit on Appellant. *Id.* (“Any such person claiming indigency **shall** file with the court an affidavit . . .”) (emphasis added). The statute also places on Appellant the burden of convincing the public defender or the court of his eligibility to receive legal services. § 600.086.6, RSMo. The clerk’s letter, submitted by Appellant, demonstrates that Appellant failed to meet his burden of proof because he failed to submit the affidavit required by the statute.

There is nothing in the record to suggest that Appellant sought another indigency hearing once the case was bound over to circuit court, or that he filed an updated affidavit before the court. *See Luleff*, 842 S.W.2d at 898 (defendant failed to file affidavit required by statute and did not contest public defender’s finding of non-indigency). Appellant has included in the appendix to his Brief a subpoena ostensibly issued by the public defender, requesting that Appellant bring certain materials to an indigency hearing on October 25, 2004. (Appellant’s Sub. Brf., Appendix, p. A5). Respondent has filed a motion to strike that material as being outside the record. The subpoena does not aid Appellant in any event, as the court is only authorized to hold an indigency hearing upon motion of either party, and there is no indication in the record that either party made such a motion.

§ 600.086.3, RSMo.³ The January 28, 2004 indigency hearing conducted in associate

³ The October 25, 2004 hearing was styled as a counsel status hearing and was eventually held on November 1, 2004. (1st Supp. L.F. 3). Nothing in the docket sheets indicate that an indigency hearing was requested or was scheduled for those dates.

circuit court came at Appellant's request, demonstrating that Appellant was aware of the requirement that he move for a hearing. (2d Supp. L.F. 1).

While Appellant did represent to the circuit court that he was having trouble coming up with the money to hire a lawyer, those statements "do not remotely approach the type of information required by the affidavit of indigency contemplated by § 600.086.3 for the appointment of appointed counsel." *State v. Williams*, 134 S.W.3d 766, 774 (Mo. App. W.D. 2004). The court in *Williams* found no error in the trial court's ruling, "given the paucity of evidence in the record concerning the appellant's indigency." *Id.* The same situation presents itself here. The record fails to show that Appellant met his burden of demonstrating that he was indigent and entitled to appointed counsel, and the trial court cannot be found to have clearly erred in its determination of non-indigency based on the record on appeal.

The evidence that does appear in the record indicates that Appellant had a gross income of \$300 to \$400 a week, and that he paid \$74 a month in child support for one son. (Tr. 9). The public defender guidelines state that: "A defendant may be considered indigent if his/her gross pay and other sources of income do not exceed the federal poverty guidelines as issued in the Federal Register by the U.S. Department of Health and Human Services." 18 C.S.R. 10-3.010(2)(A). The federal poverty guidelines for the year 2003 are \$8,980 per year for a one-person household and \$12,120 per year for a two-person household. Annual Update of the HHS Poverty Guidelines, 68 Fed. Reg. 6456

(Feb. 7, 2003). For 2004, the federal poverty guidelines are \$9,310 per year for a one-person household and \$12,490 per year for a two-person household. Annual Update of the HHS Poverty Guidelines, 69 Fed. Reg. 7336 (Feb. 13, 2004). Appellant's income of \$300 to \$400 a week amounts to an annual income of at least \$15,600. Subtracting the \$74 a month child support leaves an income of \$14,712 per year, which is well above both the 2003 and 2004 federal poverty guidelines.

Trial court findings of non-indigency have been upheld where the defendant filed the statutory affidavit and listed income of \$195 to \$200 a week, \$20 in cash, a 1968 Ford pickup, and where the defendant supported two dependant children. *Albright*, 843 S.W.2d at 402-03. In another case, a trial court's finding of non-indigency was based on the defendant's statement that he made \$300 to \$400 a week, the same as Appellant in this case, and that he paid for groceries and spent \$156 a month for his mother's medication. *State v. Davis*, 934 S.W.2d 331, 333 (Mo. App. E.D. 1996). In *Davis*, the Eastern District reversed and remanded for new trial on other grounds, and did not reach the issue of whether the trial court erred in finding that the defendant was non-indigent. *Id.* at 335. *Albright* and *Davis* suggest that the public defender and trial court findings of non-indigency in Appellant's case were supported by substantial evidence.

Appellant had also posted a \$50,000 bond, ten times the amount that creates a presumption of non-indigency under the public defenders' regulations. (Tr. 13); 18 C.S.R. 10-3.010(B)(2). Appellant also owned a home and a car, though he made

unsubstantiated claims to the trial court that the house was going through repossession and that the car had been claimed by the bondsman. (Tr. 13). Appellant suggests that his use of property, rather than cash, to secure the bond demonstrates that he was financially unable to hire a lawyer. It could just as easily be argued that because Appellant secured the bond through property, he had cash available to hire a lawyer. If Appellant had used cash to secure the bond, he still might have been forced to borrow against his house to pay his attorneys fees. The ability to secure a bond through cash thus does not correlate to an increased ability to pay for a lawyer.

Defense counsel's argument that it is unrealistic to expect Appellant to save enough money from his monthly income to hire a lawyer rings hollow when one remembers that indigency standards are set by the Public Defender Commission. § 600.086.2, RSMo. If the Public Defender's Office truly believes the indigency standards are too restrictive, it need only change its own rules to make more persons eligible for its services.

Appellant's argument that the non-indigency finding was erroneous because Appellant was later determined eligible to appeal as a poor person is not well-taken. The determination of a person's eligibility for public defender services can be made at any stage of the proceeding, and will be based on the defendant's financial situation at the time of the application. § 600.086.3, RSMo. Appellant argues that his financial situation

after trial was exactly the same as before trial, but he offers no facts to support that assertion.

Appellant has not shown that he was entitled to appointed counsel, and the trial court did not plainly err in refusing to appoint counsel to represent Appellant.

C. Signed waiver of counsel form only applies to express waivers.

Appellant argues that even if he was not entitled to appointed counsel, the trial court still plainly erred by failing to provide Appellant with a written waiver of counsel form to sign, as provided in Section 600.051.1, RSMo 2000. The Southern and Western Districts of the Court of Appeals have found that Section 600.051 applies only to express waivers of counsel. *State v. Ehnes*, 930 S.W.2d 441, 447 (Mo. App. S.D. 1996); *State v. Yardley*, 637 S.W.2d 293, 295-96 (Mo. App. S.D. 1982); *State v. Clay*, 11 S.W.3d 706, 713 (Mo. App. W.D. 1999); *State v. Williams*, 679 S.W.2d 915, 917 (Mo. App. W.D. 1984). As the Southern District noted, “[t]o construe that section otherwise would create a vehicle by which a procedurally wise defendant could frustrate the administration of justice.” *Yardley*, 637 S.W.2d at 295-96. While not expressly holding that Section 600.051 applies only to express waivers, the Eastern District has acknowledged that a defendant may impliedly waive his right to counsel if he fails to retain counsel after being afforded ample opportunity to do so. *State v. West*, 949 S.W.2d 914, 915 (Mo. App. E.D. 1997); *Davis*, 934 S.W.2d at 334.

The construction placed on the statute by the Southern and Western Districts is reasonable. The purpose of Section 600.051 is to provide objective assurance that a defendant's waiver of counsel is knowing and voluntary. *May v. State*, 718 S.W.2d 495, 497 (Mo. banc 1986). A signed waiver protects against situations where a defendant asserts his right to self-representation prior to trial, receives an adverse verdict, and then claims on appeal that the trial court erred in allowing him to represent himself. The Court is not faced with that type of situation here. One would not expect a defendant who says he wants a lawyer but claims to be unable to hire one to sign a document waiving his right to counsel. Just as a defendant cannot avoid trial by purposely failing to hire an attorney, a defendant should also not be permitted to avoid trial because he did not sign a waiver form. *See State v. Schnelle*, 924 S.W.2d 292, 298 (Mo. App. W.D. 1996); *Tanzev*, 762 S.W.2d at 858. This Court has yet to address the issue, and Respondent asks this Court to find that the requirement of a signed waiver only applies to express waivers of counsel.

D. Appellant was adequately warned of perils of self-representation.

One matter that all three districts of the Court of Appeals agree on is that a non-indigent defendant who says he wants a lawyer, but refuses to hire one, should still be admonished by the court on the perils of self-representation. *West*, 949 S.W.2d at 915; *Williams*, 679 S.W.2d at 917; *Yardley*, 637 S.W.2d at 296. The record shows that Appellant was so admonished. In determining whether a defendant should represent

himself, the trial court should: 1) advise the defendant of the dangers and disadvantages of self-representation; 2) inquire into the defendant's intellectual capacity to make an intelligent decision, and 3) make the defendant aware that, in spite of his efforts, he cannot afterwards claim inadequacy of representation. *West*, 949 S.W.2d at 916. No particular litany is required. *Id.*

Appellant was admonished on two occasions prior to trial. The first occurred on February 25, 2004, before Associate Circuit Judge Linda Hamlett. (L.F. 12; 2nd Supp. L.F. 2). Judge Hamlett filled out and signed a Memorandum on Non-Written Waiver of Counsel that tracked the written waiver form set out in Section 600.051.1. Judge Hamlett checked boxes indicating; that she advised Appellant of the charges against him, his right to trial by jury, the range of punishment,⁴ that any recommendation by the

⁴ Appellant contends that he was misadvised on the range of punishment. The February 25, 2004 memorandum stated a range of one day to fifteen years imprisonment and the subsequent memorandum of July 15, 2004 stated a range of five to fifteen years. (L.F. 12, 17). While the first memorandum does misstate the minimum range of punishment, that was corrected in the subsequent memorandum. (L.F. 12, 17; 3d Supp. L.F. 1, 5). The State filed a First Amended Information on January 3, 2005, charging Appellant as a prior and persistent offender. (3d Supp. L.F. 1, 5, 7). Appellant contends that he was never advised that he faced up to thirty years in prison if convicted and sentenced as a persistent offender. However, when the prosecutor filed the Second

prosecuting attorney is not binding on the judge, that a finding of guilty would likely result in a sentence of confinement, and that if indigent, Appellant has a right to request appointed counsel. (L.F. 12). The form also indicates that the judge further advised Appellant that:

It is dangerous and disadvantageous to represent oneself. That: (1) self-representation is almost always unwise and that he may conduct a defense ultimately to his own detriment; (2) that he will receive no special indulgence by the court and that he must follow the technical rules of substantive law and criminal procedure and evidence; and (3) that the prosecution will be represented by experienced professional counsel.

In spite of his efforts he cannot afterwards claim inadequacy of representation.

Amended Information on January 20, 2005, he specifically noted that Appellant faced an enhanced range of punishment of up to thirty years or life imprisonment. (Tr. 20). Appellant did not express any surprise over that announcement. (Tr. 21).

(L.F. 12). Judge Hamlett also checked boxes indicating that she had “inquired into [Appellant’s] intellectual capacity to make an intelligent decision and finds there is no question as to his mental capacity,” and that Appellant had been provided with a copy of the waiver form. (L.F. 12).

On July 15, 2004, Judge Sutherland read the same Memorandum on Non-Written Waiver of Counsel to Appellant. (L.F. 17; Tr. 10-17). The trial court also made additional inquiries into Appellant’s financial situation and ability to hire a lawyer. (Tr. 12-13). In discussing the disadvantages of self-representation, the trial court expanded on the reasons given in the form. (Tr. 14-15). The court also inquired into Appellant’s education, ability to read and write, and Appellant’s mental condition. (Tr. 15). It is also noteworthy that after the second admonishment on the disadvantages of self-representation, Appellant still had over six months to obtain an attorney prior to the commencement of trial. (1st Supp. L.F. 2, 6).

The record demonstrates that the trial court on both occasions fully informed Appellant of the consequences of self-representation. Even if a written waiver were required in this case, the failure to obtain one is not reversible error where the record reflects what “rights” were explained to the defendant, and where the record reflects a thorough and conscientious effort to inform defendant and dissuade him from representing himself. *Williams*, 679 S.W.2d at 918. The record in this case reflects such

efforts, and the trial court did not plainly err in failing to obtain a signed waiver from Appellant.

E. As a non-indigent defendant, Appellant was not entitled to appointed counsel.

Appellant also argues that there was no implied waiver in this case because Appellant approached at least fifteen lawyers, and was turned down. He then argues that he had a constitutional right to counsel, and that the trial court had a duty to appoint counsel even if it found that Appellant did not qualify for the public defender. The law does not require appointment of counsel for non-indigent defendants, and a trial court does not have jurisdiction to make such an appointment. *Tanzey*, 762 S.W.2d at 858. And as noted above, a non-indigent defendant who fails to hire a lawyer after appropriate warnings is not denied his constitutional right to counsel. *Brock*, 778 S.W.2d at 15. While Appellant tries to distinguish *Tanzey* on factual grounds, none of those factual differences alters the underlying legal principle of that case – that non-indigent defendants do not have the right to appointed counsel.

Appellant's argument is not supported by his cited authorities. (Appellant's Sub. Brf., p. 38). Rule 31.02 imposes on the court a duty to appoint counsel only upon a showing of indigency. Supreme Court Rule 31.02. No such showing was made in this case. *Dowdell* involved a situation where the public defender was appointed to represent the defendant, then was allowed to withdraw a week before trial. *State v. Dowdell*, 583 S.W.2d 253, 255 (Mo. App. W.D. 1979). The defendant's motion for continuance to

obtain new counsel was denied, and she was forced to proceed to trial *pro se*. *Id.* Unlike that case, counsel was never appointed for Appellant, so that the trial court's duty to assure continuous representation after the appointment of counsel was not implicated. *Id.* at 256. Also unlike the defendant in *Dowdell*, Appellant was given ample time to obtain counsel after being advised of the dangers of self-representation; he simply failed to do so. *Argersinger* merely extended the Sixth Amendment right to counsel to prosecutions for offenses classified as "petty." *Argersinger v. Hamlin*, 407 U.S. 25, 30-31 (1971). The case did not expand the Court's previous holding that the right to appointed counsel exists for those who are "too poor to hire a lawyer." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

Contrary to Appellant's assertion, *State v. Davis* is not on point. The Eastern District found plain error because the trial court completely failed to admonish the defendant on the perils of self-representation. *Davis*, 934 S.W.2d at 335. The court instead told the defendant only that he would have to represent himself if he failed to obtain counsel. *Id.* As a result, the defendant did not understand the seriousness of the charges and had not been informed of the inherent pitfalls of self-representation. *Id.* Appellant in this case, as discussed above, was adequately warned of the perils of representing himself.

The defendant in *Davis* had earlier been found to be non-indigent, and the Eastern District opinion does not even suggest that he was entitled to appointed counsel because

he had tried unsuccessfully to hire an attorney. In fact, the court noted that a defendant can impliedly waive his right to counsel by failing to retain counsel after being afforded ample opportunity to do so. *Id.* at 334.

This Court should also reject Appellant's attempt to limit the implied waiver doctrine to situations where a defendant affirmatively states that he will not hire a lawyer. If the doctrine were defined in that manner, it would be all too easy for a defendant to manipulate the proceedings by claiming that he tried to hire a lawyer, but had been unable to do so. Even a defendant who sincerely desires to hire an attorney could nonetheless thwart the proceedings by setting unrealistic limits on the amount that he is willing to pay for the attorney's services. Courts should not be placed in the position of evaluating either a defendant's sincerity about obtaining counsel or the adequacy of his efforts to hire an attorney. An implied waiver should be found whenever a non-indigent defendant is given adequate time to secure counsel and fails to do so.

F. No manifest injustice from allowing Appellant to proceed *pro se* at trial.

Appellant claims he was prejudiced because there was an actual breakdown in the adversarial process at trial. Because Appellant is seeking plain error relief, he must show more than mere prejudice, but must meet the higher standard of demonstrating a manifest injustice or miscarriage of justice. *Deck v. State*, 68 S.W.3d 418, 424 (Mo. banc 2002). Convictions and sentences have been affirmed where the record demonstrated a greater breakdown in the adversarial process than Appellant alleges herein. *State v. Williams*,

681 S.W.2d 948, 949 (Mo. App. E.D. 1984). The defendant in *Williams* asserted a total breakdown in communications between himself and counsel, but the trial court refused to allow counsel to withdraw. *Id.* The defendant refused to let counsel assist him, with the result that the defendant did not participate in voir dire or in jury selection; did not make an opening statement; did not make any objections during the testimony of the State's witnesses, despite some leading questions being interspersed throughout the interrogation; failed to cross-examine some of the State's witnesses; and was not allowed to make a closing argument after he refused to testify. *Id.* at 952-57. (Kelly, J., concurring in part and dissenting in part). While the defendant did not directly allege error from any of the foregoing, a majority of the court did not find a manifest injustice requiring reversal.

The facts of this case likewise do not merit a finding of manifest injustice. Unlike the defendant in *Williams*, Appellant did participate in voir dire and jury selection, did make an opening statement and closing arguments, did cross-examine the State's witnesses, called a witness of his own, and filed and argued pre-trial motions. (Tr. 18-54, 94-104, 169-82, 198, 209, 223, 234, 249, 258, 264, 321, 327, 328, 350).

Appellant complains that a packet of DFS materials was not disclosed to Appellant until the weekend before trial. On April 27, 2004, the State responded to Appellant's discovery request by indicating that all original disclosure material could be viewed by Appellant (who was free on bond throughout the proceedings) at the prosecutor's office

during normal business hours. (L.F. 16). During a pre-trial hearing on January 20, 2005, the prosecutor presented Appellant with a copy of a packet of materials that he had received from DFS the previous day. (Tr. 45). The prosecutor noted that several of the documents in the packet had previously been disclosed to Appellant. (Tr. 45). It is not uncommon for prosecutors to receive information, and disclose it to the defense, on the eve of trial. Appellant did not contemporaneously object to the disclosure and has not shown that the prosecutor “took advantage of [his] ignorance.” (Tr.45). (Appellant’s Sub. Brf., p. 44).

Appellant also complains that the State waited until a week prior to the Section 491 hearing to disclose its intent to use statements made by the victim to Abigail Lewis and Cynthia Mackey, and did not disclose its intent to use statements made by the victim to Detective John Pehle until immediately prior to the hearing. No abuse of discretion has been found in admitting a child’s statement where defense counsel was not notified of the prosecutor’s intent to use the statement until the day before trial. *State v. Mills*, 723 S.W.2d 68, 70 (Mo. App. E.D. 1986). The statements themselves had been disclosed to defense counsel well before trial, so no showing of surprise was made. *Id.* at 69. The record in this case shows that the statement to Lewis and Pehle’s police reports were furnished to Appellant on April 26, 2004. (L.F. 35). Mackey’s notes were disclosed on January 13, 2005, which was shortly after the prosecuting attorney obtained them. (L.F.

35; Tr. 33-34). Appellant did not allege he was surprised by the disclosure of those statements and the record shows he was aware of the statements prior to the 491 hearing.

Appellant also complains that the information was amended to change the dates when the charged offense occurred. An information may be amended at any time before trial in the discretion of the trial court. *State v. Moton*, 733 S.W.2d 449, 451 (Mo. App. E.D. 1986). The test for prejudice under this rule is whether a defendant's defense would be equally applicable, and his defense equally available, after the amendment. *Id.* Appellant's defense was that he did not commit the acts, and was being framed by the victim's mother. (Tr. 351-53). The amendment to the information had no effect on that defense, and Appellant did not suffer prejudice, much less a manifest injustice.

Appellant also complains of several evidentiary rulings by the court. The first complaint is that Appellant was prevented from asking the victim a question on cross-examination. The question had to do with a purported discrepancy between the victim's testimony and some police reports. (Tr. 208). The trial court ruled those questions were more properly directed to other witnesses. (Tr. 208). Appellant has not shown that ruling was incorrect.

Appellant also complains that a DFS investigator was allowed to testify as to the findings of the SAFE exam, but that he was prevented from cross-examining her on that subject. The question that drew the objection was, "Would that exam had still come up negative if the child had been repeatedly penetrated? Would the – I ain't sure what it's

called, but inside the vagina?” (Tr. 234). The prosecutor objected that the witness was qualified to talk about the exam findings, but not to answer that question. (Tr. 234). The court sustained the objection. (Tr. 234). While the DFS investigator was allowed on direct examination to relate the findings of the doctor who conducted the SAFE exam, Appellant’s question asked the witness to interpret those results and provide expert medical testimony that she was not qualified to give. The trial court correctly sustained the objection.

Appellant also complains that he was prevented from putting evidence in front of the jury regarding tattoos or marks on his pelvic area. That argument refers to the following exchange during Appellant’s cross-examination of Lynne Dressner, who interviewed the victim at the Rainbow House:

Q. (By the Defendant) In your interview with [the victim] did she describe any marks or tattoos of any kind around my hips or pelvic region?

A. No.

Q. Nothing? Say if a child’s memory is so accurate why would she not, you know, not know about the marks around my pelvis?

A. Well, you’re making an assumption or telling us that you have marks around your pelvis but I had no idea that that might be.

[PROSECUTOR]: Judge, that assumes facts not in evidence.

THE DEFENDANT: It's easily proved, your Honor.

THE COURT: Well, it's already answered. Go ahead. Ask your next question.

THE DEFENDANT: That was pretty much it. No more questions.

(Tr. 324-25). The above record completely refutes the claim in Appellant's brief that the prosecuting attorney successfully kept from the jury evidence that the victim had failed to mention tattoos or marks on Appellant's pelvic area. Nor does the record show that the prosecutor or the trial court prevented Appellant from offering any evidence that he in fact did have such marks.

Appellant also alleges that the prosecutor used leading questions throughout the trial. Appellant cites specifically to certain portions of the examination of Detective Pehle. Almost all of the questions on those pages that might be considered leading concerned preliminary matters, for which leading questions are frequently allowed. (Tr. 237, 244, 247, 249). A review of the entire trial transcript indicates that at most there may have been a few isolated instances where a leading question was asked on a non-preliminary matter for which an objection would have been appropriate. But even where a leading question is asked and an appropriate objection is made, a trial court may permit the question to be answered; and absent an abuse of discretion, the ruling will not constitute reversible error. *State v. Reasonover*, 714 S.W.2d 706, 719 (Mo. App. E.D.

1986). That standard suggests that Appellant cannot show a manifest injustice based on his own failure to object to a relatively small number of leading questions.

Appellant also complains that the prosecutor was allowed to elicit hearsay testimony by DFS investigator Monica Morgan on the results of the SAFE exam performed by Dr. Thomas Selva. Since the SAFE exam disclosed no specific physical findings of abuse, it is difficult to see how that testimony prejudiced Appellant. Another complaint concerns State's Exhibit 8, a list made by Lynn Dressner during the forensic interview with the victim of things that the victim alleged had been done by Appellant. That list would be admissible as a statement of a child victim under the age of twelve. § 491.075, RSMo 2000. The complaint that the list reflected uncharged misconduct by Appellant will be discussed more fully in the next point.

Finally, Appellant's reliance on *United States v. Cronin* is misplaced. *United States v. Cronin*, 466 U.S. 648 (1984). While *Cronin* does state that a trial can be deemed unfair if an accused is denied the right to counsel at a critical stage of the trial, Appellant was not denied counsel. *Id.* at 659. The trial court gave Appellant ample opportunity to secure counsel and Appellant failed to do so. Because Appellant was found to be non-indigent, the court was under no obligation to provide counsel, so any deprivation of counsel that Appellant suffered was as a result of his own actions or inactions, and was not caused by the court. *Cronin* also states that where a defendant is represented, counsel's performance can be so deficient as to result in a total breakdown of the

adversarial process. *Id.* at 656-57. A defendant who represents himself cannot later claim ineffective assistance of counsel. *Gilmore v. State*, 741 S.W.2d 704, 706 (Mo. App. E.D. 1987); *West*, 949 S.W.2d at 916. *Cronic* does not support the proposition that a defendant who represents himself can later claim that his own deficient performance led to a breakdown in the adversarial process.

II.

The trial court did not plainly err in allowing State's Exhibit 8 to be introduced even though it contained evidence of uncharged acts of misconduct because Appellant made a strategic decision that he wanted the evidence to be placed before the jury, in that the State had offered to delete a reference to the uncharged misconduct out of the tape of the victim's forensic interview but Appellant stated that he wanted the statement to remain in the tape because it might lend credibility to his defense. The State thus had no reason to delete the identical information from State's Exhibit 8 -- a written record of some of the statements made by the victim during the interview. (Responds to Appellant's Point III).

Appellant claims the trial court plainly erred in allowing the State to introduce Exhibit 8, because it placed evidence of uncharged crimes before the jury.

A. Standard of Review.

Appellant did not file a motion for new trial. (Tr. 365). Except for questions of the trial court's jurisdiction over the offense charged, whether the indictment or information states an offense, and the sufficiency of the evidence, allegations of error in a jury-tried case must be included in a motion for new trial to be preserved for appellate review. Supreme Court Rule 29.11(d). Unpreserved claims can only be reviewed for plain error, which requires a showing that not only was the trial court's ruling erroneous, but it impacted Appellant's rights so substantially that a manifest injustice or miscarriage of

justice will result if it is left uncorrected. *Brethold*, 149 S.W.3d at 909. Plain error review is to be used sparingly. *Id.*

B. Appellant wanted the now-disputed evidence to be introduced at trial.

Lynne Dressner performed the forensic interview of the victim at the Rainbow House Regional Child Advocacy Center in Columbia. (Tr. 276, 284). State's Exhibit 3, a DVD of the forensic interview, was introduced into evidence and played for the jury. (Tr. 267-68, 299). State's Exhibit 8 is a list that Dressner made during the interview of things that the victim said Appellant had done. (Tr. 291; State's Ex. 8). Appellant affirmatively stated that he had no objection to the exhibit being admitted into evidence. (Tr. 293). The exhibit was passed to the jury after it was admitted. (Tr. 293). Appellant now complains that the exhibit should have been excluded because item number four on the list, that Appellant "punches mom, knees on neck & pull hair," describes instances of uncharged misconduct.

Appellant's claim of error is contrary to the position he took during a conference immediately following the 491 hearing:

[THE PROSECUTOR]: The only other matter I guess I'd like to bring up, Judge, the State will seek to introduce also the videotape interview of the forensic interview from the Rainbow House. I guess I'd like to address two separate issues on that. First of all, there is a portion, a small portion of the interview where the child references physical abuse

that [Appellant] made against [the victim's mother]. I think as far as prior bad acts or uncharged bad acts I think it's fair to cut that part out absent any consent by [Appellant]. I would seek the ability to prepare an edited copy of the videotape that has that part removed.

* * * *

THE COURT: Yes, that would be acceptable. I hope your editing skills with (sic) better than mine.

THE DEFENDANT: I would have no objections to it staying in.

[THE PROSECUTOR]: You don't?

THE DEFENDANT: No, sir.

[THE PROSECUTOR]: Is that all right, then, if I just play it with that statement? Can I play the tape in its entirety then?

THE COURT: Yeah, I think so.

THE DEFENDANT: As long as I'd be able to – I don't know the proper word, cross-examination of, you know, of the statements being made.

THE COURT: Well, you'll have an opportunity to cross-examine the witnesses who were here today.

THE DEFENDANT: Yes.

[THE PROSECUTOR]: Right.

THE COURT: As well as we've discussed if you provide the questions to the child so we can do that. Obviously you can't cross-examine the videotape.

THE DEFENDANT: Yes, but it does then – I'm terrible with particular words but, you know, it will lend credibility to some of my defense.

(Tr. 90-91).

As the above indicates, Appellant had a strategic reason for wanting the jury to hear the victim's statement that he had assaulted the child's mother. Part of Appellant's defense theory was that the mother had prompted the victim to make false allegations of sexual abuse. (Tr. 351). Appellant could have made a reasonable strategic decision that the allegations that he abused the mother would have bolstered that theory, and perhaps even provided the jury with a motive for the mother to create false allegations against Appellant. Once Appellant made known his wishes to have the jury hear the statement on the taped interview, there was no reason for the prosecutor to redact the information on State's Exhibit 8, which was merely a written record of what was being said on the tape.

It is telling that even on appeal, no claim of error is raised as to the introduction and playing of State's Exhibit 3, the recorded interview, which contains the same information as State's Exhibit 8. Admission of evidence of uncharged misconduct does

not result in reversible error where the evidence is merely cumulative to other evidence previously introduced without objection. *State v. Griffin*, 876 S.W.2d 43, 45 (Mo. App. E.D. 1994).

Also, a new trial will not be ordered on direct appeal on the basis of plain error absent a showing that the error was outcome-determinative. *Deck*, 68 S.W.3d at 427. The jury heard evidence that Appellant, on multiple occasions fondled a six-year-old girl's vaginal area, made her perform oral sex on him, and had anal intercourse with her. Given that evidence, it is not reasonably likely that the outcome of the trial was changed by a brief and fairly non-specific account of physical abuse directed toward the child's mother.

CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

Daniel N. McPherson, Mo. Bar No. 47182
Assistant Attorney General

P.O. Box 899
Jefferson City, MO 65102
Telephone: (573) 751-3321
Facsimile: (573) 751-5391
E-Mail: Dan.McPherson@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) The attached brief complies with the limitations set forth in Supreme Court Rule 84.06, in that it contains 8,853 words as calculated pursuant to the requirements of Supreme Court Rule 84.06; and

(2) A copy of the brief has been supplied to the Court in diskette form on a diskette that has been scanned and found to be virus free; and

(3) A true and correct copy of the attached brief and a diskette containing a copy of this brief were mailed on January 8, 2007, to:

Nancy A. McKerrow
Office of the State Public Defender
3402 Buttonwood
Columbia, MO 65201-3724

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

Daniel N. McPherson, Mo. Bar No. 47182
Assistant Attorney General

P.O. Box 899
Jefferson City, MO 65102
Telephone: (573) 751-3321
Facsimile: (573) 751-5391
E-Mail: Dan.McPherson@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

APPENDIX TABLE OF CONTENTS

JUDGMENT AND SENTENCE A1

SECTION 600.086, RSMo 2000..... A4

18 C.S.R. 10-30.010 (AUG. 30, 2002)..... A5

SUPREME COURT RULE 31.02..... A7

ANNUAL UPDATE OF THE HHS POVERTY GUIDELINES, 68 FED. REG. 6456
(FEB. 7, 2003) A9

ANNUAL UPDATE OF THE HHS POVERTY GUIDELINES, 69 FED. REG. 7336
(FEB. 13, 2004) A16