



**INDEX**

	<u>Page</u>
TABLE OF AUTHORITIES.....	2
JURISDICTIONAL STATEMENT.....	3
STATEMENT OF FACTS.....	3
POINTS RELIED ON .....	4
ARGUMENT .....	8
CONCLUSION .....	17

**TABLE OF AUTHORITIES**

Page

**CASES:**

*State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993) ..... 4, 6, 8, 9, 10, 11, 13

*State v. Burns*, 978 S.W.2d 759 (Mo. banc 1998)..... 4, 8, 9, 10, 11, 12, 14

*State v. Carter*, 996 S.W.2d 141 (Mo. App., W.D. 1999) ..... 6, 14

*State v. Gilyard*, 979 S.W.2d 138 (Mo. banc 1998)..... 4, 10, 11

*State v. Reese*, 274 S.W.2d 304 (Mo. 1954) ..... 9

*State v. Sladek*, 835 S.W.2d 308 (Mo. banc 1992) ..... 4, 6, 11, 14

*State v. Worrell*, 933 S.W.2d 431 (Mo. App., W.D. 1996) ..... 6, 14

**CONSTITUTIONAL PROVISIONS:**

U.S. Const., Amend. VI..... 4, 5, 6, 8, 13

U.S. Const., Amend. XIV..... 4, 5, 6, 7, 8, 13, 15

Mo. Const., Art. I, Sec. 10..... 4, 5, 6, 7, 8, 13, 15

Mo. Const., Art. I, Sec. 17..... 4, 5, 6, 8, 10, 12, 13

Mo. Const., Art. I, Sec. 18(a) ..... 4, 5, 6, 8, 10, 12, 13

**STATUTES:**

Section 566.025 ..... 4, 5, 6, 8, 9, 12, 13

## **JURISDICTIONAL STATEMENT**

Appellant adopts and incorporates by reference the Jurisdictional Statement from his original appeal.

## **STATEMENT OF FACTS**

Appellant adopts and incorporates by reference the Statement of Facts from his original appeal, and notes additionally that Sydney testified that appellant “peed in [her] mouth” (Tr. 218). She described both urine and ejaculate (Tr. 218).

Jacqueline testified that appellant “peed” in her mouth, and it went all over her face and in her hair (Tr. 35). She described both urine and ejaculate (Tr. 34-35).

## POINTS RELIED ON

### I.

The trial court erred in overruling defense counsel's objections to the testimony of Jacqueline Wright that appellant committed uncharged crimes of a sexual nature involving Jacqueline when she was under fourteen, because the testimony was admitted to prove appellant's propensity pursuant to Section 566.025, but that statute is unconstitutional on its face, in violation of appellant's rights to due process, a fair trial, and his rights to be tried only for the offense with which he is charged and to be informed of the charges against him, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that this Court expressly found the former version of this statute unconstitutional in *State v. Burns*, 978 S.W.2d 759 (Mo. banc 1998), and the legislature's addition of a test for relevance to the statute after *Burns* did not cure its deficiencies because relevance was not the basis on which this Court decided *Burns*; rather the Court found that the admission of evidence solely to prove propensity violated the rights described above.

*State v. Gilyard*, 979 S.W.2d 138 (Mo. banc 1998);

*State v. Burns*, 978 S.W.2d 759 (Mo. banc 1998);

*State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993);

*State v. Sladek*, 835 S.W.2d 308 (Mo. banc 1992);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Secs. 10, 17 and 18(a); and

Section 566.025.

## II.

**The trial court abused its discretion in overruling defense counsel's motion in limine and admitting evidence of appellant's alleged acts against Jacqueline Wright, because admission of that evidence deprived appellant of his rights to due process and to be tried only for the crime with which he was charged, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that the evidence was not admissible under any of the exceptions to the rule excluding evidence of uncharged misconduct, and any probative value that this improper character evidence may have had to shed light on any material issue was clearly outweighed by its prejudicial impact and made it more likely that the jury would convict appellant on the charged offense relating to Sydney White.**

*State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993);

*State v. Worrell*, 933 S.W.2d 431 (Mo. App., W.D. 1996);

*State v. Carter*, 996 S.W.2d 141 (Mo. App., W.D. 1999);

*State v. Sladek*, 835 S.W.2d 308 (Mo. banc 1992);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Secs. 10, 17 and 18(a); and

Section 566.025.

### **III.**

**The trial court erred in overruling defense counsel's motions for judgment of acquittal and in imposing judgment and sentence against appellant for statutory sodomy in the first degree, because this violated appellant's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to prove hand to genital contact beyond a reasonable doubt, which is how the state charged and instructed the sodomy count, because Sydney did not testify that appellant touched her genitals with his hand, nor could the jury infer such conduct from other evidence.**

U.S. Const., Amends. XIV; and

Mo. Const., Art. I, Sec. 10.

## ARGUMENT

### I.

The trial court erred in overruling defense counsel's objections to the testimony of Jacqueline Wright that appellant committed uncharged crimes of a sexual nature involving Jacqueline when she was under fourteen, because the testimony was admitted to prove appellant's propensity pursuant to Section 566.025, but that statute is unconstitutional on its face, in violation of appellant's rights to due process, a fair trial, and his rights to be tried only for the offense with which he is charged and to be informed of the charges against him, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that this Court expressly found the former version of this statute unconstitutional in *State v. Burns*, 978 S.W.2d 759 (Mo. banc 1998), and the legislature's addition of a test for relevance to the statute after *Burns* did not cure its deficiencies because relevance was not the basis on which this Court decided *Burns*; rather the Court found that the admission of evidence solely to prove propensity violated the rights described above.

At every point in which this Court has been asked to analyze the admission of the admissibility of propensity evidence in a child sex case, a new framework for that analysis has needed to be developed. This Court held in *Bernard* that evidence of uncharged misconduct is inadmissible for the purpose of showing the

propensity of the defendant to commit such crimes. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993), citing *State v. Reese*, 274 S.W.2d 304, 307 (Mo. 1954). However, such evidence may be admissible if it is both logically relevant, meaning it has some legitimate tendency to establish the defendant's guilt of the charged offense, and legally relevant, meaning that the prejudicial impact is outweighed by its probative value. *Bernard*, 949 S.W.2d at 13. This Court further adopted a new exception to the general rule, that of "signature modus operandi." *Id.* at 17.

After the legislature adopted the first version of Section 566.025 in response to *Bernard*, this Court found it to be unconstitutional in *Burns*. This Court found that Section 566.025, RSMo 1994, was unconstitutional, in that it violated Article I, Sections 17 and 18(a) of the Missouri Constitution. *State v. Burns*, 978 S.W.2d 759 (Mo. banc 1998). Those sections guarantee a criminal defendant the right to be tried only for the offense charged. 978 S.W.2d at 760-761. The Court held that the "admission of uncharged crimes not tending to establish an element of the charged crime would, in effect, amount to trying the defendant for crimes not designated in the indictment."

The legislature responded with a new version of the statute, at issue in this case. Yet this statute did not respond to the problems inherent in the question of admissibility of propensity evidence. Respondent believes that the new statute reconciles some of the inconsistencies in *Bernard* and *Burns* (Resp. Br. at 37). Respondent argues that the addition of a test for legal relevancy in the statute cures

the problems with its constitutionality (Resp. Br. at 37-38). Yet as pointed out in appellant's opening brief, the statute in fact does not address the very constitutional problem with the first statute: that the admission of propensity evidence that is not *logically* relevant offends Article I, Sections 17 and 18(a) of the Missouri Constitution. Article I, Section 17 provides, in pertinent part, "that no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information." Article I, Section 18(a) provides, in pertinent part, "that in criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation." *Burns*, 978 S.W.2d at 760.

It may be that this Court needs an entirely new framework for analysis from this case. Appellant attempted in his opening brief to reconcile *Bernard* and *Burns*, as did respondent, albeit with differing conclusions. But reconciling the two may simply result in a game of logic, without a rational framework that the lower courts can practically apply.

In *State v. Gilyard*, 979 S.W.2d 138 (Mo. banc 1998), this Court affirmed convictions for forcible rape and false imprisonment, although evidence of another sexual assault against another victim had been admitted at trial. This Court held that the evidence met the "signature modus operandi" exception of *Bernard*. *Id.* at 142. The opinion was handed down the same day as the Court's opinion in *Burns*. *Gilyard*, 979 S.W.2d 183, 143 (Limbaugh, J., dissenting).

The *Gilyard* dissent pointed out that the "signature" aspect of *Bernard* evidence "gives it great probative value that may outweigh the prejudicial effect,

but the weighing takes place only if it is first determined that the evidence is logically relevant.” 979 S.W.2d at 144 (Limbaugh, J., dissenting). And evidence used as “corroboration” merely goes to propensity; which is constitutionally prohibited under *Burns*. *Id.* As the *Gilyard* dissent pointed out, if corroboration were a separate exception to the exclusionary rule, the exception would swallow the rule. *Gilyard*, 979 S.W.2d at 144.

As this Court has recognized throughout its jurisprudence, the allowed exceptions to the uncharged crimes rule are those of *logical* relevance: motive, opportunity, identity and the like *tend to establish* the defendant’s guilt.

“Signature modus operandi” is just another word for propensity.

It bears noting that there is some language in *Bernard* that equates “signature” with the identity exception. *See Bernard*, 849 S.W.2d at 17 (“For the prior conduct to fall within the identity exception, there must be more than mere similarity between the crime charged and the uncharged crime. The charged and uncharged crimes must be nearly ‘identical’ and their methodology ‘so unusual and distinctive’ that they resemble a ‘signature’ of the defendant’s involvement in both crimes.”) Appellant finds this appealing, insofar as identity is not at issue in his case (as in *State v. Sladek*, 835 S.W.2d 308, 317 (Mo. banc 1992), where “the defendant’s identity was not at issue; he admitted he was the caseworker and that the victim was his client but denied that the threat or rape occurred.”). When “signature” goes to identity, it is logically relevant. When it goes to corroboration, it is mere propensity evidence. But appellant is left with *Bernard*’s ultimate

conclusion, and that of the cases following it, that “signature” is an additional exception, and one that bypasses logical relevancy. “Signature” is no more than another way for propensity evidence to be admissible.

This Court stated plainly in *Burns* that “Section 566.025 violates article I, sections 17 and 18(a) of the Missouri Constitution where the evidence is presented while guilt remains undecided.” 978 S.W.2d at 762. The addition of a test for legal relevance to the statute does not save it. This Court should declare Section 566.025 unconstitutional under the Missouri Constitution and *State v. Burns*, reverse appellant’s convictions and remand for a new trial.

## II.

**The trial court abused its discretion in overruling defense counsel's motion in limine and admitting evidence of appellant's alleged acts against Jacqueline Wright, because admission of that evidence deprived appellant of his rights to due process and to be tried only for the crime with which he was charged, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that the evidence was not admissible under any of the exceptions to the rule excluding evidence of uncharged misconduct, and any probative value that this improper character evidence may have had to shed light on any material issue was clearly outweighed by its prejudicial impact and made it more likely that the jury would convict appellant on the charged offense relating to Sydney White.**

Respondent asserts that this evidence was admitted under both Section 566.025 and the "signature modus operandi" exception (Resp. Br. 11). Although the basis for the trial court's ruling is somewhat ambiguous, appellant agrees that if the evidence is admissible under *State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993), then the constitutional error asserted in Point I is harmless.

Respondent also argues that the admission of the other crimes evidence was not prejudicial to appellant (Resp. Br. at 21). This appellant does quarrel with. In fact, the jury was urged to convict appellant for crimes against Sydney White

because of the evidence of crimes against Jacqueline White (Tr. 311-312). This is propensity evidence; bad character evidence. In *State v. Carter*, 996 S.W.2d 141 (Mo. App., W.D. 1999), the Court of Appeals reversed under *Burns* where the prosecutor urged the jury in closing argument to convict the defendant because of other sex crimes against children.

Propensity evidence is inherently prejudicial. Jurors believe that “where there’s smoke, there’s fire” (see Tr. 126-128).<sup>1</sup> Everyone secretly believes that, and there is in fact some truth to it. As noted in *Sladek*, “crime statistics readily demonstrate that commission of a prior crime by a defendant is logically relevant to the issue of whether the defendant committed the crime charged” simply because recidivist statisticians demonstrate that “prior offenders commit more crimes than persons who have not previously committed a crime.” 835 S.W.2d at 308. Sexually violent predator statutes are in fact *built* on the assumption that if you do it once, you might do it again. But the state is required to prove the defendant’s guilt in a particular case, not just a guilty nature.

Respondent seems to urge that all propensity evidence be admitted, since it is relevant (Resp. Br. 35-37). But evidence is only admissible if its probative value outweighs its prejudicial impact. *State v. Worrell*, 933 S.W.2d 431 (Mo. App., W.D. 1996). The state here has not met that test.

---

<sup>1</sup> Respondent notes these jurors were struck (Resp. Br. 21). Appellant agrees that they were; that was never the point.

### III.

**The trial court erred in overruling defense counsel’s motions for judgment of acquittal and in imposing judgment and sentence against appellant for statutory sodomy in the first degree, because this violated appellant’s right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to prove hand to genital contact beyond a reasonable doubt, which is how the state charged and instructed the sodomy count, because Sydney did not testify that appellant touched her genitals with his hand, nor could the jury infer such conduct from other evidence.**

Despite the state’s assertions, Sydney never testified that appellant touched her genitals with his hand (Resp. Br. 45). She testified to countless acts that would qualify as sodomy (Tr. 215-225). But as to the offense charged in the information and instructed in the verdict director, she testified only that that appellant touched her “in a bad way” “between my legs and my butt” with “his hands *or* his private.” (Tr. 215-216) (emphasis added).

It is this disjunctive language in Sydney’s testimony that gives rise to the problem. Compounding it is the prosecutor’s closing argument, which urged the jury to convict appellant of sodomy for the other acts, not the charged one (Tr. 313). This is not proof beyond a reasonable doubt of the offense charged.

Appellant respectfully requests that this Court reverse his conviction of statutory sodomy in the first degree and discharge him.

## CONCLUSION

For the reasons presented, appellant respectfully requests that this Court reverse his conviction of statutory sodomy in the first degree and discharge him, and that this Court reverse his conviction of statutory rape and remand for a new and fair trial.

Respectfully submitted,

---

Ellen H. Flottman, MOBar #34664  
Attorney for Appellant  
Woodrail Centre, 1000 W. Nifong  
Building 7, Suite 100  
Telephone: (573) 882-9855  
FAX: (573) 884-4793  
E-mail: [Ellen.Flottman@mspd.mo.gov](mailto:Ellen.Flottman@mspd.mo.gov)

### **Certificate of Compliance and Service**

I, Ellen H. Flottman, hereby certify to the following. The attached reply brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,751 words, which does not exceed the 7,750 words allowed for a reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in September, 2007. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 18<sup>th</sup> day of September, 2007, to Jayne Woods, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri, 65102.

---

Ellen H. Flottman