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## I.

### THE PROSECUTION WAS BARRED BY THE THREE-YEAR STATUTE OF LIMITATIONS

#### A.

##### Law of the Case

The “law of the case” doctrine does not limit this Court’s power to address issues decided on a prior appeal in the same case. Rather, as the State acknowledges, the doctrine is a policy that this Court can forgo to correct an erroneous decision, particularly on an issue as consequential as the statute of limitations issue presented here.<sup>1</sup> Where a principle of law has been decided incorrectly on a prior appeal, this Court has long-recognized its duty to examine the issue and correct the error. *Mangold v. Bacon*, 141 S.W. 650, 655 (Mo. 1911).

The question in this case is which limitations rule applies – the three-year limitations period of §541.200 or the unlimited period authorized by §541.190. The answer turns on the meaning of language contained in §541.190 that excepts from the three-year statute of limitations “any offense punishable with death or by imprisonment during life.”

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<sup>1</sup>The law of the case is generally not regarded as applicable when a supreme court considers the correctness of a prior intermediate appellate court opinion. *See, e.g. Messenger v. Anderson*, 225 U.S. 436, 444 (1912). *See generally* 5 Am. Jur.2d Appellate Review §606.

The court of appeals in *State v. Graham*, 149 S.W.3d 465 (Mo.App.E.D. 2004), erroneously concluded that under §541.190, there was no limitations period for sodomy, as defined by §563.230, because life imprisonment could conceivably be imposed as punishment. The holding of the court of appeals means that any violation of an open-ended statute prior to the repeal of these statutes in 1979 may be prosecuted today.

The court of appeals' conclusion defies more than a century of understanding regarding the meaning of §541.190. The result is manifestly unjust to Graham. The applicable statute of limitations is an issue that, as a matter of policy and fundamental justice, needs to be addressed by the highest court of this State.

## **B.**

### **§541.190 is Ambiguous**

Section 541.190 excepts “any offense punishable with death or by imprisonment in the penitentiary during life” from the three-year limitations period. Although the Court has previously acknowledged the ambiguity of substantially the same language in other contexts, *e.g. State v. Naylor*, 40 S.W.2d 1079, 1083-84 (Mo. 1931) and *Garrett v. State*, 481 S.W.2d 225, 227 (Mo. banc 1972)(Finch, CJ., concurring), the State claims that the language of §541.190 is unambiguous.

There is no better testament to the ambiguity of §541.190 than the State's effort to defend the court of appeals' interpretation of that statute. In arguing that the wording of the statute is unambiguous, the State invites the Court to add the word "either" to the statute, a word that does not appear anywhere in the text. The argument becomes ethereal as the State contends that Graham's interpretation is incorrect because it moves this phantom "either" within the statute.

If a statute does not have a plain meaning without judicially inserting an additional word, it is necessarily ambiguous. This is particularly true when the interpretation is being urged upon this Court to justify a criminal conviction. *State v. Lancaster*, 506 S.W.2d 403, 404 (Mo. 1974)(criminal statutes must be strictly construed against State).

The State also attempts to explain why "with death or by imprisonment" means something different from "by death or imprisonment." This would undoubtedly spark a lively debate among grammarians, but the State's exegesis hardly yields a "plain" meaning. As the Court has observed, "The grammatical construction of a statute is one mode of interpretation, but it is not the only, and it is not always the true mode. We may assume that the draftsman of an act understood the rules of grammar, but it is not always safe to do so." *State ex rel. Pearson v. Louisiana & M.R.R. Co.*, 114 S.W. 956, 958 (Mo. 1908).

Section 541.190 was not written to challenge grammarians, but for the guidance of courts, legislators and the citizenry. Our rules of statutory

construction have not become so artificial that the placement of a preposition trumps a century of experience.

**C.**

**Over a Century of Jurisprudence Demonstrates that  
§541.190 Does not Apply to Open-Ended Offenses**

“The primary rule of statutory construction is to give effect to legislative intent.” *State v. Blocker*, 133 S.W.3d 502, 504 (Mo. banc 2004). The more remote in time the evidence, the more difficult it is to interpret. The State attempts to divine a legislative intent by comparing the 1835 version of §541.190 to the prior statute of limitations from 1825. But attempting to ascertain a legislative intent based on a juxtaposition of statutes enacted more than 170 years ago is highly speculative.

The State argues that the phrase “any offense punishable with death, or by imprisonment in the penitentiary during life” in the 1835 statute must have included offenses for which either death, the possibility of imprisonment for life, or both were potential punishments. It argues that the 1835 legislature could not have intended to refer only to offenses that carried alternative punishments of death or imprisonment up to life because otherwise first-degree murder, which was punishable by death alone in 1835, would have been subject to the three-year statute not an unlimited period.

It is more plausible to conclude from the juxtaposition of statutes that the 1835 legislature intended the unlimited period to apply when death was a potential punishment. After all, under the 1825 statutes death was the *only* penalty for capital offenses. The legislature in 1835, apparently for the first time, created capital offenses with an alternative punishment of imprisonment up to life. It is likely that the 1835 legislature worded this earliest version of §540.190 as it did to clarify that there was no limitations period for offenses where death was authorized *but might not be imposed*. And any uncertainty about the status of murder under the limitations statutes in the 19<sup>th</sup> century was removed in 1909 when life imprisonment was added as an alternative to death as an authorized punishment for first-degree murder. *See* §4450 RSMo 1909.

A “capital offense” has long been understood to encompass both offenses punishable by death alone, as well as offenses that included an alternative penalty of up to life imprisonment. Appellant’s Brief 38. That §541.190 and its predecessors have been understood for well over a century to refer to capital offenses is evident from the language “No bar in capital cases,” which has been the catch phrase for this statute since 1879, when such phrases were first inserted into the statutory compilation. *See* Respondent’s Appendix at A40.

The State notes that arson and forgery became open-ended offenses in 1835. Since those offenses were excepted from the statute of limitations in 1825, the State argues that this must mean that the 1835 legislature intended that open-ended offenses be excepted from the statute of limitations. However, it is more

likely that the 1835 legislature concluded that because death was not an authorized punishment for arson or forgery, they should not be among the grave offenses that can be prosecuted at any time. This “simply shows that the legislature was doing what it has always done, namely, adjust and refine the criminal code to reflect the current social policy of the state.” Respondent’s Brief 50 n.22.

While it is clear that the legislature has always excepted capital offenses from a limitations period, there is no indication of any intent to except open-ended offenses. The State’s comparison of open-ended statutes in 1835 and 1969 is simply beside the point, because there is no evidence at either point in time that the Missouri legislature intended to exempt open-ended offenses from the three-year statute of limitations.

The most authoritative – indeed only – legislative commentary that exists regarding the criminal limitations statutes in effect from 1835 through 1979 is that contained in the Commentary to the 1979 Criminal Code. Where there is no reliable way to determine the intent of the legislature that enacted a statute, the purpose of the legislation may be gleaned from other sources including subsequent legislation. *State v. Thomas*, 174 S.W.2d 337, 339-40 (Mo. 1943).

The Commentary stated that the 1979 Code was intended generally to maintain the same criminal limitations periods as existed under pre-Code law. The State does not dispute that virtually all of the 1969 offenses that carried open-ended punishments, including sodomy, became Class B felonies under the 1979

Code and were subject to a three-year statute of limitations.<sup>2</sup> §556.036.2(1); *see* Appellant’s Brief at 37. Therefore, the General Assembly that enacted the 1979 Code understood that a violation of the pre-existing sodomy statute, §563.230, was subject to a three-year statute of limitations.

The understanding reflected in the 1979 Commentary is also supported by a century of jurisprudence. Evidence that Missouri courts and the State understood that open-ended offenses were subject to the three-year period can be found in public corruption cases from the 19th Century. In *State v. Hays*, 78 Mo. 600, 1883 WL 9863 (Mo. 1883), Hays was prosecuted for violating Article 3, Section 41 of the 1870 criminal laws which made it an offense for a public servant to convert public moneys. This offense carried an open-ended penalty of not less than five years imprisonment. The State re-indicted Hays after the first indictment was found defective. In the new indictment, the State “set out the proceedings had under the first indictment *manifestly for the purpose of preventing the bar of the*

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<sup>2</sup>Under the 1979 Code, sodomy only became a Class A felony if the actor inflicted serious physical injury or displayed a deadly weapon. §566.060 RSMo 1978. Contrary to the suggestion of the State, the addition of new Class A felonies, which did not carry a limitations period, does not shed any light on the interpretation of the 1969 limitations statute. Most of the additions simply reclassified Class B felonies as Class A felonies under circumstances where the actor inflicted serious physical injury or displayed a deadly weapon. The decision in 1979 to except offenses committed while armed with a deadly weapon is consistent with 1969 law which made armed robbery a capital offense that was not subject to any time limitations. §560.135 RSMo 1969.

*statute of limitations.*” *Id.* at \*1 (emphasis added). Thus, in 1883, the State not only understood that an open-ended offense was subject to a statute of limitations, it affirmatively pled facts intended to avoid the time bar.

Subsequent legislation is consistent with the State’s understanding in *Hays*. As of 1899, some public corruption offenses carried open-ended punishments and others contained a maximum penalty. *Compare* “Officer loaning public money” §§1919 RSMo 1899 (not less than two years) *with* “Fraudulent disbursement of money” §1923 RSMo 1899 (not more than five years).

In 1905, with these various corruption offenses on the books, the General Assembly amended the three-year statute to provide that prosecutions “for bribery or for corruption in office” could be prosecuted within five years. *Laws of Missouri, 1905*, p. 130. In enacting an amendment, the legislature is presumed to have had in mind all existing statutory provisions as well as the judicial construction given to such provisions. *Graves v. Little Tarkio Drainage Dist. No. 1*, 134 S.W.2d 70, 81 (Mo. 1939). If there were no statute of limitations for open-ended corruption offenses such as an officer loaning public money, there would have been no need for the General Assembly to amend the three-year statute for the purpose of extending it to five years for these offenses.

In *State v. Douglass*, 144 S.W. 407 (Mo. 1912), the Court was asked to decide which offenses were within the scope of the five-year period for “bribery, or for corruption in office.” The *Douglass* Court concluded that the phrase “corruption in office” included every felony offense intentionally committed by a

ministerial or judicial officer. The Court specifically stated that the open-ended offense of receiving benefits from public funds (§§4558-4559, RSMo 1909) was among the corruption offenses subject to the five-year period. *Id.* at 408.

Other examples of the Court's understanding that §541.190 did not apply to open-ended offenses were set out in Graham's opening brief at 39-42. *E.g.*, *State v. Weiler*, 338 S.W.2d 878, 880 (Mo. 1960); *State v. Cook*, 463 S.W.2d 863 (Mo. 1971). The State argues that these cases are not persuasive because they contain little or no analysis of the statutes at issue. Instead, it asserts that this Court should look to *State v. Bray*, 246 S.W. 921 (Mo. 1922). It argues that *Bray* is somehow more compelling than the Court's later statements in 1960 and 1971 in *Weiler* and *Cook*. However, the statements from *Bray* on which the State relies were subsequently contradicted by the Court in *State v. Herron*, 349 S.W.2d 936 (Mo. 1961).

In *Bray*, the defendant was charged with the open-ended offense of first-degree robbery. The defendant challenged a jury instruction requiring the jury to find that the offense was committed within three years of the date of the information. The Court commented in dicta that the instruction was favorable to the defendant because there was no limitations period for first-degree robbery.

As in *Bray*, Herron was charged with first-degree robbery. Like *Bray*, Herron challenged a jury instruction requiring the jury to find that the offense had been committed within three years of the information. Herron argued that the instruction should have stated the specific date of the offense. *Id.* at 941. The

*Herron* Court upheld the instruction stating that “inclusion of the phrase permitting a finding that the crime had been committed at any time within the limitation period of three years is not considered erroneous” except where the defendant relies on an alibi defense. *Id.* at 941.

In light of *Herron*, there is a consistent line of cases beginning at least with *State v. Hays* in 1883 and continuing through *State v. Cook* in 1971 that demonstrate that Missouri courts understood that open-ended offenses were subject to a three-year (or five-year) statute of limitations. Where the Court is called upon to construe a statute long after its enactment, the Court “must take into consideration the comments which have been made by courts (conceding that none have ruled this precise issue), as well as the practical use made of the statute.” *State v. Crawford*, 478 S.W.2d 314, 317 (Mo. 1972).

It is striking that this case appears to be the first time in 170 years in which this Court has been asked to construe statutes of limitations enacted in 1835 and repealed in 1979. If §541.190 applies to every open-ended offense, how is it that Graham is the first person to challenge the application of §541.190 to open-ended offenses in 170 years? The absence of any prior challenge strongly suggests that the State understood, beginning in 1835, that §541.190 and its predecessor statutes did not apply to open-ended offenses and, therefore, did not charge those offenses after the three-year limitations period.

**D.**

***Naylor and Garrett***

Although the State asserts that the peremptory challenge statute in *State v. Naylor*, 40 S.W.2d 1079 (Mo. 1931) “has no real value in construing §541.190,” it cannot explain the logic whereby sodomy under §563.230 is *not* an offense “punishable by death or by imprisonment in the penitentiary for life” under the peremptory challenge statute, §546.180 RSMo 1969, but is an offense “punishable with death or by imprisonment in the penitentiary during life” under the limitations provisions of §541.190 RSMo 1969. *See, e.g., State v. Crawford*, 478 S.W.2d 314, 319 (Mo. 1972).

Nor can the State plausibly distinguish *Garrett v. State*, 481 S.W.2d 225 (Mo. banc 1972), a case in which this Court concluded that its exclusive jurisdiction over “all appeals involving offenses punishable by a sentence of death or life imprisonment” did not encompass an open-ended offense such as robbery. Even though *Garrett* addresses language similar to that of §541.190, the State again invokes the phantom “either,” pronounces the exclusive jurisdiction grant ambiguous, and therefore concludes the Court’s interpretation is “reasonable” but of “little or no bearing upon the statutory language of the 1969 limitations statute.” It is impossible to reconcile how the language of the jurisdictional grant can be ambiguous while the language of §541.190 is so clear that this Court can ignore the interpretation of courts and legislatures over more than a century.

## E.

### The Rule of Lenity

“In criminal statutes of limitation the state surrenders by an act of grace its right to prosecute, and declares the offense shall no longer be the subject of prosecution.” *State v. Snyder*, 82 S.W. 12 (Mo. 1904). “The statute is not a statute of process, to be scantily and grudgingly applied, but an amnesty, declaring that after a certain time oblivion shall be cast over the offense. Hence such statutes are to be liberally construed in favor of the defendant.” *Id.* at 31 (internal citation omitted).

Oblivion was cast over the offense charged in this prosecution more than twenty years ago. The rule of lenity requires that any remaining doubt as to whether the act charged and proved is embraced within the prohibition be resolved in favor of the accused. *Fainter v. State*, 174 S.W.3d 718, 721 (Mo.App.W.D. 2005). The wording of §541.190, its history, its interpretation by courts and legislatures, and the rule of lenity lead ineluctably to the conclusion that this prosecution of Graham is time-barred.

**II**  
**THE PROSECUTION VIOLATED DUE PROCESS**

**A.**

**§563.230 is Unconstitutional**

*Lawrence v. Texas*, 539 U.S. 558 (2003), eviscerated §563.230 by holding unconstitutional its essential premise, *i.e.*, that the State can proscribe sodomy under any and all circumstances. There is no question that §563.230 “clearly and undoubtedly contravenes the constitution.” *State v. Pike*, 162 S.W.3d 464, 470 (Mo. banc 2005), *quoting United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004). Nor, as a consequence, is there any question that §563.230 is unconstitutionally overbroad. The State concedes as much. Respondent’s Brief 68.

The true issues in this case are whether there are any residual contexts in which this statute can be constitutionally applied and how those contexts are defined. The statute yields no clues. There is no pertinent legislative history. The State here merely postulates that the age of consent is 17, and that as a result this case involves a nonconsensual act that is not constitutionally protected. But the State also concedes that §563.230 does not specify an age of consent and there is no indication the General Assembly that enacted the statute gave it any consideration. Nor was the jury asked to find that Woolfolk was below some specified age at the time of the offense. As a result, Graham was tried and convicted under a statute that failed to specify the essential elements for a

constitutionally permissible conviction, and he was denied a jury determination whether those elements were present in this case.

Graham clearly has standing to contest the constitutionality of his prosecution under §563.230. This Court has held that “a person may contest the constitutionality of a statute even if he was not engaging in constitutionally protected conduct.” *State v. Beine*, 162 S.W.3d 483, 487 (Mo. banc 2005). “Criminal statutes require particularly careful scrutiny, and ‘those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.’” *State v. Moore*, 90 S.W.3d 64, 66 (Mo. banc 2002), quoting *City of Houston v. Hill*, 482 U.S. 451, 459 (1987). As this Court observed in *Beine*, 162 S.W.3d at 487, Missouri courts have applied these principles outside the First Amendment area. *E.g.*, *City of St. Louis v. Burton*, 478 S.W.2d 320 (Mo. 1972). The standing doctrine also has limited applicability where the Nation’s highest court has already effectively determined that a statute is “unconstitutional in the vast majority of its intended applications.” *United States v. Raines*, 362 U.S. 17, 23 (1960).

More fundamentally, Graham has standing because §563.230 is unconstitutional as applied to him. The constitutional defect in the statute as applied to Graham is a direct product of the broad language of the statute and the impact of *Lawrence v. Texas*. The *Lawrence* Court left open the prospect that the State could enforce a statute that prohibited forcible sodomy or that presumed lack of consent by someone below a certain age, *i.e.*, statutory sodomy. *Id.* at 578.

However, §563.230 does none of those things. As the State concedes, “The statute criminalizes sodomy, regardless of whether it was consensual or whether it was committed with or upon a minor.” Respondent’s Brief 73. Therefore, *Lawrence* made §563.230 a statute that cannot mean what it says.<sup>3</sup>

So the essence of the vagueness and overbreadth problems in this case is that *Lawrence v. Texas* has rendered §563.230 standardless, and those standards cannot be supplied by judicial fiat. As the U.S. Supreme Court observed in *Aptheker v. Secretary of State*, 378 U.S. 500, 516 (1964):

[A]n attempt to ‘construe’ the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute’s scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage. This course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty.

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<sup>3</sup>In support of its standing argument, the State cites *Singson v. Commonwealth*, 621 S.E.2d 682 (Va.App. 2005). *Singson* has no precedential value and is factually distinguishable. It involved a conditional guilty plea to soliciting an adult to commit sodomy in a public restroom. Because there was no dispute the act was to occur in a public place, the Virginia appellate court concluded that *Singson* did not have standing to contest the constitutionality of the underlying sodomy statute. There was no age of consent issue in *Singson*, let alone a question whether defining that age is a legislative or judicial function.

The State argues that Graham can be lawfully prosecuted under §563.230, and does not have standing to contest the constitutionality of the statute, if this Court concludes a statute that proscribed sodomy with someone under 17 regardless of consent would be constitutional. The State does not explain where it obtained the age 17 standard. It is not embodied in the language of §563.230. It cannot be divined by a “choice between one or several alternative meanings” or “by severing discrete unconstitutional subsections from the rest.” *City of Houston v. Hill*, 482 U.S. 451, 468 (1987), quoting *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964).

Yet the State protests that it is not asking this Court to judicially revise the open-ended language of §563.230. Rather, the State says that it is asking this Court to review the evidence and determine whether an act of sodomy occurred under circumstances that can be constitutionally proscribed after *Lawrence v. Texas*. But the State’s distinction is meaningless, for its approach improperly “leave[s] it to the courts to step inside [§563.230’s large net] and say who could be rightfully detained, and who should be set at large.” *United States v. Reese*, 92 U.S. 214, 221 (1875). This approach does “substitute the judicial for the legislative department of the government.” *Id.*

This case therefore embodies the dangers of standardless, arbitrary enforcement.<sup>4</sup> The trial court permitted the State to fill the vacuum created by *Lawrence* with a standard that was not promulgated by the General Assembly. That standard accommodated Woolfolk’s vague testimony regarding timeframes and permitted the State to argue that Graham could be constitutionally prosecuted for any act of sodomy that occurred prior to the repeal of §563.230, just twelve days before Woolfolk’s 17<sup>th</sup> birthday.

Defining an age of consent for purposes of a criminal statute is a legislative function. As this Court has observed, “Age is a legitimate legislative consideration . . . .” *In re Interest of J.D.G.*, 498 S.W.2d 786, 792 (Mo. 1973)(“The selection of the female age factor in a statutory rape statute is basically a legislative function.”). Even if a court had the authority to graft an age of consent onto §563.230, as a historical matter there is little support for the age of 17. In

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<sup>4</sup>Graham challenged the constitutionality of §563.230 on vagueness and overbreadth grounds in pre-trial motions (LF 78-80, 87-90), and specifically objected to the verdict director as unconstitutionally vague and overbroad because “[t]here is no requirement that there be any sort of an age of the victim, nor does it require that there be any sort of force and as such . . . is unconstitutional.” Tr. 591-92. These points were reiterated in the motion for new trial with citation to *Kolender v. Lawson*, 461 U.S. 352 (1983). (LF 125-26). The essence of the vagueness doctrine is that the statute does not provide notice to the citizenry or guidance to law enforcement of the acts that are prohibited. Therefore, the suggestion that Graham’s vagueness challenge was not adequately preserved below is frivolous.

prosecutions under §563.230, the age at which a child could consent to sodomy sometimes arose when a defendant asserted that the child was an “accomplice” to the act of sodomy and that therefore the child’s testimony required corroboration. In *State v. Rutledge*, 267 S.W.2d 625, 626 (Mo. 1954), the Court observed that in order to be an accomplice, an individual would have to consent to the act of sodomy. Given that the child in that case was 13, the Court noted that “[i]n other jurisdictions it has been expressly held that boys of *from 14 years and younger* could not consent to crimes against nature and that their testimony in regard thereto need not be corroborated to sustain a conviction.” *Id.* at 626 (emphasis added); *see also State v. Shumate*, 516 S.W.2d 297, 301 (Mo.App.S.D. 1974)(quoting same language). In 1835, when the sodomy statute was first enacted, the age for statutory rape was 10. *See* Respondent’s Brief 36. The statute that replaced §563.230 in 1979 provided that “[a] person commits the crime of sodomy if he has deviate sexual intercourse with another person to whom he is not married [or] who is less than fourteen years old.” §566.060 RSMo 1978.

In enacting §563.230, the Missouri General Assembly never addressed the question at what age an individual can lawfully consent to an act of sodomy. It simply proscribed all sodomy. For a court to now read an age into the statute for purposes of saving its constitutionality—at least for purposes of this prosecution -- is an arbitrary and impermissible act of judicial legislation. *See State v. Young*, 695 S.W.2d 882, 886 (Mo. banc 1985)(statutory revision within exclusive province of General Assembly).

## **B.**

### **Failure to Instruct on Age or Consent**

Even if this Court had the power to judicially revise §563.230 to criminalize sodomy with individuals under 17, Graham's conviction below would have to be reversed because the jury was not instructed on the need to find this new, critical element of the offense beyond a reasonable doubt. The State argues that it only had to prove that Graham committed the act of sodomy and that the burden was on Graham to prove that his conduct was constitutionally protected.

If the State is correct, the General Assembly can make sodomy, sexual intercourse or any other act a crime without regard to constitutional limits, leave for the jury the sole question of whether the act occurred, and then place the burden on the citizen to convince the court that, as a constitutional matter, his conduct is protected under the circumstances. Not only would such an allocation of burdens be inconsistent with the obligation of the legislature to "establish minimal guidelines to govern law enforcement," *Kolender v. Lawson*, 461 U.S. at 358, but it would be in derogation of the individual's rights under the Due Process Clause, which "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

This protection necessarily includes facts critical to a constitutional prosecution. In *Osborne v. Ohio*, 495 U.S. 103 (1990), the U.S. Supreme Court

reviewed a statute that made it a crime to possess or view material that shows a minor in a state of nudity unless one of two exceptions applied. *Id.* at 106. In light of these exceptions, the Ohio Supreme Court construed the statute as only applying to materials showing a lewd exhibition or graphic focus on a minor's genitals. On that basis it concluded that the statute was not constitutionally overbroad. On appeal, the defendant objected that the jury should have been instructed that it had to find beyond reasonable doubt that any depiction of nudity was a lewd exhibition or graphic focus on the minor's genitals.

Citing *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965), the U.S. Supreme Court held that when a state court "narrows an unconstitutionally overbroad statute, the State must ensure that defendants are convicted under the statute as it is subsequently construed and not as it was originally written." 495 U.S. at 118. It concluded that Osborne had a federal due process right to a jury finding beyond a reasonable doubt of the existence of the new elements created by the Ohio Supreme Court.

As instructed, the jury in this case was free to convict Graham for an act of sodomy alone. It did not have to conclude that the act was nonconsensual, that Woolfolk was below some still unidentified age of consent, or that the act was committed in public. In fact, given the ambiguity in the verdict director, *see* Appellant's Brief 69-70, and the evidence of other sexual allegations that came in through Exhibit 7, one cannot reliably infer that the jury thought that the act occurred when Woolfolk was under 17, or before January 1, 1979, when §563.230

was repealed. As *Osborne* demonstrates, the Due Process Clause requires much more.

The State does not argue that Graham was not prejudiced by the failure to instruct the jury on age or lack of consent. Therefore, even if §563.230 can be constitutionally applied to Graham, and even if this Court can constitutionally divine an age of consent, Graham is entitled to a new trial wherein a jury determines beyond a reasonable doubt whether at the time of the alleged act, Woolfolk was legally incapable of consenting to it.

### **III.**

#### **ALLOWING EXHIBIT 7 TO GO TO THE JURY ROOM DURING DELIBERATIONS DENIED APPELLANT A FAIR TRIAL**

Because defense counsel used a portion of Exhibit 7 for impeachment, the State argues that the trial court did not err in sending it to the jury room. The State also contends that the defense waived any objection to the admission of this exhibit and its publication to the jury.

The State invites this Court to ignore (1) defense counsel's request to address admissibility at a later time; (2) that the trial court did not deny that request; and (3) that the trial court did entertain an objection to the exhibit at the close of evidence. (Tr. 379, 592-597). When defense counsel made his objection, the prosecutor did not maintain, nor did the trial court rule, that the objection had been waived. Moreover, in arguing that the letter contained out-of-court

statements by Woolfolk that would not be subject to cross-examination, defense counsel alerted the trial court to the hearsay problem. (Tr. 593). The trial court overruled the objection on the erroneous grounds that the full contents of the letter had already been disclosed to the jury. (Tr. 595-56). The trial court noted the objection again when the jury requested that Exhibit 7 be sent to the jury room. (Tr. 633).

The purpose of the contemporaneous objection rule is to ensure that the trial court has an opportunity to consider the substance of an objection before it is raised on appeal. “The principle involved is that the objections to evidence and the basis therefore must be brought to the attention of the trial court in time for it to act.” *State ex rel. State Highway Comm’n v. Offutt*, 488 S.W.2d 656, 660 (Mo. 1972). The trial court had that opportunity here. Graham is not challenging the admission of any portions of the letter that were read to the jury during Woolfolk’s examination. What Graham is challenging is the admission and publication of those portions of the letter that were not referenced by either party during the trial, that defense counsel objected to before they were disclosed in any form to the jury, and which the trial court had an opportunity to review before overruling the objection.

Nor did Graham waive his objection by using a portion of Exhibit 7 to impeach Woolfolk. Use of a letter for impeachment purposes does not make it admissible generally. *See* Appellant’s Brief 80-83. The trial court abused her discretion when she overruled the objection and sent Exhibit 7 to the jury room.

That decision was tantamount to allowing Lynn Woolfolk in the jury room to make an emotional plea for Graham's conviction.

In an effort to justify the admission and publication of Exhibit 7 under the doctrine of curative admissibility, the State mischaracterizes its use by the defense. It is apparent from the transcript that defense counsel used the letter to impeach Woolfolk's testimony on direct that he was not motivated by money and that he dismissed his first civil lawsuit on advice of counsel. The portions of Exhibit 7 referenced by the defense indicated that it was Woolfolk's idea to dismiss the first lawsuit and that he then made a demand on the Archdiocese for \$30,000 with "no lawyers involved." (Tr. 361). This not only contradicted Woolfolk's testimony that he dismissed the first lawsuit at the urging of his lawyer, but it also suggested there was a financial motive behind the dismissal, *i.e.*, to remove the lawyer's percentage of any recovery.

In its brief, the State invents another use of the letter. It argues that defense counsel actually used the letter to show Woolfolk "made the decision to dismiss the first lawsuit...because [he] had already found reconciliation through a spiritual experience in Africa." Respondent's Brief 83. It then contends that the entire letter was admissible because "[d]efense counsel attempted to imply that the victim had found whatever spiritual satisfaction he needed, and that the victim had then turned his efforts to extracting money from the church." *Id.* 88.

That defense counsel or the prosecutor made any issue of "spiritual satisfaction" is unsupported by the record. The rule of completeness cannot be

invoked to put in context a statement that never occurred. Nor does the State explain how the publication of any particular statement in the letter is justified under that theory.

Citing *State v. Boulware*, 923 S.W.2d 402, 405 (Mo.App.W.D. 1996), the State attempts to justify the publication to the jury of the allegations of sexual misconduct at St. Alban's, which were not alluded to by the defense, by arguing they were "admissible to show [Graham's] motive, and a complete and coherent picture of the events." Respondent's Brief 91. But *Boulware* was not a situation where the jury learned of other alleged sexual encounters for the first time in a letter sent to the jury room, without the benefit of cross-examination. Nor did the prosecution purport to present Woolfolk's uncorroborated St. Alban's allegations, as evidence of motive or necessary context. Had it done so, the prejudicial impact would have clearly outweighed any probative value. Graham moved to St. Alban's in 1980 when Woolfolk was over 18 and presumably capable of consent. Therefore, that the allegations about St. Alban's concerned the same "victim" meant only that the evidence presented the same risk of jury confusion and consequent prejudice the Court identified in *State v. Amende*, 92 S.W.2d 106 (Mo. 1936); see Appellant's Brief 86.

There is much more than a reasonable probability that sending Exhibit 7 to the jury room affected the outcome of the trial. That letter was unreliable, inadmissible, prejudicial, and ultimately devastating. Indeed, the decision to send

Exhibit 7 to the jury room was outcome determinative. The conviction below must be reversed.

#### **IV.**

### **THE PROSECUTOR'S CLOSING ARGUMENT DENIED APPELLANT A FAIR TRIAL**

#### **A.**

#### **Improper Appeal to Racial Animus**

The State initially argues that the prosecutor did not appeal to racial prejudice when he suggested in his closing argument that Graham's motive for picking Woolfolk as a victim was because allegations of misconduct by Woolfolk, an African-American teenager, would not have been credible. However, the State also acknowledges that the prosecutor's argument "might have implied that the relative races of appellant and the victim may have also factored into appellant's decision to prey upon the victim" because it is "common knowledge that racial attitudes have undergone change in the last thirty years, and that many people have harbored discriminatory points of view." Respondent's Brief 100. In the State's view, there is nothing wrong with such commentary.

What is truly common knowledge is there is no more toxic issue in an American courtroom than race. There was no evidence that Woolfolk was befriended, let alone abused, because of his race. Under these circumstances, a prosecutor has a special responsibility not to distort the fact-finding process by appealing to racial prejudices.

Courts have found that prosecutorial arguments that appeal to racial bias constitute plain error, some even rising to the level of a constitutional violation. *See, e.g., United States v. Cruz-Padilla*, 227 F.3d 1064, 1068-69 (8th Cir. 2000)(plain error when prosecutor argued illegal alien more prone to lie). Here the prosecutor’s remarks denied Graham a fair trial and their admission constitutes plain error.

## **B.**

### **Misstatements of Law**

On the critical issue of credibility, the trial court permitted the State to misstate the law on the legal significance of Woolfolk’s prayer for relief in his civil cases, and then condoned that misstatement by overruling the defense’s objection. *State ex rel. Kansas City Power & Light Co. v. Parma*, 467 S.W.2d 43, 47 (Mo. 1971).

The trial court’s erroneous approval of the misstatement was not cured by defense counsel’s later attempt to clear up the error. Just as a properly submitted jury instruction cannot correct a misstatement during argument, *Wineinger v. Logan*, 496 S.W.2d 275, 277 (Mo.App.W.D. 1973), neither can later comments of defense counsel. Moreover, the jury was misled a second time during rebuttal when the prosecutor again argued that Woolfolk did not “go for these multi-million dollar lawsuits.” (Tr. 628).

The prosecutor also argued that the jury was “outright deceived” by the defense because any judgment in the civil lawsuit would not have been paid by Graham. There was no evidence to this effect during the trial, and the financial relationship between Roman Catholic priests and an Archdiocese is not “common

knowledge” as the State maintains. The prosecutor compounded the prejudice by accusing the defense of an outright deception even though Graham was an individual defendant in each of Woolfolk’s lawsuits.

**V.**

**AS A RESULT OF THE STATE’S DISCOVERY VIOLATIONS  
THE PENALTY PHASE WAS FUNDAMENTALLY UNFAIR**

The State does not dispute that defense counsel did not receive notice of the penalty phase witnesses until mid-trial, and that the prosecutor did not provide the defense with the police report of Rohan’s allegations. It argues, however, that there was no manifest injustice to Graham because there is no indication that additional time would have helped the defense and that in any event, Graham did not request a continuance.

Regarding the police report, the State’s arguments are beside the point. Defense counsel was not advised of the existence of the report at any time during the trial, let alone provided a copy. Because the existence of the report was not discovered until after trial, Graham had no opportunity to seek a remedy prior to the jury’s penalty phase verdict. The standard of review is “whether there was a reasonable likelihood that an earlier disclosure of the requested evidence would have affected the result of the trial.” *State v. Scott*, 943 S.W.2d 730, 735-36 (Mo.App.W.D. 1997). “To warrant a new trial for lack of sufficient relief, the defendant must show that withheld information was material and was not

previously known or expected by the defendant in trial preparation.” *Id.* at 736 (citations omitted).

The Bridgeton police report was certainly material. Rohan was an important penalty phase witness and the report included information that could have been used to impeach his testimony, including his father’s contradiction of Rohan’s statements. There is a reasonable likelihood that a cross-examination with the benefit of the Bridgeton report would have affected the outcome of the penalty phase. Despite being contacted by the Bridgeton police at some point, defense counsel would not have known that the State intended to call Rohan as a witness in Graham’s case or that Bridgeton had prepared a report regarding Rohan’s allegations. Counsel also had a reasonable expectation the State would comply with its discovery obligation.

The testimony of Rohan and Capstick did result in manifest injustice. Had defense counsel known of the substance of their testimony, Graham could have waived jury sentencing based on the judgment that the trial court would be in a better position to evaluate the unreliability of their testimony. Jury sentencing must be waived prior to voir dire. §557.036.4(1) RSMo 2005. In this case, a judge may well have imposed a more lenient sentence. However, it is not surprising once a jury returned a sentencing recommendation in this high profile, emotional prosecution, that a judge would feel obliged to follow it. The nondisclosure of the Rohan report and the late disclosure of Rohan and Capstick as penalty phase witnesses undoubtedly affected the severity of the sentence that

was recommended by the jury. As a result, if Graham's conviction is not reversed outright, the Court must vacate the sentence and remand for resentencing.

## **VI.**

### **THE PROSECUTOR'S ARGUMENT DURING REBUTTAL FOR A SPECIFIC SENTENCE WAS FUNDAMENTALLY UNFAIR**

The defense, having been informed the State waived rebuttal, argued for a specific sentence of two years. The trial court's subsequent invitation to the State to make a rebuttal argument was plain error. Although there was no contemporaneous objection, at the time the prosecutor began his rebuttal argument, defense counsel could not have anticipated that he would recommend a specific sentence. Once the prosecutor made this argument, there was no way for the trial court to cure the error. The State's argument undoubtedly affected the jury since they ultimately recommended an extraordinary, 20-year sentence for a 71-year-old man with no prior record and a history of good works. Allowing the State to argue for a specific sentence during a rebuttal it had initially waived was manifestly unjust and also warrants that the sentence be vacated.

## **CONCLUSION**

For the reasons stated above and in Appellant's opening brief, the conviction of Appellant Thomas Graham should be reversed and this cause remanded with instructions that the indictment be dismissed.

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, pursuant to Rule 84.06(g), two copies of the foregoing brief and a copy of the brief on disk were hand-delivered on this 29<sup>th</sup> day of August, 2006 to:

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## CERTIFICATE OF COMPLIANCE

Robert T. Haar, one of the undersigned attorneys of record for the Appellant Thomas Graham in the above-referenced appeal, certifies that:

1. Appellant's Reply Brief contains the information required by Rule 55.03;
2. Appellant's Reply Brief complies with the limitations contained in Rule 84.06(b);
3. Appellant's Reply Brief, excluding the cover page, certificate of service, this certificate and signature blocks, contains 7,727 words, as determined by the word count tool contained in Microsoft Word 2003 software with which this Brief was prepared; and
4. The diskette accompanying Appellant's Reply Brief has been scanned for viruses and to the best knowledge, information and belief of the undersigned is virus free.

August 29, 2006

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