

No. 87424

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IN THE  
MISSOURI SUPREME COURT

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STATE OF MISSOURI,

Respondent,

v.

THOMAS GRAHAM,

Appellant.

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Appeal from the Circuit Court of the City of St. Louis, Missouri  
22<sup>nd</sup> Judicial Circuit, Division 20  
The Honorable Angela Turner Quigless, Judge

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RESPONDENT'S BRIEF

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## **JURISDICTIONAL STATEMENT**

This appeal is from a conviction of sodomy, § 563.230, RSMo 1969, obtained in the Circuit Court of the City of St. Louis, the Honorable Angela Turner Quigless presiding. For that offense, appellant was sentenced to serve twenty years in the Missouri Department of Corrections. Appellant challenges the constitutionality of § 563.230, RSMo 1969; thus, this Court has jurisdiction. MO. CONST., Art. V, § 3.

## **STATEMENT OF FACTS**

Appellant, Thomas Graham, was charged with sodomy, § 563.230, RSMo 1969 (L.F. 14). After a trial by jury, appellant was found guilty (Tr. 635). Appellant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the facts were as follows:

On August 30, 1966, appellant, a Roman Catholic Priest, was assigned to St. Mary's Parish in Bridgeton, Missouri (Tr. 481). He immediately met the victim's family (the Woolfolk family) and became a close friend of the family (Tr. 254, 481-483). In 1966, the victim, Lynn Woolfolk, was four years old; appellant later baptized the victim in 1967 or 1968 (Tr. 249, 485).

In time, appellant was entrusted to take the victim to various places, including a nearby farm where appellant kept a horse (Tr. 255). It was on these trips that appellant started to touch the victim inappropriately. As they drove, appellant would tell the victim to get on his lap and hold the steering wheel (Tr. 256-257). Then, as the victim "learned how to drive," appellant would fondle the victim's penis, either over his clothing or under his clothing (Tr. 256-258). Appellant did not question appellant's actions, for he had been taught that a priest could do no wrong (Tr. 257).

After appellant was transferred from St. Mary's Parish, he eventually was assigned to the Old Cathedral in St. Louis (Tr. 501). Appellant still maintained ties with the victim's family and with the victim (Tr. 261, 502). It was during appellant's time at the Old Cathedral – from 1975 until 1980 – that he committed the charged offense (Tr. 262-265, 540). The victim described how appellant took him to his quarters, told him to get comfortable, and then undressed him on the bed (Tr. 264). Appellant was kind, and he told the victim that he cared for him (Tr. 264). Appellant then undressed himself and proceed to kiss the victim all over his body (Tr. 265). Appellant then kissed and licked the victim's genitals and put the victim's penis in his mouth (Tr. 265). Both the victim and appellant ejaculated (Tr. 331). This occurred on more than one occasion (Tr. 268-269).

The victim did not report what had happened for many years (Tr. 270). But, eventually, he started to confide in others (Tr. 271-272). And, on the July 4<sup>th</sup> weekend in 1994, appellant told a friend what had happened at the Old Cathedral (Tr. 273). Appellant pointed to the cathedral and said, "that's where my virginity was robbed from me" (Tr. 274). Later that same weekend, after a chance meeting with appellant, the victim and his friend confronted appellant, who was, at that time, assigned to St. Bernadette Parish

(Tr. 277-279).

Appellant attempted to act as if nothing had happened, but, when the victim confronted him with what had happened, appellant hung his head and asked, “Does Lucy know?”, referring to the victim’s mother (Tr. 280-281). After brief conversation, the victim left, angry that appellant had not apologized (Tr. 281-282). It was around that time that the victim started seeing a counselor to deal with his anger (Tr. 282). The victim also approached the Archdiocese of St. Louis and reported appellant’s actions (Tr. 284). In 2002, after several more years, and after hearing on the news that the prosecutor’s office was looking for victims of sexual abuse in the Catholic Church, the victim contacted the prosecutor and made a report (Tr. 295).

At trial, which commenced on August 29, 2005, appellant testified and denied that he had ever engaged in any sexual activity with the victim (Tr. 536-537). He also presented the testimony of two witnesses who had worked at the Old Cathedral during the time that he had been there (Tr. 563, 576). The jury found appellant guilty (Tr. 635).

At the penalty phase, the state presented the testimony of two witnesses who described how they had been sexually abused by

appellant (Tr. 641, 665). The first witness, Michelle Telle-Capstick, described how appellant had raped her in the rectory of Good Shepherd Parish (Tr. 645). She testified that appellant told her, “It’s okay. I’m a priest” (Tr. 645). She then described how appellant told her it that it was her fault, that she would never be forgiven in the confessional, and that she was worthless (Tr. 645). The second witness, John Rohan, described how appellant had taken him for drives, put him on his lap, and then fondled his penis as they drove (Tr. 668).

Appellant presented the testimony of several people who testified that appellant had been an inspiration in their lives (Tr. 683, 690, 696, 703, 707, 712). The jury recommended a sentence of twenty years (Tr. 727; L.F. 117). And, on November 17, 2005, the court sentenced appellant in accordance with the jury’s recommendation (Sent.Tr. 36). This appeal followed.

## ARGUMENT

### I.

**Because the trial court was in no position to do otherwise (and because the prosecution was not, in fact, barred by a three-year statute of limitations), the trial court did not err in proceeding to trial despite appellant's previous objection that the prosecution was barred by the statute of limitations.**

Appellant contends that the trial court erred in proceeding to trial and in entering judgment and sentence on his conviction under § 563.230, RSMo 1969 (App.Br. 26). He argues that the prosecution should have been barred by the three-year statute of limitations contained in § 541.200, RSMo 1969 (App.Br. 26).

But inasmuch as the trial court had previously *sustained* appellant's motion to dismiss, and then had been directed by the Court of Appeals to proceed with the trial, there is no basis to convict the trial court of this alleged error. Moreover, because appellant's crime was punishable by life imprisonment, appellant's trial was not barred by a three-year statute of limitations contained in § 541.200, RSMo 1969; rather, under § 541.190, RSMo 1969, appellant could be prosecuted "at any time after the offense" was committed.

**A. The Trial Court Properly Followed the Directive of the Court of Appeals, and Appellant's Claim is Barred by the Doctrine of the Law of**

### **the Case**

As the record shows, the trial court originally sustained appellant's motion to dismiss his case based on the statute of limitations contained in § 541.200, RSMo 1969 (11/17/2003 Tr. 20). The state appealed, and the Court of Appeals, Eastern District, held that the trial court had erred in dismissing the case. *State v. Graham*, 149 S.W.3d 465, 466-471 (Mo.App. E.D. 2004). Citing § 541.190, RSMo 1969, the Court of Appeals held that, because appellant's crime was punishable by life imprisonment, there was no limitation on the prosecution. *Id.* at 466-469. Thus, the Court of Appeals reversed and remanded the case for further proceedings. *Id.* at 471.<sup>1</sup>

Under these circumstances, the trial court was bound to follow the directive of the Court of Appeals and proceed with trial. Pursuant to the law-of-the-case doctrine, "prior decisions of the appellate court become the law of the case in any subsequent proceedings, and the trial court is without power to modify, alter,

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<sup>1</sup> After rehearing and transfer were denied by the Court of Appeals, appellant sought transfer in this Court. This Court denied his application for transfer on December 21, 2004. *See State v. Thomas Graham*, No. SC86447.

amend, or otherwise depart from those decisions.” *State v. Pettaway*, 81 S.W.3d 126, 130 (Mo.App. W.D. 2002); *State v. White*, 70 S.W.3d 644, 650 (Mo.App. W.D. 2002) (“when an issue is decided on appeal and the case is remanded to the trial court for further proceedings, the trial court does not have the jurisdiction to overrule the appellate court”). Indeed, if the trial court had attempted to do otherwise, the result would have been a second opinion from the Court of Appeals or, if necessary, a writ to compel compliance. In short, while appellant faults the trial court for proceeding with trial, the trial court was – in light of the Court of Appeals opinion – in no position to do otherwise.

Moreover, because this issue has been previously litigated on appeal, the claim is now barred by the doctrine of the law of the case. “The doctrine provides ‘that a previous holding in a case constitutes the law of the case and precludes relitigation of that issue on remand and subsequent appeal.’” *State v. Graham*, 13 S.W.3d 290, 293 (Mo. banc 2000). Here, appellant is simply relitigating the same legal question that was presented to the Court of Appeals (and, incidentally, to this Court in appellant’s previous application for transfer). Thus, the claim should be barred by the doctrine of the law of the case.

It is, of course, within this Court's discretion to decline to apply the doctrine of the law of the case. *Id*; see *State v. White*, 70 S.W.3d at 650. "Appellate courts have discretion not to apply the doctrine where there is a mistake, a manifest injustice, or an intervening change of law." *State v. Graham*, 13 S.W.3d at 293. But, here, there is no mistake, manifest injustice, or intervening change of law that warrants additional consideration of appellant's claim. Indeed, in urging this Court to abandon the decision of the Court of Appeals, appellant simply argues that there is "a textual interpretation [of § 541.190, RSMo 1969] that is more plausible than the one [the Court of Appeals] adopted" (App.Br. 31). In other words, while appellant would label the Court of Appeals conclusion a "mistake" or "error," appellant has not identified any mistake of fact or law that warrants reconsideration of the issue.

In sum, because the trial court was obligated to follow the Court of Appeals directive, it cannot be said that the trial court erred in proceeding to trial. Moreover, inasmuch as appellant is merely arguing the same issue that was litigated in the Court of Appeals, this claim should be barred by the doctrine of the law of the case. But, in the event this Court exercises its discretion to review this claim further, respondent will address the merits of appellant's claim.

**B. Because Appellant’s Crime – Sodomy, as Defined by § 563.230, RSMo 1969 – Carried a Potential Life Sentence, the Prosecution Could Commence “At Any Time,” Pursuant to § 541.190, RSMo 1969.**

Appellant’s crime was committed before January 1, 1979; thus, the current statute of limitations does not apply. *See* § 556.031.3, RSMo 2000; *State v. Bullington*, 680 S.W.2d 238, 240 (Mo.App. W.D. 1984). Rather, the statute of limitations in effect at the time of appellant’s crime governs.

Under § 541.200, RSMo 1969, felonies generally had a three-year statute of limitations *except* “as specified in section 541.190[.]”<sup>2</sup> The exception in § 541.190 was for those grave offenses which carried the most severe penalties:

**541.190. No limitation in capital<sup>3</sup> cases.**—Any person may be prosecuted, tried and punished for any offense punishable with death *or by imprisonment in the penitentiary during life*, at any time after the offense shall have been committed.

§ 541.190, RSMo 1969 (emphasis added). As is evident from the

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<sup>2</sup> Bribery or corruption in public office had a five-year limitation.

<sup>3</sup> The use of the term “capital” in this catch phrase is discussed below.

plain language of this statute, there was no limitation for the prosecution of offenses that were punishable with death or by life imprisonment. Thus, if appellant's crime (sodomy) was punishable with death or by life imprisonment, there was no limitation on the prosecution of that offense.

And, as a review of the relevant authorities reveals, sodomy *was* punishable by life imprisonment. Section 563.230, RSMo 1969, provided:

**563.230. Sodomy—penalty.**—Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished *by imprisonment in the penitentiary not less than two years.*

§ 563.230, RSMo 1969 (emphasis added). As the emphasized language reveals, the punishment for the offense of sodomy was *unlimited* – the offense could be punished with any number of years, including life imprisonment. § 546.490, RSMo 1969. *See State v. Rutledge*, 267 S.W.2d 625, 627 (Mo. 1954) (“a life sentence was . . . authorized under Section 563.230”); *see also Thurston v. State*, 791 S.W.2d 893, 895 (Mo.App. E.D. 1990) (“The absence of a stated maximum penalty merely indicates a legislative intent that a defendant convicted of that

offense may be sentenced to any term of years above the minimum, including life imprisonment.”).<sup>4</sup>

Accordingly, because the offense of sodomy carried a potential punishment of life imprisonment, a prosecution could commence “at any time” as provided for by the plain language of § 541.190, RSMo 1969. *See State v. Graham*, 149 S.W.3d at 467 (“Applying the plain and ordinary meaning of the disjunctive “or” in section 541.190, that statute states that there is no applicable statute of limitations for a crime that may be punished by either death or by imprisonment for life, which would include the crime at issue in this case.”); *see also State v. Bray*, 246 S.W. 921, 922 (Mo. 1922).

In *State v. Bray*, for example, the Court observed that there was no limitation on a prosecution for robbery in the first degree. *Id.* At that time, robbery in the first degree was punishable by imprisonment “not less than five years.” *Id.* (citing § 3310, RSMo 1919). The Court observed, correctly, that this range of punishment “would permit the assessment of punishment ‘by imprisonment in the penitentiary

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<sup>4</sup> That the authorized punishment was unlimited reveals that the legislature deemed sodomy to be a very grave offense under certain circumstances.

during life.”” *Id.* The limitations statute at that time was identical to the later 1969 statute; it provided:

**Sec. 3736. No bar in capital cases.**—Any person may be prosecuted, tried and punished for any offense punishable with death *or by imprisonment in the penitentiary during life*, at any time after the offense shall have been committed.

§ 3736, RSMo 1919 (emphasis added). Thus, having recognized that robbery in the first degree carried a potential life sentence, the Court concluded that there was no limitation on such a prosecution. *Id.* So, too, in the case at bar.<sup>5</sup>

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<sup>5</sup> Appellant argues that this part of the *Bray* analysis was *dicta* or a “gratuitous comment related to the defendant’s complaints about a jury instruction” (App.Br. 41, n. 13). But a review of the *Bray* opinion makes plain that the limitations analysis was directly relevant to determining whether the jury instruction had erroneously and prejudicially instructed the jury to find that the crime had been committed within three years *before* the filing of the information. Such language was included in charging documents and jury instructions to ensure, when necessary, that the offense was being tried within the three-year statute of limitations. Thus, because robbery in the first

In short, because § 541.190, RSMo 1969, plainly applies to crimes that are punishable with death *or* by imprisonment for life, there was no limitation on the prosecution of appellant’s crime. Appellant’s contrary claim – that the three-year statute of limitations contained in § 541.200 applied – should be rejected.

**C. Section 541.190, RSMo 1969, is Not Ambiguous, and, Consequently, There is No Need to Engage in Statutory Construction to Ascertain the Legislature’s Intent**

Taking issue with the conclusion reached by the Court of Appeals, appellant argues that the Court of Appeals reading of § 541.190 was “overly simplistic” and does not reflect the “most plausible interpretation” of the statute (App.Br. 30). But because the language of § 541.190 is not ambiguous, there is no need to engage in statutory construction to divine the legislature’s intent. As this Court has recognized, “[t]here is no basis to resort to statutory construction to create an ambiguity where none exists.” *See Baldwin v.*

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degree did *not* have a statute of limitations, the Court was able to conclude that the jury instruction had (to the defendant’s *benefit*) unnecessarily limited the jury’s consideration to a three-year time period. *State v. Bray*, 246 S.W. at 922.

*Director of Revenue*, 38 S.W.3d 401, 406 (Mo. banc 2001).

Here, the language in question is clear: “Any person may be prosecuted, tried, and punished for any offense punishable with death or by imprisonment in the penitentiary during life, at any time . . . .” § 541.190, RSMo 1969. “The disjunctive ‘or’ in its ordinary sense marks an alternative generally corresponding to the term ‘either.’” *State v. Graham*, 149 S.W.3d at 467 (citing *Council Plaza Redevelopment Corp. v. Duffey*, 439 S.W.2d 526, 532 (Mo. banc 1969)). Thus, the plain and ordinary meaning of the language in question is that if a crime is punishable *either* “with death *or* by imprisonment in the penitentiary during life,” the prosecution can commence at any time.

Appellant argues that the language is ambiguous because it can be interpreted to refer only to “a crime that specifies as maximum punishments the *alternatives* of death or imprisonment up to life” (App.Br. 31). But in arguing that the language refers to alternative punishments that must both be authorized for any single offense, appellant subtly alters the language of the statute. Specifically, as will be explained below, he both changes the placement of the corresponding “either” and removes one of the prepositions. In other words, he attempts to create an ambiguity by re-writing the statute in more ambiguous terms.

But the statute as written does not contain the ambiguity that appellant attempts to find. As set forth above, the statute includes the phrase “any offense punishable with death *or* by imprisonment.” The presence of the word “or” marks the existence of an unstated but corresponding “either.” And it is apparent that the corresponding “either,” in the statute as drafted, *must* precede the prepositional phrase “with death.” In other words, the statute can only logically be read as follows: “any offense punishable [either] with death or by imprisonment.” Indeed, placement of the corresponding “either” before the prepositional phrase “with death” is necessitated by the statute’s use and placement of the two prepositional phrases (“*with* death or *by* imprisonment”). For example, if one attempts to place the corresponding “either” *after* the preposition “with,” the statute becomes grammatically unsound, because the correlative conjunctions are not followed by parallel constructions (i.e., “any offense punishable with [either] death or by imprisonment”). In other words, the necessary placement of the corresponding “either” and the statute’s use of two prepositions indicates that the language was intended to refer to any offense carrying *either* means of punishment.

Appellant’s reformulation and interpretation of the statute –

that it refers to “a crime that specifies as maximum punishments the alternatives *of death or imprisonment up to life*” (App.Br. 31) (emphasis added) – would be more plausible if the relevant portion of the statute were actually drafted to match his reformulation of the language, i.e., if the statute stated: “any offense punishable *with death or imprisonment* in the penitentiary during life.” Such language contains the ambiguity that appellant relies on, because it eliminates the second preposition, making it uncertain where the corresponding “either” should be placed. One might logically place the “either” *after* the preposition “with” – “any offense punishable with *either* death or imprisonment” (suggesting that the offense in question must be punishable by either punishment), or one might logically place the “either” *before* the preposition “with” – “any offense punishable *either* with death or imprisonment (suggesting that either punishment will qualify the offense under the statute).

An example of this ambiguity (and another situation in which appellant’s interpretation of such language should *not* be applied) can be found in § 556.020, RSMo 1969. That statute provides:

The term “**felony**”, when used in this or any other statute, shall be construed to mean any offense for which the offender, on conviction, is liable by law to be *punished with death*

*or imprisonment* in a correctional institution of the state department of corrections, and no other (emphasis added). If appellant's interpretation is applied to the emphasized language, then felony offenses are only those offenses that carry both death and imprisonment as authorized punishments. But that was plainly not the legislative intent of this statute.

In short, if the statute had been drafted with only one preposition preceding the two alternative punishments, the meaning of the statute would contain an ambiguity. Such phraseology might more easily support appellant's interpretation, but that is not how the statute was written. The statute was written to state that any offense punishable *either* with death *or* by life imprisonment could be prosecuted at any time.

In sum, the language of § 541.190 is not ambiguous. The plain language needs no further construction, and appellant's attempt to both re-write the language and rely on the broader "statutory scheme" (App.Br. 31) to argue that the language is ambiguous should be rejected. There is simply no need "to resort to statutory construction to create an ambiguity where none exists." *See Baldwin v. Director of Revenue*, 38 S.W.3d at 406.

**D. Even if Deemed Ambiguous, § 541.190, RSMo 1969, Should be Read**

**to Include Non-capital Offenses That Carry the Possibility of a Life Sentence**

“The cardinal rule of statutory construction is that the intention of the legislature in enacting the statute must be determined and the statute as a whole should be looked to in construing any part of it.” *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. banc 2000). “Words are to be given their plain and ordinary meaning wherever possible.” *Id.* “Where the words of a statute are capable of more than one meaning, the court gives the words a reasonable reading rather than an absurd or strained reading.” *Id.*

An unlimited statute of limitations has essentially one purpose: to enable the state to prosecute the gravest sorts of crimes, regardless of how long it takes to discover, investigate, or solve such crimes. Thus, to determine the legislative intent behind § 541.190, one must determine what crimes the legislature intended to except from the three-year limitation of § 541.200, i.e., one must determine which crimes the legislature deemed sufficiently grave so as to qualify for unlimited prosecution.

Appellant recognizes as much, and he argues that the language contained in § 541.190, RSMo 1969, only “contemplated those offenses that, as the most grave crimes, carried an alternative of

death, rather than referring to the assortment of lesser offenses that happened to carry an open-ended punishment” (App.Br. 32). In other words, appellant believes that the 1969 limitations statute referred only to capital crimes that carried both death and life imprisonment as alternative punishments. But that interpretation is simply too narrow, and, as will be discussed below, it does not comport with either the history of the limitations statute or the subsequent enactment of the new limitations statute in the 1979 code.

Appellant urges this Court to consider the Comment to the 1973 Proposed Code, which stated that the new limitations statute, § 556.036, was intended, “[w]ith some minor changes,” to “maintain[] the same periods of limitation of [sic] formerly covered by §§541.190 through 541.230.” In light of this comment, appellant views the adoption of § 556.036 in 1977, as evidence of the 1977 legislature’s intent to simply maintain the previous limitations periods. That conclusion is reasonable enough, for the 1977 legislature would have been aware of the Comment. But appellant then extrapolates backward and asserts that the intent of the 1977 legislature must have therefore been identical to the intent of the earlier legislature that originally enacted the limitations language of

the earlier limitations statute. Thus, by looking at those offenses that had no statute of limitations in 1979, appellant asserts that one can determine which earlier offenses were excepted from the three-year statute of limitations (App.Br. 35-38).

But, as will be demonstrated below, appellant's analysis does not withstand careful scrutiny. First, it must be noted that the legislative intent of the 1977 legislature in enacting entirely different statutory language of § 556.036, RSMo 1978, is largely irrelevant in determining what was the original legislative intent of the much earlier legislature that actually enacted the statutory language in question. Second, in light of the history of the earlier limitations statute, appellant's interpretation of the 1969 limitations statute cannot be correct. Third, appellant's analysis of the 1979 limitations statute (and the crimes it actually excepted from the three-year statute of limitations is incomplete). And, fourth, it is apparent that the 1977 legislature was – consistent with the 1969 limitations statute – intending to except any offense punishable with death (namely, capital murder) *and* any offense punishable by imprisonment for life (class A felonies).

**1. A review of the legislative history of the limitations language used in §541.190, RSMo 1969, reveals that it has always been applied to except both offenses that are punishable with death *and* offenses that are punishable with life imprisonment**

A review of the legislative history of the language contained in § 541.190, RSMo 1969, reveals that the language has remained unchanged since it was first enacted in 1835. *See* § 541.190, RSMo 1959; § 541.190, RSMo 1949; § 3781, RSMo 1939; § 3391, RSMo 1929; § 3736, RSMo 1919; § 4944, RSMo 1909; § 2418, RSMo 1899; § 3998, RSMo 1889; § 1703, RSMo 1879; Chap. 216, § 25, RSMo 1872; Chap. 190, § 1, RSMo 1870; Chap. 216, § 25, RSMo 1865; Chap. 127, Art. IX, § 25, RSMo 1855; Chap. 138, Art. IX, § 23, RSMo 1845; Practice and Proceedings in Criminal Cases, Art. IX, § 23, RSMo 1835.<sup>6</sup> The limitations statute in 1835 was drafted as follows:

Any person may be prosecuted, tried and punished, for any offence punishable with death, or by imprisonment in the penitentiary during life, at any time after the offence

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<sup>6</sup> Respondent has included copies of the relevant statutes cited in the Appendix to its brief.

shall be committed.

Practice and Proceedings in Criminal Cases, Art. IX, § 23, RSMo 1835.<sup>7</sup>

The question, therefore, is what legislative intent prompted the enactment of this language. A review of the previous statute of limitations enacted in 1825 is instructive, for the legislature that passed the 1835 limitations statute would have been refining the earlier statute and bringing it into conformity with the then current view of what the law should and should not except from the three-year statute of limitations.

In 1825, the limitations statute only excepted four felonies from the three-year period of limitation; it stated, in relevant part:

*Be it further enacted,* That no person or persons shall be prosecuted, tried or punished, for any felony, (treason, murder, arson, and forgery excepted) unless the indictment for the same shall be found by a grand jury,

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<sup>7</sup> Consistent with later statutes (including the 1969 statute), the next section contained the three-year limitation for all other felonies. *See* Practice and Proceedings in Criminal Cases, Art. IX, § 24, RSMo 1835.

within three years next after the offence shall have been done or committed[.]

Crimes and Misdemeanors, Chap. II, § 41, RSMo, 1825. As is evident, the legislature that enacted this limitations statute determined that treason, murder, arson, and forgery were the only grave offenses that should be excepted from the three-year limitation period.

Two of these offenses (treason and murder) were punishable by death (there was no other authorized punishment); arson was punishable by one to seven years in prison plus a fine of not more than \$10,000 (unless the arsonist was a slave, in which case the offense was punishable by death); and certain types of forgery (those expressly labeled felonies) were punishable by not more than five years in prison plus various other punishments, including fines, two hours in the pillory and not more than thirty-nine lashes. *See* Crimes and Misdemeanors, Chap. I, §§ 1, 16, 23, 41, 42, 47, 48 RSMo 1825. Notably, and incongruously, several other offenses carrying an authorized punishment of death were *not* excepted from the 1825 limitations statute. *See id.* at § 68 (“rescue” of a person convicted of a capital crime); § 56 (perjury in a capital case); § 70 (allowing a person convicted of capital crime to escape); § 96 (slave making

insurrection); § 97 (slave conspiring to make insurrection, second offense); and § 98 (slave preparing medicine with ill intent).

Thus, the stage was set for 1835, when the statutory language at issue in this case was first enacted. The 1835 limitations statute, as set forth above, provided for no limitation on prosecution if the offense was punishable by either death or life imprisonment. Under appellant's theory, this language should be understood to refer only to those offenses that carried both death and life imprisonment as authorized (alternative) punishments. But a review of the offenses enacted in 1835 (the previous criminal code of 1825 was wholly repealed and replaced in 1835), quickly reveals that appellant's interpretation cannot be correct.

In 1835, only a few offenses carried both death and life imprisonment as authorized punishments:

- treason – death or not less than ten years in prison (Art. I, § 1);<sup>8</sup>

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<sup>8</sup> This statute did not expressly provide for “imprisonment in the penitentiary during life,” but as discussed above, life imprisonment is included when the statute does not include a maximum term of years.

- insurrection by a slave – death or life imprisonment (Art. I, § 7);
- aiding a slave in insurrection – death or life imprisonment (Art. I, § 8);
- perjury in a capital case, in an attempt to obtain a death sentence – death or not less than ten years (Art. V, § 2); and
- subornation of perjury in a capital case, in an attempt to obtain a death sentence – death or not less than ten years (Art. V, § 4).<sup>9</sup>

The glaring problem with this list, of course, is that it – unlike the list of offenses excepted by 1825 limitations statute (and consistent with the current statute) – does not include the grave offense of murder in the first degree, which, in 1835, was only punishable by death. *See* Crimes and Punishments, Art. II, § 3, RSMo 1835.<sup>10</sup>

Thus, appellant’s interpretation of this statutory language would mean that in 1835, the legislature intended to limit

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<sup>9</sup> Citations on this list are to articles and sections in Crimes and Punishments, RSMo 1835.

<sup>10</sup> It also does not include the offense of raising a slave insurrection, which was also only punishable by death. *See* Crimes and Punishments, Art. I, § 6, RSMo 1835.

prosecutions for murder in the first degree to the three-year period after the commission of the murder. But that cannot be correct. Another problem with the foregoing list is that it does not include arson or forgery, both of which were expressly excepted from the three-year limitation in the 1825 limitations statute. In other words, if appellant's interpretation of this statutory language is correct, then the legislature in 1835 suddenly determined that murder, arson and forgery were no longer grave offenses that deserved to be excepted from the three-year statute of limitations.

But, again, that cannot be correct. The more plausible interpretation for the change in the limitations statute – especially in light of other changes to the criminal code that will be outlined below – is that the legislature still believed (as in 1825) that treason, murder, arson and forgery were grave crimes that generally deserved to be excepted from the three-year statute of limitations, *but* that the legislature also recognized that there were problems with the 1825 limitations statute. For example, as stated above, the 1825 statute did not except certain capital crimes (the most grave offenses) from the three-year statute of limitations. Additionally, the 1825 statute apparently excepted every murder, arson or forgery without regard to the gravity of the crime. And, finally, the 1825 statute did not

except other grave crimes not contemplated in 1825.

Thus, to fix these perceived problems, the legislature made three important changes to the criminal code: first, it changed the limitations statute, so that any offense punishable with death or punishable by life imprisonment was excepted from the three-year statute of limitations; second, it created lesser degrees of murder, arson and forgery (thus recognizing that not every murder, arson or forgery is so grave as to qualify for unlimited prosecution); and third, it defined new grave offenses (including, incidentally, sodomy) that were punishable by life imprisonment. And, when these various changes are viewed together, the list of offenses excepted from the three-year statute of limitations is both consistent with historical limitations (which excepted treason, murder, arson, and forgery) and consistent with the legislature's intent to except only the gravest crimes (i.e., crimes that carried the maximum potential punishments) from the three-year statute of limitations. To illustrate, the 1835 enactments excepted the following crimes from the three-year statute of limitations (again these cites are to RSMo 1835):

- treason – death or not less than ten years in prison (Art. I, § 1);
- raising a slave rebellion – death (Art. I, § 6);
- insurrection by a slave – death or life imprisonment (Art. I, §

7);

- aiding a slave in insurrection – death or life imprisonment

(Art. I, § 8);

- conspiring to raise a slave rebellion – not less than ten years

(Art. I, § 9);

- murder in the first degree – death (Art. II, § 3);

• murder in the second degree – not less than ten years (Art. II, § 3);

• manslaughter in the first degree – not less than five years (Art. II, § 21);<sup>11</sup>

- forcible rape or statutory rape of a child under ten – not less than five years (Art. II, § 23);

• assisting a “negro or mulatto” to commit forcible rape or statutory rape of a child under ten – not less than five years (Art. II, § 29);

• arson in the first degree – not less than ten years (Art. III, § 12);<sup>12</sup>

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<sup>11</sup> Less grave homicides were defined as manslaughter in the second, third, and fourth degrees. None of these offenses carried a punishment of more than five years in prison. *See* Art. II, §§ 21-22.

<sup>12</sup> The code also defined arson in the second, third, and fourth

- burglary in the first degree – not less than ten years (Art. III, § 23) (the code also defined burglary in the second and third degrees);
- robbery in the first degree – not less than ten years (Art. III, § 28) (the code also defined robbery in the second and third degrees);
- grand larceny involving a slave – not less than seven years (Art. III, § 31) (other types of larceny involved lesser sentences);
- forgery in the first degree – not less than ten years (Art. IV, § 29);<sup>13</sup>
- perjury in a capital case, in an attempt to obtain a death sentence – death or not less than ten years (Art. V, § 2);
- perjury in a capital case, not in an attempt to obtain a death sentence, or in any felony case – not less than seven years (Art. V, § 3);
- subornation of perjury in a capital case, in an attempt to

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degrees. None of these offenses carried a punishment of more than ten years in prison. *See* Art. III, § 12.

<sup>13</sup> The code also defined forgery in the second, third, and fourth degrees. None of these offenses carried a punishment of more than ten years in prison. *See* Art. IV, § 29.

obtain a death sentence – death or not less than ten years (Art. V, § 4);

- subornation of perjury in a capital case, not in an attempt to obtain a death sentence, or in any felony case – not less than seven years (Art. V, § 4);

- rescuing a prisoner convicted of a capital crime – not less than ten years (Art. V, § 20);<sup>14</sup>

- accepting a bribe, when done by a public official – not less than two years (Art. V, § 2);

- the detestable and abominable crime against nature (sodomy) – not less than ten years (Art. VIII, § 7); and

- defiling a minor female by carnally knowing her – not less than two years, or a fine not more than \$500, or both (Art. VIII, § 9).

This list has obviously changed and fluctuated in the many years following the enactment of the 1835 limitations statute, both because some crimes have been eliminated and because some crimes have been redefined or deemed more or less grave. But when the language of the limitations statute is read to except any offense that

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<sup>14</sup> In 1825, this crime was only punishable by death.

can be punished with death, or any offense that can be punished by life imprisonment, the consistent thread running through the list is the legislature's continuous efforts to identify and except the most grave offenses (or at least those that are then deemed to be the most grave) from the three-year statute of limitations.

Thus, in 1969, the list included many grave offenses of venerable lineage (e.g., murder in the first degree), the list did not include some offenses (either because they no longer existed or because they were no longer deemed so grave as to qualify for unlimited prosecution), and the list contained some new grave offenses (e.g., the capital crime of delivering narcotics to a person under the age of twenty-one, *see* § 195.200.1.(4), RSMo 1969). Indeed, a review of various criminal statutes on the books in 1969 reveals that the legislature had, in the years between 1835 and 1969, continued to adjust and refine the list of crimes that would be excepted from the three-year statute of limitations. Specifically, in 1969, the list included:

- resisting militia – not less than two years (§ 41.720);
- certain drug offenses, second offense/prior felony offender – a range of five years to life imprisonment (*see* § 195.200.1.(2)) (not present in 1835 list);

- certain drug offenses, third or subsequent offense/persistent felony offender – a range of ten years to life imprisonment (*see* § 195.200.1.(3)) (not present in 1835 list);
- selling, giving or delivering narcotics – a range of five years to life imprisonment (*see* § 195.200.1.(4)) (not present in 1835 list);
- selling, giving or delivering narcotics to a person under twenty-one – a range of five years to life imprisonment, or death (*see* § 195.200.1.(4)) (a capital crime not present in 1835 list);
- selling, giving or delivering narcotics, second offense/prior offender – a range of ten years to life imprisonment (*see* § 195.200.1.(5)) (not present in 1835 list);
- selling, giving or delivering narcotics to a person under twenty-one – a range of ten years to life imprisonment, or death (*see* § 195.200.1.(4)) (a capital crime not present in 1835 list);
- perjury in a capital case, in an attempt to obtain a death sentence – death or not less than ten years (§ 557.020.(1));
- perjury in a capital case, not in an attempt to obtain a death sentence, or in any felony case – not less than seven years (§ 557.020.(2)) (same as 1835);
- subornation of perjury in a capital case, in an attempt to

obtain a death sentence – death or not less than ten years (§ 557.050);

- subornation of perjury in a capital case, not in an attempt to obtain a death sentence, or in any felony case – not less than seven years (§ 557.050) (same as 1835);

- rescuing a prisoner convicted of a capital crime – not less than ten years (§ 557.230) (same as 1835);

- loaning public money by an officer of the state – not less than two years or a fine not less than \$500 (§ 558.220) (not present in 1835 list);

- an officer of the state receiving other benefits from the deposit of public money – not less than two years or a fine not less than \$500 (§ 558.240) (not present in 1835 list);<sup>15</sup>

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<sup>15</sup> Appellant apparently believes that this abuse of a public stewardship (along with the preceding offense in the list) is not a very serious offense (*see* App.Br. 32, n. 8). But in light of the positions of trust and the public monies involved, these offenses are potentially very grave. On the other hand, of course, the low minimum punishment simultaneously recognizes that there will be instances where the conduct is less egregious.

- murder in the first degree – death or life imprisonment (§ 559.030) (only punishable by death in 1835);
- murder in the second degree – not less than ten years (§ 559.030) (same as 1835);
- poisoning with intent to kill – not less than five years (§ 559.150) (limited in 1835 to a range of five to ten years, *see* Art. II, § 32);
- assault with intent to kill – not less than two years (§ 559.180) (limited in 1835 to not more than ten years, *see* Art. II, § 31);
- kidnaping for ransom – death or not less than five years (§ 559.230) (a capital crime not included in the 1835 list);
- forcible rape or statutory rape of female under sixteen – death or not less than two years (§ 559.260) (not punishable by death in 1835);
- rape after drugging a woman over fourteen – not less than five years (§ 559.270) (similar to 1835 because the definition of rape included drugging, *see* Art. II, § 24);
- forcing a woman to marry – not less than three years (§ 559.280) (limited in 1835 to a range of three to ten years);<sup>16</sup>

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<sup>16</sup> With regard to forcing a woman to marry, appellant asserts

- certain types of arson – not less than two years (§ 560.010) (arson in the first degree, which was similarly defined, was punishable by not less than ten years in 1835);
- armed robbery – death or not less than five years (§ 560.135) (a capital crime not present in the 1835 list);
- robbery in the first degree – not less than five years (§ 560.120) (punishable by not less than ten years in 1835);
- treason – death or life imprisonment (§ 562.010) (same as 1835);
- sodomy – not less than two years (§ 563.230) (punishable in 1835 by not less than ten years);<sup>17</sup> and

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that “[s]urely the Missouri General Assembly did not intend for this offense to be within the class of most serious offenses for which there is an unlimited statute of limitations” (App.Br. 32). But, in fact, it did. And with good reason, for forcing a woman to marry was akin to forcible rape.

<sup>17</sup> By lowering the minimum punishment for sodomy (this occurred well before 1969), the legislature obviously recognized that there was a broad range of conduct criminalized by the statute. Nevertheless, the gravity of the offense is still apparent in light of the unlimited potential punishment.

- bombing, with risk of death or bodily injury or – death or not less than two years (§ 564.560) (a capital offense not present in the 1835 list).<sup>18</sup>

Though somewhat lengthy, this list – due to deletions and additions – contains only a few more crimes than the 1835 list.<sup>19</sup> In other words, in the many years between 1835 and 1969, the

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<sup>18</sup> Unless otherwise specified, the citations in this list are to RSMo 1969.

<sup>19</sup> Gone, of course, are the various crimes related to slaves. Also gone are the offenses of public officials accepting bribes (limited in 1969 to seven years), burglary in the first degree (limited in 1969 to a range of five to twenty years), manslaughter (limited to a range of two to ten years, or not less than six months in jail, or a fine not less than \$500, or a fine not less than \$100 and not less than three months in jail), defiling a minor female (limited to not more than five years, or not more than a year in jail and a fine of not less than \$100); and forgery (limited in 1969 to a range of two to ten years, or a year in jail, or a fine not more than \$1,000) (it comes as no surprise that the legislature eventually removed forgery from the ranks of the most grave offenses, for of the four crimes originally excepted in 1825, forgery was the least grave).

legislature did not greatly expand (or reduce) the number of crimes for which the period of time of prosecution would be unlimited, and it did not deviate greatly from the original list of crimes that first prompted the enactment of the 1835 limitations language. Thus, by interpreting the limitations language to except crimes that carry either a death sentence or crimes that carry a sentence of life imprisonment, the resulting list of offenses excepted from the three-year statute of limitations is both consistent with history and consistent with a legislative intent to continuously refine and adjust the list according to the needs of the time.

If, on the other hand, appellant's interpretation is applied to the 1969 statutes, the list would only include the eight capital crimes that authorized both death and life imprisonment as alternative punishments, namely: (1) selling narcotics to a person less than twenty-one; (2) perjury (or subornation of perjury) in a capital case, in an attempt to obtain a death sentence; (3) murder in the first degree; (4) kidnaping for ransom; (5) forcible rape or statutory rape of a female under sixteen; (6) armed robbery; (7) treason; and (8) bombing, with risk of death or bodily injury. While such a list certainly includes all of the most grave offenses, it fails to include other grave offenses that have historically been excepted from the

three-year statute of limitations.

Most notably, appellant's list would not include murder in the second degree, a grave offense that has always been excepted from the three-year statute of limitations. Indeed, even under the new limitations statute of 1979, murder in the second degree was excepted from the three-year statute of limitations. *See* § 556.036.1, RSMo 1978 (“A prosecution for *murder* or any class A felony may be commenced at any time” (emphasis added)).

In sum, to be consistent with both the history of the statutory language and the legislature's ongoing efforts to except the most grave offenses from the three-year statute of limitations, the statutory language of § 541.190, RSMo 1969, should be read to except those offenses punishable by death *and* those offenses punishable by life imprisonment. That was the legislative intent that prompted the original enactment of the language in question, and the statute should be interpreted to give effect to that intent.

**2. The Comment to the 1973 Proposed Code, and the subsequent enactment of §557.036, RSMo 1978, does not support appellant's interpretation of the 1969 limitations statute**

As outlined above, appellant relies heavily on a Comment to the 1973 Proposed Code (App.Br. 34-36). This comment stated that

the new limitations statute would essentially maintain the previous limitations of §§ 541.190 and 541.200. Specifically, the comment stated that subsection 1 of § 556.036 achieved the same result as § 541.190 by excepting murder and class A felonies from the ordinary three-year statute of limitations.

Appellant argues that this fits with his interpretation of § 541.190, RSMo 1969 (App.Br. 36). He states: “the commentary makes clear that those offenses designated as Class A felony offenses under the 1979 Code were understood to be the same offenses that had no limitations periods under § 541.190 of the 1969 Revised Missouri Statutes” (App.Br. 36). He then finds support for this assertion by pointing out that various class A felonies in the 1979 code were previously punishable under the 1969 statutes with death or a term up to life imprisonment (App.Br. 36). Additionally, he points out that certain offenses that were previously punishable with unlimited prison sentences were re-defined as class B felonies in the 1979 Criminal Code (App.Br. 37-38). In short, these comparisons between the 1979 and 1969 statutes are relied on as a retrospective indicator of what the legislature meant when it enacted the language contained in § 541.190.

But there are problems with this argument. First, while the

writers of the comment might have understood § 541.190 to except only those crimes that were capital crimes (as defined in 1969) (this seems to be what appellant is suggesting), their understanding of that statute simply does not reveal the intent of the legislature that originally enacted the language. But, in any event, the second problem with appellant's argument is that the list of crimes excepted under the 1979 limitations statute – murder and class A felonies – does not wholly correspond to the list of 1969 capital crimes. Indeed, while appellant can draw a correlation between certain class A felonies and former capital crimes (which should come as no surprise since such crimes have been excepted from the three-year statute of limitations since 1835), the various other crimes excepted by the 1979 limitations statute were *not* capital offenses in 1969.

To illustrate: under appellant's interpretation of the earlier limitations statute, in 1969, there were only eight capital crimes excepted from the three-year statute of limitations, to wit: (1) selling narcotics to a person less than twenty-one; (2) perjury (or subornation of perjury) in a capital case, in an attempt to obtain a death sentence; (3) murder in the first degree; (4) kidnaping for ransom; (5) forcible rape or statutory rape of a female under sixteen; (6) armed robbery; (7) treason; and (8) bombing, with risk of death

or bodily injury. Thus, if appellant were correct in his assertion that the limitations statute was always designed to except capital crimes (and in his assertion that the new limitations statute simply maintained the previous limitations), then one would expect the list of crimes excepted by the 1979 limitations statute to be virtually identical to the foregoing list of eight capital crimes.

But, in fact, under the 1979 limitations statute, there were actually fifteen offenses (three murder offenses and twelve class A felonies) excepted from the three-year statute of limitations, and approximately half of them were not capital offenses in 1969 (if they existed at all) and they were not capital offenses when enacted in 1977. The list offenses excepted under the 1979 limitations statute included the following (emphasis added to show which crimes were not included in appellant's 1969 list; citations are to RSMo 1978):

- capital murder (§ 565.001);
- murder in the first degree (§ 565.003);
- ***murder in the second degree (§ 565.004);***
- ***assault in the first degree, if armed with a deadly weapon (§ 565.050);***
- kidnaping for ransom (§ 565.110);
- ***kidnaping to use as a shield (§ 565.110);***
- ***kidnaping to interfere with a governmental or political function***

**(§ 565.110);**

- forcible rape or statutory rape of child under fourteen, if the actor inflicts serious physical injury or displays a deadly weapon (§ 566.030) (the 1979 offense added requirement of injury or weapon and lowered the age of the child to fourteen);

- ***forcible sodomy or statutory sodomy of child under fourteen, if the actor inflicts serious physical injury or displays a deadly weapon (§ 566.030);***<sup>20</sup>

- robbery in the first degree, causing serious physical injury or using a deadly weapon (§ 569.020);

- ***causing catastrophe (§ 569.070);***

- perjury in a murder trial, to obtain a conviction (§575.040.7(1));

- ***escape from custody using a deadly weapon or holding a person hostage (§ 575.200);***

- ***escape from confinement using a deadly weapon or holding a person***

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<sup>20</sup> Appellant, of course, was convicted under the predecessor statute of this offense. The inclusion of this offense among other class A felonies plainly reveals that this offense (with the refinements in its definition) was, as in earlier days, still viewed as one of the most grave offenses.

*hostage (§575.210)*; and

- treason (§ 576.070).<sup>21</sup>

As this list reveals, appellant's theory – that the limitations statute was designed to except capital crimes (or crimes that were once capital crimes) does not stand up under scrutiny. The limitations statute of the new 1979 Criminal Code did not except only capital offenses from the three-year statute of limitations, and, consequently, it is evident that the 1969 statute also was not limited to excepting such offenses. Indeed, to the contrary, it appears that the new limitations statute – like its predecessor – was enacted with the intent of excepting the most grave offenses (not just capital

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<sup>21</sup> When the 1979 Criminal Code was enacted, no drug offenses were classified under the new classification system (though some still carried up to a life sentence). *See* 195.200.1.(2)-(5), RSMo 1978. The drug offenses were later classified (and added to), and some of them were classified as class A felonies. *See e.g.* § 195.214, RSMo 2000 (distribution of a controlled substance near schools). This is yet another example of a subsequent legislature's attempt to keep the most grave offenses (and not just capital offenses) on the list of crimes excepted from the three-year statute of limitations.

offenses) from the three-year statute of limitations. In fact, much like its predecessor, it excepted all capital cases (inasmuch as murder was the *only* capital offense) and it excepted other grave offenses carrying a possible punishment of life imprisonment (inasmuch as class A felonies were the only classified crimes carrying such punishment).<sup>22</sup>

In short, like the 1969 statute (and this is probably what the writers of the 1973 Comment were recognizing), the new limitations statute also operated to except “any offense punishable with death or by imprisonment in the penitentiary during life.” It simply accomplished that by excepting murder (the only capital crime) and class A felonies (those offenses under the new code that carried a possible life sentence).

**3. Appellant's other arguments in support of his interpretation of § 541.190 are not persuasive**

Appellant also argues that the heading or “catch words” of §

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<sup>22</sup> The fact that certain crimes that previously carried an unlimited sentence were classified as class B felonies 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.

541.190 indicate a legislative intent to except only capital crimes. As set forth above, § 541.190 includes the heading “**No limitation in capital cases.**” But appellant’s reliance on this heading is not well taken. The heading was not enacted by the legislature, and, at most, its relevance is simply to demonstrate how the statute has “generally been read and understood.” *See Fiandaca v. Niehaus*, 570 S.W.2d 714, 716 n.2 (Mo.App. E.D. 1978).

The heading or catch words of a statute were originally intended simply “to indicate briefly the subject matter” of the statute. *See* § 3163, RSMo 1879. Before the advent of titles and catch words, marginal notations were used to provide similar information. And, tellingly, one marginal notation to the limitations statute indicated that the limitations statute has not been viewed as referring exclusively to capital offenses. In 1865, the limitations statute (with language identical to the 1969 statute) was accompanied by the following marginal notation: “*No limitation to prosecutions for capital offenses, &c.*” *See* Chap. 216, § 25, RSMo 1865. This was a more precise description of the statute, for it revealed that offenses in addition to capital offenses were contemplated.

Citing *State v. Weiler*, 338 S.W.2d 878 (Mo. 1960); *State v. Cook*, 463 S.W.2d 863 (Mo. 1971); and *State v. Bascue*, 485 S.W.2d 35 (Mo. 1972),

appellant argues that this Court has already held that the language of § 541.190, RSMo 1969, applies only to capital offenses (App.Br. 39-40). But appellant's reliance upon these cases is misplaced.

In *State v. Weiler*, the defendant was charged with a crime under § 561.450, RSMo 1949 (a statute aimed at criminalizing confidence games and bad checks). The charged offense was a felony punishable “by imprisonment in the state penitentiary for a term *not exceeding seven years.*” See § 561.450, RSMo 1949 (emphasis added). The trial court sustained the defendant’s motion to dismiss the information (which had been filed six years after the offense allegedly occurred), and this Court upheld that ruling, concluding that the prosecution was barred by the three-year statute of limitations contained in § 541.200, RSMo 1949 (the identical predecessor to the 1969 statute). The Court stated:

Section 541.200, supra is: ‘No person shall be tried, prosecuted or punished for any felony, other than as specified in section 541.190 [capital offenses], unless an indictment be found or information be filed for such offense within three years after the commission of such offense . . .’ (bracketed insertion ours.) As noted, the offense which the state contends it stated in the indictment

and substitute information was a violation of Section 561.450, *supra*, which [is] a noncapital felony and thus within the compass of the 3-year limitation provision appearing in Section 541.200 above.

*Weiler*, 338 S.W.2d at 880.

But as is evident, the Court in *Weiler* was *not* faced with determining whether crimes carrying a potential sentence of life imprisonment were excepted from the three-year statute of limitations. Accordingly, the Court's parenthetical reference to "capital offenses" (and the Court's observation that the defendant had been charged with a "noncapital felony") can only be viewed as *dicta* as it relates to the question in the case at bar. Additionally, it must be noted that this Court has not uniformly referred to § 541.190 as only applying to capital cases. In *State v. Colvin*, 223 S.W. 585 (Mo. 1920), a case that is also cited in appellant's brief for a different proposition, the court quoted § 541.200 and referred to § 541.190, as follows: "no person shall be tried, prosecuted or punished for any felony, other than as specified in the next preceding section [which relates to capital *and life imprisonment cases*] unless an indictment be found or information filed for such offense within three years" (emphasis added). *Id.* at 585. Thus, it cannot be said that this Court has

“unequivocally recognized that under § 541.190, capital offenses are the only offenses for which there is no limitations bar,” as appellant claims (App.Br. 40).

In *State v. Cook*, the defendant was charged under § 559.180, RSMo 1969, with assault with intent to do great bodily harm with malice. 463 S.W.2d at 864. That offense was punishable by imprisonment for not less than two years. § 559.180, RSMo 1969. On appeal, the defendant challenged the sufficiency of the information, alleging that it had failed to set forth the year in which the offense occurred, so as to establish that the offense committed within the three-year statute of limitations. *Cook*, 463 S.W.2d at 864-865. (There was no allegation that, in fact, the offense had not been committed within the three-year statute of limitations; rather, the defendant simply urged reversal based on the omission in the information. *Id.*) The Court rejected the defendant’s claim, noting that “[t]ime is not of the essence of the offense of assault,” and pointing out that “because of the statute of jeofails and the applicable rule of this Court the information is not to be deemed invalid and the judgment of conviction is not to be reversed for this omission.” *Id.* at 864 (citing § 545.030). In a footnote, the Court further noted, in addressing the defendant’s claim, that “[t]he statute of limitations for assault with

intent to do great bodily harm with malice is three years.” *Id.* at 865 n. 3 (citing § 541.200).<sup>23</sup>

Based on this footnote, appellant asserts that the Court held that such crimes – crimes with an unstated maximum punishment – were not excepted from the three-year statute of limitations (App.Br. 40-41). But, as is evident, the Court was not analyzing that question. The prosecution in that case had apparently commenced within three years of the offense; thus, there was simply no question of whether the statute of limitations applied. Consequently, the footnote appellant relies on was plainly *dicta* with regard to the question raised in this case. Indeed, if the Court had been confronted with the same question (i.e., if the mind of the Court had been focused on the issue), the question in *Cook* could have been resolved exactly as the similar question in *State v. Bray* (discussed above) was resolved. Specifically, the Court could have concluded that there was no statute of limitations for assault with intent to do great bodily harm (citing *Bray* as precedent) and determined that, as a consequence, there was no need to include the year in the charging

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<sup>23</sup> It does not appear that the state had argued that there was no statute of limitations.

document.

Appellant also cites *State v. Bascue* to support his position (App.Br. 41-42). But *Bascue* is of little or no assistance to appellant's argument. In *Bascue* the defendant was charged under § 559.260, RSMo 1959, with the statutory rape of his fourteen-year-old daughter. That offense was punishable by death or not less than two years in prison. § 559.260, RSMo 1959.<sup>24</sup> In rejecting the defendant's claim that evidence of other sexual acts had been admitted in violation of the three-year statute of limitations (inasmuch as the limitations statute does not govern evidentiary questions), the Court went on to state, in *dicta*, that the charged offense had no statute of limitations. *State v. Bascue*, 485 S.W.2d at 38. But the Court's *dicta*, while entirely correct, in no way suggests that offenses punishable only by life sentences (and not death) are subject to the three-year statute of limitations. And, of course, that question was not even remotely before the Court.

In short, there is no substantial analysis in the *Weiler*, *Cook*, or *Bascue* decisions to support appellant's claim that the limitations statute only applied to capital crimes. And, as the legislative history set forth

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<sup>24</sup> The defendant, incidentally, was sentenced to three years.

above plainly indicates, there is no basis to conclude that the limitations statute was intended to except only capital offenses from the three-year statute of limitations.

Appellant next relies on *State v. Naylor*, 40 S.W.2d 1079 (Mo. 1931), a case in which this Court examined language from the 1929 statute that set forth the number of peremptory challenges available to each side in given cases (App.Br. 41-42). The statute in question set forth several guidelines for determining how many peremptory challenges each side would have. Outside cities with 100,000 residents, the rules were as follows:

- If the offense was “punishable by death or by imprisonment in the penitentiary for life,” the state was given six challenges and the defendant twelve.
- If the offense was “punishable by imprisonment in the penitentiary,” the state was given four and the defendant eight.
- If the offense was “not punishable by death or imprisonment in the penitentiary,” the state and the defendant were given three.

*See* § 3674, RSMo 1929. In cities with a population over 100,000 residents, the rules were different (allowing for more strikes):

- If the offense was “punishable with death, or by imprisonment

in the penitentiary not less than for life,” the state was given fifteen and the defendant twenty.

- If the offense was “punishable by life imprisonment, not less than a specified number of years, and no limit to the duration of such imprisonment is declared in the penitentiary,” the state was given ten and the defendant twelve.

- If the offense was merely “punishable by imprisonment in the penitentiary,” the state was given four and the defendant was given eight.

- If the offense was “not punishable with death or with imprisonment,” the state and the defendant were given four.

*See* § 3674, RSMo 1929. These various provisions were a change from the previous statutes, §§ 4017, 4019, RSMo 1919, the primary difference between them being that in cases tried *outside* cities with 100,000 residents, each side received fewer peremptory challenges.

But another change from the 1919 statutes was that the number of strikes allowed the defendant were set forth in two different lists. In particular, as indicated above, on the list for trials outside cities of 100,000 residents, there were three categories of cases, and the defendant was given twelve, eight, or three strikes (depending on the nature of the case). But in the 1919 statute, the number of strikes

allowed the defendant (in *any* case, regardless of whether it was outside a city of 100,000 residents) was set forth in a single list with *four* categories. To compare:

§ 4017, RSMo 1919	§ 3674, RSMo 1929
Category 1: “punishable with death, or by imprisonment in the penitentiary not less than life” – defendant gets twenty	Category 1: “punishable by death or by imprisonment in the penitentiary for life” – defendant gets twelve.
Category 2: “punishable by like imprisonment, not less than a specified number of years, and no limit to the duration of such imprisonment” – defendant gets twelve	Category 2: “punishable by imprisonment in the penitentiary” – defendant gets eight.
Category 3: “punishable by imprisonment in the penitentiary” – defendant gets eight	

Category 4: “not punishable with death or imprisonment in the penitentiary” – defendant gets three	Category 3: “not punishable by death or imprisonment in the penitentiary” – defendant gets three
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What this comparison reveals, of course, is that the 1929 statute apparently combined two previous categories into one category. The question that had to be resolved in *Naylor*, therefore, was which two categories had been combined into one.

The defendant in *Naylor* argued that his offense, inasmuch as it could be punished by any term of years (including life imprisonment), fell with the new first category, i.e., the defendant was essentially arguing that the first and second categories of the 1919 statute had been combined to make the new first category. The Court, however, disagreed, and concluded that the new first category corresponded to the old first category, and that the old second and third categories corresponded to the new second category. The Court stated:

it may be plausibly argued, as appellant contends, that the first subdivision includes all felonies for which, by applying section 4457 [which authorized life

imprisonment when there was no stated maximum] as well as the statute defining the offense, the offender may be punished by either death or life imprisonment. On the other hand, we think it susceptible of the construction that it was intended to include only those for which, by the terms of the statute defining the offense and prescribing the penalty, and without resort to section 4457, *supra*, the penalty may be death or life imprisonment; thus, making the first subdivision of section 3674, Rev. St. 1929 correspond in meaning and effect with the first subdivision of old section 4017[, RSMo 1919] as to the class of offenses included.

We are of the opinion that the latter is the correct construction of the statute in question.

*State v. Naylor*, 40 S.W.2d at 1083. This was a reasonable construction, because it comported both with the legislative history of the statutory language and with the policy of granting a larger number of strikes only in those limited cases where death or life imprisonment were expressly authorized as punishments. Indeed, if the Court had concluded otherwise, the number of offenses where more strikes were allowed would have greatly increased, but only in cases *outside* of

cities of 100,000 residents (for in such cities, the larger number of strikes was only allowed if the offense was “punishable with death, or by imprisonment in the penitentiary not less than for life”). Such a construction would have been senseless (especially since the rules for cases outside large cities were designed to *limit* the number of strikes), and it was properly avoided by the Court. In short, the construction of the peremptory-challenge statute of 1929 has no real value in construing § 541.190, RSMo 1969.<sup>25</sup>

Appellant next cites *State v. Garrett*, 481 S.W.2d 225 (Mo. banc 1972), and argues that it, too, shows that offenses with open-ended punishments are not excepted from the three-year statute of limitations (App.Br. 45). In *Garrett*, the defendant was convicted of robbery in the first degree, and the question was whether this Court had jurisdiction, for the Missouri Constitution had just been

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<sup>25</sup> For the same reasons, appellant’s reliance on *State v. Crawford* 478 S.W.2d 314 (Mo. 1972); and *State v. Griggs*, 445 S.W.2d 633 (Mo. 1969), is misplaced (App.Br. 43-44). In *Crawford*, as in *Naylor*, the defendant argued that he was entitled to twelve peremptory challenges (the 1969 statute was virtually identical to the 1929 statute). This Court rejected the claim and reaffirmed *Naylor*. *Id.* at 319.

amended to grant this Court jurisdiction “in all appeals involving offenses punishable by a sentence of death or life imprisonment.” *Id.* at 481. The Court concluded that the language “offenses punishable by a sentence of death or life imprisonment” meant “only those offenses having as alternative punishments life imprisonment or death.” *Id.* at 227. Thus, because the robbery offense in that case was only punishable by five years to life, the Court concluded that it did not have jurisdiction over the appeal. *Id.*

But while this was a reasonable interpretation of the newly enacted constitutional language, it has little or no bearing upon the statutory language of the 1969 limitations statute. First, it must be noted that the phrase “punishable by a sentence of death or life imprisonment” contains only one preposition (“of”) before the two alternative punishments. Thus, as discussed above, it is uncertain where the corresponding “either” should be placed, i.e., the phrase contains an ambiguity that allows the phrase to be read more than one way. Accordingly, unless there was some compelling reason to do otherwise, it was reasonable for the Court to interpret this phrase to mean that the offense had to be “punishable by a sentence of [either] death or life imprisonment,” i.e., that either sentence had to be an available sentence for the offense to come within the Court’s

jurisdiction. Second, adopting that particular interpretation was consistent with the apparent design of the various other changes made at that time – changes that were apparently designed to limit the number of appeals this Court would handle. *See id.* at 228-229 (where, after discussing the various changes, the concurring opinion stated, “I think that it is obvious that it was intended that, more than ever before, the Court of Appeals should hear most direct appeals and the Supreme Court should become truly a court of last resort, concentrating on the decision of important cases and reconciling divergence of opinions”) (Finch, C.J., concurring).

Finally, citing *J.S. v. Beard*, 28 S.W.3d 875 (Mo. banc 2000), appellant argues that the rule of lenity should be applied in favor of his interpretation of the 1969 limitations statute. The rule of lenity provides that “in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, [a court] should resolve the ambiguity in favor of the more lenient punishment.” BLACK’S LAW DICTIONARY 1332-1333 (7<sup>th</sup> ed. 1999). But the rule of lenity is not applicable for two reasons.

First, the 1969 limitations statute is not ambiguous. As discussed above in Part C, the language of the statute is clear. It provides for unlimited prosecution for any offense carrying *either* death or life

imprisonment as an authorized punishment, and appellant's attempt to read an ambiguity into the statute should be rejected. Indeed, given the legislative history of the limitations statute, it is apparent that it has always excepted non-capital offenses punishable by life imprisonment; thus, applying the rule of lenity at this late date to achieve a different interpretation is unwarranted. Second, § 541.190 is not a criminal statute that sets out multiple or inconsistent punishments; thus, the rule is not applicable to its construction.

Citing *Toussie v. United States*, 397 U.S. 112 (1970), appellant argues that “any ambiguity as to which of two statutes of limitations applies must be interpreted ‘in favor of repose’” (App.Br. 46). But the question in *Toussie* involved when the statute of limitations had begun to run for the crime of failing to register for the draft between the ages of 18 and 26. *Id.* The government argued that this was a continuing offense, and that the statute of limitations began to run after a person's 26<sup>th</sup> birthday. *Id.* at 115-116. The Court ultimately disagreed and pointed out that the offense was not expressly designated a “continuing offense.” Thus, the Court concluded that the statute had begun to run after the person's 18<sup>th</sup> birthday. *See id.* at 120-124.

As is evident, the question in *Toussie* was not analogous to the

question raised here. Indeed, in *Toussie*, the Court recognized that statutes of limitations can be extended, if Congress makes its intent to do so clear. *Id.* at 115. In the case at bar, as discussed above, it is apparent from both the plain language of the limitations statute and the history of the statute, that the legislature intended to except appellant's crime from the three-year statute of limitations.

Appellant's reliance upon *State v. Colvin*, 223 S.W. 585, for the proposition that "the statute of limitations should be liberally construed in favor of the accused" also does not aid him (App.Br. 46). In *Colvin*, it was apparent that the three-year statute of limitations had run about a month before the information was filed; thus, although close in time, because the information had not pled facts showing an exception, i.e., facts tolling the statute, the statute of limitations was construed in the defendant's favor and the case was reversed. The case did not examine which of two limitations statutes should be applied to the offense.

Lastly, appellant cites the difficulty of defending against charges brought so long after the fact. But while such a defense may involve difficulties, the same could be said of any crime excepted from the three-year statute of limitations. In short, put simply, such a difficulty cannot strip the state of its ability to prosecute those crimes that have

been deemed most grave by the legislature.

**E. Conclusion**

Because the Court of Appeals had already determined that there was no statute of limitations, the trial court did not err in proceeding to trial. Indeed, the doctrine of the law of the case compelled the trial court to abide by the Court of Appeals decision.

Moreover, the plain language of § 541.190, RSMo 1969, indicates that there is no statute of limitations for offenses that carry a potential sentence of life imprisonment. Thus, appellant's crime, which was punishable by any term of years, including life imprisonment, was plainly excepted from the ordinary three-year statute of limitations. This is consistent with the history of the limitations statute, and it is consistent with the legislature's continuous efforts to except the most grave offenses from the three-year statute of limitations. This point should be denied.

## II.

**Because appellant lacked standing to raise an overbreadth challenge to § 563.230, and because the statute is not unconstitutionally vague, the trial court did not err in denying appellant’s motion to dismiss. Additionally, because lack of consent and the victim’s age were not elements of the charged offense, the trial court did not err in refusing to include such elements in the verdict director (responds to Points II, III, and IV of appellant’s brief).**

Citing *Lawrence v. Texas*, 539 U.S. 558 (2003), appellant argues that § 563.230, RSMo 1969, is unconstitutionally overbroad and vague (App.Br. 49). In Point II, he argues that the statute is overbroad because it prohibits a wide range of conduct that is lawful, i.e., private sexual acts between consenting adults (App.Br. 50-51).

Along similar lines, in Point III, he argues that the statute is “vague” because it fails to include either a requirement that the sodomy be forcible (or without consent) or a requirement that the victim be below a certain age (App.Br. 61).<sup>26</sup> And, finally, in Point IV, he argues that the trial court erred in submitting the verdict

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<sup>26</sup> As will be discussed below, this second argument is actually a reiteration of the first. Appellant does not actually identify any “vague” term or provision of the statute.

director because the verdict director did not require the jury to find either that the sodomy was non-consensual or that the victim was a minor (App.Br. 65). Because these claims all involve a similar contention, respondent will address them together.

The statute in question was drafted as follows:

**Sodomy—penalty.**—Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished by imprisonment in the penitentiary not less than two years.

§ 563.230, RSMo 1969.

#### **A. The Standard of Review**

The party challenging the constitutionality of a statute bears the burden of proving the statute unconstitutional. *State ex rel. Zobel v. Burrell*, 167 S.W.3d 688, 692 (Mo. banc 2005). “All statutes are presumed to be constitutional, and a statute will not be held unconstitutional unless ‘it clearly and undoubtedly contravenes the constitution.’” *State v. Pike*, 162 S.W.3d 464, 470 (Mo. banc 2005). “A statute will be enforced unless it ‘plainly and palpably affronts fundamental law embodied in the constitution.’” *Id.* “Doubts will be resolved in favor of the constitutionality of the statute.” *Id.* “This Court determines

issues of law, including the constitutionality of Missouri statutes, *de novo.*” *Kirkwood Glass Company, Inc. v. Director of Revenue*, 166 S.W.3d 583, 585 (Mo. banc 2005).

**B. Appellant Lacks Standing to Raise an Overbreadth Challenge to § 563.230, RSMo 1969, and He Has Failed to Demonstrate That the Statute was Unconstitutionally Applied to Him**

Relying on *Lawrence v. Texas*, 539 U.S. 558 (2003), appellant argues that § 563.230, RSMo 1969, unconstitutionally criminalizes lawful conduct that is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution (App.Br. 50-51). In *Lawrence*, two adult men had engaged in a consensual act of sodomy in the privacy of one of the men's home. *Id.* at 562-564. They were both convicted under a statute that criminalized "deviate sexual intercourse with another individual of the same sex." *Id.* at 563. Reversing the convictions, the United States Supreme Court concluded that such conduct between consenting adults, in the privacy of their own home, was protected by the Constitution and could not be outlawed. *Id.* at 578-579.

Appellant points out that § 563.230, RSMo 1969, could be used to obtain similar convictions; thus, he argues that the statute is, therefore, unconstitutionally overbroad (App.Br. 50-51). But while it is true that § 563.230 could be used to obtain such a conviction, no such conviction was obtained in this case. At all times during the relevant time period submitted to the jury, the victim was under

seventeen years old; thus, appellant's crime did not involve "two adults who, with full and mutual consent from each other, engaged in sexual" activity. *Cf. Lawrence v. Texas*, 539 U.S. at 578. Accordingly, appellant's case is not governed by *Lawrence*.

**1. Appellant lacks standing to challenge § 563.230 as overly broad**

"A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights." *County Court of Ulster County, N. Y. v. Allen*, 442 U.S. 140, 154-155 (1979). "As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations." *Id.*

"A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment." *Id.* "This exception has been justified by the overriding interest in removing illegal deterrents to the exercise of the right of free speech." *Id.*; *see also United States v. Raines*, 362 U.S. 17, 21 (1960) ("This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'").

As this Court has also recognized:

In order to mount a facial challenge to a statute, the challenger must establish “that no set of circumstances exists under which the Act would be valid.” *U.S. v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987). It is not enough to show that under some conceivable circumstances the statute might operate unconstitutionally. *Id.* The “overbreadth” doctrine does not apply outside the limited context of the First Amendment. *Id.*

*Artman v. State Bd. of Registration for Healing Arts*, 918 S.W.2d 247, 251 (Mo. banc 1996). Here, of course, appellant does not argue that he had a speech right to engage in the conduct charged; rather, he simply argues that because a certain class of lawful conduct is criminalized by § 563.230, he should be allowed to challenge it (App.Br. 51-52).

But, as this Court recognized in rejecting a similar constitutional challenge to the very statute in question here, appellant cannot rely on the cause of others in raising this challenge:

Whether activities of a nature different from those charged against defendant might or might not constitute an offense under § 563.230 are questions the answers to

which cannot aid appellant. Defendant ‘may not espouse the cause of others differently situated as a defense in a prosecution where the statute clearly applies to him.’

*State v. Crawford*, 478 S.W.2d 314, 319 (Mo. 1972).

Here, the statute clearly applies to appellant: the evidence showed that he engaged in acts of sodomy with the victim, and it was lawful to criminalize that behavior. In short, while appellant correctly points out that this statute could be applied to one type of conduct that is protected under the Due Process Clause of the Constitution, that fact simply cannot aid appellant in arguing that his own conviction for sodomy was unconstitutional. Appellant simply had no liberty interest tied to engaging in sodomy with a child under seventeen years of age. Indeed, the case appellant principally relies upon, *Lawrence v. Texas*, implicitly rejected any such notion:

*The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationship where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other,*

engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.

539 U.S. at 578.

In other words, the conviction in *Lawrence* only violated the Constitution because, as applied in that case, it had the effect of criminalizing conduct that was protected by the liberty interest of the Due Process Clause. Here, of course, appellant has made no showing that his conduct with a child under seventeen years of age was similarly protected; and, consequently, it cannot be said that § 563.230, RSMo 1969, was unconstitutionally applied. *See Singson v. Commonwealth*, 621 S.E.2d 682, 686-687 (Va.App. 2005) (holding that the defendant lacked standing, and rejecting the defendant's claim that a Virginia sodomy statute was "facially unconstitutional because, in light of the United States Supreme Court's holding in *Lawrence*, the statute – as applied to private, consensual acts of sodomy – violates the Due Process Clause of the Fourteenth Amendment").

Citing *United States v. Raines*, appellant suggests that he should be excepted from the standing requirement because "the statute in question has already been declared unconstitutional in the vast majority of its intended applications, and it can fairly be said that it

was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover” (App.Br. 52, citing *Raines*, 362 U.S. at 23).

But contrary to appellant’s argument, it is not apparent that the statute is valid “only in a fraction of the cases it was originally designed to cover.” For, even assuming that the statute *was* designed and intended to cover the private consensual acts of adults, it is apparent – due to its broad terms – that the statute was also designed to cover forcible sodomy, other types of non-consensual sodomy, sodomy with children, any type of public sodomy, and sodomy with animals. *See* § 563.230, RSMo 1969; *see generally State v. Crawford*, 478 S.W.2d at 318. In other words, there are multiple circumstances – not a just a few “fortuitous” remaining circumstances – that are subject to the terms of the statute.

Appellant also argues that his conviction cannot stand because it would require this Court to engage in judicial re-writing of the statute (App.Br. 53). He claims that upholding his conviction requires the Court to insert one of two elements into the statute, namely, that the sodomy was forcible (or non-consensual) or that it was committed with a minor (App.Br. 53-54). But appellant is incorrect, for there is no need to insert any language in the statute.

The statute criminalizes sodomy, regardless of whether it was consensual or whether it was committed with or upon a minor. The state did not have to prove either of those elements, and the state is not suggesting that appellant is guilty of sodomy by virtue of the fact that it was committed on a minor (or without consent).

To the contrary, appellant was guilty of the offense of sodomy because he put his mouth on the victim's penis, not because he put his mouth on a minor's penis without consent. By suggesting that this Court must alter the terms of the statute to save his conviction, what appellant is doing is attempting to suggest that the state had to prove elements that were not present in the statute to obtain a constitutional conviction. But what appellant misunderstands is that he has the burden of proving that the statute was unconstitutionally applied to him. In other words, it is not the state that must prove that appellant committed his act of sodomy on a minor (or without consent); rather, it is appellant who must prove that, under the circumstances, he had a protected liberty interest to engage in conduct that was wrongfully criminalized. That, of course, appellant cannot do; for the victim was not a consenting adult who agreed to engage in private acts in appellant's home.

Consistent with this analysis, the victim's lack of consent, and

his minority were not elements of the charged offense; rather, they were simply attendant circumstances that removed appellant's conduct outside the protected realm of conduct outlined in *Lawrence v. Texas*. Thus, these were not facts that had to be proved beyond a reasonable doubt to obtain a conviction under § 563.230; and, consequently, they did not have to be submitted in the verdict director as appellant argues in Point IV. In short, the state did not bear any burden of proving these “elements.”

**C. Appellant Failed to Properly Preserve the “Vagueness” Challenge He Asserts On Appeal; But, in Any Event, Section 563.230, RSMo 1969, is Not Unconstitutionally Vague**

In his third point, appellant argues that § 563.230 is unconstitutionally vague – not because its terms are “so unclear that ‘men of common intelligence must necessarily guess at its meaning’” (i.e., not because it failed to give him notice of the conduct criminalized under the statute), but because it allegedly “provides no explicit standards for enforcement” and, thus, is susceptible to “arbitrary and discriminatory application” by law enforcement officers (App.Br. 60-61).

**1. Appellant failed to preserve this “vagueness” challenge**

Prior to trial, appellant filed a motion to dismiss, alleging that

§ 563.230 was unconstitutionally vague (L.F. 78-80). In that motion, appellant alleged that the statute was vague because it “fails to define the offense with sufficient particularity and specificity so that it conveys to a person of common intelligence and understanding an adequate description of the acts which are prohibited under the statute” (L.F. 79). In other words, he argued that the statute, due to its vagueness, failed to put him on notice. This same argument was asserted in appellant’s motion for new trial (L.F. 125-126). Appellant did not argue that the statute was vague because it failed to provide adequate guidelines to law enforcement, so as to avoid arbitrary and discriminatory application of the statute (*see* L.F. 78-80, 125-126). Thus, appellant’s “vagueness” challenge was not preserved for review.

“The general rule is that constitutional questions are deemed waived that are not raised at the first opportunity consistent with good pleading and orderly procedure.” *City of Chesterfield v. Director of Revenue*, 811 S.W.2d 375, 378 (Mo. banc 1991). “Attacks on the constitutionality of a statute are of such dignity and importance that raising such issues as an afterthought in the brief on appeal will not be tolerated.” *Id.* Accordingly, this Court should decline to review appellant’s claim that the statute is vague because it allegedly fails to

provide adequate guidance to law enforcement officers. *See State v. Wickizer*, 583 S.W.2d 519, 522-523 (Mo. banc 1979) (declining to review a claim that § 563.230, RSMo 1969, unconstitutionally invaded the right to privacy).

## **2. Section 563.230 is not unconstitutionally vague**

Even if adequately preserved for review, this claim does not compel reversal. “The test for vagueness is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.” *State ex rel. Zobel v. Burrell*, 167 S.W.3d at 692. “Neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague.” *Id.*

“As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). “Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, . . . the more important aspect of vagueness doctrine ‘is not actual notice, but the other principal

element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.” *Id.* “Where the legislature fails to provide such minimal guidelines, a criminal statute may permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’” *Id.*

With regard to notice, appellant essentially concedes that the statute is not vague. He recognizes this Court’s opinion in *State v. Crawford*, 478 S.W.2d 314, and he concedes that this Court has already held that the statute’s terms are adequate to give notice of what conduct is unlawful (App.Br. 60-61). But having said that, appellant argues that the statute is vague because it does not include the other elements (lack of consent or minority) that allegedly must be present to make its enforcement lawful. But, in fact, appellant has not identified any language of § 563.230, that is unconstitutionally vague. An example of vague statutory language can be found in *Kolender v. Lawson*, 461 U.S. 352.

In that case, the statute in question required a “loiterer” stopped by a law enforcement officer to provide “credible and reliable” identification. The Court concluded that because the statute did not define the meaning of “credible and reliable” identification, an ordinary person was not put on notice of what was

required to comply with the statute. 461 U.S. at 358. The Court stated: “As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest.” *Id.* In other words, the Court stated, “An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets ‘only at the whim of any police officer’ who happens to stop that individual under” the terms of the statute. *Id.*

Here, by contrast, appellant has not identified any portion of § 563.230, RSMo 1969, that was vague. Rather, appellant argues that it is vague because it does not contain additional elements that would make the statute less broad (and remove the constitutional infirmity discussed above). In other words, by pointing out that the statute does not refer to the use of force, the lack of consent, or the age of the victim, appellant is not identifying any language that is vague; rather, appellant is simply identifying refinements that could be made to the statute so as to avoid criminalizing lawful conduct. (Indeed, these are refinements that were made in subsequent years. *See e.g.* §§ 566.060 and 566.062, RSMo 2000.). This point should be

denied.

### III.

**Because appellant made use of the victim's letter, which was contained in State's Exhibit 7, and indicated that he had "no objection" to its admission, appellant affirmatively waived any objection to the admission of the letter. Further, the trial court did not plainly err or abuse its discretion in admitting the letter into evidence and sending the letter to the jury during deliberations (responds to Point V of appellant's brief).**

Appellant contends that the trial court erred in admitting State's Exhibit 7, a letter written by the victim (App.Br. 72). He argues that the letter was hearsay, that it contained inadmissible references to uncharged crimes, and that it improperly bolstered the victim's credibility (App.Br. 72). Appellant also contends that the trial court erred in sending the exhibit to the jury during deliberations (App.Br. 72).

#### **A. Appellant Affirmatively Waived Any Claim That the Trial Court Erred in Admitting State's Exhibit 7 Into Evidence**

State's Exhibit 7 was a letter written by the victim and presented to the St. Louis Archdiocese after the victim had dismissed the first lawsuit he filed against the Archdiocese (Tr. 358). As will be discussed in greater detail below, defense counsel used this letter in an attempt to impeach the victim's testimony on direct examination

(Tr. 356-362). On re-direct examination, the prosecutor referred to other parts of the letter and, ultimately moved to admit the entire letter into evidence (Tr. 376-379). Defense counsel stated: “I have no objection at this time, Your Honor, but I request the right to address it at a later time if it becomes necessary” (Tr. 379). On re-cross-examination, defense counsel asked the victim to read a lengthy excerpt from the letter (Tr. 386-387).

On this record, appellant should not be heard to assert error. Where “counsel has affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence,” even plain error review is waived. *State v. Mead*, 105 S.W.3d 552, 556 (Mo.App. W.D. 2003). “When a party affirmatively states that it has no objection to evidence an opposing party is attempting to introduce, for instance, plain error review is unavailable.” *Id.*; *State v. Williams*, 118 S.W.3d 308, 313 (Mo.App. S.D. 2003) (“As distinguished from a simple failure to object, an announcement by the defense of ‘no objection’ amounts to an affirmative waiver of appellate review of the issue.”).

It is, of course, true that defense counsel qualified his affirmative statement of “no objection” with “at this time” (Tr. 379); but, inasmuch as the entire letter was being admitted into evidence

at that time, this cannot be read as preserving any objection to the admission of the letter into evidence. To the contrary, the lack of contemporaneous objection and counsel's affirmative statement that he had "no objection" (along with his own affirmative use of the letter) should be viewed as an affirmative waiver of any objection to the admission of the letter into evidence.

In addition to the foregoing, appellant's claim of hearsay was also waived. By failing to object to the admission of the letter, appellant waived this alleged error for appellate review. *State v. Copeland*, 95 S.W.3d 196, 200 (Mo.App. S.D. 2003). In particular, with regard to hearsay, "[a] party's failure to timely object to hearsay evidence waives his or her right to dispute its admissibility on appeal." *State v. Howton*, 890 S.W.2d 740, 746 (Mo.App. W.D. 1995). As this Court has stated:

Generally, inadmissible hearsay which comes into the record without objection may be considered by the jury. *State v. Thomas*, 440 S.W.2d 467, 470 (Mo. 1969). In the absence of a timely objection or proper motion to strike, hearsay evidence is admitted. *State v. Griffin*, 662 S.W.2d 854, 859 (Mo. banc 1983), *cert. denied*, 469 U.S. 873, 105 S.Ct. 224, 83 L.Ed.2d 153 (1984).

*State v. Basile*, 942 S.W.2d 342, 357 (Mo. banc 1997). This evidentiary rule has long been cited by Missouri Courts. See *State v. Thomas*, 440 S.W.2d 467, 470 (Mo. 1969); *State v. Willis*, 283 S.W.2d 534, 537 (Mo. 1955). And it continues to be the rule. *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002) (“Inadmissible hearsay that goes in the record without objection may be considered by the fact-finder in determining the facts.”); see *State v. Griffin*, 662 S.W.2d at 859 (this Court summarily denied a claim of plain error, noting that there had been no timely objection to the alleged hearsay). Accordingly, this Court should decline to review appellant’s claim that the letter was inadmissible hearsay.

#### **B. The Standard of Review**

Should this Court elect to review this claim, review is for plain error. See *State v. Ballard*, 6 S.W.2d 210, 213 (Mo.App. S.D. 1999) (“to preserve an evidentiary question for appellate review, an objection needs to be made at the first opportunity”). If there is no contemporaneous objection, review is limited to plain error review.

*Id.*

On plain error review, appellant must show that the trial court’s error so substantially violated his rights that manifest injustice or a miscarriage of justice results if the error is not corrected. *State v. Sanchez*,

186 S.W.3d 260, 265 (Mo. banc 2006). Under this standard, a defendant is not entitled to a new trial unless the plain error was “outcome determinative.” *See Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002). The defendant bears the burden of establishing manifest injustice. *State v. Mayes*, 63 S.W.3d 615, 624 (Mo. banc 2001).

**C. State’s Exhibit 7 Was Properly Admitted to Rebut the Incomplete Portrayal of the Letter Elicited on Cross-examination**

On direct examination, the victim testified that by filing a lawsuit, he was seeking some sort of accountability on the part of appellant and the Catholic Church (*see* Tr. 287-288). The victim also described how he had, on his attorney’s advice, dismissed both his first and second lawsuits (Tr. 286-292). The victim testified that he was not happy about that outcome (Tr. 292-293). The victim testified that his unhappiness stemmed not from failing to obtain a large amount of money but from the fact that no one had been held accountable (Tr. 292-293).

On cross-examination, as will be set forth below, defense counsel sought to show that the victim had personally made the decision to dismiss the first law suit, not on the advice of counsel, but because the victim had already found reconciliation through a spiritual experience in Africa. Defense counsel also sought to show

that the victim had another reason for dismissing the lawsuit, namely, that he did it to obtain a settlement of \$30,000 for himself (i.e., without having to pay an attorney). When the victim would not concede that those suppositions were true, defense counsel showed the victim a copy of a letter the victim had written and presented to the Archdiocese on about October 7, 1998 (*see* Tr. 357, the letter was, at that point identified as Defendant's Exhibit B).

Then, upon further questioning, defense counsel read portions of the letter and paraphrased portions of the letter in an attempt to impeach the victim's testimony. He questioned the victim about his decision to dismiss the case on his attorney's advice (and about his motivations generally), as follows:

Q That's not what the document says, is it?

A What page are you reading on?

\* \* \*

Q (By [defense counsel]) Second page from the last, the first full paragraph begins: Upon returning back home in January of 1998. Are you there?

A Yes.

Q And in that you say but something still hung over me, that being the lawsuits and Father Graham. I

contacted my attorney, I contacted my attorney and the decision was made to dismiss the lawsuit with prejudice.

A Right. I contacted the attorney and found out where the lawsuit stood because Doug Forsyth was a person that never contacted you back, that's why I contacted Doug Forsyth to find out where he stood.

\* \* \*

Q But prior to that paragraph you go into some detail about what lead up to the decision to dismiss, correct? Do you recall writing in this document, when you prepared this document? Do you remember indicating that you had gone on a trip to South America?

A South Africa.

Q South Africa, and that you were at mass and you felt someone tell you you needed to forgive, and that is why you decided you needed to do something about this?

A To forgive in my heart.

\* \* \*

Q Okay. Now when you brought this letter to the Archdiocese you also were requesting \$30,000, correct?

A For therapy.

Q Okay. And you said again on the last page of that document, the last sentence on the first paragraph, can you read that starting with, we can?

A If we can come to terms with this, no lawyers involved, I am willing to drop my case in its entirety and sign an affidavit stating that you will not hear from me again concerning this matter, Father Graham.

\* \* \*

Q (By [defense counsel]) You indicated that as long as no lawyers were involved you would take \$30,000 and they would never hear from you again, correct?

A For therapy, yes.

Q Okay, but with no lawyers involved because that way you don't have to pay a third to your lawyer, right?

A That wasn't my intent, no.

Q But the wording of the letter is accurate, correct?

A Right.

(Tr. 359-362). As is evident, defense counsel sought to establish at least two things with his use of the letter: first, that the victim had already found spiritual satisfaction, i.e., that the victim's need for accountability had been satisfied; and second, that the victim then sought \$30,000 (that would not have to be shared with his attorney), ostensibly because the victim was simply an opportunist who wanted to make some money (and not a person simply seeking accountability) (Tr. 359-362).

But the contents of the letter were far more complex than that. Thus, on re-direct examination, the prosecutor marked a copy of the letter as State's Exhibit 7 and introduced parts of it, as follows:

Q All right, and you were asked a number of questions on cross-examination about why you made certain decisions. In fact, you recall discussing in that letter why you were making the decision, what you wanted out of that lawsuit?

A Yes.

Q Okay, and the final paragraph that begins at the bottom to the next to last page, let me direct your attention to that, the one that starts down here. Do

you recall towards the end of that starting to talk about what it is that you actually wanted to get out of this entire event?

A Yes.

Q And what was that?

A An apology.

Q And did you discuss anything about therapy sessions?

A Yes.

Q Okay, and what did you want out of the therapy sessions?

A Healing.

Q And as far as the lawsuit and the money was concerned, did you ask anything about therapy sessions?

A Yes.

Q And what was that?

A To pay for the therapy sessions.

Q Basically reimburse you for the current and into the future?

A Yes.

Q As a matter of fact, go to the paragraph up above that. Did you discuss your feelings about filing a lawsuit at the beginning of that paragraph right about that?

A Yes.

Q And tell us what you said.

A “As I look back now I never wanted to file a suit against the church.”

Q Go on.

A “I didn’t go into this for money, and no amount of money can take the place of the damage that has been done.”

Q Okay, and the next sentence?

A “As I said before, I did it out of anger and I wanted justice to be served and I wanted to help everybody before helping myself.”

(Tr. 376-378). The prosecutor then moved to admit the entire letter, and defense counsel said that he had “no objection at that time” (Tr. 379).

As is evident, the trial court properly allowed the state to use the letter and admit it into evidence. As outlined above, defense

counsel attempted to paint a very limited picture of the victim's feelings and dealings with his church and the appellant. Defense 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. In short, these questions were plainly designed to show that, contrary to the victim's testimony, this case was not about obtaining accountability.<sup>27</sup>

But, again, the letter was far more complex than that. The letter revealed the ongoing turmoil and personal struggle that the victim dealt with even after he decided to dismiss the lawsuit, and it explained in detail why he felt that accountability was so important. Thus, it was misleading for defense counsel to attempt to suggest that the victim's healing experience in Africa was the only reconciliation that the victim needed, and, accordingly, it was within the trial court's discretion to admit the entirety of the letter to reveal the complete picture. "Once counsel introduces 'part of an act,

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<sup>27</sup> In fact, by using a lengthy excerpt from the letter and by focusing again on the victim's request for \$30,000, defense counsel again attempted to support this conclusion on re-cross-examination (Tr. 386-389).

occurrence, or transaction . . . , [the prosecutor] is entitled to . . . inquire into other parts . . . , in order to explain or rebut adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by [the defendant]’, even if the prosecutor’s inquiry elicits otherwise inadmissible testimony.” *See State v. Sinner*, 779 S.W.2d 690 (Mo.App. E.D. 1989); *see also State v. Skillicorn*, 944 S.W.2d 877, 891 (Mo. banc 1997) (“The rule of completeness seeks to ensure that a statement is not admitted out of context. The rule is violated only when admission of the statement in an edited form distorts the meaning of the statement or excludes information that is substantially exculpatory to the declarant.”).

In short, by suggesting that the victim’s decision to dismiss the lawsuit was indicative of a total reconciliation and complete spiritual healing, and by suggesting that the victim, therefore, had only pecuniary interests in mind when he later approached the Archdiocese privately, defense counsel gave an incomplete and fragmentary account of the victim’s letter – an account that could only be made full by introducing the letter in its entirety.

Appellant points out that the letter contained evidence of other crimes that he committed with the victim; thus, he argues that that portion of the letter should have been excluded (App.Br. 83-87). But,

again, for the reasons discussed above, the contents of the letter were made relevant by defense counsel's attempt to isolate a small portion of the letter (and thereby misrepresent the victim's statements, which were based on the much broader range of experiences and feelings that were set forth in the letter). Additionally, while it is true that the letter mentioned other sexual acts that the appellant committed with the victim, such evidence was also admissible.

As explained in *State v. Boulware*:

Appellant mistakenly attempts to take refuge in *State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993). *Bernard* laid the parameters for when uncharged sexual conduct between the defendant and different victims is admissible. **The parameters of *Bernard* are inapplicable in this case because we are dealing with the same victim.** Evidence of uncharged sexual conduct with the same victim is admissible to establish motive, intent, absence of mistake or accident, or a common scheme or plan. The evidence can also be used to present a complete and coherent picture of the events that transpired.

*State v. Boulware*, 923 S.W.2d 402, 405 (Mo.App. W.D. 1996) (citations omitted; emphasis added); *see also State v. Richardson*, 918 S.W.2d 816,

818-819 (Mo.App. W.D. 1996).

Here, as in *Boulware*, but unlike *State v. Burns* and *State v. Bernard* (which are both cited in appellant's brief) the uncharged acts were committed upon the *same* victim. Compare *State v. Burns*, 978 S.W.2d 759, 760 (Mo. banc 1998) (the evidence showed that the defendant coerced another boy (who was not the victim) to put the defendant's penis into his mouth). Consequently, appellant's uncharged acts were admissible to show his motive, and a complete and coherent picture of the events. See *State v. Boulware*, 923 S.W.2d at 405; *State v. Richardson*, 918 S.W.2d at 818-819; *State v. Magouirk*, 890 S.W.2d 17, 17 (Mo.App. S.D. 1994) (citing additional cases); *State v. Dudley*, 880 S.W.2d 580, 583 (Mo.App. E.D. 1994).

Citing *State v. Seever*, 733 SW.2d 438 (Mo. banc 1987), appellant also argues that the letter improperly bolstered the victim's credibility and essentially allowed the victim to testify twice (App.Br. 87). But it must be recalled, firstly, that it was defense counsel that first implicated the victim's credibility with the contents of the letter; thus, it only stands to reason that the state should have been allowed to rehabilitate the victim's credibility with the letter.<sup>28</sup> See *State v. Wolfe*, 13

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<sup>28</sup> Appellant also claims that the letter attacked the credibility of

S.W.3d 248, 257 (Mo. banc 2000) (“if the out-of-court statement is offered for relevant purposes other than corroboration and duplication – such as rehabilitation – there is no improper bolstering”). Secondly, inasmuch as the letter was not prepared as a substitute for the victim’s testimony, the same concerns implicated in *Seever* were not implicated here. As this Court has observed:

In *Seever*, this Court found that the admission of a videotaped statement of a child witness, prepared pursuant to section 492.304, who also testified in person, impermissibly bolstered the child's testimony at trial. The bolstering was improper because it effectively allowed the witness to testify twice. . . . What *Seever* prohibits is the use

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appellant and the Catholic Church (App.Br. 89); but, again, the victim’s experiences with appellant and the Church (as set forth in the letter) were made relevant by defense counsel’s attempt to suggest that one small part of the letter was the sum and substance of appellant’s motivation. In any event, the victim’s sentiments and his experiences with appellant and the church were reflected in his testimony (*see e.g.* Tr. 282-285). Thus, there was no unfair prejudice from comments contained in the letter.

of such a videotape to wholly duplicate the live testimony of the child witness.

*State v. Silvey*, 894 S.W.2d 662, 672 (Mo. banc 1995). The Court went on to hold that the allegedly bolstering statements in *Silvey* were not improperly bolstering as contemplated by *Seever*, because they were “informal and not planned as a substitute for [the victim’s] testimony[.]” *Id.* So, too, in the case at bar.

**D. The Trial Court Did Not Abuse Its Discretion in Sending State’s Exhibit 7 to the Jury During Deliberations**

The decision to send an exhibit to the jury room during deliberations lies within the sound discretion of the trial court. *State v. Barnett*, 980 S.W.2d 297, 308 (Mo. banc 1998). An abuse of discretion occurs only when the trial court’s decision in sending an exhibit to the jury room was clearly against reason and resulted in an injustice to the defendant. *See id.* (citing *State v. Roberts*, 948 S.W.2d 577, 596-597 (Mo. banc 1997)). Here, because the exhibit was properly admitted into evidence in its entirety, the trial court did not abuse its discretion in allowing the jury to review the exhibit.

Additionally, while appellant points out that it is error to send “testimonial” exhibits into the jury room (App.Br. 90), the victim’s letter was not “testimonial.” As stated above, the victim’s letter was

not a formal statement, and it was not intended to duplicate the victim's testimony or act as a substitute for the victim's testimony. *Cf. State v. Evans*, 639 S.W.2d 732, 794-795 (Mo. banc 1982) (the "testimonial" exhibit was a tape-recorded statement of the defendant made by a law enforcement officer). It was, in fact, merely evidence that the defense had attempted to rely on to prove a pecuniary motive, and evidence that the state had relied on (in response) to prove that the victim's motive was to obtain accountability.

Moreover, even if deemed "testimonial," appellant was not prejudiced by the trial court's sending the exhibit back to the jury room. In requesting the letter, the jury also requested and received all of the photographs that had been admitted into evidence (L.F. 103). In other words, the jury received every exhibit that had been admitted into evidence. This lessened any emphasis that could have been put on State's Exhibit 7. *See State v. Anthony*, 837 S.W.2d 941, 945 (Mo.App. E.D. 1992) ("the jury viewed other exhibits, namely photographs, which diminished any emphasis on the tape").

#### **E. Conclusion**

In sum, appellant waived his challenge to the admission of the evidence both by admitting portions of the letter and by stating that he had "no objection" at the time the exhibit was admitted into

evidence. Moreover, by failing to lodge a hearsay objection (at any time at trial), appellant's claim that the letter was hearsay was also waived. In any event, the letter was properly admitted to rebut the fragmentary picture painted by defense counsel on cross-examination of the victim. And, finally, inasmuch as the exhibit was properly admitted into evidence in its entirety, the trial court did not abuse its discretion in sending the exhibit to the jury room.<sup>29</sup>

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<sup>29</sup> In making this argument, at points appellant asserts that he was denied his right to confrontation. But that is plainly not true, for the victim testified and was subject to cross-examination, even after the entire exhibit was admitted.

## IV.

**The trial court did not plainly err or abuse its discretion in controlling closing argument (responds to Point VI of appellant’s brief).**

Appellant contends that the trial court plainly erred and abused its discretion in allowing the prosecutor to make three different arguments (App.Br. 92). He asserts that the prosecutor injected racial prejudice into the case, and that the prosecutor misstated facts, referred to facts not in evidence, and misstated the law (App.Br. 92).

### **A. The Standard of Review**

As will be outlined below, two of appellant’s claims of error as to closing argument were preserved by timely objection. The first claim, however, was not preserved by any objection.

#### **1. Preserved error**

“A trial court maintains broad discretion in the control of closing arguments.” *State v. Forrest*, 183 S.W.3d 218, 226 (Mo. banc 2006). “A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *State v. Taylor*, 134 S.W.3d 21, 26 (Mo. banc 2004). “If reasonable persons can differ as to the propriety of the trial court’s action, then it cannot be said that the

trial court abused its discretion.” *Id.*

## **2. Unpreserved error**

On plain error review, appellant must show that the trial court’s error so substantially violated his rights that manifest injustice or a miscarriage of justice results if the error is not corrected. *State v. Sanchez*, 186 S.W.3d 260, 265 (Mo. banc 2006). “Plain error will seldom be found in unobjected to closing argument.” *Id.*

“It is well settled that relief should be rarely granted on assertion of plain error to matters contained in closing argument, for trial strategy looms as an important consideration and such assertions are generally denied without explanation.” *Id.* “Such situations rarely merit plain error review because in the absence of objection and request for relief, the trial court’s options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention.” *Id.*

### **B. The Prosecutor Did Not Inject Racial Animus Into This Case**

Appellant first argues that the prosecutor injected racial animus into the case with the following:

And look at it, ladies and gentlemen, is it any surprise that Lynn Woolfolk is the person who received this from him? Lynn’s a perfect target kid. Here is this

child. Here is this priest. He moves into this new congregation and gets involved with the community service and gets to know people. Gets to know some people from this African-American, you know, congregation that's closing down the cemetery, that's having issues and, you know, remember, this is the 1970s, attitudes are a little different. Who are people going to believe, this kid or me, the priest?

\* \* \*

So here is this kid, that yet he's scared of his dad. There's an adult male figure, a priest of all people who is willing to take the kid and spend time with the kid, and you can tell he certainly has the ability to be personable. You think Lucy thought that was in any way bad? And to be frank, okay. He's going out to look at the horses. Lynn likes horses. He had a horse of his own. Do you think that that was something that was discouraged and so he's able to find the perfect kid, the kid that no one's going to believe, because as the Defendant said, he's a little wild at times. Who's going to believe him, so he's the perfect target kid.

(Tr. 607-608).

But contrary to appellant's claim, these comments were not designed to inject racial animus into the case. The prosecutor did not expressly mention the relative races of appellant and the victim, and he did not appeal to racial prejudice or inject "race in a derogatory manner so as to inflame the minds of the jury." See *State v. Stamps*, 569 S.W.2d 762, 767 (Mo.App. St.L.D. 1978); cf. *State v. Jackson*, 83 S.W.2d 87, 94 (Mo. 1935) (it was improper to say, "A black man assaulting a white woman in a vacant house at an early hour in the morning.").

In fact, the prosecutor was simply commenting on the facts of the case and attempting to explain both appellant's motivation in picking this particular victim (a desire to insulate himself from "credible" accusations of misconduct) and the victim's reticence in coming forward. The evidence showed that the victim was raised in a house (and time) when the priest was not questioned (Tr. 252-253). The victim was a young man (who was sometimes a bit "wild"), and appellant was a trusted spiritual advisor. The fact that appellant had ingratiated himself with the community (and appellant's mother) by assisting an African-American congregation with their cemetery, was a fact that appellant specifically testified about on direct examination (Tr. 482-483). Indeed, the defense seemingly went out of its way to

point out that the victim’s mother was African-American, and that appellant and she had worked together to assist the “black community” and save a cemetery that was “going to seed” (Tr. 482-483).

In short, the prosecutor’s comments were simply a comment on the evidence, and they were designed to highlight the relative positions held by both appellant and the victim – relative positions that plainly enabled appellant to take advantage of his young victim. *See generally State v. Edwards*, 116 S.W.3d 511, 537 (Mo. banc 2003) (a prosecutor is “entitled to argue reasonable inferences from the evidence”).

Moreover, to the extent 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 (i.e., that appellant may have believed that people would not credit the accusation of a young African -American man over his denial), such a possibility was also a proper subject for closing argument. It is a matter of common knowledge that racial attitudes have undergone change in the last thirty years, and that many people have harbored discriminatory points of view. Thus, to suggest that appellant may have been relying on such views to insulate himself

from allegations was within the fair purview of closing argument. *See generally State v. Brooks*, 158 S.W.3d 841, 855-856 (Mo.App. E.D. 2005) (“A prosecutor is granted substantial latitude and may argue matters of common knowledge.”); *State v. Skelton*, 828 S.W.2d 735, 737 (Mo.App. S.D. 1992) (the prosecutor may draw conclusions from the facts in evidence and from matters of common knowledge).

### **C. The Prosecutor Properly Argued the Victim’s Credibility**

Appellant next argues that the prosecutor misstated the facts and the law in arguing the victim’s credibility (App.Br. 97). The prosecutor argued:

Well, let’s look at those two witnesses [the victim and appellant]. let’s look at what we have here. Let’s look at Lynn. For starters, Lynn testified from that witness stand this week, he has no motive to lie about anything that he testified to. It’s not a money thing that the defense was trying to bring up. Oh, you’re going to draw all sorts of money. You’re asking for at least \$30,000. Oh, you’re out there to get money.

Come on, ladies and gentlemen, in this day and age if somebody is out there just for money, they are filing, five, 10, 15, 20, 50 million dollar lawsuits. Lynn files a

lawsuit for therapy costs.

[DEFENSE COUNSEL]: Your Honor, that misstates the evidence. This misstates the state of the law in Missouri in terms of filing civil suits.

THE COURT: The jury will be guided by their recollection of the evidence as they heard it. The objection is overruled. You may proceed.

[THE PROSECUTOR]: And you heard it, a lot of questions about these lawsuits. He never filed for anything but for at least \$30,000. Okay. At least \$30,000. The defense wants you to think, oh, he's a money grubber. He's asking for at least \$30,000.

Let's be realistic, ladies and gentlemen. A kid goes to his mom and says, I'm going to go out and buy that new train that is going to cost \$10. Do they go and say, mom, I want at least \$5, hoping they will get 10 to pay for it? No. They say, mom, can I have \$20 and they compromise at 10. You don't file a lawsuit saying give me at least \$30,000 and hope you get a lot more.

Lynn is filing a lawsuit saying I need something. I want some accountability. I need something. I want some

accountability. I need something out of it because of the betrayal of the trust that I had to face. . . . It's not about money.

(Tr. 599-601).

The prosecutor is “entitled to argue reasonable inferences from the evidence.” *State v. Edwards*, 116 S.W.3d at 537. “This includes ‘the right, within the limits of closing argument, to provide the State’s view on the credibility of witnesses.’” *Id.*

Here, the prosecutor’s arguments were proper comments upon the victim’s credibility. As the record shows, the defense sought to convince the jury that the victim’s interest in bringing his allegations was pecuniary gain (*see* Tr. 624, “This is about money. This is about Mr. Woolfolk attempted to get money out of the Catholic Church based upon his allegation”). The victim, on the other hand, testified that he made his allegations (and brought his previous lawsuits for damages) in an attempt to obtain accountability (*see* Tr. 287-288). The evidence showed that the victim had filed two earlier lawsuits, asking for at least \$25,000, and that the victim had once approached the archdiocese personally and asked for a \$30,000 settlement (Tr. 288, 298, 355-356, 361-362).

In this context, in arguing the victim’s credibility, the

prosecutor repeatedly referred to the amount of “at least \$30,000” (which was actually the full amount that the victim asked the Archdiocese for after dismissing his lawsuits) as indicative of the victim’s desire for a limited amount of compensation, in contrast to the multi-million-dollar lawsuits that have made headlines in recent years. These comments (except to the extent that they overstated the minimum amount asked for in the victim’s lawsuits) were supported by the evidence. The victim had only sued for at least \$25,000, and when he had gone to the archdiocese, the victim had only asked for \$30,000. Thus, contrasting the victim’s \$30,000 request with the multi-million-dollar amounts that other people have sought and obtained was not improper.

Appellant points out that the prosecutor misstated the law because, in Missouri, the amount of at least \$25,000 is the pleading requirement in any civil case (App.Br. 99). In other words, he points out that while the victim’s lawsuits only said at least \$25,000, it was possible that he would receive much more (and therefore it was possible that he actually wanted much more). Thus, he argues that it was improper for the prosecutor to argue, “You don’t file a lawsuit saying give me at least \$30,000 and hope you get a lot more” (App.Br. 99).

It is, of course, true that some people do file lawsuits asking for “at least \$25,000,” while hoping for a lot more. But appellant overlooks the fact that the prosecutor was arguing the victim’s credibility and the victim’s state of mind – not the requirements of Missouri civil procedure. It was not the pleading requirements of a civil suit that mattered; rather, it was the victim’s hope that he would get some amount of accountability (as opposed to an enormous amount of money) – a hope that was supported by the victim’s testimony (and by the fact that the victim had only asked for \$30,000 when he approached the Archdiocese personally).

In any event, to the extent that the prosecutor’s statement might have been an incorrect statement of Missouri law, any error along those lines was cleared up both by questions posed to the victim on cross-examination and by defense counsel’s closing argument (*see* Tr. 355-356, 621-622). In particular, defense counsel was allowed to argue – over the state’s objection<sup>30</sup> – that the victim’s civil suit had only asked for not less than \$25,000, because, under Missouri rules of procedure, that is the amount that must be stated

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<sup>30</sup> As the court noted, there had been testimony about the \$25,000 threshold (Tr. 355-356).

(and, after that, “the sky is the limit”) (Tr. 621). Thus, the jury would have understood that the victim could have been hoping for and expecting a lot more than \$25,000 (or \$30,000) from his lawsuits. In short, there is no reason to believe that the prosecutor’s misstatement of the civil rules of procedure had any effect upon the outcome of trial. *See generally State v. Smith*, 32 S.W.3d 532, 545-546 (Mo. banc 2000) (alleged ambiguity in the meaning of the phrase “life without parole” was dispelled by defense counsel’s closing argument).

Lastly, appellant argues that the prosecutor misstated the facts with the following:

Now, there’s a lot of surrounding circumstances and issues that were discussed, and that’s why we spent all this time, but all those things are not at hand. One of the things I’ve got to throw out right now, part of that deception to get you off the topic, if any lawsuit is filed he would not pay one dime, not one dime. You were outright deceived on that. Not one dime out his pocket. The Archdiocese was sued.

[DEFENSE COUNSEL]: Objection, Your Honor.  
That is absolutely incorrect.

THE COURT: Retaliatory comments. Overruled.

[THE PROSECUTOR]: Realistic, ladies and gentlemen. He's a priest. How much money – do you think if Lynn's going to ask for money he's like I want to sue him and get his money? No.

(Tr. 627-628).

Appellant argues that the prosecutor's comment was both unsupported by the record and untrue (App.Br. 101). Citing attachments to his motion for new trial, he alleges that he was also personally sued as an individual defendant in each of the lawsuits (App.Br. 101, citing L.F. 169, 172). But while that may be true, it is plain from the prosecutor's closing argument that he was simply arguing, based on a common sense understanding of the world, that appellant would not personally satisfy any judgment obtained against the Archdiocese (even, for that matter, if appellant was also a named defendant). For, as is commonly known, priests generally have very limited personal finances, and larger entities generally have deeper pockets.<sup>31</sup> Thus, the prosecutor was simply arguing a matter of

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<sup>31</sup> There was evidence, incidentally, that appellant did not have unlimited funds; for, as he testified, he could not afford to board two horses at the same time (Tr. 487). Other evidence, on the other

common knowledge.

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hand, indicated that the Archdiocese, at least, had deeper pockets than the victim (Tr. 291-292).

## V.

**The trial court did not plainly err in allowing the state to call Michelle Telle-Capstick and John Rohan in penalty phase, because they were endorsed well before trial, defense counsel learned that they would be testifying the day before they offered testimony, and defense counsel made no objection to their testifying (and did not request a continuance or assert a discovery violation prior to their testifying) (responds to Point VII of appellant's brief).**

Appellant contends that the trial court abused its discretion in allowing Michelle Telle-Capstick and John Rohan to testify in penalty phase (App.Br. 104). He claims that the state failed to timely disclose the witnesses and failed to provide discovery (App.Br. 104).

### **A. Factual Background and Preservation**

On June 3, 2005, a little less than three months before trial, the prosecutor endorsed three witnesses, including Michelle Telle-Capstick and John Rohan as penalty-phase witnesses (L.F. 77). The filing of the endorsement was noted in the docket sheets (L.F. 4). The prosecutor sent a copy of the endorsement to defense counsel, but defense counsel apparently did not receive it (Tr. 637-638).

Appellant's trial commenced on August 29 (Tr. 2). Opening statements were given the next day (Tr. 222). At some point that day, the prosecutor and defense counsel discussed the state's endorsement

of two penalty-phase witnesses (Tr. 637). Defense counsel informed the prosecutor that he had not received the endorsement that the prosecutor had previously filed (Tr. 637).

On the third day of trial, after the jury's verdict of guilt, and immediately before penalty-phase opening statements, defense counsel mentioned the conversation he and the prosecutor had had the previous day (Tr. 637). The prosecutor responded by pointing out that he had filed the endorsement on June 3, 2005, and that he had mailed a copy to defense counsel (Tr. 638). The prosecutor admitted that in April 2005 he had sent something to defense counsel's old mailing address, but he pointed out that in June 2005, he had had the correct address (Tr. 638-639). The prosecutor also admitted, however, that he did not have an independent recollection of which address he had sent the endorsement to (Tr. 638).<sup>32</sup> (The certificate of service only listed defense counsel's name, it did not include defense counsel's address.)

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<sup>32</sup> At sentencing, the prosecutor stated that he was "fairly confident" that he sent the endorsement to the new address, but he again reiterated that he did not have an independent recollection (Sent.Tr. 11).

The trial court noted that the endorsement had been file stamped by the circuit clerk, that it was date stamped June 3, 2005, and that the endorsement also indicated that a copy had been sent to defense counsel (Tr. 639). Thus, in the absence of evidence showing otherwise, the trial court concluded that the state had provided notice (Tr. 639). Defense counsel then noted that the certificate of service on the endorsement did not include his address, and he reiterated that he did not receive the endorsement before trial (Tr. 639).

At no point did defense counsel object to either witness testifying, move to exclude their testimony, or assert that the state had failed to provide adequate discovery (Tr. 637-640). Defense counsel also did not request a continuance or any other relief for the alleged discovery violation (Tr. 637-640). Moreover, defense counsel did not lodge any objection when either witness took the stand (Tr. 641, 665-666). In short, appellant's claim on appeal was not preserved by timely objection at trial. (Though the claim was later included in appellant's motion for new trial (L.F. 134-136).<sup>33</sup> *See State v.*

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<sup>33</sup> It was at that time that appellant argued that the state had failed to provide discovery, including a police report concerning

*Simms*, 131 S.W.3d 811, 816 (Mo.App. W.D. 2004) (no timely objection to alleged discovery violation).

### **B. The Standard of Review**

Under Rule 23.01(e), the court has discretion to permit the late endorsement of any material witness “at any time after notice to the defendant.” Ordinarily, absent an abuse of discretion or prejudice to the appellant, the conviction should not be overturned because a witness was endorsed on the day of trial. *State v. Dowell*, 25 S.W.3d 594, 609-610 (Mo.App. W.D. 2000). A trial court abuses its discretion when a ruling is clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997).

Here, because appellant’s claim was not preserved, review is limited to plain error review. *State v. Simms*, 131 S.W.3d at 816. “Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.”

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John Rohan’s allegations against appellant (*see* L.F. 134-136; Sent.Tr. 10-16).

Rule 30.20. Under this standard, a defendant is not entitled to a new trial unless the plain error was “outcome determinative.” *See Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc 2002). The defendant bears the burden of establishing manifest injustice. *State v. Mayes*, 63 S.W.3d 615, 624 (Mo. banc 2001).

**C. Appellant Has Failed to Show Either Plain Error or Manifest Injustice**

As outlined above, the prosecutor filed the witness endorsement well before trial (L.F. 4, 77). The endorsement was a matter of record, noted in the court’s docket sheets (L.F. 4). Nevertheless, inasmuch as defense counsel apparently did not receive the notice, and inasmuch as it appears that the prosecutor did not provide the defense with the police report of John Rohan’s allegations (*see* Sent.Tr. 15-16),<sup>34</sup> the question is whether these alleged discovery violations resulted in manifest injustice.

“The basic object of the discovery process is to permit the defendant a decent opportunity to prepare in advance of trial and avoid surprise.” *State v. Storey*, 40 S.W.3d 898, 906 (Mo. banc 2001).

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<sup>34</sup> While appellant also alleged that the state failed to produce a report that Ms. Telle-Capstick made to the prosecutor, there is no evidence that any written report was ever made.

When the state seeks a late endorsement, the Court will consider the following: (1) Whether the defendant waived the objection; (2) Whether the state intended surprise or acted deceptively or in bad faith, with the intention to disadvantage the defendant; (3) Whether in fact defendant was surprised and suffered any disadvantage; and (4) Whether the type of testimony given might readily have been contemplated. *Id.* “The main consideration is whether the late disclosure of witnesses resulted in fundamental unfairness or prejudice to substantial rights of the defendant.” *State v. Dowell*, 25 S.W.3d at 610.

Here, a review of these factors reveals that there was no plain error resulting in manifest injustice. First, as outlined above, appellant made no actual objection – either to the late endorsement or lack of discovery – and he did not move to exclude the testimony of the state’s witnesses on the basis of the alleged discovery violations. He also did not request a continuance or any other relief (such as an opportunity to interview the witnesses before their testimony). Second, inasmuch as the endorsement was filed almost three months before trial (and inasmuch as the state attempted to send notice of the endorsement to defense counsel), it is apparent that the state did not intend surprise, and that the state did not act deceptively or in

bad faith, with the intention to disadvantage appellant. Third, while there might have been some surprise over Ms. Telle-Capstick, it is apparent that there should not have been any surprise over Mr. Rohan. Moreover, the testimony of these witnesses (or like testimony) should have been readily contemplated, and it does not appear that appellant suffered any real disadvantage.

That appellant should have contemplated Mr. Rohan specifically (or others like him) is apparent from the police report that appellant included with his motion for new trial.<sup>35</sup> In that report, the officer indicated that he had been contacted by Chris Goetke (defense counsel at appellant's trial), that (on another occasion) he attempted to contact appellant about Mr. Rohan's allegations, and that he received a return telephone call from defense counsel (L.F. 185, 187-188). Defense counsel apparently indicated that he and appellant had discussed the matter, and that they were not inclined to do an interview (L.F. 188). Thus, it is apparent that defense

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<sup>35</sup> That the defense knew that such evidence was extant is also shown by their pre-trial motion to exclude "[a]ny reference to any allegations made against defendant by anyone other than Lynn Woolfolk" (L.F. 98).

counsel knew that Mr. Rohan had made allegations against appellant (indeed, defense counsel never suggested otherwise; rather, he simply pointed out that he had never actually received the police report before trial (*see* Sent.Tr. 13-15)).

Additionally, appellant has failed to prove manifest injustice. From the lack of any actual objection, it is apparent that defense counsel was neither surprised that such witnesses were forthcoming nor unready to confront them. Indeed, if counsel had been surprised and unready, it seems evident that he would have raised the issue immediately upon learning about it (instead of waiting until after the verdict the next day), that he would have requested a short continuance, or, at the least, that he would have requested an opportunity to interview the witnesses before they took the stand. “Failure to seek a continuance leads to the inference that the late endorsement was not damaging to the complaining party.” *State v. Hutchison*, 957 S.W.2d 757, 764 (Mo. banc 1997); *see also Moss v. State*, 10 S.W.3d 508, 515 (Mo. banc 2000) (the defendant did not request a continuance; thus, the Court found that the state had not intended surprise and that the defendant was not, in fact, surprised or disadvantaged).

Appellant has also failed to prove that additional time would

have produced anything of consequence for the defense. With regard to Ms. Telle-Capstick, appellant points out that earlier notice would have allowed him to depose her and then “move[] to exclude her testimony as lacking any indicia of reliability whatsoever” (App.Br. 110). But any lack of reliability that appellant saw in her testimony would have gone merely to the weight and not admissibility of her testimony. Thus, it is not apparent that he could have had her testimony excluded, or that counsel would have accomplished anything more than he was able to accomplish on cross-examination of Ms. Telle-Capstick. *See State v. Storey*, 40 S.W.3d at 907 (“Where counsel is surprised by opposing evidence at trial, but deals with that evidence in precisely the same manner as if he had been fully prepared, there is no reason to exclude that evidence, however significant, based on a discovery violation.”). Moreover, if Ms. Telle-Capstick’s testimony was so lacking in reliability, it seems that its admission would have simply undermined the state’s case.

With regard to Mr. Rohan, appellant argues that production of the police report would have provided investigative leads. In particular, he points out that he could have attempted to impeach Mr. Rohan’s testimony that he had told his father about the abuse (App.Br. 110). Appellant asserts that Mr. Rohan’s father “denied any

knowledge of a claim that [appellant] abused Rohan” (App.Br. 110, citing L.F. 185). But, in fact, Mr. Rohan’s father simply indicated that while he “remembered his son . . . going horseback riding with [appellant, he did] not remember the victim saying anything about [appellant] sexually abusing him” (L.F. 185). Appellant did not produce any testimony from Mr. Rohan’s father at the hearing on the motion for new trial, but even if he had, it is not apparent that such testimony would have aided the defense in any meaningful fashion.

Moreover, if appellant had attempted to use the police report to impeach this aspect of Mr. Rohan’s testimony, it could have opened the door to other information from the report, namely, that Mr. Rohan’s mother did recall her son “crying and plead[ing] with her not to make him go with [appellant],” because appellant made him sit on his lap (L.F. 186). Additionally, while Mr. Rohan’s father apparently told the officer that he did not recall the incident, Mr. Rohan’s mother stated that Mr. Rohan’s father was “lying and knows all about the incident” (L.F. 186).

Appellant also points out that the police report contained the results of Mr. Rohan’s polygraph examination – results that indicted the possibility of deception (App.Br. 110, citing L.F. 187). But, as

appellant essentially acknowledges, such evidence would not have been admissible (App.Br. 110).<sup>36</sup> And, while appellant makes the bald assertion that the polygraph results “could well have led to discovery of impeachment evidence,” such a speculative possibility does not rise to the level of proving manifest injustice. *See State v. Tisius*, 92 S.W.3d 751, 762 (Mo. banc 2002) (“Bare assertions of prejudice are not sufficient to establish fundamental unfairness”).

Finally, while appellant argues that earlier notice of the endorsement might have led him to waive jury sentencing,<sup>37</sup> such a

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<sup>36</sup> It should be noted that the polygraph examiner also indicated that Mr. Rohan’s explanation for his “heightened physiological response” was plausible (L.F. 187).

<sup>37</sup> Appellant alleges that he wanted to waive jury sentencing upon learning about the state’s witnesses, but the record does not reveal precisely when this request was made. In any event, it certainly did not occur prior to voir dire, as required by § 557.036.4.(1), RSMo Cum. Supp. 2005. *See State v. Weaver*, 178 S.W.3d 545, 548 (Mo.App. W.D. 2005) (“The defendant’s request for the judge to determine his punishment was neither in writing nor prior to voir dire. His oral request took place after the prosecutor’s opening statement. As a result, the trial judge should have denied

claim cannot establish that he suffered a manifest injustice. There is simply no reason to believe that the judge (who ultimately imposed the sentence recommended by the jury) would have imposed a lesser sentence. It is of course within the realm of *possibility* that a different sentencer *might* have made a different determination, but that speculative possibility of a different result falls short of proving manifest injustice. *See generally Strickland v. Washington*, 466 U.S. 668, 694-695 (1984) (“The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.”). Manifest injustice requires a showing of outcome-determinative error, a showing that is more demanding than that imposed by *Strickland*. *See Deck v. State*, 68 S.W.3d at 427-428.

In sum, it is apparent that the state did not intend to surprise or deceive the defense to the disadvantage of appellant. And inasmuch as appellant did not object, move to exclude the testimony of the

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Weaver's request since it was untimely and not in writing. Section 557.036.4(1).”).

witnesses, or request a continuance, it is apparent that there was neither substantial surprise nor real disadvantage to the defense in this case. This point should be denied.

## VI.

**Because the state was entitled to a rebuttal argument in the penalty phase, and because appellant was not unfairly surprised by the state's argument (and inasmuch as there was no manifest injustice in allowing rebuttal), the trial court did not plainly err in allowing the prosecutor to make a rebuttal closing argument in penalty phase (responds to Point VIII of appellant's brief).**

Appellant contends that the trial court erred in allowing the prosecutor to give a rebuttal closing argument after the prosecutor "waived" rebuttal (App.Br. 112). He argues that he would not have urged the jury to impose a two-year sentence if he had known the prosecutor would respond by arguing for twenty-five years, a specific term of years that the state had not previously mentioned (App.Br. 113).

### **A. Preservation and the Standard of Review**

After the penalty-phase instructions conference, the trial court asked how much time the parties wanted for closing argument. There was brief discussion:

[THE PROSECUTOR]: I don't anticipate being very long, but I didn't know if there was going to a limit on it. I just figure it to be a few minutes, so. The last

one I did when the judge didn't give us a time limit because he just said you're only going to speak for a few minutes and that's what we did. However you want to work it.

[DEFENSE COUNSEL]: That's fine, Judge.

THE COURT: Do you need to split time or do you want to waive that portion of it and just make your argument and let him make his argument.

[THE PROSECUTOR]: That's fine.

THE COURT: All right. That will be fine.

(Tr. 717). Appellant asserts that this constituted a waiver of rebuttal closing argument by the prosecutor, but subsequent events suggest that this informal discussion was not viewed as a waiver by the parties.

At the conclusion of defense counsel's closing argument, the trial court asked the prosecutor, "Would you like a minute to respond?" (Tr. 724). The prosecutor accepted the invitation, and defense counsel made no objection (Tr. 724). If the previous discussion had been considered a waiver, its unlikely that the trial court would have invited the prosecutor to respond; and, moreover, if the defense strategy had rested in any significant fashion on the

existence of a previous waiver, it seems likely that there would have been an objection.

In any event, because there was no objection, this claim can only be reviewed, if at all, for plain error. To prevail on plain error review, appellant must show that the trial court's error so substantially violated his rights that manifest injustice or a miscarriage of justice results if the error is not corrected. *State v. Sanchez*, 186 S.W.3d 260, 265 (Mo. banc 2006). "Plain error will seldom be found in unobjected to closing argument." *Id.*

Indeed, "[i]t is well settled that relief should be rarely granted on assertion of plain error to matters contained in closing argument, for trial strategy looms as an important consideration and such assertions are generally denied without explanation." *Id.* "Such situations rarely merit plain error review because in the absence of objection and request for relief, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention." *Id.*

**B. Allowing the Prosecutor to Give a Rebuttal Closing Argument in Penalty Phase Was Proper and Did Not Result in Manifest Injustice**

"A trial court maintains broad discretion in the control of closing arguments." *State v. Forrest*, 183 S.W.3d 218, 226 (Mo. banc

2006). And, here, it was within the trial court's discretion to allow a rebuttal closing argument. Indeed, inasmuch as rebuttal argument in penalty phase is specifically authorized by § 557.036, RSMo Cum. Supp. 2005 ("the state shall have the right to open and close the argument"), the trial court properly determined whether the state would like the opportunity to respond.

Citing *State v. Peterson*, 423 S.W.2d 825 (Mo. 1968), and *State v. Maxie*, 513 S.W.2d 338 (Mo. 1974), appellant points out that "the State has an obligation to give fair notice in closing argument of its position on punishment so that the defense has a reasonable opportunity to respond" (App.Br. 113). But appellant's reliance on these cases is misplaced for two reasons.

First, these cases did not involve penalty-phase closing arguments in a bifurcated trial; rather, they involved closing arguments in cases where both guilt and punishment were being submitted to the jury at the same time. Accordingly, it was important for the state to discuss punishment in the first half of closing argument to give the defense a chance to determine whether it would discuss punishment at all. *See State v. Peterson*, 423 S.W.2d at 830 (in the absence of the state's arguing the issue of punishment, "it is perfectly obvious that it would have been rather foolish for defense

counsel to have initiated any argument concerning punishment, for he might thereby have been considered to be admitting defendant's guilt, at least by implication”). In the case at bar, however, punishment was the *only* issue being discussed in the penalty phase; thus, appellant must have known that the state could elaborate in rebuttal upon its opening argument.

Second, contrary to appellant’s claim that the prosecutor did not indicate in opening argument the state’s position regarding an appropriate punishment, the record shows that the prosecutor strongly urged the jury to impose a lengthy sentence commensurate with the suffering that appellant had inflicted on the victim:

You heard through the course of this trial how Lynn Woolfolk was affected, how it affected him ten years worth of counseling based on the type of things that he had to go through

\* \* \*

Well, what this case involves are those few people that had that trust viciously betrayed, horribly betrayed, and as I told you in the first half of this case, and you can consider all of that, this is a betrayal of trust. And think about that when you are going back to decide the

appropriate punishment in this case.

You have a range of punishment on the low end two years or any number of years up to life imprisonment. And you are the voice of the community today, and you are going to tell us what the most appropriate punishment is going to be for this case, and when you are talking about that punishment, remember Mr. Woolfolk and remember the other witnesses that you heard testify, and remember, I'm going to point out in particular one, Mr. Rohan.

That, you had an opportunity to see the impact, the impact that he can have on a person's life . . . . I'm talking about the impact of those people whose trust was violated.

The people who relied on their spiritual advisor, who relied on their faith only to have that faith turned around and viciously used against them. *This is not a slap on the wrist type of case, ladies and gentlemen. This is a case of a serious nature and we can see it's a case of long term consequences, and you've heard from people who are suffering from this long term consequence who have been suffering with this for 30, 40 years. Thirty, 40 years Lynn Woolfolk has had to put up with this.*

Ladies and gentlemen, again, *I ask you, look closely at the betrayal*

*of trust and how it has impacted people and tell us what you feel is the appropriate punishment for that.*

(Tr. 718-720).

As is evident, while the prosecutor did not mention the exact term of years that he thought was appropriate, he certainly made plain the state's position: that appellant's crime was severe, that it deserved much more than a "slap on the wrist," and that it should be punished in a manner commensurate with the long-term damage that it had inflicted. In short, the defense was adequately apprized of the fact that the state was, and would continue to argue for, a severe penalty that involved decades of punishment.

Lastly, even if the trial court should not have allowed rebuttal, appellant cannot show that the prosecutor's comment resulted in manifest injustice. The jury's recommended sentence of twenty years was less than the twenty-five years the prosecutor suggested (Tr. 725)), and it reflected a punishment commensurate with the seriousness of the crime and the long-term damage suffered by the victim. Moreover, the jury's recommendation was further supported by the evidence of appellant's repeated sexual misconduct with two other children (*see* Tr. 645-646, 668-670). In short, the jury recommended an appropriate individualized sentence, and it is sheer

speculation to suggest that it would have been any different if the prosecutor had not been allowed rebuttal (or if defense counsel had not specifically asked for two years and had argued the issue in some other unspecified fashion). This point should be denied.

## **CONCLUSION**

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

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify:

(1) That the attached brief complies with the limitations contained in this Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, the signature block, and appendix, contains 26,644 words (as determined by WordPerfect 9 software);

(2) That the floppy disk filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That two true and correct copies of the brief, and a copy of the floppy disk containing a copy of the brief, were mailed, postage prepaid, this \_\_\_\_\_ day of August, 2006, to:

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