

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,)
)
 Respondent,)
)
 vs.) No. ED 91188
)
WILLIAM HOLDEN,)
)
 Appellant.)

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF MARION COUNTY, MISSOURI
TENTH JUDICIAL CIRCUIT, DISTRICT II
THE HONORABLE ROBERT M. CLAYTON, II, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

Irene Karns, MoBar #36588
Attorney for Appellant
Woodrail Centre
1000 West Nifong
Bldg. 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 882-9855
FAX (573) 884-4793
irene.karns@mspd.mo.gov

INDEX

	<u>Page</u>
TABLE OF AUTHORITIES.....	2
JURISDICTIONAL STATEMENT	4
STATEMENT OF FACTS.....	5
POINTS RELIED ON.....	9
ARGUMENT.....	13
CONCLUSION	34
CERTIFICATE OF SERVICE & COMPLIANCE	35
APPENDIX.....	36

TABLE OF AUTHORITIES

CASES:

	<u>Page</u>
Anderson v. State , 196 S.W.3d 28 (Mo. banc 2006)	20
Brady v. Maryland , 373 U.S. 83 (1963)	18, 22
Doe v. Blunt , 225 S.W.3d 421 (Mo. banc 2007).....	16, 17, 34
Doe v. Phillips , 194 S.W.3d 833 (Mo. banc 2006)	15, 16, 17
Lisenba v. California , 314 U.S. 219 (1961).....	26, 33
State v. Bernard , 849 S.W.2d 10 (Mo. banc 1993) <i>overruled on other grounds by State v. Vorhees</i> , 248 S.W.3d 585 (Mo. banc 2008). 24, 32	
State v. Burns , 978 S.W.2d 759 (Mo. banc 1998).....	24
State v. Hudson , 230 S.W.3d 665 (Mo. App., E.D. 2007)	28
State v. Jones , 128 S.W.3d 110 (Mo. App., E.D. 2003)	19
State v. Parker , 198 S.W.3d 178 (Mo. App., W.D. 2006)	22
State v. Salter , 250 S.W.3d 705 (Mo. banc 2008).....	29
State v. Smith , 181 S.W.3d 634 (Mo. App., E.D. 2006).....	18
State v. Taylor , 663 S.W.2d 235 (Mo. banc 1984)	26, 33
State v. Tisius , 92 S.W.3d 751 (Mo. banc 2002).....	32
Weems v. Montgomery , 126 S.W.3d 479 (Mo. App., W.D. 2004).....	14

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment VI..... 23, 28

United States Constitution, Amendment XIV 13, 18, 23, 27, 28, 33

Missouri Constitution, Article I, Section 10 13, 18, 23

Missouri Constitution, Article I, Section 13 15

Missouri Constitution, Article I, Section 18(a)..... 23, 28

STATUTES:

§566.614, RSMo Cum. Supp. 1994..... 13

§589.400, RSMo Cum. Supp. 2006..... 13

§589.414, RSMo Cum. Supp. 2006..... 13, 15, 34

MISSOURI SUPREME COURT RULES:

Rule 25.03..... 19

Rule 29.11..... 14, 24

Rule 30.20..... 29

OTHER:

MAI-CR3d 320.41 25, 30

JURISDICTIONAL STATEMENT

William Holden appeals from his conviction for failing to advise the sheriff of a change of residence within ten days, Section 589.414, RSMo Cum. Supp. 2006,¹ after a jury trial in Marion County. The Honorable Robert M. Clayton, II, sentenced Mr. Holden to a term of four years imprisonment. Mr. Holden has filed a motion with his brief asking the Court to transfer this case to the Missouri Supreme Court because it presents a question of the constitutionality of a statute. Article V., Section 3, Mo. Const. (as amended 1982). Should that motion be denied, jurisdiction lies in this Court. Article V, Section 3, Mo. Const. (as amended 1982); Section 477.050, RSMo 2000.

¹ All references will be to RSMo Cum. Supp. 2006 unless otherwise noted.

STATEMENT OF FACTS

Marion County charged William Holden, appellant, with failure to register as a sex offender within ten days after moving into Marion County, Section 589.400,² in that on or about July 24, 2007, he established residence in Marion County without advising the sheriff's department (L.F. 47-48).³ Mr. Holden moved before trial to dismiss the charge because the statute was unconstitutionally retrospective as applied to him (L.F. 21-23). The trial court overruled the motion in January of 2008 (Tr. 11-12).

The cause was heard March 13, 2008, before the Honorable Robert M. Clayton, II (Tr. 17). Judge Clayton overruled the motion to dismiss again just before trial (L.F. 73-75, Tr. 16-18).

Mr. Holden testified that he registered as a sex offender when he moved to Hannibal in 2001 (Tr. 154). Sometime after that he moved into the basement of a residence at 2815 Marion Street (Tr. 155). He lived there

² The jury found Mr. Holden guilty of failing to notify the sheriff's office within ten days of changing residences, §589.414.1 (L.F. 61, 69).

³ The record on appeal consists of a transcript of trial (Tr.), legal file (L.F.), and transcript of sentencing (Sent. Tr.).

for six and a half years (Tr. 156). There was an open septic tank in the basement that overflowed from time to time and made him very sick (Tr. 158). The tank, which was about six feet from Mr. Holden's bed, had to be pumped out five times between January 2005 and October 2007 (Tr. 149).

On July 13, 2007, a church group helped Mr. Holden move away from the Marion Street house to 725 Bridge Street, where he stayed for several weeks (Tr. 159-160, 166, 169, 171). After leaving the Bridge Street house, Mr. Holden lived near the river in his car (Tr. 160).

One day Mr. Holden was going through some of his personal papers and realized it would soon be time to register as a sex offender, as required every 90 days (Tr. 120, 161-163). The last time he had registered was the end of May 2007 (Tr. 162-163).

Near the end of August, Mr. Holden called Janice Stewart at the Marion County Sheriff's office to explain that he was living out of his car and to arrange to register by the end of the month (Tr. 163). Ms. Stewart advised Mr. Holden that he was supposed to have registered his change of address within ten days after leaving his former residence on Marion Street, and told him to come into the office several days later (Tr. 163-164).

The next day, Mr. Holden talked with Detective Webb of the sheriff's

office, who repeated Ms. Stewart's advice of the ten-day requirement (Tr. 164).

Mr. Holden gave a written statement at the sheriff's office, advising that he had moved from 2815 Marion Street to 725 Bridge Street more than a month before because of unsanitary conditions at the Marion Street house (Tr. 126). He was arrested and taken into custody (Tr. 117).

Mr. Holden recalled that he had been registering every 90 days for almost seven years (Tr. 165-166). He had never reported a change of address within ten days in connection with his previous moves (Tr. 166, 168). He acknowledged that both the form he originally completed in 2001 and the last one he completed, in May 2007, had 10-day requirements written on them (Tr. 164-165). He testified that he had not noticed and did not know anything about the ten-day requirement until Ms. Stewart advised him of it (Tr. 165).

Lisa Jones of the Marion County Sheriff's office registered Mr. Holden as a sex offender in May of 2001 (Tr. 111, State's Exhibit 1). Counsel objected to the admission of Exhibit 1, arguing that it should be redacted to remove reference to the victim's age as five years (Tr. 111-112).

Janice Stewart currently takes care of the registration of sex offenders in the sheriff's office (Tr. 114). Ms. Stewart recalled that Mr. Holden signed a registration form on May 29 of 2007 (Tr. 117). The form contained advice of the requirement to advise of any change in address within ten days, and Mr. Holden initialed it (Tr. 117). Ms. Stewart did not hear from him again until he called on August 22nd (Tr. 117-118). She did not know that he had changed residences since registering in May (Tr. 118).

The jury found Mr. Holden guilty of failing to register within ten days after changing his residence (Tr. 207, L.F. 61, 69). Counsel filed a motion for reconsideration of the motion to dismiss before the hearing on the motion for new trial (L.F. 73-76). In the amended motion for new trial, defense counsel alleged a discovery violation in the State's failure to disclose twenty-three registration forms (L.F. 92-95). Judge Clayton overruled the motion for new trial and sentenced Mr. Holden to a term of four years imprisonment, subject to review for probation in 120 days under § 559.115 (Sent. Tr. 27, L.F. 97). Notice of appeal was timely filed (L.F. 99-103).

POINTS RELIED ON

I.

The trial court erred in denying Mr. Holden's motion to dismiss based on the unconstitutionality of §589.414 as applied to him, in violation of his right to due process as assured by the Fourteenth Amendment to the United States Constitution and Article I, §10 of the Missouri Constitution, because Section 589.414 is unconstitutionally retrospective as applied in this case in that the offenses underlying Mr. Holden's March 1995 plea to sodomy of a child under fourteen occurred in April 1994, before the requirement to register became effective.

Doe v. Blunt, 225 S.W.3d 421 (Mo. banc 2007);

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006);

Weems v. Montgomery, 126 S.W.3d 479 (Mo. App., W.D. 2004);

United States Constitution, Amendment XIV;

Missouri Constitution, Article I, §10;

§566.614, RSMo Cum. Supp. 1994;

§§589.400 and 589.414, RSMo Cum. Supp. 2006; and

Rule 29.11.

II.

The trial court abused its discretion in overruling Mr. Holden's motion for a new trial, in violation of his constitutional right to due process under the Fourteenth Amendment to the United States Constitution and Article I, §10 of the Missouri Constitution, because the State failed to disclose favorable and material information, registration forms covering six years, which were required to be disclosed under Rule 25.03(c) and Brady v. Maryland, 373 U.S. 83 (1963). The forms were material and exculpatory because the defense was that Mr. Holden did not knowingly violate the ten-day notice provision, and twenty of the twenty-three forms did not list the requirement.

Brady v. Maryland, 373 U.S. 83 (1963);

State v. Jones, 128 S.W.3d 110 (Mo. App., E.D. 2003);

Anderson v. State, 196 S.W.3d 28 (Mo. banc 2006);

Lisenba v. California, 314 U.S. 219 (1961);

United States Constitution, Amendments VI and XIV;

Missouri Constitution, Article I, §§10 and 18(a);

Rules 25.03 and 29.11.

III.

The trial court abused its discretion in admitting State's Exhibit 1, Mr. Holden's initial registration, without redacting information that the victim was only five years old, in violation of his right to due process and a fair trial as assured by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, because that evidence was legally irrelevant in that it was more prejudicial than probative since State's Exhibit 5, the judgment and sentence from the underlying sexual offense, was adequate to show that the victim was under fourteen as required.

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

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

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

Lisenba v. California, 314 U.S. 219 (1961);

United States Constitution, Amendments VI and XIV;

Missouri Constitution, Article I, §§10 and 18(a);

Section 589.414, RSMo Cum. Supp. 2006; and

Rule 29.11.

IV.

The trial court plainly erred in permitting the State to ask Mr. Holden if he had been convicted of sodomizing a five-year-old girl, in violation of his right to due process and a fair trial as assured by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, because the testimony was legally irrelevant in that it was more prejudicial than probative, since the State had already established that Mr. Holden was convicted of sodomy of a child under fourteen in 1995, which was all that the State was required to prove on the matter of a prior conviction for a sexual offense.

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

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

State v. Tisius, 92 S.W.3d 751 (Mo. banc 2002);

State v. Salter, 250 S.W.3d 705 (Mo. banc 2008);

United States Constitution, Amendments VI and XIV;

Missouri Constitution, Article I, §§10 and 18(a); and

Rule 30.20.

ARGUMENT

I.

The trial court erred in denying Mr. Holden's motion to dismiss based on the unconstitutionality of §589.414 as applied to him, in violation of Mr. Holden's right to due process as assured by the Fourteenth Amendment to the United States Constitution and Article I, §10 of the Missouri Constitution, because Section 589.414 is unconstitutionally retrospective as applied in this case in that the offenses underlying Mr. Holden's March 1995 plea to sodomy of a child under fourteen occurred in April 1994, before the requirement to register became effective.

Mr. Holden was charged by amended information with failing to register as a sex offender within ten days after moving into Marion County, §589.400.2 (L.F. 47-48). The jury found him guilty of failing to register his change of address within ten days of changing residences §589.414.1 (L.F. 61, 69). Section 566.614, RSMo Cum. Supp. 1994, the predecessor of §589.414's requirement that a sex offender notify the sheriff's office of any change in residence within ten days, became effective on January 1, 1995.

On January 7, 2008, defense counsel argued a motion to dismiss based on the fact that the offenses underlying Mr. Holden's 1995 plea occurred in April of 1994,⁴ thus the registration requirement was retrospective as applied to him (L.F. 21-23, Tr. 11-12). The Honorable Robert M. Clayton II overruled the motion (Tr. 12).

The cause was tried March 13, 2008, before Judge Clayton (L.F. 2, 70-72). Counsel argued the motion again before trial began (L.F. 73-76, Tr. 17-18). Judge Clayton again overruled the motion (Tr. 19). Counsel filed a motion to reconsider the motion to dismiss before the hearing on the motion for new trial (L.F. 73-76), and the issue is included in the motion for new trial (L.F. 85-88). This Court reviews the denial of a motion to dismiss *de novo*. **Weems v. Montgomery**, 126 S.W.3d 479, 484 (Mo. App., W.D. 2004). The claim of unconstitutionality was before the trial court and is preserved for review. **Rule 29.11.**

The registration of a new address within ten days requirement became effective on January 1, 1995. Mr. Holden was convicted of two

⁴ State's Exhibit 5 shows these dates and is filed with the Court; a copy is included in the appendix to this brief.

counts of sodomy of a child under fourteen years of age on March 7, 1995 (See State's Exhibit 5). However, the offenses occurred in April of 1994 (State's Exhibit 5). Because his offenses occurred before the effective date of the statute, application of §589.414 to Mr. Holden is unconstitutionally retrospective.

Article I, Section 13 of the Missouri Constitution forbids the enactment of any law that is retrospective in its operation. A retrospective law is one which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. **Doe v. Phillips**, 194 S.W.3d 833, 850 (Mo. banc 2006) (*citation omitted.*) It must give to something already done a different effect from that which it had when it transpired. *Id.*

In **Phillips**, the Missouri Supreme Court found the registration and notification requirements of Megan's Law, §§589.400 to 589.425, to be unconstitutional when applied to persons who pleaded guilty or were found guilty before the January 1, 1995, the effective date of the Law, because the law operated retrospectively in imposing an obligation to register on that group of persons. 194 S.W.3d at 852.

In **Doe v. Blunt**, 225 S.W.3d 421 (Mo. banc 2007), Doe challenged the applicability of the registration requirement as applied to him because the offense to which he pled was not listed among those that imposed a duty to register when he pled guilty. **Blunt**, 225 S.W.3d at 422. Doe pled guilty to the offense of public display of explicit sexual materials in May 2004. *Id.* In August of 2004, the law changed so that persons convicted of that offense had to register as sex offenders. *Id.* In finding that the law was unconstitutionally retrospective as applied to Doe, the Court summarized: “In Phillips, the Court determined that a law requiring registration as a sex offender *for an offense* that occurred prior to the registration law’s effective date was retrospective in operation in violation of Mo. Const. article I, section 13.” *Id.* (emphasis added.)

This language indicates the Court’s intention to extend the prohibition against applying the statute retrospectively to those whose offenses predate the effective date of the statute in addition to those who were convicted before the effective date.

The requirement that a sex offender register a change of address within ten days of moving became effective on January 1, 1995. Mr. Holden’s offense in April of 1994 predated the effective date of the statute.

In light of the Supreme Court's summary of **Phillips** in **Blunt**, §589.414 is unconstitutional as applied to Mr. Holden because it operated retrospectively to impose the obligation to inform the sheriff within ten days of a change of residence.

Because Mr. Holden's case challenges the constitutionality of a statute as applied, this Court should transfer the cause to the Missouri Supreme Court. Should it decline to transfer the cause, Mr. Holden requests that this Court follow **Blunt** and rule that the statute was unconstitutional as applied to Mr. Holden, reverse his conviction, and order his discharge.

II.

The trial court abused its discretion in overruling Mr. Holden's motion for a new trial, in violation of his constitutional right to due process under the Fourteenth Amendment to the United States Constitution and Article I, §10 of the Missouri Constitution, because the State failed to disclose favorable and material information, registration forms covering six years, which were required to be disclosed under Rule 25.03(c) and *Brady v. Maryland*, 373 U.S. 83 (1963). The forms were material and exculpatory because the defense was that Mr. Holden did not knowingly violate the ten-day notice provision, and twenty of the twenty-three forms did not list the requirement.

The decision of whether to grant a new trial is left to the sound discretion of the trial court. *State v. Smith*, 181 S.W.3d 634, 638 (Mo. App., E.D. 2006). The trial court abuses its discretion only when its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id.*

At trial, the State introduced registration forms dated May 1, 2001 and May 27, 2007, State's Exhibits 1 and 2, which Mr. Holden signed or initialed to acknowledge the requirement that he register a new address within ten days of moving.⁵ But twenty-three registration forms covering the period from May 2001 to August 2007, in the possession of the sheriff's department, were not disclosed to the defense (Sent. Tr. 8-9) (Defendant's Exhibit A) (amended motion for new trial, L.F. 92-95). Twenty of these twenty-three forms did not have notice of the ten-day requirement (see Defendant's Exhibit A, L.F. 92-95). The court denied the claim of a discovery violation, finding that the lack of notice on the forms did not mean that the ten-day requirement did not exist at the time Mr. Holden signed them (Sent. Tr. 12).

The purpose of discovery is to give the parties an opportunity to prepare in advance of trial and to avoid surprise. **State v. Jones**, 128 S.W.3d 110, 112 (Mo. App., E.D. 2003). Counsel filed a request for discovery pursuant to Rule 25.03 on November 5, 2007 (L.F. 15-16).

⁵ State's exhibits 1, 2, and Defendant's exhibit A are filed with this brief; copies are in the appendix.

Included in the motion was a request for “Any material or information within the possession or control of the State or its agents which tends to negate the guilt of the defendant as charged, mitigate the degree of the offense charged, or reduce punishment (L.F. 16).

Under **Brady v. Maryland**, 373 U.S. 83 (1963), suppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Evidence is material where there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. **Anderson v. State**, 196 S.W.3d 28, 36 (Mo. banc 2006).

The two registration forms admitted at trial, Exhibits 1 and 2, showed Mr. Holden’s initials beside the requirement to register a change of address within ten days. The prosecutor cross-examined Mr. Holden about the “fact” that he had been signing forms showing the requirement continuously from May of 2001 to May of 2007.

Q. The ten day notification was on every form that you signed for six years, wasn’t it?

A. As far as everybody tells me. There's a different form that doesn't have all that on there.

Q. Okay, how many –

A. And I saw that most of the time

(Tr. 168). The twenty forms without notice of the ten-day requirement shown in Defendant's Exhibit A at the motion for new trial were the "different forms" to which Mr. Holden alluded.

In closing, the prosecutor argued that Mr. Holden had been signing forms that advised of the ten-day requirement continuously over seven years. "Time after time after time he signs the forms, he initials that he knows, but today he wants to say, "Well, I didn't know that I had to notify somebody in ten days." (Tr. 182) and "[E]ven though all the other forms – you know, his signature is that far from where it tells him he has to register within ten days of moving. That far. Since 2001." (Tr. 191).

Mr. Holden's defense was that he was not aware of the ten-day requirement (Tr. 184-191). Forms covering the six years of his registration that did not exhibit the requirement would have militated against the

prosecutor's argument that Mr. Holden had to have known because all of the forms he signed over the years informed him of the obligation. These forms showed otherwise. Evidence that provides the defendant with plausible and persuasive support for his theory of innocence is material under **Brady**. **State v. Parker**, 198 S.W.3d 178, 180 (Mo. App., W.D. 2006).

The jury struggled in coming to a verdict. They were out three hours on a trial with about two hours of evidence (Tr. 193, 196, 199, 207). If the jurors knew how few of the registration forms over the years noted the ten-day obligation, Mr. Holden's defense that he did not know of the requirement would have been considerably stronger, and there is a reasonable probability that the outcome of trial would have been different. Because the trial court abused its discretion in not granting Mr. Holden a new trial based on the non-disclosed registration forms, this Court should reverse his conviction and remand for a new trial.

III.

The trial court abused its discretion in admitting State's Exhibit 1, Mr. Holden's initial registration, without redacting information that the victim was only five years old, in violation of his right to due process and a fair trial as assured by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, because that evidence was legally irrelevant in that it was more prejudicial than probative since State's Exhibit 5, the judgment and sentence from the underlying sexual offense, was adequate to show that the victim was under fourteen as required.

Defense counsel argued before trial began that Mr. Holden's original registration form, Exhibit 1, should be redacted to remove language on the form that the victim was five years old, since the State need prove only that the victim was less than fourteen, and that could be done with the exhibit that was prepared to prove his prior conviction⁶ (Tr. 22-23). Counsel objected when the form was admitted (Tr. 111-112). The issue was

⁶ Exhibit 5 was composed in part to exclude a reference to the victim being five years old (Tr. 24-25).

included in the motion for new trial (L.F. 88), and thus is preserved for review by this Court. **Rule 29.11.**

Balancing the effect and value of evidence rests within the sound discretion of the trial court. **State v. Bernard**, 849 S.W.2d 10, 13 (Mo. banc 1993) (*overruled on other grounds by State v. Vorhees*, 248 S.W.3d 585 (Mo. banc 2008)). Although the trial court has broad discretion in the admission of evidence, evidence must be legally relevant as well as logically relevant. *Id.* Evidence is logically relevant when it has some legitimate tendency to establish clearly the defendant's guilt for the crime charged, and is legally relevant when its probative value outweighs the prejudicial effect. **State v. Burns**, 978 S.W.2d 759, 760 (Mo. banc 1998).

The verdict director set out what the State was required to prove.

INSTRUCTION NO. 5

If you find and believe from the evidence beyond a reasonable doubt:

First, that the defendant pleaded guilty to sodomy committed on

Crystal Doyle on April 26, 1994, in the Circuit Court of the city

of St. Louis, State of Missouri, on March 7, 1995, and

Second, that at the time of this offense, Crystal Doyle was under the

age of fourteen years, and,

Third, that defendant registered as a sex offender on May 7, 2001, and

Fourth, that between May 29, 2007 and July 13, 2007, defendant

moved his residence from 2815 Marion Street, City of Hannibal,

Township of Mason, County of Marion, State of Missouri, and,

Fifth, that on or about July 24, 2007, in the City of Hannibal, County

of Marion, State of Missouri, defendant failed to notify Marion

County Sheriff's Department within ten days of his change of

residence, and,

Sixth, that the defendant failed to notify the Marion County Sheriff's

Department in writing, and ,

Seventh, that the defendant acted knowingly with respect to the facts

and conduct submitted in this instruction,

then you will find the defendant guilty of failing to register change of

residence.

However, unless you find and believe from the evidence beyond a

reasonable doubt each and all of the propositions, you must find the

defendant not guilty of the offense.

MAI-CR 3D 320.41

Tendered by the State

(L.F. 61).

Instruction 5 required the State to prove that Mr. Holden pleaded guilty to the offense of sodomy committed on Crystal Doyle, a child of less than fourteen years of age, in 1995 (L.F. 61). Evidence that the victim was five years old, as opposed to less than fourteen years old as shown on State's Exhibit 5, had no probative value. The State had to prove only that the victim was less than fourteen years of age, a fact established by State's Exhibit 5.⁷

On the other hand, the prejudicial effect of the evidence was great. Knowledge that the victim was so young, as opposed to being less than fourteen, served only to distract the jurors and inflame their passions. Thus evidence that the victim was five years old was legally irrelevant.

Evidence that tends to unnecessarily divert the jury's attention from the question before it is more prejudicial than probative and should be excluded. **State v. Taylor**, 663 S.W.2d 235, 239 (Mo. banc 1984). It was not

⁷ Although Exhibit 5 had not been admitted at the time Exhibit 1 was, the State was aware that it contained all of the information required by the verdict director (Tr. 24-25).

necessary to show that the victim was five years old, and doing so diverted the jury's attention from the question of whether Mr. Holden knowingly failed to timely advise the sheriff's office of his change of address.

When a state court admits evidence that renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment to the United States Constitution provides a mechanism for relief. **Lisenba v. California**, 314 U.S. 219 (1961). The trial court erred in admitting the unredacted copy of Mr. Holden's first registration form. This Court must reverse his conviction and remand the cause for a new trial.

IV.

The trial court plainly erred in permitting the State to ask Mr. Holden if he had been convicted of sodomizing a five-year-old girl, in violation of his right to due process and a fair trial as assured by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, because the testimony was legally irrelevant in that it was more prejudicial than probative, since the State had already established that Mr. Holden was convicted of sodomy of a child under fourteen in 1995, which was all that the State was required to prove on the matter of a prior conviction for a sexual offense.

This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion, which exists only where the trial court's ruling clearly offends the logic of the circumstances or appears arbitrary and unreasonable. **State v. Hudson**, 230 S.W.3d 665, 668 (Mo. App., E.D. 2007). Counsel's objection at trial was "asked and answered," while the issue is in the motion for new trial as five years of age was not legally relevant in that it was more prejudicial than probative (L.F. 88-89).

Thus Mr. Holden must ask this Court for plain error review. **Rule 30.20.**

Plain error is found where the alleged error facially establishes substantial grounds for believing that manifest injustice or a miscarriage of justice has resulted. **State v. Salter**, 250 S.W.3d 705, 713 (Mo. banc 2008).

Instruction 5, patterned on MAI-CR 3d 320.41, was the verdict director for the offense of failing to register a change of address within ten days of moving to a new address.

INSTRUCTION NO. 5

If you find and believe from the evidence beyond a reasonable doubt:

First, that the defendant pleaded guilty to sodomy committed on

Crystal Doyle on April 26, 1994, in the Circuit Court of the city

of St. Louis, State of Missouri, on March 7, 1995, and

Second, that at the time of this offense, Crystal Doyle was under the

age of fourteen years, and,

Third, that defendant registered as a sex offender on May 7, 2001, and

Fourth, that between May 29, 2007 and July 13, 2007, defendant

moved his residence from 2815 Marion Street, City of Hannibal,

Township of Mason, County of Marion, State of Missouri, and,

Fifth, that on or about July 24, 2007, in the City of Hannibal, County of Marion, State of Missouri, defendant failed to notify Marion County Sheriff's Department within ten days of his change of residence, and,

Sixth, that the defendant failed to notify the Marion County Sheriff's Department in writing, and ,

Seventh, that the defendant acted knowingly with respect to the facts and conduct submitted in this instruction,

then you will find the defendant guilty of failing to register change of residence.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of the propositions, you must find the defendant not guilty of the offense.

MAI-CR 3D 320.41

Tendered by the State

(L.F. 61).

At the end of the State's case, the court admitted State's Exhibit 5, a three-page sentence and judgment, which showed all that was required by the instruction on the element of the former conviction for a sexual offense,

that Mr. Holden pleaded guilty to the offense of sodomy committed on Crystal Doyle, a child of less than fourteen years of age, in March of 1995 (Tr. 131-132). The jury viewed all exhibits during deliberation (Tr. 193-194).

The fact of a prior conviction for sodomizing a child under fourteen was established again on direct examination when counsel inquired:

Q. And when you moved to Hannibal in 2001 were you required to register as a sex offender?

A. Yes, ma'am.

Q. And that was because you pled guilty in St. Louis City to two counts of sodomy to a child under fourteen, right?

A. Right. Yes, ma'am.

(Tr. 154).

But the State revisited Mr. Holden's prior conviction on cross examination.

Q. Okay. On March 7, 1995, you pled guilty to sodomy of Crystal Doyle—

Ms. Capkovic: Objection. Asked and answered

The Court: Miss Capkovic asked him if he was convicted of a felony.

Mr. Redington: Yes, sir. I'm required to prove when it happened. So that was not asked.

THE COURT: All right. Overruled.

Q. (By Mr. Redington) On March 7th, 1995, in the Circuit Court of the City of St. Louis you pled guilty to sodomizing Crystal Doyle who was five years old, didn't you?

(Tr. 168-169).

The prosecutor was correct in arguing that he had to show the date of the conviction, but that had already been accomplished by State's Exhibit 5. In addition, it was not correct that he had to show the age of the victim, except that she was under fourteen.

To be admissible, evidence must be both logically and legally relevant. **State v. Bernard**, 849 S.W.2d 10, 13 (Mo. banc 1993) (*overruled on other grounds* by **State v. Vorhees**, 248 S.W.3d 585 (Mo. banc 2008)). It is logically relevant if it tends to establish directly the defendant's guilt of the offense with which he is charged, and legally relevant if probative value is greater than the prejudice. *Id.* Legal relevance is a determination of the balance between the probative value and the prejudicial effect of the evidence. **State v. Tisius**, 92 S.W.3d 751,760 (Mo. banc 2002). There was no

probative value to evidence that the victim was five years old; the State had already met the requirement to show that she was under fourteen. On the other hand, the prejudice caused by knowledge that the victim was so young was great. Evidence that the victim was only five years old was not legally relevant and should not have been admitted.

Evidence that tends to unnecessarily divert the jury's attention for the question before it is more prejudicial than probative and should be excluded. **State v. Taylor**, 663 S.W.2d 235, 239 (Mo. banc 1984). The prosecutor's mention of the age of the victim was not necessary and served only to prejudice Mr. Holden and to distract the jury from the essential issue of guilt or innocence of the offense charged.

When a state court admits evidence that renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment to the United States Constitution provides a mechanism for relief. **Lisenba v. California**, 314 U.S. 219 (1961). Revealing to the jury that the victim was only five resulted in manifest injustice, and this Court should reverse Mr. Holden's conviction and remand for a new trial.

CONCLUSION

Because Mr. Holden challenges the constitutionality of §589.414 as applied to him, this Court should transfer the case to the Missouri Supreme Court. Alternatively, the Court should find the law unconstitutional as applied in accord with **Doe v. Blunt**, 225 S.W.3d 421 (Mo. banc 2007), vacate Mr. Holden's conviction, and order his discharge. Because the trial court erred as set out in Points II-IV, this Court should reverse Mr. Holden's conviction and remand for a new trial.

Respectfully submitted,

Irene Karns, MoBar #36588
Attorney for Appellant
Woodrail Centre, Bldg. 7
1000 W. Nifong
Columbia, Missouri 65203
Telephone (573) 882-9855
FAX 573-884-4793

Irene.karns@mspd.mo.gov

Certificate of Compliance and Service

I, Irene Karns, hereby certify:

- ✓ The attached brief complies with the limitations contained in Rule 84.06(b) and Eastern District local Rule 360. The brief was completed using Microsoft Word 2007, in Book Antiqua size 14 point font, and includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 5,726 words, which does not exceed the number of words allowed for an appellant's brief.

- ✓ The floppy disks filed with this brief and served on opposing counsel contain a complete copy of the brief, and have been scanned for viruses using McAfee VirusScan 4.5.1, SP1, updated in September, 2008. According to that program, the disks are virus-free.

- ✓ Two true and correct copies of the attached brief and a disk containing a copy of this brief were shipped by United Parcel Service this 11th day of September, 2008, to Shaun Mackelprang, Assistant Attorney General, P.O Box 899, Jefferson City, Mo 65102.

Irene Karns

IN THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

STATE OF MISSOURI,)
)
 Respondent,)
)
 vs.) No. ED 91188
)
 WILLIAM HOLDEN,)
)
 Appellant.)

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF MARION COUNTY, MISSOURI
TENTH JUDICIAL CIRCUIT, DISTRICT II
THE HONORABLE ROBERT M. CLAYTON, II, JUDGE

APPENDIX TO APPELLANT’S BRIEF

INDEX

State’s Exhibit 1 A1
State’s Exhibit 2 A2-A3
State’s Exhibit 5 A4-A7
Defendant’s Exhibit A A8-A23
Judgment and Order (April 4, 2008) A24