

**IN THE  
MISSOURI SUPREME COURT**

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<b>STATE OF MISSOURI,</b>	)	
	)	
	<b>Respondent,</b>	
	)	
<b>vs.</b>	)	<b>No. SC88894</b>
	)	
<b>BRIAN FASSERO,</b>	)	
	)	
	<b>Appellant.</b>	
	)	

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**APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI  
ELEVENTH JUDICIAL CIRCUIT  
THE HONORABLE NANCY SCHNEIDER, JUDGE**

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**APPELLANT’S SUBSTITUTE BRIEF**

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### TRANSFER QUESTIONS (Point 3)<sup>1</sup>

- 1. Does the confrontation clause apply in the penalty phase of a bifurcated non-capital jury trial?**
- 2. In the penalty phase, does the admission of a pending indictment deny defendant of his right to confrontation where no witness testifies concerning the indictment's allegations;**
- 3. Is that pending indictment inadmissible in the penalty phase of a non-capital jury trial under § 557.036, because it does not reflect upon defendant's character and history since what is relevant is whether defendant committed those acts whereas the actions of a grand jury are mere allegations and are not proof of those acts?**

By holding that the confrontation clause does not apply to the sentencing phase of a jury trial and that a pending indictment is admissible in the penalty phase of a non-capital jury trial even though no witness testifies concerning the indictments' allegations, the Eastern District's opinion involves questions of general interest and importance and is contrary to *State v. Berry*, 168 S.W.3d 527 (Mo. App. W.D. 2005) (hearsay should be excluded in penalty phase; but no confrontation violation because the hearsay was not testimonial).

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<sup>1</sup> To avoid confusion, the points relied are in the same order as presented in the Eastern District, except that he has withdrawn Point IV of that brief, so what was Point V is now Point IV.

## **JURISDICTIONAL STATEMENT**

Appellant, Brian Fassero, appeals his conviction for the class B felony of child molestation in the first degree, § 566.067.<sup>2</sup> The case was tried in St. Charles County, Missouri on January 18-21, 2005 (L.F. 21). On March 28, 2005, the Honorable Nancy L. Schneider sentenced Mr. Fassero to fifteen years imprisonment (L.F. 10, 13-14; S.Tr. 25). A notice of appeal was timely filed on April 6, 2005 (L.F. 12). Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Eastern District. Article V, § 3, Mo. Const.; § 477.050. This Court thereafter granted Mr. Fassero's application for transfer, so this Court has jurisdiction. Article V, §§ 3 and 10, Mo. Const. and Rule 83.03.

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<sup>2</sup> All statutory references are to RSMo 2000, unless otherwise indicated.

## STATEMENT OF FACTS

Mr. Fassero was charged by indictment with statutory sodomy in the first degree, § 566.062 (Count 1), and in the alternative, the class B felony of child molestation in the first degree, § 566.067 (Count 2) (L.F. 53-54).<sup>3</sup> Prior to trial, the State entered *nolle prosequi* as to Count 1 (L.F. 39). It was alleged that on February 2, 2003, Mr. Fassero subjected A.A., who was less than fourteen years old, to sexual contact (L.F. 54).

The case was first tried on June 15-18, 2004 (L.F. 35-36). The jury started deliberating at 10:15 a.m. on June 18, 2004 (L.F. 35; 1Tr. 776). A little over four hours later, the jury sent a note to the judge stating that “The jury deliberated vigorously and came to a final vote of 10 not guilty and 2 jurors voting guilty” (S.L.F. 1; 1 Tr. 776-77; Appendix A-1). The trial court did not send a response back to the jury, nor did the court show that note to the attorneys (L.F. 1; 1Tr. 779; Tr. 16). After the trial court questioned the foreperson, which is set out in the argument section, the trial court *sua sponte* declared a mistrial (1Tr. 776-80; L.F. 34-36).

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<sup>3</sup>The Record on Appeal consists of a three volume transcript of a first trial (1Tr. ), a four volume transcript of a second trial, which is the main subject of this appeal (Tr.), a sentencing transcript (S.Tr. ), a legal file (L.F.), and a supplemental legal file (S.L.F.). In addition, seven other supplemental transcripts have been filed. Mr. Fassero will refer to those transcripts by date, e.g. (9-13-04 Tr.).

Mr. Fassero was tried again on January 18-21, 2005, over his objection that the second trial would violate his right to be free from double jeopardy (L.F. 16-22). At that second trial, the following evidence was presented.

During the afternoon of February 3, 2003, A.A. and some of her relatives were at Tumble Drum in St. Peters, Missouri (Tr. 284-85, 288, 384, 542). There were about ten to thirteen of her relatives present (Tr. 414, 484). Among those present were A.A.'s uncle and aunt, Paul and Mindy Dorenkamp, the Dorenkamp children, Tyler and Katie, A.A.'s brother Austin, her cousin S.N., her grandmother, Sandra Lay (Ms. Lay) and her grandfather (Tr. 288, 306-07, 384, 484). S.N. was eleven years old, A.A. was ten, Austin was eight, Tyler was four, and Katie was two (Tr. 288, 306, 384-85, 465, 470, 482, 484). A.A., Austin, and their parents live with Ms. Lay and her husband (Tr. 384, 402-03, 408-10).

The Tumble Drum is an indoor play area for children, which included a "main ball pit" area (Tr. 285, 287-88, 435, 439, 483, 545). The ball pit had a vinyl bottom with springs underneath, nets all around, and plastic air filled balls for children to jump in (Tr. 436, 444-45, 458). You have to walk up some steps and go into a tunnel in order to get into the ball pit (Tr. 303).

Mr. Dorenkamp was watching S.N., A.A., Austin, Tyler, and Katie while they were playing in the ball pit area (Tr. 288-90, 305-07, 466). Mr. Fassero was standing next to Mr. Dorenkamp outside the ball pit (Tr. 291). Mr. Fassero's six year old daughter was in the ball pit (Tr. 291-92, 307, 466, 550). She started crying, so Mr. Fassero went into the ball pit to comfort her (Tr. 292, 313-14).

Once inside the ball pit, Mr. Fassero began playing with the other children including A.A., S.N., Austin, and Tyler (Tr. 292, 474). They were throwing balls at each other and Mr. Fassero was grabbing children by their belt loops and pulling them into the balls and tickling them (Tr. 292, 314, 467-68, 474). He also grabbed children by their legs and dragged them through the balls, roughhousing around (Tr. 292-93, 467-68, 474). Once when he was dragging and tickling S.N. his thumb went down the side of S.N.'s pants, but not really down her pants (Tr. 468-69, 474). S.N. believed it was an accident (Tr. 474).

While this was going on, Ms. Dorenkamp asked her husband what Mr. Fassero was doing inside the ball pit (Tr. 293, 312). Mr. Dorenkamp replied that Mr. Fassero was just having fun, playing with the children (Tr. 293). While they were talking, Ms. Dorenkamp asked her husband if it looked like Mr. Fassero was reaching his arms underneath the balls toward S.N. and A.A. (Tr. 293, 331, 360). Mr. Dorenkamp said, "No, you can't tell," although it looked to him like Mr. Fassero was "reaching out" (Tr. 293). Ms. Dorenkamp asked again why Mr. Fassero was inside the ball pit (Tr. 293-94). Mr. Dorenkamp said it seemed "innocent enough" to him (Tr. 294). Ms. Dorenkamp asked her husband to keep an "eye out" and left the area (Tr. 360).

When Ms. Dorenkamp returned she noticed Mr. Fassero was still in the ball pit (Tr. 360). She did not like the way Mr. Fassero was looking at her, so she left (Tr. 313, 331, 369). When she returned Mr. Fassero was still in the ball pit (Tr.

361). Before she walked away again, she asked her husband to keep watching because something did not feel right to her (Tr. 361).

After Ms. Dorenkamp walked away, Mr. Fassero asked A.A. to get up on his back for a piggyback ride, and she did (Tr. 294, 324-25, 351). He fell backwards on top of her (Tr. 294, 351). Her legs were around him and he was lying between her legs (Tr. 294). It looked like Mr. Fassero was kind of holding her down and teasing her (Tr. 294). After they remained in that position for a while A.A. said something like, “hey, stop, you are hurting me” (Tr. 294, 295). Mr. Dorenkamp asked Mr. Fassero what he was doing and told him to get up (Tr. 294). Mr. Fassero got up (Tr. 294). When he got up, all of the children got out of the ball pit, got sodas, and then went to their table where Mr. Dorenkamp and Ms. Lay were sitting (Tr. 294-96, 310-11, 329, 332). Mr. Fassero also got out (Tr. 310). None of the children complained that Mr. Fassero had done anything wrong (Tr. 310). Mr. Dorenkamp had not seen any of the children being mistreated by Mr. Fassero (Tr. 324).

Mr. Dorenkamp told Ms. Lay about the piggyback ride, the tickling, and that it looked like Mr. Fassero had been reaching under the balls towards the children (Tr. 296, 330). He also told her that he did not like the fact that Mr. Fassero was touching their children (Tr. 296, 330, 332). He said that there was “something fishy going on in the ball pit” with Mr. Fassero (Tr. 387).

While Mr. Dorenkamp was talking to Ms. Lay, the children started to go back into the ball pit (Tr. 296, 311, 333, 415). A.A. was the last one in line (Tr.

296, 333). Mr. Fassero got behind her to go back inside (Tr. 296, 311, 333-34). Ms. Lay saw Mr. Fassero escorting A.A. by the arm into the ball pit (Tr. 389-90, 415-16). He also had a hand on A.A.'s buttocks helping her into the tunnel (Tr. 392). Ms. Lay was about two feet away (Tr. 390). Mr. Dorenkamp did not see Mr. Fassero grab A.A. (Tr. 335, 340).

Ms. Lay went over, grabbed Mr. Fassero, and pulled him off the steps like a rag doll (Tr. 296, 335-36, 348, 391-92). She said, "What are you doing with your hands on my granddaughter?" (Tr. 336). She told him that if he did not let go of A.A. that she was "going to f\*\*k [him] up" (Tr. 392, 419-20). Mr. Fassero said that he did not know what Ms. Lay was talking about (Tr. 392). She said that her son-in-law had been watching him (Tr. 392). Ms. Lay told him not to touch A.A. again and then let him go (Tr. 392). Mr. Fassero grabbed his stuff and headed for the front door (Tr. 298).

A.A. and S.N. exited the tunnel, and Ms. Lay ordered them to the table so she could find out what was going on (Tr. 392, 423). A.A., S.N., and the other children went back to their table (Tr. 297). Mr. Dorenkamp mentioned to them that Mr. Fassero was "kind of weird" (Tr. 297, 341). A couple of children, including A.A., said yes (Tr. 297). A.A. gave Mr. Dorenkamp a "strange look," and Mr. Dorenkamp suggested, "[A.A.], he didn't do anything weird, did he?" (Tr. 297, 341). A.A. started crying and said that Mr. Fassero had his hands in her pants (Tr. 297, 341, 345, 350). Mr. Dorenkamp could not believe it because he had been outside the ball pit the entire time that Mr. Fassero had been inside and he had not

seen Mr. Fassero's hands in her pants (Tr. 298, 309-10, 341-42). Mr. Dorenkamp asked A.A. if she was sure (Tr. 298). A.A. was still crying and said, "Yes" (Tr. 298).

Ms. Lay came over to the table and told S.N. and A.A. to tell her what Mr. Fassero had done (Tr. 393, 422). They said that he had his hand down their pants (Tr. 393, 428). When Ms. Lay inquired, "both of you?," A.A. said, "just mine" and S.N. said "he tried, but my pants were too tight" (Tr. 393, 431, 433).<sup>4</sup> Ms. Lay noticed Mr. Fassero putting his daughter's shoes on her so they could leave (Tr. 393).

Ms. Lay ran to the front of the building and told Mr. Fassero that he was not going anywhere (Tr. 394-95). Mr. Fassero said that he had to have his daughter back in Columbia by six o'clock (Tr. 395). Mr. Fassero's six-year-old daughter made a comment to Ms. Lay and Ms. Lay told her to be quiet (Tr. 430). Ms. Lay told an employee to call the police (Tr. 395). The employee refused so Ms. Lay "started getting loud" and requested the police be called (Tr. 395). The employees just looked at Ms. Lay (Tr. 395). One employee told her that if she was not quiet, they were going to call the police on her (Tr. 395, 421). She said that she wished they would because Mr. Fassero molested her granddaughter in the ball pit (Tr. 395). The employee said that they did not see it happened and there was nothing they could do (Tr. 298, 395). Ms. Lay said if Mr. Fassero

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<sup>4</sup> S.N. denied that Ms. Lay had questioned her about what had happened (Tr. 472).

walked out the door, she was going after him, jump on him, “beat his ass,” and that they would probably have to call an ambulance as well (Tr. 337, 395, 420). She said she was going to “f\*\*k him up” if he left the building (Tr. 338).

The store manager, Mr. Nicholas Gaglio, heard some arguing and profanity so he exited his office and saw Ms. Lay arguing with Mr. Fassero (Tr. 437, 450). He stepped in between them and told Ms. Lay that profanity was not allowed in Tumble Drum (Tr. 440). Ms. Lay told him that Mr. Fassero had put his hands on her granddaughter, so Mr. Gaglio went over to talk to A.A. (Tr. 440, 450, 460-61).

Mr. Dorenkamp told A.A. to tell Mr. Gaglio, what she had told him (Tr. 298, 346-47, 355, 435). A.A. said that she was touched in the ball pit area (Tr. 448-50). Mr. Gaglio said that Mr. Fassero was not going anywhere and that they would call the police (Tr. 298, 346, 397, 440, 450, 462).

St. Peters Police Officer Lori Lake responded to the scene (Tr. 442). Ms. Lay was still screaming and using profanity (Tr. 543, 575). She said that her granddaughter had been fondled or touched inappropriately (Tr. 543, 575, 614, 616). Ms. Lay made sure that Mr. Fassero did not attempt to get away because if he did, Ms. Lay would run after him, jump on him, and “beat his ass” (Tr. 398).

Officer Lake confirmed that Mr. Fassero was still at the scene and then took A.A. into the manager’s office (Tr. 442, 543-44). Ms. Dorenkamp, S.N., and a Tumble Drum employee were in the room when Officer Lake interviewed A.A. (Tr. 37, 546). Ms. Dorenkamp was crying loud and hard (Tr. 373).

When Officer Lake asked what had happened, A.A. indicated that Mr. Fassero had reached down the front of her pants into her underwear and touched her private part (Tr. 547). A.A. said the incident occurred in the ball pit (Tr. 547). Mr. Fassero would tickle her and S.N., and at one point he picked A.A. up, threw her into the balls, and landed on top of her (Tr. 547-48). That's when the "molestation" occurred (Tr. 548). Ms. Dorenkamp could not recall A.A. saying anything to Officer Lake about Mr. Fassero's finger going into her body (Tr. 375, 379-80).

Officer Lake transported Mr. Fassero's daughter to the police station and Mr. Fassero was taken there in another police car (Tr. 550, 631-32). Shortly thereafter, A.A. and her family arrived at the police station where Officer Lake interviewed A.A. (Tr. 551).

A.A. told Officer Lake that while they were in the ball pit, Mr. Fassero picked her up and threw her into the balls (Tr. 551, 603-04). She landed with just her face out of the balls (Tr. 551-52, 603-04). He then landed on top of her, reached behind him into her underwear and touched her private part with his right hand (Tr. 552, 604-05). When Officer Lake questioned A.A. about what she meant by touching her private part, A.A. said that he put his finger inside of her (Tr. 552). Officer Lake questioned how far inside and used her hand referring to her knuckles, and A.A. pointed to Officer Lake's first knuckle (Tr. 552). A.A. said she was able to get away from Mr. Fassero and was trying to reach Mr. Dorenkamp, who was standing nearby outside the ball pit (Tr. 552, 600). Mr.

Fassero grabbed her by the arm and pulled her back through the balls (Tr. 552). Mr. Fassero then offered to give her a piggyback ride and she agreed (Tr. 553, 606). He fell backwards on top of her and attempted to put his hand in her pants again (Tr. 553, 606). She kicked at him and was able to get him off (Tr. 553, 606). When she got out of the ball pit, Mr. Fassero grabbed her by the arm, and tried to push her back into the ball pit again by putting his hand on her rear end (T. 553). That was when Ms. Lay saw her (T. 553). A.A. then agreed to give a written statement to Officer Lake (Tr. 553). In that written statement A.A. did not mention penetration, she wrote that Mr. Fassero had “dug in” her underwear and touched her private (Tr. 533-35).

Officer Lake then interviewed S.N. (Tr. 554). S.N. said that Mr. Fassero had touched her too, but he had “not touched her privacy” (Tr. 554). He had only put his hands between the waistband of her jeans and her skin (Tr. 554).

After A.A. was questioned at the police station, she was taken to the hospital for examination (Tr. 402, 559). The examining physician said there was no physical evidence (Tr. 559, 583).<sup>5</sup> There was, however, a scratch on A.A.’s arm (Tr. 583-84).

Mr. Fassero was interviewed by Officer Russell Vossenkemper at the police station (Tr. 631-32). Officer Vossenkemper told Mr. Fassero that they

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<sup>5</sup> At a pretrial hearing, Ms. Lay testified that A.A. told Officer Lake and the physician that there was no penetration (5-26-04 Tr. 58).

needed to take care of his six year old daughter, so they contacted his ex-wife, Jennifer Comte-Fassero (Tr. 632). After that, Mr. Fassero was given his *Miranda* warnings<sup>6</sup> and he agreed to give a statement (Tr. 633-34).

Mr. Fassero said that he and his daughter were at Tumble Drum when she got hit with a ball while inside the ball pit (Tr. 635, 642). Mr. Fassero went into the ball pit to assist her (Tr. 635). Once inside, he started playing with all of the children (Tr. 635). He tickled and dragged some of them (Tr. 635). A.A. got on his back piggyback style and he fell backwards into the balls where they got temporarily stuck (Tr. 636). He said this happened twice, and the second time it was for a few minutes (Tr. 636-37). They were both lying on their backs with a portion of their bodies underneath the balls (Tr. 637). Later he was leaving Tumble Drum because he had to be in Columbia at 6:00 p.m. (Tr. 637-38). Before he attempted to leave, he noticed A.A. “in some sort of distress over by the ball pit” (Tr. 638). Mr. Fassero asked her if she was okay and she said her hand was hurt (Tr. 638). After he patted her on the shoulder he was “contacted” by Ms. Lay (Tr. 638).

Mr. Fassero agreed to give Officer Vossenkemper a written statement (Tr. 639, 641-42; State’s Exhibit No. 11). Officer Vossenkemper told him that there was an accusation that he had stuck his finger into A.A.’s vagina (Tr. 644). Mr. Fassero denied that had happened (Tr. 644-47, 649, 678). Officer Vossenkemper

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<sup>6</sup> See, *Miranda v. Arizona*, 384 U.S. 436 (1966).

lied to Mr. Fassero and told him that S.N. had made the same accusation, but Mr. Fassero denied that too (Tr. 647-49). It was Vossenkemper's standard procedure to use lies and deceptions as an interview technique to get more details from an accused (Tr. 663). Officer Vossenkemper said that if Mr. Fassero had put his finger in A.A.'s vagina, DNA evidence would determine whether he was telling the truth (Tr. 650). Mr. Fassero continued to deny the allegations and said he would submit to a DNA test (Tr. 650-51). Officer Vossenkemper decided not to do a DNA test (Tr. 650-51).

In addition to the aforementioned evidence, A.A. and Mr. Fassero testified and gave conflicting accounts about what had happened at Tumble Drum. Rebuttal evidence was also presented. That evidence is set forth below.

A.A. testified that Mr. Fassero was in the ball pit while she and some other children were there, including S.N. and Mr. Fassero's daughter (Tr. 486-87). Mr. Fassero was giving A.A. and other children piggyback rides and dragging them around by their ankles (Tr. 488). He also tickled them and would hold them up to the net for her uncle to tickle (Tr. 489). He gave A.A. two piggyback rides (Tr. 490, 508-10, 520-21). When he gave her the piggyback rides he would fall back into the balls on top of her and put his arm underneath the balls and "dig" underneath her underwear (Tr. 490, 492, 508-09).

During the first piggyback ride, one of his fingers went inside her vagina (Tr. 493, 504, 510-11).<sup>7</sup> Mr. Fassero asked A.A. to let him give her another piggyback (Tr. 494). She agreed because she was not concerned (Tr. 522-23, 528). Mr. Fassero attempted to do the same thing again except this time there was no penetration because she was able to push his hand away (Tr. 493, 494, 505, 523-24). When she tried to get out of the pit, he would pull her leg for her to come back in, but she was able to get out (Tr. 494). After she got out she looked for Ms. Lay (Tr. 494).

While she was looking for Ms. Lay, Mr. Fassero came over, grabbed her arm, led her back into the ball pit and tried to push her in (Tr. 495, 516, 529). When he grabbed her, he scratched her arm (Tr. 513, 529).<sup>8</sup> He did not touch her butt (Tr. 516). Ms. Lay then came over, said something to Mr. Fassero, Mr. Fassero went to the front counter area to get his shoes, and Ms. Lay told A.A. and S.N. to wait by the tables (Tr. 495, 517-18). The first person A.A. told about his

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<sup>7</sup> In a deposition, A.A. denied that penetration had occurred (Tr. 502-04). In the first trial, A.A. testified that she did not remember if Mr. Fassero put his finger inside her vagina (1 Tr. 423), that she did not tell Officer Lake that his finger went inside her private part (1 Tr. 410, 423, 436), and she told that physician and nurse at hospital that he never put anything inside her body (1 Tr. 435-36).

<sup>8</sup> In the first trial, A.A. testified that she did not recall how she got the scratch (1 Tr. 405)

was S.N. (Tr. 495, 531). When Ms. Lay went to the front counter, A.A. told her uncle Paul what had happened (Tr. 495).

At the police station, A.A. wrote out a statement that said that Mr. Fassero would give her a piggyback ride, lay on her and “dig” in her pants (Tr. 533-34). This happened twice (Tr. 534, 535). After the second time it happened, she told S.N. (Tr. 534).

Mr. Fassero testified that on Sunday, February 2, 2003, he and his six year old daughter went to Tumble Drum (Tr. 688-89). He arrived at about 1:30 (Tr. 691). He was supposed to return his daughter to his ex-wife in Columbia, Missouri by 6:00 p.m. (Tr. 689, 695).

While at Tumble Drum, Mr. Fassero went into the ball pit because his daughter had been hit and was crying and she asked for his help (Tr. 707, 708). Mr. Fassero went into the pit to see what was wrong (Tr. 707). When he did he slipped, landed in the pit, and children started jumping on him (Tr. 707, 710-12). Among those present in the pit were A.A. and S.N. (Tr. 709). Mr. Dorenkamp was about a foot or so away from the pit (Tr. 707, 712).

After Mr. Fassero pulled some of the children through the balls and tickled one of the children in the pit who had tickled him, he started to leave the pit (Tr. 712-13). As he was making his way to the tunnel, A.A. jumped on his back (Tr. 713). It caught Mr. Fassero off guard and he fell backwards into the balls (Tr. 713-14). A.A. said she wanted to do it again, so she jumped on him again (Tr. 714). They fell backwards into the balls again (Tr. 714). S.N. unsuccessfully tried

to jump on him once (Tr. 714-15). Mr. Fassero denied that he had put his hands down the girls' pants and tried to touch or fondle their genital areas (Tr. 718, 754).

After he had left the pit for a while, his daughter decided to go back into the ball pit for one last time when he saw A.A. holding her hand (Tr. 704). Mr. Fassero asked about her hand and she said that she had gotten hit and her hand hurt (Tr. 704). Mr. Fassero said it would be fine and then went to get his daughter to leave (Tr. 704). As Mr. Fassero reached into the tunnel leading into the ball pit to grab his daughter's wrist to get her to leave, A.A. came darting by them (Tr. 705). Mr. Fassero did not touch her butt (Tr. 706).

Ms. Lay grabbed Mr. Fassero by the arm and started shaking him around (Tr. 705). Mr. Fassero did not know that there was any complaint about his conduct until Ms. Lay attacked him (Tr. 718). She shook him like "a rag doll" (Tr. 719). Ms. Lay said that if he did not leave A.A. alone, she would "pummel the f\*\*k out of [Mr. Fassero]" and that she was going to "f\*\*k [Mr. Fassero] up" (Tr. 718). When Ms. Lay told Mr. Fassero not to touch A.A., he said that he did not know what she was talking about (Tr. 720). She told him that he did know what she was talking about and that her son-in-law had seen it (Tr. 720).

About that time A.A. and S.N. came out of the ball pit and Ms. Lay told A.A. to get her "little ass" over at the table and "don't you move it" (Tr. 719-20). A.A. and S.N. went over to their table (Tr. 719).

Mr. Fassero decided to get himself and his daughter away from Ms. Lay, so they went up front to get their shoes (Tr. 719-21). Ms. Lay came up there and

“started going at it again” (Tr. 721). Ms. Lay told Mr. Fassero that he was not leaving and that if he tried to leave she would “f\*\*k [him] up” (Tr. 721). His daughter told Ms. Lay to stop yelling at her daddy (Tr. 697). Ms. Lay pointed her finger at Mr. Fassero’s daughter, balled her hand up in a fist and said, “if you don’t shut your f\*\*king trap I’ll knock it shut for you” (Tr. 697). Mr. Gaglio pulled her away and said “that’s enough” (Tr. 697, 721).

A.A. walked around the corner and Ms. Lay accused Mr. Fassero of sexually molesting her granddaughter by putting his hands down A.A.’s pants (Tr. 721). A.A. said, “that’s not true,” and Ms. Lay grabbed A.A. and drug her by the arm over to the corner, shook her hand in A.A.’s face and told her that when the police got there she was going to tell them what Ms. Lay told her to say or else she was going to “get it” (Tr. 721-22).

Ms. Lay then walked back over to where Mr. Fassero was and said to Mr. Gaglio, “if you let him leave I am going to f\*\*k him up” (Tr. 723). She said that if Mr. Fassero left they would have to call an ambulance or get a body bag (Tr. 723). Mr. Gaglio told her not to worry because Mr. Fassero was not leaving (Tr. 724).

At the police station, Mr. Fassero was interrogated by Vossenkemper (Tr. 701). Vossenkemper raised the issue of DNA testing and Mr. Fassero said he would submit to such testing, but Vossenkemper dropped the subject (Tr. 701). Mr. Fassero then wrote out a statement about what had happened (Tr. 702).

In rebuttal, Officer Vossenkemper testified that Mr. Fassero never said anything to him about Ms. Lay attacking or threatening his daughter (Tr. 775). He

also did not say anything about A.A. telling Ms. Lay that this never happened (Tr. 775-76).

Mr. Fassero's ex-wife, Jennifer Comte-Fassero testified that Mr. Fassero has a bad reputation in the community for truthfulness and veracity in the community and that Mr. Fassero lies (Tr. 782). On cross-examination, defense counsel asked her whether on the day in question she trusted Mr. Fassero with their daughter (Tr. 784). She answered that she did not trust him with her (Tr. 784). The following then occurred during the state's redirect examination:

Q. Ms. Comte-Fassero, why is it that you do not trust the defendant with your daughter?

A. After we were separated, but before we were divorced, Natalia started making comments that were kind of strange about her dad.

[Defense Counsel]: Your Honor, I would object. I would ask to approach.

THE COURT: Well, I am not going [to] allow her to repeat any of those statements, they would be hearsay statements.

\* \* \* \* \*

Q. [by the State] Why is it that you didn't trust Mr. Fassero with your daughter?

[Defense Counsel]: Your Honor, I would object to any statement that she makes, based on hearsay.

THE COURT: Answer the question, ma'am, without giving us hearsay statements by someone out of court.

A. So it's just my personal opinion, okay?

THE COURT: What you saw and what you observed not what someone else said to you.

A. Okay. Natalia was very upset about going to her dad's for a while. And she was scared and would cry, and so I can say that stuff, I think.

[Defense Counsel]: I can't hear.

THE COURT: Wait for another question. Just wait for a question. I can't really answer your question. The attorney has to ask you the question.

Q. [by the State] What were your feelings at the time that caused you not to trust the defendant to be with your daughter?

[Defense Counsel]: Objection, your Honor, irrelevant. She stated her opinion.

THE COURT: Sustained as to what her feelings were.

Q. [by the State] What was your opinion as to why didn't you trust Mr. Fassero with your daughter at that point?

[Defense Counsel]: Objection, your Honor, based on in part on hearsay.

[The State]: Judge, he asked her opinion. He opened the door to it, Judge.

THE COURT: I am going to allow her to give her opinion without hearsay.

A. I believe that he was molesting her.

[Defense Counsel]: Your Honor, I would move for a mistrial.

THE COURT: I am going to deny that request. Do you have any cross-examination – or recross of this witness?

(Tr. 784-86). Later, Mr. Fassero's renewed request for mistrial was again overruled by the trial court (Tr. 789-97).

The day following the request for mistrial, Mr. Fassero requested that the court order the jury to disregard Mr. Fassero's ex-wife testimony concerning her belief that Mr. Fassero was molesting their child (Tr. 799-806, 809-10). The trial court informed the jury the following:

Ladies and gentlemen, at this time the court will advise the jury that only the following question asked and answer given by Jennifer Comte-Fassero be disregarded. QUESTION: What was your opinion as why didn't you trust Mr. Fassero with your daughter at that point? ANSWER: I believe that he was molesting her.

(Tr. 810; L.F. 24).

On January 21, 2005, the jury found Mr. Fassero guilty of the charged offense (Tr. 852; L.F. 23, 25). Prior to the punishment phase of trial, the State indicated that it was going to introduce into evidence an authenticated copy of an indictment from the Circuit Court of Madison County, Illinois, showing that Mr. Fassero had been charged with two felony counts of aggravated criminal sexual abuse (Tr. 856-57; State's Exhibit No. 13). Mr. Fassero objected on the basis of relevancy (Tr. 857-58). Mr. Fassero noted that the amended indictment did not go to Mr. Fassero's "history" under section 557.036 (Tr. 861). The trial court overruled the objection (Tr. 861). Mr. Fassero objected that the amended

indictment deprived him of due process and his right to confront witnesses (Tr. 861-62). The trial court again overruled the objection (Tr. 862).

During the penalty phase the State introduced that Illinois indictment into evidence and published it to the jury (Tr. 875; State's Exhibit No. 13). During argument, the State argued that the exhibit showed that other children had been "at risk" (Tr. 877). The jury recommended the maximum punishment -- fifteen years imprisonment (Tr. 879-80; L.F. 21, 22). The trial court gave Mr. Fassero twenty-five (25) days in which to file a motion for new trial (Tr. 882-83).

On February 15, 2005, Mr. Fassero timely filed his Motion for New Trial (L.F. 16-18). Points 1 and 2 of that motion raised the claim that the trial court erred in denying Mr. Fassero's motion to dismiss because the second trial violated his right to be free of double jeopardy in that the trial court ordered a mistrial in the first trial without manifest necessity and "after the trial court failed to divulge an ex-parte communication from the jury which defendant was entitled to know to formulate his trial strategy, to wit: whether to give the hammer instruction because the court knew the jury vote count stood 10 to 2 for acquittal" (L.F. 16-17). Point 5 of that motion raised that the trial court erred in allowing the testimony of Jennifer Comte-Fassero over his objection and "after a motion for mistrial related to her attempt to prejudice the defense" (L.F. 17). Point 6 of that motion raised that the trial court erred "in allowing the jury to see the Amended Indictment from Illinois in the sentencing phase as it was prejudicial, hearsay, not a conviction or probative of defendant's character" (L.F. 17).

On March 28, 2005, the trial court overruled the motion for new trial (S.Tr. 21; L.F. 10, 15) and sentenced Mr. Fassero to fifteen years imprisonment (S.Tr. 25; L.F. 13-14). This appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

## POINTS RELIED ON

### I.

The trial court abused its discretion in ordering a mistrial of Mr. Fassero's first trial and in overruling his motion to dismiss thereby allowing the case to go to a second trial following this mistrial, because this second trial, following the *sua sponte* mistrial ordered by the trial court, subjected Mr. Fassero to double jeopardy in violation of his rights under the due process clauses of the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution, in that there was no manifest necessity for the trial court to *sua sponte* declare a mistrial after the court received a note from the jury, which stated that it had come to a "final vote of 10 not guilty and 2 jurors voting guilty," because the jury had only deliberated for a little over four hours, it was the middle of the afternoon, the trial court had not given the jury a hammer instruction, and the trial court did not share the note with Mr. Fassero and did not ask him whether or not he wanted the hammer instruction to be given. Instead, the court called the jury into the courtroom, inquired through leading questioning whether jurors believed they would be able to reach a unanimous verdict, and when they said no the court declared a mistrial without warning.

*United States v. Hotz*, 620 F.2d 5 (1<sup>st</sup> Cir. 1980);

*State ex rel. Kemper v. Vincent*, 191 S.W.3d 45 (Mo. banc 2006);

*United States v. Perez*, 22 U.S. (9 Wheat) 579, 6 L.Ed. 165 (1824)

*State v. Anderson*, 698 S.W.2d 849 (Mo. banc 1985);

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

Mo. Const., Art. I, section 19;

Rule 27.02; and

MAI-CR3d 312.10.

## II.

The trial court abused its discretion in overruling Mr. Fassero's request for mistrial after the prosecutor elicited testimony from Mr. Fassero's ex-wife that she believed that he was molesting their daughter, because this ruling violated Mr. Fassero's rights to due process, a fair trial and to be tried only for the offense with which he was charged, as guaranteed by the 14th Amendment to the United States Constitution, and Article I, §§ 10, 17 and 18(a) of the Missouri Constitution, in that evidence that Mr. Fassero's ex-wife believed that Mr. Fassero was molesting their child, who was not the alleged victim in this case, was irrelevant and lacked a legitimate tendency to directly establish Mr. Fassero's guilt of the charged offense; it failed to fall under any of the recognized exceptions to the prohibition against other crimes evidence; the probative value of such evidence was outweighed by its prejudicial nature; Ms. Comte-Fassero was a lay witness was not qualified to give such an opinion; and the comment was a blatant attempt by the State to inflame the passions of the jury. Although the following day the trial court ultimately instructed the jury to disregard the statement, the instruction was insufficient to remedy the resulting harm, and only a mistrial could cure the prejudice.

*Wilson v. Shanks*, 785 S.W.2d 282 (Mo. banc 1990);

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

*State v. Thomas*, 536 S.W.2d 529 (Mo. App. St.L.D. 1976);

*State v. Harris*, 629 S.W.2d 399 (Mo. App., E.D. 1981);

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

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

### III.

**The trial court erred and abused its discretion in overruling Mr. Fassero's objection to State's Exhibit No. 13, a 2003 Illinois indictment against him for two counts of aggravated criminal sexual abuse against an unnamed child under thirteen, because the indictment was not admissible in the second stage of his bifurcated jury trial under § 557.036, and its admission violated Mr. Fassero's rights to due process, a fair trial, and confrontation as guaranteed by 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that (1) Mr. Fassero was unable to confront and cross-examine his Illinois accuser because no witnesses were presented in his trial concerning those allegations; and (2) the indictment was not legally relevant because the actions of a grand jury do not reflect upon Mr. Fassero's history or character -- what is relevant is whether or not he committed those offenses and the actions of a grand jury are mere allegations that must be proved and are not proof of those acts. Mr. Fassero was prejudiced because the jury assessed the maximum punishment.**

*State v. Berry*, 168 S.W.3d 527 (Mo. App. W.D. 2005);

*Crawford v. Washington*, 541 U.S. 36 (2004);

*State v. March*, 216 S.W.3d 663 (Mo. banc 2007);

*U. S. v. Mills*, 446 F.Supp.2d 1115 (2006);

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

Mo. Const., Art. I, §§ 10 and 18(a);

§ 557.036, RSMo Cum. Supp. 2004;

§ 566.067, RSMo 2000;

705 ILCS 305/17, 705 ILCS 305/9 and 705 ILCS 305/9.1;

Rule 29.11;

*Black's Law Dictionary* 1258 (8<sup>th</sup> ed. 2004)

*Webster's American Dictionary of the English Language*, at 45;

*4 Blackstone, Commentaries on the Laws of England (1769)*;

*Francis H. Heller, The Sixth Amendment to the Constitution of the United*

*States: A Study in Constitutional Development (1951)*;

#### IV.

The trial court plainly erred in overruling Mr. Fassero's motion to dismiss and in allowing the case to go to a second trial, because the trial court did not have jurisdiction to try Mr. Fassero for this offense, violating his rights under Article I, § 19 of the Missouri Constitution, in that Mr. Fassero's first trial ended in a hung jury on June 18, 2004, after the trial court *sua sponte* declared a mistrial, and his second trial did not commence until January 18, 2005, and because Article I, § 19 of the Missouri Constitution specifically provides that "if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court," and Mr. Fassero's second trial date did not commence within that required time period, the court no longer had jurisdiction over the case.

*Searcy v. State*, 981 S.W.2d 596, 598 (Mo. App. W.D. 1998);

*State v. Whitmore*, 948 S.W.2d 643 (Mo. App. W.D. 1997);

*State v. Mauldin*, 669 S.W.2d 58 (Mo. App. E.D. 1984);

Mo. Const., Art. I, § 19;

Rule 30.20; and

Rule 2.2 of the Rules of the Circuit Court of the Eleventh Judicial Circuit.

## ARGUMENT

### I.

The trial court abused its discretion in ordering a mistrial of Mr. Fassero's first trial and in overruling his motion to dismiss thereby allowing the case to go to a second trial following this mistrial, because this second trial, following the *sua sponte* mistrial ordered by the trial court, subjected Mr. Fassero to double jeopardy in violation of his rights under the due process clauses of the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution, in that there was no manifest necessity for the trial court to *sua sponte* declare a mistrial after the court received a note from the jury, which stated that it had come to a "final vote of 10 not guilty and 2 jurors voting guilty," because the jury had only deliberated for a little over four hours, it was the middle of the afternoon, the trial court had not given the jury a hammer instruction, and the trial court did not share the note with Mr. Fassero and did not ask him whether or not he wanted the hammer instruction to be given. Instead, the court called the jury into the courtroom, inquired through leading questioning whether jurors believed they would be able to reach a unanimous verdict, and when they said no the court declared a mistrial without warning.

### *Facts and Preservation*

Mr. Fassero was first tried on the charged offense on June 15-18, 2004 (L.F. 35-36). The jury started deliberating at 10:15 a.m. on Friday, June 18, 2004 (L.F. 35; 1Tr. 776). A little over four hours later, the jury sent a note to the judge stating that “The jury deliberated vigorously and came to a final vote of 10 not guilty and 2 jurors voting guilty” (S.L.F. 1; 1 Tr. 776-77; Appendix A-1). The trial court did not send a response back to the jury, nor did the court show that note to the attorneys (L.F. 1; 1Tr. 779; Tr. 16). Instead, the following occurred:

[THE COURT]: Back on the record in State of Missouri vs. Brian Fassero.

Let the record show it is now 2:35 p.m. The jury has been deliberating a little over four hours. Mr. Raymond, are you the Foreperson of the jury?

JUROR RAYMOND: Yes, your Honor.

THE COURT: I was handed a note from the jury a few minutes ago that says basically the jury deliberated vigorously and is not at this time able to reach a unanimous verdict; is that correct?

JUROR RAYMOND: That’s correct, your Honor.

THE COURT: All right. And I don’t want you to make any statements about how many votes there were for guilty or how many votes there were for not guilty, and we are not going to ask each of you what your vote is at this time, but according to the note that you sent me, the jury is split ten to two; is that correct?

JUROR RAYMOND: That’s correct.

THE COURT: All right. And it's been a few minutes since you gave me this. We had to get everybody back in the courtroom. Has there been any change in that split since you wrote this note to me about fifteen minutes ago?

JUROR RAYMOND: No, there hasn't.

THE COURT: And the jury has at this time deliberated for about four – about five and a half hours. My suggestion to you at this time is whether or not you believe any further – maybe it's four and a half hours, I am sorry, whether or not you believe any further deliberation would result in the jury being able to reach a unanimous verdict in this case?

JUROR RAYMOND: We discussed it and, no, no one is willing to change their decision.

THE COURT: And so it's your opinion that you would not be able by continued deliberation in good faith to reach a unanimous verdict?

JUROR RAYMOND: That's correct.

THE COURT: Everyone who agrees with the statement that your Foreperson just made, please raise your hand at this time. For the record, the Court notes that each and every juror has raised his or her hand. Thank you, and agreed with Mr. Raymond that further deliberation by the jury would not result in a unanimous verdict. Therefore, ladies and gentlemen, the Court will honor that statement and will excuse you from any further service at this time. ...

(The jury has been excused.)

The Court declares a mistrial in this case and orders that the defendant be remanded to the custody. Counsel for the State and the defendant will contact the clerk next week with exclusionary dates so we may reset the case for trial.

MR. BUEHLER [Assistant Prosecutor]: Thank you, your Honor.

MR. O'HERIN: [Defense counsel]: Your Honor, have you declared a mistrial?

THE COURT: I just did.

MR. O'HERIN: I didn't hear it [<sup>9</sup>].

THE COURT: YES.

MR. O'HERIN: Will we be able to inspect that note?

THE COURT: Frankly, I am not sure what is permitted.

MR. O'HERIN: Would you think about it, maybe we could have a discussion?

THE COURT: Yes. When I next see both of you together or when you come in to give your exclusionary dates, let me know if you think it's

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<sup>9</sup> Apparently defense counsel had "a little hearing issue related to combat operations at Vietnam," and at the first trial once noted that he could not "hear a word that [the assistant prosecutor was] saying" (1Tr. 5).

permissible for the court to share, you know, the vote of the jury was ten to two.

MR. O'HERIN: What I was concerned about, your Honor, is that I understand from you that there was information that gave me (sic) more detail concerning that.

THE COURT: They have put in that note not only the ten to two split but which of those was for a guilty verdict and which of those was for acquittal. That's what I am not prepared at this time to divulge, but I will consider that in speaking with counsel.

MR. O'HERIN: Thank you.

(1Tr. 776-80; L.F. 34-36).

Mr. Fassero was tried again on January 18-21, 2005, over his objection (L.F. 21). On the first day of trial, Mr. Fassero moved to dismiss based on double jeopardy (Tr. 16-19). He contended that a new trial after the trial court had declared a mistrial at the first trial without his consent would result in double jeopardy (Tr. 1-18). He noted that because the trial court had not informed him of the contents of the jury note that had indicated their voting split he "was unable to make an intelligent response or any objection whatsoever with respect to the state of jury deliberations" (Tr. 18). He noted that a "hammer" instruction was not given even though it was about two and a half hours before 5:00 p.m. when the

jury was discharged (Tr. 18, 21).<sup>10</sup> Thus there was no manifest necessity to declare a mistrial (Tr. 18, 21). He was entitled to a dismissal because a new trial would violate his right to be free from double jeopardy (Tr. 19). If he had known the exact contents of the jury note in question, he would have moved for a “hammer” instruction (Tr. 21). The trial court told Mr. Fassero that he had raised the issue and preserved it for appeal, but the court denied the motion to dismiss (Tr. 22).

In Mr. Fassero’s timely Motion for New Trial paragraphs 1 and 2 raised the claim that the trial court erred in denying Mr. Fassero’s motion to dismiss because the second trial violated his right to be free of double jeopardy in that the trial court ordered a mistrial in the first trial without manifest necessity and “after the trial court failed to divulge an *ex-parte* communication from the jury which defendant was entitled to know to formulate his trial strategy, to wit: whether to give the hammer instruction because the court knew the jury vote count stood 10 to 2 for acquittal” (L.F. 16-17). Because Mr. Fassero objected that his second trial violated his right to be free from double jeopardy and because the claim raised on this appeal was presented in a timely motion for new trial, this claim is properly preserved for appeal.

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<sup>10</sup> **Rule 27.02(p)** provides that **MAI-CR 3d 312.10** (commonly referred to as the “hammer instruction”) may be given when appropriate, after extended deliberation by the jury. That pattern instruction is set out in the appendix (Appendix A-2).

### *Standard of Review*

The decision to grant a mistrial is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State ex rel. Kemper v. Vincent*, 191 S.W.3d 45, 49 (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 senses of justice and indicate a lack of careful consideration. *Id.*

### *Constitutional Provisions Involved*

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life and limb.” *U.S. Const. Amend. V*. In a jury trial, jeopardy attaches -- for purposes of the Double Jeopardy Clause -- when the jury is impaneled and sworn. *Kemper*, 191 S.W.3d at 51. The Double Jeopardy Clause applies to state trials through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787 (1969).

The Missouri double jeopardy provision applies only to retrial after an acquittal. **Mo. Const. art. I, sec. 19** (“nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury”); *Kemper*, 191 S.W.3d at 50.

### *Double Jeopardy bared retrial - no manifest necessity existed to declare mistrial*

A defendant has a “valued right” to have his or her trial completed by a particular tribunal. *Kemper*, 191 S.W.3d at 51; *Wade v. Hunter*, 336 U.S. 684,

689 (1949). A declaration of a mistrial implicates that right. *City of Smithville v. Summers*, 690 S.W.2d 850, 854 (Mo. App. W.D. 1985). Missouri courts have consistently held that a mistrial is a drastic remedy that should only be granted in extraordinary circumstances. *Kemper*, 191 S.W.3d at 49. A defendant has “a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial.” *United States v. Jorn*, 400 U.S. 470, 485 (1971). This valued right gives way only when the ends of public justice would no longer be served by a continuation of the proceedings. *Summers*, 690 S.W.2d at 854. In a case of a trial tainted by error, not of the defendant’s actions, “[t]he important considerations, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed.” *United States v. Dinitz*, 424 U.S. 600, 609, (1976).

Even though a defendant has an interest in preventing a mistrial, not all mistrials will result in barring a subsequent retrial. *Kemper*, 191 S.W.3d at 51. For instance, if the defendant requested or consented to the mistrial, then double jeopardy does not bar a second trial unless the prosecutor intentionally goaded the defendant into making the request. *Id*; *Oregon v. Kennedy*, 456 U.S. 667, 675-76 (1982). Here there was no request or consent by Mr. Fassero to the court’s *sua sponte* declaration of a mistrial.

Generally, the double jeopardy clause bars retrial if a judge grants a mistrial without the defendant’s request or consent. *State v. Tolliver*, 839 S.W.2d 296, 299

(Mo. banc 1992), *citing Jorn*, 400 U.S. at 479-481. However, this is subject to a long-recognized exception permitting retrial: where there is a “manifest necessity” for the declaration of the mistrial, *Kemper*, 191 S.W.3d at 51; *Kennedy*, 456 U.S. at 671.

The United States Supreme Court has refused to formulate rules based on categories of circumstances which will permit or preclude retrial. *Jorn*, 400 U.S. at 480. Instead, the courts remain guided by the oft-quoted language of the opinion in *United States v. Perez*, 22 U.S. (9 Wheat) 579, 6 L.Ed. 165 (1824), which dealt with the question of whether the discharge of the jury by the court from giving any verdict without the consent of the defendant is a bar to any further trial for the same offence:

We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.

*Perez*, 22 U.S. (9 Wheat) at 580.

Thus, the declaration of a mistrial due to a hung jury can be a manifest necessity, and thus double jeopardy principles generally does not bar retrial after the court declares a mistrial as the result of a hung jury. *Perez, supra; Ward v. State*, 451 S.W.2d 79, 81-82 (Mo. 1970); *State v. Holt*, 592 S.W.2d 759, 771-72 (Mo. banc 1980). “It is well settled that neither the state nor the federal constitution bars a defendant’s retrial after a mistrial resulting from a jury deadlocked unless the trial court abused its discretion in declaring the mistrial.” *State v. Perry*, 643 S.W.2d 58 (Mo. App. E.D. 1982).<sup>11</sup> Here the trial court abused its discretion in declaring a mistrial.

Mr. Fassero’ case is similar to what happened in *United States v. Hotz*, 620 F.2d 5 (1<sup>st</sup> Cir. 1980). In that case, the jury commenced deliberating at about 2:00 p.m. *Id.* at 6. At 4:00 p.m. the court received a note from the foreperson that read, “We are at a[n] impasse vote is 11-1 and the 1 juror I feel can’t be swayed.” *Id.* While the court was conferring with counsel about what to do, the court received a second note: “We are deadlocked at 11-1. I do not feel we can reach a unanimous decision.” *Id.* Defense counsel wanted the jury to continue deliberations during the evening, whereupon the court directed the deputy marshal to advise the jurors

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<sup>11</sup> “The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.” *Ex parte Lange*, 85 U.S. 163, 169 (1873).

that they should continue their deliberations but that the court would send out for sandwiches. *Id.* Shortly thereafter, the court was advised by the Marshal's office that because of an unusually large number of people eating downtown it would be impossible to make arrangements either to take the jury out to supper or to have sandwiches brought in, for a longer period of time than usual and that there was no prospect of getting supper for jurors until 7:30 or 8:00 p.m. *Id.* At 6:15 p.m. the court brought the jurors into the courtroom and, without further consultation with counsel, asked the foreperson if it was likely that the jury would reach a unanimous verdict in another thirty minutes or so. *Id.* Upon receiving a negative response, the court declared a mistrial and discharged the jury because of failure to agree. *Id.* at 6. The defendant moved to dismiss on the ground of double jeopardy. *Id.*

The First Circuit ordered the indictment dismissed. *Id.* at 7. The court held that if a jury fails to reach agreement after deliberating long enough to warrant a conclusion that agreement is not fairly possible; the court may declare a mistrial and avoid double jeopardy. *Id.* But this is to be done with great reluctance. *Id.* Although a trial court has broad discretion in determining if a mistrial is required by the jurors' reaching an impasse, the *Hotz* court knew of "no case in which such a determination has been made after so short a time." *Id.* "The fact that the jury seemed deadlocked over a single issue after four hours did not mean that another shot at reaching agreement was manifestly doomed to failure. Both in acting

without hearing counsel, and in the decision itself, the court downplayed a fundamental right of the defendant.” *Id.*

Similarly, in Mr. Fassero’s case the jury had been deliberating only between four and five hours; it was before 3:00 p.m. on a Friday afternoon; the case was tried over the course of four days and the jury was numerically close to a verdict (10-2); the hammer instruction (**MAI-CR 3d 312.10**) was not given to the jury, in fact the trial court did not even ask either party whether they wanted such an instruction; the court failed to share the contents of the note to the parties so objections or suggestions could be made; and the court failed to tell the parties that it intended to declare a mistrial. It appears from the record that the court reached its decision based upon the fact that it knew that the jury was split 10 to 2 for acquittal, a fact which the trial court initially refused to even disclose to Mr. Fassero when he asked the court about what was exactly in the note (Tr. 776-80). The double jeopardy clause “prevents a prosecutor or judge from subjecting a defendant to a second prosecutor by discontinuing the trial when it appears that the jury might not convict.” *Green v. United States*, 355 U.S. 184, 188 (1957). Such was the case here. The double jeopardy bars retrial where bad-faith conduct by judge or prosecutor threatens the harassment of an accused by declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant. *Dinitz*, 424 U.S. at 611. Here the trial court knew that Mr. Fassero had a jury favorable to acquit Mr. Fassero when it sua sponte declared a mistrial

during the afternoon after only four hours of deliberation without consulting Mr. Fassero or sharing the note it had received from the jury with Mr. Fassero.

There was not a manifest necessity to declare a mistrial under these specific circumstances. As the Missouri Supreme Court has stated, “the defendant has a constitutionally protected interest in proceeding to a verdict and a hasty trial judge would commit error in failing to prompt the jury to a verdict.” *State v. Anderson*, 698 S.W.2d 849, 853 (Mo. banc 1985), citation omitted. The trial court was hasty here.

Although the jury indicated to the trial court upon leading questioning that continued deliberation would not result in a unanimous verdict, in other cases the hammer instruction has been held to have been appropriately given under similar circumstances resulting in a verdict being reached.

For instance, in *State v. Campbell*, 147 S.W.3d 195 (Mo. App. S.D. 2004), the jury had deliberated for less than two hours and sent a note indicating that it was a “hung jury.” *Id.* at 201. The court consulted with the parties and it was determined not to give the written hammer instruction yet. *Id.* The jury was brought into court and they informed the court that it was 10-2 on two counts and a unanimous not guilty verdict on another count. *Id.* The trial court requested the jury to continue further deliberations because the parties had a right for that jury to return a verdict, although if it could not, “so be it.” *Id.* The court also asked the foreperson whether she believed that any further deliberation would be “fruitful in this case, in attempting to reach a verdict.” *Id.* The foreperson said she did not

believe any further deliberations would be fruitful. *Id.* The trial court ordered them to return to the jury room. *Id.* at 201-02. A little over two hours later, the jury later returned verdicts of guilty as to one count and not guilty as to two counts. *Id.* at 202, 203.

Similarly, in *State v. Starks*, 820 S.W.2d 528 (Mo. App. E.D. 1991), about three and a half hours after deliberating the jury sent a note that said it was “split eleven to one on Mr. Starks” and that “[w]e all agree that no decision can be reached.” *Id.* at 528-29. A half hour later the defendant requested the court to declare the jury hung. *Id.* at 529. Instead, the court sent a message requesting the jury to continue to deliberate. *Id.* A half hour after that, the court told the parties that he intended to bring the jury into the courtroom and if the jury remained eleven to one, to read MAI-CR3d 312.10 and have it deliberate further. *Id.* Stark’s request for a mistrial was again denied. *Id.* The court asked the jury whether the numerical split was the same. *Id.* The foreperson said it was. *Id.* The court then asked whether the foreperson believed that it would benefit by some further deliberations. *Id.* The foreperson said, “I do not believe so, your Honor.” The trial court then read the hammer instruction. *Id.* About five hours and twenty minutes after the jury had started deliberating, the jury delivered guilty verdict. *Id.* The *Sparks* court approved of the giving of the hammer instruction, noting that “[h]aving been told the jury is deadlocked does not preclude the trial court from reading the hammer instruction and requiring the jury to continue deliberations.” *Also see, Anderson*, 698 S.W.2d at 853 (“Being told by a juror that

further deliberation would not be helpful in resolving a deadlock does not preclude the trial judge from reading the hammer instruction, and certainly does not prevent the trial judge from attempting to facilitate a verdict by giving no additional instruction and allowing further time for deliberation”).

These cases illustrate that even where a jury indicates that it believes that further deliberations would not result in a unanimous verdict, upon further instruction and prodding by the trial court, a verdict can be reached. Here it seems apparent the trial court made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial.

### ***Conclusion***

The trial court abused its discretion in *sua sponte* declaring a mistrial. Therefore, double jeopardy bared the retrial. This Court should reverse his conviction and discharge him from his judgment and sentence therefor.

## II.

The trial court abused its discretion in overruling Mr. Fassero's request for mistrial after the prosecutor elicited testimony from Mr. Fassero's ex-wife that she believed that he was molesting their daughter, who was not the alleged victim in this case, because this ruling violated Mr. Fassero's rights to due process, a fair trial and to be tried only for the offense with which he was charged, as guaranteed by the 14th Amendment to the United States Constitution, and Article I, §§ 10, 17 and 18(a) of the Missouri Constitution, in that this evidence of uncharged crimes lacked a legitimate tendency to directly establish Mr. Fassero's guilt of the charged offense, the probative value of such evidence was outweighed by its prejudicial nature, and it was improper for Ms. Comte-Fassero to testify as to her opinion instead of stating facts. Although the following day the trial court ultimately instructed the jury to disregard the statement, the instruction was insufficient to remedy the resulting harm, and only a mistrial could cure the prejudice.

### *Facts and Preservation*

Mr. Fassero's ex-wife, Jennifer Comte-Fassero testified that Mr. Fassero has a bad reputation in the community for truthfulness and veracity in the community and that he lies (Tr. 782). On cross-examination, defense counsel asked her whether on the day in question she trusted Mr. Fassero with their daughter, who was not the victim in this case (Tr. 784). She answered that she did

not trust him with their daughter (Tr. 784). The following then occurred during the State's redirect examination:

Q. Ms. Comte-Fassero, why is it that you do not trust the defendant with your daughter?

A. After we were separated, but before we were divorced, Natalia started making comments that were kind of strange about her dad.

[Defense Counsel]: Your Honor, I would object. I would ask to approach.

THE COURT: Well, I am not going [to] allow her to repeat any of those statements, they would be hearsay statements.

\* \* \* \* \*

Q. [by the State] Why is it that you didn't trust Mr. Fassero with your daughter?

[Defense Counsel]: Your Honor, I would object to any statement that she makes, based on hearsay.

THE COURT: Answer the question, ma'am, without giving us hearsay statements by someone out of court.

A. So it's just my personal opinion, okay?

THE COURT: What you saw and what you observed not what someone else said to you.

A. Okay. Natalia was very upset about going to her dad's for a while. And she was scared and would cry, and so I can say that stuff, I think.

[Defense Counsel]: I can't hear.

THE COURT: Wait for another question. Just wait for a question. I can't really answer your question. The attorney has to ask you the question.

Q. [by the State] What were your feelings at the time that caused you not to trust the defendant to be with your daughter?

[Defense Counsel]: Objection, your Honor, irrelevant. She stated her opinion.

THE COURT: Sustained as to what her feelings were.

Q. [by the State] What was your opinion as to why didn't you trust Mr. Fassero with your daughter at that point?

[Defense Counsel]: Objection, your Honor, based on in part on hearsay.

[The State]: Judge, he asked her opinion. He opened the door to it, Judge.

THE COURT: I am going to allow her to give her opinion without hearsay.

A. I believe that he was molesting her.

[Defense Counsel]: Your Honor, I would move for a mistrial.

THE COURT: I am going to deny that request. Do you have any cross-examination – or recross of this witness?

(Tr. 784-86).

Later, Mr. Fassero's renewed request for mistrial was again overruled by the trial court (Tr. 789-97). Mr. Fassero admitted that he had asked Ms. Comte-Fassero whether she trusted him, and she had answered that she did not trust him (Tr. 790). But the state was not then entitled to elicit an answer that it knew was inflammatory and prejudicial (Tr. 790). The State noted that discovery had

disclosed this allegation, which had come up in Mr. Fassero's divorce (Tr. 791-92). Mr. Fassero acknowledged that such an allegation was contained in the police reports (Tr. 793). The trial court complained that it had not been apprised of the fact that there had been an allegation of molestation (Tr. 793). The trial court believed that the fact that Mr. Fassero had asked his ex-wife whether she trusted him with their child enabled the State to explain why she did not trust him (Tr. 794). Nevertheless, the trial court complained to the State that the State had not advised the court "that this was the territory that we were going in" because the court did not like the fact that the statement was made before the jury (Tr. 794). Mr. Fassero complained that he did not know she was going to give that answer (Tr. 796).

The day following the request for mistrial, Mr. Fassero requested that the court order the jury to disregard Mr. Fassero's ex-wife testimony concerning her belief that Mr. Fassero was molesting their child (Tr. 799-806, 809-10). The trial court agreed and informed the jury the following:

Ladies and gentlemen, at this time the court will advise the jury that only the following question asked and answer given by Jennifer Comte-Fassero be disregarded. QUESTION: What was your opinion as why didn't you trust Mr. Fassero with your daughter at that point? ANSWER: I believe that he was molesting her.

(Tr. 810; L.F. 24).

In Mr. Fassero’s timely Motion for New Trial, paragraph 5 of that motion raised that the trial court erred in allowing the testimony of Jennifer Comte-Fassero over his objection and “after a motion for mistrial related to her attempt to prejudice the defense” (L.F. 17). Because of the request for mistrial raised at trial and the inclusion of this point in the timely motion for new trial, the issue raised on this appeal is properly preserved.

### *Standard of Review*

This Court reviews a trial court’s refusal to grant a mistrial for an abuse of discretion. *State v. McGowan*, 184 S.W.3d 607, 610 (Mo. App. E.D. 2006). This Court will find that a trial court abused its discretion when its ruling is clearly against the logic of the circumstances before it and when the ruling is so arbitrary and unreasonable as to shock our sense of justice and indicate a lack of careful consideration. *Id.* Evidentiary decisions of the trial court are reviewed, in the context of the whole trial, to ascertain whether the defendant received a fair trial. *State v. Walkup*, 220 S.W.3d 748, 757 (Mo. banc 2007).

### *Analysis*

Mr. Fassero’s ex-wife’s opinion that Mr. Fassero was molesting their daughter was inadmissible for two reasons.

First, it was inadmissible evidence of uncharged crimes. Proof that Mr. Fassero committed a separate and distinct crime is not admissible unless that proof has a legitimate tendency to establish the defendant's guilt of the charged offense. *State v. Nelson*, 178 S.W.3d 638, 642 (Mo. App. E.D. 2005). The State cannot,

without legal justification, present evidence that shows that the defendant has committed, been accused of, been convicted of, or definitely associated with another crime. *State v. Butler*, 984 S.W.2d 860, 863 (Mo. App. W.D. 1998). Because of the dangerous tendency and misleading probative force of evidence of other crimes, its admission should be subjected by the courts to rigid scrutiny. *Nelson*, 178 S.W.3d at 642. If erroneously admitted, evidence of other crimes is presumed to be prejudicial. *State v. Randolph*, 698 S.W.2d 535, 541 (Mo. App. E.D. 1985). The other crimes evidence here did not fall within any exception to the general prohibition against evidence of other crimes and the evidence was particularly prejudicial due to the fact that the charged crime and the uncharged crime but involved allegations of child molestation, i.e., propensity evidence. See *State v. Ellison*, No. SC88468 (Mo. banc December 4, 2007).

Second, the evidence was inadmissible because the questions called for an opinion or conclusion on the part of a lay witness. Generally, a lay witness may not testify as to his or her opinions or conclusions but must state facts. *State v. Thomas*, 536 S.W.2d 529, 532 (Mo. App. St.L.D. 1976). Further, it was not shown that Mr. Fassero's ex-wife was qualified to give such an opinion. She based her opinion upon the actions of her daughter. Her testimony was very similar to the "rape trauma syndrome" testimony found inadmissible by this Court in *State v. Taylor*, 663 S.W.2d 235 (Mo. banc 1984). In *Taylor*, there was an expert witness who was not allowed to give such testimony. Here, it was not even established that Ms. Fassero was qualified to give this type of expert opinion.

At trial the State argued that Comte-Fassero's testimony was admissible because Mr. Fassero had asked her if she trusted him with their daughter. In its brief in the Eastern District, respondent argued that this "opened the door" to the other crimes evidence under the doctrine of "invited error" (Resp. Br. at 34-37). The Eastern District in its opinion agreed with the State (Slip op. at 13).

"Invited error" is "[a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make an erroneous ruling." *Black's Law Dictionary* 582 (8<sup>th</sup> ed. 2004). The error here was not invited by defense counsel's question – it occurred because the State persisted with its questions until it got the response it wanted over Mr. Fassero's multiple objections. Further, under the doctrine of invited error, if one party improperly elicits irrelevant evidence constituting part of a transaction to his benefit, he cannot object to a continuation of evidence of the transaction by the opposing party directed at refuting adverse inferences arising from the incomplete nature of the evidence. *Wilson v. Shanks*, 785 S.W.2d 282, 285-86 (Mo. banc 1990). But here Ms. Comte-Fassero's answer that she did not trust Mr. Fassero with their child did not go to Mr. Fassero's benefit and there was no adverse inference for the State to refute.

And even if it can be argued that defense counsel's question as to whether Ms. Comte-Fassero trusted Mr. Fassero with their daughter somehow opened the door to why she did not trust him that does not mean that the State is allowed to present all types of evidence in response. See, *State v. Taylor*, 739 S.W.2d

220 (Mo. App. S.D. 1987) (Defendant, who presented brief testimony from his girl friend concerning his assault on her, had not waived objection to State's introduction of substantial evidence attempting to prove assault on girl friend, in defendant's prosecution for manufacturing and possessing marijuana.). Ms. Comte-Fassero twice answered why she did not trust Mr. Fassero – because of her observations of her daughter's behavior. But Mr. Fassero's original question did not open the door for his ex-wife to give an improper speculative opinion that she believed that Mr. Fassero was molesting their child because while a lay witness may state facts she may not testify as to her opinions or conclusions. *State v. Thomas*, 536 S.W.2d 529, 532 (Mo. App. St.L.D. 1976).

The final issue is whether the remedy of a mistrial was required or whether the instruction to the jury to disregard the question and answer, which again highlighted the uncharged crime, sufficiently cured the error. As the United States Supreme Court has noted, “the naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction.” *Bruton v. U.S.*, 391 U.S. 123, 129 (1968). Further, the practice of the State in seeking to obtain an advantage in a trial of a case by injecting therein unfair insinuations should have the severest condemnation and suffer the most disastrous result permissible under the law, i.e., a new trial or mistrial. *State v. Harris*, 629 S.W.2d 399 (Mo. App. E.D. 1981). And as recently noted by this Court, the only realistic deterrent to improper conduct by the State is through the trial and appellate courts because counsel, encouraged by the

demonstrated reluctance of courts to declare mistrials or grant new trials, deliberately transcend the bounds of what is proper, conscious of the possibility that objection may be made and sustained, but smug in the knowledge that the objectionable matters may not be effectively withdrawn and that their poisonous influence may not be entirely neutralized. *State v. Banks*, 215 S.W.3d 118, 120 (Mo. banc 2007). The trial court's cautionary instruction only emphasized the improper evidence and did not cure the harm.

It is the State's burden to show that any error is harmless beyond a reasonable doubt. *State v. Watson*, 968 S.W.2d 249, 254 (Mo. App. S.D. 1998). Under the facts of this case, this Court cannot declare the error harmless beyond a reasonable doubt. In making that determination the prejudicial nature of the charged offenses should be considered since trials of charges for which there is a human abhorrence should be conducted with scrupulous fairness to avoid adding other prejudices to that which the charge itself produces. *State v. McElroy*, 518 S.W.2d 459, 461[6] (Mo. App. Spr.D. 1975). Further, this was a hotly contested trial, in fact the first trial ended in a hung jury with 10 jurors wanting to acquit Mr. Fassero. There were only four different witnesses between the two trials, three of them testified in the first trial and not the second trial, and Ms. Comte-Fassero testified in the second trial and not the first trial. The three witnesses who testified in the first trial were inconsequential – one established the foundations for photographs taken of A.A. (1 Tr. 232-80), A.A.'s mother testified to establish her age (1 Tr. 393-94), and the owner of the store testified that although there was

video equipment at Tumble Drum, nothing of note was recorded during the alleged incident (1Tr. 730-45). The only witness of significance who did not testify in the first trial but who did testify in the second trial was Mr. Fassero's ex-wife, who told the jury that she believed that Mr. Fassero was molesting their child. Her improper testimony might have tipped the scales against Mr. Fassero. Evidence that Mr. Fassero might have molested another child, his own child, in a child molestation case was highly prejudicial. The matter was so inflammatory that it could not be removed by an instruction to disregard them. *State v. Hancock*, 451 S.W.2d 6, 9 (Mo. 1970).

Therefore, the trial court's failure to grant a mistrial was an abuse of discretion, and violated Mr. Fassero's rights to due process, to a fair trial, and to be tried for the offense with which he was charged as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Sections 10, 17 and 18(a) of the Missouri Constitution. This Court should reverse Mr. Fassero's conviction and sentence and remand for a new trial.

### **III.**

**The trial court erred and abused its discretion in overruling Mr. Fassero's objection to State's Exhibit No. 13, a 2003 Illinois indictment against him for two counts of aggravated criminal sexual abuse against an unnamed child under thirteen, because the indictment was not admissible in the second stage of his bifurcated jury trial under § 557.036, and its admission violated Mr. Fassero's rights to due process, a fair trial, and confrontation as guaranteed by 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that (1) Mr. Fassero was unable to confront and cross-examine his Illinois accuser because no witnesses were presented in his trial concerning those allegations; and (2) the indictment was not legally relevant because the actions of a grand jury do not reflect upon Mr. Fassero's history or character -- what is relevant is whether or not he committed those offenses and the actions of a grand jury are mere allegations that must be proved and are not proof of those acts. Mr. Fassero was prejudiced because the jury assessed the maximum punishment.**

#### ***Introduction***

Although bifurcated trials in Missouri death penalty cases have existed for some time, a bifurcated trial for non-capital offenses is of recent origin and thus

the issues raised in this point on appeal are of first impression in Missouri. This point presents the following questions of general interest and importance:

1. Do the United States and Missouri Confrontation Clauses apply in the second stage of a bifurcated non-capital jury trial?
2. In the second stage, did the admission of a pending indictment deny Mr. Fassero of his right to confrontation where no witness testified concerning the indictment's allegations;
3. Was that pending indictment inadmissible in the second stage of a non-capital jury trial under § 557.036, because it did not reflect upon Mr. Fassero's character and history since what is relevant is whether he committed those acts whereas the actions of a grand jury are mere allegations and are not proof of those acts?

Neither this Court nor the United States Supreme Court have directly addressed these issues. There is a split of authority in other jurisdictions concerning confrontation at jury sentencing and the relevancy of an indictment.

### ***Facts and Preservation***

The jury found Mr. Fassero guilty of the class B felony of child molestation in the first degree, § **566.067**, for touching A.A.'s vagina on February 2, 2003 (L.F. 23, 25, 54; Tr. 852). Prior to the second stage of his bifurcated jury trial the State announced it was going to present to the jury an authenticated copy of a May 29, 2003, amended indictment from the Circuit Court of Madison County, Illinois, showing that Mr. Fassero had been charged with two felony counts of aggravated

criminal sexual abuse (Tr. 856-57; State's Exhibit No. 13). Mr. Fassero's initial objection was on the basis of relevancy (Tr. 857-58). He argued that the indictment did not go to Mr. Fassero's "history" under § 557.036, RSMo Cum. Supp. 2004 (Tr. 861). The trial court overruled that objection (Tr. 861). Mr. Fassero then objected that the admission of the indictment deprived him of due process and his right to confront witnesses (Tr. 861-62). The trial court again overruled his objections (Tr. 862).

During the second stage of trial the State introduced into evidence and published to the jury the 2003 Illinois amended indictment (Tr. 875; State's Exhibit No. 13; Appendix A-3 to A-4). It alleged that between August 2000, and August 2002, Mr. Fassero fondled the vaginal area of a child who was less than thirteen and that he also fondled the breast of a child who was less than thirteen (State's Exhibit No. 13).<sup>12</sup> During closing argument, the State argued that the exhibit showed that "there have been other kids at risk" (Tr. 877). The jury recommended the maximum punishment -- fifteen years imprisonment (Tr. 879-80; L.F. 21, 22).

In Mr. Fassero's timely Motion for New Trial, paragraph 6 raised that the trial court erred "in allowing the jury to see the Amended Indictment from Illinois

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<sup>12</sup> The exhibit included in the appendix has the names blacked out, so it cannot be determined whether there were one or two alleged victims; comments made by the prosecutor outside the jury's presence indicate there was one victim (Tr. 857).

in the sentencing phase as it was prejudicial, hearsay, not a conviction or probative of defendant's character" (L.F. 17). Because Mr. Fassero objected to the evidence and included the point in his timely motion for new trial, the point raised by Mr. Fassero on this appeal is properly preserved. **Rule 29.11.**

The Eastern District Court of Appeals denied Mr. Fassero's confrontation claim holding that, although this Court has ruled that hearsay is inadmissible during the penalty phase of a capital trial and the Western District in *State v. Berry*, 168 S.W.3d 527, 539-40 (Mo. App. W.D. 2005) has ruled the same in non-capital criminal trials, the confrontation clause does not apply to the second stage of a bifurcated jury trial (Slip op. at 15-16). The court did not directly address Mr. Fassero's relevancy argument, but instead treated it as an unpreserved hearsay argument, although the objection, motion for new trial, and point relied on clearly raised a relevancy objection (Slip Op. at 13-16).

### ***Standard of Review***

Typically, the trial court has broad discretion in deciding whether to admit evidence, and this Court will declare error only when it deems the trial court to have abused its discretion. *Berry*, 168 S.W.3d at 536. But whether a criminal defendant's rights were violated under the Confrontation Clause is a question of law that this Court reviews *de novo*. *State v. Justus*, 205 S.W.3d 872, 878 (Mo. banc 2006). Further, evidentiary decisions of the trial court are reviewed, in the context of the whole trial, to ascertain whether the defendant received a fair trial. *State v. Walkup*, 220 S.W.3d 748, 757 (Mo. banc 2007).

## *Analysis*

### *(1) Confrontation clause applies to second stage of bifurcated jury trial*

The admission of the Illinois indictment denied Mr. Fassero his right to confront witnesses against him because his jury heard that he was accused by an Illinois grand jury of fondling the vaginal area and breast of a child under the age of thirteen without Mr. Fassero being able to confront and cross-examine the *ex parte* in-court testimony of the officer who testified in front of the Illinois grand jury or any of the witnesses relied upon by that officer. At least nine of sixteen grand jurors apparently found the bill of indictment to be supported by “good and sufficient evidence.” **705 ILCS 305/17, 705 ILCS 305/9 and 705 ILCS 305/9.1.**

As noted above, the Eastern District denied Mr. Fassero’s confrontation claim holding that the confrontation clause does not apply to the sentencing phase of a jury trial, although it noted that this Court has ruled that hearsay is inadmissible during the penalty phase of a capital trial and the Western District has ruled the same in second stage of a non-capital jury trials, *Berry, supra*, (Slip op. at 15-16).

In *Berry*, the Western District held that in the second stage of a bifurcated jury trial under § 557.036, RSMo Cum. Supp. 2004, “hearsay that does not qualify under an exception to the rule should be excluded, as it would be in any other jury proceeding.” *Berry*, 168 S.W.3d at 539-40. The court noted that

although traditionally, in cases of judge sentencing as opposed to jury sentencing, hearsay is routinely permitted in the form of pre-sentencing investigations (PSI) and in other ways, that juries have more difficulty than judges in recognizing the danger of relying on hearsay statements. *Id.* Although the *Berry* court found trial court error in the admission of hearsay evidence indicating that the defendant had assaulted the murder victim before, it did not find the error prejudicial because abundant similar evidence of the defendant's "temperament" had been introduced. *Id.* at 540-41.

Although the *Berry* court found a hearsay violation, it did not find a confrontation violation because it held that the hearsay evidence was not testimonial (police officers testified about what the victim had previously told them). *Id.* at 538-39. That portion of the *Berry* opinion is contrary to recent cases decided after *Berry*, which hold that such evidence would be testimonial. *See, Davis v. Washington*, 547 U.S. \_\_\_, 126 S.Ct. 2266 (2006) (statements taken by police officers in the course of interrogation are "testimonial," and subject to the Confrontation Clause, when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution) and *State v. March*, 216 S.W.3d 663 (Mo. banc 2007) (laboratory report prepared solely for prosecution is testimonial for purposes of the Confrontation Clause).

Because the *Berry* court believed it was necessary to determine whether the hearsay statements were testimonial in order to decide whether the defendant's

confrontation rights were violated, that opinion at least implicitly indicates that the Confrontation Clause applies to the second stage of a bifurcated trial. Otherwise, there would have been no need to determine whether the statements were testimonial – the sole issue would have been whether or not the statements fell under an exception to the hearsay rule. Thus there is a conflict in the appellate courts of this State that this Court must resolve.

Mr. Fassero acknowledges that most courts in other jurisdictions that have addressed the issue have held that the Confrontation Clause does not apply to the punishment phase. See cases collected in *Summers v. State*, 148 P.3d 778 (Nev. 2006) and in respondent’s brief in the Eastern District (Resp. Br. at 47-48).<sup>13</sup> Those cases are based upon the United States Supreme Court’s 1949 opinion *involving judge sentencing*, which rejected the contention that a death sentence based on information from witnesses whom the defendant had not been permitted to confront violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Williams v. New York*, 337 U.S. 241 (1949).

But *Williams* was not a Confrontation Clause case. It was a due process case that was decided before the Supreme Court had held that the Confrontation Clause applied to the States in *Pointer v. Texas*, 380 U.S. 400 (1965). Thus it is

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<sup>13</sup> But even the *Summers* court noted that evidence must still be reliable and relevant, and the danger of unfair prejudice must not substantially outweigh its probative value. *Id.* at 783 n. 17

not controlling on the issue. The United States Supreme Court has yet to address whether the Sixth Amendment right to confront witnesses applies to the punishment phase of a bifurcated trial. *But see, Bullington v. Missouri*, 451 U.S. 430 (1981), which stated that “many of the protections available to a defendant at a criminal trial also are available at a sentencing hearing ... [citation includes] right to confront witnesses...”).

Also, *Williams* involved the use of a PSI by a judge at sentencing, and thus the court reasoned that adversarial testing of such evidence was unnecessary because sentencing was not an adversarial proceeding and the relationship between probation officers and defendant was not one of antagonists because probation officers “have not been trained to prosecutor but to aid offenders.” *Williams*, 337 U.S. at 249-50. In stark contrast, the second stage of a bifurcated trial in Missouri is adversarial, and thus the reasoning used by *Williams* to reach its conclusion that due process did not require confrontation at a judge sentencing hearing is inapplicable to bifurcated jury trial in Missouri.

Further, when the trial court in *Williams* mentioned some of the matters contained in the pre-sentence investigation that had been prepared apparently without objection by the defendant, the accuracy of the statements made by the judge as to the defendant’s background and past practices were not challenged by the defendant or his counsel, nor was the judge asked to disregard any of them or to afford the defendant a chance to refute or discredit any of them by cross-examination or otherwise. *Id.*, 337 U.S. at 244.

Not only does the fact that *Williams* was not a Sixth Amendment confrontation case cast doubt upon the validity of cases relying on *Williams* to hold that the Confrontation Clause does not apply during the sentencing phase of a jury trial, but the United States Supreme Court's Sixth Amendment jurisprudence has changed dramatically since *Williams*. E.g., *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004), where the United States Supreme Court held that the admission of testimonial hearsay statements violates the Confrontation Clause unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant.

Thus, the reliance upon *Williams* by other courts addressing this issue post-*Crawford* is misplaced. While *Williams* still might have some validity with the regard to the introduction of non-testimonial hearsay at a judge sentencing proceeding, testimonial hearsay adduced at penalty phase of a bifurcated jury trial requires different treatment after *Crawford*.

The continuing validity of applying *Williams* to confrontation challenges in sentencing hearings has been called into question by some courts. E.g. *U. S. v. Mills*, 446 F.Supp.2d 1115 (2006) (admission of testimonial statements in presentence and postsentence investigation reports and grand jury testimony violated confrontation clause); *Rodriguez v. State*, 753 So.2d 29, 43 (Fla. 2000) (confrontation clause applies to all three phases of a capital trial); *Russeau v. State*, 171 S.W.3d 871 (Tex. Crim. App. 2005) (county jail "incident reports" and prison "disciplinary reports," which contained statements written by corrections

officers detailing defendant's disciplinary offenses while incarcerated, contained testimonial statements that were inadmissible under the confrontation clause; the statements in the reports amounted to unsworn, *ex parte* affidavits of government employees and were the very type of evidence the confrontation clause was intended to prohibit); *State v. Bell*, 359 N.C. 1, 603 S.E.2d 93 (N.C. 2004) (Admission of out-of-court statements made to police officer by victim of prior robbery committed by defendant, for purposes of proving prior crime of violence aggravating circumstance during penalty phase violated defendant's constitutional right to confrontation); *Rodgers v. State*, 948 So.2d 655 (Fla.,2006) (witness' statements to police officer regarding prior shooting death of defendant's prior girlfriend was testimonial in nature, and thus, admission of officer's testimony regarding witness' statements violated defendant's right of confrontation under *Crawford*, in sentencing for capital murder, where State did not establish that witness was unavailable to testify); *U. S. v. Corley*, 348 F.Supp.2d 970 (N.D. Ind., 2004) (summary, hearsay testimony from officers was inadequate to permit the court to determine whether the evidence of defendant's unadjudicated criminal conduct was sufficiently reliable for the jury to consider during penalty phase of capital trial; consideration of such hearsay statements would run the risk of violating defendant's confrontation clause rights, especially where government had not even attempted to show, as further required by *Crawford*, that the witnesses to the unadjudicated criminal conduct would be "unavailable" for the reliability hearing); *Commonwealth v. Green*, 525 Pa. 424, 581 A.2d 544, 564 (1990)

(vacating death sentence and remanding for resentencing because defendant could not cross-examine state's rebuttal witness during mitigation).

Such cases that hold that a defendant has the right of confrontation during a punishment phase are supported by a plain reading of the texts of both the United States Constitution and the Missouri Constitution.

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” Similarly, Article I, Section 18(a) of the Missouri Constitution provides, “in all criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face.” The right to confront witnesses is guaranteed at every stage in the prosecution by the very terms of these constitutional provisions. Thus, if the second stage of a bifurcated jury trial is part of the “criminal prosecution,” then Mr. Fassero had the right to be confronted “face to face” with all the witnesses against him.

It is difficult to characterize the “second stage” of a bifurcated jury trial under § 557.036, RSMo Cum. Supp. 2004 as anything other than part of a “criminal prosecution.” The plain meaning of the words “criminal prosecution” suggests it includes the second stage of a bifurcated jury trial. See *Black's Law Dictionary* 1258 (8<sup>th</sup> ed. 2004) defining criminal prosecution as a “criminal proceeding in which an accused person is tried” and § 557.036.2 (“Where an offense is submitted to the jury, the trial shall proceed in two stages.”). Also, the same dictionary that Justice Scalia used to formulate his definition of “witness” in

*Crawford* provides that a “prosecution” is the “institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal and *pursing them to final judgment.*” *Webster’s American Dictionary of the English Language*, at 45 (Emphasis added).

These definitions show that the term “criminal prosecution” is properly recognized to include all aspects of the criminal proceeding, from charge to incarceration or acquittal. Further, when the Sixth Amendment was adopted, the sentencing decision was “collpas[ed] ... into the proceeding for determining guilt.” *4 Blackstone, Commentaries on the Laws of England, 368 (1769)*. And Blackstone wrote, “[T]he next stage of *criminal prosecution*, after trial and conviction are past, in such crimes and misdemeanors, ... is that of judgment.” *Id.* at 368 (emphasis added). *Also see, Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (declaring that parole revocation hearings are outside the ambit of the Sixth Amendment because “[p]arole arises after the end of the criminal prosecution, including imposition of sentence.”) (emphasis added); *Francis H. Heller, The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development (1951)* at 54 (“The ‘criminal prosecution’ begins with the arraignment of the accused *and ends when sentence had been pronounced on the convicted or a verdict of ‘[n]ot guilty’ has cleared the defendant of the charge.*”

The entire text of the Sixth Amendment also supports that confrontation should apply to both stages of a bifurcated jury trial. The Sixth Amendment sets

forth a list of rights guaranteed “[i]n all criminal prosecutions,” including the right to counsel. The United States Supreme Court has held that the right to counsel applies to sentencing proceedings. *Mempa v. Rhay*, 389 U.S. 128 (1967). And since the Sixth Amendment extends the rights both to counsel and to confrontation in “all criminal prosecutions,” this suggests that where one right applies that other one does too.

It would seem to logically follow that if the right to counsel applies to sentencing proceedings then the Confrontation Clause also applies to such proceedings. The exercise of the right to counsel would be futile or severely restricted if counsel is not allowed to confront and cross-examine the evidence presented at the second stage or sentencing phase of trial. And without the right to counsel, the right of cross-examination might also be futile. Thus, there is a link between the two rights. As noted by the United States Supreme Court when it ruled that the Sixth Amendment right to confrontation was applicable to the states:

It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. ... right of cross-examination is ‘one of the safeguards essential to a fair trial.

*Pointer v. Texas*, 380 U.S. 400, 404 (1965). There is no reason apparent from the plain text of the Sixth Amendment for limiting the right of confrontation to the guilt phase of trial, while extending the right to counsel through all critical stages of a criminal prosecution, including sentencing.

Similarly, the United States Supreme Court has extended the right to effective assistance of counsel to sentencing phases. In *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984), the United States Supreme Court noted that a “capital sentencing proceeding . . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision, that counsel’s role in the proceeding is comparable to counsel’s role at trial – to ensure that the adversarial testing process works to produce a just result under the standards governing decision.” Later, the United States Supreme Court extended the right to effective assistance of counsel to non-capital sentencing as well. *Glover v. United States*, 531 U.S. 198 (2001). It is difficult to see how counsel can be truly effective if he or she is denied the right to confront and cross-examine the witnesses against the accused.

Further, the United States Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972), held that in the context of parole violations, minimal due process entails, among other things, the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation). *In accord*, *State ex rel Mack v. Purkett*, 825 S.W.2d 851 (Mo. banc 1992) (parolee was denied right to due process to extent that no live witnesses were presented and he was denied

opportunity to confront and cross-examine even one officer). If a parolee is generally entitled the right to confront and cross-examine witnesses, it should follow that a criminal defendant should have that same right during a jury sentencing hearing.

Mr. Fassero recognizes that it is important that the sentencer receive as much information as possible in making its sentencing determination. But the quantity of evidence is not more important than the quality of evidence. The Confrontation Clause's ultimate goal is to ensure reliability of evidence.

*Crawford*, 541 U.S. at 61. Also, the confrontation clause commands that reliability be assessed in a particular manner; by testing in the crucible of cross-examination.

*Id.* The Clause thus reflects a judgment, not only about the desirability of reliable evidence ... but about how reliability can best be determined.” *Id.* at 61. In order to ensure reliable sentencing, the confrontation clause should apply to the second stage of a bifurcated trial.

As shown above, jury sentencing under the bifurcated system in Missouri is part of a criminal prosecution. Thus the United States Constitution guarantees Mr. Fassero the right “to be confronted with the witnesses against him,” U.S. Const. 6<sup>th</sup> Amend., and the Missouri Constitution guarantees him the right “to meet the witnesses against him face to face.” Article I, Section 18(a) of the Missouri Constitution. Yet Mr. Fassero was not afforded the right to cross-examine and confront his Illinois accusers(s). Particularly troubling is the fact that the only witness listed on the Illinois Indictment is a police officer (Appendix A-3), who

probably gave testimony involving multiple layers of hearsay in order to obtain the indictment, and whom Mr. Fassero did not have the opportunity to cross-examine or confront. The Confrontation Clause commands that the reliability of evidence be assessed in a particular manner: by testing in the crucible of cross-examination. *Crawford*, 541 U.S. at 61. This Court should rule that the confrontation clauses of the Missouri and United States Constitutions apply to second stage of a non-capital bifurcated jury trial.

***(2) Indictment does not reflect upon Mr. Fassero's history and character***

Mr. Fassero acknowledges that the law in Missouri is that the jury is entitled to hear evidence of unadjudicated bad acts in the second stage of a non-capital jury trial. What he does quarrel with, however, is the manner that those acts were presented in his trial – a certified copy of a pending indictment. Certainly the State could have introduced into evidence any prior convictions of Mr. Fassero. He had none. And certainly the State could have presented witnesses in the second stage of Mr. Fassero's bifurcated jury trial in an attempt to persuade it that Mr. Fassero had committed other crimes. But what the State should not have been allowed to do was to show the jury an indictment that had not resulted in conviction without presenting any witnesses to establish the allegations presented in that indictment.

Mr. Fassero acknowledges that: (1) **§ 557.036.3, RSMo Cum. Supp. 2004**<sup>14</sup> allows the jury in the second stage of a bifurcated non-capital jury trial to consider evidence concerning the history and character of Mr. Fassero; and (2) Missouri cases have held that such evidence may include other crimes, even those where the defendant had earlier been acquitted of. E.g., *State v. Jaco*, 156 S.W.3d 775 (Mo. banc 2005); *State v. Clark*, 197 S.W.3d 598, 600 (Mo. banc 2006). But Mr. Fassero contends that a pending indictment is not relevant to Mr. Fassero's history and character. This Court has not ruled on this issue and there is a split of authority in the other jurisdictions concerning this point of contention.

**§ 557.036.3, RSMo Cum. Supp. 2004**, provides, in pertinent part, that in the second stage of a bifurcated non-capital jury trial, evidence supporting or mitigating punishment may be presented, and such evidence may include with the discretion of the court "evidence concerning ... the history and character of the defendant."

This Court in *State v. Jaco*, 156 S.W.3d 775 (Mo. banc 2005), upheld the constitutionality of the bifurcated trial statute of **§ 557.036.3, RSMo Cum. Supp.**

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<sup>14</sup> The charged offense occurred before the effective date of the amended statute, but the case was tried after the statute was amended. This Court in *State v. Jaco*, 156 S.W.3d 775, 781 (Mo. banc 2005), held that applying the bifurcated trial statute retroactively does not violate the constitutional prohibition of ex post facto laws.

**2004.** This Court held that any facts that tend to assess punishment within the range prescribed by an offense are not required to be found beyond a reasonable doubt. *Id.* at 780-81. This Court also found that both parties may introduce “any evidence pertaining to the defendant’s character in order to help the jury assess punishment in a penalty phase setting [citation omitted], even where that evidence constitutes unadjudicated bad acts (citation omitted).” *Id.* at 781.

Recently, in *State v. Clark*, 197 S.W.3d 598, 600 (Mo. banc 2006), this Court noted that as a general rule, the trial court has discretion during the second stage of a bifurcated trial to admit whatever evidence it deems to be helpful to the jury in assessing punishment. *Id.* As a result, the State was not precluded from introducing evidence of other crimes that the defendant had been acquitted of during the second stage of trial. *Id.* at 600-02.

Thus, Missouri law clearly holds that the jury is entitled to hear evidence of Mr. Fassero’s unadjudicated bad acts in the second stage of a non-capital trial because such evidence is admissible under § 557.036.3, RSMo Cum. Supp. 2004, in that it goes to Mr. Fassero’s “history and character.” Mr. Fassero agrees that the State could have presented witnesses in the second stage of his jury trial to testify about the Illinois allegations in an attempt to persuade the jury that he had committed other crimes, and that the jury could then consider that evidence in deciding his punishment. But what the State should *not* have been allowed to do was to show the jury an indictment that had not resulted in conviction without presenting any witnesses to establish the allegations presented in that indictment.

Although the acts underlying the indictment are relevant to Mr. Fassero's history and character, if shown in a legally proper manner, the mere allegations are not relevant. The indictment was merely the act of an Illinois grand jury that allowed the State of Illinois to attempt to prove the allegations contained in the indictment in court at a later date should the State decide to pursue the matter, which as of yet it has not. It did not prove anything. It did not prove Mr. Fassero's "conduct by a preponderance of the evidence." *Clark*, 197 S.W.3d at 602, quoting *United States v. Watts*, 519 U.S. 148, 157 (1997). It did not prove Mr. Fassero's history and character. It was not relevant.

In *Waters v. State*, 483 P.2d 199, 202-03 (Alaska 1971), the Alaska Supreme Court stated that an "indictment is absolutely no evidence of guilty conduct," and in *Qualle v. State*, 652 P.2d 481, 487 (Alaska App., 1982), the court held that if the prosecution wishes to rely on other crimes or antisocial activity that do not result in convictions to enhance a sentence, it must prove that the defendant committed them; it may not rely on the fact that charges have been brought. Other cases have reached similar conclusions. See, *People v. Kirk*, 62 Ill.App.3d 49, 378 N.E.2d 795 (Ill. App. 1978) (in penalty phase the State may admit testimony concerning uncharged criminal conduct but bare arrests are not admissible at sentencing hearing; State may introduce evidence of prior criminal conduct not resulting in conviction only if the reliability and the accuracy of that evidence can be established by the rigors of cross-examination); *State v. Arther*, 290 S.C. 291, 350 S.E.2d 187 (S.C. 1986) (information regarding a formal charge that was

ultimately dismissed by the prosecutor is irrelevant; moreover, hearsay affidavit supporting the charge is not admissible evidence); *People v. Jackson*, 149 Ill.2d 540, 548, 599 N.E.2d 926, 930 (1992) (outstanding indictments may be considered but such evidence “should be presented by witnesses who can be confronted and cross-examined, rather than by hearsay allegations”). Cf. *State v. Storey*, 986 S.W.2d 462, 466 (Mo. banc 1999), wherein this Court held that void convictions are inadmissible to bolster guilt or punishment in a subsequent proceeding against the defendant.-- at least with a void conviction, the State established at some point in time the defendant’s guilt for the prior charged crime.

This line of cases makes sense because while the alleged underlying acts, if proven to be true, says something about Mr. Fassero’s history and character, the fact that a grand jury has returned an indictment based upon some unknown evidence selected by the State that Mr. Fassero did not have the opportunity to confront or cross-examine in order to test its trustworthiness does not prove anything about his history and character.

Jury sentencing under the bifurcated system is part of a criminal prosecution. Thus the United States Constitution guarantees Mr. Fassero the right “to be confronted with the witnesses against him,” U.S. Const. 6<sup>th</sup> Amend., and the Missouri Constitution guaranteed him the right “to meet the witnesses against him face to face.” Article I, Section 18(a) of the Missouri Constitution. Yet Mr. Fassero was not afforded the right to cross-examine and confront his Illinois accuser(s). Particularly troubling is the fact that the only witness listed on the

Illinois Indictment is a police officer, who more than likely gave testimony involving multiple layers of hearsay, and whom Mr. Fassero did not have the opportunity to cross-examine. The Confrontation Clause commands that the reliability of evidence be assessed in a particular manner: by testing in the crucible of cross-examination. *Crawford v. Washington*, 541 U.S. 36, 61 (2004)

### *Conclusion and prejudice*

This Court should hold that the confrontation clause applies in the second stage of a non-capital jury trial. As a result, Mr. Fassero was denied his right to confront his Illinois accuser. Further, this Court should hold that evidence of an indictment, without any evidence or witnesses presented to support that indictment, is not reliable or relevant in establishing the facts set out in the indictment, and the danger of unfair prejudice substantially outweighs its probative value. *Summers* at 783 n. 17.

The admission of the indictment here was not harmless beyond a reasonable doubt. *Storey*, 986 S.W.2d at 464-65. The indictment alleged that Mr. Fassero fondled the vaginal area of a child and the breast of either the same child or another child.<sup>15</sup> Mr. Fassero was facing very similar charges. During

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<sup>15</sup> As noted above, there was only one child, but because the names were blacked out of the indictment, the jury would not know this, especially since the prosecutor argued. “As you can see from State’s exhibit thirteen, there have been other kids at risk, other than [A.A.]” (Tr. 877).

argument, the State argued that the exhibit showed that other children had been “at risk” (Tr. 877). The jury recommended the maximum punishment -- fifteen years imprisonment (Tr. 879-80; L.F. 21, 22). It cannot be said that the prior indictment did not contribute to that result; indeed it is a virtual certainty that it. There is a reasonable probability the jury relied on the improperly admitted evidence in arriving at its sentence and that it might have reached a different result but for its admission. His sentence must be set aside and the cause remanded for a new jury sentencing phase.

#### IV.

**The trial court plainly erred in overruling Mr. Fassero’s motion to dismiss and in allowing the case to go to a second trial, because the trial court did not have jurisdiction to try Mr. Fassero for this offense, violating his rights under Article I, § 19 of the Missouri Constitution, in that Mr. Fassero’s first trial ended in a hung jury on June 18, 2004, after the trial court *sua sponte* declared a mistrial, and his second trial did not commence until January 18, 2005, and because Article I, § 19 of the Missouri Constitution specifically provides that “if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court,” and Mr. Fassero’s second trial date did not commence within that required time period, the court no longer had jurisdiction over the case.**

As noted in Point I of this brief, Mr. Fassero’s first trial ended on June 18, 2004, when the trial court *sua sponte* declared a mistrial because of a hung jury (Tr. 776-80; L.F. 35-36). Mr. Fassero was tried again on January 18-21, 2005, over his objection when he moved to dismiss based on double jeopardy (Tr. 16-19). The trial court told Mr. Fassero that he had raised the issue and preserved it for appeal, but the court denied the motion to dismiss (Tr. 22). In Mr. Fassero’s timely Motion for New Trial paragraphs 1 and 2 raised the claim that the trial court erred in denying Mr. Fassero’s motion to dismiss because the second trial

violated his right to be free of double jeopardy in that the trial court ordered a mistrial in the first trial without manifest necessity and “after the trial court failed to divulge an *ex-parte* communication from the jury which defendant was entitled to know to formulate his trial strategy, to wit: whether to give the hammer instruction because the court knew the jury vote count stood 10 to 2 for acquittal” (L.F. 16-17).

However, because the claim on appeal differs from the claim raised at trial, Mr. Fassero must request this Court to review for plain error. **Rule 30.20.** A finding of manifest injustice is justified since a double jeopardy violation would result in the discharge of Mr. Fassero. Also, a defendant may for the first time on appeal raise the issue of the trial court’s jurisdiction to try the case. *Searcy v. State*, 981 S.W.2d 596, 598 (Mo. App. W.D. 1998). *Also see, State v. Whitmore*, 948 S.W.2d 643 (Mo. App. W.D. 1997) (noting that a claim of double jeopardy is an assertion of a constitutional grant of immunity which is significantly different than other constitutional guarantees pertaining to procedural rights since a trial court is without the power or jurisdiction to try or punish a defendant twice for the same offense).

The Missouri double jeopardy provision applies to retrial after an acquittal. **Mo. Const. art. I, sec. 19** (“nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury”). But the Missouri Constitution does have an additional prohibition: “if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or

bail the prisoner for trial at the same or next term of court.” **Mo. Const. art. I, sec. 19.**

Rule 2.2 of the Rules of the Circuit Court of the Eleventh Judicial Circuit, where Mr. Fassero’s case was tried, provides: “The terms of Court shall commence on the Second Monday in January, April, July and October. Mr. Fassero’s first trial occurred on June 15-18, 2004, so it was tried during the April term of 2004. Under **Mo. Const. art. I, sec. 19**, his case could have been tried the rest of that term, which ended in June, or the following term, July-September of 2004. He was not tried the next term, however, he was not tried until January 18-21, 2005. Thus, the court did not have jurisdiction over his trial.

In *State v. Mauldin*, 669 S.W.2d 58 (Mo. App. E.D. 1984), the court reversed a conviction and ordered the defendant discharged because he was not tried within sixty days of the declaration of a mistrial. Although that case dealt with a statute that is no longer in effect and is therefore not controlling on the issue here, it does stand for the proposition that if a defendant is not tried within a required time limit he or she is entitled to a discharge. Here the Missouri Constitution required Mr. Fassero to be retried before October of 2004. Because his retrial did not occur within the required time, the court had no jurisdiction over his trial.

This Court must reverse Mr. Fassero’s conviction and order him discharged as to that offense.

## CONCLUSION

For the reasons presented in Points I and IV, Mr. Fassero requests that this Court reverse his conviction and order him discharged. For the reasons presented in Point II, Mr. Fassero requests that this Court reverse his conviction and sentence and remand for a new trial. For the reasons presented in Point III, Mr. Fassero requests that this Court reverse his sentence and remand for a new jury sentencing hearing.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13-point font. I hereby certify that this brief 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 20,510 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using McAfee VirusScan, which was updated on January 10, 2008. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this \_\_\_\_ day of January, 2008, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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