

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)
)
 Respondent,)
)
 vs.) No. SC84151
)
GERMAINE FRENCH,)
)
 Appellant.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI
FIFTH JUDICIAL CIRCUIT, DIVISION FIVE
THE HONORABLE KEITH MARQUART, JUDGE

APPELLANT’S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Germaine French, was tried by a jury and convicted of two counts of felony non-support, Section 568.040 RSMo.¹ The Honorable Keith Marquart sentenced Mr. French to two consecutive six-month sentences in the Buchanan County Jail. After the Western District Court of Appeals reversed one of Mr. French's two convictions on double jeopardy grounds, this Court granted the State's transfer application pursuant to Rule 83.04, and it has jurisdiction over this cause pursuant to Article V, Section 10, Mo. Const. (as amended 1976).

¹ All statutory references are to RSMo 1994, unless otherwise noted.

STATEMENT OF FACTS

Victoria Wilson met Appellant, Germaine French, at a college party (Tr. 127). When they met again at another party, she gave him her telephone number (Tr. 128). Appellant called Victoria a few days later, in September 1992, and she invited him to her house where they had sex one time (Tr. 128). Appellant returned to Victoria's house a couple of days later, but they had a fight and did not see each other anymore (Tr. 129).

In November 1992, Victoria told Appellant that she was pregnant and that he was going to have to pay support (Tr. 122, 124, 131). She did not contact him again during the pregnancy (Tr. 131). Marekus Wilson was born on June 17, 1993 (Tr. 123). Victoria did not call Appellant when she went to the hospital to have the baby, and she did not put Appellant's name on the birth certificate (Tr. 132). Appellant has never had a relationship with Marekus (Tr. 135).

In 1995, Victoria told Appellant where she had a bank account and that if he would deposit money into it, she would not file for child support (Tr. 125, 134, 139). Appellant agreed to do so (Tr. 125, 134). However, Appellant later called Victoria and told her that he was not paying child support for a child that was not his (Tr. 153).

When Appellant did not deposit money into her account, Victoria filed papers with the Child Support Enforcement Agency (Tr. 140). The Buchanan County child support enforcement department filed a petition to establish paternity

(Tr. 158). Appellant was served at work with an order compelling genetic testing (Tr. 170-171). Appellant did not submit to the testing (Tr. 170-171).

On November 26, 1996, a judgment was entered declaring that Appellant was Marekus' father and ordered him to pay \$431 per month to Victoria (Tr. 174-175, 207-209). Appellant never received notice of this judgment (Tr. 177-180). The judgment was sent by certified mail, but there was no signature from Appellant on the return of service and the document was returned unclaimed (Tr. 198). Appellant has never made a payment; however, a payment of \$182 was received in August 1998, through a tax intercept (Tr. 207-210).

The State charged Appellant with felony nonsupport in two separate cases: In CR399-329F, the State charged that Appellant knowingly failed to provide, without good cause, adequate food, clothing, lodging or medical attention for Marekus, from January 1, 1998 through June 30, 1998 (L.F. 14); and in case CR399-330F, the State charged Appellant with the same activity from July 1, 1998 through December 31, 1998 (L.F. 75). The cases were consolidated for trial and the Western District Court of Appeals consolidated the cases for the original appeal.

Defense counsel filed motions to dismiss both informations as barred by double jeopardy (L.F. 18-20, 77-80). The motions were renewed on the morning of trial (Tr. 2). The double jeopardy issue was also raised as error in the motion for new trial (L.F. 53).

During deliberations, the jury inquired whether Appellant had “the constitutional right to refuse the court ordered genetic DNA test?” (L.F. 49). The Court told them that this was not an issue in the case (L.F. 49). After deliberating for over four hours, the jury found Appellant guilty on both counts, recommending a fine and six months in the county jail on both counts (Tr. 252-254). The judge sentenced Appellant to two consecutive six-month sentences in the county jail (L.F. 63-64, 100-101). This appeal follows.

POINTS RELIED ON

I.

The trial court erred in sentencing Appellant for two separate counts of felony non-support because this violated Appellant's right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Section 556.041, in that the State attempted to prosecute separately, in two counts, behavior that constituted a continuing course of conduct, since the charges were based upon Appellant's failure to provide support for Marekus over the course of time.

State v. Morrow, 888 S.W.2d 387 (Mo. App., S.D. 1994);

State v. Davis, 675 S.W.2d 410 (Mo. App., W.D. 1984);

State v. Pacchetti, 729 S.W.2d 621 (Mo. App., S.D. 1987);

Boss v. State, 702 N.E.2d 782 (Ind. App. 1998);

U.S. Const., Amends 5 & 14;

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

Sections 195.211, 556.041 & 568.040 RSMo. 1994;

Wis. Stat. Sections 49.90 & 948.22 (2000); and

Webster's New World Dictionary (3rd ed. 1990).

II.

The trial court erred in overruling Appellant's motion for judgment of acquittal at the close of all the evidence and in sentencing him on his convictions of criminal nonsupport, because the state failed to present sufficient evidence to convince a rational trier of fact beyond a reasonable doubt that Appellant committed the offenses, in violation of his right to due process of law, guaranteed by the 5th and 14th Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence failed to establish that Appellant knew of his legal obligation to support Marekus Wilson because the evidence was clear that Appellant never received a copy of the civil default judgment declaring him Marekus' father and obligating him to pay \$431 per month in child support.

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970);

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979);

State v. Grim, 854 S.W.2d 403 (Mo. banc 1993);

State v. Morovitz, 867 S.W.2d 506 (Mo. banc 1993);

U.S. Const., Amends 5 & 14; and

Mo. Const., Art. I, Section 10.

III.

The trial court abused its discretion in allowing the State to present evidence that Appellant did not cooperate when he was contacted about scheduling genetic testing, that the State filed a petition to establish paternity and received a court order compelling Appellant to submit to genetic testing, and that this order was served on Appellant but he failed to appear for testing, in violation of Appellant's rights to due process and a fair trial, as guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that this evidence was irrelevant to any issue at trial and highly prejudicial to Appellant because the fact of Appellant's paternity was established through the introduction of the civil judgment. The fact that Appellant had been legally adjudicated to be Marekus' father in civil court could not be challenged at his criminal trial, and the underlying evidence leading to that judgment is irrelevant. The jury placed great emphasis on this evidence during its deliberations when it inquired whether Appellant had "the constitutional right to refuse the court-ordered genetic DNA test," which reveals the prejudice resulting from the admission of this evidence, because it led the jury to contemplate whether Appellant had to prove that he was not the father in order to be found not guilty, when the real issue was whether Appellant knew he had a legal obligation to support Marekus, and the evidence of that was not overwhelming.

State v. McClanahan, 954 S.W.2d 476 (Mo. App., W.D. 1997);

State v. Miller, 650 S.W.2d 619 (Mo. banc 1983);

State v. West, 21 S.W.3d 59 (Mo. App., W.D. 2000);

State v. Aye, 927 S.W.2d 951 (Mo. App., E.D. 1996);

U.S. Const., Amends 5, 6, & 14; and

Mo. Const., Art. I, Sections 10 & 18(a).

ARGUMENT

I.

The trial court erred in sentencing Appellant for two separate counts of felony non-support because this violated Appellant's right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Section 556.041, in that the State attempted to prosecute separately, in two counts, behavior that constituted a continuing course of conduct, since the charges were based upon Appellant's failure to provide support for Marekus over the course of time.

This case presents an issue of first impression: Whether **Section 568.040** allows the State to impose multiple punishments in the same prosecution for the continuing nonsupport of a single child? Appellant asserts that his convictions and sentences for multiple offenses, based on the same act of omission, violated his right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Double Jeopardy

The constitutional bar of the Fifth Amendment against Double Jeopardy consists of three separate constitutional protections against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d (1969); *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187, 194 (1977). This third protection forbids the state from splitting a single crime into separate parts and then prosecuting the offense in piecemeal. *State v. Nichols*, 865 S.W.2d 435, 437 (Mo. App., E.D. 1993) (citing *State ex rel. Westfall v. Campbell*, 637 S.W.2d 94, 96 (Mo. App., E.D. 1982)). Double jeopardy protections are binding on the states through the Fourteenth Amendment to the federal constitution. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707, 716 (1969).

The Missouri Constitution provides that no person shall “be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury...” **Mo. Const., art. I, § 19**. Since Appellant was never acquitted by a jury, the Double Jeopardy Clause of the Missouri Constitution does not apply to his case. *State v. Morrow*, 888 S.W.2d 387, 389 (Mo. App., S.D. 1994). However, Missouri enforces the common law rule that no person shall, for the same offense, be twice put in jeopardy. *Id.* at 390 (citing *State v. Richardson*, 460 S.W.2d 537, 538 (Mo. banc 1970)). In *Richardson*, this Court held that there is “no readily discernible difference between the Fifth Amendment guarantee against double jeopardy and the common law guarantee as applied in this state.” **460 S.W.2d at 538**. Therefore, Appellant's protection from double jeopardy under Missouri law is coextensive with that afforded by the Fifth Amendment.

Appellant's case involves a violation of the third double jeopardy principle: multiple punishments for the same offense. "In contrast to the double jeopardy protection against multiple trials, the protection against cumulative punishments is designed to ensure that the sentencing discretion of the courts is confined to the limits established by the legislature." *Ohio v. Johnson*, 467 U.S. 493, 498-99, 104 S.Ct. 2536, 2540-41, 81 L.Ed.2d 425 (1984). Double jeopardy analysis regarding multiple punishments is, therefore, limited to determining whether cumulative punishments were intended by the legislature. *Missouri v. Hunter*, 459 U.S. 359, 366-69, 103 S.Ct. 673, 678-80, 74 L.Ed.2d 535 (1983). Only the legislative branch of government has the substantive power to define crimes and prescribe punishments - not the courts or prosecuting attorneys. *Jones v. Thomas*, 491 U.S. 376, 381, 109 S.Ct. 2522, 2525-2526, 105 L.Ed.2d 322 (1989); *Morrow*, 888 S.W.2d at 391. In determining the legislative intent, we must examine the *definition* of the offense and its allowable unit of prosecution. *Morrow*, 888 S.W.2d at 390.

Section 568.040 does not reveal a legislative intent for cumulative punishments

Subsection (1) of § 568.040 defines the offense of nonsupport, making it an offense if a parent "knowingly fails to provide, without good cause, adequate support which such parent is legally obligated to provide for his child... ." Support is not defined in terms of a court-ordered, monthly monetary amount. Rather, under subsection 568.040.2(3), "'Support' means food, clothing, lodging, and medical or surgical attention." Subsection (4) of § 568.040 enhances the crime of

nonsupport from a class A misdemeanor to a class D felony under certain circumstances: "Criminal nonsupport is a class A misdemeanor, *unless* the person obligated to pay child support commits the crime of nonsupport in each of six individual months within any twelve-month period, *or* the total arrearage is in excess of five thousand dollars, in either of which case it is a class D felony." (emphasis added).

Obviously, the legislature's definition of criminal nonsupport does not reveal an intent for a parent to be subjected to multiple punishments for the continuing nonsupport of a single child. The State may wish to transform subsection (4) into a definition section, but it is not. Subsection (4) is merely a sentence enhancement section, intended to elevate to felony status delinquent support that lasts longer than five months of a year or exceeds a certain dollar amount in arrearages - similar to how a marijuana possession charge is elevated to felony status when a person possesses over 35 grams. *See Section 195.211.*

Under **568.040**, failing to support for less than six months is a misdemeanor. The State erroneously asserted in its transfer application that "subsection 4 demonstrates that a parent 'commits the crime of nonsupport' on a monthly basis" and "that each month that a parent knowingly fails to provide adequate support for his or her child that parent commits a class A misdemeanor." (Transfer at 3). This is plain misreading of the statute. The language of the statute says nonsupport is a misdemeanor "*unless*" the nonsupport continues for six months. "Unless" means "in any case other than that." **Webster's New World**

Dictionary (3rd ed. 1990). "Unless" there is six months of nonsupport, the crime is a misdemeanor. The statute does not allow the State to prosecute a parent for five misdemeanors based on five months of nonsupport. Indeed, prosecution under the criminal nonsupport statute should not be viewed as a means of enforcing the terms of a decree. *State v. Morovitz*, 867 S.W.2d 506, 508 (Mo. banc 1993).

Had the Missouri legislature intended to authorize multiple felonies for the continuous nonsupport of a single child, it easily could have done so by amending Subsection (1), which defines the crime. The State of Wisconsin has an excellent statutory model for obtaining such a result:

Wisconsin Statute **Section 948.22** defines the crime of failure to support. The relevant portion of that statute reads:

(2) Any person who intentionally fails for 120 or more consecutive days to provide...child support which the person knows or reasonably should know the person is legally obligated to provide is guilty of a Class E felony. A prosecutor may charge a person with multiple counts for a violation under this subsection if each count covers a period of at least 120 consecutive days and there is no overlap between periods.

Additionally, in Subsection (1)(a) Wisconsin defines "child support" as "an amount which a person is ordered to provide for support of a child by a court of competent jurisdiction in this state or in another state, territory or possession of the

United States, or if not ordered, an amount that a person is legally obligated to provide under **Section 49.90**.²

In its transfer application, the State relied heavily on a Wisconsin case interpreting this Wisconsin statute, *State v. Grayson*, 172 Wis.2d 156, 493 N.W.2d 23 (1992). But the State's reliance on *Grayson* is wholly misplaced because *Grayson* interpreted a Wisconsin statute that is completely dissimilar to Missouri's nonsupport statute. Obviously, the *Grayson* court's conclusion that a "common sense reading of [the statute] establishes a legislative intent to permit multiple counts of felony nonsupport when the defendant fails to pay child support for one continuous period" may have been appropriate under their above-quoted statute. Their statute *arguably*³ contains this express intent within its definition of the crime. Our statute does not.

² **Section 49.90** requires the parent of a dependent person under the age of 18 to maintain his or her child so far as the parent is able, and to the extent that the dependent person is unable to do so, regardless of whether a court has ordered maintenance.

³ *Grayson* was a 4-3 decision of the Wisconsin Supreme Court. The dissent argued that the statute's language of "120 days or more" means "120 or more" is a felony, not every "120 days" was a felony. In obvious response to the dissent's concerns, the Wisconsin legislature added a specific clause allowing the prosecutor to charge a felony at every 120 days.

Because §568.040 is ambiguous, we turn to §556.041

If the statute does not indicate whether the legislature intended to punish cumulatively, we look to the general cumulative punishment statute. **Section 556.041** addresses the issue of cumulative punishments in Missouri. *See State v. McTush*, 827 S.W.2d 184 (Mo. banc 1992). **Section 556.041** provides, in pertinent part:

When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense.

He may not, however, be convicted of more than one offense if...

(4) The offense is defined as *a continuing course of conduct* and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

Although Missouri courts have never directly confronted the issue of "continuous course of conduct" in a nonsupport case before, they have repeatedly used "nonsupport" as an example of "*a continuing course of conduct*" in other double jeopardy cases. See *State v. Morrow*, 888 S.W.2d at 393 (by its nature, nonsupport involves "a continuing course of conduct"); *State v. Pacchetti*, 729 S.W.2d 621, 627 (Mo. App., S.D. 1987) (examples of "a continuous course of conduct" include false imprisonment, bigamy, *nonsupport*, and operation of a house of prostitution); *State v. Davis*, 675 S.W.2d 410, 417 (Mo. App., W.D. 1984) (the crime of nonsupport is continuous); *State v. Arnett*, 370 S.W.2d 169,

174 (Mo. App., Springfield 1963) (The offense of failure to support is a continuing one).

In *State v. Good*, **851 S.W.2d 1 (Mo. App., S.D. 1992)**, the defendant was charged in two counts with the felony of resisting arrest. The charges arose out of a single incident involving defendant's resistance of two officers. The two counts were identical except that one charged resistance of Officer Evans and the other charged resistance of Officer Duncan. The court held that the gist of the offense was resisting an arrest, and the offense was not dependent upon how many officers were attempting to arrest the defendant. Defendant's conviction on Count II was reversed. Similarly, the gist of the offense here is nonsupport of a child, but *the offense* is not dependent upon how many months the nonsupport has continued or the amount of arrearages. Rather, under subsection (4) of § **568.040**, it is *the punishment* for the offense that is contingent upon the duration of nonsupport or the amount of arrearages.

In *State v. Baker*, **850 S.W.2d 944 (Mo. App., E.D. 1993)**, the defendant was convicted of four counts of possession of a weapon on the premises of a correctional facility. Defendant was found in possession of four knives. The statute made it an offense for any person to possess, in a correctional facility, "any knife." The court found that the statute was ambiguous as to the allowable unit of prosecution and upheld only one conviction. Likewise, here, the criminal nonsupport statute is ambiguous as to the allowable unit of prosecution. But we

know that the common law has defined "nonsupport" as a "continuing course of conduct."

No statute should be construed to alter the common law further than the words import. *In re Estate of Williams*, 12 S.W.3d 302, 307 (Mo. banc 2000). "Where doubt exists about the meaning or intent of words in a statute, the words should be given the meaning which makes the least, rather than the most, change in the common law." *Id.* Additionally, the legislature is presumed to know the common law and to have used particular words in light of prior judicial and legislative action. *State v. Davis*, 675 S.W.2d at 415. When § 568.040.4 was amended in 1993, the existing caselaw clearly stated that nonsupport is a continuing course of conduct. Absent an explicit intent by the legislature to authorize multiple punishments, which is not found in the amended subsection (4), this Court cannot presume that the legislature intended to authorize multiple felonies for the continuous nonsupport of a single child.

The crime is a continuous one, unless and until the State breaks the course of conduct by bringing a charge. Nonsupport for up to six months is a misdemeanor, and anything six months or over is a felony - just as any amount in excess of \$5,000 is a felony. Surely, the State could not charge a parent with a felony when the parent is \$5,000 delinquent, then again at \$6,000, and \$7,000 and so on and so forth. Under the State's theory, the State could wait for a parent not to pay for up to three years (given the statute of limitations), and then bring six felony counts against the parent in a single action for the continuous nonsupport of

the same child - subjecting the parent to thirty years in prison. Clearly, this was not the legislative intent.

In both its Western District brief and in its application for transfer to this Court, the State has attempted to paint a doomsday scenario by repeatedly asserting that Appellant's argument would allow a nonsupporting parent to "violate the law with impunity" and forever escape subsequent punishment. This could not be further from the truth. In reality, Appellant's argument promotes the intent of the legislature that the nonsupport statute should "compel recalcitrant persons to fulfill their obligations of care and support." (*See Comment to 1973 Proposed § 568.040*). Appellant's argument encourages the State to timely charge the nonsupporting parent, thus breaking the continuing course of conduct. Then, if the parent, once punished, renews a continuing course of conduct by failing to provide support, the State could bring another charge under the statute. This approach is much more likely to "compel recalcitrant persons to fulfill their obligations of care and support," rather than the State's approach which promotes prolonged nonpayment, prolonged incarceration, and ballooning arrearages.

Despite the State's assertions, Appellant's argument absolutely does not limit the State to one felony charge over the course of the child's minority. Rather, it limits the State to one felony charge for the specific continuing course of conduct at issue. As to the instant charges, Appellant's nonsupport of Marekus is one ongoing and continuous act, which can be terminated only by providing support, and, therefore, the consecutive sentences which resulted from two

separate charges and convictions constitute multiple punishments for the same offense, violating double jeopardy. Respondent's argument would allow the State to watch from the sidelines as a continuous crime is committed, and then, whenever it decided to do so, charge the parent with as many felonies as it wanted to - for the same continuous act. This is certainly not what the legislature intended. "It is to prevent such an application of penal laws that the rule has obtained that a continuing offense can be committed but once, for the purposes of prosecution, prior to the time the prosecution is instituted. *Ex parte Snow*, 120 U.S. 274, 282, 7 S.Ct. 556, 560, 30 L.Ed. 658 (1887).

In *Snow*, three indictments were brought against Snow for unlawful cohabitation, alike in all respects, except that each covered a different period of time and all the time periods were contiguous. 120 U.S. at 281. The Supreme Court held that there was but one offense between the earliest date in any indictment and the latest date in any indictment and, therefore, only one sentence could be imposed. *Snow*, 120 U.S. at 560-561. Any division based solely on timeframes is arbitrary. *Id.*

Take, for example, the case of *Boss v. State*, 702 N.E.2d 782 (Ind. App. 1998). There, the State charged the defendant with three counts of nonsupport for failure to support his children during three different time periods: May 1, 1995 to December 19, 1995; December 20, 1995 to June 30, 1996; and July 1, 1996 to November 10, 1996 - essentially a continuous time period. *Id.* at 784. The

defendant had previously been charged and convicted under the same nonsupport statute in 1993 for failing to support the same children. *Id.* at 783.

On appeal, the defendant alleged double jeopardy on two grounds: 1) the State could not bring a second prosecution following the prior conviction because his nonsupport is a continuous act; and 2) his current nonsupport is an ongoing and continuous act and three consecutive sentences for the same act constitute multiple punishments for the same offense. *Id.* at 784-785. In denying the first double jeopardy claim, the Court voiced the same concerns as the State has previously raised in Appellant's case: "If a parent could not be prosecuted more than once under this statute, a parent who was prosecuted while his child was still young could fail or refuse to support a child without risk of further criminal penalties." *Id.* at 784-785. In denying the "successive prosecutions" argument, the Court held that "where a parent fails to provide support following an earlier conviction, the parent commits another offense." *Id.* at 785.

However, the Court granted relief on the defendant's second double jeopardy claim, which is the same ground Appellant raises here. The defendant's nonsupport is one ongoing and continuous act which can be terminated only by providing support and, therefore, the consecutive sentences which resulted from three separate charges and convictions constitute multiple punishments for the same offense. *Id.* at 785. For continuing offenses, the State cannot arbitrarily divide the offenses into separate time periods in order to multiply the penalties. *Id.* Because the nonsupport was continuous, the defendant could be convicted and

sentenced for only one crime. *Id.* The Court remanded with instructions to vacate two of the convictions and resentence the defendant accordingly. *Id.* at 785-786.

The Court specifically noted that the length of nonsupport and the amount of the arrearage go to the severity of the crime and the length of the sentence to be imposed - not to how many crimes may have been committed. *Id.* That is precisely why, here, the State's reliance on subsection (4) of § 568.040 is misplaced. That subsection relates to the penalty to be imposed, not to the elements of the crime, or how many crimes may have been committed. While ambiguous, it is much more likely that the legislature intended for the State to examine the nonsupporting parent's conduct over the course of a year's time period (indeed it does not indicate that the six months be consecutive). If the parent failed to provide at least half of the support that the parent was required to provide over the course of a year, then he is guilty of a felony. Or, if the parent failed to pay for six consecutive months, then charge the parent immediately and break the course of conduct. Similarly, the same punishment section provides that if the parent becomes more than \$5,000 in arrears, then that parent's punishment should be elevated to a felony. But nothing in §568.040 indicates that the legislature intended for the State to do nothing while a parent provided no support for a year, two years, three years, and then charge him with *multiple* felonies for the continuous nonsupport of a single child.

The prosecution of a parent who has not provided support for six months can and should be pursued as a felony rather than a misdemeanor. Such a

prosecution would then break the continuing course of conduct. However, to allow the nonsupport to continue indefinitely, and then bring multiple felony counts to bear against an individual for one continuous course of conduct, does not further the legislative intent to "compel recalcitrant persons to fulfill their obligations of care and support." **See Comment to 1973 Proposed § 568.040.**

Indeed, as the legislature noted, "[s]uch a goal is difficult to achieve by imprisoning such persons. Imposition of punishment, particularly a fine or imprisonment, can only frustrate the object of the support statutes by guaranteeing that the defendant will be unable to meet his obligation." **See Comment to 1973 Proposed § 568.040.**

The State's argument extends this problem by allowing the parent to accumulate substantial delinquencies in payment, making the chances of paying future support, much less arrearages, while serving a lengthy sentence nonexistent. It further allows the child to suffer the consequences of nonpayment for an extended period of time while the State sits on the sidelines, waiting to charge multiple felonies, even though it had the opportunity to charge the parent immediately and break the "course of conduct." Once punished, the State would be free to charge the parent again if the parent chose to engage in nonsupport again.

If the evidence supports Appellant's convictions, (See Point II, *infra*), it supports only one count for the continuing offense of nonsupport. Holding otherwise violates Appellant's right to be free from double jeopardy and violates

Section 556.041. Therefore, the conviction in case CR399-330F must be reversed and Appellant discharged from that sentence.

II.

The trial court erred in overruling Appellant's motion for judgment of acquittal at the close of all the evidence and in sentencing him on his convictions of criminal nonsupport, because the state failed to present sufficient evidence to convince a rational trier of fact beyond a reasonable doubt that Appellant committed the offenses, in violation of his right to due process of law, guaranteed by the 5th and 14th Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence failed to establish that Appellant knew of his legal obligation to support Marekus Wilson because the evidence was clear that Appellant never received a copy of the civil default judgment declaring him Marekus' father and obligating him to pay \$431 per month in child support.

Before depriving Appellant of his liberty, the State had to prove beyond a reasonable doubt that he committed each element of the offense. *In re Winship*, 397 U.S. 358, 363-364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This impresses “upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused” and thereby symbolizes the significance that our society attaches to liberty. *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979). Viewed in the light more favorable to the verdict, *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc), cert. denied, 114 S.Ct. 562 (1993), the evidence presented by the State failed to support a conviction for criminal

nonsupport, because the jury had no evidence from which it could find that Appellant acted “knowingly.”

After meeting at a college party, Victoria Wilson and Appellant had sex one time (Tr. 127-128). Shortly thereafter, they had a fight and did not see each other again (Tr. 129). In November 1992, Victoria told Appellant that she was pregnant and that he was going to have to pay support (Tr. 122, 124, 131). She did not contact him again during the pregnancy (Tr. 131). Marekus Wilson was born on June 17, 1993 (Tr. 123). Victoria did not call Appellant when she went to the hospital and she did not put Appellant’s name on the birth certificate (Tr. 132). Appellant has never had a relationship with Marekus (Tr. 135).

In 1995, Victoria told Appellant where she had a bank account and that if he would deposit money into it, she would not file for child support (Tr. 125, 134, 139). Appellant agreed to do so (Tr. 125, 134). However, Appellant later called Victoria and told her that he was not paying child support for a child that was not his (Tr. 153).

When Appellant did not deposit money into her account, Victoria filed papers with the Child Support Enforcement Agency (Tr. 140). On November 26, 1996, a judgment was entered declaring that Appellant was Marekus Wilson’s father and ordered him to pay \$431 per month to Victoria (Tr. 174-175, 207-209). Appellant never received notice of this judgment (Tr. 177-180). The judgment was sent by certified mail, but there was no signature from Appellant on the return

of service and the document was returned unclaimed (Tr. 198). Appellant has never made a payment.

Subsection (1) of § **568.040** contains the elements of the crime of nonsupport, making it an offense if a parent “knowingly fails to provide, without good cause, adequate support which such parent is legally obligated to provide for his child... .” **Section 562.016.3** provides:

A person "acts knowingly," or with knowledge,

- (1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or
- (2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.

In a prosecution for nonsupport, this element relates to the defendant's knowledge of the legal obligation to provide support in an adequate amount for the child.

State v. Morovitz, 867 S.W.2d 506, 509 (Mo. banc 1993). When, as here, a court orders the defendant to pay child support in a certain amount, knowledge is proven when the defendant is shown to be aware of his support obligation. *Id.* The evidence clearly did not prove this.

In this appeal, Appellant does not, indeed he cannot, contest the judgment of the civil court, declaring that he is Marekus’ father. That court entered a default judgment for paternity and child support against Appellant when he did not submit to genetic testing to determine paternity. Appellant does assert, however, that the evidence at his criminal trial failed to prove that he had knowledge of this civil

judgment. In fact the State's evidence showed that Appellant never received notice of this judgment (Tr. 177-180). Although the clerk sent the judgment by certified mail, there was no signature from Appellant on the return of service and the document was returned unclaimed (Tr. 198). In the absence of proof that Appellant received notice of the judgment, his knowledge cannot be presumed. The State did not prove knowledge because it did not show that Appellant was aware of his legal support obligation. *Morovitz, supra*. Therefore, this Court must reverse Appellant's convictions and remand with instructions that the trial court enter a judgment of acquittal and order Appellant discharged.

III.

The trial court abused its discretion in allowing the State to present evidence that Appellant did not cooperate when he was contacted about scheduling genetic testing, that the State filed a petition to establish paternity and received a court order compelling Appellant to submit to genetic testing, and that this order was served on Appellant but he failed to appear for testing, in violation of Appellant's rights to due process and a fair trial, as guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that this evidence was irrelevant to any issue at trial and highly prejudicial to Appellant because the fact of Appellant's paternity was established through the introduction of the civil judgment. The fact that Appellant had been legally adjudicated to be Marekus' father in civil court could not be challenged at his criminal trial, and the underlying evidence leading to that judgment is irrelevant. The jury placed great emphasis on this evidence during its deliberations when it inquired whether Appellant had "the constitutional right to refuse the court-ordered genetic DNA test," which reveals the prejudice resulting from the admission of this evidence, because it led the jury to contemplate whether Appellant had to prove that he was not the father in order to be found not guilty, when the real issue was whether Appellant knew he had a legal obligation to support Marekus, and the evidence of that was not overwhelming.

The State called Deborah Welter to testify about the underlying paternity action against Appellant (Tr. 156-157). Ms. Welter testified about the process of establishing paternity, over defense counsel's objection that this information was irrelevant (Tr. 157). Welter testified that the parties are contacted to try and schedule genetic testing (Tr. 157). When she contacted Appellant, she did not get cooperation (Tr. 158). So, they filed a petition to establish paternity (Tr. 158). Appellant was served with the petition (Tr. 164). They also obtained an order compelling Appellant to submit to genetic testing (Tr. 167-168). The order compelling genetic testing was admitted into evidence (Tr. 172). Ms. Welter then testified:

Q: Do you personally know if the Defendant appeared for the genetic testing that he was ordered to appear for?

A: We were told by the laboratory that he did not.

Defense: Objection.

Court: Sustained.

Q: To the best of your knowledge, did the Defendant show up for genetic testing?

Defense: Objection, Your Honor.

Court: Sustained.

(Tr. 171). Later, during cross-examination of Welter, the trial court ordered the parties to the bench where he stated, "The issue is not whether or not Mr. French is the father, the issue is whether or not he is a parent under the law." (Tr. 193).

Precisely. This entirely line of questioning was irrelevant. Whether or not Appellant cooperated with Ms. Welter when she contacted him about genetic testing, whether he received a court order compelling him to submit to genetic testing, and whether he failed to appear for the genetic testing is completely irrelevant, because he was adjudged Marekus' father by default in civil court. In fact, the issue is not even whether he is a parent under the law -- the real issue in this case is *whether he knew* he was judicially declared to be Marekus' father.

While there is little, if any, case law regarding the admission of genetic testing in a nonsupport case, Appellant asserts that this situation is similar to the right of a person to refuse consent to search. "A person has a right to refuse consent to search, and his refusal to give consent to search cannot be used to infer wrongful activity." *State v. West*, 21 S.W.3d 59, 66 (Mo. App., W.D. 2000). "Such refusal does not infer a consciousness of guilt." *Id.* Therefore, while Appellant's decision to decline paternity testing may subject him to civil contempt in the civil case, and may result in the trial court's judgment of paternity by default, *See Section 210.834.3*, this evidence is irrelevant in the criminal case and could not possibly imply a consciousness of "guilt."

This situation is also similar to the bar against the State eliciting facts underlying a prior conviction. *See State v. Aye*, 927 S.W.2d 951 (Mo. App., E.D. 1996). While it is possible to introduce evidence of the existence of a prior conviction to impeach during cross-examination, it is impermissible to elicit the facts underlying the conviction. In the same way here, it was permissible -- and

indeed, necessary -- for the State to elicit the fact of the civil judgment against Appellant, but it was not necessary to elicit the facts leading to that judgment.

It has been held that the failure to comply with an order compelling a handwriting sample opens the door to the State to comment at trial on this fact as being evidence of consciousness of guilt. *State v. Scurlock*, 998 S.W.2d 578, 590 (Mo. App., W.D. 1999); however, there is no “guilt” to be “conscious of” in a civil matter. In any event, it is hard to fathom how a refusal to submit to genetic testing indicates *knowledge* of paternity. Appellant has never denied having sex with Victoria, but he could not possibly “know” that he is the father and somehow secret that information. This is precisely why a civil court is enabled, under **Section 210.834.3**, to enter a judgment by default on the issue of paternity when a party refuses to submit to blood tests ordered by the court - indeed, such refusal constitutes civil contempt of court and is admissible as evidence in *the civil action*. **Section 210.834.3**. That does not mean that it is admissible in a criminal action. Why? Because the question in the criminal case is whether Appellant knew that he had a legal obligation to support Marekus - i.e., did he know that the civil court had entered the default judgment on the issue of paternity? Therefore, the only evidence that is relevant to this issue is the actual civil judgment, (which is the evidence of the legal obligation), and any evidence bearing on Appellant’s knowledge of that judgment - i.e., did he have notice?

"Evidence is relevant if it tends to prove or disprove a fact in issue, or if it corroborates evidence that is relevant and bears on a principal issue." *State v.*

McClanahan, 954 S.W.2d 476, 479 (Mo. App., W.D. 1997). The trial court is vested with broad discretion in ruling on questions of relevancy, but this court will not uphold the trial court's ruling if there has been a clear showing of an abuse of discretion. *Id.* As noted previously, all of the genetic testing evidence is irrelevant because it does not tend to prove or disprove Appellant's knowledge of the court order declaring him to be Marekus' father. The trial court acknowledged this when it said that "The issue is not whether or not Mr. French is the father, the issue is whether or not he is a parent under the law." (Tr. 193). This is a judicial declaration that the evidence surrounding the genetic testing was irrelevant, and yet, the trial court allowed all of this evidence to come before the jury. This constitutes an abuse of discretion.

Evidence admitted in error which would require reversal in a close case can be disregarded as harmless where the evidence of defendant's guilt is strong.

State v. McMillin, 783 S.W.2d 82, 99 (Mo. banc), *cert denied*, 111 S.Ct. 225 (1990). However, error in the admission of evidence should not be declared harmless unless it is so beyond a reasonable doubt. *State v. Miller*, 650 S.W.2d 619, 621 (Mo. banc 1983). To sustain a claim that error in the admission of evidence is harmless, the record must demonstrate that the defendant was not injured by the error by showing that the jury disregarded or could not have been influenced by the evidence. *State v. Chambers*, 898 S.W.2d 119, 123 (Mo. App., S.D. 1995). If it appears that the inadmissible evidence may have played a role in the guilty verdict, then this Court's duty is to reverse and order a new trial. *State*

v. Mayes, 868 S.W.2d 541, 545 (Mo. App., W.D. 1993). On the evidence of this case, this Court should not be satisfied beyond a reasonable doubt that the verdict would have been the same if the irrelevant “genetic testing” evidence had not been admitted. Indeed, it permeated much of the jury’s deliberations. The jury sent a question to the trial court asking whether Appellant had “the constitutional right to refuse the court ordered genetic DNA test?” (L.F. 49). The Court told them that this was not an issue in the case (L.F. 49). The trial court knew it was irrelevant to any issue in the case and had sustained certain objections to the admission of the evidence. This inadmissible evidence resulted in prejudicial error, and this Court must reverse and remand for a new trial.

CONCLUSION

Because Appellant was subjected to double jeopardy by being doubly tried and sentenced for an action which constituted a continuing course of conduct (Point I), he respectfully requests that this Court reverse his conviction on one count of felony nonsupport and discharge him from that sentence. Alternatively, because the evidence was insufficient to sustain either conviction (Point II), Appellant respectfully requests that this Court reverse both of his convictions and discharge him from both sentences. Finally, because the trial court allowed the admission of irrelevant evidence surrounding Appellant's refusal to submit to genetic testing (Point III), he respectfully requests that this Court reverse his convictions and grant him a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Amy M. Bartholow, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word 2000, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 8,022 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan 4.5.0, updated in February, 2002. According to that program, these disks are virus-free.

On the 11th of February, 2002, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to Philip M. Koppe, Assistant Attorney General, Penntower Office Center, 3100 Broadway, Suite 609, Kansas City, MO 64111.

Amy M. Bartholow