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JURISDICTIONAL STATEMENT

Appellant, Philip Ray Couch, appeals his convictions for child molestation in the first degree, Section 566.065 (Count I), endangering the welfare of a child in the first degree, Section 568.045 (Count III) and endangering the welfare of a minor in the first degree, Section 568.045, RSMo 2005 (Count IV). Mr. Couch was sentenced to fifteen years on Count I, five years on Count III and five years on Count IV, said sentences to run consecutively for a total of twenty-five years. Jurisdiction of this appeal was originally in the Missouri Court of Appeals, Eastern District. Article V, Section 3, Mo. Const. (as amended 1982); Section 477.070 RSMo 2006. The Court of Appeals reversed the case in part and affirmed the case in part. This Court thereafter granted Respondents Motion for Transfer, thereby exercising jurisdiction under Article V, Sections 3 and 10, Mo. Const. and Rule 83.03.

STATEMENT OF FACTS

I. The State's evidence

The record on Appeal consists of two volumes of transcript (Tr.) and a legal file (L.F).

Philip Ray Couch, Appellant and his wife, Stephanie Couch, resided in rural Laddonia, Missouri with their children (Tr. 130). Mr. & Mrs. Couch had both biological and adopted children in common. They were J.C., Lane Couch, Josh Couch, Ronald Couch, Garnet Couch, Sam Couch, V.C., S.C., Cody Couch, Lee Couch and Justin Couch. J.C. was one of their biological children while V.C. and S.C. were adopted. (Tr.192). Philip Couch had another grown biological child from a previous relationship, her name at the time of trial was Ceri Couch Garrison (Tr. 286).

J.C. testified at trial as follows: That on May 5, 2005, when she was thirteen years old, she had difficulty sleeping and entered her parent's room where her mother and father were sleeping in bed together with her infant brother Lane (Tr. 87-89); her father woke up and indicated for her to get into his side of the bed (Tr. 90). She said that he touched her breasts and vaginal area with his hands underneath her brassiere and underwear (Tr. 91 - 92). After he stopped she attempted to get up and he pulled her back and touched her in the same way (Tr. 92). Afterwards, he asked her what she was going to do and she advised that she was going to watch a movie in another room and fall asleep (Tr. 93). She was unable to testify if the light in the room was on or off (Tr. 103). She went to her

sister's S.C.'s room and reported the incident and then fell asleep with S.C. (Tr. 93). Later that day, she reported the incident to Jan Stock of the Rainbow Center, Columbia, Missouri, a child advocate group, and to Deputy Sheriff John Pehle (Tr. 95 - 96), 254. It was also reported to child psychologist, Lisa Clervi, (Tr. 228 - 229).

The child further said that a few weeks later, her father called her at home and tried to convince her to recant her allegation and to meet him at the barn located behind her house the following Monday (Tr. 96 - 98). The child reported this to a family friend, Donna Yeager and ultimately, to the Audrain County Sheriff's Department (Tr. 99).

J.C. stated that her father was very strict about permitting his children to walk in the town of Laddonia, Missouri. She said that her sisters and her did not like being prevented from going to town to see their friends (Tr. 100). She also indicated her belief that her father was a racist and that he would not let her hang out with her black friends because he was prejudiced. She did not like that (Tr. 101). After she made the accusations against Mr. Couch, her mother sought a divorce from her father and she was then allowed to go into the town of Laddonia, Missouri to hang out with her friends (Tr. 101). J.C. expressed that she was glad her father was gone because she has friends that live in Laddonia, Missouri and she was never able to see them before (Tr. 102).

The child admitted that immediately after the alleged molestation, she believed that her father had been asleep when he touched her. However, since that

time, she had come to believe differently and has claimed that they spoke to one another during the alleged incident (Tr. 105).

V.C., whose date of birth is July 28, 1989, was living with her adoptive parents, Philip Couch and Stephanie Couch in rural Laddonia, Missouri, at this same time (Tr. 110 - 112). She testified that her father had touched her both on top of her pants and underneath her pants, on her vagina, a few days before the incident with J.C. (Tr. 114 - 118). She states that this happened two nights in a row, and on the second night he touched her vagina beneath her clothing. V.C. did not report this incident to anyone until a few days later when she learned of J.C.'s allegations (Tr 119). She also stated that on another occasion she had taken a trip to Joplin, Missouri, or some other location in Southern Missouri, alone with her father to get a car part and during the trip he made sexual comments to her. They then stayed alone in a motel. (Tr. 120 - 121). During this trip, she states that while she was fully clothed, he grabbed her legs, held them open and told her that if he wanted to do something she wasn't big enough to stop him. However, she did not testify to any sexual touching during this trip (Tr. 123).

V.C. also stated that at other undetermined times, Philip Couch had touched her breasts. When asked if it was under the clothing or on top of the clothing on these occasions, she answered "I think on top" (Tr. 123).

V.C. also agreed that her father forbade her sisters and her to go into the town of Laddonia, Missouri unsupervised. After Mr. Couch was removed from the

home, they were allowed to go into the town to visit their friends without supervision (Tr. 125).

S.C., date of birth, March 9, 1991 also lived in the home with Philip and Stephanie Couch in rural Laddonia, Missouri (Tr. 129 -130).

S.C. testified that on May 5, 2005 her sister J.C. told her that Philip Couch had molested her and that she in turn told their brother Ronald Couch (Tr. 132 - 133).

S.C. testified that between March 9 and March 27, 2003 that some of her siblings, her father, and she slept outside in the family's recreational vehicle (Tr. 134 -136). At that time, her father indicated that she should sleep with him in the rear portion of the recreational vehicle (Tr. 137). It was during this time that she says he inserted his finger into her vagina (Tr. 138).

She also said that he had come into her bedroom after work and had rubbed her breasts on top of her clothing (Tr. 139). This was said to have occurred a few weeks prior to the first allegation of molestation by J.C. (Tr. 142).

The child reported that the molestation in her room was the last time he had touched her in a sexual way and that she had told him to stop. After he stopped, he got up and went to her sister's V.C.'s room. S.C. was afraid that her father would molest V.C. as well, but did not tell anyone that this was happening and went to sleep (Tr. 142 - 143).

S.C. believed her father to be a racist who was displeased with his daughters for associating with young black men. She said that he was strict with

the children and that the children were not allowed to go into town. Further, once her father left the home the girls were allowed to visit their friends in town (Tr. 145 -146).

Ronald Couch testified that his sisters reported to him on May 5, 2005 that their father had molested the three girls. It was Ronald Couch that notified authorities that he identified as the DFS (Tr. 149).

Ronald was also aware that his sisters had expressed that they were unhappy with the restrictions that their father had placed upon them. Primary among their concerns were that they were not allowed to go into town to hang out with their friends (Tr. 151). Ronald described his father as controlling (Tr. 152).

Audrain County Deputy John Pehle testified that commencing on May 5, 2005 he investigated the allegations made by the Couch sisters against their father (Tr. 154). During the course of the investigation, he spoke with all three girls (Tr. 154 -155). Deputy Pehle also identified records establishing that two telephone calls had been made from Philip Couch's cellular telephone to the family home in rural Laddonia, Missouri on May 27, 2005. (Tr. 159).

Deputy Pehle established through receipts that Philip Couch had rented a motel room in Springfield, Missouri on March 7, 2005 (Tr. 160).

Under cross-examination, Detective Pehle testified that he had taken a statement from another of the Couch children, Sam Couch. Sam reported to him that he heard his sister V.C. talking to his brother Cody on the family trampoline. Sam relayed that at that time he had overheard V.C. and his brother Cody discuss

lying so that dad could not come back home. It should be noted that Sam was fourteen and is mentally challenged (Tr. 127). V.C. confirmed that a single conversation occurred on the trampoline between her brother Cody and her but denied any discussion of lying (Tr. 126 -128). Detective Pehle testified that he had interviewed Cody about that conversation and he reported that V.C. didn't want her dad to come home and that she didn't want the police to know that she felt that way because the police might think she was lying (Tr. 170).

Donna Yeager, a family friend, testified that on Monday, May 30, 2005, J.C. reported to her the substance of a phone call she claimed to have had with her father on or about Friday, May 27, 2005 (Tr. 174). J.C. claimed that her father attempted to tamper with her testimony and planned to meet her on Monday at 10:00 p.m. at the family barn. In response to that information, Stephanie Couch and Donna Yeager notified law enforcement so that they might come to the Couch home and put surveillance on the barn in which Philip Couch was alleged to meet his daughter J.C.. However, she never saw anyone near the barn and the authorities did not find anyone at or near the barn (Tr. 174 - 176).

Deputy Jeffrey Salois responded to a call at the Couch home in rural Audrain County on Monday, May 30, 2005 (Tr. 181). J.C. related to him the story of her father calling her a few days before, discussing her allegations of sexual abuse, and asking her to meet him at the family barn that night at 10:00 p.m. (Tr. 181 - 184). Mr. Couch was not seen in or near the barn (Tr. 188).

Officer Salois testified that he had prior to this date served Philip Couch with an Order of Child Protection prohibiting contact with J.C. and identified a certified copy of that order (Tr. 144).

Officer Salois also testified that J.C. had told him that she believed her father to be asleep at the time of her alleged molestation (Tr. 188).

Mr. Couch's wife, Stephanie Couch, testified that her husband had taken a trip to Springfield, Missouri on March 11, 2005 and that only V.C. had accompanied him on this trip (Tr. 197).

Stephanie Couch learned of the alleged sexual molestations on May 5, 2005 while at the hospital with her daughter V.C.. V.C. had suffered a panic attack and was taken to the emergency room. Stephanie Couch further testified that these panic attacks were frequent and would occur most often on Mondays. She testified that the significance of Mondays were that her husband was off from work on Sundays and Mondays of each week (Tr. 197 -198).

Sometime after this disclosure, Philip Couch told his wife that he did not know what had happened because he was asleep. However, he also said that he knew something had happened between J.C. and he because of her reaction when she left the bedroom after he awoke (Tr. 200).

Stephanie Couch further characterized her husband as controlling and that after the disclosures he did not want the girls to be taken to a counselor (Tr. 200 - 202).

Mrs. Couch related that her husband and she had not had sexual intercourse for approximately two years prior to disclosure of the alleged molestations (Tr. 205).

Stephanie Couch also claimed that Philip Couch admitted to speaking with J.C. on the phone after the disclosures but denied planning to meet her in the family barn (Tr. 202 -206).

Mrs. Couch identified State's exhibits eight through sixteen which comprised apology letters to various family members. These exhibits were admitted into evidence and were read into the record (Tr. 207 - 213).

Evidence was further adduced that there was a divorce pending between Mr. & Mrs. Couch at the time of trial and that prior to the allegations made by her daughters, Mrs. Couch believed her husband's character to be good (Tr. 214 - 215).

Licensed professional psychologist, Lisa Shriver Clervi, testified that she had worked with the three children, J.C., V.C. and S.C. (Tr. 228 - 229). Ms. Clervi told of having counseled with J.C. and recounted J.C.'s version of the allegations.

Ms. Clervi explained how different children react differently under similar circumstances (Tr. 231 - 232). She also stated that J.C.'s behavioral characteristics were consistent with that of a child who reports sexual abuse (Tr. 233). Further, the State asked and withdrew the question of whether V.C.'s behavioral characteristics were consistent with children who had been sexually abused. (Tr. 234).

Additionally, Ms. Clervi testified that adolescents often develop an unreasonable hostility toward their parents. She expected that it would be possible for an adolescent girl to be angry and frustrated that her father was keeping her on the farm and not permitting her to see her friends or boyfriend in town. She also conceded that occasionally children make false accusations of sexual abuse (Tr. 239 - 240).

Under cross-examination, Ms. Clervi denied that sisters, S.C. and V.C., showed characteristics of children who are making false allegations (Tr. 241).

Over defense counsel's objection, Ms. Clervi was permitted to testify on redirect that V.C. would have done nothing to sabotage a loving adoptive family. She also stated that when children have an ulterior motive of disrupting the family it is because they want to be out of that family. Clervi testified that neither V.C. nor S.C. wanted this, but rather that they wanted to be in an adoptive family where they could be loved and be cared for, for the rest of their lives. Clervi characterized that testimony as her impression which was received after meeting with V.C. and S.C. (Tr. 245 - 246). Clervi conceded that the allegations were only against Philip Couch and that he was removed from the home while the remainder of the family was kept together with mother, Stephanie Couch (Tr. 248).

Licensed professional counselor, Jan Stock, testified about her work at the Rainbow House Regional Child Center where she does forensic interviews with children who have witnessed or been victimized by crime (Tr. 253). Stock explained to the jury the process of a forensic interview together with many

general observations regarding the dynamics of sexual abuse and its disclosure (Tr. 254 - 266).

A video of Ms. Stock's interview with J.C. was entered into evidence and played for the jury (Tr. 267).

Ms. Stock conceded that sometimes false disclosures are triggered by anger in the child (Tr. 272 - 275 - 276).

When discussing the evidence that J.C. could not remember if the light was on or off during her molestation, Stock testified that whether the molestation occurred in light or darkness would be a significant context of the event and that she would think a child would remember if it were light or dark if telling the truth about the event (Tr. 280 - 281).

II The Defense

During the case for the defense, Ceri Couch Garrison testified that she was the natural daughter of Philip Couch and step-daughter of Stephanie Couch (Tr. 286). Ceri Couch Garrison testified that she had her father's cellular telephone in her possession between May 20th and May 27th, 2005 and that she called the Couch residence during that period of time. She further said that Philip Couch did not have access to the phone from which the calls to the Couch residence were made during the period time J.C. claimed that her father had called her from that cellular telephone and attempted to tamper with her as a victim (Tr. 387).

Additionally, Ceri Couch Garrison related a conversation she had with J.C. during June of 2005 in which she had told Ceri that she wished she had never

listened to V.C., V.C. being the one who told her to disclose the events in question (Tr. 290).

Philip Couch, Appellant, testified in his own behalf, denying the children's allegations (Tr. 294 - 301). he did admit that at one time he suspected he may have touched his daughter J.C. in his sleep on May 5, 2005 because of the allegation. He denies any knowing sexual contact however (Tr. 298,296). He relates that he woke up that night to his daughter J.C. kicking him, at which time he told her to go to her bed and she left without exchanging words with her father (Tr. 296 - 298).

With regard to the apology letters which were entered into evidence as exhibits eight through fifteen, Couch explained that he was in an extremely depressed state of mind at the time he wrote those letters and was fearful that he had touched his daughter J.C. in his sleep (Tr. 299 - 301). Appellant also denied telephoning J.C. on the 27th of May. He denied trying to meet her at the family barn the following Monday, or attempting to influence her testimony (Tr. 311). Couch also denied telling his wife Stephanie that he had contacted J.C. (Tr. 312).

Tiffany June Tice, friend of V.C., testified that V.C. had reported to her that her father had removed her pants and had raped her during a trip where they had stayed in a motel room alone. According to Tice, V.C. claimed that the trip had been to Texas, not Springfield or Joplin Missouri (Tr. 317). Other than this testimony about V.C.'s story to Tiffany, the record is devoid of any testimony of such a rape occurring.

Martin Charles Leverett testified he was friends with the Appellant and that the Appellant had a good reputation for character within the community (Tr. 319).

III. Procedural Matters

Mr. Couch was charged by amended information with Count I, Child Molestation, in the First Degree, Section 566.067, Count II, Statutory Sodomy in the First Degree, Section 566.062, Count III, Endangering the Welfare of a Child, in the First Degree, Section 568.045, Count VI, Endangering the Welfare of a Child in the First Degree, Section 568.045, Count V, Victim Tampering, Section 577.270, and Count IV, Violation of Full Order of Child Protection, Section 455.538 (L.F. 28 - 30).

On September 12 and 13, 2006, a jury trial was held in the Circuit Court of Audrain County before the Honorable Keith M. Sutherland, Judge, (L.F. 6 - 7). Prior to the trial, Mr. Couch made an offer of proof from witnesses Randy Zumwalt (Tr. 22 - 27) and Ronald Couch (Tr. 58 - 65) concerning prior false allegations of abuse which had been made by V.C.. Those offers of proof are summarized in argument one of this brief, *infra*, which Mr. Couch incorporates by reference herein.

Both the State and Appellant adduced trial evidence. After the foregoing evidence was presented, the trial court overruled Mr. Couch's motions for judgment of acquittal (Tr. 285 - 322: L.F. 6 - 7). Subsequently, the jury found Mr. Couch guilty on Counts I, III and IV and not guilty of Counts II, VI and VII (Tr. 352 - 353: L.F. 7).

The trial court granted Mr. Couch twenty-five days to file a Motion for New Trial, which was timely filed on October 6, 2006 (L.F. 7, 43 - 44). The trial court overruled the Motion for New Trial (Tr. 367).

The Court sentenced Mr. Couch to fifteen years on Count I, five years on Count III, and five years on Count IV, said sentences were ordered to be served consecutively (Tr. 370 - 371): (L.F. 45 - 47).

On November 7, 2006, Mr. Couch timely filed a Notice of Appeal (L.F. 8, 53 - 54). The Missouri Eastern District Court of Appeals reversed and remanded the conviction in Count IV and affirmed Counts I and III on September 11, 2007. Appellant's Application for Transfer to the Supreme Court was denied and Respondents Application for Transfer was granted by this Court on December 17, 2007. This appeals 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 erred and abused its discretion by precluding Appellant from presenting crucial evidence of his innocence, as provided in *State v. Long*, 140 S.W.3d 27 (Mo. banc 2004), thereby denying his right to present a defense, his right to due process of law, and his right to a fair trial, all as guaranteed by Article 1 of the Missouri Constitution, and the 6th and 14th Amendments to the U.S. Constitution, in that the trial court precluded the Appellant from presenting the proffered testimonies of Ronald Couch and Randy Zumwalt, that: A. Alleged victim, V.C., in the year 2000, accused her previous adoptive father, Rocky Zumwalt, of physically abusing her and later recanting to her brother Ronald Couch, admitting that she had lied so she might live with another relative; B. Alleged victim, V.C., had previously accused her uncle, Randy Zumwalt, of sexually molesting her, which was denied by Randy Zumwalt, his denial remaining un-rebutted; As said evidence would have been relevant to challenge the alleged victims veracity and would have supported Appellant's defense that said alleged victim had a history or tendency to make false reports, including allegations of physical and sexual abuse, with the purpose of manipulating her environment.

State v. Long, 140 S.W.3d 27 (Mo. Banc. 2004)

State v. Williams, 492 S.W.2d 1 (Mo. App. E.D. 1973)

State v. Montgomery, 901 S.W.2d 255 (Mo. App. E.D. 1995)

State v. Lampley, 859 S.W.2d 909 (Mo. App. E.D. 1993)

Section 545.140.2 RSMo 2005

II

The trial court erred and abused its discretion in allowing the State and its psychologist expert witness to engage in narrative testimony which vouched for the credibility of complaining witnesses, over the objection of defendant, and by denying defendant's motion for a mistrial when the State and said expert witness presented testimony from said expert which vouched for and opined upon the credibility of the alleged victims herein, because this testimony invaded the province of the jury, denying Appellant a fair trial.

State v. Churchill, 98 S.W.3d 536 (Mo. banc 2003)

State v. Williams, 838 S.W.2d 796 (Mo. App. E.D. 1993)

ARGUMENT

POINT I

The trial court erred and abused its discretion by precluding Appellant from presenting crucial evidence of his innocence, as provided in *State v. Long*, 140 S.W.3d 27 (Mo. banc 2004), thereby denying his right to present a defense, his right to due process of law, and his right to a fair trial, all as guaranteed by Article 1 of the Missouri Constitution, and the 6th and 14th Amendments to the U.S. Constitution, in that the trial court precluded the Appellant from presenting the proffered testimonies of Ronald Couch and Randy Zumwalt, that: A. Alleged victim, V.C., in the year 2000, accused her previous adoptive father, Rocky Zumwalt, of physically abusing her and later recanting to her brother Ronald Couch, admitting that she had lied so she might live with another relative; B. Alleged victim, V.C., had previously accused her uncle, Randy Zumwalt, of sexually molesting her, which was denied by Randy Zumwalt, his denial remaining un-rebutted; As said evidence would have been relevant to challenge the alleged victims veracity and would have supported Appellant's defense that said alleged victim had a history or tendency to make false reports, including allegations of physical and sexual abuse, with the purpose of manipulating her environment.

The standard of review for this evidentiary matter is articulated in *State v. Ray*, 945 S.W.2d 462, 467 (Mo. App. W.D. 1997). A trial court enjoys broad

discretion in determining the relevance of evidence and its ruling on the admission or exclusion of evidence will be disturbed only if there is an abuse of that discretion. *Id.*

The trial court erred by holding that Mr. Couch could not by cross-examination, or other testimony, present evidence to the jury that the alleged victim, V.C., had previously made other false claims of physical and sexual abuse, because the trial court's ruling was contrary to previous opinions in Missouri, *State v. Long*, 140 S.W.3d 27,30,31 (Mo. banc 2004), *State v. Williams*, 492 S.W.2d 1, 3 (Mo. App. E.D. 1973), *State v. Montgomery*, 901 S. W.2d. 255, 256,257 (Mo. App. E.D. 1995), and *State v. Lampley*, 859 S.W. 2d 909, 911 (Mo. App. E.D. 1993).

OFFERS OF PROOF

(1) Ronald Couch

Ronald Couch previously lived with his sister, V.C., in the home of his and V.C.'s previous adoptive father, Rocky Zumwalt. In the year 2000, V.C. accused Rocky Zumwalt of physically abusing her, making said allegations to neighbors, to various State authorities, social workers, and caseworkers (Tr.59-60).

This started an investigation of Rocky Zumwalt for physical abuse of V.C. by the use of a switch (Tr.60 - 62). Ronald Couch testified that these allegations caused V.C.'s father, Rocky Zumwalt, to be separated from the family (Tr.62). Subsequent to the allegations, V.C. told her brother, Ronald Couch, that Rocky Zumwalt had not physically abused her and she admitted that she had lied about

the abuse allegations (Tr.60). Ronald Couch also testified that V.C. had made these allegations because she wanted to be with her “grandma” (Tr.62).

The trial court ruled that Appellant could not cross-examine V.C., or present other testimony of V.C.’s false allegations against Rocky Zumwalt for two reasons. First, the Court indicated that it has not been shown by a preponderance of the evidence that V.C. had knowingly made a false allegation. Secondly, the Court indicated that the most important factor in its ruling was that the prior false allegation against Rocky Zumwalt was not of a sexual nature (Tr.69).

(2) Randy Zumwalt

Randy Zumwalt testified that he was the brother of Rocky Zumwalt, the former adoptive father of V.C. (Tr.22-23). Randy Zumwalt testified that V.C. had accused him of molesting her (Tr.23 & 26). He denied ever having had sexual contact with V.C. (Tr.23 - 27). V.C.’s false allegations against Randy Zumwalt had been made approximately six to seven years prior to appellant’s trial (Tr.23).

The trial court ruled that appellant could adduce no evidence of V.C.’s false accusation of sexual molestation or rape against Randy Zumwalt because the Court didn’t think Zumwalt’s sworn denial of the allegations was sufficient to prove that V.C.’s allegation was false (Tr.68).

The Court summed up its ruling by stating “I am not going to allow the testimony or cross-examination of the victim as to any purported alleged false accusations in years past” (Tr.69 Lines 14-17).

ARGUMENT COMMON TO BOTH OFFERS

Mr. Couch raised the issues of Ronald Couch's testimony and Randy Zumwalt's testimony in his motion for new trial (L.F.43-44). Appellant concedes that the trial court enjoys a broad discretion in determining the relevance of evidence. *State v. Ray*, 945 S.W.2d 462, 467 (Mo App. W.D. 1997). However, the Missouri Supreme Court agreed with appellant Jeffrey D. Long that such a trial error was an abuse of that broad discretion, by ruling that a defendant was entitled to introduce evidence of a victim's prior false allegations of sexual or physical assault *State v. Long*, 140 S.W.3d 27,32 (Mo banc 2004).

The Respondent argues that Appellant's argument fails because he did not cross-examine V.C. about her having made false allegations. This cross-examination was prohibited by the trial Court's ruling. *Long* does not require that the cross-examination of the alleged victim occur during the offer of proof. It only states that normally the witness should be cross-examined about the matter before introducing the extrinsic evidence of prior false allegations. This would happen during the trial, not the offer of proof. If the alleged victim admitted the false prior allegations, the extrinsic evidence would be unnecessary and therefore inadmissible. The offer of proof is for the defendant to meet, by a preponderance of the evidence, the fundamental requirement of establishing the legal relevance of the extrinsic evidence the defendant intends to offer at trial. *Long* at 31, 32. This determination should then dictate if the defendant may, during trial, cross-examine the witness and then be allowed to offer the extrinsic evidence outlined in the offer of proof if she denies making, or having knowledge of the prior false

allegation. The trial Court ordered Appellant not to cross-examine V.C. regarding this evidence, because he determined it to fall short of legal relevance. *Long* does not, nor does any other case, as argued by Respondent, require that the “cross-examination” occur during the offer of proof. As in an impeachment by a prior inconsistent statement or a criminal conviction, the witness being cross-examined should be asked, in front of the jury, if the impeaching evidence is admitted. If the evidence is denied, the extrinsic may then be offered, if it is otherwise legally relevant. The *Long* decision deals with the establishment of the legal relevance at a pre-trial offer of proof. The cross-examination of the alleged victim, by definition, occurs after the direct examination by the State. The State’s direct examination occurred after the trial had begun, not at the pre-trial offer of proof.

Even if, argueindo, unlike other forms of impeachment, *Long* is advising that the cross-examination leading to impeachment should occur pre-trial, here, as in *Long* at 32, this trial judge made its determination based on relevance, thereby rendering any attempt to cross-examine V.C. about her prior false allegation entirely futile and in direct violation of the trial Court’s ruling at the pre-trial hearing of the offer of proof.

The trial court herein clearly focused on the fact that the evidence Ronald Couch had to offer was not related to a sexual assault. The rule limiting the inquiry into prior false allegations of a similar nature only, was rejected by the court in *Long*. The Supreme Court instead emphasized that the thing that made the prior allegation relevant was fact that the prior allegation was false. *Id* at 31. *Long*

focuses on, and recognizes, the legal relevance of a knowingly made prior false allegation. Similarities between the allegations and the circumstances thereof, including remoteness in time, are all to be considered in determining relevance. *Id.*, 31,32.

The standard of relevance of such evidence is if its probative value outweighs its costs via prejudice, confusion of the issues, misleading the jury, undue delay, a waste of time or cumulativeness. *State v. Anderson*, 76 S.W.3d 275,276 (Mo banc 2002). The similarities between the circumstances of the allegations by V.C. in this case and to Ronald Couch's testimony about her prior false allegations are that they were both made against a father, both allegations were of abuse, and that arguably the motive to fabricate in this case was V.C.'s desire to manipulate her environment as in her prior false allegation. Ronald Couch testified that V.C. admitted to lying about her father beating her with a switch so that she might go live with her grandmother (Tr.62). These similarities make this evidence more probative than costly because the veracity of the witnesses was so crucial in this trial. Evidence only need be relevant, not conclusive, and it is relevant if it logically tends to prove a fact in issue or corroborates evidence which bears on the principle issues. *State v. Richardson*, 838 S.W.2d 122, 124 (Mo. App. E.D. 1992). In this trial the principle issue was the credibility of witnesses.

Appellant finds *State v. Long* cited in few cases since it established the rule on this type of evidence. One is *State v. Reeder*, 182 S.W.3d 569 (Mo App. E.D. 2005). *Reeder* is distinguished from *Long* because the review of this point of

evidence was not properly preserved for appeal by Mr. Reeder and because that case was tried prior to the decision in *Long*. The Court in *Reeder* determined that the rule was not retroactive and therefore, did not overrule the trial court's decision to exclude evidence of prior false allegations by the victim. *Reeder* at 577.

However, the Court did nicely summarize the *Long* evidentiary rule by stating:

“Rejecting the notion that, in order to be admissible, the extrinsic evidence must relate to a prior, false allegation of another rape or sexual assault, the Supreme

Court clarified that the relevance of the prior false allegations is thus derived

primarily from the fact that the allegation was false and not entirely from the

subject matter of the prior false allegation.” *State v. Reeder* 182 S.W.3d 569, 575

(MO App E.D.2005). The trial Court's stated primary reason for

denying Appellant this evidence was its determination that V.C.

Couch's prior allegation was not sexual. This was a gross misapplication of *Long* and its progeny.

Another case citing *Long* is *Williams v. State*, 168 S.W.3d 443 (Mo banc 2005). This decision articulated *Long* as holding that a witness may be impeached with extrinsic evidence in some cases where the prosecuting witness has made prior false allegations. *Id* at 441.

Similarly, *State v. Wilson*, —S.W.—, 2007 WL 2089277 (Mo. App. E.D.) reversed the appellant's convictions because the trial Court had not allowed evidence of the alleged victim's false prior allegations

Ronald Couch established through his offer of proof that V.C. knew her allegations against her father, Rocky Zumwalt, were false, even to the point where V.C. admitted to her brother that her motivation for making the false accusation was to manipulate her living arrangement (Tr.62). Therefore, her knowledge of the falsity of that prior allegation is uncontroverted.

V.C.'s apparent motive to manipulate her environment by having her father, Philip Couch, removed from the home was demonstrated by several witnesses. (Tr.100,125, 127, 170). There was even evidence of her openly discussing lying with her siblings as it related to keeping Philip Couch away from the family (Tr.127).

The evidence was that Appellant kept her from town and her friends, all to V.C.'s dissatisfaction (Tr.125). For those who might argue that such motivation is not sufficient to trigger a false allegation, I point to the many cases where we see that children, parents or siblings have assaulted or killed their family members for the same, similar or lesser reasons. If the cases we see daily are any indication, the motive and initiative to lie are not uncommon failings for humans who are seeking to manipulate their environment. .

The motive to fabricate by V.C. is made more credible and relevant by the fact that she had previously made false accusations for the purpose of being removed from her then father's custody. (Tr.62).

As for the proffered testimony of Randy Zumwalt, Appellant chooses not to guess the motivation for V.C.'s false allegations against this witness. However, in

the context which is framed by the evidence at this trial, and the decision in *Long*, Appellant argues that her motive need not be proved. What is relevant is that the allegation was false. *Long*, 140 S.W.3d 27 at 31.

Regarding proof of V.C.'s knowledge of her allegation against Randy Zumwalt being false, Appellant argues that Zumwalt's testimony that she has made the allegation and that it is false, meets the test of a preponderance of the evidence because said testimony remained uncontradicted and unchallenged by evidence from V.C. (Tr.110-127). The State could have presented evidence that V.C.'s allegation against Randy Zumwalt was not false or, due to hallucination, psychosis or any other reason, she did not know that her allegation against Randy Zumwalt was false. However, the State elected not to do so and she was not subjected to cross-examination until trial.

On the issue of remoteness of either allegation, remoteness normally effects the weight rather than admissibility of evidence. However, it can be too remote to be material and would therefore be inadmissible. *State v. Thurman*, 692 S.W.2d 317,319 (Mo. App. E.D. 1985). In this case, Appellant argues that the testimony from Ronald Couch and Randy Zumwalt is not too remote to be material. Evidence of a defendant's uncharged misconduct occurring ten years prior to the charged act is not too remote, *State v. Coleman*, 857 S.W.2d 363,66 (Mo. App. E.D. 1993). If misconduct by a defendant is material after ten years, Appellant argues that misconduct of such a relevant nature by a complaining witness would not be too remote if committed five to six years prior to the current allegations.

It is well established that an important purpose of the constitutionally protected right of cross-examination is to provide litigants with a meaningful opportunity to challenge the veracity of testimony through the process of impeachment, See, *State v. Johnson*, 700 S.W.2d 815,817 (Mo. banc 1985), *State v. Montgomery*, 101 S.W.2d. 255 (Mo. App. E.D. 1995).

The case law establishes that evidence of false prior allegations is not a collateral issue when said allegations, as in this case, weigh upon the witnesses' credibility and, the witnesses' credibility is a key factor in determining guilt or acquittal. To find otherwise would deny the defendant's constitutional right to present a full defense. *State v. Long*, 140 S.W.3d 27, 30, 31 (Mo. banc 2004).

As in *Long*, and many of the cases preceding *Long*, this was a trial where the credibility of the complaining witnesses and of the defendant was crucial in the determination of this case. There was no physical or medical evidence to convict Appellant and the Appellant denied having committed these crimes. Therefore, it was the credibility of the defendant's case pitted against the credibility of the State's case. Under such circumstances, a full disclosure of the victim's prior false allegations is absolutely necessary for the jury to determine acquittal or guilt. Because the alleged victim's credibility was the paramount issue at trial, this cause should be remanded for new trial. *State v. Montgomery*, 901 S.W.2d 255,257 (Mo. App. E.D. 1995).

The fact that the defendant was found not guilty of three of the charged offenses highlights the importance of credibility in this matter. The evidence

varied little between the six counts, yet the jury found the defendant guilty of three and three others were found not to be credible beyond a reasonable doubt. Clearly, credibility was crucial and the exclusion of the false accusation testimony was prejudicial because this evidence would be very likely to be the straw that broke the back of whatever credibility the jury saw in the three convictions that it did not see in the three acquittals. The erroneous exclusion of evidence in a criminal case creates a presumption of prejudice which can only be overcome by showing that such an erroneous exclusion was harmless beyond a reasonable doubt. *State v. Bowlin*, 850 S.W. 2d 116, 118 (Mo. App. S.D. 1993). The exclusion of this evidence cannot be considered harmless beyond a reasonable doubt when it goes to the heart of the case: credibility.

The argument that the jury decided all these counts separately due to instruction MAI-CR 304.12, which advises the jury to consider the evidence for each count separately, is facetious since under the law of joinder, a jury may rely upon the testimony of the corroborating alleged victim, V.C., in determining guilt on all counts. Therefore, evidence of a prior false allegation of that witness would also be fundamental to a fair trial regarding the related counts. Logic and the state of criminal joinder law in Missouri at the time of trial defeats the legal fiction that all counts are tried in an evidentiary vacuum, because the counts were properly joined as related by the same or similar character and were corroborative of one another. *State v. Holliday*, 231 S.W. 3d 287, 294 (Mo. App. W.D. 2007).

The Court of Appeals held that: “The exclusion of evidence that would

weaken V.C.'s credibility, while prejudicial to the conviction for Count IV, was harmless error with regard to Count II and Count III, which related to different victims and were based on evidence independent of V.C.'s testimony. The State did not link the credibility of V.C., J.C., and S.C., or seek to emphasize that three related alleged victims were more likely to be telling the truth than a single victim." The Court also mentioned as relevant that Appellant did not seek severance. *State v. Couch*, No. ED88900, slip op. 5,6.

The Court of Appeals, by so ruling, has overlooked that seeking to sever these counts would be fruitless pursuant to the law in effect at the time of Appellant's trial. The law regarding joinder made the probative nature of each count to prove the other the very basis for joinder in the first place. The Legislature and the Courts had made joinder the rule in cases such as this. Section 545.140.2 R.S.Mo, Supreme Court Rule 23.05 and *State v. Holliday*, 231 S.W.3d (Mo. App. W.D. 2007). This statute, rule and case provide for proper joinder of offenses "of the same or similar character" and are "connected." *Holliday* cites *State v. Hyman*, 375 S.W. 3d 384 (Mo. App. W.D. 2001), for the proposition that similarities and the tactics used in multiple sexual attacks make it likely that the Defendant committed all the offenses charged, therefore allowing all counts to be joined. Factors showing similar tactics include commission of the same type of offenses, victims of the same sex and age group, offenses occurring at the same location and offenses closely related in time, making it "likely that Mr. Hyman committed all sexual offenses charged" *Hyman*, at 393 , citing , *State v. Conley*,

873 S.W. 2d 233 (Mo. banc 1994) at 238. This “likelihood” that one offense tends to prove the other amounts to an unfair trial if the individual witnesses cannot be properly impeached to counter such likelihood.

The State argued the motivation of “these three girls”. (Tr.332). The State also argued that the Defendant had “violated a trust with his daughters.” (Tr. 325). Further, the State argued “Ladies and gentlemen, when you put it all together you are going to come up with one and only one conclusion and that is that Philip Couch is guilty (Tr. 333). The only justification for the State making these inclusive and related arguments is the similar character and relation of the charges as stated in the cases, rule and statute cited above. Therefore, any relevant impeachment evidence, particularly impeachment evidence of this importance, is highly relevant as to the Defendant’s guilt on all of the sex offenses charged. It is self-evident that it is to the State’s tactical advantage to have used joinder under the above rule, statutes and cases. This is especially true if the State consolidates its argument of credibility for all the witnesses and counts, as it did here. The exclusion of this relevant impeachment evidence cannot be harmless error if the testimony being impeached makes it more likely that a defendant committed the other offenses charged in the same Information.

In conclusion, the trial Court herein abused its discretion by preventing the jury from properly evaluating credibility of the witnesses without the benefit of knowing about V.C.’s prior false allegations. The State sought to bolster the testimony of each alleged victim with the testimony of the others by trying these

charges together, presenting and arguing the counts as if they were a package. If the Appellant had been allowed to present any testimony that V.C. had made prior false allegations, it would have had an effect on the strength of the State's entire case. Because this error denied Appellant a fair trial, all counts of this conviction should be remanded for a new trial using the crucially relevant evidence of V.C.'s prior false allegations.

POINT II

The trial court erred and abused its discretion in allowing the State and its psychologist expert witness to engage in narrative testimony which vouched for the credibility of complaining witnesses, over the objection of defendant, and by denying defendant's motion for a mistrial when the State and said expert witness presented testimony from said expert which vouched for and opined upon the credibility of the alleged victims herein, because this

testimony invaded the province of the jury, thereby denying Appellant his right to a fair trial.

The standard of review for this evidentiary matter is articulated in *State v. Ray*, 945 S.W.2d 462, 467 (Mo. App. W.D. 1997). A trial court enjoys broad discretion in determining the relevance of evidence and its ruling on the admission or exclusion of evidence will be disturbed only if there is an abuse of that discretion. *Id.*

The Court abused its discretion by allowing the State and its psychologist witness, Lisa Clervi, to engage in narrative testimony regarding the veracity of two of the alleged victims, over the objection of Defendant. A witness must respond to specific questions and not to those that lead to a narrative story or extended explanation. The principle objection to narrative testimony such as this is that the witness is likely to interject immaterial or irrelevant testimony. *Daudt v. Steiert*, 205 S.W. 222 (Mo 1918). This is exactly what the narrative questions led to in this case.

The Court erred in denying the Defendant a mistrial when the State and its expert witness, Lisa Clervi, presented testimony from said expert which vouched for and opined upon the credibility of the alleged victims herein. An expert witness may not be permitted to directly comment on, or vouch for, the credibility of another witness during the expert's testimony. To do so invades the province of the jury and is reversible error. *State v. Churchill*, 98 S.W.3d 536, 537 (Mo Banc 2003).

Expert child psychologist Lisa Clervi testified in the State's case in chief. On cross-examination, this expert was asked what characteristics do children who are making false accusations exhibit. She responded that they generally have no emotional reaction, they change their stories repeatedly, they usually have a hidden or ulterior motive, they have a lack of detail in their disclosures, and they verbalize to others that they have disclosed falsely. She added "the allegations can be baseless. It depends really on the child" (Tr. 241).

Counsel for the defendant explored that answer by asking if that profile for false allegations described S.C. and V.C.. The witness responded that she did not believe so (Tr. 241).

The Prosecutor then inquired of the witness follows: "Specifically what ... about V.C.? Can you explain what specific characteristics about V.C. that disagree with Mr. Hamlett's suggestion". The witness began to state: "There is nothing more that V.C. wanted than to stay ...". At this point Counsel for defense objected on the grounds that her answer was non-responsive and the question had called for a narrative response. The court overruled this objection, at which time the witness continued by stating: "There is nothing more that V.C. wanted than to be in a loving and adoptive family and she would have done nothing to sabotage that family. When children ...". Again counsel for the defendant objected that her response was a conclusion and that she was responding in a narrative form. Again the court overruled the defendant's objection (Tr. 245).

The witness was then allowed to testify that “when children have an ulterior motive of disrupting their family it is because they want to be out of that family, which is something that she never wanted and something that S.C. never wanted. They wanted to be in an adoptive family where they would be loved and cared about for the rest of their lives and would have done nothing to sabotage that”. Clervi agreed with the prosecutor’s statement that this opinion was her impression after meeting with S.C. and V.C. (Tr. 245).

At this point, Counsel for defendant moved for a mistrial on the ground that the witness commented upon the credibility of the complaining witnesses. The trial court responded by stating that “An expert witness can properly comment” (Tr. 246).

Allowing the expert to vouch for the credibility of complaining witnesses deprived the Appellant of a fair trial because the testimony infringed on the decision making function of the jury and bolstered the alleged victim’s testimony with the credibility of an expert. The lack of physical evidence indicating sexual abuse of any of the alleged victims in this trial enhanced the prejudice suffered as a result of the expert having vouched for the alleged victims’ testimony.

When a scientific expert testifies that a particular witness is telling the truth, prejudice often arises because the expert’s testimony invests scientific cachet to the issue of credibility. *State v. Williams*, 858 S.W. 2d 796, 798-800 (Mo App. E.D. 1993).

Testimony concerning the specific credibility of a complaining witness and which explicitly vouches for an alleged victim's credibility is not admissible., *Williams* , 858 S.W.2d 799. Appellant's case, *Churchill* and *Williams* are all distinguished from *State v. Collins*, 163 S.W. 3d 614 (Mo App. S.D. 2005) which analyzes the issue of vouching for credibility at length. The court in *Collins* states that assuming, argueindo, that the testimony in *Collins* was a comment on the victims credibility, the error was harmless because there had been proof beyond a reasonable doubt that the victim had been sexually abused, the defendant confessed, and the court determined from the record that there was overwhelming evidence of guilt. Unlike *Collins*, in Appellant's case there was not a defendant's confession of the victim's claims nor was there any physical evidence that the victims had been sexually abused. Therefore, the comment upon, and vouching for, the alleged victims' credibility in this case cannot be ruled as harmless as in *Collins*.

Also distinguishable from the case at bar is *State v. Artis*, 2007 W.L. 585398 (Mo App. S.D. 2007). In *Artis*, there was a brief comment by a testifying physician that the history given by the victim seemed credible. Unlike this case, the physician's comment was unsolicited and the matter was reviewed for plain error only. In this case, Appellant objected in a timely fashion and moved for a mistrial immediately. Therefore, the plain error rule does not apply herein. Since the evidence was properly objected to, expert testimony about V.C. and S.C.'s credibility, lack of motive to fabricate testimony, or the opinion by Clervi that they

would not have fabricated, must be rejected as inadmissible due to severe prejudice. *Churchill*, 98 S.W. 3d 536,38.

In *Churchill*, the physician stated that the abuse described by the victim “was real” and the court found that testimony prejudicial, requiring a new trial. *Id* at 538. The testimony which vouched for the credibility of the alleged victims in this case was rather lengthy and was initiated by the State’s open-ended question. Testimony of Lisa Clervi was further highlighted in the State’s closing argument (Tr. 349)

In holding that the State’s redirect examination of witness Clervi was aimed at replying to Defendant’s improper cross examination, the Courts herein have ignored the content of the testimony and have thus far failed to follow *State v. Churchill*, 98 S.W. 3d 536 (Mo. banc 2003). Clervi’s testimony did not rebut any question, proper or not, regarding how these witnesses compared to the models of truthful or untruthful generalized behaviors. It merely offered the opinion of the expert that the alleged victims would not “sabotage” the family with false allegations. This does not respond to whether the witnesses’ behavior fit a model of general behaviors and therefore is not curatively admissible. *Churchill* provides that testimony describing a generalization of behaviors and other characteristics commonly found in those who have been victims of sexual abuse is admissible. *Id.* at 538. Conversely, generalization of behaviors and other characteristics commonly found in those making false allegations would be admissible as would the general similarity of an alleged victim to either model. At the same time, the

witnesses' statement that "there is nothing more that V.C. wanted than to be in a loving, adoptive family and she would have done nothing to sabotage that family" (Tr. 245), is categorically stating that the child would not fabricate. The same remark was made regarding S.C. (Tr. 245), . An expert testifying that these children would not fabricate is a comment vouching for their credibility and is wholly inconsistent with the decision in *Churchill, supra*.

Appellant asks that the court apply the standards set forth in *State v. Churchill* and *State v. Artis* , Infra. This analysis should lead to remand and new trial without improper credibility vouching .

CONCLUSION

For the reasons presented in Points I, and II, this Court should reverse Mr. Couch's convictions and remand his case for a new trial with instructions on evidence.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, J. Kevin Hamlett, hereby certify to the following. The attached substitute brief complies with the limitations contained in Rule 84.06(b). The brief was completed using WordPerfect 10, in Times New Roman size 13-point font. I hereby certify that this substitute 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 9,627 words, which does not exceed the 31,000 words allowed for a substitute brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee Virus Scan program, 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 floppy disk containing a copy of this brief were mailed, postage prepaid this 11th day of January, 2008, to Linda Lemke, Assistant Attorney General, 207 W. High Street, P.O. Box 899, Jefferson City, MO 65102-0899.

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IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)
)
 Respondent,)
)

vs.) No. SC88922
)
PHILLIP RAY COUCH,)
)
Appellant,)

APPEAL TO THE MISSOURI SUPREME COURT,
FROM THE CIRCUIT COURT OF AUDRAIN COUNTY, MISSOURI
TWELFTH JUDICIAL CIRCUIT
THE HONORABLE KEITH M. SUTHERLAND, JUDGE

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APPENDIX

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