

**Sup. Ct. # 88203**

**IN THE  
SUPREME COURT OF MISSOURI COURT**

**STATE OF MISSOURI,**

**Respondent,**

**v.**

**MILTON SOTO,**

**Appellant.**

Appeal to the Missouri Supreme Court  
From the Circuit Court of St. Louis County, Missouri  
21<sup>st</sup> Judicial Circuit, Division 17  
The Honorable Larry Kendrick

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**APPELLANT'S SUBSTITUTE BRIEF  
AND  
APPENDIX**

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## JURISDICTIONAL STATEMENT

In 2004, Milton Soto entered an Alford<sup>1</sup> plea to one count of statutory sodomy in the first degree in violation of Section 566.062 RSMo.,<sup>2</sup> and was sentenced to ten years of imprisonment in the Missouri Department of Corrections.

Mr. Soto filed a timely Motion for Post-Conviction relief, which was denied on November 10, 2005 (L.F. 64-69; A4-A9). His conviction and sentence was affirmed on direct appeal on October 17, 2006. (A11-A12).

Mr. Soto moved for a Rehearing En Banc, which was denied on December 4, 2006. (A13)

On January 30, 2007, this Honorable Court sustained Mr. Soto's Application for Transfer to the Missouri Supreme Court (A14). Therefore, the Missouri Supreme Court has jurisdiction of this appeal and to hear this matter pursuant to Mo. Const. Art. V, § 10 (2007), and Missouri Supreme Court Rule 83.04.

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970).

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

## STATEMENT OF FACTS<sup>3</sup>

### *Facts of Appellant's Plea*

The State charged Milton Soto with one count of statutory sodomy in the first degree (L.F. 4-5). The State filed an indictment charging Mr. Soto as follows:

#### COUNT 1:

That Milton B. Soto, in violation of Section 566.062, RSMo, committed the felony of statutory sodomy in the first degree, punishable upon conviction under Sections 566.062, 5:00 P.M. and 6:00 P.M., at 727 Vest, in the County of St. Louis, State of Missouri, the defendant had deviate sexual intercourse with B.L.,<sup>4</sup> who was less than twelve years old.

(L.F. 4-5).

Mr. Soto appeared with counsel and tendered his Alford plea to the charged crime in St. Louis County Circuit Number 03CR-3072 (L.F. 6, 10-32). The prosecutor set forth the proposed evidence against Mr. Soto of as follows:

STATE: Judge, our evidence would show beyond a reasonable doubt, between the dates of April 20<sup>th</sup> of 2003 and May 4<sup>th</sup> of 2003,

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<sup>3</sup> The Record on Appeal consists of a Transcript of Guilty Plea and Sentencing (Tr.), a legal file (L.F.) and an Appendix (A).

<sup>4</sup> Bethany Lockett is referred herein as "B.L."

at the address of 727 Vest, in the Valley Park area, here in St. Louis County, the defendant placed the hand of four-year-old [B.L.] on his penis while in the bathroom at that address. Such conduct constituted deviant (sic) sexual intercourse. The prosecution will call the victim, [B.L.], who is six years old now. She would tell the Court that on the date in question, she was playing hide-and-go-seek with her older sister Elissa and the defendant. [B.L.] and the defendant were hiding in the bathroom, while in the bathroom, the defendant placed [B.L.]'s hand on his penis. [B.L.] initially thought it was the defendant's hand she was touching, then she realized she was touching his private part. [B.L.] ran out of the bathroom after her sister Elissa found them in the hide-and-go-seek game.

The prosecution will call Elissa Lockett, who would be expected to testify while playing hide-and-go-seek, she looked in the bathroom, found the defendant and [B.L.]. The defendant was trying to cover himself behind a shower curtain. [B.L.] ran out of the bathroom with a scared look on her face. [B.L.] ran under a kitchen table and told Elissa to, Come here, I want to tell you something. At that point, [B.L.]

told Elissa that, Milton had me touch his pee-pee. Elissa would testify [B.L.] was scared and appeared frightened. The prosecution would also call Detective Ted Zinselmeier from the St. Louis County Police Department, who interviewed the defendant after being Mirandised (sic). Detective Zinselmeier will testify the defendant understood the English language, Detective Zinselmeier was able to understand the defendant when the defendant spoke with the detective, and the detective observed the defendant had no problem whatsoever in understanding the detective when the detective spoke to the defendant.

After being Mirandised (sic) and waiving his Miranda rights, defendant made a verbal statement whereby he told Detective Zinselmeier, while in the bathroom with [B.L.], he placed [B.L.]'s hand on his erect penis. The defendant indicated he did not ejaculate. The defendant then made a subsequent written statement to Detective Zinselmeier whereby the defendant wrote he had consumed approximately four beers that day; while in the bathroom, he placed [B.L.]'s hand on his private part. He indicated he is sorry for what he did and didn't mean to harm anyone.

That would be the prosecution's evidence, your Honor.

COURT: Miss Barbre, I forgot to ask this question before we went back on the record. Is it the defendant's desire to now enter a plea of guilty in accordance with Alford v. North Carolina?

COUNSEL: It is, your Honor.

COURT: Mr. Soto, the evidence that the prosecutor just stated, do you believe that that is the very same evidence that the prosecutor would present to a jury if this case were to go to a jury trial today?

SOTO: Yes, of course, yes.

(L.F. 15-17).

On August 2, 2004, the Honorable Larry L. Kendrick sentenced Mr. Soto to ten years of imprisonment in the Missouri Department of Corrections (L.F. 7-9, 27; A1-A3).

### ***Facts of Appellant's Postconviction Motion***

On October 28, 2004, Mr. Soto filed a *pro se* motion for post-conviction relief pursuant to Missouri Supreme Court Rule 24.035 (L.F. 36-43). Counsel was appointed and granted an additional thirty days to file the amended motion (L.F. 45). Mr. Soto timely filed an amended motion and request for evidentiary hearing on May 31, 2005 (L.F. 48-61).

Mr. Soto claimed that he was denied his right to due process of law and his right to persist in his plea of not guilty in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section

10 and 18(a) of the Missouri Constitution because the court entered a judgment in violation of Missouri Supreme Court Rule 24.02(e), which requires that the court not enter a judgment on a plea of guilty unless it determines that there is a factual basis for the plea (L.F. 49, 50). The facts adduced at the plea hearing, that Milton Soto placed B.L.'s hand on his penis, were insufficient to prove Milton Soto had deviate sexual intercourse with B.L. between April 20, 2003 and May 4, 2003 (L.F. 49-51). At most, the State's proposed evidence provided a basis for a conviction of first degree child molestation since the only allegation involved hand to genital touching, and no penetration. (L.F. 50, 51).

Thus, Mr. Soto argued that the court's acceptance of his plea without a factual basis to support his conviction rendered his guilty plea involuntary, unknowing, and unintelligent (L.F. 49, 50).

The court denied Mr. Soto's amended motion without an evidentiary hearing in findings and order issued on November 10, 2005 (L.F. 64-69; A4-A9). It held that the prosecutor was very specific in articulating what his facts would establish had the case gone to trial (L.F. 66; A6), and further held that the factual basis established by the prosecutor satisfied the requirement for deviate sexual intercourse because the hand of B.L. being placed by Mr. Soto on his penis constituted deviate sexual intercourse (L.F. 67; A7).

## POINT I

**Mr. Soto's motion for post-conviction relief should have been granted because the court erroneously accepted Mr. Soto's plea to first degree statutory sodomy without sufficient factual basis to establish the elements of that crime, rendering his guilty plea involuntary, unknowing, and unintelligent. The State's proposed evidence only established that Mr. Soto placed his penis in B.L.'s hand, but did not state there was any penetration, as required for a conviction of first degree statutory sodomy. Thus, the facts adduced at the plea hearing were insufficient to prove Mr. Soto had deviate sexual intercourse with B.L. Mr. Soto was deprived of the mandate of Missouri Supreme Court Rule 24.02(e), his right to due process of law, and his right to persist in his plea of not guilty in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution by the Court's acceptance of a plea to a crime he did not commit.**

*State v. Fewell*, 2006 Mo.App. Lexis 1285 (Mo. App. S.D. 2006).

*State v. Pond*, 131 S.W.3d 792 (Mo. Banc 2004).

*State v. Robinson*, 26 S.W. 3d 414 (Mo. App. 2000).

*State v. Purkett*, 156 S.W.3d 357 (Mo. App. 2004).

Missouri Revised Statutes, Sections 566.062 and 566.067;

Missouri Supreme Court Rule 24.02;

U.S. Const. Amend. V, VI and XIV; and  
Mo. Const. Art. I, Sections 10 and 18(a).

### **ARGUMENT I.**

**Mr. Soto's motion for post-conviction relief should have been granted because the court erroneously accepted Mr. Soto's plea to first degree statutory sodomy without sufficient factual basis to establish the elements of that crime, rendering his guilty plea involuntary, unknowing, and unintelligent. The State's proposed evidence only established that Mr. Soto placed his penis in B.L.'s hand, but did not allege any penetration, as required for the conviction of first degree statutory sodomy. Thus, the facts adduced at the plea hearing were insufficient to prove Mr. Soto had deviate sexual intercourse with B.L. Mr. Soto was deprived of the mandate of Missouri Supreme Court Rule 24.02(e), his right to due process of law, and his right to persist in his plea of not guilty in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution by the Court's acceptance of a plea to a crime he did not commit.**

First Degree Statutory Sodomy and First Degree Child Molestation are different crimes, with different requisite elements. Sodomy requires penetration (Sec. 566.062), Molestation does not (Sec. 566.067). In this case, Defendant's Alford plea to First Degree Sodomy was accepted despite no allegation or proof of

penetration. (L.F. 15-17). Defendant pled guilty, and the Court accepted a plea, to a crime Defendant did not commit. This error violates Defendant's constitutional rights and conflicts with controlling precedent.

Missouri Revised Statute section 566.067 defines "deviate sexual intercourse" as "any act involving the genitals of one person and the hand, mouth tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ....." The state argued in Mr. Soto's case that this section should be analyzed as an "either /or" test, and that the offending act need only involve hand to genitals OR penetration. Mr. Soto contends that to be guilty of first degree sodomy, penetration must occur. Without penetration, the crime is that of First Degree Child Molestation. *State v. Pond*, 131 S.W.3d 792 (Mo Banc 2004); *State v. Robinson*, 26 S.W.3d 414 (Mo. App. 2000).

In *State v. Pond*, this Court **clearly** explained the difference between Statutory Sodomy and Child Molestation. 131 S.W.3d at 793 "**An accused commits first degree statutory sodomy if that person engages in deviate sexual intercourse with a person under 14 years old. "Deviate sexual intercourse" requires proof of penetration, however slight, of the male or female sex organ.**" *Id.*, citing Sec. 566.010(1)(Emphasis Added). **An accused commits first degree child molestation if an "accused has sexual contact with another person less than [14 years old]."** *Id.* at 794. **"Sexual contact means any touching of the genitals. Penetration is not an element of child molestation in the first degree."**

Id. (Emphasis added). See also: *State of Missouri v. Fewell*, 2006 Mo. App. LEXIS 1285 (Mo. App. S.D. August 30, 2006).

In this case, the State argued on appeal that either hand to genital contact or penetration satisfy the elements of statutory sodomy. The State misapplies the law, and in doing so, merges two distinct crimes into one. The State's argument contradicts the plain language of the sexual crimes statutes, multiple decisions of this Court, as well as decisions of Courts of Appeal throughout the State. When the Missouri legislature revised the sexual crimes statutes in 1995, the distinction between sodomy and child molestation was clearly set forth. (Sec. 566.062; Sec. 566.067).

The facts alleged in Mr. Soto's case, at most, establish first degree Child Molestation- NOT first degree Statutory Sodomy. The State's proposed evidence established that Mr. Soto placed BL's hand on his penis during the alleged incident. (L.F. 15-17). There was no allegation or evidence of penetration- a requirement for a finding of 1<sup>st</sup> degree statutory sodomy.

As the facts of this case do not establish the elements of Statutory Sodomy- and the court's acceptance of a plea to that offense without a sufficient factual basis is clear error and a violation of Mr. Soto's constitutional rights.

#### Preservation and Standard of Review

This issue is included in Appellant's Post Conviction Motion, and was the sole issue on direct appeal, and thus is preserved for review. A trial court's denial

of a Post-Conviction Motion is reviewed for clearly erroneous findings and conclusions. *Jenkins v. State*, 9 S.W.3d 705, 707 (Mo. App. S.D. 1999); Rule 24.035(k). The ruling court's findings and conclusions are clearly erroneous if a review of the entire record leaves the reviewing Court with the firm impression that a mistake has been made. *Yates v. State*, 158 S.W.3d 798, 801 (Mo. App. E.D. 2005).

The Court Should Have Vacated Appellant's Alford Plea

The court was clearly erroneous in finding that the facts outlined by the prosecutor and admitted by Mr. Soto met the statutory requirements for a conviction of first degree statutory sodomy (L.F. 66-67; A6-A7). The court further erred in finding that Mr. Soto's conduct constituted deviate sexual intercourse when the proposed evidence only established that Mr. Soto placed B.L.'s hand on his penis and did not allege any penetration (L.F. 67; A7).

The court's acceptance of his plea without sufficient factual basis rendered Mr. Soto's guilty plea involuntary, unknowing, and unintelligent. The facts adduced at the plea hearing were insufficient to prove Mr. Soto had deviate sexual intercourse with B.L. (L.F. 15-17). The court could not find a factual basis for his plea because based on the State's indictment and the State's comments, the court could not find facts showing that Mr. Soto had deviate sexual intercourse with B.L. At most, the State's proposed evidence established first degree child molestation since the only conduct at issue was Mr. Soto's alleged placing of B.L.'s hand on his penis (L.F. 15-17; 66-67; A6-A7).

## Analysis

The court is not to enter a judgment upon a plea of guilty unless it determines there is a factual basis for the plea. Rule 24.02(e). The trial court must determine that the facts the defendant admits at his plea would result in the defendant being guilty of the offense charged. *Jones v. State*, 758 S.W.2d 153, 154 (Mo. App. E.D. 1988).

The State filed an indictment charging Mr. Soto as follows:

### COUNT 1:

That Milton B. Soto, in violation of Section 566.062, RSMo, committed the felony of statutory sodomy in the first degree, punishable upon conviction under Sections 566.062, 5:00 P.M. and 6:00 P.M., at 727 Vest, in the County of St. Louis, State of Missouri, the defendant had deviate sexual intercourse with B.L., who was less than twelve years old.

(L.F. 4-5).

On August 2, 2004, Mr. Soto appeared in court to tender his Alford plea to first degree statutory sodomy (L.F. 10-32). “A factual basis for a guilty plea is necessary to ensure that the guilty plea was intelligently and voluntarily entered, thereby satisfying due process requirements.” *State v. Henry*, 88 S.W.3d 451, 457 (Mo. App. W.D. 2002). A defendant’s guilty plea is not voluntary and intelligent if it was entered on a charge for which there is no factual basis. See Id. “[I]f the

facts stated to the court at a guilty plea proceeding do not establish the commission of a crime, the offered plea shall be rejected.” *State v. Morton*, 971 S.W.2d 335, 340 (Mo. App. E.D. 1998); *see also DeClue v. State*, 3 S.W.3d 395, 397 (Mo. App. E.D. 1999). “A prosecutor’s statement that he is prepared to prove facts which would constitute the crime to which defendant is pleading guilty is sufficient.” *Morton*, 971 S.W.2d at 340.

Here, the prosecutor stated the proposed evidence and advised Mr. Soto of the charge against him (L.F. 15-17). The relevant portions of the transcripts are below:

STATE: Judge, our evidence would show beyond a reasonable doubt, between the dates of April 20<sup>th</sup> of 2003 and May 4<sup>th</sup> of 2003, at the address of 727 Vest, in the Valley Park area, here in St. Louis County, the defendant placed the hand of four-year-old [B.L.] on his penis while in the bathroom at that address. Such conduct constituted deviant (sic) sexual intercourse. The prosecution will call the victim, [B.L.], who is six years old now. She would tell the Court that on the date in question, she was playing hide-and-go-seek with her older sister Elissa and the defendant. [B.L.] and the defendant were hiding in the bathroom, while in the bathroom, the defendant placed [B.L.]’s hand on his penis. [B.L.] initially thought it was the defendant’s hand she was touching, then she realized

she was touching his private part. [B.L.] ran out of the bathroom after her sister Elissa found them in the hide-and-go-seek game.

The prosecution will call Elissa Lockett, who would be expected to testify while playing hide-and-go-seek, she looked in the bathroom, found the defendant and [B.L.]. The defendant was trying to cover himself behind a shower curtain. [B.L.] ran out of the bathroom with a scared look on her face. [B.L.] ran under a kitchen table and told Elissa to, Come here, I want to tell you something. At that point, [B.L.] told Elissa that, Milton had me touch his pee-pee. Elissa would testify [B.L.] was scared and appeared frightened.

The prosecution would also call Detective Ted Zinselmeier from the St. Louis County Police Department, who interviewed the defendant after being Mirandised (sic).

Detective Zinselmeier will testify the defendant understood the English language, Detective Zinselmeier was able to understand the defendant when the defendant spoke with the detective, and the detective observed the defendant had no problem whatsoever in understanding the detective when the detective spoke to the defendant.

After being Mirandised (sic) and waiving his Miranda rights, defendant made a verbal statement whereby he told Detective Zinselmeier, while in the bathroom with [B.L.], he placed [B.L.]’s hand on his erect penis. The defendant indicated he did not ejaculate. The defendant then made a subsequent written statement to Detective Zinselmeier whereby the defendant wrote he had consumed approximately four beers that day; while in the bathroom, he placed [B.L.]’s hand on his private part. He indicated he is sorry for what he did and didn’t mean to harm anyone.

That would be the prosecution’s evidence, your Honor.

COURT: Miss Barbre, I forgot to ask this question before we went back on the record. Is it the defendant’s desire to now enter a plea of guilty in accordance with Alford v. North Carolina?

COUNSEL: It is, your Honor.

COURT: Mr. Soto, the evidence that the prosecutor just stated, do you believe that that is the very same evidence that the prosecutor would present to a jury if this case were to go to a jury trial today?

SOTO: Yes, of course, yes.

(L.F. 15-17).

The plea transcript establishes that the only conduct at issue was Mr. Soto's alleged placing B.L.'s hand on his penis. (L.F. 15-17). There was no allegation or evidence of penetration- and thus no evidence of "deviate sexual intercourse," a requirement for a finding of 1<sup>st</sup> degree statutory sodomy. *Pond*, 131 S.W.3d at 794.

A person commits First Degree Statutory Sodomy if he has deviate sexual intercourse with another person who is less than fourteen years old. (Sec. 566.062.1). "Deviate sexual intercourse" is defined as any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person. (Section 566.010).

On the contrary, a person commits the crime of child molestation in the first degree if he or she subjects another person who is less than fourteen years of age to sexual contact. (Sec. 566.067.1). "Sexual contact" is defined as any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person. (Sec. 566.010(2)).

In this case, the State argued that either hand to genital contact or penetration satisfy the elements of statutory sodomy, and that Mr. Soto's placing of B.L.'s hand on his penis constituted "deviate sexual intercourse". (L.F. 15-17).

The trial court and Court of Appeals agreed. However, the law was misapplied in this case. Here, the prosecution merged two distinct crimes into one, and managed to secure a conviction to the more serious crime while only establishing the elements of the lesser crime. The court's acceptance of Mr. Soto's plea in this case contradicts the plain language of the sexual crimes statutes, multiple decisions of this Court, as well as decisions of Courts of Appeals throughout the State. When the Missouri legislature revised the sexual crimes statutes in 1995, the distinction between sodomy and child molestation was clearly set forth. Simply put, Sodomy requires penetration. Child Molestation does not. Mr. Soto entered a plea to a crime he did not commit, and it should be vacated.

In *State v. Pond*, this Court **clearly** explained the difference between Statutory Sodomy and Child Molestation. 131 S.W.3d at 793 “**An accused commits first degree statutory sodomy if that person engages in deviate sexual intercourse with a person under 14 years old. “Deviate sexual intercourse” requires proof of penetration, however slight, of the male or female sex organ.**” *Id.*, citing Sec. 566.010(1)(Emphasis Added). **An accused commits first degree child molestation if an “accused has sexual contact with another person less than [14 years old].”** *Id.* at 794. **“Sexual contact means any touching of the genitals. Penetration is not an element of child molestation in the first degree.”** *Id.* (Emphasis added). *See also: State of Missouri v. Fewell*, 2006 Mo. App. LEXIS 1285 (Mo. App. S.D. August 30, 2006).

Other decisions of this Court and the various Court of Appeals have all maintained the distinction between sodomy and child molestation. “Statutory sodomy requires that a defendant engage in deviate sexual intercourse with another person; this includes digital penetration. (citing sec. 566.010 and 566.062) Child molestation requires that a defendant subject another person to sexual contact, ie. touching the genital area without penetration (citing sec. 566.010 and 566.067)”. *State v. Edwards*, 983 S.W.2d 520 (Mo. 1999); see also; *State v. Robinson*, 26 S.W. 3d 414, 417 (Mo. App. 2000).

In the case of *State v. Edwards*, this Court overturned a conviction for statutory sodomy where no penetration was alleged. 983 S.W.2d at 521. The defendant in that case allegedly touched the minor K.E. on the breast, vagina, and on her panties, and also got on top of her. *Id.* This Court noted that under the pre-1995 law, this conduct would have been sodomy. *Id.* However, under the re-enacted statutes, the defendant’s conduct constituted First Degree Child Molestation because no penetration was alleged. *Id.*

Similarly, in *State v. Pritchard*, this Court overturned a conviction for sodomy because “unless the hand to genital contact involves digital penetration of the victim’s sex organ with the requisite purpose, such conduct would not constitute “deviate sexual intercourse” and would not be punishable as sodomy. 982 S.W.2d 273, 275 (Mo. 1999).

Also instructive is the case of *State v. Purkett*, 156 S.W.3d 357 (Mo App. 2004). In that case, the defendant plead guilty to four counts of statutory sodomy.

*Id.* At 359. During the plea hearing, defendant admitted to touching the victim's vagina with "just his fingers". *Id.* Defendant alleged that under the re-enacted statute of 1995, his conduct did not meet the requirements of statutory sodomy. *Id.* The circuit court disagreed, and as in our case, held that his actions still constituted "deviate sexual intercourse." *Id.*

At the time the defendant in *Purkett* was charged, the term "deviate sexual intercourse" was defined as "any sexual act involving the genitals of one person and the mouth, tongue, hand or anus of another person." (Sec. 566.010(1) RSMo. 1986). In 1994, the definition of "deviate sexual intercourse" was amended to read, "any act involving the genitals of one person and the mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object." (Sec. 566.010(1) RSMo. 1994). **"It is clear from reading the amended statute the word "hand" has been omitted."** *Id.* At 360 (Emphasis added). Thus, the court held that in the absence of an allegation or evidence of penetration, defendant's conduct did not constitute "deviate sexual intercourse" as required for a conviction of First Degree Sodomy. *Id.* Touching without penetration falls under the definition of "sexual contact" and supports, at most, a conviction for child molestation. *Id.* *See also; State ex rel. Nixon v. Sprick*, 59 S.W.3d 515, 519 (Mo. Banc 2001)(touching of vagina constitutes molestation under amended statutes.).

The facts alleged in Mr. Soto's case, at most, establish first degree Child Molestation- NOT first degree Statutory Sodomy. The State's proposed evidence

established that Mr. Soto placed BL's hand on his penis during the alleged incident. There was no allegation or evidence of penetration- and thus no evidence of "deviate sexual intercourse," a requirement for a finding of 1<sup>st</sup> degree statutory sodomy. *Pond*, 131 S.W.3d at 794.

The transcript of Mr. Soto's plea clearly establishes that the facts alleged by the prosecutor and admitted to by Mr. Soto do not constitute statutory sodomy, and that Mr. Soto pled to a crime he did not commit. With no factual basis establishing the commission of the charged crime, "the trial judge should have rejected the plea of guilty and allowed for further proceedings." *State v. Morton*, 971 S.W.2d at 340. *Cf. Morgan v. State*, 852 S.W.2d 374 (Mo. App. S.D. 1993) (finding no error in motion Court's denial of movant's claim that there was no factual basis for the plea where there was no disagreement about the facts stated by prosecutor). Because the facts recited at the plea proceeding did not establish the commission of the charged crime, the Court must reject Mr. Soto's plea. *See State v. Morton*, 971 S.W.2d at 340.

By accepting Mr. Soto's plea of guilty without a factual basis and convicting Mr. Soto of the crime of first degree statutory sodomy, the court deprived Mr. Soto of his liberty without due process of law and his right to persist in his plea of not guilty in violation of the United States Constitution, Amendments Fifth, Sixth and Fourteenth, and the Missouri Constitution, Article I, Section 10 and 18(a). This Court should reverse the judgment of the motion court and remand this cause for an evidentiary hearing or vacate Mr. Soto's conviction

and sentence, and allow him to proceed to trial or enter a conviction of child molestation.

## **CONCLUSION**

Based on Argument I set forth herein, Milton Soto respectfully requests that the Court reverse the judgment of the trial court, vacate his conviction, and remand his cause for a new trial.

Respectfully submitted,

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## **CERTIFICATE OF MAILING**

I hereby certify that one copy and a disc of the foregoing were mailed, postage prepaid, to: Mr. Victor Melenbrink; The Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102; on this 6<sup>th</sup> day of March, 2007.

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Kimberly L. Cofman

**CERTIFICATE OF COMPLIANCE**

I, Kimberly L. Cofman, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06.

The brief was completed using Microsoft Word, Office 2000, in Times New Roman Size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 4,800 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

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