

No. SC88203

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IN THE  
SUPREME COURT OF MISSOURI

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MILTON SOTO,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

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Appeal from St. Louis County Circuit Court  
Twenty-First Judicial Circuit  
The Honorable Larry L. Kendrick, Judge

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**RESPONDENT'S SUBSTITUTE BRIEF**

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## **JURISDICTIONAL STATEMENT**

Appellant appeals from a St. Louis County Circuit Court judgment overruling his Rule 24.035 motion for post-conviction relief. Appellant pleaded guilty and was convicted of first-degree statutory sodomy, § 566.062, RSMo 2000. Following the issuance of a *per curiam* order and memorandum opinion by the Missouri Court of Appeals, Eastern District, affirming the motion court's judgment, this Court ordered this appeal transferred to it. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, § 10; Rule 83.04.

## STATEMENT OF FACTS

Appellant, Milton Soto, was indicted in St. Louis County Circuit Court on one count of first-degree statutory sodomy, § 566.062, RSMo 2000. (L.F. 4-5). On August 2, 2004, Appellant appeared before the Honorable Larry Kendrick, to enter a plea of guilty. (L.F. 6, 10).

The factual basis for Appellant's guilty plea was that in April or May of 2003, Appellant was playing a game of "hide-and-seek" with the victim and the victim's sister. (L.F. 15). The prosecutor stated that the evidence would show that while he and the victim were hiding, Appellant "placed the hand of four-year-old [victim] on his penis while in the bathroom at [victim's home]." (L.F. 15). Appellant indicated, through an interpreter, that he understood the evidence against him and that he wished to enter an *Alford* guilty plea. (L.F. 15-18).

The State recommended a sentence of ten years, and Appellant said that he understood that this would be the State's recommendation. (L.F. 19). The court accepted Appellant's guilty plea as voluntarily and intelligently made, and sentenced Appellant to ten years in the Missouri Department of Corrections, in accordance with the understood recommendation. (L.F. 25-27).

Appellant filed his *pro se* motion for post-conviction relief on October 28, 2004. (L.F. 36). Appointed counsel filed an amended motion for post-conviction relief on May 31, 2005. (L.F. 48). On November 10, 2005, the motion court filed findings of fact and conclusions of law overruling Appellant's motion without an evidentiary hearing. (L.F. 64, Appx. A1-A6).



## ARGUMENT

**The motion court did not clearly err in overruling, without an evidentiary hearing, Appellant’s Rule 24.035 claim that his guilty plea was erroneously accepted due to an insufficient factual basis, because the prosecutor’s recitation of the facts met the elements of first-degree statutory sodomy.**

Under Missouri law applicable to this case, the elements of first-degree statutory sodomy may be met if the State can show that the defendant touched, with his hand, the genitals of a person under 14 years of age for the purpose of sexual gratification. Sections 566.062 and 566.010, RSMo 2000. The factual basis recited by the prosecutor during Appellant’s guilty plea established that Appellant performed such an act. Consequently, the record contained a sufficient factual basis to support appellant’s guilty plea, and was therefore sufficient. (L.F. 15-17).

Appellant claims that a first-degree statutory sodomy conviction requires that the State prove that penetration of the male or female sexual organ occurred. (App. Br. 11). Appellant’s argument is based on case law construing an outdated version of the statute defining “deviate sexual intercourse” which is not applicable to Appellant’s case. Consequently, Appellant’s claim that no factual basis existed for his plea is without merit.

### **A. Standard of Review**

The standard of review of the motion court’s denial of relief is limited to a determination of whether the court’s findings and conclusions are clearly erroneous. Rule 24.035(k); *Dorsey v. State*, 115 S.W.3d 842, 845 (Mo. banc 2003). The motion court’s findings and conclusions will be deemed clearly erroneous only if, after reviewing the entire

record, an appellate court definitely and firmly believes the motion court made a mistake. *Hayes v. State*, 139 S.W.3d 261, 263 (Mo. App. W.D. 2004). On review, the motion court's findings and conclusions are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991).

A motion court is not required to grant an evidentiary hearing on a claim for post conviction relief unless: (1) the movant pleads facts that if true would warrant relief; and, (2) the facts alleged are not refuted by the record; and, (3) the matter complained of resulted in prejudice to the movant. *Dorsey v. State*, 115 S.W.3d at 844 45. To deny a request for an evidentiary hearing, the record must conclusively show the movant is not entitled to relief. *Schmedeke v. State*, 136 S.W.3d 532, 533 (Mo. App. E.D. 2004).

## **B. Relevant Facts**

During Appellant's guilty plea hearing, the plea court asked the prosecutor to recite the facts which the State would show if Appellant's case proceeded to trial:

Judge, our evidence would show beyond a reasonable doubt, between the dates of April 20th of 2003 and May 4th 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 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. 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 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.

(L.F. 15-17).

Appellant, who wanted to enter a guilty plea, agreed that this would be the state’s evidence. (L.F. 17).

In his amended motion for post-conviction relief, Appellant claimed that the prosecutor had not presented an adequate factual basis to support a conviction for first-degree statutory sodomy. (L.F. 49).

The motion court denied Appellant’s motion without an evidentiary hearing. (L.F. 68). The motion court found that “[c]learly, the factual basis established by the prosecutor satisfies the requirement for deviate sexual intercourse. The hand of B.L. being placed by Movant on Movant’s penis constitutes deviate sexual intercourse.” (L.F. 67).

### **C. The factual basis recited by the prosecutor was sufficient**

Rule 24.02(e) provides that “[t]he court shall not enter a judgment upon a plea of guilty unless it determines that there is a factual basis for the plea.” *Nguyen v. State*, 184 S.W.3d 149, 152 (Mo. App. W.D. 2006). “If the facts presented during the hearing do not establish commission of the charged offense, the court must reject the guilty plea.” *England v. State*, 85 S.W.3d 103, 107 (Mo. App. W.D. 2002). Appellant claims that the factual basis related to the plea court by the prosecutor was insufficient to support a conviction for first-degree statutory sodomy.

There is no dispute over the facts. Appellant concedes that the prosecutor stated that the State would present evidence that Appellant “placed his penis in B.L.’s hand.” (App. Br. 19). But he claims that this evidence would not have met the elements of first-degree statutory sodomy under §§ 566.062 and 566.010, RSMo 2000. Instead, Appellant contends that the evidence would have supported a conviction only for child molestation, under § 566.067, RSMo 2000. (App. Br. 19). Appellant’s analysis is flawed, and the motion court did not err.

Appellant was charged by information with first-degree statutory sodomy under § 566.062. (L.F. 4). Section 566.062, RSMo 2000, provides that a person commits the crime of first-degree statutory sodomy “if he has deviate sexual intercourse with another person who is less than fourteen years old.” Appellant does not contest the age element; the only issue before this Court is whether the factual basis established that Appellant had “deviate sexual intercourse” with the victim. (App. Br. 13).

Before an amendment in 1994, “deviate sexual intercourse” was defined to include “any sexual act involving the genitals of one person and the mouth, tongue, hand or anus of another person.” Section 566.010(2), RSMo Supp. 1991.<sup>1</sup> In 1994, additional language was incorporated into the “deviate sexual intercourse” definition to include any “sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object . . . .” Section 566.010(1), RSMo 1994. The definition of

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<sup>1</sup> The 1991 text of § 566.010, along with that statute’s 1994 and 2000 revisions, has been included in the appendix to this brief. (Appx. A7-A9)

“deviate sexual intercourse” was also amended in 1994 so that the word “hand” was deleted. *State v. Montgomery*, 64 S.W.3d 328, 332 fn.3 (Mo. App. E.D. 2001).

Thus, between 1994 and 2000, § 566.010(1) provided the following definition for “deviate sexual intercourse”:

[A]ny 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 done for the purpose of arousing or gratifying the sexual desire of any person;

Section 566.010(1), RSMo 1994.

With regard to Appellant’s argument in this case, it is important to note that when the Missouri Legislature added the “penetration” language to § 566.010(1) in 1994, this language was connected to the preexisting “deviate sexual intercourse” definition through the use of the disjunctive “or.” This Court has noted that “[t]he disjunctive word, ‘or’, ordinarily indicates an alternative and generally corresponds to the word ‘either’.” *Boone County Court v. State*, 631 S.W.2d 321, 325 (Mo. banc 1982).

On July 13, 2000, the Missouri legislature amended § 566.010, effective August 28, 2000, by reinserting the word “hand” to the definition of “deviate sexual intercourse.” Section 566.010(1), RSMo 2000.<sup>2</sup> Appellate courts “review the statutes as they existed at the time of defendant's acts at issue.” *State v. Montgomery*, 64 S.W.3d at 332. Accordingly, as

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<sup>2</sup> The Missouri legislature also amended § 566.010 in 2002 and 2006, but those amendments have no bearing on the issue before this Court.

of April and May 2003, when Appellant’s charged conduct occurred, the following language constituted the definition of “deviate sexual intercourse”:

[A]ny 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(1), RSMo Supp. 2002.

“The primary rule of statutory construction is to give effect to legislative intent as reflected in the plain language of the statute.” *State v. Blocker*, 133 S.W.3d 502, 504 (Mo. banc 2004). “Each word or phrase in a statute must be given meaning if possible.” *Id.* The statutory definition contained in § 566.010(1) establishes an “either/or” test for determining whether a particular instance of conduct qualifies as deviate sexual intercourse. This interpretation is supported both by the plain language of the statute, and by the legislature’s apparent intent, as indicated by the use of the disjunctive “or” before the penetration language. Thus, in order to prove deviate sexual intercourse, the State may prove that either of the following described acts occurred for the purpose of sexual gratification:

1) that Appellant committed an “act involving the genitals of one person and the hand, mouth, tongue, or anus of another person”;

OR

2) that Appellant committed a “sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object . . .”

Section 566.010(2), RSMo 2000.

Missouri courts have, on a number of occasions, found “deviate sexual intercourse” to have occurred even where there was no allegation of penetration of a male or female sex organ. In *Stieben v. State*, 179 S.W.3d 423 (Mo. App. S.D. 2005), the defendant pleaded guilty to a charge of first-degree statutory sodomy while admitting that he touched the victim’s penis with his hand. *Id* at 425. The *Stieben* court concluded that a sufficient factual basis existed to support the defendant’s conviction. *Id* at 427.

In *State v. Carney*, 195 S.W.3d 567 (Mo. App. S.D. 2006), the defendant claimed on appeal that the trial court erred in instructing the jury on first-degree statutory sodomy, asserting that it was not supported by the evidence. *Id* at 570. Noting the victim’s testimony “that Defendant put his penis in her mouth, and she touched his sexual organ with her tongue,” the *Carney* court concluded that “there was sufficient evidence from which a reasonable juror could have found beyond a reasonable doubt that Defendant was guilty of the crime of statutory sodomy in the first degree.” *Id* at 571.

In *Harris v. State*, 204 S.W.3d 371 (Mo. App. S.D. 2006), the court concluded that a sufficient factual basis existed to support a finding that “deviate sexual intercourse” occurred where “Movant admitted that he placed his penis in Victim's mouth.” *Id* at 375.

In *State v. Johnson*, 62 S.W.3d 61 (Mo. App. W.D. 2001), the court concluded that the evidence was sufficient to support a finding of deviate sexual intercourse when it was possible for “a reasonable jury to infer [from the evidence] that the appellant put his penis in the victim's mouth with respect to the alleged incident of sodomy occurring right before the Fourth of July.” *Id* at 71.

Finally, in *State v. Bryan*, 60 S.W.3d 713 (Mo. App. S.D. 2001), the defendant claimed that the evidence presented at trial was not sufficient to support a finding of deviant sexual intercourse. The *Bryan* court disagreed, concluding that “[t]he act of Defendant placing his penis on victim Smith's lips establishes that Defendant's actions against Smith that evening constituted deviate sexual intercourse.” *Id* at 720.

Appellant argues that § 566.010 is “misapplied” under the interpretation exercised in such cases. (App. Br. 21). Appellant asserts that in order for the State to show “deviate sexual intercourse” (and thus first-degree statutory sodomy), the State **must** show penetration. (App. Br. 20). In making this assertion, Appellant primarily relies on this Court’s opinion in *State v. Pond*, 131 S.W.3d 792 (Mo. banc 2004). *Pond* provides no support for Appellant’s argument.

In *State v. Pond*, the defendant, charged with first-degree statutory sodomy, claimed that the trial court had erred in failing to instruct the jury on the lesser-included offense of first-degree child molestation. *Id* at 793. The evidence in *Pond* was that the defendant had placed his hand on the victim’s vagina, but there was a question whether penetration had occurred. In concluding that the trial court had erred in failing to instruct the jury regarding first-degree child molestation, the *Pond* court noted that “‘Deviate sexual intercourse’ requires proof of ‘penetration, however slight, of the male or female sex organ . . . .’ Section 566.010(1).”

Relying on this language, Appellant argues that *Pond* requires that the State prove penetration in all first-degree sodomy cases. This conclusion is incorrect given the context

of the *Pond* opinion. Specifically, the events underlying *Pond* predated the 2000 statutory amendment to the definition of “deviate sexual intercourse.”

As noted above, following the July 2000 amendment to § 566.010, there were two possible methods by which the State could prove that “deviate sexual intercourse” occurred:

1) an “act involving the genitals of one person and the hand, mouth, tongue, or anus of another person”;

OR

2) a “sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object . . . .”

Section 566.010, RSMo 2000

The events underlying the *Pond* case occurred in May 2000.<sup>3</sup> Therefore, the July 2000 amendment to § 566.010 did not apply to the charge in *Pond*, and the *Pond* court specifically noted its reliance on the RSMo 1994 version of the statute. *State v. Pond*, 131 S.W.3d at 794, fn.1. This is pertinent because prior to 2000 the definition of deviate sexual intercourse did not include contact between **hands** and genitals. Section 566.010, RSMo 1994. Because the allegations in *Pond* involved a defendant touching a victim’s genitals

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<sup>3</sup> *Pond* appeared before this Court on transfer from the Southern District. The Court of Appeals for the Southern District had also rendered an opinion in the matter. *State v. Pond*, 2003 WL 21478743 (Mo. App. S.D. June 27, 2003). While this Court’s opinion in *Pond* does not specifically mention the dates of the events giving rise to the charges in that case, the Southern District’s opinion does include this information.

with his hand, the only possible way for the State to have proved the elements of deviant sexual intercourse in May 2000 was to show that penetration had occurred. Thus, this Court's conclusion requiring a showing of penetration was entirely proper in the context of that case.

In Appellant's case, however, the amended definition of § 566.010(1) was applicable, and deviate sexual intercourse **could** be shown through hand-to-genital contact. Accordingly, it was no longer necessary for the State to prove penetration in such a circumstance. Thus, the factual recitation by the prosecutor in this case was sufficient.

Appellant relies on *State v. Robinson*, 26 S.W.3d 414 (Mo. App. E.D. 2000), for the proposition that "Statutory sodomy requires that a defendant engage in deviate sexual intercourse with another person; this includes digital penetration." (App. Br. 21). The *Robinson* court was undoubtedly correct in concluding that digital penetration would fall within the bounds of statutory sodomy, but this holding is nevertheless unhelpful to Appellant because the court never suggests that penetration is the **only** way to prove deviate sexual intercourse. Furthermore, just as in *Pond*, the underlying conduct in *Robinson* took place prior to 2000, and hand-to-genital contact without penetration was not included in the definition of "deviate sexual intercourse." § 566.010, RSMo 1994.

Finally, Appellant relies on *State ex rel. Fowler v. Purkett*, 156 S.W.3d 357 (Mo. App. E.D. 2004), for the proposition that penetration is required when the defendant is charged with performing an act of deviate sexual intercourse through hand-to-genital contact. Just as in *Pond* and *Robinson*, however, the underlying conduct in *Purkett* took place before 2000, and is thus inapplicable here given the statutory changes that took effect that year.

In asserting that penetration is absolutely required for any first-degree statutory sodomy conviction, Appellant is essentially asking this Court to ignore the first instance of the word “or” in the statutory definition of deviate sexual intercourse. No case cited by Appellant, when considered in the proper context, supports such a position. The Missouri Legislature, when enacting this language, clearly intended to create a situation where two different types of conduct might be classified as “deviate sexual intercourse.” Accordingly, the prosecuting attorney’s factual recitation provided a sufficient factual basis to meet the elements of first-degree statutory sodomy, and the motion court did not clearly err overruling Appellant’s motion for post-conviction relief.

## CONCLUSION

The motion court did not clearly err in overruling Appellant's Rule 24.035 motion for post-conviction relief. The motion court's judgment should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 3,723 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 3<sup>rd</sup> day of April, 2007, to:

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**APPENDIX**

Findings of Fact, Conclusions of Law, and Judgment ..... A1-A6

Section 566.010, RSMo Supp. 1991 ..... A7

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Section 566.010, RSMo 2000..... A9