APPEAL NO. SC85934

IN THE MISSOURI SUPREME COURT

MOHSIN BAGHAZAL,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal to the Missouri Supreme Court
from the Circuit Court of the County of St. Louis

Cause No. 01CR-1759

Division 15

Honorable John Ross, Judge.

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

On April 13, 2002, Appellant Mohsin Baghazal was convicted of three counts of child molestation in the first degree, involving two children. (L.F. 126-28). Appellant's Motion for New Trial was denied on May 24, 2002, and Appellant was sentenced to serve three consecutive terms of 15 years in the Missouri Department of Corrections. (L.F. 138-41). Appellant filed a timely notice of appeal. (L.F. 144-46). This Court granted Appellant's application for transfer, and jurisdiction therefore lies in the Supreme Court of Missouri.. Missouri Constitution, Article V, Section 3.

STATEMENT OF FACTS

The Telephone Call

At approximately four o'clock on April 18, 2001 (T. 810), F.S., a fourth-grade student at the Al-Salam Day School and classmate of alleged victims Y.R. and S.N., telephoned Y.R.'s mother, A.R. (T. 812). F.S. was concerned about a conversation he had overheard on the playground that afternoon in which Y.R. described being assaulted by Appellant during a 10-minute meeting at the school's computer lab. (T. 781). F.S. explained to Y.R.'s mother that Appellant "took Y.R. to the computer lab and he pulled his pants down." (T. 680). According to F.S., Y.R.'s mother began screaming and crying, "went hysterical" (T. 814), and then hung up on F.S.. (T. 681; 814). Y.R.'s mother assumed Y.R. had been slapped, disciplined, or beaten. (T. 682). Later, F.S. made a similar call to S.N.'s mother. (T. 785). Although F.S. was extremely distraught (T. 782) by the description of events, neither Y.R. nor S.N. showed any indications of trauma (T. 75; 707; 880), and told only F.S. about the alleged assault. (T. 1016). In fact, according to Y.R.'s mother, the boy was completely normal upon arriving home. (T. 707). Y.R. would later allege that he was anally penetrated by his 40 year-old teacher less than an hour before. (T. 456).

The impetus for F.S.'s call occurred sometime after lunch that day, when Y.R. told his best friend, S.N. that something had happened to him in the computer lab. (T. 1016). Upon hearing about the incident, S.N.'s own memory was refreshed, and he recalled

similar sexual encounters with Appellant during the previous month (T. 1026).[1] The boys told F.S. not to tell anyone. (T. 782).

After hanging up the phone, Y.R.'s mother asked her son what had happened. (T. 683). He told her that Appellant had brought him to the computer lab to check for bruises after Y.R. had finished playing soccer with the teenage boys at the school (T. 683), that Appellant pulled his pants down, gave him a game, and told him to lay down and relax. (T. 683-85). During the five minutes (T. 684) that ensued, Y.R. told his mother that he felt something hard (T. 683-84), and then felt something like a "pinch." (T. 687). Finally, Y.R. told his mother that Appellant "wiped [him] out." (T. 685).

Y.R.'s mother panicked, and called the school secretary. (T. 688). The school's principal was contacted and went to Y.R.'s home. (T. 726). Y.R.'s mother then placed a call to police. (T. 727-29). Y.R.'s mother examined Y.R. for blood, or other signs of damage, but found none. (T. 725). Shortly after the police arrived, Appellant called Y.R.'s mother, who promptly hung up the phone "in his face." (T. 728-30). Officer Noonan of the St. Louis County Police Dept., interviewed Y.R., who supposedly told the Officer that Appellant rubbed lotion[2] over his buttocks and moved "back and forth" on

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[1] This would later prove problematic for the State, as Appellant was in Saudi Arabia during that time. (L.F. 52-53).

[2] Y.R. referred to the substance as "white stuff," only referencing it as "lotion" after it was

top of him. (T. 870-71). Y.R. told Noonan that Appellant's private parts "touched his butt." (T. 871-72). Y.R. also told Noonan that there was a second victim, S.N. (T. 873). Y.R.'s clothes and underwear were collected, and he was taken, along with S.N.'s, to the hospital for a SAFE examination. (T. 874). There is no indication that either boy bathed, wiped or changed clothes before the examinations. (T. 719-20; 948-50).

The SAFE Examinations and Forensic Interviews

Y.R. was admitted to the emergency room at approximately 8:00PM, within five hours of the alleged incident. (T. 911-12). He told the admitting nurse, Margie Batek, that Appellant "put his front private spot" into Y.R.'s "back private spot." (T. 905). Aside from Y.R.'s statements, the nurse found no behavioral "indicators" of sexual abuse. (T. 938-40). Neither she, nor the examining physician found physical signs of abuse, including rectal pain, discharge, bleeding, constipation, tenderness, burning or itching. (T. 940-42). There was nothing there. (T. 942). Several samples were taken but no semen or other biological material was discovered (T. 977). No lotion or lubricant was discovered. (T. 983). Y.R. spoke to S.N. at length in the waiting room before S.N. was interviewed and examined. (T. 649-50).

S.N. told the admitting nurse a nearly identical version of events. (T. 912-15). Again, there were no physical or behavioral signs of abuse. (T. 950-52).

The following day, Y.R. was interviewed by Nancy Duncan, who suggested that

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suggested by Nancy Duncan, the forensic interviewer. (T. 1049).

the unidentified substance allegedly wiped onto Y.R.'s buttocks was lotion. (T. 1049). This feature has been incorporated into the story ever since.

Oral, rectal and thigh swabs of Y.R. and S.N., as well their underwear, were sent to Margaret Walsh, of the St. Louis County Crime Lab for analysis. (T. 975-76). Buccal swabs of Appellant and his clothing were also tested. (T. 977). Walsh, an expert in blood, semen, and saliva analysis, found no signs of semen or seminal fluid (T. 977). No tests for lotion or lubricant were done. (T. 983).

The Arrest

On or about 9:00 a.m., April 19, 2001, Appellant was awakened and informed that Det. Guinn wanted to speak with him. (T. 1396). Appellant agreed to speak with Guinn at the Clayton Police Department and consented to a search of his bedroom and car. (T. 1397-99). According to Appellant, upon getting into the police car, Guinn asked: "Are you aware what this is all about?" (Supp. T. 135). Although Appellant informed that he did not understand the accusations against him, Appellant indicated that he was told it had something to do with inappropriate touching. (T. 1399-1400). Upon arriving at the Clayton Police Department, Appellant was taken into an interrogation room, (T. 1400), and was presented with a rights waiver form. (T. 1401). Guinn informed Appellant that "Y.R. says you sodomized him?" (T. 1401). Appellant was shocked. (T. 1401). Guinn then asked if Appellant denied doing what the child said he did. (T. 1402). Appellant denied having sexual contact with the alleged victim. (T. 1403). Guinn responded by lying to Appellant, claiming that investigators had found physical evidence on Y.R.'s

upper buttock. (T. 1404). This evidence did not exist. (T. 42, 1030, 1050-54, 1059, 1160) (Supp. T. 73-75). Appellant then asked to speak with his brother and a lawyer, thereby asserting his Fifth Amendment right to remain silent. (Supp. T. 54). Guinn arrested him. (T. 1405).

The Amended Information in Lieu of Indictment

Pursuant to Missouri Supreme Court Rule 25.05(A)(5), Appellant provided the State notice of his intent to present the defense of alibi, that he was in Saudi Arabia, (L.F. 52-53) as to at least two counts of the initial indictment (L.F. 52). The State then amended the indictment, expanding the time frame to January 1 through March 8, (L.F. 19-23), effectively negating the alibi defense.

Voir Dire

Thirty-two venire members were called for service in this case. (T. 398-407). Of this original group, five prospective jurors were African-American: Banks, Lewis, Neal, Wells and Williams. The state utilized five of its six peremptory challenges to remove all five black venire persons from the jury panel. (T. 398-407). One of these strikes, of venire person Banks, was based on manufactured, pretextual information which made no sense in light of the fact that other white jurors were allowed to remain despite having similar backgrounds. (T. 315-16; 338).

Witness Interference

At the state's insistence and over defendant's objections, the court took a recess during the cross examination of Y.R.. Allyn Hoke, a victim's advocate and employee of

the prosecuting attorney's office violated the trial court's order not to discuss the cross examination with Y.R. and told him to answer "I don't know" or "I don't remember" (T. 502-03) to defense counsel's questions. Although the trial court granted the recess, it reasoned that the court reporter–not the witness–needed a break. (T. 569). Despite the trial court's admonitions to the prosecutor, when the witness returned he apparently followed Hoke's instructions, and answered a disproportionate number of questions "I don't know" or "I don't remember." (T. 496-97; 500; 502-06; 509-12; 514-16; 518; 521; 524-31; 533-35; 538-39; 541-48; 553; 555; 558-59; 561-62).

Other facts will be developed, as appropriate, in the argument portion of the brief.

POINTS RELIED UPON

I. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO USE FIVE OF ITS SIX PEREMPTORY STRIKES TO EXCLUDE ALL OF THE AFRICAN AMERICAN VENIRE PANELISTS IN THAT SUCH STRIKES WERE RACIALLY MOTIVATED AND THE STATED REASONS FOR THE STRIKES PRETEXTUAL IN LIGHT OF THE FACT THAT NO ATTEMPT WAS MADE BY THE STATE TO EXCLUDE SIMILARLY SITUATED WHITE VENIRE PANELISTS WHOSE BACKGROUND FACTS WERE IDENTICAL TO THOSE CITED BY THE STATE AS RACE-NEUTRAL GROUNDS FOR STRIKING THEIR AFRICAN AMERICAN COUNTERPARTS. FURTHER, IN THE CASE OF VENIREPERSON BANKS, THE STATE FABRICATED TESTIMONY SO AS TO CREATE THE ILLUSION OF A RACE-NEUTRAL STRIKE. THE TRIAL COURT SANCTIONED THE STATE'S ERROR BY ALLOWING THE STATE TO STRIKE AFRICAN-AMERICAN JURORS IF THE PROSECUTOR COULD DEVISE A BASIS FOR THE STRIKE THAT COULD BE CONSIDERED NON-RACIST. THE TRIAL COURT'S ERROR VIOLATED THE UNITED STATES SUPREME COURT'S HOLDING IN *BATSON V. KENTUCKY,* AND DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION AND AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION.

Batson v. Kentucky, 476 U.S. 79 (1986)

State v. Parker, 836 S.W.2d 930 (Mo. Banc 1992)

State v. Rios, 840 S.W.2d 284 (Mo. App. 1992)

State v. Antwine, 743 S.W.2d 51 (Mo. Banc 1987)

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR A MISTRIAL AFTER THE STATE PURPOSELY VIOLATED THE COURT'S ORDER PROHIBITING COMMUNICATION WITH A KEY STATE'S WITNESS DURING A SHORT RECESS IN CROSS-EXAMINATION. AT THAT RECESS, A VICTIM'S ADVOCATE, EMPLOYED BY THE PROSECUTING ATTORNEY'S OFFICE, INSTRUCTED THE WITNESS TO ANSWER "I DON'T KNOW" OR "I DON'T REMEMBER" TO QUESTIONS POSED BY DEFENSE COUNSEL. AFTER THE BREAK, THE WITNESS HAD DRAMATIC LAPSES IN MEMORY OVER MATTERS ABOUT WHICH HE HAD TESTIFIED TO PREVIOUSLY WITHOUT DIFFICULTY, HAD DIFFICULTY UNDERSTANDING COUNSEL'S QUESTIONS, AND HIS TESTIMONY WAS GENERALLY UNRESPONSIVE ESPECIALLY WHEN COMPARED TO HIS TESTIMONY BEFORE THE IMPROPER COMMUNICATION. THE COURT'S ERROR WAS AN ABUSE OF DISCRETION WHICH WORKED SUBSTANTIAL AND IRREVOCABLE PREJUDICE TO APPELLANT AS IT EFFECTIVELY SANCTIONED THE STATE'S IMPERMISSIBLE COACHING AND CONCOMITANTLY DEPRIVED APPELLANT OF HIS RIGHTS TO DUE PROCESS AND TO CONFRONT AND CROSS EXAMINE

WITNESSES AGAINST HIM IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 &18(a) OF THE MISSOURI CONSTITUTION.

Perry v. Leeke, 488 U.S. 272, 282 (1989)

State v. Futo, 932 S.W.2d 808, 813-14 (Mo. App. E.D. 1996)

State v. Trimble, 693 S.W.2d 267 (Mo. App. W.D. 1985)

United States v. Owens, 484 U.S. 554 (1988)

III. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO COMMENT ON THE APPELLANT'S POST ARREST SILENCE BY ELICITING FROM DETECTIVE GUINN THAT APPELLANT HAD INVOKED HIS FIFTH AMENDMENT PRIVILEGE AND REQUESTED AN ATTORNEY AND BY ASKING APPELLANT DURING CROSS EXAMINATION WHETHER HE HAD EVER TOLD ANYONE, PRIOR TO HIS TESTIMONY, THAT HE HAD TAKEN Y.R. TO THE COMPUTER LAB TO DO "MATHFACTS", A COMPUTER GAME. DURING A CUSTODIAL INTERROGATION THE APPELLANT HAD EXERCISED HIS FIFTH AMENDMENT RIGHTS AND REFUSED TO ANSWER QUESTIONS WITHOUT AN ATTORNEY PRESENT. ALLOWING THE STATE TO ELICIT TESTIMONY ABOUT THIS REQUEST AND TO CROSS-EXAMINE APPELLANT ABOUT THIS FACT WAS A DIRECT COMMENT ON HIS CHOICE TO EXERCISE HIS FIFTH AMENDMENT RIGHTS AND HIS RIGHT TO REMAIN SILENT IN THE FACE OF

A POLICE INTERROGATION IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. THE QUESTION WAS CALCULATED TO IMPLY TO THE JURY THAT APPELLANT HAD RECENTLY FABRICATED HIS DEFENSE AND TO PUNISH HIM FOR EXERCISING HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT. ANY COMMENT ON APPELLANT'S FAILURE TO PROVIDE HIS STORY AFTER INVOKING HIS FIFTH AMENDMENT PRIVILEGE, VIOLATES THE UNITED STATES SUPREME COURT'S HOLDING IN *DOYLE V. OHIO*, 426 U.S. 610 (1976), THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THOSE RIGHTS GUARANTEED HIM BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION.

State v. Dexter, 954 S.W.2d 332 (Mo. 1997)

Doyle v. State of Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976)

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966)

State v. Zindel, 918 S.W.2d 239 (Mo. banc 1996)

IV. THE TRIAL COURT ERRED BY REFUSING TO SUBMIT TO THE JURY APPELLANT'S INSTRUCTIONS A AND B FOR THE REASON THAT SAID INSTRUCTIONS WOULD HAVE ALLOWED THE JURY TO CONSIDER THE LESSER

INCLUDED OFFENSE OF SEXUAL MISCONDUCT INVOLVING A CHILD BY INDECENT EXPOSURE. THE INSTRUCTIONS SHOULD HAVE BEEN SUBMITTED TO THE JURY PURSUANT TO SUPREME COURT RULE 28.02(A), BECAUSE THERE WAS A FACTUAL BASIS FOR ACQUITTAL OF THE CRIMES CHARGED IN THE VERDICT DIRECTORS AND FOR THE SUBMISSION OF THE LESSER INCLUDED OFFENSES. THE COURT'S FAILURE TO DO SO VIOLATED THE APPELLANT'S RIGHTS GUARANTEED HIM BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, § 10 OF THE MISSOURI CONSTITUTION.

State v. Barnard, 972 S.W.2d 462 (Mo.App. W.D. 1998)

State v. Ellis, 639 S.W.2d 420 (Mo.App. W.D. 1982)

State v. Hineman, 14 S.W.3d 924 (Mo. banc 1999)

State v. Santillan, 948 S.W.2d 574 (Mo. banc 1997)

V. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE, OVER OBJECTIONS BY DEFENSE COUNSEL, THE HEARSAY TESTIMONY OF Y.R'S MOTHER, MARGIE BATEK, NANCY DUNCAN, OFFICER TOM NOONAN AND SGT. GARY GUINN CONCERNING STATEMENTS MADE BY THE ALLEGED VICTIMS PURSUANT TO V.A.M.S. § 491.075 IN THAT: (1) SUCH TESTIMONY LACKED "SUFFICIENT INDICIA OF RELIABILITY" AS THAT TERM HAS BEEN CONSTRUED BY MISSOURI COURTS; (2) IN THE CASE OF

Y.R., THE WITNESS WAS CONSTRUCTIVELY UNAVAILABLE DUE TO THE STATE'S INTERFERENCE WITH HIS TESTIMONY AND HENCE REQUIRED A TEST OF HEIGHTENED SCRUTINY FOR RELIABILITY WHICH THE COURT DID NOT PERFORM; (3) THE VICTIMS' TESTIMONY REQUIRED CORROBORATION INDEPENDENT OF THE HEARSAY TESTIMONY DUE TO ELEMENTAL INCONSISTENCY; AND (4) §491.075, AS AMENDED, VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT AND IS THEREFORE UNCONSTITUTIONAL. THE TRIAL COURT'S ERROR DEPRIVED APPELLANT OF HIS RIGHTS TO DUE PROCESS OF LAW AND TO CONFRONT WITNESSES AGAINST HIM IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION.

Idaho v. Wright, 497 U.S. 805, 815-19 (1990)

State v. Griggs, 999 S.W.2d 235, 241 (Mo. App. W.D. 1998)

Kierst v. D.D.H., 965 S.W.2d 932, 939 (Mo. App. W.D. 1998)

State v. Jankiewicz, 831 S.W.2d 195, 198-99 (Mo. banc 1992)

VI. THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION AND REFUSING TO ALLOW APPELLANT TO TESTIFY CONCERNING THE TIME FRAMES ORIGINALLY CHARGED IN THE INDICTMENT IN THIS CASE. THE STATE FILED AN INFORMATION IN LIEU OF INDICTMENT BROADENING

THE TIME FRAMES FOR WHICH THE OFFENSES OCCURRED AND SUBSEQUENTLY FILED AN AMENDED INFORMATION FIVE DAYS BEFORE TRIAL EXCLUDING THE PERIOD OF TIME FOR WHICH APPELLANT HAD PROVIDED THE STATE WITH AN ALIBI. SAID TESTIMONY WAS RELEVANT AND MATERIAL. ITS EXCLUSION DENIED THE APPELLANT HIS RIGHT TO PRESENT A DEFENSE AND HIS RIGHTS GUARANTEED HIM BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 18(a) OF THE MISSOURI CONSTITUTION.

State v. Endicott, 881 S.W.2d 661, 663 (Mo. App. 1994).

State v. Messa, 914 S.W.2d 53, 54 (Mo. App. 1996).

State v. Boone Retirement Center, Inc., 26 S.W.3d 265, 269 (Mo. App. 2000).

ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO USE FIVE OF ITS SIX PEREMPTORY STRIKES TO EXCLUDE ALL OF THE AFRICAN AMERICAN VENIRE PANELISTS IN THAT SUCH STRIKES WERE RACIALLY MOTIVATED AND THE STATED REASONS FOR THE STRIKES WERE PRETEXTUAL IN LIGHT OF THE FACT THAT NO ATTEMPT WAS MADE BY THE STATE TO EXCLUDE SIMILARLY SITUATED WHITE VENIRE PANELISTS WHOSE BACKGROUND FACTS WERE IDENTICAL TO THOSE CITED BY THE STATE AS RACE-NEUTRAL GROUNDS FOR STRIKING THEIR AFRICAN AMERICAN COUNTERPARTS. FURTHER, IN THE CASE OF VENIREPERSON BANKS, THE STATE FABRICATED TESTIMONY SO AS TO CREATE THE ILLUSION OF A RACE-NEUTRAL STRIKE. THE TRIAL COURT SANCTIONED THE STATE'S ERROR BY ALLOWING THE STATE TO STRIKE AFRICAN-AMERICAN JURORS IF THE PROSECUTOR COULD DEVISE A BASIS FOR THE STRIKE THAT COULD BE CONSIDERED NON-RACIST. THE TRIAL COURT'S ERROR VIOLATED THE UNITED STATES SUPREME COURT'S HOLDING IN *BATSON V. KENTUCKY,* AND DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION AND AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION.

A. Standard of review.

A reviewing court will set aside the trial court's finding as to whether the prosecutor discriminated in the exercise of peremptory challenges if such finding is "clearly erroneous." *State v. Blankenship,* 830 S.W.2d 1, 15 (Mo. Banc 1992). A finding is clearly erroneous when, though there may be evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed based on an evaluation of the entire evidence. *State v. Antwine,* 743 S.W.2d 51, 66 (Mo. banc 1987), *cert. denied* 486 U.S. 1017 *citing Anderson v. Bessemer City,* 470 U.S. 564, 573 (1985).

B. The State's peremptory strikes were racially motivated and their "race-neutral" justifications were pretextual.

Once a defendant has raised a *Batson* challenge with regard to the striking of a minority venire person during voir dire, the state must "come forward with a neutral, legitimate explanation for challenging black jurors." *Batson v. Kentucky,* 476 U.S. 79, 97 (1986). After a neutral and legitimate explanation has been given, the trial court must then "determine if the defendant has established purposeful discrimination." *Id.* at 98.

In determining whether there has been purposeful discrimination, the trial court is obligated to apply a three-pronged analysis. *Antwine,* at 64-65. It must evaluate: (1) the susceptibility of the particular case to racial discrimination, (2) the prosecutor's demeanor and, (3) the validity of the explanation itself. *Id.* at 65.

Here, the record reveals that 32 venirepersons were called for service. (T. 398-407). Of this original group, only five prospective jurors were African-American: Banks,

Lewis, Neal, Wells and Williams. Of these five African-American prospective jurors, the state used five of its six peremptory challenges to strike them all. (L.F. 77-88). This fact alone should cause this court concern.

In reviewing the State's reasons for these strikes, however, it becomes even clearer that each of these strikes was racially motivated and pretextual[3] in light of the fact that: (1) the State manufactured testimony of at least one venire person in order to create race-neutral grounds for exclusion; and (2) similarly situated white venire members went unchallenged.

1. Misrepresentation by the state – Venireman Banks.

Banks clearly stated that he had a "nephew" serving time for "something with the police." (T. 299). Banks also emphasized that he "never talked to [his nephew]" about the charge and that he felt that his nephew had been treated "fairly." (T. 299). Nevertheless, in spite of Banks' unambiguous sworn testimony, the State invented an altered and distorted version of what Banks had said. In spite of the fact that Banks had clearly stated that it was his ***nephew*** who was in jail because he had been ***charged*** with "***something with the police***," (T. 299) the State, seeking to justify its strike of Banks, stated that "Mr. Banks indicated that he currently has a ***brother*** who's ***serving time…for assault of a law enforcement officer.***" (T. 402) (emphasis added).

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[3]Roget's International Thesaurus, 4th ed., lists as synonyms "fakery, falsery, humbug, speciousness, cheating, fraud, deception, play acting and false front."

Not only did the state misrepresent that it was Banks' brother who was in jail, but the state completely fabricated the reason for the nephew's incarceration. Even more troubling is the State further bootstrapped this fabrication by arguing that because Banks had a "close" family member in jail "for assaulting a police officer" he would not be "a sympathetic juror to the state." (T. 402-403). In light of such egregious conduct on the part of the State, the lower court's oversight in this instance led to a clearly erroneous finding as to the validity of the State's explanation for striking Banks as well as others.

The court in *Batson* recognized and addressed the fact that the use of peremptory challenges has been, and remains particularly susceptible to racial discrimination. "The reality of the practice, amply reflected in many state- and federal-court opinions, shows that the [peremptory] challenge may be, and unfortunately at times has been, used to discriminate against black jurors." *Batson*, 476 U.S. at 99. In order to prevent such abuse, courts now hold that "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *State v. Marlowe*, 89 S.W.3d 464 (Mo. 2002) *citing Purkett v. Elam*, 514 U.S. 765, 768. Furthermore, courts have held that deception and ill-motive on the part of the State is particularly egregious, violative of the Fourteenth Amendment, and establishes firm grounds for reversal on appeal. *See State v. Elder*, 901 S.W.2d 87, 91. (Mo. App. 1995) ("If the record indicates that the state acted deceptively or with ill-motive, the Fourteenth Amendment is implicated.").

In the present case, the State was trying a member of a minority or a person of color, and eliminated as many minority members from serving on the panel as possible.

Unfortunately, for both the Appellant and the disenfranchised minority venire persons, the racially motivated strikes by the State were sanctioned by the trial court. Although the State sought refuge behind what it claimed were race-neutral excuses, a realistic and reasonable examination and evaluation of the entire voir dire discloses disturbing evidence of racial bias and motivation because: (1) similarly situated white jurors went unchallenged; (2) the reasons were not logically or plausibly related to the present case; and (3) the reasons were inherently race-related.

2. Similarly situated white jurors went unchallenged.

African-American venire persons Ms. Lewis, Mr. Banks, and Mr. Williams were struck by the prosecutor and the reasons proffered, in part, were that they were either related to people who had been the subject of a criminal proceeding, or were employed in an occupation which would make them sympathetic to the defense. (T. 298).

During the voir dire conference, the prosecutor stated that he had struck: 1) Ms. Lewis because she had a step-brother who was arrested for a drug offense and a sister who was arrested for bad checks (Tr. 400); 2) Mr. Banks, because he had a brother who was serving time in the County jail (Tr. 402); and 3) Mr. Williams because his occupation as a principal would make him particularly sympathetic to the argument that children can lie (Tr. 403-404).

However, similarly situated white venirepersons with backgrounds that paralleled the black jurors remain unchallenged. On the same panel, white venirepersons Mr. Hendrick and Mr. Blevins were not struck, even though: 1) Mr. Hendrick had expressly

stated that his stepson had been arrested and pled guilty to a misdemeanor property crime (Tr. 324); and 2) Mr. Blevins expressly stated that he had a nephew ***whom he was close to***, in jail for robbery and nonpayment of child support (Tr. 315-316). Further, in similarly situated occupations, white venirepersons Ms. Bonham, who worked as a school administrator and Ms. Wall, who worked as a summer camp counselor, were also never challenged (Tr. 233, 364-365).

"Crucial to the trial court's analysis of the state's explanation for striking [a minority juror] is whether similarly situated white venirepersons escaped the state's challenge." *Antwine,* 743 S.W.2d at 65. *See also State v. Weaver,* 912 S.W.2d 499, 509 (same). Thus, the record clearly showed that the State was, at best, being less than forthcoming, and at worst, intentionally deceiving the court, in order to remove qualified minority jurors from jury service.

3. The State's reasons for striking African American venire persons were not logically or plausibly related to the present case.

The State's other proffered reasons for excluding African-American jurors were equally preposterous. For example, the State proffered that it was excluding: 1) Mr. Banks because he had received a traffic ticket which a judge later dismissed; and 2) Ms. Lewis, because she worked for the NLRB. Both these reasons were also unmistakably pretextual. The determination of whether an explanation is pretextual depends upon, *inter alia*, "whether the reason proffered by the party exercising the peremptory challenge relates at all to the facts of the case." *People v. Ritchie,* 633 N.Y.S.2d 263, 266 (N.Y.

App. Div. 1995).

With regard to Mr. Banks, it is entirely unclear as to how a traffic citation in *any* way relates to a charge of child molestation. In fact, the moral distance between the two offenses is **so** enormous that it would seem ridiculous to postulate that someone who had received a traffic citation and successfully contested it in court would be unduly sympathetic toward a Muslim-American accused of sexually molesting a child. In fact, the state attempted to argue it as such, stating that it "was a little concerned about [Bank's having successfully contested a traffic citation] in the sense that [Banks] may think…just as [he] got off…[the man accused of molesting a child] is getting railroaded." (T. 403) Such an argument would offend any meaning of common sense, attributing an almost infantile level of moral reasoning to venireperson Banks. Equally offensive is the prosecutor's apparent assumption that Banks was guilty and managed to hoodwink the judge.

In addition, it is essential that this court scrutinize the State's reliance on such "soft data,"[4] as the State successfully used here, because exclusive reliance on such data can easily mask racial discrimination. Any court that accepts soft data-based challenges, those

[4] See Joshua E. Swift, Note, Batson's Inviduous Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge, *78 Cornell L. Rev.* 336, 359 (1993) ("Soft data" challenges are based on reasons that may include intuition or race-related traits, as well as a prosecutor's unverifiable assumptions.)

based on intuition or assumptions, allows attorneys the "wriggle room" they need to craft neutral explanations for impermissible motives, thus allowing them to remove potential jurors in bad faith. The use of intuition rather than facts sends the message that the courts are not committed to the eradication of racism from the courtroom. Here, the State argued that Mr. Banks' contesting a traffic citation would make him unsympathetic to the State, but presented absolutely **no** objective evidence that Banks, or for that matter, anyone else who contest traffic tickets are more likely to be biased.

Similarly, the state's proffered reason for excluding venireperson Lewis was equally illogical. The prosecutor implausibly argued that venireperson Lewis' previous employment for the National Labor Relations Board would make her more likely to second-guess police testimony (Tr. 399). If this "occupational logic" were followed, however, it would be more reasonable for the State to have struck white venirepersons Ms. Wall and Ms. Myers, who were both registered nurses, and/or white venireperson Ms. Bonham, who not only possessed a Master's degree in Social Work, but also possessed actual training in identifying both physical and psychological symptoms of abuse (Tr. 233-234, 364-365). Clearly, these womens' occupational backgrounds would have caused them to have the greater bias, for they would obviously have been more likely to have second-guessed any alleged victim who would have testified to sexual abuse.

POLICY CONSIDERATIONS

The United States Supreme Court has held that the removal of even one

venireperson through discriminatory means is unconstitutional. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). *See also, United States v. Lorenzo,* 995 F.2d 1448 (9th Cir.1993) Where the discriminatory practice is determined on appeal, the appellate court ***must*** reverse the conviction and remand for a new trial. *See People v. Irizarry,* 560 N.Y.S.2d 279 (1990), *State v. Holman*, 759 S.W.2d 902, 903 (Mo.App.E.D. 1988); *State v. Price*, 763 S.W.2d 286 (Mo.App.E.D. 1988) (reversed and remanded a conviction of capital murder and two counts of assault in the first degree because of a *Batson* violation). In this case, the trial court overlooked the fact that the State's "[d]iscrimination in jury selection causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128.

As of the census of 2000, the African-American population of Missouri was 629,391. 382,596, more than 60% of that population, was located within the St. Louis Greater Metropolitan Area. U.S. Census Bureau, *Regional Statistics Figures (2004).* 371,572 of that total figure was solely within the limited area of St. Louis City and St. Louis County. *Id.* Thus, the African-American population comprised more than half the total population of the City, and almost 20% of the Greater Metropolitan Area. *Id.*

According to the Missouri Department of Corrections, over 31,000 African Americans are presently in prison, on parole or on probation in Missouri. *Missouri Department of Corrections, Statistics and Publications of Drug Offenders (2004).* This number does not include those persons who have been convicted of a crime and have now

been released, or are no longer on parole or probation. Since most crime in Missouri occurs within the urban areas, many of the 31,000 are from the St. Louis area. *Area Connect St. Louis Statistics (2004).* "By the early 1990s, it was not unusual if half of young African Americans living in an urban neighborhood were in prison, in jail, on probation/parole, on bail, or being sought for arrest." *St. Louis 5 Year Consolidated Plan Strategy, Criminal Records (2004).*

While the venirepanel in this case was made up of County residents, the concept that a black resident of the County would be related to or acquainted with a black resident of the City is not only logical but probable. Thus, when a prosecutor bases a peremptory strike upon a relationship to someone who has been convicted of a crime, it is meant to, and statistically will, fall most frequently on the minority members of the population. The pretextual posturings are de facto methods of removing potential African-American jurors.

When the five strikes executed by the State are examined in the totality of the circumstances, it is apparent that these strikes were racially motivated. All African-American venirepersons were removed from the panel, while similarly situated white jurors were not. The reasons given were implausible and illogical, and some reasons given gloss over the true disproportionate impact it will have on minorities' abilities to serve as jurors in the community where they live. The picture presented before the Court is exactly the type of discrimination that *Batson* and its progeny attempted, and have thus far, failed to eradicate.

1. Should any excuse be sufficent to circumvent a *Batson* challenge?

It is inconceivable that almost any reason proffered by a prosecutor could be judged as sufficient to avoid a *Batson* challenge. *Weaver v. Bowersox*, 241 F.3d 1024, 1027 (8th Cir. 2001) ("I didn't think she was strong enough. I observed her a lot of times cutting up and talking to the black gentleman next to her."); *Elem v. Purkett*, 64 F.3d 1195, 1197 (8th Cir. 1995) ("I struck number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far."); *State v. Williams*, 97 S.W.3d 462, 471 (8th Cir. 2003) (The venireperson's earring and clothing indicated that he was "trying to be different" and was "liberal."); *State v. Hopkins, 2004 WL 1153684* ("My reason for striking her is based on her employment. She deals with things in the financial area...and there may be things that don't add up"). Clearly, no matter what reason has been given, as long as race is not explicitly mentioned or facially apparent, the challenge will fail under Missouri's present scheme of a dual motivation analysis.[5]

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[5] A dual motivation analysis allows a prosecutor's peremptory strike to stand, as long as the court accepts that there was another motivation – besides race – that prompted the strike. *See State v. Cyprian*, 864 S.W.2d 10 (Mo.App. E.D. 1993); *State v. Lacey*, 851 S.W.2d 623 (Mo.App. E.D. 1993); and *State v. Antwine*, 743 S.W.2d 51 (Mo. banc 1987) ("a prosecutor is permitted to exercise his peremptory challenges on the basis of his legitimate 'hunches' and past experiences so long as racial discrimination is not his

2. The Supreme Court's intent is not being carried out under the current framework.

In response to state statutes barring African-Americans from serving on juries, the United States Supreme Court decided *Strauder v. West Virginia*, 100 U.S. 303 (1880), which barred states from enacting statutes to that effect. While states no longer employed statutes following *Strauder,* prosecutors historically were able to use a variety of devices, ranging from the initial jury lists to peremptory strikes, to continue blocking minority representation on juries.

The Court did not act again until *Swain v. Alabama,* 380 U.S. 202 (1965), which was decided almost a hundred years later. *Swain* held that peremptory strikes utilized for venirepersons because of race was a violation of the equal protection guarantees of the 14th Amendment. However, *Swain* enunciated no effective means of enforcement. An accused would have to demonstrate a pattern of discrimination by a particular prosecutor before a challenge could be heard. *Swain* was met with disapproval because of this "crippling burden of proof." *Batson*, 476 U.S. at 92.

Batson was the Court's response to *Swain's* shortcomings and the latest attempt to protect minority defendants and venire persons. But race remains pervasive and predominant. Much of the hopes for equality and fairness engendered in *Batson* have been eliminated by camouflage, obfuscation and incredulity. Justice Marshall knew this

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motive.").

when he addressed the issue in his concurrence in the *Batson* opinion, "[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge." *Id.* at 105, *Marshall's concurrence.*

While the Court has not specifically addressed these concerns in employing the *Batson* decision and its progeny, Justices Marshall and Brennan specifically recognized the unsuitability of the dual motivation analysis to a *Batson* challenge:

> Thus, the "but-for" test transforms a difficult credibility assessment – whether the prosecutor acted for reasons he claims to have acted – into an impossible one – whether a prosecutor's nonracial ground for striking an African American juror, taken alone, would have outweighed the prosecutor's possible grounds for objecting to unchallenged white jurors ... A judicial inquiry designed to safeguard a criminal defendant's basic constitutional rights should not rest on the unverifiable assertions of a prosecutor who, having admitted racial bias, subsequently attempts to reconstruct what his thought process would have been had he not entertained such bias.
>
> *Wilkerson v Texas,* 493 U.S. 924, 927-928 (1989), *denying cert.*

Several jurisdictions have agreed with Marshall and have adopted a "tainted analysis" that does not require this seemingly impossible task for their trial judges. Georgia, *Rector v. State,* 213 Ga. App.; 450 (1994); Indiana, *McCormick v. State,* 803 N.E.2d 1108 (2004); Arizona, *State v. Lucas,* 199 Ariz. 366 (2001); South Carolina,

Kearse; and Illinois, *People v. Hope*, 137 Ill.2d 430 (1990). At least one other state, Texas, is closely divided on the issue. In a 5-4 decision en banc, the dissent stated that "the mixed-motive analysis is inconsistent with the law of equal protection in jury selection." *Guzman v. State*, 85 S.W.3d 242, 258 (Tx. Banc 2002), *dissent by Womack, J.*

3. The tainted analysis should be applied to the facts before this Court.

Had the tainted analysis framework for *Batson* challenges been utilized in this case, the strikes of black venirepersons Lewis, Banks, Wells and Williams would not have been allowed. Under the dual motivation analysis, the court would consider whether the reason, in and of itself, would be sufficient to exercise a peremptory strike. However, under the tainted analysis, the court would determine whether there was *any* motivation to remove the venireperson that was race-motivated. Therefore, the inquiry would change to whether race was ***a*** motivating factor, instead of whether it was ***the*** factor.

With regard to Lewis, Banks, Wells and Williams, it is without question that the trial court and appellate could have have gleaned the true racial motivation in having those venirepersons removed. One obvious clue was that ***all*** African-American venirepersons were removed. Second, the rationales were inconsistent, not uniformly applied and highly suspect. Third, some reasons were inherently racist, even if disguised as racially neutral. Fourth, the State misstated and intentionally distorted the testimony to heighten the likelihood that a black juror would be removed. The fact that the State had manipulated the facts and made false claims about any of its strikes is reason to be suspicious of all its strikes.

Instructive on this point are the recently decided cases of *State v. Hopkins,* 2004 WL 1153684 (Mo.App. E.D. 2004) and *Miller-El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029 (2003). In *Hopkins,* Norman Hopkins had been charged with one count of burglary in the first degree, one count of assault in the first degree, and two counts of armed criminal action. *Id.* During the trial, the State had presented substantial evidence to prove that Mr. Hopkins entered Robin Hopkins' (who had previously had a child with him) and Byron Nunley's home for the purpose of stabbing Byron Nunley.[6] Despite substantial evidence to convict him, the Missouri Court of Appeals still found that Mr. Hopkins was entitled to a new trial, when it was shown that the prosecution's reasons for striking three African American venirepersons was pretextual and violated his constitutional rights under *Batson*. With regard to each of these venirepersons, the Missouri Court of Appeals made the following observations and rulings:

1) *EMPLOYMENT:* The State stated that they had struck African-American juror number six, Aeesha Bell ("Bell") because she worked for Edward Jones and "dealt with things in the financial area." Based upon her employment, they believed she would not be a good juror for them, as they believed their case was largely circumstantial, and expressed concern that things would "not add up" for her. *Id.* at 4. They had notably failed, however, to strike white venireperson Ms. Grogan, who was a collector, and

[6] Both Byron Nunley and Robin Hopkins identified Mr. Hopkins as the person who came into their house late at night and stabbed Byron Nunley. *Id.* at 2.

similarly situated. *Id.* Although the State tried to distinguish between these two jurors by stating that a collector would "bring in bills," and not "add things up," the Court of Appeals was not persuaded by such a distinction, and found that the State had used pretext in order to unlawfully strike Bell. *Id.* at 5.

2) *MARITAL STATUS:* The State stated that they had struck African-American juror number fourteen, Christopher Acklin ("Acklin") simply because he had listed his marital status as divorced on the jury sheet. *Id.* at 6. Based upon his divorced status, but having asked him *no* further questions about it, the State concluded that he would not be a good juror for them because their case would involve testimony about marital infidelity. *Id.* They had notably failed, however, to strike white venireperson Angela Steiner, who was also divorced. *Id.* Although the State tried to distinguish between these two jurors by stating that Mr. Acklin had children, and Ms. Steiner did not, the Court of Appeals found this distinction to be irrelevant, and further found the State to lack any basis to conclude that Mr. Acklin's divorce arose out of infidelity at all. *Id.* Finding the distinction, therefore, to be disingenous, the Court of Appeals once again found the State had used pretext in order to unlawfully strike Acklin. *Id. at 7.*

3) *RELATIONSHIP TO COURT PERSONNEL*: The State stated that they had struck African-American juror number twenty-eight, Jared Owens ("Owens") because he had a relationship with LaRhonda Burse, a criminal defense attorney, which they proffered, "was more than just a base relationship." *Id.* at 8. In reviewing the record, however, the Court of Appeals found this information to be completely inaccurate. *Id.* In

fact, what Mr. Owens had *actually* stated, was that he simply knew Ms. Burse as another client of his at Charter Communications. *Id.* When asked about it further, he stated that he knew that she was an attorney, but had *no* specific discussions with her about her clientele such that he would have formed any opinions. *Id.*

In finding this strike to be racially motivated, the Court of Appeals not only noted that the State had offered an inaccurate explanation as to Mr. Owens, but found serious discrepancies in they way they had questioned white venirepanelists from African-American venirepanelists overall. *Id.* For example, when Owens answered that he knew LaRhonda Burse, he was asked an open-ended question of "what do you talk to her about?", whereas when white venirepersons Connors and Koeln, who also answered that they knew court personnel, they were simply asked, "Is that going to affect you in any way" and, "Could you still be fair and impartial? *Id.*

In the same way, the State in this case, had simply been inaccurate about Mr. Banks' description of his relationship with his nephew and had failed to strike equally situated white juror Mr. Hendrick, who also had a relative charged with a crime. For occupational reasons, it also failed to strike equally situated white jurors Ms. Bonham, Ms. Wall, and Ms. Meyers, who were school administrators, nurses, and social workers, and thus equally likely to question a child's testimony as black venireperson Mr. Williams.

In *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003), the United States Supreme Court reversed and remanded a denial of a certificate of appealability (COA),

finding that "reasonable jurists could have debated whether the prosecution's use of peremptory strikes against African-American prospective jurors was the result of purposeful discrimination." *Id.*

This case had a lengthy procedural history. The petitioner had sought habeas relief both on the state and federal level, and had ultimately been denied relief when the Fifth Circuit denied him a certificate of appealability. *Id.* at 330-331. In reversing the Fifth Circuit's decision, the United States Supreme Court held that the Fifth Circuit had applied the wrong "clear and convincing evidence" standard, rather than the "reasonable jurists" standard to deny him a COA. *Id.*

In finding that Mr. Miller-El had met that latter standard, the Supreme Court noted that he had presented extensive evidence concerning the jury selection procedures both at the state trial court level, at a pretrial *Swain* hearing and a post-trial *Batson* hearing. *Id.* at 331. After those hearings, the Supreme Court noted that a "comparative analysis of the venire members" demonstrat[ed] that African-Americans had been disproportionately excluded, that venire panel members had been questioned differently based upon race, that Texas prosecutors had used a practice known as "jury shuffling" so that minority members could be rearranged to avoid empanelment as jury members, and that the District Attorney's Office had routinely instructed prosecutors, both in writing and informally, to exercise peremptory strikes against minorities. *Id.* at 333-334.

In fact, the Supreme Court found that the statistical evidence *alone* in this case raised some debate as to whether the prosecution acted with a race-based reason when

striking prospective jurors. *Id.* at 324. When 10 of the prosecutor's 14 peremptory strikes were used against African Americans, the Court noted that "happenstance is unlikely to produce this disparity." *Id.*

In addition to the statistics, the Supreme Court found that "a fair interpretation of the record" showed that prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire. *Id.* ("Circumstantial evidence of invidious intent may include proof of disproportionate impact... We have observed that under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds'").

Having scoured the record in this case, the same statistical disparity appears. 5 of the prosecutor's 6 peremptory strikes were used against African Americans, and the same disparity in questioning venirepersons, depending upon their race, is evident. For example, the prosecutor in this case, as in *Hopkins and Miller-El*, simply did not ask the white venire panelists the same measure of "follow-up" questions as it did to black venire panelists.

In asking about occupations and interests, there were more questions directed toward black venirepanelists, even when their list was not as extensive. When black venirepanelist Ms. Lewis, for example, positively responded that she was involved with the NLRB, the prosecutor asked her 8 more follow-up questions (Tr. 226). When Mr. Emery, a white venirepanelist, however, stated that he belonged to "dozens" of groups,

including the art museum, the zoo, the repertory theatre, the democratic national committee, etc., no further follow-up questions were asked (Tr. 232). Because discriminatory intent so often reveals itself in these subtle ways, petitioner urges this court to abandon Missouri's present "dual motivation analysis".

4. This case presents an opportunity for Missouri to take the lead on an important civil rights issue.

Each jurisdiction that has abandoned the dual motivation analysis in favor of the tainted analysis model has done so because the dual motivation analysis voids the concept and purpose of the holdings in *Swain* and *Batson* – that racial discrimination cannot be tolerated in our criminal justice system or in the constitutional guarantee of equality for this country's citizens. Arizona's Court of Appeals rejected the dual motivation approach and adopted the tainted approach because it recognized that "*Batson* protects against only the most conspicuous and egregious biases." *Lucas*, 199 Ariz. At 369. Indiana noted that the dual motivation analysis "is inconsistent with the 'facially valid' standard announced by the Supreme Court in *Purkett."* *McCormick*, 803 N.E.2d 1113. Perhaps the best articulation was in South Carolina, where that State's supreme court held:

> In our opinion, it is inappropriate to apply the dual motivation doctrine in the *Batson* context. Once a discriminatory reason has been uncovered – either inherent or pretextual – this reasons taints the entire jury selection procedure. By adopting dual motivation, this Court would be approving a party's consideration of discriminatory factors so long as sufficient nondiscriminatory factors were also

part of the decision to strike a juror and the factor was not the substantial or motivating factor. However, any consideration of discriminatory factors in this decision is in direct contravention of the purpose of *Batson* which is to ensure peremptory strikes are executed in a nondiscriminatory manner.

Payton, 329 S.C. at 59-60.

The rationales adopted by the foregoing courts have been echoed in academic literature. Most commentators have found that the prevailing approach is simply ineffective at protecting the interests that *Batson* was meant to protect.

"*Batson* has thus far led to little more than a prohibition against saying race when explaining nonrepresentative outcomes." 35 Wm. & Mary L. Rev. At 64. "[O]ne bright-line rule might be that, regardless of motivation, any combination of challenges that increases the likelihood that racial bias will influence the outcome of a particular trial is impermissible." *Id.* at 91. In commenting on the practical effect of *Batson*, two law professors at New York University School of Law stated, "[d]espite its noble effort to eradicate racism from the jury process, *Batson* largely has failed in its mission." 73 N.Y.U. L. Rev. At 725.

While the Supreme Court of the United States has yet to act, the opportunity is before this Court to protect minority defendants and venirepersons from being deprived of their constitutional guarantees. Appellant urges this Court to adopt the tainted analysis, and in so doing, make a large stride for Missouri in affirming its commitment towards protecting the Missouri and United States Constitution.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR A MISTRIAL AFTER THE STATE PURPOSELY VIOLATED THE COURT'S ORDER PROHIBITING COMMUNICATION WITH A KEY STATE'S WITNESS DURING A SHORT RECESS IN CROSS-EXAMINATION. AT THAT RECESS, A VICTIM'S ADVOCATE, EMPLOYED BY THE PROSECUTING ATTORNEY'S OFFICE, INSTRUCTED THE WITNESS TO ANSWER "I DON'T KNOW" OR "I DON'T REMEMBER" TO QUESTIONS POSED BY DEFENSE COUNSEL. AFTER THE BREAK, THE WITNESS HAD DRAMATIC LAPSES IN MEMORY OVER MATTERS ABOUT WHICH HE HAD TESTIFIED TO PREVIOUSLY WITHOUT DIFFICULTY, HAD DIFFICULTY UNDERSTANDING COUNSEL'S QUESTIONS, AND HIS TESTIMONY WAS GENERALLY UNRESPONSIVE ESPECIALLY WHEN COMPARED TO HIS TESTIMONY BEFORE THE IMPROPER COMMUNICATION. THE COURT'S ERROR WAS AN ABUSE OF DISCRETION WHICH WORKED SUBSTANTIAL AND IRREVOCABLE PREJUDICE TO APPELLANT AS IT EFFECTIVELY SANCTIONED THE STATE'S IMPERMISSIBLE COACHING AND CONCOMITANTLY DEPRIVED APPELLANT OF HIS RIGHTS TO DUE PROCESS AND TO CONFRONT AND CROSS EXAMINE WITNESSES AGAINST HIM IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 &18(a) OF THE MISSOURI CONSTITUTION.

A. Factual and procedural background.

For its case-in-chief, the State offered testimony by Y.R., one of two[7] alleged victims in this case. (T. 449-68). On direct examination, Y.R. provided his account of alleged sexual contact with Appellant. (T. 453-58). Y.R. detailed a series of events in which Appellant led Y.R. to a computer lab in a secluded part of the school's mosque area (T. 486), removed a blanket from a shopping bag (T. 453), and laid the blanket on the floor of the lab. (T. 453-54). According to Y.R., Appellant then instructed Y.R. to remove his pants and underwear and to lay on his stomach. (T. 454-55). Next, Appellant allegedly wiped an unidentified cream over Y.R.'s buttocks and legs (T. 462) and penetrated him. (T. 456-57). According to Y.R., he was penetrated while playing some sort of hand-held video game. (T. 456-57). Y.R. testified that he did not know or remember anything about the events on only one[8] occasion. (T. 460).

On cross examination, defense counsel attempted to establish a time line for the purported events, as well as the fact that Appellant had assisted Y.R. in cleaning up an ink spill on his school uniform during the period in which the above referenced assaults

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[7]The Jury acquitted Appellant on two counts involving the second victim. (L.F. 124-25).

[8]At first blush, there were two statements to this effect. When initially asked if his parents liked Appellant, Y.R. stated that he did not know. (T. 452). However, an objection was sustained to that question as beyond the witness's knowledge. (T. 453).

allegedly occurred. (T. 493). As Y.R. fumbled over the dates and times of the alleged occurrences, the State interrupted the cross-examination and requested a recess, ostensibly to give the eleven-year-old witness a chance to "collect" himself. (T. 493-94) Over objection by defense counsel (T. 494), the court granted the State's request. (T. 569). For obvious reasons defense counsel requested that the State be prohibited from speaking to the witness during the recess. (T. 494). The trial court agreed, and admonished the Prosecutor not to speak to the witness. ("I don't want you talking to him.") (T. 494). Until that time, the witness had comparatively little difficulty understanding and attempting to answer defense counsel's questions.

After cross examination resumed, Y.R. initially denied having spoken to anybody during the fifteen-minute break. (T. 495). However, the witness demonstrated appreciable difficulty responding to defense counsel's questions; indeed in understanding the English language itself. In contrast to his testimony before the break, Y.R. answered "I don't know" or "I don't remember" over sixty nine times. (T. 496-97; 500; 502-06; 509-12; 514-16; 518; 521; 524-31; 533-35; 538-39; 541-48; 553; 555; 558-59; 561-62). In addition, the witness requested that many of the questions be repeated or restated (T. 469-98; 502-03).[9] Despite the initial denials, further inquiry– fueled by defense counsel's

[9] As if that were not enough, the State peppered the record with obfuscatory objections as to the form of defense counsel's questions, most of which were overruled. (T. 496; 501; 506; 509; 512).

suspicion– yielded a reluctant admission from Y.R. that he had spoken with a woman named "Ellen"[10] from the prosecuting attorney's office during the break. (T. 503). According to Y.R., "Ellen" had instructed him how he should answer questions during the remainder of the cross examination. (T. 503).

> Q. All right. Is that the only day you spilled ink?
>
> A. Could you repeat that?
>
> Q. Certainly. Is that the only day that you remember someone spilling ink and you getting ink on your clothes?
>
> A. I don't know ... .
>
> Q. All right. Do you remember any other day that you got ink on your shirt like that?
>
> A. No.
>
> Q. All right. And is that the same day – and the police took this shirt from you that day; is that right? The hospital?
>
> A. I don't remember.
>
> Q. You don't remember?
>
> A. No.
>
> Q. The day that the ink was spilled and you got it on your

[10]Allyn Hoke, of Victim's Services, erroneously named in the trial transcript as "Ellen."

shirt, is that the same day you went to the hospital, talked to Margie?

A. I don't remember.

Q. You don't remember?

A. No.

Q. During the break did anybody tell you that if you had problems remembering you should say you don't remember?

A. Could you repeat that?

Q. Certainly. During the break did anybody tell you that if you're not sure just say you don't remember?

A. The break that we just had?

Q. During the break – we took a break?

A. Yeah.

Q. Someone say to you if you're not sure just say you don't remember?

A. Well, no, they – I forgot her name, she said.

Q. Ellen?

A. Yeah, Ellen.

Q. She works for the Prosecutor's Office?

A. She said that if you don't know it, or you don't remember it, just say you don't remember or you don't know.

Q. All right. So you did talk to somebody at the break?

A. Yeah.

Q. You talked to Ellen from the Prosecutor's office?

A. Yeah.

Q. And she told you if you don't remember to say you don't remember?

A. Yeah.

(T. 502-03). Defense counsel moved for a mistrial based on the State's violation of the court's order. (T. 568-69). The request was denied for two reasons: (1) that the prosecuting attorney did not himself communicate with the witness; and (2) that Appellant suffered no prejudice from the impermissible communication. (T. 569-70). The point was again raised and denied in Appellant's motion for new trial. (L.F. 130).

B. The Confrontation Clause prohibits interference with a witness during breaks in cross- examination.

It is axiomatic that "cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties[.]" *Perry v. Leeke*, 488 U.S. 272, 282 (1989). As such, "no contact" or "non discussion" orders must be zealously enforced. *See, e.g., United States v. Johnston,* 578 F.2d 1352, 1355 (10th Cir. 1978) (judge must go beyond mere exclusion of witnesses from the courtroom and prevent circumvention of its order). The rule encompasses truth-seeking functions which go beyond cases of outright tampering. "The truth-seeking

function of the trial can be impeded in ways other than unethical 'coaching.'" "Cross examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, and in just the right way." *Perry,* 488 U.S. at 282. Further analysis under the Confrontation Clause reveals that the constitutional injury is compounded when a criminal defendant's right to confront witnesses against him is derailed by the State, as the "jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors ... that a defendant's life or liberty may depend." *Giglio v. United States,* 405 U.S. 150, 154 (1972) (citing *Napue v. Illinois,* 360 U.S. 264, 269 (1959)). The hazards are accentuated in cases wholly devoid of physical evidence, such as this one. Thus, "just as a trial judge has the unquestioned power to refuse to declare a recess at the close of direct testimony–or at any other point in the examination of a witness–[the] judge must also have the power to maintain the status quo during a brief recess." *Perry,* 488 U.S. at 283.

C. Heightened importance attaches to non discussion orders during a recess of short duration.

As a threshold matter, although *Perry* involved a defendant who had taken the stand in his own behalf, the Court's rationale **explicitly** "applies to all witnesses–not just criminal defendants." *Id.* at 281. The reason for the rule is that "it only comports with basic fairness that the story presented on direct is measured for its accuracy and completeness by uninfluenced testimony on cross examination." *Id.* at 283. More importantly, in the circumstances *sub judice, Perry* controls as a matter of constitutional

law.

Perry involved a "15-minute afternoon recess" between the direct and cross examination of a criminal defendant during which the witness was ordered "not to talk to anyone, including his lawyer." *Id.* at 274. Relying on *Geders v. U.S.*, 488 U.S. 272 (1976), the *Perry* defendant moved for a mistrial, which the trial court denied. *Id.* Significantly, the Supreme Court held that even the venerated Sixth Amendment right to assistance of counsel is suspended during short recesses in the defendant's testimony. *Id.* at 281-82. Distinguishing *Geders* to the extent that it involved an **overnight** recess which did not occur during the heat of examination, the Court reasoned that the interests of the State and the adversarial system, embodied in the truth-seeking "engine" of cross examination, trump the Defendant's right to counsel during a short break, as a presumption necessarily arises that "nothing but the testimony will be discussed." *Id.* at 284.

This Court in *State v. Futo* explained the competing rationales embodied in the *Perry* and *Geders* decisions. *Futo,* 932 S.W.2d 808, 813-14 (Mo. App. E.D. 1996). The "Supreme Court acknowledged that different concerns must be considered during an overnight recess. It recognized that during such a recess, a defendant has a constitutional right to consult with his attorney. 'It is the defendant's right to unrestricted access to his lawyer for advice on a variety of matters that is controlling in the context of a long recess.'" *Id.* at 814. On the other hand, "[w]hat *Perry* does is extend the trial court's right to prevent consultations during a 'brief recess,' a 'short recess,' or one for 'a few

minutes.'" *Id.* at 814 (citation omitted). Because *Futo* involved an overnight recess, this Court reasoned that the *Geders* rule was appropriate, and distinguished *State v. Baldridge,* 857 S.W.2d 243 (Mo. App. W.D. 1993) insofar as the *Baldridge* holding rested on different grounds (failure to preserve for appellate review any Sixth Amendment claim). *Id.* at 815.

Like *Perry,* and unlike *Geders* or *Futo,* the recess here lasted 15-minutes. (T. 494). Significantly, the interference in this case did not occur during the unavoidable pause between direct and cross examination, but rather during the heat of cross examination itself and the vigorous objections of defense counsel. (T. 494). The interruption alone had strategic consequences for the defense. In other words, Appellant already was struck a strategic blow when the State dipped into its trick bag and requested a recess to salvage the failing testimony of its star witness. The blow became fatal when it was later revealed that not only did the witness not only had an opportunity to "compose" himself, he also received instructions from a member of the prosecution team on how to answer questions during the remaining cross examination.

Similarly, the present case is not limited to theoretical concerns about the integrity of the adversarial, as opposed to the inquisitorial, system but bears directly on an accused's guaranteed rights under the Due Process and Confrontation Clauses. Surely, if the State has the unfettered right to cross examine the Appellant under *Perry,* then the Appellant must enjoy an equal opportunity to confront the State's chief witness against him– especially under circumstances when the case against the accused relies

exclusively on the credibility of the State's witnesses. *Giglio*, 405 U.S. at 154.

Finally, there is no countervailing Sixth Amendment "right to counsel" issue in this case. The State's advocate deliberately interfered with a third-party witness, and hence with the due administration of justice, in contumacious violation of the court's order. It is significant that had this witness been offered so much as a candy bar by the State in exchange for his agreement to answer "I don't know" or "I don't remember" (and we don't know that he wasn't) the crime of witness tampering under V.A.M.S. § 575.270 (2000)[11] would have occurred. The fact that the witness initially denied having spoken with anyone during the break justifiably gives rise to an inference that he was told to

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[11] A person commits the crime of tampering with a witness if, with purpose to induce a witness or a prospective witness in an official proceeding to disobey a subpoena or other legal process, or to absent himself or avoid subpoena or other legal process, or to withhold evidence, information or documents, or to testify falsely, he:
(1) Threatens or causes harm to any person or property; or
(2) Uses force, threats or deception; or
(3) Offers, confers or agrees to confer any benefit, direct or indirect, upon such witness; or
(4) Conveys any of the foregoing to another in furtherance of a conspiracy.
2. A person commits the crime of "victim tampering" if, with purpose to do so, he prevents or dissuades or attempts to prevent or dissuade any person who has been a victim of any crime or a person who is acting on behalf of any such victim from:
(1) Making any report of such victimization to any peace officer, or state, local or federal law enforcement officer or prosecuting agency or to any judge;
(2) Causing a complaint, indictment or information to be sought and prosecuted or assisting in the prosecution thereof;
(3) Arresting or causing or seeking the arrest of any person in connection with such victimization.
3. Tampering with a witness in a prosecution, tampering with a witness with purpose to induce the witness to testify falsely, or victim tampering is a class C felony if the original charge is a felony. Otherwise, tampering with a witness or victim tampering is a class A misdemeanor. Persons convicted under this section shall not be eligible for parole.

deny the communication.

Q. All right. You just took a break right; right? We just took a break?

A. Yeah.

Q. Did you talk to **anybody** when you took the break?

A. No.

Q. Didn't talk to **anybody**?

A. No.

(T. 495) (emphasis added). The notion that Appellant suffered no prejudice from the State's shaping of this witness' testimony (T. 569-70) can't pass the straight face test. The right to confront and cross examine witnesses in a criminal case is a fundamental right, *Pointer v. Texas*, 380 U.S. 400 (1965), a core value protected by the Constitution, *Maryland v. Craig*, 497 U.S. 836, 847 (1990); *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) and serves to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing" in an adversarial proceeding. In this case it was as if the witness left the courtroom and never returned. His evasive and scripted answers did everything but further the search for the truth. The prejudice to the appellant is obvious, and, as is apparent from the important role the Supreme Court believes cross examination plays in the search for the truth, prejudice should, under these circumstances, be presumed.

D. The trial court's rationale fails on both grounds as (1) the victim's

advocate was acting under the authority of the State's attorney; and (2) prejudice is presumed in case of interference with a witness during a 15-minute break.

The trial court's two-fold rationale for overruling the request for mistrial fails on both stated grounds. To the extent that the prosecutor **himself** did not talk to the witness, Appellant maintains that Allyn Hoke was in every reasonable sense an agent of the State. She occupies space in the prosecuting attorney's office, handles, within the scope of her employment, communication with victims, and is paid by the State. Even absent guile on the part of the prosecutor, as a general rule, an agent acting on behalf of her employer within the scope of her authority binds the principal–even in cases where the agent deliberately disobeys instructions. *E.g., United States v. Hilton Hotels Corp.,* 467 F.2d 1000 (9th Cir. 1972). *See also Scroggins v. State*, 859 S.W.2d 704, 706 n.3 ("knowledge of one state actor . . . is imputed to other state actors . . . regardless of whether there is actual knowledge"); *State v. Figgins*, 839 S.W.2d 630, 638 (Mo. App. 1992) (same). Undoubtedly, Ms. Hoke, who remained in the courtroom was aware of the trial court's order. Even if she were not, her actions, *qua* agent of the state, bind her principal both to its benefit and injury.

Second, *Perry* makes clear that any communication with a witness in violation of a non-discussion order during a recess of short duration gives rise to a presumption of "shaping." *Perry*, 488 U.S. at 284. This presumption is sound, as the likelihood of anything but the testimony being discussed is slim. The holding in *State v. Trimble,* 693 S.W.2d 267 (Mo. App. W.D. 1985) is instructive. In *Trimble*, the appellate

court reversed and remanded a capital murder conviction on the basis of ineffective assistance of counsel where Trimble's attorney failed to investigate a report of witness tampering. *Trimble*, 693 S.W. 2d at 280. The *Trimble* court reasoned that "an entirely different implication is raised as to credibility" in the context of witness tampering. *Id.* at 275. As such, it "was not 'reasonable' under 'prevailing professional norms' for movant's counsel to ignore the incident in question. The actions described would have been admissible in movant's case to show interest and bias on the part of the State's witnesses." *Id.* at 272-73. Therefore, the error was **presumptively prejudicial**, and enough to undermine the court's confidence in the outcome of the proceedings. Defense counsel was held *per se* ineffective. *Id.* at 274.

By placing the burden on Appellant to show prejudice (T. 569), and then using Appellant's alleged failure to demonstrate such prejudice as grounds for denying a mistrial, the trial court misapplied applicable precedent, denied Appellant his right to due process, and effectively stripped Appellant of any meaningful opportunity to confront the witnesses against him.

Strategy is paramount during cross examination, and interference with the "ability of counsel to punch holes in a witness' testimony at just the right time, and in just the right way" is potentially as serious an injury as blatant coaching. *Perry,* 488 U.S. at 282. From the face of the trial transcript, it is plain that the State's impermissible communications with the witness had a profound "shaping"effect on his testimony. In violating the court's non-discussion order, the State placed this witness' testimony on the

proverbial potter's wheel and turned an open-mouthed, transparent vase into a sealed funeral urn.

III. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO COMMENT ON THE APPELLANT'S POST ARREST SILENCE BY ELICITING FROM DETECTIVE GUINN THAT APPELLANT HAD INVOKED HIS FIFTH AMENDMENT PRIVILEGE AND REQUESTED AN ATTORNEY AND BY ASKING APPELLANT DURING CROSS EXAMINATION WHETHER HE HAD EVER TOLD ANYONE, PRIOR TO HIS TESTIMONY, THAT HE HAD TAKEN Y.R. TO THE COMPUTER LAB TO DO "MATHFACTS", A COMPUTER GAME. DURING A CUSTODIAL INTERROGATION THE APPELLANT HAD EXERCISED HIS FIFTH AMENDMENT RIGHTS AND REFUSED TO ANSWER QUESTIONS WITHOUT AN ATTORNEY PRESENT. ALLOWING THE STATE TO ELICIT TESTIMONY ABOUT THIS REQUEST AND TO CROSS-EXAMINE APPELLANT ABOUT THIS FACT WAS A DIRECT COMMENT ON HIS CHOICE TO EXERCISE HIS FIFTH AMENDMENT RIGHTS AND HIS RIGHT TO REMAIN SILENT IN THE FACE OF A POLICE INTERROGATION IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. THE QUESTION WAS CALCULATED TO IMPLY TO THE JURY THAT APPELLANT HAD RECENTLY FABRICATED HIS DEFENSE AND TO PUNISH HIM FOR EXERCISING HIS CONSTITUTIONAL RIGHT TO REMAIN

SILENT. ANY COMMENT ON APPELLANT'S FAILURE TO PROVIDE HIS STORY AFTER INVOKING HIS FIFTH AMENDMENT PRIVILEGE, VIOLATES THE UNITED STATES SUPREME COURT'S HOLDING IN *DOYLE V. OHIO*, 426 U.S. 610 (1976), THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THOSE RIGHTS GUARANTEED HIM BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court recognized that if law enforcement officers question a person who "indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege[.]" *Id.* at 473-74.

Subsequently, that Court, strengthening the Fifth Amendment privilege against self-incrimination, held that use of a defendant's silence "at the time of arrest and after receiving Miranda warnings, [for impeachment purposes] violate[s] the Due Process Clause of the Fourteenth Amendment." *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). The Court based its holding upon fundamental concepts of fairness:

> An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite

> different from his apparent one . . . . Elementary fairness requires that an accused should not be misled on that score . . . . When a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.

Id. (internal quotations and citations omitted). Rules of fairness dictate that a person's silence is not admissible or cannot be used to infer his guilt. The Supreme Court also determined that **"silence" includes a defendant's request for a lawyer**. *Wainwright v. Greenfield*, 474 U.S. 284, 295 n.13, 106 S.Ct. 634 (1986) (emphasis added).

Missouri courts have likewise held that "post-*Miranda* silence cannot be used as evidence to incriminate the defendant." *State v. Dexter*, 954 S.W.2d 332, 338 (Mo. 1997) *citing State v. Zindel*, 918 S.W.2d 39 (Mo. banc 1996); *see also State v. Whitmore*, 948 S.W.2d 643, 647 (Mo.App. W.D. 1997). Additionally, the courts have ruled that a "witness's testimony that describes the conclusion of an interrogation after the defendant revokes the waiver of his right to remain silent must be carefully scrutinized." *Id*. (internal quotations and citation omitted).

A. The State Violated Appellant's Constitutional Rights When It Questioned Its Witness Regarding Appellant's Request for an Attorney.

In this case, the State improperly questioned Det. Guinn regarding Appellant's request for an attorney, which the trial court erroneously permitted. (LF 134). The following direct examination testimony was allowed:

> Q. Then what happened?
>
> A. I said, "Are you going to deny you had any sexual contact with this boy." He said, "No, I'm not going to deny that. **Before I say anything else, I'm going to call my brother to see about a lawyer**."
>
> Q. Then what did you do once he said that?
>
> A. I let him make a phone call.
>
> **Q. After he made a phone call, did you have any further conversation with him?**
>
> **A. Yes.**
>
> Q. **What was that conversation?**
>
> A. After he returned to the room, after he got off the phone, he said, "My brother said **I shouldn't say anything else without a lawyer**. I'd like to talk to you, but my brother says **I need to get a lawyer. I'm not going to say anything else**."

Supp. T. 54-55 (emphasis added). This testimony constitutes egregious *Doyle* violations, which provided the jury a foundation for finding Appellant guilty.

Almost identical to the state's examination in *Wessel*, the state in this case "squarely and unequivocally invited the jury to infer that [Appellant] was guilty because he sought to speak to an attorney." *Wessel*, 993 S.W.2d at 576. In *Wessel*, this Court noted that "[e]ven standing alone, the State's reference . . . to a defendant's post-*Miranda* silence can merit reversal." *Id*. (citation omitted). Here, not only does the state reference Appellant's silence, the state repeatedly elicits testimony regarding it. (Supp. T. 54-55). Appellant's request to speak with an attorney was "not . . . a statement, but [a] post-*Miranda* warnings silence." *Dexter*, 954 S.W.2d at 337 *citing Wainwright*, 474 U.S. at 295 n.13. There is ample authority supporting the position that the **"improper use of post-*Miranda* silence may constitute manifest injustice and plain error."** *Wessel*, 993 S.W.2d at 576 (emphasis added and citation omitted); *see also Dexter*, 954 S.W.2d at 343; *Zindel*, 918 S.W.2d at 243; *State v. Whitmore*, 948 S.W.2d 643 (Mo.App. W.D. 1997) (finding a detective's testimony regarding a defendant's request for an attorney to be impermissible inferences of guilt, which violated defendant's constitutional rights); *State v. Martin*, 797 S.W.2d 758 (Mo.App. W.D. 1990) (finding a police officer's testimony regarding a defendant's request for a lawyer, after retelling defendant's confession, a *Doyle* violation).[12] This Court should follow prevailing Missouri authority

[12] It is worthy to note that although the trial court was aware of applicable, mandatory authority, it did not do so in this instance. (*See* Supp. T. 106-07) ("I'm saying that . . . [Appellant] waived his right to silent and made a statement in the car and back at the police state, you can comment on that statement. He has the right to, at any time, invoke

and, its own holding in *Wessel*, and rule that "as a matter of plain error, the charged [crimes against Appellant] must be retried." *Id*.

B. The Trial Court Compounded the Violation of Appellant's Fifth Amendment Rights When It Allowed the State to Question Appellant's Post-Miranda Silence During Cross Examination.

Using a defendant's silence at the time of arrest and after receiving Miranda warnings, for the purpose of impeachment, is "fundamentally unfair and violates the due process clause of the Fourteenth Amendment." *Doyle*, 426 U.S. at 619; *see also Dexter*, 954 S.W.2d at 337. But, here, the trial court permitted the State to improperly question Appellant regarding his post-*Miranda* silence, and ruled as follows:

> Again, it is my understanding of the questions that they are not questions of did he want to remain silent. Did he ask for a lawyer. When did he become uncooperative. It is a comment on his statement that he made, and things that were left out of the statement I think are a relevant inquiry. **Once he waives his right to remain silent and make a statement, the State can ask him about that statement**, anything further?

(Supp. T. 107) (emphasis added).

Even when a defendant waives his right to remain silent, this Court has ruled that a

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his right to remain silent, and you can't comment on that. You can't ask him about that, and no inference can be drawn from that.").

"request for an attorney is an effective reclamation of [the] defendant's right to silence and thus is not proper comment in testimony," and it must be "carefully scrutinized." *State v. Tims*, 865 S.W.2d 881, 886 (Mo.App. 1993). In *Tims*, the court held that the prosecutor's questions regarding post-*Miranda* silence should have been scrupulously restricted. *Id*. Similarly, a defendant's choice to exercise his Fifth Amendment rights cannot be implied in the prosecution's presentation of its case. It is evident that the trial court disregarded the fact that Appellant revoked the waiver of his right to remain silent when he requested the assistance of his attorney. (Supp. T. 105-07). This ruling was not given careful scrutiny; rather, it was dispensed of in an offhand and cursory manner. Consequently, numerous *Doyle* violations occurred, which require a retrial to rectify their wrongs.

First, in addition to the *Doyle* violations in section A above, the State also committed numerous violations during its cross examination of Appellant. It is critical to view both sets of violations in concert. In pertinent part, the State elicited the following improper testimony:

> Q. Yes, you didn't tell Detective Guinn that you took Y.R. to the computer lab to do math problems, did you?
>
> A. At that time, I was in complete shock, and I didn't know what this was all about.
>
> Q. Sir, yes or no, did you tell Detective Guinn at that time that you took Y.R. to the computer lab to do math problems?

A. No.

Q. Did you tell Detective Guinn at that time that you took Y.R. to the computer lab to log onto the internet?

A. No.

Q. Did you mention to Detective Guinn anything about math facts at that time?

A. Our conversation was very short.

(Supp. T. 112). The state goes on to elicit the following testimony:

Q. Let me ask you this. Was the only reason that you gave Detective Guinn at the time for taking Y.R. down to the computer lab – was the only reason you gave him was to clean ink off him?

A. I mentioned I attempted to clean off ink off him.

Q. Did you mention you took the child up to the computer room any other reason?

A. He didn't ask me why I took him up for it.

* * *

Q. Are you telling the jury you did not tell Detective Guinn you took the child to the room to clean the ink off his clothes?

A. That was not the only reason.

Q. Well, did you tell Detective Guinn that you took the child to the room to clean the ink off of his clothes?

(Supp. T. 122-23). Finally, the state asks the following inappropriate questions:

> Q. You didn't tell Detective Guinn about the math facts back on April 19th; is that correct?
>
> A. Like I said, he asked –
>
> Q. Sir, yes or no, did you?
>
> A. I didn't tell him. He didn't –
>
> * * *
>
> Q. You did not tell Detective Guinn about the math facts problems on April 19th, yes or no?
>
> A. No.
>
> Q. Now that you have had those almost a year, you are telling us that you were taking a 4th grade class – or your intention was to take a 4th grade class up to do something they had never done before; is that correct?

(Supp. T. 125). The state's improper testimony is relevant only in an attempt to impeach the Appellant. In conjunction with Det. Guinn's testimony, (*see* Supp. T. 54-55), the State's questioning of Appellant gave rise to compelling inferences of guilt, which heavily influenced the jury's deliberation. (*See* LF 134).

Second, not only were the trial court's curative efforts minimal, they were nonexistent. The trial court believed Appellant had waived his right to remain silent and, thus, open for comment. (Supp. T. 105-07). Therefore, the trial court would naturally recognize no need for any curative measures regarding Appellant's communications in

the police car. *Id*. Accordingly, no curative efforts were made.

Third, Appellant's defense was not transparently frivolous. There was no physical or corroborative evidence that proved Appellant committed the alleged acts. (T. 42, 1030, 1050-54, 1059, 1160; Supp. T. 73-75). The crux of this case turned on credibility and whether the jury would believe the victims' rendition of the facts or the Appellant's. The Appellant's defense theory was not transparently frivolous.

Finally, from the evidence at trial, the State failed to "overwhelmingly establish [A]ppellant's guilt." *Dexter*, 954 S.W.2d at 341. For the same reasons why the Appellant's defense was not transparently frivolous, there is no overwhelming evidence showing that the Appellant was guilty. (*See* T. 42, 1030, 1050-54, 1059, 1160; Supp. T. 73-75).

For the foregoing reasons, the trial court judgment should be reversed to protect Appellant's Fifth, Sixth and Fourteenth Amendment rights.

IV. THE TRIAL COURT ERRED BY REFUSING TO SUBMIT TO THE JURY APPELLANT'S INSTRUCTIONS C, D AND E FOR THE REASON THAT SAID INSTRUCTIONS WOULD HAVE ALLOWED THE JURY TO CONSIDER THE LESSER INCLUDED OFFENSE OF SEXUAL MISCONDUCT INVOLVING A CHILD BY INDECENT EXPOSURE. THE INSTRUCTIONS SHOULD HAVE BEEN SUBMITTED TO THE JURY PURSUANT TO SUPREME COURT RULE 28.02(A), BECAUSE THERE WAS A FACTUAL BASIS FOR ACQUITTAL OF

THE CRIMES CHARGED IN THE VERDICT DIRECTORS AND FOR THE SUBMISSION OF THE LESSER INCLUDED OFFENSES. THE COURT'S FAILURE TO DO SO VIOLATED THE APPELLANT'S RIGHTS GUARANTEED HIM BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, § 10 OF THE MISSOURI CONSTITUTION.

When refusing Appellant's Instructions C, D and E[13], the lesser-included

[13] Instruction C provided:

If you do not find the defendant guilty of child molestation in the first degree as submitted in Instruction No. ____, you must consider whether he is guilty of sexual misconduct involving a child by indecent exposure under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about April 18, 2001, in the County of St. Louis, State of Missouri, the defendant knowingly exposed his genitals to S.N., and

Second, the defendant did so for the purpose of gratifying the sexual desire of any person, and

Third, that at the time S.N. was less than fourteen years of age, then you will find the defendant guilty under Count III of sexual misconduct involving a child by indecent exposure.

If you do find the defendant guilty under Count III of sexual misconduct involving

a child by indecent exposure, you will assess and declare one of the following punishments:

1. Imprisonment for a term of years fixed by you, but not less than one year and not to exceed five years.

2. Imprisonment in the county jail for a term fixed by you, but not to exceed one year.

3. Imprisonment for a term of years fixed by you, but not less than one year and not to exceed five years and in addition a fine, the amount to be determined by the Court.

4. Imprisonment in the county jail for a tem fixed by you, but not to exceed one year and in addition a fine, the amount to be determined by the Court.

5. No imprisonment but a fine, in an amount to be determined by the Court. The maximum fine which the Court may impose is $5,000.

MAI CR3rd 320.29.1

Submitted by Defendant

Instruction D provided:

If you do not find the defendant guilty of child molestation in the first degree as submitted in Instruction No. ____, you must consider whether he is guilty of sexual misconduct involving a child by indecent exposure under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

First, that between April 6, 2001 and April 17, 2001, in the County of St. Louis,

State of Missouri, the defendant knowingly exposed his genitals to Y.R. and

Second, the defendant did so for the purpose of gratifying the sexual desire of any person, and

Third, that at the time Y.R. was less than fourteen years of age, then you will find the defendant guilty under Count IV of sexual misconduct involving a child by indecent exposure.

If you do find the defendant guilty under Count IV of sexual misconduct involving a child by indecent exposure you will assess and declare one of the following punishments:

1. Imprisonment for a term of years fixed by you, but not less than one year and not to exceed five years.

2. Imprisonment in the county jail for a term fixed by you, but not to exceed one year.

3. Imprisonment for a term of years fixed by you, but not less than one year and not to exceed five years and in addition a fine, the amount to be determined by the Court.

4. Imprisonment in the county jail for a term fixed by you, but not to exceed one year and in addition a fine, the amount to be determined by the Court.

5. No imprisonment but a fine, in an amount to be determined by the Court. The maximum fine which the Court may impose is $5,000.

MAI CR3rd 320.29.1

Submitted by Defendant

Instruction E provided:

If you do not find the defendant guilty of child molestation in the first degree as submitted in Instruction No. ____, you must consider whether he is guilty of sexual misconduct involving a child by indecent exposure under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about April 18, 2001, in the County of St. Louis, State of Missouri, the defendant knowingly exposed his genitals to Y.R., and

Second, the defendant did so for the purpose of gratifying the sexual desire of any person, and

Third, that at the time Y.R. was less than fourteen years of age, then you will find the defendant guilty under Count V of sexual misconduct involving a child by indecent exposure.

If you do find the defendant guilty under Count V of sexual misconduct involving a child by indecent exposure, you will assess and declare one of the following punishments:

1. Imprisonment for a term of years fixed by you, but not less than one year and not to exceed five years.

2. Imprisonment in the county jail for a term fixed by you, but not to exceed one year.

3. Imprisonment for a term of years fixed by you, but not less than one year and

offenses of Sexual Misconduct of a Child by Indecent Exposure, MAI-CR 3d 320.29.1, the trial court ruled that "there is no evidence, no basis for the jury to acquit of the greater offense and convict of this offense . . . ." (Supp. T. 165). Under Section 556.046 RSMo. (2000), a defendant may be convicted of a "lesser-included" offense if (1) "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged[,]" and (2) "there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." Both elements are satisfied in the case at bar.

A. Standard of Review.

Upon submission of a defendant's claim that the trial court erred in failing to instruct

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not to exceed five years and in addition a fine, the amount to be determined by the Court.

4. Imprisonment in the county jail for a tem fixed by you, but not to exceed one year and in addition a fine, the amount to be determined by the Court.

5. No imprisonment but a fine, in an amount to be determined by the Court. The maximum fine which the Court may impose is $5,000.

MAI CR3rd 320.29.1

Submitted by Defendant

on a lesser offense, this Court "review[s] the evidence in a light most favorable to defendant to determine whether a basis existed to support the lesser included offense instruction." *State v. Bruce*, 53 S.W.3d 195, 201 (Mo.App. W.D. 2001) *citing State v. Craig*, 33 S.W.3d 597, 601 (Mo.App. E.D. 2000). Missouri courts are to resolve all "[d]oubts concerning whether to instruct on a lesser-included charge . . . in favor of including the instruction." *State v. Barnard*, 972 S.W.2d 462, 464 (Mo.App. W.D. 1998) (citation omitted); *State v. Hibler*, 5 S.W.3d 147, 148 (Mo. banc 1999) (stating that if the trial court is in doubt, it should instruct on the lesser-included offense). Therefore, the criteria for testing whether the trial court erred in not submitting an instruction regarding a lesser-included offense are whether: (1) the offense was a lesser-included offense; and (2) in light of the evidence, was it error not to give the instruction. *State v. Neighbors*, 613 S.W.2d 143, 148 (Mo.App. W.D. 1980).

B. It Is Impossible to Commit Child Molestation Without Also Committing Sexual Misconduct Involving a Child.

The determination whether one offense is a lesser included of another, centers on the elements required by the statutes proscribing the offenses. *State v. Mizanskey*, 901 S.W.2d 95, 98 (Mo.App. W.D. 1995). The statutory elements of child molestation in the first degree are (1) sexual contact (2) with "another person who is less than fourteen years of age." Section 556.067 RSMo. "Sexual contact" means "any touching of another person with genitals or any touching of the genitals or anus of

another person, or breast of a female person, for the purpose of arousing or gratifying sexual desire of any person." Section 566.010(3) RSMo. To be convicted of sexual misconduct involving a child one must:

> (1) Knowingly expose[s] the person's genitals to a child less than fourteen years of age in a manner that would cause a reasonable adult to believe that he conduct is likely to cause affront or alarm to a child less than fourteen years of age;
>
> (2) Knowingly expose[s] the person's genitals to a child less than fourteen years of age for the purpose of arousing or gratifying the sexual desire of any person, including the child; or
>
> (3) Coerce[s] a child less than fourteen years of age to expose the child's genitals for the purpose of arousing or gratifying the sexual desire of any person, including the child.

Section 566.083 RSMo.

"An instruction on a lesser offense is not proper unless it is impossible to commit the greater without committing the lesser." *Barnard,* 972 S.W.2d at 465 (citation omitted). Therefore, based upon the testimony (T. 42, 1030, 1050-54, 1059, 1160; Supp. T. 73-75), the essential question is whether it is impossible for Appellant to "put his front private spot in [the Victim's] back private spot," (T. 1022-23), or penis-to-anus contact, (1) without Appellant exposing his genitals, or (2) without the victim

concurrently exposing his genitals, anus, or buttocks. The answer to that question is self-evident: it is impossible. Therefore, under the facts of this case, the crime of sexual misconduct involving a child is a lesser-included offense of child molestation in the first degree.

C. The Trial Court Erred in Declining to Submit Appellant's Instructions C D and E and thus Failed to Properly Instruct the Jury .

In this case, it is undisputed that no physical evidence of penetration or proof of penis-to-anus contact ever existed - no hairs, no semen, no pain, no rectal bleeding, and no sexual acting-out. (*See* T. 42, 1030, 1050-54, 1059, 1160; Supp. T. 73-75). Essentially, credibility is the central issue in this case, because any tangible, objective evidence of child molestation is nonexistent. Thus, the jury was relegated to weighing the victims' credibility against the Appellant's. The jury, therefore, was entitled to the option of considering a lesser-included offense:

> As a general proposition, a trial court should resolve all doubts upon the evidence in favor of instructing on the lower degree of the crime, leaving it to the jury to decide which of two or more grades of an offense, if any, the defendant is guilty, (citation omitted). Sometimes . . . a fine line separates the higher from the lower degree of the offense. **The defendant is not prejudiced by the submission of the lower degree of the offense**, though a finely milled analysis of the evidence might lead to the conclusion that it supported the submission only of the higher degree of the offense.

State v. Ellis, 639 S.W.2d 420, 422-23 (Mo.App. W.D. 1982) (emphasis added). Depending on whose testimony the jury believed, the jury could have acquitted the Appellant on all five counts of child molestation in the first degree, just as it had acquitted him on two of the counts. (LF 124-28). "When a defendant requests a lesser included offense instruction, the trial court errs in not giving the instruction if there is a basis for both an_acquittal of the higher offense and a conviction of the lesser included offense." *State v. Fowler*, 938 S.W.2d 894, 989 (Mo. 1997) (citation omitted). As discussed above, there was no sufficient physical evidence to support child molestation, which in and of itself "provide[s] a basis for acquitting the [Appellant] of the greater offense and convicting the [Appellant] of the lesser offense." *Barnard*, 972 S.W.2d at 466 (internal quotations and citation omitted). As there was a substantial lack of evidence in this case, "**any doubt concerning whether to instruct on a lesser-included charge [is resolved] in favor of including the instruction**." *Id*. (emphasis added and citation omitted). The trial court erred when it failed to instruct the jury on the lesser-included offense of sexual misconduct involving a child.

In *State v. Hineman*, 14 S.W.3d 924, 927 (Mo. banc 1999), the Missouri Supreme Court reversed a conviction for failure to give a lesser-included offense instruction. The Court held that the jury should be permitted to draw all reasonable inferences from the evidence, and added, "[i]f a reasonable juror could draw inferences from the evidence presented that the defendant acted recklessly, the trial court should

instruct down." *Id*. *citing State v. Santillan*, 948 S.W.2d 574, 576 (Mo. banc 1997). This expansive view of the use of lesser-included offense instructions was also followed in *State v. Yacub*, 976 S.W.2d 452, 454 (Mo. banc 1998), where the court expressly held that a defendant was not required to submit alternative evidence in order to warrant a lesser-included offense instruction.

Because Missouri law is construed liberally with regard to the submission of lesser-included offense instructions, *Hineman*, 14 S.W.3d at 927, the trial court's rigid application of its own skewed version of what the evidence supported was inappropriate and not supported by the record and the reasonable inferences embodied therein. Where, as here, the evidence required instructions on both child molestation and the lesser-included offense but only the child molestation instruction was given, reversible error has occurred, and a new trial is necessary.

V. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE, OVER OBJECTIONS BY DEFENSE COUNSEL, THE HEARSAY TESTIMONY OF Y.R.'S MOTHER, MARGIE BATEK, NANCY DUNCAN, OFFICER TOM NOONAN AND SGT. GARY GUINN CONCERNING STATEMENTS MADE BY THE ALLEGED VICTIMS PURSUANT TO V.A.M.S. § 491.075 IN THAT: (1) SUCH TESTIMONY LACKED "SUFFICIENT INDICIA OF RELIABILITY" AS THAT TERM HAS BEEN CONSTRUED BY MISSOURI COURTS; (2) IN THE CASE OF Y.R.,

THE WITNESS WAS CONSTRUCTIVELY UNAVAILABLE DUE TO THE STATE'S INTERFERENCE WITH HIS TESTIMONY AND HENCE REQUIRED A TEST OF HEIGHTENED SCRUTINY FOR RELIABILITY WHICH THE COURT DID NOT PERFORM; (3) THE VICTIMS' TESTIMONY REQUIRED CORROBORATION INDEPENDENT OF THE HEARSAY TESTIMONY DUE TO ELEMENTAL INCONSISTENCY; AND ALTERNATIVELY (4) §491.075, AS AMENDED, VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT AND IS THEREFORE UNCONSTITUTIONAL. THE TRIAL COURT'S ERROR DEPRIVED APPELLANT OF HIS RIGHTS TO DUE PROCESS OF LAW AND TO CONFRONT WITNESSES AGAINST HIM IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION.

A. Factual and procedural background.

To bolster its case, the State served notice of intent to present hearsay testimony pursuant to V.A.M.S. § 491.075. (L.F. 47-50). Appellant objected to the proposed testimony as inadmissible hearsay, and filed a motion opposing its admission. (L.F. 56-59). A hearing was held pursuant to subsection (1) of the statute. Despite the fact that the victims' statements, as related through the 491.075 witnesses were hopelessly inconsistent as to the time of the offenses, were

completely lacking in spontaneity by the time the 491.075 witnesses heard them, contained numerous inconsistencies upon repetition, and were totally devoid of age inappropriate terminology or subject matter, the trial court concluded the statements of the child witnesses "provide a [sic] sufficient indicia of reliability based on time, content and circumstances of the statements." (L.F. 54).

B. The erroneously admitted hearsay testimony lacked sufficient indicia of reliability within the meaning of § 491.075 as construed by Missouri Courts following *Idaho v. Wright.*

The "United States Supreme Court has ruled that hearsay testimony concerning a child's statement admitted under the authority of statutory hearsay exceptions similar to 491.075 does 'not share the same tradition of reliability' as do the 'firmly rooted' hearsay exceptions." *State v. Redman*, 916 S.W.2d 787, 790 (Mo. banc 1996) (quoting *Idaho v. Wright,* 497 U.S. 805, 815-19 (1990)). "Therefore, the Confrontation Clause requires exclusion of a child's out-of-court statement, 'unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the **presumption that a hearsay statement is not worthy of reliance at trial.'"** *Redman,* 916 S.W.2d at 790 (quoting *Wright*, 497 U.S. at 819-23) (emphasis added). Stated a different way, despite the hysteria surrounding child sexual abuse, there is no *per se* exception to the hearsay rule simply because a given utterance emanates from the mouth of a child. The Missouri Supreme Court has improved upon *Idaho v. Wright*, *supra*, and

developed a test for determining whether a child's out-of-court statement is trustworthy. Factors include: (1) "spontaneity and consistent repetition"; (2) "use of terminology unexpected of a child of similar age"; (3) "lack of a motive to fabricate"; and (4) "mental state of the declarant[.]" *State v. Jankiewicz,* 831 S.W.2d 195, 198-99 (Mo. banc 1992); *accord: Redman,* 916 S.W.2d at 791. The elements of this test were not satisfied in the present case.

1. Spontaneity and consistent repetition.

The "spontaneity and consistency" factor presents a insurmountable problem for the State. First, of the two alleged victims, only Y.R. initially made any spontaneous and affirmative allegation of abuse–and then only to his friends on the playground. (T. 1115). The second victim, S.N., adopted Y.R.'s version immediately, although he originally claimed that the abuse occurred at a time when Appellant was in Saudi Arabia. (T. 1049). The story then bounced from F.S. to Y.R.'s mother (T. 680), to Officer Noonan (T. 870), to Detective Guinn (T. 1128), to Margie Batek and finally to Nancy Duncan (T. 999).

More importantly for these purposes, the alleged victims' testimony is internally inconsistent, and seems to change over time as it is relayed to different listeners. For example, the boys alleged actual penetration, which not only varied from the physical evidence (T. 977), but from the State's own theory of the case. (L.F. 19-20). Additionally, the boys' time line is a mess. Y.R. couldn't remember when, if ever, the second incident occurred. (T. 685; 459-60). Further, he had

absolutely no idea as to the time of day any of the incidents happened. (T. 486-993). Similarly, S.N. initially alleged that he was penetrated in March (T. 1049), when Appellant was out of the country. The State's forensic interviewer was able to iron out this latter issue by suggesting to S.N. that perhaps the incidents had occurred around New Year's Day. (T. 1049). Finally, the State, when confronted with the timing issue in Y.R.'s testimony, solved the problem by instructing its witness to say he didn't remember. (T. 494; 503).

2. Use of Age-Inappropriate Terminology.

The standard of what is "unexpected" terminology is not limited to vocabulary alone, as "a particular child's verbal skills and word choices are the product of various cultural and social influences, in which parents, siblings, friends, and the entertainment media all play a role." *Redman,* 916 S.W.2d at 791. However there is a requirement that the **content** of the statements be age inappropriate. *Wright*, 497 U.S. at 825; *Redman*, 916 S.W.2d at 791. The U.S. Supreme Court narrowed this range, requiring that "the nature of the statements as to sexual abuse [be] such that they fall outside the general believability that a child could make them up or would make them up." *Wright*, 497 U.S. at 825. This reasoning is sound, and protects against the danger which inheres in the fact that **any** sexual encounter described by a child under 12 is arguably "age inappropriate." Hence, when a child approaches the upper edges of the "tender years" threshold,[14] the

[14]There is a vast difference between a two year-old victim (the age of the victim in

utterances in question should be subjected to scrutiny as to both content and form. *See Wright*, 497 U.S. at 825.

Here, nothing in the boys' statements goes beyond terms such as "my back private spot" and "my front private spot," which are entirely age-appropriate descriptions. Given the victims' inconsistencies, it is difficult, if not impossible, to conclude that the statements bear "sufficient indicia of reliability" with respect to their terminology.

3. Lack of Motive to Fabricate and Mental State of the Declarants.

The State made much of the victims' purported lack of a motive to fabricate. (T. 452; 577). However, the State ignores the obvious, and inherently tension-ridden dynamic which exists between teachers and students. Children don't need a reason to hate the unyielding instrument of socialization into whose hands they have been involuntarily thrust. Even the friendliest of teachers have, at times, been abused to enhance a student's esteem in the eyes of his fellow students. It was for this reason, after all, that venireperson Williams was ostensibly struck from the pool of jurors by the State. (T. 403-405). Fairness mandates that Appellant be given the same benefit of the doubt.

Finally, the mental state of the victims weighs against reliability. Y.R. was in the midst of his mother's hysteria (T. 814) when he told his story to her. Then,

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Redman and a 10 or 12 year-old victim. Unfortunately, our bright line statute fails to take these enormous developmental distinction into account.

within minutes, face-to-face confrontations with his friend S.N., the headmaster of the school (T. 688), law enforcement personnel (T. 728) and later forensic interviewers at the SAFE clinic. (T. 999). Once F.S. triggered the inexorable avalanche of events, it would have been extremely difficult for either child to abandon the playground story.

Clearly, then, the *Redman* factors are not satisfied by the record. Moreover, the factors were never discussed, nor weighed by the trial court. (L.F. 54). As such, admission of the hearsay statements was reversible error which deprived Appellant of his constitutionally guaranteed right to confront the witnesses against him "face to face."

C. Y.R. was constructively or "legally" unavailable due to the State's interference during his testimony. Admission of Y.R.'s out-of-court statements was reversible error in the absence of evidence that significant emotional, psychological, or other trauma precluded Y.R. from testifying on cross examination.

By interfering with Y.R.'s testimony, the State rendered him constructively unavailable for cross examination. *See* Argument II, *supra*. Because no meaningful confrontation was possible after the State's interference, the child was physically available to testify, but constructively and thus legally **unavailable** within the meaning of §491.075. Accordingly, in order to admit the legally unavailable child's hearsay statements under these circumstances, Missouri law **requires** evidence to support a finding of legal unavailability. § 491.075.1(2)©. No such

evidence was presented by the State.

Section 491.075.1 provides that an out-of-court statement of the child victim is admissible only if the court finds the statement has sufficient indicia of reliability **and:**

(2)(a) The child testifies at the proceedings; or

(b) The child is unavailable as a witness; or

© ***The child is otherwise physically available as a witness but the court finds that the significant emotional or psychological trauma which would result from testifying in the personal presence of the defendant makes the child unavailable as a witness at the time of the criminal proceeding.***

§ 491.075.2 (emphasis added). Y.R.'s 491.075 hearsay statements do not satisfy either requirement.

Here, it is uncontested that Y.R. was told to answer "I don't know" or "I don't remember" to defense counsel's questions. (T. 502-03; 496-97; 500; 502-06; 509-12; 514-16; 518; 521; 524-31; 533-35; 538-39; 541-48; 553; 555; 558-59; 561-62). It is also uncontested that he was physically available, and present on the witness stand, despite his refusal to answer. The only exception which would allow hearsay statements from this witness, therefore, is that set out in Section 491.075.1(2)©, recognizing a child to be legally unavailable if the court finds that "significant emotional or psychological trauma" would result if the child were required to testify in the personal presence of the defendant. *Kierst v. D.D.H.*, 965

S.W.2d 932, 939 (Mo. App. W.D. 1998).

However, no independent finding of unavailability was made. In fact, the State hammered home the theory that the boys were not afraid of Appellant at all, but rather, quite liked him. (T. 452; 577). Instead, as was the hallmark of this case, the trial court simply allowed the tender years doctrine to run rampant, and admitted the hearsay testimony **without regard to the availability of this child.** It can be inferred that the inherently fallacious tender years assumption "convinced the court that the child would be affected" by answering, in a meaningful way, defense counsel's questions. *Kierst,* 965 S.W.2d at 939. The trial court, however, made no additional or specific finding concerning "significant" emotional or psychological trauma. Instead, the trial court simply ignored the State's interference with Y.R., his subsequent inability to testify, and would hear no evidence on the issue. (T. 569). Moreover, the record itself is inadequate to support admission of Y.R.'s out-of-court statements due to their inconsistent nature as to time, content and circumstances. (T. 459-60; 486-993).

The Missouri Supreme Court's decision in *State v. Sanchez* 752 S.W.2d 319 (Mo. banc 1988) is instructive. In *Sanchez,* the trial court permitted, over defendant's objection, admission of a videotaped deposition of a child victim taken for use as substantive evidence, pursuant to § 491.680. *Id.* at 321 (Mo. banc 1988). That statute, like section 491.075, permits the taking of such a videotape deposition of the child-victim out of the presence of the defendant if the court finds:

that significant emotional or psychological trauma to the child which would result from testifying in the personal presence of the defendant exists, which makes the child unavailable as a witness at the time of the preliminary hearing or trial ...

§ 491.680(2).

The *Sanchez* defendant argued that the prosecutor's unsupported allegation that an expert had said that testifying might be traumatic was not enough, and that the deposition should not be admitted without a hearing as to whether the required emotional or psychological trauma would occur. *Sanchez*, 752 S.W.2d at 321. The trial court held this was not necessary. *Id.* Our Supreme Court disagreed stating that this procedure violated an accused's confrontation rights. *Id.* at 321. The Court found that "'in the usual case (including those where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant.'" *Id.* (quoting *Ohio v. Roberts*, 448 U.S. 56, 64-65 (1980)). Significantly, the *Sanchez* court noted that, in admitting this hearsay testimony, that there was a "rule of necessity," meaning that the state was required to either produce the declarant at trial, or indicate that the declarant was unavailable. *Kierst*, 965 S.W.2d at 940; *Sanchez* 752 S.W.2d at 321. Stated plainly, the State cannot have it both ways.

Unlike section 491.075.1, section 491.680 (1986) did not explicitly require the trial court to hold a hearing. Neither did it state what evidence was necessary to

determine that the child was unavailable due to emotional or psychological trauma. The *Sanchez* court nonetheless held that in order to introduce these depositions without violating the confrontation clauses of the United States and Missouri Constitutions

> the **state** must produce evidence, at a hearing, sufficient to establish not merely that it would be less traumatic for the child to testify at an in-camera deposition, but that the emotional and psychological trauma which would result from testifying in open court or in the personal presence of the defendant in effect makes the child unavailable as a witness at the time of trial.

Sanchez 752 S.W.2d at 322. The court concluded that, because there was no evidence presented that these victims were legally unavailable, the admission of their depositions violated the defendant's constitutional right to confrontation, and reversed. *Id.* at 323.

Section 491.075.1(2)© explicitly requires that, before the court can admit the out-of-court statements of the victim, the court must conduct a hearing outside the presence of the jury. Although a 491.075 hearing did take place, the State's argument for admission of the hearsay statements was predicated on Y.R.'s **availability** under subsection (2)(a). The State could not then jimmy the witness into unavailability on cross examination without evidence that "significant emotional or psychological trauma which would result from testifying in the

personal presence of the defendant makes the child unavailable as a witness at the time of the criminal proceeding." § 491.075.1(2)©.

Applying the principles set out in *Kierst* and *Sanchez,* "in order to find the victim unavailable and so make his out-of-court statements admissible under § 491.075.1(2)©, a trial court is required to find that the child would suffer significant emotional or psychological trauma if required to testify in the presence of the defendant. Moreover, the record must present sufficient evidence to support such a finding." *Kierst,* 965 S.W.2d at 941. As the court stated in *Sanchez,* the State must show "that the emotional and psychological trauma which would result from testifying in open court or in the personal presence of the defendant in effect makes the child unavailable as a witness at the time of trial." *Sanchez,* 752 S.W.2d at 322.

Where, as here, the State reaps the benefits of direct testimony, then **manufactures** unavailability by tampering with a witness, heightened caution should apply to hearsay statements which cannot be tested through the truth-seeking "engine" of cross examination. The trial court's ruling violated Section 491.075.1(2) and denied Appellant his confrontation rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

D. The victims' testimony required corroboration independent of the hearsay evidence due to elemental inconsistency.

As a general proposition, the uncorroborated testimony of a victim is sufficient to sustain a conviction for sex crimes. *State v. Sladek,* 835 S.W.2d 308,

310 (Mo. banc 1992). However, “where the testimony is of such a contradictory nature that it is deprived of probative force, the testimony must be corroborated or the judgment cannot be sustained.” *State v. Griggs,* 999 S.W.2d 235, 241 (Mo.App. W.D.,1998); *State v. Silvey,* 894 S.W.2d 662, 673 (Mo. banc 1995); *State v. Baldwin,* 571 S.W.2d 236, 239 (Mo. banc 1978). This “corroboration rule,” is triggered when the victim's testimony is “so contradictory or inconsistent as to deprive it of all probative force.” *Silvey,* 894 S.W.2d at 673. Concededly, “the trend in Missouri has been to limit the application of the corroboration rule to the victim's trial testimony.” *Griggs,* 999 S.W.2d at 241 (*citing State v. Harris,* 620 S.W.2d 349, 353-54 (Mo. banc 1981) (application limited to the victim's testimony at trial); *State v. Gatewood,* 965 S.W.2d 852, 856 (Mo.App.1998) (rule applied to victim's testimony); *State v. George,* 921 S.W.2d 638, 643 (Mo.App.1996) (refusing to apply the rule to conflicts between the victim's testimony and the victim's out-of-court statements); *State v. Graham,* 906 S.W.2d 771, 778 (Mo.App.1995) (stating the rule applied only to trial testimony and not to out-of-court statements)). However, Appellant requests that this Court reconsider the constitutionality of that rule in light of the recent amendments to § 491.075, which effectively nullify the issue of availability as it pertains to hearsay testimony or transfer the matter to the Supreme Court pursuant to Supreme Court Rule 83.02. The rationale behind the corroboration rule, after all, is that the victim is available for cross-examination when he or she testifies–a right not meaningfully afforded in

this case.

At any rate, the victims' trial testimony is at odds with the elements State's theory of the case. Despite feeling no pain or discomfort (T. 942), finding no blood (T. 725), semen (T. 977), or lotion (T. 983) (the boys did not bathe or wipe before their SAFE examinations), the boys claim they were sodomized. (T. 719-20; 948-50). This elemental inconsistency, uncorroborated by any evidence of any kind, cannot form the basis of a criminal conviction and punishment of this magnitude.

E. Alternatively Section 491.075, as amended, is unconstitutional.

One of the threshold issues that presents itself in any hearsay analysis is the availability or unavailability of the declarant. *See, e.g., United States v. Owens,* 484 U.S. 554 (1988). However, § 491.075, as recently amended, seems to relax the general unavailability rule to such a significant degree, as to render the issue a nullity. Even a cursory reading of the statute reveals that hearsay statements are admissible whether or not the declarant is unavailable. § 491.075.1(2)(a) & (b). There is also a vague and ambiguous standard which allows admission of hearsay statements upon a finding that the declarant might suffer "significant emotional or psychological trauma" from testifying, without regard to the witness's availability. § 491.075.1(2)©. Not only is this standard unworkable, but has led at least one Missouri court to ponder its continued constitutional validity. *See Griggs,* 999 S.W.2d 235, 241 n. 8). Appellant urges this court to reconsider the constitutional

parameters of the statute both in the context of this case and in light of *Idaho v. Wright* and *United States v. Owens*, for the reason that the amended statute: (1) violates an accused's right to due process and to confront witnesses; and (2) is vague and ambiguous in that it provides no reasonable notice as to whether–and to what extent–hearsay testimony of myriad unspecified varieties will be included, or excluded at trial. To the extent that Appellant's convictions rely on § 491.075, they should be reversed.

VI. THE STATE FILED AN INFORMATION IN LIEU OF INDICTMENT BROADENING THE TIME FRAMES FOR WHICH THE OFFENSES OCCURRED AND SUBSEQUENTLY FILED AN AMENDED INFORMATION FIVE DAYS BEFORE TRIAL EXCLUDING THE PERIOD OF TIME FOR WHICH APPELLANT PROVIDED THE STATE WITH AN ALIBI. THE CUMULATIVE EFFECT OF THE AMENDMENT WAS TO CIRCUMVENT APPELLANT'S DEFENSE OF ALIBI. THE AMENDMENT TO THE INFORMATION DENIED THE APPELLANT HIS RIGHT TO PRESENT A DEFENSE AND HIS RIGHTS GUARANTEED HIM BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 18(a) OF THE MISSOURI CONSTITUTION.

A. Standard of Review and Relevant Case Law

The appellate standard of review in the question of allowing an amendment to an information is for abuse of discretion. *State v. Endicott*, 881 S.W.2d 661, 663 (Mo. App. 1994). Amendment or substitution in an information is not permissible if a legitimate defense would be prejudiced. *State v. Messa*, 914 S.W.2d 53, 54 (Mo. App. 1996). Hence, the test for "prejudice" under Rule 23.08 is (1) whether a defense to the charge as originally made would be **equally available** after the amendment, and (2) whether the defendant's evidence would be equally applicable after, as well as before, the amendment. *State v. Endicott*, 881 S.W.2d 661, 664 (Mo. App. 1994). *State v. Messa*, 914 S.W.2d 53, 54 -55 (Mo. App. W.D. 1996); *accord: State v. Boone Retirement Center, Inc.*, 26 S.W.3d 265, 269 (Mo. App. W.D. 2000). Appellant's alibi of being in Saudi Arabia was lost to him by the amendment of the information to allege that events described in counts one and two occurred at a time when he was in St. Louis.

B. Facts about Original Information, and Alibi

The original information in lieu of indictment that the State filed against appellant on April 3, 2002 alleged that the offenses described in counts one and two occurred between January 1, 2001, and April 17, 2001. (L.F.14). Appellant previously entered a defense of alibi pursuant to Mo. R. Cr. P. 25.05 (5). The alibi states that he traveled to Saudi Arabia on March 9, 2001, and returned to the U.S. on April 3, 2001. (L.F. 52) Further, Appellant did not return to the Al-Salam Day

school until April 6, 2001. This alibi negates 29 days from the period that offenses alleged in counts one and two could have possibly occurred.

C. Amended Information

In response to the defense of alibi, the prosecution amended the original information to allege different dates of the offenses in counts one and two. On April 11, 2002, the prosecution filed an amendment to the original indictment, this time claiming that counts one and two occurred between January 1, 2001, and March 9, 2001. (L. F. 19). It is imperative to note that the amended information uses Appellant's departure date as the parameter of the offense. The court however, granted the State's motion for leave to amend the indictment.

The cumulative effect of the amendment to the information was to circumvent Appellant's defense of alibi. This attempt to dispose of the alibi is unacceptable for several reasons.

D. Amendment of Indictment Erroneously Permitted

1. Amendment Violated Mo. R. Crim. P 23.01 (b) 3

Mo. R. Crim. P 23.01 (b) 3 provides that in a felony action, an information shall state the time of the offense as certainly as can be done. In this case, neither the original, or the amended information state the time of the offenses described in counts one and two with any relative degree of certainty. Both are extremely rough estimates. As to both counts in question, it is unreasonable to assert that one

specific incident took place sometime within a 107 day period, as the original information claims. (L. F. 14). It is equally unreasonable to assert that one specific incident took place at some time during a 68 day period, as the amended information states. (L. F. 19). These estimates do not comply with Rule 23.01 (b) 3, as neither the original nor the amended information state the time of the alleged offenses with any objective degree of certainty.

2. Amendment Violated Mo. R. Crim. P. 23.08, and US Constitution

The amendment to the information is also a violation of Mo. R. Crim. P. 23.08. This rule states that amending an information is allowable if it does not serve to prejudice any of a defendant's substantial rights. It is beyond debate that appellant had the right to assert a defense to the charges against him. An accused has an unequivocal right to present a defense to the charges against him in a criminal case. U.S.C.A. Const. Amends. VI, XIV. Appellant pled not guilty to all charges, using the alibi as the basis of his defense. By amending the indictment after becoming aware of Appellant's alibi, the State effectively denied Appellant his right to assert an exculpatory defense.

E. The Trial Court's Error In Sustaining the State's Amendment Gives Rise to a Presumption of Unfair Prejudice Which Cannot Be Overcome.

"When a criminal defendant claims the trial court erred in excluding relevant evidence, the error, if shown, is presumed prejudicial." *State v. Starr,* 998 S.W.2d

61 (W.D.1999). In order for the presumption of unfair prejudice to arise, however, the evidence excluded must be logically and legally relevant. *Id.* at 65. Appellant's defense of alibi meets this standard, as it was exculpatory evidence which was denied to him by the amendment to the information. Additionally, in criminal cases involving erroneous exclusion of defense evidence, the presumption of unfair prejudice can only be overcome by a showing that such erroneous exclusion was harmless error beyond any reasonable doubt. V.A.M.S. Const. Art. 1, § 18(a); U.S.C.A. Const. Amends. V, VI, XIV. The State does not meet this burden.

As outlined above, the trial court erred in allowing the state to amend the original information for three reasons. First, the amendment violated Mo. R. Crim P. 23.01 (b) 3, as the amended information failed to state the time of the offenses alleged in counts one and two with any objective degree of certainty. Second, the amendment violated Mo. R. Crim. P. 23.08, as well as subsequent case law, as it prejudiced Defendant of a substantial right, the right to assert his defense. Here, the State purposefully amended its information to deprive Appellant of a fundamental constitutional guarantee. As the State's amendments plainly correspond to Appellant's departure date to Saudi Arabia, (App. 4-5), no other reasonable inference can be drawn but that the State took advantage of Appellant's good faith disclosure. This presumption must be overcome by showing the error was harmless "beyond a reasonable doubt"; a standard which cannot be met in light of the

inconsistent testimony in this case. The trial court's error resulted in error in violation of defendant's constitutional rights to present a defense. The convictions on counts one and two should therefore be reversed.

CONCLUSION

Appellant's conviction should be reversed and remanded for a new trial.

Respectfully Submitted:

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Certificate of Counsel Pursuant to Rule 84.06 and Local Rule 360

Pursuant to Rule 84.06 and Local Rule 360, counsel certifies that this brief complies with the limitations contained in both rules. Based upon the information provided by undersigned counsel's word processing program, WordPerfect 10, this brief contains 2026 lines of text and 21,211 words. Further, a copy of appellant's brief on floppy disk accompanies the written brief and that disk has been scanned for viruses and is virus-free as required by Rule 84.06.

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Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of Appellant's Brief and this Certificate of Service were mailed this 12th day of July, 2004, to: Office of the Attorney General, P.O. Box 899, Jefferson City, MO 65102.

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Richard H. Sindel