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 REPLY BRIEF

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JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

The appellant, Mohsin Baghazal, adopts the jurisdictional statement and statement of facts set forth in his substitute brief, filed on July 12, 2004, and incorporates them herein by reference.

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)

Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859 (1991)

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419 (1994)

McCormick v. State, 803 N.E.3d 1108 (Ind. 2004)

State v. Elder, 901 S.W.2d 87 (Mo. App. 1995)

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)

Scroggins v. State, 859 S.W.2d 704

State v. Figgins, 839 S.W.2d 630 (Mo. App. 1992)

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)

[redacted], 999 [redacted] 235, 241 ([redacted] 1998)

[illegible] v. [illegible], 965 [illegible].2[illegible] 932, 939 ([illegible]. [illegible]. [illegible]. 1998)

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

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 VENIRE PERSON 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.

Respondent contends, in part, that Appellant's argument that this Court adopt a "tainted analysis" approach for Missouri courts reviewing challenges to prospective jurors pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) is irrelevant (Resp. Br. 31-32). On the contrary, that is the reason appellant requested review by this Court. *Batson* holds that it is constitutionally impermissible to exercise a racially discriminatory peremptory strike. *Id*. at 84-89. The most effective way to ensure compliance with *Batson's* principles is to require trial counsel to reject every improper racial influence when selecting a juror. Only the "tainted analysis" approach accomplishes this goal.

Under the "tainted analysis" approach, regardless of how many factors are considered, any utilization of a discriminatory factor directly conflicts with the purpose of *Batson* and taints the entire jury selection process. *McCormick v. State*, 803 N.E.3d 1108, 1113 (Ind. 2004). Adopting the "tainted analysis" approach to better overcome the racial discrimination that gave rise to *Batson* is critically relevant, both in general and in this case. Under the "tainted analysis" approach, the peremptory strikes of black venire members, Lewis, Banks, and Williams, would not have been allowed.

Contrary to Respondent's preservation contentions (Resp. Br. 20-22), sufficient factors are present for review. "Where, as here, a prosecutor has offered its race neutral explanation for a peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing of purposeful discrimination becomes moot." *McCormick*, at 1111, citing *Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859 (1991) (plurality

opinion). The *McCormick* court went on to examine the prosecutor's explanations for his peremptory challenges to determine whether his reason were, in fact, race-neutral. *Id*. So, too, can this Court examine the prosecutor's proffered rationales for striking African-American venire members Banks, Lewis and Williams. In examining the plausibility of the state's explanations, this Court should view them in light of the totality of the circumstances. *See State v. Elder*, 901 S.W.2d 87, 90 (Mo. App. W.D. 1995).

Contrary to Respondent's contentions, the record, viewed in light of the totality of the circumstances, reveals the state's inherently discriminatory and pretextual rationales for its race-based peremptory strikes. As set out in much greater detail in appellant's substitute brief, the prosecutor struck four African-American and one Hispanic venire panel members out of its six peremptory strikes. (App. Br. 23; L.F. 77-88) The prosecutor's discriminatory intent becomes apparent when separating and examining the suspect categories used as bases for his peremptory strikes: venire panel members or their relatives charged with or convicted of crimes and venire panel members occupations.

The prosecutor was conspicuously silent regarding similarly-situated white venire panel members: Hendrick (stepson arrested and pled guilty); Bonham (school administrator, master in social work); and Walls (summer camp counselor), but striking African-American venire panel members: Lewis (stepbrother and sister convicted) (investigator for the NLRB); Banks (nephew convicted); and Williams (Normandy High School principal). Williams and Bonham, though strikingly similar, both were school administrators, (Tr. 364, 365, 368, 371-374), remained as jurors. Surprisingly, the

prosecutor did not strike the white venire panel member, Bonham, who was trained and experienced in recognizing sexual abuse victims (Tr. 365, 368), an area much more germane to this case, especially if the prosecutor, indeed, was worried about jury members second guessing his witnesses.

Also similarly situated were African-American venire panel member Lewis, whose job as an NLRB investigator, was comparable to Caucasian venire panel members Walls and Meyers, both registered nurses trained to diagnose and evaluate similar allegations of abuse (Tr. 358-, 363). The prosecutor did not strike Walls and Meyers who, as nurses, had medical training in addition to their analytical abilities, a factor more plausibly related to the issues in this case.

Further, the prosecutor asked more follow up questions to minority venire panel members than similarly situated white venire panel members. (App. Br. 40; Tr. 226, 232).

The prosecutor's discriminatory means combined to deprive venire panel members Lewis, Banks and Williams, and the appellant, of their rights under the Missouri and United States Constitutions. "Discrimination 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, 114 S.Ct. 1419 (1994).

The prosecutor's deceptions in his explanation for his strike of venire panel member Banks merits individual mention. The prosecutor formulated from fantasy the reason he proffered to justify the strike. It was fabrication (App. Br. 23-25). Respondent

sees little difficulty with this situation, claiming, under *State v. Bass*, 81 S.W.3d 595, 611 (Mo. App. W.D. 2002), that if the prosecutor believed his fabricated reason to be true, no harm occurred so long as the fabricated reason was race neutral (Resp. Br. 30). Because the totality of the circumstances show the prosecutor's motives were to remove as many African-American venire panel members as possible, *Bass* does not apply.

As noted previously, white jurors were allowed to remain, despite having similar backgrounds (T. 315-16; 338) (App. Br. 75-79), and, the disparity, in some instances, in the number of follow-up questions the prosecutor asked of black venire panel members compared to white ones, demonstrates the prosecutor's systematic attempt to establish non-racial bases for racial motivations and, as a result, remove as many African-Americans from the jury as he could (App. Br. 40). The prosecutor here did not proffer his reasons based on a good faith belief, but, rather, as part of an intentional distortion.

Contrary to Respondent's dismissiveness regarding the prosecutor's fabrications: (Resp. Br. 29-31) "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. 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.")

Respondent's attempt to justify as race-neutral, the prosecutor's rationale that Banks fought a traffic ticket and won, (Resp. Br. 30) fails for at least two reasons. A traffic citation has no reasonable relationship to a charge of child molestation. It is ridiculous to suggest 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.

Moreover, Respondent's contention that successfully fighting a traffic citation was so vital a factor to the prosecutor that he struck venire panel member Emory, who also contested a ticket, is another fabrication. (Resp. Br. 30) When the prosecutor asked, during voir dire, about criminal offences, he specifically said, "I'm not talking about traffic tickets." (T. 297). The prosecutor had no interest in traffic offences because they were not related to this case. The reason the prosecutor struck Emory was because he said he was falsely accused of sexual misconduct approximately three years before the trial, was interviewed by the police, and while nothing came of it, the experience put him "on alert about how a person can be falsely accused." (T. 273-274). That was the reason the prosecutor gave when he attempted to strike Emory for cause; no mention of fighting a traffic ticket. (Tr. 391-393) And that reason, found nowhere in the Respondent's analysis, shows how the casting about for a race-neutral reason amidst a discriminatory sea of racial prejudice forces courts to overlook pretuextual reasons for peremptory strikes when those courts employ the "dual motivation" analysis.

Under the "dual motivation" analysis, a court finds no *Batson* error if the proponent of a strike has articulated both race-based and race-neutral reasons for a peremptory strike, and the proponent shows he would have exercised the strike, even in the absence of discriminatory motivation. Simply put, any proffered race-neutral reason will save a State's challenge and vitiate a race-based rationale for a strike.

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.

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). Here there were three. And regarding Banks in particular, of the prosecutor's two reasons, he made one up and latched onto another he previously claimed to have no interest in.

In this and future cases, in a *Batson* context where a party offers multiple rationales for a peremptory strike**,** some of which are permissible and some of which are pretextual, Missouri courts should adopt a "tainted analysis" approach. Here, the prosecutor's multiple rationales for the peremptory strikes of Banks, Lewis and Williams, when examined apart, and in the context of the whole voir dire, are discriminatory. Under a "tainted analysis" approach, these strikes would fail. But when the prosecutor's multiple rationales are lumped together under the "dual motivation analysis," courts can look the

other way as prosecutors continue to apply racial standards for jury selection. The trial court clearly erred for the reasons stated above. The trial court's denial of Appellant's *Batson* challenge violated his rights to due process, equal protection, a fair and impartial jury and a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 2, 10 and 18(a) of the Missouri Constitution. Accordingly, this Court should reverse and remand this case for a new trial.

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.

For its second argument, Respondent asserts that the trial court did not abuse its discretion in denying Appellant's motion for a mistrial because (1) there was no bad faith on the part of the prosecutor; and (2) Appellant suffered no prejudice as a result of the State's violation of the trial court's order. (Resp. Br. 33-38).

A. The Victim's Advocate's Intent and Subsequent Actions Were Imputed to the Prosecuting Attorney's Office.

Respondent minimizes the power of a court to prohibit interference with witnesses during strategic phases of trial. Despite a wealth of Missouri authority, Respondent relies on a 1992 Nebraska case and a non-controlling federal decision for the empty platitude that where there is a purposeful violation of a non-discussion order, "the trial court has wide discretion in deciding how to respond to the violation." *U.S. v. Calderon-Rodriguez*, 244 F.3d 985 (8th Cir. 2001); *State v. Osborn*, 490 N.W.2d 160, 165 (Neb. 1992). Once again, Respondent proposes a special rule. Namely, that as long as the prosecuting attorney lacks the intent to interfere with a witness, and in fact does not dirty **her** hands by so doing, other employees of the State are free to do so. This notion does not comport with the reality of the case law governing the agency relationship between members of the prosecution's team, which hold that the actions, knowledge and intent of one are imputed to all. *See 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). In other words, the State cannot accomplish indirectly what it is not directly permitted to do.

B. Appellant suffered extreme prejudice from the State's interference.

The prejudice suffered by Appellant in this case cannot be overstated. When Y.R. resumed his testimony on cross-examination, he seemingly did not remember taking a break, going to the hospital (a point which was painstakingly detailed previously), or talking to anyone during the break. It was only after Ms. Hoke's coaching was exposed that he even admitted having spoken with her (Tr. 502-03).

Finally, Respondent equivocates, asserting Appellant "cannot show prejudice from the advocate's brief admonition to tell the truth." (Resp. Br. 38.) Not so. Ms. Hoke did not admonish Yasser to tell the truth. She told him to say, "I don't know" or I don't remember." The problem that Ms. Hoke's conduct raises is whether the prosecuting attorney's office has made it a policy to allow their victim's advocates to routinely "chat up", "console", "admonish" or otherwise coach their victims during the inevitable recesses that occur at trial. As noted in Appellant's opening brief, an accused may properly be prohibited from speaking to his own attorney during a brief recess from cross examination. *See Perry v. Leeke*, 488 U.S. 272 (1989). The ends of justice are not met when third-party lay persons without legal or technical expertise are permitted to shape the testimony of witnesses during the heat of cross-examination.

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.

Fundamentally, the difficulty in cases such as this one is the interplay between the competing

"tender years" and "corroboration" doctrines, and how they impact nontraditional hearsay exceptions such as those enumerated in §491.075. Beginning with the general premise that statutory exceptions such as §491.075 do not share "the same tradition in reliability" as the "firmly rooted hearsay exceptions," *State v. Redman*, 916 S.W.2d 787, 790 (Mo. banc 1996), the problem arises when otherwise inconsistent testimony is "corrected" by hearsay which is not traditionally reliable, *Idaho v. Wright*, 497 U.S. 805, 815-19 (1990), by operation of the "tender years" presumption.

First, the "tender years" presumption allows for a significant degree of inconsistency in child witnesses' statements according to the unverified premise that children of unspecified "tender years" are incapable of testifying competently or truthfully because of their age. This presumption cuts against the "corroboration rule" which otherwise mandates the need for corroborative testimony when the victim's testimony is inconsistent as to the fundamental elements of the offense.

In this case, the victims claimed they were anally penetrated in direct contravention of the physical evidence, and their statements did not bear sufficient indicia of reliability as to time or content. However, the state was able to flesh out its theory almost exclusively through the testimony of the §491.075 witnesses. To the extent that a conviction which relies so heavily on otherwise inadmissible evidence, the convictions offend due process and must 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 counsel certifies that this brief complies with the limitations contained therein. Based upon the information provided by undersigned counsel's word processing program, WordPerfect 10, this brief contains 460 lines of text and 3999 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.

Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of Appellant's Substitute Reply Brief and this Certificate of Service were mailed this 19th day of October, 2004, to: Office of the Attorney General, P.O. Box 899, Jefferson City, MO 65102.

Raymund J. Capelovitch