IN THE MISSOURI COURT OF APPEALS
FOR THE EASTERN DISTRICT

STATE OF MISSOURI,

Respondent,

vs.

JAMES A. BEINE,

Appellant.

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF
THE CITY OF ST. LOUIS, MISSOURI
THE HONORABLE TIMOTHY J. WILSON

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

JURISDICTIONAL STATEMENT 6

STATEMENT OF FACTS 7

A. PRELIMINARY OVERVIEW 7

B. BACKGROUND EVIDENCE 8

C. EVIDENCE ON COUNT I - JEREMY MARBLE 15

D. EVIDENCE ON COUNTS II AND III-CHARLES MARBLE 16

E. EVIDENCE ON COUNT IV - KEVIN LATIMORE 18

F. TRIAL AND POST TRIAL MOTIONS AND SENTENCING 19

POINTS AND AUTHORITIES 20

ARGUMENT 24

I. CONSTITUTIONAL ISSUE 24

II. SUFFICIENCY OF EVIDENCE 37

III. IMPARTIAL JURY ISSUE 44

IV. TESTIMONY REGARDING ARREST 49

CONCLUSION 56

CERTIFICATE OF SERVICE 58

CERTIFICATE OF COMPLIANCE 59

APPENDIX A-1

TABLE OF CONTENTS A-2

SENTENCE AND JUDGMENT (L.F. 162) A-3

STATUTE - R.S.MO § 566.083 . . . . . A-7

JURY INSTRUCTIONS 5, 7, 9 AND 11 (VERDICT DIRECTING INSTRUCTIONS) (L.F. 110, 112, 114, 116) A-8

DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AT THE CONCLUSION OF THE STATE'S CASE (L.F. 97) A-12

DEFENDANT'S MOTION FOR DIRECTED VERDICT AT THE CONCLUSION OF THE ENTIRE CASE (L.F. 101) A-15

DEFENDANT'S MOTION FOR NEW TRIAL OR FOR DIRECTED VERDICT OF ACQUITTAL (L.F. 150) A-18

DEFENDANT'S EXHIBITS (PHOTOGRAPHS OF RESTROOM) A-26

TABLE OF AUTHORITIES

Cases **Page**

Baldwin v. Director of Revenue, 38 S.W.3d 401, 405 (Mo. 2001) 24

Bethesda Barclay House v. Ciarleglio, 88 S.W.3d 85, 92 (Mo. App. 2002) 49

Bose Corp v. Consumers Union of United States, Inc.,

466 U.S. 485 (1984) 24

Boyd v. State Board of Registration for the Healing Arts,

916 S.W.2d 311 (Mo. App. 1995) 39

City of Houston v. Hill, 482 U.S. 451 (1987) 28

Cline v. Frink Dairy Co., 274 U.S. 445 (1927). 32

Colautti v. Franklin, 439 U.S. 379 (1979) 30, 36

Connally v. General Const. Co., 269 U.S. 385 (1926). 32

Grayned v. City of Rockford, 408 U.S. 104 (1972) 33, 34

Kolender v. Lawson, 461 U.S. 352 (1983) 33

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 32

Smith v. Goguen, 415 U.S. 575 (1974) 33, 35

State v. Belcher, 805 S.W.2d 245 (Mo. App. 1991) 46

State v. Bowles, 360 S.W.2d 706 (Mo. 1962) 31

State v. Brooks, 810 S.W.2d 627 (Mo. App. 1991) 56

State v. Brooks, 675 S.W.2d 53 (Mo. App. 1984) 56

State v. Brown, 660 S.W.2d 694, 697 (Mo. 1983) 33

State v. Bucklow, 973 S.W.2d 83 (Mo. 1998) 53

State v. Calicotte, 78 S.W.3d 790 (Mo. App. 2002) 38

State v. Carpenter, 736 S.W.2d 406 (Mo. 1987) 29

State v. Carter, 475 S.W.2d 85 (Mo. 1972) 55

State v. Chapman, 876 S.W.2d 15 (Mo. App. 1994) 53

State v. Cole, 887 S.W.2d 714 (Mo. App. 1994) 54, 55

State v. Cotton, 621 S.W.2d 296 (Mo. App. 1981) 53

State v. Entertainment Ventures I, Inc., 44 S.W.3d 383 (Mo. 2001) 53

State v. Goddard, 34 S.W.3d 436, 438 (Mo. App. 2000) 38, 39

State v. Graves, 27 S.W.3d 806 (Mo. App. 2000) 53

State v. Hadley, 815 S.W.2d 422, 425 (Mo. banc 1991) 45

State v. Hatton, 918 S.W.2d 790 (Mo. 1996) 36

State v. Kelly, 43 S.W.3d 343, 350 (Mo. App. 2001) 38

State v. Maddox, 675 S.W.2d 719 (Mo. App. 1983) 55

State v. Middleton, 998 S.W.2d 520 (Mo. 1999) 53

State v. Moore, 90 S.W.3d 64 N.6 (Mo. 2002) 27, 39, 42

State v. Myrick, 473 S.W.3d 402, 404 (1971) 54

State v. Reed, 971 S.W.2d 344 (Mo. App. 1998) 53

State v. Reese, 274 S.W.2d 304 (Mo. 1955) 55

State v. Scurlock, 998 S.W.2d 578, 587 (Mo. App. 1999) 53

State v. Sladek, 835 S.W.2d 308, 314 (Mo. 1992) 55

State v. Swoboda, 658 S.W.2d 24 (Mo. 1983) 28

State v. Thomas, 857 S.W.2d 537 (Mo. App. 1993) 56

State v. Watson, 968 S.W.2d 249 (Mo. App. 1998) 54

State v. Young, 695 S.W.2d 882 (Mo. 1985) 33

Trinity Lutheran Church v. Lipps, 68 S.W.3d 552 (Mo. App. 2001) 45

United States v. Udofot, 711 F.2d 831 (8th Cir. 1983) 30

United States v. Enochs, 857 F.2d 491 (8th Cir. 1988) 30

United States v. Harriss, 347 U.S. 612 (1954) 32

United States v. Lanier, 520 U.S. 259 (1997) 38

United States v. Powell, 423 U.S. 87 (1975) 36

Constitutional Provisions

Fifth Amendment, U.S. Constitution 29

Fourteenth Amendment, U.S. Constitution 24

Article I, Section 10, Missouri Constitution 29

Statutes

R.S.Mo. § 566.083(1) 25, 30

R.S.Mo. § 566.083 (2) & (3) 25

R.S.Mo. § 566.095 27

Articles

Narvil, J.C., 29 Colum. J.L. & Soc. Probs 85 (Fall 1995) 26

JURISDICTIONAL STATEMENT

Appellant James A. Beine was convicted after a jury trial in the City of St. Louis, Missouri, Circuit Court Cause Number 021-1197 of four counts of sexual misconduct involving a child by indecent exposure.

On September 15, 2003, the Court sentenced Appellant to a term of four years imprisonment on each count. The Court ordered Counts I, II and IV to be served consecutively to each other and ordered Count III to run concurrently with Count II. This resulted in an aggregate sentence of 12 years. (L.F. 162, Appendix A-3) A timely Notice of Appeal was filed on September 25, 2003. (L.F. 174)

This appeal is from the judgment and conviction in that case.

The appeal does involve an issue which is reserved for the exclusive jurisdiction of the Supreme Court of Missouri to wit: a challenge to the constitutionality of R.S.Mo. §566.083(1) (Sexual Misconduct Involving a Child). Accordingly, Appellant has filed contemporaneously herewith a suggestion to transfer this appeal to the Missouri Supreme Court pursuant to Article IV, Section 3 of the Missouri Constitution, Sup. Ct. Rule 83.01, R.S.Mo. §477.080. In the absence of such a transfer, jurisdiction lies in the Missouri Court of Appeals, Eastern District, pursuant to Article IV, Section 3 of the Missouri Constitution and Section 477.050 R.S.Mo. 1986, because the Circuit Court for the City of St. Louis is within the Jurisdiction of said District.

STATEMENT OF FACTS

A. PRELIMINARY OVERVIEW

This case involves the prosecution and conviction of Defendant Appellant James A. Beine for four alleged violations of R.S.Mo. § 566.083(1) (Sexual Misconduct involving a Child) which were alleged to have occurred sometime "between September 1, 2000 and April 30, 2001" in the boys' restroom of the Patrick Henry Elementary School where Appellant was employed as a school counselor. Specifically, the four-count Indictment charged that Appellant "knowingly exposed his genitals" to boys under 14 years of age and did so "in a manner that would cause a reasonable person to believe that such conduct was likely to cause affront or alarm to a child less than fourteen years of age." (L.F. 15-28).

Despite his Motion to Dismiss and/or Request for a More Definite Statement (L.F. 42), Appellant was not provided with any more specific date for any of the allegations in the Complaint (and later Indictment), which were not even filed until almost a year after the period during which the incidents were alleged to have occurred. (L.F. 13-16, 26-27). Additionally, Appellant was provided no specific description of the "manner" of the alleged exposure which was deemed by the prosecutors to constitute the criminal conduct.

However, it is undisputed that these charges were based on the uncorroborated allegations of one student and two former students at Patrick Henry Elementary School who each testified to separate incidents where they witnessed Appellant relieving himself in a urinal in the restroom and caught a glimpse of his penis as he did so or as he was

zipping his trousers. There were no allegations that Appellant made any offensive comment to the boys or that he touched them or even approached them in any manner. Nor were there any allegations that Appellant fondled himself or held his genitals out for display. In addition, other students who were present at the same time as these alleged incidents made no similar complaints and none were called as witnesses at Appellant's trial. (T. 330-332, 350, 369, 462) Nevertheless, on the heels of very substantial adverse media coverage, and the denial of a continuance or change of venue, the jury found Appellant guilty of all four counts and recommended a prison sentence of four years on each count. (LF 137-140) The Court thereafter sentenced him to an aggregate term of twelve years in the Missouri Department of Corrections.

B. BACKGROUND EVIDENCE

James A. Beine (known as Dr. James) was employed as a school counselor at Patrick Henry Elementary School in a low income area of the City of St. Louis. One of his duties required him to monitor the halls and restrooms to prevent violent or disruptive behavior. (T. 444, 619-620) School policy and practice required male staff members to enter the boys' restroom to maintain order and to assure compliance with the rules. (T. 733-734)

During the eight-month period alleged in the Indictment, the school did not have any designated restroom for male faculty and staff. (T. 609, 678-679) Staff and parents routinely used the nearest restroom and there was no policy about adults using the same restrooms as students. (T. 535-536, 609, 728, 737-738) Even the principal, Mr. Washington, occasionally used the boys' restroom at issue, (T. 456, 683, 737), and,

other than the complaints giving rise to the charges herein, there had never been any complaints about the use of the restroom by adults. (T. 682-683, 728)

However, sometime in early 2001, a teacher, Ms. Davis, told the principal that her students were "uncomfortable" with Dr. James in the restroom. (T. 734-735) This allegation resulted in the principal and several staff members meeting with Ms. Davis' class, including Charles Marble and Kevin Latimore who would later make the allegations contained in the Indictment. However, at the meeting with the principal, neither of those students alleged that Dr. James had exposed himself while urinating. (T. 674-75, 732) Charles Marble said only that he thought that Dr. James was looking at his "stuff" and that he felt "uncomfortable" using the restroom when Dr. James was present. (T. 676, 732, 736) After resolving Ms. Davis' unfounded complaint, Mr. Washington and several staff met with Charles' mother, Terri Brock, regarding restroom use. (T. 635)

Shortly thereafter, the same teacher, Ms. Davis, confronted Dr. James in front of students regarding his attempts, as one of several restroom monitors, to restore order after Ms. Davis had sent a number of her students to the restroom at the same time. (T. 671-673) This resulted in a second investigation and a reprimand being issued to Ms. Davis for her unprofessional conduct. (T. 675, 681-682, 694, 695)

After Ms. Davis' confrontation with Appellant, Ms. Brock complained to the school district and met with Associate Superintendent Dr. Ann Russek, Teacher Union representative Diane Rome, Principal Lloyd Washington and several staff. (T. 637) At that May 2001 meeting, Ms. Brock's concern was that adults were permitted to use the restroom at the same time as students, including her son, Charles. Ms. Brock was

dissatisfied with the school district's investigation and outcome of this meeting and contacted the police who investigated but found no criminal violations. (T. 634-635, 640, 753)

Unrelated to Ms. Brock's complaints, Tara Dudley, the mother of another student, met with Dr. James and school staff members in May 2001 to discuss her son Kevin Latimore's disruptive playground behavior, but nothing was said at that meeting regarding any inappropriate conduct by Dr. James. (T. 439, 442)

Sheree Lee, the Instruction Coordinator for Patrick Henry School, testified about meetings with Ms. Brock, Ms. Dudley, Charles Marble, Kevin Latimore and other students. She stated that neither Charles nor Kevin had said anything about Dr. James exposing himself or urinating in their presence.

The following clarifying questions were asked of Ms. Lee:

Q. But Charles Marble didn't say anything about peeing in an arch?

A. No.

Q. Latimore didn't say anything about peeing in an arch?

A. No.

Q. And neither Latimore nor Marble said anything at all about seeing Doctor Beine urinating or exposing himself?

A. No. (T. 732)

Ms. Lee testified emphatically that no students ever made statements at these meetings about Appellant or anyone else exposing themselves "That word was never used, nothing like that. Never." (T. 730)

Similarly, Principal Washington testified, "I never got the impression in talking to any of the children that Dr. James exposed himself to any children in that bathroom." (T. 699) According to the Principal, there were no such allegations at all during the meetings. (T. 703) Specifically, Washington testified that Charles Marble did not say that he saw Dr. James urinating at any time (T. 676), and that Kevin Latimore did not say anything whatsoever about Dr. James exposing himself. (T. 674) Regarding both Charles and Kevin, Washington stated that neither boy had any complaint of this nature. (T. 675)

After these two inquiries on two different occasions, Dr. James was directed to continue to monitor the restrooms (T. 678, 727), apparently to the dissatisfaction of Ms. Davis and Terri Brock, the mother of Charles Marble, who transferred her sons to another school. (T. 638-639) However, Kevin Latimore, Tara Dudley's son, continued to attend Patrick Henry School throughout the following school year (2001-2002) without incidents or complaints regarding Dr. James. (T. 443, 446)

Approximately a year later, in March 2002, amid much media coverage of the scandals involving sexual abuse of children by Roman Catholic priests, Terri Brock, who learned that Dr. James had once served as an Archdiocesan priest, contacted the media and then met with the Circuit Attorney, Jennifer Joyce. (T. 639-640, 643)

After meeting with Ms. Brock, the Circuit Attorney's Office, on March 27, 2002, without further investigation, issued a Complaint charging Dr. James with three counts of indecent exposure which were alleged to have occurred "between September 2000 and April 2001." Two counts (which were identical) alleged such exposure to Charles

Marble, and the third alleged exposure to his brother Jeremy Marble. (L.F. 15-16) At that point there were no allegations regarding Kevin Latimore.

However, late on the same night of March 27, 2002, St. Louis police detectives went to Dr. James' residence in Highland, Illinois, to arrest him on the newly issued Complaint, although they had no warrant or any other legal process from the State of Illinois. (T. 505, 539-545). At the trial, the circumstances surrounding this arrest became a central part of the state's case and, over Appellant's objections and Motion in Limine, (L.F. 91) several officers testified at length about attempts to wake Appellant, the eventual forced entry to the home and the fact that Appellant was found in a large windowless closet with a sleeping pallet and a blanket. (T. 555, 561) The officers stated, however, that Appellant did not in any way resist arrest or fight with police. (T. 538)

Carrie Finley, Appellant's landlord in Highland, testified that he had resided there since 1997. She noted that Appellant often slept in the very large walk-in closet which is virtually soundproof to avoid noise from the neighbors. (T. 497) Nevertheless, the state was permitted to introduce evidence of the circumstances of his arrest to show his "attempted flight." The court denied Appellant's written Motion in Limine on this issue. (L.F. 506) even after conducting a hearing during which the circumstances of Appellant's residence and sleeping conditions, as well as the acoustical characteristics, were explained by Ms. Finley: "This house like I say, has triple thick brick walls and stucco all over that … if you're upstairs and somebody is ringing the doorbell, pounding on the door downstairs it's hard to hear them." (T. 503)

After news accounts of Appellant's arrest, Tara Dudley brought her son Kevin

Latimore to the Circuit Attorney and alleged that Dr. James had exposed himself in the restroom to Kevin. (T. 446) This new allegation resulted in a fourth count of sexual misconduct being alleged in the Indictment which was returned on June 14, 2002. (L.F. 26) Thus, the Indictment contained four counts, two involving Charles Marble which counts were literally identical since they both alleged that the offenses occurred sometime during an eight-month period, September 2000 to April 2001, with no specific dates. A third count named his brother Jeremy Marble. The fourth count named Kevin Latimore.

All four counts alleged that sometime during an eight-month period, Appellant had committed sexual misconduct on three separate occasions in that he "knowingly exposed his genitals to (the alleged victim)…and did so in a manner that would cause a reasonable person to believe that such conduct was likely to cause affront or alarm to a child less than fourteen years of age" in violation of Section 566.083 R.S.Mo.

Appellant filed an appropriate Motion to Dismiss or For a More Definite Statement, noting that none of the counts "recite or give any precise date in an eight-month period when these occurrences allegedly occurred nor did they recite the manner in which they occurred." (L.F. 42) The motion also noted that the indictment failed to allege how "the Defendant was likely to cause 'affront or alarm' to a child less than 14 years of age, particularly considering the evidence that the Defendant made no statement to any of the alleged victims, did not advance upon them and that they simply viewed his penis while Defendant was urinating." (L.F. 43) This Motion was renewed prior to trial after the depositions of the witnesses still had not remedied the uncertainty as to the dates of the alleged offenses. (L.F. 79) The Motion was again renewed, but denied, as part of

Appellant's Oral Motion for a directed verdict of acquittal at the close of the state's case. (T. 665-667)

Appellant's supplemental written Motion, filed by leave of Court, also asserted that "the term and description 'would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child' is substantially vague and overbroad and therefore unconstitutional, both as to the definition of 'alarm' and as to the substitutional belief of whether an adult would believe the conduct would produce alarm in a child." (L.F. 98) This motion was acknowledged by the Court to be timely, but was overruled. (T. 746)

This constitutional argument was again asserted in the Motion for Directed Verdict at the Conclusion of the Entire Case (L.F. 101) and in Appellant's Motion for New Trial. (L.F. 153) The trial court rejected these arguments and denied each of these motions. (T. 746)

While awaiting trial, however, Appellant was convicted in federal court with possession of child pornography. This conviction was later overturned by the Eighth Circuit Court of Appeals, and the case was dismissed by the District Court [1]. However, that case, and the conviction which occurred in March 2003, received very substantial media coverage including mistaken references to Appellant as a "defrocked" priest and allegations about civil cases against Appellant and the St. Louis Archdiocese.

This media blitz resumed in June 2003 when Appellant was sentenced in Federal Court and when the U.S. Conference of Catholic Bishops held a week-long conference in

St. Louis, Missouri to discuss the "priest sexual abuse scandal." In fact, the trial in this case occurred during the same week as that Bishops' Conference which took place just blocks from the Courthouse. All this resulted in extensive media coverage during each day and evening of the trial.

Defense counsel raised these concerns prior to and throughout the trial; however, the trial court denied Appellant's motion for change of venue, motion to continue the trial, motion to sequester jurors, and repeated motions for mistrial due to ongoing prejudicial media coverage. (L.F. 77) Instead, the trial proceeded before a jury which had been and continued to be exposed to publicity regarding "The Priest Sexual Abuse Scandal" and Appellant's conviction and sentence in the federal court.

C. EVIDENCE ON COUNT I – JEREMY MARBLE

According to the State's evidence, on one occasion, Appellant was using the restroom as Jeremy Marble walked in and used the urinal next to Appellant. (T. 348) Jeremy finished before Dr. James, then washed his hands. (T. 347-350) Jeremy did not see Dr. James' penis while he was at the urinal. "I didn't see him pee." (T. 372)

While Jeremy was washing his hands, other children entered the restroom. They were "talking real loud." (T. 350, 369-370). Jeremy testified that Dr. James turned and "told them to shut up." (T. 350, 357-358) Jeremy repeatedly testified that Dr. James "hurried up and zipped up his pants." (T. 350-352).

Jeremy testified that he saw Dr. James' "private part" while Dr. James was zipping his pants not while he was urinating. (T. 351, 358, 363). Jeremy described his reaction

[1] United States v. Mar James, 353 F.3d 606 (8th Cir. 2003); No. 4:02CR224 (E.D.Mo.)

as follows:

A. Then he hurried up and zipped it back up.

Q. What did you do when that happened?

A. I just turned around.

Q. What did you think when you saw that?

A. I don't know.

Q. How did that make you feel?

A. Disgust. (T. 352)

. . . .

Q. You were asked a question about being mad at him. Were you mad at him?

A. Yeah. I didn't use the word – I used the word upset.

Q. Why were you upset?

A. Because he – he turn around and say "shut up." (T. 374)

Dr. James said nothing else to Jeremy. (T. 356, 358)

D. EVIDENCE ON COUNTS II AND III – CHARLES MARBLE

Jeremy Marble's brother Charles Marble was in fourth grade (T. 337-339), the same class as Kevin Latimore. Charles discussed two incidents on which he alleged he saw Appellant's penis as Appellant was standing at a urinal. Charles alleged that on the first occasion he was in the restroom with Kevin Latimore. (T. 471) The alleged second time Charles claimed he was alone. (T. 477) Charles stated that he was washing his hands and about to leave. (T. 461-462) Dr. James came into the restroom, went up to a urinal, then stepped back three or four feet, urinating in or on top of the urinal. (T. 457-

458, 458-461, 474-475). However, Kevin previously stated that Appellant never stepped back. (T. 424). While at the sink, Charles and Dr. James were not facing each other, and Charles did not turn around and look. (T. 476) Despite that, Charles stated that when Dr. James was urinating, Charles saw Dr. James' "private part." (T. 458-459, 464) (Given the physical layout of the restroom, Charles' testimony was shown to be impossible. See Exhibits A-1 through A-10, Appendix A-26-30). Charles said he left when he saw Appellant's "private part." (T. 462). The prosecutor twice asked "how did that make you feel when you saw that?" Charles answered both times in a single word, "Uncomfortable." (T. 459, 464)

Charles stated that when Dr. James was urinating, he did not look at or speak to the boys. He never touched them, advanced on them or got "in their face." (T. 464, 477, 482 & 484) Dr. James was simply looking where he was urinating. (T. 483) Charles could not remember in what month these events allegedly took place. (T. 465, 476)

Charles claims the "same thing" happened twice, and that he told his mother on the same day it happened. (T. 466, 476, 490-491) However, he does not suggest that he told his mother on two separate occasions. Ms. Brock, the mother of Jeremy and Charles, advised the police her sons did not tell her until some time later (T. 653), and then only after she tricked Charles into discussing it. (T. 529, 629-630, 650-651). Charles adamantly denied that this occurred. (T. 466, 475, 476, 485, 489-491) Ms. Brock testified that the alleged incidents could have occurred in May of 2000. (T. 653) No medical or psychological treatment was sought or provided for the boys. (T. 446-447, 528-529, 662)

E. EVIDENCE ON COUNT IV – KEVIN LATIMORE

Kevin Latimore was a fourth grade student at Patrick Henry during the 2000-2001 school year. (T. 379) His testimony in this case was in some respects self-contractory and in conflict with that of Charles Marble. First, on direct examination, Kevin stated that he was alone in the bathroom and had finished using the facilities. (T. 387-388)

He said he was about to leave the restroom when Dr. James entered, stood four or five feet from a urinal, and urinated into it. (T. 388, 424) When he saw this, Kevin left the restroom. (T. 388-391) Kevin stated that as he was leaving he saw Appellant's "private part" as Kevin was leaving and felt "embarrassed." (T. 391-392) Again, given the physical layout, it was shown that this sequence of events would have been impossible. (See: Exhibits A-1 through A-10, Appendix A-26-30)

However, on cross examination, Kevin changed his story and said that he was in the restroom with Charles Marble. Kevin said Charles had entered the restroom first and was already there when Kevin entered. (T. 400, 402) Charles later testified that Kevin was in the restroom first (T. 473, 387). Kevin now said that while he was at the urinal, Dr. James entered the restroom, and stood four or five feet back. (T. 386, 424) On cross-examination, Kevin had Dr. James standing at the urinal to his farthest left, then an open urinal, and then Kevin and Charles stood next to each other (T. 403). In his testimony, Charles put Dr. James standing at a urinal between Charles and Kevin. (T. 473, 474, 487) Kevin testified that he did not see Dr. James' penis while they were at the urinals, but as Kevin turned to walk from the urinal to the sink, he saw it. (T. 415) He washed

his hands and said he did not look back. (T. 416, 427) He then dried his hands and left. Kevin said that Charles had already left. (T. 403-405, 415-417) Yet, Charles stated that it was Kevin who left first. (T. 487) However, both agreed that Dr. James did not say anything to Kevin or Charles. (T. 393, 464, 417) Kevin said he could not recall when this happened during the 2000-2001 school year. (T. 397-399)

F. TRIAL AND POST TRIAL MOTIONS AND SENTENCING

As noted, Appellant filed a Motion for Directed Verdict at the Conclusion of the State's Case, and a Motion for Directed Verdict at the Conclusion of the Entire Case. (L.F. 97-100, 101-104) Both motions raised, inter alia, the constitutional issue asserted herein but the motions were denied. On June 19, 2003, the jury returned a verdict of guilty on all four counts and recommended the maximum sentence of four years imprisonment on each verdict form. (L.F. 137-140)

Appellant filed a Motion for New Trial or for Directed Verdict of Acquittal and noted that none of the alleged victims had claimed to have been "affronted or alarmed," as those terms have been defined (L.F. 150-158), and again asserting the constitutional issues raised in this appeal. On September 15, 2003, the court denied the motion for new trial immediately prior to sentencing. The court then sentenced Appellant to an aggregate sentence of twelve years in prison. (L.F. 162-165) A timely notice of appeal was filed on September 25, 2003. (L.F. 167-176)

POINTS AND AUTHORITIES

I. THE COURT ERRED IN REFUSING TO DISMISS THE CHARGES ON THE BASIS OF THE DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION BECAUSE MISSOURI STATUTE 566.083(1), SEXUAL MISCONDUCT INVOLVING A CHILD, IS UNCONSTITUTIONALLY VAGUE AND SUBSTANTIALLY OVERBROAD ON ITS FACE, AND PARTICULARLY AS APPLIED TO APPELLANT, BECAUSE IT PENALIZES INNOCENT CONDUCT, CONTAINS NO REQUIREMENT OF SPECIFIC INTENT OR MENS REA, ITS LANGUAGE IS NOT SUFFICIENTLY DEFINITE TO ALLOW A REASONABLE PERSON THE REQUISITE NOTICE OF WHAT IS PROHIBITED, AND ALLOWS THE ARBITRARY AND SELECTIVE PROSECUTION OF PERSONS ENGAGED IN HARMLESS CONDUCT WHICH PROSECUTING AUTHORITIES LATER FIND OFFENSIVE.

State v. Moore, 90 S.W.3d 64 (Mo. 2002)

Colautti v. Franklin, 439 U.S. 379 (1979)

Graynard v. City of Rockford, 408 U.S. 104 (1972)

Kolender v. Lawson, 461 U.S. 352 (1983)

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AS RENEWED WITH HIS MOTION FOR NEW TRIAL BECAUSE THERE WAS INSUFFICIENT EVIDENCE BY WHICH THE JURY COULD FIND BEYOND A REASONABLE DOUBT THAT HIS CONDUCT WOULD CAUSE A REASONABLE ADULT TO BELIEVE THAT THE CONDUCT WAS LIKELY TO CAUSE AFFRONT OR ALARM TO A CHILD LESS THAN FOURTEEN YEARS OF AGE, IN THAT THERE WAS NO EVIDENCE THAT APPELLANT'S NECESSARY EXPOSURE OF HIS GENITALS IN ORDER TO URINATE WAS DONE IN ANY MANNER LIKELY TO CAUSE AFFRONT OR ALARM TO SUCH A CHILD AND NO EVIDENCE THAT ANY OF THE CHILDREN PRESENT WERE ACTUALLY AFFRONTED OR ALARMED, AND NO EVIDENCE OF ANY SEXUAL MISCONDUCT WITH RESPECT TO THE FACT THAT APPELLANT USED THE URINAL IN A PUBLIC RESTROOM IN THE PRESENCE OF YOUNG BOYS.

State v. Kelly, 43 S.W.3d 343, 350 (Mo. App. 2001)

State v. Calicotte, 78 S.W.3d 790 (Mo. App. 2002)

United States v. Lanier, 520 U.S. 259, 266 (1997)

State v. Moore, 90 S.W.3d 64 (Mo. 2002)

III. THE TRIAL COURT ERRED AND DENIED APPELLANT HIS FUNDAMENTAL RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY BECAUSE IT DENIED APPELLANT'S MOTIONS FOR CHANGE OF VENUE, FOR CONTINUANCE, FOR JURY SEQUESTRATION, AND FOR A MISTRIAL, AND BY FAILING TO REMOVE FROM THE JURY PANEL A CLEARLY BIASED JUROR IN THAT THE MEDIA FRENZY SURROUNDING APPELLANT'S FEDERAL CONVICTION FOR POSSESSING CHILD PORNOGRAPHY, THE CONCOMITANT NATIONAL BISHOPS' CONFERENCE REGARDING THE PRIEST ABUSE SCANDAL, REFERENCES TO APPELLANT AS A DEFROCKED PRIEST, AND A JUROR'S SOCIAL FRIENDSHIP WITH THE CIRCUIT ATTORNEY AND THE CHIEF OF POLICE AND HIS WIFE, SEVERALLY AND JOINTLY DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL AND IMPARTIAL JURY, AS FURTHER EVIDENCED BY AN ENHANCED SENTENCE UNSUPPORTED BY AGGRAVATING FACTORS.

Trinity Lutheran Church v. Lipps, 68 S.W.3d 552, 557 (Mo. App. 2001)

State v. Hadley, 815 S.W.2d 422, 425 (Mo. banc 1991)

State v. Belcher, 805 S.W.2d 245 (Mo. App. 1991)

IV. THE COURT ERRED IN ALLOWING THE TESTIMONY OF POLICE OFFICERS GARY THOMPSON, DAVID SEEFELDT AND DARREN TWYFORD REGARDING THE CIRCUMSTANCES OF APPELLANT'S ARREST IN HIGHLAND, ILLINOIS BECAUSE THE PREJUDICIAL EFFECT OF THIS EVIDENCE OUTWEIGHED ANY PROBATIVE VALUE, IN THAT THE TESTIMONY WAS IRRELEVANT TO ANY ISSUE BEFORE THE COURT, COULD NOT BE JUSTIFIED BY PROOF OF FLIGHT, AND CONSTITUTED EVIDENCE TANTAMOUNT TO CHARACTER AND REPUTATION EVIDENCE CALCULATED SOLELY TO INFLAME THE JURY.

State v. Myrick, 473 S.W.2d 402 (Mo. 1971)

State v. Watson, 968 S.W.2d 249 (Mo. App. 1998)

State v. Chambers, 898 S.W.2d 402 (Mo. App. 1995)

State v. Cole, 887 S.W.2d 712 (Mo. App. 1994)

ARGUMENT

I. THE COURT ERRED IN REFUSING TO DISMISS THE CHARGES ON THE BASIS OF THE DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSITUTION BECAUSE MISSOURI STATUTE 566.083(1), SEXUAL MISCONDUCT INVOLVING A CHILD, IS UNCONSTITUTIONALLY VAGUE AND SUBSTANTIALLY OVERBROAD ON ITS FACE, AND PARTICULARLY AS APPLIED TO APPELLANT, BECAUSE IT PENALIZES INNOCENT CONDUCT, CONTAINS NO REQUIREMENT OF SPECIFIC INTENT OR MENS REA, ITS LANGUAGE IS NOT SUFFICIENTLY DEFINITE TO ALLOW A REASONABLE PERSON THE REQUISITE NOTICE OF WHAT IS PROHIBITED, AND ALLOWS THE ARBITRARY AND SELECTIVE PROSECUTION OF PERSONS ENGAGED IN HARMLESS CONDUCT WHICH PROSECUTING AUTHORITIES LATER FIND OFFENSIVE.

Standard of Review - This constitutional challenge being a legal issue, a De Novo review is required. Baldwin v. Director of Revenue, 38 S.W.3d 401, 405 (Mo. 2001). See also: Bose Corp v. Consumers Union of United States, Inc., 466 U.S. 485,

503-511 (1984).

Missouri statute § 566.083 provides in pertinent part: (Appendix A-7)

> A person commits the crime of sexual misconduct involving a child if the person:
>
> (1) Knowingly exposes 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 the conduct is likely to cause affront or alarm to a child less than fourteen years of age;

Obviously, this statute was not intended to prohibit all exposure of a person's genitals to children under fourteen (if so, the YMCA would be in deep trouble). Instead, the legislature attempted to narrow the class of conduct made criminal by a requirement that the exposure be "in a manner that would cause a reasonable adult to <u>believe</u> that the conduct is <u>likely</u> to cause <u>affront</u> or <u>alarm</u> to a child less than fourteen years of age."

Unfortunately, this effort still leaves a great deal of otherwise innocent conduct to the subjective judgment of those who enforce and apply the law. **Unlike subsections (2) and (3) of this statute, subsection (1), as written, does <u>not</u> require that there be an evil "purpose" or specific intent in the exposure. In fact, the only mental requirement is that the "exposure" itself be "knowingly" done.** Moreover, there is no requirement that the exposure be accompanied by words or gestures or that it even be out of the ordinary or suggestive. All that is required is that the exposure be such as would cause another person (not the victim) to believe that the conduct is "likely to" (not necessarily that it does) cause affront or alarm to a child less than fourteen years old.

A. <u>BROAD REACH OF STATUTE AS WRITTEN</u>

Read in its broadest sense, an individual would violate the statute by disrobing in a

common locker room or in one's home if sight of his genitals, in someone's opinion, is "likely to cause affront or alarm" to a child less than 14 years old. Literally read, there is not even a requirement that the exposure actually cause "affront or alarm" as long as some "reasonable person" believes that it is likely to do so.

This, of course, makes no account for cultural, emotional or religious differences or for the particular context in which the exposure occurs[2]. For example, a 17 or 18 year old who goes skinny dipping in a river or creek with his younger brother and friends under 14 could be prosecuted if someone else "believed" his conduct was "likely" to cause "affront or alarm" to the younger boys, no matter who those boys were and no matter what his intentions were. By analogy to this case, such a prosecution would be

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[2] The extent of cultural variances in attitudes towards nudity was noted in a 1995 article in the Columbia Journal of Law and Social Problems:

> Public recreational nudity is an increasingly popular activity in the United States. Approximately thirty-three million people have reportedly engaged in some form of social nudism. An estimated sixty thousand Americans belong to "clothing-optional" organizations such as the Naturist Society or the American Sunbathing Association. **** In New Jersey, the federal government recently authorized a stretch of Gateway National Recreation Area as clothing-optional.
>
> Narvil, J.C., Revealing the Bare Uncertainties of Indecent Exposure, 29 Colum. J.L. & Soc. Probs. 85, 87 (Fall 1995) (Footnotes omitted).

particularly plausible if one of the boys or his parents later became angry, for whatever reason, and decided that what the boy saw at the "swimming hole" caused him (or was "likely" to cause him) "affront or alarm." A well endowed farmer might run the same risk if he used a trough or other open type urinal sometimes seen at county fairs (and older ball parks such as Wrigley Field). Someone may determine that it was "likely" that a suburbanite ten year old witnessing this would be "affronted or alarmed," particularly, if, as alleged in this case, the poor farmer (or Cubs fan) was not standing close enough to the urinal to satisfy the sensibilities of the prosecutors.

B. WHAT IS "AFFRONT OR ALARM"?

Moreover, the words "affront or alarm" are quite indefinite in themselves. Addressing a different statute, § 566.095 making it a misdemeanor to solicit sexual conduct where the solicitation is "likely to cause affront or alarm," the Missouri Supreme Court relied upon the definitions found in Webster's Dictionary and noted that "affront" is defined as "a deliberately offensive act or utterance, an offense to one's self respect". "Alarm" is defined as "apprehension of an unfavorable outcome, of failure or dangerous consequences; an occurrence of excitement or apprehension." State v. Moore, 90 S.W.3d 64, N.6 (Mo. 2002). Of course, the jury is not provided with a definition of either "affront" or "alarm" so they would not have the benefit of any dictionary guidance.

The Court in Moore concluded that § 566.095 would survive Defendant's First Amendment/Free Speech (over breadth) challenge because:

> **In the context in which "affront" and "alarm" are used in section *566.095*, what is prohibited are sexual requests or solicitations**

> **that the defendant knows are likely to cause such a reaction. To be impolite is not enough. To be annoying is insufficient. The words "affront or alarm" convey, respectively, a deliberate offense or a feeling of danger. At the least, real emotional turmoil must result.**
>
> While experiencing "affront or alarm" can be found after a defendant's verbal behavior has occurred, application of the statute cannot depend on the idiosyncratic reaction of the person whose sexual favors have been solicited. What are "circumstances in which he knows" *at the time he makes the request* that is "likely to cause affront or alarm?" If this is simply the law's way of saying a person should know better, it falls to the courts to ascertain, by reference to the statute's words, what the person should know in advance of his conduct.

Moore, supra at 67. (emphasis supplied)

In the context of the case before it, the Court in Moore concluded that a 61 year old man should know that soliciting sex from a 13 year old restaurant employee would most likely cause "affront or alarm," i.e.: a "feeling of danger" or "real emotional turmoil."

However, even in that case, one judge dissented because the Court had effectively rewritten and narrowed the statute limiting its application to clearly criminal conduct, such as solicitation of a minor. Justice Teitleman noted that utilizing such construction to save an otherwise unconstitutional statute was rejected by the U.S. Supreme Court in City of Houston v. Hill, 482 U.S. 451 (1987). See also: State v. Swoboda, 658 S.W.2d 24

(Mo. 1983), and State v. Carpenter, 736 S.W.2d 406 (Mo. 1987) in which the court declined to limit peace disturbance statutes so as to make them constitutional, and accordingly held them overly broad.

In the instant case, however, there is simply no way to construe § 566.083(1) to provide limits on prosecution to that conduct presumably intended by the legislature. While the gravamen of the offense, as applied in this case, appears to be the "manner" in which the exposure was done, there is nothing in the statute which would have told Appellant what "manner" of using a urinal was prohibited. Unlike Moore, supra, there was no "sexual request or solicitation", express or implied. Rather, this case presents a most vivid example on how such a vaguely worded statute can be given an expansive meaning to encompass harmless conduct committed without a demonstrated *mens rea*. Consequently, the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution, and that of Article 1, Section 10 of the Missouri Constitution, have been violated, particularly in the statute's application to Appellant.

C. ABSENCE OF A REQUIREMENT OF SPECIFIC INTENT OR MENS REA

Again, the only mental requirement of § 566.083(1) is that the exposure be "knowingly" done, not that it be done with a particular specific intent or purpose such as "for the purpose of arousing or gratifying the sexual desire of any person," as is required under subsections (2) and (3) of the same statute. Consequently, the jury, which convicted Appellant, was not instructed that it had to find some evil purpose of Appellant's conduct. (L.F. 105-129, Appendix A-8-11). (As noted, it also was not

instructed as to the meaning of either “affront” or “alarm” since those terms are not defined in the statute.)

While the statute could possibly be read to require that an individual "know" that the manner of his exposure was "likely to cause affront or alarm to a child" that is not what the jury was instructed. The first element of the verdict directing instruction required that there be a "knowing" exposure, but the second element required only that the manner of the exposure be such as would cause a "reasonable adult" to believe the conduct was likely to cause "affront or alarm" (L.F. 110, 112, 114, 116, Appendix A-8-11).

This, of course, is a different requirement than that required by §566.095, the statute addressed by the Court in Moore, supra. In order to violate §566.095, a person must actually know that his request or solicitation is likely to cause affront or alarm. Consequently, the Court’s rejection of a constitutional challenge in Moore does not solve the obvious problem with § 566.083(1).

The only mental state required under §566.083(1) is that the act of exposure itself be "knowingly" done and, of course, the word "knowingly" does not require scienter or mens rea, i.e.: it does not require proof that a Defendant knew he was doing something in violation of the law. See: United States v. Udofot, 711 F.2d 831, 835-37 (8th Cir. 1983); United States v. Enochs, 857 F.2d 491, 493 (8th Cir. 1988).

The absence of a requirement of a scienter in the statute, of course, makes it particularly vulnerable to the vagueness challenge asserted here. As the U.S. Supreme Court stated in Colautti v. Franklin, 439 U.S. 379, 395 (1979):

> **This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*.** See, for example, *United States v. United States Gypsum Co.*, 438 U.S. 422, 434-446, 98 S.Ct. 2864, 2873, 57 L.Ed.2d 854 (1978); *Papachristou v. Jacksonville*, 405 U.S., at 163, 92 S.Ct., at 843; *Boyce Motor Lines v. United States*, 342 U.S. 337, 342, 72 S.Ct. 329, 331, 96 L.Ed. 367 (1952). Because of the absence of a scienter requirement in the provision of directing the physician to determine whether the fetus is or may be viable, the statute is little more than a "trap for those who act in good faith." *United States v. Ragen*, 314 U.S. 513, 524, 62 S.Ct., 374, 379, 86 L.Ed. 383 (1942). (Emphasis supplied)

Additionally, the vagueness of the statute in this case was compounded by the vagueness of the indictment and, consequently, the jury instructions. The indictment alleged that all four offenses occurred sometime during an eight-month period and gave no specific as to how they had occurred. Appellant's request to remedy this with a bill of particulars was rejected, and the jury was given instructions which tracked the vague indictment and were identical as to each count except for the name of the victim. Of course, the two counts and two instructions as to Charles Marble were absolutely literally identical with no indication that the jury had to find separately with regard to separate Counts of the Indictment. (L.F. 112, 116) See: State v. Bowles, 360 S.W.2d 706 (Mo. 1962).

Consequently, as applied in this case, there is no way to save the statute without

running afoul of the United States Supreme Court criteria regarding the required definiteness of criminal statutes under the due process clauses of the Fifth and Fourteenth Amendments. Subsection (1) is therefore unconstitutionally vague and overbroad and should be so held.

In dealing with issues of vagueness and due process over the years, the Supreme Court has enunciated several notable principles based on the due process clauses of the Fifth and Fourteenth Amendments. These same principles, of course, apply under Article I, Section 10 of the Missouri Constitution.

D. LACK OF NOTICE

One concern with vague laws relates to the issue of notice. The older cases have used phrases such as "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926) (citations omitted). "It will not do to hold an average man to the peril of indictment for the unwise exercise of his … knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result," Cline v. Frink Dairy Co., 274 U.S. 445, 465, 47 S.Ct. 681, 687, 71 L.Ed. 1146 (1927); and "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939) See also United States v. Harriss, 347 U.S. 612,

617, 74 S.Ct. 808, 812; 98 L.Ed. 989 (1954).

The same criteria are applied by Missouri Courts in determining whether a statute complies with Article I, Section 10 of the Missouri Constitution, but in reviewing vagueness challenges, the language is to be evaluated by applying it to the facts at hand. State v. Entertainment Ventures I, Inc., 44 S.W.3d 383 (Mo. 2001).

E. ARBITRARY ENFORCEMENT

Second, the Court has said that laws must provide precise standards for those who apply them to prevent arbitrary and discriminatory enforcement, because "[w]hen the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Kolender v. Lawson, 461 U.S. 352 (1983), at 358, 103 S.Ct. at 1858 (citing Goguen, 415 U.S. 566 at 575, 94 S.Ct. at 1248). See also State v. Brown, 660 S.W.2d 694, 697 (Mo. 1983), State v. Young, 695 S.W.2d 882, 884 (Mo. 1985).

The personal predilections of the prosecutor in this case are apparent in his closing argument assessing in effect, that it was wrong for Appellant to use a urinal when there were boys under 14 present (T. 756). Obviously, the vagueness and breadth of the statute allowed such an argument.

A case which sums up vagueness as it relates to due process as succinctly as any other is Grayned v. City of Rockford, 408 U.S. 104 (1972). In that case, the Court explained as follows:

> It is a basic principle of due process than an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend

> several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' … than if the boundaries of the forbidden areas were clearly marked."

Grayned, 408 U.S. at 108-109, 92 S.Ct. at 2298-99 (citations omitted).

It seems obvious that the decision to arrest and prosecute Appellant for the conduct asserted, which was alleged to have occurred a year previously, and which did not involve physical harm, drugs or theft must have been influenced by the highly charged media treatment of the "priest sex abuse scandal." Had Appellant not been characterized (incorrectly) as a "defrocked priest" who had been the target of a major civil litigation, the pressure to buy into the public claims of a couple of hostile parents probably would not have been nearly so intense for the Circuit Attorney. However,

prosecutorial discretion should not be so broad as to permit a prosecution under a vague statute for such reasons. Clearly, the decision to prosecute under the circumstances of this case was fraught with "the attendant dangers of arbitrary and discretionary application" of such a law. Graynard, supra.

In fact, the "predilections" of the prosecutor in this case are evident, not only in the fact that a complaint was issued at all, but in the prosecutor's oral response to Defendant's Motion for a Directed Verdict:

> I believe Jeremy stated how he was caused—he did cause affront and alarm, and under the circumstances I believe that the evidence supports that, that anyone reviewing that as being alarming to a child at that age, and **the same holds true for the incident with Charles and Kevin and the circumstances which took place just him standing a few inches from the urinal, him standing back and deliberately exposing himself**. I believe the state has met their burden. (T. 666). (Emphasis supplied).

According to the prosecutor, standing even "a few inches" from the urinal would be a crime if an individual did not shield his "private part" from the sight of boys under 14.

As indicated, the prosecutor's closing argument is even more indicative of his "predilection" and opinion as to appropriate behavior:

> There are stalls available, there are children in the restrooms, there are stalls available. He could have gone off on the side, gone into the stall, nobody is going to see him, but he feels the need to go and use the urinal in front of

the other kid. (T. 756)

F. FIRST AMENDMENT IMPLICATIONS

Finally, while the instant case does not overtly involve a First Amendment Free Speech issue, since Appellant said absolutely nothing and did not intend to convey any "message," the only way the alleged conduct could be deemed criminal is if it had been intended to have some type of communicative effect on the alleged victims. The State is, therefore, claiming that what was done was "communication" of some perverse thought. Therefore, this case is not without First Amendment implications and most clearly involves a very private and "basic freedom" (i.e., the freedom to relieve oneself in a designated repository such as a urinal in a public restroom). Accordingly, an over breadth analysis is appropriate just as it was in Colautti, supra, which involved restrictions on abortions where there is "sufficient reason to believe that the fetus may be viable." Compare this to the language of § 566.083 prohibiting exposure "in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm."

However, even if there are no First Amendment implications involved herein, the statute must still be reviewed for vagueness in light of the facts in the case itself. United States v. Powell, 423 U.S. 87 (1975); State v. Hatton, 918 S.W.2d 790 (Mo. 1996). If this is done, the statute is clearly unconstitutionally vague as applied in this case and should be so held. The Trial Court, therefore, erred in denying Appellant's motions based on this constitutional challenge.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AS RENEWED WITH HIS MOTION FOR NEW TRIAL BECAUSE THERE WAS INSUFFICIENT EVIDENCE BY WHICH THE JURY COULD FIND BEYOND A REASONABLE DOUBT THAT HIS CONDUCT WOULD CAUSE A REASONABLE ADULT TO BELIEVE THAT THE CONDUCT WAS LIKELY TO CAUSE AFFRONT OR ALARM TO A CHILD LESS THAN FOURTEEN YEARS OF AGE, IN THAT THERE WAS NO EVIDENCE THAT APPELLANT'S NECESSARY EXPOSURE OF HIS GENITALS IN ORDER TO URINATE WAS DONE IN ANY MANNER LIKELY TO CAUSE AFFRONT OR ALARM TO SUCH A CHILD AND NO EVIDENCE THAT ANY OF THE CHILDREN PRESENT WERE ACTUALLY AFFRONTED OR ALARMED, AND NO EVIDENCE OF ANY SEXUAL MISCONDUCT WITH RESPECT TO THE FACT THAT APPELLANT USED THE URINAL IN THE PUBLIC RESTROOM IN THE PRESENCE OF YOUNG BOYS.

Standard of Review - The standard of review when addressing a claim of insufficiency of the evidence is whether there was sufficient evidence presented from which a reasonable juror could find Appellant guilty beyond a reasonable doubt. The

same standard applies to an appellate court's review of a claim that there was insufficient evidence to convict the Appellant of each of the charged offenses. State v. Goddard, 34 S.W.3d 436, 438 (Mo. App. 2000).

Nevertheless, it also must be recognized that the state, as a matter of due process, has the burden of proving each and every element of the criminal offenses charged and its failure to do so requires a reversal of any conviction obtained under those circumstances. State v. Kelly, 43 S.W.3d 343, 350 (Mo. App. 2001), State v. Calicotte, 78 S.W.3d 790 (Mo. App. 2002). Additionally, criminal statutes must be strictly construed and under the Rule of Lenity, any ambiguity in the statute must be resolved by applying it only to the conduct clearly prohibited by the statute. Citing the leading Supreme Court opinion in United States v. Lanier, 520 U.S. 259, 266 (1997), the Sixth Circuit Court of Appeals has described this Rule as follows:

> Next, we apply the cannon of strict construction, or the rule of lenity, which requires fair warning of the prohibited conduct and under which we must resolve any ambiguity in a criminal statute by applying it only to the conduct clearly described in the statute. *Id.* Finally, due process does not permit application of a novel construction of a criminal statute "to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.* The "touchstone" behind all of these concerns is an examination of the statute to determine whether, **either on its face or as construed**, the provision in question "made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267, 117

S.Ct. 1219. (Emphasis supplied).

United States v. Blaszak, 349 F.3d 881, 886 (6th Cir. 2003)

This process can involve the interpretation of the words used in a criminal statute and if a statute is unclear or ambiguous, the court must, as indicated, construe it strictly against the State. Goddard, supra at 438, 439. Moreover, "when the legislature enacts a statute referring to terms which have had other legislative or judicial meanings attached to them, the legislature is presumed to have acted with knowledge of these meanings." Boyd v. State Board of Registration for the Healing Arts, 916 S.W.2d 311, 315 (Mo. App. 1995).

In this situation, the Missouri Supreme Court has provided a definition of terms "affronted or alarmed," although this was done after the 1997 enactment of § 566.083 and after the alleged occurrences in this case. In the context of a different statute, the Court simply adopted the definitions found in Webster's Dictionary to find that "affront" means "a deliberately offensive act or utterance, an offense to one's self respect" and "alarm" as the "apprehension of an unfavorable outcome, of failure or dangerous consequences; an occurrence of excitement or apprehension." State v. Moore, 90 S.W.3d 64 n. 6 (Mo. 2002).

The Court stated that "To be impolite is not enough. To be annoying is insufficient. The words affront or alarm convey, respectively, a deliberate offense or feeling of danger. At the least, real emotional turmoil must result." It is in light of these definitions that the sufficiency of the evidence to sustain a conviction under § 566.083(1) must be evaluated.

In the instant case there was simply no evidence of any "deliberate" action to offend another's self-respect and there was certainly no "apprehension of failure or dangerous consequences." If using a urinal in the presence of boys under 14 is likely to cause "affront" or "alarm" as defined above, all male citizens may well be at risk. Moreover, the testimony in this case did not demonstrate either "affront" or "alarm" by the alleged victims.

Jeremy Marble testified that he felt "disgust" and that he was "upset" because Appellant told him to "shut up" (T. 374-375)

> Q. When you turned around from the urinal to walk to the sink he (Appellant) was apparently still going.
>
> A. And, like, two seconds after, and then, well then they come in and he start talking and then … like two seconds I was done, he was done, then the other guys were done, and then they washed their hands, and then that's when we was talking real loud. He said "shut up," he turned around, he zipped it back up, and that's when we left. (T. 369-370)
>
> ***
>
> A. I didn't see him pee.
>
> Q. You didn't see him pee, okay. And, therefore, you didn't see his penis when he was peeing did you?
>
> A. No. (T. 372)

Charles Marble stated that Defendant at no time looked at or spoke to him, but that seeing his penis made Charles feel "uncomfortable." (T. 464).

Q. Okay, just to make sure that we're real clear on that point. Now, you were able to see his private part?

A. Yes.

Q. Okay. And how did that make you feel?

A. Uncomfortable.

Q. Okay. And did he say anything to you when this was going on?

A. No.

Q. Okay. Did he look at you or anything like that?

A. No. (T. 464)

….

Q. Okay. When Doctor James stood back from the urinal and was peeing on these two occasions, did he say anything to anybody when he was doing that?

A. No.

Q. He was looking where he was peeing, wasn't he?

A. Yes. (T. 483)

Kevin Latimore said he felt "embarrassed" when, as he was leaving the restroom, he saw Appellant's private parts:

Q. Could you actually see his private part?

A. When I was leaving.

Q. Okay. And that was while he was peeing?

A. Yes, sir. (T. 391)

Asked why he left the restroom, Kevin stated simply "I don't like adults in the bathroom with me … I don't like adults with me when I'm using it. (T. 388)

Notably, none of these three witnesses expressed anything akin to something that would "offend their self respect," and none expressed any "apprehension of failure or dangerous consequences," and none expressed any "real emotional turmoil." Moore, supra.

At most, what each of these witnesses (if they are to be believed) described was Appellant walking into a public restroom, standing 3 to 4 feet away from a urinal, peeing into a urinal from that distance, and then zipping his trousers. Appellant said nothing offensive to any of them and did not turn or advance toward them. However, because during these alleged episodes, the boys caught a glimpse of Appellant's penis, he is now serving a sentence of twelve years in prison. Appellant's alleged and somewhat acrobatic method of relieving himself (if, indeed, a 60 year old man is still capable of a 3 to 4 foot arc) would have been foolish and distasteful in a school restroom, but it is certainly not such conduct as the legislature sought to prohibit with a four year sentence for each such occurrence.

Appellant submits, therefore, that even if §566.083(1) is not determined to be impermissibly vague, as it should be, then the definitions articulated by the Missouri Supreme Court in Moore, supra, should be applied. If this is done, then there was no evidence presented that any action of Appellant was such as "would cause a reasonable adult to believe that the conduct (was) likely to cause affront or alarm" to these witnesses. Indeed, the constitutional issues addressed in the previous section can be avoided if the

Court simply determines that under any reasonable interpretation of the statute no crime was proven.

Accordingly, it is submitted that an appropriate resolution of this case would be to determine that it is not necessary to confront the complex questions of vagueness addressed under the United States and Missouri constitutions because the facts in the record do not establish the commission of the crimes alleged. There was no "sexual misconduct" of any type proven by the mere fact that Appellant used the urinal in a common restroom in the presence of boys under 14 years old. Consequently, this Court should hold that the evidence was insufficient to sustain Appellant's conviction on each count and should order him discharged. The State simply has not proven that Appellant committed four felony offenses of Sexual Misconduct involving children.

III. THE TRIAL COURT ERRED AND DENIED APPELLANT HIS FUNDAMENTAL RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY BECAUSE IT DENIED APPELLANT'S MOTIONS FOR CHANGE OF VENUE, FOR CONTINUANCE, FOR JURY SEQUESTRATION, AND FOR A MISTRIAL, AND BY FAILING TO REMOVE FROM THE JURY PANEL A CLEARLY BIASED JUROR IN THAT THE MEDIA FRENZY SURROUNDING APPELLANT'S FEDERAL CONVICTION FOR POSSESSING CHILD PORNOGRAPHY, THE CONCOMITANT NATIONAL BISHOPS' CONFERENCE REGARDING THE PRIEST ABUSE SCANDAL, REFERENCES TO APPELLANT AS A DEFROCKED PRIEST, AND A JUROR'S SOCIAL FRIENDSHIP WITH THE CIRCUIT ATTORNEY AND THE CHIEF OF POLICE AND HIS WIFE, SEVERALLY AND JOINTLY DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL AND IMPARTIAL JURY, AS FURTHER EVIDENCED BY AN ENHANCED SENTENCE UNSUPPORTED BY AGGRAVATING FACTORS.

Standard of Review - The denial of a continuance, change of venue, juror challenge, or juror sequestration are generally subject to an abuse of discretion standard. However, "when the facts are undisputed, as in this case, and can result in only one

reasonable conclusion, the matter is a question of law" requiring De Novo review. Trinity Lutheran Church v. Lipps, 68 S.W.3d 552, 557 (Mo. App. 2001).

The constitutions of the United States and the State of Missouri guarantee every citizen the fundamental right to be tried by a fair and impartial jury. U.S. Const. Amend. VII; Mo. Const. Art. I, § 22(a) – "That the right of trial by jury as heretofore enjoyed shall remain inviolate." These rights in a criminal proceeding include the right to have twelve impartial jurors reach a unanimous concurrence in the verdict. State v. Hadley, 815 S.W.2d 422, 425 (Mo. banc 1991). The trial court denied Appellant this right.

The trial court was keenly aware of the problems likely to result from the intense publicity that surrounded this case. (T. 2-12, 223-228, 431, 798-799). The judge expressed concern about a reporter "snooping around the jury causing trouble," and the danger of "inexperienced reporters or reporters that don't have a high level of ethics will approach jurors." (T. 10) The court stated:

> Our big thing here is, the pretrial publicity thing?
>
> ….
>
> And we'll fly or we'll sink on that, and everything else will be secondary to that point. (T. 10)

The court noted stories, which on the morning of trial discussed not only this case, but also a federal felony child pornography sentence, which had been imposed only 10 days before. (T. 2) (The federal conviction was later reversed, and the case was dismissed by the U.S. District Court on February 26, 2004, No. 4:02 CR 224 JCH). The court repeatedly discussed his concern that this publicity charged environment would

jeopardize the right to a fair trial. (T. 10-11)

Notwithstanding these serious concerns, the trial court did not sequester the jurors. (T. 225) A jury can and should be sequestered in any case if it is necessary to assure a fair trial. R.S.Mo. § 494.495. The decision to sequester the jury lies within the trial court's discretion. State v. Belcher, 805 W.W.2d 245 (Mo. App. 1991). The trial court abused its discretion in failing to do so.

On the evening of the first day of trial and on the morning of the second day, numerous television, radio and written news stories with pictures discussed the ongoing trial as well as the federal child pornography case. A lengthy article in the local paper read "Trial of ex priest accused in sex case begins today" and made reference to Appellant's conviction for possessing thousands of illegal child pornography images. The article went on to note the Archdiocese of St. Louis "dismissed Beine from the priesthood" over allegation of child molestation which resulted in the payment of large settlements. (T. 223-225, 226, 799). Appellant moved for a mistrial in light of this continuing and extensive prejudicial media coverage, but that request was denied.

After the second day of trial, the media frenzy intensified. Reports emerged concerning the testimony at trial on the second day. Again they linked the charges in this case with the federal felony conviction and sentence, the civil settlements for sexual misconduct while he was a priest for the Archdiocese of St. Louis, and his status as a "defrocked priest." (T. 429-432) Defense counsel moved for a mistrial and renewed his motion for change of venue, stating the obvious, "I'm not sure that despite our best efforts that the jury is going to be able to ignore this." (T. 430) Once again Appellant's

motions were denied. Similar articles were published after the third day of trial. (T. 709-712) However, trial counsel's renewed motion for a mistrial was denied. (T. 711-712) Based on the overwhelming undue prejudice created by this media frenzy, the trial court erred in failing to grant Appellant's repeated Motions for Mistrial. In the end, Appellant was denied a fair trial. Appellant was convicted by the media, not by the evidence presented or by a properly informed and unbiased jury.

The trial court also committed plain error not removing Juror Number 12, Ms. Terri Mason, from the venire panel. Ms. Mason stated that she was a long time social friend of Jennifer Joyce, the Circuit Attorney for the City of St. Louis, and handled her campaign. (T. 127, 229) They had gone out socially, and Ms. Joyce was even dating a friend of hers. (T. 127-28) Ms. Mason was also a friend of both Joseph Mokwa, the Chief of Police for the St. Louis Metropolitan Police Department, and his wife Mrs. Jan Mokwa. (T. 297)

Finally, one need look no further than the jury verdict to see the failure of the trial court's obligation to assure a trial by a fair and impartial jury. There were no real aggravating factors present to justify the verdict. In fact, mitigating factors presented demanded that only the presumptive sentence could have been appropriate. This is common sense. Instead, the jury recommended a sentence of 4 years on each count, with full knowledge that the trial court could run each sentence consecutively. (T. 135-140, 790). For an offense that involved three boys getting a glimpse of someone's penis while using a public urinal, the potential 16 year sentence is inexplicable. The presumptive sentence was probation or 1 to 2 years in prison. (T. 803) The only possible explanation

for the jury's reaction is the fact that the media impact and the unrelated Catholic priest scandal tainted the jurors and deprived Appellant of his constitutional rights. It is respectfully submitted that the trial court judge must also have been motivated by media driven influence to sentence consecutively, with no basis in the record to so determine sentencing (T. 797-800).

By failing to sequester the jury, by denying Appellant's motions for a change of venue continuance and/or a mistrial, and by failing to remove panel members who could not be impartial, Appellant's fundamental rights were violated. This Court should reverse the conviction and order that a new trial should be granted.

IV. THE COURT ERRED IN ALLOWING THE TESTIMONY OF POLICE OFFICERS GARY THOMPSON, DAVID SEEFELDT AND DARREN TWYFORD REGARDING THE CIRCUMSTANCES OF APPELLANT'S ARREST IN HIGHLAND, ILLINOIS BECAUSE THE PREJUDICIAL EFFECT OF THIS EVIDENCE OUTWEIGHED ANY PROBATIVE VALUE, IN THAT THE TESTIMONY WAS IRRELEVANT TO ANY ISSUE BEFORE THE COURT, COULD NOT BE JUSTIFIED AS PROOF OF FLIGHT, AND CONSTITUTED EVIDENCE TANTAMOUNT TO CHARACTER AND REPUTATION EVIDENCE CALCULATED SOLELY TO INFLAME THE JURY.

Standard of Review - Rulings regarding the admission of evidence are subject to an abuse of discretion review. Bethesda Barclay House v. Ciarleglio, 88 S.W.3d 85, 92 (Mo. App. 2002).

Prior to trial, Appellant filed his Motion in Limine seeking to exclude any evidence about the circumstances of his arrest at his residence in Highland, Illinois, where he was found in a large walk-in closet after the police had tried unsuccessfully to wake him.

Specifically, the Motion stated:

Defendant would object to any reference to alleged flight or hiding from service of process by virtue of an Illinois arrest warrant or search warrant

> for the house in Highland, Illinois inasmuch as that was his regular place of residence at the time and there is no evidence that he fled from the scene of any incident nor that he was aware that process had issued to allow an arrest/search warrant on the premises where he resided in Highland Illinois approximately March 28-29, 2002. Said information or evidence is irrelevant to the issues and is not probative nor is it indicative of actual "flight". (L.F. 91)

As previously noted, a hearing was conducted on this Motion and objection during which Appellant's landlord testified that he had resided at her house in Highland since 1997 and that he often slept in a very large walk-in closet which is virtually soundproof. (T. 497-503)

Appellant argued that the proposed testimony was not evidence of flight since Appellant was in fact arrested at his own residence and there was no evidence that he was even aware of the complaint that had been filed earlier that same day. Nevertheless, the Court overruled the Motion while allowing it to be preserved throughout the disputed testimony. (T. 506)

The testimony of the three police officers regarding the arrest of Appellant consumes 35 pages of the trial transcript (T. 536-571) and includes descriptions of how the officers spent almost an entire night going to Appellant's residence, spending a "half hour" knocking on the door (T. 543) with another officer in the back hollering Appellant's name, (T. 544), then obtaining two different search warrants, and surrounding the house with a number of officers, spotlights and a bull horn, obtaining the

assistance of a K-9 unit (T. 552), kicking in the door and finding Appellant in the walk-in closet where he slept. (T. 564) He had a blanket on his lap and "he appeared to be cowering or withdrawn into the back of this closet … just simply covered, seated with his legs crossed, his hands across him, had the blanket over his lap." (T. 565)

During closing argument, the prosecutor made very effective use of this testimony, arguing as follows:

> But that's not all you have. You have even more than Charles and Jeremy and Kevin. In addition to what their parents and Miss Davis said as far as the responses, as far as the problems that the children had as a result of this, it's quite, quite interesting that when the police finally go out to Highland, Illinois, show up and they are looking for him, and come on, ladies and gentlemen, you don't think that he didn't—he wasn't in that house in Highland and he knew that the police wanted to arrest him? He knew perfectly well that the police wanted to arrest him.
>
> You heard Sergeant Seefeldt say, you know, about 2:30 in the morning they are thinking they are going to get a search warrant for the other house where the Finleys live, but Seefeldt is driving past right around 2:30, he sees the lights on the second floor, and he sees an individual walking on that second floor.
>
> He calls for backup, he calls for additional officers. They surround that house, the light is on, the other people come, the other officer tells you, you know, he saw the person up there walking. Also, they are talking on

the P.A. system.

Use your common sense, ladies and gentlemen. You don't think these things are loud? And you don't think he could not hear that in the house where when the neighbors are noisy he has to go sleep in a closet or so they say? You don't think he can hear a police P.A.? Of course, he could. You don't think he could tell when they are shining a big spotlight on his house? You don't think that's going to illuminate that place?

Ladies and gentlemen, use your common sense. These police spotlights, these are bright. They are made to be bright. They have to be bright. They light up a big area and they lit up that house like a Christmas tree and he was inside, and he was trying to figure out what to do because he was caught.

He was about to be arrested and he goes and runs and cowers in this closet because maybe the police will just go away. They just can't come in. They can't just kick in the door. Maybe he was hoping they would just go away. They didn't. They got the search warrant, they kicked it in. He would still be there to this day if they didn't do that. (T. 760-761).

The message was thus conveyed to the jury that Appellant was deemed dangerous enough by the police to utilize extraordinary measures to apprehend him immediately upon issuance of the Complaint. The fact that he was arrested late at night at his own residence, that he offered no resistance, and that there had been an explanation provided by his landlord as to why he may not have heard the police knocking, was totally

overshadowed by the "Law and Order" drama of the raid on his home and his arrest in a closet.

Thirty-five pages of testimony and a substantial portion of the prosecutor's argument had been devoted to this episode which was totally irrelevant to the charges.

Admittedly, the trial judge is vested with broad discretion to determine the relevance and possible prejudice of such evidence. State v. Graves, 27 S.W.3d 806 (Mo. App. 2000); State v. Scurlock, 998 S.W.2d 578, 587 (Mo. App. 1999). However, there must be a limit to that discretion and in this case that limit was clearly crossed, particularly in view of the inflammatory details of the drama described.

This obviously was not the type of "flight" evidence usually confronted by the courts. It did not involve a jail escape as in State v. Middleton, 998 S.W.2d 520, 529 (Mo. 1999) or a flight from the scene of the arrest as in State v. Bucklow, 973 S.W.2d 83 (Mo. 1998) and State v. Reed, 971 S.W.2d 344 (Mo. App. 1998) or a defendant's failure to attend at court proceedings as in State v. Cotton, 621 S.W.2d 296 (Mo. App. 1981) and State v. Chapman, 876 S.W.2d 15 (Mo. App. 1994).

Most importantly, there was absolutely no evidence that Appellant even knew that a complaint had been issued for events which allegedly occurred more than a year before. He had not been questioned by the police or invited to provide his version of the suspected events or other information (which, of course, might have been an appropriate measure to take). He had not fled to "another jurisdiction" and there was no indication that he would not have responded to a request that he simply come to the police station.

At that point Appellant had no prior convictions and there was no evidence that he

was armed or dangerous. Yet the "dog and pony show" related by these police officers clearly conveyed a contrary impression (i.e.: that there was a need to surround his home, to call in the K-9 unit, to use the floodlights and bullhorn and to kick in his door). This, plainly and simply, was character evidence which implied other wrongdoing.

As the court stated in reversing a conviction in State v. Watson, 968 S.W.2d 249, 253 (Mo. App. 1998):

> A criminal defendant has the right to be tried only for the crimes for which he has been charged. *State v. Hornbuckle*, 769 S.W.2d 89, 96 (Mo.banc 1989). Trial courts should be wary of evidence concerning other crimes because of the prejudicial nature of such evidence. *State v. Helm*, 892 S.W.2d 743, 745 (Mo.App.1994). The difficulty with evidence of other crimes is that it tends to run counter to the rule that prevents using a defendant's character as the basis for inferring guilt. *State v. Dudley*, 912 S.W.2d 525, 528 (Mo.App.1995).
>
> ….
>
> Finally, the prosecution is not permitted to introduce evidence of the circumstances of the defendant's arrest where such circumstances have no probative value. *State v. Chambers*, 898 S.W.2d 119, 123 (Mo.App.1995). *Id at 254*.

See also: State v. Cole, 887 S.W.2d 714 (Mo. App. 1994).

The Missouri Supreme Court specifically condemned the extensive use of the details of a defendant's arrest in State v. Myrick, 473 S.W.2d 402, 404 (Mo. 1971).

> The circumstances preceding the arrest on the day following the shooting had no connection as far as we can see with the shooting on the day before. It was proper to show defendant had on his person the gun used in the shooting, but there was no need to go into the details about the call to the apartment, the apparent fear of the occupants, the general idea that something was amiss in the apartment, and that defendant was the one who was putting the people in fear. 'The prosecution is not permitted to introduce evidence of the circumstances of the arrest of the person accused where such circumstances have no probative value in establishing his guilt . . .", 22A C.J.S. Criminal Law § 628, p. 476, citing *Hill v. State*, 141 Tex.Cr.R. 169, 149 S.W.2d 93, error where the state showed that defendant when arrested was in bed with another woman than his wife.

The general prohibition against evidence of "uncharged misconduct" is not limited to the uncharged crimes, but includes "any wrongdoing that could have been the subject of a criminal charge" including "any conduct to the extent that it conveys to the jury the type of prejudice that accompanies a disclosure that the defendant has engaged in criminal conduct." State v. Cole, 887 S.W.2d 712, 714 (Mo. App. 1994) N.2. The improper admission of such evidence is presumed to be prejudicial. State v. Maddox, 657 S.W.2d 719, 721 (Mo. App. 1983). See also concurring opinion of Judge Thomas in State v. Sladek, 835 S.W.2d 308, 314 (Mo. 1992). State v. Reese, 274 S.W.2d 304 (Mo. 1955); State v. Carter, 475 S.W.2d 85 (Mo. 1972). The bottom line is that "a jury should not convict a defendant merely because it infers that the defendant has a general

propensity or proclivity to commit crime." State v. Thomas, 857 S.W.2d 537, 539 (Mo. App. 1993) (citing State v. Brooks, 810 S.W.2d 627 (Mo. App. 1991). In an earlier case of State v. Brooks, 675 S.W.2d 53, 58 (Mo. App. 1986), the admission of evidence, which showed that Defendant had been in California in violation of probation restrictions, was found to be reversible error as an inadmissible commentary on his character or reputation.

The circumstances under which Appellant was arrested undoubtedly conveyed to the jury the inference that he was **a bad and dangerous person warranting an extraordinary effort and show of force by the Highland Police Department to apprehend him in the early morning hours immediately upon the issuance of a criminal complaint**.

This evidence should not have been permitted and its admission constitutes an abuse of discretion and reversible error.

CONCLUSION

For each of the foregoing reasons, Appellant's conviction and sentence should be reversed and the case remanded to the circuit Court with directions to discharge Defendant-Appellant, or if the case is reversed only upon the grounds asserted in Points III and/or IV, to set aside the verdict and sentence and order a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that 2 true and correct copies of the foregoing instrument was served via U. S. Mail, first class, postage prepaid, on this 6th day of July, 2004, upon the following attorney of record:

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CERTIFICATE OF COMPLIANCE

This brief includes the information required by Rule 55.03 and complies with the typewritten volume limitations of Supreme Court Rule 84.06 and Local Rules 360 and 361. The brief contains 15,268 words exclusive of the cover, certificate of service, certificate of compliance and signature block. I relied upon the word count function of the Microsoft Word 2000 word processing software.

Appellant has filed herewith a diskette containing the Brief using a proportionally spaced typeface using Microsoft Word Version 2000 in the Times New Roman typestyle-style with 13 point font size, and certifies that the diskette has been scanned for viruses and is virus free.

DATED: 07/06/2004

Respectfully submitted,

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