No. SC86190

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,
v.

JAMES A. BEINE,

Appellant.

APPEAL FROM ST. LOUIS CITY CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
THE HONORABLE TIMOTHY J. WILSON, JUDGE

APPELLANT'S REPLY BRIEF

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COUNTER-STATEMENT OF FACTS

The State's recitation of facts is very misleading in several important respects. These will be addressed Point II of this Reply Brief. Most importantly, however the State emphasizes three "spins" on the evidence, none of which constitutes criminal activity: (1) Appellant used the urinal in the boys' restroom rather than a stall in the restroom or a nearby "unisex" restroom for the handicapped; (2) two boys said that Appellant was "four to five feet" or "three to four feet" from the urinal when he used it; and (3) Appellant allegedly told a jailhouse informant that he was a "serpent in the grass" who was "drawn" to these children.

These observations, of course, overlook the uncontested facts that:

(1) Part of Appellant's duties were to monitor the boys' restroom (T. 444, 619-620).

(2) There was no school policy about adults using the same restrooms as students. Faculty, including the principal, occasionally used the restroom at issue (T. 535-536, 728, 737-738).

(3) Other than the complaints giving rise to the charges herein, there had never been any complaints or discussions about use of the student restrooms by adults (T. 682-683, 728).

(4) The claim that Appellant had "peed in an arch" was first made by a fourth grade student named Ramos who originally said that Appellant was "12 feet away," but then demonstrated the distance to be about one foot.

According to the administrator who interviewed him, "that to him was12 feet." (T. 731). Principal Washington gave a similar account when he asked a student to demonstrate how far Appellant had stood from the urinal. The demonstration indicated six inches (T. 705).

(5) None of the three boys who testified at the trial had said anything about Appellant exposing himself or standing even three feet from the urinal when school officials initially investigated their complaints that Appellant had used the student restroom. According to Principal Washington "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) (T. 674-677, 732) The specific allegations resulting in this prosecution were made only after it became known the Appellant had formerly been a catholic priest and after the mother of two of the boys visited with an attorney to discuss a possible lawsuit. (T. 647)

(6) Common male experience dictates that even a 3 to 5 foot "arch" would have been an unlikely feat for a sixty-year-old man. (Although unfortunately, no medical evidence was presented on this issue.)

(7) The jailhouse informant already had two convictions for deceptive practices, one for sexual assault, and one for burglary. He had been sentenced as a persistent offender, (T. 573, 583). He spoke to the police about a month and a half after his alleged conversation with Appellant,

admittedly in the hope that he would be able to get a reduction in his sentence. (T. 587, 588)

Appellant has set out in his opening brief direct excerpts from the testimony of Jeremy Marble, Charles Marble, and Kevin Latimore (App. Brief pp. 40-41) which clearly indicate that nothing occurred which came close to indecent exposure which could be expected to cause "affront or alarm" as required by the statute. Again, the State's theory seems to be that expressed by the prosecutor at trial - Appellant is criminally culpable because: (1) He used the student restroom in the presence of young boys. (2) He used a urinal instead of a toilet stall. (3) He stood too far away from the urinal when he relieved himself or turned to correct students as he was sipping up. (T.756) For these transgressions, the State now seeks affirmance of four felony convictions and a twelve-year sentence.

ARGUMENT

I.

Appellant's claim that R.S. Mo. §566.083.1(1) is unconstitutionally vague and overbroad, as applied to him, was timely and properly raised in this Trial Court and, for the reasons articulated in Appellant's Opening Brief, the Court should determine that the statute is unconstitutional as applied to Appellant.

A. Preservation of Issue

While it is acknowledged that Appellant's constitutional objection could have been more precisely stated, it strains credibility to say that the learned and experienced judge in the trial Court did not understand that a challenge based on "vagueness and overbreath" implicates the Fifth and Fourteenth Amendments of the United States Constitution and Article I Section 10 of the Missouri Constitution. Certainly, neither the Court nor the prosecutor was misled or confused as to exactly what was argued in the written motions which were timely filed. Those motions specified the language of the statute to which Appellant objected and asserted that the statute was "substantially vague, overbroad and therefore unconstitutional." (L.F. 98, 102) To assert that Appellant should now suffer a waiver or default of this very substantial and well-recognized issue because his defense attorney did not say all of the "magic words" would appear to exalt form over substance.

B. Timeliness of Motions

Similarly, the State's argument that this constitutional challenge was untimely because it was not raised in a pre-trial motion to dismiss, rather than in a motion filed after the State had presented its evidence, ignores the fact that, until evidence was presented, there was no record on which to base the argument that the statute as applied to Appellant, under the circumstances of this particular case, is unconstitutional.

Unlike the Appellants in State v. Hadley, 815 S.W. 2d 422 (Mo. 1991) and State v. Flynn, 519 S.W. 2d 10 (Mo. 1975), Appellant Benie did not wait until his Motion for New Trial to assert his constitutional challenge, but did so twice prior to that motion in the two motions filed during trial. **In fact, when the written motions were filed, and presumably reviewed by the Trial Court, the Court specifically stated, "it's made in a timely manner preserved and overruled." (T. 746) Neither the State nor the Court questioned the timeliness of Appellant's constitutional challenge at the times it was made**.

State v. Turner, 485 S.W. 3d 693 (Mo. App. 2001) and State v. Danforth, 654 S.W. 2d 912 (Mo. App. 1983), the other two cases relied upon by the State, involved the Court of Appeals' denial of transfer to this Court and did not directly address the constitutional issues. In those cases, the Courts noted that the Appellants made no attempt to explain why they had not raised the constitutional challenges earlier. In the instant case, it is quite clear that, until the evidence was before the Court indicating exactly what the Appellant was alleged to have done, it would have been impossible to

argue (at least effectively) that to extend the statute to that conduct constituted an unconstitutional application of a vague statute.

C. Rule 24.04 Requirements

To the extent that the State's position is based on Rule 24.04 Mo.R.Cr.P., a review of the specific language of that Rule is in order. The Rule states in pertinent part:

> ***(b) Motion Raising Defenses and Objections***.
>
> > *2. Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections* ***then available*** *to the defendant. Failure to present any such defense or objection as herein provided constitutes a wavier thereof, but the court for cause shown may grant relief from the waiver.* ***Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.*** (emphasis supplied)

It could be argued that a challenge to a statute as being unconstitutionally applied is a jurisdictional argument which, under this Rule, can be made "during the pendency of the proceeding" since a Court does not have jurisdiction to enforce an invalid statute.

However, the fact is there is no rule of Court which requires that a challenge to the constitutionality of a statute, particularly a challenge based on the application of that statute to the particular conduct proven, be made before evidence has been presented. Logic would also dictate that such a challenge could hardly be ruled upon without reference to the evidence, and that, consequently, this defense or objection was not "then available" until the evidence was before the Court.

As this Court has repeatedly stated, "in reviewing vagueness challenges the language is to be evaluated by applying it to the facts at hand." See State v. Entertainment Ventures Inc., 44 S.W.3d 383, 386 (Mo. 2001), and cases cited therein. An analogy may also be drawn to reasoning of this Court in Call v. Heard, 925 S.W. 2d 840 (Mo. 1996) in which the Court recognized that a challenge to the constitutionality of a punitive damage award could not be made until the time of trial when plaintiff first made the request for punitive damages. In the instant case there was simply no way Appellant could argue that the statute was unconstitutionally vague as applied to his proven conduct until that conduct was proven at trial. Appellant herein asserted his constitutional challenge as soon as the State had rested. Under the rationale of Herd, therefore, his motion was made at the earliest realistic opportunity. Accordingly, Appellant submits that his motion at the conclusion of the State's case asserting that the statute was unconstitutionally vague and overbroad as applied to him was both timely and sufficient to preserve this issue for Appellate review.

D. First Amendment Overbreadth

The State also argues that there can be no challenge to the statute as being overbroad unless First Amendment (Free Speech) rights are implicated, citing this Court's opinion. State v. Mahan, 971 S.W.2d 307 (Mo. 1998). In that case, the Court held that the appellant who challenged R.S.Mo. § 191.677, making it a crime to create a grave and unjustifiable risk of infecting another with HIV, had no standing to assert the possible First Amendment (Privacy) claims of "others to whom the statute could not be applied constitutionally." supra at 312. The Court noted that "Here, nothing would bar an HIV-positive person who has sex with a knowing and consenting partner or an HIV positive woman who gives birth from raising such a constitutional defense if they were prosecuted under this statute." Id. Implicitly, therefore, the Court recognized that a First Amendment overbreath argument could be made if a Defendant's own his prosecution directly affected his individual privacy rights, but it could not be made based upon the possible prosecution of other persons.

In the instant case, Appellant does not attempt to assert the constitutional rights of some hypothetical other persons. Rather, he asserts his own Constitutional right of privacy to relieve himself in a designated repository, a public urinal in a public restroom, and, to the extent necessary to do that, to expose part of his genitals.

Also, as indicated in Appellant's opening brief, the only way such conduct could be deemed criminal under the State's is the theory implied assertion that it was an attempt to "communicate" some perverse message to those who were present. If there is no such communication likely to cause "affront or alarm," there is no violation. The State cannot

have it both ways by claiming that Appellant's conduct was a form of communication to the alleged victims, but that the First Amendment is in no way involved. Although Appellant emphatically denies that he was attempting to communicate anything, it is the State which has placed this case in the realm of the First Amendment for overbreadth analysis, and therefore such analysis is appropriate.

E. Comparison to Similar Statutes

As to the vagueness issue, the State asserts the language of the statute is "borrowed from provisions contained in the Model Penal Code" citing the Iowa case of State v. Bauer, 337 N.W.2d 209, 211 (Iowa 1983). However, the statute at issue in Bauer was, in fact, totally unlike the statute here in issue. It reads as follows:

> A person who exposes his or her genitals or pubes to another not his or her spouse, or who commits a sex act in the presence of or view of a third person, commits a serious misdemeanor, if:
>
> 1. The person does so to arouse or satisfy the sexual desires of either party; and
> 2. The person knows or reasonably should know that the act is offensive to the viewer.
>
> Iowa Code § 709.9 (1981). Brauer, supra, at 210.

Thus, the Iowa statute, unlike R.S.Mo. § 566.083(1), requires a mes re or specific intent, the intent "to arouse or satisfy the sexual desires of either party," and demonstrates how a constitutionally valid statute can be written to proscribe the type of indecent exposure sought to be prohibited.

The Iowa Supreme Court's opinion in Brauer, supra discusses in some detail the fact that the prior statute in that state was found to be unconstitutionally vague and that the new and improved statute mirrored the ALI suggested language on indecent exposure.

The Court stated: (at p. 211, 212)

> We note that section 709.9 is similar to the indecent exposure statute drafted by the American Law Institute:
>
> > A person commits a misdemeanor if, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm.
>
> Model Penal Code § 213.5 (1980).
>
> The lines drawn in the legislative effort to criminalize only visual sexual assaults upon unwilling viewers are not obscure. Certain conduct was deliberately left outside the proscription of section 709.9. A nude streaker, for example, while certainly offensive to some, if not running to satisfy his or another's sexual desires would not meet the requirements of section 709.9(1). *See* Model Penal Code § 213.5 comment 2. *** A drunk urinating in public, while plainly offensive, similarly does not intend to arouse sexual desires in anyone. Again section 709.9(1) is not met. *See* Dunahoo, 29 Drake L.Rev. at 541.42.

The Court then concluded that because the new statute required a particular state of mind, i.e., sexual arousal on the part of defendant, as well as knowledge that the

viewer would be offended, it was not unconstitutionally vague. The Missouri Statute here in issue contains no such requirements. It does not require a sexual intent or motivation and it does not require that the defendant know that his conduct is likely to produce affront or alarm. Consequently, the statute must be subjected to much closer scrutiny in the face of the vagueness challenge made here. United States v. United States Gypsum Co., 438 U.S. 422, 434-446 (1978).

F. Implied Requirement of Scienter

The State argues, however, that the Missouri statute does contain a "scienter element" (States Br. p. 2). It does not say what that element is, but appears to imply that an individual must "know" that the manner of his exposure was "likely to cause affront or alarm to a child." However, that is not what the statute says, and more importantly, it is not what the jury was instructed in this case. The instructions given to the Jury required only that there be a "knowing" exposure, (the first element paragraph of the instructions). The second element reflected separately in paragraph "second" required only that the manner of exposure be such as would cause a "reasonable adult" to believe the conduct was likely to cause "affront or alarm." There is no particular state of mind, neither intent nor knowledge, required of the Defendant, (or for that matter of the victim). Unlike the Iowa statute and the ALI suggested statute, there is no requirement that the defendant know or intend anything or that he have some sexual purpose. (See L.F. 110, 112, 114, 116, Appendix A-8-11, Appellant's Brief)

As the State correctly notes, the Colorado Supreme Court, in a twenty year old case, People v. Randall, 711 P.2d 689 (Colo. 1985), upheld a statute worded similarly to

§566.083(1) in the face of a void for vagueness challenge. However, in that case the defendant had taken an eleven-year-old-boy to his house on several occasions, played a game of "strip bowling" with him, rubbed his penis against the boy's and masturbated in his presence. Id. Obviously, this was conduct which was not only patently outrageous and offensive, but which was obviously for the purpose of sexual arousal. The adage that "bad cases make bad law" could be cited, but more precisely it must again be recalled vagueness challenges must be considered in view of the facts at hand. The facts of the instant case are nothing whatsoever like the facts confronted by the Colorado court in Randall, supra.

A much more similar case cited by the State is State v. Kalama, 8 P.3d 1223 (Haw. 2000) in which the Supreme Court of Hawaii reversed a conviction for indecent exposure where the defendant was sunbathing in the nude and had exposed his genitals to another nude sunbather and the police who arrested him under conditions which the state asserted were likely to cause "affront or alarm."

Confronted with the same constitutional arguments advanced in this case, the Court simply "read in" to Hawaii's statute a requirement of scienter—i.e., that the defendant had to know or intend that his conduct would cause affront or alarm and under that interpretation found that the evidence was insufficient to convict the defendant.

Without the requirement of scienter, the Court reasoned the statute would be unconstitutional. Citing a number of cases relating to vagueness, the Court stated:

> Consonant with this precept, this court has also said that, "[w]hen possible, we interpret enactments of the [l]legislature contained in the criminal code

> so as to uphold their constitutionality," and, therefore, "presume that such legislation purports to operate within the limitations of our state and federal constitutions," *In re John Doe*, 76 Hawaii 85, 93, 869 P.2d 1304, 1312 (1994) (internal quotation marks and citations omitted). Therefore, to avoid running afoul of these fundamental principles, we give HRS § 707-734 a construction that would not ensnare conduct beyond the plain import of the statute.

If this Court were to follow the example of the Hawaii Court it would have to reach the same result, i.e., the statute, if read to require scienter, is constitutional. However, as in Kalama, supra, the evidence did not support a conviction under such an interpretation because there was no mens re demonstrated. Of course, there would also be both pleading and instructional errors since the information filed (L.F. 26) and the jury instructions given contained no such assertion or requirement. This was one of the problems the U.S. Supreme Court faced in United States Gypsum, supra, when it "read into" the Sherman Anti-Trust Act a mens re requirement that did not overtly appear in the Act. Id. at 446. This resulted in reversal of the convictions since there had been no proof of, nor instruction on, the issue of actual intent. Accordingly, if the Court does not find the Missouri Statute unconstitutional as applied it should find that the Trial Court erred by not directing a verdict of acquittal and/or by omitting a required element of scienter from the jury instructions. Additionally, since the information failed to state this element it failed to properly state an offense.

II

The recitation of facts which the State presents to support, its argument on the sufficiency of the evidence is inaccurate and misleading, and the evidence actually presented did not support a conviction under R.S. Mo. §566.083.1(1).

A. Misstatements of Witness Testimony

The State's Brief recites the following version of the facts relative to Jeremy Marble:

> Jeremy Marble, then a third grader, testified that Appellant entered the bathroom when he was present, which made him fell uncomfortable since adults did not normally use the boy's bathroom, and began to use the urinal. (Tr. 343, 345-49). While Jeremy was using the sink on the opposite wall from the urinals, Appellant turned around to tell some children who were being loud to "shut up." (Tr. 350, 357). When Appellant turned around Jeremy saw Appellant's hands on his stomach and Appellant's penis hanging out of his pants. (Tr. 351, 364, 374). After that incident, Jeremy would not use the bathroom at school if Appellant was present. (Tr. 352).

This is a distortion of what the testimony was. The transcript of Jeremy Marble's actual testimony about what occurred after Jeremy entered the restroom as Appellant was using the urinal was as follows:

> Q Okay. **So, what was he doing when you walked in**?
>
> A **He was using it. I got done before he did**.
>
> Q So, where did you go to the bathroom?

A Huh?

Q Where did you go to the bathroom?

A Right next to him.

Q Okay. How **far away from the urinal would you say he was standing when you first saw him**?

A. **He wasn't that far**.

Q. Okay. Would you say from what you have seen as far as how far away the kids stand when they use the urinals, was it about the same distance, about normal distance, about normal distance?

A Yeah.

Q Okay. So, let me see, this wall right here, the judge's bench that I'm pointing to, can you put – hold your – can you stand up in front of that and show us about how far away he was at that time?

A About there (Indicating.)

Q **So, you're standing maybe, I don't know, 6 inches or 8 inches away, something like that, maybe a foot, is that right**?

A Yes.

Q Okay. Go ahead and have a seat. At that point did you think anything weird was going –

MR. MARTIN: Let me note my objection, particularly with children, he's leading the witness.

THE COURT: All right. It has to be asked - I'll allow some leeway since it's a child witness. Again, he has to testify, lead him to an area and let him testify.

MR. POSTAWKO: Okay. All right.

Q (BY MR. POSTAKO) Was it unusual for you to see an adult in the children's bathroom?

A Yes.

Q Okay. So, what did you do then after you used the bathroom?

A I washed my hands then. (T. 348-350) (Emphasis Supplied)

***

Q Okay. So then what happened then?

A So, other kids come in, they're talking real loud, I guess he told them to shut up. **He turned around, his hands were like this, and then he hurried up and zipped up his pants**.

Q So, he's at the urinal when he turned around. Where were his hands?

A Like close to right there.

Q Can you stand up for us? All right. Put your hands where you say you saw Doctor James' hands.

A Right here. (Indicating.)

Q Where are your hands touching at, your stomach? Okay. Is that where they are, on your stomach?

A Yes.

Q Okay. Go ahead and have a seat. **Now, what did you say was the deal with his zipper**?

A **It was still down and then he hurried up and zipped it back up**.

Q When you say it was still down, could you see anything?

A Yes.

Q What could you see.

A His private part. (T. 350,351) (Emphasis supplied)

Later in his direct examination the prosecutor flat out misstated what Jeremy's testimony had been, but still did not receive an affirmative answer to his leading question:

Q **Okay. You said it was hanging out of his pants**?

A **I just turned around**.

Q What did you think when you saw that?

A I don't know.

Q How did it make you feel?

A Disgust. (T. 352) (Emphasis supplied)

At no point did Jeremy say anything about Appellant standing three or four feet from the urinal. In fact his demonstration indicated that it was "6 or 8 inches away – maybe a foot" (T. 348). More significantly, **it was only the prosecutor who suggested that "it was hanging out of his pants", not Jeremy**. The characterization of hands on the "stomach" was that of the prosecutor, not Jeremy who said only that they were "close

to right there." (T.350) Additionally, the testimony is quite clear that **Appellant was already standing at the urinal before Jeremy came into the restroom and stood next to him**. Appellant did, not, as the state asserts, "enter the bathroom when he was present." Also, Jeremy specifically said "I didn't see him pee" (T. 372), and that this was the only occasion on which he saw Appellant in the boy's restroom. (T. 364)

Appellant's mere presence may have made these three boys uncomfortable, perhaps angry, but that is all that was shown by the evidence. Contrary to the State's assertion that these boys were thereafter afraid to use the bathroom if Appellant was there (State's Br. P. 10) the boys testified that they didn't want <u>any</u> adult in the bathroom, e.g.: "I don't like – I don't like nobody --- I don't like nobody in the bathroom with me" (T. 393) "I don't like adults in the bathroom with me." (T. 388)

B. Nature of Initial Complaints

The interview conducted by school principal Lloyd Washington shortly after the incident involving Ms. Davis indicates quite clearly what the initial complaint of these three boys was and that it did not involve indecent exposure. Mr. Washington testified as follows:

Q Did you have occasion to talk to a young man by the name of Kevin Latimore concerning this hallway incident?

A Yes, I did.

Q Did he say anything to you whatsoever about Doctor James exposing himself?

A No, he did not.

Q Okay. You spoke to him on or about April 27th, the day this thing occurred?

A No, I did not. I think I spoke to him and – it was on – I think it happened like a Friday, and I don't think I was in the building on Friday, but when I came back to the building towards the end of the day that's when I heard about it. I told everyone who was involved and everyone who knew about it to make your statements and give me your statements on Monday.

Q When you spoke to Mr. Littleton, I'm sorry, Mr. Latimore, he didn't say anything to you about Doctor James embarrassing him by urinating in the boys' room or peeing in an arch, or anything like that, did he?

A No, he did not. And I asked him "are you having any problems with Doctor James, because I interviewed the class, **and then when I talked to him I asked him specifically, "are you having any problems with Doctor James", he said "no"**.

Q **How about Charles Marble, did you later on talk to Charles Marble**?

A **Yes, I did**.

Q **Did Charles Marble make some Complaint about Doctor James peeing into the urinal in his view**?

A **No, he did not**. (T. 675)

***

Q Okay. And did you subsequently have a meeting with his mother, Sheree Lee, and a few other people in your office concerning this?

A Yes, I did.

Q **Did he demonstrate or say anything to your about Doctor James peeing I an arch in his view**?

A **No, he did not**.

Q Did he say that he saw Doctor James urinating at any time?

A No, he did not.

Q Only thing he said was he felt Doctor James was looking at his stuff?

A Right, and made him uncomfortable, and boys that age are self-conscious of people looking at them.

Q Did you ever get a definitive take on what had actually happened in the boys' room in talking to all of the boys?

A A definitive take?

Q Like, you know, like everybody came down on one side and said this is what happened or did just two boys say one thing, or three boys say another?

A **There were only three boys that said they felt uncomfortable with Doctor James, and there – the rest of the boys said he was doing his job, he's monitoring the bathroom, he's doing what he needs to do**, and they didn't have any problem with him, and in

asking all of the boys that none of the boys said they had any problem with Doctor James. (T. 677) (Emphasis Supplied)

A fair reading of the testimony of the 9 and 10-year-old witnesses will indicate that what may have occurred was that they caught a glimpse of Appellant's penis as he was urinating. They felt uncomfortable with the fact that an adult was using the boy's restroom. As Kevin testified "I don't like adults in the bathroom with me." (T. 388) However, these students made no issue of what they witnessed for about a year until publicity indicated that Appellant had formerly been a priest. Terry Brock, the mother of Charles and Jeremy then engaged an attorney to file a lawsuit and visited the Circuit Attorney. (T. 647, 648) "Inches" then became "feet," a brief glimpse became "hanging out" and a normal process of urinating eventually became "exposure in a circus like manner." (State's Br. P. 26)

C. No Testimony Regarding "Habits"

Curiously, the State argues that "even more compelling was the testimony by adult educators concerning Appellant's bathroom habits." (State's Br. P. 34) There simply was no testimony from "educators" about Appellant's habits, bathroom or otherwise. The State argues "the adult staff members at the school had their own designated bathroom and the children theirs. In fact, one adult restroom was located right next to the children's bathroom where Appellant committed the unlawful acts in this case." (States Br. P. 34) This also is not true and is nowhere reflected in the transcript. The only other regular restroom on the first floor was a female restroom adjacent to the boys restroom. **Certainly, the State does not contend that Appellant should have used that**

restroom. In fact, there was no restroom specifically designated for adult men anywhere in the school building. (T. 609) A handicapped restroom was located down the hall near the gym, and there were a restrooms in the janitors' quarters and the principal's office, both some distance from the boy's restroom. (T. 599) Even Ms. Davis testified that there was no policy in place regarding use of the student restroom, although the "general practice" was that adult staff used other restrooms. (T. 609)

D. Theory of Prosecution

Significantly, what this type of argument reflects is the prosecutors predilections that there was something, strange, evil, untoward or "weird" about Appellant using a urinal in the boys restroom, which was part of the area he was to monitor and that he was indecent by urinating at all in the presence of these boys, although other boys who were also there did not seem to notice or care. This was the prosecutor's argument at trial and it remains the State's basic argument on appeal.

While one could certainly question the wisdom, even the propriety, of a male teacher using a urinal in the presence of pre-teen male students, no crime was demonstrated by the actual testimony of the alleged "victims," and certainly not the crime sought to be prescribed by R.S. Mo. Section 566.083(1).

This Court should therefore put an end to the scapegoating which occurred in this case and hold that the evidence was insufficient to sustain convictions under the Missouri Statute.

III

The failure of the trial Court to apply available remedial measures to assure that the Jury was not infected by the pervasive and continuing adverse publicity all but assured convictions despite the insufficiency of the evidence.

A. Preservation and Presentation Publicity Issues

The State argues that Appellant violated Rule 84.04(d) by combining several points concerning the jury selection and control process into a single argument. However, Appellant was faced with the dilemma of conveying to the Court the prejudicial nature of what occurred in this case while addressing adequately the very substantial issues relating to the constitutionality of the statute, the inadequacy of the evidence and the very inflammatory testimony regarding his arrest, all within the word limitations imposed under the Appellate Rules.

Whether or not the Court considers the jury issues as being preserved individually for review, it is necessary to view what occurred in order to understand the atmosphere which resulted in the trial and convictions in the case. Contrary to the State's Assertions (States Br. P. 39) Appellant consistently sought relief in addition to a mistrial. The Trial Court was first alerted to this atmosphere by Appellant's Motion for Change of Venue filed on May 30, 2004, two weeks prior to trial. (L.F. 77)

However, the State argues, as did the prosecutor, that this motion was "untimely under Rule 32.04(b)" because it was filed "more than ten days after he entered his initial

plea." This, of course ignores the fact that massive publicity was generated during the month immediately prior to trial and that is was necessitated and supported the motion.

This motion was renewed prior to the voir dire and defense counsel produced a sample of news articles (Exhibit E) and four videotapes of T.V. coverage. Nevertheless, the Court denied the motion for change of venue saying "I'm not going to sustain the motion for change of venue at this juncture, but endeavor to pick a jury…" (T.6)

The saturation news coverage which contained up through the trial is exemplified by responses of potential jurors some of which are set out in the additional Appendix B attached hereto. While most of the venirepersons responding as indicated were not seated as jurors, their statements, which were undoubtedly more candid than others, indicate the pervasive nature of the publicity surrounding this case which must have had an impact on those jurors who passed the inquiries and were seated. As the U.S. Supreme Court observed in Irvin v. Down, 633 U.S. 717, 728, 781 S. Ct. 1639, 1645 (1961).

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact of requiring such a declaration before one's fellow is often its father.

Nevertheless, jury selection continued, and the next day defense counsel moved for sequestration, presented additional news articles and noted the radio and T.V. coverage that day. (T. 223) This motion was also denied.

As the publicity continued through the second day of trial, defense counsel renewed his motion for change of venue and also moved for a mistrial. (T. 429) On the third day of trial the Court noted the additional publicity but denied another motion for

change of venue and mistrial. (T. 209) The Court also stated "…it's not been waived by the defense, the defense has raised it repeatedly at every juncture, so I think that the defense has been conscientious in raising the objection." (T. 431)

B. Atmosphere of Trial Venue and Media Coverage

The plain fact is that Appellant, who had served his community well for forty years, who in fact was never before charged with, much less convicted of, molestation was made an easy target and scapegoat to deflect the political fallout resulting from the Catholic Church sexual abuse scandals. Once it was made known that he was a former priest who had left the diocese in a dispute with his Bishop he became fair game. Someone had to pay for what had occurred, and in the atmosphere in which this trial was held Appellant served this very utilitarian purpose, he was charged and a press conference held despite the facts that he had molested no one, had made no threatening statements or gestures, had no physical contact with the alleged victims and had not been confronted with any of the allegations for more than a year after the events were alleged to have occurred.

The atmosphere in which this prosecution took place was aptly summarized by Attorney Welby when he entered his appearance after the trial and argued for a new trial:

> Dozens, if not hundreds of television, radio, newspaper stories reported the case in conjunction with the priest abuse investigation. Your Honor, I have offered in support of that Defendant's Exhibit A which is a stack of newspaper articles, I believe the Court can take judicial notice of the intensive coverage in the press and I would offer Defendant's Exhibit "B"

which is a brief glimpse of 45 minutes of televised coverage covering this issue.

Every one of these stories describes Doctor James as a former priest or defrocked priest, but his case has nothing to do with the Roman Catholic Church. This case has nothing to do with the fact that Doctor Beine once served as a Roman Catholic priest. A man should be judged for what he did, not who he is, who he was.

The severity of the jury's recommendation for sentencing in relation to the nature of the acts charged demonstrates Doctor James has been held out as a whipping boy for all the allegations of priest abuse in the St. Louis area. The media coverage could not have been more negative. On Holy Thursday of last year every television station played the Circuit Attorney's press conference which she described Doctor James as "one of the most serious predators I have ever dealt with in my years as prosecutor." She went on to say this individual is a grave danger to the community, all of this before the trial, and I believe before the case was presented to the Grand Jury. Reports made reference to numerous other complaints against him, end quote, sex abuse lawsuits. **However, prior to the charge in this case there has not been a single crime, single criminal charge ever brought against him, nor was he ever afforded the opportunity to defend himself in any civil lawsuit**.

> In the last fifteen months leading up to this trial this man has been vilified by the press such that no fair trial could be had in this matter. **To make matters worse, the case was tried in the same week the U.S. Conference of Catholic Bishops were meeting in St. Louis just blocks away from the building**. The timing further tainted Doctor James' case with the cloud of the priest sex scandals. (T. 797-799) (Emphasis Supplied)

Appellant, of course, recognizes the long line of cases affording to the trial court almost absolute discretion in matters relating to venue, continuances and jury sequestration. In fact, he has been unable to find any Missouri case in which a trial Court has been reversed for abusing that discretion. But see: Shappard v. Maxwell, 384 U.S. 333, 865 Ct. 1507 and Rideau v. Louisana, 373 U.S. 723, 83 S. Ct. 1417 (1963) for the U.S. Supreme Courts insightful discussions about how such pervasive publicity can affect the fundamental rights of trial by an impartial jury. See also the equally famous case of Groppi v. Wisconsin, 40 U.S. 505, 91 S. Ct. 490 (1971) regarding the constitutional right to a change of venue, and also involving a former catholic priest.

Nevertheless, in order to fully convey the spectacle that occurred in this case it in necessary to review what occurred outside of the courtroom as well as what occurred on the record. It is only by factoring in these extraneous influences that there can be any understanding as to how our system of justice can result in a man being sentenced to twelve years in prison for allegedly inappropriately using a restroom designated primarily, but by no means exclusively, for pre-teen boys. Whatever the jury concluded from the evidence had occurred in the restroom was overshadowed, blurred and replaced

by what had been said in the news media, including the public characterization of Appellant by the Circuit Attorney "one of the most serious predators I have ever dealt with in my years as a prosecutor." (T. 799) To make such public comments on the eve of a trial may be politically expedient but it is a deplorable misuse of media attention.

C. Impact on Other Trial Errors

Should the Court believe it necessary to review the true extent of the pre-trial and trial publicity which infected this case, those articles and tapes, which were introduced as Exhibits A and B at the hearing on his past trial motion (T. 798), are available. However, it is submitted that such a review should not be necessary, and may even be a distraction in assessing the errors and unfairness which occurred upon a consideration of the record. They will, however, help to explain the "why" of what happened in this case in a Court including the impact of testimony regarding Appellant's arrest, discussed infra. While the Court cannot control the comments of the Circuit Attorney and the press, it can control the timing and location of a trial and the exposure of a jury during trial to such outside influences. The Trial Court failed to do so and thereby committed error.

IV

The admission of testimony regarding Appellant's arrest, when viewed in light of the pre-trial and trial publicity, as well as the arguments made by the prosecutor, served no purpose other than to convey the idea that Appellant was a dangerous person whose prompt apprehension warranted the extraordinary application of law enforcement resources and was therefore erroneous and overwhelmingly prejudicial.

As with the other issues in this case, the admission of over thirty pages of testimony relating to the arrest of Appellant in the middle of the night at his usual place of residence must be viewed in light of the atmosphere created by the publicity surrounding this case.

The public had been told by the Circuit Attorney that Appellant was "one of the most serious predators I have ever dealt with in my years as a prosecutor." (T 799) Since this statement was carried by all of the network television stations in St. Louis, it must be assumed that some, if not most, of the jurors had heard or seen it even if they believed during voir dire that they would not be affected by it.

Indeed, they were instructed that they should be guided only by the evidence received in the case. But then as a substantial part of that evidence they heard that the police deemed it necessary to obtain two search warrants, surround Appellant's house, use search lights and a K-9 unit and kick in Appellant's door, all in an attempt to apprehend him within hours after a Complaint was issued. The message so conveyed by this testimony was loud and clear, and had nothing whatsoever to do with the charges then being tried. The message conveyed was that Appellant was a dangerous "predator" who had to be stopped and confined for the safety of the community. The facts that charges had not been issued until more than a year after the alleged incident had occurred or that Appellant had made no attempt to flee the area or resist arrest in any way were lost in the hype of the dog-and-pony-show being described by three police witnesses. Again, Appellant was found in his own home and offered no resistance whatsoever.

In fact, the events preceding Appellant's arrest constituted a major part of the prosecutor's closing arguments. (T. 760-761, App. Br. P. 51-52) Unfortunately, while Appellant's trial counsel moved to exclude this evidence, there was no instruction requested or given limiting the jury's consideration of the testimony to any particular issue or purpose. See Huddleston v. United States, 485 U.S. 681, 691 (1988).

The Hornbook law relating to this type of evidence was long ago clearly affirmed by this Court in State v. Myrick, 473 S.W. 2d 402, 404 (Mo. 1971). "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." Such evidence is presumed to be prejudicial and inadmissible unless and until the State can explain satisfactorily why it is probative and relevant to an issue before the jury and that its value on this issue outweighs its prejudicial effect. The State has not done this either at trial or in its Brief. It has failed to delineate what possible issue before the jury was in any way proven by this long description of the dramatic circumstances surrounding Appellant's arrest.

CONCLUSION

For the foregoing reasons, as well as those set out in Appellant's opening brief, Appellant's convictions and sentences should be reversed and the case remanded to the Circuit Court with directions to discharge Defendant-Appellant. Alternatively, if the case is reversed only upon the grounds asserted in Points III or IV verdicts and sentences should be set aside and a new trial ordered.

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 11th day of October, 2004, upon the following attorney of record:

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LAWRENCE J. FLEMING

CERTIFICATE OF COMPLIANCE

This brief includes the information required by Rule 84.04 and complies with the typewritten volume limitations of Supreme Court Rule 84.06. The brief contains 7464 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: _____

Respectfully submitted,

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APPENDIX B

(Excerpts of Transcript)

Responses and statements of potential jurors.

VENIREPERSON MULLINS: I recognize him sitting at the table out there. I guess I have seen him on the news and TV. I believe he was a priest.

THE COURT: What do you recall seeing on the TV news?

VENIREPERSON MULLINS: Just – I guess the sexual accusations.

THE COURT: Okay.

VENIREPERSON MULLINS: I guess that's pretty much what I seen. I can't recall specifics necessarily.

THE COURT: Anything else about him or anything else?

VENIREPERSON MULLINS: I don't know if I'm confusing him, if he's the one that had two different names. I guess there is different things going on.

THE COURT: Okay. Bottom line, the defendant is entitled to a presumption of innocence as he sets there. The burden is on the State to prove his guilt beyond a reasonable doubt as to all the elements, and we want jurors that will be fair and open minded to both sides. You have seen stuff on TV, read stuff, you have a newspaper there in your lap, do you think you could be fair and open-minded or not?

VENIREPERSON MULLINS: Sure. Sure. (T. 16)

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VENIREPERSON BOYER: A lot of my information comes from the Post and from TV. I'm aware of the type of charges, I remember, and it's my remembrance, which may not be that, this is part of the clean up of the Catholic church. (T. 21)

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VENIREPERSON BENNETT: Well, I read about – I don't remember exactly what the article was in the newspaper. I remember reading the article, and I work for JS, a courier company, JS Express. I made several deliveries to the particular school in question and several times I have heard people talking about what had happened.

THE COURT: What did you hear them talking about?

VENIREPERSON BENNETT: Mostly cuss words and saying they should be strung up.

THE COURT: Go ahead.

VENIREPERSON BENNETT: His genitals. And not very kind statements, and I didn't participate, just passing by hearing the conversation, and I laughed along with them. I'm ashamed to say that I did. (T. 44,45)

***

VENIREPERSON PIRY: Okay. It was on the news, television, and that when he was arrested – I have to be quite honest, until I heard the exact

charges I wouldn't have remembered. I knew it was children and I knew it was sex. That's all I remember. And then this morning I heard something about arraignment. I'm not sure of the proper terms, something about he and court today.

THE COURT: Okay. Have you formed any opinions about this case?

VENIREPERSON PIRY: It's hard. It's hard to say. Probably, because I – my first thought would be – I don't remember even if I heard the age of the children, but I would think the younger the more I would tend to believe why would they lie.

First off, you have to have some strong evidence, but more than that, and I was thinking out there apart from the whole case, 13 years ago a little girl I baby-sat for was kidnapped, raped and murdered, and I think that would influence me more than anything because I would think if he is troubled and he needs help and he doesn't get it maybe he would hurt somebody later on. I'm sorry. (T. 52,53)

***

VENIREPERSON RUSTIGE: I read the article in the paper about him being accused, and well, I read the whole article. It says he was kicked out of the priesthood earlier, and I believe he was in Belleville. I don't – that's about all I remember about it, about the article.

THE COURT: All right. Have you formed opinions about this case?

VENIREPERSON RUSTIGE: Well, to some extent. I'm not in between, you know. If he was charged with just this thing before then – that's kind of what the paper said, that he was before charged with it. Now he did it again, so I halfway think there might have been something, you know, this isn't the first time so it – it might have been that he was guilty the first time and second time.

As far as I remember the paper said that he was accused the first time and wasn't really proven guilty, but that's all I recall. I would not know about it this time. You would have to see the facts, I guess.

THE COURT: You recall some other case that he was involved in. Is that what you recall reading?

VENIREPERSON RUSTIGE: Pardon me?

THE COURT: You recall reading he was involved in some other case?

VENIREPERSON RUSTIGE: Yes. It was in that whole article that earlier he was accused, I guess of it, and he was – I remember reading he was kicked out of the priest hood because of that, so that's an earlier case that he was. I don't know if it was – I don't recall now if it was the same think of exposing himself or if it was something else. (T. 63, 64)

***

VENIREPERSON FOWLER: Yeah. I read something to the effect he was a priest and he was accused of molestation before that or, you know, before that time, before Patrick Henry. (T. 74)

***

VENIREPERSON HALLORAN: Well I just heard about it and stuff through the media, and just me and friends talk about it, you know. That's about it, really.

THE COURT: Have you arrived at some opinions about the case?

VENIREPERSON HALLORAN: Well, it was just brought about how, you know, perverts and stuff, are now – are in the schools. (T. 84)

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VENIREPERSON WALLACE: It was on TV.

THE COURT: What did you see?

VENIREPERSON WALLACE: There was children that accused a, I guess a janitor, they accused him of exposing himself to them.

THE COURT: Okay. Have – do you recall anything else that was in the article or on the show?

VENIREPERSON WALLACE: That he had a history – I think he used to be a priest.

THE COURT: Go ahead.

VENIREPERSON WALLACE: I think he had a history of abusing children before and they removed him. He had got a job at the school as a janitor. I think that's how it went.

THE COURT: Based upon this stuff you have seen or heard of the media, have you formed some opinions about this defendant and this case?

VENIREPERSON WALLACE: Yeah.

THE COURT: What are those?

VENIREPERSON WALLACE: Well, that he might have done it. (T. 86, 87)

***

THE COURT: You remember anything in that report that you taped? What they said?

VENIREPERSON PARKER: I believe they said the child came forward and said he was touching inappropriately. Seems like later on there was someone else that came forward. I don't exactly remember.

THE COURT: Okay. Have you formed some opinions about this case form that or any other source?

VENIREPERSON PARKER: Probably.

THE COURT: And what opinions have you formed?

VENIREPERSON PARKER: That if memory serves me, I think when the second child came forward it seemed like it was something that probably happened. I don't know what happened. I thought that something probably happened.

THE COURT: You think you can put those opinions aside and be fair and impartial to both sides in this case or would that be a problem?

VENIREPERSON PARKER: Honestly, I don't know if I could, you know. Stuff sticks in your head. I wouldn't – I wouldn't want to prejudice

anyone, you know. There is so many educators in and out of my house all the time. That's why I think I might have something there may be more to. (T. 89,90)

***

VENIREPERSON STOCK: I seen his picture, his photograph, a lot on the news and in the paper. I know he works for the City schools, I believe, and I could be wrong, that he was a former priest or minister of some kind, and in the past. I could be wrong about that. Just pretty much what you said he was accused of some kind of improper conduct.

THE COURT: Okay. Have you, based on the media attention you have been exposed to, have you formed some opinions about this case and the defendant?

VENIREPERSON STOCK: I would have to say I did. I kind of assumed – it appears that when it gets as far as the media and is so widely exposed that it's usually probably true. (T. 94)

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MR POSTAWKO: Thank you, Your Honor. You said you recall hearing something to the effect there were similar allegations in the past.

VENIREPERSON CIBULKA: Uh-huh.

MR. POSTAWKO: Do you think that that might in any way affect you in evaluating the evidence presented in this case?

VENIREPERSON CIBULKA: Yeah. You know, I would like to say no, but quite honestly, I got to feel that it may, being human and all, because like I said, I'm aware that the man was a Catholic priest. He's no longer in the priesthood. That was kind of listed, you know, silent for reasons why, and we're only dealing with what's happened in the last couple of years.

MR. POSTAWKO: Okay.

VENIREPERSON CIBULKA: But being aware, you know, of these things, it's you know, I got – I'm just being honest with myself, you know. I wouldn't – I wouldn't know until I got there. (T. 99)