No. ED98883

In the
Missouri Court of Appeals
Eastern District

NICHOLAS HILLMANN,
Appellant,

v.

STATE OF MISSOURI,
Respondent.

Appeal from the Circuit Court of Warren County
Twelfth Judicial Circuit
Case No. 11BB-CR00112-01
The Honorable James D. Beck, Judge

BRIEF OF APPELLANT

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STATEMENT AS TO ORAL ARGUMENT

Appellant, Nicholas Hillmann, respectfully requests 20 minutes for oral argument or an amount of time equal to that granted Appellee, State of Missouri, and additionally requests an appeal bond for appellant Nicholas Hillmann throughout the appeal process.

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JURISDICTIONAL STATEMENT

Nicholas Hillmann, ("Hillmann" "Appellant") was convicted by a jury of the Class B felony of Unlawful Distribution of a Controlled Substance to a Minor and the Class D felony of Attempted Statutory Sodomy in the Second Degree on June 1, 2012. (LF p. 76-81)[1]. Appellant was sentenced on August 6, 2012 to an aggregate sentence of nine (9) years in the Missouri Department of Corrections: five years on count one and four years on count two running consecutively. (LF p. 131-132). Pursuant to §559.115 RSMo., the trial court retained jurisdiction of Appellant and he was ordered to complete the 120-day Sex Offender Assessment Unit ("SOAU") program within the Department of Corrections. (LF p. 131-132). Hillmann timely filed his Notice of Appeal on August 16, 2012.

This action is one involving an applied challenge under U.S. Const. Amend XIV and Mo. Const. Amend I, §2 to the validity of §559.115 RSMo as it violates Appellant's rights to equal protection in that it denies him a fundamental right of appeal and obtain equal access to the justice system as others sentenced to the Department of Corrections. This action therefore involves the validity of a statute

1 Appellant will cite to the Record on Appeal as follows: Trial Tr. (Tr.); Legal File (LF).

2 The alleged victim in this case will be referred to throughout as "CT" in accordance with

of Missouri in which jurisdiction is proper in the Missouri Supreme Court under Mo. Const. Art. V, §3.

STATEMENT OF FACTS

Hillmann and the purported victim, CT[2] are first cousins. While the family is somewhat close, Hillmann and CT were not. (Tr. 44). On January 29, 2011, Hillman and CT's brother, Jake Reiter ("Reiter"), made plans to go out for the evening with a friend, Joe Rothermich ("Rothermich"). (Tr. 48). CT volunteered to watch Hillmann's three sons during the evening. (Tr. 48). CT had not baby-sat for Hillman before and asked her mother for permission. (Tr. 238). CT's mother allowed CT to babysit if her brother would stay with her. (Tr. 238). CT was having difficulty in school and her mother felt she was mentally unstable. (Tr. 241). CT did not tell Hillmann that her brother was supposed to stay with her. (Tr. 238).

CT was at Hillman's house with her brother and Rothermich during the afternoon before Hillman left to go out. (Tr. 50). While they were there, CT testified that Hillman offered her marijuana. (Tr. 50). CT testified that Hillmann was smoking a "joint" in the home and, at some point, she too smoked marijuana, smoking from Hillman's "joint." (Tr. 51). CT admitted that she willingly smoked the marijuana, that she knew it was improper and that she knew she would get into trouble if caught. (Tr. 51). CT smoked marijuana until she achieved a high. (Tr.

2 The alleged victim in this case will be referred to throughout as "CT" in accordance with §566.266. RSMo.

51). Hillmann, Reiter and Rothermich left the home between 8:00-9:00 p.m. (Tr. 51).

CT baby-sat until approximately midnight when everyone fell asleep in the living room. (Tr. 52). CT slept on the sofa and the three kids slept on the floor. (Tr. 52). This particular house has an open floor plan. (Tr. 53-54). The kitchen of the home is, essentially, an extension of the living room with a countertop dividing the two rooms but, otherwise, it is essentially one large room. (Tr. 53-54). Rothermich and Reiter returned home first, sometime in the early morning hours of the next day. Rothermich left immediately and Reiter went into the kitchen and fell asleep at the kitchen table. (Tr. 56). CT testified that after Hillmann returned home he attempted to wake her by rubbing her legs and asking her if she wanted to be "cousins with benefits." (Tr. 55). CT declined the offer and fell back asleep. (Tr. 56). Later, she woke and began looking for her brother. (Tr. 56). CT woke her brother and didn't say anything about Hillmann. (Tr. 57). Reiter moved to the sofa in the living room and CT went to the kitchen. (Tr. 57). Hillmann and CT then talked in the kitchen for approximately 3-4 hours. (Tr. 60). CT talked to Hillman about her prior suicide attempt. (Tr. 60). CT testified that Hillmann tried to discourage her from having suicidal thoughts, reminding her repeatedly that she had family who loved her. (Tr. 60). CT testified that Hillmann again smoked marijuana, but that she was neither offered any nor did she partake in any. (Tr.

59).

CT testified that Hillmann then placed her on the counter in the kitchen, began kissing her, touching her breasts and attempting to touch her in other places. (Tr. 61-64). CT stated she was still "high" from smoking the marijuana before 9:00 pm and that she shoved Hillmann to stop his advances. (Tr. 63-65).

CT first testified that she stopped Hillman from touching her by leaving the kitchen to use the bathroom. (Tr. 65). CT later testified that before leaving for the bathroom, she saw Hillmann lowering his pants and underwear, exposing his penis. (Tr. 66) CT testified Hillmann followed her to the bathroom and remained outside. (Tr. 66). CT next testified that Hillmann went to his bedroom and CT followed him. (Tr. 66). CT testified that Hillmann was so intoxicated that he had a difficult time standing or walking straight. (Tr. 66). CT stated Hillmann attempted to pull her onto his bed with him, but that she refused and went into the living room to sleep in the chair next to her brother. (Tr. 68). CT next went to sleep in the children's room while they remained asleep in the living room. (Tr. 69). The next morning, CT and her brother left without waking Hillmann. (Tr. 69). CT never reported to her brother or family anything untoward about Hillmann. (Tr. 70). Instead, CT posted on her Facebook account that she "had fun" babysitting and that it "could be a regular thing." (Tr. 92). Weeks later CT, asked her mother and father to again baby-sit for Hillmann. (Tr. 241). Due to worries about CT's

mental health and the fact that CT had lied previously about her brother remaining with her, CT was not permitted to watch Hillmann's children again. (Tr. 241).

On February 18, 2012, CT's high school class participated in a "free- write." CT's free-write stated:

> My dads [sic] been being ridiculous, as always. You wouldn't believe what he said to me. I've got alot [sic] of stuff to talk about but I cant [sic] tell anyone. I told my boyfriend Aj and cried when I did. My story involves someone getting 20-35 years in prison. It doesn't involve abuse or anything. I think its [sic] bigger then [sic] that. I cant [sic] tell my brother or parents because they would go balistic [sic] and probably go for a death sentence, [sic] I know my dad would want that one. I cant [sic] tell my best friend Erika because I know she'll tell my parents or brother, but just for my safety. Its [sic] something nobody should have to experience. It would of gone ALOT [sic] further if… (Tr. 84-86).

CT's teacher forwarded her work to other school officials. (Tr. 81). CT told the school counselor that the contents of the free-write were just random thoughts, not a discussion of a particular situation. (Tr. 80- 81). CT was held in the counselor's office for approximately two hours while she was interrogated about her writing. (Tr. 81). CT was told she could leave the guidance office and go to lunch if she gave an explanation for her statements. (Tr. 82). CT finally said she was writing about Hillmann and then was allowed to go to lunch and resume her usual day at school. (Tr. 82). CT then talked to her friends during the lunch hour about the situation. (Tr. 83). CT was driven home by police who told her brothers, including Reiter, of the accusation against Hillmann. (Tr. 87).

On February 22, 2011 at approximately 6:30 pm, Warren County Sheriff's Department deputies met with CT. (Tr. 94). They requested she call Hillmann to question him. (Tr. 94). The Sheriff wanted to "make sure" CT was not lying about the incident. (Tr. 94). Two calls were made to Hillmann. (Tr. 95). CT did not recall why Hillmann needed to be called twice. (Tr. 95). CT testified that questions for the calls were provided by police officers. (Tr. 102). The calls never discussed the use of marijuana, nor did they include mention of Hillmann exposing himself. (Tr. 95-97). During the first call Hillmann appeared to have no memory of the incident and, at first, believes CT's accusations are of a kidding nature. (Tr. 131-133). Throughout each call Hillmann appeared surprised as CT relates intricate details of her recollection of the evening. (Tr. 131-133).

Later that evening, four officers go to Hillmann's house and ask to speak with him. (Tr. 134). The Sheriffs do not obtain an arrest or search warrant, even though they do consider Hillman a suspect. (Tr. 136-138). Hillmann refused to allow officers access to his home for fear that they would upset his kids and asked to speak with them on the front porch. (Tr. 137-138). The Sheriff asked for consent to enter Hillmann's house. (Tr. 136). Hillman repeatedly refuses their requests (Tr. 144). Hillmann repeatedly asked law enforcement to allow him to go inside to get his cell phone so that he could call a relative to watch his children while he spoke with police. (Tr. 137). Hillmann also offered to go the police

department the following day after he made arrangements for his children. (Tr. 146). The Sheriff told Hillman that he would not allow him to get his phone or go to the sheriff's office the next day. (Tr. 146). Hillmann eventually agrees that the Sheriff may enter his home with him for the limited purpose of letting him check on his children, get his phone and put on shoes. While Hillmann entered his home for this purpose, some law enforcement officers remain with Hillmann, pressing him for answers while others began searching his home. (Tr. 159-161). During this time, the Sheriffs seized marijuana from under Hillman's couch. (Tr. 160-161). The Sheriffs search the home for approximately an hour and continued to tell Hillmann that no decision had been made as to if he will be arrested that evening or not. (Tr. 178). At the conclusion of the search, Hillmann is arrested and charged with the aforementioned felonies. (Tr. 170).

Hillmann's family hired attorney Mr. William M. Byrnes to secure his release on bond. (LF 13-14). Hillmann then retained attorney Mr. Charles Billings to represent him at trial. (LF 19). Mr. Billings entered his appearance at the end of March or early April of 2011. (LF 19). The case was eventually set for a jury trial on February 29, 2012. (LF 22). Mr. Billings filed an endorsement on February 23, 2012 naming 30 witnesses, but failing to provide their last known addresses. (LF 23-25). Mr. Billings also requested a continuance, which was granted over the State's objection. (LF 26). The trial was continued until May 31, 2012. (LF 26).

Concurrently with the order granting the continuance, the trial court entered an order that defense counsel was to provide a list of names and addresses of all potential witnesses to the State and the Court within 30 days from February 23, 2012. (LF 26, 54-55). On April 4, 2012, Mr. Billings filed a motion to withdraw from the case. (LF 28). Mr. Billings did not file an endorsement of witnesses prior to the trial court's March 24, 2012 deadline. Mr. Jeffrey Witt entered his appearance for Hillmann on April 13, 2012 and Mr. Billings' was allowed to withdraw.

On May 29, 2012, Mr. Witt filed a motion to suppress the statements of Hillmann, motions in limine and an endorsement of 17 witnesses for trial. (LF 32-37). Included in this list were many witnesses the State intended to call at trial. Also included were a number of witnesses required for the defense. On May 30, 2012 the State filed a supplemental motion to endorse witnesses for trial. (LF 38-39). The Court ruled on all pending issues on May 31, 2012, the first day of trial by stating:

> Motions come on for hearing. State appears by Assistant Prosecuting Attorney, defendant appears in person and with counsel. Motion for Limine filed by State heard and granted as per Order and Judgment entered. Defendant's Motions in Limine heard and denied as per Order and Judgment entered. Motion to Endorse Witnesses filed by defendant heard and Order and Judgment entered. Motion to Endorse Witnesses filed by State heard and so ordered granted. Defendant's Motion To Exclude Evidence filed by defendant heard and denied. jdb/be (LF 54-57).

The Court's ruling with respect to Hillmann's endorsement of witnesses was essentially overruled. Due to the order given to Mr. Billings and the fact that no witnesses were endorsed during the period allotted to Mr. Billings, the court precluded Hillmann from calling material witnesses at trial as a sanction. (LF 54-57). An exception did exist if the State consented to a particular witness, narrowing the list of individuals Hillmann could call from 17 to a mere six or seven. Hillmann sought to call Donna Berry, Julie Kluga, Brad Young, Sarah Young, Mike Rich, Bonnie Rich, Joseph Rothermich, Joseph Ingratia, Emily Fallon, and Anthony Hemmingway, Jr. (CT's boyfriend a.k.a. A.J.) as witnesses on his behalf. (Tr. 7-15). None were cumulative witnesses and each would have cast doubt as to the veracity of CT as each of them were either friends of CT's whom she mentioned disclosing to on the same day of the free-write or were relatives of hers who discussed the events with her. Hillmann was also denied the opportunity to make an offer of proof regarding any of the witnesses in question. Conversely, the trial court granted the State leave of court to endorse two material witnesses for trial. (LF 57).

After two days of trial, Hillmann was convicted of both charges. (LF 76). A Sentencing Assessment Report (SAR) was requested and sentencing was set for August 6, 2012. On June 26, 2012 trial counsel filed a Motion for Judgment of Acquittal, a Motion to Set Aside or Arrest Judgment and a Motion for a New Trial.

(LF 82-101). On July 23, 2012 trial counsel filed a First Supplemental Motion for New Trial and on July 26, 2012 the trial court issued an Order denying all post-trial motions. (LF 102-125). On August 6, 2012 Hillmann was sentenced to five years for the controlled substances offense and four years on the attempted statutory sex offense. (LF 131.) The Court ordered the sentences to run consecutively and pursuant to §559.115 RSMo. in the Sex Offender Assessment Unit ("SOAU") for a period of 120 days. On August 30, 2012, Hillmann timely filed his Notice of Appeal. (LF 133). On November 8, 2012 the trial Court issued an Order denying release upon completion of the 120 day program and Hillmann entered general population within the prison to finish his sentence.

This appeal follows.

POINTS RELIED ON

I. APPELLANT HAS BEEN DENIED SUFFICIENT APPELLATE REVIEW OF HIS CASE AS THE TRANSCRIPT ON APPEAL IS INCOMPLETE AND UNRELIABLE IN VIOLATION OF HIS RIGHTS TO DUE PROCESS UNDER U.S. CONST. AMEND. XIV AND MO. CONST. ART. I, §10, AND TO MEANINGFUL APPELLATE REVIEW UNDER MO REV. STAT. §565.035, IN THAT THE LIMITED RECORD ESTABLISHES THAT THERE ARE SIGNIFICANT PORTIONS OF THE TRANSCRIPT MISSING FROM APPELLANT'S CASE-IN-CHIEF, INCLUDING HIS OFFER OF PROOF RELATING TO EXCLUDED WITNESSES, AND THAT HE SUFFERS PREJUDICE AS A RESULT OF BEING UNABLE TO PERFECT HIS MERITORIOUS CLAIMS ON APPEAL DUE TO THE INSUFFICIENT RECORD.

Lynn v. Plumb, 808 S.W. 2d 439 (Mo. App. S.D. 1991)

Loitman v. Wheelock, 980 S.W. 2d 140 (Mo. App. E.D. 1998)

State v. Christeson, 50 S.W. 3d 251(Mo. banc 2001)

State v. Koenig, 115 S.W.3d 408 (Mo. App. S.D. 2003)

II. THE TRIAL COURT ABUSED ITS DISCRETION IN LIMITING APPELLANT'S DEFENSE BY PRECLUDING APPELLANT FROM PRESENTING A DEFENSE THAT HE WAS NOT THE PERPETRATOR OF THE CRIMES CHARGED AND THAT THE COMPLAINING WITNESS WAS INHERENTLY UNRELIABLE IN THAT APPELLANT THE RIGHT TO PRESENT A MEANINGFUL DEFENSE SUPPORTED BY RELEVANT ADMISSIBLE EVIDENCE. APPELLANT WAS SUBSTANTIALLY PREJUDICED BY THE TRIAL COURT LIMITING HIS DEFENSE AS A DISCOVERY SANCTION AND IN PREVENTING HIM FROM CALLING TO TESTIFY TEN WITNESSES ON HIS BEHALF, INCLUDING DONNA BARRY, JULIE KLUBA, BRAD YOUNG, SARA YOUNG, MIKE RICH, BONNIE RICH, JOSEPH ROTHERMICH, JOSEPH INGRACIA, EMILY FALLON AND ANTHONY HEMINGWAY, JR.

THE EXCLUSION OF THESE WITNESSES' TESTIMONY DENIED APPELLANT'S RIGHTS TO DUE PROCESS OF LAW, TO PRESENT A DEFENSE, AND A FAIR TRIAL IN VIOLATION OF U.S. CONST. AMEND V, VI, AND XVI AND MO. CONST. ART. I, §10 AND 18(A).

California v. Trombetta, 467 U.S. 479 (1984)

State v. Downen, 3 S.W. 3d 434 (Mo. App. S.D. 1999)

State v. Miller, SC91948 (Mo. Banc 2012)

Burton v. State, 641 S.W. 2d 95 (Mo. Banc 1982)

III. THE TRIAL COURT PLAINLY ERRED IN FAILING TO SUPPRESS EVIDENCE OF MARIJUANA SEIZED FROM APPELLANT'S HOME WITHOUT A WARRANT OR ANY EXCEPTION TO THE WARRANT REQUIREMENT INCLUDING "PLAIN VIEW" OR "EXIGENT CIRCUMSTANCES" IN THAT LAW ENFORCEMENT DID NOT HAVE A WARRANT, APPELLANT HAD REPEATEDLY DENIED ACCESS AND ONLY ALLOWED ENTRY FOR THE LIMITED PURPOSE OF RETRIEVING HIS CELL PHONE AND THE MARIJUANA SEIZED WAS NOT IN PLAIN VIEW. THE TRIAL COURT'S ERROR IN ADMITTING THE EVIDENCE OF MARIJUANA SEIZED FROM APPELLANT'S HOME VIOLATED HIS RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE AS GUARANTEED BY THE U.S. CONST. AMEND IV AND MO. CONST. ART. I, §15.

State v. Simmons, 158 S.W.3d 901 (Mo. App. S.D. 2005)

State v. Cromer, 186 S.W.3d 333 (Mo. App. W.D. 2005)

State v. Adams, 791 S.W.2d 873 (Mo. App. W.D. 1990)

IV. §559.115 RSMO 2000 IS UNCONSTITUTIONAL IN THAT IT VIOLATES APPELLANT'S RIGHTS TO EQUAL PROTECTION IN THAT IT FORBIDS HIM FROM PARTICIPATING IN THE

PROGRAM TO WHICH HE WAS SENTENCED AND SECURING THE POSSIBILITY OF EARLY RELEASE FROM CONFINEMENT AS A RESULT OF THE EXERCISE OF HIS RIGHT TO APPEAL AFTER CONVICTION EVEN THOUGH OTHERS WHO ARE SIMILARLY SENTENCED ARE ABLE TO AVAIL THEMSELVES OF THE PROGRAM AND EARLY RELEASE. THE STATUTE IMPERMISSIBLY IMPINGES ON APPELLANT'S FUNDAMENTAL RIGHT TO APPEAL AND TREATS HIM UNFAIRLY FROM THOSE SIMILARLY SITUATED AND THEREFORE VIOLATES HIS RIGHTS TO EQUAL PROTECTION AS GUARANTEED BY U.S. CONST. AMEND XIV AND MO. CONST. ART. I, §2.

In the Matter of the Care and Treatment of Albert Bernat v. State, 194 S.W.3d 863 (Mo. banc 2006)

In re Care and Treatment of Coffman, 225 S.W.3d 439 (Mo., 2007)

559.115 RSMo.

ARGUMENT

I. APPELLANT HAS BEEN DENIED SUFFICIENT APPELLATE REVIEW OF HIS CASE AS THE TRANSCRIPT ON APPEAL IS INCOMPLETE AND UNRELIABLE IN VIOLATION OF HIS RIGHTS TO DUE PROCESS UNDER U.S. CONST. AMEND. XIV AND MO. CONST. ART. I, §10, AND TO MEANINGFUL APPELLATE REVIEW UNDER MO REV. STAT. §565.035, IN THAT THE LIMITED RECORD ESTABLISHES THAT THERE ARE SIGNIFICANT PORTIONS OF THE TRANSCRIPT MISSING FROM APPELLANT'S CASE-IN-CHIEF, INCLUDING HIS OFFER OF PROOF RELATING TO EXCLUDED WITNESSES, AND THAT HE SUFFERS PREJUDICE AS A RESULT OF BEING UNABLE TO PERFECT HIS MERITORIOUS CLAIMS ON APPEAL DUE TO THE INSUFFICIENT RECORD.

Standard of Review

A defendant is entitled to a full and complete transcript on appeal. State v. Koenig, 115 S.W.3d 408 (Mo. App. S.D., 2003), *see also* State v. Christeson, 50 S.W.3d 251 (Mo. banc 2001). Missouri Rules of Civil Procedure Rule 81.12 (a) and Missouri Rules of Criminal Procedure Rule 30.04(a) require a record of all proceedings and evidence necessary to determine all questions presented. Loitman v. Wheelock, 980 S.W.2d 140 (Mo.App. E.D. 1998). While this Court will not automatically reverse a judgment solely because there is an incomplete or inaccurate record (*see* State v. Middleton, 995 S.W.2d 443 (Mo. Banc 1999)), where a defendant is unable to obtain a complete and accurate copy of the transcript despite due diligence, a reversal is required. State v. Mcvay, 852 S.W. 2d

408 (Mo. App.E.D. 1993). The test for reversal is if the incompleteness of the record is prejudicial. Id. (*see also* Koenig, 115 S.W.3d 408 (Mo.App. 2003)). Appellant has the burden to prove that the alleged defects and claim of prejudice are specific. State v. Wolfe, 344 S.W.3d 822 (Mo. App. S.D. 2011). However, if an appellant demonstrates an inability to secure a complete transcript and that he is thereby prejudiced, the matter must be reversed and a new trial must be granted. Lynn v. Plumb, 808 S.W.2d 439 (Mo.App. 1991).

Discussion

The trial transcript in this case is two volumes - one for each day of the trial. Volume one contains some pretrial matters, voir dire and the State's case in chief. Volume two contains the second day of trial wherein Hillmann attempted to call witnesses on his own behalf and make offers of proof. Volume two contains at least thirty-two instances where the proceedings were in audible. Of these, the term "indiscernible" is used in excess of twenty-one times, many of them being sidebar conferences with the trial court wherein rulings as to the excluded witnesses were discussed. The transcript is incomplete as follows:

- Page 190, line 18
- Page 213, line 24 (proceedings held at the bench—all indiscernible)
- Page 218, line 11 (proceedings held at the bench – all indiscernible)
- Page 230, line 5, 8, 9 (where a motion was denied)
- Page 232, line 10
- Page 239, line 16, 21
- Page 240, line 20 (2x indiscernible), 22, 23, 24, 25

- Page 248, line 1, 7
- Page 252, line 1
- Page 253, line 25
- Page 260, line 9 (proceedings held at the bench – all indiscernible)
- Page 263, line 5, 6, 7, 12, 13, 14, 16, 20, 21, 22, 24
- Page 264, line 20 (proceeding held at the bench – all indiscernible)
- Page 302, line 2

Five of these conferences at sidebar were completely indiscernible, leaving the Appellant and this Court with no record of any rulings made by the trial court. Thus, not only are these issues solely discussed in volume two of the trial transcript the entirety of the trial court's rulings and statements made on these issues preclude appellate review due. Appellant requested a complete trial transcript, and despite due diligence, Appellant ultimately did not receive a complete and accurate transcript.

In Loitman, the inadequate transcript denied the Court the ability to make a determination of the sufficiency of the offer of proof. This Court found prejudice as the missing portions prevented appellate review. Thus, the Loitman Court held, as is argued here *infra*, that if the record cannot be completed, a new trial must be ordered. Loitman, 980 S.W.2d 140 (Mo.App.E.D., 1998).

Appellant's most concerning issues in this appeal are located in the transcript where the rulings and discussions from the trial court are "indiscernible," distinguishing from Koenig (The Appeals Court did not find that the inaudibles were unfairly prejudicial to the defendant because the Defendant did not

specifically point to which omissions were unfairly prejudicial to the defendant). Koenig, 115 S.W.3d at 414, (*see also* State v. Wolfe, 344 S.W.3d 822 (Mo. App. S.D. 2011) (The defendant was not prejudiced because the Defendant failed to articulate to the court a single error that was relevant to any issue that he raised on appeal or any other issues he wished to assert).

By way of background, the issue submitted *infra* pertains to Appellant's trial counsel, Witt, arguing after his material witnesses were excluded from trial as a discovery sanction, that he would need to provide an offer of proof for each witness for purposes of appellate review. The following colloquy ensued:

(At this time counsel approached the bench, and the following proceedings were had: (indiscernible)

Mr. Witt: I would like to offer up an offer of proof (indiscernible).

The Court: You mean the basis for your not being allowed is because of the late endorsement. I'm not sure what they have to say. I mean, if you want to put an offer of proof I'm not going to prevent you but I think (indiscernible) the Court's decision was it wasn't because they had (indiscernible) testimony or they didn't have anything to say or anything (indiscernible) because of a late endorsement. And if it's not done it comes back on me.

Mr. Witt: (indiscernible)

Ms. King: I think it comes back on you and if the Court says it's irrelevant and I'm not letting it in and you don't make an offer of proof, then it comes back on you.

Mr. Witt: Correct, if were saying (indiscernible) testimony witnesses to (indiscernible) for that reason. Absolutely (indiscernible). Preserving it for the record.

The Court: (indiscernible) relevant not be without reason, absolutely make and offer of proof and show that I'm not in that respect but my ruling was that because it was a late endorsement, two days before trial and done well after the previous order was in place. That's why they were excluded, not because they may not have anything relevant to say. So, if you want to take the time to put them on and let them testify, I mean, I can't prevent you from doing that, but I'm telling you that it doesn't affect the Court's ruling.

Mr. Witt: I guess I understand that but, preserving every right possible.

Ms. King: Your issue on appeal would be that the Court erred in not allowing you to put on these witnesses because of the endorsement, not because there was a ruling or inadmissible testimony.

The Court: Was I wrong in saying that you couldn't have a late endorsement, then that's that case when you guys come back, your offer of proof isn't going to choose the Court of Appeals of any knowledge of that issue because the issues that they gave irrelevant testimony or they (indiscernible) but again, going---

(Proceedings returned to open court.)

(Tr. 263-264).

This colloquy was the very heart of the issue wherein trial counsel was attempting to preserve the trial court's ruling for appeal. This is extremely close to the dialogue that took place in Wheelock. Yet, in Wheelock, the issue centered around whether it was clear whether that the trial court abused its discretion or if the issue was adequately preserved. The partial quotation in the last paragraph before returning to open court is obviously not complete. Similar to Wheelock, Appellant did not cause the deficiencies in the record, nor was there any means to have known about them at the time or to have corrected them later. Contrary to

Wheelock, trial counsel acted sufficiently in his attempts to assert his client's rights and to properly preserve the issues for appeal.

There can be little doubt as to the prejudice that befalls Appellant from the incomplete record.

As before, the ordinary remedy imputed on the challenging party to attempt to perfect the record is not possible in this occasion as too much of the record is non-existent. It is doubtful the parties and the trial court, even if given an opportunity, could recall the specifics of the discussions such that a complete or even a paraphrased, shortened type record could be created for review. Wheelock, 980 S.W. 2d 140 (Mo. App. E.D. 1998). Therefore, as the record could not be corrected or reconstructed with any degree of accuracy, the only possible fair and just outcome would be to Order a new trial. Even if the witnesses remain excluded, in this instance, this Court would be able to review the potential testimony and make an informed decision as to the appropriate remedy. Id. More importantly, this Court would have the ability to review the submitted testimony to determine if the trial court abused its discretion by excluding said witnesses.

Due to the prejudicial nature of the missing rulings and discussion of an offer of proof, the Appellant was not given his right to perfect his meritorious appeal. The transcript on appeal is incomplete and unreliable in violation of Hillmann's rights to due process under U.S. Const. amend. XIV and Mo. Const.

Art. I, §10, and to meaningful appellate review under Mo Rev. Stat. §565.035. This Court should reverse and remand for a new trial.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN LIMITING APPELLANT'S DEFENSE BY PRECLUDING APPELLANT FROM PRESENTING A DEFENSE THAT HE WAS NOT THE PERPETRATOR OF THE CRIMES CHARGED AND THAT THE COMPLAINING WITNESS WAS INHERENTLY UNRELIABLE IN THAT APPELLANT THE RIGHT TO PRESENT A MEANINGFUL DEFENSE SUPPORTED BY RELEVANT ADMISSIBLE EVIDENCE. APPELLANT WAS SUBSTANTIALLY PREJUDICED BY THE TRIAL COURT LIMITING HIS DEFENSE AS A DISCOVERY SANCTION AND IN PREVENTING HIM FROM CALLING TO TESTIFY TEN WITNESSES ON HIS BEHALF, INCLUDING DONNA BARRY, JULIE KLUBA, BRAD YOUNG, SARA YOUNG, MIKE RICH, BONNIE RICH, JOSEPH ROTHERMICH, JOSEPH INGRACIA, EMILY FALLON AND ANTHONY HEMINGWAY, JR. THE EXCLUSION OF THESE WITNESSES' TESTIMONY DENIED APPELLANT'S RIGHTS TO DUE PROCESS OF LAW, TO PRESENT A DEFENSE, AND A FAIR TRIAL IN VIOLATION OF U.S. CONST. AMEND V, VI, AND XVI AND MO. CONST. ART. I, §10 AND 18(A).

Standard of review

Generally a trial court has broad discretion in permitting the late endorsement of witnesses. State v. Downen, 3 S.W.3d 434, 435 (Mo. App. S.D. 1999). In this respect, the trial court abuses its discretion "when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." Id. Essentially, the test seeks to determine if reasonable persons can differ about the propriety of the action taken by the trial court. If reasonable

persons can disagree, then it is not deemed an abuse of discretion. Id., *citing* State v. Brown, 939 S.W.2d 882, 883-84 (Mo.banc 1997). However, "[t]he sanction is used sparingly against a defendant in a criminal case because of the trial court's duty to ensure a fair trial by allowing the defendant to put on a defense." State v. Miller, SC91948 (Mo. 2012), *citing* State v. Walkup, 220 S.W.3d 748, 757 (Mo. banc 2007). This unsurprising ruling stems from the thought that, "[a] defendant in a criminal case has a constitutional right to present a complete defense." California v. Trombetta, 467 U.S. 479, 485 (1984). "When it comes to applying evidentiary principles or rules, the erroneous exclusion of evidence in a criminal case creates a rebuttable presumption of prejudice." Burton v. State, 641 S.W.2d 95, 99 (Mo. banc 1982) and State v. Rhodes, 988 S.W.2d 521, 529 (Mo. banc 1999). The presumption of prejudice may only be overcome if the state proves the error was harmless beyond a reasonable doubt. Id. Obviously this test would require some ability on the part of this Court to review the likely testimony of the excluded witnesses to determine if their exclusion was prejudicial, yet our record in this matter is obviously devoid of this evidence due to the incomplete record created at the trial level.

Discussion

The trial court's February 2012 ruling required Appellant to name his witnesses within thirty days. (LF 26). Regardless, punishing a criminal defendant

for the action or non-action of his counsel clearly deprives Appellant of his right to a fair trial. More troubling, the trial court granted an endorsement of witnesses filed by the State concurrently with those of Appellant. (LF 38-39). Certainly the trial court had other tools at its disposal to punish or deter the action of Appellant's counsel while still ensuring Appellant received a fair trial. The record before this Court contains a detailed argument as to the trial court's exclusion of witnesses. Troubling within this argument is the fact that the parties apparently discussed the issue and received a ruling via a telephone conference a few days before trial. (Tr. P. 7-18). The trial court, concerned that the ruling was misunderstood, then generated an email between the parties to clarify the ruling as, "That's why I sent that email clarifying to say it was my understanding – I think I sent that email yesterday indicating it was my understanding that the State was not objecting to some of these witnesses and wanted to make sure which ones we had down." (Tr. 8-9). Clearly the outcome of the telephone hearing was not understood by all as trial counsel replied:

> Judge, on Tuesday – because I lost my cool on the conversation, and I think we'll all agree on that. I said, 'How am I to present a defense when I have no witnesses?' And the Court said, 'I understand where you're coming from. This is what happens when you come in late on a case. Sometimes things have been decided.' There was no question that the Court overruled – or denied all witnesses. I walked out of here with a stack of subpoenas saying, 'Boy that didn't work out the way I wanted.' The Court ruled no witnesses. I had to change all my structure because, as of Tuesday at 11:30 or noon, I was told by the Court, 'You will have no witnesses.' (Tr. 9).

This difference of opinion as to the Court's telephone ruling clearly impacted Appellant. This situation constitutes the exact presumption of prejudice discussed in Burton and the only just and fair method to correct the wrongs would be to remand the matter back to the trial court for a new trial wherein these witnesses could testify or an offer of proof made that could then be reviewed by this Court.

Equally important to note, the witnesses Appellant sought to call were material and would have impacted the trial by calling in to question the veracity of CT. Many of the witnesses Appellant attempted to endorse had spoken to CT either before the free-write or right after. Many others were family members she spoke with about the purported incident. These witnesses, taken together with Appellant's obvious surprise when initially contacted about his purported actions in the Sheriff-directed calls, the fact that none of those inside the home at the time reported hearing anything and that CT's free-write appears to begin with a discussion about her father, could have certainly altered the jury's verdict. Their absence from the trial had a clear, obvious prejudice to Appellant and, accordingly, the trial court's determination that they be excluded was against the logic of the circumstances and was so unreasonable that it shocks the sense of justice. Accordingly, Appellant argues the trial court's order excluding these material witnesses was an abuse of discretion and must be overturned, the conviction vacated and a new trial Ordered.

III. THE TRIAL COURT PLAINLY ERRED IN FAILING TO SUPPRESS EVIDENCE OF MARIJUANA SEIZED FROM APPELLANT'S HOME WITHOUT A WARRANT OR ANY EXCEPTION TO THE WARRANT REQUIREMENT INCLUDING "PLAIN VIEW" OR "EXIGENT CIRCUMSTANCES" IN THAT LAW ENFORCEMENT DID NOT HAVE A WARRANT, APPELLANT HAD REPEATEDLY DENIED ACCESS AND ONLY ALLOWED ENTRY FOR THE LIMITED PURPOSE OF RETRIEVING HIS CELL PHONE AND THE MARIJUANA SEIZED WAS NOT IN PLAIN VIEW. THE TRIAL COURT'S ERROR IN ADMITTING THE EVIDENCE OF MARIJUANA SEIZED FROM APPELLANT'S HOME VIOLATED HIS RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE AS GUARANTEED BY THE U.S. CONST. AMEND IV AND MO. CONST. ART. I, §15.

Standard of review

When reviewing a trial court's denial of a motion to suppress, this Court determines whether there is substantial evidence to support the decision. State v. Mahsman, 157 S.W. 3d 245, 248 (Mo. App. E.D. 2004). The ruling will only be reversed if the trial court's denial was clearly erroneous. Id. The appellate court will decide that a ruling was clearly erroneous if the appellate court is left "with a definite and firm belief a mistake has been made." State v. Rowland, 73 S.W. 3d 818, 821 (Mo. App. S.D. 2002). A Fourth Amendment violation is a question of law triggering a *de novo* review. State v. Simmons, 158 S.W. 3d 901, 907 (Mo. App. S.D. 2005), *see also* State v. Cromer, 186 S.W.3d 333, 341 (Mo. App. .W.D. 2005).

Trial counsel failed to file a Motion to Suppress Evidence or to include such a request in his Motions for New Trial and therefore the issue is not properly

preserved for review. Plain error is the standard of review for points that are not properly preserved for Appellate Review. Missouri Supreme Court Rule 30.20. "Plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." *Id.* To prevail on a claim of plain error, Defendant must show that the trial court's error so substantially violated his rights that manifest injustice or a miscarriage of justice would result if the error is left uncorrected. State v. Taylor, 166 S.W.3d 599,604 (Mo.App.S.D.2005). Plain error is to be applied sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review. State v. Roberts, 948 S.W.2d 577,592 (Mo.banc 1997).

Discussion

Both the United States Constitution and the Missouri Constitution work to protect citizens from unreasonable searches and seizures. Arresting a person in his or her home without a warrant, even if the officer has probable cause, is presumptively unreasonable, and therefore is impermissible under the Fourth Amendment unless proper consent is granted or exigent circumstances exist. Id., *see also* State v. Adams, 791 S.W. 2d 873, 877 (Mo. App. W.D. 1990).

These exigent circumstance exceptions include (1) pursuing a fleeing felon, (2) preventing the imminent destruction of evidence, (3) preventing a suspect's

escape, or (4) mitigating the risk of danger to law enforcement or other persons inside or outside of the dwelling. (*See also* State v. Simmons, 158 S.W. 3d 901, 906 (Mo. App. S.D. 2005). These issues are made on a case-by-case basis. State v. Glisson, 80 S.W. 3d 915, 919 (Mo. App. S.D. 2002) (Its been held that there is no true test for exigent circumstances). This court has elaborated on several factors that are considered when decided whether exigent circumstances exist. These include: (1) that a grave offense is involved, such as a violent crime; (2) the suspect is reasonably believed to be armed; (3) a clear showing of probable cause to believe the suspect committed the offense; (4) strong reason to believe the suspect is in the premises to be entered; (5) a likelihood the suspect will escape if not swiftly apprehended; (6) the entry, though not consented, is made peaceably. State v. Varvil, 686 S.W. 2d 507, 512 (Mo. App. E.D. 1985). Here, Officer Scott Schoenfeld did not have a warrant to search or arrest Appellant, nor were there any exigent circumstances.

This case is analogous to the State v. Cromer. In Cromer, the police were conducting a "knock and talk." Children answered the door and granted the police limited access inside. When contacted by telephone, the home's owner, Ms. Todd, granted limited access to the living room of the home while officers waited for her arrival. Ms. Todd did not give the officers permission extend their reach to any other room in the residence. The officers exceeded the scope of the consent by

searching a bedroom while awaiting Ms. Todd's return. Obviously the case turned on the items viewed in plain view in the bedroom that were illegal to own and were thus seized. The Court held the search illegal as the officers only saw this elicit activity because they violated Ms. Todd's Fourth Amendment rights. The Court made a determination that there were no exigent circumstances present even though the individual they sought had a known history of violence. Thus, the Court reversed and remanded the matter for a new trial, ruling that the items seized were to be suppressed.

Similarly, Appellant refused to allow the four officers from the Sheriff's department into his residence. Not only was Appellant not under arrest when law enforcement first arrived, but Lt. Schoenfeld repeatedly indicated throughout the hours law enforcement was present that a determination as to if Appellant would be arrested had yet to be made. (Tr. 178). More troubling, Lt. Schoenfeld's basis for his need to enter the residence stemmed from a purported concern that Appellant would get, "a weapon to hurt me or himself or destroy evidence, and he wanted his cell phone, which I told him was fine, but I wanted to accompany him in there [Hillman residence]." (Tr. 143). Appellant has no history of violence and there was no reasonable belief that appellant was armed. Appellant explained that he would like to make a statement the next day because his children were present in the house. If they occurred at all, the purported acts with CT had occurred

weeks earlier, so a claim of any exigent circumstances appears to make little sense. Yet, as Officer Schoenfeld did not approve of Appellants request to meet the following day, he attempted numerous times to enter Appellant's residence and would not allow Appellant to retrieve a cell phone, shoes or to check to ensure his children were safe.

Eventually, against the wishes of Appellant, officers entered the home's entry room. Using Appellant's children as a tool, Schoenfeld continued to encroach into a search of the rest of the home Appellant's authorization or consent eventually seizing marijuana. When questioned at trial as to if he ever received consent to search the home, the best Schoenfeld could offer was "He never asked me to leave." (Tr. 150).

One of the exigent circumstances exception to the warrant requirement, is when the person consents, freely and voluntarily to the entry and search. State v. Faulkner, 103 S.W. 3d 346, 355 (Mo.App. S.D. 2003) (Consent is freely and voluntarily given if, with the totality of the circumstances, the objective observer would conclude that the person giving consent made a free and unconstrained choice to do so). This Court has articulated some factors that can be used to determine whether consent was voluntary or not. These include: (1) the number of officers present; (2) the degree to which the officers emphasized their authority; (3)

whether weapons were displayed; (4) whether the officers were misleading or fraudulent; and (5) evidence regarding what was said or done by the person giving the consent. Ranklin v. Venator Group Retail, Inc., 93 S.W. 3d 814, 822 (Mo. App. E.D. 2002). In these instances, the State must prove whether the consent was voluntarily and freely given. State v. Cromer, 186 S.W.3d at 347. Consent cannot be coerced, either implicitly or explicitly. Id.

Here, while keeping Appellant within eyesight of his children in the entry area of the home, Officer Schoenfeld directed other officers to search the remaining parts of the home, ultimately locating items, including marijuana, used in the prosecution of Appellant. The method utilized by officers in this case clearly provided Appellant no true option to refuse an unlawful and illegal search. There can be little doubt that Appellant was not permitted to assert his rights and was coerced into an illegal search. Accordingly, the marijuana seized from under Appellant's couch was obtained illegally and should have been considered fruits of the poisonous tree and, therefore, excluded from trial. The trial court's admission of said evidence was therefore erroneous and must be overturned.

IV. §559.115 RSMO 2000 IS UNCONSTITUTIONAL IN THAT IT VIOLATES APPELLANT'S RIGHTS TO EQUAL PROTECTION IN THAT IT FORBIDS HIM FROM PARTICIPATING IN THE PROGRAM TO WHICH HE WAS SENTENCED AND SECURING THE POSSIBILITY OF EARLY RELEASE FROM CONFINEMENT AS A RESULT OF THE EXERCISE OF HIS RIGHT TO APPEAL

AFTER CONVICTION EVEN THOUGH OTHERS WHO ARE SIMILARLY SENTENCED ARE ABLE TO AVAIL THEMSELVES OF THE PROGRAM AND EARLY RELEASE. THE STATUTE IMPERMISSIBLY IMPINGES ON APPELLANT'S FUNDAMENTAL RIGHT TO APPEAL AND TREATS HIM UNFAIRLY FROM THOSE SIMILARLY SITUATED AND THEREFORE VIOLATES HIS RIGHTS TO EQUAL PROTECTION AS GUARANTEED BY U.S. CONST. AMEND XIV AND MO. CONST. ART. I, §2.

Standard of Review

This Court reviews constitutional challenges to a statute de novo. St. Louis County v. Prestige Travel Inc., 344 S.W.3d 708, 712 (Mo. banc 2011). "An act of the legislature carries a strong presumption of constitutionality". *Id.* quoting Ass'n of Club Executives v. State, 208 S.W.3d 885, 888 (Mo. banc 2006). "A statute is presumed valid and will not be held unconstitutional unless it contravenes a constitutional provision. *Id.* quoting Rentschler v. Nixon, 311 S.W.3d 783, 786 (Mo. banc 2010). The burden of proof rests on the challenger to prove otherwise. *Id.*

Discussion

On August 6, 2012, Appellant was sentenced five years on Count I and four years on Count II, both sentences to run consecutively. (LF 131-132). Said sentence was pursuant to §559.115 RSMo, thereby placing Appellant in a mandatory 120 day program called the Sex Offender Assessment Unit ("SOAU"). If successfully completed, the sentencing judge has the ability to remove the offender from the Department of Corrections and place him or her on probation.

While sentenced to this program, Appellant timely filed his notice of appeal on August 16, 2012. Unbeknownst to Appellant, the mere filing of his notice of appeal rendered him ineligible for the SOAU. On November 8, 2012, the Circuit Court entered an order denying Appellant's release and ordered the execution of the nine-year sentence. Repeated attempts to obtain Appellant's records from the Department of Corrections while he was in this program have been to no avail due to purported privacy concerns. As Appellant's participation in the SOAU is mandated by state law due to the nature of his conviction and as his right to appeal is fundamental, it appears these two provisions of Missouri law contradict each other, therein requiring review by the Missouri Supreme Court. Moreover, as section 559.115 RSMo permits many other types of offenders the same 120 day "shock" incarceration irrespective of any appeal, Appellant argues an equal protection violation exists.

The United States Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. In essence, the Constitution requires that "similarly situated" persons be treated the same way. Similarly, the Missouri Constitution provides, "all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const. Art. I, Sec. 2. Missouri's equal protection clause provides the same protections as the United States Constitution. Bernat v. State, 194 S.W.3d 863

(Mo. banc 2006), s*ee also* In re Care and Treatment of Coffman, 225 S.W.3d 439 (Mo. banc, 2007).

The Supreme Court of Missouri established a two-part analysis to determine whether a statute violates the equal protection clause. The Court has articulated the first step is to determine whether the classification operates to the disadvantage of a suspect class or infringes on a fundamental right. Id. If the statute provides for different treatment of a suspect class then the analysis is subject to strict scrutiny, and the statute would only be upheld if it necessary to achieve a compelling state interest. Id. If the treatment does not concern a fundamental right, then the statute will be upheld if it is rationally related to a legitimate state interest. Id. According to 547.070 RSMo, an appeal to the proper appellate court shall be allowed to the defendant in all cases of final judgment. The Missouri Constitution specifically states that the Supreme Court may establish rules pertaining to practice and procedure in the courtroom. However, the rule shall not change substantive rights, or the law relating to evidence or **the right to an appeal**. Mo. Const. Art. V, Sec. 5. As the right to an appeal is protected by the Missouri Constitution, a defendant's right to an appeal would be a fundamental right therein requiring strict scrutiny should any other law possibly infringe upon it. In such an instance, the state would bear the burden of proving that the requirement prohibiting a defendant's right to an appeal serves a compelling state interest. Additionally, it

must be proven that the rule or law must be narrowly tailored to serve that interest.

The Missouri Sentencing Advisory Committee (hereinafter "MOSAC") articulates the necessary criteria for placement in the Sex Offender Assessment Unit (hereinafter "SOAU"), (*see* The Missouri Sentencing Advisory Committee, http://www.mosac.mo.gov/file.jsp?id=45358). In order for a defendant to be eligible for placement in the required SOAU, the defendant could not have entered an Alford plea, nor may the defendant have a pending appeal. Id. Invariably, this criteria causes discord with the Appellant's judgment ordered from the Circuit Court and his constitutional right to an appeal. In order for Appellant to complete the mandatory program and secure his release, he must waive his right to an appeal. Seemingly the same is true for the opposite wherein, should Appellant elect to file an appeal, Appellant would lose eligibility to participate in the SOAU pursuant to section 559.115 RSMo and would be required to serve the remainder of his sentence. This unfairly discriminates against Appellant merely because he elected to appeal his conviction. Thus, Appellant is not afforded the same treatment of the law as other defendants merely due to exercising his Constitutional rights. More troubling, other subsections of 559.115 permit offenders to participate in various 120-day treatment or "shock" programs without consequence for the filing of an appeal. Obviously, this disparity seems to center upon the type of offense committed. Yet, there appears to be no compelling reason

to deny the fundamental right to appeal simply due to the conviction for a sex-type offense. Section 559.115 RSMo permits entrance and release to individuals convicted of violent crimes as well as a host of drug and other offenses all without punishment for the filing of an appeal. There is simply no precedent to conclude that Appellant's conviction is somehow considered worse than many other types of convictions and this certainly is not possible as a blanket rule.

As Appellant was forced to choose between exercising a Constitutional right or obtaining his freedom by navigating between two laws that appear to operate opposite each other, the provision of section 559.115, which denies release should an appeal be filed is unconstitutional.

As other defendants sentenced under section 559.115 RSMo are not required to abandon any appellate rights, an equal protection violation occurs. Infringing upon and prohibiting a defendant's right to an appeal does not cater to any compelling or even legitimate state interest. The requirement that a defendant must not have a pending appeal as a requirement for completion of the SOAU serves no interest other than to confuse an offender and force them to abandon their rights.

As this issue raises a conflict between two laws, Appellant contends this matter must be transferred to the Supreme Court of the State of Missouri for resolution.

CONCLUSION

WHEREFORE, for the reasons set forth herein, appellant Nicholas Hillman respectfully requests that his conviction in this matter be vacated, that any provision of law denying him the right to appeal be deemed unconstitutional and that his case be remanded to the trial court with instructions that a complete record be kept and that he be permitted to call all relevant witnesses and for any other relief this Court deems just and proper.

Respectfully Submitted,

___/s/ Jeffrey A. Goldfarb_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of May, 2013 one true and correct copy of the foregoing brief, was delivered via automatic operation of the Court's electronic filing system to: The Missouri Attorney General's Office.

___/s/ Jeffrey A. Goldfarb____
Jeffrey A. Goldfarb

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned counsel further certifies that pursuant to Rule 84.06(c) this brief: 1) contained the information required by Rule 55.03; 2) complies with Rules 84.04(g) and 30.06(d) and 3) contains 10,555 words determined using the word count in Microsoft Word. A copy of this Brief was submitted electronically. Any digital copies of this brief were scanned for viruses and found to be virus free as required pursuant to Rule 84.06(h).

/s/ Jeffrey A. Goldfarb
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