No. SC91948

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,
Respondent,

v.

DAVID BRYAN MILLER,
Appellant.

APPELLANT'S SUBSTITUTE REPLY BRIEF

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I.

APPELLANT'S FIRST CLAIM OF ERROR, CHALLENGING THE SUFFICIENCY OF THE EVIDENCE ON COUNTS III AND V, PRESENTS THIS COURT WITH AN IDEAL OPPORTUNITY TO RE-EXAMINE AND LIMIT THE "TIME IS NOT OF THE ESSENCE" RULE IN STATUTORY RAPE AND SODOMY CASES.

In addressing appellant's first claim of error, respondent does not dispute that the jury convicted appellant of an act of digital penetration, which the charging documents and the jury instructions alleged occurred when E.M.M. was thirteen years old, that was not supported by any evidence adduced at trial. Instead, in less than three pages of argument, respondent, like the Court of Appeals below, summarily brushes aside appellant's compelling due process arguments under *Jackson v. Virginia*, 443 U.S. 307 (1979) and *Cole v. Arkansas*, 333 U.S. 196 (1948), by citing the "time is not of the essence" rule that Missouri's intermediate appellate courts have repeatedly invoked in child sex offense appeals under the modern criminal code. (Resp. Br. 19-21). Respondent also cites three decisions from this Court, each of which is more than fifty years old, that also used this language in statutory rape appeals. (*Id.*). None of the cases cited by respondent in his brief, however, involves the unique factual scenario presented in this appeal

where the state, either due to negligence or for tactical reasons, elected to charge and submit to the jury an offense that the defendant clearly did not commit in light of the evidence adduced at trial.

In all three of the old cases and most of the new cases cited by respondent in his brief, the "time is not of the essence" rule was invoked to deny distinct claims of error such as the trial court's failure to grant a bill of particulars to narrow the time frame when the offense occurred, a minor variance between the charging document and the jury instructions that modified the time range in which the offense occurred to conform with the victim's trial testimony or, challenges to a late amendment to the charging document to expand the time frame when the alleged sex crime occurred. *See State v. Bowers*, 29 S.W.2d 58, 59 (Mo. 1930); *State v. Belknap*, 21 S.W.2d 39, 44 (Mo. 1920); *State v. Palmer*, 206 S.W.2d 441, 443-444 (Mo. 1957); *State v. Sprinkle*, 122 S.W.3d 652, 658-659 (Mo. App. W.D. 2004); *State v. Ellis*, 710 S.W.2d 378, 383-384 (Mo. App. S.D. 1986); *State v. Bunch*, 289 S.W.3d 701, 703-704 (Mo. App. S.D. 2009). None of the cases cited by the state involved a factual scenario that is even remotely analogous to the six year variance here between the charging document/jury instruction and E.M.M.'s trial testimony.

For instance, in *State v. Carney*, 95 S.W.3d 567 (Mo. App. S.D. 2006), the nine year old victim could not specify an exact date that the offense occurred

during her trial testimony. *Id*. at 569. However, the victim's testimony in *Carney* indicated the challenged offense could have occurred during the time period set forth in the charging document. *Id*. Because of the victim's lack of certainty, coupled with the fact that Carney gave a videotaped confession, appellant's claim of error is clearly distinguishable from *Carney*.

State v. Sexton, 929 S.W.2d 909 (Mo. App. W.D. 1999), also cited by respondent, is also distinguishable. In that case, the victim testified that she was repeatedly molested by the defendant between 1987 and 1992, which included the time frame set forth in the charging document which alleged the offenses were committed between September 1, 1990 and February 12, 1991. *Id*. at 917. Thus, the facts in *Sexton* did not involve a situation, as here, where it is clear that the charged offense, as submitted to the jury, did not actually occur during that time period.

Finally, *State v. Cannafax*, 344 S.W.3d 279 (Mo. App. S.D. 2011), also cited by the state, is clearly distinguishable. As in *Sexton*, the victim in *Cannafax* testified she was subjected to continuous acts of sexual abuse over a long period of time. The claim of error raised by Cannafax involved the fact that some of the acts of abuse could have occurred after the victim turned fourteen years old and that the state expanded the time period in which the offense occurred in order to compel Cannafax to a lifetime of parole supervision upon his release. *Id*. at 287-288.

Thus, unlike this case, it was clear in *Cannafax* that there was sufficient evidence that the sex act charged did occur during the time frames alleged in the charging documents and jury instructions in that case.

Despite the Court of Appeals' frequent use of "time is not of the essence" language in statutory rape and sodomy appeals, this Court has never had the opportunity to address the wisdom or propriety of this rule in the context presented here and whether a blanket application of such a rule in every child sex offense case involving an underage victim, regardless of the facts involved, violates procedural due process under *Cole* and *Jackson*. In modern times, this Court has mentioned the "time is not of the essence" rule only once, *in dicta*, in its recent decision in *State v. Celis-Garcia*, 344 S.W.3d 150, 154 n.4 (Mo. banc 2011).

This case presents the court with an ideal vehicle to address the propriety of this rule and strike a proper balance between the right of the state to prosecute these heinous crimes and the rights of the accused, and limit this rule to situations where a child victim becomes confused or is uncertain during trial testimony about the precise date of the offense, or where there is only a minor insignificant discrepancy between the time window in the charging document/jury instruction and the trial testimony. The Court of Appeals below, in applying this rule here, violated due process by extending the rule in a situation where the state negligently charged and submitted their case in a manner that allowed the jury to convict

appellant of a crime he did not actually commit. *See Cole v. Arkansas*, 333 U.S. 196, 200-202 (1948).

There can be little dispute that the purpose and policy of the Missouri Appellate Courts' formulation of the "time is not of the essence" rule in child sex offense cases is the fact that underage accusers in sex offense cases often cannot remember or become confused during their trial testimony about the precise dates when the offenses occurred, and this testimony sometimes falls outside the dates set forth in the charging document and/or the verdict directing instruction. *See, e.g.*, *State v. Hoban*, 738 S.W.2d 536, 541 (Mo. App. E.D. 1987). The General Assembly has also practically eliminated any statute of limitation bar for such offenses, which has often led to such charges being filed in some cases many years after the crimes are alleged to have occurred. However, despite the legislature's and the courts' noble intentions of ferreting out child predators and removing them from society, these rules must be counterbalanced against criminal defendant's due process rights to adequately defend himself against the charges and to be convicted beyond a reasonable doubt of the crimes actually charged and submitted to the jury as due process requires under *Cole* and *Jackson*. The facts of this case present the court with an ideal opportunity to strike a proper balance between the rights of the prosecution and the rights of the accused in such cases.

This case does not involve an underage victim who became confused or could not remember the actual dates of the offenses during her testimony. Instead, appellant's seventeen year old daughter's actual testimony was very precise about the time frames of the particular sex acts for which appellant was charged. (Tr. 37). Therefore, this is not an appropriate case for applying "time is not of the essence" rule because it does not involve an underage prosecutrix becoming confused or failing to remember the precise time frame the offenses occurred, which did not conform to the text of charging document or jury instructions. Instead, in this case, the prosecution, despite the precision of the victim's testimony, elected to charge and instruct the jury with deviate sexual intercourse by digital penetration during a different time period six years later that was not supported by the evidence. Appellant proposes that this Court limit the "time is not of the essence" rule to situations where there is a minor time period variance and not extend the rule to deny appellant's claim of error that was solely the result of the prosecution's incompetence.

Both the state and criminal defendants must suffer the adverse consequences of mistakes committed by their attorneys. *Coleman v. Thompson*, 501 U.S. 722, 752-754 (1991); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991). It is well settled that both plaintiffs and defendants in both civil and criminal cases must bear the risk of attorney error. As the second Justice Harlan stated: "Petitioner

voluntarily chose this attorney as his representative in this action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is duty bound by the acts of his lawyer agent . . ." *Link v. Wabash R. Co.*, 370 U.S. 626, 633-634 (1962). Salvaging this tainted prosecution "merely because the fact that [the state] should not be penalized for the omissions [and negligence] of [the prosecutor] would be visiting the sins of the plaintiff's lawyer upon the defendant." *Id*. at n.10.

The facts that were confronted by the Seventh Circuit in *Fagan* bear remarkable similarities to the facts surrounding appellant's due process claim in this appeal. In the course of granting Harrison Fagan relief on his claim that the evidence was insufficient to convict him of murder under Illinois law, under the theory presented by the prosecution at trial, Judge Richard Posner stated: "Quite possibly Fagan could have been successfully prosecuted for murder under a different theory, that of felony murder. But the state must live with the consequences of having proceeded on a theory that it could not establish with the certitude required in criminal cases. Fagan is entitled to his freedom." 942 F.2d at 1160.

Finally, there seems to be a disturbing undercurrent surrounding the pervasive use by appellate courts of the "time is not of the essence" rule to affirm

convictions of child sex offenders, often in spite of error, because of the abominable nature of such crimes. This understandable tendency of appellate courts, who after all are only human, was eloquently expressed in a recent decision from the First Circuit: "The specter of an adult, particularly one in a position of trust such as a [father], sexually abusing his minor [child] is enough to incense even the most equanimous person and to wish upon such miscreant the full retributive weight of the law. But there lies the catch: the law. We live in an ordered society, and to keep it ordered for the benefit of the whole of society, we are bound to apply the law, not just to what we believe the abominable person charged may justly deserve." *Abram v. Gerry*, 2012 W.L. 593202 at *7 (1st Cir. Feb. 24, 2012) (Torruella, J., dissenting) (emphasis in original).

II.

UNDER THE FRAMEWORK OF *STATE V. BROOKS* AND *STATE V. DEXTER*, APPELLANT IS ENTITLED TO A NEW TRIAL ON HIS *DOYLE V. OHIO* CLAIM. (Replies to Respondent's Argument III).

Respondent advances an array of arguments against granting appellant a new trial under the plain error rule based upon the prosecution's repeated violations of the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976). None of these arguments have merit. In fact, many of the arguments advanced by respondent are foreclosed by this Court's most recent *Doyle* decision: *State v. Brooks*, 304 S.W.3d 130 (2010).

First, respondent asserts that the first *Doyle* violation alleged by appellant involving the testimony of Deputy Rimmer did not constitute a *Doyle* violation because it merely involved the deputy's testimony that appellant chose to invoke his Miranda rights after warnings were given and did not make a statement. (Resp. Br. 35-36). This alleged *Doyle* violation is similar to many of the *Doyle* errors addressed in *Brooks* and in *State v. Dexter*, 954 S.W.2d 332 (Mo. banc 1997), particularly where the prosecutor in those cases, as here, during the testimony of the interrogating officer elicited that, after Miranda rights were administered, no statements were made by the defendant. *Id*. at 336-337, 339-340; 304 S.W.3d at 134-135.

Respondent's next line of defense to appellant's *Doyle* claim is the contention that, because appellant did not remain completely silent, there is no constitutional violation under *Anderson v. Charles*, 447 U.S. 404 (1980). (Resp. 41-45). This argument ignores the fact that this Court rejected a similar argument by the state that a general denial of culpability by Mr. Brooks waived his *Doyle* claims. 304 S.W.3d at 133-134. Appellant's only statement to police, that was akin to Mr. Brooks' general denial, was that his ex-wife must have "put his daughter up to" making these allegations.

In *Doyle* itself, the defendant made similar statements, that were devoid of substance, denying involvement in the offense. Mr. Doyle stated after his arrest:

"What's this all about?" 426 U.S. at 615, n.5, "You got to be crazy," and "I don't know what you're talking about." *Id*. at 623-624, n.4 (Stevens, J. dissenting). The Supreme Court did not find that these vague general denials of culpability by Mr. Doyle were sufficient to open the door to allow the state to comment on the defendant's silence. *Id*. at 616-620.

Respondent's argument in this vein also misinterprets and expands the scope of the *Anderson* decision. *Anderson* actually holds that *Doyle* does not preclude the state from introducing a post-Miranda statement regarding the circumstances of the offense as a prior inconsistent statement where the defendant later testifies at trial. 447 U.S. at 408-409. In *Anderson*, the defendant gave a detailed statement to the police regarding how he had stolen the murder victim's car that contained material inconsistencies with the testimony he later gave at trial. *Id*. at 405-409. The facts confronted in *Anderson* are clearly a "horse of a different color" than the *Doyle* issues presented here.

This interpretation of the scope of the holding in *Anderson* was adopted by this Court in *State v. Antwine*, 743 S.W.2d 51, 68 (Mo. banc 1987) and was reaffirmed in *Brooks*. In addition, there were two prior decisions from the Missouri intermediate Court of Appeals that interpreted *Anderson* in a similar matter. In *State v. Crow*, 728 S.W.2d 229, 232 (Mo. App. E.D. 1987), which this Court cited with approval in *Brooks*, the court held that where defendant makes a

brief post-Miranda statement, any waiver of the right to remain silent under *Anderson* is limited to the subject matter of that particular statement. The Southern District interpreted *Anderson* in a similar manner in *State v. Weicht*, 835 S.W.2d 485, 487 (Mo. App. S.D. 1992).

All of the cases cited by respondent where no *Doyle* violation occurred under *Anderson* are clearly distinguishable. (Resp. Br. 42-43). Unlike all of those cases, appellant gave no substantive statement surrounding the specific accusations against him, which distinguishes this case from all of the cases cited by respondent in his brief. *See State v. Hutchison*, 957 S.W.2d 757, 762-763 (Mo. banc 1997); *State v. Bell*, 931 A.2d 198, 207-212 (Conn. 2007).

Several of the other *Doyle* cases cited by respondent in his brief are also distinguishable for other reasons. *State v. Prince*, 311 S.W.3d 327 (Mo. App. W.D. 2010) involved a clearly distinct situation involving statements the defendant made in recorded phone conversations from jail to a third party after he had been charged. *Id*. at 338. *State v. Myers*, 997 S.W.2d 26 (Mo. App. S.D. 1999) and *State v. Antwine* are also clearly distinguishable because, in both of those cases, the statements to police at issue were given prior to the administration of Miranda warnings after both of those defendants were placed under arrest. 743 S.W.2d at 68-69.

Finally, respondent suggests that this Court's decision in *Brooks* was somehow overruled or limited by the Supreme Court's recent decision in *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010). This argument is ludicrous. *Thompkins* involved a distinct constitutional question, in the context of a federal habeas action, regarding whether there was constitutionally valid implied waiver of the defendant's Miranda rights that would allow the state to introduce Mr. Thompkins' incriminating statements at trial. *Id*. at 2262-2265.

In the final analysis, all of the four factors set forth in *Brooks* and *Dexter* strongly gravitate in favor of reversal. There were repeated *Doyle* violations here, which neither the court below nor respondent can deny. Second, no curative action by the trial court was taken. However, the most egregious oversight of the court below was its failure to take into account the strength of appellant's exculpatory evidence and the tenuous evidence of appellant's guilt.[1]

This case also exhibits many of the "warning signs" of a wrongful conviction in a child sex abuse prosecution. The only evidence of appellant's guilt was the uncorroborated testimony of his underage daughter. Appellant, who had no prior criminal record, took the stand and emphatically denied the charges and contended that the charges were fabricated by his ex-wife (the accuser's mother) in

[1] The evidence of appellant's guilt is weaker than the prosecution's case against Clarence Dexter and is certainly not overwhelming. 954 S.W.2d at 341-343.

the context of an acrimonious divorce and separation. (Tr. 211-244). In these two respects, appellant's case is similar to the case of Theodore White, who was subsequently exonerated of child molestation charges allegedly perpetrated against his stepdaughter after the Missouri Court of Appeals reversed his convictions. *See State v. White*, 81 S.W.3d 561, 563-564 (Mo. App. W.D. 2002); *White v. McKinley*, 605 F.3d 525, 530-531, n.9 (8th Cir. 2010).

E.M.M.'s testimony, if true, indicated that she was repeatedly raped and anally sodomized by her adult father for approximately eight years, beginning when she was six years old and ending one month before appellant was arrested on these charges. If E.M.M.'s testimony was true, one would expect that medical evidence would exist to corroborate her allegations.

The sexual abuse forensic examination (SAFE) examination of the alleged victim took place on February 24, 2006, approximately one month after E.M.M. alleged that the last act of sexual intercourse between her and her father occurred. The nurse who performed the SAFE examination, Lachelle Williams, a pediatric nurse at Children's Mercy Hospital, testified as a defense witness at trial. (Tr. 197).

As part of the SAFE examination, a full head to toe physical examination of E.M.M. was conducted. (*Id*. 204-205). During this procedure, Ms. Williams conducted a complete examination of E.M.M.'s external genitalia and a pelvic

examination. (*Id*. 205-206). This examination revealed no abnormal findings. (*Id*. 206-207). Ms. Williams also performed an anal examination of E.M.M., which also revealed no abnormalities. (*Id*. 207). Cultures were collected for laboratory tests which came back negative for any sexually transmitted diseases. (*Id*.) Ms. Williams also testified that her examination of E.M.M. was consistent with a fourteen year old girl who had never had sexual intercourse. (*Id*. 208). Finally, there were no physical findings, such as scarring or tearing of the genitalia or anal areas that were consistent with sexual abuse or assault. (*Id*.)

Under the *Brooks/Dexter* framework, reversal under the plain error rule was clearly warranted in light of the repeated *Doyle* violations, coupled with the tenuous evidence of appellant's guilt. Under *Dexter*, a new trial is warranted under the plain error rule where there are multiple uncorrected *Doyle* violations unless the evidence of guilt is overwhelming. 954 S.W.2d at 341-343.

The Court of Appeals' analysis of these *Doyle* errors, by relying upon the jury's acquittals on the counts involving the alleged statutory rape that occurred approximately a month before the allegations came to light, failed to recognize the obvious fact that the outcome in this case undoubtedly hinged upon a credibility contest between the alleged victim and her father. In situations where the defendant's guilt or innocence hinges upon such a "credibility contest" between the alleged victim and the accused, reviewing courts, including this Court, almost

universally order new trials where a substantial claim of error is established. *See, e.g.*, *Merriweather v. State*, 294 S.W.3d 52, 57 (Mo. banc 2009).

Undoubtedly, the *Doyle* rule was crafted due to the undeniable fact that a jury will tend to infer that exculpatory trial testimony from the defendant is fabricated because the accused exercised his constitutional right not to discuss the case with the police after his arrest. Thus, the Court of Appeals' truncated analysis of this *Doyle* claim failed to recognize the damage that was done to appellant's overall credibility as a witness at trial where he denied all of the allegations and the likely "spillover effect" to the other charges for which he was convicted.

III.

THIS APPEAL PRESENTS THE COURT WITH THE OPPORTUNITY TO RECOGNIZE THAT, IN CERTAIN CASES, THE CUMULATIVE PREJUDICE ARISING FROM MULTIPLE TRIAL ERRORS WARRANT A NEW TRIAL. (Replies to Respondent's Argument VII).

In *State v. Gray*, 887 S.W.2d 369, 390 (Mo. banc 1994) and *State v. Gardner*, 8 S.W.3d 66, 74 (Mo. banc 1999), this Court held that a claim of cumulative error, i.e., whether the combined prejudice from two or more trial errors denied the defendant a fair trial, is not a cognizable claim for reversal. *Id.* The facts surrounding this case give the court an ideal opportunity to re-examine

this issue and bring this Court's views in line with the vast majority of other states that recognize and grant new trials under the cumulative error doctrine in appropriate cases. *See, e.g.*, *Ex parte Tomlin*, 540 So.2d 668, 672 (Ala. 1988); *State v. Charles*, 263 P.3d 469 (Ut. App. 2011); *People v. Dunlap*, 975 P.2d 723, 757-760 (Colo. 1999); *People v. Riback*, 920 N.E.2d 939 (N.Y. 2009); *State v. Davis*, 158 P.3d 317, 327 (Kan. 2006); *Ross v. State*, 954 So.2d 968, 1019 (Miss. 2007); *Big Pond v. State*, 692 P.2d 1288 (Nev. 1985); *State v. Koskovich*, 776 A.2d 134, 230 (N.J. 2001); *State v. Canady*, 559 S.E.2d 762, 764 (N.C. 2002); *People v. Hill*, 17 Cal.4th 800 (1998); *State v. Wilson*, 787 P.2d 821 (N.M. 1990); *State DeMarco*, 509 N.E.2d 1256 (Oh. 1987); *State v. Coe*, 684 P.2d 668 (Wash. 1984).

In addition to appellant's cumulative error point, this appeal raises nine other separate points of error involving sufficiency of the evidence issues, faulty jury instructions, the improper admission and/or exclusion of evidence, improper closing arguments, and a constitutional violation under *Doyle v. Ohio*. Respondent has conceded that one reversible error has occurred regarding one of appellant's convictions and, many of his other arguments in opposition to a new trial, while not explicitly conceding error, primarily contend there was an insufficient showing of prejudice on each isolated point. (Resp. Br. 27-32, 46-47, 48-51, 63-67). In particular, respondent contended that, because some of these errors were not properly preserved, that appellant cannot meet the threshold necessary to receive a

new trial on some of his individual claims under the plain error rule. (*Id*. 46-47, 49-51, 63-67).

This case presents this Court with an opportunity to conform its views to the views of virtually every other state court that has held, in appropriate cases, that the cumulative effect of multiple errors involving erroneous and prejudicial evidentiary rulings precluded the defendant from receiving a fair trial. *State v. Botham*, 629 P.2d 589, 603 (Colo. 1981). The Alabama Supreme Court has noted that the correct rule is that, while no single error among multiple errors may be sufficiently prejudicial to require reversal, if the accumulated errors have probably injuriously affected the substantial rights of the defendant, then the cumulative effect of the errors require reversal. *Tomlin*, 540 So.2d at 672.

In light of the tenuous evidence of guilt and the likely fact that appellant may be innocent due to the lack of corroborating physical evidence, this case is an appropriate vehicle to allow this Court to re-examine its prior decisions in *Gray* and *Gardner*. Even if the court determines that no individual error here was sufficiently prejudicial to warrant a new trial, the cumulative effect of these multiple errors seriously undermined the fairness and integrity of the judicial proceedings in this case. A new trial is warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Kent E. Gipson
Kent E. Gipson