IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC96478**
	)	
TRAVIS W. WILLIAMS,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CASS COUNTY, MISSOURI
17th JUDICIAL CIRCUIT
THE HONORABLE WILLIAM B. COLLINS, JUDGE

APPELLANT'S AMENDED STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

Travis Williams appeals his convictions for three counts of first degree statutory sodomy, §566.062, following a jury trial in the Circuit Court of Cass County, Missouri before Judge William B. Collins.

Judge Collins sentenced Travis as a predatory sexual offender to concurrent fifty year sentences on each count with the possibility of parole.

This appeal challenges the constitutionality of Mo. Const. Art. I §18(c) which authorizes admission of prior criminal acts as "propensity" evidence in prosecutions for crimes of a sexual nature. The constitutional challenge is both a facial and as applied challenge to Mo. Const. Art. I §18(c).

Initially, Travis filed a brief in the Missouri Court of Appeals Western District on May 19, 2017, because Cass County cases fall with the territorial jurisdiction of the Western District under §477.070. At the same time that brief was filed, a motion to transfer to this Court, the Missouri Supreme Court, was filed with the Western District on the grounds that this Court had exclusive jurisdiction under Art. V §3 because the appeal challenged the constitutionality of Mo. Const. Art. I §18(c)

On May 31, 2017, the Western District ordered this appeal transferred to this Court because this appeal involves the validity of Mo. Const. Art. I §18(c).

Because this appeal challenges the constitutionality of Mo. Const. Art. I §18(c), this Court, the Missouri Supreme Court, has exclusive appellate jurisdiction under Article V, Section 3, Mo. Const.

STATEMENT OF FACTS

I.

The Charges

Travis Williams was charged with: (1) Count I - first degree statutory sodomy, §566.062, of M.E.E., who was less than twelve years old, by having M.E.E. put M.E.E.'s hand on Travis' penis on or between March 16, 2008 and April 1, 2012; (2) Count II - first degree statutory sodomy, §566.062, of M.E.E., who was less than twelve years old, by Travis using Travis' hand to touch M.E.E.'s genitalia on or between March 16, 2008 and April 1, 2012; and (3) Count III - first degree statutory sodomy, §566.062, of M.E.E., who was less than fourteen years old by Travis using Travis' hands to touch M.E.E.'s genitals on or between June 1, 2013 and September 13, 2013(L.F.12-15)[1].

II.

Pretrial

The trial court conducted a Chapter 491 hearing as to the admissibility of M.E.E.'s prior statements and ruled certain statements admissible(Tr.14-276).

At the 491 hearing, respondent informed the court that it anticipated presenting evidence of Travis' prior sexual offense conviction under the recent Missouri

[1] The record on appeal is designated as follows: (1) the Legal File (L.F.); (2) First Supplemental Legal File (1stSupp.L.F.); (3) the Trial Transcript (Tr.); and (4) Trial Exhibits (Trial Ex.#).

Constitutional Amendment Article I §18(c) authorizing the admission of propensity evidence for sexual offenses committed against individuals who were under eighteen(Tr.290-92). Respondent moved to admit evidence that in 1996 in Cass County, Travis pled guilty to first degree statutory sodomy for engaging in deviate sexual intercourse with a twelve year old by using his hands to touch her genitalia(L.F.26-28;Tr.297-99).

Respondent urged that Article I §18(c) was modeled on Federal Rules of Evidence 413 and 414 and federal courts had upheld them(L.F.26-28). The intended evidence was admissible because Article I §18(c) gives the trial court authority to weigh the probative value of the evidence against the danger of unfair prejudice(L.F.26-28). Travis' prior conviction was admissible as "substantive evidence" because it involved hand to genital contact and the same conduct was alleged here(L.F.28).

Defense counsel objected that Article I §18(c) violates other provisions of the Missouri Constitution as well as the Federal Constitution(Tr.299). Counsel urged that Article I §18(c) violates due process and Travis' jury trial rights (Tr.299-303). Under Article I §18(c) the court was required to make a finding of relevancy and Travis' prior was irrelevant and more prejudicial than probative(Tr.299-303). The prior was from 1996 and there was no correlation between the accuser there or any continuing course of conduct(Tr.300-01,308).

Counsel informed the court that if the court intended to allow evidence of the prior conviction, then it would be necessary to voir dire on its impact on the jury's decision making(Tr.301-03). Counsel requested guidance from the court on how voir dire would be handled, if that prior conviction was going to be admitted(Tr.301-03).

Respondent argued the prior conviction was admissible under Article I §18(c) because it was "propensity" evidence and Article I §18(c) authorized "propensity" evidence(Tr.303-04). The prosecutor urged:

> But whenever you have a prior that is the exact same thing involving the exact same elements, same offense exactly, that's what this exact amendment was passed to allow in in [sic] November. Therefore, I would argue on behalf of the State that **if this prior doesn't come in against this new charge through this Section 18 of Missouri's constitution, then there is never going to be a prior that is more in line that will come in under this analysis.**

(Tr.304) (emphasis added).

The prosecutor stated that in 1996 Travis got a 120 day sex offender assessment unit placement with five years probation, but violated probation and went to prison(Tr.308-09). Travis told the court that he was released from prison in 2003(Tr.309).

On the subject of respondent calling the accuser in Travis' prior conviction, the court suggested a stipulation as to the factual elements of that prior, but the accuser not be called(Tr.310-11). Counsel indicated that while he disagreed with allowing the

prior conviction to be admitted that he would comply with the court's ruling and work with respondent on a stipulation(Tr.310-14).

The court granted respondent's motion to allow admission of Travis' prior conviction with the understanding its use would be limited to a recitation as to its factual elements and the accuser would not testify(Tr.310-11,314-16). The court found the prior conviction was relevant because it occurred sufficiently close enough in time to the acts alleged involving M.E.E. and the type of acts associated with that prior were similar to here(Tr.314-15). The court opined the stipulation would minimize prejudice to Travis compared to calling the prior conviction accuser(Tr.314-15). The court indicated that if the parties could not agree to stipulate, then it would allow the accuser to testify about the factual circumstances of that offense(Tr.331-32).

Defense counsel indicated because of the court's propensity evidence ruling that an instruction, modeled on MAI 310.12 although never intended for that purpose, was mandated as to "propensity," and the prosecutor agreed(Tr.333-35). Defense counsel thought that because Article I §18(c) used the word "propensity" that the modified instruction was required to use propensity(Tr.334-37). The prosecutor suggested "inherent tendency"(Tr.334-37). The court believed Article I §18 (c)'s language should be tracked and "propensity" employed(Tr.334-37).

Respondent filed an information in lieu of indictment to enhance Travis as a persistent or predatory sexual offender under §558.018(Tr.293-95;1stSupp.L.F.1-6). Respondent introduced Trial Ex. 12, which was the sentence and judgment from

Travis' prior conviction(Tr.338). Respondent offered the prior conviction to establish Travis was a persistent or predatory sexual offender(Tr.337-39). The court made a finding as to the fact of the conviction, but the status determination was reserved for sentencing, if Travis was convicted(Tr.337-39).

III.

Voir Dire

A. Respondent's Questioning

In voir dire, the prosecutor told the jury that it would hear about Travis' 1996 prior conviction for first degree statutory sodomy involving a twelve year old, when Travis was 26 years old(Tr.428). The prosecutor told the jurors they could consider that prior conviction for Travis' "propensity" to commit such sex acts and they would be given a specific instruction that they could consider Travis' conviction for "propensity" purposes(Tr.428). The prosecutor then inquired as to those who would believe Travis was guilty here because of that "propensity"(Tr.428-29). Many venire members acknowledged that they would convict Travis because of his prior conviction(Tr.429-35,452).

B. Defense Questioning

Defense counsel asked the venire who is prejudiced against sex offenders and about 80% of the venire raised their hands(Tr.464). Many additional venire members acknowledged they could not fairly serve knowing Travis had a prior sexual offense conviction(Tr.465-80, 483-87,488-89).

While acknowledging he could not fairly serve knowing about Travis' prior conviction, Venireperson 81, in the presence of other venire members, stated the following: "I guess **if we're all truthful and honest, all of us are bias and all of us are prejudice in this case**."(Tr.476-79) (emphasis added). To that Venireperson 81 added: "If you are **honest** in here, it's going to be hard to separate it [the prior conviction from the present allegations]"(Tr.478) (emphasis added). Venireperson 81 stated that Travis did not enter with a **"level playing field"** because of his prior conviction(Tr.478-79) (emphasis added)[2].

IV.

Opening Statements

A. Respondent's Opening

Respondent's Opening concluded with the jury would learn about Travis' 1996 prior conviction, when Travis was 26 years old, for statutory sodomy for inserting his thumb into a twelve year old's vagina(Tr.548).

B. Defense Opening

Counsel told the jury that the accusations here were unfounded and arose because people close to M.E.E., like M.E.E.'s father, Eddy, and M.E.E.'s grandmother (Eddy's mother) distrusted Travis based on his prior conviction and regularly had the authorities investigate Travis solely because of his past(Tr.549-51). That environment caused M.E.E. to tell the Child Protection Center (C.P.C.).

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[2] Juror 81 did not serve on Travis' jury(Tr.534-35).

investigators in 2009 that Travis had done nothing to her, but then in 2013 report that he had(Tr.549-50).

V.

Closing Arguments

A. Respondent's Closing

The state's initial closing argument began:

> [THE COURT] State, you may proceed.
>
> MS. PENROSE: Thank you, Judge.
>
> [M.E.E.] never really stood a chance, did she. Born to a mother who wouldn't protect her for years on end. A mother who went essentially from man to man to man to man, including the defendant Travis Williams. A man who had previously pled guilty to and admitted touching a 12-year-old little girl in 1996. Touching her on her private parts, inserting his thumb into her vagina when he was 26 years old. The defendant, by admitting having done that in 1996, is admitting he has a propensity to do exactly that for which he is on trial this week.

(Tr.949-50).

The end of the prosecutor's initial closing argument included:

> This was a man who was satisfying his sexual desire for 12-year-old girls. He was satisfying that with [M.E.E.] for years, just as he had done back in 1996.

(Tr.965-66).

B. Defense Closing Argument

Defense counsel's closing argument attempted to address the extreme prejudice that was created by injecting propensity. Defense counsel's argument included:

> Propensity is a big word in this trial. It's been a few days, but I know you all remember, we made a big deal out of it when I was asking you all questions out there.

(Tr.967)

.....

> It isn't what happened in the 90's, isn't what happened when he pled guilty in the 90's. That's not the end.
>
> That word "propensity" is important because you are going to have to define that for yourself. You are going to have to use what you know about propensity and apply it to these charges. You can go a couple of ways with that. You can assume that everybody across the country who has ever pled guilty to a sex crime is probably going to do it again. Automatically they have a propensity for that no matter what. Or, would you look for some evidence of propensity? Would you want maybe somebody to come in and tell you propensity one way or the other because I think I understand that every person who has ever pled guilty to a sex crime, every person who has made that monumental mistake, doesn't necessarily have a propensity to keep doing it.

(Tr.967-68)

.....

I am going to talk about the evidence here, I am going to talk about what we have seen over the last few days, but they don't get a break from proving their case because of that word "propensity."

(Tr.969)

Counsel urged that Eddy and Eddy's family assumed the worst about Travis because of his prior which led them to repeatedly contact the Department of Family Services (D.F.S.)(Tr.969). Counsel's argument continued that in Travis' guilty plea he admitted to putting his thumb in the vagina of a twelve year old and M.E.E. continually heard about that prior offense from the time she was three years old(Tr.970).

To counter the propensity prejudice counsel relied on Darlene Kinney's testimony that Kinney had asked M.E.E. whether Travis had ever touched her inappropriately and M.E.E. told Kinney that had not happened(Tr.972-73).

Counsel touched on Instruction 5, about how the propensity evidence was to be considered, and which was believed to be mandatory to be given(Tr.333-35,979-80).

Counsel's argument included the following:

Or, you believe that at two or three years old, people started talking to this little girl about how that man had a history, that he must have been doing things to her, must have been touching her butt because that's what sodomites

do. He must have been having sex with her for that same decade, every time she went to dad's, every time she went to grandma's.

(Tr.981-82)

Counsel's final comments included:

It simply doesn't work to assume without any evidence that just because he pled guilty in the 90's to a sex crime, that he automatically, he did it this time.

Hold the State to its burden. Do what is right. Find Travis Williams not guilty to each and every one of these counts. Thank you.

(Tr.982-83).

VI.

Defense Case Evidence

Darlene Kinney was a LaJett Street neighbor for ten years to Travis, Tracy, and Tracy's children(Tr.924-25). Kinney was close to the children, but did not like Tracy or Travis(Tr.925-26). Tracy and Travis maintained a chaotic environment(Tr.925-26). Kinney told the children they were always welcome to come to her house and she would take care of them and they frequently did go to her house(Tr.925-27).

Kinney asked M.E.E. on several occasions through the years whether Travis was ever sexually involved with her(Tr.927-29). M.E.E. always denied that Travis had ever done anything sexually inappropriate(Tr.927-29).

VII.

Respondent's Trial Evidence

A. Exhibit 1 Stipulation

Before respondent read the Exhibit 1 stipulation, counsel renewed his prior objections(Tr.586-89). Counsel's stipulation was not to the evidence's admissibility, but only to the court's ruling as to how that prior was to get heard by the jury(Tr.586-89). The court reaffirmed its prior rulings(Tr.586-89).

The Exhibit 1 Stipulation set forth that on November 25, 1996 in Cass County that Travis pled guilty to first degree statutory sodomy by "committing an act of deviate sexual intercourse on August 15, 1996, against J.C., a female who was twelve years of age at the time of the offense" and Travis was twenty-six(Tr.589-90;Trial Ex.1). The alleged act was Travis inserting his thumb into J.C.'s vagina(Tr.589-90;Trial Ex.1).

B. Kristin Gilgour

Child Protection Center (C.P.C.) interviewer Kristin Gilgour did a recorded interview of M.E.E. in May, 2009(Tr.737-38,747).

M.E.E. stated no one told her what to say(Trial Ex.2 at 6:01-6:15). M.E.E.'s mother urged her to be truthful, which in fact was that Travis had not done anything sexually inappropriate(Trial Ex.2 at 6:20-6:39, 6:40-6:42,7:16-7:23,12:16-12:50,14:21-14:37,15:43-15:48). No one told M.E.E. to say Travis did not touch her(Trial Ex.2 at 18:08-18:25). M.E.E. recounted that Travis was good to all the household's children(Trial Ex.2 at 23:50-24:00).

M.E.E. said Travis had told her that he had been in prison(Trial Ex.2 at 20:57-22:48). M.E.E. said that Stacie had told her that Travis had been in prison for something bad that he had done to a thirteen year old girl(Trial Ex.2 at 20:57-22:48).

C. Eddy Emond

Maurice "Eddy" Emond is M.E.E.'s father and Tracy Williams is M.E.E.'s mother(Tr.551-53). M.E.E. was born March 16, 2001(Tr.552-53). Eddy and Tracy never married, but lived together from late 1997 until February, 2004 in Pleasant Hill(Tr.553-54,557). Eddy's mother is Arlene Gregg(Tr.556).

When Eddy and Tracy ended their relationship, Tracy moved to LaJett St. with three year old M.E.E.(Tr.553,557).

Tracy also had children named Glenn Chamberlain, Dustin Chamberlain, Steven Chamberlain, and Mikeala Emond(Tr.554). M.E.E. was the youngest of all the children(Tr.554-55).

Tracy told Eddy that M.E.E. could stay with him anytime(Tr.558-59). Eddy tried to arrange to have M.E.E. every weekend, but visitation was sporadic(Tr.558-59). During one late 2004 or early 2005 visit, M.E.E. disclosed to Eddy that Travis had touched her and she was crying and did not want to return to Tracy and Travis(Tr.559-61,563). Eddy hotlined what M.E.E. described(Tr.561).

In June, 2008, Eddy became involved with Stacie Turpin(Tr.552).

Eddy was not permitted to see M.E.E. for 6-8 months and up to one year(Tr.561-62). On a subsequent visit, M.E.E. told Eddy that Travis was still

touching her(Tr.563). M.E.E. reported Travis played with M.E.E.'s "butt" and Travis put M.E.E.'s hand on M.E.E.'s "private" and M.E.E.'s "chest"(Tr.563). Eddy had four or five similar conversations with M.E.E. about once a year until 2009 and each time he placed a hotline call(Tr.563-64,566-67). M.E.E.'s reporting included Travis had M.E.E. lying on a bed with her clothes off and Travis playing with M.E.E.'s "butt," while Travis "played with himself"(Tr.564).

In April, 2009, M.E.E. continued to report inappropriate touching(Tr.568). Even though Eddy did not hotline call that occurrence, someone from the D.F.S. came to see Eddy(Tr.568-70). About a year went by before Eddy got to see M.E.E. again(Tr.570).

Eddy told Tracy what M.E.E. was reporting and that he had hotlined what M.E.E. reported(Tr.565). Eddy returned M.E.E. to Tracy's and Travis' home after visits because he felt legally obliged(Tr.566).

At the time of trial, M.E.E. was living with Eddy because M.E.E. was removed from Tracy's and Travis' home in 2013 or 2014(Tr.570).

On cross-examination, Eddy acknowledged that sometime in 2003 or 2004 that he learned Travis was a convicted sex offender(Tr.576-77).

D. M.E.E.

M.E.E. lived with her mother and Travis from when she was three years old until she was twelve(Tr.593). Travis lived with them on LaJett St. in Pleasant Hill until Travis moved to Benton St., walking distance away(Tr.594-95).

M.E.E. testified Travis had touched her inappropriately(Tr.595-96). M.E.E. reported Travis played with her "boobs" and her "butt"(Tr.596). Travis stuck his fingers in her "vagina" and rubbed his "penis" on top of her "vagina"(Tr.596). These acts happened frequently(Tr.596).

M.E.E. testified the first incident where Travis did something inappropriate happened in the back bedroom of their trailer on LaJett(Tr.596-97). This incident happened when she was eight(Tr.596). M.E.E. and Travis were watching television and eating Reese's Cups and there was one left and M.E.E. wanted it(Tr.598). Travis told M.E.E. she could only have it if she took off all her clothing so that he could "play with" her "butt"(Tr.598). M.E.E. refused to take her clothes off, but they ended up off because Travis threatened her(Tr.598,600). Travis then played with her "butt," using his hand(Tr.600-01). Travis also played with her "boobs"(Tr.602). Travis told her to not tell Tracy what happened(Tr.602-03).

M.E.E. testified she could not remember the next time Travis touched her because it happened too frequently(Tr.602-03). Along with touching her "bottom," "butt," and "boobs" Travis touched her "vagina"(Tr.603-05). When Travis touched her "vagina" he did so with his hand and his "penis"(Tr.605-06). When Travis touched her "vagina" with his hand sometimes his hand went inside her "vagina"(Tr.606-07).

M.E.E. reported Travis had M.E.E. touch his penis with her hand to "jack him off, like go up and down on it"(Tr.608-09). Travis had her suck his penis with her

mouth(Tr.608-10). Travis had talked about wanting to put his penis inside her vagina, but that never happened(Tr.610).

M.E.E. testified she told Eddy and Stacie about Travis touching her in 2009(Tr.599-600,662). Stacie called D.F.S. to report what M.E.E. had told her(Tr.611-12). D.F.S. did not remove her from Tracy's and Travis' home(Tr.611-12). M.E.E. told her mother what Travis was doing and Tracy told M.E.E. that M.E.E. needed to tell D.F.S. that Travis had not touched her inappropriately(Tr.612). Tracy's directive caused M.E.E. to feel that her mother did not care what Travis did(Tr.612).

At some point, M.E.E. went to Kansas City for a C.P.C. interview after Stacie contacted D.F.S.(Tr.612-13). M.E.E. did not report what Travis had done because M.E.E. was afraid of her mother(Tr.616-17,627).

M.E.E. reported Travis threatened to hurt her siblings and take M.E.E.'s dogs if she reported what he was doing to her(Tr.617-18). After the D.F.S. reporting, Travis stopped touching her for a while, but then started up again(Tr.618-19).

M.E.E. testified that sometime before her twelfth birthday that Travis had moved out from the home he shared with Tracy and M.E.E. to Benton St.(Tr.619-20). When Travis moved out, M.E.E. still saw Travis, and actually stayed with Travis at his Benton trailer sometimes at Tracy's suggestion, because the power or the water were turned off(Tr.620-21).

M.E.E. testified that when she stayed with Travis on Benton he did to her the "[s]ame stuff" he had done at LaJett(Tr.622-23). M.E.E. did not remember when the last inappropriate touching incident at Benton happened(Tr.622-23).

M.E.E. testified that at some point she went to the Pleasant Hill police and was taken there by Eddy's mother, her grandmother, Arlene(Tr.625-26). Travis' inappropriate touching stopped after she went to the police(Tr.626).

M.E.E. testified Travis told her that in another life that he and M.E.E. were together and that he had not married Tracy and that he was going to marry M.E.E.(Tr.629).

M.E.E. testified that at different points in time she did report to people who she trusted Travis' acts with her(Tr.629-30). No one had told M.E.E. to report that Travis was touching her inappropriately(Tr.630).

On cross-examination, M.E.E. testified that at some point she learned from Travis and Stacie that Travis had a prior sexually related offense(Tr.639-40).

On redirect, M.E.E. testified that Stacie had told M.E.E. that Travis had pled guilty to touching another girl(Tr.655). Also on redirect, M.E.E. testified that Stacie told M.E.E. about Travis' prior conviction after M.E.E. had told Stacie that Travis had touched her inappropriately(Tr.655-56).

On recross, M.E.E. testified that Stacie talked to M.E.E. about Travis' sex offender status and that Travis had talked to M.E.E. about that status(Tr.661-62).

E. Stacie Turpin

In April, 2009, M.E.E. told Stacie that Travis kept her home from school, claiming she was ill, so that he could have her lay on a bed without any pants on while playing with her bottom(Tr.665-69). In response to what M.E.E. reported, Stacie called the abuse hotline and took M.E.E. to the Pleasant Hill Police(Tr.670-71). After Stacie did that reporting it was 6-9 months later until she saw M.E.E. again(Tr.671-72). Stacie and Eddy did not get to see M.E.E. often after the initial reporting of M.E.E.'s allegations(Tr.671-72). In the summer of 2012, Eddy and Stacie began to see M.E.E. more often when Travis was no longer in the LaJett home(Tr.672).

During the 2013 holidays, Stacie saw M.E.E.(Tr.672-73). M.E.E. reported then that Travis stuck his penis in her vagina and bit her breast(Tr.674). Travis threatened M.E.E. and to sexually abuse her sisters if she disclosed what happened(Tr.674). Travis had said that he was no longer with Tracy and he planned to marry M.E.E.(Tr.674).

Stacie testified that in July, 2014 M.E.E. came to live with she and Eddy under court order(Tr.664-65,675).

On cross-examination, Stacie testified that M.E.E. had told Stacie that Travis was a convicted sex offender and Eddy told her the same(Tr.677).

On redirect Stacie testified that she learned from Casenet that Travis was a convicted sex offender for sodomy with a minor, and in particular, anal sex(Tr.682-83).

F. Tracy Williams

Tracy and Travis met while working at the Pleasant Hill veneer plant while Tracy was involved with Eddy(Tr.689). Tracy left Eddy to be with Travis(Tr.689). Tracy and Travis lived in Pleasant Hill, on LaJett, along with Tracy's children Steven, Mikeala, and M.E.E.(Tr.690-91).

On direct, Tracy testified she learned Travis was a registered sex offender about two weeks after she met Travis, and she did not discuss with her children that Travis was convicted of sexually molesting a girl(Tr.689-92).

There was regular conflict between Tracy and Eddy(Tr.693-94). On direct, Tracy testified that one source of that conflict was that Eddy told Tracy that he did not want Travis around M.E.E. because Travis was a registered sex offender(Tr.693-94). Also, Eddy blamed Travis for his and Tracy's break-up(Tr.693-94).

Tracy testified that in the beginning of her relationship with Travis that he was involved with her children and gave M.E.E the most attention(Tr.695-96). Tracy appreciated that her children listened and minded Travis when he told them to do something(Tr.723-24).

In 2009, D.F.S. ordered Travis out of the home(Tr.701-02). Travis was gone 1-2 months(Tr.701-02). In 2009, M.E.E. went to Kansas City to be interviewed about allegations that Travis molested her(Tr.702-03). While those allegations were investigated, M.E.E. stayed with Tracy's mother and stepfather, Jeannette and

William Reynolds(Tr.703-04). Travis returned to live with Tracy and her children until 2012(Tr.705-07).

Travis permanently moved out in 2012 when he and Tracy were not getting along(Tr.697,705-06). Tracy testified, on direct, that Travis' moving out happened following an incident where Tracy wanted to hurt Travis and Tracy said to Travis that he did not like women, but liked little girls(Tr.697-98). At the time of that argument, Tracy and Travis had no sexual relationship(Tr.698). At the time Travis moved out permanently, Tracy had become involved in a relationship with another man(Tr.727-28).

M.E.E. was eleven years old when Travis moved out(Tr.704-05). Travis moved to Benton St., which was walking distance from LaJett(Tr.707-08).

While Travis lived at Benton, he helped Tracy pay her utility bills(Tr.708-11). After Travis moved to Benton, he continued to have contact with Tracy's children(Tr.709-10). In 2012 or 2013, Tracy's utilities were turned off and she and her children stayed at Travis' Benton trailer(Tr.711-12). M.E.E. knew Travis was helping pay bills(Tr.714-15).

Tracy never threatened M.E.E. by telling M.E.E. to deny that Travis was touching M.E.E. inappropriately(Tr.714,731-32). Tracy did not believe Travis was sexually abusing M.E.E.(Tr.714).

Tracy never observed anything that caused her to suspect Travis was sexually abusing M.E.E., but if she had then she would have addressed it(Tr.715-16). D.F.S.

investigators came out numerous times and talked to Tracy about allegations against Travis(Tr.7171-18). Tracy told M.E.E. to tell the truth to D.F.S. investigators(Tr.718).

In Fall, 2013, Tracy took M.E.E. to the Pleasant Hill Police to make a report that Travis was sexually molesting M.E.E.(Tr.731-32). At the time of trial, Tracy and Travis were still married(Tr.731-32).

G. Robbie Emond

Robbie lived with and babysat M.E.E, Mikeala Emond, and Steven Chamberlain(Tr.776-79).

Robbie lived with Travis at Benton(Tr.780). The children occasionally came over to Benton(Tr.780-81).

Robbie reported seeing inappropriate "horseplay" involving Travis and M.E.E.(Tr.781-82). Travis treated M.E.E. better than the other children, getting her gifts(Tr.785).

Until Travis bought an air mattress, M.E.E. slept in Travis' bed(Tr.782). There was an incident on July 4, 2011, where Travis became upset with M.E.E. because she did not want to sleep in Travis' bed(Tr.783). When Travis purchased the air mattress, it was shared by M.E.E. and Mikeala, while Travis slept in his back bedroom(Tr.793-94).

Both Robbie and Travis had conversations with all the children about what to do if anyone touched them inappropriately(Tr.783,791).

Because the only place to sit in Travis' trailer's bedroom was on the bed, he saw Travis and M.E.E. regularly sitting on Travis' bed(Tr.785). When Robbie would see Travis and M.E.E. sitting on the bed together they were sitting on opposite ends(Tr.788).

Robbie acknowledged on cross-examination that he knew about Travis' sexual offender past(Tr.787). Also on cross-examination, Robbie viewed himself as a protector of the children and he was particularly vigilant about observing Travis' interaction with the children because of Travis' sexual offender past(Tr.787-89).

H. Glenn Chamberlain

On direct, Glenn testified that he became uncomfortable about Travis and Travis was suspect because of his sexual offender history(Tr.801). Glenn thought Travis' tickling M.E.E. on her thighs and buttocks was inappropriate(Tr.801-02). Glenn thought Travis and M.E.E. lying in bed together, under the covers, was inappropriate(Tr.802-03).

On cross-examination, Glenn testified that it was not until Glenn learned of Travis' sexual offender past that Glenn came to question the tickling and snuggling behavior between Travis and M.E.E.(Tr.809-10,816-17). Glenn did not observe any sexually inappropriate behavior between Travis and M.E.E.(Tr.810).

Glenn indicated Travis was really the father to the three children who lived with Travis and Tracy(Tr.807). Travis would buy things for M.E.E., but not buy

similarly for Steven and Mikeala(Tr.815-16). M.E.E. was not only Travis' favorite child, but also Tracy's favorite child(Tr.808).

I. Steven Chamberlain

Steven Chamberlain testified that when they spent the night at Benton, Travis and M.E.E. slept in the back bedroom(Tr.821-22). Travis did not ask Steven to get in bed to play video games or tickle him(Tr.827-28).

Steven, M.E.E., and Mikaela would go to the back bedroom and lie on the bed with Travis to watch television(Tr.825-26). All of the children and Travis did not attempt to get in the back bedroom at the same time because they could not all fit in that small trailer space(Tr.826). While M.E.E. got favorable treatment, she was the youngest(Tr.827).

J. Officer Bledsoe

In August, 2012, Pleasant Hill police officer, Bledsoe, accompanied Children's Division investigator, Mr. Kolden, to the Pleasant Hill Intermediate School because of a re-report of concern about M.E.E.(Tr.765-66). The school counselor, Ms. Bermel, had hotlined(Tr.766-67). At that time, M.E.E. reported that when she was 8-9 years old as a condition for making her dinner Travis made her lay naked in bed and he touched her(Tr.769-70). M.E.E. also reported that another incident happened about one year later(Tr.770).

In September 2013, Bledsoe accompanied Investigator, Pfister, to the First Baptist Church to meet with M.E.E. because of another report(Tr.771-72).

K. Investigator Pfister

Jason Pfister investigates abuse hotline calls(Tr.829). Pfister handled a September 4, 2013 hotline call about M.E.E., assisted by Bledsoe(Tr.833-35). M.E.E. was at bible study at the Baptist Church, so Pfister and Bledsoe went there to meet her(Tr.836). M.E.E. was angry about that contact(Tr.838-39). Pfister asked M.E.E. if Travis had ever touched her inappropriately and she indicated a long time ago(Tr.840).

Pfister again saw M.E.E. at the Pleasant Hill Middle School on September 19, 2013 in the counselor's office because of another hotline call(Tr.842).

L. Officer Frazee

On September 13, 2013, Pleasant Hill police officer Frazee met with M.E.E. at the police station(Tr.848-50). M.E.E. walked into the police station with her mother, Tracy(Tr.850-51).

On video, M.E.E. reported that she was afraid of Travis(Trial Ex.6 at 0:30-0:40). M.E.E. reported that Travis had touched her private on the outside with two fingers, her "boobs" and her "butt"(Trial Ex.6 at 1:46-2:19). M.E.E. reported that such actions had been occurring since M.E.E. was eight(Trial Ex.6 at 2:19-2:24). The most recent occurrence happened when the electricity was turned off at Tracy's house in September, 2013(Trial Ex.6 at 2:43-2:51).

M.E.E. reported that the most recent acts happened in Travis' back Benton trailer bedroom(Trial Ex.6 at 2:51-3:10). M.E.E. went to the back bedroom because

Travis threatened to kill her brother(Trial Ex.6 at 3:10-3:44). M.E.E. said that she slept in the back bedroom because Travis directed her to do that(Trial Ex.6 at 7:35-8:01). Travis directed M.E.E. not to tell anyone or he would hurt one of M.E.E.'s brothers(Trial Ex.6 at 8:45-8:56). Travis touched M.E.E.'s vagina with two fingers(Trial Ex.6 at 10:00-11:16).

M.E.E. reported generally that in the past Travis had touched her "boobs" and her "butt" which were accompanied by threats to hurt her siblings(Trial Ex.6 at 11:16-11:42).

M.E.E. told Frazee that Travis had a record for sexual abuse(Trial Ex.6 at 5:58-6:00).

Frazee told M.E.E. that she was going to arrange an interview for M.E.E. with C.P.C.(Trial Ex.6 at 13:53-14:07).

On cross-examination, Frazee indicated that Travis' status as a sexual offender would have been in Pleasant Hill police reports available to Frazee(Tr.856-57).

M. <u>Arlene Gregg</u>

At the time of trial, M.E.E. was a foster child with Arlene Gregg(Tr.865-66).

During the summer of 2013, M.E.E. stayed with Arlene on several occasions(Tr.867-70). One of those times was in September, 2013(Tr.871-72). Arlene testified M.E.E. reported that Travis had her do things to him by moving her hands together up and down(Tr.872-73).

In September, 2013, Arlene took M.E.E. to Children's Mercy Hospital(Tr.874). At Children's Mercy, M.E.E. told the doctor she was really concerned about her nipples because Travis sucked on them a lot(Tr.874).

On cross-examination, Arlene testified that when she learned about Travis' prior sexual offense that she was devastated(Tr.876). Arlene also indicated that Eddy had told her about his calls to D.F.S. about Travis(Tr.878).

On redirect, Arlene testified that she understood that Travis' prior sexual offense was for sodomy based on putting "his penis in her butt"(Tr.881).

Arlene testified that she had made an allegation that "Robbie" was touching M.E.E.(Tr.881).

N. <u>Erin Watterson</u>

C.P.C. interviewer Erin Watterson conducted a recorded interview of M.E.E. on September 24, 2013(Tr.882,886-87,891).

Watterson was aware that during a C.P.C. 2009 interview of M.E.E. that M.E.E. did not disclose any abuse(Tr.890).

M.E.E. reported that when she was eight years old that Travis played with her butt with his hand touching her skin(Trial Ex.9 at 8:17-9:12).

M.E.E. reported that Travis had used his hand to play with her "boobs" and sucked on them with his mouth(Trial Ex.9 at 13:53-14:40).

M.E.E. reported that Travis had used his fingers to play with the outside of her vaginal area more than once and that had happened at Benton(Trial Ex.9 at 15:44-16:27).

M.E.E. reported that the first touching of her vaginal area happened when she was 10-11 years old(Trial Ex.9 at 16:40-17:00). M.E.E. reported that the last incident of Travis touching her vaginal area occurred a couple of months before the interview(Trial Ex.9 at 16:40-17:00).

M.E.E. reported Travis had her "rub his thing," Travis' "private," with her hand(Trial Ex.9 at 17:10-18:05).

M.E.E. reported that Travis told her not to tell anyone what he had done(Trial Ex.9 at 22:37-22:55). M.E.E.'s mother said that Travis had not done anything inappropriate(Trial Ex.9 at 22:37-22:55).

M.E.E. reported that Travis either took her clothes off or directed her to take them off(Trial Ex.9 at 25:00-25:35). M.E.E. reported that Travis threatened her and threatened to kill her brothers(Trial Ex.9 at 25:59-26:21).

M.E.E. reported that her last contact with Travis was a couple months before the interview(Trial Ex.9 at 33:35-34:20). That contact included Travis telling her that he had gotten in trouble on his probation and that he might be going back to prison(Trial Ex.9 at 33:35-34:20).

M.E.E. stated that she knew that Travis had molested another girl(Trial Ex.9 at 38:00-38:27).

O. Pediatrician Anderst

Pediatrician Dr. Anderst examined M.E.E. at Children's Mercy(Tr.902). Anderst found M.E.E.'s genitalia were normal, but that did not equate with the absence of abuse(Tr.914-15,918). M.E.E. reported that she had a bite mark on her breast, but Anderst found no evidence of that(Tr.915-16).

VIII.

Instructions, Verdicts, And Sentencing

In accordance with earlier discussions (Tr.333-37), the jury was given a modified version of MAI 310.12, Instruction 5, that Travis' prior conviction was to be considered for propensity purposes only(L.F.49).

The jury found Travis guilty of all three counts(Tr.989-90;L.F.60-62).

The court overruled the motion for new trial which renewed all of counsel's objections to the admission of evidence about Travis' prior conviction(L.F.64;Tr.997).

The court sentenced Travis as a predatory sexual offender to concurrent fifty year sentences on each count with the possibility of parole(Tr.1004,1008-09;L.F.71-72).

This appeal followed.

POINTS RELIED ON

I.

PROPENSITY EVIDENCE VIOLATES DUE PROCESS AND JURY TRIAL RIGHTS

The trial court erred in overruling all of counsel's objections made at each and every phase of this case's proceedings throughout to respondent relying on and admitting evidence under Mo. Const. Art. I §18(c) that Travis Williams had a prior conviction for a sexual offense involving a child for purposes of showing his "propensity" to have committed the sex offenses charged here involving M.E.E. because Mo. Const. Art. I §18(c), on its face as to Travis and all similarly charged defendants like Travis, as well as specifically as applied here to Travis, denied Travis his right to due process and right to a fair jury trial, U.S. Const. Amends. VI and XIV, and Mo. Const. Art. I §10 and §22(a), in that respondent's propensity evidence denied Travis his jury trial right to the presumption of innocence to be convicted for only what the jury found he did here rather than the type of person the jury believed his "propensity" to be because of his prior conviction and with that lessened and relieved respondent of its obligation of proving Travis' guilt beyond a reasonable doubt.

Old Chief v. U.S., 519 U.S. 172 (1997);

In re D.M., 370 S.W.3d 917 (Mo.App., E.D. 2012);

State v. Parker, 988 S.W.2d 93 (Mo.App., S.D. 1999);

Chambers v. Mississippi, 410 U.S. 284 (1973);

U.S. Const. Amends. VI and XIV;

Mo. Const. Art. I §§10, 18(c), and 22(a).

II.

BALANCING REQUIRED EXCLUSION

The trial court erred, abusing its discretion, when it admitted as "propensity" evidence Travis' prior conviction for statutory sodomy as evidence he committed the charges alleged as to M.E.E. because that action denied Travis his right to due process and right to a fair jury trial, U.S. Const. Amends. VI and XIV and Mo. Const. Art. I §10 and §22(a), as the probative value of that evidence was substantially outweighed by the danger of unfair prejudice as provided for under Mo. Const. Art. I §18(c).

U.S. v. Lovasco, 431 U.S. 783 (1977);

Chambers v. Mississippi, 410 U.S. 284 (1973);

U.S. Const. Amends. VI and XIV;

Mo. Const. Art. I §§10, 18(c), and 22(a).

III.

FAILURE TO FOLLOW BALANCING REQUIRMENT

The trial court abused its discretion in admitting evidence of Travis' prior conviction because that action denied Travis his right to due process and right to a fair jury trial, U.S. Const. Amends. VI and XIV, Mo. Const. Art. I §10 and §22(a), in that the trial court did not follow the terms of Mo. Const. Art. I §18(c) that before admitting evidence of his prior conviction the trial court was to make a determination whether the probative value of the prior criminal act evidence, his prior conviction, was substantially outweighed by the danger of unfair prejudice as the trial court did not make such an express finding on that issue.

Chambers v. Mississippi, 410 U.S. 284 (1973);

State v. Anderson, 306 S.W.3d 529 (Mo. banc 2010);

U.S. Const. Amends. VI and XIV;

Mo. Const. Art. I §§10, 18(c), and 22(a).

ARGUMENT

I.

PROPENSITY EVIDENCE VIOLATES DUE PROCESS AND JURY TRIAL RIGHTS

The trial court erred in overruling all of counsel's objections made at each and every phase of this case's proceedings throughout to respondent relying on and admitting evidence under Mo. Const. Art. I §18(c) that Travis Williams had a prior conviction for a sexual offense involving a child for purposes of showing his "propensity" to have committed the sex offenses charged here involving M.E.E. because Mo. Const. Art. I §18(c), on its face as to Travis and all similarly charged defendants like Travis, as well as specifically as applied here to Travis, denied Travis his right to due process and right to a fair jury trial, U.S. Const. Amends. VI and XIV, and Mo. Const. Art. I §10 and §22(a), in that respondent's propensity evidence denied Travis his jury trial right to the presumption of innocence to be convicted for only what the jury found he did here rather than the type of person the jury believed his "propensity" to be because of his prior conviction and with that lessened and relieved respondent of its obligation of proving Travis' guilt beyond a reasonable doubt.

Throughout respondent hammered home that Travis had a "propensity" to commit the sex acts charged here as to M.E.E. because he had a prior conviction for a sex act involving another young girl. Mo. Const. Art. I §18(c), which authorized such

actions, denied Travis his Federal Constitutional right to due process and right to a fair jury trial, U.S. Const. Amends. VI and XIV, and his corresponding Missouri Constitution due process and right to a fair jury trial rights, Mo. Const. Art. I §10 and §22(a).

I.

Standard of Review

Whether a state law conflicts with federal law is a legal question subject to de novo review. *Bechtel v. Department of Social Services*, 274 S.W.3d 464, 467 (Mo. banc 2009).

The challenge here to Mo. Const. Art. I §18(c) is both a facial and as applied challenge. A law is unconstitutional on its face where it cannot be applied constitutionally in any circumstance. *State v. Perry*, 275 S.W.3d 237, 240 (Mo. banc 2009). An as applied challenge is directed at a law being unconstitutional as to a particular defendant. *Id.* at 240, 242-43.

II.

Preservation

At the 491 hearing, the prosecutor informed the court she intended to present Travis' prior for "propensity" as evidence he committed the charged acts here based upon Mo. Const. Art. I §18(c)(L.F.26-28;Tr.290-92,297-99,303-04).

Defense counsel objected that Article I §18(c) violates other provisions of the Missouri Constitution as well as the Federal Constitution(Tr.299). Counsel urged that

Article I §18(c) violates due process and Travis' jury trial rights (Tr.299-303). Under Article I §18(c) the court was required to make a finding of relevancy and Travis' prior was irrelevant and more prejudicial than probative(Tr.299-303). The prior was from 1996 and there was no correlation between the accuser there or any continuing course of conduct(Tr.300-01,308).

Counsel made the record that if the court intended to allow the "propensity" evidence then it would be necessary to voir dire the impact on the jury's decision making(Tr.301-03). Counsel also sought guidance from the court on how voir dire would be conducted assuming the "propensity" evidence was admitted(Tr.301-03).

The court ruled that the "propensity" evidence was admissible and in order for the defense to avoid the state being allowed to call the prior accuser the parties were to enter a stipulation as to the factual elements of the prior(Tr.310-11,314-16,331-32).

Before respondent read the Ex.1 stipulation, counsel renewed his prior objections(Tr.586-89). Counsel's stipulation was not to the evidence's admissibility, but only to the court's ruling as to how that prior got heard by the jury(Tr.586-89). The court reaffirmed its prior rulings(Tr.586-89).

The motion for new trial renewed all of counsel's objections to the propensity evidence and that motion was denied(L.F.64;Tr.997).

This claim is fully preserved.

III.

Missouri's Historical Prohibition of Sexual Misconduct Propensity Evidence

This Court has long recognized that evidence of a defendant's prior sexual misconduct was inadmissible for the sole purpose of showing the defendant's propensity to commit the sexual act for which he was on trial. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993); *State v. Burns*, 978 S.W.2d 759, 760-61 (Mo. banc 1998); *State v. Ellison*, 239 S.W.3d 603, 605-08 (Mo. banc 2007). *See also*, *State v. Blakey*, 203 S.W.3d 806, 811 (Mo.App., S.D. 2006) (defendant has right to be tried only for charged offense and propensity evidence is prohibited). In so holding, this Court relied on Mo. Const. Art. I §§17 and 18(a) that a defendant has the right to be tried only on the offense charged. *Burns*, 978 S.W.2d at 760-61; *Ellison*, 239 S.W.3d at 605-06.

Under §566.025 evidence that a defendant had committed other sexual offenses was "admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he or she is charged unless the trial court finds that the probative value of such evidence is outweighed by the prejudicial effect." *Ellison*, 239 S.W.3d at 606 (quoting §566.025). In *Ellison*, this Court found that §566.025 violated Mo. Const. Art. I §§17 and 18(a) that a defendant has the right to be tried only on the offense charged. The *Ellison* Court observed that

> Evidence of prior criminal acts **is never admissible for the purpose of demonstrating the defendant's propensity** to commit the crime with which he is presently charged. [citation omitted]. **There are no exceptions to this rule**.

Ellison, 239 S.W.3d at 606 (emphasis added). In making this statement, the *Ellison* Court observed that *Burns* had been "misread" to allow propensity evidence if that evidence is logically and legally relevant where the probative value of such evidence outweighs its prejudicial effect. *Id.* at 606-07. The *Ellison* Court stated that what *Burns* stood for was:

> Evidence of prior criminal acts *may* be admissible for purposes **other than demonstrating the defendant's propensity** if the evidence is logically and legally relevant. Alternate purposes for admitting evidence of prior criminal acts include establishing "(1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; [or] (5) the identity of the person charged with the commission of the crime on trial." [citation and footnote omitted]

Id. at 607 (italics in *Ellison*) (emphasis added). The *Ellison* Court continued:

> The criteria of logical and legal relevance **are not intended as a loophole for evading the general ban on propensity evidence.** A finding of legal and logical relevance will *never* provide a basis for the admission of prior

> criminal acts evidence for the purpose of **demonstrating a defendant's propensity**. The misconception that logical and legal relevance are required for the admission of propensity evidence is reflected in the 2000 statutory amendment to section 566.025. The clause requiring probative value and prejudicial effect **has no bearing on the constitutionality of propensity evidence**.

Ellison, 239 S.W.3d at 607 (italics in original) (emphasis added). Both convictions and uncharged acts "are inadmissible to show propensity." *Id.* at 608.

IV.

Missouri Constitutional Provisions At Issue

The due process clause of the Missouri Constitution, Art. I §10, provides:

> That no person shall be deprived of life, liberty or property without due process of law.

The Missouri Constitution's right to a jury trial, Art. I §22(a), provides:

> That the right of trial by jury as heretofore enjoyed shall remain inviolate; provided that a jury for the trial of criminal and civil cases in courts not of record may consist of less than twelve citizens as may be prescribed by law, and a two-thirds majority of such number concurring may render a verdict in all civil cases; that in all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict; and that in every criminal case any defendant may, with the assent of the court, waive a jury trial

> and submit the trial of such case to the court, whose finding shall have the force and effect of a verdict of a jury.

Commencing on December 4, 2014, the Missouri Constitution was amended to provide in Mo. Const. Art. I §18(c):

> Notwithstanding the provisions of sections 17 and 18(a) of this article to the contrary, in prosecutions for crimes of a sexual nature involving a victim under eighteen years of age, relevant evidence of prior criminal acts, whether charged or uncharged, is admissible for the purpose of corroborating the victim's testimony or demonstrating the defendant's propensity to commit the crime with which he or she is presently charged. The court may exclude relevant evidence of prior criminal acts if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

See State ex rel. Tipler v. Gardner, 506 S.W.3d 922, 924 (Mo. banc 2017). In *Tipler*, this Court held that Mo. Const. Art. I §18(c) applied to all trials after its effective date regardless of when a charged offense was alleged to have occurred. *Id.* at 923-24. This Court expressly indicated that it was reserving for another day whether Mo. Const. Art. I §18(c) violated a state or federal constitutional right. *Id.* at 923, 927-28.

Respondent successfully persuaded the trial court that it could introduce Travis' prior conviction as "propensity" evidence under Mo. Const. Art. I §18(c).

V.

Propensity Evidence Violates Due Process And Jury Trial Right

The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

The presumption of innocence has been characterized as "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In re Winship*, 397 U.S. 358, 363 (1970) (relying on *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

Whether particularized actions of the government violate due process is to be analyzed based on "'fundamental conceptions of justice which lie at the base of our civil and political institutions, [citation omitted] and which define the community's sense of fair play and decency.'" *U.S. v. Lovasco*, 431 U.S. 783, 790 (1977) (relying on *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) and *Rochin v. California*, 342 U.S. 165, 173 (1952)). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

"'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'" *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). The

presumption of innocence and that the state bears the burden of proof beyond a reasonable doubt are fundamental principles. *Taylor*, 436 U.S. at 483.

A state rule violates due process where '"it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."' *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)). Whether a principle is regarded as fundamental is based on historical practice and "whether the rule transgresses any recognized principle of 'fundamental fairness' in operation." *Medina v. California*, 505 U.S. 437, 448 (1992).

The prohibition against propensity evidence is universally recognized and firmly established and has its historical origins in English law traceable back to at least the Magna Charta. *People v. Molineux*, 61 N.E. 286, 293-94 (N.Y.Ct. App 1901).

The admission of propensity evidence of any kind, sexual or otherwise, destroys the presumption of innocence and a defendant's right to a fair jury trial, and lessens and relieves the state of its burden of proof beyond a reasonable doubt and violates due process. The prohibition against propensity evidence lies at the base of our civil and political institutions and defines the community's sense of fair play and decency. *See, Lovasco*. Propensity evidence denies a defendant the right to a fair opportunity to defend against the State's accusations. *See, Chambers.* The prohibition against propensity evidence is a fundamental principle based on historical

practice that ensures fundamental fairness. *See*, *Patterson and Medina*. Propensity evidence has been consistently found to violate due process, and therefore, Travis' challenge to Mo. Const. Art. I §18(c) is both a facial and an as applied challenge to its constitutionality.

In *Boyd v. U.S.*, 142 U.S .450, 454-58 (1892), the government presented evidence that the defendants had committed robberies in March that were entirely unconnected to the murder they were charged with having committed in April. In finding prejudicial error, the *Boyd* Court reasoned as follows:

> Proof of them [the robberies] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.

Boyd, 142 U.S. at 458.

In *Brinegar v. U.S.*, 338 U.S. 160, 161-62 (1949) the defendant was convicted of importing intoxicating liquor from one state to another and moved to suppress the

liquor on the grounds of an illegal search and seizure. The issue before the Court was whether there was probable cause for Brinegar's arrest and the resulting search and seizure. *Id*. at 164. The evidence at the suppression hearing included testimony that the same officer who had arrested Brinegar on the present matter also had arrested Brinegar a few months earlier for illegally transporting alcohol, had seen Brinegar loading alcohol onto a truck on two prior occasions, and knew Brinegar to have a reputation for hauling alcohol. *Id*. at 162. In upholding the legality of the search, the *Brinegar* Court noted that the trial court was permitted to consider the propensity evidence at the suppression hearing, but then "properly excluded" at the jury trial the propensity evidence and cited *Michelson v. U.S.*, 335 U.S. 469 (1948) as authority for the trial exclusion of that evidence. *Brinegar*, 338 U.S. at 172-73.

The *Brinegar* Court explained the different treatment of propensity evidence for purposes of a motion to suppress for probable cause purposes versus admitting the same evidence at trial before a jury. *Brinegar*, 338 U.S. at 173-74. The *Brinegar* Court observed:

> For a variety of reasons elating [sic] not only to probative value and trustworthiness, but also to possible prejudicial effect upon a trial jury and the absence of opportunity for cross-examination, the generally accepted rules of evidence throw many exclusionary protections about one who is charged with and standing trial for crime. Much evidence of real and substantial probative

> value goes out on considerations irrelevant to its probative weight but relevant to possible misunderstanding or misuse by the jury.

Brinegar, 338 U.S. at 173. To that observation the *Brinegar* Court added:

> The court's rulings, one admitting, the other excluding the identical testimony, were neither inconsistent nor improper. They illustrate the difference in standards and latitude allowed in passing upon the distinct issues of probable cause and guilt. Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are **historically grounded rights of our system**, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

Brinegar, 338 U.S. at 174 (emphasis added). While the *Brinegar* dissent would have suppressed the evidence, it did so while also voicing the identical views as to the difference in admitting the propensity evidence at the suppression hearing versus at trial stating as follows:

> In contrast, the proof that Brinegar was trafficking in illegal liquor rests on inferences from two circumstances, neither one of which would be allowed to be proved at a trial: One, it appears that the same officers previously had arrested Brinegar on the same charge. But there had been no conviction and it

> does not appear whether the circumstances of the former arrest indicated any strong probability of it. In any event, this evidence of a prior arrest of the accused would not even be admissible in a trial to prove his guilt on this occasion.

Brinegar, 338 U.S. at 186 (Jackson, J. dissenting).

In *U.S. v. Old Chief*, 56 F.3d 75 (Table) 1995 W.L. 325745 at *1 (9th Cir. 1995) (Memorandum Opinion), the defendant was convicted of being a felon in possession of a firearm, using or carrying a firearm during the commission of a violent crime, and assault with a dangerous weapon. Old Chief's convictions were affirmed by the Ninth Circuit, but the case was remanded for resentencing. *Old Chief*, 1995 W.L. 325745 at *4 - *6. *See, also, U.S. v. Old Chief*, 85 F.3d 638 (Table) 1996 W.L. 228560 (9th Cir. 1996) (Memorandum Opinion). Certiorari was then granted.

In *Old Chief v. U.S.*, 519 U.S. 172, 174-75 (1997), Old Chief was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. §922(g) where the prior felony was required to be one in which the term of imprisonment was greater than one year. Old Chief's prior conviction was assault causing serious bodily injury. *Old Chief*, 519 U.S. at 175. Defense counsel moved to limit the government's presentation of the prior felony conviction to the fact that Old Chief had a prior felony conviction with the required sentence in excess of one year that disqualified him from being allowed to possess a firearm. *Old Chief*, 519 U.S. at 175. The defense motion sought to exclude evidence of the name and nature of the prior assault conviction.

Old Chief, 519 U.S. at 175. The defense offered to stipulate that Old Chief had been convicted of a qualifying felony offense with a prison sentence greater than one year that forbid him from possessing a firearm. *Old Chief*, 519 U.S. at 175. The government refused to accept the defense's stipulation and the District Court agreed with the government. *Old Chief*, 519 U.S. at 177.

The *Old Chief* Court stated that the "principal issue" before it was the scope of a trial judge's discretion to exclude "relevant evidence" when under Rule 403 its '"probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."' *Old Chief*, 519 U.S. at 180. The Court noted that under the Committee Notes to Rule 403 that unfair prejudice constituted "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Old Chief*, 519 U.S. at 180 (quoting Committee Note). The *Old Chief* Court observed the following: "Such improper grounds certainly include the one that Old Chief points to here: generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)." *Old Chief*, 519 U.S. at 180-81. That was immediately followed by:

> As then - Judge Breyer put it, "Although ... 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that,

uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance." [citation omitted].

Old Chief, 519 U.S. at 181.

Next, the *Old Chief* Court quoted from *Michelson v. U.S.*, 335 U.S. 469 (1948) the law's handling of such risk:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, [citation omitted] but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record **and deny him a fair opportunity to defend against a particular charge.** The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise **and undue prejudice.**"

Old Chief, 519 U.S. at 181(emphasis added) (quoting *Michelson v. U.S.*, 335 U.S. 469, 475-76 (1948)). The *Old Chief* Court stated that Rule 404(b)'s prohibition of "propensity" evidence reflected the common-law's view of "propensity" evidence. *Old Chief*, 519 U.S. at 181-82. "Propensity" is an improper basis for a conviction. *Old Chief*, 519 U.S. at 182. Evidence of a prior conviction is subject to analysis under Rule 403 for relative probative value and for prejudicial risk of misuse as "propensity" evidence. *Old Chief*, 519 U.S. at 182.

The *Old Chief Court* noted:

> there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case, for the reasons already given, but will be substantial whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning. Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious, and Old Chief sensibly worried that the prejudicial effect of his prior assault conviction, significant enough with respect to the current gun charges alone, would take on added weight from the related assault charge against him.

Old Chief, 519 U.S. at 185. This analysis reflects, the Supreme Court in *Old Chief* believed Old Chief's prior assault conviction would unduly cause the jury to convict

him of the present gun charge and most especially the present assault charge because of his past assault conviction.

The *Old Chief* Court found that the risk of unfair prejudice through admitting the prior offense and its associated details outweighed the probative value of that evidence and it was an abuse of discretion to admit the complete record when an admission devoid of the details of the prior conviction was available. *Old Chief*, 519 U.S. at 191-92.

Propensity evidence suggests a decision on an improper basis. *See, Old Chief.* The *Boyd*, *Brinegar*, *Michelson*, and *Old Chief* analyses recognize that propensity evidence renders fundamentally flawed and unfair a trial where propensity evidence is admitted, and therefore, due process is violated.

Propensity evidence is excluded "not on a belief that the evidence is irrelevant, but rather on a fear that juries will tend to give it excessive weight, and on a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds." *U.S. v. Daniels*, 770 F.2d 1111, 1116 (D.C. Cir. 1985). "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." *U.S. v. Meyers*, 550 F.2d 1036, 1044 (5th Cir. 1977). Even when a trial court carefully instructs the jury as to the limited significance it can give evidence of other crimes, "prejudice to the defendant is 'well-nigh inescapable.'" *Daniels*, 770 F.2d at 1116 (quoting *U.S. v. Carter*, 482 F.2d 738, 740 (D.C. Cir. 1973)).

The very essence of propensity evidence is to convict a defendant for who he is and not for what he did, and therefore, violates due process. *See*, *Daniels* and *Meyers*. Missouri appellate court decisions have recognized that propensity evidence violates due process.

Juvenile Court defendant D.M. was convicted of assault while on school property. *In re D.M.*, 370 S.W.3d 917, 919 (Mo.App., E.D. 2012). In the trial court, D.M. failed to object to the trial court's reliance on similar past conduct of D.M. found in her abuse and neglect file in order to find her guilty of the assault. *Id.* at 921. The Eastern District, however, reviewed D.M.'s appeal claim and found the use of that evidence in such manner did not rise to the level of a manifest injustice constituting plain error. *Id.* at 921-22. Relevant to Travis' case is the Eastern District's analysis of the use of the propensity evidence against D.M. The Eastern District observed: "Simply put, **due process prohibits** the use of **propensity** evidence to determine guilt." *In re D.M.*, 370 S.W.3d at 921 (emphasis added). The Eastern District continued: "In the instant case, D.M.'s behavioral and disciplinary history **was propensity evidence and thus inadmissible** in the adjudication phase of the hearing." *In re D.M.*, 370 S.W.3d at 921 (emphasis added).

Similarly, the admission of evidence of drug sales an informant made to the defendant, other than the one sale charged, denied the defendant due process because the other sales constituted propensity evidence. *State v. Parker*, 988 S.W.2d 93, 93-

97 (Mo.App., S.D. 1999) (opinion setting out Point Relied On that challenged use of evidence on due process grounds).

In *State v. Courter*, 793 S.W.2d 386, 387 (Mo.App., W.D. 1990), the defendant was convicted of sodomy involving a 5-6 year old child. Respondent called an adult witness to testify that when he was 5-6 years old the defendant had engaged in similar sex acts with him. *Id.* at 387. Courter's conviction was reversed as the evidence constituted improper "propensity" evidence presented for the purpose of persuading the jury that if the defendant had performed similar acts in the past, then he must have done them in the instance charged. *Id.* at 389. While reversing, the *Courter* Court observed:

> The showing of prior sexual deviation is highly prejudicial to a person held to answer sexual charges and even where an objection to such evidence is sustained, a cautionary instruction by the judge is of dubious value in erasing the suggestion from the jury's mind.

Courter, 793 S.W.2d at 388. That prejudice is the kind that violates the community's sense of fair play and decency, *Lovasco, supra*, and denies the right to a fair opportunity to defend against the State's accusations, *Chambers supra*. While *Courter* recognized that a limiting instruction cannot undo the prejudice of evidence of a prior sexual offense, and because everyone here believed MAI 310.12 was required (Tr.333-37), under Instruction #5 (L.F.49) the jury was told Travis' prior was to be considered for its propensity purpose, but no other purpose. Instruction 5 only

compounded the prejudice to Travis by emphasizing the evidence of his prior conviction was to be used for propensity purposes. *See*, *Courter*.

Respondent maintained that admitting Travis' prior under Mo. Const. Art. I §18(c) was proper based on cases that have found Federal Rules of Evidence 413 and 414 properly authorize propensity evidence in sexual assault and child molestation cases because those rules are tempered by discretion given to trial courts under Rule 403 (L.F.26-28) (relying on *U.S. v. Coutentos*, 651 F.3d 809 (8th Cir. 2011); *U.S. v. LeMay*, 260 F.3d 1018 (9th Cir. 2001); *U.S. v. Charley*, 189 F.3d 1251 (10th Cir. 1999)). Rule 403 provides a trial court "may exclude" relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice. Respondent asserted that because Mo. Const. Art. I §18(c) tracks Rule 403 and that the trial court "may exclude" propensity evidence based on such weighing that due process is not violated(L.F.26-28).

The Rule 413 and 414 cases are in direct conflict with the *Old Chief* Court's opinion, as well as, *Boyd*, *Brinegar*, and *Michelson*. The *Old Chief* Court found the risk of unfair prejudice through admitting Old Chief's prior assault causing serious bodily injury conviction and its associated details outweighed the probative value of that evidence where Old Chief's prior offense was not offered for propensity purposes, but rather to prove up an element of the felon in possession charge. If the evidence admitted when not offered for propensity purposes in *Old Chief* created a risk of unfair prejudice, then admitting Travis' prior for first degree statutory sodomy

as propensity evidence for its propensity purpose he committed the first degree statutory offenses here against M.E.E. must violate *Old Chief*.

The history of Rules 413 and 414 also demonstrate why the cases respondent relied on lack persuasive force. Under 28 U.S.C. §2072(a) (parenthetical in original), the Supreme Court is vested with "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals." The accepted practice for enacting evidence rules is the Advisory Committee on Evidence Rules proposes the Rules of Evidence followed by the Supreme Court transmitting proposals to Congress for passage. *See* Deborah Jones Merritt and Ric Simmons, *Learning Evidence: From The Federal Rules To The Courtroom* 22 (copyrighted 2009 part of West's American Casebook series). Congress by-passed the accepted practice of relying on the Advisory Committee for enacting rules as to Rules 413-15 when it made those rules part of its 1994 Violent Crime Control and Law Enforcement Act. *See Learning Evidence* at 405. In response to Congress' actions on Rules 413-15, the Judicial Conference of the United States submitted a report to Congress on the admission of character evidence in sexual misconduct cases. *See Judicial Conference of the United States Report*, 159 F.R.D. 51 (Feb. 9, 1995). The Judicial Conference was unanimous in its opposition to the new rules, except for the Department of Justice's representative. *Id.* at 52-53.

The Judicial Conference opposed Rules 413-15 because those rules permitted the admission of unfairly prejudicial evidence. *Judicial Conference,*159 F.R.D. at 52. The new rules:

> diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice. **These protections form a fundamental part of American jurisprudence** and have evolved under long-standing rules and case law. A significant concern identified by the committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person.

*Judicial Conference,*159 F.R.D. at 53 (emphasis added).

The Judicial Conference also opposed those rules because Rule 404(b) already authorized the admission of evidence of prior offenses for the proper permissible evidentiary purposes of showing intent, plan, motive, preparation, identity, knowledge, or absence of mistake or accident. *Judicial Conference,* 159 F.R.D. at 52-53.

Respondent's argument ignored that in *Ellison* this Court found balancing of probative value against unfair prejudice is not "a **loophole** for evading the **general ban on propensity** evidence" and "has **no bearing** on the constitutionality of propensity evidence." *Ellison*, 239 S.W.3d at 607 (emphasis added). The decisions in *In re D.M.* and *Parker* similarly stand for the proposition that propensity evidence violates due process. *Boyd, Brinegar, Michelson,* and *Old Chief* also make clear that

any balancing authorized by Mo. Const. Art. I §18(c) does not save it from violating due process. *Boyd* ruled that a defendant is not to be tried on his past crimes and only for the offenses charged. *Boyd*, 142 U.S. at 458. In *Old Chief*, the Court demonstrated its fidelity to the principle that propensity evidence violates due process when admitted to show a person acted in conformance with his "propensity" and that Rule 403's balancing of probative value against prejudicial effect does not make propensity evidence admissible.

In *Deck v. Missouri*, 544 U.S. 622, 624, 634-35 (2005), after the defendant was convicted of first degree murder, the trial court required the defendant to wear visible shackles and chains in front of the jury during penalty when there was no indication that such treatment was necessary to courtroom safety and order. That shackling violated due process. *Id.* at 629, 635. The shackling violated Deck's presumption of innocence as the shackling undermined the jury's ability to weigh accurately all relevant considerations, including unquantifiable and elusive considerations, of whether death was the appropriate punishment. *Id.* at 630, 633. The visible shackling added for penalty phase was propensity evidence that Deck posed a security risk for penalty simply because of the fact of his guilt phase conviction. The use of propensity evidence, like a prior sexual offense when a defendant is on trial for a sexual offense, violates due process, the presumption of innocence, and a defendant's right to a fair jury trial and relieves and lessens the state's burden of proof in the same

way that shackling Deck in penalty phase violated those rights. *See, also, Lovasco, Chambers, In re Winship, and Taylor.*

Constitutional provisions are subject to the same rules of construction as other laws. *Pestka v. State*, 493 S.W.3d 405, 408-09 (Mo. banc 2016). Words used in constitutional provisions are interpreted so as to give effect to their plain, ordinary, and natural meaning. *Id.* at 409.

Giving statutory language its plain and ordinary meaning is a mandatory rule of statutory construction. *Committee on Legislative Research v. Mitchell*, 886 S.W.2d 662, 664 (Mo.App., W.D. 1994). Where statutory language utilizes "may" that statutory language is permissive rather than mandatory. *Schubert v. Tolivar*, 905 S.W.2d 924, 929 (Mo.App., E.D. 1995). The use of "shall" in a statute is mandatory and not permissive. *Greenwich Condominium Association v. Clayton Investment Corp.*, 918 S.W.2d 410, 414-15 (Mo.App., E.D. 1996). The use of "shall" in a constitutional provision constitutes "mandatory" language. *Pearson v. Koster*, 359 S.W.3d 35, 39 (Mo. banc 2012).

Besides the general due process bar to propensity evidence, Mo. Const. Art. I §18(c) violates due process because it provides that the trial court after balancing **"may exclude"** the propensity evidence rather than **requiring** it be excluded when the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. In *Old Chief*, it relied on what then Judge Breyer had written that propensity evidence by its very nature "creates a prejudicial effect that outweighs

ordinary relevance." *Old Chief*, 519 U.S. at 181. Similarly, the *Courter* Court noted that a cautionary instruction where a prior sexual offense is admitted when a defendant is on trial for a sexual offense does not cure the prejudice to a defendant. *Courter*, 793 S.W.2d at 388. In *State v. Rucker*, 512 S.W.3d 63, 69 (Mo.App., E.D. 2017), that Court stated as to Mo. Const. Art. I §18(c) "even if the evidence's probative value was "substantially outweighed by the danger of unfair prejudice," the trial court was not required to exclude the evidence." Under *Old Chief*, a trial court is required, as a matter of due process, to exclude evidence where the probative value is substantially outweighed by the danger of unfair prejudice.

To be admissible evidence must be relevant. *State v. Anderson*, 306 S.W.3d 529, 538 (Mo. banc 2010). Relevance is a two tiered inquiry: logical and legal. *Id.* at 538. Evidence is logically relevant if it tends to make the existence of a material fact more or less probable. *Id.* at 538. Logically relevant evidence is only properly admitted, though, if it is likely to make the existence of a material fact more or less probable. *Id.* at 538. Legal relevance balances the probative value of evidence against its costs in terms of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness. *Id.* at 538. **Logically relevant evidence is excluded if its prejudice outweighs its probative value.** *Id.* at 538. That Mo. Const. Art. I §18(c) does not **require** the exclusion of this brand of evidence when the probative value of the evidence is substantially outweighed by the danger of unfair prejudice violates due process, the presumption of innocence, and a defendant's

right to a fair jury trial and relieves and lessens the state's burden of proof. *See Lovasco, Chambers, In re Winship, and Taylor*.

In voir dire, the venire heard from the prosecutor that the jurors could consider Travis' prior sexual offense for its propensity purpose(Tr.428-35,452). When defense counsel asked the venire who was prejudiced against sexual offenders about 80% of the venire raised their hands(Tr.464). This all preceded Venireperson 81's statements made in the presence of other venire members. Venireperson 81's statements say it best from a juror's perspective why Travis was prejudiced. Venireperson 81 stated: "I guess **if we're all truthful and honest, all of us are bias and all of us are prejudice in this case**."(Tr.476-79)(emphasis added). To that Venireperson 81 added: "If you are **honest** in here, it's going to be hard to separate it [the prior conviction from the present allegations]"(Tr.478)(emphasis added). Venireperson 81 stated that Travis did not enter with a **"level playing field"** because of his prior conviction(Tr.478-79) (emphasis added).

Mo. Const. Art. I §18(c) violates due process because it **allows**, but does not **require** the trial court to exclude propensity evidence when the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. The failure to mandate exclusion of propensity evidence violates '"fundamental conceptions of justice which lie at the base of our civil and political institutions, [citation omitted] and which define the community's sense of fair play and decency."' *See Lovasco*, 431 U.S. at 790 and *Boyd*, *Brinegar*, and *Michelson*, *supra*. Mo. Const. Art. I §18(c)

violates due process because it denies the right to a fair opportunity to defend against the State's accusations. *See Chambers*, 410 U.S. at 294. Mo. Const. Art. I §18(c) denied Travis' rights to due process, the presumption of innocence, to a fair jury trial, and lessened and relieved respondent's obligation to prove guilt beyond a reasonable doubt. *See Lovasco, Chambers, In re Winship, and Taylor.*

The due process clauses of the United States and Missouri Constitutions are co-extensive. *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006); *Doughty v. Director of Revenue*, 387 S.W.3d 383, 387 (Mo. banc 2013). Because Mo. Const. Art. I §18(c) violates Travis' right to due process and right to a fair jury trial, U.S. Const. Amends. VI and XIV, it also violates Travis' corresponding Missouri due process and jury trial Constitutional rights, Mo. Const. Art. I §10 and §22(a).

This Court should find that Art. I §18(c) violates Missouri's due process clause, Art. I §10, as the Iowa Supreme Court did, under the Iowa Constitution's due process clause, when that court was confronted with the issue presented here. In *State v. Cox*, 781 N.W.2d 757, 762, 768-69 (Ia. 2010) the Iowa Supreme Court concluded that admitting propensity evidence that the defendant had sexually abused other individuals, other than the complainant, in a sexual abuse case violated Iowa's due process clause. Such evidence is not relevant to a "legitimate issue" and a "legitimate issue" is not propensity. *Id*. at 764-65, 768. In so holding under the Iowa due process clause, the *Cox* Court relied on *Lovasco's* '"fundamental conceptions of justice which lie at the base of our civil and political institutions, [citation omitted] and which

define the community's sense of fair play and decency."' *Cox*, 781 N.W.2d at 764, 766 (quoting from *Lovasco*). The *Cox* Court also relied on *Boyd's* "the defendants were entitled to be tried upon competent evidence, and only for the offense charged" analysis. *Cox*, 781 N.W.2d at 764 (quoting from *Boyd*). The *Cox* Court noted that the underlying premise of the presumption of innocence is that a defendant is to be tried for what he did and not for who he is. *Cox*, 781 N.W.2d at 767.

The "purpose" of due process is "to prevent fundamental unfairness." *State v. Snipes*, 478 S.W.2d 299, 303 (Mo. 1972). A municipal ordinance which created a rebuttable presumption that the owner of a motor vehicle was the operator when the vehicle was photographed by a red light camera violated the Art. I §10 due process clause of the Missouri Constitution. *Brunner v. State*, 427 S.W.3d 201, 233 (Mo.App., E.D. 2014).[3] The use of propensity evidence under Mo. Const. Art. I §18(c) imposes greater fundamental unfairness on defendants, like Travis, than *Brunner's* rebuttable presumption and violates Art. I §10's due process protections because the jury was told to convict Travis here because of his prior conviction. Missouri's due process clause, Mo. Const. Art. I §10, and right to a jury trial, Mo. Const. Art. I §22(a), must supersede Mo. Const. Art. I §18(c) because the due process

[3] The *Brunner* case was overruled on grounds not relevant here to the extent that it held that "a municipal division lacks subject matter jurisdiction when an ordinance on which an ordinance violation is based is found to be invalid." *Tupper v. City of St. Louis*, 468 S.W.3d 360, 369 n.7 (2015) (citing to *Brunner*, 427 S.W.3d at 214-16).

protections against propensity evidence and the jury trial rights are fundamental conceptions of justice at the base of our civil and political institutions, which define our sense of fair play and decency. *See, Lovasco*. Propensity evidence denies a defendant the right to a fair opportunity to defend against the state's accusations. *See*, *Chambers*. Propensity evidence denies defendants the presumption of innocence and lessens and relieves the state of satisfying its burden of proof beyond a reasonable doubt and with that denies a defendant his right to a fair jury trial. *See*, *Taylor and Irvin v. Dowd*.

Article I §18(c) is an evidentiary rule that was intended to overrule this Court's prohibition of propensity evidence, premised on Art. I §§17 and 18(a), and recognized in *Bernard*, *Burns*, and *Ellison*, *supra*. Because Missouri's due process clause, Art. I §10, and jury trial rights, Mo. Const. Art. I §22(a) embody fundamental conceptions of justice at the base of our civil and political institutions, which define our sense of fair play and decency, *Lovasco*, Art. I§10 and §22(a) supersede the Art. I §18(c) evidentiary rule.

VI.

Travis Was Prejudiced

Respondent's use of propensity evidence, specifically as applied to Travis, violated his rights to due process and a fair jury trial and was prejudicial. When there is a constitutional error in a trial, reversal is not required if the reviewing court determines the error was harmless beyond a reasonable doubt. *Chapman v.*

California, 386 U.S. 18, 24 (1967). It is the State's burden to prove that the error did not contribute to the verdict. *Id.* at 24.

The propensity evidence here was prejudicial because it was the touchstone of respondent's case that defense counsel was forced to continually chase.

A. Voir Dire

During voir dire that prejudice was highlighted by Venireperson 81's comments. Venireperson 81, in the presence of other venire members, stated the following: "I guess **if we're all truthful and honest, all of us are bias and all of us are prejudice in this case**."(Tr.476-79) (emphasis added). To that Venireperson 81 added: "If you are **honest** in here, it's going to be hard to separate it [the prior conviction from the present allegations]"(Tr.478) (emphasis added). Venireperson 81 stated that Travis did not enter with a **"level playing field"** because of his prior conviction(Tr.478-79) (emphasis added).

B. Opening Statements

Respondent's Opening concluded with the jury would learn about Travis' 1996 prior conviction, when Travis was 26 years old, for statutory sodomy for inserting his thumb into a twelve year old's vagina(Tr.548).

In defense counsel's Opening, he was forced to adopt a defense theory that the accusations here were premised on all of those people close to M.E.E.'s life falsely accusing Travis of sexually abusing her solely because of mere suspicions based on his prior conviction for a sexual offense involving a child(Tr.549-51). Without the

propensity evidence, the defense theory could have been that in May, 2009 M.E.E. denied on video to C.P.C. interviewer Gilgour that Travis had engaged in any sexually inappropriate behavior(Tr.737-38,747;Trial Exhibit 2) and M.E.E. had repeatedly over the course of years denied to Kinney that Travis had ever done anything sexually inappropriate to M.E.E.(Tr.927-29).

C. Respondent's Case

During respondent's case, the jury heard over and over about Travis having a prior sexual offense involving another young girl. That defense counsel on occasion elicited this evidence first was necessitated by having to adopt the forced defense of Travis was falsely accused based on mere suspicions about him premised on his prior conviction.

The jury was read the Exhibit 1 stipulation as to the details of Travis' prior offense(Tr.589-90).

On Gilgour's C.P.C. May, 2009, interview of M.E.E., the jury learned that Travis had told her that he had been in prison(Trial Ex.2 at 20:57-22:48). M.E.E. said that Stacie had told her that Travis had been in prison for something bad that he had done to a thirteen year old girl(Trial Ex.2 at 20:57-22:48).

On cross-examination, Eddy acknowledged that sometime in 2003 or 2004 that he learned that Travis was a convicted sex offender(Tr.576-77).

On cross-examination, M.E.E. testified that at some point she learned from Travis and Stacie that Travis had a prior sexually related offense(Tr.639-40).

On redirect, M.E.E. testified that Stacie had told M.E.E. that Travis had pled guilty to touching another girl(Tr.655). Also on redirect, M.E.E. testified that Stacie told M.E.E. about Travis' prior conviction after M.E.E. had told Stacie that Travis had touched her inappropriately(Tr.655-56).

On recross, M.E.E. testified that Stacie talked to M.E.E. about Travis' sex offender status and that Travis had talked to M.E.E. about his sex offender status(Tr.661-62).

On cross-examination, Stacie testified that M.E.E. had told Stacie that Travis was a convicted sex offender and Eddy told her the same(Tr.677).

On redirect, Stacie testified that she learned from Casenet that Travis was a convicted sex offender for sodomy with a minor, and in particular, anal sex(Tr.682-83).

On direct, Tracy testified that she learned Travis was a registered sex offender, about two weeks after she met Travis, and she did not discuss with her children that Travis was convicted of sexually molesting a girl(Tr.689-92).

On direct, Tracy testified that one source of conflict between she and Eddy was that Eddy told Tracy that he did not want Travis around M.E.E. because Travis was a registered sex offender(Tr.693-94).

Tracy testified, on direct, that Travis' moving out happened following an incident where Tracy wanted to hurt Travis and Tracy said to Travis that he did not like women, but liked little girls(Tr.697-98).

Robbie acknowledged on cross-examination that he knew about Travis' sexual offender past(Tr.787). Also on cross-examination, Robbie viewed himself as a protector of the children and he was particularly vigilant about observing Travis' interaction with the children because of Travis' sexual offender past(Tr.787-89).

On cross-examination Glenn testified that it was not until Glenn learned of Travis' sexual offender past that Glenn came to question the tickling and snuggling behavior between Travis and M.E.E.(Tr.809-10,816-17).

On the September 13, 2013, Officer Frazee interview, M.E.E. told Frazee that Travis had a record for sexual abuse(Trial Ex.6 at 5:58-6:00).

On cross-examination, Frazee indicated that Travis' status as a sexual offender would have been in Pleasant Hill police reports available to Frazee(Tr.856-57).

On cross-examination, Arlene testified that when she learned about Travis' prior sexual offense that she was devastated(Tr.876).

On redirect, Arlene testified that she understood that Travis' prior sexual offense was for sodomy based on putting "his penis in her butt"(Tr.881).

On the September 24, 2013, C.P.C. Watterson interview video the jury heard M.E.E. state that she knew that Travis had molested another girl(Trial Ex.9 at 38:00-38:27).

The repetition about Travis' prior conviction diminished all persuasive force the fact that in May, 2009 M.E.E. gave a recorded interview to C.P.C. interviewer Gilgour in which M.E.E. denied Travis did anything sexually inappropriate to

her(Trial Ex.2 at 6:40-6:42,7:16-7:23,12:16-12:50,14:21-14:37) and that M.E.E. had over the course of years told Kinney that Travis had not done anything sexually inappropriate to her(Tr.927-29).

D. Closing Arguments

The prejudice of this propensity evidence is apparent from reviewing the closing arguments.

The state's initial closing argument commenced as follows:

> [THE COURT] State, you may proceed.
>
> MS. PENROSE: Thank you, Judge.
>
> [M.E.E.] never really stood a chance, did she. Born to a mother who wouldn't protect her for years on end. A mother who went essentially from man to man to man to man, including the defendant Travis Williams. A man who had previously pled guilty to and admitted touching a 12-year-old little girl in 1996. Touching her on her private parts, inserting his thumb into her vagina when he was 26 years old. The defendant, by admitting having done that in 1996, is admitting he has a propensity to do exactly that for which he is on trial this week.

(Tr.949-50).

The end of the prosecutor's initial closing argument included:

> This was a man who was satisfying his sexual desire for 12-year-old girls. He was satisfying that with [M.E.E.] for years, just as he had done back in 1996.

(Tr.965-66).

Defense counsel's closing argument attempted to address the extreme prejudice that was created by injecting propensity. Defense counsel's argument included:

> Propensity is a big word in this trial. It's been a few days, but I know you all remember, we made a big deal out of it when I was asking you all questions out there.

(Tr.967)

.....

> It isn't what happened in the 90's, isn't what happened when he pled guilty in the 90's. That's not the end.
>
> That word "propensity" is important because you are going to have to define that for yourself. You are going to have to use what you know about propensity and apply it to these charges. You can go a couple of ways with that. You can assume that everybody across the country who has ever pled guilty to a sex crime is probably going to do it again. Automatically they have a propensity for that no matter what. Or, would you look for some evidence of propensity? Would you want maybe somebody to come in and tell you propensity one way or the other because I think I understand that every person who has ever pled guilty to a sex crime, every person who has made that monumental mistake, doesn't necessarily have a propensity to keep doing it.

(Tr.967-68)

.....

I am going to talk about the evidence here, I am going to talk about what we have seen over the last few days, but they don't get a break from proving their case because of that word "propensity."

(Tr.969)

Counsel urged that Eddy and Eddy's family assumed the worst about Travis because of his prior conviction which led to them to repeatedly contact D.F.S.(Tr.969). Counsel's argument continued that in Travis' guilty plea he admitted to putting his thumb in the vagina of a twelve year old and M.E.E. continually heard about that prior offense from the time she was three years old(Tr.970).

To counter the propensity prejudice counsel relied on Darlene Kinney's testimony that Kinney had asked M.E.E. whether Travis had ever touched her inappropriately and M.E.E. told Kinney that had not happened(Tr.972-73).

Counsel touched on Instruction 5's directive as to how the prior conviction evidence was to be considered as propensity(Tr.979-80;L.F.49).

Counsel's argument included the following:

Or, you believe that at two or three years old, people started talking to this little girl about how that man had a history, that he must have been doing things to her, must have been touching her butt because that's what sodomites

do. He must have been having sex with her for that same decade, every time she went to dad's, every time she went to grandma's.

(Tr.981-82)

Counsel's final comments included:

It simply doesn't work to assume without any evidence that just because he pled guilty in the 90's to a sex crime, that he automatically, he did it this time.

Hold the State to its burden. Do what is right. Find Travis Williams not guilty to each and every one of these counts. Thank you.

(Tr.982-83).

The *Cox* Court, *supra*, concluded that the admission of the propensity evidence there was not harmless because of the predominant focus that was given the evidence. *Cox*, 781 N.W.2d at 771. Like *Cox*, Travis' prior conviction, used as "propensity" evidence, permeated the trial every step of the way and was prejudicial.

VII.

Conclusion

This Court should find that Mo. Const. Art. I §18(c), on its face and as applied, denied Travis his right to due process and right to a fair jury trial, U.S. Const. Amends. VI and XIV, as well as, Travis' corresponding Missouri Constitution due process and jury trial rights, Mo. Const. Art. I §10 and §22(a). This Court should reverse all of Travis' convictions for a new trial where respondent is prohibited from introducing Travis' prior conviction as propensity evidence that he committed acts

charged as to M.E.E. because Mo. Const. Art. I §18(c) violates the Federal and Missouri Constitutions.

II.

BALANCING REQUIRED EXCLUSION

The trial court erred, abusing its discretion, when it admitted as "propensity" evidence Travis' prior conviction for statutory sodomy as evidence he committed the charges alleged as to M.E.E. because that action denied Travis his right to due process and right to a fair jury trial, U.S. Const. Amends. VI and XIV and Mo. Const. Art. I §10 and §22(a), as the probative value of that evidence was substantially outweighed by the danger of unfair prejudice as provided for under Mo. Const. Art. I §18(c).

Travis Williams believes that for the reasons set forth in Point I this Court should find that Mo. Const. Art. I §18(c) is unconstitutional both facially and as applied to him. Further, for that reason Travis believes this Court should never reach this Point II. In the event, however, that this Court rejects Travis' Point I challenge, then this Court should find the trial court abused the discretion given to it under Mo. Const. Art. I §18(c) to exclude respondent's propensity evidence constituting Travis' prior conviction.

Standard of Review

A trial court has broad discretion whether to admit or exclude evidence at trial. *State v. Robinson*, 392 S.W.3d 545, 551 (Mo.App., S.D. 2013). In order to reverse a trial court's ruling on the admission of evidence an abuse of discretion must be shown. *Id.* at 551. The trial court abuses its discretion "when a ruling is clearly

against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *Id.* at 551 (relying on *State v. Forrest*, 183 S.W.3d 218, 223 (Mo. banc 2006)). This Court reviews the trial court's ruling for prejudice. *Robinson*, 392 S.W.3d at 551.

Preservation

Travis incorporates by reference his Preservation statements contained in Point I.

Unfair Prejudice To Travis

The right to a jury trial guarantees a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

The presumption of innocence has been characterized as "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In re Winship*, 397 U.S. 358, 363 (1970) (relying on *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

Whether particularized actions of the government violate due process is to be analyzed based on '"fundamental conceptions of justice which lie at the base of our civil and political institutions, [citation omitted] and which define the community's sense of fair play and decency."' *U.S. v. Lovasco*, 431 U.S. 783, 790 (1977) (relying on *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) and *Rochin v. California*, 342 U.S. 165, 173 (1952)). "The right of an accused in a criminal trial to due process is, in

essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

The same factors that were relied on to establish prejudice under *Chapman v. California*, 386 U.S. 18, 24 (1967), contained in Point I, are equally applicable as to why under Mo. Const. Art. I §18(c) the trial court abused its discretion in failing to exclude respondent's propensity evidence because the probative value of that evidence was substantially outweighed by the danger of unfair prejudice. Because the matters demonstrating prejudice, discussed in Point I, and the reasons the probative value of that evidence was substantially outweighed by the danger of unfair prejudice are the same, an abbreviated summarized version of the Point I prejudice argument follows to avoid unnecessary wholesale duplication.

The jury was read the Exhibit 1 stipulation on the details of Travis' prior conviction(Tr.589-90). The jury heard on **both** C.P.C. recorded interviews of M.E.E. about Travis' prior(Trial Ex.2 at 20:57-22:48) (Trial Ex.9 at 38:00-38:27). Besides the C.P.C. videos, the jury heard this information on the Officer Frazee video(Trial Ex.6 at 5:58-6:00). Witness after witness testified about Travis' prior conviction(Tr.576-77,639-40,655-56,661-62,677,682-83,689-92,693-94,697-98,787-89,809-10,816-17,856-57,876,881).

Respondent's closing arguments drilled home for the jury Travis' prior conviction. The state's initial closing argument commenced as follows:

[THE COURT] State, you may proceed.

MS. PENROSE: Thank you, Judge.

[M.E.E.] never really stood a chance, did she. Born to a mother who wouldn't protect her for years on end. A mother who went essentially from man to man to man to man, including the defendant Travis Williams. A man who had previously pled guilty to and admitted touching a 12-year-old little girl in 1996. Touching her on her private parts, inserting his thumb into her vagina when he was 26 years old. The defendant, by admitting having done that in 1996, is admitting he has a propensity to do exactly that for which he is on trial this week.

(Tr.949-50).

The end of the prosecutor's initial closing argument included:

This was a man who was satisfying his sexual desire for 12-year-old girls. He was satisfying that with [M.E.E.] for years, just as he had done back in 1996.

(Tr.965-66).

Defense counsel devoted substantial time and energy in closing telling the jury why it should not convict Travis based on propensity(Tr.967-70,972-73,979-83).

The probative value of Travis' prior conviction as propensity evidence was substantially outweighed by the danger of unfair prejudice as provided for under Mo. Const. Art. I §18(c) and it was an abuse of discretion to allow respondent to present Travis' prior conviction as propensity evidence.

This Court should reverse Travis' convictions and order a new trial where his prior conviction is prohibited from being admitted for propensity purposes.

III.

FAILURE TO FOLLOW BALANCING REQUIRMENT

The trial court abused its discretion in admitting evidence of Travis' prior conviction because that action denied Travis his right to due process and right to a fair jury trial, U.S. Const. Amends. VI and XIV, Mo. Const. Art. I §10 and §22(a), in that the trial court did not follow the terms of Mo. Const. Art. I §18(c) that before admitting evidence of his prior conviction the trial court was to make a determination whether the probative value of the prior criminal act evidence, his prior conviction, was substantially outweighed by the danger of unfair prejudice as the trial court did not make such an express finding on that issue.

Travis Williams believes that for the reasons set forth in Point I this Court should find that Mo. Const. Art. I §18(c) is unconstitutional both facially and as applied to him. Further for that reason, Travis believes this Court should never reach this Point III. In the event, however, that this Court rejects Travis' Point I challenge, then this Court should find the trial court abused its discretion because it failed to conduct the balancing required under Mo. Const. Art. I §18(c). Specifically, the court failed to make the required express finding, under Mo. Const. Art. I §18(c), whether the probative value of the prior criminal act evidence, Travis' prior conviction, was substantially outweighed by the danger of unfair prejudice before it admitted the evidence of that conviction.

Standard of Review

A trial court has broad discretion whether to admit or exclude evidence at trial. *State v. Robinson*, 392 S.W.3d 545, 551 (Mo.App., S.D. 2013). In order to reverse a trial court's ruling on the admission of evidence an abuse of discretion must be shown. *Id.* at 551. The trial court abuses its discretion "when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *Id.* at 551 (relying on *State v. Forrest*, 183 S.W.3d 218, 223 (Mo. banc 2006)). This court reviews the trial court's ruling for prejudice. *Robinson*, 392 S.W.3d at 551.

Preservation

Travis incorporates by reference his Preservation Statements contained in Point I.

Trial Court Failed To Do Required Balancing

To Make Express Art. I §18(c) Finding

Whether particularized actions of the government violate due process is to be analyzed based on '"fundamental conceptions of justice which lie at the base of our civil and political institutions, [citation omitted] and which define the community's sense of fair play and decency."' *U.S. v. Lovasco*, 431 U.S. 783, 790 (1977) (relying on *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) and *Rochin v. California*, 342 U.S. 165, 173 (1952)). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

To be admissible evidence must be relevant. *State v. Anderson*, 306 S.W.3d 529, 538 (Mo. banc 2010). Relevance is a two tiered inquiry: logical and legal. *Id.* at 538. Evidence is logically relevant if it tends to make the existence of a material fact more or less probable. *Id.* at 538. Logically relevant evidence is only properly admitted, though, if it is likely to make the existence of a material fact more or less probable. *Id.* at 538. Legal relevance balances the probative value of evidence against its costs in terms of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness. *Id.* at 538. Logically relevant evidence is excluded if its prejudice outweighs its probative value. *Id. at* 538.

Under the text of Mo. Const. Art. I §18(c), the trial court was required to make a determination whether the probative value of the prior criminal act evidence was substantially outweighed by the danger of unfair prejudice. *See* Point I text of Mo. Const. Art. I §18(c). The record does not reflect that the trial court conducted such balancing and made an express finding on the probative value of the prior conviction evidence versus the danger of unfair prejudice before it admitted respondent's evidence of Travis' prior conviction.

The trial court granted the state's motion to admit evidence of Travis' prior conviction as authorized under Mo. Const. Art. I §18(c)(L.F.26-28;Tr.315-16). When the court granted that motion to allow admission it did so with the understanding that evidence of the prior conviction would be limited to a recitation as to its factual elements and the accuser would not testify(Tr.310-11,314-16). The court found the

prior conviction was relevant because it occurred sufficiently close enough in time to the acts alleged involving M.E.E. and the type of acts associated with the prior were similar to here(Tr.314-15). The court opined the stipulation would minimize prejudice to Travis compared to calling the prior accuser(Tr.314-15). The court indicated that if the parties could not agree to stipulate, then it would allow the accuser to testify about the factual circumstances of that offense(Tr.331-32).

While the trial court addressed the potential prejudice of the state being allowed to call the accuser in the prior conviction, the record does not reflect that it conducted the balancing of the probative value versus unfair prejudice by admitting evidence of Travis' prior conviction at all and then made an express finding on that matter. The court's finding that the prior conviction evidence was relevant (Tr.314-15) only addressed the issue of logical relevance, but did not address the legal relevance of the evidence. *See, Anderson.* The legal relevance inquiry occurs where the trial court balances the probative value of the evidence against its costs in terms of unfair prejudice. *See, Anderson.* There is no express record that the trial court engaged in balancing the probative value of Travis' prior conviction against its costs in terms of unfair prejudice, and therefore, the trial court could not properly admit that evidence under Mo. Const. Art. I §18(c). *See, Anderson.*

This Court should reverse Travis' convictions for a new trial because the trial court did not follow the terms of Mo. Const. Art. I §18(c) before admitting the evidence of Travis' prior conviction.

CONCLUSION

For the reasons discussed in Points I, and II this Court should reverse Travis Williams' convictions for a new trial at which the State is prohibited from introducing his prior conviction for the purposes of "propensity" that he committed the offenses charged here. For the reasons discussed in Point III, this Court should reverse Travis Williams' convictions for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, hereby certify to the following.

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 17,899 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in June, 2017. According to that program the brief is virus-free.

A true and correct copy of the attached brief with brief appendix have been served electronically using the Missouri Supreme Court's electronic filing system this 5th day of June, 2017, on Assistant Attorney General Richard A. Starnes at richard.starnes@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift
William J. Swift