IN THE
MISSOURI SUPREME COURT

SC96524

STATE OF MISSOURI,

Respondent,

v.

JORDAN L. PRINCE,

Appellant.

Appeal from the Circuit Court of St. Charles County, Missouri
The Honorable Nancy L. Schneider
Case No. 1211-CR06357-01

Brief of American Civil Liberties Union of Missouri and the Roderick and Solange MacArthur Justice Center at St. Louis as *Amici Curiae* in Support of Appellant Filed with Consent

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Jurisdictional Statement

Amici adopt the jurisdictional statement as set forth in Appellant's brief.

Interest of *Amici Curiae* and Authority to File

The ACLU of Missouri is an affiliate of the national American Civil Liberties Union (ACLU), a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 1.6 million members nationwide. The ACLU of Missouri has more than 15,900 members in the state. In furtherance of their mission, the ACLU and its affiliates engage in litigation, by direct representation and as *amici curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions. In cases across the country, including before this Court, the ACLU has explained the constitutional difficulties that exist when children are treated and punished as adults. *See, e.g., In the Interest of S.C. v. Juvenile Officer*, 474 S.W.3d 160 (Mo. banc 2015); *State v. Nathan*, 404 S.W.3d 253 (Mo. banc 2013); *Hill v. Snyder*, No. 10-14568, 2013 WL 364198 (E.D. Mich. Jan. 30, 2013); *People v. Carp*, 828 N.W.2d 685 (Mich. Ct. App. 2012).

The Roderick and Solange MacArthur Justice Center at St. Louis (MJC-STL) is a nonprofit, public interest law firm that advocates criminal and juvenile justice reforms. MJC-STL opened its doors in St. Louis in 2016 and is one of five MacArthur Justice Center offices across the country. With headquarters in Chicago (at the Northwestern Pritzker School of Law), the group also has offices in New Orleans, at the University of Mississippi Law School, and in Washington, D.C. It was founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation and has fought on behalf of the youthful accused in individual juvenile court

cases, criminal courts, and in class actions lawsuits, including in the context of juvenile life without parole sentencing.

The ACLU and MJC-STL file this brief urging this Court to forbid the use of prior juvenile sex offenses as evidence of a person's propensity to commit a sex crime when they are later tried as an adult.

The *amici* brief is filed with consent of the parties.

Statement of Facts

Amici adopt the statement of facts as set forth in Appellant's brief.

Argument

Propensity evidence implicates significant constitutional concerns and has been banned historically as tangential, unreliable, and prejudicial. Thus, any exception to the general rule against the use of propensity evidence must be narrowly construed—especially evidence of sexual propensity, since it has been shown to be empirically unreliable. Article I, section 18(c) of the Missouri Constitution, which is extraordinarily broad in its sweep and use of alleged prior sexual misconduct, should be found to violate the Due Process Clause of the United States Constitution, as well other state and federal constitutional protections.

In the alternative, article I, section 18(c), should be read narrowly so as not to allow evidence of crimes committed while the defendant was a juvenile. Allowing evidence of alleged crimes committed while the defendant was a child is inconsistent not only with the federal Due Process Clause but also with § 211.271.3 of the Missouri Juvenile Code and the intent of that law.[1] It would also undermine the purpose of the juvenile justice system, harm the countless children who benefit from that system, and fail to account for the common-sense and scientifically proven proposition that children are different from adults. The Court should not let the facts of the present case lead it to make a decision that would have a negative impact on so many others who benefit from the juvenile justice system.

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[1] All statutory citations are to Missouri Revised Statutes 2000, as updated, unless otherwise noted.

I. Article I, section 18(c) of the Missouri Constitution is unconstitutional.

Admitting evidence of prior bad acts to show a defendant's guilt in an unrelated criminal trial runs counter to fundamental conceptions of fairness and justice that are at the heart of our federal Constitution.[2] Thus, any rule that seeks to chip away at this most basic rule in criminal trials must be carefully considered and narrowly drawn. It must also avoid the possibility of conviction rooted in irrational fears or false assumptions. Unfortunately, article I, section 18(c) throws open the door to allow for criminal convictions based upon all manner of alleged past sexual acts without proper limitations, regard for modern scientific understandings, or concerns for prejudice.

[2] *See, e.g.*, *People v. Molineux*, 61 N.E. 286, 293–94 (N.Y. 1901) ("This [no propensity evidence] rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt.").

A. The admission of propensity evidence has been historically disfavored because it implicates significant constitutional concerns.

The general rule against propensity evidence is rooted in English common law and was adopted into early American jurisprudence by the colonial courts.[3] In the late nineteenth century, the Supreme Court of the United States—in keeping with the common law tradition—prohibited the introduction of prior-crimes evidence. *See Boyd v. United States*, 142 U.S. 450, 458 (1892) ("Proof of [prior crimes] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that [defendants] were wretches whose lives were of no value to the community. . . . However depraved in character . . . the defendants were entitled to be tried . . . only for the offense charged.").

Since then, courts and commentators alike have continued to condemn the practice of admitting prior misconduct evidence when it will lead to the unfair assumption of propensity to commit such an act again. *See, e.g.*, *Michelson v. United States*, 335 U.S.

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[3] *See United States v. Castillo*, 140 F.3d 874, 881 (10th Cir. 1998) ("The ban on propensity evidence dates back to English cases of the seventeenth century."); *Harrison's Trial*, 12 How. St. Tr. 834, 864 (Old Bailey 1692) ("Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter."); *Hampden's Trial*, 9 How. St. Tr. 1053, 1103 (K.B. 1684) ("[A] person was indicted of forgery, [but] we would not let them give evidence of any other forgeries, but that for which he was indicted.").

469, 475–76 (1948); *State v. Burns*, 978 S.W.2d 759, 761 (Mo. banc 1998) (quoting *State v. Bernard*, 849 S.W.2d 10, 16 (Mo. banc 1993); *see also, e.g.*, Stephen Saltzburg, *Proper and Improper Uses of Other Act Evidence*, 28 CRIM. J. *46, *46 (Winter 2014) ("[Generally,] evidence must be offered for a permissible purpose, not to prove the defendant's propensity to commit the crime(s) charged."). Given this long tradition of prohibiting propensity evidence, which is "rooted in [a] jealous regard for the liberty of the individual" and is a product of our "humane and enlightened public spirit," *People v. Molineux*, 61 N.E. 286, 293–94 (N.Y. 1901), article I, § 18(c) simply does not pass federal constitutional muster.

The admission of propensity evidence implicates numerous foundational constitutional principles. "[T]he United States Supreme Court has recognized [that] the admission of pure propensity evidence directly undermines three specific principles of federal due process: (1) the presumption of innocence; (2) the 'beyond a reasonable doubt' standard of proof; and (3) the principle that cases, not people, are placed on trial." Drew D. Dropkin & James H. McComas, *On A Collision Course: Pure Propensity Evidence and Due Process in Alaska*, 18 ALASKA L. REV. 177, 191 (2001). Likewise, this Court has continually held that the use of propensity evidence violates the Missouri Constitution. *See, e.g.*, *State v. Leonard*, 182 S.W.2d 548, 551 (Mo. 1944) ("Evidence of other crimes, when not properly related to the cause on trial, violates the defendant's right to be tried for the offense for which he is indicted." (citing MO. CONST. art. I, § 22)); *State v. Vorhees*, 248 S.W.3d 585, 587 (Mo. banc 2008) (noting that the use of propensity evidence violates a defendant's right to be free from criminal prosecution "otherwise than

by indictment or information" and to "demand the nature and cause of the accusation" (citing MO. CONST. art. I, §§ 17, 18(a)).

Indeed, in 2007, in *State v. Ellison*, 239 S.W.3d 603 (Mo. banc 2007), this Court struck down a statute that was remarkably similar to article I, section 18(c).[4] This Court held that "evidence of a defendant's prior criminal acts, when admitted purely to demonstrate the defendant's criminal propensity, violates one of the constitutional protections vital to the integrity of our criminal justice system." *Id*. at 608. Relying on article I, sections 17 and 18(a) of the Missouri Constitution relating to due process and other fair trial rights, this Court banned the use of sexual propensity evidence during a criminal trial.

Nevertheless, six years later, unable to pass legislation on this issue, the General Assembly proposed to the voters a constitutional amendment as an end-run around this

[4] *Compare* § 566.025 ("In prosecutions pursuant to this chapter [566] or chapter 568, RSMo, of a sexual nature involving a victim under fourteen years of age, whether or not age is an element of the crime for which the defendant is on trial, evidence that the defendant has committed other charged or uncharged crimes of a sexual nature involving victims under fourteen years of age shall be 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.") and Mo. Const. art. I, § 18(c).

Court's sound pronouncements—now article I, section 18(c).[5] But unfortunately, the amendment was adopted with little debate or discussion of collateral constitutional implications of its passage.[6] No legislator or commentator on record mentioned the possibility that the amendment would apply differently than the previous statute or that evidence that is otherwise inadmissible—such as juvenile records, *see* § 211.271.3—might become admissible under it.[7]

B. Section 18 (c) is rooted in unfounded fears and dubious assumptions.

Indeed, due process and fairness concerns are particularly heightened in the context of admission of past alleged sex acts. Such evidence can be especially prejudicial when presented to juries and allow for improper presumption of propensity that is just not rooted in law or science. *See, e.g.*, Aviva Orenstein, *Propensity or Stereotype? A*

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[5] Although the previous statute likewise allowed "evidence that the defendant ha[d] committed other charged or uncharged crimes," no Missouri court held that juvenile records were admissible under it. *Id.*

[6] *See HJR 16*, http[]://www.house.mo.gov/Bill.aspx?bill=HJR16&year=2013&code=R (last visited July, 9, 2017), *Misssouri Evidence in Sexual Crimes Against Minors, Amendment 2 (2014)*, Ballotpedia, https[]://ballotpedia.org/Missouri_Evidence_in_Sexual_Crimes_Against_Minors,_Amendment_2_(2014) (last visited July 9, 2017).

[7] *Id.*

Misguided Evidence Experiment in Indian Country, 19 CORNELL J.L. & PUB. POL'Y 173 (2009); Zachary Stirparo, *Reconsidering Pennsylvania's Lustful Disposition Exception: Why the Commonwealth Should Follow its Neighbor in* Getz v. Delaware, 23 WIDENER L. REV. 65 (2017).

Across a range of fields, experts are now warning about the false premises that have been baked into emerging criminal law policies and practices relating to sex crimes. *See* Alissa R. Ackerman & Marshall Burns, *Bad Data: How Government Agencies Distort Statistics on Sex-Crime Recidivism*, JUST. POL'Y J. 1, 19 (Spring 2016) (admonishing that "[u]ntrue or unsubstantiated 'knowledge'" about sex crimes and those accused of such acts "can have deleterious effects," especially when it seems "[s]ometimes [lawmakers] just make things up out of nowhere"); Jill Levenson, *Opinion: Sex Offense Recidivism Rate is Rare, Shouldn't Determine Policy*, WLRN ONLINE, Sept. 5, 2013 (warning that "[s]exual recidivism rates are lower than commonly believed, and are in fact lower than the overall recidivism rate in the state" of Florida); *see also* Steven Yoder, *What's the Real Rate of Sex-Crime Recidivism?*, PAC. STANDARD, May 27, 2016 (collecting reactions from a range of experts indicating that criminal law policies relating to sex crimes, including those that assume high recidivism rates, are misguided and lack scientific foundation).

Law professors Tamara Rice Lave and Aviva Orenstein persuasively debunked many of the myths behind sex offender propensity principles in particular to demonstrate the false assumptions at play in such evidentiary rules. Tamara Rice Lave and Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of*

Prior Sex Crimes, 81 U. CIN. L. REV. 795, 798 (2013). For instance, they explain that "the recidivism rate for sex offenders is actually lower than for many other crimes in which the propensity rule does not apply." *Id.* at 833. They argue that it is difficult to generalize about sex offenses and that, as a result, past acts of sexual misconduct are not especially predictive of future conduct. *Id.* at 829–30.

In the end, professors Lave and Orienstein concluded: "If trained psychologists who have actually spoken at length with their patients cannot predict recidivism, it is difficult to understand how a judge would be able to do so after reading a police or probation report. It is even harder to understand why a legal rule would allow such evidence before the jury, given the many ways that jurors will overvalue and distort it. . . ."

C. Lacking standards and limits, article I, section 18(c) is simply unlawful.

Overreliance and distortion become even more likely when propensity rules allow for the admission of evidence without clear standards around type, scope, and limit. Unfortunately, article I, section 18(c) also falls prey to these infirmities. It fails to provide definitions for the terms like "sexual nature," "relevant," or "evidence"—allowing for all manner of information to be placed before a jury for use as propensity evidence.

As demonstrated by the debate between the majority and dissenting judges in this matter, article I, section 18(c) has been written broadly with insufficient restrictions or guidance for judges and juries. Key terms like "sexual nature," "relevance" and even

"evidence"[8] are open to debate and a range of definitions. Indeed, the range of information that was ultimately presented to the jury here (the Idaho juvenile court adjudication and additional records from defendant's Idaho juvenile court file), along with how it was presented (through reading and narration by a Missouri law enforcement officer), demonstrates the sweeping nature of Section 18(c) as written and interpreted.

[8] For instance, Judge Dowd, below, concurring in the result only, suggested that the plain meaning of "evidence" is "'an outward sign' and 'something that furnishes or tends to furnish proof.'" *State v. Prince*, ___ S.W.3d ____, 2017 WL 2644431, at *11 (Dowd, J., concurring) (quoting Webster's Third New International Dictionary 788 (2002)). However, Merriam-Webster additionally defines evidence as "something *legally* submitted to a tribunal to ascertain the truth of a matter," *Evidence*, Merriam-Webster (emphasis added), https[]://www.merriam-webster.com/dictionary/evidence. "If a word has more than one dictionary definition that applies in the context of the provision, it is ambiguous." *Johnson v. State*, 366 S.W.3d 11, 25-26 (Mo. banc 2012) (citation omitted). As with the word "possible" in *Johnson*, "there are several definitions [of 'evidence'] that could apply, so the plain and ordinary meaning of the word … is uncertain and the term is ambiguous." *Id.* at 26. This alone suggests the amendment fails to satisfy due process norms, or at the very least counsels in favor of applying the definition that allows Section 211.273.3 and article I, Section 18(c) to coexist.

II. Article I, section 18(c) should not allow for admission at an adult criminal trial the defendant's sexual conduct as a youth.

While past sexual conduct of adults is of dubious evidentiary value given faulty assumptions about recidivism and the like, when it comes to children such information is even more suspect. Indeed, youthful sexual conduct, much of which may be considered exploration and experimentation, should not be used to stigmatize or prejudice persons in their adult years. Moreover, using such evidence in the course of a criminal trial would conflict with the plain language and intent of Missouri's Juvenile Code, as well as the historic goals of the juvenile justice system. Thus, if this Court does not entirely strike down article I, section 18(c) as unconstitutional, it should at least forbid the admission of evidence childhood sexual conduct.

A. Youthful sexual conduct lacks probative value given the nature of many youthful actions.

Children are different than adults. *See, e.g., Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion) (noting that a child's "irresponsible conduct is not as morally reprehensible as that of an adult" and that children and teenagers are "much more apt to be motivated by mere emotion or peer pressure"); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"); *Roper v. Simmons*, 543 U.S. 551, 573 (2005) ("[T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." (citation omitted)); *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (recognizing that children, compared to

adults, have a "lack of maturity and an underdeveloped sense of responsibility," which often leads to "impetuous and ill-considered actions and decisions").

Therefore, a fair and just system does not treat child offenders like adults. In *Miller v. Alabama*, 567 U.S. 460 (2012), *Graham*, and *Roper*, the Court highlighted recent research on adolescent behavior supporting the view that child offenders are less culpable and more capable of reform than adults who commit similar crimes. In *Graham*, the Court held that, because of children's lessened culpability and greater capacity for change, a child who had not been charged with homicide could not be reliably classified among the worst offenders for purposes of sentencing. *Graham*, 560 U.S. at 68. The *Graham* majority was unequivocal in its insistence that irrevocable judgments about the character of juvenile nonhomicide offenders are impermissible under the Constitution where they deny children any opportunity to prove their rehabilitation and their eligibility to re-enter society. The Supreme Court has thus acknowledged that the capacity of child offenders to change and grow, combined with their reduced blameworthiness and inherent immaturity of judgment, sets them apart from adult offenders in fundamental and constitutionally relevant ways.

The vast differences between adult offenders and juvenile offenders demonstrate that juvenile sex offending does not predict adult sex offending. With juveniles, their patterns are not ingrained, some of the acts are experimental in nature, and their sex offenses tend to be less violent. It should not be assumed that these juvenile offenders will become adult offenders. This conclusion is supported by psychological and scientific research specific to sexual offenders

solidifying the premise of *Miller*, *Graham*, and *Roper*: that children are different, less culpable, and more capable of reform.

But more than this, research clearly shows that child "sex offenders" typically do not continue re-offending into adulthood and are considered to be more responsive to treatment than adult sex offenders. Association for the Treatment of Sexual Abusers (ATSA), *The Effective Legal Management of Juvenile Sex Offenders*, Mar. 11, 2000, http[]://www.atsa.com/ppjuvenile.html (Adopted by the ATSA Executive Board of Directors on October 30, 2012). Adolescent sex offenders have fewer victims than adult offenders and, on average, engage in less serious and aggressive behaviors. David L. Burton & Joanne Smith-Darden, *North American Survey of Sexual Abuser Treatment and Models: Summary Data*, The Safer Society Foundation (2000).

Moreover, multiple psychological and physiological assessments of sex offenders find that there are no measurable differences in sexual preferences between children adjudicated of sex-offending and other children, whereas the sexual preferences of adult sex offenders and non-offenders differ drastically. A 1994 study found that, while there is a significant difference in measurable erectile responses to "deviant" stimuli between adult sex offenders and non-sex offending adults, there is no measurable distinction in erectile responses between sex-offending and non-sex offending children to "deviant" stimuli. John A. Hunter, Jr. & Judith V. Becker, *The Role of Deviant Sexual Arousal in Juvenile Sexual Offending*, 21 CRIM. JUST. & BEHAV. 132, 137, 142-43, 146 (1994).

Similarly, another study comparing attractions to visual stimuli of "children and

other paraphernalia" to "normal attraction to females" found no correlation between an adolescent's attractions and the victims of their offenses. Gilian Smith & Lane Fischer, *Assessment of Juvenile Sexual Offenders: Reliability and Validity of the Abel Assessment for Interest in Paraphilias*, 11 SEXUAL ABUSE 207, 214 (1999). Yet another study comparing children incarcerated for serious sexual crimes to other children incarcerated in the exact same facility for nonsexual crimes was unable to establish any significant distinctions between the groups. Wendy L. Jacobs et al., *Juvenile Delinquents: A Between-Group Comparison Study of Sexual and Nonsexual Offenders*, 9 SEXUAL ABUSE: J. RES. & TREATMENT 201, 214 (1997).

When discussing the differences between child and adult offenders, it is crucial to remember that "a critical development gap exists between adults and adolescents." Major Charles A. Kuhfahl Jr., *"I Was Only Twelve—It Doesn't Count": Why Adolescent Sex Offenses Are Not Legally Relevant in Prosecutions of Adult Sex Offenders and Why Military Rules of Evidence 413 & 414 Should Be Amended Accordingly*, 194 MIL. L. REV. 132, 153 (2007) (quoting Kim Taylor-Thompson, *Children, Crime, and Consequences: Juvenile Justice in America: States of Mind/States of Development* (hereinafter *Children, Crime, and Consequences*), 14 STAN. L. & POL'Y REV. 143, 144 (2003)). Additionally, "studies in the field of developmental psychology . . . suggest that an adolescent's choice about engaging in misconduct is often the 'product of cognitive and psychological immaturity.'" *Id.* (quoting Taylor-Thompson, *Children, Crime, and Consequences*, at 156).

Thus, "'[i]f youthful choices to offend are based on diminished ability to make decisions, or if the choices (or the values that shape the choices) are strongly driven by transient developmental influences, then the presumption of free will and rational choice is weakened.'" *Id.* at 153–54 (quoting Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences, and Juvenile Justice*, 2005 UTAH L. REV. 695, 737 (2005) (hereinafter *A Disconnect Between Law and Neuroscience*)). "Such a position makes it hard to justify using adolescent offenses to demonstrate a propensity to engage in similar adult criminal conduct when the adolescent was not psychologically developed to such an extent that he understood the wrongfulness of his conduct." *Id.* at 154. Neurological studies have also indicated "that a person's brain is actually 're-wired' during his teenage years." *Id.* (quoting Saunders, *A Disconnect Between Law and Neuroscience*, at 711). And at least one researcher concluded that teenagers "'may simply not be as capable as adults at inhibiting behavior.'" *Id.* (quoting Saunders, *A Disconnect Between Law and Neuroscience*, at 712). All of this points to the conclusion that any argument in favor of allowing propensity evidence that relies on the premise that a person will continue to commit similar crimes for similar reasons is flawed when this reasoning is applied to situations where the prior offense was committed when the person was a child. *See id.* at 154–55.

Psychologically, child sex offenders are different and less culpable than adult sex offenders. For instance, "[a]dolescent sexual offenders are often successfully treated in short treatment programs, and current studies and literature do not show that adolescent sex offenders naturally progress to adult sex offenders." *Id.* at 152 (citing Bonner et al.,

Adolescent Sex Offenders: Common Misconceptions vs. Current Evidence, NAT'L CENTER ON SEXUAL BEHAVIOR OF YOUTH, July 2003). "The importance of such studies is obvious; if adolescent sex offenders can be successfully treated, one cannot logically argue that an individual has a propensity to engage in sexual misconduct as an adult simply because he engaged in similar misconduct as a child." *Id.*

The fluidity of the adolescent brain indicates that cognitive development is not stable and that aspects of personality may change over time as part of the developmental process. David Prescott, *Twelve Reasons to Avoid Risk Assessment*, in Risk Assessment of Youth Who Have Sexually Abused: Theory, Controversy, and Emerging Strategies (David Prescott ed., 2006). Consequently, a juvenile who appears to be trending toward sexual pathology may respond far better to treatment than adults, partly because children are malleable and because the juvenile's brain is still maturing. *See* Association for the Treatment of Sexual Abusers, *The Effective Legal Management of Juvenile Sexual Offenders*, ATSA, March 11, 2000, http[]://www.atsa.com/ppjuvenile.html; *see also, e.g.*, *In re Gault*, 387 U.S. 1, 15–16 (1967).

Moreover, recidivism rates for child sexual offenders are extremely low. A recent study found that child sexual offenders had a recidivism rate of 7.5%, almost half that of adult sexual offenders. Robert Prentsky et al., *An Actuarial Procedure for Assessing Risk with Juvenile Sex Offenders*, 12 SEXUAL ABUSE: J. RES. & TREATMENT 71, 73 (2000). Another study found that, out of a group of 108 child sexual offenders and over a period of six years, only two of the child offenders reoffended, showing a study-specific

recidivism rate of less than two percent. Glen E. Davis & Harold Leitenberg, *Adolescent Sex Offenders*, 101 PSYCHOL. BULL. 417, 419 (1987). Moreover, "[t]he likelihood that most *adult* offenders began their sexual deviancy as juveniles does not mean that most *child* offenders will necessarily become adult offenders." Victor I. Vieth, *When the Child Abuser Is a Child: Investigating, Prosecuting and Treating Juvenile Sex Offenders in the New Millennium*, 25 HAMLINE L. REV. 47, 52 (2001). "As stated in a position paper of the Association for the Treatment of Sexual Abusers, 'poor social competency skills and deficits in self-esteem can best explain sexual deviance in juveniles, rather than the paraphilic interests and psychopathic characteristics that are more common in adult offenders' and that 'there is little evidence to support the assumption that the majority of juvenile sexual offenders are destined to become adult sexual offenders, or that these youths engage in acts of sexual perpetration for the same reasons as their adult counterparts.'" *Id.* (quoting Mark Chaffin & Barbara Bonner, *"Don't Shoot, We're Your Children": Have We Gone Too Far in Our Response to Adolescent Sexual Abusers and Children with Sexual Behavior Problems*?, 3 CHILD MALTREATMENT 314 (1998)).

Research also indicates that children are "categorically less culpable" than adults when they commit offenses. *Roper*, 543 U.S. at 570. Studies have shown that adolescent thinking is present-oriented and tends to discount, ignore, or not fully understand future outcomes and implications. *See, e.g.*, WILLIAM GARDNER ET AL., ADOLESCENTS IN THE AIDS EPIDEMIC 17, 25-26 (1990); Marty Breyer, *Recognizing the Child in Delinquent*, KY. CHILD RTS. J., vol. 7, 16-17 (Summer 1999). Additionally, children have a far greater tendency to make decisions based on emotions rather than logic or reason. *See* Steinberg

et al., Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA Flip Flop, 64 AM. PSYCHOLOGIST 583, 587 (2009); THOMAS GRISSO & ROBERT G. SCHWARTZ, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 267-69 (2000). Children not only differ from adults cognitively; they also differ in "maturity of judgment" stemming from a complex combination of the ability to make good decisions and social and emotional capability. Elizabeth Cauffman & Laurence Steinberg, *Immaturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCIENCES & L. 741 (2000). Notably, research using MRI images studying the function of the brain at different ages has physiologically confirmed years of psychological research indicating that children are less culpable. Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999) (finding physical and physiological immaturity in the portions of children's brains associated with reasoning and emotional equilibrium).

Because children do not fully understand the consequences of their actions, they are less affected by the threat of sanctions and harsher sentences do not serve as a deterrent. *See, e.g.*, *Roper*, 543 U.S. at 571-72. In light of the research indicating significant physiological differences in the teenage brain, it is necessary to rethink questions about a child's culpability and punishment. While these limitations do not negate knowledge of right and wrong, they do demonstrate that "children cannot be viewed simply as miniature adults." *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982)). Public opinion as well

recognizes that children should be treated differently than adults because of their lessened culpability and greater capacity for change. In a 2014 survey, sixty-five percent of Americans, across ideologies and party lines, said that they believed that the justice system should treat adult offenders and child offenders differently. *Public Opinion on Juvenile Justice*, Pew Charitable Trusts 2 (Nov. 2014), http[]://www.pewtrusts.org/~/media/Assets/2014/12/PSPP_juvenile_poll_web.pdf.

The juvenile court regards the child as neither fully mature nor set in his ways, but rather as a malleable entity. "The options that an adolescent perceives and acts upon are limited by and linked to developmental factors that change with maturity. In short, adolescent decision-making bears little resemblance to the mental operation that adults—and adult courts—treat as typical." Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143 (2003); *see also* Brief of American Medical Assoc. and American Academy of Adolescent and Child Psychiatry as Amici Curiae in Support of Neither Party in *Graham v. Florida*, 2009 WL 2247127. By contrast, the image of the adult sex offender is that of a person who poses a sexual threat to the community, who has fixed preferences of victims, who is driven by all-but-inevitable urges to recidivate, and who is unable to rehabilitate. *See* Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, 27 DEV. MENTAL HEALTH L. 34, 38-39 (2008).

Because evidence that a person committed a sex offense as a juvenile is an empirically unreliable indicator of that person's propensity to commit a sex offense as an adult, admission of such records is overwhelmingly prejudicial and should not be

admissible at an adult's trial. Moreover, the facts of the present case should not lead this Court to make a decision regarding the admissibility of propensity evidence that would negatively impact the countless children who benefit from the juvenile justice system.

B. Admitting evidence from childhood sex cases contradicts the plain language of § 211.271.3.

Interpreting article I, section 18(c) to allow the admission of juvenile records as propensity evidence would both overlook the plain language of § 211.271.3 and unnecessarily render the statute unconstitutional in contravention of the canon of constitutional avoidance. Section 211.271.3 provides, inter alia, that "all reports and records of the juvenile court[] are not lawful or proper evidence against the child [who is the subject of the adjudication] and shall not be used for any purpose whatsoever in any proceeding, civil or criminal, other than proceedings under this chapter." § 211.271.3. Article I, section 18(c), on the other hand, creates an exception to the general rule forbidding propensity evidence without any reference to juvenile records. It provides in part that, in prosecutions for sex crimes against minors, "relevant evidence of prior criminal acts, whether charged or uncharged, is admissible for the purpose of … demonstrating the defendant's propensity to commit the crime with which he or she is presently charged." MO. CONST. art. I, § 18(c).

To read "relevant evidence" as including "reports and records of the juvenile court" would contradict the unambiguous statutory mandate that juvenile court records are *not* to be used as evidence against the subject of the adjudication in non-juvenile court

proceedings.[9] Such an interpretation would render § 211.271.3 unconstitutional as in irreconcilable conflict with section 18(c). But in light of the fact that "the legislature's acts are presumed constitutional," *Spradlin v. City of Fulton*, 924 S.W.2d 259, 262 (Mo. banc 1996), this Court should not read unconstitutionality into a statute where there need be none.

Section 211.271.3 should at least be read as excepting juvenile records from the category of evidence that would otherwise be admissible to show propensity under article I, section 18(c), should its provisions survive constitutional review. Read this way, the statute comports with the amendment and is constitutional; thus, it is such a reading that

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[9] Although Missouri law controls in Missouri courts, Idaho law may be relevant to this appeal and the underlying trial because Jordan Prince's juvenile adjudication took place there. In Idaho, pure propensity evidence is forbidden in all cases, *see* I.R.E. 404(b), including those involving sexual abuse of a minor.

For evidence of prior bad acts to be admissible, "at a minimum, there must be evidence of a common scheme or plan *beyond the bare fact that sexual misconduct has occurred with children in the past*. The events must be linked by common characteristics that go beyond merely showing a criminal propensity. . . ." *State v. Johnson*, 227 P.3d 918, 922 (Idaho 2010) (emphasis added). This law was one upon which the defendant here was allowed to rely at the time of his adjudication in the Idaho juvenile court system. Idaho law also creates a presumption of youthful sexual misconduct being removed from any public registry. *See* Idaho Code § 18-8410 (2010).

this Court ought to adopt. "When a constitutional and an unconstitutional reading of a statute are equally possible, this Court must choose the constitutional one." *Spradlin*, 924 S.W.2d at 263. Article I, section 18(c) neither states that "all" evidence of prior criminal acts is admissible nor explicitly states that juvenile court records are evidence for purposes of the amendment. Indeed, when a majority of Missouri voters adopted article I, section 18(c), § 211.271 was already law, providing explicitly that juvenile court records *are not* evidence. Furthermore, article I, section 18(c) itself carves out an exception to the longstanding rule that "[e]vidence of prior criminal acts is *never* admissible for the purpose of demonstrating [a] defendant's propensity to commit the crime with which he is presently charged," *State v. Ellison*, 239 S.W.3d 603, 606 (Mo. banc 2007) (citing *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993)).[10]

Given that history, if this Court finds that article I, section 18(c) passes federal constitutional muster, it should nevertheless find that the amendment does only what its text says: allow for the admission of relevant evidence for the usually forbidden purpose

[10] *See also, e.g.*, *State v. Shilkett*, 204 S.W.2d 920, 922–23 (Mo. 1947) ("The well-established general rule is that proof of the commission of separate and distinct crimes is not admissible, unless such proof has some legitimate tendency to *directly* establish the defendant's guilt of the charge for which he is on trial…. Evidence of other crimes, when not properly related to the cause on trial, violates [a] defendant's right to be tried for the offense for which he is indicted." (emphasis added) (citations omitted)).

of establishing propensity in a clearly defined set of cases. This Court should not make the far more tenuous assumption that, despite the text of the amendment making no mention of any such consequences, voters intended article I, section 18(c) to abrogate an existing law supported by compelling independent policy justifications, change the definition of evidence, and erode the foundations of the juvenile court system.[11]

C. Allowing youthful sex acts as substantive evidence in adult criminal prosecution matters undermines the historic goals of the juvenile justice system.

"[O]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults." *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) (internal quotation marks omitted) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (1982) (citing examples from criminal, property, contract, and tort law)). "The sole purpose of juvenile justice system and its separation from the adult system is to encourage reform and rehabilitation so that juveniles can be a better fit for society."

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[11] *See State ex rel. Rowland v. O'Toole*, 884 S.W.2d 100, 103 (Mo. App. E.D. 1994) ("The overall purpose of Chapter 211, inclusive of § 211.273, is to protect and safeguard the best interests of the juvenile. [*Smith v.*] *Harold's Supermarket*, 685 S.W.2d [859,] 863 [(Mo. App. W.D. 1984)]. The underlying policy and purpose of § 211.273 is to permit and encourage discussion and consultation between the juvenile and the juvenile officer in a relaxed, nonadversary and confidential setting." (citations omitted)).

Chauntelle R. Wood, *Romeo and Juliet: The 21st Century Juvenile Sex Offenders*, 39 S.U. L. REV. 385, 392 (2012).

In the early twentieth century, Missouri established a separate judicial system for children based on the belief that children, as compared to adults, are both less culpable for their crimes and more capable of reform. *See* DOUGLAS E. ABRAMS, A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI 45-46 (2003); Sacha M. Coupet, Comment, *What to Do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1312 (2000). The juvenile justice system in Missouri was created through a movement that recognized child offenders as "less responsible than adults for antisocial behavior and more amenable to rehabilitation." ABRAMS, A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI, at 19. The creation of Missouri's juvenile justice system was also in response to emerging scientific and sociological thought in the early 1900s that children are "individuals with developing cognitive faculties, moral sensibilities and emotional needs," and the "growing numbers of American[s who] no longer viewed juvenile offenders as miniature adult criminals deserving adult incarceration." *Id.* Missouri juvenile justice legislation creating juvenile courts was ultimately passed in 1903.

The legislation's primary purpose was to promote rehabilitation rather than to focus on punishment. *Id.* After its implementation, the Missouri Supreme Court recognized that the state had a *parens patriae* obligation to protect delinquent children that was fulfilled through the juvenile justice system, stating that children should "no

longer [be] regarded as criminals to be punished without effort at reformation ... but as wards to be aided, encouraged and educated, that they may ... become assets instead of liabilities." *State ex rel. Cave v. Tincher*, 166 S.W. 1028, 1030 (Mo. 1914). In keeping with its rehabilitative purpose, Missouri juvenile court proceedings have been closed to the public, aiming to "spare children and their families [the] stigma and the glare of publicity." ABRAMS, A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI, at 64.

And, although children alleged to have committed egregious violations of law may be transferred to adult court, Missouri largely maintains discretionary transfer. § 211.071. Thus, a child who is retained in the juvenile court is deemed more appropriate for rehabilitation than punishment. § 211.071(6)(9); *see also* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9, 13–14 (Thomas Grisso & Robert G. Schwartz eds., 2000). Today, the core function of the juvenile court in Missouri remains unchanged and continues to focus on the rehabilitation of child offenders by diverting child offenders from the criminal justice system in an effort to avoid the harmful consequences of criminal sanctions and intervening in the lives of child offenders to address the root causes of their delinquency. *See* FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 34 (2005).

Retaining a child in the juvenile court system has long been believed to promote the rehabilitation of child offenders. *See Kent v. United States*, 383 U.S. 541, 554-54 (1966). Underlying this belief is the premise that, if children are protected from the

harmful features of the criminal justice system that would inhibit their development, they can "outgrow their criminal behavior" and be rehabilitated. *See* ZIMRING, AMERICAN JUVENILE JUSTICE, at 35-38, 62-64. Children maintained in the juvenile justice system are spared from exposure to aspects of the adult criminal justice system that would disrupt their development and diminish their capacity for reform. *See id.*; *see also* David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century*, *in* A CENTURY OF JUVENILE JUSTICE 42-69 (Rosenheim et al. eds., 2002). Examples of such features include the recognition that children are impressionable and, if incarcerated with adult criminals, are easily "schooled" on how to engage in more sophisticated criminal activities. *See* ZIMRING, AMERICAN JUVENILE JUSTICE, at 36. Additionally, because proceedings and records of the adult criminal court are open to the public, children who face the public stigma resulting from this exposure find it difficult to reintegrate into their communities after completing their sentences. *See United States v. Juvenile Male*, 590 F.3d 924, 928–29, 935 (9th Cir. 2010), *vacated on other grounds*, 564 U.S. 932 (2011); *see also United States v. Three Juveniles*, 61 F.3d 86, 88 (1st Cir. 1995). Shielding children from public exposure has long been considered necessary to enable rehabilitation and successful reintegration into society. *See* Tanenhaus, *The Evolution of Juvenile Courts* at 42, 61.

Moreover, this Court and the Supreme Court of the United States have repeatedly recognized that traditional goals of adult sentencing, including deterrence and retribution, carry less force with regard to children. *See Miller v. Alabama*, 132 S. Ct. 2455, 2473 (2012); *Graham v. Florida*, 560 U.S. 48, 71-72 (2010); *Roper v. Simmons*, 543 U.S. 551,

571 (2005); *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 413 (Mo. banc 2003); *State ex rel. Shartel v. Trimble*, 63 S.W.2d 37, 38 (Mo. 1933). Courts have also noted that youth, because they are still malleable and developing, are more amenable to rehabilitative interventions than adults. *See McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Gault*, 387 U.S. 1, 15-16 (1967); *State ex rel. Matacia v. Buckner*, 254 S.W. 179, 180 (Mo. banc 1923).

As this Court has recognized, juvenile courts were established to serve a protective function for children. *State ex rel. Cave v. Tincher*, 166 S.W. 1028, 1030 (Mo. 1914). In fact, it has been noted repeatedly that the function of the juvenile court should be to provide social and rehabilitative services, care, protection, development, and corrective treatment of youthful offenders in the juvenile justice system. *In Interest of A.D.R.*, 603 S.W.2d 575, 580 (Mo. banc 1980) (noting that "a laudable purpose of our juvenile code is the rehabilitation of erring youths"); *Shartel*, 63 S.W.2d at 38 (noting that the purpose of the juvenile justice system "is not to convict minors of criminal acts, but to safeguard and reform children that may have erred and have been declared delinquent . . . ."); *Matacia*, 254 S.W. at 180 (noting that the juvenile justice act's "principal, if not sole, purpose is not trial and punishment for crime, but the protection and support of neglected children and the reformation of delinquent children").

The admission of child offenses as evidence of an adult's propensity to commit a crime fundamentally clashes with the underlying principles of the juvenile justice system—that children are different from adults and that children can change. In fact, the foundational principles of the juvenile systems directly reject the suggestion that an

offense committed as a child is evidence of an adult's propensity to commit a crime later. By establishing a separate system for child offenders guided by the *parens patriae* doctrine, our legal system implicitly recognizes that an offense committed by a child is *not* evidence of a propensity to commit a similar offense as an adult. Admitting child offenses as propensity evidence undermines the fundamentally rehabilitative principles of the juvenile justice system and harms all of the children who benefit from the reformative nature of that system.

Furthermore, despite the clear underlying rationale of the juvenile system, the number of collateral consequences incident to child offenses has already been increasing in recent years, much to the dismay of youth advocates and academics. *See, e.g.*, Barry C. Feld, *The Transformation of the Juvenile Court-Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 328 (1999) (arguing that contemporary trends in treatment of child offenses have "transformed the juvenile court from a nominally rehabilitative social welfare agency into a scaled-down, second-class criminal court for young offenders that provides neither therapy nor justice"); Ashley Nellis, *Addressing the Collateral Consequences of Convictions for Young Offenders*, CHAMPION, July/August 2011, at 20 (noting the increasing number of collateral consequences incident to child offenses). Collateral consequences of child offenses include expulsion from school, challenges to re-enrollment, barriers to employment, eviction and homelessness, and placement on sex offender registries. The admission of child sex offenses as evidence of an adult's propensity to commit a crime would only add to an already growing and misguided list of collateral consequences of childhood boundary-testing and missteps.

Conclusion

This Court should reverse the judgment against Prince and remand the case for further proceedings.

Respectfully submitted,

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Certificate of Service and Compliance

The undersigned hereby certifies that on July 31, 2017, the foregoing amicus brief was filed electronically and served automatically on the counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 7,497 words (excluding the cover, tables, signature block, and this certificate of service and compliance), as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus-free.

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