No. SC96478

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

TRAVIS WILLIAMS,

Appellant.

Appeal from the Cass County Circuit Court
Seventeenth Judicial Circuit
The Honorable William B. Collins, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Mr. Williams appeals his convictions of three counts of statutory sodomy in the first degree, § 566.062, RSMo (*see* L.F. 71-72). He asserts that the trial court erred in admitting evidence that he had a prior conviction of statutory sodomy committed against a different victim (*see* App.Br. 29-32).

He raises three claims: (1) that Article I, section 18(c) of the Missouri Constitution is unconstitutional on its face and as applied; (2) that the trial court abused its discretion in admitting the evidence of the prior act of statutory sodomy because "the probative value of [the] evidence was substantially outweighed by the danger of unfair prejudice"; and (3) that the trial court abused its discretion in admitting the evidence because it failed to make an express finding on the issue of whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice (App.Br. 29-32).

* * *

Victim was born on March 16, 2001 (Tr. 552-53, 592). Victim's father and mother met toward the end of 1997 or the beginning of 1998, and they were together until 2004 (Tr. 553-54).

In 2003, Mother introduced Father to Mr. Williams (Tr. 557). Mother wanted to spend time with Mr. Williams outside of work, and she eventually left Father for Mr. Williams (Tr. 557, 689). In February 2004, Father and

Mother's relationship ended, and Mother moved out (Tr. 557). Mother married Mr. Williams about a year later (Tr. 690). Victim lived with Mother, but Father and Mother agreed that Father "could come over and get [Victim] any time [he] wanted to" (Tr. 558). Father "tried to go over there and get her every weekend" (Tr. 558-59).

Later, however, the informal visitation and custody agreement came to an end, and, after a custody hearing, Father had "just sporadic visits with" Victim (Tr. 559). Under a court-ordered parenting plan, Father agreed to "reasonable visitation" without a "specific plan" for visits (Tr. 575, 693-94). It was during that period of sporadic visits that Victim first told Father that Mr. Williams "was touching her and she did not want to go home" (Tr. 559).

Over time, Father's visits became "less and less" (Tr. 694). Mother "got tired of fighting with him and his family" (Tr. 694). Father had told Mother that he "didn't want [Mr. Williams] around his children" (Tr. 694). Father blamed Mr. Williams for breaking up their relationship, and he did not like Mr. Williams because Mr. Williams was a registered sex offender (Tr. 694-95). Mr. Williams had told Mother a "[c]ouple of weeks after" they met that he had a prior conviction for "sexually molesting a girl" (Tr. 690).

While Victim lived with Mother, Mr. Williams frequently subjected Victim to various sexual acts (Tr. 596). He "played with [her] boobs," "played with [her] butt," "stuck his fingers in [her] vagina, and . . . rubbed . . . his

penis on top of [her] vagina" (Tr. 596).

The first instance that Victim recalled occurred when she was eight years old (Tr. 596). Victim was sick, and she had stayed home from school (Tr. 597). Victim was in her mother's room with Mr. Williams, and no one else was home (Tr. 597). They were eating candy, and when Victim wanted the last piece, Mr. Williams said that she "had to do something to get it" (Tr 598). He said she "had to take off all [her] clothes and let him play with [her] butt" (Tr. 598). Victim said she did not want to, and Mr. Williams "started threatening" her (Tr. 600). Victim was scared, and she "ended up doing it" (Tr. 601). Victim "took off all [her] clothes, [and] let him play with [her] butt" (Tr. 601). They were lying on the bed, and Mr. Williams also "played with [her] boobs" (Tr. 601-02). Mr. Williams told Victim not to tell her mother (Tr. 602).

On other occasions, Mr. Williams touched Victim's vagina (Tr. 603). On those occasions, they were usually in Mr. Williams's bedroom (Tr. 603-04). He would tell Victim to go into his bedroom, and Victim would comply (Tr. 604). Victim would "end up taking off [her] clothes," and Mr. Williams would touch her "[v]agina, butt and boobs" with his hand and his penis (Tr. 605-06). Sometimes his hands would "go inside" Victim's vagina (Tr. 606).

Mr. Williams also made Victim touch his penis with her hand (Tr. 608). Victim would "jack him off, like go up and down on it, or [she] would suck it"

(Tr. 609). When Victim performed these acts, "[s]tuff would come out" of Mr. Williams's penis (Tr. 609). "[C]lear stuff would come out first, and then like a whitish colored stuff would come out" (Tr. 609). Afterward, Mr. Williams would "go to the bathroom and wipe it off with toilet paper" (Tr. 609). Victim would stop sucking on Mr. Williams's penis when "stuff would come out" because she thought it was "nasty" (Tr. 609-10). Mr. Williams tried "to convince [Victim] that sticking his penis in [her] vagina hole was not sex" (Tr. 610). He said that "if he stuck his dick in [her] vagina hole, then it wouldn't be sex, because there is a difference between the two" (Tr. 610). He would rub his penis on Victim's vagina, but "it wouldn't go inside the hole, as far as [Victim]" knew (Tr. 656-57).

Victim initially disclosed to Father what was happening in "probably late 2004, 2005" (Tr. 560). When she disclosed, Victim was crying and did not want to go home (Tr. 560-61). Father "didn't think [he] had any legal right to keep [Victim]," so he dropped her off, went to his mother's house, and made a hotline call to the Division of Family Services (Tr. 561). No one followed up with Father about the call (Tr. 561).

Father saw Victim again several months later (Tr. 561-62). Victim was still living with Mother and Mr. Williams (Tr. 562). Father had tried to see Victim earlier, but Mother had not permitted him to see her (Tr. 562). Visits with Victim at that time were sporadic, "whenever [Mother] would think that

[Father] needed to see her" (Tr. 562).

In "late, middle 2005," when Father was about to take Victim back to Mother's home after a visit, Victim "started crying and told [Father] she didn't want to go" (Tr. 563). Victim said that Mr. Williams "was still touching her" (Tr. 563). Victim told Father that "he was playing with her butt and then put her hand to her private and on her chest" (Tr. 563).

Over the next four years "up until 2009," Victim disclosed similar incidents to Father on four or five occasions (Tr. 563-64). On one occasion, Victim provided additional details, stating that Mr. Williams "would make her strip down and he would play on the bed beside her, and he would play with her butt while he played with himself" (Tr. 564). During these conversations, Vitim "was very upset and she was begging [Father] not to take her back" (Tr. 565).

Father told Mother what Victim had told him, and he told her that he had "hotlined it" (Tr. 565). Father made a hotline call every time Victim disclosed to him, but no one ever followed up with him about the calls (Tr. 566-67). Father continued to return Victim to Mother because he thought he "had no legal right . . . to keep her" (Tr. 566). During this time period, the Division of Family Services repeatedly investigated allegations of abuse at Mother's home (Tr. 716-17).

In June 2008, Father started dating another woman (Tr. 551-52, 665).

In April 2009, Victim told Father's girlfriend that Victim needed to talk to her (Tr. 568-69, 665-67). They went into a bedroom, and Victim told Father's girlfriend that Victim "needed to talk about some of the things that [Mr. Williams] was doing to her" (Tr. 668). Victim disclosed that Mr. Williams would make her lie on a bed "without her pants on while he played with her bottom" (Tr. 669). Victim was "scared" when she made this disclosure (Tr. 669). Father's girlfriend made a hotline call and called the police (Tr. 611, 670-71). She drove Victim to the police station to make a report (Tr. 671).

After that report, the Division of Family Services told Mr. Williams that he had to leave Mother's home (Tr. 701; *see* Tr. 568). Mother was "upset" and "shocked" when he had to leave (Tr. 702). Victim became upset when she saw Mother crying (Tr. 702, 714, 733). When Victim told Mother that Mr. Williams had been touching her, Mother said, "No, he didn't, you need to tell them that he didn't" (Tr. 612). Mother told Victim to say that Mr. Williams had not touched her so that Mr. Williams "could come home" (Tr. 612).[1]

In May 2009, Mr. Williams's mother took Victim to the Child Protection Center in Kansas City to be interviewed (Tr. 612-13, 703, 747). The interview

[1] Although she admitted that she could not believe Mr. Williams had touched Victim, Mother denied that she told Victim to recant; she testified that she "never told [Victim] to keep her mouth shut or anything like that" (Tr. 714).

was recorded (Tr. 755; State's Ex. 2). Victim did not tell the interviewer what Mr. Williams was doing to her (Tr. 616).[2] Victim did not disclose because she was afraid of Mother (Tr. 616-17). Mr. Williams had also threatened Victim "that if [she] told," he would hurt Victim's siblings and cousins and that he would "dump [her] dogs off" (Tr. 617-18).

After the interview, Victim went back to live with Mother (Tr. 618). Mr. Williams was living with Mother during that time (Tr. 618-19). The sexual touching "stopped for a little bit," but it eventually started again (Tr. 619). One of Victim's older siblings became "less comfortable" around Mr. Williams over time in light of interactions he observed between Mr. Williams and Victim (Tr. 801). Mr. Williams would tickle Victim and Victim's sister "not only on their sides, but . . . also . . . on their thighs and in the area around their buttocks, [and] stuff like that" (Tr. 801-02). Victim's older sibling also "thought it was a little weird how [Mr. Williams]" "would want [Victim] to lay

[2] The forensic interviewer testified that disclosure is a process, and that children sometimes initially deny abuse (Tr. 743). She stated that sometimes children disclose and then recant, and she outlined various reasons that can cause recantation (Tr. 744-45). She testified that it is not unusual for a child to make a disclosure and then refrain from disclosing when interviewed by a forensic interviewer (Tr. 746).

in the bed next to him" (Tr. 803). He also noticed that Mr. Williams and Mother always dressed Victim in "skirts that were like way too short or shirts that didn't always cover her stomach" (Tr. 806).

In 2012, when Victim was ten or eleven years old, Mr. Williams separated from Mother and moved out (Tr. 619-20, 672, 707-08). At that time, Mr. Williams's attitude toward Mother's children had become "aggressive," and "[h]e was constantly screaming at them" and "just getting so mad at them all the time" (Tr. 697). One night, Mr. Williams and Mother argued, and Mother said to Mr. Williams, "You don't like women, you like little girls" (Tr. 697). Mr. Williams moved out after that argument (Tr. 697). Mother and Mr. Williams had not had sexual relations for "quite a while" (Tr. 698).

After the separation, Victim still saw Mr. Williams occasionally because "sometimes [she and her siblings] had to stay with him because [their] power would be out or [their] water would be out" (Tr. 620-21; *see* Tr. 708-11, 780-81, 819-20). On those occasions, Victim would sleep with Mr. Williams in his bed, unless Mother was there (Tr. 622; *see* Tr. 782, 821-22). Mr. Williams would touch Victim at his house in the same ways that he had touched her at Mother's house (Tr. 622-23). During that time period, Mr. Williams assisted Mother in paying for rent, food, and utilities, and Victim was aware of that fact (Tr. 708-10, 715).

Also during that time period, Victim's great uncle observed interactions

between Mr. Williams and victim that he thought were inappropriate (Tr. 782). Mr. Williams "would want her to sit on his lap, or he would kind of touch her butt or something like that" (Tr. 782). He would also kiss Victim on the lips (Tr. 796). Almost every time Victim was at Mr. Williams's home, Mr. Williams would go into his bedroom to talk to Victim (Tr. 784). Victim's great uncle also "didn't quite agree with [Victim sleeping in [Mr. Williams's] bed" (Tr. 782).

Mr. Williams also treated Victim differently than he treated Victim's siblings (Tr. 785; *see* Tr. 803-04). He "paid more attention to [Victim]" and treated her like she was "his favorite child" (Tr. 627, 695; *see* Tr. 804). As Victim got older, Mr. Williams bought presents for her (Tr. 696, 804). He bought Victim a cell phone and a necklace that said "Daddy's Girl" (Tr. 628, 696, 698; *see* Tr. 785). Victim did not wear the necklace; instead, she threw it on the ground, where it was eventually stepped on and broken (Tr. 696).

In August 2012, the police and a Children's Division investigator went to Victim's school and talked to Victim in response to a hotline call from the school (Tr. 765-69). When Victim saw that the police were there, she said, "I don't like the police" (Tr. 769). Victim told the investigator that, when she was eight or nine years old, Mr. Williams had "made [her] lay butt naked in bed, and he touched [her]" (Tr. 769-70). Victim said there had also been another incident about a year later (Tr. 770).

In 2013, Victim made additional reports to the police (*see* Tr. 625-26, 730-31; *see also* Tr. 771-72). On September 4, 2013, a Children's Division investigator and a police officer went to Mother's home to investigate an allegation of sexual abuse (Tr. 833-35). Victim was at a Bible study class at a nearby church (Tr. 835-36). Victim was upset when she was pulled out of her class, and, when the investigator identified himself and started to talk to her about the reason for his visit, Victim became more upset and said, "Are we going to start this bullsh-- again" (Tr. 838-39).

The investigator asked Victim if Mr. Williams had ever touched her inappropriately, and Victim said that "he had, but it had been a long time ago and it had all blown over" (Tr. 840). Victim "started to cry and . . . she pretty much lost her composure" (Tr. 840). Victim exhibited "[a] mix of anger and crying, [and] it was very emotional" (Tr. 840). Victim told the investigator that "she didn't need [his] help, that her family didn't want [his] help" (Tr. 840). Victim then "ran down the steps and exited the church" (Tr. 842).

On September 13, 2013, Mother, Victim, and two other household or family members went to the police station so that Victim could make a report about Mr. Williams "sexually molesting her" (Tr. 730-31, 849-50). Victim's statement was recorded (Tr. 852-53; State's Ex. 6). In brief, Victim disclosed that Mr. Williams had touched her "private," her "boobs," and her "butt," and that he had been touching her since she was eight years old (State's Ex. 6).

Victim stated that Mr. Williams had threatened her brother, and that he had directed Victim not to tell anyone what he had done (State's Ex. 6).

After that report, Victim went to live with her paternal grandmother (Tr. 867, 872). Victim talked to her grandmother about something that Mr. Williams had had her do (Tr. 872). Victim was "really crying," and "she just couldn't say it" (Tr. 873). Victim then "did a hand motion going up and down in front of her, her hands together up and down," and said that Mr. Williams had "made her do that" (Tr. 873).

On September 24, 2013, Victim was interviewed by another forensic interviewer from the Child Protection Center in Kansas City (Tr. 882, 886-87). The interview took place at a police station, and it was recorded (Tr. 887, 891; State's Ex. 9). In brief, Victim reported that when she was eight years old, Mr. Williams played with her "butt" (State's Ex. 9). Victim also reported that he played with her "boobs" and sucked on them (State's Ex. 9). Victim reported that Mr. Williams had touched her vaginal area on multiple occasions, and that Mr. Williams had made her rub his penis with her hand (State's Ex. 9). Victim stated that Mr. Williams had told her not to tell anyone, and that he had threatened her and her brothers (State's Ex. 9).

On September 30, 2013, Victim's grandmother drove Victim to the hospital (Tr. 874, 903-04; *see* Tr. 627). Victim confirmed that Mr. Williams had touched her breasts with his hand, that he had touched her buttocks

with his hand, that he had touched her "privates" with his hand, and that he had had her touch his "private" with her hand (Tr. 907). Victim also stated that Mr. Williams's "penis touched [her] private part" (Tr. 908). Victim said that she did not recall whether "anything went inside of her," and she stated that she "didn't like to watch when this was happening, but sometimes it hurt" (Tr. 908). Grandmother recalled that Victim was "really concerned about her nipples" while talking to the doctor because Mr. Williams had "sucked on them a lot" (Tr. 874).

The doctor conducted a physical examination of Victim, but he was unable to complete the examination (Tr. 909-11). In examining Victim's genitals with a small Q-tip, Victim experienced "quite a bit of pain which [was] unusual" (Tr. 911). Victim agreed to another examination at a later date (Tr. 911-12). At the subsequent examination, Victim was again "having trouble" during the genital examination, and she agreed that it would be better if a female doctor completed the examination (Tr. 913). The genital examination was video recorded, and it revealed that Victim's genitals were "normal"—a finding that was consistent with "most" cases of reported sexual abuse (Tr. 914).

In 2013, shortly before Thanksgiving, Victim disclosed more details to Father's girlfriend, including some of the threats Mr. Williams had made to her (Tr. 672-74). Victim said that Mr. Williams had "got on top of her and

stuck his penis in her vagina, [and] that he would bite her breast" (Tr. 674). Victim described "hand jobs and blow jobs" (Tr. 682). Victim said that Mr. Williams threatened to "do the same thing to her little sisters" if she ever told anyone (Tr. 674). Victim said that Mr. Williams said "he was with [Victim], that he was going to marry her some day" (Tr. 674; *see* Tr. 629). Victim went to live with Father in July 2014 (Tr. 570, 675).

The State charged Mr. Williams with three counts of statutory sodomy in the first degree, § 566.062, RSMo (L.F. 12-13). The State subsequently filed an information in lieu of indictment that added the allegations that Mr. Williams was a prior offender, a persistent sexual offender, and a predatory sexual offender (Supp.L.F. 1-3).

The case went to trial in February 2015 (Tr. 346). As part of its case-in-chief, the State admitted evidence that Mr. Williams had previously pleaded guilty to the offense of statutory sodomy (Tr. 589). The evidence showed that, in 1996, when he was twenty-six years old, Mr. Williams committed an act of deviate sexual intercourse by inserting his thumb into the vagina of a twelve-year-old child (Tr. 589-90).

Mr. Williams presented the testimony of Darlene Kinney (Tr. 924). Ms. Kinney testified that she lived in the same trailer park with Mr. Williams and Mother, and that she was their neighbor for ten years (Tr. 924-25). She testified that their household was "chaotic," and that she "didn't care for

[Mother] nor [Mr. Williams], but [she] loved the kids" (Tr. 925). She stated that she told the children to come over to her house when Mr. Williams and Mother "got into fights, which was very often" (Tr. 926). She said that the children used her house "as kind of a safe base" (Tr. 926-27). She testified that, before Victim moved out of the area, she asked her if Mr. Williams "had been naughty with her" (Tr. 927). She said that Victim "put her head down and she said, 'No.' " (Tr. 927).

The jury found Mr. Williams guilty of all three counts of statutory sodomy in the first degree (Tr. 989-90; L.F. 60-62). The court sentenced Mr. Williams, as a predatory sexual offender, to life imprisonment without parole for fifty years on each count (Tr. 1004, 1009; L.F. 71-72).

ARGUMENT

I.

The admission of propensity evidence pursuant to Article I, section 18(c), of the Missouri Constitution did not violate Mr. Williams's rights to due process and a fair trial. (Responds to Points I-III of appellant's brief.)

In his first point, Mr. Williams asserts that Article I, section 18(c), of the Missouri Constitution is "on its face" and "as applied" unconstitutional (App.Br. 33). He asserts that "admitting evidence . . . that [he] 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 . . . denied [him] his right to due process and right to a fair jury trial" (App.Br. 33).

A. The standard of review

"Constitutional challenges are issues of law this Court reviews *de novo*." *State v. Merritt*, 467 S.W.3d 808, 811 (Mo. 2015).

To successfully mount a facial challenge to the constitutionality of a provision of the Missouri Constitution, "the challenger must establish that no set of circumstances exists under which the [provision] would be valid." *See State v. Perry*, 275 S.W.3d 237, 243 (Mo. 2009) (" 'A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under

which the Act would be valid.' " (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

"Circuit courts retain wide discretion over issues of relevancy and admissibility of evidence." *State v. Naylor*, 510 S.W.3d 855, 862 (Mo. 2017). " 'Evidence is logically relevant if it tends to make the existence of a material fact more or less probable.' " *Id*. "The circuit court's 'discretion will not be disturbed unless it is clearly against the logic of the circumstances.' " *Id*. "On direct appeal, 'this Court reviews the trial court "for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." ' " *Id*.

B. Article I, section 18(c), is not facially unconstitutional under the United States Constitution or Missouri Constitution

The question of whether the government's use of propensity evidence in sexual-offense cases violates the Due Process Clause of the United States Constitution has been confronted several times by the United States Court of Appeals. Under Federal Rules of Evidence 413 and 414, certain propensity evidence is admissible in "sexual assault" cases and "child molestation" cases. Those circuits of the United States Court of Appeals that have confronted the issue have all held that these rules do not violate the Due Process Clause. *See*, *e.g.*, *United States v. Schaffer*, 851 F.3d 166, 179-80 (2nd Cir. 2017); *United States v. Mound*, 149 F.3d 799, 801 (8th Cir. 1998); *United States v.*

LeMay, 260 F.3d 1018, 1026-27 (9th Cir. 2001); *United States v. Enjady*, 134 F.3d 1427, 1432 (10 Cir. 1998). While not binding on this Court, the analysis employed in these cases is instructive.

The Due Process Clause of the United States Constitution has limited operation beyond the specific guarantees enumerated in the Bill of Rights. *See United States v. Castillo*, 140 F.3d 874, 881 (10th Cir. 1998) (citing *Dowling v. United States*, 493 U.S. 342, 352 (1990)). "The Supreme Court has 'defined the category of infractions that violate "fundamental fairness" very narrowly.' " *Id.* (quoting *Dowling*, 493 U.S. at 352-53). Thus, "[t]he Due Process Clause will invalidate an evidentiary rule only if the rule 'violates those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency.' " *Id.* (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)).

The question here, then, is whether the new evidentiary rule[3] adopted by the people in Article I, section 18(c), of the Missouri Constitution "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions." *See Schaffer*, 851 F.3d at 178. The provision states:

Notwithstanding the provisions of sections 17 and 18(a) of this

[3] *See State ex rel. Tipler v. Gardner*, 506 S.W.3d 922, 924 (Mo. 2017) (stating that Article I, section 18(c), is "a new rule of evidence in criminal cases").

> 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.

MO. CONST., Art. I, § 18(c).

For Mr. Williams to succeed on his claim that Article I, section 18(c) offends the Due Process Clause of the United States Constitution, he must show that the admissibility of propensity evidence in the sexual-offense cases identified in Article I, section 18(c), " 'violates those fundamental conceptions of justice which lie at the base of our civil and political institutions.' " *See Schaffer*, 851 F.3d at 178. "The necessary predicate to such a showing, of course, would be a determination that prohibiting the use of propensity evidence in prosecutions for sexual assault is a 'fundamental conception[ ] of justice.' " *Id.*

To ascertain whether that is the case, this Court "must examine 'historical practice.' " *Id.* (quoting *Montana v. Egelhoff*, 518 U.S. 37, 43

(1996)). "In conducting that inquiry, [the Court should be] mindful of the Supreme Court's admonition that '[j]udges are not free, in defining "due process," to impose on law enforcement officials [their] "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function." ' " *Id*. (quoting *Lovasco*, at 431 U.S. at 790).

Mr. Williams argues at some length that historically, as a general proposition, propensity evidence has been prohibited in criminal prosecutions (*see* App.Br. 41-50). Respondent agrees that, generally, the historical practice of courts in the United States has been to prohibit the use of propensity evidence in criminal prosecutions. *See id*. at 179. For instance, as the United States Court of Appeals for the Second Circuit observed in *Schaffer*, "Not only is a general prohibition on propensity evidence embodied in [Federal] Rule 404(b), but the Supreme Court has repeatedly extolled, though often in dicta, the virtues of the 'common-law tradition' of 'disallow[ing] resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of guilt.' " *Id*. *See Old Chief v. United States*, 519 U.S. 172, 182 (1997) (stating in *dicta* that "[t]here is . . . no question that propensity would be an 'improper basis' for conviction"); *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (noting in *dicta* that "[c]ourts 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").

This has also been the general practice in Missouri. *See State v. Ellison*, 239 S.W.3d 603, 606 (Mo. 2007) ("Based on art. I, section 17 and 18(a), this Court has long maintained a general prohibition against the admission of evidence of prior crimes out of concern that '[e]vidence of uncharged crimes, when not properly related to the cause of trial, violates a defendant's right to be tried for the offense for which he is indicted.' "); *State v. Bernard*, 849 S.W.2d 10, 16 (Mo. 1993) ("This evidentiary bar stems from the need to avoid 'encourag[ing] the jury to convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the crime charged.' ").

But while propensity evidence has been generally prohibited in most or many criminal prosecutions, "the evidence regarding the historical practice of allowing (or disallowing) propensity evidence *in prosecutions for sex crimes* is mixed." *Schaffer*, 851 F.3 at 179. As the United States Court of Appeals for the Ninth Circuit observed in *LeMay*, 260 F.3d at 1025, some "courts have routinely allowed propensity evidence in sex-offense cases, even while disallowing it in other criminal prosecutions." The court explained:

> In many American jurisdictions, evidence of a defendant's prior acts of sexual misconduct is commonly admitted in prosecutions for offenses such as rape, incest, adultery, and child molestation.

> *See*, *e.g.*, 2 JOHN H. WIGMORE, WIGMORE ON EVIDENCE, §§ 398–402. As early as 1858, the Michigan Supreme Court noted that "courts in several of the States have shown a disposition to relax the rule [against propensity evidence] in cases where the offense consists of illicit intercourse between the sexes." *People v. Jenness*, 5 Mich. 305, 319–20, 1858 WL 2321 at *8 (Mich. 1858). Today, state courts that do not have evidentiary rules comparable to Federal Rules 414 through 415 allow this evidence either by stretching traditional 404(b) exceptions to the ban on character evidence or by resorting to the so-called "lustful disposition" exception, which, in its purest form, is a rule allowing for propensity inferences in sex crime cases. *See*, *e.g.*, Thomas J. Reed, Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases, 21 AM. J. CRIM. L. 127, 188 (1993).

Id. at 1025-26.

Accordingly, the Ninth Circuit in *LeMay* concluded that " 'the history of evidentiary rules regarding a criminal defendant's sexual propensities is ambiguous at best, particularly with regard to sexual abuse of children.' " *Id*. at 1026 (quoting *Castillo*, 140 F.3d at 881). In *Schaffer*, the Second Circuit followed *LeMay* and *Castillo* and observed that "many jurisdictions presently

have evidentiary rules analogous to both Rule 413 and its companion rule addressing child molestation, Federal Rule of Evidence 414, and have had rules permitting the use of various kinds of propensity evidence in prosecutions for sex crimes for the past century and a half." 851 F.3d at 179. *See also Mound*, 149 F.3d at 801 (holding that "Rule 413 does not violate the Due Process Clause"); *Enjady*, 134 F.3d at 1432 (holding that, subject to the protections of Rule 403, Rule 413 did not violate the Due Process Clause and observing, "[t]hat the practice [of excluding prior bad acts evidence] is ancient does not mean it is embodied in the Constitution.").[4]

Mr. Williams cites to several Missouri cases that have held—prior to the enactment of Article I, section 18(c)—that propensity evidence in sexual-offense cases is not admissible in Missouri (*see* App.Br. 36-38, 51, 54). In particular, he outlines this Court's decision in *State v. Ellison*, 239 S.W.3d 603 (Mo. 2007), where the Court held that § 566.025—which authorized the

[4] Mr. Williams asserts that these cases analyzing Federal Rules 413 and 414 "are in direct conflict" with cases like *Old Chief* that discuss the general prohibition against propensity evidence (App.Br. 52). But these federal cases acknowledge cases like *Old Chief* and distinguish them by pointing out that there has *not* been a general prohibition against propensity evidence in sexual-offense cases. *See Schaffer*, 851 F.3d at 179.

admission of propensity evidence in certain prosecutions involving crimes of a sexual nature—violated Article I, sections 17 and 18(a) of the Missouri Constitution (App.Br. 36-38). Mr. Williams also cites *State v. Cox*, 781 N.W.2d 757 (Iowa 2010), a case in which the Iowa Supreme Court held that a state statute analogous to Federal Rule 413 was unconstitutional as applied to the defendant (*see* App.Br. 59-60).[5]

But the fact that some courts have prohibited the use of propensity evidence in sexual-offense cases is not sufficient to prove that a rule or law permitting the use of propensity evidence in sexual-offense cases "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." *See Schaffer*, 851 F.3d at 179. In *Schaffer*, for instance, the defendant also cited *Ellison* and *Cox*, along with a Washington case, but the court concluded that the defendant's argument fell short of "establishing that

[5] Mr. Williams also points out that the Judicial Conference of the United States opposed the congressional enactment of Federal Rules 413-415 (*see* App.Br. 53-54). The court in *Schaffer* acknowledged that opposition but concluded that it was irrelevant to its constitutional analysis. *See Schaffer*, 851 F.3d at 181 ("our concern is only whether Rule 413 violates fundamental principles of due process").

the prohibition of propensity evidence in *sexual-offense cases* is a 'fundamental conception[] of justice." *Id*.

In addition, while this Court in *Ellison*, reaffirmed that propensity evidence was not admissible under the Missouri Constitution (*i.e.*, that there was no recognized propensity "exception" to the general rule prohibiting evidence of prior criminal acts), *see Ellison*, 239 S.W.3d at 606-07, historical practice in Missouri has not always adhered to that rule in sexual-offense cases. In *Bernard*, which was decided in 1993, the Court observed, "*In cases involving sexual abuse of children*, the recent trend in Missouri has been liberally to allow the admission of evidence of prior sexual misconduct by the defendant." 849 S.W.2d at 13 (citing *State v. Lachterman*, 812 S.W.2d 759 (Mo.App. E.D. 1991) (emphasis added)).

In *Lachterman*, the Court of Appeals discussed "the increasingly liberal attitude toward the admission of evidence regarding the sexual conduct of defendants charged with sexual abuse of children" and concluded that "[e]vidence of repeated acts of sexual abuse of children demonstrates, per se, a propensity for sexual aberration and a depraved sexual instinct and should be recognized as an additional, distinct exception to the rule against the admission of evidence of uncharged crimes." 812 S.W.2d at 768. In short, before *Bernard*, practices in Missouri Courts were akin to other courts that had adopted (at least in practice if not expressly) a "lustful disposition"

exception that effectively permitted the admission of propensity evidence in sexual-offense cases involving children.

Legislative history in Missouri also shows that completely prohibiting propensity evidence in sexual-offense cases involving children is *not* a "fundamental conception[ ] of justice which lie[s] at the base of our civil and political institutions and which define[s] the community's sense of fair play and decency." In 1994 and 2000, the Missouri General Assembly passed legislation that required or permitted the admission of propensity evidence in sexual-offense cases involving children. *See* § 566.025, RSMo 1994; § 565.025, RSMo 2000. These statutes were, of course, later found to violate the general prohibition against evidence of uncharged acts found in Article I, sections 17 and 18(a). *See Ellison*, 239 S.W.3d at 606-08. However, in 2014, Missouri voters expressly adopted an exception to that general prohibition—the new evidentiary rule of Article I, section 18(c). It is, thus, apparent, that "the community's sense of fair play and decency" does not include a complete ban on propensity evidence in sexual-offense cases involving children.

In short, Mr. Williams has not shown, as a matter of historical practice, that permitting the use of propensity evidence in sexual-offense cases involving children violates a "fundamental conception[ ] of justice." And inasmuch as he "bears the burden of establishing that the prohibition of propensity evidence in sexual-offense cases is a 'fundamental conception[ ] of

justice,' the lack of conclusive historical evidence is a sufficient ground on which to reject his due process claim." *Schaffer*, 851 F.3d 166. "As the Supreme Court stated in *Egelhoff*, 'It is not the [government] which bears the burden of demonstrating that its rule is "deeply rooted," but rather [the defendant] who must show that the principle of procedure violated by the rule (and allegedly required by due process) is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." ' " *Castillo*, 140 F.3d at 881.

Apart from historical practice, "it is significant that other rules of evidence have been found constitutional even though they allow evidence presenting a risk of prejudice similar to that presented by" evidence admitted under Article I, section 18(c). "When a court admits evidence of a defendant's propensities, such as evidence of the defendant's prior criminal acts, it creates ' "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." ' " *Id.* at 882 (citing *Old Chief*, 519 U.S. at 181). "Those risks of prejudice are present not only when the evidence is offered to show propensity, but whenever a defendant's prior bad acts are admitted." *Id.* "Whenever such evidence is before the jury, the jury may be tempted to convict for the prior bad act, or what it says about the defendant's character, rather than what it says about the likelihood that the defendant

committed the charged crime." *Id.*

Despite that risk, however, this Court has long recognized exceptions to the general prohibition against evidence of prior bad acts. "Evidence of prior misconduct of the defendant, although not admissible to show propensity, is admissible if the evidence is logically relevant, in that it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial, . . . and if the evidence is legally relevant, in that its probative value outweighs its prejudicial effect." *Bernard*, 849 S.W.2d at 13. Those exceptions, as recognized by case law, included, "(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." *Id.*[6]

In other words, a defendant has no absolute right to eliminate evidence of prior criminal acts from the jury's consideration in a criminal case. Article I, section 18(c), merely creates a new exception—limited to certain sexual-offense cases—to the general rule of Article I, sections 17 and 18(a).

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[6] To guard against the jury's improper consideration of such evidence, trial courts can instruct the jury to limit is consideration of such evidence. *See* MAI-CR 4th 410.12.

Finally, like Federal Rule 413 and Federal Rule 414, a "significant factor favoring" the constitutionality of Article I, section 18(c), "is the existence of procedural protections" built into the section. *See Castillo*, 140 F.3d at 882. First, as indicated above, under section 18(c), evidence must be "relevant" to be admissible. This comports with the federal rules inasmuch as Federal Rule 402 requires, as a threshold matter, that "all evidence be logically relevant to a material issue in the case." *Id*. Second, under section 18(c), the trial 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." This provision also comports with the federal rules inasmuch as Federal Rule 403 provides that relevant evidence "may" be excluded, among other reasons, if its probative value is substantially outweighed by the danger of unfair prejudice. *See id*. These procedural protections "adequately control the prejudicial effect" of propensity evidence admitted pursuant to Article I, section 18(c). *See id*.; *see also Schaffer*, 851 F.3d at 180 ("we conclude, like the Eighth, Ninth, and Tenth Circuits before us, that the protections provided in Rule 403, which we now explicitly hold apply to evidence being offered pursuant to Rule 413, effectively mitigate the danger of unfair prejudice resulting from the admission of propensity evidence in sexual-assault cases").

Mr. Williams argues that Article I, section 18(c), nevertheless "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" (App.Br. 56). He points out that the Missouri Court of Appeals in *State v. Rucker*, 512 S.W.3d 63, 69 (Mo.App. E.D. 2017), stated with regard to applying Article I, section 18(c), that "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."

The court in *Rucker*, however, was not analyzing the constitutionality of Article I, section 18(c), under the Due Process Clause of the United States Constitution. And even if it had been, its observation about the discretion accorded to the trial court merely raised the specter of a trial court failing to exercise its discretion to exclude evidence that might violate a defendant's right to due process due to its lack of probative value and unfairly prejudicial effect. (Notably, in *Rucker*, the court held that the alleged prejudice "did not 'substantially outweigh' the evidence's probative value." 512 S.W.3d at 69.)

If a trial court *were* to fail to appropriately exercise its discretion in a given case, *i.e.*, if a trial court were found to have abused its discretion in failing to exclude unfairly prejudicial evidence, that failure could support a finding that, *as applied to that defendant*, Article I, section 18(c), violated the defendant's right to due process. On its face, however, Article I, section 18(c),

includes procedural protections which, if employed by the trial court, will adequately safeguard the defendant's right to due process.

Mr. Williams also argues generally that Article I, section 18(c), violates due process because "[t]he 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" (App.Br. 41). But an evidentiary rule that merely permits the admission of relevant evidence (while providing for its exclusion if it is unfairly prejudicial) does not lead to these alleged results.[7]

"The introduction of relevant evidence, by itself, cannot amount to a constitutional violation." *LeMay*, 260 F.3d at 1026. "Likewise, the admission of prejudicial evidence, without more, cannot be unconstitutional." *Id*. "All evidence introduced against a criminal defendant might be said to be prejudicial if it tends to prove the prosecution's case." *Id*.

Here, nothing in Article I, section 18(c), destroys the presumption of innocence or the right to a fair jury. The evidentiary rule contained in section

[7] Mr. Williams's reliance on *Deck v. Missouri*, 544 U.S. 622, 624-35 (2005), is misplaced, as that case dealt with the unjustified shackling of a defendant during trial, as opposed to an evidentiary rule permitting the admission of relevant evidence.

18(c) also does not relieve the State of proving its case beyond a reasonable doubt; rather, "by its plain language, the . . . amendment addresses only the admissibility of evidence in 'prosecutions for crimes of a sexual nature involving a victim under eighteen years of age.' " *See generally State ex rel. Tipler v. Gardner*, 506 S.W.3d at 925 (stating that Article I, section 18(c), does not purport "to change the facts that the state must prove in order to sustain a conviction for such acts"; rather, "by its plain language, the . . . amendment addresses only the admissibility of evidence in 'prosecutions for crimes of a sexual nature involving a victim under eighteen years of age.' ").[8]

In sum, for the reasons outlined above, Article I, section 18(c), is not facially unconstitutional under the Due Process Clause of the United States Constitution. For the same reasons—and also because the evidentiary rule contained in Article I, section 18(c), is now *part* of the Missouri Constitution (and declares an exception to the general rule derived from Article I, sections 17 and 18(a)), Article I, section 18(c), does not violate the Due Process Clause of the Missouri Constitution. *See generally Doughty v. Director of Revenue*,

[8] To safeguard the presumption of innocence, a fair and impartial jury, the State's burden of proof, and proper consideration of the evidence, there were other procedural protections in place (which were employed in this case), *e.g.*, voir dire, appropriate jury instructions, and closing argument.

387 S.W.3d 383, 387 (Mo. 2013) (stating that the "due process protections of both our state and national constitutions" are "coextensive"). The facial challenge to the constitutionality of Article I, section 18(c), should be denied.

C. The trial court properly admitted the evidence of Mr. Williams's prior conviction, *i.e.*, Article I, section 18(c), was not unconstitutional "as applied" in this case

In his second point, Mr. Williams asserts that the trial court abused its discretion when it admitted the propensity evidence pursuant to Article I, section 18(c), because "the probative value of that evidence was substantially outweighed by the danger of unfair prejudice" (App.Br. 71). This claim goes hand in hand with Mr. Williams's "as applied" constitutional challenge because if the evidence of his prior act of sodomy was properly admitted under Article I, section 18(c), "there can have been no as-applied constitutional violation." *See LeMay*, 260 F.3d 1018.

Article I, section 18(c), provides that "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." Here, Mr. Williams was charged with three counts of statutory sodomy in the first degree, and it was alleged that Victim was less than

twelve years old in two of the counts and less than fourteen years old in the third count (L.F. 1-2). Thus, the evidentiary rule of Article I, section 18(c), was applicable in Mr. Williams's case.

In addition, Mr. Williams's prior criminal act of statutory sodomy committed against another child was "relevant." The evidence showed that, in 1996, when he was twenty-six years old, Mr. Williams committed an act of deviate sexual intercourse by inserting his thumb into the vagina of a twelve-year-old child (Tr. 589-90). "[T]he simple fact that [he] had done it before makes it more likely that he did it again." *See United States v. Rogers*, 587 F.3d 816, 820-21 (7th Cir. 2009). The relevance of the evidence was also heightened by the similarity of the prior act to charged acts and the similarity of the prior victim to the Victim in this case.

Moreover, the record shows that the trial court in this case carefully considered the admission of the evidence and whether its probative value was substantially outweighed by the danger of unfair prejudice. Before trial, the State gave notice of its intent to use the evidence, and the court heard argument from the parties regarding the probative value of the evidence (or lack thereof), including similarities between the prior act and the charged offenses, the lack of connection between the victims, the amount of time that had passed between the prior act and that charged offenses, and the fact that Mr. Williams was in prison between the prior act and the charged offenses

until 2003 (*see* Tr. 300-16). The trial court also considered the manner in which the evidence would be presented (by live testimony versus written stipulation), the extent of the evidence that would be presented, and whether steps could be taken in voir dire and in instructing the jury to limit any unfair prejudice (*see* Tr. 300-16, 331-32, 333-38).

The trial court ultimately concluded that it would permit the State to use the evidence, stating, "I believe that it does, based upon what I have heard here with regards to argument, is that it is a relevant piece of evidence for the jury to hear because it is close enough in time and the charge that he was charged with matches the factual allegations that are contained in the current case" (Tr. 315). The trial court stated that it would "limit" the evidence "to a stipulation of the facts that he has already pled guilty to so that we would not require the victim to come in," because "that would held with not creating a prejudice for Mr. Williams" (Tr. 315). The trial court also stated that it would "increase the jury pool in this matter so that there will be enough panel members available to be questioned with regards to this matter" (Tr. 316). In short, the trial court found both that the evidence was relevant, and it took affirmative steps to ensure that Mr. Williams would not be unfairly prejudiced by the evidence it decided to admit.

In light of this record, the trial court did not abuse its discretion. Trial courts should consider various factors in evaluating relevance, *e.g.*, "(1) 'the

similarity of the prior acts to the acts charged,' (2) the 'closeness in time of the prior acts to the acts charged,' (3) 'the frequency of the prior acts,' (4) the 'presence or lack of intervening circumstances,' and (5) 'the necessity of the evidence beyond the testimonies already offered at trial.' " *See LeMay*, 260 F.3d 1018. Trial courts should also "consider other factors relevant to individual cases." *Id*.

Here, the trial court appropriately considered these factors, the record shows that the evidence was relevant, and the record does not show that the probative value of Mr. Williams's prior act of sodomy was "substantially outweighed" by the danger of unfair prejudice. To the contrary, the trial court took appropriate steps to limit the prejudicial effect of the evidence, and the mere fact that Mr. Williams had to deal with the evidence in various ways did not render it unfairly prejudicial.

Mr. Williams asserts in Point III that the trial court abused its discretion because it did not make an "express finding" as to "whether the probative value of the prior criminal act evidence . . . was substantially outweighed by the danger of unfair prejudice" (App.br. 76). But Article I, section 18(c), does not require an express finding; and, in any event, as outlined above, the record shows that the trial court carefully considered the probative value of the evidence versus its prejudicial effect. *See LeMay*, 260 F.3d at 1028 (". . . although the district judge did not discuss the specific

factors . . ., the record reveals that he exercised his discretion to admit the evidence in a careful and judicious manner.").

In short, the trial court did not abuse its discretion in admitting the evidence of Mr. Williams's prior act of statutory sodomy. Consequently, Mr. Williams's as-applied challenge in Point I and his claims in Points II and III should be denied.

CONCLUSION

The Court should affirm Mr. Williams's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Rule 84.06(b) and contains 8,850 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word.

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