

,

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Respondent,)	
v.)	No. 96524
)	
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

MISSOURI ASSOCIATION OF PROSECUTING ATTORNEYS

IN SUPPORT OF RESPONDENT

AS AMICUS CURIAE

SHERRIE HAMNER, #50907
Child Abuse Resource Prosecutor
 Missouri Office of Prosecution Services
 200 Madison St.
 Jefferson City, MO 65102
 (573) 751-0619
 FAX (573) 751-1171
 E-mail: Sherrie.Hamner@prosecutors.mo.gov

JASON H. LAMB, #50253
Executive Director
 Missouri Office of Prosecution Services
 200 Madison St.
 Jefferson City, MO 65102
 (573) 751-0619
 FAX (573) 751-1171
 E-mail: Jason.Lamb@prosecutors.mo.gov

Attorneys for Amicus Curiae

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Missouri Association of Prosecuting Attorneys (MAPA), established in 1969, is a non-profit, voluntary association representing over 500 prosecutors, including elected and assistants, and their investigators statewide. MAPA strives to provide uniformity and efficiency in the discharge of duties and functions of Missouri's prosecutors, to promote high levels of professionalism amongst Missouri's prosecutors, and to continually improve the criminal justice system in Missouri.

This case raises a matter of interest to Missouri's prosecutors as it has the potential to greatly impact the investigation, arrest and prosecution of child sex abuse crimes across the state.

Counsel for the undersigned has contacted both parties and they have consented to the filing of this brief.

ARGUMENT

BECAUSE ARTICLE I, SECTION 18(c) OF THE MISSOURI CONSTITUTION REFERENCES PRIOR CRIMINAL ACTS, WHETHER CHARGED OR UNCHARGED AND BECAUSE THE PUBLIC SAFETY POLICY OF MISSOURI SHOULD PROTECT ALL CHILD VICTIMS UNDER THE LAW, THE SECTION SHOULD BE APPLIED TO JUVENILE ADJUDICATIONS.

Article I, Section 18(c) of the Missouri Constitution (hereinafter “Section 18(c)”) was adopted by the voters on November 4, 2014, with a super-majority of 71.98% of the vote,¹ and states:

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

¹ Constitutional Amendment 2, Missouri Secretary of State, “General Election –November 4, 2016”, (<http://enrarchives.sos.mo.gov/enrnet/default.aspx>)

Prior to the adoption of Section 18(c), Missouri was the only state that had a strict ban on the introduction of propensity evidence for child sex abuse cases.² Missouri's voters found this distinction to be woefully inadequate when they approved the addition of Section 18(c) to the Missouri Constitution.

² Ala. R. Evid. 404 (**AL**); Alaska R. Evid. 404(b)(1) (**AK**); Ariz. R. Evid. 404(b) (**AZ**); Ark. R. Evid. 404(b) (**AR**); Evidence Code section 1101 (**CA**); Colo. R. Evid. 404(b) (**CO**); CT. Code Evid. §4-5(a) (**CT**); Del. R. Evid. 404(b) (**DE**); Fla. Stat. Ann. §90.404(2)(a) (**FL**); GA. Code Ann. §24-2-2 (**GA**); Haw. Rev. State §626-1 (**HI**); IL. R. Evid. Rule 404 (**IL**); Idaho R. Evid. 404(b) (**ID**); Ind. R. Evid. 404(b) (**IN**); Iowa R. Evid. 5.404 (**IA**); K.S.A. 60-455(b) (**KS**); KRS 404(b) (**KY**); LA. Code Evid. Ann. Art. 404 (**LA**); ME. R. Evid. 404 (**ME**); MD. Rule 5-404 (**MD**); Mass. Gen. Laws Ann. Ch. 134 (**MA**); MI. R. Evid. Rev. 404 (**MI**); Minn. R. Evid. 404 (**MN**); Miss. Code Ann. §40 (**MS**); MT. R. Evid. 404 (**MT**); NH. Rev. Rule 404 (**NH**); NJ. R. Evid. 404 (**NJ**); NM. R. Re. Rule 404 (**NM**); NY. Crim. Pro. §60-40 (**NY**); NCST EV §8C-1 (**NC**); N.D.R. Evid. 404 (**ND**); Neb. Rev. St. §27-404 (**NE**); Nev. Rev. Stat. Ann. §48.045 (**NV**); OH. St. Evid. Rule 404 (**OH**); R. Okl. St. Ann. §2404 (**OK**); OR. Rev. Stat. Ann. §40.170 (**OR**); PA. R. Evid. 404 (**PA**); RI. R. Rev. Rule 404 (**RI**); S.C. Rev. Rule 404 (**SC**); S.D. Codified Laws §19-19-404 (**SD**); TN. R. Evid. Rule 404 (**TN**); Tex. Evid. R. 404 (**TX**); UT R. Evid. Rule 404 (**UT**); VT. Rev. Rule 404 (**VT**); VA. Sup. Ct. R. 2:404 (**VI**); WV. Rev. Rule 404 (**WV**); WA. Rev. Evid. 404 (**WA**); Wis. Stat. Ann. §904.04 (**WI**); Wyo. R. Evid. 404 (**WY**).

Section 18(c) allows relevant evidence of prior criminal acts, whether charged or uncharged, to be admitted in prosecutions for crimes of a sexual nature involving a child. Felony offenses committed by juveniles are still criminal acts within the definition of a crime. As noted in the recent decision by the Eastern District in *State v. Thigpen*, a “crime is defined as ‘conduct in violation of the law,’ a ‘criminal act’ may include a thing done or being done involving, relating to, or being conduct in violation of the law.” *State v. Thigpen*, 2017 ED103992 at *20 (Mo. App. E.D. August 8, 2017). The Court in *Thigpen* also noted that chargeable acts are defined as those “capable....of being charged as a criminal offense.” Therefore, the Court found that “‘criminal acts, whether charged or uncharged’ may include, *inter alia*, a thing done or being done which involves, relates to, or is conduct in violation of the law, whether this act has been charged or is capable of being charged as a criminal offense or not. *Id.*

Whether a juvenile is certified as an adult and charged in adult court is irrelevant to the definition of a crime. Pursuant to 211.071, RSMo., if a juvenile is over the age of 12, a felony offense committed by that juvenile can be certified and charged in adult court. Therefore, if a felony offense is committed by a child over the age of 12, it is a matter of whether it is “charged” (certified to adult court) or “uncharged” (as a juvenile adjudication), not a matter of whether or not a crime occurred. *See also State v. Thigpen*, 2017 ED103992 at *21 (Mo. App. E.D. August 8, 2017).

Prior to the recent decision in *Thigpen*, the Eastern District previously found in this case that pursuant to Section 211.271(3) juvenile records are not “evidence” and are

not admissible as such.³ This contention ignores other instances in Missouri statutes that allow for the use and admission of juvenile records in other proceedings.⁴

³ Assuming *arguendo* that 211.271, RSMo. is interpreted to mean that Missouri juvenile records are never admissible, then it is limited specifically to “cases under this chapter.” See 211.271(3). The juvenile records at issue in this case were not juvenile records under Chapter 211, but juvenile records from Idaho. Pursuant to Idaho Code Section 20-525 records of proceedings brought against a juvenile fourteen (14) years or older who is charged with an act which would be a felony if committed by an adult are open to the public unless the court determines that extraordinary circumstances exist to justify that the records should be confidential. The Fourth Circuit of the United States Court of Appeals addressed a similar issue in *Hester v. Ballard*, 679 Fed.Appx. 273 (2017). In *Hester*, the Court held that though West Virginia (the state of the underlying offense) and the two jurisdictions of the juvenile convictions all had confidentiality provisions as to their own records, the Court affirmed the admission of out-of-state records, finding that such admission did not violate Defendant’s rights under the Full Faith and Credit Clause, Equal Protection Clause, Due Process Clause or State law. *Id.*

⁴ See Section 491.078, RSMo.(allowing a juvenile court adjudication for certain acts to be used to affect the credibility of a witness or defendant in a criminal case); *State v. Sapien*, 337 S.W.3d 72, 77–78 (Mo. App. W.D. 2011) (finding pursuant to section 211.321.2(2) that it was proper to allow juvenile court records into evidence during the sentencing phase of defendant's trial as an adult).

As pointed out by the Eastern District in *Thigpen*, this contention would also ignore other rulings by Missouri Courts which, prior to Section 18(c), found evidence of juvenile misconduct or juvenile records were evidence of prior criminal acts and ruled the evidence inadmissible. *Id.* at *21.⁵

Additionally, Section 490.130, RSMo. allows certified records of judicial proceedings to be admitted in court proceedings without further foundation in all court proceedings. Further, presenting a certified copy of a prior record in lieu of live testimony serves the dual purpose of protecting past victims, as well as the least prejudicial way of presenting the evidence allowed by the Amendment.

Criminal law prohibits conduct by individuals that threaten public safety and welfare. In none of the criminal statutes is there a minimum age for the commission of a crime. Offenses committed by juvenile offenders are also a threat to public safety.

⁵ *State v. Harris*, 477 S.W.3d 131, 142-43 (Mo. App. E.D. 2015) (juvenile truancy evidence treated as evidence of uncharged crimes); *In re D.M.*, 370 S.W.3d 917, 921 (Mo. App. E.D. 2012) (juvenile's behavioral and disciplinary history was inadmissible propensity evidence); *State v. Doss*, 394 S.W.3d 486, 494-97 (Mo. App. W.D. 2013) (juvenile records were evidence of prior criminal acts); *State v. Rush*, 949 S.W.2d 251, 254-56 (Mo. App. S.D. 1997) (juvenile acts treated as evidence of uncharged crimes). *Cited in State v. Thigpen*, 2017 ED103992 at *21 (Mo. App. E.D. August 8, 2017).

Research has shown that juvenile offenders constitute between 15 and 20% of sexual offense arrests.⁶

The policy reasons behind Section 18(c) are not different simply because the prior criminal act was committed by a juvenile offender. Reports from adult sex offenders indicate that 50% reveal their first sexual offense occurred when they were in their teens or younger.⁷ Further, those who begin offending early are more likely to offend more seriously and persistently.⁸

Respondent's argument also overlooks Article I, Section 32(6) of the Missouri Constitution which must be read in harmony with Section 18(c), and states that crime victims have the right to reasonable protection from the defendant. Allowing propensity evidence to come in at trial reasonably protects child victims from their abusers.

The public safety policy of Missouri should support this interpretation. While there is no specific public policy declaration by the General Assembly regarding this issue,

⁶ Caldwell, Michael F., *Quantifying the Decline in Juvenile Sexual Recidivism Rates*, 22 *Psychology, Public Policy, and Law*, 414 (2016).

⁷ Waite, Dennis, et al., *Juvenile Sex Offender Re-Arrest Rates for Sexual, Violent Nonsexual and Property Crimes: A 10-Year Follow-Up*, 17 *Sexual Abuse: A Journal of Research and Treatment*, 313, 314 (2005).

⁸ Vandiver, Donna M., *A Prospective Analysis of Juvenile Male Sex Offenders Characteristics and Recidivism Rates as Adults*, 21 *Journal of Interpersonal Violence*, 673, 677 (2006).

Section 1.092, RSMo declares that the best interests of the child shall be the public policy of the state. Undoubtedly, holding the abuser of a child sex crime victim accountable under the state's criminal laws is in the best interest of Missouri's children. Allowing the introduction of propensity evidence in as many cases of child sexual abuse as possible promotes the best interests of the child in those cases, and in the best interests of protecting potential future child victims from these predators.⁹

⁹ See, e.g. Floor Statement of the Principal House Sponsor, Rep. Susan Molinari, Concerning the Prior Crimes Evidence Rules for Sexual Assault and Child Molestation Cases (Cong.Rec. H8991-92, Aug. 21, 1994). "In child molestation cases, for example, a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant--a sexual or sadosexual interest in children--that simply does not exist in ordinary people. Moreover, such cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, there is a compelling public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense." See also, *U.S. v. LeCompte*, 131 F.3d 767 (8th Cir. 1997) (*District court abused its discretion in excluding evidence of defendant's prior uncharged sex offenses, in prosecution for abusive sexual contact with defendant's 11-year-old niece, under rule permitting court to exclude relevant evidence if its probative value is outweighed by other concerns, in light of strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible, as evidenced by separate rule, and substantial similarity of offenses*).

Section 18(c) applies solely to child sex abuse cases for a good reason – because these cases present unique challenges; specifically distinguishable from other criminal cases. The defendants who prey upon child victims do so because of their unique vulnerability. The particular dynamics of child sexual abuse necessitate different rules. Multiple statutes in Missouri treat court proceedings involving children special and differently, with deference to our public interest in protecting our children.¹⁰ Child victims and witnesses are less likely to be able to articulate the facts of the case, and they are more likely to be fearful of harm or embarrassment to themselves or their family if they tell what has happened to them because the abuser has ingrained that fear and shame into them. Child sexual abuse occurs behind closed doors, with very few witnesses to any of the surrounding behaviors, making these some of the most difficult cases to prosecute.

¹⁰ See, e.g. Section 491.075 (*Sets out special procedures for admissibility of hearsay statements of children under 14*); Section 491.710 (*Mandates special docket priority for cases involving child witnesses*); Section 491.725 (*Sets out special procedures for protecting child witnesses in the courtroom*); Section 492.304 (*Sets out special procedures for admitting visual and audio recordings of children under 14*); Section 545.950, effective August 28, 2016 (*Sets out special protections from copying of visual or audio recordings or photographs of child victims*); Section 556.037 (*Special statute of limitations for sexual offenses involving children*).

Researchers have documented that child sexual abusers are remarkably prolific recidivists.¹¹ By the admission of sex offenders themselves, they are very likely to have multiple victims over time (an anonymous survey of sex offenders indicated they had committed two to five times more sex crimes than those for which they had been arrested).¹² It is estimated that every eight minutes a child protective agency responds to a report of sexual abuse.¹³

Child sexual abusers inflict lifelong consequences on their victims by the abuse itself.¹⁴ After a child makes a sexual abuse disclosure, the justice system often re-

¹¹ Abel, G, et al. *Self-reported crimes of non-incarcerated paraphilics*, 2 *Journal of Interpersonal Violence*, 3-25 (1987); Brake, S, *Reporting Rates for Sex Offenses and Recidivism and Re-offense Rates of Adult Sex Offenders* (2010).

¹² Groth, A.N., Longo, R.E. & McFadin, J.B. *Undetected recidivism among rapist and child molesters*, 28 *Crime & Delinquency* 450 (1982). See also, Finkelhor, D. et al. *School, Police, and Medical Authority Involvement With Children Who Have Experienced Victimization*, 165 *Arch Pediatr Adolesc Med* (2011).

¹³ Nely, “*To Seek Justice*”: *Why Missouri’s Constitutional Amendment Allowing Propensity Evidence is a Step Forward*, 11 *LSD Journal*, 256, (2016).

¹⁴ Felitti, V & Anda, R., *The Relationship Of Adverse Childhood Experiences To Adult Medical Disease, Psychiatric Disorders And Sexual Behavior: Implications For Health Care*, Ch.8 *The Impact of Early Life Trauma on Health & Disease* (2010); *See also*,

traumatizes the child and their family.¹⁵ When a child has the courage to come forward with a disclosure, we must hold these offenders accountable with every shred of available evidence. Section 18(c) recognizes that child predators who repeatedly commit crimes against children should not be allowed to hide behind the vulnerabilities of their previous victims as they create new victims. The public safety policy of this state should support eradicating child sexual abuse, and limiting the life-long impact that abuse has on children in addition to reducing the risk that recidivating sex offenders pose to potential future child victims.

Child sex abuse is chronic in nature. Due to the secrecy, shame and manipulation that surrounds child sexual abuse, disclosure is often delayed and incremental. The vast majority of child sexual abuse is never reported to authorities, investigated or prosecuted. Victims often come forward years later when another victim's abuse by the same perpetrator comes to light. Through experience in prosecuting these cases statewide, Missouri's prosecutors know first-hand that victims report that the other victims' courage in reporting has given them the courage to report the crimes against them. This sentiment was summarized by the St. Louis Post-Dispatch Editorial Board when it supported

Finkelhor, D. & Browne, A., *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, American Journal of Orthopsychiatry, 55(4), (1985).

¹⁵ Walsh, *et al*, *supra*.

Amendment 2, and wrote: “[t]hose who commit crimes in secret against society’s most vulnerable victims should not be able to keep their past a secret.”¹⁶

To limit the application of this tool to exclude juvenile adjudications would be an affront to the victims of child abuse in Missouri and contradictory to the public safety policy of protecting Missouri’s children.

¹⁶ *St. Louis Post-Dispatch*,” Editorial: Amendment 2 offers special help for child abuse victims,” October 14, 2014.

CONCLUSION

Section 18(c) of the Missouri Constitution references prior criminal acts, whether charged or uncharged, and should be applied to all juvenile adjudications in order to advance the public safety policy of protecting Missouri's children from child predators.

Respectfully submitted,

/s/Sherrie Hamner

/s/Jason H. Lamb

SHERRIE HAMNER, #50907

JASON H. LAMB, #50253

Child Abuse Resource Prosecutor

Executive Director

Missouri Office of Prosecution Services

Missouri Office of Prosecution Services

200 Madison St.

200 Madison St.

Jefferson City, MO 65102

Jefferson City, MO 65102

(573) 751-0619

(573) 751-0619

FAX (573) 751-1171

FAX (573) 751-1171

E-mail: Sherrie.Hamner@prosecutors.mo.gov E-mail: Jason.Lamb@prosecutors.mo.gov

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE AND COMPLIANCE

I, the undersigned, hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 3,037 words, excluding the cover, certification and appendix, as determined by Microsoft Word, and;
2. That the electronic file has been scanned and found to be virus-free; and
3. That a true and correct copy of the foregoing was sent through the e-filing system this 7th day of September, 2017 to all counsel of record.

Respectfully submitted,

/s/Sherrie N. Hamner

SHERRIE N. HAMNER, #50907
Child Abuse Resource Prosecutor
Missouri Office of Prosecution Services
200 Madison St.
Jefferson City, MO 65102
(573) 751-0619
FAX (573) 751-1171
E-mail: Sherrie.Hamner@prosecutors.mo.gov