**IN THE**
**MISSOURI SUPREME COURT**

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

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

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# APPELLANT'S REPLY BRIEF

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**William J. Swift, MoBar #37769**
**Assistant Public Defender**
**Attorney for Appellant**
**Woodrail Centre**
**1000 W. Nifong**
**Building 7, Suite 100**
**Columbia, Missouri 65203**
**(573) 777-9977**
**FAX: (573) 777-9974**
**william.swift@mspd.mo.gov**

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## JURISDICTION AND STATEMENT OF FACTS

The Jurisdictional Statement and Statement of Facts from the original brief are incorporated here.

## POINTS RELIED ON

### I.

### PROPENSITY/CHARACTER EVIDENCE VIOLATES DUE PROCESS AND JURY TRIAL RIGHTS

**The trial court erred in overruling objections to evidence Travis had a prior child sex offense conviction to show his "propensity" because Mo. Const. Art. I §18(c), on its face and as applied to Travis, denied Travis his right to due process and right to a fair jury trial, U.S. Const. Amends. VI and XIV, and Mo. Const. Art. I §10 and §22(a), in that historical practice since at least the early 1900s in this Court, and other states, prohibited propensity evidence in child sex crimes to show a defendant acted in accordance with his propensity/character, and therefore committed the charged offense such that the admitted evidence violated fundamental conceptions of justice.**

**The Federal Courts of Appeals cases rejecting F.R.E. 413-414 constitutional challenges never addressed propensity evidence presented for the purpose of showing the defendant acted in accordance with his propensity/character as juries in those cases were expressly instructed they could not consider the evidence for that unconstitutional, improper purpose.**

**No state has authorized propensity/character evidence for use in child molestation cases by evidentiary rule or statute to show the defendant acted in accordance with his propensity/character.**

*State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993);

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

*Culombe v. Connecticut*, 367 U.S. 568 (1961);

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

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

## ARGUMENT

### I.

### PROPENSITY/CHARACTER EVIDENCE VIOLATES DUE PROCESS AND JURY TRIAL RIGHTS

**The trial court erred in overruling objections to evidence Travis had a prior child sex offense conviction to show his "propensity" because Mo. Const. Art. I §18(c), on its face and as applied to Travis, denied Travis his right to due process and right to a fair jury trial, U.S. Const. Amends. VI and XIV, and Mo. Const. Art. I §10 and §22(a), in that historical practice since at least the early 1900s in this Court, and other states, prohibited propensity evidence in child sex crimes to show a defendant acted in accordance with his propensity/character, and therefore committed the charged offense such that the admitted evidence violated fundamental conceptions of justice.**

**The Federal Courts of Appeals cases rejecting F.R.E. 413-414 constitutional challenges never addressed propensity evidence presented for the purpose of showing the defendant acted in accordance with his propensity/character as juries in those cases were expressly instructed they could not consider the evidence for that unconstitutional, improper purpose.**

**No state has authorized propensity/character evidence for use in child molestation cases by evidentiary rule or statute to show the defendant acted in accordance with his propensity/character.**

Respondent asserts Mo. Const. Art. I §18(c) did not violate Travis' due process and jury trial rights because fundamental conceptions of justice were not violated as the historical practice involving propensity evidence in child sex offense cases is "mixed" and "ambiguous"(Resp.Br.20,23-24). Respondent relies on cases from Federal Circuits addressing constitutional challenges to F.R.E. 413-14 and their rendering of history(Resp.Br.23-25). Respondent also relies on *State v. Lachterman*, 812 S.W.2d 759 (Mo.App., E.D. 1991) and its "depraved sexual instinct" rule(Resp.Br.27-28).

The historical record since at least the early 1900s in this Court, and other states, prohibited propensity evidence in child sex crime cases to show a defendant acted in accordance with his propensity/character to commit the charged offense. Thus, the evidence admitted here violated fundamental conceptions of justice that lie at the base of our civil and political institutions and which define the community's sense of fair play and decency.

Respondent also relies on decisions from Federal Circuits rejecting challenges to the constitutionality of F.R.E. 413-14. Those Federal cases, however, never addressed propensity evidence presented for the purpose of showing the defendant acted in accordance with his propensity/character. Juries in those Federal cases were expressly instructed they could not consider the propensity evidence for its unconstitutional improper purpose that the jury should convict the defendant of the charged offense based on the propensity/character evidence.

## Long-Standing History Prohibited Improper Propensity In Child Sex Cases

History from this Court and other states since at least the early 1900s shows respondent has been prohibited from introducing in child sex offense cases evidence of the defendant's propensity/character to show that he committed the charged child sex offense because he acted in accordance with his propensity/character.[1]

In *State v. Teeter*, 144 S.W. 445, 445 (Mo. 1912), the defendant was convicted of "seducing and debauching under promise of marriage" Ruth Bosley, who was under 18 when the alleged act occurred. To prove the charge, respondent presented evidence Teeter had done the same to Mabel French when she also was a minor. *Id.* at 447-48. This Court concluded the Mabel French evidence was "highly prejudicial" and reversed noting respondent had other "ample machinery" to obtain a conviction. *Id.* at 448.

In *State v. Wellman*, 161 S.W. 795, 796, 800 (Mo. 1913) this Court reversed the defendant's conviction for sodomy of a sixteen year old where throughout trial the prosecution repeatedly injected defendant had sodomized a woman named Fromson and also committed the offense of adultery. In reversing, this Court stated that if documentary evidence had been admitted to show a prior conviction for adultery, then Wellman would have been entitled to an instruction the prior could only be

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[1] As to the due process prohibition against propensity evidence generally, see Appellant's Original brief at 40-49.

considered as to Wellman's testimony's credibility and not as tending to prove he committed sodomy against the child as charged. *Id.* at 800. This Court stated the prosecutor could not have referred to an adultery conviction as evidence Wellman committed sodomy against the child as charged there. *Id.* at 800. Lastly, this Court added: "The prosecutor should never be allowed to appeal to the jury to convict the defendant because he has committed some other crime not in any way connected with the one for which he is being tried, or because his reputation is bad." *Id.* at 800.

In *State v. Smith*, 157 S.W. 307, 307 (Mo. 1913), the defendant was convicted of assault with intent to rape eleven year old Gladys Penny where the evidence included "fondling her." To prove its case respondent called Kate Ashinhurst to testify that when she was twelve years old Smith "fondle[d] her in a lascivious way." *Id.* at 307. That propensity evidence required reversal. *Id.* at 307.

In *State v. Bowman*, 199 S.W. 161, 162, 164 (Mo. 1917), the defendant was convicted of statutory rape of 15 year old Eva Frampton while respondent presented evidence he committed statutory rape against Clara Parker. This Court reversed because the uncharged statutory rape was presented to show Bowman acted in conformance with his character in committing the charged statutory rape. *Id.* at 164.

In *State v. Atkinson*, 285 S.W.2d 563, 564 (Mo. 1955), the defendant was convicted of sodomizing a thirteen year old. Respondent called another youth, other than the victim, to testify that the defendant had attempted to sodomize him. *Id.* at

566-67. This Court reversed the conviction for admitting this propensity evidence. *Id.* at 567-68.

In a separate sodomy prosecution of Atkinson for acts involving a fifteen year old, the state called two witnesses, besides that victim, to testify that Atkinson had also sodomized them. *State v. Atkinson*, 293 S.W.2d 941, 942-43 (Mo. 1956). As it did in the other *Atkinson* case, this Court reversed noting it was "a well-established general rule" evidence the defendant committed the same offense charged on another occasion is inadmissible to prove he committed the charged offense. *Id.* at 942. More particularly, this Court quoted from C.J.S. the following: "Where sodomy is the crime charged. [sic] evidence . . . that accused committed the same offense, or had improper relations, with a person other than the one named in the indictment, is as a rule held to be inadmissible." *Atkinson*, 293 S.W.2d at 943. In reversing this *Atkinson* case conviction, this Court relied on its 1917 *State v. Bowman* case. *Atkinson*, 293S.W.2d at 942, 944.

Besides the decisions from this Court, the historical record from other states shows that presenting evidence a defendant committed a child sex offense based on propensity/character evidence was prohibited. *See, People v. Wyett*, 193 P. 153, 154-55 (Cal.App. 1st Dist. 1920) (child sodomy conviction reversed where another child testified defendant also sodomized him where defendant was not on trial for sodomy of other child); *State v. Gregoroius*, 16 P.2d 893, 894-99 (Utah 1932) (child sodomy conviction reversed because state presented evidence defendant attempted to

sodomize another child for which defendant was not on trial); *People v. Rosenthal*, 46 N.E.2d 895, 896-99 (N.Y. Ct. App. 1943) (conviction for sodomy of 16 year old reversed for presenting propensity evidence defendant sodomized other youths); and *State v. Ewing*, 149 P.2d 765, 767-72 (Ore. 1944) (conviction for sodomy committed against 13 year old reversed where evidence defendant had committed sodomy against other youths was introduced because other crime evidence was improper to show bad character).

"'The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.'" *Culombe v. Connecticut*, 367 U.S. 568, 583 (1961) (quoting *Lisenba v. People of State of California*, 314 U.S. 219, 236 (1941)). In *Montana v. Egelhoff*, 518 U.S. 37, 48 (1996) the Court found Montana's prohibiting consideration of evidence of intoxication in determining whether the required criminal mental state existed did not violate due process. (*See*, Resp. Br.21). The *Egelhoff* Court found presenting such evidence was not a fundamental right because the English common-law history showed drunkenness was viewed as aggravating rather than lessening responsibility. *Egelhoff*, 518 U.S. at 43-44. In contrast, the historical record in this Court, and other states, shows that admitting evidence of the defendant's propensity/character to show that he committed a child sex offense was prohibited. Thus, allowing such evidence is a violation of a fundamental right that lies at the base of our civil and political institutions which define the community's sense of fair play

and decency. *See*, *U.S. v. Lovasco*, 431 U.S. 783, 790 (1977). Propensity/character evidence violates fundamental fairness in its use whether it is true or false evidence. *See*, *Culombe* and *Lisenba*.

To support its history argument respondent relies on decisions characterizing the historical practice involving propensity evidence in child sex offense cases as "mixed" and "ambiguous"(Resp.Br.20,23-24).

In *U.S. v. Lemay*, 260 F.3d 1018, 1025-26 (9th Cir. 2001) *(*relying on *U.S. v. Castillo*, 140 F.3d 874, 881 (10th Cir. 1998)), F.R.E. 414 was found not to violate due process because the history of evidentiary rules regarding a defendant's sexual propensities was "ambiguous" as to the sexual abuse of children. As support for there being ambiguity *Lemay* relied on *People v. Jenness*, 5 Mich. 305 (Mich. 1858). *See*, *Lemay*, 260 F.3d at 1025-26. *See*, also, *U.S. v. Castillo*, 140 F.3d at 881-82 (also relying on *People v. Jenness)*. In *Jenness*, the defendant was charged with an act of incest having occurred on February 24, 1858. *Jenness*, 5 Mich. at 307. The *Jenness* Court found evidence the defendant had engaged in having sex with the victim on multiple other occasions was admissible to prove the February 24th occurrence with the victim. *Jenness*, 5 Mich. at 316. Thus, the *Jenness* case did not involve admission of prior sexual misconduct evidence as propensity evidence to prove the defendant had acted in accordance with that propensity/character.[2] The *Lemay* Court,

[2] Under *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. banc 2011), what *People v. Jenness*, 5 Mich. 305 (Mich. 1858) authorized is prohibited.

without citing any on-point propensity/character evidence authority, stated "courts have historically allowed propensity evidence to reach the jury in sex offense cases." *Lemay*, 260 F.3d at 1026.

*Castillo* relied on Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 Am. J.Crim. L. 127, 167 n. 223 (1993) for the proposition that in the 1920s there were 23 states that had a "lustful disposition" exception for statutory rape cases. *Castillo*, 140 F.3d at 881. The "lustful disposition" exception allowed evidence of prior sexual activity between the defendant and the victim to establish the particularized charged act of statutory rape between the defendant and victim occurred. *See*, Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 Am. J.Crim. L. at 170-71. The "lustful disposition" exception did not involve presenting propensity/character evidence the defendant on a particular occasion acted in accordance with his propensity/character, it was limited to prior sexual acts between the defendant and the victim.

In *U.S. v. Schaeffer*, 851 F.3d 166 (2nd Cir. 2017), the reason given for finding F.R.E. 413 did not violate due process in prosecuting the defendant for a sexual molestation offense where other acts of sexual molestation he committed against other minors not charged was introduced was that other Federal Courts of Appeals had found the historical practice on propensity evidence in prosecution for sex crimes is "mixed." *See*, *Schaeffer* 851 F.3d at 179 n.66 relying on *U.S. v. LeMay*, 260 F.3d

1018, 1025-26 (9th Cir. 2001) and *U.S. v. Castillo*, 140 F.3d 874, 881 (10th Cir. 1998). Because of the so called "mixed" history, *Schaeffer* held admission of such propensity evidence did not violate a fundamental conception of justice. *Schaeffer*, 851 F.3d at 179.

The "history," referenced in the Federal decisions, simply does not address the admissibility of propensity/character evidence to show the defendant acted in accordance with his propensity/character to commit the child sex offense charged. In contrast, an accurate rendition of the history from this Court, and other states, from at least the early 1900s on the issue of the presenting of propensity/character evidence to show the defendant acted in accordance with his propensity/character to commit the child sex offense charged is to prohibit that evidence. *See*, *Teeter*, *Wellman*, *Smith*, *Bowman*, and *Atkinson* (both) and other states' cases, *supra*.

Federal Rules of Evidence 413 and 414 were enacted as part of the Violent Crime Control and Enforcement Act of 1994. Livnah, *Branding The Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 Through 415*, 44 Clev. St. L.Rev. 169, 169-75 (1996). The Rules were introduced in response to a public perception of inadequacy in prosecuting sexual abusers. *Constitutional Ramifications*, 44 Clev. St. L. Rev. at 173. They were initially introduced in 1991 in Congress, but removed because they were believed unconstitutional. *Constitutional Ramifications*, 44 Clev. St. L. Rev. at 170, 173-74. They were only added back to the Act because a group of representatives, led by Representative Molinari, threatened to

block passage of the entire Act, if Rules 413-14 were not included, when there was intense political pressure on Congress to pass the Act. *Constitutional Ramifications*, 44 Clev. St. L. Rev. at 170-74. Thus, the history and origin of Rules 413-14 is reflective of an early 1990s political climate, rather than some larger historical treatment of propensity/character evidence in child sex offense cases. *See*, this Court's decisions in *Teeter*, *Wellman*, *Smith*, *Bowman*, and *Atkinson* (both) and other states, *supra*.

Respondent quotes from *State v. Lachterman*, 812 S.W.2d 759, 766 (Mo.App., E.D. 1991) for the following: "the increasingly liberal attitude toward the admission of evidence regarding the sexual conduct of defendants charged with sexual abuse of children" (Resp.Br.27) authorized "depraved sexual instinct" evidence. In *Lachterman*, the Eastern District recognized a "depraved sexual instinct" rule for child sexual abuse cases. *Id.* at 766-69. In the same paragraph respondent quoted from *Lachterman* (relating to "liberal" admission policy prior sexual misconduct), the Eastern District noted this Court had held to the contrary in both *Atkinson* cases. *Id.* at 766. Later, in contravention of its constitutional obligation to follow this Court's precedent, the *Lachterman* Court stated: "we are today accepting the identical argument expressly rejected by the Supreme Court in the Atkinson cases forty-five years ago." *Id.* at 768. In creating a "depraved sexual instinct" rule for child sexual abuse cases, the *Lachterman* Court acknowledged what it was authorizing was "propensity" evidence. *Lachterman*, 812 S.W.2d at 768.

In *State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993), this Court adhered to its longstanding prohibition, going back and starting in at least the early 1900s, against admitting evidence of a defendant's prior sexual misconduct for the sole purpose of showing the defendant's propensity/character to commit the sexual act for which he was on trial. *See*, *Teeter*, *Wellman*, *Smith*, *Bowman*, and *Atkinson* (both) *supra*. In adhering to the prohibition against propensity evidence in *Bernard*, this Court expressly overruled *Lachterman* and included a discussion of what the 1956 *Atkinson* case held. *Bernard*, 849 S.W.2d at 14-16.

**Federal Juries Were Instructed Propensity Could Not Be Considered For Its Constitiutionally Forbidden Purpose**

The Federal Circuit cases respondent relies on for their treatment of F.R.E. 413-14 have no value in deciding the constitutionality of Mo. Const. Art. I §18(c) because the evidence in those cases was not allowed to be considered for its historically improper purpose to show those defendants acted in accordance with their character/propensity.

In *Schaffer*, the jury was instructed both when the prior sexual misconduct evidence was introduced, and immediately before deliberations commenced, that the evidence of the other sexual offenses were not sufficient on their own to convict Schaffer of the offenses he was on trial for. *Schaffer*, 851 F.3d at 183-84.

In *Lemay*, the jury was instructed the evidence of prior sexual misconduct could only be considered for the "limited purpose" as "it may bear on the credibility

of witnesses." *Lemay*, 260 F.3d at 1023-24. The jury was instructed the prior sexual misconduct was not evidence of guilt "per se." *Id.* at 1023-24. When both parties rested, the jury was instructed Lemay was on trial for the acts charged and not for the prior acts of sexual misconduct. *Id.* at 1023-24.

In *U.S. v. Mound*, 149 F.3d 799, 801 (8th Cir. 1998), the propensity evidence challenge was summarily rejected by merely citing to *U.S. v. Enjady*, 134 F.3d 1427 (10th Cir. 1998). In *Mound*, the jury was instructed the defendant had a 1988 prior conviction for sexual abuse of a minor, but that did not mean he was guilty of the 1993-1997 charges of aggravated sexual abuse involving a different victim for which he was on trial. *Id.* at 802.

In *U.S. v. McHorse*, 179 F.3d 889, 896-97 (10th Cir. 1999), the Court rejected the propensity constitutional challenge there citing to its decision in *U.S. v. Castillo*,140 F.3d 874 (10th Cir. 1998). *McHorse* is significant because the jury was instructed on multiple occasions the evidence of prior sexual offenses by themselves as propensity were insufficient to prove the defendant committed the charged offenses. *McHorse*, 179 F.3d at 896-97, 903.

That the federal juries were being so instructed demonstrates that in addressing the constitutionality of F.R.E. 413-14 those courts were never called upon to decide the use of propensity evidence for its improper purpose that those defendants should be convicted of child sex offenses based on prior bad acts used to prove those defendants in the charged situations acted in accordance with their

propensity/character because the juries were **expressly instructed they could not consider the evidence for its constitutionally improper purposes.** The evidence as used in those federal cases was reviewed from the perspective only that it was adduced in a framework that mirrors what this Court authorized in *Bernard* as "a signature modus operandi/corroboration exception." *See, Bernard* exception discussion, *infra*. Thus, the result in the Federal cases should be disregarded entirely in deciding the constitutionality of Mo. Const. Art. I §18(c) because they were not deciding the use of propensity/character to show the defendants had acted in accordance with their propensity/character.

Respondent asserts Travis' arguments based on *Old Chief v. U.S.*, 519 U.S. 172 (1997) should be rejected because the Federal Circuits considered and rejected its application(Resp.Br.25 n.4). The Federal cases, however, either have no or only passing references to *Old Chief* because they were not considering propensity/character evidence offered for its improper purpose in light how the juries were instructed. *See, Schaeffer*, 851 F.3d at 179 n.65; *Lemay*, 260 F.3d at 1025, 1033; *U.S. v. Enjady*, 134 F.3d 1427 (10th Cir. 1998); *U.S. v. Mound*, 149 F.3d 799 (1998).

**Travis Was Prejudiced And Due Process Violated**

In voir dire, the venire heard from the prosecutor that the jurors could consider Travis' prior sexual offense for its propensity purpose(Tr.428-35,452). When defense counsel asked the venire who was prejudiced against sexual offenders about 80% of the venire raised their hands(Tr.464). This all preceded Venireperson 81's statements

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

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

The state's initial closing argument began:

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

(Tr.949-50).

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

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

(Tr.965-66).

From beginning to end the jury was told it could consider Travis' prior conviction for the improper propensity/character reasons prohibited by this Court in *Teeter*, *Wellman*, *Smith*, *Bowman*, and *Atkinson* (both). The prosecutor's argument here violated this Court's express directive in *Wellman*: "The prosecutor should never be allowed to appeal to the jury to convict the defendant because he has committed some other crime not in any way connected with the one for which he is being tried, or because his reputation is bad." *Wellman*, 161 S.W. at 800. Moreover, Juror 81 best demonstrates why the improper use of propensity/character evidence resulted in due process fundamental unfairness in the use of evidence, whether true or false here. *See*, *Culombe* and *Lisenba*, *supra*.

**MAPA's *Prince* Amicus Assertions**

MAPA's Amicus in *State v. Prince*, SC96524 states Mo. Const. Art. I §18(c) was necessitated because "Missouri was the only state that had a strict ban on the introduction of propensity evidence for child sex abuse cases"(Amicus at 6). Amicus footnotes its assertion with references to the other 49 states(Amicus at 6 n.2). Amicus

continues "Missouri's voters found this distinction to be woefully inadequate" and was why voters approved Mo. Const. Art. I §18(c)(Amicus at 6).

F.R.E. 404(a)(1) prohibits character or character trait evidence "to prove that on a particular occasion the person acted in accordance with the character or trait." (*See*, Appendices Orig.Br. A-8 and Repl.Br. at A-1 - A-2). Thus, on its face F.R.E. 404(a)(1) prohibits propensity evidence like what is sanctioned in Mo. Const. Art. I §18(c). F.R.E. 404(b)(2), however, does allow evidence of prior bad act evidence to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

In *Bernard*, this Court noted that evidence of other misconduct is admissible when it "tends to establish: (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." *Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993) (quoting *State v. Sladek*, 835 S.W.2d 308, 311 (Mo. banc 1992). Thus, under *Bernard*, the same F.R.E. 404(b)(2) exception to other crime evidence is operative in all cases, including child sex cases.

In *Bernard* this Court adopted "a signature modus operandi/corroboration exception" to the rule prohibiting evidence of prior bad acts and applicable to child sex offenses. *Bernard*, 849S.W.2d at 17-20. The *Bernard* victim testified about many acts the defendant committed, including soliciting him to take off his clothes

and run around a car. *Id.* at 12. The four propensity witnesses testified about many acts the defendant committed against them which included having them run naked around a car and performing acts naked with a car backdrop. *Id.* at 12. This Court found that on retrial the evidence of Bernard's conduct involving a preference for naked boys in motion on or around a car was a "signature" of Bernard's involvement in the charged offenses, and therefore, admissible. *Id.* at 19. Bernard's conduct as to the naked car associated activity constituted a distinctive "earmark" so as to corroborate the victim in the case charged. *Id.* at 19.

Many of the state Rules amicus referenced are numbered as "404s" and track either verbatim or substantially F.R.E. 404. Those state Rules contain the same F.R.E 404(a)(1) prohibition against propensity evidence ("to prove that on a particular occasion the person acted in accordance with the character or trait"), while also authorizing as F.R.E. 404(b)(2) does prior bad act evidence for motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In tracking F.R.E. 404, those rules or statutes do not go on to create a propensity/character exception for child sex cases.

It is impossible to address in detail all 49 states' rules/statutes amicus referenced because overwhelmingly those are unremarkable - simply restating F.R.E. 404(a)(1) and F.R.E. 404(b)(2) with nothing more. This brief will address, however, only those states which have special provisions going beyond F.R.E. 404 as they are relevant, specifically relating to child sex cases and propensity.

Florida St. §90.404, modeling F.R.E. 404, actually expressly provides in §90.404(2) that other crimes evidence is "**inadmissible** when the evidence is relevant **solely to prove** bad character or **propensity**." (Emphasis added).

Nevada R.S. §48.045 tracks F.R.E. 404 and merely declares in §48.045(3) that there is no *per se* prohibition in all types of sexual offense prosecutions, not just child sex offense ones, of evidence the defendant committed another sexual offense.

Arizona Rule 404(c)(1)(B) creates an exception for sexual misconduct cases for evidence of "a character trait giving rise to an aberrant sexual propensity to commit the crime charged." The Arizona Rule Comments direct that where sexual propensity evidence is admitted the court must instruct the jury admission of such evidence does not lessen the state's burden to prove guilt beyond a reasonable doubt and the jury "may not convict the defendant simply because it finds that he committed the other act or had a character trait that predisposed him to commit the crime charged." Connecticut has a rule, like Arizona, which authorizes evidence of "a propensity to engage in aberrant and compulsive sexual misconduct" where also accompanied by a cautionary instruction. *See*, Connecticut Code of Evidence §4-5. Arizona and Connecticut simply reflect a codification of this Court's *Bernard* "signature modus operandi/corroboration exception," *supra*, while also requiring instructions that prohibit the constitutionally impermissible use of propensity/character evidence.

Utah Rule of Evidence 404 tracks other Rule 404s. Utah is the **only state,** however, that has adopted anything approaching what amicus claims about the other 48 states. Utah Rule 404(c) authorizes in child molestation cases evidence the defendant committed other acts of child molestation to prove propensity. The Committee Notes direct that the court may provide a limiting instruction upon request of a party.

In *State v. Verde*, 296 P.3d 673, 676 (Utah 2012), the defendant was charged with sexually molesting a 12 year old boy. At trial, the state called two males to testify that when they were 18 years old Verde engaged in sexual misconduct with them. *Id.* at 676. The state relied on Rule 404(c)'s authorization of propensity evidence as authority for why the other crimes evidence was admissible. *Id.* at 683. The *Verde* Court rejected that contention because the evidence there violated Rule 404(b) as it constituted "mere propensity to act in conformity with bad character." *Id.* at 681.[3] Verde's conviction was reversed because of the improper use of the propensity/character evidence. *Id.* at 681, 688. Thus, even Utah's express rule does not authorize the admission of propensity for the purposes of showing the defendant acted in conformity with his propensity/character as to the charged offense.

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[3] In *State v. Thornton*, 391 P.3d 1016, 1024-26 (Utah 2017), the Utah Supreme Court concluded the "scrupulous examination," standard for reviewing evidence admitted under Rule 404(b), applied in *Verde*, was confusing and instead should be whether the trial judge erred in admitting the evidence.

**Limiting Respondent's Manner of Proof And Recidivism**

Grounds urged for allowing propensity/character evidence in child sex cases are such evidence advances proving respondent's case against sex offenders and as a class sex offenders are disproportionately recidivists(Amicus at 11-13). It is urged respondent's case is advanced by propensity/character evidence under Mo. Const. Art. I §18(c) by adding credibility to child victims' testimony through "corroboration." *Lemay*, 260 F.3d at 1028 (relying on statements of Representative Molinari) and (Amicus at 11 n.9).

In the words of *Teeter*, respondent already has other "ample machinery" to prove its case against defendants charged with sexual offenses committed against children so that adding sexual propensity/character evidence to the means already available is unreasonable, unnecessary, and violates due process. That other "machinery" is personified by particularized statutory and evidentiary procedures particular to child sex cases.

Under §491.075, child victim out-of-court statements are admissible as substantive evidence for the truth of the matter asserted. *See, State v. Wright*, 751 S.W.2d 48 (Mo. banc 1988). Under §491.060.2, child victims under 10 years old are deemed competent witnesses and are allowed to testify "without qualification." *See, Wright*, 751 S.W.2d at 53. Section 491.710 mandates special docketing for cases involving child witnesses. Section 491.725 mandates the trial court take specified actions to ensure "the comfort" of child witnesses and "to prevent intimidation or

harassment." Section 492.304 provides for admitting visual and aural recorded statements of child victims. Section 545.950 prohibits copying and distribution of aural and visual recordings or photographs of child victims. Section 556.037 creates a 30 year statute of limitation that does not commence running until a child turns 18 for certain child sexual offenses and for other offenses provides there is no statute of limitations.

In child sex abuse cases, physician experts are allowed to testify that based on a review of the child's records the child was sexually abused. *State v. Hendrix*, 883 S.W.2d 935, 940 (Mo.App., W.D. 1994). Child Advocacy Center experts (CAC) are allowed to testify about the multiple phases a sexually abused child goes through in order to demonstrate the veracity and credibility of the child's reporting and to account for inconsistencies, including accusation recantation. *State v. Baker*, 422 S.W.3d 508, 510-15 (Mo.App., E.D. 2014). Expert testimony is allowed that a child demonstrates age-appropriate sexual knowledge or awareness and that a child's behaviors are consistent with a stressful sexual experience. *Id.* at 514-15.

This Court in *Bernard* recognized "a signature modus operandi/corroboration exception" because it was acutely aware child sex cases pose unique matters of proof as the only eyewitnesses are the defendant and victim, which produces a credibility contest. *Bernard*, 849 S.W.2d at 17. Thus, this Court in *Bernard* accounted for the particularized challenges respondent has to address in child sex cases.

What all this statutory and caselaw already in place has done is address the unique characteristics particular to protecting child sex abuse victims on a case-by-case basis through accommodating the needs of youthful witnesses while affording explanations for the dynamics that can impact youthful testimony. There simply is no need to inject propensity/character evidence that a defendant acted in accordance with his propensity/character, which violates due process.

In 2003, Attorney General Ashcroft's Department of Justice published *Recidivism of Sex Offenders Released from Prison in 1994*. *See*, Langan, Schmitt, and Durose *Recidivism of Sex Offenders Released from Prison in 1994* available at bjs.gov/content/pub/pdf/rsorp94.pdf (hereinafter the DOJ Sex Offender Recidivism Study).[4] The DOJ Sex Offender Recidivism Study found 5.3% of convicted sex offenders were rearrested for a new sex crime within three years of release from prison. *See*, DOJ Sex Offender Recidivism Study at page 34 and as discussed in Lave and Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look At The Admission Of Prior Sex Crimes*, 81 U.Cin. L. Rev. 795, 816-18 (2013). The DOJ Sex Offender Recidivism Study made findings as to specific types of sex offenders and the re-offending rate for those convicted of child molestation was 5.1%. *See*, DOJ Sex Offender Recidivism Study at page 24 and as discussed in *Empirical Fallacies*, 81 U.Cin. L. Rev. at 816-18.

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[4] The introductory lettering preceding web addresses is removed throughout to prevent hyperlinking.

In 2002, the Department of Justice published a Special Report, authored by Langan and Levin, *Recidivism of Prisoners Released in 1994* available at bjs.gov/content/pub/pdf/rpr94.pdf (hereinafter the DOJ Recidivism of Prisoners Report). The Recidivism of Prisoners Report found 13.4% of robbers were rearrested for robbery; 22% of assailants were rearrested for assault; 23.4% of burglars were rearrested for burglary; 33.9% of thieves were rearrested for larceny or theft; 11.5% of car thieves were rearrested for car theft; and 41.2% of drug offenders were rearrested for a drug crime. *See*, Recidivism of Prisoners Report at 9 and as discussed in *Empirical Fallacies,* 81 U.Cin. L. Rev. at 816-18. Among all released offenders who reoffended by committing the same offense for which they had been incarcerated only those with homicide convictions (1.2%) had a lower recidivism rate than individuals convicted of child molestation. *See*, Recidivism of Prisoners Report at 9 and as discussed in *Empirical Fallacies,* 81 U.Cin. L. Rev. at 816-18. Thus, DOJ's own data showed that sex offenders are less likely than non-sex offenders (except homicide offenders) to be rearrested for committing the same offense that resulted in their reason for having been incarcerated. *Empirical Fallacies,* 81 U.Cin. L. Rev. at 816-18.

"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." *State v. Shilkett*, 204 S.W.2d 920, 922-23 (Mo. 1947). This Court would not sanction in

cases charging a defendant with robbery, or assault, or burglary, or stealing, or car theft or a drug offense evidence that the defendant had committed the same offense as presently charged to prove that for the present charge the defendant had acted in accordance with his propensity/character. *See, Shilkett. See, also, Old Chief v. U.S.*, 519 U.S. 172 (1997). Moreover, this Court, sensitive to the particular difficulties of proof in child sex cases, addressed those considerations recognizing the "signature modus operandi/corroboration exception." *See*, *Bernard*.

Venireperson 81's statements, *supra*, reflect a mindset of equating past conduct as proof of commission of the charged child sex offense. The DOJ's data refutes the legitimacy of such a mindset in child sex cases and underscores the prejudice to Travis.

Chief Justice Robertson concurred separately in *Bernard* cautioning against weakening the prohibition against propensity/character evidence in child sex cases observing:

> Child abuse and sexual molestation are crimes that deserve society's deepest outrage and most stern punishments. Because of the outrage we justifiably feel when confronted with these crimes, there is a grave danger that we will allow them to alter our commitment to basic evidentiary concepts designed to guarantee due process. Cases like this one appeal to "the feelings and distort [ ] the judgment. These immediate interests exercise a kind of hydraulic pressure ... before which even well settled principles of law will

> bend." *Northern Securities Co. v. United States*, 193 U.S. 197, 400–01, 24 S.Ct. 436, 487, 48 L.Ed. 679 (1904) (Holmes, J., dissenting). Regretfully, the hydraulic pressure of outrage we feel when a person exercises his position of authority to abuse children sexually has resulted in a rule that places a defendant's right to a fair trial in jeopardy.

*Bernard*, 849 S.W.2d at 21 (Robertson, C.J. concurring). Mo. Const. Art. I §18(c) personifies the type of "hydraulic pressure" Chief Justice Robertson cautioned against and why this Court should find it violates due process.

The reason defendants are entitled to lesser included offense instructions for nested offenses is to hold otherwise would "undermin[e] the **fundamental** values embodied in the presumption of innocence and the right to a jury trial." *Jackson*, 433 S.W.3d 390, 402 (Mo. banc 2014) (emphasis added).

In *State v. Reese*, 481 S.W.2d 497, 499 (Mo. banc 1972), this Court observed "any and all defendants, regardless of guilt or innocence, are guaranteed a jury trial and are entitled to the benefit of the presumption of innocence." This Court continued that the jury trial right and the presumption of innocence

> are among the **most primal and elemental** of any we have. 'The right to have a trial by jury is a **fundamental right** in our democratic system, and is recognized as such in the Magna Carta, the Declaration of Independence, the Federal Constitution, and the constitutions of the various states', [citations omitted].

*Reese*,481 S.W.2d at 499 (emphasis added). This Court noted the presumption of innocence '"is no mere procedural presumption. It is **substantive, basic**; there is no exception. We give great voice to its guaranty . . . ."' *Reese*, 481 S.W.2d at 499 (quoting *State v. Barton*, 236 S.W.2d 596, 602 (Mo. banc 1951)) (emphasis added). Mo. Const. Art. I §18(c) violates the fundamental, primal, basic, and elemental values of the presumption of innocence and right to a jury trial and denies due process. *See*, *Jackson* and *Reese*.

**This Court's Constitutional Authority And Responsibility**

**To Find Mo. Const. Art. I §18(c) Violates Due Process**

Respondent and amicus assert because Mo. Const. Art. I §18(c) was enacted through a general election ballot vote this Court should defer to the voters and not find it violates due process(Resp.Br.28) (Amicus at 5).

This Court has noted that "[t]he quintessential power of the judiciary is the power to make *final* determinations of questions of law." *Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo. banc 1993) (citing to *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803)) (italics in *Lombardi*). *See, also*, *Missouri Coalition For The Environment v. Joint Committee On Administrative Rules*, 948 S.W.2d 125, 132 (Mo. banc 1997) ('"[i]t is emphatically the province and duty of the judicial department to say what the law is"' (quoting *Marbury v. Madison*)).

In *State ex rel. Cason v. Bond*, 495 S.W.2d 385, 393 n.3 (1973) this Court observed: "[i]nterpretation of statutes as well as constitutional provisions is a judicial

junction [sic] and may be made when raised in appropriate litigation." Under Mo. Const. Art. IV §26 the Governor is authorized to veto all or part of any money in an appropriation bill. *Id.* at 386. The issue before this Court in *Cason* was whether Art. IV §26 allowed the Governor to strike words which set out the purpose of an appropriation bill without also vetoing the money appropriated. *Id.* at 386. This Court concluded that the Governor did not have such constitutional authority. *Id.* at 386.

In *Cason*, this Court exercised its authority and responsibility to find certain acts of the Governor violated the Missouri Constitution. This Court should now exercise that same authority and responsibility to do the same as to Mo. Const. Art. I §18(c) and find that it violates the Federal and Missouri due process clauses.

**Severance of Due Process Defect**

Mo. Const. Art. I §18(c) provides:

> 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.

When this Court has been confronted with a statute where portions are constitutional and others unconstitutional, this Court has recognized it has the

authority to sever the unconstitutional portions so the remainder of the statute remains in force. *See*, *e.g.*, *Hammerschmidt v. Boone County*, 877 S.W.2d 98 104-05 (Mo. banc 1994). Severance is permissible where the unconstitutional portion of a statute is not essential to the overall efficacy of that statute and it would have been adopted without its unconstitutional portion. *Id.* at 104.

This Court should sever the due process violating part of Mo. Const. Art. I §18(c) from its balance. In particular, this Court should sever out "propensity" leaving the "corroborating" provision. The "corroborating" provision should be construed as provided for in *Bernard* to mean "signature modus operandi/corroboration." *See*, *Bernard*, *supra*. The "**may** exclude relevant evidence" where probative value outweighs the danger of unfair prejudice should be replaced with "**must** exclude." The "propensity" provision and the "may exclude" are not essential to the overall efficacy of Mo. Const. Art. I §18(c) and Mo. Const. Art. I §18(c) would have been passed with the "corroborating" provision and a requirement that where the probative value of evidence is substantially outweighed by the danger of unfair prejudice it "must" be excluded. *See*, *Hammerschmidt.* This Court should sever the portions of Mo. Const. Art. I §18(c) that violate due process.

For all the reasons discussed, this Court should reverse all of Travis' convictions for a new trial.

## CONCLUSION

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

Respectfully submitted,

/s/ William J. Swift
William J. Swift, MOBar #37769
Assistant Public Defender
Attorney for Appellant
Woodrail Centre
1000 W. Nifong
Building 7, Suite 100
Columbia, Missouri 65203
(573) 777-9977
FAX: (573) 777-9974
william.swift@mspd.mo.gov

## CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,709 words, which does not exceed twenty-five percent of the 31,000 words (7,750) allowed for an appellant's reply brief.

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

A true and correct copy of the attached reply brief has been served electronically using the Missouri Supreme Court's electronic filing system this 14th day of September, 2017, on Assistant Attorney General Shaun Mackelprang at shaun.mackelprang@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift
William J. Swift