**No. SC96524**

# In The Supreme Court of Missouri

**STATE OF MISSOURI,**

*Respondent*,

**vs.**

**JORDAN L. PRINCE,**

*Appellant*.

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

## APPELLANT'S SUBSTITUTE REPLY BRIEF

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## ISSUE PRESENTED:

Article I, §18(c), of the Missouri Constitution gives a trial court discretion to admit "relevant evidence of prior criminal acts" in prosecutions for crimes of a sexual nature involving victims less than 18-years-old, for the purpose of demonstrating the defendant's propensity to commit the charged crime.

In this case, Prince was charged with the first-degree murder, abuse of a child, and forcible sodomy of a four-month-old baby for events occurring in December, 2012, when Prince was 24-years-old. The primary issue presented in this case is:

Whether the prosecution should have been allowed to present testimony and exhibits revealing to the jury that almost 9 years before the charged offenses, Prince had a juvenile adjudication for lewd and lascivious conduct, involving the "manual/genital contact" of a six-year-old child when Prince was 15-years-old?

## REPLY ARGUMENT

**(Addresses Respondent's Argument I)**

**The prosecution should not have been allowed to present propensity evidence concerning Prince's juvenile adjudication for lewd and lascivious conduct because:**

**1) It was not logically or legally relevant since the prior adjudication had occurred almost nine years before the charged offenses when he was a juvenile and it involved a dissimilar act under dissimilar circumstances (manual/genital contact to his cousin) than the charged crimes of first-degree murder, abuse of a child, and forcible sodomy of the four-month-old baby of his girlfriend;**

**2) The juvenile record concerning that adjudication was inadmissible under § 211.271, because all evidence, reports, and records of the juvenile court are not "lawful or proper evidence;" and,**

**3) It was a delinquent act committed by a juvenile and adjudicated in juvenile court, and thus did not involve a criminal act.**

The Missouri Constitution now provides that in prosecutions for sexual crimes involving a victim less than 18 years of age, "relevant evidence of prior criminal acts" is admissible for the purpose of corroborating the victim's

testimony or demonstrating the defendant's propensity to commit the crime with which he is presently charged.[1] Article I, §18(c), of the Missouri Constitution.

The trial court, however, may exclude this evidence if the probative value of it is substantially outweighed by the danger of unfair prejudice. *Id.* Article I, §18(c) provides the sole exception to the rule in Missouri prohibiting the admission of propensity evidence.

At issue here is whether the prosecution should have been allowed to present testimony and exhibits revealing to the jury that almost 9 years before the charged offenses (first-degree murder, child abuse, forcible sodomy), involving a four-month-old baby, Prince received a juvenile adjudication for lewd and lascivious conduct, involving "manual/genital contact" of a six-year-old child when Prince was 15-years-old.

In Prince's substitute brief filed in this Court, he argued that the prosecution should not have been allowed to present evidence concerning Prince's juvenile adjudication for lewd and lascivious conduct because: 1) it was not logically relevant; 2) it was not lawful or proper evidence under § 211.271; 3) it was a delinquent act committed by a juvenile, and thus did not involve a criminal

[1] A "propensity" is defined as "a natural inclination: innate or inherent tendency." *State ex rel. Hof v. Cloyd*, 394 S.W.2d 408, 411 (Mo. banc 1965) (citation omitted). Because the victim died in this case, corroboration is not an issue.

act; and, 4) its probative value was substantially outweighed by the danger of unfair prejudice.

***The juvenile adjudication was not logically or legally relevant***

Evidence of other crimes, bad acts, or misconduct must be both logically and legally relevant. *State v. Barriner*, 34 S.W.3d 139, 144 (Mo. banc 2000). Evidence is logically relevant "if it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial." *Id*. "Evidence of prior uncharged misconduct generally has a legitimate tendency to prove the specific crime charged when it tends to establish motive, intent, the absence of mistake or accident, a common scheme or plan, or the identity of the person charged with the commission of the crime on trial." *Id.* at 145; *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993).

For evidence to be considered legally relevant, its prejudicial effect must be outweighed by its probative value. *Barriner*, 34 S.W.3d 144-45. Article I, §18(c) requires that the evidence be "relevant evidence" and that the trial court weigh the probative value of that evidence against the danger of unfair prejudice.

Respondent argues that Prince's juvenile adjudication was both logically and legally relevant because that offense would constitute the crime of sodomy in Missouri if committed by an adult, and Prince was charged with sodomy in this

case,[2] and both incidents involved extremely young females (4-month-old; 6-years-old) who were either a relative (niece) or a person he deemed to be a relative (girlfriend's daughter) (Respondent's Brief at 35-36).

Respondent also argues that it does not matter that the present offense involved force whereas there is no evidence of force in the juvenile matter, that it does not matter that they each involved different sexual acts, and that it does not matter that the length of time between the two sexual acts was almost 9 years. Respondent argument is that no matter how dissimilar the acts are, and no matter how much time between the charged and the uncharged sexual acts, the evidence would be admissible under the Missouri Constitution. In essence, Respondent's argument is that evidence about *any* prior sexual criminal act committed by a defendant, *no matter how remote, no matter how dissimilar*, will *always* be admissible as propensity evidence in prosecutions for crimes of a sexual nature involving a victim less than 18 years of age.

[2] Because "deviate sexual intercourse" has such an expansive definition, it covers any sex act: "any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the penis, female genitalia, or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim." § 566.010(3).

Respondent's overly broad interpretation essentially reads out that that the evidence must be "relevant" and that such evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, two requirements of the Missouri Constitution and the Due Process Clause.

Although remoteness normally goes to the weight of the evidence and not the admissibility, this Court has noted that where the remoteness is so great that it erodes the probative value of the evidence, the prejudicial effect outweighs its probative value and the evidence is not admissible. *State v. Shaw*, 847 S.W.2d 768, 778 (Mo. banc 1993). Such determinations must proceed on a case-by-case basis balancing both factors of time and similarity. *Id*.

The prior act occurred on January 10, 2004, almost nine years before the charged offenses (December 3, 2012). Under the circumstances of this case, this was too remote to be relevant, logically or legally. E.g., *State v. Chiles*, 847 S.W.2d 807, 808-811 (Mo. App. W.D. 1992), holding that where the defendant was charged with sexual abuse in the first degree of an 11-year-old boy, and the state was allowed to introduce evidence concerning acts leading up to the defendant's prior conviction for sexual abuse of a 9-year-old boy that had occurred approximately 7 years before the crime being tried, it was too remote to be admissible; *State v. Stegall*, 353 S.W.2d 656, 658 (Mo. 1962) (evidence showing that the defendant obtained possession of property by means of false pretenses more than 14 months after the alleged commission of the charged crime of obtaining money by false pretenses was too remote to be admissible); *State v.*

*Maddox*, 657 S.W.2d 719, 721 (Mo. App. E.D. 1983) (evidence concerning defendant's use of a fictitious name two and a half months after the charged burglary was too remote in time to be relevant to the crime for which the defendant was on trial).

Remoteness is even a greater factor in this case because Prince was a juvenile when the prior sexual act was committed, and acts committed by a juvenile are less probative than those committed by an adult. As Justice Felix Frankfurter wrote, "Legal theories and their phrasing in other cases readily lead to fallacious reasoning i[f] uncritically transferred to determination of a state's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

The United States Supreme Court has strictly adhered to the notion that the law should categorically treat juveniles different than adults. E.g., *Graham v. Florida*, 560 U.S. 48 (2010) and *Roper v. Simmons*, 543 U.S. 551 (2005). Juveniles are categorically less culpable and more capable of rehabilitation and redemption than adults. *Roper*, 543 U.S. at 570-71. "[F]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570).

> For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities

develop entrenched patterns of problem behavior that persist into adulthood.

Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 American Psychologist 1009, 1014 (2003).

"Because of the considerable changes in character that most individuals experience between childhood and adulthood, behavior that occurred when the defendant was a minor is much less probative than behavior that occurred while the defendant was an adult." *State v. Barreau,* 651 N.W.2d 12, 23 (Wis. App. 2002) (citations omitted)).[3]

"When projecting on a child the mens rea of an adult or extrapolating an adult mens rea from the acts of a child, [] judges must take care to meaningfully analyze the different phases of the accused's development rather than treat those phases as being unaffected by time, experience, and maturity." *U.S. v. Berry*, 61 M.J. 91, 97 (2005) ("Consequently the passage of eight years in this case constitutes a notable intervening circumstance between the two events at issue

[3] The studies cited by the *Amici Curiae* brief in support of Prince illustrate that evidence that a person committed a sexual offense as a juvenile is an empirically unreliable indicator of that person's propensity to commit a sexual offense as an adult. *Brief of American Civil Liberties Union of Missouri and the Roderick and Solange MacArthur Justice Center at St. Louis*, at pages 19-21, 25-31.

when coupled with Berry's growth from childhood to adulthood during that time). Also see, *State v. Fisher*, 783 N.W.2d 664, 673-74 (S.D. 2010) (prior bad act evidence that the defendant when he was a juvenile 14 years earlier had pleaded guilty to sexual contact with his 13-year-old stepsister was too remote in time and too dissimilar to be deemed relevant in his trial for multiple rape and sexual contact offenses against his daughter); *Denmark v. State*, 927 So.2d 1079 (Fla. App. 2006) (defendant's juvenile misconduct occurring about 20 years before the charged offense had no probative value).

Further, factually the two cases were too dissimilar to be either logically or legally relevant. See, *Trowbridge v. State*, 647 A.2d 1076 (Del. 1994) (the similarity between the two incidents necessary to prove a permissible purpose is inversely proportional to the time span between the two crimes; thus, a 12-year-old juvenile adjudication for starting a fire was too remote in time).

Here, the prior adjudication involved a 15-year-old juvenile (Prince) having "manual/genital contact" with his 6-year-old cousin. But the charged offenses involved Prince as an adult in his mid-twenties, who was alleged to have forcibly sodomized a 4-month-old baby by inserting something forcibly into her anus and rectum, causing serious physical injury, and then strangling her. The combination of remoteness and dissimilarity made evidence of the prior juvenile adjudication not logically or legally relevant. See, *Shaw*, 847 S.W.2d at 778, noting that determinations of whether the remoteness is so great that it erodes the probative

value involves balancing both factors of time and similarity. Prince's prior juvenile adjudication was not admissible.

***The juvenile adjudication was not a "criminal act"***

In Prince's substitute brief, he argued that Article I, §18(c) requires that the prior "relevant evidence" be of a "criminal act," and that an act committed by a juvenile is a "delinquent act" not a "criminal act." *See*, *Griffith v. State*, 791 N.E.2d 235, 239 n. 8 (Ind. App. 2013) ("So long as the child remains before a juvenile court, the child has committed a delinquent act, not a criminal act."). Thus, the use of the phrase "criminal act" (i.e., a crime) in Article I, §18(c) should be held to require that the prior act be one that was committed when the defendant was no longer subject to juvenile court jurisdiction because a juvenile does not commit a "crime." Also see, § 211.271.1: "… nor shall the child …be deemed a criminal by reason of the adjudication."

Respondent argues that because the Idaho statute for lewd and lascivious conduct with a minor covers "[a]ny person" who commits that offense, and Prince was "[a]ny person" when he committed the prior act that resulted in his juvenile adjudication, then it was a prior criminal act. (Respondent's Brief at 32).

The use of "any person" does not mean that a juvenile is included within that statute. This is evidenced by the fact that the same statute also indicates that "any person" "shall be imprisoned in the state prison for a term of not more than life," Idaho Code Ann. § 18-1508. Clearly a juvenile could not receive such a

sentence when they are before the juvenile court, which Prince was when he received that juvenile adjudication.

Respondent also places great emphasis on the use of "charged or uncharged" in Article I, §18(c) (Respondent's Brief at 31-32). But just because a criminal act can be a charged or uncharged crime under Article I, §18(c), does not mean that it necessarily covers a charged or uncharged delinquent act committed by a juvenile.

***The juvenile adjudication was not "lawful or proper evidence" under §211.271***

Section 211.271.3 provides that "all admissions, confessions, and statements by the child to the juvenile officer and juvenile court personnel and all evidence given in cases under this chapter, *as well as all reports and records of the juvenile court, are not lawful or proper evidence against the child and shall not be used for any purpose whatsoever in any proceeding*, civil or criminal, other than proceedings under this chapter." (Emphasis added).

In Prince's substitute brief, he asserted that Prince's juvenile records were not admissible because juvenile records are "not lawful or proper evidence" under § 211.271.3, and therefore the trial court erred in admitting those records as propensity evidence during his trial. E.g., *State v. Arbeiter*, 449 S.W.2d 627, 633 (Mo. 1970) (statements made to juvenile officer and presented to the juvenile court during a certification proceeding were not lawful or proper evidence against the juvenile in a subsequent criminal trial).

Respondent first contends that this Court should not review this claim because it was not raised in Prince's brief filed in the court of appeals, Rule 83.08(b). (Respondent's Brief at 25-26).

The Eastern District's opinion noted that the issue of the applicability of § 211.271.3 was argued before the trial court before trial, that Prince further raised the issue in his motion for new trial, and "[a]lthough not fully articulated in his brief, we address the merits because the issue concerns an important question of law," and the court did so under the *de novo* standard of review as part of the court's "independent duty to ascertain the applicable law and apply it accordingly." *State v. Prince*, No. ED102938, slip op. at 9, n.4.

The Eastern District's opinion then noted that it would have reversed Prince's judgment and remanded for a new trial because the juvenile records were not admissible evidence under Article I, §18(c) since juvenile records are "not lawful or proper evidence" under § 211.271.3, but instead that court transferred the case to this Court to determine the admissibility of a defendant's juvenile records under Art. I, §18(c) because it is a question of first impression and general importance. *Id*. slip op. at 9, 20.

Under these circumstances, it was appropriate for Prince to fully articulate and brief this issue in his substitute brief, since the Eastern District transferred the case, rather than reversing for a new trial, so that this Court could address this issue of first impression and question of general importance. A substitute brief should fully address the issue transferred to this Court by the court of appeals.

But if this Court decides that Prince should not have fully briefed the issue that resulted in the transfer to this Court, he would request that this Court review under Rule 30.20. Under that rule, this Court can consider allegations of plain error whether briefed or not. *See*, *State v. Moore*, 303 S.W.3d 515, 523 (Mo. banc 2010) (reviewing a claim for plain error because the claim was not raised in the brief filed in the court of appeals, although not finding plain error under the facts). This would be particularly appropriate in this case since the issue was fully preserved in the trial court and the Eastern District believed it was at least briefed enough for it to review the issue under a *de novo* standard of review.[4]

Respondent's first substantive argument regarding § 211.271.3 is that the statute "plainly governs, and can govern, only juvenile court proceedings in Missouri 'in cases under this chapter. *Id*." (Respondent's Brief at 28).

Respondent misreads § 211.27.3. That section provides that the following are not "lawful or proper evidence against the child and shall not be used for any purpose whatsoever in any proceeding… other than proceedings under this chapter:" all admissions, confessions, and statements by the child to the juvenile officer and juvenile court personnel;" "all evidence given in cases under this chapter;" "as well as all reports and records of the juvenile court."

[4] Of course, the Eastern District was also free to review the error under Rule 30.20 whether briefed or not.

The phrase, "under this chapter," relied upon by Respondent in its argument modifies "all evidence given in cases." That phrase is then followed by, "as well as all reports and records of the juvenile court," which is not limited by the phrase "under this chapter." Thus, *any* juvenile court reports and records, even from other states, are not "lawful or proper evidence against the child." § 211.271.3. Contrary to Respondent's argument, that section does bar the use of Idaho juvenile court reports and records in a criminal case.

Further, as noted in the opinion below, juvenile records do not lose their legal status as juvenile records merely because they are from another state. *Prince*, No. ED102938, slip op. at 16-17, n. 8. Because § 211.271.3 is a procedural rule of evidence, the law of the forum governs the admissibility of evidence. *See, State v. Simon*, 680 S.W.2d 346, 353 (Mo. App. S.D. 1984) (the admissibility of a juvenile confession obtained by out-of-state authorities is controlled by the law in Missouri; thus, even though the juvenile was questioned in New York, he was entitled to be informed of his rights under former Missouri Juvenile Rule 122.05 prior to in-custody interrogation).

Respondent also erroneously relies upon Idaho Code Ann. § 20-525. Although that statute mandates that certain juvenile records "shall be open to the public," it does not make them admissible in a Missouri court, or a court in Idaho for that matter. Just because records are open to the public does not mean that they are entitled to be admitted into evidence in any court proceeding throughout these

United States, including Missouri. Those records would still be subject to the evidentiary rules in the jurisdiction where they were offered into evidence.

Respondent argues that that because § 211.271 and Article I, § 18(c) "conflict," the "Missouri Constitution obviously trumps" § 211.271 (Respondent's Brief at 30-31). But as noted in the Eastern District's opinion below, those two provisions do not conflict. *Prince*, No. ED102938, slip op. at 11-16.

Article I, § 18(c) permits "relevant evidence of prior criminal acts" to be introduced as proof of a defendant's propensity to commit the charged sexual crime. Section 211.271.3 provides that a defendant's juvenile records "are not lawful or proper evidence against the child and shall not be used for any purpose."

Thus, the two provisions can be read in harmony. Section 211.271.3 addresses whether a defendant's juvenile records are evidence, whereas the constitutional provision addresses whether certain relevant evidence is admissible for the purpose of proving a defendant's propensity to commit the charged crime. Because Article I, § 18(c) only addresses the admissibility of "relevant evidence," it does not govern the admissibility of a defendant's juvenile records, which are "not lawful or proper evidence" under § 211.271.3. In other words, evidence offered under Article I, § 18(c) still has to satisfy other evidentiary rules (set by statute, rule or case law), to be admissible at trial.

Further, Article I, § 18(c) did not repeal § 211.271.3 expressly or impliedly. That section contains the language, "[n]otwithstanding the provisions of sections

17 and 18(a) of this article to the contrary," which expressly repealed those two sections; it did not, however, say "notwithstanding *any* other provision of law," which would have indicated an intent for Article I, § 18(c) to prevail over any previously enacted laws to the extent they are inconsistent. *Earth Island Inst. V. Union Elec. Co.*, 456 S.W.3d 27, 34 (Mo. banc 2015). If the drafters of Article I, § 18(c) had intended to repeal § 211.271 or any other existing law, they could have done so by saying "notwithstanding any other provision of law" or expressly identifying the laws they intended to repeal in the language of that constitutional provision. *Id.*

Respondent also argues that Prince's statements to the police as an adult when he was questioned in this case are not governed by § 211.271 (Respondent's Brief at 30). That is true. But the portions of those statements referring to the Idaho misconduct should not have been admitted into evidence for the other reasons set out in this reply brief and in Points I and II of Prince's substitute brief.

***Prince was prejudiced***

Respondent argues that even if there was error, any error was harmless beyond a reasonable doubt (Respondent's Brief at 41-42).

"Improperly admitted evidence should not be declared harmless unless it can be said harmless without question, and the record demonstrates that the jury disregarded or was not influenced by the improper evidence." *State v. Grant*, 810 S.W.2d 591, 592 (Mo. App. S.D. 1991). Here, the prosecution showed the jury two video clips of Prince discussing his prior juvenile adjudication. It also

introduced an exhibit showing the prior conviction and had a detective read about the contents of the prior juvenile petition and the Idaho statute it was based on. The jury requested all the clips from Prince's interview as well as "the paperwork for the defendant's prior crime against a child that occurred in another state" (LF 107-08). Thus, it cannot be said that the error was harmless without question, or that the record demonstrated that the jury disregarded or was not influenced by the improper evidence." *Grant*, 810 S.W.2d at 592.

Further, the evidence was not overwhelming as implied by Respondent's argument. Admittedly, the evidence pointed to Prince, his girlfriend (Jessica Howell),[5] or both as having committed the charged offenses. It was the prosecution's theory that both were involved. It was the defense theory that Howell committed the offenses (Tr. 266-68, 781). Although there was evidence to support the prosecution's theory, there was also evidence to support the defense theory.

For instance, during the morning when the Victim died, one of Prince's roommates heard a baby crying and the noise appeared to be coming from a bedroom where Howell was later seen lying in bed (Tr. 287, 289, 293-94, 310). When that roommate later told Howell that something was wrong with Victim, she just meandered into the living room (Tr. 294). When emergency personnel

[5] Howell pled guilty to felony murder and abuse of a child, receiving a 25-year prison sentence, as the result of Victim's death (Tr. 13-15).

responded to the home, Prince was performing CPR on Victim, and Howell, was instructing him on how to perform the CPR, but she was using a very calm and "normal" tone of voice, which would be an unusual reaction of the mother of a child who is dying *if* the mother had nothing to do with the death (Tr. 270-71, 278). After Victim died at the hospital, and Prince and Howell returned to Prince's home, Howell threw her purse and glasses and was screaming (Tr. 289, 301). One of Prince's roommates heard them, mostly Howell, saying that they had to "get their story straight;" Howell could have been the one doing all of the talking (Tr. 290, 301). Again, this is an unusual reaction from a mother *if* the mother had nothing to do with the death, and it portrayed her as being a person domineering Prince and being in charge. Detective Maxiner examined Howell's cellphone, and he found that less than a month after Victim's death, Howell had visited some pornography websites concerning incest (Tr. 618).

A quilt seized from the couch at Prince's home appeared to have numerous blood or bodily fluids stains on it (Tr. 566-67). But there were no seminal fluids or semen found on the quilt (Tr. 651-52, 668). A DNA examiner did not find any evidence only found evidence of semen or male DNA on the rectum/anus swab used on Victim (Tr. 642, 646, 648-50, 661-63). A DNA profile from the vaginal swab was consistent with Victim's DNA; there was no evidence of semen or male DNA on the vaginal swab (Tr. 650, 660-61, 663). There also was no evidence of semen, sperm, or seminal fluids from Victim's oral swab (Tr. 662).

All of this evidence supported the defense theory that Howell committed the crimes, and some of it was exculpatory for Prince. This evidence negates a finding beyond a reasonable doubt that the admission of testimony and exhibits regarding Prince's juvenile adjudication for lewd and lascivious conduct with a minor was harmless. Although Prince made some statements to the police that seemingly exonerated Howell, a jury could believe that Prince was merely attempting to protect her.

It cannot be said that the error was harmless without question, particularly since no one saw Prince commit the crimes, Prince never admitted to committing the crimes, some evidence was exculpatory as to whether he had committed the forcible sodomy, and Howell was in a position to commit the crimes, which she ultimately pled guilty to having committed. See *Barriner* 34 S.W.3d at 143-44, where this Court determined that improper uncharged misconduct evidence was outcome-determinative despite the fact that the defendant had confessed, police found ropes consistent with the ones used to bind the victims, police found a note in the defendant's wastebasket containing directions to the victims' house, and police found traces of blood matching one of the victim's DNA in the defendant's car, which is less evidence than in Prince's case.

***MAPA's inaccurate brief regarding other state propensity rules***

How other states address propensity evidence is not controlling on how Missouri addresses it. But Prince must conclude with a final comment so that this Court at least has a more accurate record about the admissibility of this type of

evidence in other states. Respondent writes, "Moreover, as *amicus*, Missouri Association of Prosecuting Attorneys [MAPA] points out, every state in the Union now has a rule permitting such [propensity] evidence."(Respondent's Brief at 24, no. 2), citing *Brief of Amicus Curiae, Missouri Association of Prosecuting Attorneys* at 6 n. 2.

But the majority of the rules/statutes cited by MAPA do *not* state what MAPA, and Respondent by incorporation, asserts.[6] In fact, most of those rules and statutes specifically provide that evidence of other crimes, wrongs, or acts "***is not admissible*** to prove the character of a person in order ***to show action in conformity therewith***." E.g., Ala. R. Evid. 404 **("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."**); Ark. R. Evid. 404 (the same); D.R.E. 404 (the same); Ga. Code Ann. § 24-4-404; Haw. Rev. Stat. Ann. § 626-1, Rule 404 (the same); I.R.E. 404 (the same); Ind. R. Evid. 404 (the same, but slightly different wording); Iowa R. Civ. P. 5.404 (the same); KRE 404 (the same); La. Code Evid. Ann. Art. 404 (the same); Me. R. Evid. 404 (the same, but slightly different wording); Md. Rule 5-404 (the same, but slightly different wording); MA R. Evid. § 404 (the same, but slightly different wording); MRE 404 (the same); Minn. R. Evid. 404 (the same); M.R.E. 404 (the same, but slightly different

[6] Perhaps some of those states have other rules or statutes that do reflect what MAPA asserts, but the rules and statutes cited by MAPA as to many states do not.

wording); MT R. Rev. Rule 404 (the same); Nev. Rev. Stat. Ann. § 48.045 (the same); N.H.R. Evid. 404 (the same); NJ R. Evid. N.J.R.E. 404 (the same); N.M.R. Evid. Rule 11-404 (the same, but slightly different wording); N.C. Gen. Stat. Ann. 8C-1, 404 (the same); N.D. R. Ev. 404 (the same, but slightly different wording); Ohio Evid. R. 404 (the same); Okla. Stat. Ann. title 12 § 2404 (the same); Pa.R.E. 404 (the same, but slightly different wording); R.I. R. Evid. 404 (the same); SCRE 404 (the same); S.D. Codified Laws § 19-19-404 (the same); Tenn. R. Evid. 404 (the same, but slightly different wording); Vt. R. Evid. 404 (the same); Va. Sup. Ct. R. 2:404 (the same, but slightly different wording); ER 404 (the same); W.Va. R. Evid. 404 (the same, but slightly different wording); and, Wyo. R. Evid. 404 (the same).

Prince is entitled to a new trial. His convictions must be reversed and the cause remanded for a new trial.

## CONCLUSION

Prince is entitled to a new trial. The prosecution was allowed to present propensity evidence that Prince had a 2004 juvenile adjudication in Idaho for lewd and lascivious conduct involving a minor.

This ruling was erroneous because:

(1) The evidence was not "relevant evidence of prior criminal acts" under Art. I, § 18(c) of the Missouri Constitution, since it was not "relevant" (it was too remote and factually dissimilar); the records were not lawful or proper evidence because all evidence, reports, and records of the juvenile court are not "lawful or proper evidence" under §211.271; and it was not a "criminal act" because it was a juvenile delinquent act adjudicated in juvenile court (Point I of Appellant's Substitute brief); and,

(2) The probative value of this propensity evidence was substantially outweighed by the danger of unfair prejudice, i.e., it was not legally relevant, since it was too remote in time and involved too dissimilar circumstances (Point II of Appellant's Substitute brief).

Further, the trial court also erred in allowing the prosecution to present prejudicial, irrelevant evidence that pornography had been viewed and downloaded on his cellphone and computer, most of which had occurred a year or two before the charged offenses (Point III of Appellant's Substitute brief).

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify: The attached substitute reply brief complies with the limitations contained in Rule 84.06(b). The substitute reply brief was completed using Microsoft Word 2010, in Times New Roman size 13 point font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, the substitute reply brief contains 5,565 words, which does not exceed the 7,750 words allowed for a substitute reply brief. And, on this 21st day of September, 2017, an electronic copy of Appellant's Substitute Reply Brief was sent through the Missouri e-Filing System to Gregory L. Barnes, Assistant Attorney General, at greg.barnes@ago.mo.gov.

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