SC 91821

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

DAVID D. LIBERTY,

Appellant

Appeal from the Circuit Court of Platte County County, Missouri
6th Judicial Circuit, Division 2
The Honorable Owens Lee Hull, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

ARGUMENT

I. The post describing riding in an inner-tube does not depict sexual conduct.

Appellant relies on the argument set forth on pages 13-19 of Appellant's Substitute Brief, but also makes the following additional reply:

The State argues that the text is child pornography because it is possible to infer that Appellant derived some type of sexual satisfaction from the activity described in the text. (Respondent's Substitute Brief, 16-17). This includes the reference in the text to Appellant's touching a child's bottom as he was helping a child into a boat. (Respondent's Substitute Brief, 14, 17). The term "**sexual conduct**" is defined (in relevant part) as: physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, . . . in an act of ***apparent*** sexual stimulation or gratification." § 573.010(14) RSMo (Supp. 2006) (emphasis added). The State's argument reads the word "apparent" out of the statute. According to the State, a depiction of any contact between the genitals or buttocks of a child and adult (such as occurs when a child sits on the lap of an adult) constitutes sexual conduct if one of the participants derived some type of sexual stimulation from the contact regards of whether the contact appeared to be an act of sexual stimulation. Thus, according to the State, a photograph of a child sitting on the lap of a Santa Claus would constitute child pornography if there was some evidence that the adult playing the role of Santa Claus somehow derived sexual satisfaction from the encounter.

The State also argues that the text constitutes obscene child pornography because the purpose of posting the text was to sexually stimulate the readers of the text. (Respondent's Substitute Brief, 17-19). This argument again ignores the wording of the statutes, which requires that the text depict sexual conduct. § 573.025 RSMo (2000); § 573.010(12), RSMo (Supp. 2006). Whether someone derives sexual stimulation from publishing or viewing text that describes a non-sexual conduct is not the issue.

The State argues that its construction of the statute to criminalize the publication of material that does not depict sexual conduct but that a viewer might find sexually stimulating is supported by the decision in *State v. Oliver*, 293 S.W.3d 437, 445 (Mo. banc 2009). This Court in *Oliver* held that the conduct depicted was "an act of apparent sexual simulation," and did not appear to consider whether a viewer would find the image sexually stimulating. *Id*. To the extent that the decision can be read as supporting the State's argument, it is not consistent with the statutory provisions.

And finally, the State argues that Appellant should be punished for promoting child pornography because he published the account to an audience he knew would be sexually stimulated by it and his conduct was not, therefore, "innocent." (Respondent's Substitute Brief, 19). There is no doubt that publishing discussions of children on web site devoted to pedophilia is troubling. But Appellant was not charged with or convicted of publishing material depicting children on a web site devoted to pedophilia. He was charged with and convicted of promoting child pornography. Child pornography is limited to depictions of children engaged in or witnessing sexual conduct. No sexual conduct with a child was depicted in the text.

II. The entry of separate convictions of possession of child pornography for each allegedly obscene item consisted a violation of constitutional protections

Appellant relies on the argument set forth on pages 20-38 of Appellant's Substitute Brief, but also submits the following argument in response the arguments raised by Respondent:

A. Standard of Review/ Plain Error Review.

On pages 40-42 of its Substitute Brief, the State cites to the recent Western District decision in *State v. Shinkle*, 340 S.W.3d 327 (Mo. App. W.D. 2011), which held that a double jeopardy violation is waived if it not raised at trial and it was hypothetically possible for the State to allege and prove facts to support multiple prosecutions. As that decision is not consistent with existing law and is based on erroneous reasoning, it should not be followed.

In *Shinkle*, the defendant was found guilty of two counts of receiving stolen property. *Id*. at 330. Because there was no allegation or proof that the defendant received each item at a separate time, the defendant on appeal alleged a double jeopardy violation, which had not been raised below. *Id*. at 332-333. The court believed that the failure to raise the issue below waived it because the State had no statutory burden to prove that the two stolen items were received at different times. *Id*. at 333.

In reaching this conclusion, the court in *Shinkle* overruled *State v. Davidson*, 46 S.W.3d 68, 77 (Mo. App. W.D. 2001), which held that the State must affirmatively prove multiple violations of Section 570.080 RSMo by adducing evidence that the stolen property was received on separate and unconnected occasions. 340 S.W.3d at 333 n. 5.

According to the Western District panel in *Shinkle*, the Court's decision in *Davidson* "was premised on the view that double jeopardy violations are jurisdictional," and thus was no longer valid under *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo. banc 2009).

However, neither *Davidson* nor the decisions relied on in that decision—*State v. Elliott*, 987 S.W.2d 418, 420–21 (Mo. App. W.D.1999), and *Hagan v. State*, 836 S.W.2d 459, 461 (Mo. banc 1992)--are based on the notion that double jeopardy violations is "jurisdictional." Rather the line of decisions holding that such errors are not waived are premised on the notion that multiple convictions entered in violation of constitutional provisions constitute manifest injustice and a miscarriage of justice warranting plain error review. *See State v. Polson*, 145 S.W.3d 881, 891, 896 (Mo. App. W.D. 2004); *State v. Neher*, 213 S.W.3d 44, 48 (Mo. banc 2007); *Feldhaus v. State*, 311 S.W.3d 802, 805 (Mo. banc 2010).

The reasoning undergirding *Shinkle* is also faulty. The court in *Shinkle* failed to distinguish between a claim alleging a double jeopardy violation arising from multiple or successive prosecutions from one involving multiple punishments. Thus, the court stated that "[b]ecause double jeopardy is an affirmative defense, it is the defendant's burden to prove that double jeopardy applies." *Shinkle*, at 334. The court then reasoned that because the defendant "did not plead or raise the affirmative defense of double jeopardy in the circuit court, she therefore 'cannot fairly complain that the state should have offered more evidence against an affirmative defense [she] never raised.'" *Id*. at 334 (quoting *State v. Tipton*, 314 S.W.3d 378, 380 (Mo. App. 2010)).

The problem with this reasoning, however, is that a claim involving multiple punishments is fundamentally different from one alleging successive prosecutions. At issue in a case involving successive prosecutions is the ability of the State to proceed with the action at all. Thus, the double jeopardy claim arises when the action is initiated. Further, proof of a successive prosecution double jeopardy violation requires proof of the previous action that is extrinsic to case at issue.

With respect to a claim involving multiple punishments, "[t]he protection against multiple punishments for the same offense does not . . . prohibit the state from prosecuting multiple offenses in a single prosecution." *State v. Taylor*, 807 S.W.2d 672, 675 (Mo. App. E.D. 1991) (citing *Ohio v. Johnson*, 467 U.S. 493, 500 (1984)). The submission of multiple counts, even if arising out of a single offense, did not run afoul of double jeopardy clause. *Id.*; *State v. Bacon*, 841 S.W.2d 735, 741 (Mo. App. S.D. 1992). Thus, in contrast to a claim involving multiple prosecutions, "[t]he double jeopardy protection against multiple punishments does not arise until the time of sentencing." *Taylor*, 807 S.W.2d at 675.

Because a double jeopardy claim for the imposition of multiple punishments does not arise until sentencing, the *Shinkle* court's assertion that the claim is an affirmative defense that must be alleged and proved by the defendant prior to trial is incorrect. And even if a defendant did raise it in a timely manner at sentencing, the State would not have the opportunity to go back and submit additional evidence at that point.

For these reasons, the *Shinkle* decision should be explicitly overruled. Although the double jeopardy claim was not raised below at trial, the issue is one that can and

should be examined under plain error review "because of the substantial rights involved." *Taylor*, 807 S.W.2d at 675.

B. Analysis

Although the State sets forth a number of reasons why it believes multiple punishments should be warranted in a case such as this, the issue here is not whether multiple punishments are, or are not, a wise policy. Such a decision is vested with the legislature, which must balance competing interests, including the costs of incarceration and concerns about the proportionality of sentences. *See e.g. State v. Bruce*, 796 N.W.2d 397, 409-410 (S.D. 2011) (Severson, J., concurring) (noting these concerns under statutory schemes that permit separate punishments for each pornographic item). Thus, the issue is not what punishment the prosecutor or the Court believes should be authorized, but rather what punishment was actually authorized by the legislature.

In making that determination, the Courts is primarily limited to the language of the statutes. And if the legislature did not clearly authorize multiple punishments in clear and unambiguous language, multiple punishments should not be imposed. *State v. Good*, 851 S.W.2d 1, 4 (Mo. App. S.D. 1992). It is not the function of the Court to determine what is the most appropriate policy, or to speculate as to what the legislature might have intended.

Appellant cited the 1993 decision in *State v. Baker*, 850 S.W.2d 944, 947-948 (Mo. App. E.D. 1993), which construed a statute prohibiting the possession of "any gun, knife, weapon, or other article or item of personal property that may be used in such manner as to endanger the safety or security of" another. The court in *Baker* found that

this language was ambiguous as to the appropriate unit of prosecution and therefore a defendant could not be convicted of a separate count for each individual weapon found in his possession.

The State also argues that *Baker* should not be followed because it "conflicts, though, with the approach that the Southern District has taken in construing similar statutory language." (Respondent's Substitute Brief, 22). This argument is based on a distortion of the cases cited by the State. The *Baker* decision does not conflict with cases decided in the Southern District or with any Missouri decision.

The State begins its discussion of "the approach that the Southern District has taken," by citing *Horsey v. State*, 747 S.W.2d 748, 751-52 (Mo. App. S.D. 1988). The State, however, incorrectly cites the ruling in *Horsey*. The court in *Horsey* was not construing statutory language containing the word "any." Rather, the court was considering whether the "single larceny rule" applicable to the charge of receiving stolen items should apply to the retention of stolen property. *Id.*

Next, the State cites *State v. Foster*, 838 S.W.2d 60, 68 (Mo. App. S.D. 1992). The defendant in that case raised a double jeopardy claim to his conviction of multiple counts of promoting child pornography by taking five separate photos. *Id*. But the issue was so poorly briefed that the court could not even determine what issue the defendant was attempting to raise, deemed it abandoned and did not even consider it. *Id.* In doing so, the court expressed no opinion as to whether a double jeopardy claim might have merit. *Id*.

The decision in *Foster* adds nothing to the discussion of the issue in this case. First, the court did not really express its opinion on the subject. The statement that the facts in that case "did not necessarily prevent the prosecution of multiple counts" does not constitute an expression of the court's opinion about whether the statute permitted multiple counts. Second, the court was not looking at the specific language in the statute to determine whether the unit of prosecution was unambiguously defined. Third, the statute at issue in *Foster* did not contain the word "any[1]." Fourth, the conduct at issue in *Foster* concerned the creation of child pornography rather than the possession of child pornography. The creation of the five photographs in that case involved five discreet acts, although all five acts occurred over a relatively short period of time. This is distinct from the possession of multiple pornographic images at issue in this case, which was a single act in which Appellant was in possession of all of the items simultaneously.

Finally, the State cites the decision in *State v. Wadsworth*, 203 S.W.3d 825, 833-834 (Mo. App. S.D. 2006). At issue in *Wadsworth* were multiple convictions for attempted enticement of a child based on numerous messages sent over a number of days.

[1] The defendant in *Foster* was convicted of five counts of promoting child pornography. Under the applicable statute, "[a] person commits the crime of promoting child pornography in the first degree, 'if, knowing its content and character, [the person] photographs, films, videotapes, produces, publishes or otherwise creates child pornography, or knowingly causes another to do so.' § 573.025.1." *Foster*, 838 S.W.2d at 63-64.

The court was not looking at the statutory language to determine how it defined the appropriate unit of prosecution. *Id.* Rather, the issue was whether the defendant's actions in sending messages on different days asking the purported child to meet him at different locations and different times constituted discreet acts of attempted enticement that would support separate counts. *Id.* The court concluded that they would, finding that the defendant made numerous attempts to entice a purported child. *Id.* The decision in *Wadsworth* is not instructive on the issue here. Here, Appellant was charged with the simultaneous possession of nine images at the same location. (L.F. 76-79). The State did not allege that the images were possessed on different days or at different locations. (L.F. 76-79).

1. *Baker* is not distinguishable.

The State also argues that the present case is more similar to the issues in drug cases, as set forth *State v. Williams*, 542, S.W.2d 3, 5 (Mo. App. St.L. D. 1976) than the issues in *Baker*. (Respondent's Substitute Brief, 24-27). The court in *Williams*, 542 S.W.2d at 5 held that possession of two different types of drugs constituted separate offenses, even though both drugs were listed on the same schedule. The court came to this conclusion based on the fact that proof of each offense required proof of a distinct element. *Williams*, 542 S.W.2d at 6. As noted by the court in *Baker*, this holding in *Williams* is not controlling with respect to the issue of multiple prosecutions arising out of one's possession of a number of the same type of prohibited item. *Baker*, 850 S.W.2d at 948.

The State's argument with respect to *Williams* is premised on the notion that "[t]he bare element that the State had to prove [in a drug case] was possession of a controlled substance." (Respondent's Substitute Brief, 26). This, however, is not a correct representation of how drug cases are submitted to juries. With respect to drug cases, each distinct controlled substance is categorized and itemized on a schedule. *State v. Winters*, 525 S.W.2d 417, 422 (Mo. App. K.C. D. 1975). It is not the function of the jury in such cases to make the broad determination of whether the item possessed by the defendant was a proscribed substance. *Winters*, 525 S.W.2d at 422. Rather it is the function of the jury to decide whether or not the substance defendant was charged with possessing was the substance the State alleged it was. *Id*.; *see also* M.A.I. Cr. 3d 325.02 (requiring the State to identify that the defendant was in possession of a specific type of drug). The question of whether the substance was a controlled substance is question of law for the court. *Winters*, 525 S.W.2d at 422. Because each type of substance is individually itemized and must be identified and submitted to the jury, the courts in drug cases have concluded that each different type of drug constitutes a separate unit of prosecution, but individually packaged units of the same drug are not. *See State v. Polson*, 145 S.W.3d 881, 896 (Mo. App. W.D. 2004); *State v. Cunningham*, 193 S.W.3d 774, 780-782 (Mo. App. S.D. 2006).

With respect to obscene child pornography, the jury (or fact finder) is required to make a broad based determination of whether the material was obscene and depicted sexual conduct. Although "sexual conduct," does incorporate different types of conduct,

the State is not required to specify and the jury is not asked to find what particular type of sexual conduct was depicted. *See* M.A.I. Cr.3d 327.16.

Similar to the situation here, the court in *Baker* was construing a statute that specifically set forth various types of weapons, including "any gun, knife, weapon, or other article that may be used . . . to endanger" another. 850 S.W.2d at 947. The statute did not require the State to prove or the jury to find what type of weapon(s) the defendant possessed. Based on the use of the word "any," and in the absence of any indication otherwise, the court held that the statute was ambiguous with respect to the appropriate unit of prosecution. *Id*. at 948

Further, the State's argument that the fact that each image may depict a different type of conduct from that depicted in another image thereby evidences an intent to separate each item to a separate unit is difficult to discern. A single image may depict numerous different types of sexual conduct. Does that mean that multiple prosecutions and punishment are permitted for the possession of a single item if there are multiple types of sexual conduct depicted in the image? Conversely, if a defendant is in possession of multiple items, is there just one unit of prosecution if the same sexual conduct is depicted in all of the items? The State's response to these issues is to state that this would not be the case if correct unit of prosecution is the individual item. (Respondent's Brief, 27). But if the unit of prosecution was determined by the type of sexual conduct depicted, why would it be limited to the individual item?

In support of it argument, the State also cites to "the separate or several offense rule." (Respondent's Substitute Brief, 26-27). However, the separate offense rule is not

particularly helpful in determining whether a defendant should be convicted of multiple violations of the same offense because the test "assumes identification of a separate offense that requires proof of a fact not required by another offense." *Horsey v. State*, 747 S.W.2d 748, 751 (Mo. App. S.D. en banc 1988) (citations and quotations omitted). And contrary to the argument of the State, the test looks at "the statutory elements of the offenses rather than upon the evidence actually adduced at trial." *State v. McTush*, 827 S.W.2d 184, 188 (Mo. 1992). Thus, the fact that "unique evidence" might be required to demonstrate that each image is obscene would not make each a separate offense under this rule.

2. *Baker* follows well established law.

The State also argues that the decisions cited in *Baker* do not support the court's holding. (Respondent's Brief, 27-30). The State starts its argument by asserting that the Florida decision in *State v. Watts*, 462 So. 2d 813 (Fla. 1985) was "questioned" in *State v. Rubio*, 967 So. 2d 768, 778 (Fla. 2007). (Respondent's Brief, 27-28). While *Rubio* notes that the mere inclusion of the word "any," does not automatically render the statute ambiguous with respect to the appropriate unit of prosecution, the decision also stated: "absent clear legislative intent to the contrary, the a/any test serves as a valuable but nonexclusive means to assist courts in determining the intended unit of prosecution." *Id.* at 777; *see also People v. Renander*, 151 P.3d 657, 661 (Colo. App. 2006) (discussing the ambiguity inherent in the word "any").

The State also argues that federal decisions in *United States v. Calhoun*, 510 F.2d 861, 869 (7th Cir. 1974) and *United States v. Carty*, 447 F.2d 964, 965 (5th Cir. 1971),

considering the appropriate unit of prosecution with respect to federal firearm provisions do not support the decision in *Baker* because these decisions do not expressly refer to the statutory language. (Respondent's Brief, 28-29). Although those two decisions did not specifically discuss the statutes at issue, the relevant provisions did contain language referring to "any firearm." *See* 18 U.S.C. § 922(g) (prohibiting a convicted felon from possessing "any firearm"), and 18 U.S.C. § 922(i) (prohibiting any person from transporting "any stolen firearm."). And those decisions followed the well established rule that one cannot be separately prosecuted for each individual firearm possessed or transported. *Calhoun*, 510 F.2d at 869; *Carty*, 447 F.2d at 965; *McFarland v. Pickett*, 469 F.2d 1277, 1278-79 (7th Cir. 1972); *United States v. Carty*, 447 F.2d 964 (5th Cir. 1971). And this line of cases followed the United States Supreme Court decision in *Bell v. United States*, 349 U.S. 81, 82-83 (1955), which held that a statute prohibiting the transportation of "any woman or girl for the purpose of prostitution. . . . " was ambiguous with respect to the appropriate unit of prosecution with respect to the transportation of two women. *See McFarland*, 469 F.2d 1278-79; *Carty*, 447 F.2d at 964.

Finally, the State argues that the decision in *United States v. Kinsley*, 518 F.2d 665 (8th Cir. 1975) does not support the conclusion reached in *Baker* because *Kinsley* was "distinguished" in *Castaldi v. United States*, 783 F.2d 119 (8th Cir. 1986). The court in *Castaldi* found that the statute at issue there (pertaining to counterfeit postage stamps) was sufficiently clear in permitting a separate unit of prosecution for each denomination of counterfeited stamps—given consideration of the legislative history and the entire statutory scheme. But the court affirmed the holding in *Kinsley*, finding the word "any"

to be ambiguous, stating "We conclude, therefore, that the express language of section 501, defining as the object of the offense 'any postage stamp,' does not 'plainly and unmistakably' indicate whether each denomination of counterfeited postage stamps is an allowable unit of prosecution." 783 F.2d at 121.

3. Statutory Purpose

For the bulk of its argument, the State cites to a number of decisions construing the statutory purposes of dissimilar child pornography statutes (or in some cases statutes that do not address the possession of child pornography). These decisions are not useful in deciding the issue in this case for a number of reasons: (1) they concern offenses other than the possession of pornography, (2) they rely on an expression of legislative intent not present in Missouri, (3) they address statutes that do not contain similar language[2], and (4) they do not involve a legislative history in which the legislature has actually articulated the appropriate unit of prosecution.

The decisions in *United States v. Esch*, 832 F.2d 531, 542 (10th Cir. 1987); *State v. Mather*, 646 N.W.2d 605, 609, 611 (Neb. 2002); and *Williams v. Commonwealth*, 178 S.W.3d 491, 495 (Ky. 2005) concern offenses relating to the use of minors in the creation of child pornography. With respect to the creation of the multiple photographs, the taking of each photograph involved a distinct act, which may be separately prosecuted. *See Esch*, 832 F.2d at 542 (Finding that "[e]ach photograph depended upon a separate

[2] Comparison of child pornography statutes in different jurisdictions is difficult as the statutes do not appear to be uniform and as they are frequently amended.

and distinct use of the children," and thus supported separate prosecutions). This is different from the possession of multiple pornographic images at issue in this case, which occurred simultaneously.

In a footnote, the State argues that this distinction does not matter. (Respondent's Substitute Brief, 31). However, an examination of the gravamen of the offense is an important factor in determining the appropriate unit of prosecution. *State v. Good*, 851 S.W.2d 1, 5-6 (Mo. App. S.D. 1992). Thus in *Good*, the court held that double jeopardy barred multiple resisting arrest convictions of defendant who threatened arresting officer with knife, then drew second knife and accosted second officer who had arrived to assist. *Id*. As noted by the court, "[t]he gravamen of the offense is resisting an arrest, not flight from a law enforcement officer." *Id*. In this case, the *actus reus* the statute required the State to prove—the defendant's possession—was a single event in the instant case, at a single time and place, indistinguishable in law or in fact.

Additionally, many of the decisions cited by the State—*Esch*, 832 F.2d at 542; *State v. Fussell*, 947 So. 2d 1223, 1233, 1235 (La. 2008); and *People v. Renander*, 151 P.3d 657, 662 (Colo. Ct. App. 2006) also rely on an expressed or apparent legislative intent in the statutes at issue of preventing the abuse of children in creating child pornography. Because these decisions rely on expressed statements concerning the intent of legislature and involve very different statutory schemes than the one at issue here, they provide no guidance to the Court in this case. No such legislative history or statement of purpose is available with respect Missouri's enactment of the statute at issue here.

In addition to the absence of any legislative history or explicit statements of purpose, Missouri's statutory scheme is different from the statutory schemes considered in *Esch*, 832 F.2d at 541; *Fussell*, 974 So.2d at 1234-1236; *Renander*, 151 P.2d at 661-662; and *State v. Martin*, 674 N.W.2d 291, 297-300[3] (S.D. 2003), which are limited to pornography in which actual children are used.

The Missouri statute at issue here is not limited to pornography in which actual children were used in its creation, but rather applies any obscene material the depicts "what appears to be a child" and includes virtual pornography. § 573.037 RSMo (2007 Supp.). Additionally, the statute is also contained within the general provisions concerning obscenity in Chapter 573 and actually prohibits the possession of "obscene material" and not "child pornography." *Id*. The statute also treats the possession of obscene material different from the use of children in creating pornography. *Compare* § 573.037 (2009 Supp.) with § 573.023 (pertaining to the sexual exploitation of a minor). Thus, the statute also applies with equal force to written material, including material that may be clearly fiction. And as was the case with respect to Count I in this case, the statute applies to material even though the identity of the children is never clearly indicated and the conduct depicted may not have actually constituted any type of sexual abuse of a child.

[3] The court in *Martin* specifically limited the application of the statute to pornography involving actual children. 674 N.W.2d at 297-300.

The State argues that Missouri's statutory scheme, although much broader in scope than the statutes of other states, nonetheless is intended to be limited to the protection of actual children. Perhaps, but it does not follow that—given the breadth of the Missouri statutory scheme—the legislature intended each obscene item (including fictional written text) to constitute a separate unit of prosecution.

Additionally, even if this Court could determine the intent of the legislature in enacting the statute, it does not follow that the Court could divine from such broad policy statements what the legislature intended to be the allowable unit of prosecution. "It does not necessarily follow that, because possession of a single firearm is sufficient to constitute the evil legislated against, Congress thereby intended that felons in simultaneous possession of more than one firearm should be deemed to have committed multiple offenses." *Kinsley*, 518 F.2d at 669. And "general arguments as to the gravity of the evil [should be] unavailing to prevent application of the Bell[4] rule of lenity." *Id* at 669 (citing *United States v. Bass*, 404 U.S. 336, 348 (1971)).

4. Other States' Construction of the terms

In addition to the State's citation to foreign decisions addressing the statutory purposes of the legislation adopted in those jurisdictions, the State also cites to *State v. Multaler*, 643 N.W.2d 437, 451 (Wis. 2002); *Williams v. Commonwealth*, 178 S.W.3d 491, 495 (Ky. 2005); *State v. Morrison*, 31 P.3d 547, 555-556 (Utah 2001); *State v. Howell*, 609 S.E.2d 417, 419 (N.C. Ct. App. 2005); and *State v. Martin*, 674 N.W.2d

[4] *Bell v. United States*, 349 U.S 81 (1955)

291, 303 (S.D. 2003), to support its argument that the inclusion of the word "any" in the Missouri statute does not render the statute ambiguous. (Respondent's Brief, 27-28). In responding to this argument, it should be noted that Appellant has not alleged that the inclusion of the word "any" in the statute automatically renders the statute ambiguous. To the contrary, Appellant points to: the inclusion of the word "any," the use of the collective noun "material;" the use of singular, plural and collective nouns in the list of the items contained in the definition of material; the amendment to the statute to specifically referring to the number of images as raising the level of the offense; and to the failure to separate child pornography from obscenity prohibitions.

The decision in *Multaler* is not useful in considering the Missouri statute for a number of reasons. First, *Multaler* involved a guilty plea and the facts supporting that plea indicated that the defendant downloaded the images at different times. 643 N.W.2d at 449. Thus, the court there concluded that it was possible that the defendant was in possession of the images at different and distinct times. *Id*. at 448-449. Second, the statute at issue there did not use the collective term "material," or include singular, plural and collective nouns elsewhere. *Id*. at 451. And finally, the courts in Wisconsin presume "that the legislature intended multiple punishments." *Id*. There is no such presumption in Missouri.

The decision in *Williams*, 178 S.W.3d at 494-495 is also not persuasive. First, as previously noted, the defendant in *Williams* was convicted of four counts of the use of a minor in a sexual performance, and thus concerns a different type of offense. Second, the operative language in the statute did not use the term "any." Rather, the statute

prohibited "the use of a minor . . . in **a** sexual performance." *Id*. at 495 (emphasis added). Third, although the statute included the word "any" combined with the singular term "photograph." the statute did not utilize the collective noun "material," or include singular, plural and collective nouns in the applicable definition.

Review of the decision in *Morrison*, 31 P.3d at 555, is difficult as the court did not set out the entire statute at issue. As indicated by the court, the statute "in relevant part, . . . creates a second degree felony for 'knowingly ... possess[ing] ... material ... depicting a nude or partially nude minor for the purpose of causing sexual arousal of any person or any person's engagement in sexual conduct with the minor.'" *Id.* at 555. Thus, it does not appear that the word "any" was used in relation to "material." *Id*. The court does go on to look at the definition of "material," which does use the word "any" and the plural forms of the items listed. *Id*. at 555-556. Although the court concluded that "the clearest reading of the statute" was that each individual visual representation was the basis for a separate unit of prosecution, there is no discussion of how the court reached that conclusion. *Id*.

The decision in *State v. Howell*, 609 S.E.2d 417, 419 (N.C. App. 2005) actually supports Appellant's argument. The applicable statute in *Howell* prohibited possession of "**a** visual representation of a minor." *Id*. at 419. The court found the use of the term "a" rather than the use of the term "any," as a critical fact evidencing the legislature's intent to permit multiple prosecutions. *Id.* at 419-421. The court also found that because the legislature separated the child pornography laws from those pertaining to obscenity, the

court believed that legislation was directed specifically at preventing the sexual exploitation of children, which further supported its conclusion. *Id*. at 420-421.

Finally, the State cites to *State v. Martin*, 674 N.W.2d 291, 303 (S.D. 2003) The court in *Martin* specifically limited the application of the statute to pornography involving actual children. *Martin*, 674 N.W.2d at 297-300. The court that the limitation of the statute to pornography with actual children "comported with the underlying rationale of . . . protecti[ng] of the children who would otherwise be exploited during the production process of such material." *Id*. at 300. And because that protection extended to each child in each picture found on the computer, the court concluded that the legislature must have intended for each picture to constitute a separate unit of prosecution. *Id*. As noted above, the Missouri statutory scheme is not limited to the prosecution of child pornography depicting actual children.

Additionally, there are a number of other decisions that follow the analysis as argued by Appellant. *See, e.g., Schmitt v. State*, 563 So. 2d 1095, 1101 (Fla. Dist. Ct. App. 1990) *approved in part, quashed in part*, 590 So. 2d 404 (Fla. 1991); *State v. Parrella*, 736 So.2d 94 (Fla. App. 1999); *American Film Distributors, Inc. v. State*, 471 N.E.2d 3 (Ind. App.1984) (all holding that the use of the term "any" is ambiguous).

5. [6.] Subsequent Revision of the Statute

All of the decisions from other jurisdictions are also distinguishable in that the Missouri Legislature has adopted a provision that clearly contemplates multiple images giving rise to a single charge. The amendment provides that an individual in possession of "more than twenty still images of child pornography," is guilty of a class B felony. §

573.037 RSMo (2009 Supp.) The fact that the statute specifically refers to the possession of multiple images is a clear indication that the legislature never intended for each image to constitute a single unit of prosecution. *United States v. Kimbrough,* 69 F.3d 723 (5th Cir. 1995).

The State argues that this provision merely enhances the available sentence and that a person convicted of twenty-one still images can still be convicted of twenty-one separate offenses, with each offense elevated to a class B felony. (Respondent's Brief, 42-44). This construction of the statute is strained and illogical. It ignores the express language stating that the possession of more than twenty still images is "***a*** class B felony." § 573.037 RSMo (2009 Supp.) Further, if the statute authorized multiple charges to be brought for each item—each of which could be punished consecutively for a total term of 147 years on 21 counts—it is difficult to see what is gained by also elevating each offense to a class B felony. It is also inconsistent with the practice in Missouri in which aggravating factors that increase the level of punishment create distinct offenses and require the state to plead and prove the aggravating factors as elements of the crime. *See e.g., State v. Simpson*, 846 S.W.2d 724, 726-727 (Mo. banc 1993) (discussing the distinction between rape and aggravated rape); *State v. Burns*, 877 S.W.2d 111, 112-113 (Mo banc 1994)(holding that the amount of drugs possessed is an essential element of the aggravated form drug possession).

The State also argues that "Appellant's argument when taken to its logical conclusion would result in an absurd construction of the statute." (Respondent's Brief, 44-45). In this argument, the State misconstrues Appellant's argument. Appellant is not

arguing that the amendment altered the intended unit of prosecution with respect child pornography, thus resulting in a situation where there is a single unit of prosecution for multiple images child pornography, but multiple units for the prosecution of multiple images of obscenity. To the contrary, Appellant is arguing that the legislature did not intend to permit multiple prosecutions prior to the amendment, as evidenced by the fact that the legislature did not change the operative language in the statute prohibiting the possession of "any obscene material" when it amended the statute in 2008. If the legislature intended and understood the language "any obscene material" to permit a separate prosecution for each image, the 2008 amendment would have been unnecessary and unduly confusing and convoluted.

Thus, the Missouri statutory scheme at issue here does not unambiguously define each image as a separate unit of prosecution. The entry of convictions on eight counts of possession of child pornography violated Appellant's rights to be free of double jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution.

III. The images in counts 2, 4, 5, 7, 8 and 9 do not fall within the definition of child pornography.

Appellant relies on the argument set forth on pages 23-25 of Appellant's Substitute Brief, but also submits the following in response the arguments raised by Respondent.

The State argues that Appellant abandoned his claim that the images that gave rise to the charges in counts 4, 5 and 8 do not constitute obscene child pornography because "Appellant does not develop his argument." (Respondent's Substitute Brief, 49-50). However, Appellant did set forth the basis for reversing the convictions by asserting that although the images depicted nude males in physical contact with one another, the individuals are not engaged in acts of apparent sexual stimulation and thus the images do not depict children engaged in or observing sexual conduct. (Appellant's Substitute Brief, 40-41).

The State argues that the images constitute child pornography because the pictures were "designed to cause the sexual stimulation and gratification" of those who view the images. (Respondent's Brief, 50). The statute, however, does not address whether the images might arouse a viewer of the images. Rather, the statute prohibits the possession of images depicting sexual conduct, which includes "an act of apparent sexual stimulation." § 573.037.1 RSMo (Supp. 2004); § 573.010(17) RSMo (Supp. 2006).

The decision in *State v. Oliver*, 293 S.W.3d 437, 445 (Mo. banc 2009) does not support the State's argument. This Court in *Oliver* never discussed and did not hold that material falls within the definition of child pornography based on whether a viewer might

find it sexually stimulating. Rather, the Court held that the conduct depicted was itself "an act of apparent sexual simulation." *Id*.

With respect to Count 2, the State argues that the statute does not require any "touching." (Respondent's Brief, 34-35). In making this argument, the State selectively deletes parts of the statute and ignores the punctuation contained in the statute. Sexual conduct" includes:

> "[1] actual or simulated, normal or perverted acts of human masturbation; [2] deviate sexual intercourse; [3] sexual intercourse; or [4] physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification or any sadomasochistic abuse or acts including animals or any latent objects in an act of apparent sexual stimulation or gratification."

§ 573.010(17) (Supp. 2006). When considering the way in which the statute is punctuated, it appears that the definition includes "physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in [a] an act of apparent sexual stimulation or gratification or [b] any sadomasochistic abuse or [c] acts including animals or any latent objects in an act of apparent sexual stimulation of gratification." Because there is no semicolon or comma separating the term "physical contact" from the term "sadomasochistic abuse," the statute does not appear to dispense with the requirement that there be some contact with a person's genitals, pubic area, buttocks or the breast of a female.

CONCLUSION

Appellant respectfully asks this Court to reverse his conviction for promotion of child pornography, and to remand to the trial court to enter a judgment of acquittal on that count. Appellant also requests this Court to reverse Appellant's convictions for eight counts of possession of child pornography and remand with instructions to enter a conviction for a single count. In the alternative, Appellant requests this Court to reverse his convictions for possession of child pornography under Counts 2, 4, 5, 7, 8 and 9, and remand to the trial court with instructions to enter a judgment of acquittal on those counts.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Frederick J. Ernst, hereby certify as follows:

The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Office Word 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service and the appendix, this brief contains 7,361 words, which does not exceed the 7,750 words allowed for an appellant's brief under Rule 84.04.

A copy of the foregoing was sent through the e-filing system on October 25, 2011, to Dan McPherson, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102, Dan.McPherson@ago.mo.gov.

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