IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	Appeal No. SC85704
vs.	)	
	)	
BILLY LYNN BLOCKER,	)	
	)	
Appellant.	)	

APPELLANT'S SUBSTITUTE BRIEF

On Post Opinion Transfer to the
MISSOURI SUPREME COURT

Appeal to the Missouri Court of Appeals
SOUTHERN DISTRICT
From the Circuit Court, Division II, of Iron County, Missouri
Honorable J. Max Price, Judge

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JURISDICTIONAL STATEMENT

On February 11, 2002, the State tried the Appellant on a one-count information charging the Appellant with unlawful possession of a controlled substance. LF 11-12, & 5. The jury returned a verdict of guilty. LF 22. On May 13, 2002 the Court sentenced the Appellant as a prior and persistence offender to 10 years in the Department of Corrections. LF 27-28. On May 13, 2002 the Appellant filed his notice of appeal. LF 29-32. The Southern District Court of Appeals handed down its opinion affirming the conviction on October 28, 2003 and the Appellant requested transfer on November 12, 2003, which the court denied on November 19, 2003. The Appellant thereafter timely filed a motion for transfer, which this Court granted on December 23, 2003.

STATEMENT OF FACTS

Respondent charged the Appellant with possession of a controlled substance. LF 11-12. A jury convicted the Appellant on this charge. LF 22. The Appellant's two major points relied on are the trial court's failure to suppress the evidence seized from the Appellant's person and the trial court's failure to consider the ultimate user or household prescription defense tendered by the Appellant.

The Appellant lived with his grandparents. Tr 207. He was traveling north on Highway 67 in his grandfather's car taking his brother to Hillsboro. Tr 209. Sometime before the brothers departed Poplar Bluff, the Appellant's grandmother gave the Appellant's brother a diazepam pill, a schedule IV controlled substance.

The Appellant subpoenaed a pharmacist who had recently filled a prescription for diazepam issued to the Appellant's grandmother. Tr 60, 63-64. The subpoena was served on Wednesday, February 6, 2002 and filed with the court on Friday, February 8, 2002. On Friday, February 8, 2002 the pharmacist's husband had a heart attack and subsequently on Sunday, February 10, 2002 informed counsel for the Appellant she would not be attending the trial. Tr 58-60; Exhibit A. The Appellant obtained an affidavit from the pharmacist on Sunday, February 10, 2002, which attached records Appellant needed. Exhibit A. The Appellant filed a motion for continuance on the morning of trial, February 11, 2002 and the case proceeded to trial under the following facts. Tr 63.

Appellant and his brother left Poplar Bluff in their grandparent's Buick Skylark. Tr 209. The Appellant was driving. Tr 210. The Appellant's brother asked if he could drive and the Appellant stopped the car on the paved portion of Highway 67 so the two could switch positions. Id.

While the vehicle was stopped, Corporal Carson of the Missouri Highway Patrol drove by. Tr 211. The Corporal turned his vehicle around. By the time he caught up to the car, the Appellant and his brother were already continuing their trip northward. Tr 165 & 211.

The Corporal saw the two switching places. TR 165. The Corporal went ahead and pulled the vehicle over. Id. He told the occupants he stopped them because he thought they were having vehicle trouble and wondered why they stopped in the road to switch places. Tr 166. He then asked for their identifications, which the driver, Mr. Ray, could not produce. Tr 166-67.

Corporal Carson took Mr. Ray back to his cruiser. Tr 167. After adequately identifying Mr. Ray, the Corporal got him out of the cruiser and arrested him on an outstanding warrant. Tr 168, 194-96. During the arrest, Conservation Agent Duckworth arrived on the scene. Tr 194 & 196.

The Appellant realized his brother was being arrested and saw a pill lodged between the cellophane wrapper and paper packaging of a cigarette pack on the vehicle's center console. Tr 212 & 216-17. The Appellant's brother had previously been in trouble for controlled substances. Tr 219. The Appellant

placed the pill in his pocket for fear his brother would somehow get in trouble for the pill. Tr 212 & 216-17.

Both officers then approached the passenger side of the Skylark and initiated a conversation with the Appellant. Tr 169-70, 196. Corporal Carson asked permission to search the vehicle, which the Appellant granted. Tr 170 & 196-97. The Corporal then asked Mr. Blocker to exit the vehicle. Tr 170 & 197.

The stories of the three witnesses diverge slightly at this point. The Appellant testified the Corporal arrested him as soon as he got out of the vehicle and began riffling through his pockets. Tr 211. The Corporal testified he asked the Appellant to empty his pockets. Tr 170. Agent Duckworth testified the Corporal asked the Appellant to pull his pockets inside out and then he patted the Appellant down. Tr 197.

The Appellant was arrested for the possession of the diazepam pill. Tr 175.

POINTS RELIED ON

POINT I

The Trial Court erred in admitting evidence seized from the Appellant's person, the diazepam pill, in that the Appellant is entitled to be free from unreasonable searches and seizures and the search of his person was conducted without a warrant, consent or any other exception and the Appellant was not subject to the minimal intrusion of a pat-down search based on a reasonable articulable suspicion he was armed but was asked or told to empty his pockets, which compliance was mere acquiescence with a claim of lawful authority.

State v. Leavitt, 993 S.W.2d 557 (Mo.App. W.D. 1999).

State v. Martin, 79 S.W.3d 912 (Mo.App. E.D. 2002).

State v. Taber, 73 S.W.3d 699 (Mo.App. W.D. 2002).

State v. Richard Weddle, 18 S.W.3d 389 (Mo.App. E.D. 2000).

POINT II

The decision of the trial court to admit the pill seized from the Appellant's pocket cannot be upheld on the basis that he waived the issue by confessing in that a waiver of a constitutional right must be knowing and voluntary and can only be found by reviewing the totality of the circumstances in the light most favorable to the Appellant and, as a matter of law, the legal underpinnings of the alleged rule are dubious because the Appellant did not confess but repeatedly denied knowing the pill was a

controlled substance and, as his testimony was coerced by the trial court's refusal to suppress the evidence, it was not a voluntary act and the rule has not been relied on in the federal system since 1962 or the year prior to the announcement of the fruit-of-the- poisonous tree doctrine.

State v. Bucklew, 973 S.W.2d 83, 90 (Mo. 1998)

State v. Miller, 894 S.W.2d 649, 654 (Mo. 1995)

State v. Purlee, 839 S.W.2d 584, 587 (Mo. 1992)

POINT III

The trial court erred in concluding that the law prohibits sole possession of a drug by anyone other than the prescription holder and denying the Appellant's requested continuance and jury instructions in that § 195.180 allows the lawful possession of prescriptions "pursuant to" a prescription and § 195.010(40) defines ultimate users to include household members because the Appellant shared his household with a person holding a valid prescription.

State v. Barber, 635 S.W.2d 342 (Mo. 1982)

State v. Burnau, 642 S.W.2d 621 (Mo. 1982)

State v. Werner, 9 S.W.3d 590, 595 (Mo. 2000)

State v. Withrow, 8 S.W.3d 75 (Mo. 1999)

R.S.Mo. § 195.010

R.S.Mo. § 195.017

R.S.Mo. § 195.110

R.S.Mo. § 195.180

R.S.Mo. § 195.367

POINT IV

The Trial Court erred in denying Appellant's Motion for Continuance based on an absent witness because Appellant filed a written motion with an attached affidavit containing sufficient facts to support the continuance bolstered further by the testimony of counsel that the witness's testimony was material to the defense and the Appellant had been diligent in securing the testimony in that on the Friday before a Monday trial, the witness's husband had a cardiac event and did not notify Appellant's counsel she would be unavailable on Monday as a result of her husband's scheduled emergency surgery in Memphis on the date of trial until Sunday and, even on such short notice, Appellant obtained an affidavit from the witness identifying the business records he sought to introduce by way of the witness, which records supplied a necessary element of the Appellant's only defense, to-wit: the "ultimate user" or household prescription defense to possession of a controlled substance.

Lee v. Kimna, 534 U.S. 362 (2002).

State v. Patton, 84 S.W.3d 554, 556 (Mo.App. S.D. 2002).

POINT V

The Trial Court erred in denying Appellant's tendered Instructions A and B because there would have been substantial evidence to support the ultimate user defense set forth in those instructions in that the controlled substance the Appellant possessed had been prescribed to a member of his household and a pharmacist had been subpoenaed to provide the evidence of filling the prescription and the Appellant testified the individual identified by the pharmacist as having the prescription was his grandmother with whom he lived.

State v. Jessica Weddle, 88 S.W.3d 135 (Mo.App. S.D. 2002).

Rule 28 (2002).

ARGUMENT

POINT I

The Trial Court erred in admitting evidence seized from the Appellant's person, the diazepam pill, in that the Appellant is entitled to be free from unreasonable searches and seizures and the search of his person was conducted without a warrant, consent or any other exception and the Appellant was not subject to the minimal intrusion of a pat-down search based on a reasonable articulable suspicion he was armed but was asked or told to empty his pockets, which compliance was mere acquiescence with a claim of lawful authority.

Corporal Carson of the Missouri State Highway Patrol searched the Appellant's person following a traffic stop. After arresting the driver of the car on a warrant and obtaining consent to search the car from the passenger, the Appellant, the officer asked the Appellant to get out of the car and told him to empty his pockets. This was an illegal nonconsensual search and the evidence should have been suppressed. State v. Leavitt, 993 S.W.2d 557 (Mo.App. W.D. 1999).

The standard of review is well stated in State v. Middleton, 43 S.W.3d 881 (Mo.App. S.D. 2001). Deference is shown to the trial court's ruling and the evidence is viewed in the light most favorable to that ruling. If there is insufficient evidence to sustain the ruling, it may be reversed as an abuse of discretion.

However, the application of law to the historic facts as found by the trial court is reviewed de novo. Id at 884.

There were two officers at the scene of the Appellant's arrest. Both officers testified that, after the Appellant was asked to exit the vehicle, he was told to empty his pockets. Corporal Carson testified he asked the Appellant to empty his pockets. Tr 170. Agent Duckworth recalls the Corporal telling the Appellant to turn his pockets inside out. Tr 197. At the suppression hearing, the Corporal testified that after the pockets were emptied he performed a finger sweep of the pockets. Tr 28.

Unlike Middleton, where the officer conducted a pat-down search and then got the defendant's consent to remove the contents of his pockets, the officers in this case simply told the Appellant to empty his pockets. In Middleton, the court distinguished its ruling from the decision reached in State v. Leavitt, 993 S.W.2d 557 (Mo.App. W.D. 1999). The court reasoned that in Leavitt, the police officer told the defendant to empty her pockets, while in Middleton, the officer had asked consent to remove items from the defendant's pockets. The Appellant, like Leavitt, was told to either empty his pockets or turn his pockets inside out and the evidence should be suppressed.

The case at bar is much like Leavitt. In both cases, the officer just got the defendants out of their cars and told them to empty their pockets. Leavitt, 93 S.W.2d 557 at 559. The officer in Leavitt even had a good excuse for not patting down the defendant. The driver and the officer were opposite sexes. There is no

such explanation in this case. After obtaining the Appellant's consent to search the car, he told the Appellant to get out of the car and empty his pockets. The Appellant was only submitting to the officer's claim of lawful authority.

The officers testimony was plain. He "asked [Appellant] for consent to search the vehicle" and the Appellant "gave verbal consent to search". Tr 170. The officer then "asked [Appellant] to exit the vehicle" and "asked him to empty his pockets". While the officer asked **consent** to search the car, once he obtained that, he simply started ordering the Appellant around. In the end, the determination of a defendant's consent or acquiescence to an officer's claim of lawful authority rests not on whether the officer testified he asked rather than told or ordered the defendant but on the totality of the circumstances. Middleton, 43 S.W.3d 881 at 885-86.

The totality of the circumstances are that the Appellant was illegally seized from the inception of the stop in the case at bar. The Corporal turned his car around because he thought the Appellant was having car trouble. Tr 166. Before he initiated the stop he learned the occupants of the car were changing drivers. Tr 165. Before he turned on his lights to initiate the stop of the vehicle, it was already back in motion. Tr 165. The Corporal's stated purpose for approaching the vehicle ended when he learned the car was stopped so the occupants could exchange drivers and the car was operable.

The Corporal testified at the suppression hearing he was stopping the car because it had illegally stopped in the roadway. Tr 5-6. He stated "U.S. 67 is a

fairly busy highway and if a vehicle is going to stop it needs to stop as far right to the shoulder as possible, or on the shoulder." Id. Appellant has been unable to locate any such law. The State has previously argued that § 304.015.1 (2002) requires pulling onto the shoulder. The statute only requires pulling as far to the "right side of the highway as practicable". To expand that statue beyond the paved portion of the road, which is the definition of roadway in 304.001(12), to include the "shoulder" would not only include the "shoulder" but as far out into the grass as one can practicably drive because that is the area maintained by the State, which is the definition of State highway in § 304.001(13). Further, the express terms of § 304.015 shows it covers much more than just "State highways" as the only thing excluded are municipal streets. The term highway is not defined and the only reasonable analogue is "roadway", which includes the traveled portion of the road but expressly excludes "the berm or shoulder".

The statute related to this is § 304.151, which exhorts a driver whose vehicle "obstructs the regular flow of traffic on the roadway on any State highway shall make every reasonable effort to move the vehicle…". The court may first note the use of the terms "roadway on any State highway", which bares out the Appellant's first argument, and limits the application of § 304.151 to a vehicle stopped on the paved road excluding those on the shoulder or berm. There was no other traffic behind the Appellant. Tr 16-17. The Appellant's vehicle never obstructed "the regular flow of traffic" because there was no traffic. Even if the statute prohibits even the potential of obstructing traffic, the Appellant made

reasonable efforts to move his vehicle, i.e. the vehicle was off and moving before the corporal could get his patrol car turned around and create obstructed traffic. Tr 7.

Citizens who are not engaged in or suspected of illegal activity may not be seized by having the police stop their car, other than at road blocks or check points at or near the nation's borders. See State v. Miller, 894 S.W.2d 649, 651 (Mo. 1995); City of Indianapolis v. Edmond, 531 U.S. 32 (2000). When the Corporal's questions about the vehicle were answered, any subsequent conduct on his part to seize or continue the seizure of the car the Appellant occupied was unconstitutional. State v. Taber, 73 S.W.3d 699 (Mo.App. W.D. 2002). The officer in Taber intended to stop a car because it did not have a front license plate. When he got behind the vehicle he realized it was licensed in Kansas but he nonetheless continued with the traffic stop. The Western District reversed the trial court and suppressed all the evidence.

The Taber case bears other strong similarities to the case at bar. After the stop, the officer approached the vehicle and demanded identification from the driver just as the Corporal in the present case did. This is actually the point where the Taber stop became unlawful. 73 S.W.3d 699 at 706-07.

The Appellant had committed no crime. The officer never had "a reasonable suspicion supported by articulable facts" to support the stop. Taber 73 S.W.3d at 705. A police officer stopping to assist a stranded motorist is laudable and one of the primary functions of the Missouri State Highway Patrol. R.S.Mo.

§ 43.025 (promote safety upon the highways). It does not include stopping cars that are moving to find out if at sometime in the past the vehicle broke down or if the occupants think that in the future the vehicle is likely to break down.

Stopping the car in the roadway to change drivers is odd behavior. Fortunately, odd behavior or even odd and nervous behavior will not justify the seizure of a person. State v. Richard Weddle, 18 S.W.3d 389 (Mo.App. E.D. 2000). In Weddle, an officer was dispatched to Hardee's because a drunk was passed-out behind the wheel of his van in the parking lot. After the officer arrived and rousted the defendant out of his vehicle, he determined the defendant was only sleeping and not intoxicated. The officer, nonetheless, continued his detention of the defendant, took his license and subsequently searched his van. The Eastern District reversed the trial court and suppressed evidence reasoning that, once the officer determined the defendant was not intoxicated or ill, the officer's continued detention was illegal.

As in Weddle, even if the initial approach to the vehicle could be justified, continuing the seizure could not. Even if seizing the vehicle could be justified to ask why it had stopped in the road, taking the occupants licenses and continuing the seizure was unconstitutional. Taber.

It may be important at this point to revisit the principal that it is the State which bears the burden of proof on suppression issues. R.S.Mo. § 542.296 (2000). In the case at bar, the State was apprised the Appellant would raise this issue by the pre-trial objection. The Appellant would further invite the Court's attention to

the fact that the suppression hearing happened 18 months before trial. Tr 34, LF 5. The State could not or did not produce any additional facts to support the seizure or continued detention of the Appellant. Unlike Weddle or Taber, there is not even testimony the car's occupants were "nervous". It may well be that this was commendable conduct and the State intentionally refrained from embellishing the record with non-justifications for the seizure such as a citizen's nervousness. See State v. Woolfolk, 3 S.W.3d 823 (Mo.App. W.D. 1999). However, the Appellant did want to make clear it was the State's obligation to develop the record before this Court.

The Appellant would next invite the Court's attention to the continued unconstitutional seizure of the Appellant's person after the stop. The Corporal took the Appellant's license and took his brother back to the patrol car. Tr 166-67. The Corporal arrested the Appellant's brother on a warrant but nothing came up regarding the Appellant. The Corporal then approached the car and Appellant.

The Appellant was not free to leave. Tr 23. The constitutional problem with this continuing seizure is that the purpose for the stop was completed and there was no longer a justification to hold the Appellant. The mere fact that the officer arrested the driver does not justify the continued seizure of the passenger. This is true even if the passenger is passed out in the car. State v. Young, 991 S.W.2d 173 (Mo.App. S.D. 1999).

Another case which bears out Appellant's point is State v. Martin, 79 S.W.3d 912 (Mo.App. E.D. 2002). The officer stopped a car because of an

expired registration but subsequently he noticed a temporary tag in the back window. The officer detained the driver to confirm she had a valid license. After confirming this, he continued to detain the driver in his patrol car and obtained her "consent" to search the car. The Eastern District reversed the trial court's denial of the passenger's motion to suppress reasoning that the driver did not feel free to leave and her "consent" to search was the product of an illegal detention and merely an acquiescence to the officer's claim of authority.

The Martin decision and the court's reasoning based on the Taber decision also bears out the Appellant's argument regarding being "asked" to empty his pockets. In both cases, the Courts held that, just because the officer testified he "asked" and the drivers complied, did not make the drivers' conduct consensual. Martin, 917 S.W.2d 912, 917; Taber, 73 S.W.3d 699, 706-07. In those cases, there was even the issue before the court of whether the defendants were free to leave at the time consent was obtained. In this case, the Corporal expressly stated the Appellant was not free to leave. Tr 23.

The Appellant would also point out that failing to obey a member of the Missouri Highway Patrol after being "asked" to do something may well be a misdemeanor. Section 43.170 initially makes it unlawful to fail to stop when signaled or to follow directions from a trooper regarding the movement of traffic. The section then states "any person who willfully fails to obey or willfully resists or opposes a member of the patrol in the proper discharge of his duties shall be guilty of a misdemeanor…".

The State might be tempted to suggest that the onus falls on the person stopped to determine whether the Trooper is "properly discharging" his duties. The practical problem with this is that it will change encounters with the Highway Patrol from ones where a natural tension already exists to outright confrontational exchanges. However, allowing people who are stopped to comply with the directions of the Trooper without inadvertently waiving a constitutional right, places the burden on those who are trained and experienced to determine the "proper discharge" of their duties.

Leaving the burden on the Troopers is also consistent with the broad discretion the Troopers have in "properly discharging" their duties. The Trooper testified he had discretion to write a ticket. Appellant does not believe a resident should be forced to waive a constitutional right by complying with a Trooper's request in the hope of avoiding a ticket. Further, the Corporal in this case testified he had to get the Appellant out of the car to search. Tr 10. The officer in Martin did not get the passengers out prior to beginning his search. 79 S.W.3d 912 at 915. Given this discretion, it is unreasonable to suggest residents should question Troopers as to whether they are "properly discharging" their duties, rather than leaving it for the Troopers to confine their conduct within constitutional limits and expect that, even when he or she is over the line, the resident will still comply but not at the expense of waiving his or her constitutional rights or having mere acquiescence become consent.

Finally, the best reason not to have people question Troopers as to whether or not they are "properly discharging" their duties before complying with a Trooper's request is a case such as this one where the Trooper is plainly confused as to the "proper discharge of his duties". The Appellant has discussed how the Corporal's initial stop of the vehicle was dubious because there is no requirement to pull off the road before stopping, as long as traffic is not obstructed. Tr 5-6. The Trooper believed he could search the car incident to arrest, which is incorrect because incident to an arrest only the defendant's person and the area in his or her immediate control may be searched and it could not have been an inventory search of the car because there was a passenger to take charge of the vehicle and it could not have been a search for additional evidence because the arrest was on a warrant. When fewer than all the occupants of a motor vehicle have been arrested, the vehicle cannot be searched incident to the arrest for the same reason that a passenger has standing to challenge the search of the car, it is fruit from a poisonous tree. The poisonous tree is the continued detention, the seizure of the passenger's person, which necessarily comes prior to and during the search of the car. United States v. Shareff, 100 F.3d 1491, 1499-1500 (10th Cir. 1996)(while not binding the opinion provides a lucid discussion of a passenger's standing to challenge car searches). This is why New York v.Belton is limited to its facts, which included the arrest of everyone in the vehicle ostensible for marijuana but more likely because none of them owned the car or were related to the owner. Belton, 453 U.S. 454, 455 (1981). Finally, the Corporal in this case is under the

impression he can order people to empty their pockets, as opposed to conducting a pat-down search only after he has a reasonable suspicion based on articulable facts that the person stopped may be armed. Terry v. Ohio, 392 U.S. 1 (1968); Minnesota v. Dickerson, 508 U.S. 366 (1993). If that were not enough, the Corporal then did a "finger sweep" of the Appellant's pockets. In short, it was probably best that the Appellant did not challenge the Corporal as to whether he was "properly discharging his duties" when he asked the Appellant to empty his pockets.

The search of the Appellant's person was not consensual. It followed an illegal stop of the vehicle he was riding in. The search occurred after an unlawful detention extending past the purpose of the initial traffic stop, which the Trooper said was to see if the vehicle had mechanical problems. The search followed the illegal seizure and continued detention of the Appellant after his brother's arrest when central dispatch gave no indication there was a hold out for the Appellant and the driver was arrested on a warrant, which meant there was no additional evidence to be discovered by searching the vehicle. Further, even if the seizure and continuing detention of the Appellant can be justified, the State never offered any evidence suggesting the Trooper had reasonable articuable facts indicating the Appellant might be armed and should be searched. Finally, assuming all those hurdles can be cleared, the Appellant was not subject to the minimal intrusion of a pat-down search which allows officers to seize items immediately recognizable as weapons or contraband but the far more intrusive order to empty his pockets

followed by a finger sweep to insure compliance. Therefore, the produce resulting from the search of the Appellant are fruits of a poisonous tree, which should have been suppressed.

POINT II

The decision of the trial court to admit the pill seized from the Appellant's pocket cannot be upheld on the basis that he waived the issue by confessing in that a waiver of a constitutional right must be knowing and voluntary and can only be found by reviewing the totality of the circumstances in the light most favorable to the Appellant and, as a matter of law, the legal underpinnings of the alleged rule are dubious because the Appellant did not confess but repeatedly denied knowing the pill was a controlled substance and, as his testimony was coerced by the trial court's refusal to suppress the evidence, it was not a voluntary act and the rule has not been relied on in the federal system since 1962 or the year prior to the announcement of the fruit-of-the- poisonous tree doctrine.

The State has claimed the Appellant waived his constitutional right to be free from unreasonable searches and seizures by taking the witness stand and confessing. The standard of review for a court to find the waiver of a constitutionally protected right is to read the record with every indulgence and reasonable presumption against finding such a waiver based on a consideration of the totality of the circumstances. State v. Bucklew, 973 S.W.2d 83, 90 (Mo. 1998)(discussing the issue in regards to the Fifth and Sixth Amendment rights to remain silent and have counsel). The evidence supporting the claimed waiver must also show the Appellant acted with knowledge and intelligence in

relinquishing or abandoning the right. Edward v. Arizona, 451 U.S. 477, 482 (1981)(discussing a waiver of the right to counsel).

The right the Appellant allegedly waived is a fundamental constitutional right. The right to be free from unreasonable searches and seizures is a safeguard that is "the very essence of constitutional liberty". Ker v. State of California, 374 U.S. 23, 32-33 (1963). It is of such importance the Supreme Court has chosen to protect the guarantee with the most draconian remedy available, an absolute prohibition against admitting such evidence during a criminal prosecution.

The record in the case at bar does not support the conclusion that the Appellant confessed. To the extent facts were admitted by the Appellant, such facts do not establish a knowing and intelligent wavier of the right to be free from unreasonable searches and seizures. Finally, even if there were a confession and knowing and intelligent waiver, it could hardly be voluntary as it came in response to the very wrong complained of, to-wit: the admission at trial of evidence seized in an unconstitutional manner.

The Appellant asserted his rights by filing a motion to suppress and proceeding through a hearing and briefing the issues for the trial court. Tr 2-34. The trial court denied the motion. The Appellant objected to the introduction of the evidence during the State's case-in-chief. Tr 68-69. The State's case-in-chief also included the Appellant's alleged statement identifying the pill as a Xanax. Only after these events did the Appellant take the witness stand.

The Appellant denied knowing what the pill was at the end of his testimony on direct exam. Tr 213. The Appellant then questioned whether he even identified the pill as a Xanax, as the officer had testified. Tr 214. He then denied knowing it was a controlled substance. Tr 215-16. He denied that the jury could infer he knew it was illegal on the theory he put it in his pocket because he knew it was illegal and claimed he just knew his brother had drug problems and was protecting him. Tr 216-17. He denied knowing that Xanax was a controlled substance and later pointed out that he is not illiterate and is aware that there are drugs like Xanax and Valium. Tr 216 & 219. He further denied he even told the officer it was Xanax and suggested he may only have said it was a nerve pill. Tr 217-18 & 218-19.

Curiously, when the evidence is read in the light most favorable to the Appellant, the conclusion is inescapable that he did not know what the pill was. The Officer alleged the Appellant said it was a Xanax. Xanax contains alprazolam. PDR 2004 pp. 333 & 2798. The evidence at trial was that the pill the Appellant had was diazepam. Diazepam has been marketed under the trade name Valium. PDR 2004 pp. 334 & 2988.

The Appellant did not know what the pill was. He denied knowing what the pill was. He did not confess. The Appellant expressly denied one of the two necessary elements for a conviction on the charge of possessing a controlled substance, to-wit: that he knew of the drug's illegal nature. State v. Purlee, 839 S.W.2d 584, 587 (Mo. 1992).

The Appellant's testimony cannot be read to amount to a knowing and intelligent waiver of his rights. Two police officers took the stand and, over objection, were allowed to testify that they found the diazepam pill in the Appellant's pocket. The Appellant's "admission" he had put the pill in his pocket did not constitute a knowing or intelligent waiver. His right to keep the evidence out of the trial had already been taken from him. It is impossible to fathom how one could have given-up, abandoned or relinquished, what has already been taken, despite repeated claims of entitlement to that which has been taken. Indeed, even when the issue has not been preserved by way of pre-trial motion or proper objection at trial, the issue is reviewable under the plain error standard. State v. Galazin, 58 S.W.3d 500 (Mo. 2001).

The Appellant's final observation on the application of existing law to the facts of this case is that his testimony cannot be viewed as voluntary. The Appellant sought the suppression of the evidence a crime had been committed, the diazepam tablet. The court refused to exclude the pill from trial. While the Appellant's decision to testify or to remain silent certainly remained his own to make, the question before this court is whether the State's case could have survived a motion for judgment of acquittal at the end of the State's case-in-chief. But for the trial court's error in admitting the evidence, the Appellant would have never had to choose whether to take the stand or remain silent. The proposition can be rephrased by observing that the Appellant's testimony was fruit of the poisonous tree as it followed from trial court's admission of evidence seized in an

unconstitutional manner. State v. Miller, 894 S.W.2d 649, 654 (Mo. 1995). Another way to consider this is to observe that, if a police officer, who is searching for a murder victim's body, gives the "good Christian burial" speech to a defendant, which will be found to have coerced the defendant into giving up a right to remain silent, then surely a trial court's admission into evidence of matters that should have been excluded is coercive. See Williams v. Brewer, 375 F.Supp. 170, 184-85 (D.C. Iowa 1974)(reversing a state court conviction on habeas corpus review because of the "good Christian burial speech").

Review of the Law

The Appellant believes this Court should review the status of the law in regards to the application of the principal that a defendant's testimony can amount to a wavier of a previously asserted claim seeking the suppression of physical evidence when the evidence constitutes the crime charged. The legal underpinning for the rule has not been revisited by the Supreme Court for more than 100 years. The case from which all others derive is Motes v. U.S., 178 U.S. 458 (1900). The law of criminal procedure has undergone fundamental changes in the past century. The changes at issue here are the rise of the right to suppress physical evidence and the fruit of the poisonous tree doctrine.

The review should start with the most modern example establishing the existing standards of review. In U.S. v. Hill, the Eighth Circuit refused to grant review of the failure to suppress physical evidence when the defendant only objected at trial to the use of the evidence, guns, as physical exhibits and failed to

object to the admission of his out-of-court confession. U.S. v. Hill, 864 F.2d 601 (8th Cir. 1988). The rule as stated by the Eighth Circuit was that "otherwise valid convictions will not be set aside if the reviewing court may confidently say on the whole record that the constitutional error was harmless beyond a reasonable doubt". Id. at 603.

The Appellant's position is that it can never be harmless error when, if the error is corrected, the State cannot get past a motion for judgment of acquittal at the close of the State's case. When a defendant seeks the suppression of all the evidence constituting the crime and the trial court should have suppressed it, the error is not harmless.

A police officer cannot use after acquired information as a basis to establish a reasonable, articuable suspicion to continue the seizure of a person. State v. Woolfolk, 3 S.W.3d 823, 829 (Mo.App. W.D. 1999)(refusing to consider answers the defendant gave to questions asked after the stop was complete as a basis to justify the defendant's continued detention). The police cannot rely on the defendant's conduct after an illegal seizure to retroactively justify their conduct. State v. Miller, 894 S.W.2d 649, 654 (Mo. 1995)(refusing to accept the proposition that consent given following illegal initial seizure could justify the search); State v. Solt, 48 S.W.3d 677, 682 (Mo.App. S.D. 2001)(rejecting the proposition that property was abandoned after an illegal search as justification to uphold the search). The police must make their decisions in the heat of battle. Trial courts make decisions on the suppression of evidence usually after calm

deliberation following an adversarial proceeding where the issues have been fully aired. It is difficult to understand why a trial court would be cloaked with the protection of allowing after required information, i.e. the defendant's testimony, to justify the earlier erroneous decision, admitting the evidence seized by unconstitutional means.

The post hoc justification runs afoul of the principals of the exclusionary rule. The Supreme Court has taken the view that the right to be free from unreasonable searches and seizures is so fundamental that it will be enforced by the most draconian of remedies, the exclusion of evidence. It is difficult to see how a defendant's testimony can somehow render as moot the harm he or she has suffered. The real problem is that the defendant's testimony comes after the admission of the unconstitutionally seized evidence and, as such, is itself fruit of the poisonous tree.

The Appellant anticipates an argument that under the fruit-of-the-poisonous tree doctrine, when there is a removal in time and change of circumstances, the prior unconstitutional behavior no longer taints the process. State v. Miller, 894 S.W. 649 (Mo. 1995). The State will then argue about the time difference between the police officer's conduct and the time the defendant, represented by counsel, takes the witness stand. This argument ignores the fact that the time frame in question is the trial. The question at issue is whether the trial court erred in admitting the trial evidence, which should have been suppressed. If the police seized the evidence in an unlawful manner, it is just as unconstitutional for the

trial court to admit it or, but for the exclusionary rule being a constitutional right, State court's would be free to ignore it. Mapp v. Ohio, 367 U.S. 643 (1961)(declaring the exclusionary rule is of constitutional origin). If the trial court erred in admitting the evidence, the defendant's testimony is fruit of that error and there is no change in circumstances as it is one continuance process, a trial.

The vast majority of cases in this genre at issue are, in fact, harmless error cases. The cases are not ones properly decided on the theory that the defendant's testimony renders the improper evidence cumulative or the defendant's testimony is a confession. There is absolutely no problem with Appellate courts refusing to grant review when, even if it is assumed arguendo the trial court erred, the error was harmless. These cases include the likes of U.S. v. Hill, and the claim that the Defendant was somehow prejudiced by admitting the guns as physical evidence after he had already allowed testimony about the guns and his confession to come in without objection. U.S. v. Hill, 864 F.2d 601 (8th Cir. 1988). This is similar to a case in Missouri where the defendant sought to have reviewed the question of whether or not his exculpatory statements should have been suppressed. State v. Ryder, 598 S.W.2d 526 (Mo.App. E.D. 1980). Another harmless error case from Missouri involved the admission of a gun and shell casings when the Defendant had taken the stand and admitted shooting through the door. State v. Moseley, 705 S.W.2d 613 (Mo.App. E.D. 1986). In Mosely, it is difficult to imagine any circumstances under which admitting or not admitting the gun and shell casings changes the outcome of the case when the defense being asserted is a claim that

Mosely was defending his household when he shot through a door and struck a police officer. A final example from Missouri provides a much closer call as to whether it was harmless error. In the last case, the court asserted that because the Defendant's testimony did not vary from his confession, the admission of the confession was simply cumulative evidence. State v. DeWese, 751 S.W.2d 389 (Mo.App. E.D. 1988). A cynic might conclude that DeWese was simply trying to obtain the right to purger himself on retrial. The real question that would have been involved in harmless error review is whether, having excluded the confession, would the defendant have even taken the stand or if he had taken the stand would he have mentioned anything from the facts he had apparently confessed to.[1]

This brings us to the case at bar and the one similar example from Missouri. The problem in these cases is the defendant was seeking the suppression of all the evidence that constituted the crime, the controlled substance. If all the evidence

[1] If a confession is suppressed, the Appellant suspects that the issue of whether it may be used to impeach a defendant who takes the stand and testifies contrary to the confessed facts would depend on whether the coercion which led to the confession undermines its credibility, i.e. the police beat the defendant until he confessed, or was more in the nature of technical violation. See U.S. v. Lee, 16 F.3d 1222, unpublished 1994 WL20089 (6th Cir. 1994)(government agreed not to introduce the confession in its case-in-chief but use it only for impeachment).

constituting the crime is suppressed, then it cannot possibly have been harmless error committed by the court during the State's case-in-chief in admitting the evidence. The case at bar is a rather mild example in that the defendant took the stand in an attempt to supply the necessary facts for his claimed "ultimate user" defense, i.e. identifying the members of his household. The Pate case is an extreme example of the problems of determining whether or not to review the issue of suppressing evidence and relying on the defendant's testimony to deny review. State v. Pate, 859 S.W.2d 867 (Mo.App. S.D. 1993). When Pate took the witness stand, he testified that marijuana grows wild all over Waverly, Missouri and was convicted of possession of marijuana. Although it is never mentioned anywhere in the opinion, the only possible explanation for Pate's testimony is that in addition to being charged with possession of marijuana, he was also charged with the cultivation of marijuana. In short, by overcharging the crime the prosecutor managed to coerce trial testimony from a Defendant and on that basis an appellate panel refused to review whether or not the marijuana should have been suppressed. Given that Pate had apparently pulled entire plants from the ground and put them in his pickup, the crime probably was not even overcharged, although it was certainly zealously prosecuted, given that the defendant proceed to jury trial knowing he would likely have to take the stand and admit to possession. Pate's testimony, just like the testimony in this case, is not voluntary but comes on the heels of a trial court depriving the defendant of his constitutional right to stand trial in forum free from the taint of unlawful conduct. See Weeks v. U.S., 232

U.S. 383 (1914)(relied on in Mapp v. Ohio, *supra*). The defendant's testimony is fruit of the poisonous tree. The exclusionary rule is not a rule of evidence. The exclusionary rule is the judicial recognition that unlawful conduct will not find sanction in the judgment of the courts. Weeks, 232 U.S. 383 at 392.

The Pate opinion does what few other opinions in Missouri do, applies the harmless error standard of review.[2] The court cited Chambers v. Maroney, 399 U.S. 42 (1970) for the proposition that even unlawfully seized physical evidence admitted at trial may nonetheless be harmless error. The Supreme Court cited

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[2] The errors among the regional appellate courts and not applying the harmless error standard is perhaps excusable because it appears to be an often overlooked requirement. See State v. Rutter, 93 S.W.3d 714 (Mo. 2002). As I suspect the highly accomplished and specialized State Public Defender's appellate division represented Rutter, this is a matter that needs to be addressed. When the alleged trial court error impinges a fundamental constitutional right, the standard of review is not a demonstration of prejudice by the defendant. Prejudice to the defendant is presumed when the trial error violated a constitutionally protected right. In those circumstances, only if a court can confidently state the error was harmless beyond reasonable doubt can the court decline to overturn the conviction. Chapman v. California, 386 U.S. 18 (1967) cited in Pate and standard relied on in Hill v. U.S., 864 F.2d 601 (8th Cir. 1988). The different standard not only shifts the burden to the State but raises the bar.

with approval the harmless error found by the Chambers court in Rose v. Clark, 478 U.S. 570 (1986). The problem with extending Chambers to the proposition that, even if the evidence the defendant seeks to exclude from trial is all the evidence of the crime it is harmless error, is that the Chambers opinion deals with extraneous evidence. The harmless error in Chambers involved the seizure of ammunition that fit a firearm. As the Chambers court observed, the issues arising from the search that led to the ammunition's seizure was confused, involved fact questions of a lost search warrant, and procedural questions on Pennsylvania requirements to challenging seized evidence. In the end, the sum total of the Supreme Court's holding was the observation that the issues had been fully reviewed in the courts below and it would decline to revisit the lower courts harmless error holdings. The Southern District's conclusion in Pate that it could somehow be possible to admit all the evidence constituting a crime and nonetheless be harmless error while relying on Chambers will not bare close scrutiny. The Chambers opinion is much like DeWessee and the admission of unlawfully seized evidence, which is extraneous or cumulative of other evidence admitted in the State's case-in-chief establishing the same fact. However, when the evidence that should have been suppressed constitutes all the evidence of the crime and the State's case would not survive a motion for directed verdict at the close of the State's case, the error cannot be harmless nor can the error be rendered moot by conduct occurring in the defendant's case-in-chief because it is fruit of the poisonous tree.

When a defendant makes a claim the trial court erred in such a manner as to deprive him of a fundamental constitutional right, the appropriate initial standard of review is whether or not the error, assuming arguendo it occurred, was harmless. To state the rule another way, appellate courts should initially determine the question of even if the error had not been made, would the trial have proceeded in much the same manner. In cases where a defendant is seeking the suppression of all the evidence constituting the crime, the error can never be harmless.

POINT III

The trial court erred in concluding that the law prohibits sole possession of a drug by anyone other than the prescription holder and denying the Appellant's requested continuance and jury instructions in that § 195.180 allows the lawful possession of prescriptions "pursuant to" a prescription and § 195.010(40) defines ultimate users to include household members because the Appellant shared his household with a person holding a valid prescription.

The trial court's determination of a clear statutory intent on the parameters of Chapter 195 is an issue of law. This Court reviews issues of law de novo. State v. Werner, 9 S.W.3d 590, 595 (Mo. 2000). In determining the meaning of a statute, the court first looks at the plain and ordinary meaning of the words used to determine if there is a clear legislative intent expressed. State v. Withrow, 8 S.W.3d 75 (Mo. 1999). The court will consider related statutes to determine if such a clear intent may be found. Id.

The law does allow for the lawful possession of controlled substances, although the burden of proof is placed on the defendant. R.S.Mo. § 195.180.2 (2000). The law defines lawful possession as:

> A person may lawfully possess or have under his control a controlled substance if such person obtained the controlled substance directly from, or pursuant to, a valid prescription or order of a practitioner while acting in

the course of a practitioner's professional practice or except as otherwise authorized by sections 195.005 to 195.425.

R.S.Mo. § 195.180.1 (2000). The statute plainly has a broad sweep by covering both "possession" and "control", as in a joint control case. See *eg.* State v. Barber, 635 S.W.2d 342 (Mo. 1982). The statute then expands the coverage to include those in possession or control who obtained such position either "directly from**, or** pursuant to**,** a valid prescription". The General Assembly's language suggests the words "pursuant to" mean something different than "directly from". There would be no point in setting off the phrase with commas and including a conjunction if "pursuant to" meant the same thing as the words it followed.

There may be an initial temptation to suggest that there are only two categories by mating "possession" with "directly from" and "control" with "pursuant to". Unless there are four categories and it is possible for the prescription holder, whose possession would generally be seen as being "directly from" the prescription to also have "control" "directly from" the prescription, then absurdities result. The Appellant will establish there must be four groupings or ridiculous things happen to the prescription holder, much less anyone else. The four groupings under the statute include: possession & directly from; control & directly from; possession & pursuant to; control & pursuant to. What the State is attempting to do and what the opinion below did do was attempt to circumscribe the third category, "possession" "pursuant to" when no statute justifies the limits imposed.

The problem with paring off and limiting it to two groups would arise when a husband and wife are driving home from the pharmacy with drugs in the pharmacy bag sitting on the center console or in the trunk or when the couple is at home with the drugs are in the medicine cabinet. The spouse would have "control" "pursuant to" a prescription and fit within one of the two protected groups, however, the prescription holder no longer has "possession" "directly from" a prescription but merely has "control". The prescription holder no longer has sole possession directly from the prescription and therefore would have no defense. If the court were to pair off the types of possession with the manner of how it was obtained, the results are absurd. The family member with control deriving from the prescription holder has a defense but the patient to whom the drug has been prescribed, if he or she has relinquished possession to some form of joint control, no longer has a defense, i.e. perhaps the prescription holder placed the bottle in the medicine cabinet and unwittingly lost possession and created some type of joint control.

The Appellant is mindful of the fact that cases are decided on their facts. The Appellant dislikes just as much as the members of this court claims of Kafkaesque nightmares. However, the question at issue is the intended meaning of multiple provisions of Chapter 195. There is no existing case law on the issue being raised. Perhaps the General Assembly intended to outlaw medicine cabinets, which appears to be the position argued by the State to the extent it relies on § 195.180 creating two rather than four categories of lawful possession.

However, it seems unlikely that the legislative intent behind § 195.180 was to outlaw medicine cabinets or to require people living with others to retain sole possession of their medications by keeping them on their person. The Appellant rather doubts this intent because it seems absurd. The same examples above could be restated not with a spouse but with a one year-old child holding the prescription. Somewhere in the state or federal regulations the law requires that medicine be dispensed in containers with childproof closures. A reading of the statute with only two groupings not four groupings would require the conclusion that a pharmacist must dispense a medication in a bottle a child cannot open and, after receipt by the parent, possession of that medication must be transferred to the child immediately upon coming into the child's presence knowing the child cannot open the container. Appellant believes such a statute would run afoul of the doctor patient "substantial impediment" analysis flowing from Rowe v. Wade and invite a constitutional challenge. Statutes should not be construed in a manner inviting a constitutional challenge. State v. Burnau, 642 S.W.2d 621 (Mo. 1982).

The court might ponder why it is not a felony for a parent to administer, dispense, distribute or give a minor child the medication prescribed by a physician. The question fits seamlessly with why it is not a felony for a parent to retain control and possession of the minor's medications.

Chapter 195 provides no direct language establishing what was intended when the General Assembly stated that it was lawful to possess controlled substances "pursuant to" a prescription. Schedule I drugs are those with no

medicinal value and it is unlawful to possess or control such drugs. There would be no defense, right to a continuance or right to jury instructions, if the drugs seized were listed under schedule I because no one could have such a prescription, unless it is marijuana, 195.017.2(4)(s) & (aa), and the issue of full faith and credit arose on an out-of-state prescription. Schedule II drugs are highly addictive but have some medicinal value and include the opium, heroin and morphine groups. R.S.Mo. § 195.017.3. Schedule II drugs must be kept in their original containers, § 195.110. The original container must contain notice that "it is a criminal offense to transfer such narcotic or dangerous drug to any person other than the patient". § 195.100.3. It might be possible to argue that a Schedule II medication must be kept in its original container however, the Appellant was not charged with failing to keep a drug in its original container but possession of a controlled substance.

The appellate opinion attempted to use the term "transfer" in § 195.100.3 as an aid in determining the meaning of "pursuant to", as used in § 195.180. The problem is the chapter does not define the terms transfer, dangerous drug or patient. The chapter does define administer, dispense and distribution. § 195.010. The problem is figuring out what "pursuant to" or "transfer" means. R.S.Mo. §§ 195.100 & 195.180. Assuming a fact not in evidence, that schedule II drugs are never prescribed to a minor, it is possible to believe that, as to schedule II drugs, they must be immediately surrendered to the prescription holder and upon surrender can never leave his or her possession and thus avoid even the creation of joint control. Taken literally and construed to give a plain meaning, it appears a

person who has a valid prescription for a schedule II drug and takes the drugs home and puts them in the medicine cabinet would have "transferred" the drugs to joint control circumstance and committed a felony by relinquishing exclusive control. The appellate opinion below requires the conclusion that § 195.180 creates only two categories, with the exception of picking up the medication from the pharmacy, resulting in the conclusion the General Assembly outlawed medicine cabinets as to schedule II drugs. The absurdities are insurmountable if schedule II drugs are ever prescribed to a minor.

It is possible to farret out the meaning for some of the terms used in § 195.100. Narcotic is a term of art and the narcotics are listed separately within each schedule, i.e. § 195.017.8(1) are the Schedule IV narcotics. The drug in this case, diazaepam, is not a narcotic. Tr 175; § 195.017.8(2). The term "dangerous drug" is not defined but presumably means any listed or scheduled drug or compound that is not a narcotic. This leaves the court with the position of trying to reconcile § 195.180 allowing lawful possession "pursuant to" a prescription and a labeling requirement making it illegal to "transfer" the drug from the possession of the prescription holder, which creates a potential problem in joint possession circumstances such as the medicine cabinet.

It is not hard to see that the labeling requirement is not a grand sweeping statement of legislative intent. The labeling requirement is just that. It is what will fit on a label. The legislature surely did not intend to outlaw the use of medicine cabinets or require that possession and control of drugs be surrendered to

minors. To give a shorthand restatement of the law such as in the labeling requirement a position of paramount importance needlessly brings § 195.100.3 in to conflict with § 195.180, in that the later provision allows much broader possession rights. Further, to give paramount importance to the use of the word "transfer" in § 195.100.3 makes it needlessly difficult to reconcile with § 195.110, which states that only schedule II drugs must be kept in the package with the label.

The final reason why it is obvious the labeling requirement in the later part of § 195.100.3 is not a guidepost to the legislative intent is the first part of § 195.100.3. The full text of § 195.100.3 is:

> 3. The label of a controlled substance in Schedule II, III or IV shall, when dispensed to *or for a patient*, contain a clear, concise warning that it is a criminal offense to transfer such narcotic or dangerous drug to any person other than the patient.

R.S.Mo. § 195.100.3 (2000)(emphasis added). It is difficult to believe there is a legislative intent to outlaw transferring drugs to anyone other than the patient when the statute allows what it purports to outlaw. The statute allows dispensing drugs "to or for a patient". The statute cannot possibly mean it is illegal to transfer a drug to anyone other than the patient when, by its own terms, the statute anticipates drugs will be dispensed to third parties, i.e. both to the patient and for a patient.

The labeling requirement is nothing more than shorthand for what is allowed by § 195.180. Far from helping to decipher the meaning of possession

"pursuant to" a prescription, it only muddies the waters. Indeed, the statute itself makes little sense by anticipating transfers to third parties and then seemingly outlawing the transfers it anticipates.

This does bring the discussion closer to the heart of the question. When can drugs be dispensed "for a patient"? Why can an individual pick-up his or her spouse's or child's prescription? Why don't individuals have to surrender prescriptions to three year-old's? Is there a definition for possession "pursuant to" a prescription?

Section 195.010(11) allows drugs to be dispensed to an "ultimate user". Dispensing is the delivery of "a narcotic or controlled dangerous drug to an ultimate user…" pursuant to a prescription. An "ultimate user" is:

> (40) **"Ultimate user"**, a person who lawfully possess a controlled substance or an imitation controlled substance for his own use or for the use of a member of his household or for administering to an animal owned by him or by a member of his household;

R.S.Mo. § 195.010(40) (2002). From the definition of "ultimate user", it can be inferred the term "lawful possession" is intended to include prescriptions for members of the household. However, the definition of ultimate user does not move the present discussion closer to an answer about the definition of "pursuant to" because the statutory definition for ultimate user assumes what is at issue that the definition of lawful possession is clear.

At this point, it is known that a pharmacist can "dispense" controlled substances to the prescription holder or any member of his or her household. § 195.010(11) & (40) & 195.100.3 (dispensed *for a patient*). Lawful possession includes possession pursuant to a valid prescription. When the drugs are in the medicine cabinet, everyone in the house has joint possession but each person in the house has a defense to prosecution because each person's control arose "directly from" or "pursuant to" a prescription. § 195.180.

There is no statutory geographic limit or proximity requirement. As discussed *supra*, the statutory language cannot be parched into sole possession for the prescription holder and joint possession for others without creating the absurd results of requiring parents, guardians household members to deliver sole possession of prescriptions to minors and incompetents. Once the possession is lawful, it remains lawful so long as drugs are for the use of the person in possession or for any member of his household. § 195.010(40). The court might wonder about a case where an individual had possession of 40 or 50 medications, although all the medicines where, in fact, prescribed to some member of his household. Is the person a drug addict or he is simply the family nurse? The problem is sorted out through the exceptionally ingenious system of a jury trial. The defendant bears the burden of proof and persuasion. R.S.Mo. §§ 195.180.2 & 195.367. The Appellant is not asking this court to condone any particular lifestyle or conduct it might find ill conceived. The Appellant is only asking this court to give the statutes their plain and ordinary meaning, avoiding constructions that

produce absurd results and allow him the opportunity to present his defense to a jury.

At one point, the Appellant believed the statutes were ambiguous because they were producing absurd results, like criminalizing the failure to surrender drugs to a minor or outlawing the use of the medicine cabinets, as such would constitute a transfer from sole possession to joint possession. There is no need to charge the General Assembly with being ambiguous. The absurdities arise not from the statutes being read with their plain and ordinary meanings but from the narrow and strained interpretation the State is requesting. Of course, if the statutes can be construed together to produce the results sought by the State without producing absurd results then the statutes are *per se* ambiguous. The Appellant has provided a reasonable reading of the statutes that avoids absurd results but allows him the defense claimed. If it is possible to construe the various provisions such that absurdities are avoided but the Appellant's conduct does not fall within a legal exception, the only thing that has been proved is that reasonable people can read the statutes and reach opposite conclusions, which is the definition of ambiguous. Ambiguous statutes must be construed to allow the assertion of the claimed defense pursuant to the Rule of lenity.

The Appellant believes the statutes can reasonably be construed together without absurd results only by reading the terms of the statute with their plain and ordinary meaning. The stumbling block that awaits any attempt to read the statutes such that the Appellant does not have a defense is that there are no

exceptions relating to prescriptions for minors, incompetents or spouses. The only exception excusing a parent from having to surrender a prescription to a three year-old child is because they are household members pursuant to the joint construction of § 195.010(40) and 195.180. While the General Assembly could have tried to write statutory provisions covering every possible combination of minors, stepchildren, incompetents, etc. the General Assembly chose the simpler and time honored route of allowing the defendant to try and convince a jury he or she has a valid excuse with the only proviso being that the defendant must be a household member of the prescription holder. The beauty of the approach selected by the General Assembly is that it would even cover a family reunion when the defendant had joint control of the drugs in a hotel suite he was sharing with his adult brother who lived in a different state because the suite is the household and for the duration of the suite's occupancy by either brother, they were members of the same household. It further lasts up until the last brother checks out of the suite and that period of time in which he had sole possession of the suite the opportunity to convince the jury the first brother to check out inadvertently left his prescriptions rather than unlawfully transferred possession to the last brother to check out. This approach would likewise cover the circumstances where an adult child comes home to visit his parents for Christmas vacation and then leaves for his permanent residence in another State but forgets his prescription medicine at his parent's home.

One may possess a drug pursuant to a prescription. § 195.180. Possess pursuant to the prescription arises when the drug has been prescribed for the use of the possessor or any member of his or her household, including the pets and farm animals. § 195.010(40). Who constitutes a member of the household and whether the drugs really were for the use of the possessor or a member of the household are issues reserved to the jury. §§ 195.180.2 & 195.367. The trial court erred in denying the continuance, Point IV, and rejected the tendered jury instructions, Point V. If the evidence is not suppressed, the Appellant is entitled to a new trial.

POINT IV

The Trial Court erred in denying Appellant's Motion for Continuance based on an absent witness because Appellant filed a written motion with an attached affidavit containing sufficient facts to support the continuance bolstered further by the testimony of counsel that the witness's testimony was material to the defense and the Appellant had been diligent in securing the testimony in that on the Friday before a Monday trial, the witness's husband had a cardiac event and did not notify Appellant's counsel she would be unavailable on Monday as a result of her husband's scheduled emergency surgery in Memphis on the date of trial until Sunday and, even on such short notice, Appellant obtained an affidavit from the witness identifying the business records he sought to introduce by way of the witness, which records supplied a necessary element of the Appellant's only defense, to-wit: the "ultimate user" or household prescription defense to possession of a controlled substance.

The Appellant tried to assert the "ultimate user" defense to the charge of possession of a single diazepam pill. The Appellant took the stand and testified he intentionally took possession of the pill from his brother's cigarette pack fearing it was a controlled substance after seeing his brother being arrested. Appellant testified he and his brother lived with their grandmother and Mr. Ray got the pill from grandmother. The Appellant's defense was that the diazepam pill had been prescribed to a member of his household, grandmother. The witness who could

not attend due to her husband's heart attack was the pharmacist who filled the prescription. The pharmacist or her records were the only source of proof a member of Appellant's household had lawful possession of diazepam as a result of a filled prescription.

The court reviews the denial of a motion for continuance to determine if the trial court abused its discretion in denying the request and, if so, whether the denial prejudiced the defendant. State v. Patton, 84 S.W.3d 554, 556 (Mo.App. S.D. 2002). Westlaw identifies 195 cases stating this position, which seems to include most of the cases on this issue. The Appellant is aware of only two instances where a trial court was reversed.

The Missouri Supreme Court reversed a conviction after the trial court denied the State's motion for continuance but then admitted into evidence the Prosecutor's affidavit of what the absent witness would have testified to. State v. Emerson, 2 S.W. 274 (Mo. 1886). Over the next 115 years, the vast majority of cases refusing to grant a new trial following the denial of a continuance based on an absent witness rested on procedural deficiencies in the motion for continuance, attached affidavits or efforts of counsel to secure the testimony, although there were occasional instances where the issue was whether counsel's conduct had waived the issue during trial. See State v. Quinn, 142 S.W.2d 79 (Mo. Div. 2 1940). The year before last the United States Supreme Court granted habeas corpus review to Remon Lee, holding that counsel's efforts to comply with Rule 24.10 were sufficient to meet the purpose of the rule and any technical defects

were insufficient to block a federal adjudication of whether the denial of a continuance amounted to a denial of due process. Lee v. Kimna, 534 U.S. 362 (2002).

Appellant subpoenaed a pharmacist to appear and testify she filled a diazepam prescription for Alice Ellis. SLF 1. On the Friday before a Monday trial, the witness's husband went into the hospital with a cardiac condition. Exhibit A. Counsel for the Appellant did not learn of this until Sunday, the day before trial, at which time counsel obtained an affidavit from the witness. Tr 58-60.

The affidavit indicates the witness is a pharmacist and attaches the records she would have identified at trial. Exhibit A. It further sets forth she became unavailable when her husband's doctor scheduled him for emergency surgery in Memphis beginning on the morning of trial. Id.

The State refused to consent to the admission of the pharmacist's business records. Tr 58. The State insisted upon preserving its right to cross-examine the pharmacist as to her business records showing what prescriptions she had filled for Alice Ellis over the years. Id. The State likewise opposed the Appellant's motion for continuance. The trial court denied the requested continuance.

The Appellant's motion and affidavit established the material fact that a member of Appellant's household had filled a prescription for the controlled substance he was accused of possessing. Only the pharmacist could testify the prescription was actually filled. The affidavit recites the witness is a pharmacist

and attached her records showing she filled diazepam prescriptions for Alice Ellis. Exhibit A. The motion and affidavit both indicated the Appellant did not become aware of the witness's problem until the day before trial and, on a Sunday, counsel still obtained the necessary affidavit. Exhibit A, Tr 58-60. The Court was readily able to infer from the nature of the witness's disability, her husband's illness, that her testimony would be available in the immediate future either in person or by deposition.

Appellant assumes the grounds for the denial are not procedural but those stated by the Court in response to the motion. The Court stated:

> THE COURT: And the court is going to sustain your objection Mr. Kiser and I want to give the reasons so the appellate court will understand if this ends up in the appellate court. It is my understanding that the evidence will be, as related by you, and I believe agreed by the defense counsel that this controlled substance is diazepam, was recovered from the defendant by an officer of the Highway Patrol, away from the premises and not in the presence of grandmother. Now is that correct?
>
> MR. KISER: That's what the evidence will be.
>
> THE COURT: And that he had it in his pocket and not in a container?
>
> MR. KISER: That's correct also.
>
> THE COURT: And you are objecting that it is not relevant?
>
> MR. KISER: Not relevant to any issue of the offense.

THE COURT: And the affidavit, which I haven't looked at the prescription, but it is my understanding that all the prescriptions pertain to grandmother and none of the prescriptions pertain to the defendant, is that correct?

MR. WALSH: Yes sir.

THE COUIRT: Okay, then the court will sustain your objection. Mr. Moore, do you have anything more you want to put on the record?

Tr 64-65.

The Appellant would first address the "original container" requirement. This appears at § 195.110, which requires that schedule II drugs must be kept in their original container. Schedule II drugs are the most addictive drugs that can lawfully be prescribed. Tr 188. Diazepam, the pill the Appellant possessed, is in the next to last schedule, schedule IV. R.S.Mo. 195.017.8(2)(n). There is no requirement to keep schedule IV drugs in their original containers.

The Appellant will next turn to the "ultimate user" defense. For purposes of Chapter 195, an ultimate user is:

"Ultimate user", a person who lawfully possess a controlled substance or an imitation controlled substance for his own use or for the use of a member of his household or for administering to an animal owned by him or a member of his household;

R.S.Mo. 195.010(40) (2002). Lawful possession is defined in § 195.180 by showing:

1. A person may lawfully possess or have under his control a controlled substance if such person obtained the controlled substance directly from, or pursuant to, a valid prescription or order of a practitioner while acting in a course of a practitioner's professional practice or except as otherwise as authorized by Sections 195.005 to 195.425.

Lawful possession arises when the controlled substance is obtained pursuant to a prescription. § 195.180 (2000). Lawfulness of the possession extends from the person with the prescription to members of his or her household. § 195.010(40)(2002). Whether the person holding the prescription is present or in the vicinity is irrelevant. A pharmacist may "dispense" drugs to an "ultimate user", which is why residents in Missouri can pickup their spouse's medicine, or children's medicine or have their children pickup their medicines from the pharmacy. R.S.Mo. § 195.010(11).

Counsel for the Appellant actually discovered the "ultimate user" defense when he pondered whether it would be a felony if a doctor prescribed husband horse pills dispensed in a bottle with a diameter twice the size of a quarter and the husband gave them to his wife to put in her purse. Thinking that this could not possibly be a felony led to the discovery of the definition of an "ultimate user". The definition of "ultimate user" also encompasses other common sense problems and, as in this case, common practices. Common sense dictates that parents do not entrust controlled substances to minor children even if it is the child's prescriptions and this problem is addressed by the definition of "ultimate user".

Appellant likewise believes common practice is sanctioned by the "ultimate user" definition for members of the same household to share medications, as in:

> Honey, my _____ [fill in body part] hurts.
>
> That's okay. I think I still have some _____[fill in medication] from when I had the _____ [fill in medical procedure].

This is not felonious conduct. The only reason it escapes being felonious conduct is because of the definition of "ultimate user".

Appellant is aware of factual distinctions between the case at bar and the examples mentioned. However, the issue before this Court is what is the meaning and how should the definitions of possession "pursuant to" and "ultimate user" be construed together. Appellant hopes the instances he has cited are not felonious conduct. This court might not find the Appellant's version terribly persuasive. A jury might well agree with the court's view. However, the Appellant asks only the right to have the facts tried by a jury.

Appellant has a final example of why the presence or vicinity of the prescription is not relevant. Husband and wife divorce. Husband keeps the house and, unbeknownst to him, his wife left a prescription in the medicine cabinet. His house is searched pursuant to a warrant, perhaps an anonymous tip from the ex-wife, resulting in the discovery of the prescription. Surely the husband is not forced to rely solely on the defense of "knowing" possession. Such a case would boil down to a he-said she-said shouting match pitting the defendant, who is trying to avoid jail time, against the testimony of police officers, who must have had

some reason to believe the defendant knew of the presence of the drugs to convince the Prosecutor to file charges. If the court finds any of these scenarios apocryphal, the Appellant would invite the Court's attention to the fact that he faces a second remand to the Department of Corrections – the first one was in 1981 on grand theft charges – with a 10-year sentence for the possession of a single diazepam pill.

The Appellant seeks only to have his defense heard and decided by a jury. People in the United States – they need not be citizens – are entitled to a trial by jury on criminal charges. A jury is empanelled to resolve disputed facts. More importantly, "a jury is to guard against the exercise of arbitrary power – to make available the commonsense judgment of the community, as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." Duncan v. Louisiana, 391 U.S. 145, 155 (1968). At the conclusion of a trial, the defendant is entitled under the 5th, 6th and 14th amendments to have the jury instructed on the theory of the defense. Matthews v. United States, 485 U.S. 58, 63 (1988) *citing* Stevenson v. United States, 162 U.S. 313 (1896)(holding that the refusal of a voluntary manslaughter instruction in murder trial where self-defense was the primary defense constituted reversible error).

The right to such an instruction is guaranteed even when the additional instruction is not for a lesser-included offense. In United States v. Brown, the Eight Circuit reversed a conviction for robbery when the defendant contended

through-out the case that he was at most an accessory after the fact and the trial court refused such an instruction. 33 F.3d 1002 (8th Cir. 1994). The reason such rules exist is that the "right to a jury trial is granted to criminal defendants in order to prevent oppression by the Government." Duncan, 391 U.S. at 155.

The Appellant was entitled to a continuance until he could secure the testimony of the only witness who could supply the crucial testimony that a member of the Appellant's household lawfully possessed diazepam pursuant to a prescription. The Appellant bears the burden of proof and persuasion on this issue. R.S.Mo. §§ 195.180 & .367. Appellant had no intent of taking upon the burden of persuasion based on his grandmother's testimony. The only other individual who could testify that a prescription for diazepam existed and had actually been filled was the pharmacist who filled it.

Appellant was entitled to develop the evidence on and submit the "ultimate user" defense to the jury. Other than the testimony of the pharmacist, the Appellant presented the other necessary elements for the "ultimate user" defense, to-wit: the holder of the prescription was a member of the Appellant's household. The Appellant was prevented from presenting the necessary evidence establishing his defense by the court's error of law in determining the defense was not available.

POINT V

The Trial Court erred in denying Appellant's tendered Instructions A and B because there would have been substantial evidence to support the ultimate user defense set forth in those instructions in that the controlled substance the Appellant possessed had been prescribed to a member of his household and a pharmacist had been subpoenaed to provide the evidence of filling the prescription and the Appellant testified the individual identified by the pharmacist as having the prescription was his grandmother with whom he and his brother lived.

The Appellant raises the issue of submitting jury instructions to avoid any questions of whether he waived his right to assert the "ultimate user" defense. This is an affirmative defense on which the Appellant bore the burden of production and persuasion. R.S.Mo. §§ 195.180 & .367. The substantial evidence that would have supported the submission of instructions upon the affirmative defense was the offer of proof for the pharmacist regarding filling a prescription and testimony that the individual who held the prescription was a member of the Appellant's household.

Instructions must be given when there is substantial evidence to support them. State v. Jessica Weddle, 88 S.W.3d 135 (Mo.App. S.D. 2002). The court reviews the evidence in the light most favorable to the party tendering the instruction. Id. The refusal to give an instruction required by MAI creates a

presumption of prejudice. The "ultimate user" defense is a statutorily created affirmative defense but there is not yet an approved instruction.

The Appellant's proposed instruction complied with Rule 28. The Appellant would point out that during the instruction conference, it does appear counsel mislabeled Instruction A & B in that they are reversed and obviously the verdict director cross-referencing the affirmative defense should be labeled as A not B. There was substantial evidence to support the submission of the affirmative defense. The failure to submit to the jury the Appellant's affirmative defense amounted to prejudice given that the Appellant had no other defense to the crime charged in the Information.

Having presented sufficient proof and tendered what is arguably an accurate instruction, the Appellant was entitled to have the jury instructed on the issue of the "ultimate user" defense. The time is not yet ripe to fully visit whether the instruction is absolutely perfect insofar as it is not yet gone through the adversarial process at the trial level. In the case at bar, the trial court had already decided it would not submit the ultimate user defense when it denied the motion for continuance regarding testimony of the pharmacist. Until the construction of instruction itself is put through the adversarial process at trial, the issue is not yet ripe for this Court's review as to the sufficiency of the instruction. The first and most obvious reason for this is that it would allow the State to sandbag in the case at bar and raise any objection to the instruction on appeal even though no objection had been stated to the instruction in the trial court. The Appellant

likewise does not believe it would be wise to find that the State's failure to specifically identify its objection to the instruction when tendered waived all objection to the submission to Instructions A & B on retrial.

CONCLUSION & REMEDY

The Appellant's first point should be sustained, the conviction reversed and the Appellant discharged. If the first point is denied but the fourth and fifth points sustained, the case should be remanded for a new trial.

_____

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IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	Appeal No. SC85704
vs.	)	
	)	
BILLY LYNN BLOCKER,	)	
	)	
Appellant.	)	

CERTIFICATE OF SERVICE

COMES NOW Appellant, by and through counsel, John M. Albright of MOORE, WALSH & ALBRIGHT, L.L.P., and certifies that the Brief complies with the limits in Rule 84.06(b) insofar as it is Appellant's Brief with less than 31,000 words or a Respondent's Brief with less than 27,000 words or as a Reply Brief with less than 7,750 words in that it is Appellant's Brief and contains 14,273 words and that a copy of the Appellant's Brief, together with a copy on disk in Word format scanned for viruses, was served upon the attorneys of record by United States mail, postage prepaid, addressed to: Jeremiah Nixon, Attorney General, P.O. Box 899, Jefferson City, MO 65102 on this 9th day of January, 2004.

BY:_____
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