IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. SANDRA KEMPER	)	
	)	
Relator,	)	No: SC87246
	)	
vs.	)	
	)	
THE HONORABLE DAVID LEE VINCENT, Judge of the Circuit Court of St. Louis County, Div. 9	)	
	)	
Respondent.	)	

WRIT OF PROHIBITION FROM THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS, STATE OF MISSOURI

HONORABLE JUDGE DAVID LEE VINCENT, DIVISION 9

RELATOR'S BRIEF

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INDEX

JURISDICTIONAL STATEMENT

This is an original proceeding for a Writ of Prohibition pursuant to Rule 97 of the Missouri Rules of Civil Procedure. At issue is whether Respondent exceeded his jurisdiction in purporting to hold Relator for a second trial, unless now prohibited, after declaring, sua sponte, a mistrial in her case in the Circuit Court of St. Louis County in Cause No. 02CR-001525 on September 20, 2005 and denying Relator's Motion to Dismiss for Lack of Subject Matter Jurisdiction on October 6, 2005 in that the proceedings are barred by the United States Constitution and the Missouri Constitution to wit:

This Court has jurisdiction pursuant to Article V, § 4 of the Missouri Constitution in that this is a proceeding for an original remedial writ. In addition, there is no adequate relief to be afforded by an appeal or by application for this writ to a lower court. Mo. R. Civ. Pro. 84.22(a). This writ is filed pursuant to Rule 84.24 Missouri Rules of Civil Procedure. This writ was previously filed in the Missouri Court of Appeals on October 24, 2005 and was denied by the Missouri Court of Appeals, Eastern District on October 25, 2005.

PROHIBITION AS A PROPER REMEDY HEREIN

Prohibition is appropriate to prevent unnecessary, inconvenient and expensive litigation. **State ex rel. the Police Retirement System of St. Louis v. Mummert, III**, 875 S.W.2d 553, 555 (Mo. en banc 1994). Because Relator faces the daunting prospect of a new trial due to the sua sponte declaration of a mistrial by Respondent herein, the remedy sought by Relator is proper particularly in light of the above-referenced rationale.

TABLE OF CASES Page No.

POINTS RELIED ON

THE GRANTING OF A MISTRIAL BY THE RESPONDENT TRIAL JUDGE SUA SPONTE ON SEPTEMBER 20, 2005 AND THE RESPONDENT'S DENIAL OF RELATOR'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION ON OCTOBER 6, 2005 WAS ERROR AND RESULTED IN THE RELATOR BEING PLACED IN THE POSITION OF DOUBLE JEOPARDY IN VIOLATION OF THE FIFTH AMENDMENT AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION ON THE CHARGES OF ARSON IN THE FIRST DEGREE, MURDER IN THE FIRST DEGREE AND THREE COUNTS OF ASSAULT IN THE FIRST DEGREE FOR THE REASON THAT NO CIRCUMSTANCES EXISTED JUSTIFYING THE RESPONDENT TO GRANT A MISTRIAL UNDER THE MANIFEST NECESSITY DOCTRINE AND THE RESPONDENT FAILED TO EXERCISE SCRUPULOUS JUDICIAL DISCRETION IN GRANTING THE MISTRIAL AND NEITHER THE STATE OF MISSOURI NOR RELATOR ENGAGED IN ANY ACTIVITIES DURING THE COURSE OF THE TRIAL WHICH JUSTIFIED OR CREATED A NEED FOR THE GRANTING OF A MISTRIAL

STATEMENT OF FACTS

The State of Missouri charged Relator Sandra Kemper with Arson in the First Degree, Murder in the First Degree, and three counts of Assault in the First Degree in March 2002. The charges stem from a terrible house-fire that occurred at her residence in November 2001. Kemper's son, Zachariah, perished in the fire, while the remaining four residents, including Kemper, survived.

The bulk of the State's case against Sandra Kemper consisted of two audio taped inculpatory statements purportedly made by Ms. Kemper to two St. Louis County police detectives after she had been in police custody for 10-12 hours. The audiotape confessions were part and parcel of a much longer interrogation process that started at 9:30 a.m. when police officers picked Kemper up at her home and brought her to the station for questioning until the late evening when Kemper confessed. Preceding these inculpatory audiotapes was a videotaped polygraph interrogation (**See Appendix A24-A141**)which was over three hours in length conducted by Detective Schunzel, which is more instructive regarding the manner in which Kemper was interrogated prior to the ultimate audiotaped statement.(**See Appendix A24-A141**)

This videotape shows Kemper repeatedly denying any involvement with the fire. Detective Schunzel repeatedly tells Kemper that the (1) the fire was not accidental; (2) she must have set the fire; (3) if she does not confess, she would "get the needle." Despite these threats, Kemper continued to maintain her innocence. Schunzel administered a polygraph examination. After the examination was complete, Schunzel

informed Kemper that she had failed the examination and that she must confess. Kemper remained attached to the polygraph machine for the remainder of the interrogation, until she confessed. Kemper later learned, through pretrial discovery, that she had in fact passed the polygraph examination wherein she had denied involvement in the crimes as charged. (**See Appendix A18-A20**)

In addition to the problems with the nature and scope of the interrogation, the 'confessions' were also problematic for the State in that the Kemper's description of the fire, how she started it, and her actions during it, was not supported by the State's technical evidence and was not scientifically possible. Specifically, the State's own fire expert testified that it would not have been possible to remain in the basement where the fire originated for longer than five (5) minutes after the fire had started. The defendant's fire expert contended that it would not have possible to remain the basement where the fire originated for longer than three (3) minutes after the fire had started. In spite of this remarkable congruity amongst opposite experts, Kemper repeatedly insisted in her audiotape confession that she watched the fire burn for 20-30 minutes.

In October 2004 Relator endorsed Dr. David Raskin as a witness in her case. In December 2004, the State filed its Motion in Limine to Exclude Evidence of Defendant's Polygraph Examination and Strike and Exclude Defendant's Expert Witnesses, seeking to exclude Dr. Raskin's testimony. **(*See* Appendix A1-A15**.) The trial court ruled on these motions on January 12, 2005 entering an order specifically stating, "State's Motion to Exclude Evidence of Polygraph denied if State offers any of Defendant's statement," and

"State's Motion to Exclude the Expert Testimony of Dr. Raskin denied." (***See* Appendix A16-A17)**.

Before the deposition of Detective Scheunzel, Defense counsel, via subpoena, compelled him to produce any and all records in relation to Kemper's polygraph examination. During the deposition, Scheunzel repeatedly denied using the 'polyscore,' or having any such printout. Detective Scheunzel subsequently died of a stroke, prior to trial. Scheunzel's deposition testimony was read to the jury, by Dr. Raskin, as follows:

A. ... Sir, I had asked that you supply me with the computer files when I had the subpoena served upon you concerning the electronic media that was utilized in the polygraph test. Do you have that at your disposal?

Answer: I gave you everything I have.

Question, Okay. Where is the – where are the computer files and the electronic data from the polygraph test?

Answer, Computer files? I don't know what you mean by that. (**See Appendix A153)**

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Question, Didn't you say that you used the Lafayette Computerized Polygraph and the software was LX3000?

Answer, Yes.

Question. Okay. Where is – where are the computer files with the electronic, in the electronic media from the polygraph testing?

Answer, What do you mean by computer files? Are you referring to the charts, or what are you referring to?

Question, The charts or whatever would be generated.

Answer, Everything that's generated, you have copies of.

Question, Okay. And are there any additional polygraph recordings, other than those which you have previously supplied, which are set forth in Defendant's Exhibit B?

Answer, There is not.

(**See Appendix A153-A154**).

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Question, Can you tell me what methods does the polygraph system that you utilize to interpret the outcome, can you tell me -- strike that. What methods does your polygraph system, I assume it's this Lafayette Computerized Polygraph System, provide for interpreting the outcome of the polygraph test?

Answer, They offer what they call polyscoring.

Question, What is a polyscore?

Answer, It's the way to evaluate the charts.

Question, Okay. And do you have any of that information that was used to polyscore Sandra Kemper's polygraph charts?

Answer, I don't, we don't, no.

Question, Okay. Was that available at one time?

Answer, Was the polyscore available?

Question, Right.

Answer, Or was the results of them?

Question, Either.

Answer, No.

Question, Okay. Did you utilize this polyscore method?

Answer, No.

Question, You did not?

Answer, No.

Question, Why not?

Answer, Because they call them, we call them too strict, too tight.

Question, What do you mean, you call them too strict, or too tight?

Answer, They'll call a particular response -- let me explain it this way. We would much rather call a guilty person innocent than an innocent person guilty. With polyscore, there's a slight response they may call deceptive when, in fact, it may not be. So we don't utilize polyscore.

(**See Appendix A154**).

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Question, Okay. And would you be willing to do that for me and provide me with a printout of the results, and a copy of the computer files of these analyses and electronic media?

Answer, It's available.

Question, Okay. Would you be willing to do that?

Mr. Duepner, It's up to you. If you don't want to do it, you don't. If you don't want to, you don't have to.

Answer, We don't. We don't utilize it. So no.

Question, So you'd be unwilling to do that?

Answer, Yes.

Question, Why would you be unwilling, if you are certain of your scoring of the polygraph test, to utilize the polyscore and check your accuracy?

Answer, We don't utilize the polyscore.

Question, Okay. Why would you be unwilling to do this?

Answer, Because we don't utilize it.

Question, So you could if you chose to do it, but you won't do it. Is that what you're telling me?

Answer, We just don't utilize it.

Question, Are you willing to polyscore the results of the polygraph --

Mr. Duepner, He said no.

(**See Appendix A155-A156**).

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Six days before the start of the Kemper trial, and over one year since the deposition where Schunzel denied possession or use of the 'poly-score,' the State produced the 'poly-score.' (***See*** **Appendix A18-A20).** On September 12, 2005, the first

day of Kemper's trial, counsel met in chambers to discuss the State's late disclosure of the polyscore, on the record. During this lengthy record, there was absolutely no discussion of the State's late disclosure of the 'polyscore' having any impact on the admissibility of the polygraph evidence or the testimony of Dr. Raskin. In fact, at no time between the January 12, 2005 Order and the Court's sua sponte declaration of a mistrial, did the Court revisit the issue of the admissibility of either the polygraph or Dr. Raskin's testimony. In fact, with regard to the late disclosure of the polyscore, the only conversation was as follows:

Mr. Duepner: I asked Detective Schunzel about that, and he said, We don't have it. We don't use it. So I took him at his word. And I was talking with another polygraph examiner exactly six days ago, maybe seven days ago. And he said, Well, if he used this machine, they have got to have it. He said, There will be something there, there will be a log to show if it's there. And if it was accessed. And so I said, All right. I'll look into that. He left.

And I called Randy Combs, who is the other polygraph examiner in the St. Louis County Police Department. And he says, Yes, we have that ability. I said, Can you look at this particular polygraph examination and see if it's there, and see if it was accessed? He called me back and he said, Yeah, I have it. I said, Print it out. I'll be right over to get it. And when I got back to my office is when I

sent it over to Susan Roach's office.

I asked him, Is there a way to find out if anybody accessed it? And he said nobody had accessed it previously. I called him again the other day, and I said, Are you sure? He said, You know, I went back and looked. We changed our system in 2002, after this particular polygraph examination was made. So there's no way of knowing if anybody accessed it before or not.

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The Court: Okay. I find that the prosecutor acted properly within the scope of his duties, and did not act in bad faith in this case, and that he timely disclosed the testimony and evidence to the defense in this case.

(See Appendix A200-A201).

During the course of the trial, the Court determined that the State opened the door to evidence regarding the polygraph results. During examination, by the State, of their witness Detective Webb, the following was elicited by the prosecution:

Q. Did Detective Schunzel communicate to you anything about the results of this polygraph test?

A. Detective Schunzel stated that she had set the fire.

Ms. Roach: I'm going to object. That's not responsive to the question.

The Court: Overruled.

Q. Did he tell you the result, what he thought after he gave her the polygraph test?

A. He had stated that she had shown signs of deception.

(**See Appendix A230**)

After Webb's testimony, the trial court made the following record:

The Court: We are outside the hearing and presence of the jury, with both counsel present, as well as the defendant. I was going to note that the results of polygraph examinations are not admissible in a State of Missouri court of law. However, I also will note that, Mr. Duepner, you entered, or opened the scope of that issue when you examined this last witness on signs of deception. So that Ms. Roach, through your witness, you will be able to give – to respond to the signs of deception.

(**See Appendix A230**).

Subsequently, Dr. Raskin testified regarding the interrogation tactics employed by Detective Schunzel. With the apparent blessing of the trial court, Dr. Raskin gave testimony regarding his interpretation of the recently disclosed polyscore and regarding the methods that Detective Schunzel employed to arrive at his conclusion that Kemper had been deceptive. Dr. Raskin's trial testimony, in pertinent part, was as follows:

THE COURT: Any objection to XX, counsel? That's the curriculum vitae of Dr. Raskin.

MS. ROACH: It is, your Honor.

MR. DUEPNER: No objection to the exhibit itself, your Honor, but to the admission of any testimony related to polygraph, subject to our previous objection about -- that polygraph examinations are not admissible --

MS. ROACH: Your Honor, I object to the prosecutor making a speaking objection.

THE COURT: Let me hear his objection. I think's he's making a specific objection as to the polygraph examination?

MR. DUEPNER: My previous objection will be made to the admission of any polygraph examination testimony, your Honor.

THE COURT: Okay. The objection is overruled. Exhibit XX will be received.

(**See Appendix A145**).

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Q. But just from your observations, did Detective Schunzel follow this process when he conducted the pretest of Ms. Kemper, which preceded the polygraph and the interrogation?

A. The process of the pretest interview?

Q. Right. Did he conduct a demonstration test?

A. He did not conduct a demonstration test. And the rest of the pretest interview, he performed parts of it. But he did many other things that should not be part of that.

(**See Appendix A147-A148)**

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Q. So I guess what I'm hearing is that an innocent depressed person is more likely to fail a polygraph than to pass it, according to the study, is that correct?

MR. DUEPNER: Objection, leading.

THE COURT: Overruled.

A. That is my understanding, yes.

(**See Appendix A149-A150)**

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Q. Okay. Now, Doctor, what were your findings in this case regarding the polygraph?

A. When I reviewed this, I was able to perform a numerical analysis. I did not have the computer analysis, because it was not provided at that time. So I could only base it on my numerical analysis, which indicated that the examinee showed relatively stronger reactions to comparison questions than to the relevant questions. So it was in the direction of a truthful result, but not a strong truthful result.

Q. And were her responses, when you scored them numerically -- and again, reminding the jury that numeric is the scoring that was adopted in the1950s, and that's the same that's utilized by the government agencies, et cetera -- was she shown to be deceptive?

A. No. It clearly was not a deceptive result.

(**See Appendix A151)**.

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Q. By any stretch of the imagination, was she found to be deceptive on any of these questions?

A. Well, I think -- not to be facetious, I think it would require a stretch of the imagination to find her deceptive. The results were far from a deceptive result.

Q. So not a close call?

A. Not a close call, no.

(**See Appendix A152)**.

Q. And, Doctor, I'm going to hand you what has been marked as Defendant's Exhibit five Cs, I guess it's quintuple Cs, and ask you, Doctor, does this document reflect that six days before the trial began in this matter, specifically on September 6th, 2005, that I was faxed the polyscore results from Mr. Duepner's office?

A. That's correct.

THE COURT: Any objection to five Bs and five Cs?

MR. DUEPNER: No, your Honor.

THE COURT: Five Bs and five Cs will be received. You may proceed, counsel.

Q. And, Doctor, is that essentially what we had subpoenaed about a year before that, at the time Detective Schunzel's deposition was taken?

A. It's part of what was subpoenaed. It's the polyscore. The actual electronic data that formed the basis for this were also subpoenaed, but they were not supplied.

(**See Appendix A157-A158)**.

Q. The analysis that the polyscore made, which is reflected in the document?

A. Yes.

Q. Can you tell the jury what that states, and then explain it?

A. Yes. It states right at the top, Inconclusive, probability of deception is zero point one two.

What this means is that the polyscore calculations indicated that there were twelve chances in one hundred that Ms. Kemper was being deceptive. Or to put it alternatively, eighty-eight chances in one hundred that Ms. Kemper was being truthful.

Q. So that's what that means? Eighty-eight chances in a hundred she was truthful?

A. Yes.

Q. And, Doctor, can you tell this jury, does that, in the polygraph world, indicate in any way, shape, or form, except in Detective Schunzel's mind, that there was deception shown by Sandra Kemper?

A. No. It indicates strongly the opposite.

Q. And, Doctor, after you reviewed all the information which I provided to you, including the most recent polyscore, did you come to an overall conclusion regarding the results of the polygraph examination of Sandra Kemper which was conducted by Detective Schunzel three and a half years ago, on or about March 21st, 2002?

A. A conclusion with regard to the outcome of the test?

Q. Yes.

A. Yes, I did.

Q. Okay. And what was your conclusion?

A. That very likely she was being truthful when she answered the relevant questions, denying any involvement in the fire, in setting the fire and participating in it.

(**See Appendix A158)**.

MS. ROACH: Thank you, your Honor. Dr. Raskin, now that you've seen the tape and reviewed the other information concerning the polygraph which was conducted by Detective Schunzel, can you tell the jury what your overall evaluation is of the way in which Detective Schunzel conducted the pretest, in the context of polygraph science?

A. Yes. First of all, a polygraph examination can be used in two ways, either to assess a person's truthfulness with regard to a specific set of events or allegations, and use it to make that determination, or it can be used as the opening wedge for an interrogation designed to extract a confession.

This examination was, unfortunately, the latter. The way in which the examination was conducted was highly inappropriate. It violated many of the basic principles of polygraph techniques.

(**See Appendix A160).**

Q. Okay. Did she pass the test?

A. Yes.

Q. Did he tell her after the test that she failed it?

A. Yes.

Q. And what is the significance of that, from a polygraph science standpoint?

A. Well, he misrepresented the results to her. And it was incorrect. And, therefore, it has a chilling affect on a person, if they are telling the truth, that they are now told that they failed. Especially if it's an important matter like this, and their life may be on the line.

(**See Appendix A162).**

Q. I guess the bottom line, your overall conclusions in this matter concerning the manner in which Detective Schunzel administered the test, scored the test, and conducted the entire process. What would your opinion be, based upon the many, many cases that you've handled over the years, excluding but not limited to the eleven hundred polygraphs that you've conducted for governmental agencies and all of those entities that you more specifically set forth at the beginning of this trial?

A. Overall, my opinion is that this was a grossly substandard polygraph examination. It not only violated many of the fundamental procedures that are necessary to conduct a proper polygraph for the purpose of assessing truth or deception, it apparently -- and the way it was conducted and the way it was used was designed simply for the purpose of breaking her down and giving her information during the pretest that would make it easier for him to extract a statement from her in which she admitted that she set the fire.

This test was so substandard that I can only think of one other videotape of an

examination that I've reviewed that was worse in that regard.

(**See Appendix A165).**

THE MISTRIAL

One day after Raskin's testimony, during a noontime break, the trial court, inexplicably, revisited the issues surrounding the January 12, 2005 Order regarding polygraph evidence and Dr. Raskin's testimony, stating:

The Court: "Shortly after Detective Webb testified, and was excused, this Court sua sponte entered an order on the record outside the hearing and presence of the jury to both parties that polygraph results are out. Are not in evidence. Inadmissible.

And I told the prosecutor at that time, I believe, that he may have opened the door to that particular evidence.

Now, shortly after that, I think both parties came to me and indicated to me that I had a previous ruling regarding polygraph information. And I looked at my previous ruling. They gave me the impression that I ruled that polygraph results were in. And I see a court order of January 12th, 2005, State's motion to exclude evidence of polygraph denied if the State offers any of the Defendant's statement. It should have been statements. And I believe in the State's motion it did mention polygraph results, but the prayer was asking for – to exclude any mention of, I believe, and I'm not really

sure at this time, of the polygraph examination all together.

And I thought it was relevant at that time, to show whether or not the defendant was coerced into giving a confession, that they at least see, because the confession was obtained during the course and scope of the polygraph examination, whether or not Detective Schunzel coerced a confession or made it involuntary, as a matter of fact.

And I think both parties have indicated to me that they thought I had ruled previously that everything comes in.

Upon further examination of Missouri law, specifically the State versus Biddle case, which is cited over and over again, that the results of polygraph examinations are inadmissible as evidence. There's even a subsequent case that cites the Biddle case, Missouri Supreme Court, that indicates it doesn't really matter if the parties stipulate.

I believe that is the Biddle case. Did I rule that stipulations cannot be invoked or circumscribe the Court in its determination of questions of law.

So even if the parties stipulated, it doesn't really matter. If the prosecutor in this case has waived his objections to it or didn't waive his objections to it, or stood up on the bench in front of the jury and said, The polygraph results are this, under Missouri law, there can be no results of polygraph examination before the jury.

And I've asked both counsel before the last break to come back in chambers

to discuss this. And I've asked counsel for the defendant, Ms. Roach, on what case was the defendant relying on in its earlier motion that I decided back in January of 2005.

In addition, what complicated this issue is the fact that there was no -- I guess with the exception of the chart, there wasn't any real evidence of any data, except for the data collected or obtained six days prior to trial, and that issue of exclusion of polygraph results was not -- that issue was not reconsidered.

I believe, had I reconsidered that issue at the time, specifically on the State's motion to exclude, that evidence would have been excluded. Ms. Roach, do you have the case that you were relying on for the admission of that evidence?

MS. ROACH: No, your Honor. I have a response, however. I've reviewed the information that I have in my file concerning the various motions that have been filed over the years that this case has been pending. And the State, in fact, filed a motion to which the judge -- you just directed our attention. They requested, and we argued that -- they had the Biddle case. We argued that extensively before you back in December of -- '03?

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MS. ROACH: '04. And the Court found that because of the fact that the defendant

> had repeatedly filed motions and taken the position under the doctrine of completeness, that if the State introduced any portions of the defendant's statement -- and which they've, in fact, done. They have introduced the audio portions and they've introduced statements which were purportedly made during the initial interrogation process. We took the position if they put the statements in, that they need, under the doctrine of completeness, to put the whole thing in. And the whole thing is this big piece that we have that is left out of the middle, which is this three and a half hour video polygraph interrogation by Detective Schunzel. The Court agreed that, yes, it has to go in.

(**See Appendix A231-A232).**

The trial court then proceeded to declare a mistrial, over the strenuous objection of the Defense, stating "It is error before the jury at this time. And that error is the result of the admission of the polygraph examination results to the jury." (**See Appendix A235).** The Court ultimately stated, "The Court does find that there is a manifest injustice in allowing this evidence of polygraph examination results before the jury, which is declared and ruled as inadmissible evidence in a court of law in Missouri." (**See Appendix A236).**

Relator urged the Court to find other remedies, besides the drastic remedy of a mistrial, stating that "[t]he Court has a remedy of offering a curative instruction to the

jury, explaining how they may consider this evidence. Your Honor, that is certainly not my suggestion. But I certainly point it out to the Court that you have a remedy. And you have a remedy that does not have the financial repercussions, that does not have the liberty repercussions to this woman, as that drastic suggestion which the Court has made." (**See Appendix A235-A236).**

Relator contends that the declaration of a mistrial in this case was not only unwarranted, but also that the admission of the polygraph evidence was permitted by the Court and supported by Missouri law. Relator states that at the very essence of this case, is a situation wherein Respondent made certain rulings; the parties' relied on those rulings; and after said reliance, Respondent changed his mind, to the detriment of Relator, putting her twice in jeopardy.

THE OCTOBER 6, 2005 ORDER

Subsequent to the declaration of a mistrial, the Defense filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction based on double jeopardy. Respondent denied the Motion and entered its Order of October 6, 2005 setting forth its reasoning ***(See Appendix A21-A23).***

The Relator filed a Petition for Writ of Prohibition against the Respondent which was granted on a preliminary basis. Respondent was granted until December 19, 2005 to show cause why the writ should not be made permanent. On December 19, 2005 the Court set the matter for oral argument after the submission of briefs to the Missouri Supreme Court on March 1. 2006.

ARGUMENT - I

THE GRANTING OF A MISTRIAL BY THE RESPONDENT TRIAL JUDGE SUA SPONTE ON SEPTEMBER 20, 2005 AND THE RESPONDENT'S DENIAL OF RELATOR'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION ON OCTOBER 6, 2005 WAS ERROR AND RESULTED IN THE RELATOR BEING PLACED IN THE POSITION OF DOUBLE JEOPARDY IN VIOLATION OF THE FIFTH AMENDMENT AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION ON THE CHARGES OF ARSON IN THE FIRST DEGREE, MURDER IN THE FIRST DEGREE AND THREE COUNTS OF ASSAULT IN THE FIRST DEGREE FOR THE REASON THAT NO CIRCUMSTANCES EXISTED JUSTIFYING THE RESPONDENT TO GRANT A MISTRIAL UNDER THE MANIFEST NECESSITY DOCTRINE AND THE RESPONDENT FAILED TO EXERCISE SCRUPULOUS JUDICIAL DISCRETION IN GRANTING THE MISTRIAL AND NEITHER THE STATE OF MISSOURI NOR RELATOR ENGAGED IN ANY ACTIVITIES DURING THE COURSE OF THE TRIAL WHICH JUSTIFIED OR CREATED A NEED FOR THE GRANTING OF A MISTRIAL

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb." U.S.

Constitution, Amendment V. The Double Jeopardy Clause applies to state trials through the Due Process Clause of the Fourteenth Amendment. **Benton v. Maryland**, 395 U.S. 784, 787 (1969). Retrying this matter would violate Realtor's due process rights by twice placing her in jeopardy.

The standard of review regarding a writ of prohibition is such that the burden is on the person seeking the writ to show an abuse of discretion. Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. **State ex.rel. Kansas City Southern Ry. Co. V. Mauer**, 998 S.W.2d 185, 188 (Mo. App. W.D. 1999) and **Anglim v. Missouri Pac. R.R. Co.**, 832 S.W.2d 298, 303 (Mo. Banc 1992) and until a **scrupulous exercise** of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. **United States v. Jorn**, 400 U.S. 470, 485 (1971).

In Missouri, the prohibition against double jeopardy prevents the retrial of a defendant in the case of a mistrial, unless (1) the mistrial is declared by the court without the defendant's request or consent because the trial court concludes that justice would not be served by continuation of the proceedings, or (2) where a mistrial is consented to or requested by the defendant. **State v. Fitzpatrick**, 676 S.W.2d 831, 834-35 (Mo.banc 1984).

The first circumstance is an expression of the "manifest necessity doctrine, "an example of which is where the trial court declares a mistrial because the jury is unable to

reach a verdict. **Id**. at 835; see also **Oregon v. Kennedy**, 456 U.S. 667, 672, 102 S.Ct.2083 (1982). Where "manifest necessity" exists for the declaration of a mistrial, there is no bar to retrial, even where the defendant does not consent to the trial court's action. For example, in **State v. Lee**, 948 S.W.2d 627 (Mo.App.1997), the trial judge declared a mistrial *sua sponte* on the second day of the defendant's trial upon recognizing that the defendant's family members were social acquaintances of his. The defendant raised the defense of double jeopardy in a subsequent proceeding, complaining that he had not consented to the trial court's action. **Id**. at 629. The Eastern District held that double jeopardy did not bar further proceedings because the trial judge had sound reasons for declaring a mistrial and his recusal was the appropriate action to take. **Id**. It is very rare that a manifest necessity warrants declaration of a mistrial over the objection of the defendant. In **United States v. Jorn**, 400 U.S. 470 (1971), the United States Supreme Court stated that " . . .where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his valued right to have his trial completed by a particular tribunal." **Jorn**, supra at 484. The Court went on to further state that in the absence of a motion for mistrial by the defendant the " . . .doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a **scrupulous exercise** of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." **Jorn,** supra at 485 citing **United States v. Perez**, 9 Wheat. 579, 6 L.Ed. 165 (1824). (emphasis provided).

In this case, there was no prosecutorial or defense misconduct giving rise to a

mistrial. The Court entered it's Order on January 12, 2005 denying the State's Motion to Exclude the Polygraph Examination and ruled that if the State presented into evidence the statement of the Defendant given to Detective Webb that the Defendant could introduce the three and one half (3 ½) hour interrogation of the Defendant and the statement given by the Defendant to Detective Schuenzel prior to the Webb statement. This is precisely what occurred. After the admission of the audiotape statement, the videotape, and the testimonies of Detective Webb and Dr. David Raskin, the Court reversed its prior rulings granted, sua sponte, a mistrial.

In addition thereto, to illustrate a total lack of "scrupulous exercise of judicial discretion" the Respondent, in justifying and explaining his sua sponte mistrial ruling suggested that counsel for the relator was "admonished" for making statements regarding the admissibility of the polygraph exam results. To begin with, any statements made by counsel for the defendant were only in response to statements made by the prosecutor in open court unsolicited by the court wherein the prosecutor made continuous statements that the polygraph examination results were not admissible. Counsel for the Defendant responded that in this situation they were and there was no admonishment by the court whatsoever. The transcript is clear that there was no such admonishment by the court. (**See Appendix A226).** The reason for that is clear. The Court was clearly of the opinion at that point and time that the results were admissible and only after the Court changed its mind did the polygraph results then become inadmissible. Mr. Duepner states, "Your Honor, I am going to object. The reason for my objection is counsel for the Defendant

knows full well that the State of Missouri can not illicit testimony about a polygraph examination." (**See Appendix A226-A227).** Defense counsel responds, "Your Honor, that is absolutely untrue. I have begged and pleaded this Court for a couple of years to have the State present the whole case. (**See Appendix A227).** The Court states, "the objection is sustained. Proceed counsel also as to form - you are asking for a legal conclusion - maybe even asking for work product - you may proceed." (**See Appendix A227).**

The trial court concluded, in this case, that its prior ruling of January 12, 2005 and its statement on the record, during the trial, that the State had opened the door for the evidence of the results of the polygraph, was not supported by Missouri law. The mistrial which was declared essentially prevented further judicial review of the trial court's rulings in this case. Because the interrogation was part and parcel of the polygraph preparation and because Kemper was attached by straps and wires to the polygraph machine for a majority of the videotape, the videotape interrogation could not be presented without evidence that a polygraph examination took place. Under the "Doctrine of Completeness," the defense had no choice but to introduce evidence that a polygraph was administered. ***See*** **State v. Baldwin**, 808 S.W.2d 384 (Mo. App. S.D. 1991). Additionally, the United States Supreme Court has held that the exclusion of the testimony about the circumstances of a confession by the defendant deprives the defendant of his fundamental constitutional right, whether under the Due Process Clause of the Fourteenth Amendment or under the Compulsory Process or Confrontation Clauses

of the Sixteenth Amendment, to a fair opportunity to present a defense. See **Crane v. Kentucky**, 106 S.Ct. 2142, 2143 (1986).

In **State v. Mick**, 546 S.W.2d 508 (Mo.App.1976), the accused, under questioning by her lawyer regarding her delay in informing police of a claimed alibi, answered she was talking to a detective "... and set up with him to take this polygraph test..." Over the accused's objection the State was thereafter allowed to establish, by questioning the accused, that she took a polygraph examination **and failed it.** (Emphasis provided). The appellate court upheld the trial court, pointing out the accused volunteered that arrangements had been made for her to take the polygraph examination and thereby implanted in the jurors' minds that she had taken one. **Id**. at 509. This case is on point with **State v. Mick**, supra. In **State v. Mick,** the defense "opened the door" with regard to the polygraph results by bringing into evidence facts to establish that her confession had been coerced. The State was then allowed to present evidence that she had undergone a polygraph examination and had failed it. In this case the opposite situation occurred. Respondent acknowledged that the State "opened the door" with regard to the issue of polygraph results.

Respondent, in his Order of October 6, 2005, seems to have forgotten much of what he said when he granted the sua sponte mistrial. What he described in court as a rather colossal "mistake" on the part of himself, the prosecution and the defense counsel now seems to be an error on the part of defense counsel. This is simply not true. Judge Vincent in his October 6, 2005, Order states, "**State v. Baldwin**, 808 S.W. 2d 384 (Mo.

App. S.D. 1991) where it was held that it was proper to present evidence of a polygraph examination, but not the results, to counter act a negative inference raised by the opposing party." The relator respectfully submits that this is simply not the law. While it is the general rule that polygraph examination results are not admissible, there are exceptions and in **State v. Baldwin,** the court noted one particular exception, that being the situation of **State v. Mick**, supra, as previously discussed herein above which is applicable to this case and situation. As also previously stated, the judge seemed to consider his prior January ruling as "unclear" and that it had given the false impression to both prosecutor and defense counsel that results were admissible. (**See Appendix A232-A239).**

Respondent, the Relator respectfully suggests, is simply ignoring the law and ignoring the "rule of completeness" as set forth in **State v. Baldwin** which is a subsequent case to **State v. Biddle**, supra. The court is also overlooking the **State v. Mick** case. It is obvious that Judge Vincent, the relator herein, even as of October 6, 2005 still does not comprehend the applicable law in this particular situation by virtue of the fact of his misquoting the holding in **State v. Baldwin.** Judge Vincent states, without reservation, that **State v. Baldwin** stands for the proposition that results of a polygraph are not admissible. This is simply not the law.

The overarching point of Dr. Raskin's testimony discussing the polygraph administration and results did not pertain to the truth of the matters asserted therein, but rather as to the issue of voluntariness. This argument was also made to the court but was apparently ignored. (**See Appendix A236).** In other words, the defense contended that

the fact that Detective Schunzel incorrectly informed Kemper that she had failed the polygraph examination had a direct effect on Kemper's state of mind by rendering her more susceptible to confess. This clearly would be properly admitted evidence relative to the effect of the detective's statements on Kemper's subsequent actions, and the Respondent made no indication when articulating his reasons for granting a mistrial that this would be an inappropriate basis for admission of said evidence. That this evidence would have properly been admitted on the issue of voluntariness exacerbates Respondent's error in refusing a limiting instruction. Even assuming *arguendo* that the jury's consideration of the results of the polygraph itself would have created "manifest injustice," Respondent could have spared the defendant the titanic burden of additional months of incarceration, additional expense, and the additional time required to start trial de novo by simply issuing a straightforward limiting instruction preventing the jury from considering the results of the polygraph itself for the truth of the matters contained therein. It is perhaps more appropriate to say that **Jorn** *requires* that Respondent have issued such a limiting instruction under the circumstances. To grant a mistrial based upon manifest necessity, the trial court must engage in a scrupulous exercise of judicial discretion before doing so. See **United States v. Jorn**, supra at 485. If there is no bad faith conduct by a prosecutor or overreaching by the trial judge then a Motion for Mistrial generated by the defendant may or may not barr re-prosecution, depending upon whether the defendant's motion was necessitated by prosecutorial or judicial misconduct designed to avoid an acquittal. See **United States v. Jorn** supra at 485 citing **United States v.**

Perez, 9 Wheat at 580. However, here there was no such motion made by the defendant and there was no prosecutorial misconduct leading to the necessity of a mistrial. Both prosecutor and Relator were trying the case pursuant to the confines of the Court's previous order of January 12, 2005. In such a sua sponte circumstance as was the case here, the court is taxed with the standard of a scrupulous exercise of judicial discretion. It is clear from the record that there were no such facts to require a mistrial and the Respondent did not conduct a scrupulous exercise of judicial discretion to determine whether a mistrial was appropriate.

Consequently, it is clear that there are circumstances in the State of Missouri where polygraph results are admissible. When one party opens the door or when the results are admissible under the "rule of completeness" the per se rule, which Missouri does not adopt exclusively, is not applicable. Both situations are present and apply in this case and the granting of the mistrial based on the introduction of the "polygraph results" is clear. Re-trial of the defendant places her in double jeopardy.

While generally applying the per se inadmissibility rule, Missouri courts have admitted polygraph evidence for specific purposes under certain circumstances. It is well established in Missouri that evidence which would otherwise be inadmissible is admissible in order to rebut an inference created by the opposing party.

In **State v. Baldwin**, 808 S.W.2d 384 (Mo. App. S.D. 1991) the Court held that testimony about a polygraph examination is admissible under the well settled rule that where either party introduces part of an act, occurrence, or transaction, the opposing party

is entitled to introduce or to inquire into other parts of the whole thereof in order to explain or rebut adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary– a rule that has been held to apply even though the evidence was in the first place illegal. 808 S.W.2d 384, 390 (Mo.App.S.D.1991), relying on **State v. Odom**, 353 S.W.2d 708, 711 (Mo.1962); **State v. Bendickson**, 498 S.W.2d 593, 594-593 (Mo.App.1973). This is commonly referred to as the "rule of completeness." The testimony regarding the polygraph was admissible to rebut the evidence elicited by defendant about the duration and circumstances of her interrogation. Id. at 392. See also **Crane v. Kentucky**, 106 S.Ct. 2142, 2143 (1986). In **Baldwin**, defense counsel established that the defendant was questioned for a lengthy period of time, did not leave the interview room, and was given nothing to eat or drink. The Court concluded that without knowing a polygraph test was given and that two hours may be required for the "pre-test," the jury could have inferred that the defendant was subjected to unrelenting interrogation, without food or drink, until she capitulated and told her interrogators what they demanded. The trial court ruled that defense counsel "opened the door" to testimony that part of the time defendant was at the police station was used for a polygraph examination. Id. at 391.

In **Jorn**, the Court stated with reference to a situation where there is prosecutorial or defense misconduct, "Yet we cannot evolve rules based on the source of the particular problem giving rise to a question whether a mistrial should or should not be declared, because, even in circumstances where the problem reflects error on the part of one

counsel or the other, the trial judge must still take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal." **Jorn**, supra at 486.

This language in **Jorn** is precisely on point. Counsel for the defendant strenuously objected to the granting of any mistrial, sua sponte or otherwise. Counsel for the defendant and counsel for the prosecution were adhering strictly to the dictates and confines of the Court's prior rulings regarding admissibility of evidence and the rule of completeness regarding the statements of the defendant. There was no reason for the court to grant a mistrial from a potentially favorable verdict for the defendant. In **United States v. Jorn**, supra at 487 the Court stated that jeopardy attached because the " . . .trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial." When questioned in this case as to his reasons for the mistrial, the Respondent was vague and indefinite. The Court's have set the standard high for the granting of a mistrial. There was no reasonable justification for the mistrial in this case. Certainly, the Respondent did not engage in a "scrupulous exercise" of judicial discretion. It is clear that the evidence presented was admissible and in compliance with the Court's earlier correct ruling. The court's subsequent change of mind was in error and certainly did not justify the granting of a mistrial.

CONCLUSION

Relator is being held over for a second trial, after jeopardy has attached to this case. There was no manifest necessity that would have made a mistrial necessary in this case. Respondent made ruling, both pretrial and during the trial regarding the admission of polygraph evidence and those rulings were supported by Missouri law. Counsel for both the State and the Defense scrupulously followed these rulings. The mistrial was nothing more than Respondent changing his mind and allowing Relator to be put twice in jeopardy.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed this 12th day of January, 2006 to Mr. John Duepner, Office of the Prosecuting Attorney for St. Louis County, 100 South Central, Clayton, MO 63105 and Honorable David Lee Vincent, St. Louis County Court House, 7900 Carondelet Ave., Division 9, St. Louis, Missouri 63105 and the word count of Relator's Brief is 8,520 and that the attached disc is deemed "virus free" pursuant to the Norton Anti Virus scan utilized on the attached disc by counsel for Sandra Kemper.

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