

IN THE SUPREME COURT OF MISSOURI

KENDRICK TIPLER,)	
Relator,)	
v.)	No. 95655
)	
HON. MICHAEL GARDNER,)	
)	
Respondent.)	

ON PETITION FOR WRIT OF PROHIBITION OR MANDAMUS FROM THE
CIRCUIT COURT OF CAPE GIRARDEAU COUNTY
32ND JUDICIAL CIRCUIT
THE HONORABLE MICHAEL GARDNER, CIRCUIT JUDGE

BRIEF OF
MISSOURI ASSOCIATION OF PROSECUTING ATTORNEYS
IN SUPPORT OF RESPONDENT
AS AMICUS CURIAE

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Missouri Association of Prosecuting Attorneys (MAPA), established in 1969, is a non-profit, voluntary association representing over 500 prosecutors, including elected and assistants, and their investigators statewide. MAPA strives to provide uniformity and efficiency in the discharge of duties and functions of Missouri's prosecutors, to promote high levels of professionalism amongst Missouri's prosecutors, and to continually improve the criminal justice system in Missouri.

This case raises a matter of interest to Missouri's prosecutors as it has the potential to greatly impact the investigation, arrest and prosecution of child sex abuse crimes across the state.

ARGUMENT

BECAUSE ARTICLE I, SECTION 18(c) OF THE MISSOURI CONSTITUTION IS STRICLTLY EVIDENTIARY IN NATURE AND BECAUSE THE PUBLIC SAFETY POLICY OF MISSOURI SHOULD PROTECT ALL CHILD VICTIMS UNDER THE LAW, THE SECTION SHOULD BE APPLIED TO ALL TRIALS THAT OCCUR SUBSEQUENT TO ITS ADOPTION.

Article I, Section 18(c) of the Missouri Constitution (hereinafter “the Amendment”) was adopted by the voters on November 4, 2014, with a super-majority of 71.98% of the vote,¹ and states:

Notwithstanding the provisions of sections 17 and 18(a) of this article to the contrary, in prosecutions for crimes of a sexual nature involving a victim under eighteen years of age, relevant evidence of prior criminal acts, whether charged or uncharged, is admissible for the purpose of corroborating the victim's testimony or demonstrating the defendant's propensity to commit the crime with which he or she is presently charged. The court may exclude relevant evidence of prior criminal acts if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

¹ Constitutional Amendment 2, Missouri Secretary of State, “General Election – November 4, 2016”, (<http://enrarchives.sos.mo.gov/enrnet/default.aspx>)

The Amendment clearly pertains strictly to the admissibility of evidence. In fact, it is titled “Admissibility of evidence.” New rules of evidence are procedural, and are applied prospectively. *See State v. Reeder*, 182 S.W.3d 569, 575 (Mo. App. 2005). Amendments to the law which involve evidentiary issues are applied to the case at the time that it is tried. *Id.* *See also Stiers v. Dir. of Revenue*, 477 S.W.3d 611 (Mo. banc 2016). As such, the Amendment should be applied to all criminal *trials* involving child sexual abuse which are tried subsequent to the date of adoption.

Relator relies upon *State v. McCoy*, 468 S.W.3d 892 (Mo. banc 2015) for the proposition that the Amendment cannot be applied to any crimes which occurred prior to the adoption of the Amendment. Interpreting the Amendment to apply to all criminal trials subsequent to the adoption of the Amendment does not run afoul of this Court’s holding in *McCoy* that constitutional amendments are prospective in nature unless specifically noted otherwise. Likewise, Relator fails to acknowledge *Stiers*, and the evidentiary nature of the Amendment. Indeed, this interpretation is consistent with both *McCoy* and *Stiers*. All trials subsequent to the date of adoption by the voters are prospective.

Merely applying the new evidentiary rule to the case at the time it is tried does not violate the constitution. To hold otherwise would require all trial judges to know the exact date of adoption or decision by case law of modifications to rules of evidence, and to apply them differently in trials based upon when the crime occurred. Or, as is often the case in trials of child sexual abuse, there are multiple counts extending over long periods of time. Conceivably, Count I could have occurred prior to the adoption of the

Amendment, and Count II could have occurred subsequent to the adoption of the Amendment. Under Relator's theory, the Amendment would allow propensity evidence with respect to Count II, but not to Count I, which would undoubtedly draw an objection from the defense. The natural defense motion would be to sever the counts and force the child victim to endure two separate trials.² Such an absurdity would result in legal confusion and chaos at best, and undue added suffering and system-based traumatization of the victim at worst. The alternative approach is far more reasonable.

Relator argues that the Amendment changes substantive rights of criminal defendants found in Missouri's Constitution; specifically in Article I, Section 17. However, the Amendment expressly states, "notwithstanding the provisions of sections 17 and 18(a) of [the Missouri Constitution] to the contrary," prior criminal acts are admissible pursuant to the Amendment. In other words, the Amendment specifically addresses and negates any potential applicability of Article I, Section 17 of the Missouri Constitution.

² "Research suggests that a prolonged criminal court experience is a stressor for child sexual abuse victims that can be detrimental to a child victim's mental health." Walsh, W., Lippert, T., Cross, T., Maurice, D., & Davison, K. (2008) *How Long to Prosecute Child Sexual Abuse*. In *Child Maltreatment*, Vol. 13, No. 1, February 2008 3-13. Citing: Dezwirek-Sas, L. (1992). *Empowering child witnesses for sexual abuse prosecution*. In H. Dent & R. Flin (Eds.), *Children as witnesses* (pp. 181-199). New York: John Wiley.

Moreover, Relator's argument overlooks Article I, Section 32(6) of the Missouri Constitution which must be read in harmony with Section 18(c), and states that crime victims have the right to reasonable protection from the defendant. Allowing propensity evidence to come in at trial reasonably protects child victims from their abusers.

The public safety policy of Missouri should support this interpretation. While there is no specific public policy declaration by the General Assembly regarding this issue, Section 1.092, RSMo declares that the best interests of the child shall be the public policy of the state. Undoubtedly, holding the abuser of a child sex crime victim accountable under the state's criminal laws is in the best interest of Missouri's children. Allowing the introduction of propensity evidence in as many cases of child sexual abuse as possible promotes the best interests of the child in those cases, and in the best interests of protecting potential future child victims from these predators.³

³ See, e.g. Floor Statement of the Principal House Sponsor, Rep. Susan Molinari, Concerning the Prior Crimes Evidence Rules for Sexual Assault and Child Molestation Cases (Cong.Rec. H8991-92, Aug. 21, 1994). "In child molestation cases, for example, a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant--a sexual or sadosexual interest in children--that simply does not exist in ordinary people. Moreover, such cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, there is a compelling public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense." See also, *U.S. v.*

The Amendment applies solely to child sex abuse cases for a good reason – because these cases present unique challenges; specifically distinguishable from other criminal cases. The defendants who prey upon child victims do so because of their unique vulnerability. The particular dynamics of child sexual abuse necessitate different rules. Multiple statutes in Missouri treat court proceedings involving children special and differently, with deference to our public interest in protecting our children.⁴ Child victims and witnesses are less likely to be able to articulate the facts of the case, and they

LeCompte, 131 F.3d 767 (8th Cir. 1997) (*District court abused its discretion in excluding evidence of defendant's prior uncharged sex offenses, in prosecution for abusive sexual contact with defendant's 11-year-old niece, under rule permitting court to exclude relevant evidence if its probative value is outweighed by other concerns, in light of strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible, as evidenced by separate rule, and substantial similarity of offenses*).

⁴ See, e.g. Section 491.075 (*Sets out special procedures for admissibility of hearsay statements of children under 14*); Section 491.710 (*Mandates special docket priority for cases involving child witnesses*); Section 491.725 (*Sets out special procedures for protecting child witnesses in the courtroom*); Section 492.304 (*Sets out special procedures for admitting visual and audio recordings of children under 14*); Section 545.950, effective August 28, 2016 (*Sets out special protections from copying of visual or audio recordings or photographs of child victims*); Section 556.037 (*Special statute of limitations for sexual offenses involving children*).

are more likely to be fearful of harm or embarrassment to themselves or their family if they tell what has happened to them because the abuser has ingrained that fear and shame into them. Child sexual abuse occurs behind closed doors, with very few witnesses to any of the surrounding behaviors, making these some of the most difficult cases to prosecute.

Researchers have documented that child sexual abusers are remarkably prolific recidivists.⁵ By the admission of sex offenders themselves, they are very likely to have multiple victims over time (an anonymous survey of sex offenders indicated they had committed two to five times more sex crimes than those for which they had been arrested).⁶ It is estimated that every eight minutes a child protective agency responds to a report of sexual abuse.⁷

⁵ Abel, G, et al. *Self-reported crimes of non-incarcerated paraphilics*. (1987) Journal of Interpersonal Violence, Vol. 2 No. I, March 1987 3-25; Brake, S, *Reporting Rates for Sex Offenses and Recidivism and Re-offense Rates of Adult Sex Offenders* (2010).

⁶ Groth, A.N., Longo, R.E. & McFadin, J.B. *Undetected recidivism among rapist and child molesters*. (1982). 28 Crime & Delinquency 450. See also, Finkelhor, D. et al. *School, Police, and Medical Authority Involvement With Children Who Have Experienced Victimization* (2011) Arch Pediatr Adolesc Med/Vol 165 (No. 1), Jan 2011

⁷ Nely, “To Seek Justice”: *Why Missouri’s Constitutional Amendment Allowing Propensity Evidence is a Step Forward*, LSD Journal, Vol. 11, 2016, page 256

Child sexual abusers inflict lifelong consequences on their victims by the abuse itself.⁸ After a child makes a sexual abuse disclosure, the justice system often re-traumatizes the child and their family.⁹ When a child has the courage to come forward with a disclosure, we must hold these offenders accountable with every shred of available evidence. The Amendment recognizes that child predators who repeatedly commit crimes against children should not be allowed to hide behind the vulnerabilities of their previous victims as they create new victims. The public safety policy of this state should support eradicating child sexual abuse, and limiting the life-long impact that abuse has on children in addition to reducing the risk that recidivating sex offenders pose to potential future child victims.

Should this Court disallow the introduction of all propensity evidence in child sex abuse cases in which the crimes occurred prior to passage of the Amendment, it would not only further traumatize the child victims of cases which have already been tried using this evidence, but it would hamper the potential prosecution of untold numbers of cases that will come to light in the future due to delayed disclosure.

⁸ Felitti, V & Anda, R. (2010) *The Relationship Of Adverse Childhood Experiences To Adult Medical Disease, Psychiatric Disorders And Sexual Behavior: Implications For Health Care*, Ch.8 The Impact of Early Life Trauma on Health & Disease; *See also*, Finkelhor, D. & Browne, A. (1985) *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, American Journal of Orthopsychiatry, 55(4)

⁹ Walsh, *et al*, *supra*.

Child sex abuse is chronic in nature. Due to the secrecy, shame and manipulation that surrounds child sexual abuse, disclosure is often delayed and incremental. The vast majority of child sexual abuse is never reported to authorities, investigated or prosecuted. Victims often come forward years later when another victim's abuse by the same perpetrator comes to light. Through experience in prosecuting these cases statewide, Missouri's prosecutors know first-hand that victims report that the other victims' courage in reporting has given them the courage to report the crimes against them.

Prior to the passage of the Amendment, Missouri was the only state that had a strict ban on the introduction of propensity evidence for child sex abuse cases.¹⁰

¹⁰ Ala. R. Evid.404 (**AL**); Alaska R. Evid. 404(b)(1) (**AK**); Ariz. R. Evid. 404(b) (**AZ**); Ark. R. Evid. 404(b) (**AR**); Evidence Code section 1101 (**CA**); Colo. R. Evid. 404(b) (**CO**); CT. Code Evid. §4-5(a) (**CT**); Del. R. Evid. 404(b) (**DE**); Fla. Stat. Ann. §90.404(2)(a) (**FL**); GA. Code Ann. §24-2-2 (**GA**); Haw. Rev. State §626-1 (**HI**); IL. R. Evid. Rule 404 (**IL**); Idaho R. Evid. 404(b) (**ID**); Ind. R. Evid. 404(b) (**IN**); Iowa R. Evid. 5.404 (**IA**); K.S.A. 60-455(b) (**KS**); KRS 404(b) (**KY**); LA. Code Evid. Ann. Art. 404 (**LA**); ME. R. Evid. 404 (**ME**); MD. Rule 5-404 (**MD**); Mass. Gen. Laws Ann. Ch. 134 (**MA**); MI. R. Evid. Rev. 404 (**MI**); Minn. R. Evid. 404 (**MN**); Miss. Code Ann. §40 (**MS**); MT. R. Evid. 404 (**MT**); NH. Rev. Rule 404 (**NH**); NJ. R. Evid. 404 (**NJ**); NM. R. Re. Rule 404 (**NM**); NY. Crim. Pro. §60-40 (**NY**); NCST EV §8C-1 (**NC**); N.D.R. Evid. 404 (**ND**); Neb. Rev. St. §27-404 (**NE**); Nev. Rev. Stat. Ann. §48.045 (**NV**); OH. St. Evid. Rule 404 (**OH**); R. Okl. St. Ann. §2404 (**OK**); OR. Rev. Stat. Ann. §40.170 (**OR**);

Missouri's voters found this distinction to be woefully inadequate when they approved the Amendment. This sentiment was summarized by the St. Louis Post-Dispatch Editorial Board when it supported the Amendment and wrote: "[t]hose who commit crimes in secret against society's most vulnerable victims should not be able to keep their past a secret."¹¹

To limit the application of this tool to combat child abuse to only cases in which disclosure is made subsequent to the Amendment's passage would be an affront to the victims of child abuse in Missouri and contradictory to the public safety policy of protecting Missouri's children.

PA. R. Evid. 404 (**PA**); RI. R. Rev. Rule 404 (**RI**); S.C. Rev. Rule 404 (**SC**); S.D. Codified Laws §19-19-404 (**SD**); TN. R. Evid. Rule 404 (**TN**); Tex. Evid. R. 404 (**TX**); UT R. Evid. Rule 404 (**UT**); VT. Rev. Rule 404 (**VT**); VA. Sup. Ct. R. 2:404 (**VI**); WV. Rev. Rule 404 (**WV**); WA. Rev. Evid. 404 (**WA**); Wis. Stat. Ann. §904.04 (**WI**); Wyo. R. Evid. 404 (**WY**).

¹¹ *St. Louis Post-Dispatch*, "Editorial: Amendment 2 offers special help for child abuse victims," October 14, 2014.

CONCLUSION

The Amendment should be interpreted to be evidentiary in nature and applied prospectively to all trials that occur subsequent to the adoption of the Amendment in order to advance the public safety policy of protecting Missouri's children from child predators.

Respectfully submitted,

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/s/Jason H. Lamb

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Megan Vincent, a law student at the University of Missouri School of Law, assisted in research for the preparation of this brief.

CERTIFICATE OF SERVICE AND COMPLIANCE

I, the undersigned, hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 2,377 words, excluding the cover, certification and appendix, as determined by Microsoft Word, and;
2. That the electronic file has been scanned and found to be virus-free; and
3. That a true and correct copy of the foregoing was sent through the e-filing system this 2nd day of August, 2016 to all counsel of record.

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