

No. SC95655

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IN THE  
MISSOURI SUPREME COURT

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KENDRICK TIPLER,

Relator,

v.

HON. MICHAEL GARDNER,

Respondent.

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Petition for Writ of Prohibition or Mandamus to the Supreme Court of Missouri  
from the Circuit Court of the Cape Girardeau County, Missouri  
Thirty-Second Judicial Circuit, Division 1  
The Honorable Michael Gardner, Circuit Judge

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RELATOR'S STATEMENT, BRIEF, AND ARGUMENT IN SUPPORT OF HIS  
PERMANENT WRIT OF MANDAMUS

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Respectfully submitted,

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**Contents**

Table of Authorities.....	2
Jurisdictional Statement.....	4
Statement of Facts .....	5
Point Relied On .....	7
Argument .....	9
Conclusion .....	16
Certificate of Service and Compliance.....	17

## **Table of Authorities**

### **Cases**

<i>Brune v. Johnson Controls</i> , 457 S.W.3d 372 (Mo. App. E.D. 2015) .....	13
<i>Griffith v. Kentucky</i> , 479 U.S. 314 (1987).....	10
<i>State ex rel. Deutsch v. Thornhill</i> , 340 S.W.3d 301 (Mo. App. E.D. 2011) .....	9
<i>State ex rel. Hall v. Vaughn</i> , 483 S.W.2d 396 (Mo. banc 1972).....	10
<i>State ex rel. St. Louis-San Francisco Ry. Co. v. Buder</i> , 515 S.W.2d 409 .....	
(Mo. banc 1974).....	13
<i>State ex rel. Linthicum v. Calvin</i> , 57 S.W.3d 855 (Mo. Banc 2011) .....	9
<i>State v. Burns</i> , 978 S.W.2d 759 (Mo. banc 1998).....	13
<i>State v. Ellison</i> , 239 S.W.3d 603 (Mo. banc 2007). ....	14, 15
<i>State v. McCoy</i> , 468 S.W.3d 892 (Mo. banc 2015).....	9, 10, 11
<i>State v. Vorhees</i> , 248 S.W.3d 585 (Mo. banc 2008).....	14, 15

### **Statutes**

§566.025, RSMo.....	14
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### **Rules**

Mo. Sup. Ct. R. 84.23 .....	4
Mo. Sup. Ct. R. 84.24 .....	4
Mo. Sup. Ct. R. 97.01 .....	4

### **Constitutional Provisions**

Mo. Const. Art. I, §17.....	13, 14
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Mo. Const. Art. I, §18(a) .....	13, 14
Mo. Const. Art. I, §18(c) .....	4, 8, 9, 10, 11, 12, 13, 14, 15
Mo. Const. Art. I, §23 .....	10, 11
Mo. Const. Art. V, §4 .....	4

### **Jurisdictional Statement**

This original writ case seeks a writ of prohibition or in the alternative a writ of mandamus. Relator, Kendrick Tipler, is a criminal defendant charged with attempted statutory sodomy in Cape Girardeau County, Missouri. Respondent, the Honorable Michael Gardner, is the Circuit Court Judge of Cape Girardeau County, Missouri presiding over the criminal case against Relator.

After the Missouri Court of Appeals, Eastern District, denied Relator's petition for a writ of prohibition or mandamus without an opinion, Relator filed in this Court an application for a writ to prohibit Judge Gardner's order of March 23, 2016 sustaining Plaintiff's "Notice of Intent and Motion to Produce 'Prior Criminal Acts' in the State's Case-in-Chief Pursuant to Missouri Constitution Article 1 Section 18(c)" in the criminal case *State v. Kendrick Tipler* (Cape Girardeau County Case No. 14CG-CR02061-01.)

On May 2, 2016, this Court issued its preliminary writ of prohibition.

This Court has jurisdiction under Mo. Const. Art. V, §4. Mo. Sup. Ct. R. 84.23, Mo. Sup. Ct. R. 84.24 and Mo. Sup. Ct. R. 97.01.

### **Statement of Facts**

1. The State charged Kendrick Tipler by an amended information with the crime of attempted statutory sodomy. [Exhibit A]. The information alleged that Mr. Tipler committed this crime on or between September 1, 2013 and December 31, 2013. [Exhibit A].
2. On November 4, 2014, Mo. Const. Art. I, §18(c) took effect. That provision provides:  
  

“Notwithstanding the provisions of section 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.”
3. On December 8-9, 2015 a jury trial was conducted. The jury was unable to reach a unanimous verdict, resulting in a mistrial. [Exhibit B].
4. On December 21, 2015 a second jury trial was scheduled for May 4-6, 2016. [Exhibit B].
5. On February 19, 2016 Relator filed his “Motion in Limine to Exclude Propensity Evidence, Evidence of Prior Crimes, and Evidence of Prior Bad Acts.” [Exhibit C].

6. On February 23, 2016 the State filed its “Notice of Intent and Motion to Produce Prior Criminal Acts in the States Case-in-Chief Pursuant to Missouri Constitution Article 1 Section 18C.” [Exhibit D].
7. On March 3, 2016 the State filed its Brief in Support of its Motion. [Exhibit E].
8. On March 9, 2016 both motions were taken up and argued. The matter was taken under advisement. [Exhibits B and F].
9. On March 23, 2016 Judge Gardner issued his order granting the State’s motion, denying Relator’s motion and specifically allowing Article I, Section 18(c) to be used to present propensity evidence in the upcoming trial. [Exhibit G].
10. On April 12, 2016 Relator filed his “Motion to Reconsider Order Regarding Article 1, Section 18(c).” This motion specifically argued that Article 1, Section 18(c) cannot be applied retroactively. [Exhibit H].
11. On April 18, 2016 Relator’s Motion to Reconsider was taken up and argued. The matter was taken under advisement. [Exhibit B].
12. On April 19, 2016 the State filed its “Response to Defendants Motion to Reconsider Propensity Evidence Pursuant To Missouri Constitution Article 1 Section 18(c).” [Exhibit I].
13. On April 21, 2016 Judge Gardner entered his order denying Relator’s Motion to Reconsider. [Exhibit B, A1].

**Point Relied On**

**Point I.**

**Relator is entitled to an order prohibiting Respondent from applying Article I, Section 18(c) retroactively, because such application would violate the principle set forth by this Court in *McCoy* that unless a contrary intent is spelled out in clear, explicit, and unequivocal detail beyond a reasonable question, this Court will give only prospective application to a constitutional amendment in that the alleged conduct in Relator’s criminal case predates Article I §18(c) and nothing in Article I, §18(c) indicates that it is intended to be applied retroactively.**

**Cases**

*State v. McCoy* , 468 S.W.3d 892 (Mo. banc 2015) .....9, 10, 11



## Point II.

**Relator is entitled to an order prohibiting Respondent from applying Article I, Section 18(c) retroactively, because such application would violate the principle that substantive rights are presumed to operate prospectively in that Article I, Section 18(c) is a substantive amendment rather than a procedural amendment because it impairs Relator’s right to be tried only for the crime with which he is charged.**

### Cases

<i>State v. Ellison</i> , 239 S.W.3d 603 (Mo. banc 2007). .....	14, 15
<i>State v. Vorhees</i> , 248 S.W.3d 585 (Mo. banc 2008).....	14, 15

### Constitutional Provisions

Mo. Const. Art. I, §17.....	13, 14
Mo. Const. Art. I, §18(a) .....	13, 14

## Argument

### Point I.

**Relator is entitled to an order prohibiting Respondent from applying Article I, Section 18(c) retroactively, because such application would violate the principle set forth by this Court in *McCoy* that unless a contrary intent is spelled out in clear, explicit, and unequivocal detail beyond a reasonable question, this Court will give only prospective application to a constitutional amendment in that the alleged conduct in Relator’s criminal case predates Article I §18(c) and nothing in Article I, §18(c) indicates that it is intended to be applied retroactively.**

#### **A. Standard of Review**

A writ of prohibition is “an extraordinary remedy” and “is to be used with great caution and forbearance and only in cases of extreme necessity.” *State ex rel. Deutsch v. Thornhill*, 340 S.W.3d 301, 302 (Mo. App. E.D. 2011)(citation omitted). “Prohibition will lie only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power.” *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856-57 (Mo. Banc 2011)(citation omitted). “Nevertheless, the prohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation.” *Id.* (citation omitted).

#### **B. Analysis**

This Court recently addressed the question of retroactive applicability and prospective applicability of constitutional amendments in *State v. McCoy*, 468 S.W.3d

892 (Mo. banc 2015). At issue in *McCoy* was the new constitutional language in Mo. Const. Art. I, §23 related to firearm rights. The defendant in *McCoy* argued the new language should have applied retroactively to his pending unlawful felon in possession of a firearm case. *Id.* at 894. The defendant in that case cited to *Griffith v. Kentucky* where the United States Supreme Court held “that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.” *Griffith v. Kentucky* , 479 U.S. 314, 328 (1987).

This Court disagreed with Mr. McCoy and found the prior version of Mo. Const. Art. I, §23 applied. *McCoy* at 895. This Court explicitly distinguished *Griffith*, stating that “*Griffith* does not govern the retroactivity of newly enacted state constitutional amendments.” *Id.* This Court went on to clarify, stating that “[t]his Court gives only prospective application to a constitutional amendment unless it finds ‘ a contrary intent that is spelled out in clear, explicit and unequivocal detail so that retrospective application is called for beyond a reasonable question.’” *Id.* (citing *State ex rel. Hall v. Vaughn* , 483 S.W.2d 396, 398-99 (Mo. banc 1972)). Having not found any contrary intent in Mo. Const. Art. I, §23, this Court ruled the new constitutional language only applied prospectively. *Id.*

The charged crime in the present case was alleged to have occurred on or between September 1, 2013 and December 31, 2013. [Exhibit A]. However, Art. I, §18(c) did not come into effect until after these dates on November 4, 2014. Further, §18(c) contains absolutely no language indicating that it was meant to be applied retroactively, let alone an explicit and unequivocal intent; thus, it must only be applied prospectively. Any

application of §18(c) to this case would be a retroactive application in direct conflict with the recent *McCoy* ruling. The trial court therefore erred in ruling that Mr. Tipler's prior convictions were admissible at his future trial.

The State argues in its answer that a writ is an inappropriate remedy in the present case because if Mr. Tipler is convicted at trial, he will be able to file a direct appeal challenging the trial court's rulings. (Answer, 3-6). However, the present case does not involve a routine evidentiary issue. Instead, this is an issue of first impression asking this Court to determine whether or not a newly-enacted constitutional provision should be applied retroactively.

It is true that if Mr. Tipler loses at trial, he will be able to appeal the trial court's rulings. However, numerous other trial courts throughout the State are deciding this issue. It would be an extremely inefficient use of judicial resources for each trial court and each district of the Court of Appeals to decide on its own whether or not §18(c) should be applied retroactively. This is an issue of first impression that can be decided as a matter of law; issuing a writ of prohibition is an appropriate remedy, and it will not lead criminal defendants being permitted to seek interlocutory review of every trial court evidentiary ruling as argued by the State. (Answer, 4).

No language within §18(c) indicates that it was intended to be applied retroactively, therefore this Court should issue a Writ of Prohibition preventing Judge Gardner from applying it retroactively or a Writ of Mandamus directing him to deny the State's "Motion to Produce Prior Criminal Acts in the State's Case-in-Chief Pursuant to

Missouri Constitution Article 1 Section 18(c)” and for any other relief this Court finds just and proper under the circumstances.

## Point II.

**Relator is entitled to an order prohibiting Respondent from applying Article I, Section 18(c) retroactively, because such application would violate the principle that substantive rights are presumed to operate prospectively in that Article I, Section 18(c) is a substantive amendment rather than a procedural amendment because it impairs Relator’s right to be tried only for the crime with which he is charged.**

Under Missouri Law, substantive laws are applied prospectively, while procedural laws are applied retroactively. *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 410 (Mo. banc 1974)(citation omitted); *see also Brune v. Johnson Controls*, 457 S.W.3d 372, 379 (Mo. App. E.D. 2015). This Court has previously stated that substantive rights “take away or impair vested rights acquired under existing laws[.]” *Buder*, 515 S.W.2d at 410.

Section 18(c) does not simply change the procedural aspect of a criminal proceeding; it changes substantive rights enshrined in the Missouri constitution. Mo. Const. Art. I, §17 provides that “no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information.” Section 18(a) states that “in criminal prosecutions the accused shall have the right. . . to demand the nature and cause of the accusation.” This Court determined in *State v. Burns* that these Constitutional provisions “guarantee a criminal defendant the right to be tried only on the offense charged.” 978 S.W.2d 759, 760 (Mo. banc 1998). Retroactive application of §18(c) would “take away or impair” Mr. Tipler’s right to be tried only on the offense charged.

In prosecutions for crimes of a sexual nature involving a victim under eighteen years of age, §18(c) allows the State to present prior criminal acts “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.” It appears that the entire purpose behind enacting §18(c) was abrogate the holdings of two past decisions of this Court. *See State v. Ellison*, 239 S.W.3d 603, 607-08 (Mo. banc 2007); *State v. Vorhees*, 248 S.W.3d 585, 591-92 (Mo. banc 2008).

In *Ellison*, the defendant argued that § 566.025 was unconstitutional. 239 S.W.3d at 605. That statute stated:

In prosecutions pursuant to this chapter [566] or chapter 568, RSMo, of a sexual nature involving a victim under fourteen years of age, whether or not age is an element of the crime for which the defendant is on trial, evidence that the defendant has committed other charged or uncharged crimes of a sexual nature involving victims under fourteen years of age shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he or she is charged unless the trial court finds that the probative value of such evidence is outweighed by the prejudicial effect.

This language closely resembles the language of §18(c). This Court determined that the statute, which allowed the State to present propensity evidence, violated the “defendant’s right to be tried for the offense for which he is indicted,” as guaranteed by sections 17 and 18(a) of the Missouri Constitution. *Id.* at 606-07. This Court further stated that “[e]vidence of a defendant’s prior criminal acts, when admitted purely to demonstrate the

defendant's criminal propensity, violates one of the constitutional protections vital to the integrity of our criminal justice system." *Id.* at 608.

In *Vorhees*, the defendant argued that the State should be prohibited from presenting evidence of uncharged crimes for the purpose of corroborating the victim's testimony. 248 S.W.3d at 586. This Court agreed, holding that "[w]hen offered to corroborate an alleged victim's testimony, evidence of a signature *modus operandi*—like the propensity evidence in *Ellison* and its precedent cases—violates the Missouri constitution's guarantee that a defendant will be tried only for the crime charged." *Id.* at 592.

It is clear from *Ellison* and *Vorhees* that the purpose of enacting §18(c) was to "take away or impair" the right to be tried only for the crime charged. Article 1, Section 18(c) is much more than a procedural rule or a rule of evidence; it is a constitutional amendment which substantially alters constitutional rights and must be given a prospective application. Therefore, this Court should issue a Writ of Prohibition preventing Judge Gardner from applying §18(c) retroactively or a Writ of Mandamus directing him to deny the State's "Motion to Produce Prior Criminal Acts in the State's Case-in-Chief Pursuant to Missouri Constitution Article 1 Section 18(c)" and for any other relief this Court finds just and proper under the circumstances.



**Conclusion**

WHEREFORE, Relator requests that this Court grant the writ of prohibition or, in the alternative, the writ of mandamus, requested in this cause and order Respondent not to apply Art. I §18(c) retroactively.

Respectfully submitted,

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**Certificate of Service and Compliance**

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on this 27th day of June, 2016, a true and correct copy of the foregoing brief served via the efilings system to the Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65101. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed the greater of 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains 2,938 words. Finally, I hereby certify that the electronic copies of this brief have been scanned for viruses and found virus-free.

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