

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

WD No. 58462

STATE OF MISSOURI,

Plaintiff/Appellee,

v.

THEODORE W. WHITE, JR.,

Defendant/Appellant.

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Theodore W. White, Jr., Appellant (sometimes hereinafter referred to as “Ted”), was charged in the Circuit Court of Jackson County, Missouri, with offenses arising from his daughter’s allegations that he sexually abused her on several occasions between June of 1995 and March of 1998. Pursuant to a plea of not guilty and a trial by jury, Appellant was convicted of two counts of rape, Mo. Rev. Stat §566.032 (1994), three counts of child molestation in the first degree, Mo. Rev. Stat. §566.067 (1994), two counts of child molestation in the second degree, §566.068 (1994), four counts of statutory sodomy, Mo. Rev. Stat. §566.062 (1994), and one count of furnishing pornographic material to a minor, Mo. Rev. Stat. §573.040 (1994).

Appellant was sentenced on March 27, 2000, by the Honorable John I. Moran to a period of 50 years for Counts I and XII, seven years for Counts II, V and VII, 25 years for Counts III, IV, VI and XI, and one year for Counts VIII, IX and X. The court ordered that each of the sentences shall run concurrently. Appellant, on April 3, 2000, filed his timely notice of appeal to this Court.

The punishment imposed herein is not death. This appeal does not involve any issue reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court. This Court has jurisdiction pursuant to Mo. Const., Art. V, §3 (as amended 1982).

STATEMENT OF FACTS

Appellant Theodore White, Jr., appeals his March 27, 2000, conviction on 12 counts of the alleged sexual abuse of his daughter, Jami White, and his resulting sentence of 50 years. He was charged by indictment with various instances of molestation that allegedly occurred between June, 1995, and March, 1998.

The allegations of child sexual abuse in this case arose during the dissolution of a passionate but troubled marriage between Tina White and Ted White, Jr. The complainant, Jami White, born June 18, 1985, was Tina's natural daughter from a prior relationship, but had been adopted by Ted after his marriage to Tina. Ted also adopted Jami's younger brother, Danny. A third child, Tanner, was born to Ted and Tina in 1996. (T. 404-05).

Ted White, Jr., was an entrepreneur who raised capital for start-up corporations. He worked long hours and traveled frequently. (T. 321, 564). His work enabled him to maintain his wife and children in a prosperous lifestyle. They lived in a large house at 5321 Northgate Crossing in the exclusive Lakewood Subdivision of Lee's Summit, Missouri. Though Tina did not work outside the home for the majority of their marriage, the Whites employed a full-time nanny, Nina Morad. (T. 392). Evidence suggested that Mrs. White's monthly allowance was as high as \$12,000. (T. 473-75).

When Jami's allegations surfaced, Ted was starting a company called Professional Employer Organization (PEO) America, which brokered group health plans for small businesses. (T. 562-63). Although Tina had been a shareholder or partner in prior ventures, she was not included in the ownership or management structure of PEO America for reasons

which are in dispute.¹ (T. 477). Except for her interest by virtue of her marital rights, Tina's sole involvement in the company consisted of a brief part-time job which she held for the six weeks preceding March 21, 1998. (T. 436). A week before Jami's allegations surfaced, a significant investor in PEO America fell through due to personal illness. This investor represented a \$400,000 interest in the company. (T. 574).

By all accounts, Ted and Tina argued loudly and frequently about finances, often in front of the children. (T. 465-68). They threw things at each other. On at least one occasion, Jami stepped in between them and stood up for her mother, calling her father a "jerk-off" and telling him that she hated him. The arguments upset Jami and her brother very much. (T. 325-26). In August of 1997, Tina told Ted's younger brother, Ryan White, that she was unhappy with Ted, they were constantly bickering, and they were discussing divorce. They had substantial financial burdens. (T. 586-88).

In spite of the arguments, Tina and Ted had an active sexual relationship. Tina testified that Ted found her sexually stimulating. (T. 446). They kept erotic videotapes in their bedroom, along with a variety of oils and lubricants for use during sex. (T. 411, 433). While the children were forbidden from entering their parents' bedroom, they sneaked in and snooped around when their parents were away, and Jami's chores included cleaning her parents' bedroom. (T. 327, 481).

¹ Myrna White, Appellant's mother, testified that Tina was excluded because of her spendthrift habits; Tina testified that she wanted no part of the company because of Ted's decaying credit rating. (T. 483).

The turmoil over finances led to a brief separation in the fall of 1997. Ted moved out of the house, and Tina filed a petition for dissolution of marriage. (T. 437). The children remained with Tina. Nina Morad, who worked as a nanny for the Whites since November, 1996, was present when the Whites separated. Ted came by to get his clothes, and Jami shut the door behind him when he left and said “I hope my Dad never walks back through that door again.” (T. 392). Ted and Tina reconciled after reaching an agreement about finances that involved an allowance distributed to her by an administrative officer of one of Ted’s corporations. However, Tina’s petition for dissolution of marriage was never dismissed.

Danny and Ted were actively involved in Boy Scouting. They occasionally spent weekends together on camping trips, leaving Tina, Jami and Tanner in Lee’s Summit. Jami was resentful that she never got to go camping alone with her father. Ted ignored Jami’s repeated pleas to take her on a weekend trip for just the two of them. Ted promised to take her to the lake, but always found excuses not to go. (T. 322-24). Tina testified that Jami was disappointed that Ted never took her to the lake. (T. 471).

Jami’s grandmother, Myrna White, testified that Ted and Tina treated Jami “like a servant.” (T. 565). Jami was only 14 years old at the time of trial, but for several years she had functioned as Tanner’s primary caretaker. She fed him, bathed him and changed his diapers. She did the family’s laundry and prepared meals for Ted and Tina. (T. 322, 564-65). She was once physically disciplined by Ted because she had dropped Tanner. (T. 308). Her brother, Danny, was never required to do any household chores, and she strongly felt that it wasn’t fair. (T. 323). Jami was very unhappy about her role in the family. (T. 589).

A month or two before her allegations of sex abuse surfaced, Jami went on a church-sponsored ski trip with several friends, including a girl named Andrea Lampson. Jami described Andrea as having “funny colored hair” and rings in different places on her body. (T. 330-31). Jami came home from the trip and told Ted and Tina that Andrea talked about sexual experiences she had had with her grandfather. (T. 449-50). Andrea told Jami that her grandfather had “fingered her” and made her give him “blow jobs.” Andrea also described what oral sex was like. Jami had learned all these things from Andrea before talking to her mother about the allegations of abuse. (T. 332). Jami was not upset by the story as she related it, but Tina was concerned enough to call the girl’s mother. (T. 449-50).

In early March, 1998, a week or two before any allegations of sex abuse surfaced, Ted had promised to take Jami to the Big 12 Women’s Basketball Tournament in Kansas City. Jami was a huge basketball fan, and this was very important to her. She was very angry when her father couldn’t take her to the tournament, yet he took another camping trip with Danny and had plans the last weekend in March to leave the children home and take Tina to Acapulco. (T. 332-35).

On March 21, 1998, Ted and Danny had gone to Boy Scout Camp for the weekend. After coming in from playing basketball, Jami told her mother, “Dad’s been touching me.” (T. 297). According to Tina, Jami said, “I know that if I tell you this that it’s probably going to . . . break up the family . . . we won’t be together anymore, . . . and Danny won’t have a father . . . and it’s just going to change everything.” (T. 406). Tina insisted that Jami told her “most likely I would divorce Ted” after she disclosed her allegations. (T. 441). Jami denied saying

any such thing. (T. 335). In the two hours that followed, Jami told her mother specific stories about being molested. (T. 300-01, 337-38). Tina took notes as Jami answered questions about what she claimed had happened to her. (T. 313).² Tina then called the Lee's Summit police.

Officer Richard Bledsoe was dispatched to the White home, where he obtained the details of the sexual abuse allegations from Tina White. (T. 612-14). He then interviewed Jami. He testified that he told Jami "the very basic elements of oral sex involving what we call a blow job," and she said, "Yes, that was what happened." (T. 615). Bledsoe asked Jami, "Did he spurt in your mouth?" and described an ejaculation to her. (T. 616). When asked to recall his exact words, Bledsoe testified that he asked Jami, "Did his penis spurt in your mouth?" Jami answered the question after Officer Bledsoe explained to her what that meant. (T. 617). Bledsoe testified that he supplied the details to her in order to spare her the emotional trauma of repeating what had happened. (T. 617). He also testified that, before interviewing Jami, he already knew what had happened "based on what the mother had told him." (T. 620).

Jami asked to talk to her grandmother, Myrna White, who made the three-and-a-half-hour drive from Aurora, Missouri, and arrived as Bledsoe was finishing his interview. (T. 566-67). Myrna and Jami were very close to one another. When Myrna arrived, Jami told her about one incident of abuse, and Tina told her about another. (T. 577).

The next day, Ted and Danny arrived home from their camping trip. Tina confronted Ted with the abuse allegation. According to Myrna, Ted said, "What?" and "Bull shit." He got a perplexed look on his face and then said, "Is this the way you're going to get the house?" Tina

² Tina's three pages of notes were introduced at trial as Exhibit 10. (T. 409).

replied, “You’re going to get out of this house and never see the kids again.” (T. 580-81). By that time, Ted White, Sr., had arrived from Aurora. He heard Tina reply, “You’re damn right, and your ass is out of here, or I’m going to call the police.” (T. 610). According to Tina, Ted didn’t deny the accusation; he got tears in his eyes and just looked at her. When Tina told Ted that he would have to leave, Ted got angry and asked, “What are you trying to fill her head with?” As he left, he demanded that Jami receive a physical examination. (T. 423-24).

Detective Richard McKinley was responsible for investigating most of the sexual abuse cases in Lee’s Summit. (T. 543). He was involved in this investigation as well, and signed the statement of probable cause that accompanied the complaint and information in this case. (L.F. 8-9).³ During his investigation, McKinley came across a diary kept by Jami. (T. 547). McKinley testified that he read the diary and found no entries relating to sexual abuse. He asked Jami why she recorded nothing about her abuse in her diary, and Jami replied she was afraid that her mother would find it. (T. 549). However, Detective McKinley also observed a number of negative entries by Jami about her mother, though he could only recall entries by Jami about her mother spending too much time on the telephone. (T. 550-51). Detective McKinley did not retain the diary as evidence, and left it in Jami’s room. At the time of trial, its whereabouts were unknown. (T. 547).

³ Less than a month after the indictment was filed in this case, McKinley left his wife, Jennifer McKinley, for another woman. In June, 1998, Jennifer McKinley learned that the other woman was Tina. McKinley told his ex-wife “not to tell anyone about that relationship” because “he could get in trouble if anybody were to find out.” (L.F. 248-49). Counsel for the State found out about the relationship around the same time as Jennifer McKinley, but concealed that fact from defense counsel. (L.F. 242-43).

In the ensuing investigation, Jami was interviewed by McKinley, social worker Cathy Donelon, and counselor Robert Sherman. She was also examined by Katherine Smith, M.D., a pediatrician specializing in adolescent gynecology. (T. 488-89). Dr. Smith found “no scars, tears, sores, nothing.” (T. 506). Examination of Jami’s hymen was normal; the opening in the center of the hymen was five millimeters, which is rather small, even for a 12-year-old child. Five millimeters is approximately the diameter of a pencil. (T. 515). Dr. Smith recited statistics tending to discount the significance of her lack of findings (T. 494-505), but conceded that the absence of findings could be due to the fact that no sexual abuse occurred. (T. 517).

Ted White was charged by indictment filed on May 1, 1998, with 12 counts of child-sex offenses against his daughter, Jami. Although the charges were based entirely on the testimony of Jami White, the prosecution attempted to correlate each instance of abuse with other occurrences in the White family. Jami’s allegations of abuse and the testimony regarding surrounding circumstances are summarized below.

The Lake Incident. Jami testified that the first incident of sexual abuse by her father occurred when they were on vacation at the Lake of the Ozarks when she was approximately 10 years old. (T. 193-95). The family was on the lake in a pontoon boat. Ted dropped Tina off at the cabin, and then, with Danny asleep in the front of the boat, he drove into a secluded cove.⁴ She said Ted gave her a “French kiss,” touched her chest and touched her vagina over her

⁴ Although Jami testified that Ted was drunk and “out of it” when he dropped her Mom off at the dock (T. 347), Tina White testified that Ted was not drunk on that occasion, and that she would not have allowed the children to go back on the lake in the boat with him if he had been drunk. (T. 470-71).

bathing suit. (T. 196-97).⁵ Although she testified that Appellant stopped molesting her when another boat drove by once, she told Ms. Donelon that “Danny woke up when the boat drove by again.” (T. 343). Danny only remembered one incident when they were boating in which he fell asleep, but he never woke up in a cove, and was not awakened by a boat coming and making noise. (T. 385).

Jami said that back at the cabin, her father took her into a pump room while her mother fixed margaritas. The pump room is a basement utility room with a workbench. Jami said Ted lifted her onto the workbench, gave her a French kiss and touched her chest. (T. 198-99).⁶ When he heard Tina coming down the steps, Ted pushed Jami out of the room very quickly. (T. 200).

Onyx Street. Until the summer of 1995, the White family lived at 305 S.E. Onyx in Lee’s Summit. (T. 405). Jami recited a story that allegedly occurred when they still lived at that address. She could not remember what time of year it occurred until the prosecutor prompted her that it was during the summer. (T. 200-01). Jami testified that Ted locked Danny in the garage, made her take her clothes off and lie on the bed. She testified that Appellant licked her vagina and then put “little white beads” on her vagina, which were “kind of slimy.”⁷

⁵ Departing from her sworn testimony at trial, Jami told Cathy Donelon at the Child Protection Center that he had tried to insert his finger up inside her vagina. (T. 342).

⁶ When confronted with the fact that she told social worker Cathy Donelon that Ted lifted her up to a bed in the pump room, she admitted, “Yes, that was wrong.” There had never been a bed in the pump room, ever. (T. 345).

⁷ Defense counsel attempted to cross-examine Jami about the lotion with the beads in it. When relating the incident to Dr. Sherman, Jami said that Ted made her put on a beaded dress, but had said nothing about a lotion with beads in it. (T. 347). Defense

He then tried to stick his penis inside of her, but stopped when she started to cry and told him it hurt. (T. 202-03). Jami did not remember who finally let Danny out of the garage. (T. 204).

Tina’s “Tummy Tuck.” When Jami was in the fifth grade, the family had just moved to Lakewood, and her mother went into the hospital for several days to have a cosmetic tummy tuck surgical procedure. (T. 204). Jami said that one day while her mother was in the hospital, she came home from school, and Ted French kissed her. When Danny knocked on the front door, Jami let him in, and, according to Jami, Ted called her back into the room and French kissed her, took off her shirt and touched her chest. (T. 205). Jami said they were interrupted when Ted’s brother, Ryan, knocked on the door and talked to Ted. Ryan’s girlfriend, Lindsey, was also present. (T. 206).

Jami said that when Ryan and Lindsey left, Appellant made her “give him a blow job.” (This was a term that she had learned in school.) She does not remember if she was standing or sitting during this incident, but she testified that Appellant’s sperm went into her mouth. (T. 207).⁸ Jami testified that before she performed oral sex, that Appellant laid her down on the bathroom floor and licked her vagina. (T. 208).⁹

counsel was prohibited from impeaching her with any inconsistent statement which she may have made to Dr. Sherman. (T. 349). Although Tina and Jami claimed that they discussed the incident with the beaded lotion on the day Jami disclosed her allegations, in her notes of that first discussion with Jami, Tina wrote down, “one time tried to have sex with her on Onyx, vaseline.” (T. 453; Ex. 10).

⁸ The prosecutor asked Jami if there was any particular taste she associated with the incident, to which Jami answered, “No.” In her opening statement, the prosecutor told the jury Jami would testify that it “tasted like sour throw-up.” (T. 145).

⁹ This testimony had to be prompted by the prosecutor. After describing the fellatio, the prosecutor asked:

Wrapping Christmas Presents. When she was in the seventh grade, around Christmas time, Jami, Danny, and their brother, Tanner, were watching wrestling on television. Ted was in his bedroom and asked Jami to come to the room. She said that she had a headache, but he asked three times, and the last time he was angry, so she went. (T. 209-10). According to Jami, there was wrapping paper and stuff on the bed, and a pornographic tape on the television, showing two naked girls using a dildo.¹⁰ (T. 210). Tina identified Exhibits 13 and 17 as pornographic tapes that she and Ted kept in their bedroom, and which she turned over to Detective McKinley for evidence. (T. 433). During the incident with the wrapping paper, Jami said that Appellant made her give him a “blow job” on his bed. She could not fix a specific time frame, except to say that it occurred before Christmas but after school had started in the fall. (T. 212).¹¹

Appellant allegedly told Jami that they were going Christmas shopping and then to a hotel, where he was going to have girls there show her “how to eat pussy.” He also asked her to have some friends come with her to the lake. The next day they went shopping, and

Q. Did anything else happen?

A. No.

Q. Did anything happen in the bathroom?

A. Yes.

(T. 208).

¹⁰ Jami testified that this was not the first time Appellant had shown her pornographic movies, but could not remember any other occasion on which this had happened. (T. 211).

¹¹ Danny testified that at Christmas time, it was the usual practice for a parent to take kids into the bedroom to wrap presents they had purchased for others. (T. 383). Danny could not recall any other time when Ted and Jami were in the bedroom with the door locked. (T. 384).

Appellant supposedly said that he wanted to be a good Dad, and that what he was doing to her was wrong. (T. 211).

Danny's Birthday. On February 16, 1998, the Whites celebrated Danny's birthday. She said that on this occasion, her father took her to the laundry room, French kissed her and touched her chest, but stopped when he heard her mother coming. (T. 213, 274).

Watching Television on the Family Room Couch. It was common for the family to cover up with blankets on a winter night while watching television together. Often Danny or Jami sat on Appellant's lap. (T. 317, 384). Jami testified that Appellant molested her on these occasions when the entire family was in the same room. She reported an alleged incident when the family was watching a football game, and Appellant put a blanket over the two of them, and put his finger in her vagina with her mother sitting right there next to him. (T. 275-76). Jami told her mother that Dad had put his finger up her vagina more than 20 times while she was sitting right next to Mom, but at trial she admitted that this was not true. Defense counsel asked, "You told your Mom that, but that's not what really happened?" Jami replied, "Yes." (T. 314). Although Tina denied that Jami told her Appellant had abused her at least 20 times in Tina's presence, she wrote in her notes, "at least 20 times in front of me molested her." (T. 454; Ex. 10).

Jami related another incident, which was not related to any particular time, when Ted was lying on the couch, and he lifted up his shorts while she "massaged his wiener." Jami said that sperm came out on his stomach, and he told her to get a towel so he could wipe it up. (T. 280-81).

The Plaza Limousine Ride. Jami said that one winter the family had gone to Skies Restaurant on the Plaza and then to the Cheesecake Factory in a limousine.¹² Her mother wore a fur coat and removed it in the limousine. Her mother and her brother, Danny, were sitting in the front of the limo with their backs to the driver, and Appellant and Jami were sitting in the back of the limo, so that they were all facing each other. Jami claimed that Appellant put Tina's fur coat over their laps and "fingered her again." (T. 277-79). Although Danny remembered the ride in the limousine to Skies Restaurant on the Plaza, he doesn't remember if Ted and Jami were covered up with his mother's fur coat, and he didn't see anything weird going on. (T. 382).

Christmas in Aurora. Appellant's parents, Ted White, Sr., and Myrna White, live in Aurora, Missouri. After Christmas of 1997, Ted allegedly took Jami for a ride in a four-wheeler and stopped by a clump of trees some distance from her grandparents' house. Appellant allegedly French kissed her and touched her chest, but heard some men working in the vicinity and stopped. He told her that there were too many people. On another occasion at her grandparents' house, Appellant allegedly took her beyond a pile of trees in front of the house and French kissed her and touched her chest, but was interrupted by Ted White, Sr., who came because he thought the four-wheeler had broken down. Jami only told Tina about one

¹² This story surfaced for the first time during a therapy session with Dr. Robert Sherman. Using a therapy he called "Traumatic Incident Reduction Technique" (TIR), (T. 238), Dr. Sherman "had Jami relax with deep breathing and visualizing herself on a relaxing beach." (T. 236). Dr. Sherman's notes reflected that he used this technique to "reframe" Jami's memory of events and recover "suppressed" memories. (T. 232).

incident in Aurora, Missouri, involving a four-wheeler. (T. 470). Jami never told her grandmother, Myrna, that anything had happened on her farm. (T. 578).

Danny testified that he “doesn’t remember anybody riding the four-wheeler because it was put up.” He explained discrepancies in his trial testimony by stating that Mom and Jami “helped him remember things.” (T. 388). Ted White, Sr., testified that he does not allow anyone to use the four-wheeler on his farm in the winter because it won’t start in cold weather. (T. 605). He also testified that the incident which Jami described in which he interrupted her and Appellant while they were out riding the four-wheeler never happened. (T. 606). Furthermore, there had never been any construction adjacent to the farm, and there was no accessibility by four-wheeler to the area where Jami claimed Ted had molested her; an overgrown fence line made it impossible for the four-wheeler to get to that portion of the property. (T. 607).

Jami’s Bedroom. The prosecutor enumerated the incidents that Jami had already mentioned: the living room, laundry room, Dad’s bedroom, and asked her if she had been molested in any other place in the house. Jami replied, “I can’t think of any.” (T. 287). When the prosecutor asked, “Did anything happen in your room?” Jami replied, “Yes.” She then related an incident in which Appellant laid on her bed and made her give him a “blow job.” (T. 287). She said that sometimes during oral sex, Appellant would stand, and she would be on her knees. (T. 288).

The Evening with the Mossmans. Jami testified that one evening her parents went out with the Mossmans, who were neighbors, to the Lakewood Pub. Appellant came back, and

she sat in his lap. He whispered in her ear that “he wanted me to suck him all night.” (T. 289). When Tina was in the kitchen, she saw Ted sitting on the couch, whispering something in Jami’s ear. (T. 415).

The Diarrhea Incident. Jami testified that one time Appellant had begun to molest her when her mother came into the bedroom and caught him with his pants down to his knees. Appellant ran into the bathroom real quick and said that he had a bad case of diarrhea. (T. 290, 412-14). Tina testified that this incident did not arouse any suspicions that Ted was abusing Jami. (T. 450-51). Myrna White testified that Ted had chronic problems with diarrhea and that Tina had reported to her that Ted was continuing to have those problems. He was always running to the bathroom. (T. 575-76).

The Garage. The prosecutor asked if there was “ever anything that happened in the garage?” (T. 290). Jami then related the story that her Mom had left, then Appellant locked Danny in the garage and made her give him a “blow job.” (T. 291). Jami testified that she did not see Danny get locked in the garage. She knew about it because Ted and Danny told her about it. Jami testified that she was never in the garage. (T. 350-51). Before Danny was interviewed by the police, Tina White had coaxed him to remember certain things. Danny told Detective McKinley, “Mom told me to remember being locked in the garage.” (T. 554).

Danny’s Haircut. When the prosecutor asked Jami when was the last time she was molested by Appellant, she said it occurred March 7 or March 8, about two weeks before she went to Children’s Mercy Hospital and gave a videotaped interview of her allegations.¹³ On this

¹³ On March 7 and March 8, PEO America had a lock-in meeting with 20 people who had a stake in the company. It lasted from 8:00 a.m. until 6:00 p.m. each day; Appellant was

occasion, Tina had taken Danny out to get a haircut, and Jami and Tanner were watching “Peter Pan” on television. With Tanner sitting right there, Appellant allegedly put an afghan over his head and started licking Jami’s vagina. She said he pulled her pants down to her ankles and, after licking her vagina, he took her to his bedroom and made her give him a blow job. (T. 291-92). She said this time Appellant was “really aggressive,” and was pushing her head down on his penis really hard until she started to choke because his penis was in her throat. (T. 293).¹⁴

Jami testified that since disclosing her allegations against her father that she had difficulty urinating and occasionally would see blood in the toilet. She said that Ted has a really big mole on his left leg. She testified that she did not disclose the allegations sooner, because Appellant had told her that it would hurt her mother if she did. (T. 294-95). She said she finally decided to tell about what Appellant was doing, because he had become more aggressive, he wanted to involve her friends, and he wanted to make a movie of “just me and him.” (T. 296).

On one trip to the Lake of the Ozarks, Jami was riding alone with her mother in the car while Ted and Danny drove a recreational vehicle. On the way to the lake, she allegedly told her mother about other children who were molested, in an attempt to broach the subject of Appellant’s sexual abuse of her. When they arrived at the lake, Ted confronted her outside the

present for the entire meeting. (T. 582).

¹⁴ Prior to trial, Jami had never told anyone that her father was getting aggressive or that he had hurt her throat while making her perform fellatio. This allegation was omitted from all prior statements, including her deposition, and she had not told Detective Bledsoe, Detective McKinley, Social Worker Donelon, Dr. Sherman or mentioned it during her deposition. (T. 212).

RV and asked her if she had a problem. Jami testified that he looked “real mean,” and he had an extension cord in his hand. (T. 296-97). Jami admitted that her trial testimony was the first time she mentioned to anyone that Ted was holding an extension cord while he was being mean to her outside the RV. (T. 313). Tina testified that she has never been shy about confronting Ted, but did not confront him when she allegedly heard him talking mean to Jami. (T. 447).

The defense counsel presented testimony from Officer Bledsoe and Detective McKinley regarding the various inconsistent statements of Jami and Tina White. They pointed out several factors surrounding the case which increase the risk of false allegations of child sexual abuse, such as the fact that the allegations arose in the context of a failing marriage and impending divorce,¹⁵ and that Bledsoe and Tina White used suggestive and inappropriate questioning techniques. (T. 543-45, 553-56, 612-20).

In addition, defense counsel established that prior to Jami’s allegations on March 21, 1998, no one had any reason to suspect that Ted was sexually abusing his daughter. Although their nanny, Nina Morad, worked in the White home two days a week in 1996 and almost every day in 1997, she testified that she never had any reason to suspect that Ted was molesting Jami. She testified that “I never did see anything or think that, no.” (T. 396). Ted denied to Nina the allegations that he had molested Jami. (T. 401). Although Tina considers herself a protective mom, she never sensed anything that triggered any suspicions of abuse by Ted. (T. 460-62).

¹⁵ Detective McKinley acknowledged that there are confirmed cases of false accusations and that the risk of such false accusations are highest in the context of unhappy children whose parents are undergoing separation or divorce proceedings which may involve a custody battle. (T. 543-45). He also conceded the necessity for taking care not to influence the statements of small children because of their suggestibility. (T. 545).

Although Jami said there were numerous instances when Ted molested her in Tina's presence, Tina never noticed anything about Jami's facial expressions or observed any suspicious movements when Ted was allegedly molesting her under the blankets. (T. 463). This is also true of the limousine incident; nothing aroused her suspicion from three feet away. Likewise, there was nothing suspicious to her about Appellant's conduct on Danny's birthday. (T. 465).

The prosecution presented evidence that Jami's behavior changed in response to the abuse. Tina testified that Jami was scared, petrified, experienced dry heaves, and became withdrawn. She started dressing in loose, unattractive clothing and stayed in her room alone. She cut her hair short like a boy and wore clothes that were way too big for her. (T. 426-27). She couldn't concentrate and had "flashbacks of things that were now coming to her . . ." (T. 429). She was scared to be in her room. (T. 429). However, the school counselor, Barbara Winkler, testified that prior to Jami's allegations surfacing, neither Ms. Winkler nor any of the teachers on Jami's team expressed any suspicion that she might be having problems. There were no dips in grades or behavior problems, nor were there any other factors that would raise anyone's suspicion that something was going on. (T. 538). All of the changes that she noted occurred after the allegations of abuse arose, rather than after the abuse was alleged to have started. (T. 524-28).

The jury on February 19, 1999, found Ted guilty on all counts, and assessed and declared punishment at 50 years on Count I, seven years on Count II, 25 years on Count III, 25 years on Count IV, seven years on Count V, 25 years on Count VI, seven years on Count VII, one year and a fine on Count VIII, one year on Count IX, one year and a fine on Count X, 25

years on Count XI, and 50 years on Count XII. (L.F. 191-202). Appellant requested and received a total of 25 days within which to file his motion for new trial. (L.F. 208). Appellant filed a timely motion for new trial. (L.F. 209).

On March 4, 1999, counsel for Appellant received a phone call from a co-worker of Tina White informing him that she was having an affair with Detective Richard McKinley, and had been for some time. This individual further related that Tina had been told by the prosecutor's office to keep the affair quiet until after trial. Counsel for defendant notified the prosecution that he had come upon some interesting information about the case. The next day, March 11, 1999, counsel for the State called defense counsel and admitted that Tina White and Richard McKinley had been involved in a relationship for "nearly a year," and that the prosecution had been aware of the relationship nearly from the beginning. (L.F. 242). A meeting had been held in the prosecutor's office, and a decision was made to conceal the information from defense counsel. (L.F. 243). Appellant alleged in his timely motion for new trial that the State's conduct violated his right to due process of law. (L.F. 236-37).

On May 4, 1999, the trial court overruled Appellant's motion for new trial and amended motion for new trial after Appellant failed to appear for sentencing. (L.F. 233). The trial court, on March 24, 2000, entered judgment and sentenced Appellant in accordance with the verdict, running all sentences concurrently, for a total term of 50 years. (L.F. 271-73). Appellant was granted leave to appeal as a poor person (L.F. 275), and, on April 3, 2000, Appellant filed a timely notice of appeal to this Court.

POINTS RELIED ON

POINT I

The trial court erred in overruling Appellant’s objection and allowing the State to present therapeutically enhanced testimony of Jami White regarding alleged sexual abuse by Appellant because the “relaxation” interview techniques which Dr. Richard Sherman used to “reframe” Jami White’s memory were suggestive and tantamount to hypnosis, and the court improperly put the burden on Appellant to establish that this suggestive testimony was inadmissible, rather than requiring the State to establish that her trial testimony was not tainted by hypnotic suggestion.

U.S. Const., Amend. 6

Alsbach v. Bader, 700 S.W.2d 823 (Mo. banc 1985)

State v. Post, 901 S.W.2d 231, 237 (Mo. App. ED 1995)

Rock v. Arkansas, 483 U.S. 44 (1987)

State v. Fertig, 143 N.J. 115, 121, 668 A.2d 1076, 1079 (1996)

POINT II

The trial court erred in sustaining the State’s motion in limine and ordering the defense not to question Jami White or present testimony of Dr. Richard Sherman regarding any aspect of Jami White’s counseling sessions because the court violated Mo. Rev. Stat. §210.140 and Appellant’s Sixth and Fourteenth Amendment rights to due process of law, compulsory process and to confront and cross-examine witnesses against him in that Jami White’s statements to Dr. Sherman fell within a statutory exception to the patient-counselor privilege, and her credibility could have been effectively undermined with proof of inconsistent statements and Jami’s susceptibility to suggestive interview techniques applied by Dr. Sherman. Appellant was prejudiced because Jami White was the only witness to establish the corpus delicti of any offense, and these matters substantially undermine the credibility of her allegations.

Mo. Rev. Stat. §210.140 (1994)

Mo. Rev. Stat. §337.540 (1994)

U.S. Const., Amend. 6

State v. Ward, 745 S.W.2d 666, 670 (Mo. banc 1988)

Davis v. Alaska, 415 U.S. 308 (1974)

Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986)

Napue v. Illinois, 360 U.S. 264, 269 (1959)

POINT III

The trial court erred in sustaining the State’s motion in limine and preventing Appellant from presenting to the jury the testimony of Dr. David Holmes because Appellant’s due process right to present reliable, exculpatory evidence was violated by the exclusion of expert testimony that the “relaxation” technique employed by Dr. Richard Sherman to “reframe” and enhance Jami White’s memory was hypnotic and suggestive, and probably resulted in creation of false memories.

U.S. Const., Amend. 6

Crane v. Kentucky, 476 U.S. 683 (1986)

State v. Copeland, 928 S.W.2d 828, 837 (Mo. 1996)

State v. Ray, 945 S.W.2d 462 (Mo. App. W.D. 1997)

State v. Carroll, 629 S.W.2d 483 (Mo. App. W.D. 1981)

POINT IV

The trial court erred in denying Appellant's Motion for New Trial and Amended Motion for New Trial because the prosecutor withheld exculpatory evidence and intentionally misled the jury, in violation of the Due Process Clause of the Fourteenth Amendment, in that the state deliberately concealed an illicit sexual affair between Appellant's wife, Tina White, and Detective Richard R. McKinley, who investigated Jami White's allegations of sexual abuse against Appellant, while arguing to the jury that Tina White had no conceivable motive to give false testimony or to encourage Jami White to make false allegations of abuse against Appellant. This deliberate concealment was material because it allowed the State to improperly rely on Tina White to corroborate the allegations of abuse and prevented the defense from impeaching Tina White or presenting a coherent defense.

U.S. Const., Amends. 5 and 14

Brady v. Maryland, 373 U.S. 83 (1963)

Hayes v. State, 711 S.W.2d 876, 880 (Mo. banc 1986)

State v. Rodriguez, 985 S.W.2d 863 (Mo. App. W.D. 1998)

State v. Weiss, 24 S.W.3d 198, 202 (2000)

POINT V

The trial court erred in overruling Appellant’s objection to the admission of a letter written by Jami White to her school counselor, Barbara Winkler, as this evidence was inadmissible hearsay, irrelevant, immaterial and highly prejudicial, in that it shed no light whatsoever on the truth of Jami White’s allegations and served only to inflame the jury against Appellant and engender sympathy for Jami White.

State v. Denman, 635 S.W.2d 345, 348 (Mo. 1982)

State v. Burk, 809 S.W.2d 391, 399 (Mo. App. 1990)

POINT VI

The trial court plainly erred in sustaining the State's objection and preventing Appellant from introducing evidence of the prior false sexual abuse accusations made by Jami White against her maternal grandmother, Reba Allen, because Appellant's right to due process of law, compulsory process and right to confront and cross-examine witnesses against him was violated in that Jami White's false allegations of sexual abuse against her grandmother were probative of the reliability of her allegations against Appellant.

U.S. Const., Amend. 6

State v. Montgomery, 901 S.W.2d 255 (Mo. App. 1995)

State v. Lampley, 859 S.W.2d 909 (Mo. App. 1993)

State v. Woods, 508 S.W.2d 297 (Mo. App. 1974)

State v. Johnson, 700 S.W.2d 815 (Mo.banc 1985)

ARGUMENT I

The trial court erred in overruling Appellant’s objection and allowing the State to present therapeutically enhanced testimony of Jami White regarding alleged sexual abuse by Appellant because the “relaxation” interview techniques which Dr. Richard Sherman used to “reframe” Jami White’s memory were suggestive and tantamount to hypnosis, and the court improperly put the burden on Appellant to establish that this suggestive testimony was inadmissible, rather than requiring the State to establish that her trial testimony was not tainted by hypnotic suggestion.

Standard of Review: Post-hypnotic statements of a witness are per se inadmissible under Missouri law; a trial court has no discretion to admit such testimony. Alsbach v. Bader, 700 S.W.2d 823 (Mo. banc 1985). Further, the burden of proving the admissibility of a witness’ therapeutically enhanced memory is on the party offering such testimony. State v. Post, 901 S.W.2d 231, 237 (Mo. App. ED 1995). When a court shifts the burden of proof and thus bases its judgment on an erroneous view of the law, it is an abuse of discretion. Schlup v. Delo, 513 U.S. 298, 333 (1995).

Two days after Jami White accused her father of sexually molesting her, she met with her therapist, Richard Sherman, a licensed professional counselor with a Ph.D. in “human and organizational development.” (L.F. 265, 267). Dr. Sherman is not a psychologist, and he is not certified by any board to practice clinical or forensic psychology. *Id.* In his numerous sessions with Jami White, Sherman used what he described as a “traumatic incident reduction technique” (TIR) which involved “deep muscle relaxation.” (L.F. 266). After placing Jami in this “desensitized, relaxed state,” Sherman questioned her about her allegations of abuse and had her repeat each scenario four to six times. (L.F. 266). Dr. Sherman used this technique to retrieve or reconstruct memories that may have been blocked out and, in his words, to “reframe” her memories of abuse. (L.F. 127, T. 232).

Appellant moved prior to trial to suppress testimony influenced by hypnosis, alleging that the TIR technique employed by Dr. Sherman to reconstruct Jami White’s memory was

tantamount to hypnosis. (L.F. 126, 127.) The motion identified instances of abuse that surfaced for the first time in Jami White’s TIR sessions with Dr. Sherman, and was supported by the affidavit of Kansas University Professor of Psychology, David Holmes, Ph.D. (L.F. 127.) In a hearing on this motion conducted during the trial, but outside the presence and hearing of the jury, Appellant presented unrefuted evidence that Sherman’s technique amounted to hypnosis, regardless of the label that Sherman chose to use to describe his technique. Dr. Holmes’ uncontradicted testimony established that Dr. Sherman’s procedure was hypnotic in nature and probably resulted in suggesting false scenarios which were incorporated into Jami White’s trial testimony.

In spite of credible expert testimony that Dr. Sherman used hypnotic techniques on Jami White, the trial court did not require the State to prove that Jami White’s testimony was untainted by hypnotic suggestion before she testified to the jury. Instead, the court imposed the burden on Appellant to prove that Jami White was under hypnosis. The trial court noted that it had no opportunity to observe or listen to Sherman or review his testimony. (T. 271). The sole reference in the record on this question is the court’s inquiry, “Does he [Dr. Sherman] use the word hypnosis?” to which counsel for the State replied, “No, no.” (T. 271-72). The trial court ruled that it could make no finding that hypnosis was used because of Sherman’s denial, stating, “Well, it seems to me that the issue of whether or not hypnosis was used in this case is a disputed fact and *I don’t believe I can make a finding on the record so far.*” (T. 273) (emphasis added).¹⁶

¹⁶ The trial court decided that Dr. Holmes’ testimony went “more to the weight rather than admissibility and I think if you saw fit to call Dr. Holmes, he might be an

The trial court's ruling violated Alsbach v. Bader, 700 S.W.2d 823 (Mo. banc 1985), where the Missouri Supreme Court held that post-hypnotic statements are *per se* inadmissible in a court of law. Such testimony is inherently untrustworthy, and "safeguards do not adequately address how a layperson, such as a trial judge or juror, will recognize when the hypnotized subject has lost his critical judgment and begun to credit 'memories' that were formerly viewed as unreliable. Nor do safeguards provide a means for distinguishing between actual recall and confabulation invented and employed to fill gaps in the story." *Id.* at 830. Because of the recognized danger of false or altered memories, courts must exclude any testimony produced from such methods.

The trial court here circumvented Alsbach by shifting the burden to Appellant to prove that Dr. Sherman's suggestive relaxation techniques actually induced a hypnotic trance. According to the trial court, Dr. Holmes' testimony that suggestive, hypnotic-like procedures were used by Dr. Sherman, coupled with the fact that those procedures produced new memories of abuse, was insufficient to carry that burden. Such analysis invites litigants to evade Alsbach simply by having memory reconstruction therapists avoid the term "hypnosis." Given the essential role of Alsbach's rule to protect the integrity and reliability of the truth-seeking process, the rules governing the use of hypnotized witnesses must apply with equal vigor to testimony based on therapeutically recovered memory.

appropriate witness." (T. 253). In spite of this observation, the court sustained the State's motion in limine and prohibited Appellant from presenting Dr. Holmes' testimony. (Sentencing Transcript, p. 18) (See Argument III, below). Prior to trial, the court had already sustained the State's motion in limine to prohibit the defense from eliciting testimony from either Jami White or Dr. Sherman as to the content of any therapy sessions. (L.F.137).

This case demonstrates the potential for abuse in a rule which imposes the burden of proof on the party against whom the testimony is being offered. The trial court imposed on Appellant the threshold burden of proving that Jami White was hypnotized.¹⁷ Examining the entire record, one is forced to wonder what it would take for a litigant in Appellant's situation ever to shoulder that burden. While the Court's decision in Alsbach v. Bader clearly makes hypnotically-refreshed testimony inadmissible in Missouri, the issue of what constitutes "hypnosis" for application of the Alsbach doctrine is not clear. The United States Supreme Court has observed that there is no "consensus on a single definition of hypnosis." Rock v. Arkansas, 483 U.S. 44 (1987). State supreme courts have agreed, noting that there is "no consistently agreed upon definition of hypnosis." Stokes v. Florida, 548 So.2d 188 (Fla. 1989). Black's Law Dictionary (1990) defines hypnosis as: "A state of heightened concentration with diminished awareness of peripheral events," citing, State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981). In spite of the controversy, there is little question in this case that Dr. Sherman's sessions with Jami White fit practically any definition of hypnosis; Dr. Sherman placed Jami in a suggestive state prior to coaxing her recollection and repeated rehearsal of each instance of alleged abuse.

Dr. Holmes testified that hypnosis is "a very broad term" that describes situations in which a person "is led to be more suggestible, and then suggestions are used to alter their feelings, perceptions and memories." (T. 227). Dr. Holmes testified that the two elements

¹⁷ Incredibly, the trial judge imposed this burden on Appellant without affording him a full opportunity to explore the nature and content of the sessions with either Jami or Dr. Sherman.

of hypnosis are present in this case. First, Jami was placed in a relaxed, suggestible state. Her relaxed state was then accompanied by suggestive conduct of the therapist. (T. 246). Dr. Holmes pointed to several aspects of Sherman's conduct with were highly suggestive. In his efforts to "facilitate her memory" he was telling Jami "we've got to fill in the blanks. And, you know, it isn't that he is playing a totally passive role in these sessions. He is making very dramatic interpretations . . . he is playing an active role. He is giving her interpretations of how she should understand her experience." (T. 260-61).

Sherman used interview techniques often applied by trained hypnotists.¹⁸ He "used a variety of techniques for deep muscle relaxation, and then he would have her review her memories as though they were on videotape, and then have her freeze frame and go fast forward and fast back, apparently to try to refresh her memory." (T. 228). "[H]e's asking her to go through this deep muscle relaxation, he is having her do a lot of fantasy kinds of things, and then starts asking her about, you know, to run this videotape of her . . . experiences." (T. 230). Dr. Sherman "had Jami relax with deep breathing and visualizing herself on a relaxing beach" (T. 236), a relaxation method which "could be characterized as a hypnotic procedure." (T. 238). Dr. Holmes explained that therapists employing the TIR technique are "inducing a state of relaxation, and then they are exposing the person, through imagery, to the incident that they find troubling, and in that period helping them explore and relive that stressful period." (T. 239).

¹⁸ Although Dr. Sherman was not trained in hypnosis, Dr. Holmes pointed out that "you don't have to be trained in hypnosis to put somebody in a highly suggestive state." (T. 234).

Dr. Holmes pointed to factors in Dr. Sherman's notes indicating that Jami White actually responded as though she were a hypnotized subject. For example, Jami reported that she vomited every night when she thought about the abuse. Dr. Sherman wrote that "I reframed this for her," and suggested that she had been repressing memories of years of abuse and now "they're coming out and allowing herself to feel sick." About a week later, on April 4, 1998, Jami reported that her vomiting had ceased. (T. 232). Dr. Holmes called that a "classic case" of hypnotic suggestibility. (T. 233).

Dr. Holmes concluded that he "would worry about the reliability and validity of any of her reports that followed these procedures. . . . I think she's creating a story and filling in blanks and being led to believe that other things are happening." (T. 242). Dr. Holmes stated he could "put no stock in" Jami's alleged memories of particular episodes of abuse that she claimed not to have remembered until after hypnosis." (T. 243). Research demonstrates that "when sexual abuse occurs, people remember it, they do not repress it. I cannot give any credence to [Jami's] recovered memory that she reports suddenly coming to mind as she was driving across the Plaza." (T. 244). Dr. Holmes concluded that the planting of false memories "probably happened" in this case. (T. 265).

It is difficult to imagine what else a litigant could prove to trigger the Alsbach protection in the face of a therapist and opposing party who will not admit that a hypnotic technique is, in fact, hypnosis. This is the reason that Missouri law clearly places the burden of proof on the proponent of testimony based on therapeutically recovered memory to establish that it is not tainted by hypnosis. "Despite the prosecutor's and the State's apparent

belief to the contrary, it was the burden of the prosecution to establish the admissibility of the testimony.” State v. Post, 901 S.W.2d 231, 237 (Mo. App. ED 1995). The trial court in Post erred in accepting the word of the prosecutor, “as an officer of the court,” in lieu of actual evidence that a witness’ testimony was not the product of hypnosis. Id.

Like the prosecution in this case, the State in Post attempted to disguise the initial hypnotic interview as a “relaxation session.” Counsel for the State insisted that the hypnotic sessions were “not intended to aid her memory.” 901 S.W.2d at 237. The State in Post did not present the testimony of the therapist who employed the relaxation technique or introduce his records. Instead, the trial court ruled the issue solely on the representations of the State’s counsel. The court in this case relied on even less explicit representations by the prosecutor that Dr. Sherman never used the word “hypnosis” to describe his therapy. (T. 271-72). Again, these circumstances are identical to Post. The court’s explanation of its ruling is equally applicable to Appellant’s case:

The record here does not contain the records or testimony of the hypnotist. It does not reflect other than by expressions of opinion by people not present or by hearsay, when such sessions occurred, the subject matter of each session, the subject’s memories prior to each of the sessions, and the source of the determinations of pre-hypnosis memory. We do not hold on the record before us that the state may not be able to provide sufficient evidence to carry its burden that some or all of Stephanie’s testimony of her family relationships is legitimate pre-hypnosis memory and therefore admissible if otherwise relevant. But considerably more than was presented in this trial will be required to meet that burden.

State v. Post, 901 S.W.2d at 237-38. In this case, Jami White’s “relaxation sessions” with Dr. Sherman commenced two days after her initial report of alleged sexual abuse, before she was

examined by Dr. Smith and before she made her videotaped statement at Children's Mercy Hospital.

Judge Moran's ruling that Appellant had not proved Dr. Sherman's use of hypnosis reflects that he inappropriately shifted the burden of proof to Appellant. He compounded his error by preventing the defense from calling Dr. Sherman as a witness or questioning Jami White about her sessions with him. The defense sought evidence of the exact techniques used so that Jami could be fully cross-examined as to the events that formed the basis of the allegations against Mr. White. (L.F. 126-30). Defense counsel sought records of the meetings as well as an opportunity to question both Jami and Dr. Sherman regarding the sessions, particularly with respect to allegedly "new" memories that surfaced during and after therapy. (L.F. 137). The State, citing privilege, argued that the records of Jami's sessions with Dr. Sherman should not be subject to discovery. (L.F. 137-38). The trial court agreed and denied defense counsel any opportunity to question Jami, Tina, or Dr. Sherman regarding the techniques utilized in the psychological sessions. (L.F. 137).

Examination of the record demonstrates that most of the concerns regarding the admissibility of post-hypnotic recollections apply with equal or greater force in this case. Indeed, the court in Alsbach noted that, in jurisdictions which allow hypnotically refreshed testimony, the courts insist on certain safeguards:

- (1) The hypnotic session or sessions must have been administered by a licensed psychiatrist or psychologist trained in the use of hypnosis.
- (2) Any information given to the hypnotist by law enforcement personnel, by the defendant or from any other source prior to the hypnotic session should be in written form and should be preserved so that subsequently the extent of the information the subject received from the hypnotist may be determined.

- (3) Before induction of hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them, carefully avoiding any new elements to the witness's description of the events. The witness's pre-hypnotic memory should be preserved via tape recording or, if possible, videotape.
- (4) The entire procedure of hypnosis and the hypnotic interview should be tape recorded or, if possible, videotaped.
- (5) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and post-hypnotic interview.
- (6) The opposing party or parties should have full access, prior to trial, to the recording of the hypnotic interview.
- (7) All opposing parties must be given free rein to cross-examine the hypnotically-induced witness and/or the hypnotist regarding the witness's memory and the particular procedure used to refresh it.
- (8) No hypnotically-enhanced statements made by a witness or victim may be received into evidence unless there is available otherwise admissible corroborating testimony or physical evidence which tends to substantiate the hypnotically-enhanced statements.

Alsbach v. Bader, 700 S.W.2d at 826, Borawick v. Shay, 68 F.3d 597 (2nd Cir. 1995). The court in Alsbach found such safeguards inadequate to “distinguish[] between actual recall and confabulation invented and employed to fill gaps in the story.” Id. at 827. However, the court observed that the fact that few, if any, of the standards were adhered to only served to diminish confidence in the testimony tendered by Alsbach.

The same is true in this case, where Dr. Sherman employed suggestive hypnotic interview methods, although he was admittedly unqualified to do so. Sherman is neither a licensed nor board certified psychologist or psychiatrist. (L.F. 265). No attempt was made to preserve Jami White's independent recollection prior to the commencement of his “relaxation” therapy. The interviews were not recorded on either audio or videotape. Counsel for Appellant was not given full access to the content of the interviews. Appellant was

prohibited by the trial court from cross-examining Jami White about her sessions with Dr. Sherman, and was prohibited from calling Dr. Sherman as a witness. Expert testimony before the trial court reflected the use of many suggestive procedures by Dr. Sherman and others in the course of investigating Jami White's abrupt accusations against Appellant, beginning with Tina White and Officer Bledsoe, and continuing with Dr. Sherman's intensive therapy sessions. Dr. Holmes testified that such procedures probably generated false allegations against Appellant. Jami White's allegations of abuse were not corroborated by anything other than innocent, lawful behavior that others had observed. In fact, of the persons closest to the situation, none saw any behavior which led them to even suspect that Appellant was abusing his daughter. (T. 396, 450-51). More important, substantial evidence contradicts rather than substantiates Jami White's alleged recollections.

In conclusion, this case presents compelling arguments for adhering to the universally recognized principle that "the party seeking to introduce the hypnotically refreshed testimony has the burden of establishing admissibility by clear and convincing evidence." State v. Fertig, 143 N.J. 115, 121, 668 A.2d 1076, 1079 (1996). The allocation of such a burden is "justified by the potential for abuse of hypnosis, the genuine likelihood of suggestiveness and error, and the consequent risk of injustice." Id., citing State v. Hurd, 86 N.J. at 547. Of course, Missouri law is even more protective than New Jersey law, since Alsbach prohibits the use of hypnotically refreshed recollection regardless of any assurances of reliability offered by the proponent of such testimony. The fact that Missouri judicially recognizes the dangers inherent in such evidence argues even more stringently for requiring a party presenting therapeutically

enhanced testimony to bear the burden of proof on the threshold question of whether such procedures are hypnotic.

For the foregoing reasons, the trial court erred in rejecting Appellant's challenge to the use of Jami White's testimony regarding matters explored during her suggestive post-hypnotic therapy sessions with Dr. Sherman. This Court should reverse Appellant's conviction and remand the case for a new trial, or grant such further relief as the Court deems appropriate.

ARGUMENT II

The trial court erred in sustaining the State's motion in limine and ordering the defense not to question Jami White or present testimony of Dr. Richard Sherman regarding any aspect of Jami White's counseling sessions because the court violated Mo. Rev. Stat. §210.140 and Appellant's Sixth and Fourteenth Amendment rights to due process of law, compulsory process and to confront and cross-examine witnesses against him in that Jami White's statements to Dr. Sherman fell within a statutory exception to the patient-counselor privilege, and her credibility could have been effectively undermined with proof of inconsistent statements and Jami's susceptibility to suggestive interview techniques applied by Dr. Sherman. Appellant was prejudiced because Jami White was the only witness to establish the corpus delicti of any offense, and these matters substantially undermine the credibility of her allegations.

Standard of Review: “‘Questions of law fall within this court's province of independent review and correction.’ Barry Service Agency Co. v. Manning, 891 S.W.2d 882, 887 (Mo. App. 1995). Or in other words, as to questions of law, our review is de novo with no deference being paid to the trial court's determination of the law.” State v. Tinoco, 967 S.W.2d 87, 89 (Mo. App. 1998).

On Saturday, March 21, 1998, Jami White for the first time accused her father of molesting her over a course of nearly two years. The following Monday, March 23, 1998, she saw the White's family therapist, Dr. Richard Sherman, who began therapy directed toward the allegations of abuse that she had raised with Tina White. (T. 267). The defense sought to question Jami and Dr. Sherman regarding both the substance of the conversations and also the procedures employed. Of particular concern was the fact that Sherman's therapy was producing new and different allegations of sexual abuse against Appellant, and the fact that Sherman's cryptic notes of his therapy sessions which counsel had obtained reflected that Jami White had made statements to Dr. Sherman describing incidents of alleged abuse that were materially inconsistent with other statements she had made. In addition to impeaching the credibility of Jami White's testimony, such evidence would have supported a defense theory

that Jami White's original false allegations were rewarded, reinforced and enhanced by her mother, her therapist and interested law enforcement personnel.

The State successfully blocked Appellant from pursuing such a defense. The prosecutor moved to exclude Dr. Sherman as a witness, preventing the defense from discovering this information on the grounds that, pursuant to Mo. Rev. Stat. §337.540 (1994), any and all communications made between Jami and Dr. Sherman were strictly confidential and were not subject to discovery by the defense. (L.F. 137-38). The trial court agreed with the State's arguments and restricted the defense's access to both Jami and Dr. Sherman, and prohibited the defense from presenting any testimony from Dr. Sherman regarding their therapy sessions. (L.F. 137). As a direct consequence of the trial court's rulings in this case, the defense was prohibited from proving that Jami had undergone hypnosis, that her testimony was improperly influenced, and that she had made contradictory statements to Dr. Sherman during her counseling sessions. These rulings were error.

The trial court's actions in this matter not only violated Missouri law regarding privilege, it also denied Appellant his Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses against him and to present evidence in his own defense. There is no privilege to bar inquiry into Jami White's statements during therapy or into techniques used by Dr. Sherman which are known to produce false and unreliable memory. Even if such a privilege existed, it would have to give way to the defendant's and society's compelling interest in a just and reliable resolution of the serious charges in this case.

A. The trial court erroneously ruled that Jami White's counseling sessions with Dr. Sherman were protected by statutory privilege.

The trial court's rulings apparently stem from an incorrect interpretation of Missouri law regarding patient-counselor privilege. As previously noted, the trial court relied upon Mo. Rev. Stat. §337.540 (1994) wherein the Missouri legislature deemed conversations between a licensed psychologist and his or her patient to be privileged. The trial court, however, overlooked a material limitation to the privilege:

Any legally recognized privileged communication, except that between an attorney and client, **shall not apply to situations involving known or suspected child abuse or neglect and shall not constitute grounds for failure** to report as required or permitted by sections 210.110 to 210.165, to cooperate with the division in any of its activities pursuant to sections 210.110 to 210.165, or **to give or accept evidence in any judicial proceeding relating to child abuse or neglect.**

Mo. Rev. Stat. §210.140 (1994) (emphasis added).

The Missouri statutes could not be more clear on this point. See State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 451-52 (Mo. banc 1984). Though the legislature clearly wanted to protect certain conversations occurring between a licensed therapist and a patient, it did not make that privilege all-encompassing. The Missouri Supreme Court, in addressing the broad scope of the exception created by this statute, stated: "The legislature has specifically chosen not to protect privileged communications between doctors, psychologists, and licensed counselors and their patients when the communication involves child abuse or neglect." State v. Ward, 745 S.W.2d 666, 670 (Mo. banc 1988). Thus, it was error under Missouri statute to prohibit Appellant and the jury from having access to the relevant and material facts surrounding Sherman's sessions with Jami White.

B. Enforcing the counselor-patient privilege to exclude all evidence and testimony surrounding Jami White's therapy sessions with Dr. Sherman violated

Appellant's Fourteenth Amendment right to due process of law and his Sixth Amendment right to confront and cross-examine witnesses against him.

Even if Jami White's sessions with Dr. Sherman were privileged under Missouri law, that privilege must give way to Appellant's constitutional rights to confront witnesses against him and to present evidence in his defense, both of which are crucial to a just and reliable outcome in his case.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to confront witnesses against him. See Davis v. Alaska, 415 U.S. 308 (1974). In Davis, the Court held that the right of confrontation extends beyond merely physically confronting one's accusers. Id. Rather, the guarantee includes the right to cross-examine a witness for any possible bias. The Court stated: "A more practical attack on a witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of witnesses as they may directly relate to issues or personalities in a case." Id. at 316. Information regarding Jami's counseling sessions with Dr. Sherman would have been crucial in effectively cross-examining Jami regarding her memory and biases toward Mr. White. Where, as here, "... it is upon such subtle factors as the possible interest of a witness in testifying falsely that defendant's life or liberty may depend," Napue v. Illinois, 360 U.S. 264, 269 (1959), it was error of constitutional dimension to conceal from the defense the precise substance of the conversations that Jami had with Dr. Sherman.

Preventing Appellant from cross-examining Jami White regarding prior inconsistent statements made to Dr. Sherman is a quintessential violation of the right to confront and cross-examine the government's witnesses:

We think that a criminal defendant states a violation of the confrontation clause by showing that he was prohibited in engaging in otherwise appropriate cross examination designed to show a prototypical form of bias on the part of the witness, and thereby ‘to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.’

Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986), quoting Davis v. Alaska, 415 U.S. 308, 318 (1974). The trial court frustrated Appellant’s right to confront his accuser by precluding him from obtaining access to the psychiatric records of the State’s key witness. See United States v. Beckman, 222 F.3d 512, 524-527 (8th Cir. 2000). Just as in Davis, the interest of the State’s witness in maintaining secrets with her therapist “must fall before the right of petitioner to seek out the truth in the process of defending himself.” 415 U.S. at 320.

In this case, Appellant was prevented from engaging in prototypical impeachment of the State’s key witness, including the use of prior inconsistent statements made by Jami White to Dr. Sherman. For example, Jami White testified that Appellant had used a lotion with “little white beads” as a lubricant when he attempted to rape her. (T. 202-03). Defense counsel attempted to cross-examine Jami about the lotion with the beads in it. When relating the incident to Dr. Sherman, Jami said that Ted made her put on a beaded dress, but had said nothing about a lotion with beads in it. (T. 347). Defense counsel was prohibited from impeaching her with any inconsistent statements which she made to Dr. Sherman. (T. 349). The court’s ruling further infringed on Appellant’s Sixth Amendment right to “delve into the witness’ story to test the witness’ perceptions and memory.” Davis v. Alaska, 415 U.S. at 316. This is especially critical in this case, given the inherent susceptibility of a child witness or a

hypnotized witness to the suggestive creation of false memories and allegations. See Argument I, above.

The trial court's restriction of Appellant's Sixth Amendment right of confrontation in this case crippled his ability to challenge the credibility of witnesses against him "as they may relate directly to issues or personalities in the case at hand." 415 U.S. at 316. In the interest of insuring a fair and just result, the Constitution demands that he have the opportunity to do so. For these reasons, Appellant's conviction should be reversed, and the cause remanded for a new trial.

ARGUMENT III

The trial court erred in sustaining the State's motion in limine and preventing Appellant from presenting to the jury the testimony of Dr. David Holmes because Appellant's due process right to present reliable, exculpatory evidence was violated by the exclusion of expert testimony that the "relaxation" technique employed by Dr. Richard Sherman to "reframe" and enhance Jami White's memory was hypnotic and suggestive, and probably resulted in creation of false memories.

Standard of Review: "Questions of law fall within this court's province of independent review and correction.' Barry Service Agency Co. v. Manning, 891 S.W.2d 882, 887 (Mo. App. 1995). Or in other words, as to questions of law, our review is de novo with no deference being paid to the trial court's determination of the law." State v. Tinoco, 967 S.W.2d 87, 89 (Mo. App. 1998).

Appellant moved to exclude or limit the testimony of Jami White based on the hypnotic techniques applied by Dr. Sherman in his counseling sessions. (L.F. 126). In support of his motion, outside the hearing of the jury, Appellant presented the testimony of Dr. David Holmes, a professor of psychology, that the "Traumatic Incident Reduction" (TIR) technique applied by Dr. Sherman was tantamount to hypnosis and probably resulted in the creation of unreliable memories of sexual molestation. (See Argument I, above). The trial court

acknowledged that Dr. Holmes' testimony did indeed go to the weight of Jami White's accusations. (T. 253). However, the State moved in limine to exclude Dr. Holmes' testimony on the grounds that it was based on matters within Jami White's counselor-patient privilege with Dr. Sherman, and the trial court sustained that motion. (See Sentencing Transcript, p. 18). Appellant was thereby precluded from presenting reliable, material and exculpatory expert testimony.

In Crane v. Kentucky, 476 U.S. 683 (1986), a unanimous Court unequivocally ruled that “whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” Id. at 690, quoting California v. Trombetta, 467 U.S. 479, 485 (1984). Appellant was denied that right when the court below prevented him from presenting expert testimony explaining the susceptibility of the State's key witness to suggestive and coercive pressures to which she was subjected. See 476 U.S. at 690-91. The exclusion of Dr. Holmes' testimony violated the holding of Crane.

The due process clause demands that a defendant be allowed to introduce evidence which rebuts the State's allegations. Washington v. Texas, 388 U.S. 14, 19 (1967). “The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” State v. Ray, 945 S.W.2d 462 (Mo. App. W.D. 1997). “The denial of the opportunity to present relevant and competent evidence negating an essential element of the

State's case may, in some cases, constitute a denial of due process." State v. Copeland, 928 S.W.2d 828, 837 (Mo. 1996).

The Supreme Court has clearly held that a state must demonstrate a legitimate and compelling interest in excluding such evidence:

We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. In re Oliver, 333 U.S. 257, 273 (1948); Grannis v. Ordean, 234 U.S. 385, 394 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 656 (1984). See also Washington v. Texas, [388 U.S. 14, 22-23 (1967)].

Crane v. Kentucky, 476 U.S. at 690-91. Further, restrictions on a criminal defendant's right to present relevant evidence "may not be arbitrary or disproportionate to the purposes they are designed to serve." Michigan v. Lucas, 500 U.S. 145, 151 (1991) (quoting Rock v. Arkansas, 483 U.S. at 56). Here, the interests of the defendant and society in preserving the reliability of the truth-seeking process are balanced against a statutory counselor-patient privilege of questionable applicability.¹⁹ Appellant's constitutional right to present evidence in his defense "is paramount to the State's policy" of protecting counselor-patient privilege. Davis v. Alaska, 415 U.S. 308, 319 (1974). Where the a defendant offers reliable, exculpatory evidence, his

¹⁹ Missouri statute provides that any legally recognized privileged communication "shall not apply to situations involving known or suspected child abuse or neglect and shall not constitute grounds for failure . . . to give or accept evidence in any judicial proceeding relating to child abuse or neglect. Mo. Rev. Stat. §210.140 (1994). See Argument II, above.

due process right to present a defense prevails over a State's evidentiary rule. State v. Carroll, 629 S.W.2d 483 (Mo. App. W.D. 1981).

The balance in favor of admitting Dr. Holmes' testimony is even more compelling in light of the fact that Appellant was left helpless against the testimony of State's witness Dr. Katherine Smith, a physician who presented herself as a trainer of "validated sexual abuse evaluators" for the State of Missouri. (T. 490). Dr. Smith had conducted a physical examination of Jami White and found no evidence of injury or infection related to abuse. (T. 506). Nevertheless, she testified extensively to bolster Jami White's credibility. (T. 494-508). She was allowed to testify that Jami's report was "very convincing when a child can be so specific about these events." (T. 508). It was fundamentally unfair to prevent Dr. Holmes from testifying in favor of Appellant on the same subject. United States v. Homick, 964 F.2d 899 (9th Cir. 1992); State v. Hickson, 630 So.2d 172 (Fla. 1993).

A good example of the due process "sauce for the goose is sauce for the gander" principle is found in a recent decision of the Tenth Circuit Court of Appeals. Even though it is widely held that polygraph evidence is inadmissible, in Paxton v. Ward, 199 F.3d 1197 (10th Cir. 1999), the court found that the exclusion of evidence that the defendant passed a polygraph test violated the defendant's constitutional rights where the prosecutor injected an issue which made the evidence relevant. Just as the exclusion of polygraph evidence in Paxton's case "denied his due process right to explain or deny the evidence against him," the exclusion of Dr. Holmes' testimony in this case "significantly undermined fundamental elements of the defendant's defense." Id. Appellant's right to a fair trial was unconstitutionally undermined

when “the jury heard only that part of the story that implicated him and was not permitted to hear highly probative evidence which the jury could have determined was exculpatory.” LaJoie v. Thompson, 201 F.3d 1166, 1176 (9th Cir. 2000). At a constitutional trial, Appellant would have been allowed to counter Dr. Smith’s testimony with evidence that the procedures by which Jami White’s allegations of abuse were encouraged, reframed and reinforced were likely to produce false and unreliable testimony.

If the jury had heard Dr. Holmes’ testimony, its verdict probably would have been different. The logical relevance and persuasiveness of Dr. Holmes’ testimony is undeniable. After hearing Dr. Holmes’ testimony outside the presence of the jury, the trial court remarked that his testimony went “more to the weight rather than admissibility and I think if you saw fit to call Dr. Holmes he might be an appropriate witness.” (T. 253). By excluding Dr. Holmes’ testimony, the court left Appellant helpless against the State’s argument, based on Dr. Smith’s expert testimony, that Jami White’s failure to disclose her allegations for two years did not reflect negatively on her credibility (T. 629), and the State’s argument that Jami’s allegations were too “incredibly detailed” and specific to be fabricated. (T. 666-69, 679-80). Dr. Holmes’ testimony would have provided evidence directly responsive to the State’s strongest arguments by explaining the impact of the suggestive procedures used by Tina White, investigating officers and Dr. Sherman. The trial court’s order sustaining the State’s motion in limine against calling Dr. Holmes as a witness violated Appellant’s due process right to present a defense.

For the foregoing reasons, Appellant's conviction should be reversed and the case remanded for a new trial.

ARGUMENT IV

The trial court erred in denying Appellant's Motion for New Trial and Amended Motion for New Trial because the prosecutor withheld exculpatory evidence and intentionally misled the jury, in violation of the Due Process Clause of the Fourteenth Amendment, in that the state deliberately concealed an illicit sexual affair between Appellant's wife, Tina White, and Detective Richard R. McKinley, who investigated Jami White's allegations of sexual abuse against Appellant, while arguing to the jury that Tina White had no conceivable motive to give false testimony or to encourage Jami White to make false allegations of abuse against Appellant. This deliberate concealment was material because it allowed the State to improperly rely on Tina White to corroborate the allegations of abuse and prevented the defense from impeaching Tina White or presenting a coherent defense.

Standard of Review: “A district court’s denial of a Brady claim is reviewed . . . de novo to determine whether the suppressed evidence undermines confidence in the outcome of the defendant’s trial.” United States v. Corrado, 227 F.3d 528, 538 (6th Cir. 2000). If a new trial motion is based on an alleged Brady violation, . . . the district court’s ruling is de novo. United States v. Quintanilla, 193 F.2d 1139, 1146 (10th Cir. 1999); accord, United States v. Hughes, 230 F.2d 815, 819 (5th Cir. 2000).

When the allegations of sexual abuse surfaced in this case, a petition for dissolution of marriage, filed by Tina White, was pending in the Circuit Court of Jackson County, Missouri. (T. 437, 586-88). A key aspect of appellant’s defense in this case were assertions that Jami’s allegations were fabricated to please or assist her mother, were the product of her mother’s pressure and encouragement, and were exacerbated by unskilled, suggestive questioning by law enforcement officers and therapists involved in the case. (T. 640-56, 658-59). In response to defense counsel’s strong attack on the inappropriate interview methods used by Tina White, police investigators, and Dr. Richard Sherman, counsel for the State asked the jury, “What does Tina White have to gain [by fostering Jami’s false allegations]?” (T. 674). The State told the

jury, “we still haven’t figured out why it would benefit Tina White in any way, shape, or form to do such a thing.” (T. 673). In light of evidence known to the prosecutor and deliberately withheld from the defense, the State’s argument, if not outright false, was at least misleading.

On March 4, 1999, two weeks after the verdict in this case, defense counsel, Matt O’Connor, discovered that the prosecutor knew that Tina White had powerful motives to get rid of her husband. Mr. O’Connor received information from Tina’s co-worker informing him that Tina was having an affair with a member of the Lee’s Summit Police Department. (L.F. 242-44). Mr. O’Connor confirmed that Tina was romantically involved with Detective Richard McKinley. (L.F. 242-44). In his timely motion for new trial, appellant alleged that “the State was aware and intentionally concealed the sexual relationship between the alleged victim’s mother, Tina White, and the lead investigator for this case, Detective Richard McKinley,” and that “Defense counsel first learned this information on or about March 4, 1999.” (T. 209).

Tina White’s co-worker further told defense counsel that “the prosecutor was aware of the relationship and had instructed Ms. White and Det. McKinley to keep this matter quiet.” Id. After learning this information, on March 10, 1999, Mr. O’Connor told assistant prosecutor Jennifer Mettler that “a matter of concern had come to light.” The next day, March 11, 1998, Ms. Mettler phoned Mr. O’Connor and admitted that Ms. White and Det. McKinley were in a sexual relationship. (L.F. 208-09). Ms. Mettler confirmed that the State had been aware of the relationship for nearly a year, which she claimed was the relationship’s inception.²⁰ Ms. Mettler further confirmed that other assistant prosecuting attorneys were

²⁰ Jami White first made her allegations of sexual abuse on March 21, 1998. (T. 406). The prosecutor’s admission establishing that the relationship existed for nearly a

aware of the relationship and that the issue had been discussed in the prosecutor's office and "the decision was made not to disclose the relationship." (L.F. 209-10).

Appellant filed a timely motion for new trial alleging that the prosecutor's intentional concealment of this information violated appellant's right to due process of law as guaranteed under Brady v. Maryland, 373 U.S. 83 (1963). (L.F. 210). On May 16, 1998, appellant filed a timely amended motion for new trial, incorporating additional suggestions in support of his Brady claim. Mr. O'Connor submitted a sworn affidavit setting forth the prosecutor's misconduct and describing Ms. Mettler's admissions in more detail:

Ms. Mettler stated that a decision was made that the Prosecutor's office would not disclose this relationship. In fact, Ms. Mettler and several others in the Jackson County Prosecutor's office discussed whether or not this information should be divulged and disclosed to defense counsel. Mettler related that the decision of the Prosecutor's office was to not disclose this information, as it was not relevant.

* * * *

During the conversation on March 10, 1999, with Jennifer Mettler, I asked her why she was now disclosing this information. She admitted that it was clear that the defense was about to discover the information and that this discovery in essence forced her to divulge this information.

It is my understanding that Jennifer Mettler, Jill Kanatzar, Kate Mahoney, and the other Assistant Prosecuting Attorneys at the Jackson County Prosecutor's Office were aware of the relationship between Tina White and Detective Richard McKinley. Further, it is my understanding that several Assistant Prosecutors were involved in the process to determine whether or not to disclose this information to the defense in this case.

year places its inception in the same time frame as Jami's abrupt accusations.

(L.F. 242-43.) The record further reflects that an assistant prosecutor sat silently during Detective McKinley's sworn deposition, taken January 18, 1999, while he testified, under oath, that he had no vested interest or personal interest in the case. (L.F. 246-47).

Appellant also submitted the affidavit of Det. McKinley's ex-wife, Jennifer Dawn McKinley, who swore:

At the end of May, 1998, my husband informed me that he wanted a divorce. Our married life effectively ended on that day, and when I could make other living arrangements at the end of June, I left our home on 5th Street.

Shortly after I left the 5th Street residence, during the middle of July, 1998, I met with Richard McKinley to return an item of his jewelry (his class ring) which I found within my property. I met Richard at a park in Lee's Summit and returned his property. Before we parted company, he acknowledged to me that he had left me for a woman named Tina. It may have been on that day during that conversation that, for the first time, he asked me not to say anything to anyone about his relationship with Tina.

My divorce from Richard McKinley was finalized on September 21, 1998.

Prior to our divorce, around the first of September, I had another conversation with Richard McKinley concerning his affair with the woman Tina. During this conversation, he asked me not to tell anyone about that relationship. He said that he could get in trouble if anybody were to find out about that relationship.

(L.F. 248-49).

The State did not deny that it had conspired to withhold evidence that Tina White was having a sexual affair with the Lee's Summit Police Department's chief investigator assigned to this case. Instead, it justified its misconduct by claiming that the evidence of the affair was not relevant to appellant's trial. Appellant pointed out to the trial court that the evidence was relevant for a number of reasons, including "its considerable impeachment value and its transforming effect on the defense theory of the case." (L.F. 238). Counsel for appellant

contended that “once the affair is known, the prospects for a successful defense rise dramatically,” and that “[t]he concealment of the affair raises the specter of an innocent man convicted by a jury that did not know all of the facts of his case.” (L.F. 240).

The prosecution’s suppression of evidence favorable to the accused violates due process. Brady v. Maryland, 373 U.S. 83 (1967); Agurs v. United States, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985); Stanno v. Dugger, 921 F.2d 1125 (11th Cir. 1990). The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether the information relates to innocence or punishment, and regardless of whether defense counsel requests the information. United States v. Bagley, *supra*; accord, State v. Bebee, 577 S.W.2d 658, 661 (Mo.App., 1979); Lee v. State, 573 S.W.2d 131, 133 (Mo.App. 1978). Closely related to the Brady principle is the duty which the Due Process Clause of the Fourteenth Amendment imposes on the prosecutor to refrain from presenting false testimony or misleading a jury, and the affirmative duty to correct false testimony when it appears. United States v. Agurs, 427 U.S. 97 (1976). These due process principles are based on society’s strong interest in the integrity of the criminal justice system. The Court explained that “by requiring the prosecutor to assist the defense in making its case, the Brady rule represents a limited departure from a pure adversary model.” United States v. Bagley, *supra*. at 675, n.6. Recently, the Supreme Court summarized the essential purpose of the Brady doctrine:

These cases, together with earlier cases condemning the knowing use of perjured testimony, illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is “the representative

not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” Berger v. United States, 295 U.S. 78, 88 (1935).

Strickler v. Greene, 527 U.S. 263 (1999) (internal footnotes omitted).

The prosecution admitted that it knew of the relationship between Tina White and Detective McKinley. The only issue it contested was whether the information was material. As Missouri Supreme Court Judge Charles Blackmar noted in a similar situation, “The prosecutor’s omission was a serious matter. The information is of a kind which any capable trial lawyer would like to have.” Hayes v. State, 711 S.W.2d 876, 880 (Mo. banc 1986). Reversing Hayes’ conviction, the Court followed the Brady principle that evidence is material “if there is a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding *might* have been different.” Id. at 879. (Court’s emphasis) (citing United States v. Bagley, 473 U.S. 667 (1985)). In applying the Brady standard to give Hayes a new trial, the Court cautioned, “No certain prediction is possible about the result of a trial, but the Bagley rule uses two qualifying terms -- ‘reasonable,’ and ‘might.’” Id. Further, that determination must be made on the basis of the cumulative effect of the suppressed evidence considered together with all the evidence introduced at trial. Kyles v. Whitley, 514 U.S. 419, 434 (1995). In this case, the evidence of the secret affair was not merely evidence a capable trial lawyer would have “like[d] to have had”, Hayes, 711 S.W.2d at 880, it was essential to the defense of this case.

It blinks reality to suggest that the secret affair between Tina White and Detective McKinley had no bearing on the outcome of appellant’s trial. To the contrary, it satisfies any

test of materiality ever articulated by a court. First, the affair sheds light on an important issue in dispute at trial, Alcorta v. Texas, 355 U.S. 28 (1957)-- Tina's motive for encouraging Jami to elaborate on her accusation. Additionally, evidence of the tryst refutes a prosecutorial theory, impeaches a prosecution witness, and contradicts inferences from prosecution evidence. Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972). It does so by revealing that Tina White may not be the protective mother motivated solely by maternal protection of her daughter's best interest which the prosecutor portrayed and further undermines Tina's believability as independent corroboration of Jami's accusations. Moreover, the clandestine relationship provides ample support for a theory advanced by the accused, Miller v. Pate, 386 U.S. 1, 6-7 (1967), because it demonstrates Tina's strong motive to get rid of her husband while taking the bulk of the assets of the marriage.

This case turned on the believability of Jami White's allegations of sexual abuse by her father. Whether those allegations were credible was the key issue in dispute at trial. Much of the state's case was an attempt to bolster the credibility of those allegations through her mother, Tina White. Her testimony was used by the State to argue that Jami White was telling the truth about her allegations, telling the jury, "She's corroborated by her mother, by Tina." (T. 627). The prosecutor referred to Tina repeatedly as a witness who independently verified many details of Jami White's testimony. (T. 627-29). Accordingly, effective impeachment of Tina White was essential to the defense case. The importance of including impeachment evidence in the government's duty of disclosure is that "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon

such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Napue v. Illinois, 360 U.S. 264, 269 (1959). Where, as here, evidence withheld by the prosecution seriously undermined the defendant's ability to impeach a crucial witness, that evidence was constitutionally material.

The prosecutor's own conduct resolves any question about the materiality of the sordid affair between Detective McKinley and Tina White. One sure way to determine the materiality of suppressed evidence is to examine it "in the context of the trial testimony" and "the closing argument of the prosecutor." Anderson v. South Carolina, 542 F. Supp. 725, 734-37 (D.S.C. 1982), *aff'd*, 709 F.2d 887 (4th Cir. 1983). In this case, the prosecutor's closing argument demonstrates that she used her deception to affirmatively misled the jury in order to overcome appellant's defense.²¹ First, the prosecutor attempted to paint Tina White as a conscientious, innocent and naive mother who was betrayed by appellant:

And why didn't Tina -- and it's so easy to look back in hindsight, which is 20-20 and say, gosh, Tina, you probably should have caught on here, two by two. Don't you think she's told herself that a hundred times over the past year? But what is the last thing you expect, the last thing, is the man you love, the man who is the father of your children, the man you trust, to be abusing that trust, molesting the child. That's the last thing she would expect. People don't look for that, they don't suspect it. But, when she did find out she did everything right. She did everything she could to protect her daughter.

(T. 628-29).

²¹Defense counsel referred to the discord in Ted and Tina's relationship and the exchange between Tina and Ted White about Tina getting the house and the kids as a result of Jami's accusations. He argued, "Well, in thinking about reasons why Tina would try to manipulate these accusations and help Jami fill them in, think about that." (T. 657). Mr. Speck also argued that the pendency of Tina's divorce petition was a significant factor in the credibility of Jami's accusations. (T. 658-59).

Appellant, at trial, had nothing to rebut this argument. Had defense counsel been aware of what the prosecution knew, however, the situation would have been markedly different. Defense counsel could have argued that Tina White did not do what every mother would have done to protect her daughter. Rather, Tina White was doing what she needed to do to protect her own interests in maintaining her affair and setting up a divorce and custody situation beneficial to her interests.

The concealed evidence of the secret affair not only impeded appellant's impeachment of Tina White; it affirmatively assisted the prosecution in making its case. Anticipating the defense that Tina manipulated Jami into making and embellishing her allegations, the State, in the opening half of its argument to the jury, openly vouched for Tina White's conduct and character:

So then I guess we have the conspiracy theory here, that Tina manipulated this whole thing. Well, why did Tina manipulate this whole thing? Why did Tina do such a sadistic, vicious thing, as to have her daughter falsely accuse someone, two and a half years of sexual abuse. Now, we've heard about how Tina was a protective mother, a good mother, and how -- you saw it. I mean, as soon as this thing was disclosed she called the police. She had the defendant out of that house. She took care of Jami; she kept her promises. She got her in counseling. She's now working two jobs to try and keep the family going.

And that brings us to Tina's supposed motive to fabricate all this? No. But Tina knew they were in way over their heads. She knew they weren't paying the utility bills. Was she going to get the house? Tina had a part-time receptionist job. She could probably work for four or five months just to make one house payment, for one month, not including all the utilities, food, everything else that was required. She knew that. She absolutely knew that. Is she better off financially now than she was a year ago? As bad as things were for them then, she's now living with her mother. She's now looking at getting no support from this man, ever again. She is working two jobs and has sole responsibility for all three children. To get the house? The house is

mortgaged up to the hilt. They were in debt up to their eyeballs. *She wasn't seeking a divorce at that time. She had filed for one, she hadn't got one. She was hoping things were going to work out.*

(T. 631-32.). (emphasis added).

In the closing half of her argument, counsel for the State again focused extensively on Tina White. She argued that Tina's notes were credible corroboration of Jami's accusations. In response to the suggestion that Tina would try to influence Jami's story, the State replied:

And he wants you to believe that there are reasons why Tina would help Jami, why Tina would help Jami fill in the details, fill in gaps. *Well, if Tina was going to help Jami, if that was her goal, and we still haven't figured out why it would benefit Tina White in any way, shape, or form to do such a thing, she would come up with something much better than the things that she was able to testify to. She could only testify to the things that she saw and the things that she remembers. If Tina wanted to corroborate Jami so badly, she's sit on that stand and she would tell you that she walked in on them and caught them in the act. It'd be her word against his, just like everything else.*

(T. 673-74) (emphasis added). The evidence that the prosecution withheld about Tina White's relationship responded directly to the prosecutor's question that she posed to the jury on closing argument:

What does Tina White gain? They've gone from living in this beautiful house in Lakewood to living with her mother where they share rooms, where she goes to work at three in the morning to load trucks at United Parcel Service, and then she goes to her second job during the day. Yeah, they're just living it up after having made these allegations, aren't they. What does he have to gain? He's trying not to go to prison.

(T. 674) (Emphasis added).

Because of the prosecution's withholding of key evidence, appellant was left defenseless against these claims as well. Had defense counsel been aware of the affair, this would have been a focal point of his closing argument. Not only would it likely have been

independently persuasive, it would certainly have short-circuited a major thrust of the state's argument. Because it would have clearly refuted a major part of the prosecution's theory of the case, this evidence was clearly material.

Not only was the concealed evidence material and the prosecutor's decision to withhold it misconduct, she compounded this misconduct by presenting testimony which she knew was false. At the time of appellant's trial, Tina White was not living with her mother; she and McKinley were living together. In support of his request for a new trial, appellant presented persuasive evidence to the court establishing beyond question that the prosecutor's conduct approached subornation of perjury:

Preliminary investigation reveals that Tina White had taken up residence with McKinley by December, 1998, see Exhibit IV, property tax receipt of Tina White, and defendant had reason to believe that Tina White had moved in with McKinley as early as June, 1998. Tina White was living with McKinley on October 15, 1999, when her divorce from defendant was decreed. While defendant was represented by counsel in that proceeding, he did not appear himself, having received a verdict of guilty on February 19, 1999. Tina White was awarded the principal asset of the marital estate, a body of stock (83,700 shares of Adatom stock). See Exhibit V, certified copy of Dissolution decree. That stock on March 22, 2000, was traded at six-and-seven-eighths, see Exhibit VI, and accordingly had a value of \$575,437.50. Tina White had become a rich woman through her divorce. She will grow ever richer as the stock increases in value. It is reasonable to suppose that the man living with her will enjoy the benefit of that wealth. Current investigation indicates that Tina White and McKinley reside to this day at his residence, 1933 SE 5th Street, Lee's Summit, Missouri.

(L.F. 239). This failure to disclose the affair between Tina White and Detective McKinley enabled the state to paint a false picture of Tina White's personal and financial interest in the case.

Additionally, the withheld evidence was material with regard to Detective McKinley's role in this case as well. The prosecution did not call McKinley, the primary law enforcement officer involved in the case and the detective who prepared the Probable Cause Statement. (L.F. 8). At the time, this decision may have appeared curious, but not sinister. It was not until appellant was made aware of the concealed evidence of McKinley's relationship with Tina White that the true import of this choice became apparent. The state understandably did not want Detective McKinley subject to impeachment, since, in light of his relationship with Tina White, he certainly was. Had defense counsel had the opportunity to probe Detective McKinley on cross-examination, there was a real risk that the secret relationship might have been revealed.

Even more importantly, however, was the fact that by concealing Detective McKinley's relationship with Tina White, the State deprived the defense of the ability to take him to task for losing Jami White's diary, which McKinley read and, finding nothing inculpatory, abandoned. (T. 547). That diary may well have contained exculpatory entries—notes about Jami's relationship with her parents and her daily activities which might have enabled appellant to assemble a defense to her allegations. Without knowledge of the concealed affair, his actions regarding the diary appear, at worst, to be shoddy police work. His affair with appellant's wife puts those actions in a totally different light: it gave him a huge stake in appellant's prosecution and a powerful motive to "lose" this potentially exculpatory evidence. Moreover, because the affair was concealed, the defense could not demonstrate a need to treat him as a hostile witness for purposes of drawing relevant defense evidence from him through

more leading, pointed questioning. Such questioning may well have revealed helpful information about the suggestive interview techniques used by officers working under his direction.

Concealment of the affair also prevented the defense from exposing McKinley's financial stake in the outcome of the case. As appellant established at sentencing, McKinley's subsequent marriage to Tina White also produced a substantial financial windfall, in the form of 83,700 shares of Adatom stock. At the time of sentencing, Adamaton was trading at six-and-seven-eighths a share, for a total value of \$575,437.50. All of that stock was awarded to Tina McKinley in her divorce from appellant. (L.F. 239). If Tina White wanted to use and embellish Jami's allegations for her own benefit, she could not have a better partner than the chief sex abuse investigator in the local police department.

The State's conduct in this case is "fundamentally unfair" and warrant's this Court's application of "a strict standard . . . not just because [such cases] involve prosecutorial misconduct, but more importantly because it is a corruption of the truthseeking function of the trial process." United States v. Agurs, 427 U.S. 97, 103-104, n.8 (1976). The prosecutor's "deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the rudimentary demands of justice." Giglio, 150 U.S. at 153. In cases such as appellant's "involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict." United States v. Bagley, 473 U.S. 667, 677 (1985), quoting, United States v. Agurs, 427 U.S. at 102. "The question is not whether the defendant would more likely than not have received a different

verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” Kyles v. Whitley, 514 U.S. 419 (1995). A new trial is required “if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.” Bagley, 473 U.S. at 677-78. Unquestionably, that standard is met in this case.

Missouri courts have demonstrated a particular concern with the type of misconduct that occurred in this case, misconduct that impacts on the integrity of the truth-seeking process. In an analogous line of cases dealing with prosecutorial misconduct in arguments to the jury, Missouri Courts condemn as plain error the conduct of a prosecutor who excludes evidence from trial, and then takes strategic advantage of the development by “intentionally misrepresent[ing] the facts.” State v. Weiss, 24 S.W.3d 198, 202 (2000). Just as “it is error for a prosecutor to ‘comment on or refer to evidence or testimony that the court has excluded,’” State v. Weiss, *supra* at 202, so too it must be error for the prosecutor to make misleading arguments based on evidence which she has withheld. Such misconduct is “even more improper” where, as here, the prosecutor connives in advance to withhold the material evidence in order to manipulate the record to support a misleading argument to the jury. *Id.* Missouri courts strongly condemn deliberate, positive misrepresentations such as those made in this case. Misleading the jury is denounced as a “distasteful tactic,” *Id.*, and a “manifest injustice” which “affect[s] the defendant’s substantial rights,” State v. Luleff, 729 S.W.2d 530 (Mo. App. E.D. 1987).

The violation in this case is particularly egregious. This was not a lone prosecutor failing to recognize the significance of a piece of evidence and inadvertently keeping it from the defense nor a possible overzealous prosecutor caught up in the heat of argument who inadvertently stretched the available facts. Rather, the prosecution in this case made a deliberate, calculated decision to withhold the fact that Tina White and Detective McKinley were involved in a sexual relationship, and advised the witnesses to keep their affair a secret to prevent discovery by the defense. Assistant Prosecuting Attorney Jenni Mettler stood by silently during Richard McKinley's January 18, 1999, deposition even though she knew he was giving false testimony under oath denying his interest in the case. The prosecution concealed evidence of Mrs. White's chicanery not only to dispel the defense that she fostered Jami White's allegations, but also to go one step further and paint a false picture of her as a naive, conscientious mother who was betrayed by her husband. The sexual liaison between Tina White and Richard McKinley was a crucial fact, the concealment of which frustrated appellant's "right to have the opportunity to formulate a defense in advance of trial." State v. Rodriguez, 985 S.W.2d 863 (1998). For the foregoing reasons, appellant's conviction should be reversed and the cause remanded to the circuit court for a new trial on all counts.

ARGUMENT V

The trial court erred in overruling Appellant's objection to the admission of a letter written by Jami White to her school counselor, Barbara Winkler, as this evidence was inadmissible hearsay, irrelevant, immaterial and highly prejudicial, in that it shed no light whatsoever on the truth of Jami White's allegations and served only to inflame the jury against Appellant and engender sympathy for Jami White.

Standard of Review: "A question of "[w]hether admission of hearsay evidence violated a defendant's Sixth Amendment right of confrontation is a mixed question of law

and fact” that we review do novo. Gochicoa v. Johnson, 118 F.3d 440, 445 (5th Cir. 1997), cert. denied, 522 U.S. 1121 (1998).” Reed v. Thalacker, 198 F.3d 1058, 1061 (8th Cir. 1999).

Defense counsel moved in limine to exclude statements made by Jami White to school counselor Barbara Winkler, including a letter allegedly written by Jami making allegations of sexual abuse against Appellant and expressing a desire to address the student body about the subject at an assembly. The motion was overruled (L.F. 100), as was Appellant’s objection at trial. (T. 304). Admission of the letter, which was prejudicial, inadmissible hearsay, requires reversal of Appellant’s conviction.

In the aftermath of the allegations that serve as the basis of this case, Jami White returned to her classes at Hall McCarter Middle School in Lee’s Summit, Missouri. (T. 525). Once there, she complained of a lack of concentration in the classroom, and she was referred to the school counselor, Barbara Winkler. (T. 525). Jami began to meet with Ms. Winkler on a weekly basis and eventually began to spend most of her school day in Ms. Winkler’s office rather than in the classroom. (T. 526).

One day during the school year, Ms. Winkler left the office for a period of time. When she returned, there was a typewritten letter for her, purportedly authored by Jami. (T. 529). In the letter, Jami expressed her interest in becoming an advocate for children who are dealing with abusive parents at home. (T. 532). According to the letter, Jami felt the need to reach out to her peers and to act as a sort of peer counselor. (T. 532).

The State sought to introduce this letter into evidence through Ms. Winkler. Though the defense vigorously objected on the basis that the letter was inadmissible hearsay, the court

allowed the letter to be admitted and read into the record. (T. 531-33). In doing so, the trial court abused its authority because the letter was hearsay evidence that failed to meet any recognized exception under Missouri law.

A criminal defendant's right to confront and cross-examine witnesses against him are fundamental to a fair trial. See State v. Denman, 635 S.W.2d 345, 348 (Mo. 1982). Statements by an out-of-court declarant offered for the truth are inadmissible hearsay. See State v. Burk, 809 S.W.2d 391, 399 (Mo. App. 1990). Unless such statements are relevant and fit within a well-recognized exception to the hearsay rule, that being a statement which, by its circumstances, demonstrates the declarant's reliability, such statements are inadmissible. Id.

The ostensible purpose of Ms. Winkler's testimony and the introduction of the letter was to establish that Jami suffered some emotional difficulties after returning to school. That testimony, even if not hearsay, is irrelevant. It is not probative of whether the events Jami complained of actually occurred. As for the inference that the emotional difficulties are proof of the abuse, the jury could just as easily infer that the physical symptoms and emotional difficulties identified by Ms. Winkler resulted from Jami struggling with the aftermath of telling, and having to repeat, an enormous lie. In fact, the record bears this out. During the time that Jami claims to have been abused, neither Ms. Winkler nor any of the teachers on Jami's team expressed any suspicion that she might be having problems. There were no dips in grades or behavior problems, nor were there any other factors that would raise anyone's suspicion that something was going on. (T. 538). The prosecution noted that Jami was, at the

time of the alleged abuse, “good in school.” (T. 629). It is accurate to say that the allegations had a far greater impact on Jami’s scholastic life than did any claimed abuse.

But instead of the jury hearing about the physical and emotional problems from Jami, who could have been cross-examined about them, the jury got that information from a letter that could not be cross-examined.

There was a clear alternative to admission of this letter. Obviously, Jami could have testified to everything she allegedly wrote in the letter during her direct testimony. She did not. Jami was not asked by the prosecutor to verify anything she wrote in the letter. Jami did not testify that the statements she made in the letter were true. Yet it was admitted by the court for the truth of the statements contained in it.

Because the letter was obviously hearsay, it could only be admitted if it fell within a recognized exception to the hearsay rule. It is unclear from the record on what exception the trial court relied, but it is clear that no exception justified its admission.

While there are certain exceptions under the Missouri hearsay rule that would allow child victim statements to be admissible even though they are clearly hearsay, these exceptions are inapplicable in this case. For instance, a “declaration made by a witness under the age of twelve to the occurrence of an offense chargeable under Chapters 565, 566, or 568” may be admissible in some circumstances, Mo. Rev. Stat. §491.075 (1994), but in this case, the alleged victim was not a child under the age of 12. At the time she purportedly authored the letter to Miss Winkler, Jami was at least 13 years old, thus rendering this exception inapplicable.

The prejudice associated with the erroneous admission of this letter cannot be overstated. The letter was clearly offered by the State in an effort to bolster the credibility of the State's chief witness against Appellant. This bolstering was part of a calculated prosecution effort to have Jami's allegations repeated by others so as to make them appear more credible. Moreover, the State purported to present Jami as a sympathetic figure, willing and able to overcome the crimes of her father in an effort to reach out and touch other children's lives. Though these may have been arguable trial strategies on the part of the State, the State cannot meet its trial objectives by relying upon inflammatory and inadmissible hearsay. This Court should, therefore, reverse the trial court's ruling and remand the case for a new trial.

ARGUMENT VI

The trial court plainly erred in sustaining the State's objection and preventing Appellant from introducing evidence of the prior false sexual abuse accusations made by Jami White against her maternal grandmother, Reba Allen, because Appellant's right to due process of law, compulsory process and to confront and cross-examine witnesses against him was violated in that Jami White's false allegations of sexual abuse against her grandmother were probative of the reliability of her allegations against Appellant.

Standard of Review: It is an abuse of the trial court's discretion to prohibit a defendant accused of sexual abuse from introducing evidence of prior false accusations of sexual abuse made by the complaining witness. State v. Montgomery, 901 S.W.2d 255 (Mo. App. 1995).

Appellant was not the only adult relative accused by Jami White of initiating unwanted, inappropriate sexual contact with her. Jami White also accused her maternal grandmother, Reba Allen, of French kissing her.

According to Jami White, the alleged French kissing incident with her grandmother occurred with other family members in the room who did not notice the kiss. Reba White

denies that it was a French kiss or in any way improper.²² Tina White acknowledges that Jami told her about the incident, but agrees with her mother's assessment that it was not a French kiss.²³

The defense sought to introduce evidence of the incident as a prior false accusation of sexual abuse. One witness with knowledge of this accusation was Detective Richard McKinley. Direct examination of the detective contained this exchange:

- Q. Wouldn't another instance of false reporting have been important to you in this case?
- A. All instances of false reports are important.
- Q. During the course of your investigation did you discover that –
- MS METTLER: Objection, Your Honor, may we approach. (The attorneys approach the bench and the following is out of the hearing of the jury.)

²² Reba Allen was deposed on January 18, 1999:

- Q. Did you French kiss Jami?
- A. No.
- Q. So if Jami says that you French kissed her, then Jami would be lying about that?
- A. Well, I didn't French kiss her. (Page 35, lines 17-21)
- *****
- Q. So you didn't French kiss her.
- A. No. Absolutely not.
- Q. So if Jami says that you French kissed her, she would not be telling the truth about that?
- A. Well, I didn't consider it a French kiss.
- Q. So if Jami said that you French kissed her, she would not be telling the truth about that?
- A. Well, I guess so. I didn't—it wasn't a French kiss. (Page 36, lines 14-22)

²³ Tina White was deposed on January 12, 1999:

- Q. Was there a time when Jami told you that your mother French kissed her?
- A. This was a joke. And my mother did not French kiss her. (Page 38, lines 22-25)

MS METTLER: Your Honor, he's attempting to ask about the french kissing incident with Reba, the grandma.

MR O'CONNOR: That's correct.

MS METTLER: This is improper. He never asked Jamie [sic] about it. This is improper impeachment. He's going to be asking this detective about what Jamie [sic] said about something that Jamie [sic] has never been asked and never testified to under oath in court.

THE COURT: Are you going in this direction?

MRO'CONNOR: She's correct in that assumption, Judge.

THE COURT: What would that impeach in Jamie's [sic] testimony?

MR O'CONNOR: Jamie [sic] has made a prior false allegation against her grandmother, that her grandmother french kissed her. And I think that would be relevant to this detective's investigation, that if he has evidence she gave false reports that would be something he would've looked into.

THE COURT: Was that covered with Jamie [sic] at all?

MS METTLER: No.

THE COURT: I don't remember that.

MR O'CONNOR: It was not, Judge.

THE COURT: But this wouldn't impeach her. Objection sustained.

(T. 555-57).

The stated rationale for the exclusion was that such an inquiry of Detective McKinley would have constituted improper impeachment of the testimony of Jami White. If that were the only basis on which the testimony could be offered, the ruling might fall within the court's discretion. But counsel made it clear that he was asking the detective if his investigation revealed that Jami had made any prior false sexual abuse allegations against a relative. He did ask not the detective if Jami lied in court about the grandmother incident. He inquired about the incident through one of the persons who had heard the allegation and had investigated its lack of merit.

Detective McKinley's testimony was offered to prove that Jami White had a history of making false allegations, which is probative of whether her allegations against Appellant were likewise concocted. Such evidence is admissible in cases charging sexual abuse. A prosecutrix's prior charges of sexual misconduct are relevant and may be introduced to impugn her credibility if they have been conclusively proven to be false. Phillips v. State, 545 So. 2d 221, 223 (Ala. Crim. App. 1989); Ex Parte Loyd, 580 So. 2d 1374 (Ala. 1991). The relevance of such evidence is heightened in the case of a child witness, who is subject to suggestion and whose motives for making such allegations are not always easy to discern. Thomas v. State, 669 SW2d 420 (Tex. App. 1984). Such evidence is logically relevant to show that the present charges might also be fabricated. State v. Smith, 743 So. 2d 199 (La. 1999); Cox v State, 51 Md App 271, 443 A2d 607, affd 298 Md. 173, 468 A2d 319 (1982).

Wigmore explains that establishing a witness' general disposition to make false charges indicates a direct or personal bias against the opposing party:

It is time that the courts took warning here, and became more liberal. They know, and all know, that the court-room has its quota of false claimants and pretended victims of wrongs; some are children, some eccentrics, some hysterics, some insane, some nymphomaniacs, some conscious blackmailers. It is hard enough, at last, to detect and expose them. To hamper this exposure with the shibboleth 'res inter alios acta' is unpractical. And the injustice of the situation is often intensified by this maddening prohibition of the very evidence to which a common-sense tribunal would most quickly resort.

3A Wigmore, Evidence, §963, p. 811. (Footnote omitted.)

Missouri follows the common sense approach advocated by Wigmore. Motive for false accusation of one charged with a crime by a witness for the State is a proper subject for inquiry in a criminal prosecution. State v. Woods, 508 S.W.2d 297 (Mo. App. 1974). The bias of an

accusing witness is directly and intimately involved in the issues of the case. State v. Johnson, 700 S.W.2d 815 (Mo.banc 1985), cert. denied, 476 U.S. 1119 (1986).

It is beyond dispute that the central issue in this trial was Jami White's credibility. There were no witnesses to, nor any independent corroboration of, any of the acts of abuse that she claimed occurred. Jami's mother didn't see anything improper. (T. 460-62). Her brother couldn't verify some of the events that Jami claimed, such as the fur coat in the limousine (T. 382) and testified that he didn't see Ted do anything to Jami at any time. (T. 382-83) Nina Morad, the nanny/housekeeper saw nothing in the one and one-half years that she worked for the family to substantiate the claims. (T. 396).

There was also strong evidence before the jury that Jami had been untruthful in her accusations against Appellant. She told her mother that, on the pontoon boat, Appellant touched her vaginal area over the top of her bathing suit (T. 197), but told Cathy Donelon at Children's Mercy Hospital that his finger was under her suit and in her vagina (T. 342). She told her mother that Appellant had placed his finger in her vagina her more than 20 times while her mother was sitting close by, but admitted in court that she was untruthful when she told her mother that. (T. 314). She told Cathy Donelon that Appellant had placed her on a bed in the pump room at the lake; she admitted on cross-examination that there was never a bed in the pump room at the lake. (T. 345).

Of course, any jury hearing this case would want to know if Jami was lying; it is also logical to assume that the jury would want to know why Jami was lying. They were entitled to know if she had a motive to confabulate these incidents, and Appellant was entitled to show that

such a motive existed. State v. Lampley, 859 S.W.2d 909 (Mo. App. 1993); State v. Montgomery, 901 S.W.2d 255 (Mo. App. 1995).

State v. Montgomery is very similar to the case at bar. In Montgomery, defendant was accused of sodomizing a 13-year-old girl (J.M.B.) who was the daughter of a woman with whom he was romantically involved. He sought to introduce evidence of prior false accusations of sexual misconduct brought by the girl against other adults. He offered to prove the existence and falsity of the allegations through J.M.B.'s mother, not through J.M.B. herself. 901 S.W.2d 255 at 256. As in White, the prosecution objected to the testimony on the grounds of improper impeachment. Id. The trial court barred the testimony.

In reversing, the Montgomery court recognized that impeachment was not the only basis on which the testimony would be relevant. It analyzed why the prior false accusations were made:

The complaining witness in the present case may also have had a motive to falsely accuse defendant. J.M.B. testified that she wanted her mother's attention. The prior allegations could demonstrate a motive to fabricate by illustrating a pattern of J.M.B.'s attempts to get her mother's attention by making allegations of sexual abuse. Accordingly, J.M.B.'s prior allegations of sexual abuse were relevant to her credibility.

Id. at 256. The court concluded: "Once informed of these allegations of sexual abuse, the jury could better assess J.M.B.'s credibility. As in many cases of this type, witness credibility was the paramount issue at trial." Id.

The record before this Court is replete with references to Jami White seeking the attention and approval of her mother. Her diary (not preserved as evidence or produced in court because Tina White's lover, Detective McKinley, decided it didn't contain incriminating

evidence against Ted White) showed her frustration with not having her mother's attention because of the time Tina spent on the phone. (T. 550-51). It is hardly surprising that Jami first presented the allegations to Tina after waiting for Tina to get off a long telephone call. (T. 297).

The record is also clear that Jami White was angry with Ted White at the time the allegations were made. She was angry that he had not taken her to the Big 12 basketball game as he promised he would. (T. 332-34). She was angry that Ted planned to take Tina to Acapulco without the kids the next week. (T. 334).

The jury heard that Jami was untruthful to her mother, a social worker, and others about the allegations against Ted White. They heard that she wanted her mother's attention. They heard that she was angry with Ted. What the jury did not hear, because the court excluded it, was that Jami had a history of being willing and able to fabricate a story of sexual abuse by another relative to get the attention of her mother. The White jury was entitled to hear that evidence and, just as the juries in the Lampley and Montgomery cases, assess the accuser's credibility. To prohibit the introduction of that evidence was an abuse of discretion by the trial court. Appellant's conviction should be reversed and the case remanded.

CONCLUSION

For the foregoing reasons, Appellant's conviction and sentence should be reversed and the case remanded to the circuit court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were mailed to Mr. John M. Morris, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102, on this 31st day of May, 2001.

Attorney for Appellant