

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE MARK KILMARTIN - PETITIONER, PRO-SE

VS.

JASON LEWIS, WARDEN AND
STATE OF MISSOURI - RESPONDENT'S

PETITION FOR A WRIT OF HABEAS CORPUS

MARK KILMARTIN #189625
SOUTHEAST CORRECTIONAL CENTER
300 E. PEDRO SIMMONS DRIVE
CHARLESTON, MISSOURI 63834

573-324-9975
(PHONE NUMBER)

QUESTIONS PRESENTED

1. WHETHER A CRIMINAL DEFENDANT CAN BE CONVICTED AND SENTENCED TO LIFE FOR A SEPARATE, NEW AND DISTINCT CRIME WITH WHICH HE HAD NOT BEEN ON TRIAL FOR AND WAS NOT A LESSER INCLUDED CRIME? CAN THE PETITIONER BE TRIED FOR THE CRIME OF SODOMY UNDER MISSOURI STATUTE §566.060 SECTION 3, BUT CONVICTED OF FORCIBLE SODOMY UNDER §566.060 SECTION 1 RSMO A SEPARATE, NEW AND DISTINCT CRIME WITHOUT A JURY TRIAL FOR THE NEW CRIME? IS THIS EXTRAORDINARY ERROR A STRUCTURAL DEFECT OR STRUCTURAL ERROR THAT CONSTITUTIONALLY REQUIRES AN AUTOMATIC REVERSAL? IS PETITIONER ENTITLED TO A JURY TRIAL FOR THE CRIME WITH WHICH HE HAS NOW BEEN CONVICTED AND SENTENCED TO LIFE FOR THE PAST MORE THEN 27 YEARS NOW WITHOUT A JURY TRIAL?

2. WHETHER PETITIONER CAN BE CONVICTED AND SENTENCED TO LIFE IMPRISONMENT WITHOUT NOTICE OR INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION SO AS TO ALLOW PETITIONER THE OPPORTUNITY TO ADEQUATELY PREPARE A DEFENSE AND TO NOT BE SUBJECT TO TWICE BEING PLACED IN JEOPARDY FOR THE SAME OFFENSE IN THE FUTURE? CAN PETITIONER BE TRIED AND CHARGED WITH ONE CRIME BUT CONVICTED OF ANOTHER WITHOUT A SEPARATE JURY TRIAL FOR THE NEW CRIME? AND IS CONVICTING AND SENTENCING PETITIONER TO LIFE IN PRISON WITHOUT TRIAL OR CHARGE FUNDAMENTALLY UNFAIR? AND DOES IT CONSTITUTE A MANIFEST INJUSTICE AND A FUNDAMENTAL MISCARRIAGE OF JUSTICE?

3. WHETHER PETITIONER WAS DENIED HIS FOURTEENTH AMENDMENT RIGHTS TO SAFEGUARDS GUARANTEED BY DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW, SAFEGUARDS ESSENTIAL TO LIBERTY IN A GOVERNMENT DEDICATED TO JUSTICE UNDER LAW? INCLUDING HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, TRIAL, APPELLATE AND POST-CONVICTION RELIEF MOTIONS?

4. WHETHER AN APPEALS COURT CAN INVENT, EXPAND AND RETROACTIVELY APPLY A JUDICIAL CONSTRUCTION OF A CRIMINAL STATUTE IN AN UNEXPECTED AND INDEFENSIBLE MANNER BY REFERENCE TO LAW WHICH HAD BEEN EXPRESSED PRIOR TO THE CONDUCT IN ISSUE AND WAS THEN RETROACTIVELY APPLIED TO PETITIONER'S ALLEGED CONDUCT? DID THIS VIOLATE PETITIONER'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND DOES IT CONSTITUTE A MANIFEST INJUSTICE OR A FUNDAMENTAL MISCARRIAGE OF JUSTICE AND MAKING HIS CONVICTION AND LIFE SENTENCE ILLEGAL?

5. DID IT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW WHEN THE MISSOURI COURT OF APPEALS ENGAGED IN UNLAWFUL AND JUDICIAL MISCONDUCT WHEN THERE WAS A LACK OF FORCIBLE COMPULSION EVIDENCE TO INVENT AND MAKE UP A COMPLETELY FICTIONAL STORY LINE IN THEIR OPINION NOT SUPPORTED BY THE RECORD, TRANSCRIPTS OR ANY EVIDENCE AT TRIAL? AND CAN AN APPEALS COURT IGNORE A MANIFEST INJUSTICE BECAUSE OF THE TYPE OF OFFENSE IT WAS? (SEX OFFENSE INVOLVING A MINOR). DID THIS VIOLATE PETITIONER'S FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION?

LIST OF PARTIES

[X] ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON THE COVER
PAGE.

PETITIONER IS MARK KILMARTIN, PRISONER NUMBER 189625, A PRISONER
IN THE MISSOURI DEPARTMENT OF CORRECTIONS AND IS CURRENTLY AT THE
SOUTHEAST CORRECTIONAL CENTER, 300 E. PEDRO SIMMONS DRIVE, CHARLESTON,
MISSOURI 63834.

THE RESPONDENTS ARE JASON LEWIS, WARDEN OF THE SOUTHEAST
CORRECTIONAL CENTER AND THE STATE OF MISSOURI. BOTH RESPONDENTS ARE
REPRESENTED BY JOSHUA D. HAWLEY, ATTORNEY GENERAL OF MISSOURI, P.O.
BOX 899, JEFFERSON CITY, MO 65102.

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FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION	
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JURISDICTION

THIS COURT HAS JURISDICTION PURSUANT TO 28 U.S.C. §1651(a), §2241 AND §2254.

STATEMENT TO THE COURT IN COMPLIANCE WITH SUPREME COURT RULE 20.4(a)

PETITIONER RESPECTFULLY PRAYS THAT A WRIT OF HABEAS CORPUS BE ISSUED TO CORRECT A MANIFEST INJUSTICE OR A FUNDAMENTAL MISCARRIAGE OF JUSTICE AND STATES THE REASON FOR NOT FILING THIS PETITION IN THE DISTRICT COURT OF THE DISTRICT IN WHICH THE APPLICANT IS HELD IS BECAUSE HE HAS ALREADY EXHAUSTED THAT REMEDY WITH INEFFECTIVE COUNSEL REPRESENTING HIM IN A HABEAS CORPUS PETITION.

EXCEPTIONAL CIRCUMSTANCES WARRANT THE EXERCISE OF THIS COURT'S DISCRETIONARY POWERS AS SHOWN IN THE GROUNDS OF THIS PRESENT PETITION, AND AT THIS POINT ADEQUATE RELIEF CANNOT BE OBTAINED IN ANY OTHER FORM OR FROM ANY OTHER COURT. PETITIONER'S CONTINUED IMPRISONMENT AND CONFINEMENT AND LOSS OF LIBERTY WITHOUT CHARGE OR TRIAL IS ILLEGAL, NULL AND VOID. THE ISSUES ARE CLEARLY JURISDICTIONAL.

UNDER THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE THE PETITIONER IS ENTITLED TO HAVE HIS WRONGFUL AND ILLEGAL CONVICTION VACATED AND TO BE DISCHARGED FROM IMPRISONMENT AND CONFINEMENT, AND TO BE CHARGED AND GIVEN NOTICE AND TO BE INFORMED OF THE TRUE NATURE AND CAUSE OF THE ACCUSATION TO ALLOW PETITIONER THE OPPORTUNITY TO ADEQUATELY PREPARE A DEFENSE. TO TO BE GRANTED A JURY TRIAL FOR THE CRIME WITH WHICH PETITIONER NOW STANDS CONVICTED SENTENCED AND IMPRISONED FOR WITHOUT A JURY TRIAL FOR THAT CRIME OR FOR ANY OTHER AND FURTHER RELIEF THIS COURT DEEMS JUST AND FAIR AND TO UPHOLD THIS COURTS RULINGS.

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COMES NOW THE PETITIONER MARK KILMARTIN, A MISSOURI STATE PRISONER ACTING PRO-SE AND PROCEEDING IN FORMA PAUPERIS AND HEREBY PETITIONS THIS HONORABLE COURT TO CORRECT A MANIFEST INJUSTICE AND A FUNDAMENTAL MISCARRIAGE OF JUSTICE AND DISCHARGE PETITIONER FROM HIS CURRENT ILLEGAL AND UNCONSTITUTIONAL IMPRISONMENT. PETITIONER'S CURRENT IMPRISONMENT IS ILLEGAL BECAUSE HE WAS CONVICTED AND SENTENCED TO LIFE IMPRISONMENT WITHOUT BEING CHARGED OR TRIED FOR THE CRIME WITH WHICH THE STATE OF MISSOURI IS CURRENTLY IMPRISONING THE PETITIONER. EXCEPTIONAL CIRCUMSTANCES WARRANT THE EXERCISE OF THIS COURT'S DISCRETIONARY POWERS AS SET FORTH IN THE GROUNDS OF THIS PRESENT PETITION AND FOR THIS COURT TO ENFORCE ITS LANDMARK DECISIONS AND ITS PRECEDENT CASES IN SIMILAR CASES TO PETITIONER'S.

THE SUPREME COURT OF THE UNITED STATES IS THE COURT OF LAST RESORT. ADEQUATE RELIEF CANNOT BE OBTAINED IN ANY OTHER FORM OR FROM ANY OTHER COURT. THERE IS NO OTHER POSSIBLE REMEDY WITH WHICH THE PETITIONER CAN OBTAIN ANY RELIEF. PETITIONER RESPECTFULLY REQUESTS THAT THIS COURT REQUIRE THE STATE OF MISSOURI TO SHOW CAUSE AS TO WHY HABEAS CORPUS RELIEF SHOULD OR SHOULD NOT BE GRANTED, AND THEREAFTER, AFTER A THOROUGH REVIEW OF THE FACTS, RECORD AND LAW, ISSUE AN ORDER GRANTING A WRIT OF HABEAS CORPUS AND VACATE PETITIONER'S ILLEGAL CONVICTION AND SENTENCE FOR THE UNCHARGED AND UNTRIED CRIME OF FORCIBLE SODOMY AND DISCHARGE PETITIONER FROM HIS ILLEGAL IMPRISONMENT AND/OR ORDER THE STATE OF MISSOURI TO CHARGE PETITIONER AND GRANT HIM A JURY TRIAL.

PROCEDURAL HISTORY

1. PETITIONER MARK KILMARTIN, WAS CHARGED BY AMENDED INFORMATION IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI, CASE NO. CR992-2F WITH SEVEN COUNTS OF SODOMY UNDER § 566.060 SECTION 3 R.S.Mo. Supp. (1990). COUNT 1 OF THIS INFORMATION ALLEGED THAT PETITIONER HAD "DEVIATE SEXUAL INTERCOURSE WITH MARK J. SLATE, TO WHOM HE WAS NOT MARRIED AND WHO WAS THEN LESS THAN FOURTEEN YEARS OLD, WITHOUT THE CONSENT OF MARK J. SLATE." (APPENDIX A).

2. PUBLIC DEFENDER HORTON LANCE WAS APPOINTED TO REPRESENT THE PETITIONER ON THESE CHARGES. THE CASE PROCEEDED TO JURY TRIAL ON OCTOBER 9, 1992 BEFORE THE HONORABLE STEPHEN K. GRIFFIN IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI FROM A CHANGE OF VENUE.

3. AFTER THE PROSECUTION RESTED, THE TRIAL COURT GRANTED THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL ON COUNTS 2, 3, 5 AND 6. COUNTS 1, 4 AND 7 WERE SUBMITTED TO THE JURY. AFTER DUE DELIBERATION

, THE JURY FOUND THE DEFENDANT NOT GUILTY ON COUNTS 4 AND 7. HOWEVER, THE JURY FOUND PETITIONER GUILTY UNDER COUNT 1 AND RECOMMENDED A SENTENCE OF LIFE IMPRISONMENT, BUT IT WAS FOR A NEW AND DISTINCT CRIME THAN CHARGED IN COUNT 1 AND FOR A CRIME WITH WHICH PETITIONER HAD NOT BEEN ON TRIAL FOR AND WAS NOT TRIED. THE JURY FOUND THE DEFENDANT GUILTY OF FORCIBLE SODOMY UNDER § 566.060 SECTION 1 R.S.Mo. RATHER THAN SODOMY UNDER § 566.060 SECTION 3 R.S.Mo.. FOR UNKNOWN REASONS COUNSEL FAILED TO OBJECT.

4. ON DECEMBER 9, 1992, JUDGE STEPHEN K. GRIFFIN WITHOUT OBJECTION FROM COUNSEL, SENTENCED PETITIONER TO LIFE IMPRISONMENT. PETITIONER THEN PURSUED A DIRECT APPEAL AND MOTION FOR POST-CONVICTION RELIEF UNDER MISSOURI RULE 29.15. ON CONSOLIDATED APPEAL, THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT, AFTER SUA SPONTE CONSIDERING THE VARIANCE BETWEEN THE INFORMATION AND VERDICT DIRECTING INSTRUCTION AND THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE UNCHARGED, UNTRIED FORCIBLE COMPULSION ELEMENT SUPPORTING THE CONVICTION FOR FORCIBLE SODOMY, AFFIRMED PETITIONER'S CONVICTION. STATE V. KILMARTIN, 904 S.W.2d 370 (Mo. App. W,D, 1995). REHEARING AND TRANSFER WERE SUBSEQUENTLY DENIED.

5. THEREAFTER, PETITIONER PURSUED A FEDERAL HABEAS CORPUS ACTION BEFORE THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI PURSUANT TO 28 U.S.C. §2254. THE FEDERAL COURTS DENIED RELIEF AFTER FINDING THAT PETITIONER'S DUE PROCESS CLAIM DID NOT ENTITLE HIM TO RELIEF UNDER THE PLAIN ERROR RULE BECAUSE THEY WERE NOT PROPERLY PRESERVED DURING STATE COURT APPEALS. KILMARTIN V. DORMIRE, 161 F.3d 1125 (8th Cir. 1998). HOWEVER, THE UNITED STATES 8th CIRCUIT COURT OF APPEALS IT SELF MADE A FATAL ERROR WHILE ANALYZING THE CASE FOR ANY MANIFEST INJUSTICE. THE COURT WRONGFULLY SEEMED TO ANALYZE IT

AS IF PETITIONER HAD BEEN CHARGED WITH STATUTORY SODOMY BUT CONVICTED OF FIRST-DEGREE SODOMY RATHER THAN THE TRUE FACTS IN WHICH PETITION WAS CHARGED WITH SODOMY BUT CONVICTED OF FORCIBLE SODOMY. THIS FATAL ERROR MADE BY THE 8TH CIR. COURT OF APPEALS DENIED THE PETITIONER A FULL AND FAIR APPEAL AND DUE PROCESS AND EQUAL PROTECTION OF THE LAW AND CREATED A SEPARATE AND DISTINCT MANIFEST INJUSTICE AND WAS THE CAUSE OF THAT COURT NOT RECOGNIZING ANY MANIFEST INJUSTICE. SEE MARK KILMARTIN V. DAVID DORMIRE, 161 F.3D 1125 (8TH CIR. 1998). CASE NO. 98-1219.

6. PETITIONER THEN FILED SEVERAL MOTIONS TO RECALL THE MANDANT IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT CASE NO. WD 47244 AND WD 49202. THOSE MOTIONS WERE SUMMARILY DENIED.

7. ON OR ABOUT 2001 PETITIONER FILED HIS FIRST STATE PETITION FOR A WRIT OF HABEAS CORPUS UNDER MISSOURI RULE 91.00 IN THE CIRCUIT COURT OF RANDOLPH COUNTY MISSOURI. THAT PETITION WAS SUMMARILY DENIED.

8. THEREAFTER, PETITIONER FILED THE SAME PETITION FOR A WRIT OF HABEAS CORPUS UNDER MISSOURI RULE 91 IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT. THAT PETITION WAS SUMMARILY DENIED.

9. AFTER PETITIONER WAS TRANSFERRED TO A DIFFERENT PRISON HE FILE A PETITION FOR A WRIT OF HABEAS CORPUS IN THE CIRCUIT COURT OF PIKE COUNTY MISSOURI ON JUNE 29, 2009 UNDER MISSOURI RULE 91.00. THAT PETITION WAS SUMMARILY DENIED.

10. THEREAFTER, PETITIONER FILED AT LEAST 3 PETITION FOR WRIT OF HABEAS CORPUS'S IN THE MISSOURI COURT OF APPEALS EASTERN DISTRICT ONE CASE NUMBER ED 97666 THE OTHER CASE NO. UNKNOWN UNDER MISSOURI RULE 91.00. ALL THREE WERE SUMMARILY DENIED.

11. THEREAFTER, PETITIONER FILED SEVERAL PETITION FOR WRIT OF

HABEAS CORPUS'S UNDER MISSOURI RULE 91.00 IN THE MISSOURI SUPREME COURT. THE FIRST WAS FILED ON OR ABOUT JUNE 1, 2010 CASE NO. UNKNOWN ANOTHER ON OR ABOUT DECEMBER 9, 2010, CASE NO. SC92182, THE OTHER CASE NO. SC93065.

12. THEREAFTER, PETITIONER FILED A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT IN 2013. CASE NO. UNKNOWN AT THIS TIME. THAT PETITION WAS DENIED.

GROUND ONE

PETITIONER IS CURRENTLY BEING ILLEGALLY AND WRONGFULLY IMPRISONED AND RESTRAINED OF HIS LIBERTY BY THE STATE OF MISSOURI BECAUSE HE WAS CONVICTED AND SENTENCED TO LIFE IMPRISONMENT WITHOUT A TRIAL BY JURY OR JUDGE IN THAT PETITIONER WAS TRIED FOR ONE OFFENSE BUT CONVICTED OF ANOTHER NEW AND DISTINCT OFFENSE WITHOUT A TRIAL FOR THAT OFFENSE THAT WAS NOT A LESSER INCLUDED OFFENSE IN VIOLATION OF THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAW AND A FAIR AND IMPARTIAL JURY TRIAL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 AND 18(a) OF THE CONSTITUTION OF THE STATE OF MISSOURI. PETITIONER WAS CHARGED AND TRIED FOR ONE OFFENSE BUT CONVICTED AND IMPRISONED FOR ANOTHER THEREBY RESULTING IN A STRUCTURAL DEFECT AND A STRUCTURAL ERROR REQUIRING AN AUTOMATIC REVERSAL. THIS ILLEGAL CONVICTION AND IMPRISONMENT IS IN VIOLATION OF STATE LAW, FEDERAL LAW AND INTERNATIONAL LAW. FURTHERMORE, RESULTING IN A MANIFEST INJUSTICE, A FUNDAMENTAL MISCARRIAGE OF JUSTICE AND A INTERNATIONAL HUMAN RIGHTS VIOLATION AND A DENIAL OF FUNDAMENTAL FAIRNESS! THE SENTENCING COURT WAS WITHOUT JURISDICTION AND AUTHORITY TO CONVICT AND IMPRISON PETITIONER WITHOUT TRIAL RENDERING THE SENTENCE AND JUDGMENT NULL AND VOID. THE IMPRISONMENT AND LIFE SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

THIS HABEAS CORPUS ACTION PRESENTS THE COURT WITH AN EXTRAORDINARY SITUATION AND EXCEPTIONAL CIRCUMSTANCES WHERE A CRIMINAL DEFENDANT WAS CONVICTED OF A CRIME WITH WHICH HE WAS NOT CHARGED OR ON TRIAL AND NEVER RECEIVED HIS CONSTITUTIONAL RIGHT TO A TRIAL BY JURY FOR THE CRIME WITH WHICH HE NOW STANDS ILLEGALLY CONVICTED AND SENTENCED TO LIFE IMPRISONMENT.

THIS PETITION RAISES INTERRELATED LEGAL AND CONSTITUTIONAL ISSUES REGARDING WHETHER IT IS CONSTITUTIONALLY PERMISSIBLE TO CONVICT AND IMPRISON A UNITED STATES CITIZEN FOR A CRIME THAT IS DISTINCT FROM THE CRIME FOR WHICH HE WAS ACCUSED IN THE CHARGING DOCUMENT AND ON TRIAL FOR WITHOUT A SEPARATE TRIAL FOR THE NEW AND DISTINCT CRIME.

BASED UPON THE FOREGOING FACTS, IT CANNOT BE SERIOUSLY DISPUTED THAT THE PETITIONER WAS CONVICTED, SENTENCED TO LIFE AND IMPRISONED FOR A CRIME THAT WAS NOT CHARGED IN THE INFORMATION AND FOR A CRIME

WITH WHICH HE WAS NOT TRIED OR ON TRIAL. UNDER THE LAW AT THE TIME PETITIONER WAS CHARGED AND CONVICTED, IT IS CLEAR THAT SODOMY UNDER §566.060 SECTION 3 RSMo. AND FORCIBLE SODOMY UNDER §566.060 SECTION 1, ALTHOUGH CODIFIED UNDER THE SAME STATUTE, WERE TWO SEPARATE AND DISTINCT OFFENSES. EACH CRIME HAS SEPARATE AND DISTINCT ELEMENTS AND THE VERDICT DIRECTING INSTRUCTIONS UNDER MISSOURI APPROVED INSTRUCTIONS (MAI) WERE DIFFERENT. FOR REASONS THAT WERE UNCLEAR AT THE TIME AND MAY NEVER BE KNOWN, THE STATE AND THE TRIAL COURT, DESPITE THE FACT THAT PETITIONER WAS CHARGED AND ON TRIAL FOR SODOMY INVOLVING AN UNDERAGE ACCUSER, SUBMITTED MAI-CR3D 320.08(1), THE PATTERNED JURY INSTRUCTION FOR THE OFFENSE OF FORCIBLE SODOMY. ~~APP. D~~ IT WAS, THEREFORE, A CLEAR VIOLATION OF DUE PROCESS TO CONVICT PETITIONER WITHOUT A TRIAL AND OF A CHARGE NEW AND DISTINCT FROM THAT FOR WHICH HE WAS ACCUSED AND TRIED. COLE V. ARKANSAS, 333 U.S. 196 (1948); DE JONGE V. OREGON, 299 U.S. 353, 362 (1937). AS THE SUPREME COURT STATED IN DE JONGE: "CONVICTION UPON A CHARGE NOT MADE WOULD BE SHEER DENIAL OF DUE PROCESS." ID.

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18(a) OF THE MISSOURI CONSTITUTION REQUIRES IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL BY AN IMPARTIAL JURY. DUNCAN V. LOUISIANA, 391 U.S. 145, 20 L.ED. 2D 491, 88 S.CT. 1444 (1968). IN U.S. V. RAETHER, 82 F.3D 192, 194 (8TH CIR. 1996), THE COURT STATED IN PART; "WE CONCLUDE THAT THE DENIAL OF A JURY TRIAL IS A STRUCTURAL ERROR SUBJECT TO AUTOMATIC REVERSAL". IN DUNCAN V. LOUISIANA, 391 U.S. 145, 149, 20 L.ED. 2D 491, 88 S.CT. 1444 (1968) (HOLDING THAT TRIAL BY JURY IN SERIOUS CRIMINAL CASES IS "FUNDAMENTAL TO THE AMERICAN SCHEME OF JUSTICE"

AND THEREBY APPLICABLE IN STATE PROCEEDINGS).

IN THE PRESENT CASE, MR. KILMARTIN WAS CHARGED IN A SUBSTITUTE INFORMATION AND TRIED BY A JURY FOR THE CRIME OF SODOMY IN VIOLATION OF §566.060 SECTION 3, RSMo. SUPP. (1990) "IN THAT ON OR ABOUT MARCH 17, 1991, IN THE COUNTY OF CLAY, STATE OF MISSOURI, DEFENDANT HAD DEVIATE SEXUAL INTERCOURSE WITH MARK J. SLATE, TO WHOM THE DEFENDANT WAS NOT MARRIED AND WHO WAS THEN LESS THAN FOURTEEN YEARS OLD, WITHOUT THE CONSENT OF MARK J. SLATE. SEE [APPENDIX **A**] COUNT 1].

THE JURY DID NOT RENDER A VERDICT AS TO THE SODOMY CHARGE AND TRIAL AS CONTAINED IN COUNT ONE OF THE SUBSTITUTE INFORMATION. INSTEAD, THE JURY RENDERED A GUILTY VERDICT FOR A SEPARATE, NEW AND DISTINCT CRIME WITH WHICH THE DEFENDANT HAD NOT BEEN TRIED. SEE [APPENDIX **B** AND **C**]. THE JURY RENDERED A VERDICT FOR THE UNTRIED AND UNCHARGED CRIME OF FORCIBLE SODOMY IN VIOLATION OF 566.060 SECTION 1 RSMo. SUPP (1990). A PERSON COMMITS THE CRIME OF FORCIBLE SODOMY IF HE HAS DEVIATE SEXUAL INTERCOURSE WITH ANOTHER PERSON WITHOUT THAT PERSON'S CONSENT BY THE USE OF FORCIBLE COMPULSION. THE TRIAL COURT ERRED AND EXCEEDED IT'S JURISDICTION AND AUTHORITY WHEN IT EXCEPTED THE JURIES VERDICT OF GUILTY AND ENTERED A JUDGMENT OF CONVICTION AGAINST MR. KILMARTIN AND SENTENCED HIM TO LIFE IMPRISONMENT FOR THE UNTRIED CRIME OF FORCIBLE SODOMY. THE JUDGMENT OF CONVICTION AND SENTENCE ARE ILLEGAL, UNCONSTITUTIONAL, NULL AND VOID AND CLEARLY VIOLATED PETITIONER'S RIGHTS TO DUE PROCESS OF THE LAW, EQUAL PROTECTION OF THE LAW AND A SPEEDY AND PUBLIC TRIAL BY AN IMPARTIAL JURY AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION IN THAT THE JURY FOUND PETITIONER MARK KILMARTIN GUILTY

OF A CRIME NEW AND DISTINCT FROM THE TRIED CRIME, AND THE VARIANCE BETWEEN THE TRIAL, CONVICTION AND SENTENCE WAS FATAL, THEREBY RESULTING IN A STRUCTURAL DEFECT AND A STRUCTURAL ERROR REQUIRING AUTOMATIC REVERSAL. DUNCAN V. LOUISIANA, 319 U.S. 145, 20 L.ED. 2d 491, 88 S.CT. 1444 (1968), ALSO SEE U.S. V. RAETHER, 82 F.3D 192, 194 (8TH CIR. 1996). A MANIFEST INJUSTICE, FUNDAMENTAL MISCARRIAGE OF JUSTICE AND A HUMAN RIGHTS VIOLATION HAS RESULTED UNDER THE EXTRAORDINARY AND EXCEPTIONAL CIRCUMSTANCES OF THIS CASE. THIS ILLEGAL CONVICTION, SENTENCE AND IMPRISONMENT IS IN VIOLATION OF STATE, FEDERAL AND INTERNATIONAL LAW AND SHOULD THEREFORE BE VACATED BY THIS COURT.

PETITIONER'S CAUSE FOR HIS PROCEDURAL DEFAULT IS FIRST AND FOREMOST BECAUSE OF TRIAL COUNSEL'S INEFFECTIVENESS FOR FAILING TO OBJECT WHEN THE STATE PUT UP A JURY INSTRUCTION FOR A NEW CRIME, AND HIS FAILURE TO OBJECT WHEN THE JURY FOUND THE DEFENDANT GUILTY OF A NEW AND DISTINCT CRIME FROM THAT CHARGED OR TRIED, AND FOR TRIAL COUNSEL'S FAILURE TO OBJECT AT SENTENCING AND ALLOWING THE COURT TO SENTENCE THE DEFENDANT TO AN UNCHARGED AND UNTRIED CRIME. AND FOR TRIAL COUNSEL'S FAILURE TO RAISE THE ISSUES IN A MOTION FOR NEW TRIAL.

FURTHER CAUSE IS THAT POST-CONVICTION RELIEF COUNSEL WAS ALSO INSUFFICIENT AND INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE IN HIS MOTION FOR POST-CONVICTION RELIEF UNDER MISSOURI RULE 29.15.

THE CAUSE WAS ALSO APPELLATE COUNSEL'S INEFFECTIVENESS FOR FAILING TO RECOGNIZE, PRESEVE AND RAISE THE CLAIM UNDER PLAIN ERROR REVIEW PURSUANT TO MISSOURI RULE 30.20 INVOLVING THE VARIANCE BETWEEN THE TRAIL, CONVICTION AND THE TRIAL AND SENTENCE.

PETITIONER CLEARLY SUFFERED ACTUAL PREJUDICE. HE WAS CONVICTED AND SENTENCED TO LIFE IMPRISONMENT WITHOUT A JURY TRIAL FOR THE CRIME

OF FORCIBLE SODOMY. MR. KILMARTIN DID NOT RECEIVE DUE PROCESS, EQUAL PROTECTION OF THE LAW OR FAIR NOTICE OF THE CHARGE AGAINST HIM TO ALLOW HIM THE OPPORTUNITY TO ADEQUATELY PREPARE A DEFENSE. PETITIONER FURTHER SUFFERED ACTUAL PREJUDICE IN THAT ALL OF THE CONSTITUTIONAL AND FUNDAMENTAL SAFE-GUARDS FAILED IN THIS CASE THROUGHOUT THE WHOLE ENTIRE PROCESS FROM THE SENTENCING COURT THROUGH POST-CONVICTION RELIEF MOTION TO THE DIRECT APPEAL DUE TO SEVERE INEFFECTIVE ASSISTANCE OF COUNSEL. THE ACTUAL PREJUDICE UNDER THE CIRCUMSTANCES OF THIS CASE IS SEVERE AND EXTRAORDINARY.

CLEARLY PETITIONER SUFFERED ACTUAL PREJUDICE BECAUSE HIS PUBLIC DEFENDER HORTON LANCE ADMITS IN A SWORN AFFIDAVIT HE DID NOT DEFEND PETITIONER FOR THE UNCHARGED, UNTRIED CRIME OF FORCIBLE SODOMY SINCE THERE WAS NO TRIAL. (SEE APPENDIX **C**)

REQUESTED RELIEF ON GROUND ONE

ISSUE AN ORDER GRANTING A WRIT OF HABEAS CORPUS VACATING THE PETITIONER'S ILLEGAL AND VOID CONVICTION AND LIFE SENTANCE FOR THE UNCHARGED, UNTRIED CRIME OF FORCIBLE SODOMY AND DISCHARGE THE PETITIONER OR IN THE ALTERNATIVE REMAND THIS CASE BACK TO THE CIRCUIT COURT OF OF CLINTON COUNTY WITH DIRECTIONS TO GRANT A NEW TRIAL ON THE SODOMY CHARGE SO A JURY CAN RENDER A LAWFUL VERDICT ON THE CHARGED AND TRIED CRIME AND FOR ANY OTHER AND FURTHER RELIEF THIS COURT DEEMS JUST AND FAIR UNDER EXTRAORDINARY AND EXCEPTIONAL CIRCUMSTANCES OF THIS PRESENT CASE.

GROUND TWO

PETITIONER IS CURRENTLY BEING ILLEGALLY AND WRONGLY IMPRISONED AND RESTRAINED OF HIS LIBERTY BY THE STATE OF MISSOURI BECAUSE HE WAS CONVICTED OF A CRIME (FORCIBLE SODOMY) WITHOUT HIS CONSTITUTIONAL RIGHT TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM AND TO BE GIVEN NOTICE OF THE CHARGE AGAINST HIM TO ALLOW HIM THE OPPORTUNITY TO ADEQUATELY PREPARE A DEFENSE AND TO BE SUBJECTED TO TWICE BEING PLACED IN JEOPARDY FOR THE SAME OFFENSE AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10, 17, 18(a) AND 19 OF THE MISSOURI CONSTITUTION IN THAT THE JURY FOUND THE PETITIONER GUILTY OF AN OFFENSE NEW AND DISTINCT FROM THE CHARGED AND TRIED OFFENSE THAT WAS NOT A LESSER INCLUDED OFFENSE, AND THE VARIANCE BETWEEN THE CHARGED OFFENSE, CONVICTION AND SENTENCE WAS FATAL AND PREJUDICED THE SUBSTANTIAL RIGHTS OF THE PETITIONER. UNDER THE EXTRAORDINARY AND EXCEPTIONAL CIRCUMSTANCES OF THIS CASE A MANIFEST INJUSTICE, FUNDAMENTAL MISCARRIAGE OF JUSTICE AND AN INTERNATIONAL HUMAN RIGHTS VIOLATION HAS RESULTED. THE TRIAL AND SENTENCING COURT EXCEEDED ITS JURISDICTION RENDERING THE SENTENCE AND JUDGMENT NULL AND VOID. UNDER THE CIRCUMSTANCES OF THIS CASE THE STATE OF MISSOURI IS IN VIOLATION OF STATE, FEDERAL AND INTERNATIONAL LAW AND THE IMPRISONMENT OF MR. KILMARTIN AND LIFE SENTENCE FOR AN UNCHARGED CRIME CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

IN THE PRESENT CASE, PETITIONER WAS CHARGED IN A SUBSTITUTE INFORMATION WITH PLAIN "SODOMY" IN VIOLATION OF §566.060 SECTION 3 RSMo. (SUPP 1990). SEE APPENDIX A. THE INFORMATION STATES: "BRIAN J. KLOPENSTAIN, (ASST) PROSECUTING ATTORNEY WITHIN AND FOR THE COUNTY OF CLAY IN THE STATE OF MISSOURI, CHARGE THAT THE DEFENDANT, IN VIOLATION OF SECTION 566.060 RSMo., COMMITTED THE FELONY OF SODOMY, PUNISHABLE UPON CONVICTION UNDER SECTION(S) 566.060.2 BY LIFE IMPRISONMENT OR A TERM OF YEARS NOT LESS THAN FIVE YEARS, RSMo., IN THAT ON OR ABOUT MARCH 17, 1991, IN THE COUNTY OF CLAY, STATE OF MISSOURI DEFENDANT HAD DEVIATE SEXUAL INTERCOURSE WITH MARK J. SLATE, TO WHOM THE DEFENDANT WAS NOT MARRIED AND WHO WAS THEN LESS THAN FOURTEEN YEARS OLD, WITHOUT THE CONSENT OF MARK J. SLATE". PLEASE SEE (APPENDIX A), COUNT (1) OF THE SUBSTITUTE INFORMATION. THIS TRACKS

THE CHARGE OF SODOMY UNDER §566.060 SECTION 3 RSMo. (SUPP. 1990).

THE DEFENDANT WAS THEN TRIED BY A JURY PURSUANT TO THIS CHARGE.

HOWEVER, THE DEFENDANT WAS NOT CONVICTED OF THIS CHARGE. MR. KILMARTIN WAS WRONGFULLY AND ILLEGALLY CONVICTED AND SENTENCED TO LIFE IMPRISONMENT FOR A SEPARATE NEW AND DISTINCT CRIME. MR. KILMARTIN THE DEFENDANT WAS CONVICTED OF "FORCIBLE SODOMY" UNDER §566.060 SECTION 1 RSMo., (SUPP. 1990). SEE (APPENDIX B); "A PERSON COMMITS THE CRIME OF "FORCIBLE SODOMY" IF HE HAS DEVIATE SEXUAL INTERCOURSE WITH ANOTHER PERSON WITHOUT THAT PERSON'S CONSENT BY THE USE OF FORCIBLE COMPULSION."

THUS, THERE IS A SIGNIFICANT AND FATAL VARIANCE BETWEEN THE CHARGED OFFENSE AND THE CONVICTION AND THE CHARGE AND SENTENCE THAT CLEARLY WITHOUT QUESTION RESULTED IN A MANIFEST INJUSTICE, FUNDAMENTAL MISCARRIAGE OF JUSTICE AND AN INTERNATIONAL HUMAN RIGHTS VIOLATION. THE DEFENDANT MR. KILMARTIN WAS CLEARLY NOT GIVEN ANY NOTICE OF THE "FORCIBLE SODOMY" OFFENSE UNDER §566.060 SECTION 1 RSMo. SO AS TO ALLOW HIM THE OPPORTUNITY TO ADEQUATELY PREPARE A DEFENSE. SEE STATE V. COLLINS, 154 S.W.3d 486, 494 (MO. APP. W.D. 2005) CITING STATE V. REESE, 687 S.W. 2d 635, 636-37 (MO. APP. S.D. 1985). CLEARLY THE SUBSTITUTE INFORMATION DID NOT INFORM MR. KILMARTIN OF THE "NATURE AND CAUSE" OF THE "FORCIBLE SODOMY" ACCUSATION. PETITIONER DID NOT RECEIVE FAIR AND REASONABLE NOTICE OF THE CRIME WITH WHICH HE WAS CONVICTED AND SENTENCED TO LIFE IMPRISONMENT BUT NOT CHARGED IN VIOLATION OF THE DUE PROCESS CLAUSE. SEE JACKSON V. VIRGINIA, 433 U.S. 307, 314, 99 S.CT. 2781, 2786, 61 L.Ed.2d 560 (1979). (APPENDIX A, B & C). ALSO, PLEASE SEE (APPENDIX C), WHEREAS PETITIONER'S COURT APPOINTED ATTORNEY HORTON LANCE ADMITS IN A SWORN AFFIDAVIT THAT HE WAS NOT GIVEN ANY NOTICE AS TO THE "FORCIBLE SODOMY" OFFENSE AND DID

NOT DEFEND MR. KILMARTIN AT THE SODOMY TRIAL FOR THE UNCHARGED AND UNTRIED OFFENSE OF FORCIBLE SODOMY.

THE SUBSTITUTE INFORMATION DID NOT CHARGE "FORCIBLE COMPULSION" THE MOST VITAL AND CRITICAL ELEMENT TO CHARGE THE OFFENSE OF "FORCIBLE SODOMY" TO PUT MR. KILMARTIN ON NOTICE. NO PRINCIPLE OF PROCEDURAL DUE PROCESS IS MORE CLEARLY ESTABLISHED THAN THAT NOTICE OF THE SPECIFIC CHARGE AND A CHANCE TO BE HEARD IN A TRIAL OF THE ISSUES RAISED BY THAT CHARGE, IF DESIRED, ARE AMONG THE CONSTITUTIONAL RIGHTS OF EVERY ACCUSED IN ALL CRIMINAL PROCEEDINGS IN ALL COURTS, STATE AND FEDERAL. RABE V. WASHINGTON, 405 U.S. 313, 31 L.Ed.2d 258, 92 S.CT. 993 (1972).

THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18(a) OF THE MISSOURI CONSTITUTION REQUIRE THAT A CRIMINAL DEFENDANT BE GIVEN NOTICE OF THE CHARGE OR CHARGES AGAINST HIM TO ALLOW HIM THE OPPORTUNITY TO ADEQUATELY PREPARE A DEFENSE. STATE V. COLLINS, 154 S.W.3d 486, 494 (MO. APP. W.D. 2005) CITING STATE V. REESE, 687 S.W.2d 635, 636-37 (MO. APP. S.D. 1985). THE CHARGING INSTRUMENT, THE INFORMATION OR INDICTMENT, SERVES THAT PURPOSE. COLLINS, SUPRA AT 494. THUS, AS A GENERAL RULE, DUE PROCESS MANDATES THAT A CRIMINAL DEFENDANT MAY NOT BE CONVICTED OF AN OFFENSE NOT EXPRESSLY CHARGED IN THE INFORMATION OR INDICTMENT ID. (CITATIONS OMITTED); STATE V. FOWLER, 983 S.W.2d AT 896 (MO. BANC 1997).

CRIMINAL DEFENDANTS CHARGED BY THE STATE OF MISSOURI ARE GUARANTEED THEIR FUNDAMENTAL RIGHT TO BE INFORMED OF THE "NATURE AND CAUSE OF THE ACCUSATION [S]" AGAINST THEM BY BOTH THE MISSOURI CONSTITUTION, MO. CONST. ART. I, §18(a) AND THE UNITED STATES CONSTITUTION, U.S. CONST. AMEND. VI (APPLICABLE TO THE STATES THROUGH THE FOURTEENTH

AMENDMENT, SEE WILKERSON V. WYRICK, 806 F.2d 161 C.A. 8 (MO.) 1986 QUOTING COLE V. ARKANSAS, 333 U.S. 196, 201, 68 S.CT. 514, 517, 92 L.Ed. 644 (1948)). IT IS AXIOMATIC, HOWEVER, THAT DUE PROCESS IS DENIED WHEN A PERSON IS CONVICTED WITHOUT HAVING RECEIVED FAIR AND REASONABLE NOTICE OF THE CHARGE AGAINST HIM. JACKSON V. VIRGINIA, 443 U.S. 307, 314, 99 S.CT. 2781, 2786, 61 L.Ed. 560 (1979).

IN STATE V. PULLUM, 281 S.W.3d 912 (MO. APP. 2009), THE COURT FOUND THE VARIANCE BETWEEN THE CHARGE AND CONVICTION WAS FATAL AND CONSTITUTED A MANIFEST INJUSTICE OR A MISCARRIAGE OF JUSTICE. THE COURT REVERSED MR. PULLUM'S CONVICTION FOR STATUTORY RAPE, BECAUSE MR. PULLUM WAS NOT CHARGED WITH THAT OFFENSE. THE SUBSTITUTE INFORMATION HOWEVER CHARGED MR. PULLUM WITH STATUTORY SODOMY. THE COURT CITED: " DUE PROCESS REQUIRES THAT A DEFENDANT NOT BE CONVICTED OF AN OFFENSE NOT CHARGED IN A INDICTMENT. STATE V. SMITH, 592 S.W. 2d 165, 165 (MO. BANC 1979); STATE V. SHIPLY, 920 S.W.2d 120, 122 (MO. APP. 1996). SEE ALSO STATE V. CAIN, 980 S.W.2d 145, 146 (MO. APP. 1998); STATE V. GANT, 586 S.W.2d 755, 762 (MO. APP. 1979). "[A] PERSON CANNOT BE CONVICTED OF A CRIME WITH WHICH THE PERSON WAS NOT CHARGED UNLESS IT IS A LESSER INCLUDED OFFENSE OF A CHARGED OFFENSE." STATE V. PARKHURST, 845 S.W.2d 31, 35 (MO. BANC 1992).

HERE, THE RECORD CLEARLY REFLECTS PETITIONER KILMARTIN WAS CONVICTED OF AN OFFENSE WITH WHICH HE HAD NOT BEEN TRIED OR CHARGED AND WHICH WAS NOT A LESSER-INCLUDED OFFENSE OF THE CHARGED OFFENSE. AS STATED SUPRA, PETITIONER WAS CHARGED AND TRIED FOR THE OFFENSE OF SODOMY UNDER §566.060 SECTION 3 RSMo. BUT WAS CONVICTED AND SENTENCED TO LIFE IMPRISONMENT FOR THE UNCHARGED AND UNTRIED CRIME OF FORCIBLE SODOMY UNDER §566.060 SECTION 1 RSMo. RESULTING IN A FATAL

VARIANCE BETWEEN THE SUBSTITUTE INFORMATION AND THE CONVICTION AND SENTENCE. THIS CONSTITUTIONAL DEFECT AND ERROR AFFECTED AND IMPACTED SO SUBSTANTIALLY UPON THE RIGHTS OF THE DEFENDANT THAT A CLEAR AND CONVINCING MANIFEST INJUSTICE, FUNDAMENTAL MISCARRIAGE OF JUSTICE AND A HUMAN RIGHTS VIOLATION HAS RESULTED AND HAS HAD UNFORESEEN CONSTITUTIONAL RAMIFICATIONS INCLUDING BUT NOT LIMITED TO PETITIONER'S PAROLE ELIGIBILITY. PETITIONER HAS BEEN ILLEGALLY IMPRISONED FOR ALMOST THREE DECADES NOW AND HAS DONE A DECADE MORE THEN HE WOULD HAVE HAD HAD HE BEEN CONVICTED OF THE CHARGED AND TRIED CRIME OF PLAIN SODOMY. IF NOT FOR THIS SUBSTANTIAL ERROR PETITIONER WOULD HAVE BEEN RELEASED AND FREE ON PAROLE MORE THEN A DECADE AGO. UNDER THE EXTRAORDINARY AND EXCEPTIONAL CIRCUMSTANCES OF THIS CASE PETITIONER MARK KILMARTIN HAS BEEN AND CONTINUES TO BE SUFFERING CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

FURTHERMORE, THE JURY NEVER RENDERED A VERDICT AS TO THE SODOMY CHARGE UNDER §566.060 SECTION 3 RSMo. CONTAINED IN COUNT 1 OF THE SUBSTITUTE INFORMATION. SEE (APPENDIX A). THUS, THE SODOMY CHARGE IS STILL OFFICIALLY AND LEGALLY PENDING AND HAS NOT BEEN DISMISSED BY THE COURT OR NOLLE PROSEQUI BY THE PROSECUTOR, THUS, PETITIONER WILL BE PLACED IN THE POSSIBILITY OF AGAIN BEING PROSECUTED FOR THE CRIME OF SODOMY UNDER §566.060 SECTION 3 RSMo. ARISING OUT OF THE SAME CRIME/ALLEGATION FOR THE REST OF HIS LIFE WITHOUT HABEAS CORPUS RELIEF FROM THIS COURT. "DOUBLE JEOPARDY" IS HEREBY ATTACHED TO THIS CLAIM. WITHOUT RELIEF THERE WOULD BE NOTHING STOPPING A PROSECUTOR IN THE FUTURE FROM RE-TRYING THE PENDING SODOMY CHARGE FOR POLITICAL REASONS SINCE THIS CASE INVOLVES A SEX OFFENSE INVOLVING A MINOR. THE RECORD IN THIS CASE IS CLEAR AND UNEQUIVOCAL, THE JURY DID NOT

FIND THE DEFENDANT MARK KILMARTIN GUILTY OR NOT GUILTY AS TO THE SODOMY CHARGE UNDER COUNT 1 OF THE SECOND SUBSTITUTE INFORMATION UNDER §566.060 SECTION 3 RSMo. (APPENDIX A & B), NOR DID THE COURT ENTER OR RENDER A JUDGMENT OF ACQUITTAL ON THE PENDING SODOMY CHARGE. BASED ON THE EVIDENCE AND THE FOREGOING FACTS, IT CANNOT BE SERIOUSLY DISPUTED THAT THE SODOMY CHARGE IN COUNT 1 OF THE SUBSTITUTE INFORMATION IS NOT STILL LEGALLY PENDING. IT CLEARLY IS STILL PENDING!

THE DOUBLE JEOPARTY CLAUSE OF THE FIFTH AMENDMENT STATES: "NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB." IT PROTECTS AGAINST A SECOND PROSECUTION FOR THE SAME OFFENSE AFTER ACQUITTAL OR CONVICTION. SEE NORTH CAROLINA V. PEARCE, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969).

PETITIONER'S CAUSE FOR HIS PROCEDURAL DEFAULT IS FIRST AND FOREMOST BECAUSE OF TRIAL COUNSEL'S MAJOR INEFFECTIVENESS FOR FAILING TO OBJECT WHEN THE STATE PUT UP A JURY INSTRUCTION AS TO COUNT 1 OF THE SUBSTITUTE INFORMATION FOR A SEPARATE NEW AND DISTINCT CRIME FROM THAT CHARGED IN COUNT 1, AND COUNSELS FAILURE TO OBJECT WHEN THE JURY FOUND THE DEFENDANT GUILTY OF A SEPARARE NEW A DISTINCT CRIME FROM THAT CHARGED OR TRIED, AND FOR TRIAL COUNSEL'S FAILURE TO OBJECT AT SENTENCING AND ALLOWING THE COURT WITHOUT CONTEST TO SENTENCE THE DEFENDANT MARK KILMARTIN FOR AN UNCHARGED AND UNTRIED CRIME. AND FOR TRIAL COUNSEL'S FAILURE TO RAISE THE ISSUE IN A MOTION FOR A NEW TRIAL.

FURTHER CAUSE IS THAT POST-CONVICTION RELIEF COUNSEL WAS ALSO INSUFFICIENT AND INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE IN HIS MOTION FOR POST-CONVICTION RELIEF UNDER MISSOURI RULE 29:15.

THE CAUSE WAS ALSO APPELLATE COUNSEL'S INEFFECTIVENESS FOR FAILING TO RECOGNIZE, PRESERVE AND RAISE THE CLAIM UNDER PLAIN ERROR REVIEW

PURSUANT TO MISSOURI RULE 30.20 INVOLVING THE FATAL VARIANCE BETWEEN THE CHARGE AND CONVICTION AND THE CHARGE AND SENTENCE.

PETITIONER MARK KILMARTIN HAS CLEARLY SUFFERED ACTUAL PREJUDICE. HE WAS CONVICTED AND SENTENCED TO LIFE IMPRISONMENT FOR A CRIME WITH WHICH HE WAS NOT CHARGED AND THUS WAS NOT INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM AND TO BE GIVEN NOTICE OF THAT CHARGE AGAINST HIM TO ALLOW HIM THE OPPORTUNITY TO ADEQUATELY PREPARE A DEFENSE. FURTHER PETITIONER IS SUFFERING ACTUAL PREJUDICE BECAUSE THE SODOMY CHARGE IS STILL PENDING PLACING THE PETITIONER FOR THE REST OF HIS LIFE THE POSSIBILITY OF AGAIN BEING PROSECUTED FOR THE CRIME OF SODOMY UNDER §566.060 SECTION 3 RSMo. ARISING OUT OF THE SAME CRIME/ALLEGATION WITHOUT HABEAS CORPUS RELIEF.

FURTHER PETITIONER HAS SUFFERED ACTUAL PREJUDICE BECAUSE ALL OF THE CONSTITUTIONAL AND FUNDAMENTAL SAFE-GUARDS FAILED IN THIS CASE THROUGHOUT THE WHOLE ENTIRE PROCESS FROM THE SENTENCING COURT THROUGH POST-CONVICTION RELIEF MOTION AND PROCESS TO THE DIRECT APPEAL DO TO BOTH SEVERE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND CLEARLY FROM THE APPELLATE COURTS OPINION IN THIS CASE A BIAS, PARTIAL AND PREJUDICIAL APPELLATE PANEL.

IT IS CLEAR FROM THE RECORD OF THIS CASE PETITIONER SUFFERED AND IS STILL SUFFERING ACTUAL PREJUDICE BECAUSE HE HAS BEEN INFLICTED WITH CRUEL AND UNUSUAL PUNISHMENT.

FURTHER PROOF OF PETITIONER'S ACTUAL PREJUDICE IS HIS PUBLIC DEFENDER'S SWORN AFFIDAVIT ADMITTING HE DID NOT DEFEND PETITIONER FOR THE UNCHARGED AND UNTRIED CRIME OF FORCIBLE SODOMY SEE (APPENDIX C).

WHEREFORE, THIS HONORABLE COURT SHOULD ISSUE AN ORDER GRANTING A WRIT OF HABEAS CORPUS VACATING PETITIONER'S ILLEGAL AND VOID CONVICTION AND LIFE SENTENCE FOR THE UNTRIED AND UNCHARGED CRIME OF FORCIBLE SODOMY AND DISCHARGE HIM OR IN THE ALTERNATIVE REMAND THIS CASE BACK TO THE CIRCUIT COURT OF CLINTON COUNTY MISSOURI WITH DIRECTIONS ORDERING A NEW TRIAL ON THE SODOMY CHARGE SO A JURY CAN RENDER A LAWFUL AND JUST VERDICT ON THE CHARGED OFFENSE OF SODOMY AND FOR ANY OTHER AND FURTHER RELIEF THIS COURT DEEMS JUST AND FAIR UNDER THE EXTRAORDINARY AND EXCEPTIONAL CIRCUMSTANCES STATED HEREIN.

GROUND THREE

PETITIONER IS CURRENTLY BEING ILLEGALLY AND WRONGFULLY IMPRISONED AND RESTRAINED OF HIS LIBERTY BY THE STATE OF MISSOURI BECAUSE HE RECEIVED SEVERE INEFFECTIVE ASSISTANCE OF TRIAL, POST-CONVICTION AND APPELLATE COUNSEL IN VIOLATION OF HIS RIGHTS SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION IN THAT TRIAL COUNSEL FAILED TO OBJECT WHEN THE PETITIONER WAS CONVICTED AND SENTENCED TO LIFE FOR AN UNCHARGED AND UNTRIED CRIME AND PRESERVE THE CLAIMS FOR APPELLATE REVIEW, AND POST-CONVICTION RELIEF COUNSEL'S FAILURE TO RAISE THE ISSUES IN HIS PCR MOTION UNDER RULE 29:15, AND FOR APPELLATE COUNSEL'S FAILURE TO RECOGNIZE, PRESERVE AND ADVANCE THE DUE PROCESS CLAIMS HE WAS CONVICTED AND SENTENCED FOR AN UNTRIED AND UNCHARGED OFFENSE. THERE IS A REASONABLE PROBABILITY THAT THE PETITIONER'S ILLEGAL AND VOID CONVICTION AND SENTENCE WOULD HAVE BEEN REVERSED ON DIRECT APPEAL OR COLLATERAL REVIEW IF COUNSEL HAD PERFORMED EFFECTIVELY.

APART FROM ESTABLISHING CAUSE AND PREJUDICE TO OVERCOME ANY PROCEDURAL DEFAULT OF PETITIONER'S DUE PROCESS CLAIMS, TRIAL, POST-CONVICTION (PCR) AND APPELLATE COUNSEL'S INEFFECTIVENESS IN THREE RESPECTS ALSO PROVIDES AN INDEPENDENT GROUND FOR HABEAS RELIEF. FIRST, TRIAL COUNSEL FAILED TO RECOGNIZE AND PRESERVE AND OBJECT WHEN (A) THE STATE PUT UP A JURY INSTRUCTION AS TO COUNT 1 OF THE SUBSTITUTE INFORMATION FOR A SEPARATE NEW AND DISTINCT CRIME FROM THAT CHARGED

IN COUNT 1, AND (B) TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE JURY FOUND THE DEFENDANT GUILTY OF A SEPARATE NEW AND DISTINCT CRIME FROM THAT CHARGED OR TRIED, AND (C) FOR TRIAL COUNSEL'S FAILURE TO OBJECT AT SENTENCING ALLOWING THE COURT WITHOUT CONTEST TO SENTENCE THE DEFENDANT MARK KILMARTIN TO LIFE IMPRISONMENT FOR AN UNCHARGED AND UNTRIED CRIME, AND (D) RAISE THESE CLAIMS OF ERROR IN THE MOTION FOR A NEW TRIAL.

SECOND, POST-CONVICTION RELIEF (PCR) COUNSEL ALSO FAILED TO RECOGNIZE, PRESERVE AND RAISE THE CLAIMS OF ERROR'S INVOLVING THE FATAL VARIANCES BETWEEN THE CHARGE, CONVICTION AND SENTENCE, AND THE FATAL VARIANCE BETWEEN THE TRIAL, CONVICTION AND SENTENCE AS SET OUT IN GROUNDS ONE AND TWO OF THIS PETITION.

THIRD, DIRECT APPEAL COUNSEL FAILED TO RECOGNIZE, PRESERVE AND RAISE THE CLAIMS OF ERROR'S INVOLVING THE FATAL VARIANCE BETWEEN THE CHARGE IN COUNT 1 OF THE INFORMATION AND THE CONVICTION AND SENTENCE AND THE FATAL VARIANCE BETWEEN THE TRIAL AND THE CONVICTION AND SENTENCE. FURTHER, AFTER THE COURT OF APPEALS ISSUED ITS DECISION, COUNSEL FAILED TO RAISE A DUE PROCESS CLAIM UNDER BOUIE V. CITY OF COLUMBIA IN POST-JUDGMENT MOTIONS. COUNSEL'S FAILURES NOT ONLY PRECLUDED PETITIONER FROM OBTAINING RELIEF BEFORE THE STATE COURTS ON DIRECT APPEAL AND POST-CONVICTION RELIEF, BUT ALSO COMPROMISED PETITIONER FROM SUCCEEDING ON HIS DUE PROCESS CLAIMS IN A SUBSEQUENT FEDERAL HABEAS CORPUS ACTION. SEE NIEDERSTADDT V. NIXON, 505 F.3d 832 (8TH CIR. EN BANC 2007). IN LIGHT OF THE SUBSTANCE OF THE CLAIMS ADVANCED UNDER GROUND ONE AND TWO, IT IS SELF-EVIDENT THAT APPELLATE COUNSEL WAS INEFFECTIVE IN NOT RECOGNIZING THE VARIANCE ISSUES BETWEEN THE CRIME CHARGED AND TRIED AND THE CRIME WITH WHICH PETITIONER WAS

CONVICTED AND SENTENCED TO LIFE.

PETITIONER HAS A CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL STRICKLAND V. WASHINGTON, 466 U.S. 668, 687 (1984). THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IS A BEDROCK PRINCIPLE IN OUR JUSTICE SYSTEM. IT IS DEEMED AS AN "OBVIOUS TRUTH" THE IDEA THAT "ANY PERSON HALEL INTO COURT, WHO IS TOO POOR TO HIRE A LAWYER, CANNOT BE ASSURED A FAIR TRIAL UNLESS COUSEL IS PROVIDED FOR HIM." GIDEON V. WAINWRIGHT, 372 U.S. 335, 344, 83 S.CT. 792, 9 L.ED.2D 799 (1963). INDEED, THE RIGHT TO COUNSEL IS THE FOUNDATION FOR OUR ADVERSARY SYSTEM. DEFENSE COUNSEL TESTS THE PROSECUTION'S CASE TO ENSURE THAT THE PROCEEDINGS SERVE THE FUNCTION OF ADJUDICATING GUILT OR INNOCENCE, WHILE PROTECTING THE RIGHTS OF THE PERSON CHARGED. SEE E.G., POWELL V. ALABAMA, 287 U.S. 45, 68-69, 53 S.CT. 55, 77 L.ED. 158 1932) ([THE DEFENDANT] REQUIRES THE GUIDING HAND OF COUNSEL AT EVERY STEP IN THE PROCEEDINGS AGAINST HIM. WITHOUT IT, THOUGH HE BE NOT GUILTY, HE FACES THE DANGER OF CONVICTION BECAUSE HE DOES NOT KNOW HOW TO ESTABLISH HIS INNOCENCE"). EFFECTIVE TRIAL COUNSEL PRESERVES CLAIMS TO BE CONSIDERED ON APPEAL.

HERE IN THIS CASE AT BAR TRIAL COUNSEL ALLOWED HIS CLIENT MR. KILMARTIN TO BE CONVICTED OF A DIFFERENT NEW AND DISTINCT CRIME THEN HE HAD BEEN CHARGED OR TRIED WITHOUT OBJECTION OR A JURY TRIAL FOR THE CRIME WITH WHICH HE WAS CONVICTED. AND TRIAL COUNSEL FAILED IN HIS CONSTITUTIONAL DUTY TO PRESERVE THE CLAIMS IN GROUND ONE AND TWO TO BE CONSIDEREED ON DIRECT APPEAL.

PETITIONER WAS ALSO HAD A CONSTITUTIONAL RIGHT TO ADEQUATE AND EFFECTIVE ASSISTANCE OF COUNSEL IN HIS POST-CONVICTION RELIEF MOTION UNDER MISSOURI RULE 29:15 AT HIS INITIAL-REVIEW COLLATERAL PROCEEDINGS.

THIS ALSO ESTABLISHES CAUSE AND PREJUDICE TO EXCUSE THE PROCEDURAL DEFAULT. SEE MARTINEZ V. RYAN, 132 S.CT 1309.

PETITIONER ALSO HAD THE CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL. EVITTS V. LUCEY, 469 U.S. 387, 396 (1985). THIS COURT MUST ANALYZE THIS CLAIM UNDER THE FAMILIAR TEST OF STRICKLAND V. WASHINGTON, 466 U.S. 668, 687 (1984). UNDER STRICKLAND, PETITIONER MUST SHOW THAT COUNSEL FAILED TO EXERCISE THE CUSTOMARY SKILL AND DILIGENCE THAT A REASONABLY COMPETENT ATTORNEY WOULD EXERCISE IN SIMILAR CIRCUMSTANCES, AND THAT APPELLANT WAS PREJUDICED AS A RESULT. STATE V. CLAY, 975 S.W.2D 121, 138 (MO. BANC 1998). PREJUDICE IS DEMONSTRATED BY SHOWING THAT THERE IS A REASONABLE PROBABILITY SUFFICIENT TO UNDERMINE CONFIDENCE IN THE OUTCOME. DECK ♦ V. STATE, 68 S.W.3D 418, 426 (MO. BANC 2002).

APPELLATE COUNSEL HAS A CONSTITUTIONAL DUTY TO MASTER THE TRIAL RECORD, THOROUGHLY RESEARCH THE LAW, AND EXERCISE JUDGMENT IN IDENTIFYING THE ARGUMENTS THAT MAY BE ADVANCED ON APPEAL. MCCOY V. COURT OF APPEALS OF WIS. DIST. 1, 486 U.S. 429, 438 (1988). THE ATTORNEY MUST RESOLVE ALL DOUBT AND AMBIGUOUS LEGAL QUESTIONS IN FAVOR OF HIS CLIENT. ID. AT 444. APPELLATE COUNSEL'S FAILURE TO RAISE A CLAIM THAT HAS SIGNIFICANT MERIT RAISES AN INFERENCE THAT COUNSEL PERFORMED BENEATH PROFESSIONAL STANDARDS. STATE V. SUMLIN, 820 S.W.2D 487, 490 (MO. BANC 1991).

APPELLATE COUNSEL COMPLETELY FAILED TO RECOGNIZE AND ADVANCE THE ISSUES IN GROUNDS ONE, TWO AND FOUR OF THIS PETITION AND CLEARLY PERFORMED BENEATH PROFESSIONAL STANDARDS AND WAS WITHOUT QUESTION INEFFECTIVE. AFTER THE COURT OF APPEALS ISSUED ITS OPINION IN THIS CASE STATE V. KILMARTIN, 904 S.W.2D 370 (MO. APP. W.D. 1995), APPELLATE

COUNSEL TIMELY FILED MOTIONS FOR REHEARING AND TRANSFER, IN WHICH COUNSEL HAD THE OPPORTUNITY TO CALL THIS COURT'S ATTENTION TO MATERIAL MATTERS OF LAW AND FACT OVERLOOKED BY COUNSEL AND OVERLOOKED AND MISINTERPRETED BY THE COURT IN ITS OPINION AND TO SEEK DISCRETIONARY REVIEW BEFORE THE MISSOURI SUPREME COURT ON IMPORTANT ISSUES OF LAW. HOWEVER, AGAIN APPELLATE COUNSEL COMPLETELY FAILED TO RECOGNIZE AND ADVANCE THE FACT PETITIONER HAD BEEN CONVICTED OF AN UNCHARGED AND UNTRIED CRIME. APPELLATE COUNSEL FURTHER COMPLETELY FAILED TO RECOGNIZE AND ADVANCE THE BOUIE ISSUE AS SET FOURTH IN GROUND FOUR OF THIS PETITION IN PETITIONER'S POST-JUDGMENT MOTIONS. THIS FAILURE PRECLUDED THE MISSOURI SUPREME COURT FROM EXERCISING ITS DISCRETIONARY REVIEW OF THE MISSOURI COURT OF APPEALS' UNFORESEEABLE AND UNCONSTITUTIONAL JUDICIAL ENLARGEMENT OF THE DEFINITION OF FORCIBLE COMPULSION UNDER BOUIE.

STRICKLAND PREJUDICE IS UNDOUBTEDLY ESTABLISHED BY APPELLATE COUNSEL'S INCOMPETENCE. HAD COUNSEL PERFORMED EFFECTIVELY, THERE IS A REASONABLE PROBABILITY THAT THE COURT OF APPEALS WOULD HAVE REVERSED THE CONVICTION BASED UPON THE FATAL VARIANCES ISSUES, HAD IT BEEN ADEQUATELY PRESERVED, OR ON TRANSFER THE MISSOURI SUPREME COURT WOULD HAVE REVERSED IT HAD IT BEEN RAISED IN THE POST-JUDGMENT MOTIONS. OR THAT THE FEDERAL COURT WOULD HAVE REVERSED THIS CONVICTION SUBSEQUENT TO THE MISSOURI COURT OF APPEALS' OPINION. SEE FREEMAN V. LANE, 962 F.2D 1252, 1259 (7TH CIR. 1992). HABEAS RELIEF IS WARRANTED UNDER THE EXTRAORDINARY AND EXCEPTIONAL CIRCUMSTANCES OF THIS CASE STATED HEREIN.

WHEREFORE, THIS HONORABLE COURT SHOULD VACATE THIS WRONGFUL AND ILLEGAL CONVICTION FOR THE UNTRIED AND UNCHARGED CRIME OF FORCIBLE

SODOMY OR GRANT SUCH OTHER AND FURTHER RELIEF AS THIS COURT DEEMS JUST AND FAIR UNDER THE CIRCUMSTANCES STATED HEREIN.

GROUND FOUR

PETITIONER IS CURRENTLY BEING ILLEGALLY AND WRONGFULLY IMPRISONED AND RESTRAINED OF HIS LIBERTY BY THE STATE OF MISSOURI BECAUSE THE MISSOURI COURT OF APPEALS USED THE SODOMY TRIAL RECORD ON APPEALS TO SEARCH FOR EVIDENCE TO UPHOLD THE FORCIBLE SODOMY CONVICTION IN THAT THERE WAS INSUFFICIENT EVIDENCE FROM THE SODOMY TRIAL TO SUPPORT THE UNCHARGED ELEMENT OF FORCIBLE COMPULSION INVENTED, APPLIED AND RETROACTIVELY EXPANDED THE DEFINITION FOR FORCIBLE COMPULSION TO PROSCRIBE CONDUCT THAT DID NOT FIT THE ELEMENTS OF THE CRIME AS PREVIOUSLY DEFINED IN VIOLATION OF PETITIONER'S RIGHTS GUARANTEED BY THE DUE PROCESS CLAUSE AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, SECTIONS 2 AND 10 OF THE MISSOURI CONSTITUTION A MANIFEST INJUSTICE AND FUNDAMENTAL MISCARRIAGE OF JUSTICE HAS RESULTED IN THIS CASE AT BAR.

APART FROM THE FACT THAT THE MISSOURI COURT OF APPEALS BRUSHED ASIDE A CLEAR-CUT CONSTITUTIONAL VIOLATION THAT REQUIRED A REVERSAL OR A NEW TRIAL AS SET FORTH IN GROUNDS ONE AND TWO OF THIS PETITION, THE MISSOURI COURT OF APPEALS COMPOUNDED THE ERRORS BY PERMITTING A SEPARATE AND DISTINCT CONSTITUTIONAL VIOLATION BY INVENTING AND APPLYING A NOVEL INTERPRETATION OF THE FORCIBLE COMPULSION ELEMENT OF THE CRIME FOR WHICH PETITIONER WAS CONVICTED BUT NOT CHARGED OR TRIED. THE COURT OF APPEALS USED THE TRIAL TRANSCRIPT AND RECORD FROM THE SODOMY TRIAL TO SEARCH FOR EVIDENCE THAT DID NOT EXIST TO UPHOLD THE UNCHARGED AND UNTRIED CRIME OF FORCIBLE SODOMY.

A DUE PROCESS VIOLATION OCCURS WHERE A JUDICIAL CONSTRUCTION OF A CRIMINAL STATUTE IS "UNEXPECTED AND INDEFENSIBLE BY REFERENCE TO LAW WHICH HAD BEEN EXPRESSED PRIOR TO THE CONDUCT IN ISSUE" AND IS RETROACTIVELY APPLIED TO A DEFENDANT'S CONDUCT. BOUIE V. CITY OF COLUMBIA, 378 U.S. 347, 354 (1964). "[D]UE PROCESS BARS COURTS FROM

APPLYING A NOVEL CONSTRUCTION OF A CRIMINAL STATUTE TO CONDUCT THAT NEITHER THE STATUTE NOR ANY PRIOR JUDICIAL DECISION HAS FAIRLY DISCLOSED TO BE WITHIN ITS SCOPE." UNITED STATES V. LANIER, 520 U.S. 259, 266 (1997).

IN FINDING THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE FORCIBLE COMPULSION EVIDENCE, THE MISSOURI COURT OF APPEALS CITED NO EXISTING CASE LAW WHICH FOUND THAT THE FORCIBLE COMPULSION EVIDENCE WAS LEGALLY SUFFICIENT BASED UPON SIMILAR FACTS TO THOSE PRESENTED AT PETITIONER'S SODOMY TRIAL. 904 S.W.2D AT 374. INSTEAD, THE COURT RELIED ONLY ON A DICTIONARY DEFINITION OF PHYSICAL FORCE. ID. THE MISSOURI COURT OF APPEALS'S OPINION CLEARLY CONSIDERED UNPRECEDENTED FACTORS IN SUPPORT OF ITS FINDING OF SUFFICIENT EVIDENCE TO SUPPORT FORCIBLE COMPULSION INCLUDING CONSIDERATION OF THE AGE OF THE VICTIM AND THE ACCUSED, THE ATMOSPHERE AND SETTING OF THE INCIDENT, THE EXTENT TO WHICH THE ACCUSED WAS IN A POSITION OF AUTHORITY, THE ACCUSED'S DOMINATION AND CONTROL OVER THE VICTIM, AND WHETHER THE VICTIM WAS UNDER DURESS. 904 S.W.2D AT 374. BY CONSIDERING THESE UNPRECEDENTED FACTORS, THE COURT OF APPEALS CLEARLY CREATED A NOVEL DEFINITION OF FORCIBLE COMPULSION THAT WAS NOT SUPPORTED BY ANY PRIOR CASE LAW OR THE TEXT OF THE STATUTE PROSCRIBING THAT OFFENSE. BASED UPON THE FOREGOING FACTS, IT CANNOT BE SERIOUSLY DISPUTED THAT THE MISSOURI COURT OF APPEALS CHANGED THE DEFINITION OF FORCIBLE COMPULSION FROM PHYSICAL FORCE THAT OVERCOMES REASONABLE RESISTANCE TO MENTAL AND PSYCHOLOGICAL FORCE THAT OVERCOMES REASONABLE RESISTANCE. THUS, THE MISSOURI COURT OF APPEALS CLEARLY VIOLATED DUE PROCESS UNDER BOUIE BY JUDICIALLY EXPANDING THE SCOPE OF A CRIMINAL STATUTE IN AN UNEXPECTED MANNER THAT HAD NO BASIS IN PREEXISTING LAW PRIOR TO THAT

TIME. 378 U.S. AT 354.

THUS, THIS COURT SHOULD ISSUE A WRIT OF HABEAS CORPUS AND VACATE PETITIONER'S ILLEGAL AND UNCONSTITUTIONAL CONVICTION AND LIFE SENTENCE FOR A CRIME HE CLEARLY DID NOT COMMIT AND FOR ANY OTHER AND FURTHER RELIEF THIS COURT DEEMS JUST AND FAIR UNDER THE EXTRAORDINARY AND EXCEPTIONAL CIRCUMSTANCES STATED HEREIN AND TO CORRECT A MANIFEST INJUSTICE AND A FUNDAMENTAL MISCARRIAGE OF JUSTICE.

GROUND FIVE

PETITIONER IS ENTITLED TO THIS COURTS DISCRETIONARY ISSUANCE OF A WRIT OF HABEAS CORPUS VACATING HIS UNCONSTITUTIONAL CONVICTION AND LIFE SENTENCE FOR THE CRIME OF FORCIBLE SODOMY BECAUSE THE MISSOURI COURT OF APPEALS ENGAGED IN UNLAWFUL AND JUDICIAL MISCONDUCT IN THAT THEIR OPINION IN THIS CASE CLEARLY SHOWS THAT THE COURT WAS PREJUDICED AGAINST THE PETITIONER, BIAS AND NOT IMPARTIAL BECAUSE THE COURT ILLEGALLY AND UNLAWFULLY FILLED IN A LACK OF FORCIBLE COMPULSION EVIDENCE WITH A COMPLETELY FICTIONAL STORY LINE NOT SUPPORTED BY THE RECORD OR ANY EVIDENCE AT TRIAL AND THE FACT THE COURT FOUND NO MANIFEST INJUSTICE WHILE FINDING IT IN MANY OTHER SIMILAR CASES. THE ACTIONS OF THE JUDGES ON THE PANEL IN THE COURT OF APPEALS DENIED THE PETITIONER HIS RIGHT TO A FULL AND FAIR DIRECT APPEAL AND HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 2 AND 10 OF THE MISSOURI CONSTITUTION. THE MISSOURI COURT OF APPEALS IN OF ITSELF CREATED A MANIFEST INJUSTICE AND A FUNDAMENTAL MISCARRIAGE OF JUSTICE AND A DENIAL OF FUNDAMENTAL FAIRNESS.

THIS PETITION RAISES INTERRELATED LEGAL AND CONSTITUTIONAL ISSUES REGARDING WHETHER IT IS CONSTITUTIONALLY PERMISSIBLE FOR THE MISSOURI COURT OF APPEALS TO SUPPLY MISSING AND LACK OF FORCIBLE COMPULSION EVIDENCE BY MANUFACTURING A FICTIONAL STORY LINE NOT IN THE TRIAL RECORD OR TRANSCRIPTS. THE MISSOURI COURT OF APPEALS FICTIONAL STORY IN THE COURT'S OPINION NOT SUPPORTED BY THE RECORD OR TRANSCRIPT IS AS FOLLOWS:

UNDER THE CIRCUMSTANCES OF THIS CASE, KILMARTIN'S PHYSICAL

FORCE WAS SUFFICIENT TO OVERCOME AN 11-YEAR-OLD BOY'S REASONABLE RESISTANCE. KILMARTIN, WHILE EXERTING HIS PHYSICAL FORCE, THREATENED FURTHER FORCE IN NO UNCERTAIN TERMS. HE REPEATEDLY ASKED FOR M.J.S.' CONSENT, TO THE POINT THAT COUPLED WITH THE THREAT, IT BECAME DEMANDING. THEY WERE ALONE IN KILMARTIN'S HOUSE WHERE KILMARTIN CONTROLLED AND DOMINATED AND WHERE M.J.S. WOULD LIKELY FEEL TRAPPED. ALTHOUGH HE PUT THE BOY UNDER DURESS BY FRIGHTENING HIM, HE PERSISTED UNTIL M.J.S. SUCCUMBED.

KILMARTIN DID NOT USE A WEAPON OR TWIST M.J.S.' ARM, BUT HE EXERTED FORCE WHICH WAS EVERY BIT AS OVERPOWERING AS A GUN. KILMARTIN REINFORCED HIS PHYSICAL FORCE---GRABBING THE BOY AND HOLDING HIM--WITH MANY PSYCHOLOGICAL FACTORS INTENDED TO INSTILL FEAR AND WEAR DOWN THE BOY'S RESISTANCE. KILMARTIN CALCULATEDLY INCREASED HIS PRESSURE ON THE BOY: FIRST COAXING HIM WITH FAVORS AND REQUESTS BEFORE RESORTING TO THEATS AND PHYSICAL FORCE. IT BECAME APPARENT TO M.J.S. THAT RESISTANCE WOULD BE UNSUCCESSFUL, AND HE SUCCUMBED TO KILMARTIN'S OVERWHELMING TACTICA. KILMARTIN INTENDED HIS PHYSICAL FORCE TO SUBDUE ANY NOTION OF RESISTANCE.

THE MISSOURI COURT OF APPEALS THEN WENT ON TO STATE:

ALTHOUGH THIS CASE IS NEAR THE OUTER LIMITS AS TO WHAT CONSTITUTES FORCIBLE COMPULSION, WE CONCLUDE THAT THE JURY'S VERDICT WAS REASONABLE AND SUPPORTED BY SUFFICIENT EVIDENCE. NO ONE LOOKING AT THIS SITUATION WITH ANY AMOUNT OF OBJECTIVE COULD CONCLUDE, AS KILMARTIN ASSERTS, THAT M.J.S.' CONSENTED. AFTER THIS FICTIONAL STORY LINE NOT SUPPORTED BY THE TRIAL RECORD

OR TRANSCRIPT THE COURT OF APPEALS STATES IN A FOOT NOTE:

THE RECORD DOES NOT INDICATE HOW KILMARTIN GRABBED M.J.S.
THE CLEAR IMPLICATION IS THAT HE GRABBED M.J.S.' CROTCH,
BUT THE RECORD IS NOT SPECIFIC.

PLEASE SEE THE APPEALS COURT OPINION IN STATE OF MISSOURI V.
MARK KILMARTIN CASE NO. WD 47244, CITED AS: STATE V. KILMARTIN, 904
S.W.2D 370 (MO. APP. W.D. 1995). (APPENDIX E). BASED ON THE TRIAL
TRANSCRIPT AND RECORD ON APPEAL, IT CANNOT BE SERIOUSLY DISPUTED THAT
THE COURT MADE UP AND MANUFACTURED A COMPLETE FICTIONAL STORY LINE
TO FILL IN THE MISSING AND LACK OF EVIDENCE TO FIND SUFFICIENT EVIDENCE
OF FORCIBLE COMPLUSION AND TO UP HOLD THE CONVICTION. AFTER A REVIEW
OF THE TRIAL TRANSCRIPT, RECORD AND THE TRUE EVIDENCE IN THIS CASE
IT IS CLEARLY EVIDENT THAT SINCE THIS WAS A SEX OFFENSE INVOLVING
A MINOR THE MISSOURI COURT OF APPEALS WAS CLEARLY PREJUDICED AGAINST
THE PETITIONER AND WAS BIAS. THE COURT WAS CLEARLY NOT IMPARTIAL AND
AS SHOWN SUPRA ENGAGED IN UNLAWFUL AND JUDICIAL MISCONDUCT AND CREATED
A MANIFEST INJUSTICE AND A FUNDAMENTAL MISCARRIAGE OF JUSTICE. THIS
MISCONDUCT AND ERROR BY THE APPEALS COURT DENIED THE PETITIONER HIS
RIGHT TO A FULL AND FAIR DIRECT APPEAL AND REVIEW OF HIS CONVICTION.
AND PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION
OF THE LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED
STATES CONSTITUTION AND ARTICLE I, SECTIONS 2 AND 10 OF THE MISSOURI
CONSTITUTION. THIS IS CLEARLY AN EXTRAORDINARY AND EXCEPTIONAL
CIRCUMSTANCE THAT WARRENTS HABEAS CORPUS RELIEF.

APART FROM THE FACT THAT THE COURT CLEARLY BRUSHED ASIDE A CLEAR-
CUT CONSTITUTIONAL VIOLATION THAT REQUIRED A REVERSAL FOR A LACK OF

FORCIBLE COMPULSION EVIDENCE, THE COURT OF APPEALS COMPOUNDED THE ERROR FOUND NO MANIFEST INJUSTICE RESULTED IN THE VARIANCE BETWEEN THE INFORMATION AND THE INSTRUCTION WHILE THE COURT COMPLETELY IGNORED (INTENTIONALLY) THE FACT THE VARIANCE WAS FATAL BECAUSE IT CAUSED HIM TO BE CONVICTED OF A CRIME WITH WHICH HE WAS NOT CHARGED AND HAD NOT BEEN INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM AND WAS NOT GIVEN NOTICE OF THE FORCIBLE SODOMY CHARGE TO ALLOW THE PETITIONER THE OPPORTUNITY TO ADEQUATELY PREPARE A DEFENSE. SEE GROUND TWO OF THIS PETITION. (APPENDIX C). THUS, THE VARIANCE BETWEEN THE INFORMATION AND THE JURY INSTRUCTION PREJUDICED THE SUBSTANTIAL RIGHTS OF THE PETITIONER AND PREJUDICED HIS DEFENSE AND CLEARLY RESULTED IN A MANIFEST INJUSTICE. MANY MISSOURI COURTS HAVE REVERSED CONVICTION WHERE THE DEFENDANTS WERE CONVICTED OF UNCHARGED CRIMES. MANY OF THOSE COURTS FOUND IT WAS A MANIFEST INJUSTICE: PLEASE SEE STATE V. PULLUM, 281 S.W.3D 912 (MO. APP. 2009): IN RE. J.L.T., 441 S.W. 3D 183. PETITIONER CLEARLY SUFFERED MANIFEST INJUSTICE IN THIS CASE. CONVICTING AN ACCUSED OF A CRIME FOR WHICH HE WAS NOT CHARGED REPRESENTS A "CLASSIC EXAMPLE" OF "MANIFEST INJUSTICE" OR A "MISCARRIAGE OF JUSTICE" WHICH FALLS WITHIN THE PERIMETERS OF "PLAIN ERROR". STATE V. GANT, 586 S.W.2D 755 (MO. APP. 1979); STATE V. SHIPLEY, 920 S.W.2D 120 (MO. APP. 1996). CLEARLY HERE THE MISSOURI COURT OF APPEALS KNEW OR SHOULD HAVE KNOWN THE PETITIONER WAS CONVICTED OF AN UNCHARGED CRIME AND A CLEAR MANIFEST INJUSTICE HAD RESULTED. NO ONE LOOKING AT THE COURT OF APPEALS OPINION IN THIS CASE CASE WITH ANY AMOUNT OF OBJECTIVE COULD SERIOUSLY CONCLUDE THE COURT OF APPEALS MISTAKENLY OVER LOOKED THE FACT THE VARIANCE BETWEEN THE INFORMATION AND THE JURY INSTRUCTION CAUSED THE PETITIONER TO BE CONVICTED OF

AN UNCHARGED CRIME AND THAT IT DID NOT RESULT IN A MANIFEST INJUSTICE. THE OPINION IS CLEAR THE COURT KNEW BUT REFUSED TO UPHOLD THE LAW AND THE CONSTITUTION AND THE UNITED STATES SUPREME COURT RULINGS IN THESE SITUATIONS. THE UNITED STATES SUPREME COURT STATED IN DEJONGE V. OREGON, U.S. 335, 336 (1937): "CONVICTION UPON A CHARGE NOT MADE WOULD BE SHEER DENIAL OF DUE PROCESS." ALSO, THE UNITED STATES SUPREME COURT STATED IN COLE V. ARKANSAS, 68 S.CT. 514, 333 U.S. 196 (U.S. ARK. 1948); "IT IS AS MUCH A VIOLATION OF DUE PROCESS TO SEND AN ACCUSED TO PRISON FOLLOWING A CHARGE ON WHICH WAS NEVER TRIED AS IT WOULD BE TO CONVICT HIM UPON A CHARGE THAT WAS NEVER MADE." IT IS AXIOMATIC, HOWEVER, THAT DUE PROCESS IS DENIED WHEN A PERSON IS CONVICTED WITHOUT HAVING RECEIVED FAIR AND REASONABLE NOTICE OF THE CHARGE AGAINST HIM. JACKSON V. VIRGINIA, 443 U.S. 307, 314, 99 S.CT. 2781, 2786, 61 L.ED. 560 (1979).

IN ANOTHER MISSOURI CASE OUT OF THE MISSOURI COURT OF APPEALS EASTERN DISTRICT THERE IS A CASE VERY CLOSE TO THIS CASE AT BAR WHERE IT WAS ALSO REVIEWED UNDER MISSOURI RULE 30.20 PLAIN ERROR. THE COURT FOUND THE DEFENDANT WAS CHARGED IN COUNT IV WITH STATUTORY SODOMY IN THE SECOND DEGREE, BUT WAS FOUND GUILTY OF STATUTORY RAPE IN THE SECOND DEGREE. THAT COURT FOUND: THE ENTRY OF JUDGMENT ON A CONVICTION NOT CHARGED IN THE SUBSTITUTE INFORMATION CONSTITUTES PLAIN ERROR REQUIRING REVERSAL. STATE V. PULLUM, 281 S.W.3D 912 (MO. APP. 2009). THERE ARE MANY OTHER CASES IN MISSOURI FINDING CONVICTING A DEFENDANT OF A CRIME NOT CHARGED AND WITH IS NOT A LESSER INCLUDED OFFENSE CONSTITUTES MANIFEST INJUSTICE. THE FINDING IN THIS CASE BY THE MISSOURI COURT OF APPEALS THAT THEY FIND NO MANIFEST INJUSTICE IS BAD LAW NOT SUPPORTED BY ANY CASE LAW AND IS CLEARLY A BIAS OPINION

BY A PANEL THAT WAS NOT IMPARTIAL IN THIS APPEAL AND WITHOUT QUESTION PREJUDICED AGAINST THE PETITIONER IN HIS APPEAL. SEE STATE V. KILMARTIN, 904 S.W.2D 370 (MO. APP. W.D. 1995).

UNDER THE EXTRAORDINARY AND EXCEPTIONAL CIRCUMSTANCES OF THIS CASE AT BAR, THIS HONORABLE COURT SHOULD VACATE THIS ILLEGAL, AND UNCONSTITUTIONAL CONVICTION FOR THE UNTRIED AND UNCHARGED CRIME OF FORCIBLE SODOMY AND DISCHARGE THE PETITIONER FROM HIS ILLEGAL AND WRONGFUL IMPRISONMENT AND RESTRAINT OF HIS LIBERTIES AND FOR ANY FURTHER RELIEF THIS COURT DEEMS JUST AND FAIR.

LASTLY, PETITIONER IS PRO-SE AND PROCEEDING IN FORMA PAUPERIS AND RESPECTFULLY REQUESTS THIS HONORABLE COURT TO LIBERALLY CONSTRUCT HIS PETITION AND PLEADINGS AND HOLD HIM AT A LESS STRINGENT STANDARD THAN THOSE PREPARED BY AN ATTORNEY. BOAG V. MACDOUGALL, 454 U.S. 364, 70 L.ED.2D 551, 102 S. CT. 700 (1982).

CONCLUSION

WHEREFORE, FOR ALL THE FOREGOING REASONS, PETITIONER RESPECTFULLY REQUESTS THAT THIS COURT APPOINT HIM COUNSEL TO REPRESENT HIM IN THIS JUST CAUSE AND REQUIRE THE RESPONDENT'S AND STATE OF MISSOURI TO SHOW CAUSE AS TO WHY HABEAS CORPUS RELIEF SHOULD OR SHOULD NOT BE GRANTED AND FURTHER ORDER THE TRANSMISSION OF THE TRANSCRIPTS AND RECORD ON APPEAL IN STATE OF MISSOURI V. MARK KILMARTIN MISSOURI WESTERN DISTRICT CASE NO. WD 47244 AND WD 49202 TO BE TRANSMITTED TO THE UNITED STATES SUPREME COURT AND THEREAFTER, AFTER A THOROUGH REVIEW OF THE FACTS AND LAW, ISSUE AN ORDER GRANTING A WRIT OF HABEAS CORPUS FOR THE FOREGOING REQUESTED RELIEF GRANTING A JURY TRIAL OR VACATING THE PETITIONER'S ILLEGAL CONVICTION FOR THE UNTRIED AND UNCHARGED CRIME OF FORCIBLE SODOMY AND DISCHARGE PETITIONER FROM HIS ILLEGAL AND

WRONGFUL IMPRISONMENT AND LOSE OF LIBERTIES AND GRANT SUCH OTHER AND
FURTHER RELIEF AS THE COURT DEEMS FAIR AND JUST UNDER THE EXTRAORDINARY
AND EXCEPTIONAL CIRCUMSTANCES STATED HEREIN THIS CASE AT BAR.

RESPECTFULLY SUBMITTED



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PETITIONER PRO-SE AND
IN FORMA PAUPERIS