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## State v. Prince: A Standard of Application or an Evidentiary Trump Card?

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**STATE v. PRINCE: A STANDARD OF APPLICATION OR AN  
EVIDENTIARY TRUMP CARD?**

INTRODUCTION

“Prosecuting sex crimes is a sensitive and challenging process, and most people who perpetrate these crimes go unpunished.”<sup>1</sup> Federal and State Rules of Evidence have evolved to address this challenge by incorporating special rules concerning the use of propensity evidence. Propensity evidence is a type of character evidence which relies on presenting evidence of the defendant’s prior criminal actions for the specific purpose of showing the defendant has the likelihood to commit similar crimes.<sup>2</sup> Generally speaking, due to the prejudicial nature of propensity evidence, submission of prior criminal acts is inadmissible at trial to demonstrate propensity;<sup>3</sup> however, in response to the extremely serious, personal, and damaging nature of sex crimes, in conjunction with the difficulty of their prosecution, the federal government and several states have created exceptions to this general rule.<sup>4</sup> All of these states and the federal government have crafted these evidentiary exceptions to deal specifically with sex offenses. Some of these statutes and rules of evidence are even narrower,

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1. Michael L. Smith, *Prior Sexual Misconduct Evidence in State Courts: Constitutional and Common Law Challenges*, 52 AM. CRIM. L. REV. 321, 322 (2015). *See also*, Karen M. Fingar, *And Justice For All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendments to the Federal Rules of Evidence*, 5 S. CAL. REV. L. & WOMEN’S STUD. 501, 501-04 (1996).

2. Scott H. Greenfield, *What’s Wrong with Propensity Evidence Anyway?*, SIMPLEJUSTICE: A CRIMINAL DEFENSE BLOG (Oct. 14, 2008), <https://blog.simplejustice.us/2008/10/14/whats-wrong-with-propensity-evidence-anyway/> [<https://perma.cc/EU8L-WC2F>].

3. KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE, Ch. 17, § 186 (7th ed. 2013) (“Exclusion is therefore much more likely when the character evidence is offered solely to help prove that a person acted in one way or another.”).

4. FED. R. EVID. 413; MO. CONST. art. I, § 18(c); ALASKA R. EVID. 404(b); ARIZ. R. EVID. 404(c); CAL. EVID. CODE § 1108(a); CONN. CODE EVID. 4-5(b); FLA. STAT. § 90.404(2)(b) (West 2019); GA. CODE ANN. § 24-4-414(a) (West 2019); KAN. STAT. ANN. § 60-455(d) (West 2019); LA. CODE EVID. ANN. art. 412.2(a); MICH. COMP. LAWS § 768.27(a) (West 2019); NEB. REV. STAT. ANN. § 27-414(1) (West 2019); OKLA. STAT. tit. 12, § 2413(a) (West 2019); UTAH R. EVID. 404(c); *People v. Falsetta*, 89 Cal.Rptr.2d 847, 852 (Cal. 1999); *People v. Fitch*, 63 Cal.Rptr.2d 753, 759 (Cal. Dist. Ct. App. 1997); *Report to the Attorney General on the Admission of Criminal Histories at Trial*, 22 U. MICH. J.L. REFORM 707, 723–27 (1989). “In the wake of the 1994 enactment of Rules 413 and 414, several states have passed legislation permitting the introduction of prior sexual assault or child molestation.” Smith, *supra* note 1, at 323.

encompassing only child sex crimes.<sup>5</sup> Missouri is one of a handful of states that have crafted exceptions to the general rule against prior acts evidence,<sup>6</sup> passing by referendum a constitutional amendment allowing such evidence in the realm of child sex crimes.<sup>7</sup> Under the new standard, evidence of prior criminal acts is admissible to demonstrate propensity and “[a] court may exclude relevant evidence of prior criminal acts if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.”<sup>8</sup> After a handful of appeals citing multiple issues with the new section’s application, the Missouri Supreme Court weighed in. The question is: Did it lay down a standard, or did it create an evidentiary trump card?

This note presents a critical review of the Missouri Supreme Court’s recent decision in *State v. Prince* concerning the admission of propensity evidence under a provision of the Missouri Constitution Article I, section 18(c) (“the Section”). Part I of this note details the state of the law concerning propensity evidence as it currently stands. Subpart A to Part I briefly details how Missouri courts have traditionally treated propensity evidence. It then lays out how Missouri courts have applied the Section since it became effective, and what appellate challenges have arisen under its application. Subpart B to Part I begins by briefly detailing the history of propensity evidence in other jurisdictions. Subpart B then details the initial test for relevancy and admissibility under propensity evidence standards. It discusses the current trend of application (or standard of admissibility) in Missouri and in other jurisdictions. After discussing the state of the law, Parts II and III lay out the facts, procedural posture, and eventual holding of the Missouri Supreme Court in *State v. Prince*. In addition, Part III presents a detailed account of the Missouri Supreme Court’s analysis and rationale in deciding this case. Part IV presents a critical analysis of what the Missouri Supreme Court’s decision in *Prince* represents, as well as any anticipated issues or repercussions dealing with the nature of having constitutional evidentiary standards, the lack of addressing the prejudicial effect of this type of evidence, and the actual factors of the test laid down in this case.

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5. MO. CONST. art. I, § 18(c); FLA. STAT. § 90.404(2)(b) (West 2019); GA. CODE ANN. § 24-4-414(a) (West 2019); LA. CODE EVID. ANN. art. 412.2(a) (West 2019); MICH. COMP. LAWS § 768.27(a) (West 2019); UTAH R. EVID. 404(c).

6. Smith, *supra* note 1, at 323–24 (listing Alaska, Arizona, California, Connecticut, Florida, Georgia, Iowa, Kansas, Louisiana, Michigan, Missouri, Nebraska, Oklahoma, Tennessee, Utah, and Washington as states with legislation permitting evidence of prior acts in prosecutions for sex crimes).

7. MO. CONST. art. I, § 18(c); Claire Boston et al., *Two Ballot Measures Pass Statewide, and Two Are Defeated* (Nov. 9, 2014), [https://www.columbiainmissourian.com/news/state\\_news/two-ballot-measures-pass-statewide-and-two-are-defeated/article\\_ed213198-bed1-5a2a-b50c-d43916119494.html](https://www.columbiainmissourian.com/news/state_news/two-ballot-measures-pass-statewide-and-two-are-defeated/article_ed213198-bed1-5a2a-b50c-d43916119494.html) [<https://perma.cc/7V3G-LN5V>].

8. MO. CONST. art. I, § 18(c).

## I. STATE OF THE LAW

A. *Missouri Courts*

Missouri has historically banned the use of prior acts evidence for the purpose of proving a criminal defendant's propensity to commit crimes with which he or she is charged.<sup>9</sup> Twice, by statute, the Missouri Legislature has attempted to allow propensity evidence for the purpose of prosecuting child sex offenders.<sup>10</sup> Both times, these statutes have been struck down as unconstitutional.<sup>11</sup> In 2014, Missourians amended the state constitution to allow propensity evidence in prosecutions for crimes of a sexual nature with a victim under the age of eighteen years old.<sup>12</sup> The Section has been applied in a number of cases, including *State v. Prince*, discussed below in Parts II–IV.<sup>13</sup> Its application has been appealed on several distinct grounds.

The first issue with application seen on appeal was the question of applicability or inapplicability on the basis of when the alleged crime occurred.<sup>14</sup> In the cases of *State ex rel Tipler v. Gardner* and *State v. Jones*, application of the subsection was challenged on the ground that its application was retrospective because the crimes with which the defendants were charged occurred prior to the effective date of the amendment.<sup>15</sup> The defendants argued that application to their cases was barred under the *ex post facto* clauses of the Missouri and United States Constitutions.<sup>16</sup> In *State ex rel Tipler*, the Missouri Supreme Court held that Art. I, § 18(c) was a procedural evidentiary standard, and as such was applicable because it did not purport to alter or change the

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9. *State v. Burns*, 978 S.W.2d 759, 760 (Mo. banc 1998) (citing *State v. Holbert*, 416 S.W.2d 129, 132 (Mo. 1967)).

10. William E. Marcantel, *Protecting the Predator or the Prey? The Missouri Supreme Court's Refusal to Allow Past Sexual Misconduct as Propensity Evidence*, 74 MO. L.REV. 211, 212 (2009).

11. *Id.*

12. MO. CONST. Art. I, § 18(c).

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

*Id.*

13. *See State v. Prince*, 534 S.W.3d 813, 819 (Mo. 2017) (en banc); *State ex rel Tipler v. Gardner*, 506 S.W.3d 922, 924 (Mo. 2017); *State v. Jones*, 546 S.W.3d 1, 3 (Mo. Ct. App. 2017); *State v. Hood*, 521 S.W.3d 680, 683 (Mo. Ct. App. 2017); *State v. Rucker*, 512 S.W.3d 63 (Mo. Ct. App. 2017).

14. *Tipler*, 506 S.W.3d at 924; *Jones*, 546 S.W.3d at 3–5.

15. *Tipler*, 506 S.W.3d at 924; *Jones*, 546 S.W.3d at 3–5.

16. *Tipler*, 506 S.W.3d at 925.

crimes with which the defendant was charged.<sup>17</sup> The court in *State v. Jones*, decided after *Tipler*, applied the *Tipler* analysis to the same end.<sup>18</sup>

The next line of cases challenging the Section's application focused on the prejudicial effect of admitting propensity evidence. In *State v. Rucker* the defendant appealed the trial court's failure to take into account the prejudicial effect of the evidence submitted under the Section.<sup>19</sup> The Missouri Court of Appeals for the Eastern District of Missouri rejected this argument, stating that the statutory language of the Section grants the trial courts significant discretion in the admission or exclusion of evidence under the Section.<sup>20</sup> In *State v. Jones*, the defendant appealed, arguing that the trial court failed to apply a balancing test as was required under the Section.<sup>21</sup> The court rejected this argument, stating that the Section did not have an inherent balancing test.<sup>22</sup>

The final issue Missouri courts have addressed on appeal is the admissibility of testimony presented under the Section about actions occurring while the defendant was a juvenile. In *State v. Hood*, the trial court allowed testimony of family members about the actions of the defendant while he was a juvenile.<sup>23</sup> This testimony was in turn used to demonstrate the defendant's propensity to commit statutory rape and sodomy.<sup>24</sup> On appeal, the defendant argued that this testimony was inadmissible because the actions to which various family members testified occurred while he was a juvenile.<sup>25</sup> The Missouri Court of Appeals for the Southern District of Missouri rejected this argument, stating that the testimony was admissible because it neither referenced nor relied on juvenile records or adjudications.<sup>26</sup>

In summary, prior to the Missouri Supreme Court's opinion in *State v. Prince*, Missouri Courts had struggled with applying the Section, allowing for liberal admission of propensity evidence without being able to lay down or even articulate a cognizable standard on which to base admissibility. Moreover, the appellate courts addressed prejudice at a bare minimum, electing only to say that courts have discretion; balancing tests are optional. In addition to little definitive caselaw on the subject, the language of the Section provides little guidance from

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17. *Id.*

18. *Jones*, 546 S.W.3d at 5.

19. *State v. Rucker*, 512 S.W.3d 63, 67–69 (Mo. Ct. App. 2017).

20. *Id.* at 69. “The General Assembly’s use of the word ‘may’ indicates that the court has discretion to exclude such evidence in these circumstances, but it is not obligated to do so.” *Id.* (citing *Wolf v. Midwest Nephrology Consultants, PC.*, 487 S.W.3d 78, 83 (Mo. Ct. App. 2016)). “Accordingly, even if the evidence’s probative value was ‘substantially outweighed by the danger of unfair prejudice,’ the trial court was not required to exclude the evidence.” *Id.*

21. *Jones*, 546 S.W.3d at 3.

22. *Id.* at 5.

23. 521 S.W.3d 680, 685–86 (Mo. Ct. App 2017).

24. *Id.* at 688.

25. *Id.* at 683.

26. *Id.* at 687.

which trial courts can derive a clear standard of application. Thus, it seems the Missouri Supreme Court had little option but to address these issues and lay down a uniform standard for applying the Section.

### B. Other Jurisdictions

As with Missouri, prior acts evidence has historically been banned in other jurisdictions due to its prejudicial nature.<sup>27</sup> In 1994, the Federal Rules of Evidence (the “Rules”) were amended to allow admission of prior misconduct evidence to be admitted at trials for crimes of a sexual nature.<sup>28</sup> The Rules allow juries to consider any propensity evidence admitted for its bearing “on any matter to which it is relevant.”<sup>29</sup> Following suit, states began to abandon rigid evidentiary standards banning prior acts evidence, opting instead to weigh the probative value of this type of evidence to the prejudicial effect.<sup>30</sup> Similar to what has occurred in Missouri, jurisdictions allowing prior acts evidence in criminal prosecutions have experienced numerous appeals dealing with the application of these standards.<sup>31</sup> From these appellate decisions, a general standard of application has emerged.

One of the first tests for admission emerging out of federal circuit courts is the *LeMay* test, which listed five factors for consideration in determining relevance and weighing probative value.<sup>32</sup> In applying these factors, courts were able to determine admissibility of prior acts evidence while being conscious of the necessary interplay between Federal Rules of Evidence 403 and 414.<sup>33</sup> Those factors are: similarity in conduct; remoteness in time; frequency of prior acts; the presence or lack of intervening circumstances; and the necessity of this evidence beyond the testimony and evidence already offered at trial.<sup>34</sup> As this

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27. BROUNET AL., *supra* note 3, at Ch. 17, § 186.

28. Fingar, *supra* note 1, at 507–09.

29. *Id.* FED. R. EVID. 413, Similar Crimes in Sexual-Assault Cases, provides:

(a) PERMITTED USES. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

FED. R. EVID. 414, Similar Crimes in Child-Molestation Cases, provides:

(a) PERMITTED USES. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

30. Fingar, *supra* note 1, at 510.

31. *See generally* Smith, *supra* note 1.

32. *United States v. LeMay*, 260 F.3d 1018, 1031 (9th Cir. 2001) (holding the five-factor test handed down in *Glanzer* was applicable to criminal trials to determine whether evidence admitted under Federal Rules of Evidence 413 and 414 is unfairly prejudicial within the meaning of Federal Rule of Evidence 403). *See also* Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1268 (9th Cir. 2000).

33. *LeMay*, 260 F.3d at 1031.

34. *Id.* at 1028.

test was laid down at the intermediate appellate level, this test is not binding on all jurisdictions.<sup>35</sup> Thus, many jurisdictions have utilized a similar framework; however, not all jurisdictions weigh factors present in this test equally and sometimes even eliminate certain factors altogether.

The predominant variation of the *Lemay* test is a three-factor test. The majority of jurisdictions look at victim similarity, similarity in the crime or prior act, and temporal relevance.<sup>36</sup> While similarity in victimology and crime are themselves essentially self-defining, temporal relevance is not. Temporal relevance, through case law, has been defined as a combination of two factors: remoteness of the prior crime or act and presence or lack of an intervening event between crimes, often weighted together to determine probative value.<sup>37</sup>

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35. See *United States v. Hawpetoss*, 478 F.3d 820, 825 (7th Cir. 2007) (stating the Seventh Circuit has not expressly adopted the factors-based test of *Lemay*, instead opting to apply a more flexible approach centered on similarity, remoteness, and frequency).

36. *Smithart v. State*, 946 P.2d 1264, 1270 (Alaska Ct. App. 1997) (relying on upon similarity of the conduct, proximity in time to the alleged crime, and similarity in victimology to determine admissibility); *Carpentino v. State*, 38 P.3d 547, 553–54 (Alaska Ct. App. 2002) (specifically comparing victims and conduct, then looking at remoteness to determine admissibility under the standard); *State v. Williams*, 99 P.3d 43, 47–48 (Ariz. Ct. App. 2004) (assessing remoteness and similarity of incidents to determine relevancy); *People v. Villatoro*, 281 P.3d 390, 397 (2012) (stating that when a defendant is charged with multiple sex offenses they may be dissimilar enough or too remote so as to cause exclusion); *People v. Harris*, 70 Cal.Rptr.2d 689, 697 (Cal. Ct. App. 1998) (looking at similarity in victimology and the proffered prior conduct to determine relevancy and probative value); *State v. DeJesus*, 953 A.2d 45, 79–80 (Conn. 2008) (determining admissibility on the basis of similarity in victim, conduct, and close proximity in time); *Coleman v. State*, 126 So.3d 1199, 1202 (Fla. Dist. Ct. App. 2012) (determining probative value and prejudice by evaluating similarity of the acts and victimology, proximity or remoteness in time, frequency of acts, and presence of lack of intervening events); *McLean v. State*, 934 So.2d 1248, 1262 (Fla. 2006) (assessing similarity of acts and victimology, proximity in time, frequency of acts, and presence or lack of intervening events to determine probative value); *Eubanks v. State*, 774 S.E.2d 146, 148 (Ga. Ct. App. 2015) (looking at prosecutorial need, similarity between the events, and temporal remoteness to determine probative value); *State v. Boysaw*, 372 P.3d 1261, 1272 (Kan. Ct. App. 2016) (determining probative value and admissibility by looking to time lapse between offenses, frequency of acts, occurrence or lack of intervening events, similarity in conduct, and similarity in victims); *People v. Duenaz*, 854 N.W.2d 531, 542 (Mich. Ct. App. 2014) (looking at similarity in acts and victimology, temporal proximity, frequency or infrequency of conduct, and necessity to determine admissibility).

37. *Smithart*, 946 P.2d at 1270 (not too remote in time); *Harris*, 70 Cal.Rptr.2d at 696 (“remoteness” or “staleness”); *Coleman*, 126 So.3d at 1202 (presence or lack of intervening circumstances); *McLean*, 934 So.2d at 1262 (closeness in time and presence or lack of intervening circumstances). In *Carpentino*, 38 P.3d at 553, the court reasoned that the remoteness and similarity prongs overlap:

[T]he “remoteness” of a prior crime does not hinge simply on a chronological calculation. A trial judge’s determination of “remoteness” also involves a weighing of the circumstances surrounding the two incidents (the prior one and the charged one), an identification of the factors common to the two incidents, and an assessment of whether the probative value of these connecting factors is likely to appreciably diminish with the elapsed time.

Although the majority of jurisdictions have followed the three-factor test, or a variation thereof, for determining relevance and probative value, there are some outliers. In addition to the three-factor test noted above, several jurisdictions have also employed the necessity factor, weighing the true need for this type of evidence in the instant case with the potential prejudice created by the evidence.<sup>38</sup> Other jurisdictions have expanded what prior acts may be admitted beyond those traditionally thought to be similar.<sup>39</sup> Finally, some other jurisdictions require clear and convincing evidence that the prior act actually occurred.<sup>40</sup> However, these outliers can be explained by the language specifically used in the applicable statutes or rules of evidence.<sup>41</sup>

In addition to the relevancy factors test, all of the other jurisdictions have one thing in common. They all allow relevant prior acts evidence where the probative value of the proffered evidence outweighs its prejudicial effect.<sup>42</sup> This

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*Id.*

38. *See Lemay*, 260 F3d. at 1027–28.

39. *State v. Snelgrove*, 954 A.2d 165, 177 (Conn. 2008) (holding that prior acts not necessarily sexual in nature may be admissible for propensity purposes so long as they were motivated by the defendant's aberrant sexual compulsion).

40. *State v. James*, 393 P.3d 467, 472 (Ariz. Ct. App. 2017).

41. ARIZ. R. EVID. 404(c), Character Evidence in Sexual Misconduct Cases, provides:

(1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

CONN. CODE EVID. 4-5(b), When Evidence of Other Sexual Misconduct Is Admissible to Prove Propensity, provides:

(b) When evidence of other sexual misconduct is admissible to prove propensity. Evidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct if: (1) the case involves aberrant and compulsive sexual misconduct; (2) the trial court finds that the evidence is relevant to a charged offense in that the other sexual misconduct is not too remote in time, was allegedly committed upon a person similar to the alleged victim, and was otherwise similar in nature and circumstances to the aberrant and compulsive misconduct at issue in the case; and (3) the trial court finds that the probative value of the evidence outweighs its prejudicial effect.

NEB. REV. ST. § 27-414 (West 2019), Criminal Use; Evidence of Similar Crimes in Sexual Assault Cases, provides:

(1) In a criminal case in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense or offenses of sexual assault is admissible if there is clear and convincing evidence . . . that the accused committed the other offense or offenses.

42. FED. R. EVID. 413; ALASKA R. EVID. 404(a)(2)(ii); ARIZ. R. EVID. 404(c)(1)(C); CAL. EVID. CODE § 1108(a); CONN. CODE EVID. 4-5(b); FLA. STAT. ANN. § 90.404(2)(b) (West 2019); GA. CODE ANN. § 24-4-414(a) (West 2019); KAN. STAT. ANN. 60-455(d) (West 2019); LA. CODE EVID. ANN. ART. 412.2(a); MICH. COMP. LAWS ANN. § 768.27 (West 2019); NEB. REV. STAT. ANN. § 27-414(3) (West 2019); OKLA. STAT. ANN. TIT.12 § 2413 (a) (West 2019); UTAH R. EVID. 404(c).



requirement serves as a check on admission which stems from each jurisdiction's various rules of evidence.

In summary, other jurisdictions, similar to Missouri, have struggled with appellate challenges to the application of evidentiary standards for allowing admission of propensity evidence. Through a myriad of case law and appeals, other jurisdictions have seemingly settled on a three-factor test weighing temporal relevance, victim similarity, and similarity in prior conduct to determine relevancy and probative value. Once the proffered evidence is determined relevant, the courts require that the proffered evidence's prejudicial effect does not outweigh its probative value.

## II. FACTS AND LOWER COURT HOLDINGS

### A. *Case Facts*

In *State v. Prince*, the victim was a four-month-old child. On December 2, 2012, the victim and her mother spent the night at Prince's home.<sup>43</sup> The following morning, Prince "discovered" the victim face down and unresponsive on the living room couch.<sup>44</sup> The victim was taken to a nearby hospital and then air-lifted to a regional children's hospital, at which she was placed in the pediatric intensive care unit.<sup>45</sup> The victim died at the hospital.<sup>46</sup> It was determined that the cause of the victim's death was strangulation; however, the victim suffered multiple injuries from which she would have died had she not been strangled.<sup>47</sup> The victim was sexually assaulted anally, resulting in numerous internal tears.<sup>48</sup> The victim had multiple bruises to her body, face, chest, and legs, as well as a cranial laceration, all of which indicated she was subjected to severe trauma prior to her strangulation.<sup>49</sup> Prince was arrested and charged with first-degree murder, felony abuse of a child, and forcible sodomy.<sup>50</sup>

### B. *Trial Court Proceedings*

Between the commission of Prince's crimes and the date of his eventual jury trial, the Missouri Constitution was amended to allow the admission of relevant evidence of a defendant's prior bad acts or criminal conduct at trial for prosecution of crimes of a sexual nature perpetrated against someone under the

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43. *State v. Prince*, 534 S.W.3d 813, 816 (Mo. 2017) (en banc).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 817.

48. *Prince*, 534 S.W.3d at 816–17.

49. *State v. Prince*, No. ED 102938, 2017 WL 2644431, at \*1 (Mo. Ct. App. June 20, 2017), transferred to Mo. S.Ct., 534 S.W.3d 813 (Mo. banc 2017).

50. *Prince*, 534 S.W.3d at 817.

age of eighteen.<sup>51</sup> The amended section allows the admission of evidence for the purpose of demonstrating a defendant's propensity to commit the crimes with which he or she is charged.<sup>52</sup> As a result, the prosecution sought to enter evidence of prior bad acts contained within Prince's juvenile record for the purpose of demonstrating his propensity to commit the types of crimes with which he was charged.<sup>53</sup>

At trial, and over Prince's objection, the prosecution submitted evidence of Prince's cell phone internet search history and text messaging records, as well as evidence of Prince's Idaho juvenile record with regard to an adjudication of delinquency for "lewd and lascivious" conduct with a minor.<sup>54</sup> The prosecution did so through the testimony of the interrogating officer in his juvenile case.<sup>55</sup> While testifying, the interrogating officer read substantial portions of Prince's juvenile record to the jury.<sup>56</sup> These portions included the allegation itself, the criminal statute defining the acts as a felony, and the certified adjudication which included Prince's admission that he committed the alleged acts.<sup>57</sup> At the conclusion of evidence, the court instructed the jury that evidence of prior criminal acts could be considered for the purpose of proving Prince did in fact have a propensity to commit crimes of a sexual nature against children.<sup>58</sup> In addition, during jury deliberations, the jury requested to see "the paperwork for the defendant's prior crime against a child that occurred in another state."<sup>59</sup> The court provided the jury with portions of Prince's juvenile record including the petition listing the factual allegations and the juvenile court's decree indicating Prince's admission to the delinquency.<sup>60</sup> Prince was found guilty on all charges and sentenced to three consecutive life sentences.<sup>61</sup>

### C. *Intermediate Appellate Court*

Prince appealed his conviction to the Missouri Court of Appeals for the Eastern District of Missouri.<sup>62</sup> Prince raised multiple issues on appeal.<sup>63</sup> First,

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51. *Prince*, 2017 WL 2644431, at \*1.

52. *Id.*; MO. CONST. art. I, § 18(c).

53. *Prince*, 534 S.W.3d at 817.

54. *Id.* The defendant's cell phone internet history showed that he visited pornographic websites and had recently researched child autopsies, while the text messages submitted were detailed conversations between Prince and the victim's mother, in which sexual contact between the victim and Prince was discussed. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *State v. Prince*, No. ED 102938, 2017 WL 2644431, at \*2, (Mo. Ct. App. June 20, 2017).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at \*1.

63. *Prince*, 2017 WL 2644431, at \*2.

he argued that the trial court erred in admitting his juvenile records for the purposes of proving his propensity because his juvenile adjudication was neither logically nor legally relevant evidence<sup>64</sup> of prior criminal acts as required by Article I, Section 18(c).<sup>65</sup> Second, Prince argued that the evidentiary standard could not be applied in the case at bar as his juvenile conduct predated the enactment of the Section, thus rendering application a violation of the ex post facto clause of both the Missouri and United States Constitutions.<sup>66</sup> Finally, Prince argued that the court erred in admitting his pornographic website use because it was neither logically nor legally relevant.<sup>67</sup>

The appellate court reversed and remanded the trial court's judgment, stating the court erred in admitting Prince's juvenile records as propensity evidence under Article I, Section 18(c), and that Prince suffered prejudice as a result.<sup>68</sup> However, the appellate court, as this was a case presenting an issue of first impression in Missouri and involving a question of general importance,<sup>69</sup> transferred the case to the Missouri Supreme Court pursuant to Rule 83.02.<sup>70</sup>

### III. THE MISSOURI SUPREME COURT OPINION

After accepting transfer, the Missouri Supreme Court recognized three points on appeal.<sup>71</sup> Those points were: the admission of the defendant's pornography use and text messages found on his phone; the admissibility of the defendant's juvenile record under the standard of logical relevancy; and the admission of the defendant's juvenile record under the standard of legal relevancy.<sup>72</sup> The court dismissed Prince's argument regarding the prejudicial effect of the admission of his text messages and use of pornography, stating that

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64. *Id.*; "The general rule in Missouri is that relevance is two-tier: logical and Legal." *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. 2002) (en banc). "Evidence is logically relevant if it tends to make the existence of a material fact more or less probable." *Id.* "Legal relevance weighs the probative value of the evidence against its cost, unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Id.* (citing *State v. Sladek*, 835 S.W.2d 308, 314 (Mo. banc 1992)).

65. *Prince*, 2017 WL 2644431, at \*2; *see also* MO. CONST. art. I, § 18 (c) ("[C]ourt may exclude relevant evidence . . . if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.").

66. *Prince*, 2017 WL 2644431, at \*2.

67. *Id.*

68. *Id.* at \*10.

69. Note: the appellate court made the decision to reverse the trial court's holding based on the dispositive issue that Prince's juvenile records were admitted as *evidence* under MO. CONST. Art. I, § 18(c), and an admission of such records as *evidence* could not occur at law because such records are not "lawful or proper evidence" under MO REV. STAT. § 211.271(3). The issue of first impression was the issue of how to resolve the seemingly present conflict between MO. CONST. Art. I, § 18(c) and MO. REV. STAT. § 211.271(3) (West 2019). *Id.*

70. *Prince*, 2017 WL 2644431, at \*10.

71. *State v. Prince*, 534 S.W.3d 813, 817 (Mo. 2017) (en banc).

72. *Id.* at 821.

any prejudice arising from its admission “was not due to the state’s presentation . . . but rather from the offensive content of the material found.”<sup>73</sup> The court addressed the admission of Prince’s juvenile record, stating that it was both logically and legally relevant under Art. I, § 18(c).<sup>74</sup> As a result, the court reversed the judgment of the Eastern District, affirming the circuit court and upholding Prince’s convictions for first-degree murder, felony abuse of a child, and forcible sodomy.<sup>75</sup>

The court began its analysis by defining relevance.<sup>76</sup> The court stated that evidence is only admissible if both legally and logically relevant.<sup>77</sup> The court’s definition of relevancy is as follows: “Evidence is logically relevant if it tends to make the existence of a material fact more or less probable.”<sup>78</sup> “Legal relevance weighs the probative value of the evidence against its costs—unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness.”<sup>79</sup> Finally, the court stated that prejudice created by logically relevant evidence must not outweigh its probative value, otherwise the evidence will not be admitted.<sup>80</sup> Setting these two relevancy standards as the benchmark for admission, the court looked at both the historical development of the law in Missouri and federal jurisdictions to define logical and legal relevancy within the context of admitting or excluding propensity evidence.

In addressing logical relevance, the court started by noting logical relevance “is a very low-level test that is easily met.”<sup>81</sup> The court then went on to address Prince’s arguments against logical relevancy—namely a lack of relevance based on remoteness in time, dissimilarity in action or conduct, and the fact that juvenile adjudications are not criminal acts.<sup>82</sup> The court did not find Prince’s arguments convincing. The court stated that temporal relevance is not an issue of logical relevance, but rather one of legal relevance, as passage of time would ordinarily decrease the probative value of such evidence.<sup>83</sup> Next, the court dispelled with Prince’s arguments about the dissimilarity of his criminal conduct by stating the mere fact that he was not related to the second victim, as he was with the first, was not enough to make these crimes *dissimilar* within the relevancy context.<sup>84</sup> The court stated that the crimes were similar because of the

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73. *Id.*

74. *Id.* at 817–21.

75. *Id.* at 822.

76. *Prince*, 534 S.W.3d at 817.

77. *Id.* at 818–19.

78. *Id.* (quoting *State v. Collings*, 450 S.W.3d 741, 746 (Mo. 2014) (en banc)).

79. *Id.* at 818 (quoting *State v. Anderson*, 306 S.W.3d 529, 538 (Mo. 2002) (en banc)).

80. *Id.*

81. *Prince*, 534 S.W.3d at 819 (quoting *State v. Sladek*, 835 S.W.2d 308, 314 (Mo. 1992) (en banc) (Thomas, J., concurring)).

82. *Id.* at 819.

83. *Id.*

84. *Id.*

similarity in victimology—namely that both victims were young females who he had access to through close family-like relationships.<sup>85</sup> Finally, the court addressed Prince's argument regarding juvenile adjudications not being criminal acts.<sup>86</sup> In doing so, the court stated that Prince's prior acts, regardless of their classification at law, were criminal acts.<sup>87</sup> The court relied on *State v. Doss* stating although juvenile records were generally inadmissible, they were indicative of one's previous engagement in criminal behavior.<sup>88</sup> Based on the foregoing, the court found the admission of the prior acts contained within his juvenile record to be logically relevant.

After determining admission of the prior acts evidence logically relevant, the court addressed legal relevance. The court, as seen earlier, stated that remoteness in time was not an issue of logical relevance, but rather one of legal relevance as remoteness of the prior act traditionally affects probative value.<sup>89</sup> As the Missouri Supreme Court had not addressed the issue of legal relevance with regard to admission of prior criminal acts occurring years prior to the conduct at issue, the court looked to other jurisdictions employing similar evidentiary standards for guidance.<sup>90</sup> In doing so, they found that the remoteness with regard to relevance is not subject to a rigid rule.<sup>91</sup> Instead, the court found that it is case dependent and should be looked at together with similarity in the criminal conduct to determine the questions of relevance and probative value.<sup>92</sup> The court, having gleaned guidance from other jurisdictions, looked to similarity in conduct and victimology, as well as whether any intervening events could mitigate the remoteness in time between the adjudication and the present crimes.<sup>93</sup> Here, comparing the acts for which Prince was adjudicated delinquent in Idaho and the crimes with which he was currently charged, the court determined both the victimology and conduct to be sufficiently similar.<sup>94</sup> Finally, the court, looking at the gap between Prince's adjudication and the present case, found that a three year detention as a result of his adjudication

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85. *Id.*

86. *Prince*, 534 S.W.3d at 819.

87. *Id.*

88. *Id.* (citing *State v. Doss*, 394 S.W.3d 486, 496–97 (Mo. Ct. App. 2013)).

89. *Id.*

90. *Id.* at 820.

91. *Prince*, 534 S.W.3d at 820. (citing *State v. Armstrong*, 793 N.W.2d 6, 12 (S.D. 2010)). See also *id.* (citing *Fisher v. State*, 641 N.E.2d 105, 109 (Ind. Ct. App. 1994)); *id.* (citing *United States v. Emmert*, 825 F.3d 906, 909 (8th Cir. 2016) (admitting offense from up to twenty years prior conduct at issue)); *id.* (citing *United States v. Lemay*, 260 F.3d 1018, 1029, 1020 (9th Cir. 2001) (finding prior conduct committed eleven years earlier when the defendant was twelve years old admissible)); *id.* (citing *United States v. Meacham*, 115 F.3d 1488, 1494–95 (10th Cir. 1997) (finding prior sexual conduct thirty years earlier was not too remote)).

92. *Id.*

93. *Id.* at 820–21.

94. *Id.*

sufficiently mitigated the fact that his prior actions and this current case were a number of years apart, thus rendering the admission of his prior adjudication legally relevant.<sup>95</sup>

The court then went on to briefly address the issue of prejudice. In doing so, the court stated that the circuit court retains substantial discretion in determining the question of admission or exclusion based on prejudice.<sup>96</sup> The court also stated that because the prosecution did not elicit inflammatory testimony, but rather just presented the official adjudication record, whatever prejudice may have been created by its admission was not unfair.<sup>97</sup> Finally, the court concluded its opinion by stating there was significant other evidence presented which supported conviction and that the circuit court did not abuse its discretion with regard to admitting the prior adjudication.<sup>98</sup>

#### IV. ANALYSIS

The Missouri Supreme Court's holding in *Prince* represents Missouri's first iteration of a relevancy test regarding the admission of prior acts evidence for propensity purposes.<sup>99</sup> The test for relevancy hinges on three factors: victim similarity, similarity in conduct, and temporal relevance. As stated previously, temporal relevance is an analysis weighing the remoteness of prior acts and the presence or lack of an intervening event.<sup>100</sup> The court relied on Missouri common law and precedent from other jurisdictions to formulate this framework.<sup>101</sup> The court did not, however, lay down a standard for what constitutes prejudice which substantially outweighs probative value.<sup>102</sup> In fact, the court barely addressed the aspect of prejudicial effect, noting only that the lack of eliciting inflammatory testimony indicated that the admission of the juvenile record was not unfairly prejudicial.<sup>103</sup>

As discussed above, prior acts evidence has historically been banned for the purpose of showing a defendant's propensity. This is due to jurors often conflating the actual importance of propensity evidence to the instant trial. As such, every other jurisdiction allowing for the admission of prior acts evidence to prove propensity has done so as an exception to the general bar on propensity evidence. As these standards are crafted as exceptions, they are always subject to what one might call checks and balances with regard to admission—namely a required check on whether or not prejudice outweighs probative value. These

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95. *Id.*

96. *Prince*, 534 S.W.3d at 821.

97. *Id.*

98. *Id.*

99. *Id.* at 818–21.

100. *Id.*

101. *Prince*, 534 S.W.3d at 818-21.

102. *See id.* at 821.

103. *Id.*

checks are present in either the rule of evidence which allows admission of propensity evidence or another rule within each jurisdiction's rules of evidence.<sup>104</sup> Here, the language of the Section itself all but creates such a check.<sup>105</sup> This case and other Missouri precedent on point, however, have interpreted the language to grant a wide breadth of discretion rather than indicating the need for this check.<sup>106</sup> If the legislature intended to grant wide discretion, thereby allowing trial courts to weigh prejudice at their own discretion, it would not have included the language addressing prejudice in the Section at all. Is this really the standard concerning prejudicial effect courts want to apply to Missouri's propensity evidence rule? In order to adequately balance the policy concerns of convicting child sex offenders and protecting defendants' rights Missouri courts should not diverge from what other jurisdictions are doing, but rather should weigh the prejudicial effect of the proffered evidence when admitting evidence pursuant to Article I, section 18(c).

In addition to its failure to fully address prejudice, the court did not consider necessity as a factor. The court's failure to consider necessity exacerbated its inadequate consideration of the prejudicial effect of admission of prior acts evidence. The necessity factor asks whether or not the prosecution could have achieved conviction without the admission of the prior acts evidence. Under the *Lemay* standard, necessity is determined by practicality rather than absolute necessity, meaning that it need not be absolutely necessary to obtain conviction, but rather practically necessary in light of the evidence already adduced.<sup>107</sup> Thus, the necessity of the evidence with regard to obtaining conviction is arguably one of the most important factors in this analysis because it weighs the competing policy concerns surrounding admission of prior acts evidence.

In *Prince*, the evidence at issue was not necessary to achieve a conviction. The Missouri Supreme Court concluded there was ample other evidence to support conviction.<sup>108</sup> Why then should the juvenile records of a defendant be admitted for propensity purposes? If the prosecution did not need the evidence to prove their case, then it logically follows the evidence was neither absolutely nor practically *necessary*. Thus, the only real value provided by the admission

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104. FED. R. EVID. 413; ALASKA R. EVID. 404(a)(2)(ii); ARIZ. R. EVID. 404(c)(1)(C); CAL. EVID. CODE § 1108(a); CONN. CODE EVID. 4-5(b); FLA. STAT. ANN. § 90.404(2)(b) (West 2019); GA. CODE ANN. § 24-4-414(a) (West 2019); KAN. STAT. ANN. 60-455(d) (West 2019); LA. CODE EVID. ANN. ART. 412.2(a); MICH. COMP. LAWS ANN. § 768.27 (West 2019); NEB. REV. STAT. ANN. § 27-414(3) (West 2019); OKLA. STAT. ANN. TIT.12 § 2413 (a) (West 2019); UTAH R. EVID. 404(c).

105. See Mo. CONST. art. I, § 18(c) ("The court may exclude relevant evidence of prior criminal acts if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.").

106. *Prince*, 534 S.W.3d at 821; *State v. Rucker*, 512 S.W.3d 63, 67-69 (Mo. Ct. App. 2017); *State v. Jones*, 546 S.W.3d 1, 5 (Mo. Ct. App. 2017).

107. *United States v. Lemay*, 260 F.3d 1018, 1029 (9th Cir. 2001).

108. *Prince*, 534 S.W.3d at 821.

of the juvenile records was in proving the defendant's bad character, again one of the major policy concerns at the heart of the historical ban on this type of evidence. In the absence of necessity, this type of evidence should never have been admitted. It was prejudicial to say the least, and to allow admission liberally creates a standard that favors admission of evidence over providing a fair trial by the defendant's peers.

Finally, the Missouri Supreme Court did not address the glaring conflict of law seemingly present in this case. Missouri does not allow for the admission of child adjudicative records in any case outside of the juvenile justice system.<sup>109</sup> In order to stay on topic, this note will not discuss the historical development of the juvenile justice system, nor the policy concerns behind why it is a separate system with separate records; however, the relevant Missouri statute provides:

[A]ll admissions, confessions, and statements by the child to the juvenile officer and juvenile court personnel and all evidence given in cases under this chapter, as well as all reports and records of the juvenile court, are not lawful or proper evidence against the child and shall not be used for any purpose whatsoever in any proceeding, civil or criminal, other than proceedings under this chapter.<sup>110</sup>

In upholding the circuit court's decision, the Missouri Supreme Court in *Prince* ignored the conflict of law created between admission of defendant's juvenile record and the above cited statute. Furthermore, the only Missouri precedent under which this evidence could have been admitted was cited by the court, but not for the purpose of addressing this conflict.<sup>111</sup> *State v. Doss* provides that juvenile records for delinquencies which would have amounted to a felony had the perpetrator been an adult at the time of delinquency may be admitted during the sentencing phase of a trial.<sup>112</sup> Here, the records were admitted during the guilt phase of the trial,<sup>113</sup> clearly circumventing Missouri statutory and common law. The only justification for this circumvention is that the Section, as a constitutional provision, trumps state statutes and common law.

If this indeed was the reasoning applicable to the instant case, this creates the very real and very dangerous precedent that the Section itself is an evidentiary trump card. As Missouri rules of evidence are not codified in the traditional sense, but rather are dictated by the combined statutes and case law which lay them down,<sup>114</sup> case law and statutes which would normally keep

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109. MO. REV. STAT. § 211.271 (West 2019).

110. *Id.*

111. *Prince*, 534 S.W.3d at 819 (citing *State v. Doss*, 394 S.W.3d 486, 496–97 (Mo. Ct. App. 2013)).

112. *State v. Doss*, 394 S.W.3d 486, 496–97 (Mo. Ct. App. 2013).

113. *Prince*, 534 S.W.3d at 817.

114. Justin M. Dean, *Missouri's Law on Admissibility of Other Crimes Evidence: Increasing Inclusivity*, 64 MO. LAW REV., 187, 192 (1999) ("Missouri's law of evidence, unlike the federal rules of evidence, has not been codified into a formal set of rules to which the courts can look. Instead, it has developed through case law and statutes.").



juvenile adjudications out of court are subordinate to Missouri's constitution, and therefore, the Section. Thus, by ignoring the conflict of law, the court failed to dictate how the Section will co-exist with other rules of evidence, thereby creating an evidentiary trump card pertaining to the most prejudicial type of evidence. This, in and of itself, makes Missouri the outlier with regard to propensity evidence as every other jurisdiction has inherent checks on admissibility present in their rules of evidence.

Beyond the scope of this Note, but still very relevant, are three additional issues. Those issues are: potential Sixth Amendment issues regarding the inability of a defendant to confront his accuser when evidence adduced is in summary record form; due process issues stemming from the language of the Section itself, as it appears to create a presumption of admissibility; and the very real concern that the genesis of these types of evidentiary rules is a result of the emotionally charged nature of the crime and that conviction rates in these types of crimes are traditionally below that of other types of crimes, and as a result these rules are crafted to lessen the prosecutor's burden in such cases. Changes like this create precedent for a proverbial Pandora's Box full of potential rule changes based not on constitutional protections, but rather on the thoughts and concerns currently relevant in society.

#### CONCLUSION

The Missouri Supreme Court's decision in *State v. Prince* represents both a standard of application and an evidentiary trump card. The three-factor relevancy test for admission under Art. I, section 18(c) prescribed in this case was in line with what other jurisdictions are doing regarding relevancy. However, the court should consider adding a fourth factor: necessity. Adding the necessity factor weighs the value created by admission with the policy concerns behind its traditional ban, thereby fully evaluating the evidence prior to its admission. In addition, the court's minimal analysis with regard to prejudice, and the complete omission of analysis addressing the potential conflict between Missouri statute and the evidence admitted in this case created potentially dangerous precedent. To all but ignore the prejudicial effect by stating the statutory language grants wide discretion to trial courts was directly contrary to the policy concerns behind the historical prohibition on propensity evidence. Furthermore, it was in direct conflict with the inherent checks on prejudicial effect included in every other similar statute or rule of evidence. Finally, to ignore the potential conflict of law present in this case seemingly creates a standard by which, in the absence of constitutional checks on admission, presumes admissibility regardless of other rules of evidence.

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