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THE NEW FACE OF MISSOURI CHILD SEX CRIMES: ELECT OR INSTRUCT

INTRODUCTION

“Lloyd G. Oswald was convicted of the detestable and abominable crime against nature. He has appealed from a judgment imposing twenty years’ imprisonment in accord with the verdict.”¹

These were the opening words of *State v. Oswald*, an early Missouri Supreme Court decision involving multiple acts of statutory sodomy.² Despite recognizing the defendant’s crimes as ones so atrocious they were “not fit to be named,” the court nonetheless concluded that the jury’s ability to convict the defendant if they believed he committed *either* of two acts constituting the offense of sodomy violated the defendant’s right to a unanimous jury verdict.³ Long forgotten until recently, *Oswald* stands in direct opposition to the last several decades of Missouri jurisprudence governing cases involving multiple criminal acts.

Modern child sex crimes are equally as “detestable” and “abominable” as they were in the 1950s. As in *Oswald*, many involve a series of acts committed over a lengthy time span.⁴ In Missouri, the trend towards alleging the commission of multiple acts in a multi-count indictment spanning a period of weeks, months, or even years has led to increasing judicial deference.⁵ Arguably, prosecutors have received the widest possible latitude in drafting indictments and informations in these cases. Until recently, most pre-prepared verdict directors alleging general time frames have read something to the effect of:

As to Count _____, regarding the defendant _____, if you find and believe from the evidence beyond a reasonable doubt:

That between the dates of _____ and _____, in the County of _____, State of Missouri, the defendant [committed the crime of] _____,

1. *State v. Oswald*, 306 S.W.2d 559, 561 (Mo. 1957) (citation omitted) (“We quote § 563.230: ‘Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished by imprisonment in the penitentiary not less than two years.’”).

2. *Id.* at 563.

3. *Id.* at 562–63.

4. *See, e.g.*, *State v. Germany*, 323 S.W.3d 472, 475 (Mo. Ct. App. 2010) (describing multiple sex acts between October 2006 and April 2007).

5. *See infra* note 6 and accompanying text.

Then you will find the defendant guilty under Count ____ of ____.⁶

After a Missouri Supreme Court decision handed down in June 2011, however, prosecutors may no longer rely on general allegations of time as set out in the Missouri Approved Instructions without taking additional steps to ensure jury unanimity as to a particular act.⁷

In *State v. Celis-Garcia*, the Missouri Supreme Court overturned the use of general verdict directions in multiple acts cases.⁸ Although the court's ruling in *Celis-Garcia* reaches *all* multiple acts cases before the courts irrespective of subject matter, the issue frequently arises in cases involving child sex crimes.⁹ Consequently, this Article will focus specifically on cases involving multiple sexual acts committed against children. It will argue that *Celis-Garcia* was correctly decided and that the court's adoption of the "either/or" rule for child sex crimes requires a strategic response from Missouri prosecutors in several critical respects. Before analyzing the impact of the *Celis-Garcia* decision, this Article will first provide a brief overview of *Celis-Garcia*, and then provide a short history of the legal doctrine and caselaw leading up to the court's decision.

I. FACTUAL BACKGROUND

In April 2006, C.J. and K.J., two females ages five and seven, were removed from the home of their mother, Maura Celis-Garcia, and placed in foster care.¹⁰ Upon informing their foster mother that they had been sexually abused by their mother and her boyfriend on several occasions, the children were interviewed and taken to the hospital for sexual assault forensic examinations ("SAFE").¹¹ Celis-Garcia was subsequently charged with two counts of first-degree statutory sodomy—one for each daughter.¹² Though Celis-Garcia initially was tried in September 2007, the jury was unable to reach a verdict and a mistrial was declared.¹³ Celis-Garcia was retried two months later.¹⁴

6. See, e.g., *State v. Rudd*, 759 S.W.2d 625, 628–29 (Mo. Ct. App. 1988) (upholding like instructions as "rescripts of MAI-Cr.3d 320.02.2, adapted to the facts of the case") ("The words 'on or about' do not put the time at large, but indicate that it is stated with approximate certainty.").

7. See *infra* note 83 and accompanying text.

8. *State v. Celis-Garcia*, 344 S.W.3d 150, 158 (Mo. 2011) (en banc).

9. See *id.* at 155–56 (defining a multiple acts case).

10. *Id.* at 152.

11. *Id.* ("The SAFE reports indicated that C.J. had a segment of her hymen missing, while K.J.'s genitals showed no abnormalities.").

12. *Id.*

13. *Celis-Garcia*, 344 S.W.3d at 152.

14. *Id.*

During the second trial, the State presented videotaped depositions of each child describing the separate incidents of statutory sodomy.¹⁵ K.J.'s deposition detailed two occurrences of sodomy on an enclosed back porch and one in her mother's bedroom.¹⁶ As to the first incident, K.J. testified that Celis-Garcia and her boyfriend touched her breasts, vagina, and buttocks with their hands.¹⁷ She described the second incident as occurring several days later and claimed Celis-Garcia and her boyfriend handcuffed her hands and feet, hung her naked from a hook on the bedroom wall, and touched her genitals with their hands.¹⁸ With regard to the third incident, K.J. alleged Celis-Garcia and her boyfriend removed both girls from the shower, led them to the enclosed back porch, and touched both girls' private areas with their hands.¹⁹ C.J. testified separately to the same incident of sexual assault in the bedroom, and a second occurrence of sexual touching in a shed behind the home.²⁰ C.J. also claimed to have witnessed multiple incidents of sexual abuse committed on her sister.²¹

The prosecution presented testimony from two individuals with whom the girls had spoken, a forensic interviewer with a children's advocacy center and a licensed social worker. Both accounts revealed additional disclosure from the girls involving an incident of sexual touching in the bathroom.²² At the close of the evidence, the trial court submitted the following instruction:

As to Count 1 regarding the defendant Maura L. Celis-Garcia, if you find and believe from the evidence beyond a reasonable doubt:

First, *that between the dates of January 01, 2005 and March 31, 2006, in the County of Saline, State of Missouri, the defendant or [her boyfriend] placed her or his hands on [C.J.'s] genitals, and*

Second, *that such conduct constituted deviate sexual intercourse, and*

Third, *that at the time [C.J.] was less than twelve years old, then you are instructed that the offense of statutory sodomy in the first degree has*

*occurred . . .*²³

The jury found Celis-Garcia guilty of both counts of first-degree statutory sodomy, and the trial court sentenced her to two twenty-five year sentences to run concurrently with one another.²⁴

15. *Id.* at 153.

16. *Id.*

17. *Id.*

18. *Celis-Garcia*, 344 S.W.3d at 153.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Celis-Garcia*, 344 S.W.3d at 154.

24. *Id.*

Celis-Garcia contended on appeal that the trial court erred in submitting verdict directors that failed to “include detailed information about the alleged acts of sodomy,” thereby violating “her right to a fair trial, unanimous jury verdict, and freedom from double jeopardy.”²⁵ In reviewing for plain error, the appellate court concluded the trial judge “might have had an obligation to provide more specific instructions if requested by Ms. Celis-Garcia,” but “the failure to do so on its own motion under these circumstances was not evident, obvious, and clear error.”²⁶ The Missouri Supreme Court granted transfer.²⁷

II. MUTUAL AGREEMENT: THE MISSOURI UNANIMITY REQUIREMENT

The Sixth Amendment entitles all criminal defendants to a “speedy and public trial” by an “impartial jury.”²⁸ In *Johnson v. Louisiana*, the United States Supreme Court held that a guilty verdict from a less-than-unanimous jury in federal court does not violate a defendant’s due process rights.²⁹ The Missouri Constitution also provides for a jury trial in all criminal litigation³⁰ but further requires that the verdict be unanimous.³¹ In *State v. Oswald*, the Missouri Supreme Court reiterated that a defendant is “entitled to the concurrence of twelve jurors upon one definite charge of a crime.”³² Finding that the statutory sodomy charge given by the trial judge potentially enabled some jurors to agree the defendant was guilty of “an offense committed with the mouth” while other jurors could reach the same result “with respect to an offense committed with the rectum,” the court overturned the defendant’s

25. *State v. Celis-Garcia*, No. WD 69199, 2010 WL 1539849, at *2 (Mo. Ct. App. April 20, 2010).

26. *Id.* at *6. The court also stated the following: “Ms. Celis-Garcia concedes that her claim of instructional error is not preserved for appellate review because her counsel failed to object to the verdict directors at trial. Thus, she seeks review under Rule 30.20 for ‘plain errors affecting substantial rights.’” *Id.* at *2.

27. *Celis-Garcia*, 344 S.W.3d at 154; *see also* Mo. Const. art. V, § 10 (providing for the transfer of cases pending in courts of appeals to the supreme court).

28. U.S. Const. amend. VI.

29. 406 U.S. 356, 362 (1972); *see also* *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972) (“We are quite sure . . . that the Sixth Amendment itself has never been held to require proof beyond a reasonable doubt in criminal cases. The reasonable doubt standard developed separately from both the jury trial and the unanimous verdict.”).

30. Mo. Const. art. I, § 22(a) (“the right of trial by jury as heretofore enjoyed shall remain inviolate . . .”). The Missouri Supreme Court has interpreted the phrase “as heretofore enjoyed” as protecting “all the substantial incidents and consequences that pertain to the right to jury trial at common law.” *State v. Hadley*, 815 S.W.2d 422, 425 (Mo. 1991) (en banc). The right to a unanimous jury verdict is one of the “substantial incidents” protected by Article I, § 22(a). *Id.*

31. *See* Mo. Sup. Ct. R. 29.01(a); *see also* *State v. McGee*, 447 S.W.2d 270, 273 (Mo. 1969) (en banc) (internal quotation marks omitted) (“We agree that complete waiver of a jury and consent to be tried by less than twelve jurors in substance amount to the same thing.”).

32. *Oswald*, 306 S.W.2d at 563.

conviction and ordered a new trial.³³ Although later courts cited *Oswald* as declaring erroneous disjunctive verdict directors,³⁴ *Oswald's* wider significance with regard to jury unanimity remained largely unexplored.³⁵

A. *Dormancy of Unanimity Challenges and Minority as a Defense to Specific Verdict Directors*

Leading up to *Celis-Garcia*, defendants in Missouri child sex abuse trials significantly failed to challenge before appeal the specificity of the verdict directors submitted by the prosecution and authorized by the trial judge.³⁶ Presumably, this is because courts have long upheld indictments and informations containing general allegations of time, such as “between the dates of March 15, 1976 and November 16, 1976.”³⁷ In these scenarios, appellate courts have commonly cited section 545.030 of the Missouri Revised Statutes as explicitly authorizing trial judges to approve general verdict directors.³⁸ The current statute provides: “No indictment or information shall be deemed invalid . . . [f]or omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense”³⁹ In child sexual abuse cases, courts have determined time is not “of the essence” due to the lengthy (or, for violent crimes, nonexistent) statute of limitations.⁴⁰ In Missouri, the statute of limitations for prosecuting “unlawful sexual offenses” involving minors is “thirty years after the victim reaches the age of eighteen,”

33. *Id.*

34. See, e.g., *State v. Brigham*, 709 S.W.2d 917, 922 (Mo. Ct. App. 1986) (“The disjunctive submission of two distinct acts by which an offense could have been committed has been held to be erroneous.”).

35. One of the first Missouri cases to explicitly apply *Oswald's* unanimity reasoning to a case involving multiple acts was *State v. Parsons*, 339 S.W.3d 543, 553–554 (Mo. Ct. App. 2011). Interestingly, *Oswald* cited *State v. Jackson*, 146 S.W. 1166 (Mo. 1912) and *State v. Washington*, 146 S.W. 1164 (Mo. 1912) to support its interpretation of the unanimity requirement—two cases later cited by *Celis-Garcia* in support of the same assertion. *Id.* at 551.

36. See, e.g., *State v. Germany*, 323 S.W.3d 472, 477 (Mo. Ct. App. 2010) (“As Germany concedes, his general objection to the instructions was insufficient to preserve for appeal his objection to the disjunctive verdict director.”).

37. *State v. Hoban*, 738 S.W.2d 536, 539–40 (Mo. Ct. App. 1987) (citing *State v. Murray*, 609 S.W.2d 192, 196 (Mo. Ct. App. 1980)).

38. See, e.g., *Hoban*, 738 S.W.2d at 539 (quoting Mo. Rev. Stat. § 545.030.1(5) (1986)) (“Section 545.030, RSMo 1986, expressly provides that an indictment shall not be deemed invalid ‘[f]or omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense.’”).

39. Mo. Rev. Stat. § 545.030.1(5) (2011) (emphasis added).

40. See, e.g., *State v. Sexton*, 929 S.W.2d 909, 917 (Mo. Ct. App. 1996) (finding that time was not of the essence in a sodomy case); *State v. Mills*, 872 S.W.2d 875, 878 (Mo. Ct. App. 1994) (stating that time is not of the essence in sex offense cases generally).

but prosecutions for forcible rape and forcible sodomy may be “commenced at any time.”⁴¹

Courts over the last several decades have also based their decisions to uphold general verdict directors on the tender age of child victims, explicitly recognizing attacks on specificity as commonly raised on appeal, but deeming them legally insufficient for reversal.⁴² Instead, general temporal allegations have been “consistently approved” on the basis that child victims “may find it difficult to recall precisely the dates of offenses against them months or even years after the offense has occurred.”⁴³ As a general policy, courts have strictly adhered to the idea that “[l]eeway is necessary in charging sexual abuse and sexual intercourse with minors” to prevent defendants from asserting an alibi to avoid prosecution “once it becomes apparent that a child was confused with respect to the date of a sexual assault.”⁴⁴ In such cases, courts have concluded “[t]he defendant is adequately protected by the requirement that the trier of fact must find defendant guilty beyond a reasonable doubt.”⁴⁵

Reflecting these principles, the Missouri Approved Instructions explicitly authorize the State to set out a “less definite time period” in multiple acts cases.⁴⁶ As an example, Note on Use 5 cites *State v. Siems*,⁴⁷ emphasizing as correct the appellate court’s decision to uphold an instruction setting out a one month time frame.⁴⁸ Interestingly, the Notes on Use also specify that “upon request of the defendant or on the court’s own motion, the place [of offense] should be more definitely identified, such as ‘the front bedroom on the second floor,’ ‘the southeast corner of the basement,’ etc.”⁴⁹ While on its face this provision may seem to protect the defendant facing a multi-count indictment, it deals only with location rather than time, and is therefore relevant only “under certain circumstances, such as (a) when evidence of alibi is introduced, or (b) when an issue of venue arises, or (c) where the defendant may have committed several separate offenses against the same victim at the same general location

41. Mo. Rev. Stat. § 556.037; *see also* Mo. Rev. Stat. 556.036.1 (“A prosecution for . . . forcible rape, attempted forcible rape, forcible sodomy, attempted forcible sodomy . . . may be commenced at any time.”).

42. *See, e.g.*, *State v. Sprinkle*, 122 S.W.3d 652, 659 (Mo. Ct. App. 2003) (“[T]he claim that an indictment is not specific enough because the dates are too broad is often made in sexual abuse cases.”); *State v. Weiler*, 801 S.W.2d 417, 420 (Mo. Ct. App. 1990) (“Defendant’s complaint against the information often appears in appeals by defendants in cases of sex offenses against children, and arguments like defendant’s have been ruled against them time after time.”).

43. *State v. Carney*, 195 S.W.3d 567, 571 (Mo. Ct. App. 2006).

44. *Hoban*, 783 S.W.2d at 541 (citations omitted).

45. *Id.*

46. MAI-CR3d 304.02(5)(c) (2009).

47. 535 S.W.2d 261 (Mo. Ct. App. 1976).

48. MAI-CR3d 304.02(5)(c) (2009).

49. MAI-CR3d 304.02(6) (2009).

within a *short* space of time.”⁵⁰ As *Celis-Garcia* later observed, the provision standing alone is “insufficient to protect a defendant’s constitutional right to a unanimous jury verdict in a multiple acts case.”⁵¹

B. A Split Judicial Climate and the Reawakening of Oswald

By the close of the twentieth century, many appellate decisions aggressively rejected specificity challenges based on either the jury’s capacity to differentiate between offenses in multiple acts cases, or on an overarching finding of culpability. Courts adopting an expansive view of overall guilt advocated that “the jury need only be unanimous as to the ultimate issue of guilt or innocence, and need not be unanimous as to the means by which the crime was committed.”⁵² Convictions were upheld by the court so long as the instructions submitted to the jury were clearly drafted, and each instruction properly defined the essential elements of the defendant’s crime(s).⁵³ In contrast, for appellate decisions focusing on the jury’s capacity to differentiate between counts, “the relevant inquiry [became] whether . . . the jury clearly understood that the defendant was charged with different offenses in distinct counts and that each offense was to be considered separately.”⁵⁴ In making this determination, courts considered whether the jury received separate and specific verdict directors for each count charged, whether the jury heard evidence supporting each count through the trial, and whether a split verdict was returned by the jury after deliberation as an indication of individual consideration of each count.⁵⁵

Around the same time, some courts also began to take notice of the potential instructional error created by the issuance of general verdict directors. In *State v. Parsons*, an important case in the line of decisions ultimately giving rise to *Celis-Garcia*, the defendant “concede[d] that Note 4 of the Notes on Use for MAI-CR 3d 304.07 gives as an example the very language” he contested on appeal, but argued that where “substantive law conflicts with

50. *State v. Johnson*, 62 S.W.3d 61, 67 (Mo. Ct. App. 2001) (emphasis added).

51. *Celis-Garcia*, 344 S.W.3d at 158.

52. *Germany*, 323 S.W.3d at 478 (quoting *State v. Fitzpatrick*, 193 S.W.3d 280, 292 (Mo. Ct. App. 2006)) (finding sufficient the “overwhelming” evidence that defendant had sexual contact with one or more of his students).

53. See *Carney*, 195 S.W.3d at 570–71 (finding victim’s testimony as to specific acts provided “sufficient evidence” of guilt); *Sexton*, 929 S.W.2d at 916–17 (finding record was “replete with evidence” to support counts).

54. *State v. Williams*, 329 S.W.3d 700, 705 (Mo. Ct. App. 2010).

55. *Id.*; see also *State v. Marley*, 257 S.W.3d 198, 201 (Mo. Ct. App. 2008) (“The jury acquitted Marley of all other charges involving genital and body part contact Given the context of the instructions and the explanation in argument, we are not persuaded that the jury was granted a roving commission that resulted in manifest injustice.”).

MAI-CR 3d and its Notes on Use, the substantive law controls”⁵⁶ Rejecting this argument, the court found that “[i]mplicit in the use of approved pattern instructions like MAI-CR is the notion that they should be simple, brief, and submit ultimate issues rather than detailed evidentiary facts.”⁵⁷ Nonetheless, the court proceeded to analyze Parsons’ unanimity challenge under past precedent.

Significantly, the court returned to the Missouri Supreme Court’s decision in *State v. Oswald* in reviewing the defendant’s challenge to the trial court instructions for plain error.⁵⁸ Reaffirming as erroneous the use of disjunctive verdict directors,⁵⁹ the court noted that prior courts had distinguished the facts before them from *Oswald* by creating the caveat that “while it [is] error to make a disjunctive submission on the ‘gravamen of the offense’ . . . it [is] not error to submit alternative means of the committing the offense [sic]”⁶⁰ When applying this precedent to Parsons’ case, however, the court determined that Parsons had attempted to rape the victim on “at least two separate occasions—once in the bedroom and once in the bathroom.”⁶¹ These attempts, the court concluded, were “not simply a continuous series of steps toward committing a single rape” but were rather “repeated anew.”⁶² Based on this analysis, the court found “the trial court erred by submitting Instruction No. 9 because it failed to identify which of these separate incidents the jury was being asked to unanimously find constituted ‘tr[ying] to have sexual intercourse with [Victim].’”⁶³

Despite this finding of error, the court observed that Parsons failed to cite a Missouri case addressing the unanimity issue and instead analogized distinguishable cases involving disjunctive submissions.⁶⁴ For this reason, the court concluded there had been no “evident, obvious and clear” error resulting in “manifest injustice” or “miscarriage of justice.”⁶⁵ Although the court in *Parsons* declined to create new precedent and failed to find that the submission of a general verdict director in a multiple acts case constitutes plain error, the court’s decision is nonetheless significant because it acknowledged the flawed nature of the verdict director itself. This decision ultimately laid the

56. *Parsons*, 339 S.W.3d 543 at 550 (citations and quotations omitted).

57. *Id.* (quoting *State v. Wood*, 668 S.W.2d 172, 174 (Mo. Ct. App. 1984)).

58. *Id.* at 551. In addition to relying on *Oswald*, the defendant had also cited *State v. Washington*, 141 S.W. 1164 (Mo. 1912) and *State v. Jackson*, 146 S.W. 1166 (Mo. 1912), both of which were relied on by the Missouri Supreme Court in *Celis-Garcia. Id.*

59. *Id.*

60. *Parsons*, 339 S.W.3d at 551–52.

61. *Id.* at 552.

62. *Id.*

63. *Id.* at 553.

64. *Id.*

65. *Parsons*, 339 S.W.3d at 553.

groundwork for the Missouri Supreme Court's decision two months later in *Celis-Garcia*.⁶⁶

III. UNANIMITY REDEFINED: THE *CELIS-GARCIA* DECISION

In *State v. Celis-Garcia*, the Missouri Supreme Court held that a defendant's right to a unanimous verdict must be protected in multiple acts cases by the state either: (1) "electing the particular criminal act on which it will rely to support the charge," or (2) "specifically describing the separate criminal acts" in the verdict director and instructing the jury "that it must agree unanimously that at least one of those acts occurred."⁶⁷ The court began its analysis by reaffirming a defendant's right under the Missouri Constitution to a unanimous jury verdict.⁶⁸ In considering whether *Celis-Garcia* had been deprived of this right, the court first sought to determine whether the facts under review properly constituted a case involving "multiple acts."⁶⁹ The court defined multiple acts as arising "when there is evidence of multiple, distinct criminal acts," and set out the following four-part factors analysis to guide judicial inquiry:

- (1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct.⁷⁰

Applying this test to the facts before them, the court observed "there were at least seven acts of statutory sodomy that occurred at different times (some more than three days apart) and in different locations."⁷¹ The trial testimony consisted of numerous incidents occurring in multiple locations including an enclosed back porch, the defendant's bedroom, the children's bathroom, and a shed behind the home.⁷² "Despite evidence of multiple, separate incidents of statutory sodomy," the court observed that "the verdict directors failed to differentiate between the various acts in a way that ensured the jury unanimously convicted Ms. *Celis-Garcia* of the same act or acts."⁷³

In analyzing the verdict director administered by the trial judge, the court made several observations. First, the broad allegation of time enabled "each individual juror to determine which incident he or she would consider in

66. *Parsons* was decided on April 11, 2011. *Parsons*, 339 S.W.3d at 543. *Celis-Garcia* was decided on June 14, 2011. *Celis-Garcia*, 344 S.W.3d at 150.

67. *Celis-Garcia*, 344 S.W.3d at 157.

68. *Id.* at 155.

69. *Id.*

70. *Id.* at 155–156 (quoting 75b Am. Jur. 2d *Trial* § 1511 (2007)).

71. *Id.* at 156.

72. *Celis-Garcia*, 344 S.W.3d at 156.

73. *Id.*

finding Ms. Celis-Garcia guilty of statutory sodomy.”⁷⁴ As phrased, “jurors could convict Ms. Celis-Garcia if they found that she engaged or assisted in hand-to-genital contact with the children during an incident in her bedroom, *or* on the enclosed porch, *or* in the shed, *or* in the bathroom.”⁷⁵ Second, “the verdict directors submitted by the state instructed the jurors to find Ms. Celis-Garcia guilty if they believed she committed sodomy by hand-to-genital contact generally.”⁷⁶ Because “[t]he state presented evidence of multiple, separate instances of hand-to-genital contact committed against both victims, any one of which would have supported the charged offenses . . . the verdict directors were erroneous.”⁷⁷ In light of these observations, the court found it was “impossible to determine whether the jury unanimously agreed on any one of these separate incidents,” and “the verdict directors violated Ms. Celis-Garcia’s constitutional right to a unanimous jury verdict.”⁷⁸

Having found the verdict director constitutionally inadequate, the court turned next to the constitutionality of the Missouri Approved Instructions generally, which “do not require differentiation among multiple, separate criminal acts that each could constitute the charged offense, unless the defendant requests or the court elects to do so on its own motion.”⁷⁹ The court found this permitted modification was “insufficient to protect a defendant’s constitutional right to a unanimous jury verdict in a multiple acts case” because it is “written in permissive rather than mandatory language.”⁸⁰ Furthermore, the Note on Use provides for additional identifying detail only with regard to location, failing to consider timing, or “other distinguishing characteristics.”⁸¹ “Most significantly,” the court observed, “the note does not require that the jury unanimously agree on the same criminal act that serves as the basis for the defendant’s conviction.”⁸² Given these observations, the court concluded the constitutional mandate will only be met if a verdict director “describe[s] the separate criminal acts with specificity,” and the court “instruct[s] the jury to

74. *Id.*

75. *Id.*

76. *Id.* at 158.

77. *Celis-Garcia*, 344 S.W.3d at 158.

78. *Id.*

79. *Id.* at 157-158 (citing MAI-CR 3d 304.02 Note on Use 6) (“The place of the offense may become of decisive importance under certain circumstances such as . . . (c) where the defendant may have committed several separate offenses against the victim at the same general location within a short space of time. In such a situation, upon the request of the defendant or on the court’s own motion, the place should be more definitely identified, such as ‘the front bedroom on the second floor,’ ‘the southeast corner of the basement,’ etc.”).

80. *Id.* at 158.

81. *Id.*

82. *Celis-Garcia*, 344 S.W.3d at 158.

agree unanimously on at least one of the specific criminal acts described”⁸³

The court also returned to its prior opinions in *State v. Washington*⁸⁴ and *State v. Jackson*,⁸⁵ two companion cases unrelated to sexual offenses upon which it had relied in *Oswald* to conclude the defendant’s right to a unanimous jury verdict had been violated. The court observed both cases involved single counts of charged criminal gambling activity, but each verdict director failed to specify which gambling table served as the basis for prosecution.⁸⁶ This enabled the jury “to convict the defendant even though some of the jurors may have agreed to a verdict of guilty as to one table and disbelieved the testimony as to the other table, while the other jurors may have found the opposite to be true.”⁸⁷ The court also reiterated its prior statement in *Jackson* that to “avoid violating a defendant’s right to a unanimous jury verdict in a multiple acts case, the state should be required to ‘elect’ the specific act on which it asks the jury to convict.”⁸⁸ In recognizing this principal as valid, the court noted “other states have guaranteed a unanimous verdict by allowing the prosecution either to elect the particular criminal act on which it will rely to support the charge or to require the trial court to specifically instruct the jury that it must agree on the same underlying criminal act.”⁸⁹ Based on this analysis, the court concluded a defendant’s right to a unanimous jury verdict is protected only through election of a particular criminal act, or submission of a specific unanimity instruction to the jury.⁹⁰

“Having determined the trial court erred by failing to correctly instruct the jury,” the court sought to determine “whether that error resulted in manifest injustice or a miscarriage of justice, thereby warranting reversal.”⁹¹ The court noted that the defendant “relied on evidentiary inconsistencies and factual improbabilities respecting each specific allegation of hand-to-genital contact” and distinguished *Celis-Garcia*’s case from “some statutory sodomy cases in which the defense simply argues that the victims fabricated their stories.”⁹² Based on these observations, the court found it “more likely that individual jurors convicted her on the basis of different acts,” and “the verdict directors misdirected the jury in a way that affected the verdict, thereby resulting in

83. *Id.*

84. 146 S.W. 1164 (Mo. 1912).

85. 146 S.W. 1166 (Mo. 1912).

86. *Celis-Garcia*, 344 S.W. 3d at 156.

87. *Id.*

88. *Id.* at 157 (citing *Jackson*, 146 S.W. at 1168).

89. *Id.*

90. *Id.* at 158.

91. *Celis-Garcia*, 344 S.W.3d at 158.

92. *Id.* at 158–59 (also acknowledging that “the jury was free to believe or disbelieve any of the witness testimony”).

manifest injustice.”⁹³ Consequently, the court reversed Ms. Celis-Garcia’s convictions for first-degree statutory sodomy.”⁹⁴

IV. AUTHOR’S ANALYSIS: EVIDENT AND NOT-SO-OBVIOUS ERROR

Quite significantly, *Celis-Garcia* created groundbreaking constitutional precedent in the face of “plain error” review. “Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.”⁹⁵ Plain error review under Rule 30.20 is therefore a two-step process in which the court first seeks to determine whether an obvious, clear error occurred, and then seeks to determine if a miscarriage of justice will result if the error is left uncorrected.⁹⁶ In criminal jury trials, “reversal is proper only if an evidentiary error was so prejudicial that it deprived the defendant of a fair trial.”⁹⁷ Missouri courts have made clear that a mistrial is a “drastic remedy” to be resorted to “only in the most extraordinary of circumstances” and when “the prejudicial effect of improper evidence or argument can be removed in no other way.”⁹⁸

In *State v. Germany*, a case decided eight months prior to *Celis-Garcia*, the Missouri Court of Appeals concluded the trial court’s submission of jury instructions with disjunctive verdict directors alleged in multiple counts did not constitute plain error in light of the defendant’s “overwhelming” guilt.⁹⁹ “Because his guilt was clear,” the court observed, “the effect of the disjunctive verdict director on the jury’s verdict, if any, did not result in manifest injustice.”¹⁰⁰ The court concluded, “a jury need only be unanimous as to the ultimate issue of guilt or innocence, and need not be unanimous as to the means by which the crime was committed.”¹⁰¹ Less than a year later, the Missouri Supreme Court made a drastic turnaround.

In *Celis-Garcia*, the court applied “clear error” analysis to conclude a miscarriage of justice had in fact occurred, and the defendant had been deprived of her right to a fair trial. This legal conclusion necessitates consideration as to why, if the error was so “clear” and “obvious,” appellate courts failed to discern the constitutional inadequacy of the Missouri Approved

93. *Id.* at 159.

94. *Id.*

95. Mo. Sup. Ct. R. 30.20.

96. 22 Mo. Prac., *Missouri Evidence* § 103.3 (3d ed. 2011).

97. *Id.*

98. *Id.* (citations omitted) (internal quotation marks omitted); *see also* United States v. Poitra, 648 F.3d 884, 887 (8th Cir. 2011) (finding plain error is that which seriously affects the fairness, integrity, or public reputation of judicial proceedings).

99. 323 S.W.3d 472, 477 (Mo. Ct. App. 2010).

100. *Id.* (citing *State v. Haynes*, 158 S.W.3d 918, 919–20 (Mo. Ct. App. 2005)).

101. *Id.* at 478. (internal quotation marks omitted).

Instruction for numerous decades. This author believes *Celis-Garcia* was correctly decided by the Missouri Supreme Court, and multi-count indictments alleging general time frames were not subject to judicial scrutiny for several reasons. First, as one appellate court observed in the 1990s, the *Oswald* case was decided in 1957,¹⁰² and the Missouri Supreme Court did not approve the first MAI criminal jury instructions until 1973.¹⁰³ Presumably, Missouri courts of appeals declined to invalidate general verdict directions under the assumption that the Missouri Supreme Court itself would amend any approved instructions that failed to adequately protect a defendant's right to a unanimous jury verdict. In the limited circumstances under which error was found by the court, such error was therefore determined not to be a miscarriage of justice warranting reversal. In addition, appellate courts seemingly forged an artificial distinction between the effect of duplicitous and multiplicitous indictments, further limiting *Oswald*'s ruling in an attempt to protect child victims. For these reasons, courts did not require additional measures to protect a defendant's unanimity and due process rights in multiple acts cases.

A. *Duplicity Distinguished*

As previously described in *Celis-Garcia*, multiple acts cases arise when there is evidence of "multiple, distinct criminal acts."¹⁰⁴ Multiple acts cases commonly involve acts remote in time and location that are motivated by fresh impulse.¹⁰⁵ When a multiple acts case exists, there are several steps a prosecutor must take in protecting against or responding to a unanimity challenge. First, the statutory language must be examined "to determine whether the legislature created multiple, separate offenses, or a single offense with alternative manners or means of commission."¹⁰⁶ Because sexual crimes like statutory sodomy may be found by a jury to have been committed by any

102. It warrants remembering that when *Oswald* was decided, the word "sodomy" alone was "sufficient to constitute a general verdict of guilty in prosecutions under § 563.230," without differentiation as to the means by which the crime was committed. *See Oswald*, 306 S.W.2d at 563.

103. *State v. Wilkins*, 872 S.W.2d 142, 147 (Mo. Ct. App. 1994). *But cf.* *State v. Pope*, 733 S.W.2d 811, 813 (Mo. Ct. App. 1987) (holding pattern instruction for deviate sexual intercourse that failed to specify deviate act with which defendant was charged allowed jurors to convict based on testimony as to other uncharged acts, entitling defendant to a new trial) ("Modifications of approved instructions are often called for by the facts of the case, Rule 28.02(d), and their use is always subject to their being 'applicable under the law to the facts', Rule 28.02(c). The obvious truth is stated in 'How to Use This Book' (1988 revision), MAI-CR2d at xviii: 'Most of the instructions were prepared upon various assumptions. If any one or more of those assumptions is not valid for a particular case the MAI-CR instruction may need adaption to the situation presented.'")

104. 344 S.W.3d at 155–56 (quoting 75b Am. Jur. 2d *Trial* § 1511 (2007)).

105. 75b Am. Jur. 2d *Trial* § 1511 (2007).

106. *Id.*

one of several defined criminal actions by the defendant, they constitute “single offense[s] with alternative manners or means of commission.”¹⁰⁷ Verdict directors presenting such alternative means of commission in the disjunctive create the problem of “duplicity,” defined as “the joining in a *single count* of two or more distinct and separate offenses.”¹⁰⁸

“One vice of duplicity is that a general guilty verdict against a defendant on that count does not reveal whether the jury found him guilty of one crime or . . . of [all potential crimes covered by the count].”¹⁰⁹ “Conceivably, this could prejudice the defendant in protecting himself against double jeopardy[,]” because “numerous acts of criminal conduct falling within a duplicitous count, together with generalized allegations of proof may” fail to “prevent a second prosecution from being brought against a defendant.”¹¹⁰

“Another vice of duplicity is that because the jury has multiple offenses to consider under a single count, the jury may convict without reaching a unanimous agreement on the same act, thereby implicating a defendant’s right to jury unanimity.”¹¹¹ This was the Missouri Supreme Court’s rationale in *State v. Oswald*. Because *Oswald* involved two offenses, either of which could have constituted the *single count* of statutory sodomy charged in the indictment, later courts mistakenly limited *Oswald*’s unanimity holding as specific to disjunctive, *either-or* verdict directors.¹¹² A proper reading of *Oswald*, however, reveals that the critical issue in all cases is whether there was “a concurrence of twelve jurors upon one definite charge of a crime,” regardless of whether the defendant’s criminal acts are splintered into separate counts or subsumed within a single count charged in the indictment.¹¹³

Confusingly, many child sexual abuse cases involve *multiple counts* of statutory sodomy, and statutory sodomy is a crime capable of commission by *alternative means*.¹¹⁴ Therefore, it is critical that the State determine in advance of trial whether multiple offenses will be contemplated within a *single count* or within *multiple counts*. As modern scholars recognize:

107. *Id.*; see also *Oswald*, 306 S.W.2d at 563 (finding the charged count of statutory sodomy could have been found by the jury to have been committed by means of the mouth *or* the rectum).

108. Thomas Lundy, *Jury Instruction Corner: Duplicity—Part Two: A Methodology for Determining When Specific Juror Unanimity Is Required*, 34 *Champion*, Dec. 2010, at 49, 49 (emphasis added).

109. *State v. Muhm*, 775 N.W.2d 508, 515 (S.D. 2009) (quoting *United States v. Starks*, 515 F.2d 112, 116 (3d Cir. 1975)).

110. *Id.* (internal quotation marks omitted).

111. *Id.* at 517 (citing *United States v. Garcia*, 400 F.3d 816, 819 (9th Cir. 2005)).

112. See, e.g., *State v. Brigham*, 709 S.W.2d 917, 922 (Mo. Ct. App. 1986).

113. See *infra* note 111 and accompanying text.

114. See, e.g., *State v. Hyman*, 37 S.W.3d 384, 386 (Mo. Ct. App. 2001); *State v. Wyatt*, 811 S.W.2d 55, 56 (Mo. Ct. App. 1991).

The unanimity of a verdict is jeopardized in multiple-count trials if more incidents of the offenses are presented than the number charged, and the jury receives no guidance from the trial court or indication from the State as to which offenses are to be considered for which verdict sheets. Also, charging in the disjunctive on separate offenses involving separate incidents runs afoul of the unanimity requirement for a jury verdict¹¹⁵

Therefore, when only a single count is charged, *Oswald* makes clear that the State may not submit a disjunctive verdict director.¹¹⁶ When multiple acts are presented to the jury in conjunction with a verdict director alleging multiple counts, specific election or instruction is required.

Unlike *Oswald*, cases like *Celis-Garcia* and its predecessors involving multi-count indictments charged within a general time frame create the danger of “multiplicity,” defined as the splintering of a single offense into separate counts of an indictment.”¹¹⁷ Therefore, “in . . . cases involving multiple acts, either an instruction must be given stating that the jurors must unanimously find the same underlying criminal act has been proved beyond a reasonable doubt, or the state must make an election as to the particular act upon which it will rely for conviction.”¹¹⁸ Defendants view the election requirement favorably because it enables focused defense preparation, protects the defendant against double jeopardy, and facilitates appellate review of the legal sufficiency of the evidence presented.¹¹⁹ In many states, a defendant’s failure to request an election by the prosecution necessitates a unanimity instruction given by the trial judge to the jury.¹²⁰

Missouri cases were slow to recognize the danger of multiplicity due to the artificial distinction forged by appellate courts between the effect of duplicitous and multiplicitous indictments. The appellate court in *Celis-Garcia* distinguished their decision from *Oswald* by reasoning that the specific act of sodomy was not presented in the disjunctive, and therefore Ms. Celis-Garcia “could not have been found guilty of first-degree statutory sodomy unless all of the jurors agreed” she was guilty of the count charged.¹²¹ In creating this distinction, the court limited *Oswald*’s unanimity requirement to protect only against the threat of duplicity. Although the indictment in *Oswald* was duplicitous rather than multiplicitous, *Oswald* ultimately stood for the proposition that each member of the jury must agree to the same set of facts constituting the crime charged in rendering a guilty verdict.¹²² Despite Celis-

115. 75b Am. Jur. 2d *Trial* § 1511 (2007).

116. *State v. Oswald*, 306 S.W.2d 559, 563 (Mo. 1957).

117. *State v. Muhm*, 775 N.W.2d 508, 514 (S.D. 2009).

118. 23A C.J.S. *Criminal Law* § 1647 (2011).

119. *Id.*

120. *Id.*

121. *State v. Celis-Garcia*, No. WD 69199, 2010 WL 1539849, at *4 (April 20, 2010).

122. *See State v. Oswald*, 306 S.W.2d 559, 563 (Mo. 1957).

Garcia's contention that the verdict directors lacked specificity as to the date and location of the offenses charged, the court turned a blind eye to multiplicity dangers in narrowly interpreting the MAI.

In determining that time is not of the essence in child sex crimes,¹²³ courts seemingly lost sight of the requirement that the particular acts alleged in an indictment must nonetheless be distinguished from one another and proven beyond a reasonable doubt. To rectify this error, the Missouri Supreme Court in *Celis-Garcia* drew from a developing body of caselaw in other states regarding a defendant's right to a unanimous jury verdict in multiple acts cases.¹²⁴

B. Elect or Instruct: Evolving National Precedent

As explained by the South Dakota Supreme Court in *State v. Muhm*, the most commonly followed procedure for balancing the need to prosecute cases involving repetitive acts charged in a single count against a defendant's due process and jury unanimity rights has been described as the "either/or rule."¹²⁵ This rule is derived predominantly from California caselaw. In *People v. Jones*, the California Supreme Court observed that several decisions of its lower court had developed an either/or rule applicable when the number of specific acts introduced at trial exceeded the number of acts pleaded in the information: "Either the prosecutor must select the acts relied on to prove the charges, or the jury must be given an instruction that it must unanimously agree beyond a reasonable doubt that the defendant committed the same specific criminal act."¹²⁶ Interestingly, the South Dakota Supreme Court additionally concluded that:

when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.¹²⁷

The court reasoned that because credibility is usually the "true issue," the jury will either "believe the child's testimony that the consistent, repetitive pattern of acts occurred or disbelieve it."¹²⁸

123. See *supra* notes 38–39 and accompanying text.

124. See *State v. Celis-Garcia*, 344 S.W.3d 150, 157 (Mo. 2011) (en banc).

125. 775 N.W.2d 508, 518 (S.D. 2009).

126. 792 P.2d 643, 649 (Cal. 1990) (en banc).

127. *Muhm*, 775 N.W.2d at 519 (citations omitted).

128. *Id.* at 520 (quoting *Jones*, 792 P.2d at 659) ("In either event, a defendant will have his unanimous jury verdict and the prosecution will have proven beyond a reasonable doubt that the

In an opinion somewhat in conflict with Missouri caselaw, the Supreme Court of Ohio recognized that while the prosecution must either “elect” or “instruct” in multiple acts cases, the same is not applicable to alternative means cases:

In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means. In reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt.¹²⁹

Several states have adopted verdict directors for use in both single and multi-count, multiple acts cases. The pattern Kansas instruction for single count, multiple act cases specifies that for the defendant to be found guilty of the crime charged, the jury “must unanimously agree on the same underlying act.”¹³⁰ In multiple *count* cases, the jury is instructed that “each crime charged . . . is a separate and distinct offense,” and each charge must be decided separately on the evidence and law applicable to it, uninfluenced by the jury’s decision as to any other charge.¹³¹

The state of California, on the other hand, adopted a multiple acts instruction specific to child sexual abuse cases.¹³² The verdict director specifies the counts in which the defendant is accused of having committed the particular crime, and also the general time frame in which the acts were alleged to have occurred. In its entirety, the verdict director reads:

Defendant is accused [in Count[s] _____] of having committed the crime of _____, a violation of section _____ of the Penal Code, on or about a period of time between _____ and _____.

In order to find the defendant guilty, it is necessary for the prosecution to prove beyond a reasonable doubt the commission of [a specific act [or acts] constituting that crime] [all of the acts described by the alleged victim] within the period alleged.

defendant committed a specific act, for if the jury believes the defendant committed all the acts it necessarily believes he committed each specific act.”).

129. *State v. Gardner*, 889 N.E.2d 995, 1005 (Ohio 2008); *c.f.* *State v. Oswald*, 306 S.W.2d 559, 563 (Mo. 1957) (“It cannot be determined that there was a concurrence of twelve jurors upon one definite charge of a crime.”).

130. PIK-CR3d. 68.09-B (2009).

131. PIK-CR3d. 68.07 (2009).

132. *See* CALJIC 17.01 (2011) (“In child molesting cases, when it is alleged defendant committed two or more crimes between certain dates, use CALJIC 4.71.5.”).

And, in order to find the defendant guilty, you must unanimously agree upon the commission of [the same specific act [or acts] constituting the crime] [all of the acts described by the alleged victim] within the period alleged.

It is not necessary that the particular act or acts committed so agreed upon be stated in the verdict.¹³³

The Use Note specifies this instruction is to be used “where the information charges an act or series of acts within a specified period and the prosecution has not elected to rely upon any specific date or dates, and the alleged criminal activity does not come within the continuous course of conduct exception.”¹³⁴

Washington adopted a specific election instruction to be used “for a case in which the jury heard evidence of multiple acts but the prosecutor has elected to specify one act as constituting the criminal conduct.”¹³⁵ This instruction informs the jury that the State, in alleging a particular crime, has relied upon evidence regarding a single act constituting the offense which must be proved and agreed to by the jury unanimously.¹³⁶ When no such election is made, the prosecution is instructed to use WPIC 4.25, which informs the jury they must unanimously agree to one of multiple acts constituting the offense.¹³⁷

C. *Missouri and Prosecutorial “Elect or Instruct” Strategy*

The “elect or instruct rule” is undoubtedly the new face of child sex crimes for Missouri prosecutors. In 2010 alone, 270 of the 292 victims of registered Missouri sex offenders were under the age of eighteen.¹³⁸ Of those child victims, forty were male and 230 were female.¹³⁹ National statistics show that sixty-seven percent of sexual assaults involve victims under eighteen, and approximately two-thirds of these sexual assaults are committed by someone known to the victim.¹⁴⁰ Based on the overwhelming number of child victims and the common familiarity these victims share with their perpetrators, prosecutors will be continually forced to rely on multi-count indictments alleged over a general time frame.

Nonetheless, no new instruction has been adopted by the Missouri Supreme Court since *Celis-Garcia* was decided. Presumably, trial judges have

133. CALJIC 4.71.5 (2011).

134. *Id.*

135. 11 WPIC 4.26 (3d ed. 2008).

136. *Id.*

137. 11 WPIC 4.25 (3d ed. 2008).

138. MISSOURI STATE HIGHWAY PATROL, *Missouri Sex Offender Registry: Summary of Victim Demographics Gender by Age Group, Offense Year 2010*, <http://www.mshp.dps.mo.gov/CJ38/statistics.jsp> (last visited May 20, 2012).

139. *Id.*

140. MISSOURI STATE HIGHWAY PATROL, *Sex Offender Registry Fact Sheet*, <http://www.mshp.dps.mo.gov/MSHPWeb/PatrolDivisions/CRID/SOR/factsheet.html> (last visited May 20, 2012) (citing U.S. Department of Justice, Bureau of Statistics 2007).

proceeded by issuing a unanimity instruction in conjunction with the verdict directors when the prosecution fails to elect a specific transaction or occurrence to constitute each offense charged in a criminal indictment. As suggested by the Missouri Practice Handbook, motions for bills of particulars may also be appropriate in some cases.¹⁴¹ Citing to *Celis-Garcia*, the Criminal Practice Handbook suggests that “some judges will insist that a bill of particulars be filed which fixes the time of the occurrence or occurrences with respect to certain events, such as the child’s birthday or a major holiday, so that the defendant has a reasonable idea as to the time frame in which the illegal conduct allegedly occurred.”¹⁴² In adding detail to verdict directors, however, prosecutors must avoid impermissibly commenting on the evidence adduced at trial. In *State v. Eaker*, a Washington court of appeals concluded a verdict director detailing the time of the offense as “while [the victim’s] parents were on vacation on the day that [defendant] was babysitting [the victim] and took him to his house” improperly assumed as undisputed the facts it alleged.¹⁴³

Practically speaking, *Celis-Garcia* makes clear that for prosecutors, the new face of child sex crimes is the “elect or instruct” rule. At first glance, instruction seems preferable to election because it affords the jury a great deal of latitude in finding the defendant guilty. Jurors need not specify the particular occurrence upon which their guilty verdict is based, and need only agree unanimously on a particular act for each count after considering all of the evidence introduced by the prosecution. While *Celis-Garcia* essentially overruled the reasoning of the Missouri Court of Appeals in *State v. Germany*, which focused on an overarching belief in the defendant’s guilt,¹⁴⁴ that same rationale generally underlies prosecutorial preference for instruction over election. As the South Dakota Supreme Court correctly observed, credibility is usually the “true issue” in child sex crimes, and the jury will either “believe the child’s testimony that the consistent, repetitive pattern of acts occurred or disbelieve it.”¹⁴⁵ In those cases, “the only question is whether the defendant in

141. 28 Mo. Cr. Prac. Handbook § 7:3 (2012); *see also* *State v. Mills*, 872 S.W.2d 875, 878 (Mo. App. Ct. 1994) (“Under Rule 23.04 a trial court has discretion to direct or permit the filing of a bill of particulars. Denial of a motion for a bill of particulars will not be disturbed unless an abuse of discretion is shown. In reviewing a trial court’s ruling for abuse in this regard we know that ‘[t]he function of such a bill is limited to that of informing the defendant of the particulars of the offense sufficiently to prepare his defense.’” (citations omitted)).

142. 28 Mo. Cr. Prac. Handbook § 7:3 (2012). The practice guide additionally notes that the State often responds to a motion for a bill of particulars by arguing that discovery will provide the answers required by the defendant, but this argument is improper “since the burden is not on the defendant to provide information sufficient to prepare a defense.” *Id.*

143. 53 P.3d 37, 41–42 (Wash. Ct. App. 2002).

144. *See supra* note 51 and accompanying text.

145. *State v. Muhm*, 775 N.W.2d 508, 520 (S.D. 2009).

fact committed all of [the acts.]"¹⁴⁶ Although jurors in multiple acts cases often believe or disbelieve the entirety of a child's allegations, this will not always be the case.

In many circumstances, it will be more favorable for the prosecution to rely solely on one underlying act for each count charged in order to ensure a guilty verdict. In issuing a unanimity instruction in cases involving young children who may be confused as to particular dates and occurrences, the prosecution risks that the jury will fail to reach unanimous agreement as to a particular count. By electing a single act for which the prosecution is able to produce the most convincing evidence, the prosecution is more likely to receive a favorable verdict.

D. A Breakdown of Prosecutorial Either/or Strategy

As previously established, the danger of multiplicity arises in a multiple acts case when the number of acts alleged exceeds the number of counts charged.¹⁴⁷ If the number of acts alleged in trial matches the number of counts charged against the defendant in the indictment, the only potential threat to a defendant's unanimity rights arises from the danger of duplicity. Duplicity is created only when the defendant is charged with an offense capable of commission by alternative means, such as statutory sodomy, and only when those means are presented within the indictment in the disjunctive.¹⁴⁸ So long as prosecutors are careful not to enable the jury to convict the defendant if they believe *any* of several acts constituting the offense occurred, prosecutorial either/or strategy will only come into play when the number of acts alleged at trial exceeds the number of counts charged in the indictment. Prosecutorial either/or strategy can arguably be broken down into three main steps, each of which is associated with a distinct trial phase.

Step One—Indictment Phase: The first step in prosecutorial either/or strategy begins in the indictment phase. If a defendant is alleged to have committed multiple offenses, the prosecution must carefully consider the number of counts with which the defendant will be charged for each offense. In criminal cases where the defendant is accused of child molestation or sexual assault, the Federal Rules of Evidence permit a trial court to admit evidence that the defendant committed any other child molestation or sexual assault.¹⁴⁹ In contrast, evidence of a defendant's prior acts of sexual misconduct is inadmissible under Missouri law as improper character evidence.¹⁵⁰ Even when

146. *Id.* at 519.

147. *See supra* notes 104–107 and accompanying text.

148. *See supra* notes 104–107 and accompanying text.

149. Fed. R. Evid. 413–14.

150. In *State v. Ellison*, the Missouri Supreme Court struck down Missouri Statute 566.025, which made evidence of a defendant's prior sexual misconduct admissible in sex cases, as

the prosecution intends to ultimately elect a single occurrence or transaction to constitute a charged offense, prosecutors should initially charge every possible count of sexual misconduct in order to introduce a full range of evidence against the defendant at trial. Failure to charge all relevant acts could result in the inadmissibility of the defendant's prior alleged acts involving the victim in some courts.

Step Two—Amendment Phase: Although many prosecutors are undoubtedly tempted to submit the maximum possible counts against a defendant to the jury for deliberation, judges rarely stack sentences consecutively. More often than not, a defendant's sentence for each count runs concurrently with the additional sentences,¹⁵¹ mitigating the benefit of charging multiple counts in a criminal indictment. Because jurors in multiple acts cases must now be completely unanimous as to which of the alleged acts they will rely upon in convicting the defendant for *each* count,¹⁵² prosecutors should consider amending the indictment to a single count for each offense charged based on the overall presentation of evidence at trial. In doing so, the prosecution arguably removes a great deal of potential confusion, disagreement, or even deadlock from jury deliberation.¹⁵³

Step Three—Instruction Phase: Finally, after amending the criminal indictment (and regardless of the number of counts charged for each offense), a special instruction explaining the prosecution's election of a single act or submission of a special unanimity instruction should be submitted to the jury. If the prosecution chooses to issue a special unanimity instruction, the jury may permissibly consider all of the acts introduced at trial in determining which it will rely upon in rendering a guilty verdict. When a special unanimity

violating Article I, sections 17 and 18(a) of the Missouri Constitution. *State v. Ellison*, 239 S.W.3d 603, 606 (Mo. 2007) (en banc); *see also* *State v. Davis*, 226 S.W.3d 167, 170 (Mo. Ct. App. 2007) (“As a general rule, evidence of uncharged misconduct is inadmissible for the purpose of showing the propensity to commit such crimes.”) (quoting *State v. Barriner*, 34 S.W.3d 139, 144 (Mo. 2000) (en banc) (holding evidence of prior misconduct may be admissible if it is logically relevant in establishing the defendant's guilt)).

151. 21A AM. JUR. 2d *Criminal Law* § 840 (2007).

152. *See State v. Celis-Garcia*, 344 S.W.3d 150, 158 (Mo. 2011) (en banc). It is no longer permissible for each individual juror to determine which incident he or she will rely upon in convicting the defendant.

153. One can easily imagine the inevitable jury deadlock that would ensue if multiple *offenses* were charged in multiple *counts*, and each count required that the jury be unanimous as to a particular act selected from multiple *acts* alleged. While there will certainly be situations where the prosecution charges and receives guilty verdicts on multiple counts, the added counts simply magnify the level of complexity faced by jurors in deliberating, more specifically when numerous offenses are alleged. Ultimately, the prosecution must balance its desire to seek guilty verdicts on multiple counts against the capacity of the jury to undertake deepening levels of analysis for multiple and distinct offenses.

instruction is issued to the jury in conjunction with the verdict directors, that instruction should read:

The defendant is accused in Count _____ of having committed the crime of _____. The State alleges that the defendant committed the crime of _____ on multiple occasions.

In order to find the defendant guilty of _____ in Count _____, one particular act of _____ must be proved beyond a reasonable doubt, and you must unanimously agree to the same particular act constituting the offense.

You need not unanimously agree that the defendant committed all the acts of _____, and it is not necessary that the particular act agreed upon be stated in the verdict.¹⁵⁴

In cases where the prosecution believes there is “no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them,”¹⁵⁵ prosecutors should consider submitting an additional, modified unanimity instruction to the jury. This instruction should read:

The defendant is accused in Counts _____ through _____ of having committed the crime(s) of _____ on multiple occasions.

If you unanimously agree that all of the acts alleged to have been committed by the defendant in Counts _____ through _____ have been proven beyond a reasonable doubt, you must find the defendant guilty of _____ in Counts _____ through _____.

If instead the prosecution chooses to elect a single act or occurrence to constitute the offense charged, the jury will focus their attention specifically on the act for which the prosecution is able to produce the strongest evidence. When the prosecution charges one count of a criminal offense and elects a single act to constitute that offense, the instruction submitted in conjunction with the verdict director should read:

In alleging the defendant committed the crime of _____, the State relies upon evidence regarding a single act constituting the alleged crime.

To convict the defendant of _____, you must unanimously agree that this specific act was proved.¹⁵⁶

154. This suggested instruction is patterned after WPIC 4.25 (3d ed. 2008) and PIK-CR3d 68.07 (2009).

155. *See supra* notes 127 and accompanying text. The South Dakota Supreme Court also stated this instruction should always be given where “the testimony of the victim recounts undifferentiated or generic occurrences of the sexual act,” because “neither an election nor a unanimity instruction is very helpful where the victim is unable to distinguish between a series of acts, any one of which could constitute the charged offense.” *State v. Muhm*, 775 N.W.2d 508, 519 (S.D. 2009).

156. This suggested instruction is patterned after WPIC 4.26 (3d ed. 2006).

When an offense is charged in multiple counts, the instruction prefacing the verdict directors should read:

In alleging the defendant committed the crime of _____ in Count _____, the State relies upon evidence regarding a single act constituting the alleged crime.

To convict the defendant on Count _____, you must unanimously agree that this specific act was proved.¹⁵⁷

This instruction must be reproduced for each count. Such instructions specifying and explaining the state's election of a particular occurrence cures the constitutional defect found by the court in *Celis-Garcia*, and the state may permissibly allege general time frames within the verdict directors for each count.¹⁵⁸ As established in early Missouri jurisprudence, such general time frames are permissible because time is not of the essence in child sex crimes, and the defendant is not unconstitutionally subjected to double jeopardy.¹⁵⁹

Courts have long held time is not of the essence in child sex abuse cases,¹⁶⁰ finding a "variance between allegation and proof is not fatal unless the variance [is] material to the merits of the case and prejudicial to the defense of the defendant."¹⁶¹ When the defendant is unable to raise or establish an alibi defense in trial, general allegations of time are properly upheld by the trial court.¹⁶² In these circumstances, the defendant is "adequately protected" by the requirement that the trier of fact, who "weigh[s] the witness's inability to specify the exact day and time of the alleged crime," as well as "the subsequent inability of the defendant to establish an alibi defense over so long a period of time," must find him guilty beyond a reasonable doubt.¹⁶³ Courts have held general time frames do not subject the defendant to double jeopardy because:

157. This suggested instruction is patterned after WPIC 4.26 (3d ed. 2006).

158. General timeframes may also be alleged in conjunction with a unanimity instruction for the same reasons.

159. See, e.g., *State v. Sexton*, 929 S.W.2d 909, 917 (Mo. Ct. App. 1996).

160. See *State v. Hoban*, 738 S.W.2d 536, 541 (Mo. Ct. App. 1987) (citations omitted). The court stated the following:

The state in the case at bar could not have been any more specific as to the date and time of occurrence. The child victim was unable to narrow the time span to a period shorter than while she was in the second and third grade. We find the more prudent rule of law to be reflected in those cases which expressly recognize that an alibi defense does not change the nature of the charges against the defendant or suddenly incorporate time as a necessary element of the offense. Any other rule would too often preclude prosecution of crimes involving child victims as here where the crimes are not discovered until some time after commission.

Id.

161. *State v. Douglas*, 720 S.W.2d 390, 393–94 (Mo. Ct. App. 1986) (quoting *State v. Jarrett*, 481 S.W.2d 504, 509 (Mo 1972)).

162. See *id.*

163. *Hoban*, 738 S.W.2d at 541–42.

“[w]hen time is not of the essence of an offense and the state is not confined in its proof to any specific date within the statute of limitations, a prosecution therefor[sic] will usually operate as a bar to a subsequent prosecution for this offense committed within the period of limitation at any time prior to the filing of the information or indictment.”¹⁶⁴

For the first time since *Celis-Garcia*, a Missouri appellate court validated this reasoning in *State v. Miller*.¹⁶⁵ Interestingly, the defendant in *Miller* was charged with ten counts of sexual abuse over an eight-year period¹⁶⁶ but convicted of only six counts.¹⁶⁷ Citing to *Celis-Garcia*, the court observed it is “well settled law” that “time is not ‘of the essence’” in sex offenses, and “the inclusion of a more restrictive time range in an instruction constitutes mere surplusage.”¹⁶⁸ The court further observed that “[u]nlike the time of the offense, which . . . is not an essential element thereof, the method of the charged offense, as prescribed by statute, is an essential element of the crime.”¹⁶⁹ The jury’s decision to find the defendant not guilty of four counts charged in the ten-count indictment lends further support to the idea that jurors are capable of differentiating between the various offenses alleged in a multi-count indictment, particularly when each offense is represented by one count.¹⁷⁰

CONCLUSION

In recognizing the changes effected by *Celis-Garcia*, it is equally important to recognize what has not changed. In Missouri, a high emphasis will continue to be placed on protecting child victims.¹⁷¹ The prosecution’s ability to submit general verdict directors in a multiple acts case has been affected only in that additional steps must be taken by the prosecution prior to deliberation in order to protect the defendant’s right to a unanimous jury verdict. While *Celis-Garcia* undoubtedly makes it more difficult for prosecutors to obtain guilty verdicts in multiple acts cases by adding an additional unanimity requirement, it also affords defendants necessary and critical constitutional protection in multiple acts cases.

In any multiple acts case, prosecutors will first need to determine the nature of the offenses charged in the indictment. For each offense capable of

164. *Douglas*, 720 S.W.2d at 395 (quoting 22 C.J.S. *Criminal Law* § 280 (1978)).

165. *State v. Miller*, No. WD 71175, 2011 WL 2446408, at *2 (Mo. Ct. App. June 21, 2011).

166. More specifically, the defendant was charged with one count for each offense.

167. *Miller*, 2011 WL 2446408 at *1.

168. *Id.* at *2.

169. *Id.* at *4. The court concluded that “[a]ccordingly, even if there is sufficient evidence to convict a defendant of the charged crime on an alternative basis for the offense permitted by statute, where that method was not submitted to the jury, the conviction cannot stand.” *Id.*

170. See *supra* note 53 and accompanying text.

171. See *supra* notes 42–44.

commission by alternative means, the prosecution must then determine which means of commission are relevant to the case.¹⁷² For each of these alternative means, at least one count should be charged within the general time frame established by the victim so as not to limit the admissibility of evidence at trial. The prosecutor should be as specific as possible in alleging this time frame so as to enable the defendant to adequately prepare his or her defense. As noted in *Celis-Garcia*, this will be particularly important when the defendant's trial strategy is to rely upon the "evidentiary inconsistencies and factual improbabilities respecting each specific allegation."¹⁷³ At the close of the evidence, prosecutors must strategically determine whether to proceed on all counts or to amend the indictment so that each offense is represented by one count. Finally, after determining the number of counts upon which it will rely, the prosecution must decide whether to elect one underlying act to constitute the charged offense for each count or to submit a special unanimity instruction to the jury for deliberation.¹⁷⁴ In cases where the defendant's guilt is overwhelming and the entirety of the child's testimony is likely to be received by the jury as credible—or alternatively where the child has difficulty articulating and distinguishing between the various offenses—the jury should arguably receive a special unanimity instruction. When the defendant is likely to rely on evidentiary inconsistencies and factual improbabilities, as is often the case in child sex crimes, a specific election by the prosecution will arguably be more beneficial.

Celis-Garcia is a hallmark decision in Missouri constitutional law because of the protection it affords defendants in all multiple acts cases, irrespective of subject matter. By requiring the most stringent possible standard of specificity in verdict directors, a defendant's right to a unanimous jury verdict is properly safeguarded from duplicitous and multiplicitous indictments. When approached strategically by prosecutors, the either/or rule will not burden criminal convictions, but rather strengthen the overall criminal justice system.

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172. See *infra* Addendum.

173. State v. Celis-Garcia, 344 S.W.3d 150, 159 (Mo. 2011) (en banc) ("[T]he fact that Ms. Celis-Garcia relied on evidentiary inconsistencies and factual improbabilities respecting each specific allegation of hand-to-genital contact makes it more likely that individual jurors convicted her on the basis of different acts." (emphasis added)).

174. Still, if the single count charged represents an offense capable of commission by alternative means, the prosecution must ensure such means are not submitted in the disjunctive within the verdict director. Arguably, this is a "forced" election in that the prosecution must specify to the jury upon which means it will rely for a conviction.

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ADDENDUM: PROSECUTORIAL EITHER/OR CHECKLIST

Table 1: Offenses Involving “Deviate Sexual Intercourse”¹⁷⁵

Offenses	Means of Commission
<u>FORCIBLE & STATUTORY SODOMY</u>	<u>CONTACT BETWEEN VICTIMS GENITALS AND. . .</u>
§ 566.060	<ul style="list-style-type: none"> • Defendant’s Hand • Defendant’s Mouth • Defendant’s Tongue • Defendant’s Anus
§ 566.062	
§ 566.064	
<u>DEVIATE SEXUAL ASSAULT</u>	<u>CONTACT BETWEEN DEFENDANTS GENITALS AND. . .</u>
§ 566.070	<ul style="list-style-type: none"> • Victim’s Hand • Victim’s Mouth • Victim’s Tongue • Victim’s Anus
	<u>PENETRATION OF VICTIM’S SEX ORGAN BY. . .</u>
	<ul style="list-style-type: none"> • Defendant’s Finger • Instrument or Object
	<u>PENETRATION OF VICTIM’S ANUS BY. . .</u>
	<ul style="list-style-type: none"> • Defendant’s Finger • Instrument or Object

175. Mo. Rev. Stat. 566.010(1) (2006). As evidenced by Table 1, any offense involving “deviate sexual intercourse” could potentially be committed by any one of twelve alternative means for each count charged. If multi-count indictments submitted to juries failed to allege the specific act constituting the offense for each count charged, one can easily imagine scenarios in which jurors would be able to individually select from as many as 50+ alleged occurrences in unanimously finding the defendant guilty.

Table 2: Offenses Involving “Sexual Contact”¹⁷⁶

Offenses	Means of Commission
<u>CHILD MOLESTATION</u>	<u>DEFENDANT TOUCHES VICTIM’S . . .</u>
§ 566.067	• Genitals
§ 566.068	• Anus
	• Female Breasts
	• Any of Above through Clothing
<u>SEXUAL MISCONDUCT</u>	
§ 566.090	
§ 566.093	<u>DEFENDANT TOUCHES VICTIM</u>
§ 566.095	<u>WITH HIS/HER GENITALS</u>
<u>SEXUAL ABUSE</u>	
§ 566.100	

176. Mo. Rev. Stat. 566.010(3) (2006). As evidenced by Table 2, any offense involving “sexual contact” could potentially be committed by any one of five alternative means for each count charged.

