NO. SC85234

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. COREY RYAN GREEN,

Petitioner,

v.

JIM MOORE,

Superintendent, Northeast Correctional Center

Respondent.

ORIGINAL PROCEEDING IN HABEAS CORPUS

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

JEREMIAH W. (JAY) NIXON
Attorney General

ANDREW W. HASSELL
Assistant Attorney General
Missouri Bar No. 53346

P. O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Statutes and Constitutional Provisions

Rules

JURISDICTIONAL STATEMENT

This case is an original proceeding in habeas corpus. This Court has jurisdiction to determine original writs pursuant to Article V, §4, of the Missouri Constitution (as amended 1976). Petitioner Corey Ryan Green is currently incarcerated at the Northeast Correctional Center in Bowling Green, Missouri, pursuant to the judgment and sentence of the Circuit Court of Boone County, Missouri. Petitioner pled guilty to one count of second-degree murder, §565.021.1(2), RSMo 2000, and one count of armed criminal action, §571.015, RSMo 2000, and was sentenced to two consecutive ten-year terms in the custody of the Missouri Department of Corrections. Respondent Jim Moore, superintendent of the Northeast Correctional Center, is the proper party respondent. Missouri Supreme Court Rules 91.04 and 91.07.

STATEMENT OF FACTS

Petitioner Corey Green is currently incarcerated in the Northeast Correctional Center in Bowling Green, Missouri, pursuant to the judgment and sentence of the Circuit Court of Boone County, Missouri. Petitioner pled guilty to one count of second-degree felony murder and one count of armed criminal action on August 3, 1998, and was sentenced to consecutive ten-year terms in the custody of the Missouri Department of Corrections on September 14, 1998. Resp. App. at A4-A5.

On March 1, 1998, petitioner Green pointed a shotgun at Tasha Stewart, pulled the trigger, and killed Stewart. Resp. App. at A5, A8, A14-A16. Before shooting Stewart, petitioner assembled the shotgun, fired one round from the shotgun, chambered a second round, threatened to commit suicide. Resp. App. at A15-A16. Petitioner was at least four feet from Stewart when he shot her. Resp. App. at A16.

Petitioner did not file a post-conviction motion under Rule 24.035. Petitioner filed petitions for writs of habeas corpus in the Circuit Court of Pike County, Pet. App. A12, and the Missouri Court of Appeals, Pet. App. A22, both of which were denied without comment, Pet. App. A22 and A34. Petitioner then filed a petition for writ of habeas corpus in this Court. Pet. App. A36. This Court issued a writ of habeas corpus on August 26, 2003. Resp. App. at A48.

ARGUMENT

A. Petitioner's claim is procedurally barred

Petitioner raises one claim in his petition for habeas corpus. Petitioner claims that his conviction for armed criminal action violates the Double Jeopardy Clauses of the state and federal constitutions.[1] Petitioner contends that the Double Jeopardy Clause prohibits the imposition of an additional punishment for armed criminal action in cases where the underlying felony for the armed criminal action count is second-degree felony murder and the underlying crime for the felony murder is unlawful use of a weapon. Petitioner did not raise this claim in a timely motion for post-conviction relief under Rule 24.035. Therefore, this claim is procedurally barred. State ex rel. Nixon v. Jaynes, 63 S.W.3d 210, 214 (Mo. banc 2001). Petitioner may overcome the procedural bar only if petitioner establishes:

> (1) a claim of actual innocence or (2) a jurisdictional defect or (3)(a) that the procedural default was caused by something external to the defense--that is, a cause for which the defense is not responsible--and (b) prejudice resulted from the underlying error that worked to his actual and substantial disadvantage.

Brown v. State, 66 S.W.3d 721, 731 (Mo. banc 2002).

[1]Petitioner does not challenge the felony murder plea, conviction, and sentence.

In the case at bar, petitioner makes no claim of actual innocence and cannot raise a claim of actual innocence following a guilty plea except in the most unusual of circumstances. *See* Weeks v. Bowersox, 119 F.3d 1342, 1355-56 (8th Cir. 1997)(en banc)(Loken., J., concurring), *cert. denied* 522 U.S. 1093 (1998). Likewise, petitioner does not make any allegation that his failure to raise this claim in a Rule 24.035 motion was caused by a factor external to the defense. Petitioner therefore cannot rely on actual innocence or cause and prejudice to overcome the procedural default in this case. Therefore, unless petitioner can show a jurisdictional defect in this case, he cannot overcome the procedural bar.

B. Petitioner cannot demonstrate a jurisdictional defect

This Court has held that "a plea of guilty voluntarily and understandably made waives all non-jurisdictional defects and defenses." Hagan v. State, 836 S.W.2d 459, 461 (Mo. banc 1992), *quoting* State v. Cody, 525 S.W.2d 333, 335 (Mo. banc 1975). Missouri law is well established that double jeopardy is a personal defense that is subject to waiver. Hagan, *supra*; State v. Dunn, 7 S.W.3d 427, 430 (Mo. App., W.D. 1999); State v. Baker, 850 S.W.2d 944, 947 (Mo.App., E.D. 1993); State v. Bacon, 841 S.W.2d 735, 741 (Mo.App., S.D. 1992).

This Court in Hagan held that the sole exception to the general rule that double jeopardy can be waived "exists where it can be determined *on the face of the record* that the court had no power to enter the conviction or impose the sentence." Hagan,

836 S.W.2d at 461 (emphasis in original opinion). This Court defined the "face of the record" as "solely" the information or indictment and the guilty plea transcript. Hagan, *supra.* This Court cited language from the Supreme Court's decision in United States v. Broce, 488 U.S. 563, 569, 109 S.Ct. 757, 762, 102 L.Ed.2d 927 (1989), in support of its decision.

However, the United States Supreme Court's double jeopardy analysis is not as clear as this Court's decision in Hagan suggests. Double jeopardy encompasses three areas: a prohibition against a new trial afer an acquittal, a prohibition against a new trial after a conviction, and cumulative punishments for the same offense. North Carolina v. Pierce, 395 U.S. 711, 719, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); Hagan, 836 S.W.2d at 462. The situation in this case does not deal with successive prosecutions; it only deals with the question of cumulative punishments for an offense.

This Court's decision in Hagan states that "the right to be free from double jeopardy is a constitutional right that goes 'to the very power of the State to bring the defendant in the court to answer the charges against him.'" Hagan, 836 U.S. at 461, *quoting* Cody, *supra*, 525 S.W.2d at 335, *quoting* Blackledge v. Perry, 417 U.S. 21, 30-31, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). However, the Supreme Court precedent that this Court cited, Blackledge v. Perry, is a successive prosecution case, not a cumulative punishment case. The Supreme Court's jurisprudence reveals a large

difference between a court's jurisdiction in double jeopardy cases involving successive prosecutions as opposed to jurisdiction in cases involving cumulative punishments.

1. The Double Jeopardy Clause's bar against cumulative punishments applies only at sentencing, not at the time of indictment

The United States Supreme Court has held that "in the multiple punishments context, [the] interest [that the Double Jeopardy Clause exists to protect] is 'limited to ensuring that the total punishment did not exceed that authorized by the legislature.'" Jones v. Thomas, 491 U.S. 376, 381, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989), *quoting* United States v. Halper, 490 U.S. 435, 450, 109 S.Ct. 1892, 1903, 104 L.Ed.2d 487 (1989). The Court continued by stating that "[t]he purpose is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." Jones, 491 U.S. at 381. The purpose of the Double Jeopardy Clause's prohibition against cumulative punishments, therefore, looks only to sentencing after conviction and trial. The Double Jeopardy Clause, in the context of cumulative punishments, does not look at the power of the State to indict a criminal defendant or otherwise bring a defendant before a criminal tribunal.

2. The *Hagan* exception extends only to successive prosecution cases

The United States Supreme Court in United States v. Broce, 488 U.S. 563, 569, 109 S.Ct. 757, 762, 102 L.Ed.2d 927 (1989), examined the rule in Blackledge, *supra*, and Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975), and determined that the defendants in Blackledge and Menna both had not waived double jeopardy as part of a guilty plea because both defendants were subject to successive prosecutions. 488 U.S. at 574-575. The defendant in Blackledge, after conviction on a misdemeanor charge of assault, was indicted on a felony assault charge based on the same facts after attempting to appeal the misdemeanor conviction. 488 U.S. at 574. The defendant in Menna was indicted for refusal to answer grand jury questions after previously being found in contempt of court for refusing to answer to same questions. 488 U.S. at 575. The Supreme Court in Broce determined that

> In Blackledge, the concessions implicit in the defendant's guilty plea were simply irrelevant, because the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all. In Menna, the indictment was facially duplicative of the earlier offense of which the defendant had been convicted and sentenced so that the admissions made by Menna's guilty plea could not conceivably be construed to extend beyond a redundant confession to the earlier offense.

488 U.S. at 575-76. Therefore, the exception in Blackledge, cited by approval by this Court in Hagan, applies only to successive prosecution cases, not cumulative punishment cases.

This conclusion is butressed by the Supreme Court's analysis in Broce. The defendants in Broce contended that the indictment was insufficient in that the two conspiracies charged were only one large conspiracy. 488 U.S. at 567-68. Thus, the Broce defendants were pursuing a double jeopardy claim based on cumulative punishment for the same offense. The Court determined that "[j]ust as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes." 488 U.S. at 570. The Court then stated that

> Respondents here, in contrast, pleaded guilty to indictments that on their face described separate conspiracies. They cannot prove their claim by relying on those indictments and the existing record. Indeed, as noted earlier, they cannot prove their claim without contradicting those indictments, and that opportunity is foreclosed by the admissions inherent in their guilty pleas.

488 U.S. at 576. Therefore, the Court's conclusion is that double jeopardy does not provide a bar to prosecution but rather a defense at trial in cases involving cumulative punishment. *See* Broce, 488 U.S. at 571 ("Respondents had the opportunity, instead

of entering their guilty pleas, to challenge the theory of the indictments and to attempt to show the existence of only one conspiracy in a trial-type proceeding. They chose not to, and hence relinquished that entitlement.").

The United States Supreme Court thus has determined that double jeopardy, although barring successive prosecutions, is not a total bar to cumulative punishment. The Double Jeopardy Clause's protection against cumulative punishment may be waived by a knowing and voluntary plea of guilty. In the case at bar, petitioner entered a knowing a voluntary plea of guilty to one count of second-degree felony murder and one count of armed criminal action, two facially distinct crimes. As in Broce, petitioner could have proceeded to trial and attempted to show that these crimes incorporated the same acts. Petitioner however, relinquished that right when he pled guilty. The plea court thus had jurisdiction to accept petitioner's plea. Petitioner therefore cannot show a jurisdictional defect, and his claim is procedurally barred.

B. Petitioner was properly convicted of armed criminal action

Even assuming that petitioner can overcome the procedural bar in this case, petitioner's claim fails. The central issue of this case is whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution precludes conviction of a criminal defendant under Missouri's armed criminal action statute, §571.015, RSMo 2000, where the underlying felony for the armed criminal action was second-

degree felony murder, and the underlying felony for second-degree murder is unlawful use of a weapon. Petitioner cannot prevail on this claim.

1. Legal standard for double jeopardy claims

The Double Jeopardy Clause provides that "[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb." Hagan v. State, 836 S.W.2d 459, 460 (Mo. banc 1992), *quoting* U.S. Const. amend. V. The United States Supreme Court has directly addressed the question of when cumulative punishments violate the Double Jeopardy Clause. The Court squarely ruled that

> Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under [Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)], a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Missouri v. Hunter, 459 U.S. 359, 368-69, 103 S.Ct. 673, 679, 74 L.Ed.2d 435 (1983). This Court has articulated an identical standard. State v. Flenoy, 968 S.W.2d 141, 144-45 (Mo. banc 1998); State v. McTush, 827 S.W.2d 184, 186 (Mo. banc 1992). Therefore, this case turns solely on the Missouri General Assembly's authorization for the cumulative punishments in this case.

As the General Assembly's authorization is controlling in this case, this Court should interpret the armed criminal action statute to determine legislative intent. In matters of statutory interpretation, this Court looks to the plain and ordinary meaning of the words in the statute. As this Court has explained,

> "Where the language of a statute is unambiguous, courts must give effect to the language used by the legislature." [American Standard Ins. Co. v. Hargrave, 34 S.W.3d 88, 90 (Mo. banc 2000)]. This Court has a duty to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in their plain and ordinary meaning. Rules of construction are not to be used if the statute contains no ambiguity.

Kerperien v. Lumberman's Mut. Cas. Co. 100 S.W.3d 778, 781 (Mo. banc 2003).

2. The armed criminal action statute applies to all felonies that are not specifically excluded by the statute

The armed criminal action statute, §571.015.1, RSMo 2000, provides that "any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action." As the Missouri Court of Appeals, Western District, has recognized that "[t]he term 'any' is defined by Webster's New World College Dictionary 62 (3rd ed.1997) as "one, no matter which, of more than two ... without limit ... every.'" State v. Williams, 24 S.W.3d 101, 115 (Mo.App., W.D. 2000). This

Court, in the context of interpreting the Missouri Constitution, has held that the "[t]he word 'any' as used in a constitutional provision is 'all-comprehensive, and is equivalent to 'every.'" Boone County Court v. State, 631 S.W.2d 321, 325 (Mo. banc 1982), *quoting* State ex rel. Randolph County v. Walden, 357 Mo. 167, 206 S.W.2d 979, 983 (1947). Therefore, giving the "any felony" language of the statute its plain and ordinary meaning, "any felony" means "every felony." The General Assembly thus specifically provided for and authorized cumulative punishment for every felony in which a dangerous instrument or deadly weapon was used except for those listed in §571.015.4, RSMo 2000.

The General Assembly's intent becomes even more clear when §571.015 is read in conjunction with §571.017, RSMo 2000. Section 571.017 provides that

> Nothing contained in any other provision of law, except as provided in subsection 4 of section 571.015, shall prevent imposition of sentences for both armed criminal action and the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon.

Section 571.017 plainly indicates that the only exceptions to the armed criminal action statute are found in §571.015.4 Therefore, the General Assembly, with only one exception, has specifically authorized cumulative punishment for armed criminal action and the underlying felony. State v. Flenoy, 968 S.W.2d 141, 145 (Mo. banc 1998).

3. The armed criminal action statute does not exclude second-degree felony murder

The General Assembly's one exception to the "all felony" requirement for armed criminal action is that "the provisions of this section shall not apply to the felonies defined in sections 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo." §571.015.4, RSMo 2000. Reference to the 1969 version of the Missouri Revised Statutes establishes that the following felonies are excepted from the armed criminal action statute:

1. Section 564.590, RSMo 1969 (current §571.020.1(2), RSMo 2000) prohibited possession of machine guns.
2. Section 564.610, RSMo 1969 (§571.030, RSMo 2000, *repealed by* SB83 (eff. Aug. 25, 2003; currently codified at §§50.535, 571.030, and 571.094 (RSMo Supp. 2003)), prohibited concealed weapons and the dangerous use of weapons.
3. Section 564.620, RSMo 1969 (current §571.050, RSMo 2000) prohibited possession of defaced firearms.
4. Section 564.630, RSMo 1969 (current §571.090, RSMo 2000) set out standards for issuing a permit to carry a concealed weapon.
5. Section 564.640, RSMo 1969 (current §571.050, RSMo 2000, and §571.080, RSMo 2000) prohibited the sale of defaced firearms and the sale of concealable firearms to a person without a permit.

In the case at hand, petitioner was convicted of second-degree felony murder pursuant to §565.021.1(2), RSMo 2000. Resp.App. at A-4-5. Petitioner was convicted of armed criminal action

based on the second-degree murder charge. Resp.App. at A4-A5. As shown above, the General Assembly did not include second-degree murder, felony or otherwise, in the list of crimes excepted from the armed criminal action statute, §571.015.4, RSMo 2000. Second-degree felony murder thus is not one of the crimes specifically excepted from the reach of the armed criminal action statute. The General Assembly stated that the exceptions in §571.015.4 are the only exceptions to the "all felonies" standard in §571.015.1. Therefore, the legislature has specifically authorized cumulative punishment for felony murder in the form of armed criminal action. State v. Flenoy, 968 S.W.2d 141, 145 (Mo. banc 1998). Second-degree felony murder thus may be the underlying felony for armed criminal action because second-degree murder is not one of the felonies excepted by §517.015.4, RSMo 2000. This conclusion is further bolstered by the fact that Missouri courts have consistently upheld cases in which a criminal defendant has been convicted of armed criminal action with the underlying felony being felony murder. State v. Hodges, 66 S.W.3d 83, 84 (Mo.App., W.D. 2001); State v. Gheen, 41 S.W.3d 598, 602 (Mo.App., W.D. 2001); State v. Dudley, 51 S.W.3d 44, 47-48 (Mo.App., W.D. 2001); State v. Gilmore, 22 S.W.3d 712, 714 (Mo.App., W.D. 1999); State v. Boyd, 992 S.W.2d 213, 217 (Mo.App., E.D. 1999). Petitioner's conviction for armed criminal action thus does not violate the Double Jeopardy Clause.

In summary, the General Assembly intended for armed criminal action to be a cumulative punishment to "any felony." The armed criminal action statute does not specifically except second-degree felony murder, and second-degree felony murder thus is a proper underlying felony for armed criminal action. The armed criminal action count at issue in this case was predicated on a second-degree felony murder count. Therefore, the circuit court had jurisdiction to accept petitioner's guilty

plea on the armed criminal action court, enter judgment, and sentence petitioner to imprisonment on the armed criminal action count. Therefore, petitioner's double jeopardy claim fails.

C. Second-degree felony murder is not "completely dependent" on the felony of unlawful use of a weapon

In an attempt to avoid the plain language of Missouri v. Hunter and §571.015, RSMo 2000, petitioner argues that the offense of second-degree felony murder in this case is "completely dependant" on the felony of unlawful use of a weapon. Pet. Br. at 13-14. The logical extension of this argument is that because felony murder is completely dependant upon unlawful use of a weapon, and because unlawful use of a weapon cannot be the underlying felony for armed criminal action, second-degree felony murder based on unlawful use of a weapon cannot be the underlying felony for armed criminal action. Petitioner's argument reflects the reasoning of the Court of Appeals, Western District in Ivy v. State, 81 S.W.3d 199 (Mo.App., W.D. 2002) and Couts v. State, no. WD61714 (slip op.) (Mo.App., W.D., July 15, 2003), *motion for transfer pending*, no. SC85556 (Mo. banc, motion to transfer filed Sept. 12, 2003).

1. The Court of Appeals' decisions in *Ivy v. State* and *Couts v. State* are contrary to *Missouri v. Hunter* and should be overruled

Petitioner argues that Ivy v. State, 81 S.W.3d 199 (Mo.App., W.D. 2002) is persuasive authority in this case. While the facts in Ivy are similar, if not identical, to the facts in the case at bar, the Court of Appeals' reasoning in Ivy is flawed. The court in Ivy stated that the issue in that case was "whether the felony murder charge predicated solely upon the 'unlawful use of a weapon' required proof of different facts from the armed criminal action charge." Ivy, 81 S.W.3d at 207. However, this formulation of the

issue is at odds with Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 435 (1983). Hunter specifically states that "*regardless* of whether [the] two statutes proscribe the same conduct," cumulative punishment does not violate the Double Jeopardy Clause in cases where the legislature has specifically authorized cumulative punishment. Hunter, 459 U.S. at 368-69 (emphasis added). Analysis of whether felony murder requires different facts than armed criminal action thus is irrelevant. Ivy therefore misinterprets the law as defined by the United States Supreme Court.

As stated in Missouri v. Hunter, the sole factor in determining the double jeopardy issue is whether the legislature specifically authorized cumulative punishment by statute. As previously shown, the General Assembly did not except second-degree murder from the armed criminal action statute and stated that the armed criminal action statute extended to "any felony." The armed criminal action statute thus extends to second-degree murder, the crime at issue in this case. Ivy thus should not be followed in this case, and, as it is contrary to the United States Supreme Court precedent of Missouri v. Hunter, Ivy should be overruled.

The Missouri Court of Appeals, Western District, recently reaffirmed its holding in Ivy in Couts v. State, no. WD61714 (slip op.) (Mo.App., W.D., July 15, 2003), *motion for transfer pending*, no. SC85556 (Mo. banc, motion to transfer filed Sept. 12, 2003). As the holding in Couts is identical to the holding in Ivy, *see* slip op. at 5-6, Resp. App., at A41-A42, the Court of Appeals' decision in Couts should be overruled as well.

2. Second-degree murder is a separate felony than unlawful use of a weapon

Second-degree felony murder is defined in §565.021.1(2), RSMo 2000. The statute defines felony murder as follows:

> 1. A person commits the crime of murder in the second degree if he:(2) Commits or attempts to commit any felony, and, in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, another person is killed as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony.

The elements of second-degree felony murder therefore are 1) the commission or attempted commission of any felony, and 2) the death of a person in the commission or attempted commission of that felony as a result of the felony or attempted felony. *See* State v. Williams, 24 S.W.3d 101, 118 (Mo.App., W.D. 2000).

The crime of second-degree felony murder requires a death in the course of the underlying felony. The offense of unlawful use of a weapon does not require a death. *See* §571.030, RSMo Supp. 2003. Felony murder is thus a separate and distinct offense from unlawful use of a weapon because it requires an additional element: a human death. Therefore, contrary to petitioner's reasoning, *see* Pet. Br. at 14, the offense upon which petitioner's armed criminal action conviction is predicated is not simply unlawful use of a weapon. The underlying offense is second-degree murder with its additional element of a human death. As previously demonstrated in respondent's brief, §571.015.4, RSMo 2000, does not exclude the offense of second-degree murder from the application of the armed criminal action statute. Therefore, petitioner properly was convicted of armed criminal action based on the felony of second-degree murder.

CONCLUSION

For the above reasons, respondent prays that this Court deny the petition for writ of habeas corpus after briefing and argument.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

ANDREW W. HASSELL
Assistant Attorney General
Missouri Bar No. 53346
P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
(573) 751-3825 Fax

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains _____ words, excluding the cover and this certification, as determined by WordPerfect 9 software; that the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using McAfee Anti-virus software, and is virus-free; and that a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of _____, 2003, to:

Ms. Phebe La Mar, Esq.
SMITH LEWIS, LLP
111 South Ninth Street, Suite 200
Columbia, Missouri 65205-0918

JEREMIAH W. (JAY) NIXON
Attorney General

ANDREW W. HASSELL
Assistant Attorney General
Missouri Bar No. 53346

P. O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321
(573) 751-3825 Fax

Attorneys for Respondent

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APPENDIX TO RESPONDENT'S BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

ANDREW W. HASSELL
Assistant Attorney General
Missouri Bar No. 53346

P. O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321

Attorneys for Respondent

Appendix Table of Contents

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§571.015, RSMo 2000

1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the department of corrections and human resources for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the department of corrections and human resources for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the department of corrections and human resources for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

§571.017, RSMo 2000

Nothing contained in any other provision of law, except as provided in subsection 4 of section 571.015, shall prevent imposition of sentences for both armed criminal action and the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon.

§565.021, RSMo 2000

1. A person commits the crime of murder in the second degree if he:

   (1) Knowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person; or

   (2) Commits or attempts to commit any felony, and, in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, another person is killed as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony.

2. Murder in the second degree is a class A felony, and the punishment for second degree murder shall be in addition to the punishment for commission of a related felony or attempted felony, other than murder or manslaughter.

3. Notwithstanding section 556.046, RSMo, and section 565.025, in any charge of murder in the second degree, the jury shall be instructed on, or, in a jury-waived trial, the judge shall consider, any and all of the subdivisions in subsection 1 of this section which are supported by the evidence and requested by one of the parties or the court.

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the a true and correct copy of the attached appendix was mailed, postage prepaid, this ___ day of _____, 2003, to:

Ms. Phebe La Mar, Esq.
SMITH LEWIS, LLP
111 South Ninth Street, Suite 200
Columbia, Missouri 65205-0918

JEREMIAH W. (JAY) NIXON
Attorney General

ANDREW W. HASSELL
Assistant Attorney General
Missouri Bar No. 53346

P. O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321
(573) 751-3825 Fax

Attorneys for Respondent