IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No.SC 84855
	)	
RONNIE GAINES,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
31st JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE HENRY W. WESTBROOKE, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Ronnie Gaines, appeals from his conviction of one count of assault in the second degree, Section 565.060, RSMo 1994, after a jury trial in Greene County, Missouri. The Honorable Henry W. Westbrooke sentenced Mr. Gaines, as a prior offender, to a six year term of imprisonment. After the Missouri Court of Appeals, Southern District, issued its opinion reversing the conviction in SD 24252, this Court granted the Respondent's Application for Transfer pursuant to Rule 83.02. This Court has jurisdiction of this appeal under Article V, Section 10, Mo. Const. (as amended 1976).

STATEMENT OF FACTS

Terri Raye Tarwater met Ronnie Gaines in the summer of 1997 while waiting for a bus (Tr. 271). Shortly thereafter, Gaines moved in with Tarwater (Tr. 272). On December 12, 1997, Tarwater had run a bath for her daughter (Tr. 275). She was telling Gaines to get out, and she went to the closet and began throwing his things out (Tr. 274). The couple scuffled, and Gaines put Tarwater's head under the water in the bathtub (Tr. 276). After a "couple of seconds", she was able to fight him off and she grabbed a can of hair spray for protection (Tr. 276). Gaines knocked the hairspray out of her hands (Tr. 276). He took one of her coats and tried to rip it up (Tr. 276). At that point someone knocked on the front door and Gaines went to answer it (Tr. 276-277). Tarwater grabbed one of Gaines' coats and a pair of scissors and started to cut it up as "pay back" (Tr. 277). The next thing Tarwater remembered was Gaines hitting her with his fist, knocking her to the floor (Tr. 278). When she looked up, Gaines was leaning against the baby's bed smoking a cigarette (Tr. 278). He flicked his ashes on Tarwater and said "Die, bitch." He then picked her up, put her in the bathtub and wiped the blood from her face (Tr. 278).

A neighbor saw Tarwater a couple of days later and called the police (Tr. 279). The police came and took photographs of her face (Tr. 279). Later, Tarwater went to the emergency room because her face would not stop hurting (Tr. 282). She told the emergency room personnel either that she had been in a car

wreck or that she'd fallen down some stairs, to protect "Ronnie, because I liked him. I didn't want nothing to happen." (Tr. 283).

When the doctor confronted her with the fact that her injuries were not consistent with a fall down steps, Tarwater admitted to him that she had been hit in the face (Tr. 362), but specifically denied that it was the man she was currently living with who had hit her (Tr. 374).

Tarwater was treated for a broken nose (Tr. 364). She was told to put ice on her face, was given pain medication, and was released (Tr. 366). The following day, a CAT scan revealed a "blow-out fracture" (a fracture of the floor of the eye socket) (Tr. 365). Had the emergency room doctor known this when Tarwater was in the emergency room, he would have recommended a follow-up with an ophthamologist (Tr. 366). The treating physician testified that Tarwater's injury was consistent with a blow to the face by a fist (Tr. 368).

Ten or eleven days after visiting the emergency room, the pain in Tarwater's face was worse (Tr. 284). During a visit by her mother, Tarwater explained the injury by saying she had been in a car wreck (tr. 285). While her mother was there, Tarwater's eye suddenly bulged out and she lost sight (Tr. 285). Gaines carried Tarwater to her mother's van (Tr. 453) and they took her to the emergency room (Tr. 380). She had started to spontaneously hemorrhage, secondary to trauma, and had to have emergency surgery (Tr. 384). According to the ophthalmologist who performed the surgery, to fracture the orbit of the eye

would take a severe blow, and gave the examples of a fist or a car wreck (Tr. 381). Tarwater lost the sight in her right eye (Tr. 384).

The State was allowed, over objection, to introduce evidence of another incident which occurred in November, 1997 (Tr. 287). Tarwater testified that on the morning of November 17, 1997, Gaines had just arrived home (Tr. 290). Tarwater told him to get his belongings and get out, and the couple started to argue (Tr. 290). Gaines then punched Tarwater in the face with his fist (Tr. 291).

Tarwater testified that she ran to the neighbor's house and called the police (Tr. 292). The police came and took photographs of her face (Tr. 354). Springfield Police Officer Steve Hosinger was one of the officers called to Tarwater's house on November 17, 1997 (Tr. 329). Tarwater had bruising on her nose and was bleeding from both nostrils (Tr. 329). Gaines and Tarwater were separated, Tarwater was taken to the bedroom and Gaines was questioned in the living room (Tr. 333). Gaines denied hitting Tarwater, telling the officer that he and Tarwater had been arguing throughout the night and into the morning. He said Tarwater had fallen on a rocking chair (Tr. 335). Tarwater initially told Hosinger that she had been assaulted by Gaines, but then said she had fallen on the rocking chair in the bedroom and that Gaines had not hit her (Tr. 335-336). She explained that she had only said that "to be a bitch." (Tr. 337). Two days later Tarwater went to the Family Medical Walk-in Clinic and told the doctor that she had been hit by an ex-boyfriend (Tr. 395). She had a broken nose (Tr. 398).

The defense presented the following evidence. Joy Rayburn was working as a registered nurse in the emergency room on December 14, 1997 when Tarwater came in for treatment (Tr. 405, 408). Rayburn conducted an intake interview with Tarwater and was told that she had fallen down a flight of steps and hit a rock three days earlier (Tr. 409).

Linda Cox was the owner of Easy Recovery Investigations, a business that repossesses cars and other items (Tr. 410). Gaines was working for Cox and would sometimes be gone overnight (Tr. 413). Gaines worked for Cox in November and December, 1997, and the last check that was written for him was December 4th. He worked as a second driver for one of the other agents after that (Tr. 412).

Gaines testified in his own defense (Tr. 420). He met Tarwater in late August, 1997, while she was waiting for a bus (Tr. 421). The couple knew each other for about three weeks before he moved in with her (Tr. 421). Living in the apartment were Tarwater, Gaines, and Autumn, Tarwater's 18 month old daughter (Tr. 421). Sometimes a man named Troy would stay over but Tarwater said they were not dating; he babysat for her sometimes (Tr. 421).

Tarwater was pregnant when she and Gaines met, and Paul Cox, the father of the child, came around after the baby was born (Tr. 425). Tarwater gave that baby up for adoption (Tr. 295).

Gaines testified that during their time together, he and Tarwater argued because she did not believe that he was working (Tr. 426). Gaines is the one who

called 911 on November 17, 1997 (Tr. 427).[1] Tarwater was acting strangely, having a temper tantrum and she slipped and fell, hitting her nose on the rocking chair beside the crib (Tr. 427). She was bleeding and hysterical so Gaines told her if she did not settle down, he would call 911 (Tr. 427). That is when she ran across the street to the neighbor's house (Tr. 427). Gaines assumed she had a warrant which accounted for her response when he called 911 (Tr. 427).

The police arrived, took Tarwater to the bedroom and kept him in the living room, handcuffed (Tr. 428). He was later released (Tr. 430). He and Tarwater continued to live together (Tr. 430).

As for the December incident, Gaines testified that he was not home (Tr. 432). He returned home and Tarwater had major injuries to her face (Tr. 432). At first she told him she had been in a car wreck (Tr. 432). He found out she had not been to a doctor so he took her to the emergency room and waited while she was treated (Tr. 433).

He denied hitting Tarwater in November or December (Tr. 436).

The jury was instructed on first degree assault and second degree assault (L.F. 29, 30). It returned its verdict finding Gaines guilty of second degree assault (L.F. 31).

[1] On cross examination, the prosecutor agreed that it was Gaines who called 911 on November 17, 1997 (Tr. 438).

Gaines' motion for new trial was denied (Tr. 497), and the trial court, which had found Gaines to be a prior offender (Tr. 75), sentenced him to a six year term of imprisonment (Tr. 510). Gaines was granted leave to appeal *in forma pauperis* (Tr. 513), notice of appeal was timely (L.F. 39), and this appeal follows.

POINT RELIED ON

The trial court erred in overruling defense counsel's objections and abused its discretion in admitting evidence that on November 17, 1997, Gaines hit Tarwater with his fist and broke her nose, because that evidence was neither logically nor legally relevant and its admission violated Gaines' rights to due process of law and to be tried only for the crime with which he was charged, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 17, and 18(a) of the Missouri Constitution, in that Gaines denied that he hit Tarwater on November 17, 1997, and the result was a trial within a trial with the State attempting to prove that he had assaulted Tarwater on that earlier occasion and forcing Gaines to defend against a charge that had never been filed.

State v. Conley, 873 S.W.2d 233 (Mo. banc 1994);

State v. Burns, 978 S.W.2d 759 (Mo. banc 1998);

State v. Bernard, 849 S.W.2d 10 (Mo. banc 1993);

State v. Wallace, 943 S.W.2d 721 (Mo.App., W.D. 1997);

U.S. Const. Amends. V and XIV;

Mo. Const. Art. I, Sections 10, 17, and 18(a);

Rule 29.11(d).

ARGUMENT

The trial court erred in overruling defense counsel's objections and abused its discretion in admitting evidence that on November 17, 1997, Gaines hit Tarwater with his fist and broke her nose, because that evidence was neither logically nor legally relevant and its admission violated Gaines' rights to due process of law and to be tried only for the crime with which he was charged, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 17, and 18(a) of the Missouri Constitution, in that Gaines denied that he hit Tarwater on November 17, 1997, and the result was a trial within a trial with the State attempting to prove that he had assaulted Tarwater on that earlier occasion and forcing Gaines to defend against a charge that had never been filed.

***Introduction*:**

Ronnie Gaines was charged with assaulting Terri Tarwater on December 12, 1997, but he was tried for two assaults. Along with the charged December 12th incident, Ronnie Gaines was forced to defend against an allegation that he had assaulted Tarwater on November 17, 1997. The State never charged him with that offense, it just put him on trial for it.

A look at the State's evidence makes this clear:

Evidence Presented Concerning the Charged Offense

* Tarwater's testimony, Tr. 274-279

* Zanetta Gann - policewoman who took photographs, Tr. 354-357

* States' Exhibits 1 and 2 – photographs of Tarwater's face 12/14/97

* Dr. Brady Messner – treating physician, Tr. 359-374

* Dr. Wendell Scott – treating physician, Tr. 377-384

* State's cross examination of Gaines: Tr. 442, 443, 444, 445

* References to the charged offense during State's closing argument:

Tr. 465, 466, 468, 469, 470, 471, 483, 485, 486, 487

Evidence Presented Concerning the Uncharged Offense:

* Tarwater's testimony Tr. 290-295

* Steve Hosinger – Investigating officer, Tr. 328-337

* State's Exhibits 3 and 4 – photographs of Tarwater's face 11/17/97

* Dr. Daniel Burke – treating physician, Tr. 392-398

* State's Exhibit 5 – Dr. Burke's diagram of injuries

* State's cross examination of Gaines, Tr. 437, 438, 439, 440, 441

* References to the uncharged offense during State's closing argument,

Tr. 466, 467, 468, 471, 472, 482, 483, 484, 487

The admission of so much evidence of an uncharged offense in this case is evidence of the State's motive. If the State could convince the jury that Gaines assaulted Tarwater on November 17th, it would find it more likely that he assaulted her on December 12th. That is propensity evidence pure and simple and its admission denied Gaines his right to a fair trial.

Preservation:

During his direct examination of Tarwater, the prosecuting attorney took her through the December 12, 1997, incident (Tr. 271-187). He then asked, "Is that the only time he'd hit you?" (Tr. 287). Gaines objected and at a bench conference informed the trial court that he believed the State was preparing to introduce evidence of the November 17, 1997, incident and that evidence was inadmissible as evidence of other crimes. He asked that it not be allowed (Tr. 288). The State argued that the evidence was being introduced to prove intent and motive (Tr. 288). The trial court overruled Gaines' objection and allowed the evidence to be admitted (Tr. 289). Gaines included this allegation of error in his motion for new trial (L.F. 35) and therefore the issue is properly preserved for review by this Court. Rule 29.11(d).

Standard of Review

A trial court has broad discretion in deciding whether to admit evidence and its decision will not be disturbed unless a clear abuse of discretion is shown. *State v. Danikas*, 11 S.W.3d 782, 788 (Mo.App., W.D. 1999). "The decision to admit evidence is an abuse of discretion where it 'is clearly against the logic of the

circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.'" *Id., quoting Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991).

***The Law*:**

It is well settled that evidence of uncharged crimes is inadmissible to prove that a defendant has a propensity to commit similar crimes. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993). "Showing the defendant's propensity to commit a given crime is not a proper purpose for admitting evidence, because such evidence 'may encourage the jury to convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the crimes charged.'" *State v. Burns*, 978 S.W.2d 759, 761 (Mo. banc 1998) *quoting Bernard*, 849 S.W.2d at 16.

There are exceptions to this general rule, if the evidence is logically relevant "in that it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial" and legally relevant, in that "its probative value outweighs its prejudicial effect." *Burns*, 978 S.W.2d at 761. "Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors." *State v. Clover*, 924 S.W.2d 853, 856 (Mo. banc 1996) (citation omitted).

The admission of other crimes evidence which is "not properly related to the cause on trial violates the defendant's right to be tried for the offense with which he is charged by the information. §18(a), V.A.M.S. Const. of Missouri 1945." *State v. Dunn*, 309 S.W.2d 643, 645 (Mo. banc 1958).

Missouri courts have found evidence of other crimes to be logically relevant where the evidence shows motive, intent, the absence of mistake or accident, a common plan or scheme or identity. *Danikas*, 11 S.W.3d at 788.

But before evidence is legally relevant to prove one of those exceptions, the exception must be a legitimate issue in the case. *State v. Conley*, 873 S.W.2d 233, 237 (Mo. banc 1994). Here, the State argued that the November 17, 1997 incident was relevant to prove intent and motive (Tr. 288).

Discussion:

In *State v. Conley*, the State sought to introduce evidence of acts of sexual abuse which were not the subject of the trial and which involved other alleged victims. 873 S.W.2d at 237. The State argued that the evidence of uncharged offenses went to Conley's intent. *Id*.

In rejecting that argument and reversing Conley's conviction, this Court held that "[i]n order for intent or the absence of mistake or accident to serve as the basis for admission of evidence of similar uncharged crimes, it is necessary that those be legitimate issues in the case." *Id*. at 237 (citation omitted). This Court went on to hold that where there is direct evidence that the defendant did the act alleged, the proof of the act "ordinarily gives rise to an inference of the necessary

mens rea. No other evidence is required to establish that element of the case unless the state has some reason to believe that the defendant will make intent or mistake or accident an issue in the case." *Id.* (citations omitted). Thus, where intent is not a real issue in the case, introduction of other crimes evidence is unnecessary and it lacks legal relevance, its probative value is far outweighed by its prejudicial effect. *Id*.

In *State v. Wallace*, 943 S.W.2d 721 (Mo.App. W.D. 1997), the defendant was charged with first degree assault involving his choking the victim. *Id*. The State was permitted to introduce evidence through the testimony of the victim of five prior instances where the defendant had assaulted her. *Id*. at 723-724. The last of these instances involved an attack a year before the charged offense where the defendant had choked the victim until she "saw stars" *Id*. at 724. The State argued that this evidence was relevant to prove Wallace's intent to cause serious physical injury. *Id*. The Western District reversed, finding that the first four instances had little probative value. In so holding, the Court followed this Court's decision in *Conley* and held that "unless and until the defendant challenges the intent element, the prosecutor's need to introduce evidence of prior bad acts is minimal, while the prejudicial effect of admitting the evidence is substantial. *Id. citing State v. Dudley*, 912 S.W.2d 525, 529 (Mo.App. W.D. 1995). *See also State v. Alexander*, 875 S.W.2d 924 (Mo.App. S.D. 1994), in which the Court held that because the Defendant denied the charge, neither motive, intent, identity nor absence of mistake or accident were issues in the case. Therefore the probative

value of the other crimes evidence was outweighed by its prejudicial effect. *Id*. at 930.

In *State v. Smotherman*, 993 S.W.2d 525 (Mo.App. S.D.1999), the defendant was charged with first degree assault and armed criminal action. In that case the defendant had shot at his wife "four or five" times. *Id*. at 527. During his direct examination of the wife, the prosecutor asked whether defendant had been abusive to her prior to the date of the charged offense. *Id*. at 528. Defendant appealed the trial court's ruling admitting that evidence. In affirming the conviction, the Court held that the evidence was admissible because it exhibited "the continuing animus of Defendant toward his ex-wife, and arguably demonstrates his motive and intent to injure her. . ." *Id*. at 529, *citing State v*. *McCracken*, 948 S.W.2d 710 (Mo. App. S.D. 1997).

This case is distinguishable from *Smotherman.* In that case the defendant's "explanation of the events of that night put motive and intent squarely in issue." *Id*. The defendant claimed that he fired the gun only because his wife fired at him first and he was attempting to shoot the gun out of her hand. *Id*. In addition, the Court noted that in *Smotherman,* the testimony concerning prior uncharged misconduct was "terse." *Id*.

In this case, the State argued that the evidence of the November 17th alleged assault was relevant to show Gaines' intent. But Gaines' intent was not in issue. He did not allege mistake or accident, or self-defense or any other defense which would have put his intent in issue. As this Court said in *Conley*, "when direct

evidence is presented demonstrating the accused committed the illicit act, the proof of the act ordinarily gives rise to an inference of the necessary *mens rea*." *Conley*, 873 S.W.2d at 237. If the jury believed Tarwater, then it would have found that Gaines hit her with his fist with enough force to break her nose, fracture the floor of her eye socket, and ultimately cause her to lose her sight. After this occurred, Gaines said, "Die, bitch." These are facts of the type contemplated by the rule enunciated in *Conley*, i.e., direct evidence that Gaines committed the illicit acts giving rise to an inference of the necessary *mens rea*. The evidence of the uncharged assault was unnecessary and therefore had no legal relevance.

The State is asking this Court to create yet another exception to the rule against the admission of evidence of other crimes. The State is arguing that anytime the prior crime or misconduct is directed at the victim of the charged offense, it should be admissible to prove intent. But that is not the law and this Court should decline the State's invitation.

The general rule barring evidence of other crimes is a constitutional prohibition, not merely an evidentiary one. *State v. Burns*, 978 S.W.2d 759 (Mo. banc 1998). Thus, when the State seeks to introduce evidence of uncharged crimes or misconduct, the trial court has an obligation to subject that request to rigid scrutiny to determine whether the evidence is logically relevant, i.e., the evidence has a legitimate tendency to directly establish the accused's guilt, *State v. Post*, 901 S.W.2d 231, 236 (Mo. App., E.D. 1995), and whether the evidence is legally relevant, i.e., its probative value outweighs its prejudicial effect. *Id*. at 236,

citing, *State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993). This balancing and rigid scrutiny is absolutely necessary before evidence of uncharged offenses is admissible, and this is true whether or not the victim of the uncharged offense is also the victim of the charged offense.

Given the facts of this case, the trial court abused its discretion when it failed to put the State's request for admission of the uncharged assault to the rigid scrutiny required by this Court in *Conley, Burns*, and *Bernard*. Not only was the State permitted to question Tarwater about the alleged November 17, 1997 assault (Tr. 287), but the trial court permitted the State to try that case. The only things missing from the State's case were the charging document and a verdict director.

The State called the police officer who responded to the November 17th 911 call (Tr. 329). The State offered, and the trial court admitted, two photographs of Tarwater's injuries from November 17th (Tr. 293, 332). The jury heard the testimony of the doctor who treated the injuries allegedly caused by that November 17th assault (Tr. 392), along with a diagram showing Tarwater's injuries (Tr. 396).

When Appellant testified, he was forced to deny the November 17th assault (Tr. 427). The prosecuting attorney then began his cross examination of Appellant with questions concerning the November 17th assault (Tr. 437-442). And finally, the State's closing arguments contain numerous references to that alleged assault (Tr. 466, 467, 468, 471, 472, 484, 487).

An example of the State's closing is when the prosecutor argued:

It is her testimony that is corroborated by other independent evidence, and there is nothing to corroborate the defendant's account.

(Tr. 487). Thus, the prosecutor argued, if the jury found that the November 17th assault actually occurred, then that "independent evidence" supported a finding of guilt on the December 12th charge, the charge Gaines was actually defending. That is propensity evidence pure and simple. Its admission was prejudicial error.

The State argues that many Missouri decisions have allowed evidence of uncharged offenses when the victim of the uncharged offense is the same as the victim of the charged offense. This argument overlooks two things. First, nearly all of the cases cited by the State are pre-*Conley* cases, *State v. Patterson*, 847 S.W.2d 935 (Mo.App., 1993); *State v. Earvin*, 743 S.W.2d 125 (Mo.App., E.D. 1988); *State v. Williams*, 784 S.W.2d 309 (Mo.App., E.D. 1990); *State v. Smith*, 791 S.W.2d 744 (Mo.App., E.D. 1990); *State v. Bolden*, 494 S.W.2d 61 (Mo. 1973). Second, in the post-*Conley* cases, the Courts of Appeals understood the general rule against admission of evidence of other crimes and the exceptions to that rule and engaged in the balancing of logical and legal relevance required in *Conley*. For example, the Southern District Court of Appeals in *State v. McCracken*, 948 S.W.2d 710 (Mo.App., S.D. 1997) held, after enunciating the correct standards, that the evidence of prior misconduct in that case "exhibit[ed] the continuing animus of defendant toward his ex-wife, and arguably demonstrate[ed] his motive and intent to injure her or to damage or obtain items of

her property" *Id*. at 713, and, *State v. Smotherman*, 993 S.W.2d 525, 529 (Mo.App., S.D. 1999), discussed above.

Given the facts of this case, and the fact that the trial court permitted the State to go too far in proving an uncharged offense which had no legitimate tendency to prove Gaines' guilt of the charged offense, this Court should reverse Gaines' conviction and remand for a new, fair, trial, without the irrelevant and prejudicial evidence.

CONCLUSION

Ronnie Gaines was put on trial for an offense he was never charged with committing. This Court should reject the State's request for yet another exception to the rule against admission of other crimes evidence and continue to require the careful balancing of the logical and legal relevance of such evidence prior to its admission. Had the trial court engaged in such balancing with the rigid scrutiny required by Missouri law, evidence of the uncharged assault of November 17, 1997 would not have been admitted. Appellant Gaines respectfully requests that this Court reverse his conviction and remand his case for a new, fair, trial in which he will defend himself only against the charge he actually faces.

Respectfully submitted,

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Certificate of Compliance and Service

I, Nancy A. McKerrow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,635 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in December, 2002. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ___ day of December, 2002, to Sara Trower, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Nancy A. McKerrow