IN THE
MISSOURI SUPREME COURT

No. SC90583

RYAN SEELER,

Appellant,

v.

STATE OF MISSOURI,

Appellee.

On Appeal from the Circuit Court of St. Louis County,
State of Missouri
The Honorable John A. Ross, Circuit Judge

OPENING BRIEF FOR APPELLANT

Respectfully Submitted,

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JURISDICTIONAL STATEMENT

Appellant Ryan Seeler was convicted of the Class B felony of involuntary manslaughter in the first degree, § 565.024.1(3), RSMo, Supp. 2008,[1] on November 4, 2008, in the Circuit Court of St. Louis County, Missouri, after trial by jury, the Honorable John A. Ross presiding. On January 9, 2009, Appellant was sentenced to seven years in prison. A Notice of Appeal of Appellant's conviction was timely filed on January 9, 2009 in the 21st Judicial Circuit Court, St. Louis County for appeal in the Missouri Court of Appeals, Eastern District.

One of the issues on appeal is reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, pursuant to Article V, § 3 of the Missouri Constitution, in that Appellant asserts that § 565.024.1(3) is unconstitutionally vague in violation of the Appellant's right to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution. Article V, § 3 of the Missouri Constitution provides, in pertinent part: "The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a . . . statute . . . of this state . . . ." In order to be within the Supreme Court's exclusive jurisdiction, an assertion that a statute is

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[1] All statutory citations are to RSMo 2000 unless otherwise indicated. All statutory citations to § 565.024.1**(3)** are to RSMo, 2008 Supp. unless otherwise indicated.

unconstitutional must be "real and substantial, not merely colorable." *Glass v. First Nat'l Bank of St. Louis, N.A.*, 186 S.W.3d 766, 766 (Mo. 2005). A constitutional challenge to a statute is "substantial when, upon preliminary inquiry, the contention discloses a contested matter of right, involving some fair doubt and reasonable room for controversy; but, if such preliminary inquiry discloses that the contention is so obviously unsubstantial and insufficient, either in fact or in law, as to be plainly without merit and a mere pretense, the claim may be deemed to be merely colorable." *Kansas City Star Co. v. Shields*, 771 S.W.2d 101, 103 (Mo. App. 1989). "One clear indication that a constitutional challenge is real and substantial and made in good faith is that the challenge is one of first impression with [the Supreme] Court. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 52 (Mo. banc 1999). Moreover, if one issue on appeal involves a substantial, rather than merely colorable, challenge to a statute's validity, the Missouri Supreme Court has jurisdiction not only of the constitutional claim but of the entire appeal. *Matter of Estate of Potashnick*, 841 S.W.2d 714, 718 (Mo. App. 1992)(citing *State ex rel. Union Elec. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 165[3] (Mo. banc 1985)). Thus, if the constitutional claim in this case is substantial, "the entire case must be transferred to the Supreme Court." *Id.*

As evidenced *infra* in Point II, Appellant's claim that § 565.024.1(3)(a) is unconstitutionally vague is based on a contested matter of right that involves fair doubt and reasonable room for controversy, and thus is substantial. Additional support for the substantiality of the claim that § 565.024.1(3)(a) is unconstitutionally vague stems from the fact that it has never been considered and is an issue of first impression in any court.[2] As the constitutional claim is substantial and an issue of first impression, exclusive appellate jurisdiction over the entire appeal exists in the Missouri Supreme Court. However, seeking to facilitate the appeal and prevent any delay,[3] Appellant appealed to the Missouri Court of

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[2] In addition, Appellant has been unable to find a record of any conviction, or even a charge, under this provision.

[3] *See* Rule 30.01(f)(discussing the requirement that a jurisdictional statement be filed with a notice of appeal to the Supreme Court "for the purpose of facilitating appeals and preventing delays"). Appellant filed his appeal with the Missouri Court of Appeals, Eastern District, rather than directly with the Missouri Supreme Court, in hopes that it would facilitate his appeal and prevent delay by allowing the Court of Appeals the opportunity to find that the constitutional claim is substantial and to transfer the case pursuant to Mo. Const. Art. V, § 11. Article V, section 11 states in pertinent part: "[W]ant of jurisdiction shall not be ground for dismissal, and the proceeding shall be

Appeals, Eastern District, to first determine whether a substantial constitutional question exists, and requested the Appeals Court to transfer this case to the Missouri Supreme Court. Finding that the claim was real and substantial, not merely colorable, the Court of Appeals transferred the case to this Court pursuant to Article V, § 11 of the Missouri Constitution on December 23, 2009.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S: (1) MOTION TO DISMISS INDICTMENT . . . ; (2) MOTION TO DISMISS INDICTMENT, OR ENTER A JUDGMENT OF ACQUITTAL FOR LACK OF JURISDICTION; (3) MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE STATE'S EVIDENCE; AND (4) MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL OF THE EVIDENCE, BECAUSE THE PROPER INTERPRETATION OF §

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transferred to the appellate court having jurisdiction." *See also Glass*, 186 S.W.3d at 766 (finding that the constitutional arguments raised were "not real and substantial" and thereby transferring the case to the Court of Appeals); *Boone v. State*, 2004 WL 727039, *2 (Mo. App. 2004)(holding that the "appeal involve[d] a real and substantial claim challenging the constitutionality of a Missouri statute" and accordingly transferred the case to the Supreme Court).

565.024.1(3)(a) REQUIRES THE STATE TO PROVE "LEAVING A HIGHWAY . . . OR HIGHWAY'S RIGHT-OF-WAY," IN THAT THE PHRASE "INCLUDING A DEATH CAUSED BY THE DEFENDANT'S VEHICLE LEAVING A HIGHWAY . . . OR THE HIGHWAY'S RIGHT-OF-WAY" IS AMBIGUOUS AND MUST BE CONSTRUED LIBERALLY FOR THE DEFENDANT.

Authority Principally Relied On

Missouri Highway and Transp. Comm'n v. Merritt, 204 S.W.3d 278 (Mo. App. 2006)

Robinson v. Advance Loans II, LLC, 290 S.W.3d 751 (Mo. App. 2009)

State on Inf. Huffman v. Sho-Me Power Co-Op, 191 S.W.2d 971 (Mo. banc 1946)

State v. Jones, 172 S.W.3d 448 (Mo. App. 2005)

Mo. Rev. Stat. § 562.016

Mo. Rev. Stat. § 565.024 (2008 Supp.)

U.S. Const. amend. V, VI

U.S. Const. amend. XIV

II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT AND TO DECLARE STATUTE UNCONSTITUTIONAL AND DEFENDANT'S MOTION FOR NEW TRIAL,

BECAUSE § 565.024.1(3)(a) IS UNCONSTITUTIONALLY VAGUE, IN THAT THIS STATUTE CAN BE READ IN SEVERAL CONTRADICTORY WAYS AND THEREBY DOES NOT GIVE A PERSON OF ORDINARY INTELLIGENCE A REASONABLE OPPORTUNITY TO KNOW WHAT CONDUCT IS PROHIBITED, AND FURTHER THE STATUTE DOES NOT CONTAIN SUFFICIENTLY EXPLICIT STANDARDS TO GUIDE ENFORCEMENT IN A WAY THAT AVOIDS DISCRIMINATORY OR ARBITRARY APPLICATION, IN VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS AS GUARANTEED IN THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, § 18(a) OF THE MISSOURI CONSTITUTION.

Authority Principally Relied On

Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955 (Mo. banc 1999)

Conseco Fin. Servicing Corp. v. Missouri Dep't of Revenue, 195 S.W.3d 410 (Mo. banc 2006)

Grayned v. City of Rockford, 408 U.S. 104 (1972)

Thompson v. State Bd. of Registration for the Healing Arts, 244 S.W.3d 180 (Mo. App. 2007)

Mo. Rev. Stat. § 565.024 (2008 Supp.)

U.S. Const. amend. V, XIV

III. THE TRIAL COURT ERRED IN GRANTING THE PROSECUTION'S REQUEST TO SUBSTITUTE AN INFORMATION IN LIEU OF THE ORIGINAL INDICTMENT AFTER THE CLOSE OF THE STATE'S EVIDENCE, BECAUSE SUCH SUBSTITUTION PREJUDICED APPELLANT'S SUBSTANTIAL RIGHTS, IN THAT IT MADE APPELLANT'S DEFENSES THAT HE NEVER LEFT THE "RIGHT-OF-WAY" AS DEFINED BY STATUTE AND THAT ANY ACT OF "LEAVING THE RIGHT-OF-WAY" WAS DUE TO THE IMPROPER ARRANGEMENT OF THE CONSTRUCTION ZONE AND THUS NOT CRIMINALLY NEGLIGENT, INAPPLICABLE BY ABRUPTLY REMOVING ANY "RIGHT-OF-WAY"-RELATED ISSUE.

Authority Principally Relied On

State v. Harris, 873 S.W.2d 887 (Mo. App. 1994)

Mo. Sup. Ct. R. 23.08

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CONSTRUCTION ZONE'S CONFORMANCE WITH THE NATIONAL MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES ("MUTCD"), BECAUSE THE EVIDENCE WAS RELEVANT AND MATERIAL AND SUCH EXCLUSION VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I § 18(A) OF THE MISSOURI CONSTITUTION BY DEPRIVING HIM OF A VIABLE DEFENSE, IN THAT THE EXCLUDED EVIDENCE TENDED TO SHOW THAT A REASONABLE PERSON WOULD HAVE BEEN CONFUSED AND UNABLE TO ASCERTAIN WHAT PART OF THE ROADWAY/HIGHWAY WAS A CONSTRUCTION ZONE AND WHICH LANES WERE CLOSED TO TRAFFIC, BECAUSE THE DISTANCE BETWEEN THE CONES SEPARATING THE CONSTRUCTION ZONE AND THE LANE OPEN FOR TRAFFIC WAS ALMOST TWICE THAN THAT REQUIRED AND CONSIDERED REASONABLE PURSUANT TO THE MUTCD.

Authority Principally Relied On

State v. Barriner, 111 S.W.3d 396 (Mo. banc 2003).

State v. Sanders, 126 S.W.3d 5 (Mo. App. 2003).

Mo. Rev. Stat. § 562.016

Mo. Rev. Stat. § 565.024 (2008 Supp.)

23 C.F.R. § 630.1102

23 C.F.R. § 630.1108

23 C.F.R. § 655.603

Mo. Const. art. I **§** 18

U.S. Const. amend. V

U.S. Const. amend. XIV

V. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE STATE'S PRESENTATION OF EVIDENCE REGARDING THE SPEED OF APPELLANT'S VEHICLE, BECAUSE THE EVIDENCE WAS IRRELEVANT, UNRELIABLE, AND ITS PREJUDICIAL EFFECT OUTWEIGHED ITS PROBATIVE VALUE, IN THAT THE EVIDENCE OF SPEEDING WAS NOT ALLEGED IN THE INDICTMENT AS A CONTRIBUTING FACTOR OR AN ACT OF NEGLIGENCE, NOR WAS IT AN ELEMENT OF THE OFFENSE CHARGED; AND THE WITNESS COULD NOT IDENTIFY APPELLANT'S VAN AS THE VEHICLE HE SAW SPEEDING.

Authority Principally Relied On

State v. Anderson, 76 S.W.3d 275 (Mo. banc 2002)

State v. Hernandez, 815 S.W.2d 67 (Mo. App. 1991)

State v. Sladek, 835 S.W.2d 305 (Mo. 1992)

STATEMENT OF FACTS

At around 3:00 a.m. on July 7, 2007, Gavin Donohue, an intern with Pace Construction, was working in Chesterfield Valley as part of a repaving project on Highway 40 westbound when he was struck and killed by an automobile operated by Appellant, Ryan Seeler. Transcript (hereinafter "T") at 981, 923. When the accident occurred, Donohue was temporarily re-striping the newly paved road by placing reflectors onto the pavement. (T. 779, 980-81). The only construction vehicle near Donohue at the time of the accident was a shadow vehicle, which serves as a barricade and warning system for oncoming traffic. (T. 924, 984-85). The shadow vehicle was located in the middle lane of the highway, next to the portion of the right lane that remained open, 744 feet east of where Donahue was working (T. 780, 826-27, 862), even though it should have been within 100 to 150 feet of him. (T. 872). There were no other trucks, construction crew, or other pieces of equipment near the scene of the accident, and the paving crew was located a mile west of Donohue's location. (T. 826, 981, 421).

On July 6, 2007, Ryan Seeler went to work and afterwards, he went to the

Cardinals baseball game with his friend Andy Wiggins. (T. 1024). His wife also attended the game with a client, and during the seventh inning stretch she told Seeler that she was taking her client to a restaurant afterwards. (T. 1030-31, 1220). Seeler made informal plans to meet up with his wife later in the evening, and when she spoke with him during the seventh inning he did not have a drink in his hand or appear to be intoxicated. (T. 1218, 1220). He left the game sometime close to 11:00 p.m., and he went with Wiggins to Mike Shannon's Restaurant. (T. 1031). By 1:45 a.m., Seeler's wife still had not shown up at the restaurant, so Seeler left to go home. (T. 1033). In the more than seven-hour period between 6:30 p.m. and 1:45 a.m., Seeler drank a total of four beers–two at the game and two at Mike Shannon's restaurant–and ate two hot dogs. (T. 1027, 1087).

Seeler was driving west on Highway 40 toward Chesterfield to go home. (T. 1041). As he approached Timberlake Manor near St. John's Hospital, he noticed signs indicating road work ahead. (T. 1042). The two left lanes were closed off to westbound traffic using directional indicators, an arrow board, and construction cones, otherwise known as channelizing devices. (T. 880). These lanes were blocked off starting at westbound 40 at Olive, where there are normally three lanes. (T. 777-78). Only the far right lane and shoulder remained open. (T. 778, 820). The construction cones were set up such that they intruded into the only open lane of traffic, forcing drivers onto the shoulder (T. 362, 1116) and the rumble strips. (T. 819-20). The cones were anywhere from 168 to 175 feet apart (T. 781), almost double the distance they should have been spaced according to the MUTCD. (T. 897). At trial, Jeremiah Davis, a Pace Construction employee, also testified that the cones were too far apart. (T. 988).

As Seeler entered into the Chesterfield Valley, he encountered a dump truck traveling in front of him in the far right lane. (T. 1044). As he approached the dump truck, the misplaced cones located in the far right lane forced him to drive onto the shoulder and rumble strips. (T. 1047, 362, 1116, 819-20). As Seeler followed behind the dump truck, the dump truck moved over into the middle lane without hitting any cones. (T. 1014-15). Seeler followed the truck (T. 1047, 1001-02) without attempting to pass it (T. 347, 386-87), believing the lane was now open in part because there were no signs indicating trucks would be entering and leaving the highway or the construction zone. (T. 917). The dump truck then moved back into the right lane, where Seeler followed it again (T. 1047, 1003) without hitting any cones. (T. 1049). At that point, Seeler believed that he was driving in the wrong lane because the cones were in his lane, and he was driving on the shoulder and the rumble strips. (T. 1048). In an attempt to determine which lane was the proper travel lane, Seeler pulled slightly to the right to peer around the truck. (T.

326, 1048). Believing the middle lane was now the proper travel lane, Seeler signaled to move into the center lane. (T. 1048-49). As he moved into the center lane, his vehicle struck Donahue. (T. 1050).

After the accident, Seeler was seen walking up the middle of the highway. It did not appear that he was stumbling, falling, or experiencing any difficulty walking. (T. 351, 553-54). Before the accident, Seeler never weaved within his own lane, and he did not demonstrate difficulty driving or staying within the lane boundaries, except for when the cones forced him past the fog line and onto the rumble strips and shoulder (T. 351, 1047-48), and when he peered around the truck. (T. 326, 1048). Officer Powers made contact with Seeler upon his arrival. (T. 413). Powers testified that he detected the odor of an alcoholic beverage on Seeler's breath. (T. 419). He testified that Seeler's eyes had a slow reaction to light, which indicated to him that Seeler might be intoxicated. (T. 419). Despite these observations, Powers did not administer any field sobriety tests, nor did he ask Seeler if, when, or what he had to drink that night. (T. 420, 478).

Officer Broeker was the second police officer to arrive on the scene. (T. 532). He spoke with Seeler and noticed no signs indicating that Seeler might be intoxicated. (T. 561). Seeler's eyes were not bloodshot, glassy, or dilated. (T. 562). Seeler was not staring and his eyes did not have a slow reaction to light. (T.

562). His clothes were not soiled with dirt, urine, vomit, or saliva and there were no signs of hiccups, belching, vomiting, or fighting. His attitude was not belligerent, cocky, assaultive, carefree, or combative. (T. 563-64). Instead, Seeler was upset that he hit Donohue and concerned about his condition. (T. 564). Broeker did not conduct any field sobriety tests because he did not suspect that Seeler was intoxicated. (T. 568). Even though Seeler's contacts with Powers and Broeker did not result in **any** field sobriety tests, Seeler was handcuffed and placed under arrest. He was transported to St. Luke's Hospital, where his blood was drawn to test for the presence of alcohol. (T. 1056).

Two separate blood draws were done at the hospital and provided to the police. (T. 651, 663). The State presented testimony from Richard Dupuis, the nurse who took Seeler's blood the morning of the accident. (T. 651). Three tests were run on the blood taken from Seeler, and the average of the three tests indicated a blood alcohol content of .16%. (T. 708). Dupuis testified that he performed his duties according to protocol, but Seeler presented expert testimony from Dr. Terry Martinez that attacked the accuracy of the blood draw based upon the possibility of improper protocol[1] and the total lack of correlation between the history of blood

[1] Testimony established that a blood draw is improper if it is drawn from a person using a swab containing alcohol because it creates a false introduction of alcohol into the tube

preservation, the officers' observations of Seeler the night of the accident, and Seeler's blood alcohol level. If proper procedures had been followed and the alcohol level in Seeler's blood was actually .16%, the officers' observations would have coincided with Seeler's blood alcohol level. (T. 651-52, 1261). Officer Broeker, who was with Appellant from the time the police first arrived until the time Seeler's blood was drawn, did not observe any signs that Seeler was intoxicated. (T. 562-63, 569, 581-82, 585-86). Dr. Martinez also testified that .16% was about four times the legal limit pharmacologically. (T. 1258). At that level, Seeler would have been exhibiting clear and obvious signs of intoxication, such as staggering and slurring words. (T. 1259). Dr. Martinez also testified that he did a pharmacokinetic calculation based upon what Seeler ate and drank that night to determine the rate of alcohol absorption in Seeler's system. (T. 1266). Based upon Seeler's testimony of what he ate and drank that evening, Martinez testified that in a seven hour time span, if Seeler had consumed four beers and two hotdogs, the alcohol would have metabolized out of Seeler's body by 3:10 a.m. (T. 1266-67).

Seeler was indicted on August 8, 2007. Legal File (hereinafter "LF") 31. The original indictment charged that Seeler, "[w]hile under the influence of alcohol

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containing the blood sample, thus tainting the sample. (T. 1238).

and/or a controlled substance caused the death of Gavin Donohue by striking him with a motor vehicle when operating a motor vehicle with criminal negligence in that defendant was driving in a close[d] construction zone, thereby leaving said highway's right of way, and Gavin Donohue was not a passenger in the vehicle operated by the defendant." (LF 31).

When Seeler's trial began on October 27, 2008, he filed a motion to dismiss the indictment on the grounds that the that the statute was unconstitutionally vague as to whether "leaving a highway or a highway's right-of-way" was an element of the offense charged. (LF 155-57). The Court overruled the motion. (T. 12-13). At the close of the State's evidence, Seeler filed a written motion to dismiss the indictment and for the judgment of acquittal for lack of jurisdiction and a motion for directed verdict. (LF 161-64; T. 959). Seeler argued that no evidence was produced that the he ever left the "right-of-way" (T. 960), and that the court lacked jurisdiction because the State failed to prove every element of the offense. (LF 161; T. 960). The State argued that the language "leaving the highway's right-of-way" was surplusage, and for the first time, claimed that the criminal negligence was driving into a closed construction zone. (T. 962). To cure the discrepancy between the indictment and the proof at trial, the State requested leave to amend the indictment by excluding the allegation that Seeler left the "right-of-way." (T. 962).

The element of **“leaving the highway’s right-of-way”** was replaced with the new allegation that Seeler **“drove into a lane closed to traffic.”** (LF 165-67). Seeler argued that allowing the amendment was prejudicial, but the Court allowed the State to amend the indictment. (T. 962).

After the Court granted the State’s motion to amend, it denied Seeler’s motion to dismiss and his motion for a directed verdict at the close of the State’s evidence. The Court based its ruling on its determination that the indictment initially charged the defendant with driving into a closed construction zone, that the information in lieu of indictment did not change any facts of the case, and that sufficient evidence had been submitted from which a jury could determine that Seeler acted with criminal negligence. (T. 966-68). Seeler renewed his motion for judgment of acquittal at the close of all evidence. (LF 168-69). It was denied.

At trial, Seeler was prohibited from presenting evidence on whether the construction zone set up by Pace and Donahue conformed to the MUTCD. (T. 900-01). Seeler attempted to present evidence that the cones in the construction zone did not meet uniform standards, but the court excluded the evidence as irrelevant. This evidence formed a basis for Seeler’s defense that he was not criminally negligent when he drove into the poorly designated construction zone, because it was not clear to a reasonable person which lanes were closed to traffic. (T. 900).

Both elements had to be proven according to the jury instructions.[2] However, the Court ruled that the uniform standards did not prove or disprove whether the area was a closed construction zone, but never considered whether the spacing of the cones was relevant to whether a **reasonable person** would know which lanes were closed. (T. 901).

While the Court found that the uniform standards related to construction zones were not relevant to prove or disprove whether Seeler acted with criminal negligence by driving into a closed construction zone, it did find evidence of the speed of Seeler's vehicle relevant and admissible over his objection, even though it was not an element of the crime charged, lacked probative value, and was highly unreliable and prejudicial. (LF 31-32, 165-67; T. 259). At trial, the deposition of Derek Eichholz was played for the jury. [3] He testified that a newer, darker colored minivan passed him at approximately 90 miles per hour several miles before the

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[2] The fourth and fifth elements that had to be proven according to Jury Instruction 6 were that the defendant was: (4) "driving in a construction zone and . . . a lane closed to traffic, and (5) . . . was thereby criminally negligent." (LF 227).

3 Derek Eichholz was unavailable to testify as a witness and in lieu of his live testimony, his deposition was played by DVD for the jury.

accident scene. See Deposition (hereinafter “D”) at 6-8. Other than that bare description, he could not determine the make or model of the van or the general characteristics of the vehicle, such as the license plate number. (D. 26-27). He had no idea whether the driver was male or female, or whether there was more than one occupant in the vehicle. (D. 27, 8). Eichholz also testified that there were “several exits” and “several miles” between where he saw the vehicle and where the accident occurred (D. 26, 29), and that he lost sight of the vehicle shortly after it passed him. (D. 28). Eichholz could not determine whether the vehicle that passed him was present at the accident scene because there were multiple vans at the accident scene that night. (D. 27).

The jury found Seeler guilty of involuntary manslaughter in the first degree and assessed his punishment at seven years. (T. 1498). Defendant filed a Motion for New Trial on November 24, 2008, wherein Defendant requested a new trial based on all the above referenced issues. (LF 253-59). A timely Notice of Appeal was filed on January 9, 2009. (LF 267-68).

Additional facts will be developed in the Argument portion of the Brief as they pertain to the issue presented.

INTRODUCTION AND RELEVANT STATUTORY PROVISIONS

On appeal, Appellant asserts that the statute under which he was convicted is ambiguous unless it is construed to require that the prosecution prove "leaving a highway or right-of-way" as an element of the offense, or alternatively, that the statute is unconstitutionally vague in violation of his right to due process. The numerous statutory provisions relating to these arguments are set forth in pertinent part below for ease of reference; historical information about these provisions is included as relevant.

A. Convicting Statute

Appellant was convicted under § 565.024.1(3)(a), RSMo Supp. 2008. As a historical note, § 565.024.1(3) was added to the first degree involuntary manslaughter statute in 2005 to raise the felony level for causing a person's death while driving intoxicated from class C to class B if additional elements were present. The entirety of § 565.024.1(3) provides:

> 1. A person commits the crime of involuntary manslaughter in the first degree if he or she:
>
> . . . (3) While in an intoxicated condition operates a motor vehicle . . . in this state, and, when so operating, acts with criminal negligence to:
>
> (a) Cause the death of any person not a passenger in the vehicle . . .

> operated by the defendant, including the death of an individual that results from the defendant's vehicle leaving a highway, as defined by section 301.010 RSMo, or the highway's right-of-way . . . ; or
>
> (b) Cause the death of two or more persons; or
>
> (c) Cause the death of any person while he or she has a blood alcohol content of at least eighteen-hundredths of one percent by weight of alcohol in such person's blood . . . .

§ 565.024.1, RSMo 2008 Supp. Prior to the 2005 amendment, § 565.024.1(2) was the only form of first degree manslaughter that involved driving while intoxicated; it sets forth the class C felony as follows: "(1) A person commits the crime of involuntary manslaughter in the first degree if he or she: (2) While in an intoxicated condition operates a motor vehicle . . . in this state, and, when so operating, acts with criminal negligence to cause the death of any person . . . ."

Section 565.024.2, which designates the felony level of the offense, provides:

> Involuntary manslaughter in the first degree under subdivision . . . (2) of subsection 1 of this section is a class C felony.
>
> Involuntary manslaughter in the first degree under subdivision

> (3) of subsection 1 of this section is a class B felony. A second or subsequent violation of subdivision (3) of subsection 1 of this section is a class A felony. For any violation of subsection (3) of subsection 1 of this section, the minimum prison term which the defendant must serve shall be eighty-five percent of his or her sentence.[4]

B. Relevant Statutory Definitions

Section 301.010(19), specifically referenced in § 565.024.1(3)(a), defines "highway" as "any public thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways or alleys in any municipality." In other words, the definition includes practically everything other than a foot path or hiking trail.

Section 565.024.1(3)(a) does not contain any specific definition for "right-of-way" however, § 304.001(11),[5] which sets forth definitions to be used in chapters

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[4] Section 558.011.1 details the penalty ranges for the various felony classes. Class B felonies are punishable by "not less than five years and not to exceed fifteen years" in prison; class C felony terms of imprisonment are "not to exceed seven years." § 558.011.1(2) & (3).

[5] The term is not defined in any other statute.

304 and 307, defines “right-of-way” as “the entire width of land between the boundary lines of a state highway, including any roadway.” Section 304.001(12) further defines “roadway” as “that portion of a state highway ordinarily used for vehicular travel, exclusive of the berm or shoulder.” “State highway” is correspondingly defined by § 304.001(13) as “a highway constructed or maintained by the state highways and transportation commission with the aid of state funds or United States government funds, or any highway included by authority of law in the state highway system, including all right-of-way.”

C. Definition of Mental State Required Under § 565.024.1(3)

Culpable mental states are set forth in § 562.016; § 562.016.5, provides: “A person ‘acts with criminal negligence’ . . . when he fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.”

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT’S: (1) MOTION TO DISMISS INDICTMENT . . . ; (2) MOTION TO DISMISS INDICTMENT, OR ENTER A JUDGMENT OF ACQUITTAL FOR LACK OF JURISDICTION; (3) MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE STATE’S EVIDENCE; AND (4) MOTION FOR

JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL OF THE EVIDENCE, BECAUSE THE PROPER INTERPRETATION OF § 565.024.1(3)(a) REQUIRES THE STATE TO PROVE "LEAVING A HIGHWAY . . . OR HIGHWAY'S RIGHT-OF-WAY," IN THAT THE PHRASE "INCLUDING A DEATH CAUSED BY THE DEFENDANT'S VEHICLE LEAVING A HIGHWAY . . . OR THE HIGHWAY'S RIGHT-OF-WAY" IS AMBIGUOUS AND MUST BE CONSTRUED LIBERALLY FOR THE DEFENDANT.

STANDARD OF REVIEW

Questions involving statutory interpretation and application are questions of law that are reviewed de novo, with no deference given to the trial court's judgment. *Strong v. American Cyanamid Co.*, 261 S.W.3d 493, 522 (Mo. App. 2007).

STATUTORY CONSTRUCTION

"[The] primary objective in interpreting [a statute] is to give effect to the General Assembly's intent . . . from the plain and ordinary meaning of the statute's words." *State v. Jones*, 172 S.W.3d 448, 451 (Mo. App. 2005). "Legislative intent can only be derived from the words of the statute itself." *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. banc 2002). In other words, courts must "determine the legislative intent from what the legislature said and not from what [courts] think the legislature intended to say or inadvertently failed to say." *Gray v. Wallace*, 319 S.W.2d 582, 585 (Mo. 1958). As a threshold, there must be ambiguity in a statute before a court can engage in statutory interpretation; "[i]f the language of the statute is clear and unambiguous, there is no room for statutory construction." *Missouri Highway and Transp. Comm'n v. Merritt*, 204 S.W.3d 278, 282 (Mo. App. 2006).[6] The language of a clear statute must be effectuated as written; if a statute is not ambiguous, the court cannot add words or requirements by implication. *Strong*, 261 S.W.3d at 524.

The primary means of determining if ambiguity exists and judicial interpretation is necessary is to give words that are not defined by statute their "plain and ordinary meaning[s]," i.e. dictionary definitions. *Missouri Highway and Transp. Comm'n*, 204 S.W.3d at 282; *Jones*, 172 S.W.3d at 451. Words can have more than one "plain and ordinary meaning"; for example, when the dictionary

[6] Ambiguity in a statute differs from vagueness in violation of due process. *Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 105 (Mo. 1998); *see also infra* Point II (discussing the applicable law for vagueness in violation of due process). "Courts have long accepted responsibility for providing meaning to laws that are ambiguous." *Holden*, 959 S.W.2d at 105.

gives two definitions, one broader and one narrower, both definitions are "plain and ordinary meanings." *Id.* at 454. When "legislative intent cannot be ascertained from the language of a statute by giving it its plain and ordinary meaning, the statute is considered ambiguous." *State v. Condict*, 65 S.W.3d 6, 12 (Mo. App. 2001). In addition, a statute is ambiguous when "reasonably well-informed persons" read a statute differently. *State v. Haskins*, 950 S.W.2d 613, 615 (Mo. App. 1997).

"Courts look beyond the plain and ordinary meaning of a statute when . . . its meaning is ambiguous." *Id.* at 616. Courts should use canons of construction to aid them in determining legislative intent. *Id.* For example, statutes should not be interpreted "so as to render some of their phrases to be mere surplusage." *Robinson v. Advance Loans II, LLC*, 290 S.W.3d 751, 755 (Mo. App. 2009). It must be "presume[d] that the legislature included every word of a statute for a purpose . . . ." *Id.* Additionally, it is sometimes appropriate to examine the history of the statute, circumstances surrounding its adoption, and the societal problem the statute was enacted to address. *Condict*, 65 S.W.3d at 12. Further, when a criminal, rather than civil, statute is ambiguous and "reasonably susceptible to more than one construction," the statute must be construed strictly against the state and liberally in favor of the defendant. *Jones*, 172 S.W.3d at 456. Thus, criminal statutes will not be interpreted to embrace any acts or omissions that are not clearly described within the letter and spirit of the statute, or remove any provision that the legislature included as an element of the offense. If there is any fair doubt as to whether the crime charged and proved is contained within the statute, such doubt must be resolved in favor of the defendant. *Id.* This "rule of strict construction 'must prevail even though courts may think that the legislature ought to have made a law more comprehensive and that by failing to do so it failed to accomplish a salutary purpose.'" *Id.* at 457(quoting *State v. McClary*, 399 S.W.2d 597, 599 (Mo. App. 1966)). Although "the rule of strict construction does not require that the courts ignore either common sense or evident statutory purpose," *State v. Hobokin*, 768 S.W.2d 76, 77 (Mo. banc 1989), there is "no possible authority to construe [a] law as embracing an offense which is not already expressly written into it or so clearly, plainly and necessarily implied by the words the law employs that we can fairly say such offense is proscribed by the law beyond all rational doubt."[7] *McClary*, 399 S.W.2d at 600 (emphasis added).

In sum, courts are to make every effort to discern the intent of the legislature in enacting a statute, first by considering the plain and ordinary meaning of the

[7] To so construe a law "would be for [a court] to legislate rather than to adjudge, and this [a court is] forbidden to do." *Id.*

words, giving effect to each word, clause, and sentence. *Missouri Prop. & Cas. Ins. Guar. Assoc. v. Pott Indus.*, 971 S.W.2d 302, 304 (Mo. banc 1998). If the legislative intent remains unclear, courts may look to legislative and societal history. Any remaining ambiguity in a criminal statute must be resolved in the defendant's favor.

In this case, with respect to the statute at issue, § 565.024.1(3), the General Assembly's intent was clearly to increase the felony level, and thus possible punishment, for deaths caused by criminally negligent driving that occurs while a person is intoxicated under particular circumstances set out in the statute. However, the plain and ordinary meanings and statutory definitions of the words used in § 565.024.1(3)(a), as well as the grammatical structure of the sentence and phrases therein, do not unambiguously indicate what specific facts and elements must be proved, specifically whether the prosecution must prove "leaving a highway . . . or highway's right-of-way" by the defendant as an element or if that language is mere surplusage[8] used to give one of many possible means of proving criminal negligence. Further, an examination of the history of the statute, the surrounding circumstances, and the societal problem being addressed suggests that the General

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[8] This is a construction the courts are usually directed to reject. *Robinson*, 290 S.W.3d at 755.

Assembly could have intended either interpretation. Thus, the statute can be properly construed as requiring the prosecution to prove "leaving a highway . . . or highway's right-of-way" by the accused as an element of the crime charged under § 565.024.1(3)(a). Any remaining ambiguity in the statute must be resolved in favor of Appellant.

A. Analysis of Language of § 565.024.1(3)(a)

An examination of the language used in § 565.024.1(3)(a) reveals a number of ambiguities.[9] First, the plain and ordinary meaning, i.e. dictionary definition, of the word "including" is ambiguous. Second, the statutory definitions referred to, whether expressly or implicitly, merely further the confusion. Finally, the grammatical structure of this subsection can result in several different constructions of the statute, with widely differing legal effects. The combined effect of these drafting issues results in the existence of at least three reasonable interpretations of what must be proved under this subsection: (1)(a) driving while intoxicated, (b) criminal negligence, (c) death of any person who is not a passenger, and (d) such death resulting from the defendant's vehicle leaving the highway or right-of-way; (2)(a) driving while intoxicated, (b) criminal negligence, (c) death of any person

[9] *See supra*, Introduction and Relevant Statutory Provisions, for the full text of section 565.024.1(3).

who is not a passenger, and (d) the aforementioned criminal negligence resulted from the defendant's vehicle leaving the highway or right-of-way; or (3)(a) driving while intoxicated, (b) criminal negligence, (c) death of any person who is not a passenger, and (d) the aforementioned criminal negligence could possibly result from the defendant's vehicle leaving the highway or right-of-way or from any other action comprising criminal negligence. While the first interpretation appears to be the intent of the legislature, the possibility of multiple interpretations at the very least results in sufficient ambiguity to render the statute so vague and unclear as to be a violation of due process.

1. Plain and Ordinary Meanings of Words in § 565.024.1(3) that are not Defined by Statute

In the instant case, the word "including" as used before "the death of an individual that results from the defendant's vehicle leaving a highway . . . or the highway's right-of-way" is ambiguous and is properly construed to require that the prosecution prove leaving the highway or right-of-way as an element. In an effort to effectuate the General Assembly's intent and determine the plain and ordinary meaning of "including," it is appropriate to look to the dictionary definition. "Including" is not defined in most dictionaries; rather, the verb form "include" is defined and "including" is listed as a variant form. "Include" is defined as "to take in or comprise as a part of a whole or group." *Merriam-Webster Online Dictionary* (2009), *available at* http://www.merriam-webster.com/dictionary/including. One dictionary defines "include" as "[t]o consider with or place into a group, class, or total." *The American Heritage Dictionary of the American Language,* "include" (4th ed. 2004). Further, in a usage note addressing whether "include" implies only a partial, not a complete, list, it states: "This restriction is too strong. Include does not rule out the possibility of a complete listing." *Id.* Another dictionary discusses that "include" "traditionally has introduced a nonexhaustive list, [but] is now . . . widely []used for consists of." Bryan A. Garner, *A Dictionary of Modern American Usage* 363 (1998). "Include means to contain as a part or member of a larger whole; it may indicate one, several, or all parts." *Random House Webster's College Dictionary* 667-68 (2000). Another definition of "include" is "to have as part of a whole; contain; comprise . . . ." *Webster's New World Dictionary of the American Language* 736 (College Ed. 1958). "Including" is the participle form of the verb "include," and as such, it modifies the word or term preceding it. *See infra* Point I, Part B.2 (discussing which word or phrase "including" is intended to modify). These plain and ordinary meanings demonstrate that "including" can be used either as a modifier suggesting limitation or restriction, such that the words following it comprise the entirety of something, or expansion, such that the words following it are merely illustrative parts of a greater whole. By the simple addition of four words, "including but not limited to" rather than merely "including," the General Assembly could have unambiguously revealed an intent to illustrate mere parts of a greater whole; however, this is not what the General Assembly did. Given the two options, they chose not to designate the clause as a subpart of a whole, but rather as the sum total of the whole.

Examination of case law further supports the proposition that "including" can be used in multiple ways, and thus is ambiguous. "The term 'including' is ambiguous and its meaning may vary according to its context." *Rice v. Bd. of Adjustment of the Village of Bel-Ridge*, 804 S.W.2d 821, 824 (Mo. App. 1991); *see also, e.g., Kieffer v. Kieffer*, 590 S.W.2d 915, 918 (Mo. banc 1979); *St. Louis County v. State Highway Comm'n*, 409 S.W.2d 149, 153 (Mo. 1966). Several courts have stated that "generally the term ['including'] is one of enlargement rather than limitation." *Kieffer*, 590 S.W.2d at 918. However, "the term has various shades of meaning, sometimes of restriction and sometimes of enlargement." *State on Inf. Huffman v. Sho-Me Power Co-Op*, 191 S.W.2d 971, 977 (Mo. banc 1946)(internal quotations omitted). For example, "where a general term is followed by the word 'including,' which is itself followed by specific terms, the intent may be one of limitation." *State Pub. Defender v. Iowa Dist. Court*, 633 N.W.2d 280, 283 (Iowa 2001). In *Huffman*, the court found that "including" was "used restrictively in the sense of its synonyms 'comprising; comprehending; embracing'" because the words it qualified, standing alone, were all-encompassing, "and if such was the legislative intent, it was unnecessary to say more." 191 S.W.2d at 977.[10] As in *Huffman,* where the term "including" qualified words that were all-encompassing categories, in this case, the term "criminal negligence" in and of itself encompasses any and all conduct fitting its definition. § 562.016.5; see also *infra* Point I, Part B.3 (discussing the effect of statutory definitions, such as that of "criminal negligence," on the proper construction of section 565.024.1(3)(a)). Like the court noted in *Huffman*, in this case, if the legislature had intended to encompass all possible conduct constituting "criminal negligence," it would have been unnecessary to say more about criminal negligence; interpreted this way, the "leaving a highway . . . or the highway's right-of-way" language becomes mere surplusage–an interpretation that courts seek to avoid.[11] *See, e.g., Robinson*, 290

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[10] The statute at issue in *Huffman* provided that cooperatives could be created "for the purpose of conducting any agricultural or mercantile business . . . including . . ." and then proceeded to set forth an exhaustive list of the types of agricultural and mercantile businesses that could be conducted under the statute. *Id.*

[11] The prosecutor himself referred to this language as "superfluous" and "surplusage" in

S.W.3d at 755. To construe "including . . . leaving a highway . . . or the highway's right-of-way" as merely articulating two examples of acting with criminal negligence begs the question of what it was about those two examples, out of undoubtedly hundreds of possible means of acting with criminal negligence, that made the General Assembly think to use those particular examples. Finally, "when a statute uses the word 'include' in th[e] restrictive, limiting sense to define a term, it sets forth the entire definition, and no other elements or items are includable." *Auer v. Commonwealth*, 46 Va. App. 637, 646 (Va. App. 2005). Thus, if the General Assembly did intend to use "including" in the restrictive sense, then only conduct that meets the definitions of leaving the highway or leaving the right-of-way can fulfill this element.

The dictionary definitions combined with case law indicate that "including" as used in § 565.024.1(3)(a) is more likely to function as an element or at the very

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arguing that § 565.024.1(3) is not unconstitutionally vague and that leaving the highway or right-of-way is not a required element. (T. at 961.) However, the Supreme Court of the United States has said that "one of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or **superfluous**, void or insignificant." *Corley v. United States*, 556 U.S. _____ (2009)(emphasis added).

least is unconstitutionally ambiguous as to whether “leaving a highway . . . or the highway’s right-of-way” is a restrictive provision or a partial list of all possible criminally negligent conduct. If it is a limitation, this language either creates an additional element that must be proved in order to raise the felony level from class C to class B, or it limits the types of criminal negligence to those that involve the defendant leaving the highway or right-of-way. The distinction is subtle, and for purposes of this appeal, has no practical effect–either way, the State needed to charge, instruct, and prove beyond a reasonable doubt that Appellant’s vehicle left the highway or right-of-way. The State undoubtedly failed to fulfill this burden.

2. Effect of the Grammatical Structure of Phrases and Sentences on the Interpretation of § 565.024.1(3)

Application of rules of statutory construction to the grammatical structure of § 565.024.1(3) further supports the interpretation of subsection (a) as including the element of leaving the highway or right-of-way, or at least a finding that the statute is ambiguous. Significantly, the grammatical structure of § 565.024.1(3) indicates that the General Assembly intended that the word “including” modify the preceding phrase “the death of any person not a passenger” by adding to that an additional element, “leaving a highway . . . or the highway’s right-of-way.” “[T]he long recognized ‘last antecedent rule’ [] instructs that: ‘relative and qualifying words, phrases, or clauses are to be applied to the words or phrase immediately preceding and are not to be construed as extending to or including others more remote.'" *Rothschild v. State Tax Comm'n of Missouri*, 762 S.W.2d 35, 37 (Mo. banc 1988)(quoting *Citizens Bank & Trust v. Dir. of Revenue*, 639 S.W.2d 833, 835 (Mo. 1982)). To read the phrase "including . . . leaving a highway . . . or the highway's right-of-way" as a modification or explanation of the term "criminal negligence" violates this rule by extending the phrase to a term that precedes it by eighteen words and a separate phrase. Even more significantly, the term "criminal negligence" constitutes an element in not only subsection (a), but also subsections (b) and (c), thereby making it even more remote when compared to the "including . . . leaving a highway . . . or the highway's right-of-way" phrase. It is far more likely that the "including" phrase is intended to modify "the death of any person not a passenger" by adding an additional circumstance that must exist–leaving the highway or right-of-way. When this interpretation is combined with a reading of "including" in its restrictive, exhaustive sense, it is apparent that leaving either the highway or the right-of-way is a requirement for a defendant to be found guilty under § 565.024.1(3)(a).

When the grammatical structure used in § 565.024.1(3)(a) is compared to that used in subsections (3)(b) and (c), which were adopted at the same time, the existence of several possible interpretations is further illustrated. It is appropriate and important to compare (3)(a) to (b) and (c) because "[p]rovisions of a whole legislative act must be construed together, and all provisions must be harmonized if it is reasonably possible to do so." *Missouri Highway and Transp. Comm'n*, 204 S.W.3d at 282. Initially, subsection (3) clearly sets forth the elements of operating a motor vehicle while intoxicated and acting with criminal negligence. Subsection (a) then introduces "[c]aus[ing] the death of any person not a passenger" and "including the death of an individual that results from the defendant's vehicle leaving a highway . . . or the highway's right-of-way . . . ." Subsection (b) merely contains "[c]aus[ing] the death of two or more persons," while (c) contains "[c]aus[ing] the death of any person" with a blood alcohol content of a specified amount. Subsections (b) and (c) clearly set forth additional circumstances that raise the felony level from class C to class B by adding additional elements that must be proven. They do not, however, attempt to modify or expound upon the already extant element of criminal negligence, which is the result if subsection (a) is construed as containing mere surplusage language that gives possible examples of criminal negligence. When (a) is read in parallel with (b) and (c), it is apparent that the legislature intended to add additional elements that must be proved in order to raise the felony level: causing the death of a non-passenger and doing so by leaving the highway or right-of-way.

Moreover, subsection (a) contains two phrases describing the victim's death: (1) "the death of any person not a passenger in the vehicle . . . operated by the defendant; and (2) the death of an individual that results from the defendant's vehicle leaving a highway . . . or the highway's right-of-way;" the use of these two descriptions and the parallel nature of the language indicate that the proper interpretation is that each is a required element under subsection (a). As it must be presumed that the legislature included all the words for a purpose, the General Assembly's decision to use two phrases to describe the victim's death indicates that each phrase should be construed to modify the nature of the death in a necessary and significant manner. In other words, the circumstances described in each phrase must be proved. The similarity of the two phrases further supports reading them as parallel requirements, rather than reading one as a modification of a more distant and remote phrase not contained within subsection (a) itself.

3. Effect of Statutory Definitions on Possible Interpretations of § 565.024.1(3)(a)

To construe this phrase as merely elucidating two out of the hundreds of ways that a driver can be criminally negligent causes additional problems beyond creating mere surplusage when the statutorily-defined terms are considered. Under this interpretation, the statute can be paraphrased as saying that the driver must have acted with criminal negligence, including but not limited to leaving the highway or right-of-way. This interpretation implicitly creates a presumption that "leaving a highway . . . or the highway's right-of-way" automatically constitutes criminally negligent conduct as defined under § 562.016.5. However, whether particular conduct meets the standard of criminal negligence and by inference what constitutes a "gross deviation from the standard of care which a reasonable person would exercise" is a matter of fact to be decided by the trier of fact. If the legislature intended to create a legal presumption that leaving a highway or its right-of-way constitutes acting with criminal negligence, it could have done so by adding a subsection to § 562.016.5 that so specifies.

The problematic nature of this interpretation, and the sleight-of-hand creation of a presumption of criminal negligence, becomes increasingly apparent when other statutorily defined terms are considered. A "highway," as defined by § 301.010(19) and referenced by the section at issue, amounts to "any public thoroughfare." The definition of "right-of-way" for purposes of § 565.024.1(3)(a) is far more complicated because it references other statutory definitions, particularly "highway" (as the possessive term "highway's" is used to modify "right-of-way") and "roadway."[12] § 304.001(11). When all relevant portions of the statutory definitions are incorporated into the definition of "right-of-way," it becomes "any public thoroughfare's entire width of land between the boundary lines of a state highway, including any portion of a state highway ordinarily used for vehicular travel."[13] § 301.010(19); § 304.001(12). If "leaving" the newly defined "highway" or "highway's right-of-way" presumptively constitutes criminal negligence, a person could be found guilty under § 565.024.1(3)(a) for conduct that is not "a gross deviation from the standard of care which a reasonable person would exercise in the situation," as required by § 562.016.5. For example, if a driver pulled off the highway for an emergency reason, such as to avoid hitting a deer, to help another stranded driver, or to fix a flat tire, such conduct would be presumed criminally negligent under § 565.024.1(3)(a)[14] by virtue of the "including" phrase, even if no

[12] The term "state highway" is also referenced, but there is no dispute that highway at issue in this case fits the definition of state highway. Thus, it will not be considered in this discussion.

[13] The definition of "roadway" excludes the berm or shoulder, but that is not relevant here and thus it has not been included here.

[14] If intoxication alone is not enough to demonstrate criminal negligence, it follows that leaving the highway or right-of-way, standing alone, should not automatically constitute criminal negligence. *See State v. Garrett*, 829 S.W.2d 622, 627 (Mo. App. 1992)(stating

reasonable juror would find that such conduct was “a gross deviation from the standard of care which a reasonable person would exercise in the situation.” § 562.016.5. That interpretation invades the province of the jury and denies a criminal defendant’s right to a jury determination of his guilt. U.S. Const. amends. V, VI & XIV. As such, it cannot be the interpretation intended by the General Assembly. Rather, § 565.024.1(3)(a) is properly construed as requiring the State to prove that the defendant caused the death of a non-passenger and did so by leaving the highway or right-of-way.

The plain and ordinary meanings, the statutorily defined terms, and the grammatical structure of the section all provide support for the interpretation of the “leaving a highway . . . or the highway’s right-of-way” language as an element that must be proved, or at a minimum demonstrate the hopeless ambiguity of this provision. The fact that the attorneys and trial judge involved in the case read the statute differently further supports the contention that § 565.024.1(3)(a) is ambiguous because a statute that “could be read differently by reasonably well-informed persons . . . is ambiguous.” *Haskins*, 950 S.W.2d at 615. In this case, the attorneys and trial judge were presumably more than “reasonably well-informed,”

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that “intoxication *alone* does not support a manslaughter conviction [under §565.024.1(2)]”)(emphasis added).

yet they read § 565.024.1(3)(a) differently. (*See* T. 10-12, 958-62). The defense attorneys read the statute, and the indictment, as requiring the State to prove that Appellant left the highway or right-of-way and thus built their defense around proving that he did not in fact leave the highway or right-of-way. (T. at 10-12, 958-62). On the other hand, the prosecutor interpreted § 565.024.1(3)(a) as containing "superfluous" "surplusage" language with respect to leaving the highway or right-of-way. (T. at 961). It is readily apparent that both interpretations have their advocates, and as a result, § 565.024.1(3)(a) is ambiguous and must be properly construed by this Court to require the prosecution to prove leaving the highway or right-of-way as an element.

B. Legislative History

When a statute is ambiguous and the proper construction is unclear, it is appropriate to examine the history of the statute to further illuminate the legislative intent. *Condict*, 65 S.W.3d at 12. Thus, as evidenced by the discussion *supra*, § 565.024.1(3)(a) is ambiguous, and it is appropriate to look at its legislative and societal history, which provides additional support for construing this section to require the prosecution to prove leaving the highway or right-of-way as an element.

The Senate's proposed bill ("Senate Bill") originally attempted to create a new provision, § 565.022, creating the class B felony of aggravated vehicular manslaughter if [the driver] while in an intoxicated condition, operates a motor vehicle in this state, and when so operating with criminal negligence: (1) Causes the death of any person not a passenger in the vehicle operated by the defendant; or (2) Causes the death of two or more persons; or (3) Causes the death of a person less than fifteen years of age; or (4) Causes the death of any person while the defendant's blood alcohol is greater than or equal to two-tenths percent of alcohol by weight in the defendant's blood.

Senate Bill Nos. 37, 322, 78, 351, & 424, First Regular Session, 93rd General Assembly, *available at* http://www.senate.mo.gov/05info/billtext/comm/SB37.htm. The bill proposed by the House of Representatives ("House Bill") sought to make involuntary manslaughter a class A felony when a person operates a motor vehicle in an intoxicated condition and acts with criminal negligence to cause the death of any person if at least one of the following conditions exist: (1) Such individual has a blood alcohol level that is at least one and one half times the legal limit established in section 577.012, RSMo, while operating the vehicle; or (2) A fatality occurs as a result of the person's vehicle leaving a highway, as defined by section 301.010, RSMo, or its right-of-way. House Bill No. 526, 93rd General Assembly, First Regular Session, *available at* http://www.house.missouri.gov/content.aspx?info=/bills051/biltxt/intro/HB0526I.htm. Some aspects of each proposed bill were retained in the final version. § 565.024.1(3). Specifically, one of the conditions proposed by the Senate to raise the felony level, the death of someone fourteen or under, was deleted, while the other three remained. Further, the element in the Senate Bill that is at issue here, causing the death of any non-passenger, was modified by one of the conditions proposed in the House Bill, that the "fatality occur[] as a result of the person's vehicle leaving a highway . . . or its right-of-way." The retention of that phrase in the final bill suggests that the General Assembly believed that leaving the highway or right-of-way was an important component in raising the felony level from class C to class B, and to treat that language as superfluous or mere surplusage appears even more inappropriate. Thus, it is properly construed to be an element or a specific form of criminal negligence that must be proved.

C. Application of the Rule of Strict Construction

When legislative intent remains unclear after examination of the plain and ordinary meanings, statutorily defined terms, and legislative history, the statute must be strictly construed against the state and liberally construed in favor of the defendant. *Hobokin*, 768 S.W.2d at 77; *Jones*, 172 S.W.3d at 456. Thus, "even if it could be said that it is equally possible that the legislature intended that the word be construed [another way], it really does not matter, because the statute would still be ambiguous and the result would be the same." *Id.* In this case, there are three possible constructions of § 565.024.1(3)(a). As previously discussed, the most likely construction is that leaving the highway or right-of-way was intended to be an element. However, even if it is equally likely that the phrase "leaving a highway . . . or the highway's right-of-way" was intended as mere surplusage to point out one possible means of meeting the criminal negligence element, the statute is ambiguous and must be construed against the government and in favor of the defendant. Thus, the proper construction of § 565.024.1(3)(a) is that it requires the government to prove that the defendant left the highway or right-of-way, which did not occur in this case.

SUFFICIENCY OF THE EVIDENCE

"The state has the burden and must prove each and every element of a criminal case. The failure to do so demands that any conviction be reversed." *State v. Smith*, 33 S.W.3d 648, 652 (Mo. App. 2000). As discussed above, § 565.024.1(3)(a) is properly construed as including the element of leaving the highway or right-of-way, either as a subset of criminal negligence or as a stand-alone element. Under either interpretation, the State did not meet its burden of proving that Appellant left the highway or right-of-way. In fact, the State neither attempted to prove that Appellant left the right-of-way, nor did it instruct the jury on this element. As a result, in addition to insufficient evidence to sustain the conviction, the jury's findings are insufficient. Accordingly, Appellant's conviction should be reversed and a judgment of acquittal entered. Alternatively, Appellant requests a new trial. Alternatively, if this Court finds that § 565.024.1(3)(a) is not properly construed in this manner, then the statute is unconstitutionally vague in violation of Appellant's right to due process as guaranteed by the United States and Missouri Constitutions.

II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT AND TO DECLARE STATUTE UNCONSTITUTIONAL AND DEFENDANT'S MOTION FOR NEW TRIAL, BECAUSE § 565.024.1(3)(a) IS UNCONSTITUTIONALLY VAGUE, IN THAT THIS STATUTE CAN BE READ IN SEVERAL CONTRADICTORY WAYS AND THEREBY DOES NOT GIVE A PERSON OF ORDINARY INTELLIGENCE A REASONABLE OPPORTUNITY TO KNOW WHAT CONDUCT IS PROHIBITED, AND FURTHER THE STATUTE DOES NOT CONTAIN SUFFICIENTLY EXPLICIT STANDARDS TO GUIDE ENFORCEMENT IN A WAY THAT AVOIDS DISCRIMINATORY OR

ARBITRARY APPLICATION, IN VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS AS GUARANTEED IN THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, § 18(a) OF THE MISSOURI CONSTITUTION.

STANDARD OF REVIEW

Should this Court find against Appellant on Point I by holding that a proper construction of § 565.024.1(3)(a) does not require the State to prove that a defendant's vehicle left the highway or right-of-way, then Appellant asserts that the statute is unconstitutionally vague in violation of Appellant's constitutional rights to due process. The determination of the validity of a statute is a question of law, which "are matters reserved for de novo review by the appellate court, and we therefore give no deference to the trial court's judgment in such matters." *Baris v. Layton*, 43 S.W.3d 390, 397 (Mo. App. 2001). Thus, the question of whether § 565.024(3)(a) is unconstitutionally vague, and therefore invalid, is a question of law to be reviewed de novo. Additionally, there are four requirements to properly raise a constitutional issue for review on appeal: (1) The issue must be raised at the first available opportunity; (2) the constitutional provision alleged to have been violated must be specified; (3) the facts showing the violation must be given; and (4) the constitutional question must be preserved. *Missouri Highway and Transp.*

Comm'n, 204 S.W.3d at 284. The purpose of this rule is "to prevent surprise to the opposing party and to allow the trial court the opportunity to identify and rule on the issue." *Call v. Heard*, 925 S.W.2d 840, 847 (Mo. banc 1996). To further preserve the issue for review, it is necessary that the trial court ruled on the issue. *Missouri Highway and Transp. Comm'n*, 204 S.W.3d at 284.

Appellant raised his constitutional argument via pretrial motion (LF:155.), referenced the violation of due process (LF:155.), argued facts showing the violation (T:11-12), and preserved the argument by including it in his Motion for New Trial (LF:253.); thus the constitutional issue has been properly preserved for appellate review.

CONSTITUTIONALITY

In determining the constitutionality of a statute, there is a presumption of validity, but if the statute clearly contravenes a constitutional provision, it will be held unconstitutional. *Thompson v. State Bd. of Registration for the Healing Arts*, 244 S.W.3d 180, 185 (Mo. App. 2007). Both the United States and Missouri Constitutions include provisions guaranteeing a right to due process. U.S. Const. amends. V & XIV; Mo. Const. art. I, § 10. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo.

banc 1999). A statute is not clearly defined if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). While "neither absolute certainty nor impossible standards of specificity are required," a law must be susceptible of some "reasonable and practical construction which will support it" to be held valid. *Cocktail Fortune, Inc.*, 994 S.W.2d at 957. Terms and words "of common usage" that "are understandable by persons of ordinary intelligence" are sufficiently definite and certain; "[w]here, however, the statutory terms are of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, the statute is void." *Prokopf v. Whaley*, 592 S.W.2d 819, 824 (Mo. banc 1980). Moreover, the statutory language must be evaluated by applying it to the facts of the case rather than to some imagined hypothetical situation in which the language might be vague. *Cocktail Fortune, Inc.*, 994 S.W.2d at 958-59. Finally, courts are less tolerant of vagueness in statutes with criminal penalties than those with civil penalties because the consequences of imprecision are less severe when the penalty is civil. *Id.* at 957-58.

The purpose of the void for vagueness doctrine is twofold: (1) to "ensure[] that laws give fair and adequate notice of proscribed conduct," and (2) to "protect[]

against arbitrary enforcement." *State v. Pribble*, 285 S.W.3d 310, 315 (Mo. 2009). Accordingly, there are two forms of vagueness that violate due process.[15] *Conseco Fin. Servicing Corp. v. Missouri Dep't of Revenue*, 195 S.W.3d 410, 415 (Mo. banc 2006). The first form encompasses vagueness in a statute that results in the lack of notice to a potential offender of the proscribed conduct ("Notice of Proscribed Conduct"). *Thompson*, 244 S.W.3d at 185. Notice is vital because "[v]ague laws may trap the innocent by not providing fair warning." *Grayned*, 408 U.S. at 108. The test for notice and fair warning is whether the "law[] give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.*; *State v. Brown*, 660 S.W.2d 694, 697 (Mo. banc 1983). The second form of vagueness stems from the absence of explicit standards by which the responsible governmental entity would be guided in enforcing the statute in a nondiscriminatory, nonarbitrary manner ("Enforcement Guidelines"). *Thompson*, 244 S.W.3d at 185; *Conseco Fin. Servicing Corp.*, 195 S.W.3d at 415. The concern addressed in this second form of vagueness is that "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for

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[15] There is actually a third form of vagueness which is not relevant here, termed "overbreadth," in which a statute impinges on First Amendment or other guaranteed freedoms. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

resolution on an ad hoc and subjective basis," leading to the dangers of arbitrary and/or discriminatory application. *Grayned*, 408 U.S. at 108. As applied to the facts of this case, § 565.024.1(3)(a) did not give Appellant, a person of ordinary intelligence, a reasonable opportunity to know what conduct was prohibited because the statutory term "including the death of an individual that results from the defendant's vehicle leaving a highway . . . or the highway's right-of-way" can be read to raise the felony level from class C for causing the death of any person to class B for causing the death of a non-passenger either in and of itself or as a result of leaving the highway or right-of-way as discussed *supra*. Further, this section does not contain sufficient standards to guide the police, prosecutors, and courts in nondiscriminatory, nonarbitrary enforcement because that term is so uncertain and confusing that the courts cannot discern with reasonable certainty whether the term defines an element of "leaving the highway or right-of-way" or is mere surplusage intended to articulate one of hundreds of possible means of demonstrating criminal negligence–a distinction of critical importance in this case.

A. Notice of Proscribed Conduct

The language of § 565.024.1(3)(a) fails to give fair and adequate notice of the proscribed conduct because it is unclear whether the subject terminology delineates an element that must be proved, a specific form of criminal negligence that must be proved, or is window dressing ostensibly as a single example of what might constitute criminal negligence. *See supra*, Point I. Determining whether a statute is unconstitutionally vague necessarily requires interpretation of the words and phrases used in a statute to determine whether "the words used are of common usage and understandable to persons of ordinary intelligence." *Doe v. Missouri Dept. of Soc. Servs.*, 71 S.W.3d 648, 651 (Mo. App. 2002)(citing a dictionary definition in construing the term "well-being" to determine whether a statute was unconstitutionally vague). As the interpretation of § 565.024.1(3)(a) has been discussed at length, Appellant will merely reiterate the points most pertinent to his vagueness challenge.

The words used in § 565.024.1(3)(a) are words of common usage, but the word "including" is commonly used both as a restrictive and an expansive modifier. *See supra*, Point I, Part 1.A (discussing the varying uses of "include" and "including"). As applied in this case, § 565.024.1(3)(a) did in fact confuse "persons of ordinary intelligence." Three attorneys and a judge had distinctly different interpretations of the statute and Appellant's counsel correctly interpreted the indictment as charging Appellant specifically with "leaving the right-of-way." (LF 155-56)(articulating the lack of clarity in the "including . . . leaving a highway . . . or the highway's right-of-way" language with respect to whether it is an element that must be proved). The attorneys thus understood the statute to require the State to prove that Appellant actually left the right-of-way. (LF 161-2; T. 963)(explaining that defense counsel interpreted § 565.024.1(3)(a) as requiring the State to prove that Appellant's vehicle left the highway or right-of-way). On the other hand, the prosecutor interpreted § 565.024.1(3)(a) as containing approximately thirty "superfluous" words that were added by the legislature as a bonus and should not be considered. (T. 961). In sum, one side understood the "including" phrase to contain an entire additional element while the other side understood it to be extraneous and "to basically giv[e] it a broader sense . . . than just saying that person was not a passenger in the vehicle"–two polar opposite interpretations. (T. 11). It was not until over halfway through the trial, at the close of the State's evidence, that the matter was clarified, and then only by the trial judge's ruling in favor of the State. (T. 958-63). Thus, § 565.024.1(3)(a) "forbids . . . the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning." *Connally*, 269 U.S. at 391. The fact that the statute at issue is criminal rather than civil requires the court to be even less tolerant of this vagueness.

B. Enforcement Guidelines

Vagueness with respect to enforcement guidelines is caused by a statute's lack of explicit standards by which the responsible governmental entity is guided in enforcing the statute in a nondiscriminatory, nonarbitrary manner. *Thompson*, 244 S.W.3d at 185. The facts of this case demonstrate that the current wording of the statute allows for "impermissible delegat[ion of] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis," thereby creating dangers of arbitrary and discriminatory application. *Grayned*, 408 U.S. at 108. For example, the initial Complaint charged the defendant with a class C felony in violation of § 565.024 in that "while under the influence of alcohol and/or controlled substance caused the death of Gavin Donohue by striking him with a motor vehicle when operating a motor vehicle with criminal negligence in that defendant was driving in a closed highway construction zone." (LF 1). Two days later, an Amended Complaint was filed charging Appellant with a class B felony and changing "closed highway construction zone" to "close construction zone" and adding "thereby leaving said highway's right of way and, [sic] Gavin Donohue was not a passenger in the vehicle operated by the defendant." (LF 4). While no explanation was given as to why, in a span of two days, the prosecutor decided to change the charge,[16] the addition of "thereby" before "leaving said highway's right

[16] Possibly, the prosecutor was not familiar with § 565.024.1(2) or (3) and therefore was

of way" modifies "driving in a close construction zone," suggesting that the prosecutor was attempting to demonstrate that Appellant driving in a construction zone fulfilled the element of "leaving said highway's right of way." Despite the prosecutor's later argument that he believed the "including" language of § 565.024.1(3)(a) to be "superfluous" and "basically giving it a broad sense," its purposeful inclusion in the Amended Complaint indicates otherwise. (T. 11). At a minimum, this alteration demonstrates that the guidelines of § 565.024.1(3)(a) are not sufficient to prevent arbitrary and discriminatory enforcement.

In addition to the aforementioned example, the lack of clarity as to whether leaving the highway or right-of-way is an element in order to raise the felony level under subsection (3)(a) continued to be problematic throughout the trial.[17] Because Appellant understood § 565.024.1(3)(a) to require the State to prove the leaving the

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unaware that he could choose between the two charges. If so, the potential for prosecutors all over the State of Missouri to charge people with varying levels of crimes based on a lack of familiarity with the law at a minimum constitutes "arbitrary enforcement."

[17] Also of note is the fact that Appellant is the only person who has been convicted, and possibly the only person charged, under § 565.024.1(3)(a) since its adoption in 2005. Thus, there is no history to aid in determining whether this provision has been enforced in an arbitrary and discriminatory manner in Appellant's case.

highway or right-of-way, he prepared his defense on the legal issue of whether "driving in a close construction zone" constitutes leaving the right-of-way. *See infra*, Point III. The State did not focus on the "right-of-way" language, but rather presented evidence that the Appellant drove into a lane that was supposed to be closed for construction. *See*, *e.g*. T. 363 (Question: "And what did the minivan do?" Answer: "And then he went into the construction zone."). Thus, Appellant was under the reasonable impression, particularly in light of the phrasing of the indictment, that the State did not meet its burden of proof as to that element. It was not until the close of State's evidence, when Appellant filed his motion to dismiss and motion for directed verdict, in which he argued that "[t]he evidence presented d[id] not support the charge that Defendant left the highway's right of way," that the issue was addressed by the State. (LF 155-57, T. 959-60). The court did not rule explicitly on whether leaving the highway or right-of-way was an element, but rather allowed the State to substitute an information in lieu of the indictment because "it d[id]n't change those facts at all" in that "[t]he State's case has always been that the defendant was driving in the closed construction zone." (T. 963). The fact that the court itself avoided the issue of statutory construction by allowing a fact-based, rather than element-based, information to be substituted for the original indictment suggests that the prosecutor and the court found the statutory language so vague that it was not sure how to properly enforce it. As applied to the facts of this case, the statutory language was "of such uncertain meaning, or so confus[ing] that the courts [could]not discern with reasonable certainty what [wa]s intended," and thus, "the statute is void." *Prokopf*, 592 S.W.2d at 824.

C. Conclusion

As applied to the facts of this case, § 565.024.1(3) did not give Appellant, a person of ordinary intelligence, a reasonable opportunity to know what conduct was prohibited due to the lack of clarity about the specific elements of the crime, specifically, whether leaving the highway or right-of-way is an element. Further, this section does not contain sufficient standards to guide the prosecution or the court in nondiscriminatory, nonarbitrary enforcement because that term is so uncertain and confusing that no one in this case could discern with reasonable certainty whether the term defines an element of "leaving the highway or right-of-way," or is mere surplusage intended to articulate one of hundreds of possible means of demonstrating criminal negligence. As a result, Appellant requests a reversal of his conviction and a finding of acquittal. This remedy, as opposed to forcing the statute to conform to constitutional due process requirements, is appropriate because "[f]or this Court to convert the statute into a constitutional proscription would be to indulge in statutory revision, a matter within the exclusive province of the General Assembly." *State v. Young*, 695 S.W.2d 882, 886 (Mo. banc 1985).

III. THE TRIAL COURT ERRED IN GRANTING THE PROSECUTION'S REQUEST TO SUBSTITUTE AN INFORMATION IN LIEU OF THE ORIGINAL INDICTMENT AFTER THE CLOSE OF THE STATE'S EVIDENCE, BECAUSE SUCH SUBSTITUTION PREJUDICED APPELLANT'S SUBSTANTIAL RIGHTS, IN THAT IT MADE APPELLANT'S DEFENSES THAT HE NEVER LEFT THE "RIGHT-OF-WAY" AS DEFINED BY STATUTE AND THAT ANY ACT OF "LEAVING THE RIGHT-OF-WAY" WAS DUE TO THE IMPROPER ARRANGEMENT OF THE CONSTRUCTION ZONE AND THUS NOT CRIMINALLY NEGLIGENT, INAPPLICABLE BY ABRUPTLY REMOVING ANY "RIGHT-OF-WAY"-RELATED ISSUE.

STANDARD OF REVIEW

A court of appeals reviews a trial court's decision to allow an amendment of an indictment for abuse of discretion. *State v. Endicott*, 881 S.W.2d 661, 663 (Mo. App. 1994).[18]

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[18]Missouri courts have ruled that a defendant seeking reversal based on an improperly amended indictment or information must request a preliminary hearing on the new

ARGUMENT

An information may not be substituted for an indictment if the new information either charges an additional or different offense or the substitution prejudices the defendant's substantial rights. Mo. Sup. Ct. R. 23.08.[19] In this case, there is no issue as to whether the new information charged an additional or

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information in order to preserve the error for appeal. *See State v. Simpson*, 846 S.W.2d 724 (Mo. banc 1993); *State v. McKeehan*, 894 S.W.2d 216 (Mo. App. 1995). However, such a request was not necessary to preserve the issue in this case because the amended information came after the trial had already begun. The rule requiring a defendant to request a preliminary hearing to properly preserve the error for appeal is grounded in the rule that, "An accused waives his right to object to the absence of a preliminary hearing when the accused proceeds to trial without an objection." *Simpson*, 846 S.W.2d at 729 (citing *State v. Wood*, 596 S.W.2d 394, 400 (Mo. banc 1980)). Because in this case, the amended information first appeared after the trial had already begun, the rule is inapplicable, and Seeler properly preserved this issue for appeal.

[19] Rule 23.08 states in full: "Any information may be amended or an information may be substituted for an indictment at any time before verdict or finding if:

(**a**) No additional or different offense is charged, and

(**b**) A defendant's substantial rights are not thereby prejudiced."

different offense. Thus, at issue is whether Seeler's substantial rights have been prejudiced. The test for determining if a defendant's substantial rights have been prejudiced is "whether a defense to the charge as originally made would be equally available after the amendment and whether defendant's evidence would be equally applicable after, as well as before, the amendment." *State v. Bratton*, 779 S.W.2d 633, 634 (Mo. App. 1989)(citing *State v. Carter*, 771 S.W.2d 844 (Mo. App. 1989)).[20]

A defendant's rights may be prejudiced where the amended portion of the indictment causes confusion as to the substance of the actual charges, thereby interfering with the right of the defendant to be notified of the charges against him and to present a defense. *State v. Harris*, 873 S.W.2d 887, 887 (Mo. App. 1994). In *Harris*, the defendant was initially charged with burglarizing a building at a specific address. *Id.* at 888. During trial, it became clear that the building in question actually encompassed two addresses, and the testimony was unclear as to

[20]Clearly, amending the indictment prejudiced the defendant's rights if the Court determines that "leaving the right-of-way" is an element of the offense, since amending the indictment relieved the government from proving an element of the offense, and the prosecution's failure to prove an essential element is a full and complete defense. However, for the reasons explained herein, the amendment of the indictment requires reversal even if "leaving the right-of-way" was not an element of the offense.

which address was the actual location of the burglary. *Id.* at 888-89. The court accordingly allowed an amendment of the indictment to encompass a burglary that included both addresses. *Id.* The court of appeals found that permitting this amendment was plain error, finding that "the possibility of confusion by the Defendant and his counsel [had] persisted throughout the trial." *Id.* at 889.

In this case, the original indictment made absolutely clear that the alleged criminal negligence was leaving the highway's right-of-way, by alleging that Seeler was "driving in a close[d] construction zone, thereby leaving said highway's right-of-way. . . ." (LF 31). However, the amended information changed the charge to "driving in a construction zone and drove into a lane closed to traffic . . . ." (LF 165). In the original indictment, "driving in a closed construction zone" and "leaving the right-of-way" were one and the same; in the substituted information, they were not.

A significant focus of defense counsel's strategy centered around the understanding that the criminal negligence the State alleged in the indictment was that Appellant had left "the highway's right-of-way." The defense strategy was aimed at establishing two things: first, the defendant never left the "right-of-way" as defined by statute; second, even if he did technically leave the "right-of-way" as defined by statute, Seeler's actions in so doing were not unreasonable and did not amount to criminal negligence.

This strategy was apparent in two different lines of questioning continuously put forth by defense counsel prior to the prosecution's decision to belatedly adapt the indictment to make it conform to the evidence it had actually presented, thereby nullifying the entire theory of the defense. First, defense counsel repeatedly questioned witnesses about where Donahue was standing before he was struck and about where both he and Seeler's van were at the time Seeler's van struck him.[21] This focus on the **location** of both Seeler's car and Donahue himself in the roadway

[21] T. 339 ("Q: 'Now, the minivan passes you, initially it passes you . . . on the right hand side, is this correct?' A: 'That is correct.' . . . Q: '[T]he best of your recollection is that he passed you in the right lane?' A: 'That's correct.' Q: 'Now, back on May 21st, 2008, you had testified that you thought maybe you were in the right lane when he went past you. Do you remember that?' A: 'Yes.' Q: 'But after a thought today, you were in the middle lane?'"; T. 388-399 ("'Q: Okay. And you indicated that [Mr. Donahue] was standing more to the left than to the right, is that what you said earlier?' . . . A: 'Yes, sir.' Q: Okay. And so when you're looking, you can see that Mr. Donahue is apparently in the middle lane and that he's more to the left of that lane than to the right?' A: 'Just a little bit to the left.' . . . Q: 'Yeah. In other words, he's not in between the open lane, not paved lane, and the newly paved lane?' A: 'He's not standing where the cones are, no.'"

was intended to establish that Seeler was not negligent, in that he was physically on the highway the entire time, **and thus had not left its right-of-way** at the time the accident occurred.

Second, the defense was continuously focused on the fact that all of the cars on the road on the night in question were driving over the "rumble strips" and on the shoulder. Defense counsel specifically questioned every State's witness who had driven on the road that night about whether they had been driving over the "rumble strips."[22] This line of questioning sought to establish that if one interprets

[22] T. 268 ("And the dump truck was a bit on the shoulder, on those rumble strips."); T. 345 ("Q: 'Now do you remember, did you ever run up on the rumble strip when you were driving here on this right-hand side?' A: I don't remember doing that, no.'"); T. 382 ("Q: 'And now, it kind of forced you to shift over into partially on the breakdown lane, correct?' A: 'Yes, sir.' Q: 'And are you familiar with Highway 40, whether there are rumble strips out on the edge of highway 40?' A: 'I'm not.' . . . Q: 'Is it possible you may have been on rumble strips, you just don't remember from that night?' A: 'Exactly.' Q: So now it's kind of forced you into using the – partially the breakdown lane, too. The white fog line is going under your car, partially?' A: 'Yes.' Q: And now there was not room, and then off to the shoulder it's grass, right?' A: 'Yes.'"); T. 819-20 ("Q: 'Now, you indicated that the condition of the roadway out there that evening is that you had the far right lane, and there's the rumble strips that people in the far right lane are having to travel across, right?' A: 'Yes.' Q: And the cones

going over the white lane lines as leaving the highway or the right-of way, every car that was driving on the road that night was driving outside of the established lanes, "thereby leaving the right-of-way." Seeler's actions in doing so, therefore, were objectively reasonable and did not come close to reaching the level of indifference necessary to prove criminal negligence.

The two-fold defense strategy culminated in the motion made at the close of the State's case, in which defense counsel argued that the government's evidence had not established that Seeler ever left "the highway's right-of-way" under the legal definition of the term. The entire purpose of the State's ninth inning shell game was to make each and every point defense counsel had proven and emphasized as part of his overall trial strategy irrelevant. By allowing the State to do so, the trial court erred in a manner that severely prejudiced Seeler's rights and completely deconstructed and eviscerated the defense he had worked so diligently to present.

Not only did the language that was later excised from the original indictment force Seeler to defend himself on issues that the substitution of the information subsequently made irrelevant, it also prevented him from presenting evidence to the

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in the particular – in the lane that is open for travel, far right lane, the cones are actually . . . in the travel lane, aren't they?' A: 'Yes, they are.'")

jury that was clearly relevant to the negligence with which he was ultimately charged. When the question arose regarding the admissibility of evidence of Donahue's complete lack of training for working in and around a construction zones, the judge found that this evidence was irrelevant and inadmissible because the only relevant question was "where he was" at the time he was hit. (T.863).

However, such a focus only on "where he was" was not in line with the ultimate question presented by the information by which Seeler was charged in the end–whether the lane was actually closed, and whether Seeler's confusion about the closure amounted to criminal negligence, as discussed *infra* in Point IV. The evidence of Donahue's training was certainly relevant as to this question because it would have been probative of the question of whether the lanes were closed in accordance with any set of standards by which he was trained, namely the MUTCD. This was in turn relevant to the question of what identifiers people would normally expect to see when lanes are closed, and therefore whether Seeler's failure to realize he was in a "lane closed to traffic" rose to the level of criminal negligence. However, in making its ruling, the trial court clearly had in mind the indictment under which Seeler was originally charged, thereby rendering the closing of the lane less relevant than the question of "where he was"– and, therefore whether Seeler had left the right-of-way.

The prosecution did not give any indication that it would seek to amend the original indictment until after it had already presented its entire case. Its submission of this amendment so late in the game tainted every aspect of the trial that preceded it. The words of the original indictment colored every decision that was made at trial by both the judge and by defense counsel up to that point. The cumulative impact of those decisions was that Appellant was denied the opportunity to adequately defend himself against the actual charges against him. The trial court's ruling permitting such an amendment was therefore in violation of Rule 23.08, and requires that Seeler's conviction be reversed.

IV. THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION DURING CROSS-EXAMINATION AND PROHIBITING APPELLANT FROM INTRODUCING EVIDENCE ON THE CONSTRUCTION ZONE'S CONFORMANCE WITH THE NATIONAL MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES ("MUTCD"), BECAUSE THE EVIDENCE WAS RELEVANT AND MATERIAL AND SUCH EXCLUSION VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I § 18(A) OF THE MISSOURI CONSTITUTION BY DEPRIVING

HIM OF A VIABLE DEFENSE, IN THAT THE EXCLUDED EVIDENCE TENDED TO SHOW THAT A REASONABLE PERSON WOULD HAVE BEEN CONFUSED AND UNABLE TO ASCERTAIN WHAT PART OF THE ROADWAY/HIGHWAY WAS A CONSTRUCTION ZONE AND WHICH LANES WERE CLOSED TO TRAFFIC, BECAUSE THE DISTANCE BETWEEN THE CONES SEPARATING THE CONSTRUCTION ZONE AND THE LANE OPEN FOR TRAFFIC WAS ALMOST TWICE THAN THAT REQUIRED AND CONSIDERED REASONABLE PURSUANT TO THE MUTCD.

STANDARD OF REVIEW[23]

Review of a trial court's exclusion of evidence is based on an abuse of discretion standard. *State v. Morgan*, 289 S.W.3d 802, 804 (Mo. App. 2009). A defendant must show that the error was prejudicial and that it deprived the defendant of a fair trial. *Id*. at 804-05. A defendant is deprived of the right to a fair trial if there is a reasonable probability that the trial court's error affected the outcome of the trial. *Id.* at 805. Appellant raised the issue of excluding "Pace's

[23]The remaining points assume *arguendo* that "leaving a highway . . . or the highway's right-of-way" is not an element under § 565.024.1(3)(a) and that the information substituted in lieu of the indictment was proper.

employee safety information and training [and] Pace's employee orientation material[s], including safety and accident prevention...and various other documents" in his Motion for New Trial (LF 254); therefore the issue has been properly preserved for appellate review. Mo. Sup. Ct. R. 29.11(d).

To preserve the matter for appellate review, an offer of proof is generally required when an objection is sustained as to proffered evidence. *State v. Flynn*, 937 S.W.2d 739, 741 (Mo. App. 1996). However, there is an exception to the offer of proof requirement when: (1) there is a complete understanding, based on the record, of the excluded testimony; (2) the objection is to a category of evidence rather than to specific testimony; and (3) the record reveals the evidence would have helped its proponent. *Id*. In Appellant's case, there was no specific evidentiary offer of proof as to the excluded evidence, but such an offer of proof was not needed because the exceptions set out in *Flynn* apply. There was a complete understanding of the testimony because in his opening statement, Appellant's counsel stated that "according to the National Highway Association, that based on the speed out here, these cones should be about 90 feet apart." (T. 286). Counsel also stated that based on the MUTCD formula, the cones should have been spaced no more than 90 feet apart, and a State witness agreed with that assertion. (T. 897). The sustained objection was also to an entire category of evidence rather than to specific testimony, as the objection was based on relevance, not on the form of the particular question or the manner in which it was asked. *Id*. Finally, the excluded evidence would have provided a basis for a defense, because the spacing of the cones was relevant to whether a **reasonable person**[24] would have known which lanes of the highway were closed for construction that evening (emphasis added).

ARGUMENT

To be admissible, evidence must be relevant. *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002). While a trial court has discretion in deciding relevance, that discretion is bound by the principle that the court's ruling must be overturned if it is "clearly against the logic of the circumstances." *State v. Smith*, 996 S.W.2d 518, 521 (Mo. App. 1999). Evidence is relevant when it tends to make the existence of a material fact more or less probable, and when its probative value outweighs its prejudicial effect. *Anderson*, 76 S.W.3d at 276.

[24]Jury Instruction Six defines "criminally negligent" as a "failure to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a **reasonable person** would exercise in the situation." (LF 227)(emphasis added).

When a trial court excludes otherwise admissible evidence, it creates a presumption of prejudice, rebuttable by the facts and circumstances of the particular case. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo. banc 2003). The state can only rebut the presumption by proving that the error was harmless beyond a reasonable doubt. *State v. Walkup*, 220 S.W.3d 748, 757 (Mo. 2007). In assessing whether the exclusion of evidence was harmless beyond a reasonable doubt, the court must examine the facts and circumstances of the particular case, including the nature of the charge, the evidence presented, and the role the excluded evidence would have played in the defense's theory. *State v. Sanders*, 126 S.W.3d 5, 23 (Mo. App. 2003).

The MUTCD, approved by the Federal Highway Administration of the U.S. Department of Transportation, is "the national standard for all traffic control devices installed on any street, highway, or bicycle trail" of the federal government. 23 C.F.R.§ 655.603(a). The Missouri Department of Transportation has adopted the MUTCD with the approval of the Missouri State Highway Commission. *Huifang v. City of Kansas City*, 229 S.W.3d 68, 78 (Mo. App. 2007). Because Missouri has adopted the MUTCD, any traffic control devices on any Missouri highway must be in conformity with the requirements of the MUTCD provisions, as the Code of Federal Regulations provides that "[b]oth temporary and permanent devices **shall** conform to the MUTCD" and "[a]ll traffic control devices installed in construction areas using Federal-aid funds **shall** conform to the MUTCD." 23 C.F.R §§ 655.603(d)(2) and 655.603(d)(3)(emphasis added). The purpose behind using temporary traffic controls is "[t]o decrease the likelihood of highway zone work fatalities and injuries to workers and road users by establishing **minimum** requirements and **providing guidance** for the use of positive protection devices between the work space and motorized traffic." 23 C.F.R.§ 630.1102 (emphasis added). The Code also provides that other traffic control measures, including channelizing device spacing reduction, should be given consideration for "use in work zones to **reduce work zone crashes** and risks and **consequences of motorized traffic intrusion into the work space**." 23 C.F.R. § 630.1108(c)(12)(emphasis added). In regards to the spacing of channelizing devices (e.g. cones), the MUTCD provides that the spacing should not exceed a distance in feet equal to two times the speed limit in miles per hour when used for a tangent channelization. § 6F.58, 6F-29. (T.897).

Thus, in Appellant's case, the **maximum** distance that would separate each cone should have been no more than 90 feet (2 x 45) according to the MUTCD, not 175 feet (T. 781), which is almost twice the distance of the approved national standard. According to the Code of Federal Regulations, this maximum spacing of the channelizing devices serves to reduce the likelihood of motorized traffic intrusion into the working zone, while also ensuring that workers are adequately protected. 23 C.F.R. §§ 630.1102; 630.1108(c)(12).

The evidence of the spacing of the cones is thus relevant to establish whether a reasonable person would have understood which lanes were closed to traffic and whether it was a properly designated construction zone. The spacing of the cones becomes even more important and relevant when considering that Jeremiah Davis, a Pace Construction employee, testified that "there were no other pieces of equipment down in the Valley" (T. 981), and that Donohue's shadow vehicle was 744 feet west of the accident instead of being parked within the recommended 100 or 150 feet (T. 872), which would have further notified drivers that the left-hand lanes were closed. Since the cones were one of few temporary traffic control devices used to designate the "construction" zone area, then the spacing of those cones **must** be done in accordance with the national standards in order to ensure that drivers are aware of which lanes are open and which are closed. At one point during the trial, the judge even stated, "[W]here the cones were. . . . I'm not suggesting that that is []n[o]t relevant." (T. 866). Furthermore, other national standards, the National Highway Traffic Safety Administration standards for how to administer field sobriety tests, were relevant and admissible at trial. (T.

423, 565.) Because the evidence tends to establish that the improper spacing of the cones would have been confusing to a reasonable person operating an automobile at night on this roadway, the exclusion of such evidence was clearly improper, as it was highly relevant. If a reasonable person might not understand which lane was closed to traffic because of the improper spacing of the cones, then it tends to prove that Appellant was not criminally negligent when he drove into that lane, a material fact and an element of the crime. It is well-settled that the State has the burden of proving each and every element of the case. *State v. Messer*, 207 S.W.3d 671, 674 (Mo. App. 2006).

There were substantial and significant facts in evidence that the construction site was confusing, in addition to the cones being spaced too far apart (T. 988) and not being in conformance with the MUTCD. (T. 897). The cones that separated the open and closed lanes were improperly placed in the open lane of travel, as testified to by the State's accident reconstructionist, Officer Deckard; and the improper placement of the cones forced drivers onto the shoulder and rumble strips. (T. 819-20). The dump truck driver, Ken Cavaness, who was driving in front of Appellant, also testified that he was able to drive his dump truck into the closed middle lane and back into the open lane, without hitting any cones. (T. 1014-15). As Appellant followed the dump truck, his entry into the "construction" lane was not impeded and he too did not hit any cones. (T. 1049). Furthermore, a reasonable person might have followed the dump truck into the middle lane, thinking that it was open, because there were no signs that indicated trucks would be entering and leaving the highway or moving in and out of the "construction" zone. (T. 917).

The evidence is also relevant because the probative value of the evidence outweighed its prejudicial effect. The evidence had substantial probative value to establish a defense that Seeler was not aware of which lane was open and which lane was closed due to the construction and that such lack of awareness was not unreasonable under the circumstances. Presentation of that evidence would not have misled the jury, could have been elicited without causing undue delay or wasting time, and would not have been cumulative. *State v. Sladek*, 835 S.W.2d 305, 314 (Mo. 1992). Because Appellant was prevented from presenting a viable defense, he was also denied his right to a fair trial under the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution. *See also* Mo. Const. art. I § 18(a).

Under the Due Process Clause of the Fifth and Fourteenth Amendments, criminal prosecutions must comport with prevailing notions of fundamental fairness. *California v. Trombetta*, 467 U.S. 479, 485 (1984). This standard of fairness has been interpreted to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *Id*. The Supreme Court has noted that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Because Appellant was not allowed to introduce evidence to support his defense that he was not criminally negligent because a reasonable person would have been confused about which lane was open or closed, Appellant's rights to due process were denied.

Since the evidence should have been admitted because it was relevant to determining whether Appellant was criminally negligent, the State has the burden of proving that the error was harmless beyond a reasonable doubt. *Walkup*, 220 S.W.3d at 757. In assessing this issue, the court must examine the facts and circumstances of the particular case, including the nature of the charge, the evidence presented, and the role the excluded evidence would have played in the defense's theory. *Sanders*, 126 S.W.3d at 23.

In *Sanders*, the defendant was found guilty of promoting child pornography. The State alleged that the defendant had taken nude photographs of his son and daughter. The defendant maintained that his wife had "set him up" by planting the photographs in his house. To support his defense, the defendant sought to introduce into evidence statements made by his son, in which he claimed that the defendant's wife had taken the photographs. The trial court, however, excluded the presentation of such evidence after the state filed a motion in limine preventing the defendant from introducing any evidence that suggested that the victims were photographed by someone other than the defendant. *Id*. at 21. On appeal, the court reversed the conviction and held that the evidence was relevant as exculpatory evidence. *Id* at 21-22. The court also held that a rebuttable presumption of prejudice was created when the evidence was excluded, and that the State did not rebut that presumption. *Id* at 23-24. After looking at the relevant factors, including the nature of the charge, the evidence presented, and the role the excluded evidence would have played in the defense's theory, the court reasoned that the ruling prevented Appellant from introducing evidence that was pertinent to his defense, and thereby reversed the conviction on that count. *Id.* at 25.

Applying the factors laid out in *Sanders* to Appellant's case, the nature of the charge and the role the excluded evidence would have played in the defense's theory are interrelated. In order to be found guilty of involuntary manslaughter in the first degree, a defendant must be criminally negligent in operating a motor vehicle in an intoxicated condition and cause the death of another person not a passenger in the vehicle. § 565.024. Criminal negligence is defined as the "failure to be aware of a substantial and unjustifiable risk that circumstances exist, or a result will follow, and such failure constitutes a gross deviation from the **standard of care which a reasonable person would exercise in the situation.**" § 562.016 (emphasis added). Appellant's primary defense was that he was not criminally negligent in entering the allegedly closed construction zone because a reasonable person would not have known which lane was open or closed to traffic. Appellant testified that he initially entered the allegedly "closed" middle lane because he thought he was driving in the wrong lane as he was traveling in the far-right lane. (T. 1120). He was confused about which lane was the proper travel lane because he had seen the dump truck driving in the allegedly closed lane, he testified that when he was in the far-right lane he was driving on the shoulder and the rumble strips (T. 1048), and the truck was able to enter and exit the lane without striking any cones (T. 1049), because the cones were twice as far apart as they should have been according to the MUTCD. (T. 823, 988). Furthermore, there were no signs indicating that trucks would be entering and leaving the highway or the "construction" zone. (T. 917). The State's accident reconstructionist also testified that the placement of the cones intruded into the lane closest to the shoulder, forcing vehicles over the fog line and rumble strips and onto the shoulder. (T. 819-20). Another State witness and Pace Construction employee, Randy Besand, testified that the cones should have been spaced 90 feet apart. (T. 897). Officer Deckard testified that the cones were instead spaced anywhere from 168 to 175 feet apart (T. 781), almost twice the *maximum* distance allowed for proper placement of the cones according to the national standards in the MUTCD.

Thus, based on the nature of the charge and the element of criminal negligence, the evidence presented, and the role the excluded evidence would have had in Appellant's defense, the exclusion of the relevant evidence was not harmless beyond a reasonable doubt, and the conviction must be reversed. Furthermore, because relevant evidence was excluded that would have provided Appellant with a viable defense, his rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I § 18(a) of the Missouri Constitution, were violated.

V. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE STATE'S PRESENTATION OF EVIDENCE REGARDING THE SPEED OF APPELLANT'S VEHICLE, BECAUSE THE EVIDENCE WAS IRRELEVANT, UNRELIABLE, AND ITS PREJUDICIAL EFFECT OUTWEIGHED ITS PROBATIVE VALUE, IN THAT THE EVIDENCE OF SPEEDING WAS NOT ALLEGED IN THE INDICTMENT AS A CONTRIBUTING FACTOR OR AN ACT OF NEGLIGENCE, NOR

WAS IT AN ELEMENT OF THE OFFENSE CHARGED; AND THE WITNESS COULD NOT IDENTIFY APPELLANT'S VAN AS THE VEHICLE HE SAW SPEEDING.

STANDARD OF REVIEW

Review of a trial court's admission of evidence is based on an abuse of discretion standard. *Anderson*, 76 S.W.3d at 276. At trial, Appellant objected to the admissibility of the evidence before it was introduced by the State in his motion in limine (T. 235; LF 160), the objection was continuing (T. 259), and was also included in the Motion for New Trial. (LF.253). Thus, the issue has been properly preserved for appellate review. *State v. Chambers*, 234 S.W.3d 501, 512 (Mo. App. 2007); Mo. Sup. Ct. R. 29.11(d).

ARGUMENT

To be admissible, evidence must be relevant. *Anderson*, 76 S.W.3d at 276. The general rule in Missouri is that the relevance inquiry is two-tiered: it must be logical and legal. *Id*. Evidence is logically relevant if it tends to: (1) prove or disprove a fact in issue; or (2) corroborates evidence which itself is relevant and bears on the principal issue of the case. *Id*; *State v. Hernandez*, 815 S.W.2d 67, 70 (Mo. App. 1991). Even if evidence is deemed logically relevant, it is inadmissible if it is legally irrelevant. *Anderson*, 76 S.W.3d at 276. Legal relevance requires the court to weigh the probative value of the evidence, i.e. its usefulness, against its costs. If the costs outweigh its probative value, the evidence must be excluded. *Id*.

A. The speeding testimony of State's witness Derek Eichholz was not logically relevant to the charge of criminal negligence.

The elements of the offense of involuntary manslaughter in the first degree in this case are: (1) the defendant operated a motor vehicle while in an intoxicated condition; (2) the defendant was criminally negligent by driving in a closed construction zone; and (3) in so doing, defendant caused the death of Donohue, who was not a passenger in defendant's vehicle. (LF 227). Because speeding evidence is irrelevant to elements one and three, whether Appellant operated a motor vehicle in an intoxicated condition and caused the death of Gavin Donohue, the speed of Seeler's automobile can only be logically relevant to the second element, Appellant's mental state, i.e. criminal negligence.

A defendant is criminally negligent if he "fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." § 562.016.5. It is the least culpable of the criminal mental states. *Hernandez,* 815 S.W.2d at 70.

Seeler's speed is logically irrelevant to Appellant's culpable mental state. Speeding was not charged in the indictment or information in lieu of indictment, was not an element of the charge, and was not pled with particularity in any charging document. (LF 31-32, 165-67). The charge of criminal negligence, when it finally came to rest, was based on the allegation that he drove into a closed construction zone, not that he exceeded the speed limit. Furthermore, there was extensive testimony from both the State's and Appellant's witnesses that Appellant was driving the speed limit at the time the accident occurred. Thus, speeding did not contribute to the State's allegation of criminal negligence, driving in a closed construction zone. As such, the improperly admitted evidence was logically irrelevant to the element of criminal negligence, in that it does not prove or disprove a material fact in the case, nor does it corroborate relevant evidence.

In *Hernandez*, the defendant was found guilty of involuntary manslaughter for causing the death of the victim while operating a motor vehicle in an intoxicated condition. *Id.* at 67. Hernandez was driving at an excessive rate of speed when his van crossed into the oncoming lane of traffic and struck another vehicle, killing the passenger. During trial, various bumper stickers, signs, and pins containing "drinking slogans" that were displayed on defendant's vehicle were admitted into evidence over the defendant's objection. *Id.* at 69-70. On appeal, the defendant argued that the slogans were irrelevant to the charges against him. The State, on the other hand, argued that the slogans were relevant to show that the defendant "knew that drinking large amounts of alcohol could distort his sense of reality and his driving skills." *Id.* at 70. The appellate court reversed the conviction and held that the drinking slogans were not relevant to the issue of whether the defendant acted with criminal negligence. *Id*. In its reasoning, the court rejected the State's argument because "the defendant's knowledge of the effect of alcohol on him was not an issue," and "[t]he state did not have to prove that the defendant knew of the effects of alcohol . . . ." *Id*.

As in *Hernandez,* the State did not have to prove that Seeler was speeding to show that he was criminally negligent. The fact (which assumes that there was any credible evidence that proved it) of Appellant's speed miles before the accident did not prove or disprove a material fact in the case, nor did it corroborate any relevant evidence. It was not a charge in the complaint, nor an element of the offense. In *Hernandez,* the improperly admitted evidence was at least tangentially related to the defendant's culpable mental state. In this case, the speeding evidence had no logical relevance to Appellant's mental state. The criminal negligence stemmed wholly from the allegation that Appellant drove in a closed construction zone. Furthermore, all the witnesses who were present on the highway just prior to the accident never testified that Appellant was speeding through the construction zone. State witness Mark Zahner testified that even though Appellant's vehicle passed him on the highway, he still could have been traveling within the speed limit because Zahner was driving under the posted speed limit. (T. 343). He also stated that he had no idea how fast Appellant was driving. (T. 343). Zahner also testified that when Appellant pulled into the lane next to the dump truck, he did not attempt to pass the truck and that the two vehicles were driving at the same speed. (T. 347, 349). State witness Sonja Mills also testified that she never saw Appellant attempt to pass the dump truck. (T. 386-87). The driver of the dump truck, Ken Cavaness, confirmed that Appellant's vehicle never attempted to pass him. (T. 1008, 1110). Seeler himself testified that he was confident that he was driving the speed limit through the construction zone. (T. 1101).

It is true that it is not essential that an information charging manslaughter by criminal negligence in the operation of a motor vehicle set out in detail the particulars of the criminal negligence, *See State v. Devall*, 654 S.W.2d 172, 175 (Mo. App. 1983); *State v. Beck*, 449 S.W. 2d 608, 608 (Mo. 1969).[25] However, when the State opts to include the particulars in its indictment, as in the case *sub*

[25]These cases were tried under the old vehicular manslaughter statute, § 565.005, which used the term culpable negligence instead of criminal negligence.

judice, it should not be allowed to argue other acts of criminal negligence that are wholly unrelated to the specifically alleged instance of criminal negligence. Allowing the State to push these arguments created an improper inference that Appellant was criminally negligent when he allegedly traveled 90 miles per hour several miles before arriving at the construction zone. However, Appellant could not have been criminally negligent even if he was speeding prior to the construction zone because nothing about the velocity of his van remotely contributed to Donohue's death. The prosecutor knew the poison the improper evidence contained, and he raised the issue in his opening statement. (T. 266-67). This reference to speeding inflamed the jury from the beginning of the trial.

Furthermore, Appellant's case is inapposite to *Devall* and *Beck*. In both of those cases, the defendants argued that the charging document was deficient in that it did not apprise them of what conduct the State was contending constituted culpable negligence, and because the information only alleged mere conclusions and not specific facts, it should *have been dismissed. Devall*, 654 S.W.2d at 174*;* *Beck*, 449 S.W.2d at 611 (emphasis added). Unlike Devall and Beck, Appellant is not arguing that because the information is insufficient dismissal is required; rather, Appellant contends that if the particulars are alleged in the indictment, in this case that he was criminally negligent by driving in a closed construction zone, other evidence of speeding miles before he reached the construction zone is irrelevant to that specific allegation, and must be excluded. This is particularly true when the evidence is completely unreliable, as it is in this case (*See infra* Point V, Part B)(discussing how the prejudice of the testimony outweighs its probative value). Furthermore, the undisputed testimony and evidence presented at trial clearly proves that Appellant was not speeding when he allegedly drove into the closed construction zone. Entering the closed construction zone was the only allegation of criminal negligence in this case; therefore whether Seeler was speeding at some time during the night was irrelevant to the charge, because it did not prove or disprove a material fact in the case, nor did it corroborate other relevant evidence.

B. The speeding testimony was not legally relevant to the charge of criminal negligence because its prejudicial effect outweighed its probative value.

Assuming *arguendo*, that the evidence was logically relevant, it is still inadmissible because its prejudicial effect substantially outweighs its probative value. *Sladek*, 835 S.W.2d at 314. The important factors the Court should consider in determining whether evidence should be excluded as prejudicial include the probability of unfair prejudice and whether the evidence could mislead the jury. *Id*.

In this case, the speeding evidence was unfairly prejudicial because it was almost totally unreliable. The State's velocity witness, Derek Eichholz, could only remember that the vehicle was a "newer, very-dark colored mini-van." (D. 6-7, 26). He could not determine the make or model of the van, and did not note general characteristics of the vehicle (D. 26-27), such as the license plate number (D. 7). He did not know if the driver was male or female (D. 27), or whether there was more than one occupant in the vehicle. (D. 8). Eichholz also testified that were "several exits" and "several miles" between where he saw the vehicle and where the accident occurred (D. 26, 29), and that he lost sight of the vehicle shortly after it passed him. (D. 28). Eichholz was unable to even determine whether the vehicle that passed him was present at the accident scene, even though Seeler's obviously disabled and damaged van was in a conspicuous location where traffic slowed because of the accident. He testified that there were multiple vans down in the Chesterfield Valley, the site of the accident. (D. 27). Quite simply, there is no logical connection between Eichholz's testimony and Seeler's vehicle because the testimony was non-specific, vague, and could apply to any number of vehicles that might have exited the highway, sped by the scene before the accident occurred, or could have been one of the many vans stopped in the Valley. The likelihood of unfair prejudice far outweighs the probative value of such testimony.

The speeding evidence was also misleading because it encouraged the jury to infer that Appellant was guilty prior to an essential element being met, the death of a non-passenger. The testimony was confusing and misled the jury because the evidence only showed that a vehicle was speeding miles east of the construction zone. (D. 6). However, the prosecutor used this speculative evidence to encourage the jury to believe that Appellant was speeding within the closed construction zone by telling the jury during his closing argument that Appellant was "speeding through a construction zone, going in between the cones." (T. 1483). Thus, the State improperly argued that Eichholz's testimony regarding the speed of the unidentified van miles from the construction zone proved that Seeler's vehicle was speeding in the construction zone. As set out, there was no evidence that Seeler was speeding within the construction zone.

It is well-settled in Missouri that a party may argue inferences supported by the evidence, but not inferences that have no factual foundation. *State v. Barton*, 936 S.W.2d 781, 783 (Mo. 1996). That, however, is exactly what happened to Appellant.

C. The admission of the speeding evidence was harmfully prejudicial to Appellant.

Once Appellant demonstrates that the trial court erred in the admission of evidence, he must demonstrate that the evidence affected the fairness of his trial. *Anderson*, 76 S.W.3d at 277. In this case, Appellant's trial was not fair because the speeding evidence inflamed the jurors from the commencement of the case, was conceived from irrelevant inferences, and was totally misleading. The inadmissible testimony, combined with the prosecutor's emphasizing it in his opening and closing statements,[26] influenced the jury in such a way that there is more than a reasonable probability that the jury would have reached a different conclusion but for the erroneously admitted evidence. *State v. Barriner*, 34 S.W.3d 139, 150 (Mo. 2000). Primacy and recency: the evidence was the first and last thing the prosecutor urged the jury to consider. The majority of Eichholz's testimony focused on the unreliable assertion that Seeler was speeding. The prosecutor referenced Eichholz's inadmissible testimony in his closing argument (T.1359), and made other references to speeding in the construction zone when he claimed that Appellant was "driving crazy," "didn't want to slow down," and was "just impatient, speeding." (T. 1360).

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[26]In his opening statement, the prosecutor claimed that Seeler's van was traveling in excess of 90 miles per hour. (T. 266-67). Likewise, in his closing argument he emphasized yet again that Seeler was "speeding through a construction zone" (T.1483), evidence which was inadmissible and a highly speculative, factless assertion.

Although opening and closing statements are not evidence, *State v. Madison*, 997 S.W.2d 16, 21 (Mo. banc 1999), inadmissible evidence, combined with a prosecutor's reference to it in his opening and closing statements, can be grounds for reversal if the statements create a reasonable probability that the jury would have reached a different conclusion but for the erroneously admitted evidence. *State v. Rose*, 86 S.W.3d 90, 103 (Mo. App. 2002). Furthermore, in *Hernandez*, 815 S.W.2d at 71, the trial court reversed the defendant's conviction because the appeals court found that the defendant was prejudiced when the prosecutor made extensive references to the drinking slogans in his closing argument. *Hernandez* is similar to this case in that the prosecutor made numerous references to irrelevant evidence that was erroneously admitted.

Because evidence was introduced that was both logically and legally irrelevant, and because Appellant thereby suffered harmful prejudice as a result, the trial court's ruling should be reversed.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Judgment of the Circuit Court be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 84.06

The undersigned that on this 14th day of January, 2010, one true and correct copy of the foregoing brief, and one CD-Rom containing the foregoing brief, were mailed, postage pre-paid to:

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The undersigned counsel hereby certifies that pursuant to Rule 84.06(c) this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 19,931 words, as determined by using the word count in WordPerfect 12. A copy of this brief was submitted, in WordPerfect 12 format, on disk to the Court. All digital copies of this brief were scanned for viruses and found to be virus free as required pursuant to Rule 84.06(h).

IN THE
MISSOURI SUPREME COURT

No. SC90583

RYAN SEELER,

Appellant,

v.

STATE OF MISSOURI,

Appellee.

On Appeal from the Circuit Court of St. Louis County,
State of Missouri
The Honorable John A. Ross, Circuit Judge

APPENDIX

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