No. SC90649

In the Supreme Court of the State of Missouri

DONALD R. NASH,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Crawford County Circuit Court
The Honorable Douglas E. Long, Judge

RESPONDENT'S BRIEF

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ATTORNEYS FOR RESPONDENT

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Jurisdictional Statement

Appellant was convicted of murder in the first degree pursuant to Section 565.001, RSMo, 1977. Although Appellant did not receive a sentence of death, he does challenge his conviction as being in violation of Article III, Section 28 of the Missouri Constitution. Thus, jurisdiction is vested in the Supreme Court of Missouri. *See* Mo. Const. art. V, § 3 (as amended effective 1982).

Statement of Facts

Twenty-one year old Judy Spencer lived in Salem, Missouri, in Dent County, with the Appellant, Donald Nash, in March of 1982. (Tr. 305-306, 308-309). Ms. Spencer worked as a clerk at the Salem Memorial Hospital. (Tr. 363).

After completing her work shift at 3:00 p.m. on March 10, 1982, Ms. Spencer went to visit a foot doctor with her friends, Janet Jones[1] and Suzette Edmonson. (Tr. 365-366). They drove Appellant's black pickup truck to the doctor's office in Waynesville. (Tr. 367). Following the doctor's visit, the women bought and drank some beer and returned to Salem at around 7:00 p.m. (Tr. 367). They went to Janet Jones' apartment. (Tr. 367).

Ms. Spencer telephoned Appellant and told him, falsely, that they were still in the nearby town of Anutt and would be home shortly. (Tr. 367). A short time later, Appellant arrived at the apartment building driving Ms. Spencer's maroon Oldsmobile. (Tr. 668, 369). Ms. Spencer went outside to speak to Appellant briefly. (Tr. 369). Ms. Spencer asked for the keys to her car and Appellant threw them at her. (Tr. 370). When she came back into the apartment, Ms. Spencer indicated to Janet Jones that Appellant told her, "This is the last time you'll ever lie to me, bitch" and also told her she was ugly. (Tr. 374).

Ms. Spencer had just had her hair styled and Appellant stated it was ugly. (Tr. 374). Ms. Spencer then proceeded to go to the kitchen sink and restyle her hair by washing it. (Tr. 374). Ms. Spencer then left to go see Appellant. (Tr. 375).

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[1] At trial, Ms. Jones was married and her name is now Janet Edwards. For purposes of consistency and simplicity, the State will refer to her in this brief as Janet Jones.

When Ms. Spencer returned to Ms. Jones' apartment a short time later, Ms. Spencer told Janet Jones that the relationship was over this time and that she was going to drive to Houston, Missouri, that evening. (Tr. 376). Ms. Spencer left in her vehicle. (Tr. 377).

Around 10:00 p.m., Appellant telephoned Janet Jones, asking if she knew where Ms. Spencer was and asking that Ms. Jones call him after 5:45 a.m. the next morning to wake him for work. (Tr. 378).

The next morning, around 8:30 a.m., Appellant called Ms. Spencer's mother, Mildred Spencer. (Tr. 311). Appellant had never telephoned her before. (Tr. 311). Appellant asked if Ms. Spencer was there at her house and when told "no," he said, "I won't keep you then." (Tr. 311). When Ms. Spencer did not show up for work the next day, March 11, Appellant and Janet Jones drove to Houston looking for Ms. Spencer. (Tr. 380).

That same day, March 11, two brothers called the police to report finding a body behind an old, abandoned school in rural Dent County when they went to tend to some cattle behind the school. (Tr. 724-725). Their attention was drawn to some drag marks, which they followed to a pile of brush with a body underneath. (Tr. 726-727).

The police were called and Trooper Gary Dunlap was the first officer to arrive at the scene (Tr. 422, 727) at approximately 1:40 p.m. (Tr. 422).

Ms. Spencer's body was found in an old outhouse hole, covered in brush. (Tr. 433). The drag marks measured 153 feet and went from behind the old schoolhouse to the outhouse hole. (Tr. 436). Ms. Spencer had no pulse and was cold and clammy. (Tr. 437). Ms. Spencer's body was nude except for a black T-shirt and her bra, which had been pushed up

around her neck. (Tr. 438). Ms. Spencer's other clothing and shoes had been thrown into some nearby woods. (Tr. 433-434).

Scientific testing revealed no evidence of a sexual assault or sexual contact. (Tr. 549, 680-682).

One of Ms. Spencer's shoelaces was wrapped around her neck. (Tr. 440). She also had a shotgun wound to her neck. (Tr. 440-441).

Dr. Eddie Adelstein, a pathologist, testified that Ms. Spencer died by strangulation from the shoe string and was then shot in the neck after she was dead. (Tr. 318, 321). Dr. Adelstein also testified that the time of Ms. Spencer's death could not be determined to a reasonable degree of scientific certainty. (Tr. 324). Dr. Adelstein also confirmed there was no evidence of sexual assault. (Tr. 322).

Sgt. P.J. Mertens of the Missouri State Highway Patrol testified that he was a criminal investigator who was called to the crime scene on March 11, 1982. (Tr. 483). When he noticed that the victim's purse was not at the scene, Sgt. Mertens checked a bridge and creek bed about a half mile from the crime scene. (Tr. 497). There, Sgt. Mertens found the victim's purse, with her wallet. (Tr. 499, 501).

Later that night, Ms. Spencer's maroon Oldsmobile was also discovered several miles from the abandoned schoolhouse. (Tr. 503). Her car was found completely off the roadway and it appeared that someone had tried unsuccessfully to back the car back on to the roadway. (Tr. 503). The keys to the car were on the console and Ms. Spencer's jacket was in the vehicle. (Tr. 504). A local resident, Mr. James Cowan, testified that he saw the

abandoned car at that location as early as 7:30 a.m., the morning of March 11, 1982. (Tr. 543).

Sgt. Mertens testified that he took fingernail clippings from Ms. Spencer at the funeral home. (Tr. 488). Sgt. Mertens testified that there was no knowledge of DNA testing in 1982, but he took the clippings from each of her hands because that was what he was trained to do. (Tr. 540).

When the officers determined the identity of the victim after locating Ms. Spencer's wallet, they proceeded to the Salem Hospital to speak to Ms. Spencer's employers. (Tr. 447-448). There they met Appellant and Ms. Jones. (Tr. 449). Trooper Dunlap spoke to Appellant and told him it appeared Ms. Spencer had been shot. (Tr. 450).

Appellant told Trooper Dunlap that Ms. Spencer and he had argued that evening and that she left. (Tr. 451). Appellant stated that he went looking for Ms. Spencer about 8:00 p.m. that evening on one occasion and then went home for the remainder of the evening. (Tr. 452-453). Appellant denied going out again after that. (Tr. 452-453).

Ms. Christine Colvin, however, testified that she saw Appellant driving around her apartment building in his black pickup truck between 11:00 and midnight that evening. (Tr. 475). This is in the same apartment building Janet Jones lived in. (Tr. 474).

The case remained inactive until 2007, when Sgt. Henry Folsom of the Missouri State Highway Patrol was asked to reopen the case by Judy Spencer's sister. (Tr. 601). The evidence from the investigation had been kept in an evidence bunker in Jefferson City. (Tr. 601-602).

On March 13, 2008, Sgt. Folsom visited Appellant at his residence in Franklin County and asked him to provide a DNA sample. (Tr. 602-603). When Sgt. Folsom told Appellant that a DNA profile had been detected from the fingernail clippings of Ms. Spencer, Appellant became visibly nervous with his hand shaking. (Tr. 603-604). Sgt. Folsom received a swab from Appellant (Tr. 605), who then asked "will you let me know if I am eliminated?" (Tr. 606). Appellant also indicated his belief that a female may have committed the murder. (Tr. 606). When told by Sgt. Folsom that the DNA profile was that of a male, Appellant paused, stepped back and stared at Sgt. Folsom. (Tr. 606).

Ruth Montgomery, a criminal analyst for the Missouri State Highway Patrol Crime Lab testified that she compared the DNA detected from the fingernail clippings of Ms. Spencer's left hand to Appellant's DNA sample and determined they were consistent. (Tr. 651, 667-668). The possibility of a comparison in this case was 1 in 16.13 million Caucasians. (Tr. 668). Ms. Montgomery testified there was no contamination of any of the samples used for comparison in this case. (Tr. 677). Ms. Montgomery testified Ms. Spencer's act of washing her hair on the evening of her murder would have removed any DNA from underneath her fingernails that had existed prior to the washing. (Tr. 680).

After the DNA results were compared, Sgt. Folsom again visited Appellant at his home and told Appellant that his DNA matched the DNA found underneath Ms. Spencer's fingernails. (Tr. 608). Appellant said that was not possible and his hands began to physically shake. (Tr. 608).

Appellant called his own DNA expert, Stephanie Beine, who testified that there have been scientific studies reporting the presence of DNA underneath fingernails of couples who

cohabitated. (Tr. 737-738). Ms. Beine admitted that Ms. Montgomery did follow generally accepted methods in doing her DNA analysis and did find a profile consistent with Appellant. (Tr. 764). Ms. Beine also acknowledged that Ms. Montgomery found as much DNA from Appellant as she found DNA from Ms. Spender under the fingernails. (Tr. 756). Finally, Ms. Beine acknowledged that no DNA profile or evidence of a third person was detected under the fingernails of Ms. Spencer. (Tr. 764).

On March 23, 2008, the prosecuting attorney of Dent County filed a felony complaint charging Appellant with murder in the first degree, Section 565.001, RSMo, 1977. (L.F. 23-25). On June 17, 2008, venue was changed to Crawford County by agreement. (L.F. 78). On August 7, 2008, Judge Douglas Long was assigned to try the case, by agreement, by this Court. (L.F. 90).

The case was tried in Phelps County, Missouri, with a jury selected from Crawford County, beginning on October 26, 2009. (Tr. 244). On October 29, 2009, the jury rendered a verdict finding Appellant guilty of murder in the first degree. (Tr. 927; L.F. 705). Pursuant to the sentencing provisions in effect in 1982, the jury foreperson signed a verdict form imposing a sentence of life without the possibility of parole for 50 years, the only sentence available in this case. (Tr. 931-932; L.F. 704).

On December 18, 2009, the Court sentenced Appellant to life imprisonment without the possibility of probation or parole for 50 years. (Tr. 942; L.F. 935-936).

Appellant then filed his Notice of Appeal with this Court. (L.F. 928-930).

Argument

Point I

The trial court did not err in denying the Appellant's Motion to Quash the Information because Missouri did not repeal or abolish the crime of capital murder in 1984 in that all amendments and revisions of the crime of capital murder expressly state that the statute outlawing and punishing capital murder shall remain in effect.

Relying on a statute enacted in 1983 that expressly states that the law "shall not govern the construction or procedures … of any offense committed before the effective date of this Chapter" (emphasis added), the Appellant nevertheless makes the confusing assertion that the statute, §565.001, RSMo (1983) had the effect of repealing all crimes of murder committed prior to 1984 – in spite of the fact that the statute explicitly states the contrary.

This argument is based on a strained reading of the statute that is contrary to the rules of statutory construction, a plain reading of the words of the statute, and common sense. Appellant was properly charged and convicted of the crime of capital murder as it existed in March of 1982.

A. Standard of Review

Challenges to the constitutionality of a state statute are reviewed *de novo* under this Court's exclusive appellate jurisdiction. *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56, 61 (Mo. banc 2010). The statute is presumed to be constitutional and the Appellant bears the burden to prove the statute "clearly and undoubtedly violates the constitution." 301 S.W.3d at 61; *R.W. v. Sanders*, 168 S.W.3d 65, 68 (Mo. banc 2005).

B. Legislative History

As it existed on March 10, 1982, Missouri law made premeditated murder a crime called "capital murder" under Section 565.001, RSMo (1977). The crime was called "capital murder" regardless of whether the death penalty was being sought; in Appellant's case, the State did not seek death.

In 1983, the Missouri's legislature created the crime of murder in the first degree, §565.020, RSMo, to encompass murders that were premeditated. Section 565.001, RSMo, was amended to state, in part:

> 565.001. Procedures for chapter 565
>
> 1. The provisions of this chapter shall govern the construction and procedures for charging, trial, punishment and appellate review of any offense defined in this chapter and committed after July 1, 1984.
>
> 2. The provisions of this chapter shall not govern the construction or procedures for charging, trial, punishment or appellate review of any offense committed before the effective date of this chapter. Such an offense must be construed, punished, charged, tried and reviewed on appeal according to applicable provisions of law existing prior to the effective date of this chapter in the same manner **as if this chapter had not been enacted, the provisions of section 1.160, RSMo, notwithstanding**.

According to the Appellant, this language means the "savings" provision of Section 1.160, RSMo, does not apply and, as a result, the crime of capital murder was abolished until October 1, 1984, the effective date of the new Section 565.001, RSMo.

"We presume that the General Assembly did not intend an absurd result from its statutory mandates, and we interpret its statutes accordingly." *State v. Lewis*, 955 S.W.2d 563, 565 (Mo. App. W.D. 1997). The goal is to interpret the statute from the plain and ordinary language used in the statute. *Prapotnik v. Crowe*, 55 S.W.3d 914, 917-18 (Mo. App. W.D. 2001).

What the Appellant fails to cite in his brief, or acknowledge in his argument, is that the language contained in Section 565.001, as enacted in 1983, was intended to explicitly state that the punishment provisions of the capital murder statute in effect in 1982 were to apply to cases tried after 1983 – "section 1.160, RSMo, notwithstanding."

The statute avoids the very result Appellant argues it created. The statute expressly states that there is no "void" or uncertainty in the prosecution of murder cases, regardless of when the murder occurred or when the prosecutor of that murder arises. A murder that occurred in 1982 is to be charged and prosecuted with the laws that existed in 1982. It cannot be reasonably argued that the statute was intended to, or had the effect, of nullifying the crime of murder.

"In [*State v.*] *Sumlin* [820 S.W.2d 487 (Mo. banc 1991)], this Court interpreted Section 1.160 as authorizing a reduction of sentence if the penalty for the offense is reduced by statutory amendment subsequent to the commission of the offense, but before the conviction becomes final." *State v. Pritchard*, 982 S.W.2d at 276.

In this case, the sentence for capital murder that existed in 1982 – life without the possibility of parole for 50 years – is actually less than the subsequently enacted sentence for murder in the first degree – life without any possibility of parole. Therefore, Section 1.160, really has no application whatsoever to the trial and conviction of Appellant. Because the punishment for premeditated murder as it existed in 1982 is "less" than the subsequent penalty provisions, Appellant was entitled to be punished under those 1982 penalty provisions. Thus, in reality, Section 1.160, RSMo, played no role and had no effect on Appellant's sentence.

It most certainly does not "eliminate" the prosecution and conviction of those who committed murder in 1982 as suggested by the Appellant. Statutes are to be read in a way that does not lead to an absurd result. *State v. Lewis*, 955 S.W.2d 563, 565 (Mo. App. W.D. 1997). To argue that the legislature intended to allow murderers who eluded prosecution until 1984 to escape responsibility for their crime is just such an absurd interpretation.

Point II

The trial court did not err in denying the Appellant's Motion for Judgment of Acquittal or for New Trial because there was sufficient evidence to convict Appellant of capital murder. Furthermore, there was no error in failing to instruct the jury using an improper "circumstantial evidence" instruction because that was, and is, an improper statement of the law and the rules of evidence and there is no prejudice in failing to give an improper instruction.

(Addressing Points II and III of Appellant's Brief)

A. Standard of Review

In reviewing sufficiency of the evidence, review is limited to a determination of whether there was sufficient evidence from which a rational finder of fact might have found the defendant guilty beyond a reasonable doubt. *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998). The reviewing court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. *Id*.

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the United States Supreme Court emphasized the deference given to the trier of fact. The Court stated:

> this inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Id. at 318-319. Consistent with this principle, the Missouri Supreme Court observed in *Chaney* that "When reviewing the sufficiency of evidence supporting a criminal conviction, the Court does not act as a ' "super juror" with veto powers,' *State v. Grim*, 854 S.W.2d 403, 414 (Mo. banc 1993), but gives great deference to the trier of fact." *State v. Chaney*, 967 S.W.2d at 52.

B. There was Sufficient Evidence of Guilt

The DNA evidence in this case is not "merely" circumstantial, notwithstanding Appellant's attempts to mitigate its significance. Nor is it less compelling than the DNA evidence used to convict the defendant in *State v. Freeman*, 269 S.W.3d 422 (Mo. banc 2008). While Appellant attempted to argue to the jury that the DNA was the result of "casual contact" between Ms. Spencer and Appellant, that argument is not assumed for purposes of this appeal since it was obviously rejected by the jury and the evidence is to be reviewed in the light most favorable to the verdict. *State v. Belton*, 153 S.W.3d 307, 309 (Mo. banc 2005).

In this case, the DNA evidence was compelling evidence that Appellant murdered Ms. Spencer and the State established this was the only reason for the DNA being present under her left fingernails. The State's evidence was that after the last physical contact between Appellant and Ms. Spencer on the night of March 10, 1982, Ms. Spencer washed her hair. (Tr. 374). Appellant told the police he looked for Ms. Spencer, but never saw her again. (Tr. 451). Ms. Spencer was murdered by being strangled with her own shoelace. (Tr. 321, 440). According to the State's DNA expert, Ruth Montgomery, the washing of her hair would

remove any DNA from underneath her fingernails. (Tr. 680). The amount of Appellant's DNA detected underneath the victim's fingernails was as much as the victim's own DNA underneath her fingernails. (Tr. 678-679). "It is not considered a low level, low amount of DNA." (Tr. 678). Finally, and most significant, is the fact that no other DNA was found underneath the fingernails of Ms. Spencer. (Tr. 764).

While the Appellant did have his own expert who testified that, among other things, finding Appellant's DNA underneath the fingernails was not significant (Tr. 745), that testimony was obviously disbelieved by the jury. Therefore, her proffered testimony in no way reduces the significance of the DNA in this case and the fact that the DNA is direct evidence that the Appellant was the killer of Judy Spencer. Unlike the DNA evidence in *State v. Freeman*, 269 S.W.3d 422 (Mo. banc 2008), the State's evidence in this case places Appellant in the presence of Ms. Spencer during the time of her murder, and established that the contact between them was not "casual."

In addition to this significant evidence, Appellant stated the night of the murder, "That's the last time you'll lie to me, bitch." (Tr. 374). He lied to the police about being home at his apartment after 8:30 that evening (Tr. 451-452); he was seen driving around town looking for her much later that evening (Tr. 475). Appellant stated it was not possible that his DNA would be underneath the victim's fingernails (Tr. 607-609), and had asked to be notified "if" he was eliminated (Tr. 606).

Further evidence was that Appellant was involved with another woman, Della Wingfield, at the time of the murder (Tr. 388); lied to the police about that relationship (Tr.

507-508); and moved in with Ms. Wingfield almost immediately following the murder (Tr. 388).

Additional circumstantial evidence introduced at trial revealed that Appellant asked Janet Jones to call him the morning following the murder to wake him up for work (Tr. 377-378), demonstrating that Appellant knew that Ms. Spencer would not be coming home. The murder was "staged" as a sexual assault (Tr. 438), although there was no sexual assault. (Tr. 322, 549-552). Appellant was able to describe the victim's shoes (from which the ligature came) with an accuracy that can be argued to be unusual. (Tr. 452).

Thus, this is not the "weak" case Appellant suggests. While some of the evidence, such as the lack of an actual sexual assault and Appellant's uncanny ability to describe the victim's shoes, are circumstantial, the DNA evidence is compelling and direct evidence that Appellant was in direct physical contact with the victim during a time in which he said he was not with her, and during the time she was murdered.

C. Circumstantial Evidence Instruction

Appellant claims that the trial court violated Appellant's due process rights by refusing to give the "circumstantial evidence" instruction that was in effect at the time of this murder in 1982. While acknowledging that in *State v. Grim*, 854 S.W.2d 403 (Mo. banc 1993), this Court held that the circumstantial evidence instruction is misleading and invalid, *id*. at 408, the Appellant's brief nevertheless insists that it should have been given to the jury. Failing to do so, according to Appellant, was a violation of the prohibition against an *ex post facto* law because eliminating the circumstantial evidence rule reduces the State's burden of proof.

This argument demonstrates the fallacy of the circumstantial evidence rule and the propriety of its elimination by this Court in *Grim*. The burden of proof and the quantum of evidence to prove Appellant's guilt remain unaltered – proof must be beyond a reasonable doubt. Neither the United States Constitution nor the Missouri Constitution has required any different level of proof or evidentiary burden. Thus, eliminating the use of the circumstantial evidence instruction was not an *ex post facto* application of the law.

In Points II and III of his brief, the Appellant proclaims repeatedly the general proposition that an *ex post facto* law is unconstitutional. Appellant fails to offer, however, any legal or factual support for the proposition that the invalidation of the circumstantial evidence instruction by this Court in *State v. Grim*, 854 S.W.2d 403 (Mo. banc 1993), decreased the quantum of evidence necessary to support a murder conviction and, thus, violated the constitutional prohibition against *ex post facto* laws.

The simplest, and most obvious, response to that allegation is to point out that if Appellant's legal analysis were true, Mr. Grim, himself, would have been the victim of such a constitutional violation since his conviction was analyzed in the manner that Appellant now asserts is unconstitutional.

Obviously, this Court understood that abrogating the circumstantial evidence instruction did not change either the burden of proof or the evidence necessary to support a conviction.

In *Grim*, the Court did not reduce the state's burden of proof in proving the offense of murder (or any given crime). Rather, the Court merely clarified the standard that is employed in reviewing whether the evidence is sufficient to support a conviction for any

given crime. And, in doing so, the Court abolished the circumstantial evidence rule because it was confusing and misleading and because it was not consistent with the requirements of the Constitution. *Grim*, 854 S.W.2d at 407. Thus, even if abolishing the circumstantial evidence rule seemingly "lowered" the state's burden (because it was no longer the rule in reviewing the sufficiency of the evidence that the evidence had to disprove every reasonable hypothesis of innocence), that was merely the practical consequence of bringing review of the evidence into conformity with Missouri law and the Constitution. In order words, the elements of murder (or any given crime) were not changed by the holding in *Grim*, and the standard of proof—proof beyond a reasonable doubt—remained the same. As the Court stated in *Grim*, the circumstantial evidence rule merely stated "the same standard and is confusing and redundant." 854 S.W.2d at 408.

In fact, this Court has stated very clearly and unequivocally that the proof necessary to establish guilt beyond reasonable doubt is, and has always been, the same regardless of whether the evidence is direct or circumstantial. The very reason the circumstantial evidence instruction was abandoned by this Court was because "a different rule stating the same standard is confusing and redundant." *Grim*, 854 S.W.2d at 408 (emphasis added).

Prior to *Grim*, in 1979 this Court was asked to abrogate the circumstantial evidence instruction in *State v. Lasley*, 583 S.W.2d 511 (Mo. banc 1979). It is important to note that in 1979, there was no "reasonable doubt" instruction. In fact, in *Lasley*, the Court made it clear that the reason it was not abrogating the circumstantial evidence instruction was because "the circumstantial evidence instruction is needed precisely because Missouri practice forbids defining reasonable doubt." *Id*. at 517. The fact that no reasonable doubt instruction existed

was the reason this Court, in 1979, declined to eliminate the circumstantial evidence instruction. *Id*. at 515. ("It is this condition precedent which causes the problem for Missouri courts.")

Though declining for the moment to abrogate the circumstantial evidence instruction, this Court nevertheless refuted the claims now raised by Appellant that circumstantial evidence is substantively "different" from direct evidence. This Court noted that "the two types of evidence are equal in weight" and "that circumstantial evidence is not inherently of less probative value than direct evidence." 583 S.W.2d at 515. "The distinction is not cast in terms of the weight to be accorded each type of evidence, but in terms of the pattern of logical inference which must be employed in reasoning from circumstantial evidence." 583 S.W.2d at 516.

In fact, in *Lasley*, this Court could not have been any more clear in its rejection of Appellant's allegation that circumstantial evidence is to be given different weight:

> "Neither does the instruction invoke a different or higher standard of proof for circumstantial evidence than for direct evidence. It merely instructs the jury to apply a reasonable doubt standard to each phrase of the inference process involved in drawing conclusions from circumstantial evidence."

583 S.W.2d at 516-517.

This decision was consistent with the analysis of the United State Supreme Court. In 1954, the United States Supreme Court upheld the refusal of a District Court judge to submit a circumstantial evidence rule as long as the jury was properly

instructed on the definition of reasonable doubt. *Holland v. U.S.*, 348 U.S. 121, 139, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954). The unanimous Supreme Court noted that giving a circumstantial evidence instruction was not only unnecessary, but it would have been erroneous:

> "[T]he better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect."

348 U.S. at 139-140, 75 S.Ct. at 137.

From these decisions, it becomes quite clear that the instruction on circumstantial evidence was geared towards assuring that the jury would convict a criminal defendant only if the State proved the defendant guilty beyond a reasonable doubt. In Missouri, since Missouri had no reasonable doubt definition, the Court believed it necessary to guide the jury in its analysis of the facts in a circumstantial evidence case.

In 1984, this Court approved the use of an instruction defining reasonable doubt. MAI-CR2d 220.[2] Though not in effect in 1982, this instruction was given to the jury in this case. (L.F. 710). Appellant makes no challenge to the use of this instruction in his appeal.

It is the adoption of the reasonable doubt instruction by this Court, and not any attempt to change the quantum of evidence necessary to prove guilt in a circumstantial case,

[2] Now MAI-CR3d 302.04. The language in the instruction has remained unchanged since first adopted in 1984.

that led to this Court's elimination of the circumstantial evidence instruction in *State v. Grim*, *supra*. We know this because this Court so stated, in clear and unequivocal language:

> "We believe the reasonable doubt instruction fully and accurately instructs the jury on the risk of non-persuasion. The circumstantial evidence instruction no longer serves the same purpose it did when we reaffirmed its use in *State v. Lasley*, [*supra*]."

State v. Grim, 854 S.W.2d at 408. According to this Court in *Grim*, continued use of the circumstantial evidence instruction would simply continue to mislead and confuse jurors. *Id*. at 407.

Again, Appellant does not challenge the giving of the reasonable doubt instruction to the jury. And this Court determined long ago that the reasonable doubt instruction is a proper and accurate instruction on the State's burden of proof. *State v. Murray*, 744 S.W.2d 762, 771 (Mo. banc 1988); *State v. Guinan*, 732 S.W.2d 174, 179 (Mo. banc 1987), *cert denied*, 484 U.S. 933, 108 S.Ct. 308, 98 L.Ed.2d 266 (1987).

Thus, the trial court properly refused the circumstantial evidence instruction that is invalid, confusing, and misleading, and submitted the reasonable doubt instruction in its place which is a proper statement of the state's burden. "Accurately informing the jury concerning a point of law will limit, rather than increase, the chance of a jury being mislead or confused." *State v. Avery*, 275 S.W.3d 231, 234 (Mo. banc 2009). Regardless of when the instruction was in effect, when that "instruction is an accurate statement of law and supported by the evidence . . . there is no prejudice." 275 S.W.3d at 233. To have given

Appellant's circumstantial evidence instruction, after being declared invalid, confusing and misleading, would have been error.

Finally, Appellant's argument that Section 565.001.2, RSMo (2009), mandates the giving of the circumstantial evidence instruction in existence in 1982 is equally meritless.

"It is presumed that the legislature intended that every word, clause, sentence and provision of a statute have effect." *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 520 (Mo. banc 2009). Statutory analysis is driven by the plain and ordinary meaning of the words used by the legislature. *Gasconade County Counseling Services, Inc. v. Missouri Dept. of Health*, 314 S.W.3d 368, 376 (Mo. App. E.D. 2010). The mention of one or more things in a statute implies the exclusion of all others. *Id*. at n. 7.

Section 565.001.2, does not say that the instructions are governed by the rules in effect at the time of the crime. And it is a significant "leap" for Appellant to presume the statute intended to foreclose this Court altering the instructions to be used at a criminal trial.

In fact, it has long been the law of Missouri that this Court establishes the rules of practice and procedures in this State, and that those rules supersede statutes unless the legislature makes it explicitly clear that the statute is intended to supersede the Court's rules. *State ex rel. K.D. v. Saitz*, 718 S.W.2d 237, 239 (Mo. App. E.D. 1986); *State v. Bryan*, 60 S.W.3d 713, 717-718 (Mo. App. S.D. 2001); *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. banc 1995); *State v. Jaco*, 156 S.W.3d 775, 781 (Mo. banc 2005).

Thus, Appellant cannot challenge this Court's conclusion in *State v. Grim*, that the circumstantial evidence instruction was an incorrect statement of the law and should not be given. Even if the legislature's goal in enacting §565.001.2 was to suggest the same

instructions continue,[3] that is a matter of procedure that rests within the constitutional authority of this Court alone. In fact, since the statutory change which Appellant relies on occurred prior to *State v. Grim*, he cannot reasonably argue that it was the legislature's intent to insist on the continued use of an invalid and confusing instruction in criminal trials.

Giving the circumstantial evidence instruction in this case, after that instruction had been repudiated by this Court, would have been error. By giving the jury an accurate instruction of the State's burden of proof that included a definition of "beyond a reasonable doubt," the trial court properly instructed the jury on the law and the State's responsibility to provide sufficient evidence to convict. Such evidence was proven in this case.

[3] A suggestion the State by no means concedes.

Point III

The trial court did not err in refusing to allow Appellant to offer evidence that a third person could have committed the murder because Appellant's offer of proof presented no evidence connecting that third person to the crime and the proffer by Appellant failed to demonstrate the admissibility of the alleged facts Appellant claims he wished to offer. Furthermore, the Missouri rule requiring proof of a third party's culpability by establishing a direct connection is not a violation of either the Missouri or United States Constitution. (Addressing Point IV of Appellant's Brief)

In Appellant's final claim, the Appellant asserts that the trial court erred in failing to permit him to "prove" that another person, Tony Feldman, committed the murder of Ms. Spencer. The entirety of Appellant's evidence to support this theory is the presence of Mr. Feldman's fingerprint on the outside of the victim's vehicle.

A. Standard of Review

A trial court has broad discretion in determining whether to admit or exclude evidence at trial, and that decision will be reversed only upon a showing of a clear abuse of discretion. *State v. Chaney*, 967 S.W.2d 47, 55 (Mo. banc 1998), *State v. Mayes*, 63 S.W.3d 615, 627 (Mo. banc 2001). "An abuse of discretion occurs when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful deliberate consideration." *Hancock v. Shook*, 100 S.W.3d 786, 795 (Mo. banc 2003).

B. Appellant Failed to Preserve Objection

One of the difficulties in addressing the Appellant's claim is his failure to identify specifically – and with references to the record – exactly what evidence or testimony he claims was improperly excluded. Nowhere in his Points Relied On does the Appellant identify specifically what proffered evidence was excluded. The offer of proof Appellant made after the evidence was concluded (Tr. 916-921) was very different from the offer Appellant made in response to the State's motion in limine (L.F. 610-613), and then in his motion for new trial (L.F. 799-811). These inconsistencies[4] make it difficult for both the trial court and this Court to determine exactly what evidence the Appellant claims was improperly excluded.

"[A]n offer of proof is necessary to preserve the matter for appellate review where the objection to the proffered evidence is sustained by the trial court." *State v. Pisciotta*, 968 S.W.2d 185, 189 (Mo. App. W.D. 1998); *State v. Broussard*, 57 S.W.3d 902, 911 (Mo. App. S.D. 2001). "An offer of proof must demonstrate the relevance of the testimony offered,

[4] As just one example of the inconsistencies in Appellant's proffers is the fact that Appellant never mentioned in response to the State's motion in limine (L.F. 610-613) he had two expert witnesses to testify as to the "prints solubility in heavy rain" (Tr. 917). That "fact" was disclosed only after the jury was deliberating. (Tr. 914-916). Of course, the veracity of that assertion was established to be untrue because both witnesses submitted affidavits stating they had never made any such assertion to the defense and had never had any conversation about such an assertion. (L.F. 877-880).

must be specific, and must be definite." *State v. Broussard*, 57 S.W.3d at 911. This Court cannot properly evaluate the propriety of the trial court's ruling unless the proposed questions and answers are preserved. *State v. Lingle*, 140 S.W.3d 178, 187 (Mo. App. S.D. 2004).

One essential requirement of a proper offer of proof is that the Appellant establish the admissibility of the proffered evidence. *State v. Lingle*, *supra*. "If an offer of proof consists of evidence that is admissible in part and inadmissible in part, the trial court is justified in rejecting the entire offer." *State v. Broussard*, 57 S.W.3d at 911.

This Court has indicated that the proper method for making an offer of proof is to have the potential witness testify. *State v. Townsend*, 737 S.W.2d 191, 192 (Mo. banc 1987). It is acceptable for counsel to make a narrative offer, but the narrative must be definite and specific, and must be more than mere conclusions. *Id.*; *State v. Pisciotta*, 968 S.W.2d at 189.

C. Proffered Evidence was Inadmissible

While, again, it is difficult to discern which version of his offer of proof Appellant now claims was improperly excluded, this inconsistency pales next to Appellant's failure to establish the admissibility of any of that evidence.

1. **Feldman's fingerprints do not directly connect him to the murder**. Appellant makes the bold assertion that there is no innocent explanation for Feldman's fingerprints on the victim's car. Appellant thinks the fingerprints are compelling because the victim had to have been murdered at 9:10 a.m. on March 11, 1982. (Appellant's Brief, p. 66). Appellant proffered no evidence that the victim had to have died at that time, and offers absolutely no evidence of that claim on appeal.

The conclusory assertion is based on the fact that the victim's watch stopped at 9:10. This murder occurred when people still "wound" a watch – they were not battery operated. There is no evidence that the watch stopped at 9:10 a.m. as opposed to 9:10 p.m.; there is no evidence the watch was not already stopped before the victim was murdered. And, most important, Appellant made no offer of proof that he had any evidence as to when the watch stopped, or how it stopped.

Appellant then argues that he would "prove" that any fingerprints left on the victim's vehicle were placed on the vehicle between 10:00 p.m., March 10th, and 7:30 a.m., March 11th, because two fingerprint experts would establish the "fact of the prints solubility in heavy rain." (Tr. 917).

What Appellant fails to disclose to this Court is that he did not, in fact, have any such evidence. In response to the Appellant's motion for new trial, the State included affidavits from both experts, Don Lock and Kim Harden, who stated they never discussed such a matter with anyone from Appellant's defense team and never made such an assertion. (L.F. 877-880). In fact, Appellant took the deposition of Ms. Harden prior to trial and never asked her any question about this issue. (L.F. 877). The offer of proof was patently untrue.

Appellant also fails to disclose that the evidence in this case showed that the police recovered fingerprints from three individuals on the exterior of the car (Tr. 917), and that the fingerprints of Appellant and Ms. Spencer were not found anywhere on the vehicle (Tr. 916), even though it is uncontroverted that both were driving the car the night of the murder.

In the context of the admission of evidence regarding alternate suspects, evidence suggesting motive or opportunity to commit a crime is not admissible in the absence of some

evidence that the alternative suspect did some act directly connecting that suspect with the alleged crime. *State v. Davidson*, 982 S.W.2d 238, 242 (Mo. banc 1998). Likewise, evidence of other bad acts unconnected to the alleged crime itself is not admissible for purposes of casting "bare suspicion" on an alternative suspect. *State v. Chaney*, 967 S.W.2d 47, 54-55 (Mo. banc 1998) (evidence related to neighbor being a pedophile inadmissible to cast suspicion on pedophile as alternate suspect in killing of friend of defendant's stepdaughter); *State v. Castro*, 276 S.W.3d 358, 361 (Mo. App. S.D. 2009) (evidence of presence of another person with propensity to molest children not admissible to prove that alternative person molested victim); *State v. Riley*, 213 S.W.3d 80, 92-93 (Mo. App. W.D. 2006)(evidence that other person in household had used drugs subsequent to date of offense not admissible in possession case to prove that the other person was the person who possessed the drugs in question).

Once the "bluster" is filtered, the reality is that Appellant's only evidence to support his claim that Tony Feldman committed the murder is Feldman's fingerprint on the victim's car, along with those of two other unknown individuals. Again, the fingerprint is on the outside of the vehicle, not inside. Appellant offers no reasonable explanation why the other two individuals whose fingerprints were on the car are not properly the subject of suspicion. The reason is obvious – this single fact does not directly connect these other persons with the corpus delicti and does not point to them as the murderer. *State v. Woodworth*, 941 S.W.2d 679, 690 (Mo. App. W.D. 1997).

2. **There was no "relationship" between the victim and Mr. Feldman**. To overcome the lack of any connection between Mr. Feldman and the victim, Appellant

fabricates a claim that the two "had a relationship." (Appellant's Brief, p. 66). This assertion goes unexplained, although Appellant embellishes this assertion by saying that "Mr. Feldman is the person who was following Judy [Spencer], frightening her to the point that she needed a police escort to get to her car in the hospital parking lot." (Appellant's Brief, p. 66).

Appellant should concede that he lacks one scintilla of evidence to support that broad assertion. Furthermore, that assertion was not made in his offer of proof to the trial court. (Tr. 915-921). The trial court cannot be condemned for failing to consider an allegation not made in the offer of proof. Additionally, the "evidence" offered by Appellant contradicts this claim. A police dispatcher testified at trial that a month before the murder, Ms. Spencer called and asked for an escort to her car at work on one or two occasions. (Tr. 715). The time period does not match Appellant's claim that Ms. Spencer was seen with Mr. Feldman at a local tavern a few days before the murder. (Tr. 918). There is no evidence that anyone was stalking Ms. Spencer, much less that Mr. Feldman was the stalker.

3. **Mr. Feldman died of self-inflicted shotgun wounds in 2008**. Next, Appellant claims that the fact that 26 years after the murder, Mr. Feldman shot himself with a 12-guage shotgun is relevant to prove that Mr. Feldman murdered Ms. Spencer with a shotgun.[5]

[5] In this appeal, Appellant abandons the claim made in his offer of proof at trial that he had evidence that in 1982, Tony Feldman "was known" to carry a shotgun in his car. (Tr. 920). The State assumes the Appellant recognizes that such evidence of habit is not

Once more, Appellant fails to be forthcoming about the actual facts surrounding Mr. Feldman's suicide. The suicide weapon could not have any possible connection to the murder of Ms. Spencer because Mr. Feldman did not purchase the weapon until 20 years after the murder (L.F. 882), and he purchased the shotgun in California (L.F. 882).

If this directly connects Mr. Feldman to Ms. Spencer's murder, then every individual who ever possessed a shotgun in Dent County, Missouri, is equally subject to suspicion.

4. **Mr. Feldman and Ms. Spencer were seen days earlier at a public tavern**.

Likewise, the fact that witnesses would testify that Mr. Feldman and Ms. Spencer were seen together at a local tavern days before the murder does not in any way connect Mr. Feldman to the murder. It appears that Appellant believes it is logical to conclude that because they were seen in a tavern together, they must have "had a relationship." (Appellant's Brief, p. 66).

At most, this evidence supplies a perfectly innocent explanation as to how Mr. Feldman's fingerprint may have appeared on the outside of Ms. Spencer's vehicle, an explanation that is in no way incriminating.

Appellant tries to bolster the relevance of this innocuous evidence that the two met in a public place days before the murder by alleging that Mr. Feldman lied about knowing Ms. Spencer. Yet Appellant failed to explain in his offer of proof how he would prove these

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admissible or relevant. *State v. Hemby*, 63 S.W.3d 265, 269 (Mo. App. S.D. 2001). Of course, the offer of proof at trial also failed to establish that Appellant could lay a proper foundation to prove "habit," even if such evidence was admissible in Missouri.

allegations, which is a necessary part of an offer of proof. *State v. Lingle,* 140 S.W.3d at 187; *State v. Ross*, 292 S.W.3d 521, 526 (Mo. App. W.D. 2009); *State v. Childs,* 257 S.W.3d 655, 658 (Mo. App. W.D. 2008).

Mr. Feldman is dead; any statements of his would be hearsay. Appellant failed to offer any explanation during his offer of proof at trial, or in his brief, how the hearsay statements he wishes to attribute to Mr. Feldman would be admissible. Under §491.074, RSMo, only the "prior inconsistent statements of any witness testifying at trial" are admissible as substantive evidence. Mr. Feldman could not testify at trial and there has been no explanation by Appellant how this evidence could be admissible. *State v. Childs*, 257 S.W.3d 655, 658 (Mo. App. W.D. 2008)(The offer must "demonstrate specifically what the evidence would be, the purpose and object of the evidence, and each fact essential to establishing its admissibility.")

D. Missouri's Direct Connection Rule is Constitutional

Appellant makes a claim that the requirement under Missouri law that there be a direct connection between a third person and the crime before a defendant may assert to the jury that this third person actually committed the crime is somehow unconstitutional. This constitutional challenge is raised for the first time on appeal.

> "In order to preserve a constitutional issue for appellate review, a party must (1) raise the issue at the first available opportunity, (2) state the constitutional provision claimed to be violated by specifically referencing the article and section of the constitution or by quoting the constitutional provision itself, (3) state the facts that comprise the

> constitutional violation, and (4) preserve the constitutional issue throughout the criminal proceeding."

State v. Newlon, 216 S.W.3d 180, 184 (Mo. App. W.D. 2007). Not until this appeal did Appellant ever make any claim that the "direct connection rule" was unconstitutional. Though he did make a generic reference to several constitutional principles in his reply to the State's motion in limine (L.F. 610-613), the argument contained in his brief was not presented to the trial court at any time.

Regardless, the requirement under Missouri law that a defendant not be allowed to confuse or mislead the jury with allegations that some third person committed the crime unless there is "proof as directly connects the other person with the corpus delicti, and tends clearly to point out someone besides accused as the guilty person," *State v. Woodworth*, 941 S.W.2d 679, 690 (Mo. App. W.D. 1997), is constitutional.

Appellant cites the United States Supreme Court's decision in *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), as his sole authority to support his argument. In *Holmes*, the Supreme Court invalidated South Carolina's common law rule excluding evidence of a third person's guilt, no matter how compelling, if the State's evidence of a defendant's guilt was "strong." 547 U.S. at 330, 126 S.Ct. at 1734. Such a rule was deemed "arbitrary," and does not serve the purpose "other similar third-party guilt rules were designed to further." 547 U.S. at 331, 126 S.Ct. at 1735.

This decision not only did not invalidate Missouri's direct connection rule, but actually affirmed its propriety. "State and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." 547 U.S. at 324, 126

S.Ct. at 1731. The court noted that there exist "well-established rules of evidence permit(ing) trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." 547 U.S. at 326, 126 S.Ct. at 1732.

The court explicitly noted in its decision that it was not questioning the validity of "rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged." 547 U.S. at 327, 126 S.Ct. at 1733.

In fact, the court affirmed that such evidence "may be excluded where it does not sufficiently connect the other person to the crime." 547 U.S. 327, 126 S.Ct. at 1733. "Such rules are widely accepted," *Id*., according to the Supreme Court, which then cited this Court's decision in *State v. Chaney*, 967 S.W.2d 47 (Mo. banc 1998), with approval. In *Holmes*, the defense had four witnesses who would testify that the third person (Jimmy White) admitted to committing the crimes. 547 U.S. at 321, 126 S.Ct. at 1730. Likewise, in *Woodworth*, the Western District was compelled to reverse the trial court's exclusion of evidence that the victim, himself, had identified a third person as his assailant. *State v. Woodworth*, 941 S.W.2d 679, 690 (Mo. App. W.D. 1997). There is no dispute that in each of these cases there was direct evidence connecting the third person to the crimes.

Thus, Appellant's claim that this case is similar to *Holmes* is incorrect. The Missouri rule does not "arbitrarily" exclude evidence; Appellant was allowed to attempt to prove there was some evidence connecting Mr. Feldman to the murder of Ms. Spencer. The evidence was excluded because Appellant could not make such a showing. Following *Holmes*, the

Sixth Circuit confirmed that state courts may continue to exclude such evidence when "the trial court's decision was based on defense counsel's failure to demonstrate a sufficient nexus between [the third party] and the murder." *Miller v. Brunsman*, 599 F.3d 517, 524 (6th Cir. 2010). The weighing of the probative value of a defendant's proffered evidence "is entirely consistent with United States Supreme Court precedent." 599 F.3d at 526.

The fact that Mr. Feldman's fingerprints were one of several found on the outside of the victim's car, which was located several miles from the crime scene, after having been left unattended for a lengthy period of time prior to its discovery, is not evidence that incriminates Mr. Feldman in the murder of Ms. Spencer. Throughout this case, Appellant altered and amended his offer of proof, hoping to assert a set of facts connecting Mr. Feldman in some way to the murder. This has included some significant embellishment of the available evidence.

Appellant also claims that the State "exploited" the exclusion of the evidence by "emphasiz[ing] the absence of the very evidence the State had asked the court to keep from them." (Appellant's Brief, p. 67). Yet, a simple reading of the transcript shows the State discussed only the evidence that was admitted and addressed Appellant's argument that Appellant's DNA evidence underneath the victim's fingernails was from "casual contact." (Tr. 897-901). In response to Appellant's closing argument, the State argued:

> The one thing I didn't hear in any discussion of for over an hour, was this. If DNA gets under your fingernails so easily, then where's the third sample? Where is the third person? If Mr. Nash's DNA is underneath her fingernail simply because of casual contact, then

where's the killer's DNA? Because he did a lot more than have casual contact with her.

(Tr. 906).

The State said nothing about fingerprints, or stalking. The State simply addressed the claim that Appellant's DNA was underneath the victim's fingernails[6] because of "casual contact." The State's evidence was that the DNA could not be due to casual contact because of the quantity of DNA (Tr. 678-679), and because Ms. Spencer's washing of her hair after her last contact with Appellant would have eliminated any DNA underneath her fingernails. (Tr. 680).

Without objection, the State presented evidence that no third person's DNA was present underneath the fingernails. (Tr. 671). In fact, the argument Appellant complains of was made without objection. The reason is because the argument was a fair comment on the evidence. If Appellant's DNA was present due to mere casual contact, then it was fair to infer the murderer's DNA would also be present. That is certainly a reasonable argument, and one based on the evidence at trial.

The issue for the jury in this case was whether Appellant murdered Judy Spencer. The jury was properly told it could convict Appellant only if the State proved him guilty beyond a reasonable doubt. To invite the jury to "compare" suspects, or to decide if some third

[6] Appellant's brief attempts to perpetuate the falsehood that the DNA was found underneath a single fingernail of the victim ("the presence of Mr. Nash's DNA under one of Ms. Spencer's fingernails ….") (Appellant's Brief, p. 65).

person might be involved, without adequate evidence only distracts the jury from its proper role. The jury should not be distracted or confused about that responsibility by confounding its assessment of the evidence relevant to Appellant's guilt and either increasing or decreasing the likelihood of guilt based on the strength or weakness of evidence related to some third person's possible culpability.

Appellant's "proof" of Mr. Feldman's involvement in Judy Spencer's murder was speculative, inexact, and continues to be unclear and nebulous. The trial court properly exercised its discretion in excluding any such speculation and Appellant was not denied a fair trial as a result of the trial court's decision.

Conclusion

For the foregoing reasons, Appellant's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 9,622 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this ____th day of November, 2010, to:

Frank K. Carlson
The Carlson Law Firm
17 South Oak Street
Union, MO 63084

_____
THEODORE A. BRUCE

IN THE SUPREME COURT OF THE STATE OF MISSOURI

DONALD R. NASH,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal No. SC90649

APPENDIX TO RESPONDENT'S BRIEF
