IN THE SUPREME COURT OF MISSOURI

NO. SC 90618

STATE OF MISSOURI,

Respondent,

vs.

GREGORY BOWMAN,

Appellant.

APPEAL FROM THE CIRCUIT COURT
TWENTY FIRST JUDICIAL CIRCUIT
THE HONORABLE DAVID VINCENT

REPLY BRIEF OF APPELLANT GREGORY BOWMAN

ORAL ARGUMENT REQUESTED

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A. MR. BOWMAN'S MOTION TO SUPPRESS SHOULD BE REVIEWED BY THIS COURT DE NOVO BECAUSE APPELLANT ADEQUATELY PRESERVED THIS ISSUE FOR APPEAL IN ACCORD WITH MISSOURI SUPREME COURT RULE 24.05 AND SECTION 542.296 OF THE REVISED MISSOURI STATUTES BY SUBMITTING A WRITTEN PRE-TRIAL MOTION, PROVIDING NOTICE TO THE PROSECUTING ATTORNEY, OBJECTING TO THE DNA EVIDENCE DURING TRIAL, AND RAISING THE ISSUE IN HIS MOTION FOR A NEW TRIAL.

Respondent argues that Mr. Bowman failed to adequately preserve his Motion to Suppress DNA evidence, and that this Court should review the Motion to Suppress Mr. Bowman's DNA based on a plain error review because there was not an evidentiary hearing before the Trial Court. (Respondent's Brief, 31). Respondent's analysis is flawed because Mr. Bowman complied with both Missouri Supreme Court Rule 24.05 and § 542.296 of the Revised Missouri Statutes to preserve the issue for appeal.

Missouri Supreme Court Rule 24.05 states that requests that evidence be suppressed shall be raised by motion before trial. *Rule 24.05*. Section 542.296 of the Revised Missouri Statutes provides the grounds for which a motion to suppress may be made. *Mo. Rev. Stat. § 542.296*. It further delineates the procedural guidelines that must be followed in order to preserve the issue for appeal. *Id*. These guidelines include that the motion must be in writing, must be made before the commencement of trial (except in limited circumstances which do not apply here), and notice must be given to the prosecuting attorney of said motion. *Id.*

In *State v. Fields*, this Court noted that the procedural rules of Missouri require that the Defendant, when he seeks to have illegally obtained evidence suppressed, must make a pretrial motion to suppress the

evidence at issue. *State v. Fields*, 442 S.W.2d 30, 33 (Mo.1969). If such a motion is not made, the issue is waived. *Id*.

In *State v. Galazin*, the Defendant twice objected during trial to the testimony of a police officer, attempting to block evidence that the defendant believed was subject to being suppressed. *State v. Galazin*, 58 S.W.3d 500, 504 (Mo. banc 2001). The Defendant then raised the issue again in his appeal. *Id*. However, the defendant failed to submit a written motion to the trial court to suppress the evidence. *Id*. This Court found that because the Defendant had not submitted a written motion to suppress the evidence prior to trial, the issue had not been properly preserved for appeal. *Id*. at 505-506. This Court explained that the purpose of the rule regarding a written motion was to avoid delays in trial and to give the prosecution a fair chance to respond and investigate the allegations contained within the motion. *Id*. at 505.

Mr. Bowman filed his Motion to Suppress his DNA Profile on January 23, 2009. (LF, 22). Mr. Bowman attached several exhibits to his Motion to Suppress that set forth the history of how the St. Louis County Police Department obtained a DNA profile of Mr. Bowman.[1] (LF, 22). A

[1] Mr. Bowman's DNA profile was not in any state or federal DNA database when it was obtained by the St. Louis County Police Department.

hearing on the Motion to Suppress was held on February 5, 2009 where both Mr. Bowman and the prosecution presented arguments on the motion. (ROP Motion, 2/5/09). There was no dispute as to the facts of how the St. Louis County Police Department obtained Mr. Bowman's DNA profile, with those facts being set forth in the Motion to Suppress and the Exhibits attached to it. (ROP Motion, 2/5/09, LF, 22). Judge Vincent denied the motion to Suppress Mr. Bowman's DNA Profile at the conclusion of the hearing on February 5, 2009. (ROP Motion, 2/5/09, 9). At trial, Mr. Bowman renewed his objections to the introduction of his DNA. (ROP Vol. II, 20). Further, Mr. Bowman alleged error on the part of Judge Vincent in his Motion for a New Trial. (LF 124).

Mr. Bowman met every requirement as mandated by Supreme Court Rule 24.05 and Section 542.96 of the Revised Missouri Statutes. Because Mr. Bowman complied with Supreme Court Rule 24.05 and Section 542.296 of the Revised Missouri Statutes, he properly preserved the issue for appeal. Accordingly, Mr. Bowman respectfully requests that this Court review the Motion to Suppress his genetic profile *de novo*.

B. THE SEARCH AND SEIZURE OF MR. BOWMAN'S BIOLOGICAL MATERIAL AND SUBSEQUENT ANALYSIS OF THAT MATERIAL CONSTITUTES A

SEARCH UNDER FOURTH AMENDMENT LAW, AND AS SUCH, IT SHOULD BE ANALYZED UNDER A FOURTH AMENDMENT ANALYSIS.

Respondent argues that Mr. Bowman's theory of this case requires this Court to recognize a separate and distinct privacy right in items seized by law enforcement. (Respondent's Brief, 36). Respondent also argues that a criminal defendant who voluntarily submits a DNA sample for purposes of exoneration in a criminal investigation, forfeits all privacy rights in that sample. *Id*. Respondent cites no U.S. Supreme Court or Missouri law to support these contentions.

Respondent ignores the discussion of *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989) in Appellant's Brief. (Appellant's Initial Brief, 46). There, the United States Supreme Court held that the intrusion into the body for the purpose of taking blood, as well as the ensuing chemical analysis of the blood sample, constitutes a search under the Fourth Amendment. *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989).

Respondent relies on *Segundo v. State* in arguing the proposition that the storage and use of a validly obtained DNA sample does not implicate Fourth Amendment Rights. (Respondent's Brief at 37). In *Segundo*, the

blood sample at issue was taken pursuant to a Texas statute. *Segundo v. State*, 270 S.W.3d 79, 83 (Tex. Crim. App. 2009). The statute requires the disclosure of DNA samples from convicted felons and sexual offenders. *Id*. at 96. The statute then requires that the DNA profiles extracted from those samples be entered into the Texas State CODIS system. *Id*. The statute also ensures a person's privacy by mandating that the DNA database remain confidential. *Id*. The penalties for the unauthorized dissemination of the information contained within the Texas CODIS system are criminal penalties. *Id*.

Segundo is strikingly different from the facts of Mr. Bowman's case. Unlike *Segundo*, Mr. Bowman's DNA was not collected pursuant to any statute, nor was Mr. Bowman mandated to submit to a blood test. Mr. Bowman's blood sample was obtained in July of 2001. (LF, 27). At that time, Mr. Bowman was charged in St. Clair County, Illinois with the murders of Elizabeth West and Ruth Ann Jany. (LF, 22-29). When he learned that a DNA profile was available in the West case, he volunteered to submit his own DNA via a blood sample in order to exonerate himself of the West murder. (LF, 27). The blood sample was taken pursuant to a Court Order issued by the Circuit Court of St. Clair County. (LF, 27). The St. Clair County Sheriff's Department took a blood sample from Mr. Bowman, which

was provided to the Illinois State Police Crime Lab located in Fairview Heights, Illinois. (LF, 27). The Crime Lab obtained a DNA profile, and it retained possession of the DNA profile until January of 2007. (LF, 22-37).

The Illinois State Police Crime Lab did nothing with Mr. Bowman's DNA until late January of 2007. (LF, 29). In late January of 2007, Mr. Bowman, still awaiting trial for the West and Jany murders, posted bail and was released from custody. (LF, 29). Upon learning of this, James Rokita contacted the Illinois State Police Crime Lab, obtained Mr. Bowman's DNA profile, and sent it to the St. Louis County Police Department. (LF, 29).

In contrast to *Segundo*, Mr. Bowman's DNA profile was never entered into any type of CODIS system, either state or national. As a consequence, Mr. Bowman was never afforded any safeguards that others are afforded in a system like CODIS. However, following Respondent's logic, in Illinois, should one consent to giving a biological sample for purposes of exonerating themselves from a crime, they can expect that their DNA profile will be retained indefinitely, and that it will be released on request, and that it can be sent anywhere for comparison.

Respondent also relies heavily on *Pharr v. Commonwealth*, 646 S.E.2d 453 (Va. App. 2007). In that case, the Virginia Court of Appeals held that in the absence of an explicit limitation on the possible subsequent

uses of DNA collection, there was no violation of the Fourth Amendment when the defendant's DNA profile was used in a later investigation. *Pharr v. Commonwealth*, 646 S.E.2d 453, 458 (Va. Ct. App. 2007). Mr. Bowman first respectfully submits to this Court that *Pharr v. Commonwealth* was wrongly decided by the Virginia Court of Appeals. However, should this Court agree with the Virginia Court of Appeal's decision, Mr. Bowman argues that *Pharr* is factually distinct from his case.

Pharr is a strictly intrastate case. *See Pharr generally*. The DNA profile at issue was never transferred outside of Virginia borders. *See Pharr generally*. The defendant in Pharr consented to the taking of his DNA sample by a Virginia Detective in 2001 after he was brought in for questioning by the Virginia police. *Pharr*, 636 S.E.2d at 454. The detective who obtained the buccal swab in 2001 later recognized similarities between the 2001 case and an unsolved rape case from 1999. *Id*. The similarities were in the similar methods used and the proximity in time and location of the two cases. *Id*. Based upon these observations, the detective then submitted the buccal swab for comparison to biological material recovered at the 1999 unsolved crime scene and found a genetic match. *Id*. at 454-455. The Court ultimately decided that the defendant had relinquished any

privacy right in the sample absent an express limitation on his consent. *Id*. at 458.

In contrast to *Pharr*, Mr. Bowman's case is an interstate case. His DNA sample was transferred from Illinois to Missouri. (LF, 29) Also, James Rokita never had any involvement with the Velda Rumfelt homicide investigation. Rather, Mr. Bowman submits that Mr. Rokita, who was no longer a detective at the time he obtained Mr. Bowman's DNA profile, became obsessed with keeping Mr. Bowman in prison after the Illinois convictions were overturned and Mr. Bowman posted bail and was released from custody. Also factually distinct from *Pharr* is the fact that the Illinois murders and the Velda Rumfelt homicide were not close in proximity. Lastly, in the *Pharr* case, the detective immediately transferred the buccal swab to the crime lab rather than waiting six years as happened in Mr. Bowman's case. Additionally, Mr. Rokita was not involved in the 2001 taking of Mr. Bowman's DNA sample. Based upon the distinct factual differences, Mr. Bowman respectfully requests that this Court decline to follow the holding in *Pharr v. Commonwealth*.

C. BASED ON A PLAIN MEANING READING OF THE ILLINOIS GENETIC PRIVACY ACT, THE RETENTION, TRANSFER, AND TRANSMISSION OF

MR. BOWMAN'S DNA PROFILE BY THE ILLINOIS STATE POLICE CRIME LAB AND JAMES ROKITA IS A CLEAR VIOLATION OF THE ILLINOIS GENETIC PRIVACY ACT.

Respondent's analysis and understanding of the Illinois Genetic Privacy Act is flawed.

Respondent places great weight on the legislative debate surrounding the passage of the Illinois Genetic Privacy Act. However, this Court has articulated on many occasions, an appropriate analysis for statutory interpretation. See generally: *Hagely v. Board of Education of the Webster Groves School District*, 841 S.W.2d 663 (Mo. banc 1992); *Community Federal Savings & Loan Association v. Director of Revenue*, 752 S.W.2d 794 (Mo. banc 1988). Accordingly, this Court should use a plain meaning reading of the statute to determine the intent of the legislature.

In *Hagely v. Board of Education of the Webster Groves School District*, this Court indicated that its responsibility in construing statutes is to ascertain the intent of the Legislature from the language used and to give effect to that intent. *Hagely v. Board of Education of the Webster Groves School District*, 841 S.W.2d 663, 667 (Mo. banc 1992). In *Community Federal Savings & Loan Association v. Director of Revenue*, this Court

emphasized a plain meaning reading of the statute to determine legislative intent. *Community Federal Savings & Loan Association v. Director of Revenue*, 752 S.W.2d 794, 798 (Mo. banc 1988). In determining legislative intent, the Court must first consider the language of the statute and words employed in their plain and ordinary meaning. *Id*. Provisions of the entire legislative act must be construed together and, if reasonably possible, all provisions must be harmonized. *Id*.

Respondent's argument regarding the Illinois Genetic Privacy Act largely consists of what it believes was the intent of the legislators. (Respondent's Brief, 40-44). Respondent argues that the Appellant's "narrow" interpretation of the Illinois Genetic Privacy Act is inappropriate. (Respondent's Brief, 43-44). However, the Respondent argues that the Act should be construed as applying only to "genetic testing" and not applying to "DNA testing." (Respondent's Brief, 42). Respondents ignore the language of the legislators during the floor debate on the law. The legislators consistently use "DNA testing" and "DNA profiling" interchangeably with "genetic testing". (Respondent's Appendix, 17, 22, 23, 24, 26, 32). This language used by the legislators during the debate indicates that the legislators intended to use the words "genetic testing" and "DNA testing" interchangeably within the text of the statute.

Section 15(b) the Illinois Genetic Privacy Act, specifically applies to biological samples obtained by law enforcement for use in a criminal investigation. *410 ILCS 513/15(b)*. The plain meaning reading of the statute indicates that law enforcement may disclose, for identification purposes, information derived from that biological sample to appropriate **law enforcement bodies conducting the investigation or prosecution**. A plain meaning reading of this section of the Act reveals that the legislature intended only those officers involved in the investigation of the criminal matter for which the sample was obtained to be able to receive or transfer the profile.

The problem with Respondent's reasoning is that at the time that Mr. Rokita obtained Mr. Bowman's DNA profile from the Illinois State Police Crime, he was *not* a police officer nor was he involved in the investigation or prosecution of any cold cases. Mr. Rokita retired from the Belleville City Police Department in 2002. (ROP, 496). At the time that Mr. Rokita obtained Mr. Bowman's DNA profile from the Illinois State Police Crime Lab and transferred it to the St. Louis County Police Department, he was a civilian employee of the Belleville Police Department, no longer a member of law enforcement. (ROP, 496). Mr. Rokita only sought to obtain Mr. Bowman's DNA profile when he learned that Mr. Bowman had been

released from custody on bail. (LF, 29). Furthermore, at the time that the transfer of his DNA profile took place, Mr. Bowman was presumed innocent of both Illinois murders because his convictions had been overturned, and he was awaiting trial in those cases. (LF, 29).

Respondent places much emphasis on the floor debate of the statute arguing that the legislature's intent in passing the Illinois Genetic Privacy Act was to aid citizens in health insurance matters. (Respondent's Brief, 42). This debate did not extend to Section 15(b) of the Act. Respondent seems to argue that because the legislature did not place emphasis on these sections during the debate, that it was not intending on having those sections carry as much weight or apply to this type of situation. On the contrary, this Court held in *Community Federal Savings & Loan* (supra) that the responsibility of this Court is to read the entire text of the statute together and, if possible, in harmony. *Community Federal Savings & Loan Association,* 752 S.W.2d at 798.

Reading the entire act in harmony requires this Court to recognize that although the Illinois legislature carved out an exception for law enforcement, it was still concerned about the privacy rights of those who stand presumed innocent of crimes. The Act protects people from having their confidential

genetic information released to anyone who is not a member of law enforcement actively engaged in the case at issue.

D. THE PROPER ANALYSIS FOR THE DISCLOSURE OF MR. BOWMAN'S DNA IS A CONSENT STANDARD BECAUSE MR. BOWMAN CONSENTED TO HAVING A DNA SAMPLE TAKEN FOR PURPOSES OF EXONERATING HIMSELF FROM THE ELIZABETH WEST MURDER AND THE STATE OF ILLINOIS NEVER ISSUED A RULE 413 DISCOVERY REQUEST FOR MR. BOWMAN'S DNA.

Respondent contends that the proper analysis for the "consent" issue in this case is under the scope of "judicially-mandated" disclosures because Respondent asserts that Mr. Bowman consented to a court order. (Respondent's Brief, 33-36, 44-51). This is not true. Mr. Bowman consented to having a DNA sample taken for the sole purpose of exonerating himself from the Elizabeth West murder. After Mr. Bowman consented to the taking of his DNA, Judge Richard A. Aguirre entered a Court Order acknowledging that Mr. Bowman knowingly and voluntarily consented to provide that sample. (LF, 27). He therefore ordered that the sample be taken

and be promptly delivered to the Metro-East Forensic Laboratory of the Illinois State Police. (LF, 27).

Respondent argues that this case should be treated under the same analysis as discovery orders or subpoenas which do not implicate the Fourth Amendment. (Respondent's Brief, 50). Respondent cites to *People v. Treece*, 159 Ill.App.3d 397 (Ill.App.1987), for the proposition that a court order under Illinois Rule 413 eliminated the need for a search warrant. (Respondent's Brief, 50). In *Treece*, the defendant never consented to having a blood sample taken, rather the court granted the State's Rule 413 pretrial discovery motion to permit the taking of the defendant's hair, blood, and saliva samples. *Id.* at 405. The defendant then argued on appeal that the taking of the samples violated his Fourth Amendment rights against unreasonable searches and seizures. *Id.* at 405-406. The Court held that because the State was able to show probable cause for requesting the samples, Illinois Rule 413 could be used to obtain samples from the defendant. *Id*. at 407.

Mr. Bowman's case is drastically different from the facts in *Treece*. Mr. Bowman consented to the taking of his DNA sample believing that by providing the sample he would be exonerated from the accusations that he killed Elizabeth West. The State did not request a Rule 413 from Mr.

Bowman. Because there was no request made by the State pursuant to Rule 413, Rule 413 is inapplicable to this case.

II. THE TRIAL COURT DID ABUSE ITS DISCRETION IN DENYING MR. BOWMAN THE RIGHT TO PRESENT EVIDENCE THAT KEVIN KIGER COMMITTED THE MURDER OF MS. RUMFELT

According to Respondent, the issue of whether the trial court abused its discretion in denying Mr. Bowman the right to present evidence that Kevin Kiger committed the murder of Velda Rumfelt should be analyzed under an evidentiary standard that is controlled by cases involving the prosecution's attempts to introduce evidence of other similar crimes of the *defendant* in an effort to prove that the defendant committed the crime charged. (Respondent's Brief, 55). That rule is inapplicable to the issue that we are faced with here.

Mr. Bowman's appeal involves exculpatory evidence consisting of similar crimes committed by a *third-party* (Mr. Kiger) to prove that someone *other than Mr. Bowman* committed the crime charged – not evidence connecting Mr. Bowman to similar uncharged crimes to prove that Mr. Bowman committed the crime charged. The rule Respondent sets out in its Brief that "the charged crime and the uncharged crime must be nearly

'identical' and their methodology so unusual and distinctive that they resemble a 'signature' of the defendant's involvement in both crimes" fails to recognize the issue raised by Mr. Bowman, and fails to address to correct rule of admissibility of the evidence that the trial court barred the jury from hearing in Mr. Bowman's case.

Likewise, Respondent's references to "signature" modus operandi are also unrelated and irrelevant. "Signature evidence used for corroboration [that a charged defendant committed the charged crime] is, at base, propensity evidence masquerading under the well-recognized identity exception, a category of exception in which it does not belong." *State v. Vorhees*, 248 S.W.3d 585, 590 (Mo. 2008). "Propensity evidence, although logically relevant, is unconstitutional because it 'violates [the] defendant's right to be tried for the offense for which he is indicted …[and] signature modus operandi evidence is actually just propensity evidence by another name." *Id*. (citations omitted). Consequently, the Respondent's arguments in its Brief are based on entirely different circumstances and involve a much different – and much higher – degree of proof than the issue that Mr. Bowman now appeals. And because a defendant's rights are at issue in this case, not the state's, cases cited in respondents brief are inapplicable and should be disregarded by this court

Furthermore, contrary to Respondent's assertion, Missouri courts do condition the admissibility of evidence of tending to show that another person committed the offense on the trial court's assessment of the strength of the prosecution's case. Respondent argues that the United States Supreme Court decision in *Holmes v. South Carolina*, 547 U.S. 319 (2006) has no impact on the traditional Missouri rule regarding admissibility of evidence of third-party guilt because "the focus of the Supreme Court was on the second part of the rule, which conditioned admissibility of evidence showing an alternative suspect on the trial court's assessment of the strength of the prosecution's case" and "it was this rule that … the Supreme Court found to be invalid" in *Holmes*. (Respondent's Brief, 60). However, a closer look at third-party guilt cases in Missouri reveals that the traditional Missouri rule, in practice, routinely conditions the admissibility of third-party guilt evidence on the strength of the prosecution's case. See *Glaze v. Redman*, 986 F.2d 1192, 1196-97 (8th Cir. 1993) (Exclusion of evidence that murders with which defendant was charged could have been committed by a person other than defendant did not render entire trial fundamentally unfair in view of fact that the evidence offered by defendant was not completely excluded and in view of the overwhelming evidence of defendant's guilt, including multiple inculpatory statements); *State v. Caldwell*, 632 S.W.2d

501, 503 (Mo. App. E.D. 1982) (presumptive prejudicial effect of error, if any, in undue restriction of defendant's "second man" argument was overcome by strength of prosecution's case); *State v. Barriner*, 111 S.W.3d 396, 404 (Mo. 2003) (Limbaugh, R., dissenting) ("Assuming arguendo that the trial court erred in failing to admit the hair evidence, in light of the overwhelming evidence of appellant's guilt, a reasonable probability that the error would have affected the outcome of the trial does not exist.").

However, the most telling evidence on this point, and perhaps the most ironic, can be found in the *Holmes* case itself and the briefs submitted on behalf of the respondent, South Carolina. An *Amici Curiae* brief was submitted jointly by several different states in support of South Carolina's approach to the admission of third-party guilt evidence. Brief for the States of Kansas, Alabama, Arizona, Arkansas, Colorado, Delaware, Hawaii, Idaho, Kentucky, Michigan, Mississippi, Missouri, Nevada, Oklahoma, Oregon, Pennsylvania, South Dakota, and Texas as Amici Curiae in Support of Respondent, *Holmes v. South Carolina*, 547 U.S. 319 (2005) (No. 04-1327), WL 123766. Urging the Court to reaffirm the South Carolina trial court's decision to exclude third-party guilt evidence based on the strength of the prosecution's case was the state of Missouri, represented by then-Attorney General Jeremiah W. Nixon. *Id*.

Respondent also incorrectly interprets the holding in *State v. Barriner* as putting a limitation on the nature and type of third-party guilt evidence that the court deems admissible. Respondent states that, because the evidence connecting Mr. Kiger to Ms. Rumfelt's murder was not "physical evidence," then "the requirements in *Barriner* are not met." (Respondent's Brief, 61). Respondent seems to imply that the court in *Barriner* made a rule that all third-party guilt evidence must be physical in nature. To the contrary, it was not the nature of the evidence itself that the *Barriner* court found important, but what the evidence could possibly prove, i.e., "another person's direct connection to the murders." *State v. Barriner, 111 S.W.3d 396, 400 (Mo. banc 2003).* Moreover, this Court in *Barriner* not only highlighted the importance of third-party guilt evidence, but even went so far as to state that there are "*limited circumstances* in which evidence tending to show that another person committed the offense is *properly excluded*," thus emphasizing the importance of the defendant's constitutional right to present a complete defense. *Id*. (emphasis added).

Consistently throughout its brief, Respondent claims that there is no direct evidence connecting Mr. Kiger to Ms. Rumfelt's murder – that all of the evidence is speculative at best. In support of this claim, Respondent attempts to, first, isolate the sum of evidence concerning Mr. Kiger, and then

compare it to cases involving only one or two similar pieces of evidence in which the court determined did not amount to a direct connection to a third party. (See Respondent's Brief generally). However, the amount of third party guilt evidence presented to the court in each of those cases pales in comparison to the breadth of evidence that Mr. Bowman offered connecting Kevin Kiger to Ms. Rumfelt's murder.

For instance, in *State v. Kelley*, the Southern District found that evidence of an alternative suspect reporting the death of the victim minutes before the victim's body was supposedly found did not demonstrate a direct connection between the alternative suspect and the murder. *State v. Kelley*, 953 S.W.2d 73 (Mo. App. S.D. 1997). However, the court in *Kelley* was not presented with the additional evidence that the alternative suspect knew the victim personally and yet lied to the police about knowing the victim; that the alternative suspect was known to frequent the same park where the victim was murdered; that the alternative suspect's description matched the description given of the victim's murderer; and that the alternative suspect was known to collect the same item (keys) that was only item missing from the victim's belongings when her body was found. (SR 14; ROP 403/14-18; SR 4; ROP 84). More importantly, the court in *Kelley* was not presented

with evidence that the alternative suspect was once considered a *prime suspect* in the victim's murder. (SR 14).

Likewise, this Court in *State v. Chaney* was faced with evidence that a known pedophile lived near the victim, lied to the police about his whereabouts, and may have been familiar with the area where the body was found. Lacking, however, was additional evidence that the known pedophile matched the description of the suspect and was considered by the police to be a "prime suspect" in the investigation. *State v. Chaney*, 967 S.W.2d 47, 54-55 (Mo. banc 1998). Further, lying to the police about his whereabouts is not the same as lying to the police about *actually knowing the victim personally*, which is what Mr. Kiger did when questioned by investigators concerning Ms. Rumfelt's murder. (ROP 134-135). In fact, lying to police about knowing the victim is consciousness of guilt, which "bears directly on the issue of guilt or innocence." *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989), citing *State v. Rodden*, 728 S.W.2d 212, 219 (Mo. banc 1987). Indeed, untrue denials constitute "admissions" as well as manifesting a consciousness of guilt. *State v. Fitzgerald*, 778 S.W.2d 689, (Mo. App. 1989); *State v. Simmons*, 737 S.W.2d 488 (Mo. App. 1987); *State v. Leach*, 752 S.W.2d 395 (Mo. App. 1988).

Of course, a single isolated piece of evidence standing alone will not have the same exculpatory value as it would if coupled with additional corroborating evidence. That is not the case here, however, where the breadth of the evidence presented on Mr. Kiger tips the scales in terms of establishing mere opportunity or motive versus a direct connection to Ms. Rumfelt's murder. Indeed, good authority--not to mention the Constitution--support Mr. Bowman's claim that the evidence concerning Kevin Kiger was relevant, exculpatory evidence favorable to him and admissible at his trial.

The U.S. Constitution provides every criminal defendant the right to convince a jury that the state has not met its burden of proving guilt beyond a reasonable doubt by offering exculpatory evidence that someone else (a third party) committed the crime. Exculpatory evidence is "evidence favorable to an accused" so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Bagley*, 473 U.S. 667, 676 (1985). In Mr. Bowman's case, the trial court's exclusion of such evidence denied him the very rights which must be most vigorously protected in a death penalty case, and most certainly could have made a difference between conviction and acquittal, where the evidence of Kevin Kiger's role in Ms. Rumfelt's death could have spared Mr. Bowman's life with the jury.

Mr. Bowman had an undeniably strong interest in presenting the jury with exculpatory evidence. In contrast to the prosecution, which must prove all elements of a charged crime beyond a reasonable doubt, to gain an acquittal, Mr. Bowman need only raise a reasonable doubt as to his guilt. Thus, even evidence that might be of slight probative value as part of the prosecution's case, could very well be sufficient to cause the jury to doubt Mr. Bowman's guilt.

In Mr. Bowman's case, evidence of third party guilt is too important for its suppression to be tolerated. The third party guilt evidence on Kevin Kiger would have supported the defense's theory that there were problems with the preservation of evidence in this case. *See Appellant's Initial Brief, pgs. 123 – 132*. Admitting third party guilt evidence is particularly necessary when, as in Mr. Bowman's case, there are allegations that forensic evidence has been improperly preserved and contaminated. *Id*. Presented together, the extensive third party guilt evidence and the flawed forensic evidence would, at the very least, have raised a reasonable doubt in the jurors minds as to Mr. Bowman's guilt. Unfortunately, this was not the case. For Mr. Bowman, the fact-finding function was stripped from the jury and relegated to a trial court judge who made a single, blanket determination as to whether third party guilt evidence should be presented to the jury. (ROP

409/12-22). As shown by the record on appeal, the important preservation and contamination problems with the DNA evidence were raised by the defense at trial. However, without the third party guilt evidence, the jury was given in incomplete picture in which to examine and resolve these scientific issues. Given the opportunity to present a complete defense, the evidence of Kevin Kiger's connection to Ms. Rumfelt's murder could very well have spared Mr. Bowman's life with the jury.

As Voltaire says, "It is better to risk saving a guilty man than to condemn an innocent one."

III. THE RESPONDENT'S ARGUMENT THAT MR. BOWMAN IGNORES EVIDENCE SUPPORTING THE VERDICT MISSTATES THE DEFENSE RAISED AND THE ACTUAL MEANING OF THE DIRECT EVIDENCE PRESENTED AT TRIAL IN THAT THE DIRECT EVIDENCE PRESENTED AT TRIAL DOES NOT ALLOW A REASONABLE INFERENCE TO BE DRAWN BY THE JURY TO SUSTAIN MR. BOWMAN'S CONVICTION

The State failed to produce sufficient objective evidence from which a reasonable, rational, and logical juror could have found beyond a reasonable doubt that Mr. Bowman caused the homicide of Ms. Rumfelt. The

Respondent's argument that in its Brief that Mr. Bowman ignores evidence supporting the verdict simply misstates the actual meaning of the evidence presented at trial, and the lack of reasonable inferences that could be drawn from the trial evidence to support the jury's verdict.

The Respondent's analysis of the evidence still requires one to speculate that simply because one's DNA is found on an article of clothing that may be connected in some way to the victim, such evidence is sufficient to sustain a conviction of that person of a crime beyond a reasonable doubt.

All evidence presented must be reviewed in the light most favorable to the verdict. *State v. Freeman,* 269 S.W.3d 422, 425 (Mo. banc 2008). Respondent's reply argument is not relevant to this issue. The reply argument simply points out that the jury was free to disregard certain evidence presented at trial.

The jury's verdict in this case rests upon Dr. Walsh's conclusion that Mr. Bowman's DNA profile could not be excluded from the profile obtained from the DNA found in the underwear that the State argued was on Ms. Rumfelt when her body was found. This required an inference by the jury that Mr. Bowman murdered Ms. Rumfelt based on the presence of the material from which the DNA profile was obtained. It is this inference that is unreasonable and insufficient to sustain Mr. Bowman's conviction.

The cases cited by the Respondent discussing DNA-only evidence upheld as sufficient to sustain a criminal conviction are distinguishable from Mr. Bowman's case. Many of those cases involved sexual assaults, with the nature of the DNA evidence being consistent with a sexual assault. In *State of Tennessee v. Toomes*, the defendant was charged with rape. *State of Tennessee v. Toomes*, 191 S.W.3d 122, 124 (Court of Criminal Appeals of Tenn. Jackson 2005). The victim testified that she was raped. *Id*. DNA material taken shortly following the incident from the victim's anal area matched the DNA profile of the defendant. *Id.* at 125. The Tennessee Court concluded that there was no innocent reason for the defendant's DNA to be found on the victim's anal area. *Id*. at 131. The DNA at issue was directly connected to the crime, there was sperm around the victim's anal area, and the examining doctor found evidence of attempted anal penetration. *Id*. There was no issue of consent, so there was no reason to question why the DNA of this particular defendant was on the victim. *Id*.

In *State v. Calhoun*, dried semen was found on the victim's buttocks. *State v. Calhoun*, 259 S.W.3d 53, 55 (Mo. App. W.D. 2008). Evidence established that the victim was likely lying on her back during the sexual intercourse and was likely shot after intercourse while still lying on her back. *Id*. at 56. These conclusions were reached based on the splatter of blood on

the victim's body from the fatal gunshot wound, and based on the location of the semen that was found on the victim's body. *Id*. The fact that semen was found was on her buttocks meant that the victim remained lying on her back following intercourse (ie., she never stood up after intercourse), which prevented the semen from running down her legs due to gravity. *Id*. There was also evidence that the victim's underwear was a short distance from her body, and that it was unlikely that she would have remained lying outside near a freeway with little clothing for any length of time due to the chilly temperatures at that time of the year. *Id*. This left little room for an innocent explanation by the defendant as to why his semen was found on the victim's buttocks when the blood splatter from the gunshot wound indicated that she was shot while continuing to lay on her back. *Id*. at 55.

In *Roberson v. State of Texas,* the defendant was convicted of aggravated sexual assault. *Roberson v. State of Texas,* 16 S.W.3d 156, 159 (Tx. App. 2000). The DNA profile obtained from the defendant showed that it matched the profile obtained from blood and semen found on the victim's clothing and vaginal swabs taken from the victim a short time following the assault. *Id*. at 160-161. There was no issue of consent here. *Id*. at 160. There could be no innocent reason for this defendant's blood and semen to have

been on this victim's clothes, or found in vaginal swabs of this victim. *Id*. at 166-167.

Finally, in *State v. Abdelmalik*, a "significant" amount of the defendant's DNA was found under the victim's fingernails of her left hand, which was also missing a fingernail, and all of which supported an apparent struggle. *State v. Abdelmalik* 273 S.W. 61, 64 (Mo. W.D. 2008). But this was not a DNA-only case. The defendant worked at locations near where the victim lived; the defendant had friends who lived on the victim's street; and he admitted that both the victim and her apartment looked familiar him. *Id*. Not only did the defendant admit facts that placed him in contact with and in the vicinity of the victim, but the defendant's DNA was also found under her fingernails which supported an inference that her contact with this defendant was physically violent. *Id*. at 66-67.

None of the above type facts are present in Mr. Bowman's case. His DNA was not found on Ms. Rumfelt's body, it was not found on the murder weapon, and it was not found mixed with Ms. Rumfelt's DNA (or blood). These are the types of direct connections between the nature of the evidence and the actual crime (ie. presence of semen on the victim of a sexual assault) that sustained the convictions in these cases.

Mr. Bowman's case is perhaps best reviewed by analogy. Consider a murder prosecution where the state must prove that the defendant caused the death of the victim. The accused is a female whose fingernail was found in one of the front pockets of the pants found on the male victim. Assume that the male victim had been strangled with a shoe string, and that the strangulation was the cause of his death.

An eye witness saw the male victim the night before the homicide walking with a female companion who was described as having a slender build with long, blond scraggly hair. The female defendant at the time of the homicide had a slender build, but had long scraggly dark brown hair. A DNA profile was obtained from organic material found on the underwear of our male victim, and our female defendant's DNA profile could not be excluded from the DNA profile obtained from the male victim's underwear.

On these facts, could a reasonable jury draw a reasonable inference from the presence of the fingernail (and the inability of our female defendant to be excluded from the DNA profile) to conclude beyond a reasonable doubt that our female defendant strangled our male victim? The physical evidence consisting of the fingernail and the inability to exclude the accused's DNA profile from a DNA profile obtained from the clothing of the victim have no direct connection to the causation element of the crime

(murder by strangulation), so our analogized case is distinguishable from those cases cited by the Respondent. If no such reasonable jury could reach find our female defendant guilty beyond a reasonable doubt, then Mr. Bowman's conviction cannot be sustained. Mr. Bowman's DNA was not on Ms. Rumfelt's body, nor was it found under her fingernails. Moreover, Mr. Bowman's DNA was not found on the ligature used to cause the death of Ms. Rumfelt.

Mr. Bowman by no means belittles the fact that it is semen that is the connecting DNA in this case, and the personal aspect that such evidence interjects into any case involving the death of a young woman. But his semen was not on the victim's skin, nor on vaginal swabs obtained from the victim. Despite the State's efforts to the contrary, the facts showed no sexual assault of Ms. Rumfelt. And, there was no evidence showing when the semen at issue came into contact with the underwear on which it was located.

So, just as a jury would have to leap to conclude a fingernail in a pocket of a victim's pants could support a conviction for murder, so did Mr. Bowman's jury leap to conclude that Mr. Bowman strangled Ms. Rumfelt based on semen allegedly containing his DNA that was found on a pair of

underwear that does reasonably appear to be the underwear found on the victim.

Where as here, the State relies upon inferences drawn from the evidence to support elements of the charged offense, due process requires that those inferences rise above the level of conjecture and speculation and that the inferred facts be more likely than not to flow from the proven fact for the inferred facts to be considered rational, reasonable, and logical. *Leary v. U.S.*, 395 U.S. 6 (1969). And neither a jury nor a reviewing Court should be allowed to provide the State the benefit of an unreasonable, speculative or forced inference, nor should that jury or that reviewing court be allowed to provide the State missing facts. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001), (quoting *Bauby v. Lake*, 995 S.W.2d 10, 13 (Mo. App. 1999)).

Based on the record, there is insufficient evidence from which to sustain Mr. Bowman's conviction and it should be reversed.

CONCLUSION

For the reasons set forth in Points I, II, and III, Mr. Bowman prays that this Court granting him any relief deemed necessary and just, or that this Court remand this action with instruction to vacate the judgment of guilty and to enter a judgment dismissing this charge against Mr. Bowman. In the

alternative, for the reasons set forth in Points I, II, and III, Mr. Bowman prays that this cause be remanded with an Order granting him a new trial. In the alternative, Mr. Bowman prays that if the aforerequested relief is denied, that this cause be remanded with an Order requiring a new sentencing hearing based on the arguments set forth in Mr. Bowman's Initial Brief.

ORAL ARGUMENT REQUESTED

Respectfully Submitted,

EVANS PARTNERSHIP

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CERTIFICATION PURSUANT TO RULE 84.06(c)

I, Katherine E. Hummel, hereby certify that Appellant's Brief complies with the limitations contained in Rule 84.06(b), and contains 7,678 words and 769 lines of monospaced type, exclusive of the cover, certificate of service, certificate required by Rule 84.06(c), signature block and appendix.

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CERTIFICATION PURSUANT TO RULE 84.06(g)

I, Katherine E. Hummel, hereby certify that the electronic copy of Appellant's Brief filed herewith has been scanned for viruses and has been found to be virus-free.

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IN THE SUPREME COURT OF MISSOURI
No. SC 90618

STATE OF MISSOURI,	)	
	)	21st Judicial Circuit, Division 9
Respondent,	)	The Hon. David Vincent III, Judge
	)	
vs.	)	No. 07 CR 532
	)	
GREGORY BOWMAN,	)	
	)	
Appellant.	)	

CERTIFICATE OF SERVICE

This is to certify that the foregoing pleadings were served via U.S. Mail and in an envelope securely secured, legibly addressed, and postage prepaid to the following counsel of record:

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This 29th day of October, 2010. _____