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IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,)
)
Respondent,)
)
v.) No. WD85439
)
JAHUAN WHIRLEY,)
)
Appellant.)

RESPONDENT'S MOTION FOR REHEARING OR, IN THE ALTERNATIVE, APPLICATION FOR TRANSFER TO THE MISSOURI SUPREME COURT

The State respectfully seeks rehearing of the court's reversal and remand of convictions of convictions for second-degree murder, first-degree assault, two counts of armed criminal action, two counts of attempted first-degree robbery, and two counts of unlawful use of a weapon under Rule 84.17(a), or, in the alternative, transfer to the Missouri Supreme Court under Rule 83.02.

The State agrees with the resolution of four of the five issues on appeal but believes the Court overlooked material matters of law and fact in reversing based on the exclusion of alleged alternative perpetrator evidence.

The Court reads out of the analysis the requirement that "some act" ***directly*** connect the alternative perpetrator to the *corpus delicti* of the crime in contravention of multiple Missouri Supreme Court precedents, instead

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requiring only a nexus to evidence in the case.

In addition, the Court exaggerates the evidence of connection of the gun, the ammunition, the clothing, and the bag containing the gun to the alleged alternative perpetrator and overlooks, or at least declines to mention, the DNA evidence and gunshot residue evidence connecting the murder weapon and clothing to Defendant alone, as well as Defendant's admissions that the bag containing the murder weapon and other evidence, including Defendant's DNA on the extended magazine, was his, the gray sweatshirt or hoodie on which the gunshot residue was found was his, and the ski mask found with the other evidence—which contained Defendant's DNA—was also his.

No witness directly connected Defendant's fraternal twin to the crime itself. No witness placed the alternative perpetrator at the scene of the crime. No witness placed the alternative perpetrator in possession of the murder weapon on the day of the crime. No witness placed the alternative perpetrator in possession of the bag holding the weapon on the day of the crime. No DNA connected the alternative perpetrator to the crime. No gunshot residue connected the alternative perpetrator to the crime. No text messages connected the alternative perpetrator to ***this*** crime. No forensic evidence of any kind directly connected the alternative perpetrator to ***this*** crime.

I. The Court reads the requirement of "some *act*" directly connecting the alternative perpetrator to the crime out of the analysis, contrary to five Supreme Court precedents.

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While the Court initially acknowledges that evidence of an alternative perpetrator is admissible "only if there is proof that the other person committed *some act* directly connecting him with the crime[,]" citing *State v. Benedict*, 495 S.W.3d 185, 191 (Mo. Ap. E.D. 2016) (emphasis original), the Court quickly debases that standard by contending that any "clear link" to a "key piece of evidence" in the crime is sufficient, citing only Court of Appeals cases. The Court then relies on tenuous, at best, links to the evidence in the case (rejected by the trial court) to hold there was such a "clear link" while obfuscating the lack of clarity in the proffered evidence with terms such as "arguably" to describe alleged links rejected by the finder of fact at the hearing on the proffered evidence, the trial court. The Court does not purport to describe any "act" linking the alleged alternative perpetrator to ***this*** crime.

This mode of analysis overlooks and contravenes material law in at least five governing precedents of the Missouri Supreme Court, none of which is cited in the opinion.

In *State v. Bowman*, 337 S.W.3d 679 (Mo. banc 2011), the Missouri Supreme Court held that, "When the evidence is merely that another person had opportunity or motive to commit the offense, or the evidence is otherwise disconnected or remote and there is no evidence that the other person committed *an act* directly connected to the offense, the minimal probative value of the evidence is outweighed by its tendency to confuse or misdirect the

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jury." *Id.* at 686 (emphasis added in *Benedict*, 495 S.W.3d at 191).

Indeed, *Benedict* relied on the absence of evidence of such an "act" to hold that evidence of an alleged alternative perpetrator, who said he would like to see the victim "on fire in his wheelchair" a week before Victim the paralyzed Victim was murdered by a fire set in his home, was inadmissible. *Benedict*, 495 S.W.3d at 189-192. The alternative perpetrator's "statement that he wanted to see Victim on fire in his wheelchair was not an *act* directly connecting" the alternative perpetrator "to the crime." *Id.* at 191 (emphasis original).

In *Bowman*, *supra*, the Missouri Supreme Court held that an offer of proof purporting to establish that an alternative perpetrator, who was a suspect in three other murders, was "acquainted with" the victim, "was a suspect in the case" and "was familiar with the area" where the victim's body was discovered was "not admissible alternative perpetrator evidence" and that the fact that the alternative perpetrator "was investigated as a suspect and may have had an opportunity to murder" the victim "does not establish the requisite direct connection to her death." *Bowman*, 337 S.W.3d at 687-688. The defendant had "presented no evidence directly connecting" the alternative perpetrator to the victim's murder. *Id.* "No witnesses observed" the victim in the alternative perpetrator's "company at any time near her time of death." *Id.* at 688. "As such, the evidence pertaining to" the alternative perpetrator's "potential involvement in" the victim's murder was "not admissible alternative

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perpetrator evidence[.]" *Id.*

Here, no witness observed the alternative perpetrator in the company of the victims "at any time near" the "time of death" or ever. *Id.* No forensic evidence put the alternative perpetrator at the scene of the crime. *Id.* The alternative perpetrator committed no "act" linking him to the victim's murder. *See, id.* Under the material law outlining the proper analysis laid down by the Missouri Supreme Court, Defendant's point should have been rejected.

Similarly, in *State v. Rousan,* 961 S.W.3d 831 (Mo. banc 1998), the Missouri Supreme Court held that "[t]o be admissible, evidence that another person had an opportunity or motive for committing the crime for which a defendant is being tried must tend to prove that the other person ***committed some act*** directly connecting him with the crime." *Id.*, 961 S.W.2d at 848 (emphasis added). "The evidence must be of the kind that directly connects the other person with the *corpus delicti* and tends ***clearly to point to someone other than the accused as the guilty person***." *Id.* (emphasis added). "Disconnected and remote acts, ***outside the crime itself***, cannot be separately proved for such purpose; and evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." *Id.* (emphasis added).

Applying this overlooked material law set down by the Missouri Supreme Court to govern the analysis, Defendant did not establish that the

alternative perpetrator "***committed some act*** directly connecting him with the crime." *Id.* (emphasis added). At best, Defendant established that the alternative perpetrator took pictures of himself with a gun during the month prior to the murder and committed a different crime with a similar gun and similar ammunition a week prior to the crime in another part of town to seek revenge (a different motive than the robbery motive in the case at bar) against different victims. The alternative perpetrator committed no "act" directly connecting him with ***this* crime** and the trial court's ruling holding the proof was deficient was not an abuse of discretion under the applicable standard of review. Rather, these were disconnected and remote acts "***outside the crime itself***" which "cannot be separately proved for such purpose[.]" *Id.* (emphasis added).

Nor could application of this material law result in a holding that the evidence tended "***clearly to point to someone other than the accused as the guilty person***." *Id.* (emphasis added). Defendant's DNA, and not the alternative perpetrator's, was on the magazine on the murder weapon found in what Defendant admitted was his bag in his house. Gunshot residue was found on what Defendant admitted was his gray sweatshirt or hoodie found in his house near the murder weapon. The fact that the alternative perpetrator may have owned a different gray sweatshirt or hoodie that he was photographed in (not on the day of the crime but the day before the crime) does

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not tend "clearly to point to someone other than the accused as the guilty person." *Id.* The bag containing the murder weapon was, by Defendant's admission, his bag. The fact that the alternative perpetrator also possessed a gun and a bag does not tend to "clearly point to someone other than the accused as the guilty person." *Id.* Nor does the fact that the alternative perpetrator lived in the same neighborhood or that the alternative perpetrator was visiting his mother at Defendant's house the day after the crime when police searched the premises "**clearly** point to someone other than the accused **as the guilty person**." *Id.* (emphasis added).

In *State v. Chaney*, 969 S.W.2d 47, 54 (Mo. banc 1998), the Missouri Supreme Court held that evidence that a known pedophile had lied repeatedly to the police about his whereabouts at the time of the murder of a child was not admissible because it did not "establish an ***act*** directly connecting another to the crime." *Chaney*, 967 S.W.2d at 55 (emphasis added). "The individual's lying to the police only may indicate a guilty conscience. But this evidence, standing alone or in conjunction with the person's status as a pedophile, does not establish **an *act*** directly connecting the individual to the crime and is inadmissible as it would "have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another[.]" *Id.* (emphasis added) (quoting *State v. Umfrees*, 433 S.W.2d 284, 288 (Mo. banc 1968)).

Here, photographs taken at a different location prior to a different crime and the alternative perpetrator's residence in the neighborhood and visit to his mother do not establish "an **act** directly connecting another to the crime." *Id.* (emphasis added).

In *State v. Schaal*, 806 S.W.2d 659 (Mo. banc 1991), the Supreme Court held that evidence of an alternate perpetrator engaged in sex acts with the child victim at a different time was not admissible because "[e]vidence that another person had an opportunity or motive for committing the crime for which the defendant is being tried is not admissible without proof that such other person committed ***some act directly connecting him with the crime.***" *Id.* at 669 (emphasis added).

In *State v. Nash*, 339 S.W.3d 500 (Mo. banc 2011), the Supreme Court reaffirmed that evidence that another person "had an opportunity or motive for committing the crime for which a defendant is being tried must tend to prove that the other person ***committed some act*** **directly connecting** him with the crime." *Id.* at 513 (emphasis added). "The evidence must be of the kind that directly connects the other person with the *corpus delicti* and tends ***clearly to point to someone other than the accused as the guilty person***." *Id.* (emphasis added). "Disconnected and remote acts, ***outside the crime itself***, cannot be separately proved for such purpose[.]" *Id.* (emphasis added). The Court held the rule was constitutional because it "prevents confusion of

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the issues and reduces the potential to mislead the jury. It is not arbitrary to exclude evidence that does not directly connect a third person to the charged crime." *Id.* at 514.

The *Nash* Court held it was proper to exclude evidence that the alternative perpetrator's fingerprints were on the victim's car but the defendant's were not, that the alternative perpetrator had falsely denied to police that he had met the victim or ever been to the town in question, that the alternative perpetrator had a previous arrest for stalking a woman, that the alternative perpetrator was known to carry a shotgun (the type of weapon used in the murder) in his vehicle, and that the alternative perpetrator later killed himself with a shotgun. *Id.* at 515. The Court held that the trial court's holding that this evidence did not directly connect the alternative perpetrator to the *corpus delicti* of the murder "was not a decision that was clearly against the logic of the circumstances and so unreasonable as to indicate a lack of careful consideration" and, therefore, the trial court did not abuse its discretion by excluding it. *Id.*

Similarly, here, a proper application of the full standard as set forth by the Missouri Supreme Court would result in the conclusion that the trial court's decision that the photographs and other evidence at issue did not establish an "act" linked to *this* crime but rather disconnected and remote acts "outside the crime itself" was "not a decision that was clearly against the logic

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of the circumstances and so unreasonable as to indicate a lack of careful consideration" and, therefore, the trial court did not abuse its discretion by excluding it. *Id.*

II. The Court overlooks material matters of law by failing to give proper deference to the standard of review for the trial court's resolution of evidentiary offers of proof.

"[T]he law allocates the function of factfinder to the [trial] court." *State v. Williams*, 334 S.W.3d 177, 181 n. 9 (Mo. App. W.D. 2011).

As set forth by the Missouri Supreme Court in *Nash*, this Court may reverse the trial court's holding on the admission of evidence only if it was "clearly against the logic of the circumstances and so unreasonable as to indicate a lack of careful consideration[.]" *Id.* "Where reasonable persons can differ about the propriety of the action taken by the trial court, no abuse of discretion will be found." *State v. Williams*, 247 S.W.3d 144, 154 (Mo. App. S.D. 2008).

Here, the Court seems to have engaged in *de novo* review of documentary evidence in photographs and other exhibits to conclude that the alternative perpetrator had once possessed—weeks before the crime at issue— "arguably" the same gun and "arguably" the same bag. Defendant admitted the bag with the murder weapon and magazine ***with Defendant's DNA on it,*** was his bag. (Tr. 791-795, 1000, 1077).

Similarly, the Court concludes that a photograph taken the day before

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the crime with the alternative perpetrator in a gray hoodie could somehow connect him to the crime, despite the fact that the hoodie ***with the gunshot residue on it*** was admittedly Defendant's hoodie in Defendant's bag, not the alternative perpetrator's. (Tr. 949-950, 953, 958-959, 964, 1333, 1337).

The trial court reached no such conclusion because there was no proof that either the gun or the bag were the same, let alone that some act connected them to ***this* crime**. This holding was not "clearly against the logic of the circumstances and so unreasonable as to indicate a lack of careful consideration[.]" *Nash*, 339 S.W.3d at 515.

The United States Supreme Court has pointed out that deference to a trial court's factual determinations is "not limited to the superiority of the trial judge's position to make determinations of credibility," but is also rooted in the trial court's relative expertise, and considerations of judicial efficiency. *Anderson v. City of Bessemer City, North Carolina*, 407 U.S. 563, 573-574 (1985). Thus, even that Court defers to trial court findings even when they are based "on physical or documentary evidence or inferences from other facts." *Id.* The Supreme Court explained:

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct

> one, requiring them to persuade three more judges at the appellate level is requiring too much….[T]he trial on the merits should be the "main event … rather than a tryout on the road."

Id., 470 U.S. at 574-575.

This Court has also held that "[e]ven where the trial court's decision was based solely on the records, we defer to the trial court as the finder of fact in determining whether there is substantial evidence to support the judgment and whether the judgment is against the weight of the evidence." *Greene v. Alliance Automotive, Inc.*, 435 S.W.3d 646, 649 (Mo. App. W.D. 2014) (internal quotation marks omitted). "While the record might have supported a contrary result, it is not our role to reweigh the evidence." *Id.*

The same reasoning applies to review of trial court's decisions in admitting evidence. The trial court held the hearing, listened to the offers of proof, and made a decision on the factual issue of whether Defendant had linked the evidence to an act involving the crime at issue. That holding is entitled to deference. *See, id.* It is not for appellate judges to get out their respective magnifying glasses to attempt to see whether they disagree with the trial court about the legibility or illegibility of a serial number in a photograph of a weapon, for example, or about whether a photograph of a bag resembles a bag in evidence, or about whether a photograph of a gray hoodie resembles the one in evidence. These judgments were for the trial court, which is both assigned by the system to make those judgments and better equipped to

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compare the photos to the actual evidence of the charged crime.

When the trial court's decision is "not a decision that was clearly against the logic of the circumstances and so unreasonable as to indicate a lack of careful consideration[,]" this Court cannot hold the trial court abused its discretion by excluding evidence, even if it would have held differently if sitting as the trial court. *See, State v. Nash*, 339 S.W.3d at 515.

Here, the Court should presume the trial court made all factual findings in a manner consistent with its ruling. Applying the proper standard, the trial court did not believe the serial number on the gun in the photograph of the alternative perpetrator weeks before the crime was legible, that it matched the serial number of the murder weapon, or that the offer of proof established that it was "arguably the same gun." Nor did the court hold that Defendant proved that any photograph of the alternative perpetrator with a bag showed the same bag, which was found in the immediate aftermath of the crime at Defendant's house, containing Defendant's identification and the murder weapon with Defendant's DNA on the magazine. Nor did the trial court find that the alternative perpetrator possessed that bag on the date of the crime.

Similarly, the trial court did not believe that the offer of proof established that a photograph of the alternative perpetrator wearing a gray hoodie—not exactly an uncommon item of clothing—showed the same gray hoodie found with gunshot residue on it which Defendant identified as his.

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The trial court made no finding that the alternative perpetrator was "in the area when and where the current shooting occurred," probably because there was absolutely no evidence of that contention. The alternate perpetrator said he was at his home the entire time after 9 p.m. on the night of the shooting. (Tr. 1181-1182). The alternative perpetrator's roommate also said the alternative perpetrator was at home, blocks away from the scene of the crime. (Tr. 1126).

Thus, the alternative perpetrator could not have been "where the current shooting occurred" "when" the current shooting occurred, at approximately 11 p.m. Living in the neighborhood is hardly enough to constitute an "act" directly connecting the alternative perpetrator with the shooting; if it were, there were hundreds of alternative perpetrators. Defense counsel admitted it isn't even "opportunity from merely being in the neighborhood[.]" (Tr. 1206).

The trial court's holding, far from being "clearly against the logic of the circumstances and so unreasonable as to indicate a lack of careful consideration[,]" was far more consistent with the evidence than the appellate factfinder's. *Id.*

Finally, the trial court did not find that the fact that Defendant's brother was visiting his mother at Defendant's house the day after the completed crime when the police happened to arrive to search showed an "act" directly connecting the alternative perpetrator to the already completed crime. Such a

holding is not "clearly against the logic of the circumstances and so unreasonable as to indicate a lack of careful consideration[.]" *Id.*

III. The Court overlooks material matters of fact in exaggerating the alleged evidence connecting the alternative perpetrator to the crime and cites no evidence *directly* connecting the alternative perpetrator to an "act" connected to *this* crime.

The Court significantly exaggerates the evidence connecting the alternative perpetrator to the crime. First, the Court, after engaging in appellate factfinding, concludes that the alternative perpetrator was photographed (weeks before) with "arguably" the same gun. Based on comments during oral argument, this conclusion seems to be based on defense counsel's attempt to claim there was at least a partial serial number visible that matched. However, the serial numbers on the defense exhibits are murky at best, completely illegible at worst, and cannot be matched. The best that can be said for the defense position is that the alternate perpetrator had pictures of himself and another man who is not the alternative perpetrator with a gun of similar make and model in the months prior to the crime at issue. The trial court's holding is not "clearly against the logic of the circumstances and so unreasonable as to indicate a lack of careful consideration" because the serial number is illegible and there was no evidence that they were the same gun used in the crime, merely the same model of a common Glock gun with an extended magazine.

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Nor was there the slightest evidence that the alternative perpetrator committed an "act" directly connected to the charged crime or that he possessed the Defendant's gun at the time of the crime. Indeed, Defendant introduced evidence in the offer of proof that the alternative perpetrator said he lost his gun in November. (Tr. 1190). The only early December photo showed a different man with a similar Glock whom Defendant does not contend is the alternative perpetrator. (Tr. 1185).

Nor did Defendant establish that the alternative perpetrator had possession of the bag holding the murder weapon at any point of time connected to the murder. Defendant showed only a picture of a Lacoste brand bag. No evidence established it was the same bag. Indeed, multiple other pictures introduced during the offer of proof showed a different brand of bag ("FILA"). Defendant did testify that he loaned the bag to the alternative perpetrator around November 3 but said he got it back from him within two days after loaning it to him. (Tr. 1317-1319). Thus, photographs from November of the alternative perpetrator with the bag did not constitute an "act" which "directly connected" the alternative perpetrator to this December crime.

The gun used in the crime was found in a bag Defendant admitted was his, in Defendant's house, with a magazine with Defendant's DNA on it, near a sweatshirt or hoodie Defendant admitted was his that had gunshot residue

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on it, near a ski mask and gloves that had Defendant's DNA. All of those items connected Defendant to the *corpus delicti* of the crime; none of them connected the alternative perpetrator.

Third, the court relied on evidence in the offer of proof that the alternative perpetrator sometimes wore a Nike brand gray hoodie, including on the day before the crime. No evidence connected that Nike brand gray hoodie to the *corpus delicti* of this crime. Rather, the Nike brand gray hoodie with the gunshot residue found in Defendant's house with other evidence of the crime belonging to or possessed by Defendant was expressly admitted to be the Defendant's.

Fourth, the court cites the fact that AUSA Luger 9-mm ammunition was one of two types of ammunition used in a shooting eight days before in another part of town that the alternative perpetrator pled guilty to and that the same brand of 9-mm ammunition was used in the shooting in this case. No ballistics evidence tied the ammunition in the unrelated shooting to the gun used in this case and Defendant did not seek to introduce any such evidence. If the use of the same brand of common ammunition were enough to introduce alternative perpetrator evidence, a large percentage of the murderers in America could be considered alternative perpetrators. Thus, the ammunition was not evidence of an "act" which "directly connected" the alternative perpetrator to this shooting, as opposed to "[d]isconnected and remote acts, ***outside the crime***

itself," which "cannot be separately proved for such purpose[.]" *Nash*, 339 S.W.3d at 513 (emphasis added).

Fifth, the Court claims that "Brother was in the area when and where the shooting occurred," which is not true. The trial court made no finding that the alternative perpetrator was "in the area when and where the current shooting occurred," probably because there was absolutely no evidence of that contention.

The alternate perpetrator said he was at his home the entire time after 9 p.m. on the night of the shooting. (Tr. 1181-1182). The alternative perpetrator's roommate also said the alternative perpetrator was at home, blocks away from the shooting, asleep. (Tr. 1126).

Thus, no testimony supported this Court's conclusion that the alternative perpetrator was "where the current shooting occurred" "when" the current shooting occurred, at approximately 11 p.m.

Living in the neighborhood is hardly enough to constitute an "act" directly connecting the alternative perpetrator with the shooting; if it were, there were hundreds of alternative perpetrators. Defense counsel admitted it isn't even "opportunity from merely being in the neighborhood[.]" (Tr. 1206).

The trial court's holding, far from being "clearly against the logic of the circumstances and so unreasonable as to indicate a lack of careful consideration[,]" was far more consistent with the evidence than the appellate

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factfinder's. *Id.*

Finally, the Court relies on evidence that that Defendant's brother (the alternative perpetrator) was visiting his mother at Defendant's house the day after the completed crime when the police arrived to search. While the fact that the alternative perpetrator had access to Defendant's house may show opportunity, visiting one's mother is not an "act" showing a "direct connection" to the *corpus delicti* of a murder.

This is particularly true since Defendant admitted the bag in which the murder weapon was found was his, Defendant's DNA was on the magazine of the murder weapon, Defendant's DNA was on the ski mask and gloves, and gunshot residue was on a gray Nike hoodie which Defendant admitted was his. "The evidence must be of the kind that directly connects the other person with the *corpus delicti* and tends ***clearly to point to someone other than the accused as the guilty person***." *Id.* (emphasis added). "Disconnected and remote acts, ***outside the crime itself***, cannot be separately proved for such purpose[.]" *Id.* (emphasis added). This rule "prevents confusion of the issues and reduces the potential to mislead the jury. It is not arbitrary to exclude evidence that does not directly connect a third person to the charged crime." *Nash*, 339 S.W.3d at 514.

Here, the alternative perpetrator's visit to his mother on a day other than the day of the murder was not shown to be anything other than a disconnected

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act outside the crime itself and did not tend to "clearly point to someone other than the accused as the guilty person" given Defendant's acknowledgment that the key evidence in the house belonged to him and forensic evidence that directly connected the evidence to Defendant but did not connect any of this evidence to the alternative perpetrator. *Id.*

Thus, the trial court's holding is not "clearly against the logic of the circumstances and so unreasonable as to indicate a lack of careful consideration[.]" *Id.*

In the alternative, the case should be transferred to the Missouri Supreme Court because of the general interest and importance of the question of whether the evidence directly connecting an alternative perpetrator to the *corpus delicti* of the crime must include "some *act*" or whether, as the Court opines, any alleged connection to key evidence in the case, however thin the proof, is sufficient, in the face of countervailing DNA and gunshot residue evidence establishing that the Defendant, rather than the alternative perpetrator, was the gunman.

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Respectfully submitted,

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