No. SC94668

In the

Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

DENNIS E. MEACHAM,

Respondent.

Appeal from the Jefferson County Circuit Court
Twenty-Third Judicial Circuit
The Honorable Troy Cardona, Judge

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

Rules

JURISDICTIONAL STATEMENT

The State appeals the Circuit Court of Jefferson County's judgment granting Defendant's "Motion to Dismiss and to Declare Missouri Statute §568.040.1 Unconstitutional."

Supreme Court Rule 30.01(a) (2015) permits every party "any appeal permitted by law" after the rendition of final judgment in a criminal case. Section 547.200.2, RSMo (2000) authorizes the state, in any criminal prosecution, to appeal except in those cases in which the possible outcome would result in double jeopardy. Here, jeopardy had not attached at the time of the dismissal. *State v. Metzinger*, 456 S.W.3d 84, 90 (Mo. App. E.D. 2015). "In a court-tried case, jeopardy attaches when the court begins to hear evidence" on the issue of guilt. *State v. Thomas*, 434 S.W.3d 524, 528 (Mo. App. E.D. 2014). The defendant "was not then, nor has he ever been, 'put to trial before the trier of facts[.]'" *U.S. v. Serfass*, 420 U.S. 377, 389 (1975). "Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Id.* at 391-392.

The circuit court's judgment granting the defendant's motion to dismiss on constitutional grounds is a final judgment from which the State may appeal because it had the practical effect of terminating the litigation. *State*

v. Honeycutt, 421 S.W.3d 410, 413-414 & n.4 (Mo. banc 2013); *State v. Brown*, 140 S.W.3d 51, 53 (Mo. banc 2004).

The Missouri Supreme Court has exclusive appellate jurisdiction over cases involving the constitutional validity of a statute. MO. CONST. art. V, § 3 (amended 1982); *Honeycutt*, 421 S.W.3d at 414. Here, the Circuit Court held that the 2011 amendment to Section 568.040, RSMo (Cum. Supp. 2011), which removed "without good cause" as an element of the offense under §568.040.1, and continued to provide that, "[i]nability to provide support for good cause shall be an affirmative defense" under §568.040.3, with the person raising the affirmative defense having the burden of proving the defense by a preponderance of the evidence, violated the Due Process Clause of the 5th and 14th Amendments to the U.S. Constitution, and Article I, §10 of the Missouri Constitution, by unconstitutionally shifting the burden of proof on the alleged element of "criminal intent"[1] to the defendant in a criminal case. (LF 22).

On November 13, 2014, the circuit court entered its order dismissing the case. (LF 22-24). On November 19, 2014, the State timely filed a notice of appeal. (LF 25-26). On December 2, 2014, the Missouri Court of Appeals,

[1] As demonstrated *infra*, "criminal intent" is not an element of the crime of criminal non-support. Rather, the *mens rea* required is "knowingly." Section 568.040.1, RSMo (Cum. Supp. 2011).

Eastern District, entered an order transferring this case to the Missouri Supreme Court pursuant to MO. CONST. art. V, § 11 (amended 1976). (Appendix at 1). This Court has jurisdiction over the transferred case as though it were originally appealed to this court under MO. CONST. art. V, § 10 (amended 1982).

STATEMENT OF FACTS

Defendant was charged by information in the Circuit Court of Jefferson County with the Class D felony of criminal nonsupport in violation of Section 568.040, RSMo (Cum. Supp. 2011). (LF 9).[2] The information charged that Defendant "knowingly failed to provide adequate food, clothing, lodging, and medical attention for [Jo. E. M.], [B.N.M.], and [Ju. E. M.], the defendant's children, for whom the defendant was legally obligated to provide such support, and that the defendant failed to make his ordered child support payments in April, May, June, July, August, September, October, November, and December, 2012 and January, February and March, 2013, and, as of March 31, 2013, the defendant has accumulated a total arrearage in excess of an aggregate of twelve monthly payments due under an order of support issued by the Family Support Division and docketed in the Circuit Court of Franklin County, Missouri." (LF 9).

On April 28, 2013, Defendant's ex-wife swore to these facts in a probable cause statement, adding that Defendant had been ordered to pay $715 per month for the support of the three minor children, but had failed to

[2] All statutory citations are to RSMo (Cum. Supp. 2011) unless otherwise indicated. The legal file will be cited as "LF" and the hearing transcript as "Tr."

pay his court-ordered support for the aforementioned months, "has a child support arrearage totaling in excess of twelve monthly owed child support payments and has not provided any non-monetary support for his minor children." (LF 8).

Defendant filed a "Motion to Dismiss the Information and to Declare Missouri Statute §568.040.1 Unconstitutional." (LF 19-21).

On November 13, 2014, Judge Troy Cardona granted the motion and issued a Judgment holding that "RSMo Sections 568.040.1, 3, and 4 are Unconstitutional." (LF 22-24). The court held that the 2011 amendment to the statute, which removed "without good cause" as an element of the offense under §568.040.1, and continued to provide that "[i]nability to provide support for good cause shall be an affirmative defense" under §568.040.3, with the person raising the affirmative defense having the burden of proving the defense by a preponderance of the evidence, violated the Due Process Clause of the 5th and 14th Amendments to the U.S. Constitution, and Article I, §10 of the Missouri Constitution, by unconstitutionally shifting the burden of proof to the defendant in a criminal case. (LF 22). The court held that the statute is invalid "because it shifts the burden of persuasion to the defendant

in criminal cases and does not require the State to prove criminal intent (as amended in 2012)." (LF 22).[3]

On November 19, 2014, the State timely filed a Notice of Appeal in the Missouri Court of Appeals, Eastern District. (LF 25-26). On December 2, 2014, the Court of Appeals transferred the case to the Missouri Supreme Court because this Court has exclusive appellate jurisdiction of all cases involving the constitutional validity of a state statute. (Appendix at 1).

[3] The amendment was actually effective August 28, 2011. *See*, Section 568.040, RSMo (Cum. Supp. 2011).

POINT RELIED ON

The trial court erred by granting Defendant's Motion to Dismiss and declaring Missouri's criminal nonsupport statute, Section 568.040, unconstitutional because the statute is constitutional and does not violate the Due Process Clause of the U.S. or Missouri Constitutions in that it does not shift the burden of proof as to any element of the offense, but merely provides that the burden to prove an affirmative defense rests on the defendant, which is permissible under the Due Process Clause of both Constitutions.

Smith v. United States, 133 S.Ct. 714 (2013)

Dixon v. United States, 548 U.S. 1 (2006)

State v. Holmes, 399 S.W.3d 809 (Mo. banc 2013)

Hicks v. Feiock, 485 U.S. 624 (1988)

Section 568.040, RSMo (Cum. Supp. 2011)

ARGUMENT

The trial court erred by granting Defendant's Motion to Dismiss and declaring Missouri's criminal nonsupport statute, Section 568.040, unconstitutional because the statute is constitutional and does not violate the Due Process Clause of the U.S. or Missouri Constitutions[4] in that it does not shift the burden of proof as to any element of the offense, but merely provides that the burden to prove an affirmative defense rests on the defendant, which is permissible under the Due Process Clause of both Constitutions.

The trial court, in ruling that Section 568.040 is unconstitutional, usurped the prerogative of the people, through their legislative representatives, to define and redefine the elements of a criminal statute. "It is fundamental that to declare what shall constitute a crime and the punishment therefor is a power vested solely in the legislature[.]" *State v. Raccagno*, 530 S.W.2d 699, 703 (Mo. 1975).

As this Court recognized in *State v. Holmes*, 399 S.W.3d 809 (Mo. banc 2013), the legislature specifically "removed [lack of good cause] as an

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[4] "[I]n the past [the Missouri Supreme Court] has treated the state and federal due process clauses as equivalent." *Jamison v. Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399, 405 n.7 (Mo. banc 2007).

element" of criminal nonsupport prior to the violations in this case. *Id*. at 814. *Holmes* recognized that an amendment enacted by the legislature (effective in August 2011) was the logical means to "remove 'without good cause' as an element" of the criminal nonsupport "but allow it as an affirmative defense[.]" *Id*. at 814.[5]

Perhaps understanding that the Due Process Clause permits the burden of proof for affirmative defenses to be assigned to the defendant (as the legislature did in §568.040.3), the trial court here circumvented clear legislative intent expressed in plain language by holding that "criminal intent" (LF 22) is somehow a *mens rea* element of the present statute for which the burden of proof was impermissibly reversed because Defendant was required to prove "[i]nability to provide support for good cause" by a

[5] *Holmes* and the lower court here reference the amendment accomplishing this as effective in 2012, perhaps because the parties cited to the 2012 Cumulative Supplement in *Holmes* to avoid any confusion over 2011 violations that transpired prior to the effective date of the amendment. However, the amendment was effective on August 28, 2011 (after the early 2011 violations in *Holmes* but prior to the 2012-2013 violations in this case). Section 568.040, RSMo (Cum. Supp. 2011).

preponderance of the evidence.[6] (LF 22-24). At the same time, the trial court asserted that the amendment creating the present statute "in effect removes criminal intent" as an element and "creates a scenario where evidence presented by the State need merely include evidence to prove only two

[6] Indeed, the trial court went out of its way to do more than Defendant asked, inexplicably striking down not only §568.040.3 (providing that "[i]nability to provide support for good cause" is an affirmative defense which the defendant must prove by a preponderance of the evidence) and §568.040.1 (which specifies the elements of the offense of criminal nonsupport), but §568.040.4 (which places a mere burden to inject the issue of permissible nonmedical remedial treatment in lieu of medical and surgical attention), a provision not at issue in this case which does not reverse the burden of proof. (LF 22, 24). *See*, *State v. Latall*, 271 S.W.3d 561, 563-566 (Mo. banc 2008) (burden to inject is analogous to burden of production but does not reverse burden of persuasion once issue successfully injected); *State v. Strubberg*, 616 S.W.2d 809, 816 (Mo. banc 1981).

elements: 1) that defendant knew there was a child support obligation; and 2) that the defendant did not pay child support." (LF 23).[7]

A. The statutory scheme

"The support of one's children involves the discharge of one of the most basic responsibilities that a person assumes as a member of society." *State v. Latall*, 271 S.W.3d 561, 563-564 (Mo. banc 2008) (quoting *In re Warren*, 888 S.W.2d 334, 336 (Mo. banc 1994)). Every parent has a legal obligation to provide for his or her children regardless of the existence of a child support order. *Id.* The proof of the relationship of parent to child is sufficient to establish a *prima facie* basis for a legal obligation of support. *Id.* While a child support order is not required, it may be considered evidence of what constitutes adequate support. *State v. Reed*, 181 S.W.3d 567, 570 (Mo. banc 2006).

Section 568.040.1 defines the elements of the offense of criminal nonsupport and provides that:

> A person commits the crime of nonsupport if such person knowingly fails to provide adequate support for his or her spouse; a

[7] While this latter version accurately states the *mens rea* element—which is "knowingly" and not "intentionally"—it misstates the second element, which is failure to provide adequate support. Section 568.040.1.

parent commits the crime of nonsupport if such parent knowingly fails to provide adequate support which such parent is legally obligated to provide for his or her child or stepchild who is not otherwise emancipated by operation of law.

The *mens rea* required by the statute is "knowingly." *Id*. The evidence required to establish the *mens rea* is minimal. *State v. Reed*, 181 S.W.3d 567, 569 (Mo. banc 2006) (proof of relationship of parent to minor child sufficient to establish a *prima facie* basis for a legal obligation of support; knowledge of support order not required).

"Support" means "food, clothing, lodging, and medical or surgical attention." Section 568.040.2(3).

Section 568.040.3 provides that:

> Inability to provide support for good cause shall be an affirmative defense under this section. A person who raises such affirmative defense has the burden of proving the defense by a preponderance of the evidence.

"Good cause" is defined in §568.040.2(2) and "means any substantial reason why the defendant is unable to provide adequate support. Good cause does not exist if the defendant purposely maintains his inability to support[.]"

Prior to the 2011 amendment, §568.040.1 provided in relevant part that "a parent commits the crime of nonsupport if such parent knowingly fails to

provide, without good cause, adequate support which such parent is legally obligated to provide…" Section 568.040.1, RSMo (Cum. Supp. 2009).

Prior to the 2009 amendment to the statute, "inability to provide support for good cause" was not an affirmative defense; rather "without good cause" was an element of the offense. In 2009, the legislature added language making "inability to provide support for "good cause" an affirmative defense, but failed to remove the "without good cause" language from the paragraph which this Court construed as listing the elements of the offense. *See*, *Holmes*, 399 S.W.3d at 813-814, 816 (finding the legislative purpose in "duplicatively permitting a defendant also to prove good cause as an affirmative defense" to be "unclear").[8]

By express contrast, this Court found the removal of the "without good cause" language in the 2011 amendments clear; the language "removed [without good cause] as an element" but allowed inability to provide support for good cause as an affirmative defense. *Id*. at 814.

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[8] This Court therefore held that the State was still required to prove the "without good cause" element under the version of the statute in effect between the 2009 and 2011 amendments beyond a reasonable doubt, but that the defendant could also choose to put on evidence that he was unable to provide support for good cause as an affirmative defense. *Id*.

This more efficient and more workable scheme of enforcing a vitally important social obligation to provide for one's children is well within the classic rubric of the legislature's responsibility to make public policy by defining the elements of a crime. *See*, *Raccagno*, 530 S.W.2d at 703.

B. Standard of Review

Constitutional challenges to a statute are reviewed *de novo*. *Sanders v. Ahmed*, 364 S.W.3d 195, 202 (Mo. banc 2011). A statute is presumed to be constitutional and will not be held unconstitutional unless it "clearly and undoubtedly" contravenes the constitution, or "plainly and palpably affronts fundamental law embodied in the constitution." *Id.* Otherwise, legislative enactments should be recognized and enforced by our courts as embodying the will of the people. *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. banc 1976). The party claiming that the statute is unconstitutional bears the burden of proof. *Sanders*, 364 S.W.3d at 202.

Though a statute cannot lawfully supersede the Constitution, this Court, whenever possible, must harmonize the statute with the Constitution, interpreting the statute within the strictures of our organic law. *McIntosh v. Haynes*, 545 S.W.2d 647 (Mo. banc 1977). This Court is bound to avoid, if possible, a construction which would bring the statute into conflict with constitutional limitations. *Cascio v. Beam*, 594 S.W.2d 942 (Mo. banc 1980).

An amended statute should be construed on the theory that the legislature intended to accomplish a substantive change in the law. *Sermchief v. Gonzales*, 660 S.W.2d 683, 689 (Mo. banc 1983). Moreover, where one provision of a statute contains general language and another provision in the same statute contains more specific language, the general should give way to the specific. *Brandsville Fire Protection Dist. v. Phillips*, 374 S.W.3d 373, 378 (Mo. banc 2012) (quoting *Younger v. Missouri Pub. Entity Risk Mgmt. Fund*, 957 S.W.2d 332, 336 (Mo. banc 1997)).

C. The statute does not unconstitutionally shift the burden of proof as to any element of the offense because "without good cause" is no longer an element of the offense.

1. Distinction between affirmative defense and element of crime

As this Court explained in *State v. Faruqi*, 344 S.W.3d 193, 202 n.3 (Mo. banc 2011): "An affirmative defense is an independent bar to liability with respect to which the defendant carries the burden of persuasion that 'does not serve to negative any facts of the crime which the State must prove in order to convict' the defendant." *Id.* (quoting *Patterson v. New York*, 432 U.S. 197, 207 (1977)). This Court contrasted an affirmative defense from an ordinary defense, in which the burden of proving guilt remains on the State

and the defendant attempts merely to disprove one of the crime's essential elements. *Id.* at 202 n.4.

Because the legislature chose to define inability to provide support for "good cause" as an "affirmative defense," it cannot be a defense that merely attempts to disprove one of the crime's essential elements. *Id.* Hence, the absence of good cause was no longer an element of the crime as of the time of this action. *See*, *Holmes*, 399 S.W.3d at 814.

Because the absence of "good cause" was no longer an element of the offense at the time of trial, the statute is not facially unconstitutional because it does not reverse the burden of proof on an element of the offense as prohibited in *Hicks v. Feiock*, 485 U.S. 624, 629-630 (1988).

2. *Hicks v. Feiock* supports the State.

In the trial court, Defendant relied on the U.S. Supreme Court case of *Hicks v. Feiock*, 485 U.S. 624 (1988), a case which dealt with a defendant held in contempt by the State of California for failing to pay child support arrearages as required by a court order. In *Hicks*, the Supreme Court deferred to the state court's findings that inability to pay was both an element of contempt, and was required to be proven by the defendant beyond a reasonable doubt. *Id.* at 629-630. (LF 19-20). The Court held that if the proceeding was criminal, requiring the defendant to bear the burden of proof on an element of an offense violated the Due Process Clause. *Id.* at 637.

However, the Court remanded the case for a determination of whether the proceeding was civil or criminal in nature. *Id*. at 640-641.

Hicks is inapposite where the Missouri legislature has provided that inability to provide support for good cause is an affirmative defense, rather than an element of the statute. Section 568.040.3.

Hicks requires only that the burden of persuasion rest with the State as to the elements of the statute as defined by state law; it does not preclude the state from placing the burden of proof on affirmative defenses on the defendant. *See*, *Hicks*, 485 U.S. at 629-630. *See also*, *Neely v. McDaniel*, 677 F.3d at 352. Thus, the Missouri criminal nonsupport statute is consistent with *Hicks*, which makes clear that it is up to state courts to decide the elements of the offense and who bears the burden of proof. *See*, *Hicks*, 485 U.S. at 629-630. Missouri's criminal nonsupport statute does not make an inability to provide support for good cause an element of the offense. There is therefore no burden of proof placed on a defendant as to any element of the offense, the factor that raised the due process issue in *Hicks*. *Id*.

Because *Hicks* expressly recognizes that the State may place the burden of proof on affirmative defenses on the defendant, and "good cause" is now an affirmative defense under the Missouri criminal nonsupport statute, *Hicks* favors the State rather than the Defendant and the statute is constitutional. *See*, *Hicks*, 485 U.S. at 629-630. *See also*, *Neely v. McDaniel*,

677 F.3d 346, 352 (8th Cir. 2012). There is no Due Process violation, for *Hicks* merely stands for the proposition that "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires in such criminal proceedings, including the requirement that the offense be proven beyond a reasonable doubt." *Hicks*, 485 U.S. at 632; *see also*, *id*. at 637. Here, every element of the offense must be proven by the State beyond a reasonable doubt. *Hicks* expressly relied on the state court's finding that inability to pay was not an affirmative defense, but rather an element of the offense which the state was not required to prove beyond a reasonable doubt because it could rely on a mandatory presumption under California law that a contemnor retained the ability to pay he enjoyed at the time of the initial court order. *See*, *id*. at 629-630, 632, 637. *Hicks* emphasized that "the state courts remain free to decide for themselves the state-law issues we have taken as having been resolved in this case by the court below," which included whether inability to pay was an element of the crime or an affirmative defense. *Id*. at n.13; *see also, id*. at 629.[9]

[9] Indeed, *Hicks* did not even hold that there was a constitutional violation of Due Process in the application of the statute, which provided for a mandatory presumption of ability to pay, but rather remanded back to the lower courts

3. Placing the burden of persuasion for an affirmative defense on the defendant does not violate due process.

In *Patterson v. New York*, 432 U.S. 197 (1977), the United States Supreme Court expressly "decline[d] to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused." *Id.* at 210. "To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate." *Id.* at 209. "Nor does the fact that a majority of the States have now assumed the burden of disproving affirmative defenses—for whatever reasons—mean that those States that strike a different balance are in violation of the Constitution." *Id.* at 211.

In *Dixon v. United States*, 548 U.S. 1, 13-15 (2006), the Supreme Court held that the burden of proof for the affirmative defense of duress under the federal Safe Streets Act was on the defendant, observing that "the common law long required the defendant to bear the burden of proving the existence of duress." *Id.* Moreover, where Congress has enacted an affirmative defense in

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to determine whether the order under the statute was criminal or civil in nature. *Id.* at 640-641.

the proviso of a statute, the "settled rule" is that the State's pleading "need not negative the matter of an exception made by a proviso or other distinct clause" and "that it is incumbent on one who relies on such an exception to set it up and establish it." *Id.* (quoting *McKelvey v. United States*, 260 U.S. 353, 357 (1922)). At common law, the burden of proving affirmative defenses, indeed all "circumstances of justification, excuse or allevation" rested on the defendant. *Id.* at 8 (quoting 4 W. Blackstone, Commentaries *201). The rule also accords with the doctrine that "where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." *Id.* at 9 (quoting 2 J. Strong, McCormick on Evidence §337, p. 413).

Although the statute at issue was silent, the Court could "safely assume" that Congress, in enacting the Safe Streets Act, "was familiar with both the long-established common-law rule and the rule applied in *McKelvey* and that it would have expected federal courts to apply a similar approach to any affirmative defense that might be asserted as a justification or excuse for violating the new law." *Id.* at 13-14.

The *Dixon* Court explicitly rejected the 1962 Model Penal Code approach, which would have placed the burden on the government to disprove the existence of duress beyond a reasonable doubt, holding that "there is no evidence that Congress endorsed the Code's views or incorporated

them into the Safe Streets Act." *Id*. at 16. "[W]e cannot rely on the Model Penal Code to provide evidence as to how Congress would have wanted us to effectuate the duress defense in this context." *Id*.[10] The Supreme Court concluded that, in the context of the firearms offenses at issue, "as will usually be the case, given the long-established common-law rule—we presume that Congress intended the [defendant] to bear the burden of proving the defense of duress by a preponderance of the evidence." *Id*.

Moreover, *Dixon* held that "[t]he definition of the elements of a criminal offense is entrusted to the legislature," particularly in the case of crimes which are "creatures of statute." *Id*. at 7. The two crimes at issue punished defendants who acted "knowingly," or "willfully," respectively. *Id*. "It is these specific mental states, rather than some vague 'evil mind,' . . . or 'criminal'

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[10] While the 1977 version of Chapter 568 was apparently based on the Model Penal Code, *see Callier v. Director of Revenue*, 780 S.W.2d 639, 646 (Mo. banc 1989) (Blackmar, C.J., dissenting), the 2009 and 2011 amendments clearly established through plain language the legislature's intent to depart from the Model Penal Code and allocate the burden of proof for the affirmative defense of "[i]nability to provide support for good cause" to a "person who raises such affirmative defense" by "a preponderance of the evidence." Section 568.040.3, RSMo (Cum. Supp. 2011).

intent . . . that the Government is required to prove beyond a reasonable doubt." *Dixon*, 548 U.S. at 7 (internal citations omitted).

The United States Supreme Court in *Dixon* thus explicitly rejected the trial court's assumption in the case at bar that "criminal intent" is an implied *mens rea* element of the crime where the legislature specified a *mens rea* of "knowingly," and further rejected the claim that requiring the defendant to prove the affirmative defense by a preponderance of the evidence rather than requiring the government to prove criminal intent beyond a reasonable doubt violated the Due Process Clause. *See*, *id*. at 7-8.

"[C]onsistent with the movement away from the traditional dichotomy of general versus specific intent and toward a more specifically defined hierarchy of culpable mental states . . . Congress defined the crimes at issue to punish defendants who act 'knowingly,' [under one statute] or 'willfully,' [under the other]." *Id*. The Due Process Clause was not violated when the government "placed the burden on [the defendant] to establish the existence of duress by a preponderance of the evidence." *Id*. at 8.

Similarly, in *Smith v. United States*, 133 S.Ct. 714 (2013), the Supreme Court affirmed the lower courts' holding that "[o]nce the government has proven that a defendant was a member of a conspiracy, the burden is on the defendant to prove withdrawal from the conspiracy by a preponderance of the evidence." *Id*. at 718. "Allocating to a defendant the burden of proving

withdrawal does not violate the Due Process Clause." *Id*. at 719. "While the Government must prove beyond a reasonable doubt every fact necessary to constitute the crime with which [the defendant] is charged, [p]roof of the nonexistence of affirmative defenses has never been constitutionally required." *Id*. (quoting *In re Winship*, 397 U.S. 358, 364 (1970) and *Patterson*, 432 U.S. at 210; internal quotation marks and citations omitted). While the State is foreclosed from shifting the burden of proof to the defendant when an affirmative defense negates an element of the crime, where it instead "excuse[s] conduct that would otherwise be punishable but does not controvert any of the elements of the offense itself, the Government has no constitutional duty to overcome the defense beyond a reasonable doubt." *Id*. (quoting *Dixon*, 548 U.S. at 6; internal quotation marks omitted).

In *Smith*, the Supreme Court held that "[f]ar from contradicting an element of the offense, withdrawal presupposes that the defendant committed the offense." *Id*. Similarly, a statute-of-limitations defense "does not call the criminality of the defendant's conduct into question, but rather reflects a policy judgment by the legislature that the lapse of time may render criminal acts ill suited for prosecution." *Id*. at 720.

Moreover, "the common-law rule was that affirmative defenses … were matters for the defendant to prove." *Id*. (quoting *Martin v. Ohio*, 480 U.S. 228, 235 (1987)); *see,* W. Blackstone, Commentaries on the Laws of England

201 (1769). Where Congress was silent on the burden of proof for withdrawal, the Supreme Court presumed that Congress intended to preserve the common-law rule. *Smith*, 133 S.Ct. at 720.

The Supreme Court emphasized that it found this "traditional burden of proof" to be "both practical and fair." *Id.* "[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof." *Id.* (quoting *Dixon*, 548 U.S. at 9; internal quotation marks omitted). In the case of withdrawal from a conspiracy, "the informational asymmetry heavily favors the defendant." *Id. See also*, 9 J. Wigmore, Evidence §2486, p. 288 (J. Chadbourn rev. 1981) ("It is often said that the burden is upon the party having in form the affirmative allegation.").

"Thus, although union of withdrawal with a statute-of-limitations defense can free the defendant of criminal liability, it does not place upon the prosecution a constitutional responsibility to prove that he did not withdraw. As with other affirmative defenses, the burden is on him." *Id.* at 720.

Because "inability to provide support for good cause" in an affirmative defense rather than an element of the offense of criminal nonsupport in Missouri, and because a defendant may, consistent with the Due Process Clause, be required to bear the burden of establishing affirmative defenses, Section 568.040 is constitutional. *Id.* at 209-211. This is both "practical and fair" because the defendant is in possession of the information concerning his

ability to pay and any good cause for his inability to pay, and the legislature has consciously determined "that party is best situated to bear the burden of proof." *See*, *Smith*, 133 S.Ct. at 721; *Dixon*, 548 U.S. at 9.

Nor did the legislature imply a requirement to show "criminal intent." "The definition of the elements of a criminal offense is entrusted to the legislature," particularly in the case of crimes which are "creatures of statute." *Dixon*, 548 U.S. at 7. This Court has held, "It is fundamental that to declare what shall constitute a crime and the punishment therefor is a power vested solely in the legislature[.]" *State v. Raccagno*, 530 S.W.2d at 703. As in one of the statutes at issue in *Dixon*, "consistent with the movement away from the traditional dichotomy of general versus specific intent and toward a more specifically defined hierarchy of culpable mental states[,]" the legislature defined the crime at issue to punish defendants who act 'knowingly[.]'" *Id*. at 7-8. "It is [this] specific mental state[], rather than some vague 'evil mind,' . . . or 'criminal' intent . . . that the Government is required to prove beyond a reasonable doubt." *Dixon*, 548 U.S. at 7 (internal citations omitted).

As in *Dixon*, requiring the defendant to prove the affirmative defense by a preponderance of the evidence rather than requiring the government to prove criminal intent beyond a reasonable doubt does not violate the Due Process Clause. *See*, *id*. at 7-8. *See also, People v. Likine*, 823 N.W.2d 50

(Mich. 2012) (upholding a strict-liability statute imposing criminal penalties for failure to pay court-ordered child support; court recognized only a common-law "genuine impossibility" defense to crimes of omission, held that the statute did not permit a mere inability-to-pay defense, and nonetheless held that such a statute did not violate due process).

D. The statute does not permit imprisonment for debt or punish a person for his poverty.

Defendant has preserved no claim under Article I, § 11 of the Missouri Constitution prohibiting imprisonment for "debt, except for nonpayment of fines and penalties imposed by law." (LF 19-21). *State v. Davis*, 675 S.W.2d 410, 418 (Mo. App. W.D. 1984) (no constitutional error preserved where not raised until appeal).

Even if he had, this Court and other State courts reject such a theory, noting that support of children is a "legal duty" and not a "debt," the support obligation does not arise from a contract, and/or that imprisonment for nonsupport is a penalty imposed by law. *State v. Davis*, 469 S.W.2d 1, 3 (Mo. 1971) (jail sentence for conviction of criminal nonsupport is for punishable offense against the State and is not imprisonment for debt). *See, e.g., State v. Krumroy*, 923 P.2d 1044, 1047-1048 (Kan. App. 1996) ("debt" applies only to liabilities arising upon contract); *Lyons v. Texas*, 835 S.W.2d 715, 718 (Tex. App. 1992) (obligation to support children not considered a "debt," but a legal

duty); *Wisconsin v. Lenz*, 602 N.W.2d 173, 177-178 (Wis. App. 1999) (not "debt" because not founded on contract).

Nor has Defendant raised any claim in the trial court that the statute impermissibly punishes a person for his indigency or poverty, as discussed in *Bearden v. Georgia*, 461 U.S. 660, 671 (1983). (LF 19-21). Even if he had, "[t]he State . . . has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment." *Id.* at 669. Moreover, the statute at issue in this case, in contrast to the enforcement of fines statute at issue in *Bearden*, expressly permits a defendant to establish an "[i]nability to provide support for good cause" as an affirmative defense and escape criminal liability for the offense, a far lighter showing than that required by the Supreme Court to comport with equal protection and due process in *Bearden*. Section 568.040.3.

E. Conclusion

This Court recognized in *Holmes* that the 2011 amendments removed "without good cause" as an element of criminal nonsupport, and that the logical purpose of such drafting was to make the "inability to provide support for good cause" an affirmative defense required to be proven by the defendant by a "preponderance of the evidence." The United States Supreme Court has held that such a practice is permissible under the Due Process Clause,

consistent with centuries of common law, and represents an appropriate judgment to be made by the legislature, particularly where the information to establish the relevant facts is in the possession of the defendant.

The United States Supreme Court has similarly made clear that where a legislature chooses to follow the modern trend of defining a specific *mens rea*, such as "knowingly," in the elements of the offense, it is merely that mental element that must be proven by the State beyond a reasonable doubt, and not some vague notion of "criminal intent" as the trial court held.

Consequently, there is no violation of the holding in *Hicks* that a defendant may not be required to bear the burden of proof on an element of a criminal offense, because "inability to provide support for good cause" is not an element of the offense.

The holding of the trial court dismissing the case should be reversed.

CONCLUSION

The judgment of the Circuit Court of Jefferson County dismissing Defendant's charges and holding Sections 568.040.1, 568.040.3, and 568.040.4 unconstitutional should be reversed and the case remanded for further proceedings consistent with the Court's opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 6,413 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 20th day of May, 2015, to:

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