APPEAL NO. SC90649

IN THE SUPREME COURT OF THE STATE OF MISSOURI

STATE OF MISSOURI,
Respondent,

vs.

DONALD R. NASH,
Appellant.

APPEAL FROM CIRCUIT COURT OF CRAWFORD COUNTY, MISSOURI
42nd JUDICIAL CIRCUIT
THE HONORABLE DOUGLAS E. LONG
(Cause No. 08C7-CR00139-02)

APPELLANT'S BRIEF

Frank K. Carlson #27840
Sarah K. Tupper #60695
Michael P. Bastian #25815
THE CARLSON LAW FIRM
17 South Oak Street
Union, Missouri 63084
(636) 583-8300 (tel)
(636) 583-2523 (fax)
Email: fcarlson@usmo.com
ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

MISSOURI STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This appeal is from Appellant's December 18, 2009 conviction, after an October, 2009 jury trial, of the offense of Capital Murder, charged against Appellant as a violation of Section 565.001 RSMo. 1977. Because this appeal involves the validity of a statute or a provision of the Constitution of Missouri, exclusive jurisdiction over this appeal lies in this Court pursuant to Article V, Section 3 of the Missouri Constitution. Appellant was purportedly charged in 2008 with having committed the crime of Capital Murder in 1982, in violation of the 1977 Capital Murder statute, Section 565.001 RSMo. (1977). Section 565.001 RSMo. (1977) had been repealed in 1983 by legislation that: (a) by its terms could not be applied to prosecute offenses that occurred before October 1, 1984; (b) specifically made the provisions of the Section 1.160 RSMo. (Supp. 2008) savings statute inapplicable to Capital Murder prosecutions commenced after October 1, 1984; and, (c) was not accompanied or followed by the Legislature's revival or reenactment of the repealed pre-October 1, 1984 Capital Murder statute, which revival or reenactment is prescribed by Article III, section 28 of the Constitution of Missouri. Accordingly, the statutes under which Appellant was charged, tried and convicted are and at all times pertinent hereto were invalid. Article V, Section 3 of the Missouri Constitution provides in pertinent part: "The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of…a statute or provision of the constitution of this state…."

STATEMENT OF FACTS

THE CHARGE

The Prosecuting Attorney for Dent County Missouri, on April 29, 2008, filed a Felony Information in the Dent County Circuit Court, which stated certain factual allegations and purportedly charged Appellant with the crime of Capital Murder in violation of Section 565.001 RSMo. (1977), to-wit:

> The Prosecuting Attorney of the County of Dent, State of Missouri, charges that the defendant, in violation of Section 565.001, RSMo. (1977), Charge Code 1001000, committed the Class A felony of Capital Murder, in that the defendant willfully, knowingly, and with premeditation, deliberately and unlawfully killed Judy Spencer by strangling her and or by shooting her on or about 10 March 1982, in the County of Dent, State of Missouri, thereby causing her to die on or about 10 March 1982 in the County of Dent, State of Missouri.

(LF 687) The original Information alleged the homicide occurred on March 10, 1982. The State was allowed to amend during trial to change the date of the homicide to March 11, 1982 after Appellant proved Ms. Spencer had died at 9:10 a.m. on March 11, 1982, and not on March 10. (LF 687-88)

THE TRIAL

The jury trial in this case was conducted on October 22, and – 26-29, 2009. The jury was selected in Crawford County, Missouri on October 22, 2009 and transported to Phelps County, Missouri for trial in the Phelps County Courthouse. The jury rendered its

guilty verdict on October 29, 2009. (LF 705) Sentencing was conducted at the Pulaski County, Missouri courthouse on December 18, 2009 at which time the Court formally sentenced Appellant to imprisonment for life without possibility of probation or parole for 50 years. (LF 935-936) Appellant filed a timely notice of appeal with this Court on December 23, 2009.

THE EVIDENCE BEFORE THE JURY

Judy Spencer was 21 when she died. She worked at the Salem hospital as a receptionist. She and Appellant Donald "Doc" Nash lived together in Salem, Missouri in Dent County. (T305-309) He worked in a steel plant. (T635) Just prior to her death, Judy had called the Salem police twice to request an escort to her car in the hospital parking lot after her work shift had ended, because someone was following her and she was scared. (T713-15)

Judy Spencer was killed on March 11, 1982 at 9:10a.m.. (T 719, 330-31, 328-334) She was strangled with a shoelace from one of her brushed suede shoes. After she was dead, Judy was shot in the neck with a 12 gauge shotgun. The blast cut through the shoelace still wrapped around her neck. (T317-18, 430, 440) Judy's body was dragged to an abandoned outhouse foundation into which it was dumped and covered over with tree limbs, branches and logs. (T461) Some of her clothing was strewn about the grounds nearby, on a fence, a bush, and on the ground. (T426-32) Her body was found there, partially clothed, just before 12:00 noon by brothers James and Gerald Nichols. (T438) This was at the old Bethlehem School property (T423), on Highway 32, where the

brothers rented land to run their cattle. (T724) It is 15-20 minutes outside of Salem, Missouri. (T457)

That same morning, the 11th, at 5:45a.m. Judy's friend Janet Jones called Doc on the phone at his home in Salem. Doc and Janet had been worried about and looking for Judy the previous night. Doc had asked Judy to call him at 6a.m. so he would not be late for work, and she did so. (T377-79, 419, 452-53, 475-78) At 8:30a.m., forty minutes before Judy was killed, Doc called Judy's mother on the phone from work, looking for Judy. (T311) He called Janet Jones on the phone at least twice on the 11th, including at 10a.m., fifty minutes after Judy was killed, and again at 11a.m., still worried and looking for Judy. He was concerned for Judy's safety, worried about her drinking and driving, afraid she would get in an accident or get arrested. (T404-05) Less than an hour later, the Nichols brothers found her. (T726) They could still smell her perfume. (T726, 727) There were still wet bubbles of saliva near the corner of her mouth. (State's Exhibit 28)

After work on the 11th, at 3p.m., Doc and Janet went together to Houston, Missouri looking for Judy. Doc was concerned about Judy. (T379-81) When they got back to Salem they stopped at Doc and Judy's home to check the answering machine. A call came summoning them to the hospital. There they learned of Judy's death from Missouri State Highway Patrol Trooper Gary Dunlap. (445-50) Janet had to be sedated. (T382, 450) Doc reacted visibly. He began to cry and appeared very upset. (T464) The next time Janet saw Doc, he appeared heartbroken. (T408)

Doc and Janet had been worried about Judy, because Judy had spent approximately four hours the afternoon and evening on the 10th drinking and driving

around with Janet. (T366-68) Ms. Spencer drank too much (T392), and sometime late in the evening of the 10th she had driven off mad and upset (T399), saying she was going to Houston. (T376) She invited Janet to come along, but Janet declined. (T376) As she was leaving Janet's apartment for the last time, Judy ran into Janet's neighbor, Christine Colvin. Judy invited Christine to ride along to Houston, but Christine declined because of a prior commitment, and because when Judy was drinking she got a little wild and was kind of a party girl. (T481)

Judy feared her drinking and lying about it had wrecked her relationship with Doc. That evening, the 10th, she argued with Doc about her drinking. They had not argued like that since they quit drinking. (T399-400) Doc and Judy had together quit drinking, but on March 10, Judy started again. (T391-92) She'd lied to him about it at about 7p.m. on the 10th, telling him she was still out of town with Janet, when she was actually back in Salem at Janet's apartment drinking. A few minutes later Doc showed up at Janet's apartment to switch cars with Judy. The women had been out in Doc's pickup. Doc brought Judy her Oldsmobile and gave her the keys. Judy and Doc talked outside Janet's apartment briefly. (T367-373) Judy came back in and told Janet Doc had said, "This is the last time you'll ever lie to me, bitch." (T374) Judy said, "Doc thinks I'm ugly. He doesn't like my hair." She told Janet she thought her relationship with Doc was over. (T403) She washed her hair in Janet's kitchen sink (T374) and went back home to Doc. About an hour later, Judy came back to Janet's (T375) for the last time, before she left, apparently headed for Houston, Missouri.

Judy's post-mortem blood alcohol content was 0.18%, more than double the legal threshold for driving while intoxicated. (T707)

The morning of the 11th, the Nichols brothers found that the previous night there had apparently been "a large party" at the Bethlehem School where Judy's body was found. (T726) The place was known as a party spot, a kind of lovers' lane. (T458-59) There were "lots of beer cans and rubbish and stuff scattered around" the area near her body. (T726) The police photos showed Busch beer cans there. (T458) Judy drank Busch beer (T505, 531), including on the 10th. She and Janet had switched over from Coors beer to Busch (T394) by the time they returned from drinking and driving at around 7p.m.

Trooper Dunlap worked up the scene at the Bethlehem School. He noted fresh tire tracks in the dirt near her body. He specifically noted the tread pattern, the width of the tires and how far apart the two tire marks were from one another. (T461) The police had ready access to Mr. Nash's vehicle (T533-34), but there was no evidence his vehicle could have produced the tracks. He followed the drag marks the Nichols brothers had pointed out, which led to the foundation of an old outhouse. There, covered over with limbs and branches, small logs and a large log, (T461) they found Judy's body. She was partially nude. Her T-shirt and bra were pulled up around her neck. (T433-39) When the debris atop her was cleared, he saw that she had a shoestring wrapped around her neck. It appeared she had been shot in the neck through the shoelace. There was not much blood in the hole where her body had been found. (T440-41). State's Exhibit 26 shows her hand with watch pulled up high on her wrist. The crystal was missing and the

watch was stopped. Dunlap found the crystal in the drag marks and matched it up with her watch. (State's Exhibit 27, Defendant's Exhibit B, T442-45) The way her watch was pulled up on her wrist was consistent with her assailant dragging her by the hands. (T535) Exhibits A and B also showed Judy's left hand, with the watch slid up to the widest part of her hand as if it had been pulled up there. The watch stopped at 9:12. (T330-31) There was no blood or tissue under her fingernails. At that time, Judy's identity was unknown. The police found her purse in a nearby creek bed near the Bethlehem School, identified her through its contents, and learned she worked at the hospital. (T537) Inside were Judy's ID (T448, 497), a nail file (T537), and several bank books, including one for Doc's savings account (T537-39).

Trooper Dunlap went to the hospital, where he met Janet Jones and Doc Nash. There he told them that Judy had been killed, but gave no details. He interviewed Doc and Janet Jones separately. (T445-50) Nash described to Trooper Dunlap his contacts with Judy in the previous 24 hours, including her drinking and driving. He said they had had an argument about her resumption of drinking, and switched cars. Nash volunteered a description of what Judy was wearing when she left their house for the last time, including a white windbreaker and brushed suede shoes. (T450-51) Doc told the trooper that he and Judy had last had sexual intercourse on the 8th. (T532)

Doc Nash told Trooper Dunlap about looking for Judy the night of the 10th. Judy had come home around 8p.m., and he had begun looking for her sometime later. (T467) They did not discuss whether Doc had gone out more than once that night to look for Judy. (T453) They did not discuss what time Doc got home from looking for Judy on the

night of the 10th. (T453) When Doc finally got home though, he stayed in the rest of the night, and did not go out until the next morning. (T453) Doc went out of town on "the highway" to look for Judy at the Legion Hall and at the hospital sometime after 8 p.m. He was hoping to see her car on one of the parking lots. Those two locations were the only places he went "out on the highway." (T419) Christine Colvin saw Doc around midnight driving through the parking lot of Janet Jones' apartment at the Carnett Apartments (T475, 477), where Doc had traded cars with Judy earlier. (T475-78) The Carnett Apartments are inside Salem proper, not out on the highway. (T477) Mr. Nash saw Judy "up town on Fourth Street" going the opposite way. (T451) By the time he got turned around he'd lost her and didn't see her again. (T451) At that point, he finally went home. He stayed in the rest of the night, and did not go out again until the next morning. (T453)

Janet Jones also went out looking for Judy the night of the 10th, in Salem at the Tower Inn bar. Janet returned home within 20 minutes. Doc called Janet again (T377) looking for Judy. He told her Judy had returned home the night of the 10th, changed clothes and left. Doc said how much he loved Judy and how much he was worried for her safety. (T409)

Doc called Janet looking for Judy several times the night of the 10th and the day of the 11th. He was concerned for Judy's safety. He said he was worried about Judy drinking and driving. He was afraid Judy would have an accident or get arrested. (T404-05) He called Janet at 8:30 p.m. and 9:30 p.m. on March 10 asking about Judy,

concerned about her. (T404-05) The last time Doc called Janet on March 10, 1982 was around 10 p.m. He was still worried about Judy. (T378)

Doc was fingerprinted and swabbed for gunshot residue. The process involved close proximity, observation and contact with Doc's hands and forearms. (T519-31) The police found no scratches, marks, bruises or scrapes on him. (T519) Such marks would be consistent with Doc being involved in a physical altercation with another person. (T521) Doc tested negative for gunshot residue. (T706)

The police took fingernail clippings from Judy, as well as pubic combings, vaginal and rectal swabs. (T488-93) The Highway Patrol lab found no evidentiary material under her nails in 1982. (T553) No semen was found in the swabs. (T558)

Judy's car was discovered on Highway FF approximately a half-hour away from the Bethlehem School and 15-20 minutes outside of Salem. (T453-57) It had swerved sharply off the road, leaving four feet of tire marks (T455), and had come to rest in the ditch sometime between 9p.m. on the 10th and 7:30A.M. on the 11th. (T542-46) Her car had gone down a steep embankment (T503), and become stuck in the mud (T462-63) after someone had tried to drive it back onto the road by rocking it back and forth. (T455) There were Busch beer cans and bottle in the car on the driver's side, a bottle of beer on the passenger-side floor, and maybe on the back floor. (T455, 462-63, 531-32) Her purse was gone, but her white windbreaker jacket was still there. Her keys were on the console of her abandoned car. (T 455)

Judy's purse was found in a dry creek bed 1/10 (T445) to 1/2 (T497) mile from where Bethlehem School road intersects Highway 32. (T445, 500) Inside were Judy's

ID (T448, 497), a nail file (T537), and several bank books, including one for Doc's savings account (T537-39). This was how the police learned Judy's identity and that she worked at the hospital. There they talked to Janet and Doc the afternoon of the 11th.

Janet Jones questioned Doc more than once, once while wearing a wire for the police in May, 1982. (T383-84) She said he was very jealous of Judy. (T386) He had "slapped her jaw a bit one time" (T386) when Judy had become drunk and hysterical. (T405) Doc said that when he saw Judy at Janet's apartment the night of March 10 he'd been angry at Judy, because she'd started drinking again. (T405-06) He told Judy she'd never lie to him again. Janet asked him if he had an alibi for the night of the 10th, and he said no. She did not ask him if he had an alibi for the 11th, when Judy was killed. (T405) She asked him about Della Wingfield, whom Doc began seeing and then living with shortly after Judy's death. He said his feelings for Della could never supplant those for Judy. (T388-89) Janet told Doc she suspected him of being involved in Judy's murder. She asked if, were their roles reversed, he would suspect her. He said he would. Doc told her again how much he loved Judy and he said, "I'm innocent. They're on the wrong track. They're not going to catch the right guy." (T409) Nash said, "the only place I went was to the Legion to see if her car was there and that was after eight o'clock, went to the Legion to see if her car was there, and then I went back and drove back to the hospital to see if Judy was working and see if Judy's car was there, and that is the only places I went out on the highway." (T419)

Twenty-six years later, Doc voluntarily gave the Highway Patrol a DNA sample, knowing they were investigating anew the murder of Judy Spencer. (T603-04) The

Highway Patrol lab determined that the DNA of both Doc and Judy was underneath the fingernails of her left hand in a mixture. (T664-71) When MSHP Sergeant Jamie Folsom told Doc that his DNA had been found both on Ms. Spencer and at the crime scene, Doc said, "That can't be true." (T632) Doc was right. It was not true. His DNA was not found anywhere except under the fingernails of Judy's left hand. Trooper Folsom noted that Doc's hands were shaking at that time.

The evidence was uncontroverted that the presence of Appellant's DNA under Judy Spencer's fingernails is insignificant (T745), because the two lived together. Mr. Nash bore no injuries, such as scratches on his arms, hands or face that would indicate some type of struggle. (T519) Judy's fingernails did not have blood, skin or other human tissue under them, except for 5 nanograms of DNA. There was as much DNA from Judy as from Doc. (T679) That amount of DNA is more than would be expected to be present from the victim touching a surface or clothing. (T678) But according to the state's expert, MSHP crime lab quality assurance coordinator Thomas Grant, DNA can transfer from a person you touch onto your hand. (T573) He said cohabiters carrying one another's DNA would be very common in some homes. (T594-95) The more intimate a couple are, the more they touch one another, the greater the likelihood they carry one another's DNA. (T595) It could be present from a sneeze, from saliva, from the scalp. (T595-97) Defense counsel rubbed Doc's head for Lab Supervisor Tom Grant, who opined that there existed a good possibility counsel now had Doc's DNA under counsel's nails as result. (T597) Doc and Judy had had sexual relations on March 8, 1982. (T505,

777) As described above, they were together at home multiple times on March 10 before Judy left for the last time.

The State's other expert witness, Ruth Montgomery, did the actual DNA analysis at the MSHP crime lab. In addition to the mixture of DNA from both Judy and Doc under Judy's fingernails, she found Judy's DNA on the shoelace from her neck, but no one else's. (T675-76) She was unable to develop any DNA profile from the vaginal swabs that had been collected from the victim in 1982. (T681-82) Because Janet Jones recalled Judy washing her hair at Janet's house sometime between 7 and 8p.m. on March 10, 1982, just before Judy went back to her house to change and talked to Doc again, Ms. Montgomery discussed that fact and its impact on the DNA evidence.

Ms. Montgomery said she would expect washing one's hair would remove DNA from under one's fingernails, and that a detergent based shampoo would contribute to the process. She did not have an opinion as to what quantity of DNA would or would not persist under the fingernails after that process. (T680) She could not say that washing one's hair would remove all the foreign DNA from under one's fingernails or even from one's hands. She did say that shampooing would be more likely to remove foreign DNA from the surface of one's hands than from under the fingernails. (T696) She did not know if the sexual contact between Mr. Nash and Ms. Spencer on March 8 included digital penetration of Mr. Nash by Ms. Spencer. She did not know what kind of contact occurred between Mr. Nash and Ms. Spencer before Ms. Spencer did her hair the evening of March 10. She did not know if Ms. Spencer used shampoo when she did her hair the evening of March 10. She did not know if the possible shampoo was detergent or soap-

based. She did not know what kind of contact occurred between Mr. Nash and Ms. Spencer between the time she washed her hair and the time of her death. (T698)

Appellant's DNA analyst, Stephanie Beine, in response to the State's questioning, agreed that she did not dispute Ruth Montgomery's finding that a mixture containing the DNA of both Appellant and Judy Spencer was found under Ms. Spencers' fingernails, nor that no DNA of a third party was present. (T764) She agreed that she, like Ms. Montgomery, did not know the nature of the sexual activity between Appellant and Judy Spencer on March 8. Nor did she know how Appellant's DNA got under Judy Spencer's fingernails. (T777) She agreed with Mr. Grant that people who cohabit likely carry one another's DNA simply from the fact of cohabitation. (T757-58) She presented three scientific studies on the topic, defendant's exhibits AA, BB and CC. (T734) State's DNA analyst Montgomery acknowledged that the three studies are scholarly articles from peer-reviewed publications and are of the type normally and reasonably relied upon by experts in her scientific community. (T691-92)

Defendant's Exhibit AA, entitled "The Prevalence of Mixed DNA Profiles in Fingernail Samples Taken From Couples Who Cohabit Using Autosomal and Y-STRs" studied cohabiting couples and the persistence of their partners' DNA under one anothers' fingernails. The study in Exhibit AA took into account the number of hours that couples had spent together during any specific day, as well fingernail length, whether or not the subjects bit their nails, whether or not they'd taken a shower or bath, how many times they'd washed their hands, whether or not they'd done any dishes, and other variables. The authors found that showers and baths, hand-washing and dish-washing

had no significant impact on the ability to detect foreign DNA from under an individual's fingernails. Of all the couples they tested, 37% had their partner's DNA under their fingernails, despite these variables. The authors then conducted Y-Filer analysis, which is specific to detection of male DNA. That analysis revealed that of the women that did not show their partners' DNA in the first tests, 63% now did show male DNA under their fingernails. (T734-40; Defendant's Exhibit AA)

Defendant's Exhibit BB, "The DNA Analysis of Fingernail Debris Using Different Multiplex Systems: a Case Report," involved a male hospital nurse who was accused of sexually assaulting a female patient by penetrating her vaginally and possibly rectally with his fingers. The patient did not report incident for two days. During those two days, the nurse had scrubbed his hands multiple times per day in a manner consistent with the hospital environment. Nonetheless, the patient's DNA remained detectable under his fingernails. (T741; Defendant's Exhibit BB)

Defendant's Exhibit CC, "The Persistence of DNA Under Fingernails Following Submersion in Water," reported 2 case studies. One involved a victim submerged in water for approximately 2 hours in a bathtub. The second involved a victim submerged in sea water for approximately 3 hours. In both instances, foreign human DNA was detected underneath their fingernails even after prolonged submersion. (T741; Defendant's Exhibit CC)

These studies, along with Ms. Beine's lengthy prior experience analyzing DNA from under fingernails, plus her specific experience in analyzing DNA material derived from bodies that had been immersed or submerged in water (T735) informed her opinion

that the presence of Donald Nash's DNA under his girlfriend Judy Spencer's fingernails is not a significant finding. (T745) Exhibit AA informed her opinion that DNA can be present in such circumstances simply because people cohabit. (T757-58) She said that a mixture of DNA under the fingernails can result from a struggle. The fact that Appellant had no scratches, marks, abrasions bruises or wounds upon close examination by multiple police officers was significant. (T777) But a struggle is "absolutely not" the only way to get someone else's DNA under one's fingernails. (T776) The presence of DNA under one's fingernails "absolutely [does] not" mean that one has been in a struggle with another. DNA turns out to be unexpectedly persistent in remaining under one's fingernails, even after hand-washing, bathing, dishwashing and two days of repeated hand scrubbings of a hospital nature in a hospital setting. (T776) The fact that Doc and Judy had sex on March 8, depending on the specific sexual activity, makes this case strikingly similar to the male nurse studied in Exhibit BB. Without evidence of their specific sexual activity, doubt remains. (T777)

No further evidence was adduced before the jury.

THE OFFER OF PROOF

Appellant made an offer of proof as to third-party guilt evidence which had been excluded by the trial court upon the State's Motion In Limine I – Concerning The Possible Defense That Someone Else Committed This Crime. (LF 546-50) The State's Motion was based upon Missouri's so-called "direct connection rule" that bars a criminal defendant from adducing evidence that some third person other than the accused and the victim had actually caused the victim's death, where such evidence shows only the third-

party's motive or opportunity without showing a "direct connection" to the *corpus delicti*. Appellant suggested in opposition to the motion that first, Appellant's evidence showed more than a motive and opportunity for Anthony Lambert Feldman and thus complied with the direct connection rule, and second, exclusion of Appellant's evidence of Anthony Feldman's guilt under the direct connection rule would be violative of Appellant's rights to compulsory process and due process of law under the Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution as well as the specified parallel provisions of the Missouri Constitution. (LF 610-13)

Appellant's offer of proof was articulated at T915-921 as follows:

> MR. CARLSON: Your Honor, Mr. Nash moves for an offer of proof to make a record of the evidence disallowed by the Court's pretrial rulings denying to Mr. Nash the ability to present an adequate defense, denying to Mr. Nash his right to counsel and the assistance of counsel, his right to a jury trial, his right to a fair trial, his rights confrontation and compulsory process, his right to appear and defend his rights to due process of law and to the equal protection of the law, his right to be free from cruel and unusual punishment and other valuable rights all of which are secured to him by Article 1 of the Missouri Constitution, including but not limited to Sections 10, 15, 17, 18A and B, 19 and 22A as well as the 4th, 5th, 6th, 8th and 9th and 14th amendments of the United States Constitution.

Mr. Nash hereby incorporates by reference the contents of defendant's reply memorandum of law in opposition to the State's motion in limine No. 1, the third party guilt motion of the State. And that's my record on grounds.

THE COURT: Noted for the record.

MR. CARLSON: Thank you. Judge, if permitted to adduce this evidence, the evidence would be that, one Lambert Anthony Feldman's fingerprint's were found on Judy Spencer's car. That Doc's and – I should say Mr. Nash's and Judy Spencer's prints were not found on the car. That would be established by Missouri State Highway Patrol criminalists Don Lock and Kim Harden.

The fact that Mr. Nash and Judy Spencer's fingerprints were not on the car is because the car came to rest off the county highway sometime between 9 p.m. on March 10, 1982 and 7:30 a.m. on March 11, 1982. That fact has been established and would be established by Mr. Collin[1] who would have testified.

The car was washed clean of existing fingerprints while it resided alongside of the highway, because it was subject to a heavy rainstorm sometime shortly after 10:00 p.m. on March 10, 1982, washing away the prints of Judy Spencer and Mr. Nash. That would

[1] This is the court reporter's misspelling of "Cowan."

be established by Constance Read who was a neighbor living near by who would testify that she clearly recalled the heavy rainstorm that night because she had just put in a garden and was afraid it was going to be washed away.

The fact of the prints solubility in heavy rain would be established by Mr. Lock and Ms. Harden, the same witnesses from the highway Patrol lab that I described a moment ago.

A neighbor, John Hire[2] – and I mean a neighbor to the location where the car came to rest – a neighbor John hire put his prints on the car sometime after the rain as did an unknown person and Tony Feldman or Lambert Anthony Feldman.

This would be established by officers of the Missouri State Highway Patrol and Dent County Sheriff's deputies and the statements of Mr. Hire. Anthony Feldman – Lambert Anthony Feldman falsely denied to the police that he had ever met Judy Spencer or that he'd ever been to Salem. The falsity of that statement is proven by – well, first the fact that he made the statement is a matter of the records in this case, and would be testified to by the investigating officers in this case.

[2] This is the court reporter's misspelling of "John Heyer."

And Tony Feldman falsity of his statement is also witnessed by four witnesses Mr. Tim Bell who obtained statements from witnesses when he was a sheriff's deputy for Dent County and by the witnesses whose statements he obtained, David Tiefenthaler, MR. BRUCE Stevens and William Whitaker.

It came about in this fashion. Mr. Bell would testify and Mr. Tiefenthaler would testify that Mr. Tiefenthaler was present in the Dent County Sheriff's office while Mr. Bell was on duty. That Mr. Bell had on his desk a booking photo from Rolla, Missouri Police Department records of Mr. Feldman. That Tiefenthaler spontaneously identified the photo of Mr. Feldman as someone he recognized. And Mr. Tiefenthaler spontaneously stated to Mr. Bell that Tiefenthaler had seen Mr. Feldman in the company of Judy Spencer in the Tower Inn in Salem, Missouri within a couple of days of her death. Mr. Tiefenthaler indicated he was accompanied by Mr. Whitaker and Mr. Stephens. Mr. Whitaker would also testify to the same matter as would Mr. Tiefenthaler. Mr. Stephens is demised.

And, again, these facts would be proven by Deputy Bell, by Mr. Tiefenthaler, by Rolla, Missouri Police Department booking records.

Mr. Feldman, your Honor, was later convicted in the State of Iowa – I mean, after the death of Judy Spencer, was convicted in the

State of Iowa for the crime of stalking a woman with intent to sexually assault her. That would be proven by certified records form the Circuit Court of Johnson County, Iowa.

The woman in question that testified in that Feldman stalked on a college campus in Iowa was 21 years of age when he committed his crime.

THE COURT: Would be mark your place, please. We have a question from the jury.

MR. CARLSON: All right.

THE COURT: So that they can be busy about their stuff, while your making your offer I'd like to get to that. I'll read that note from the jury to you now.

MR. CARLSON: Yes, sir.

THE COURT: You're doing like I am, you're juggling many things at one time. I apologize.

Please provide the following things that were requested on the first request. One – they changed it now to map of crime scene Bethlehem School in parenthesis. And two, Officer Dunlap's police report in quotes – or excuse me, in parenthesis, original. They don't like copies. So it's signed by the same person as I told you before, juror or No. 12. And it's dated today. I put down it was received by the court at 4:30 p.m. and it was written at 4:23 p.m. Now then, No.

1 is easy to comply with. That was admitted into evidence. And No. 2, I'm going to have to tell them again. I'll just tell them your second request. No. 2 is not admitted into evidence. Instruction No. 10.

You can continue with yours while I'm writing Instruction No. 2. I'm listening to you.

MR. CARLSON: All right, Judge.

According to the records of the Johnson County, Iowa Circuit Court, Mr. Tiefenthaler in fact – I'm sorry, not Mr. Mr. Tiefenthaler. Mr. Feldman, in fact, made physical contact with his victim – his stalking victim. While on probation from that Iowa conviction.

Tony Feldman stated to his Missouri probation officer that when he was stalking his Iowa victim that he had done so for some time. And when he first saw her, he knew she would be his next victim.

These facts are born out by the testimony of Tim Bell and probation – the records of Missouri Department of Probation and Parole that were supplied to Defendant in violation of subpoena duces tecum validly served on that department.

Further, the evidence would be that Anthony Feldman – Lambert Anthony Feldman was known to always carry a shotgun in his car in the time periods surrounding Judy Spencer's death. This

would be proven by the testimony of Mr. Tim Bell and by Mr. Feldman's ex-sister-in-law, Mrs. Kelly Feldman, a resident of Hannibal, Missouri across the river from Quincy.

The evidence would further be, your Honor, that on October 2008, Lambert Anthony Feldman shot himself to death with a 12-gauge shotgun. The evidence would further be that Judy Spencer was shot with a 12-gauge shotgun. These facts would be proven by certified records from the Quincy, Illinois Police Department, from the certified records of Adams County, Illinois, from the testimony of Quincy police officers, and from the testimony of Thomas Buhl[3] a Missouri State Highway Patrol criminalist who established that Judy was shot with a 12-gauge shotgun, your Honor. And that's the offer of proof.

THE COURT: Thank you very much. The offer of proof having been listened to by the Court, and actually the Court has heard this argument before, but not on the record, and having given it thought the same ruling as I've made in chambers either off the record or – I believe it was off the record.

MR. BRUCE: I think the Court made it – I think we communicated by e-mails over the weekend prior to trial, your Honor.

[3] This is the court reporter's misspelling of "Thomas Buel."

(T915-921) The evidence was closed.

Although Appellant had at the State's instance been prohibited by the trial court from offering available third party guilt evidence as to Mr. Feldman, the State seized upon the absence of such evidence in closing. In its initial closing, the State argued: "There's one other piece of this puzzle that even Ms. Beine could not refute. There was only two individual's DNA underneath her fingernails. There wasn't a third person. And I want you to listen for an explanation." (T870) Knowing Appellant could not argue third person evidence, the State pointedly asked the jury to listen for it. Then, Appellant being unable to make such argument, in rebuttal the State argued again the absence of third party guilt evidence. "The one thing I didn't hear in any discussion of over an hour, was this. If DNA gets under your fingernails so easily, then where's the third sample? Where's the third person? If Mr. Nash's DNA is underneath her fingernail simply because of casual contact, then where's the killer's DNA? Because he did a lot more than have casual contact with her. And I want you to discuss that among yourselves. I want you to take all the time you need." With that, the State told the jury to pick a foreman, return a guilty verdict and sat down. (T906) Appellant could not respond.

THE VERDICT, JUDGMENT, MOTION FOR NEW TRIAL AND SENTENCE

The jury returned its verdict finding Appellant guilty of capital murder, (T927) and jury fixed the punishment at life without parole for fifty years. (T931-32) (LF 704) Defendant was adjudged guilty by the court. (LF 935-36)

Appellant moved for judgment of acquittal based upon the insufficiency of the evidence at the close of the State's case, at the close of all the evidence, and after the

jury's verdict (LF 684-86, 799-812) (T699, 837, 942) Appellant's Motion for New Trial also alleged insufficiency of the evidence (LF 799-812). All were denied by the trial court. (LF 684, 686) (T699, 837, 942)

Appellant timely filed his Motion for New Trial, which raised as error each and every error herein assigned. The same was overruled on December 18, 2009 after hearing, and Appellant was then sentenced by the trial court to fifty years imprisonment without opportunity for probation or parole for fifty years. Appellant timely filed his Notice of Appeal.

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S "DEFENDANT'S MOTION TO QUASH THE INFORMATION, TO DISMISS AND TO DISCHARGE DEFENDANT FROM CUSTODY," AND THE SAME WAS ERROR BECAUSE THE STATUTE UNDER WHICH APPELLANT WAS CHARGED, TRIED AND CONVICTED, MO. REV. STAT. SECTION 565.001 (1977), HAD BEEN REPEALED IN 1983 BY SENATE BILL 276, AND BY ITS SPECIFIC TERMS WAS NOT SUBJECT TO THE MISSOURI CRIMINAL "SAVING STATUTE" CONTAINED IN MO. REV. STAT. SECTION 1.160, IN VIOLATION OF MO. REV. STAT. SECTION 566.026, WHICH REQUIRES THAT ALL CRIMINAL OFFENSES BE DEFINED BY STATUTE.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL, AND THE SAME WAS ERROR, BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION IN THAT THERE WAS NO EVIDENCE, EITHER DIRECT OR CIRCUMSTANTIAL, INDICATING EVEN INFERENTIALLY THAT APPELLANT CAUSED THE DEATH OF JUDY SPENCER, BECAUSE THE STATE'S CASE RESTS ON CIRCUMSTANTIAL EVIDENCE, BECAUSE THAT EVIDENCE IS NOT INCONSISTENT WITH REASONABLE THEORIES

OF APPELLANT'S INNOCENCE AND IS NOT IRRECONCILABLE WITH THE INNOCENCE OF THE APPELLANT, AS THE LAW REQUIRED IN MARCH 1982, BECAUSE THIS COURT MUST APPLY THE STANDARD THAT EXISTED IN MARCH 1982 IN ORDER TO AVOID AN EX POST FACTO – TYPE VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND MO. CONST. ART. I, § 10, AND BECAUSE A CONVICTION RESTING UPON INSUFFICIENT EVIDENCE CONSTITUTES A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND MO. CONST. ART. I, § 10.

POINT III

THE TRIAL COURT ERRED IN DENYING APPEALLANT'S PROFFERED MAI-CR2D 3.42 CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION, AND THE SAME WAS ERROR: (1) BECAUSE IN SUBMITTING THE CASE TO THE JURY WITHOUT MAI-CR2D 3.42, THE TRIAL COURT EX POST FACTO ALTERED THE LEGAL RULES OF EVIDENCE TO PERMIT APPELLANT TO BE CONVICTED ON LESS, OR DIFFERENT, EVIDENCE THAN THE LAW REQUIRED AT THE TIME OF THE CHARGED OFFENCE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION; AND (2) BECAUSE MO. REV. STAT. SECTION 565.001.2 (2009) REQUIRED THIS CASE BE "CONSTRUED,

PUNISHED, CHARGED, TRIED AND REVIEWED ON APPEAL ACCORDING TO" PROVISIONS OF LAW IN EFFECT AT THE TIME OF THE CHARGED CRIME, MAI-CR2D 3.42 WAS IN EFFECT AT THE TIME OF THE CHARGED CRIME, AT THE TIME OF THE CHARGED CRIME MAI-CR2D 3.42 WAS MANDATORY IF REQUESTED BY A DEFENDANT IN A CIRCUMSTANTIAL EVIDENCE CASE, THIS IS A STRICTLY CIRCUMSTANTIAL EVIDENCE CASE, AND APPELLANT TIMELY REQUESTED THE INSTRUCTION BE GIVEN.

POINT IV

THE TRIAL COURT ERRED IN SUSTAINING OVER APPELLANT'S OBJECTIONS "STATE'S MOTION IN LIMINE I – CONCERNING THE POSSIBLE DEFENSE THAT SOMEONE ELSE COMMITTED THIS CRIME" AND THEREBY PROHIBITING APPELLANT FROM INTRODUCING EVIDENCE THAT A CERTAIN LAMBERT ANTHONY FELDMAN WAS THE ACTUAL MURDERER OF JUDY SPENCER AND THE SAME WAS ERROR:

BECAUSE MISSOURI'S "DIRECT CONNECTION RULE," WHICH PROHIBITS CRIMINAL DEFENDANTS FROM INTRODUCING EVIDENCE OF ANOTHER PERSON'S GUILT, SO-CALLED "THIRD PARTY GUILT" EVIDENCE, UNLESS DEFENDANT'S SAID EVIDENCE RISES TO THE LEVEL OF "SUCH PROOF AS DIRECTLY CONNECTS THE [THIRD PARTY] WITH THE CORPUS DELICTI, AND TENDS CLEARLY TO POINT OUT THAT THIRD PERSON AS THE GUILTY PERSON" IS AN

UNCONSTITUTIONAL EVIDENTIARY RULE THAT INFRINGES ON FUNDAMENTAL RIGHTS OF CRIMINAL DEFENDANTS, INCLUDING APPELLANT, WIHTOUT A COMPELLING STATE INTEREST FOR THE INFRINGEMENT AND WITHOUT BEING DRAWN SUFFICIENTLY NARROWLY TO SERVE A COMPELLING STATE INTEREST WITHOUT UNNECESSARILY INFRINGING FUNDAMENTAL RIGHTS OF CRIMINAL DEFNEDANTS, INCLUDING APPELLANT; BECAUSE APPELLANT'S OFFER OF PROOF DEMONSTRATED THAT APPELLANT'S PROHIBITED EVIDENCE PRESENTED STRONGER, MORE DIRECT AND MORE CONVINCING CIRCUMSTANTIAL PROOF OF MR. FELDMAN'S GUILT THAN THE STATE'S CIRCUMSTANTIAL PROOF PROVIDED AGAINST APPELLANT; BECAUSE MISSOURI'S "DIRECT CONNECTION RULE" REQUIRES A GREATER QUANTUM OF PROOF TO OBTAIN MERE ADMISSION OF DEFENSE EVIDENCE OF THIRD PARTY GUILT THAN THE QUANTUM OF PROOF NECESSARY TO OBTAIN A MURDER CONVICTION BEYOND A REASONABLE DOUBT; AND BECAUSE MISSOURI'S DIRECT CONNECTION RULE, AND THE TRIAL COURT'S EXCLUSION OF APPELLANT'S THIRD PARTY GUILT EVIDENCE, IS FOR THE ABOVE REASONS VIOLATIVE OF THE COMPULSORY PROCESS CLAUSE OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS APPLIED TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE

FOURTEENTH AMENDMENT AS WELL AS THE PARALLEL PROVISIONS OF ARTICLE I, SECTION 18(a) OF THE MISSOURI CONSTITUTION.

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S "DEFENDANT'S MOTION TO QUASH THE INFORMATION, TO DISMISS AND TO DISCHARGE DEFENDANT FROM CUSTODY," AND THE SAME WAS ERROR BECAUSE THE STATUTE UNDER WHICH APPELLANT WAS CHARGED, TRIED AND CONVICTED, MO. REV. STAT. SECTION 565.001 (1977), HAD BEEN REPEALED IN 1983 BY SENATE BILL 276, AND BY ITS SPECIFIC TERMS WAS NOT SUBJECT TO THE MISSOURI CRIMINAL "SAVING STATUTE" CONTAINED IN MO. REV. STAT. SECTION 1.160, IN VIOLATION OF MO. REV. STAT. SECTION 566.026, WHICH REQUIRES THAT ALL CRIMINAL OFFENSES BE DEFINED BY STATUTE.

Standard of Review

The construction of a state statute is a question of law, which this court reviews de novo. *State v. Wiley*, 80 S.W.3d 509 (Mo.App. W.D. 2002).

Argument

On April 29, 2008, Appellant was charged by Information with the March 10, 1982[4] murder of Judy Spencer under a statute, § 565.001 RSMo. 1977, that had been

[4] The original Information alleged the homicide occurred on March 10, 1982. The State was allowed to amend during trial to change the date of the homicide to March 11, 1982

repealed via legislation that specifically made the criminal saving statute, § 1.160 RSMo. inapplicable. When the Information herein was filed, no statute existed or exists defining the crime of capital murder for acts committed prior to October 1, 1984, where the defendant had not been charged with capital murder by that date. The Information herein was thus filed almost 24 years too late to bring a murder prosecution under §565.001 RSMo. 1977.

Prosecuting Attorney for Dent County Missouri, on April 29, 2008, filed a Felony Information in the Dent County Circuit Court, which stated certain factual allegations and purportedly charged Appellant with the crime of Capital Murder in violation of Section 565.001 RSMo. (1977), to-wit:

> The Prosecuting Attorney of the County of Dent, State of Missouri, charges that the defendant, in violation of Section 565.001, RSMo. (1977), Charge Code 1001000, committed the Class A felony of Capital Murder, in that the defendant willfully, knowingly, and with premeditation, deliberately and unlawfully killed Judy Spencer by strangling her and or by shooting her on or about 10 March 1982, in the County of Dent, State of Missouri, thereby causing her to die on or about 10 March 1982 in the County of Dent, State of Missouri.

(LF 687)

---

after Appellant proved Ms. Spencer had died at 9:10 a.m. on March 11, 1982, and not on March 10.

In 1983, the Missouri General Assembly passed House Committee Substitute for Senate Committee Substitute for Senate Bill no. 276 (L. 1983, p. 924, S.B. No. 276, Section 1) (hereinafter referred to as "Senate Bill 276"). Senate Bill 276 did two things: (1) It repealed a number of criminal statutes, including § 565.001 RSMo. 1977, under which Appellant was tried and convicted; and, (2) It also enacted a new Chapter 565 of the Missouri Revised Statutes, defining Missouri's crimes against persons. In 1984 the General Assembly changed the effective date of said Senate Bill 276 from July 1, 1984 to Oct. 1, 1984. (L. 1984, S.B. No. 448, Section A). The crime of Capital Murder, which had been set out in § 565.001 RSMo. 1977 was abolished. In its place, the newly enacted § 565.001 established the procedures to be employed under the new Chapter 565. Also enacted in 1983 by Senate Bill 276 was § 565.020, defining the crime of First Degree Murder.

That new Chapter 565 begins with section 565.001 RSMo. (L. 1983), which states in applicable part:

> **565.001. Procedures for chapter 565**
>
> 1.The provisions of this chapter shall govern the construction and procedures for charging, trial, punishment and appellate review of any offense defined in this chapter and committed after July 1, 1984.
>
> 2. The provisions of this chapter shall not govern the construction or procedures for charging, trial, punishment or appellate review of any offense committed before the effective date of this chapter. Such an offense must be construed, punished, charged, tried and reviewed on appeal

according to applicable provisions of law existing prior to the effective date of this chapter in the same manner **as if this chapter had not been enacted, the provisions of section 1.160, RSMo, notwithstanding**.

3. All provisions of "The Criminal Code" or other law consistent with the provisions of this chapter shall apply to this chapter. In the event of a conflict, the provisions of this chapter shall govern the interpretation of the provisions of this chapter.

****

Section 565.001 RSMo. (L. 1983) (emphasis added).

The final clause of Section 565.001.2 (L. 1983), "the provisions of section 1.160, RSMo, notwithstanding," plainly and specifically makes inapplicable to all pre-October 1, 1984 murders the provisions of §1.160 RSMo. That section, referred to as the "saving statute" states:

1.160. Effect of repeal of penal statute.

No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision is **repealed** or amended, shall be affected by the **repeal** or amendment, but the trial and punishment of all such offenses, and the recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been **repealed** or amended, except that all such proceedings shall be conducted according to existing procedural laws.

Mo. Rev. Stat. section 1.160. (Emphasis added.)

Thus, in pertinent part, § 1.160, Missouri's criminal "saving statute" provides that "No offense committed . . . previous to . . . the time when any statutory provision is repealed . . . shall be affected by the repeal." Under that section, any crime committed prior to the repeal of a penal law is unaffected by the repeal. *State v. Gillespie*, 944 S.W.2d 268 (Mo.App. E.D. 1997). Conversely, where there is no saving statute, the repealing statute operates to relieve a defendant being prosecuted under a repealed law for an offense committed before the enactment of the repealing statute. *City of St. Louis v. Wortman*, 112 S.W. 520 (Mo. 1908).

Appellant filed Defendant's Motion to Quash the Information, to Dismiss and to Discharge Defendant From Custody (LF 569-573) on grounds, *inter alia*, that § 565.001 RSMo. 1977, under which he was charged, had been repealed, such that the Information thus failed to charge him with any crime. Respondent's State's Response to Defendant's Motion to Quash (LF 793-95) argued that "Section 1.160, RSMo, expressly states that a repealed penal statute is still in effect and the person will be subjected to prosecution for that law as it existed. The only exception is that the person gets the benefit of any change in the actual penalty if it is reduced or lessened. Section 1.160 was in effect during all applicable times." (LF 793, ¶3) The trial court denied Appellant's Motion to Quash Dismiss and Discharge.

Respondent's position in this regard fails, however, because § 565.001.2 by its explicit terms, "the provisions of section 1.160, RSMo, notwithstanding" overrides and makes inapplicable that saving statute. Accordingly, § 565.001 (RSMo. 1977), the statute

of Appellant's conviction, was no longer in existence when he was charged, tried and convicted. *Wortman, supra.*

Moreover, all common law crimes have been abolished in Missouri long ago. In that regard, § 556.026 RSMo. specifically provides: **"**No conduct constitutes an offense unless made so by this code or by other applicable statute."

The Information fails to charge any crime.

CONCLUSION

Accordingly, this Court should enter its Order setting aside Appellant's conviction, discharging him from custody, and remanding to the trial court with directions to dismiss the Information herein.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL, AND THE SAME WAS ERROR, BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION IN THAT THERE WAS NO EVIDENCE, EITHER DIRECT OR CIRCUMSTANTIAL, INDICATING EVEN INFERENTIALLY THAT APPELLANT CAUSED THE DEATH OF JUDY SPENCER, BECAUSE THE STATE'S CASE RESTS ON CIRCUMSTANTIAL EVIDENCE, BECAUSE THAT EVIDENCE IS NOT INCONSISTENT WITH REASONABLE THEORIES OF APPELLANT'S INNOCENCE AND IS NOT IRRECONCILABLE WITH THE INNOCENCE OF THE APPELLANT, AS THE LAW REQUIRED IN MARCH 1982, BECAUSE THIS COURT MUST APPLY THE STANDARD THAT EXISTED IN MARCH 1982 IN ORDER TO AVOID AN EX POST FACTO – TYPE VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND MO. CONST. ART. I, § 10, AND BECAUSE A CONVICTION RESTING UPON INSUFFICIENT EVIDENCE CONSTITUTES A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND MO. CONST. ART. I, § 10.

Standard of Review

The standard of review, as to a claim of insufficiency of the evidence to convict, is set forth in *State v. Johnson,* 62 S.W.3d 61, 69-70 (Mo.App.2001)(*quoting State v. O'Brien,* 857 S.W.2d 212, 215-16 (Mo. banc 1993): "A challenge to the sufficiency of the evidence to support a finding of guilt is based in the Due Process Clause of the Fourteenth Amendment to the United States Constitution. No person may be deprived of liberty, 'except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt.'" Missouri's Constitution also protects due process rights, in article I, section 10. Mo. Const. art. I, § 10. *Id.* Properly preserved constitutional violations are presumed prejudicial. The trial court's judgment can only be upheld if the error was "harmless beyond a reasonable doubt." *State v. Wolfe,* 13 S.W.3d 248, 263 (Mo. banc 2000); *Chapman v. California,* 386 U.S. 18, 24 (1967). Under *Chapman*, a constitutional error is harmless only if there could be no reasonable doubt that the error's admission failed to contribute to the conviction. *Reed v. Thalacker*, 198 F.3d 1058, 1062 (8th Cir.1999).

In addition, because this is a 1982 circumstantial evidence case, the standard of review applicable to this case, that is to say the standard of review in a circumstantial evidence case is governed by the circumstantial evidence rule that existed on March 11, 1982 as was carefully articulated by this Court in *State v. Grim*, 854 S.W.2d 403 (Mo. banc 1993). *Grim* abrogated the circumstantial evidence rule after first defining its parameters thusly:

The standard for appellate review of the sufficiency of the evidence to support a criminal conviction was stated by this Court in *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989):

> On review, the Court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence and disregards all evidence and inferences to the contrary. [Citation omitted.] In reviewing a challenge to the sufficiency of the evidence, appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt.

Under this standard, the Court must review the evidence adduced at trial and examine the inferences reasonably supported by that evidence to determine whether the jury's verdict is proper. The *Dulany* standard echoes the due process standard announced by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). Missouri might choose to require **more** evidence to support convictions on appellate review, but due process mandates that all convictions be supported at least to this extent. For the most part, we have not required anything **more** than the constitutionally required minimum and employ the *Dulany* standard. One **exception**, however, has been in cases based upon circumstantial evidence. ****

The circumstantial evidence rule originated as a **higher** standard to which circumstantial evidence cases were held. Because of a basic distrust of criminal convictions based upon circumstantial evidence and nothing more, we required the prosecution in such cases to meet a **different burden**. The distrust took form in the rule, which was used both as a standard of appellate review and as a jury instruction. In its appellate form the rule was stated: "Where the conviction rests on circumstantial evidence, the facts and circumstances to establish guilt must be consistent with each other, consistent with the guilt of the defendant, and inconsistent with any reasonable theory of his innocence." *State v. Pritchett*, 39 S.W.2d 794, 796-97 (1931). Although this statement of the rule is quite similar to our modern rule, the older cases reveal the distrust of circumstantial evidence and the resulting higher standard.

> Where a chain of circumstances leads up to and establishes a state of fact inconsistent with any theory other than the guilt of the accused, such evidence is entitled to as much weight as any other kind of evidence; *but the chain, as it were, must be unbroken, and the facts and circumstances disclosed and relied upon must be irreconcilable with the innocence of the accused in order to justify his conviction.*

Pritchett, 39 S.W.2d at 797 (quoting *State v. Morney*, 196 Mo. 43, 50, 93 S.W. 1117, 1119 (1906)) (emphasis added in *Pritchett*).

Grim, 854 S.W.2d at 405-407 (bold-face emphasis added).

THE EX POST FACTO DUE PROCESS MANDATE

> "No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts ... ."

U.S. CONST. art. I, § 10

The Framers deemed Article I, § 10 necessary to prevent state legislation "contrary to the first principles of the social compact and to every principle of sound legislation," *The Federalist No. 44*, p. 282 (C. Rossiter ed. 1961) (J. Madison). The Framers included provisions they considered to be "perhaps greater securities to liberty and republicanism than any [the Constitution] contains." *No. 84*, at 511 (A.Hamilton)[5] Its provisions are among the most fundamental guarantees the Constitution was to provide.

In *Calder v. Bull*, 3 U.S. 386 (1798), shortly after the United States Constitution was adopted, the Supreme Court squarely established the parameters of its Article I, Section 10 prohibition of ex post facto laws. Reaching into the common law of England, which developed in response to the Parliament's enactment of just such laws, Justice Chase wrote for the majority:

> I will state what laws I consider ex post facto laws, within the words and

[5] Article I, § 9, cl. 3, applicable to Congress says: "No Bill of Attainder or ex post facto Law shall be passed."

> the intent of the prohibition. 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. **4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.** All these, and similar laws, are manifestly unjust and oppressive.

Id. at 390-91 (bold-faced emphasis added). More than two centuries later, the Court reaffirmed that *Calder* remains the law of the land. *Carmell v. Texas*, 529 U.S. 513 (2000).

In *Carmell v. Texas*, the Court reemphasized that those four *Calder* categories of ex post facto laws lie at the very heart of the Framers' original intent. The Court stated:

> The fourth [*Calder* ex post facto] category, so understood, resonates harmoniously with one of the principal interests that the *Ex Post Facto* Clause was designed to serve, fundamental justice. Justice Chase viewed all *ex post facto* laws as "manifestly *unjust and oppressive.*" *Calder*, 3 Dall., at 391. Likewise, Blackstone condemned them as "cruel and unjust," 1 Commentaries on the Laws of England 46 (1765), as did every state

constitution with a similar clause, see n. 25, *infra*. As Justice Washington explained in characterizing "[t]he injustice and tyranny" of *ex post facto* laws:

> "**Why did the authors of the constitution turn their attention to this subject**, which, at the first blush, would appear to be peculiarly fit to be left to the discretion of those who have the police and good government of the State under their management and control? The only answer to be given is, **because laws of this character are oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man."** *Ogden v. Saunders*, 12 Wheat. 213, 266, 6 L.Ed. 606 (1827).

In short, the *Ex Post Facto* Clause was designed as "an *additional* bulwark in favour of the personal security of the subject," *Calder*, 3 Dall., at 390 (Chase, J.), to protect against "**the favorite and most formidable instruments of tyranny**," The Federalist No. 84, p. 512 (C. Rossiter ed. 1961) (A.Hamilton), that were "often used to effect the most detestable purposes," *Calder*, 3 Dall., at 396 (Paterson, J.).

Calder's fourth category addresses this concern precisely. A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof (see

> *infra,* at 1636-1639). In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end. All of these legislative changes, in a sense, are mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.

Carmell, 529 U.S. at 531-33(*emphasis added; footnotes omitted*). There can be no doubt of the primacy of the *ex post facto* clause in protecting American citizens against oppressive government.

The State might argue that Missouri Supreme Court's 1993 decision in *State v. Grim*, *supra*, suddenly eliminating the circumstantial evidence rule after applying and upholding it for more than 150 years, is not a legislative enactment but a judicial construction and is therefore a method by which the state can circumvent and avoid the Constitution's Article I, § 10 prohibition of ex post facto laws. But the United States

Supreme Court has repeatedly made manifest that a state cannot do by judicial action that which the state is prohibited to do by legislative action. Accordingly, the Constitution's ban on *ex post facto* laws is so fundamental that the Due Process Clause[6] must be read to apply that ban to judicial action as well. The Framers could not have intended that such core foundational rights could be nominally protected from legislative action but nonetheless unprotected from judicial action having the same oppressive, unjust, and tyrannical effect, because such effect is condemned by the universal sentence of civilized man. This was addressed squarely by the Supreme Court in *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964):

> Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, s 10, of the Constitution forbids. **** If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. **** The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d

[6] Section 1 of the Fourteenth Amendment of the United States Constitution states in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law…."

> ed. 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. *Id*., at 61.

Bouie, supra at 353-54.[7]

The State might argue that this Court's abrogation of the circumstantial evidence rule in *Grim* somehow does not constitute an *ex post facto* law of the fourth *Calder* type. But this Court has been most emphatic on the point. In *Grim* itself, as the bold-faced language of *Grim* set out above reveals, this Court specifically denounced the circumstantial evidence rule as requiring **more** evidence to support convictions, as imposing a **higher** standard to which circumstantial evidence cases were held, and of requiring the prosecution in such cases to meet a **different burden** than in direct

[7] One could also argue that the Legislature recognized the *ex post facto*-type problems that could obtain by virtue of its re-write of Chapter 565, and that this recognition is evidenced by their inclusion of § 565.001.2, which states in pertinent part: "The provisions of this chapter shall not govern the construction or procedures for charging, trial, punishment or appellate review of any offense committed before the effective date of this chapter. Such an offense must be construed, punished, charged, tried and reviewed on appeal according to applicable provisions of law existing prior to the effective date of this chapter…."

evidence cases. Indeed, in *State v. Chaney*, 967 S.W.2d 47 (Mo. banc 1998) this Court affirmed a first degree murder conviction that rested upon circumstantial evidence, while noting that had *Grim* not jettisoned the circumstantial evidence rule, reversal would have been "required." 967 S.W.2d at 54. Likewise, in *State v. Freeman*, 269 S.W.3d 422 (Mo. banc 2008) this Court reversed the Southern District Court of Appeals in a circumstantial evidence murder case. The Southern District found the evidence to be insufficient to sustain a conviction, but this Court disagreed. Reminding that "the circumstantial evidence rule . . . puts an affirmative duty on the prosecution to disprove every reasonable hypothesis except that of guilt," the Court explained that it was not substituting its judgment of the sufficiency of the evidence for that of the Southern District, but rather that the lower appellate court had implicitly applied the incorrect standard of review, the "equally valid inferences rule," which had been swept away by *Grim* as a mere subset of the circumstantial evidence rule. *Freeman, supra* n.4. Had the Southern District applied the correct standard of review, enunciated in *Grim*, it would have reached the same conclusion as this Court, and would have found the evidence sufficient to sustain a conviction.[8] In this regard, *see also* the thoughtful concurrence in *Freeman* about the efficient allocation of appellate judicial resources properly served by the majority opinion in *Freeman*. *Id.* at 428-32.

[8] In this regard, *see also* the concurrence in *Freeman* concerning the efficient allocation of appellate judicial resources properly served by the unaninmous opinion in *Freeman*. *Id.* at 428-32.

The State might argue that *Grim* was not a surprise, not "unforeseeable," and therefore not within the ambit of *Bouie* and *CarmeLl*, but such a contention would be specious, given that the circumstantial evidence rule had been reaffirmed by the appellate courts as late as 1991. *See e.g.*, *State v. Luna*, 800 S.W.2d 16 (Mo.App. W.D. 1990) (application for transfer denied, 1991), reaffirming a rule of criminal evidence law at least a century old. Further, this Court has held:

> The *corpus delicti* must be established in every criminal prosecution before a conviction can be sustained. While it may be established by circumstantial evidence, the courts, and particularly the trial courts, should see to it that the evidence is cogent and convincing, and excluding all other reasonable hypothesis. Mere suspicion will not supply the place of the evidence when life or liberty is at stake.

State v. Jones, 17 S.W. 366, 369 (Mo. 1891).

Applying the bedrock constitutional principles *Calder*, *Bouie* and *Carmell* conjunctively, it is inescapable that an unforeseeable judicial alteration of the legal rules of evidence to permit conviction on less, or different, evidence, applied retroactively, operates precisely like an ex post facto law, such as Art. I, section 10 of the Constitution forbids. An ex post facto law has been defined by the United States Supreme Court as one "that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*." *Calder v. Bull* 3 U.S. 386 (1798)(emphasis in original). If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State

Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. If a judicial alteration of a rule of evidence to permit conviction on less or different evidence is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect.

It is therefore unavoidable that the pre-*Grim* circumstantial evidence rule, the pre-*Grim* standard of review, must apply to this appeal. As such, Appellant's Motions for Judgment of Acquittal (LF 684-686) and Motion for New Trial (LF 799-812) should have been sustained.

Argument

The evidence adduced at trial was insufficient to sustain a conviction of the charged offense. Defendant was tried under an Information and, over objection, under an Amended Information, purportedly charging the offense of Capital Murder under Section 565.010 RSMo. 1977. That statute includes as an element that the Appellant caused the death of Judy Spencer. There was no direct evidence that Donald Nash caused the death of Judy Spencer. There was no circumstantial evidence that Donald Nash caused the death of Judy Spencer. The only evidence that even circumstantially connected Mr. Nash physically to Judy Spencer at or near the time of her death was that his DNA was found under Ms. Spencer's fingernails on one hand. The State would argue that Appellant's statement, "that's the last time you'll lie to me" and the fact that Appellant once slapped Judy when she had become drunk and hysterical, constituted circumstantial evidence of his guilt but these are not "irreconcilable with the innocence of [Appellant]."

It is interesting to note that in *State v. Freeman, supra*, the circumstantial evidence of guilt was far more compelling than is the State's evidence in this case. There, the Southern District found the evidence insufficient to sustain a conviction, and this Court found that under the pre-*Grim* rule the Southern District would have been correct. 269 S.W.3d at 424, n. 4. Applying the constitutionally-mandated pre-*Grim* circumstantial evidence rule standard of review here, Appellant must be acquitted. His conviction must be reversed outright for insufficiency of the evidence.

> The uncontroverted evidence was that there exist multiple innocent reasons why Mr. Nash's DNA would be found under Ms. Spencer's fingernails. The evidence against Mr. Nash was wholly circumstantial, and could not support a determination by a rational, reasonable fact-trier, under <u>any</u> standard of review, that Mr. Nash caused the death of Judy Spencer. The evidence was insufficient to do more than cast a bare suspicion on Mr. Nash, or to raise a conjectural inference as to his commission of the crime. Neither comes close to proof beyond a reasonable doubt. The evidence was insufficient to overcome reasonable hypotheses of innocence. The evidence is not irreconcilable with Appellant's innocence. Appellant's conviction under this evidence has denied to him his Due Process rights under the Fourteenth Amendment to the United States Constitution, and MO. CONST. art. I, § 10

CONCLUSION

A criminal conviction may not be maintained in this 1982 case which is based wholly upon circumstantial evidence, unless both: (a) the circumstantial evidence is consistent with the Appellant's guilt; and (b) the circumstantial evidence is inconsistent with any reasonable theory of his innocence. The evidence in this case was not

inconsistent with reasonable theories of Appellant's innocence. The evidence is therefore, as a matter of law, insufficient to sustain a conviction of homicide in any degree, because it fails to directly connect Appellant to the *corpus delicti*, in that it fails to show beyond a reasonable doubt his agency in Judy Spencer's death.

This Court should therefore reverse Appellant's conviction and discharge him from custody or in the alternative remand to the trial court with a directive to order the entry of a judgment of acquittal.

POINT III

THE TRIAL COURT ERRED IN DENYING APPEALLANT'S PROFFERED MAI-CR2D 3.42 CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION, AND THE SAME WAS ERROR: (1) BECAUSE IN SUBMITTING THE CASE TO THE JURY WITHOUT MAI-CR2D 3.42, THE TRIAL COURT EX POST FACTO ALTERED THE LEGAL RULES OF EVIDENCE TO PERMIT APPELLANT TO BE CONVICTED ON LESS, OR DIFFERENT, EVIDENCE THAN THE LAW REQUIRED AT THE TIME OF THE CHARGED OFFENCE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION; AND (2) BECAUSE MO. REV. STAT. SECTION 565.001.2 (2009) REQUIRED THIS CASE BE "CONSTRUED, PUNISHED, CHARGED, TRIED AND REVIEWED ON APPEAL ACCORDING TO" PROVISIONS OF LAW IN EFFECT AT THE TIME OF THE CHARGED CRIME, MAI-CR2D 3.42 WAS IN EFFECT AT THE TIME OF THE CHARGED CRIME, AT THE TIME OF THE CHARGED CRIME MAI-CR2D 3.42 WAS

MANDATORY IF REQUESTED BY A DEFENDANT IN A CIRCUMSTANTIAL EVIDENCE CASE, THIS IS A STRICTLY CIRCUMSTANTIAL EVIDENCE CASE, AND APPELLANT TIMELY REQUESTED THE INSTRUCTION BE GIVEN.

Standard of Review

This Court in *State v. Justus*, 205 S.W.3d 872, 881 (Mo. banc 2006) has recently reminded that properly preserved constitutional violations are presumed prejudicial. The trial court's judgment can only be upheld if the court's error was "harmless beyond a reasonable doubt." *State v. Wolfe*, 13 S.W.3d 248, 263 (Mo. banc 2000); *Chapman v. California*, 386 U.S. 18, 24 (1967). Under *Chapman* a constitutional error is harmless only if there could be no reasonable doubt that the error's admission failed to contribute to the jury's verdict. *Id.; see also Reed v. Thalacker*, 198 F.3d 1058, 1062 (8th Cir.1999).

Argument

Just as in the preceding Point, there exists in this error a constitutional Due Process Clause dimension, because the effect of the trial court's refusal to give Appellant's proffered circumstantial evidence instruction was to allow the jury to convict Appellant on less evidence or different evidence than the law required in March 1982. As shown in the preceding Point, the argument of which is for the sake of brevity incorporated herein by reference, such judicial action is in the nature of an *ex post facto* violation. *Calder v. Bull*, 3 U.S. 386 (1798); *Carmell v. Texas*, 529 U.S. 513 (2000).

Similarly, because the principles underlying the *ex post facto* clause[9] are so fundamental to our system of justice they are by implication read into and incorporated in the Due Process Clause of the Fourteenth Amendment. *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964). "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.*

The trial court erred in refusing to submit the circumstantial evidence instruction, MAI-CR2d 3.42, requested by Appellant. There can be no doubt that the State's case was wholly circumstantial. A trial court must instruct on circumstantial evidence if the defendant so requests and the evidence is wholly circumstantial. *State v. Bannister*, 680 S.W.2d 141, 148 (Mo. banc 1984), *cert. denied*, 471 U.S. 1009 (1985). This issue was addressed by this Court shortly before Judy Spencer's death in *State v. Lasley*, 583 S.W.2d 511 (Mo. banc 1979):

> We first consider the appellant's argument that the trial court erred in not giving MAI-Cr 3.42, the "circumstantial evidence" instruction, which reads as follows:
>
> > Circumstantial evidence is the proof of facts or circumstances that give rise to a reasonable inference of other facts that tend to show the guilt or innocence

[9] "No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts ... ." U.S. Const., Art. I, § 10.

> of the defendant. Circumstantial evidence should be considered by you together with all the other evidence in the case in arriving at your verdict.
>
> You should not find the defendant guilty unless the facts and circumstances proved are consistent with each other and the guilt of the defendant, and inconsistent with any reasonable theory of his innocence.

The second paragraph of the instruction is variously referred to as a "reasonable hypothesis" or "multiple hypothesis" or "negative-exclusion" instruction.

The notes on the use of MAI-Cr 3.42 state that the trial judge is required to give the instruction if the evidence in a case is wholly circumstantial and the defendant properly requests the instruction under Rule 20.02. See State v. Hoskins, 515 S.W.2d 502, 503 (Mo.1974); State v. Regazzi, 379 S.W.2d 575, 579 (Mo.1974) (per curiam).

Id. at 513-514.

The instruction at issue in *Lasley* is, of course, precisely the instruction Appellant sought at trial and which the trial court refused. Its submission to the jury was mandatory. Under the logic of *State v. Bannister, supra*, it was *per se* error to refuse it. Because the error infringed Appellant's Fourteenth Amendment Due Process Clause rights, it is presumptively prejudicial. As such the trial court's judgment can be upheld

only if the error was "harmless beyond a reasonable doubt." That is to say, the constitutional error is harmless only if there could be no reasonable doubt that the error's admission failed to contribute to the jury's verdict. *State v. Justus*, 205 S.W.3d 872, 881 (Mo. banc 2006); *State v. Wolfe*, 13 S.W.3d 248, 263 (Mo. banc 2000); *Chapman v. California*, 386 U.S. 18, 24 (1967); *Reed v. Thalacker*, 198 F.3d 1058, 1062 (8th Cir.1999).

In addition to the foregoing case law-based constitutional errors, the trial court erred in failing to follow the dictates of Mo. Rev. Stat. § 565.001.2 (2009) which plainly required the trial court to employ all of the laws that existed in 1982, not current law. Section 565.001.2 states in pertinent part: "The provisions of this chapter shall not govern the construction or procedures for charging, trial, punishment or appellate review of any offense committed before the effective date of this chapter. Such an offense must be construed, punished, charged, tried and reviewed on appeal according to applicable provisions of law existing prior to the effective date of this chapter…."

As discussed in the preceding Point, given this Court's analysis and explanation of the true nature of the circumstantial evidence rule in *State v. Chaney*, *supra* and *State v. Freeman*, *supra*, and given this Court's demonstration in those two cases of the polar opposite results that obtain from applying or not applying the circumstantial evidence rule to a given quantum of circumstantial evidence, there can be no doubt that the trial court's refusal to submit Appellant's proffered MAI-CR2 3.42 circumstantial evidence instruction in fact tipped the jury improperly toward conviction. It is thus impossible to

conclude that the error was "harmless beyond a reasonable doubt." As such, reversal is mandated.

CONCLUSION

For all the above stated reasons, this Court should reverse Appellant's conviction, and if Appellant is not discharged as a result of the Court's rulings on Appellant's other Points Relied On, this Court should order the trial court's judgment be set vacated and aside, and a new trial ordered with the trial court instructed to submit to the jury the circumstantial evidence instruction MAI-CR2d 3.42.

POINT IV

THE TRIAL COURT ERRED IN SUSTAINING OVER APPELLANT'S OBJECTIONS "STATE'S MOTION IN LIMINE I – CONCERNING THE POSSIBLE DEFENSE THAT SOMEONE ELSE COMMITTED THIS CRIME" AND THEREBY PROHIBITING APPELLANT FROM INTRODUCING EVIDENCE THAT A CERTAIN LAMBERT ANTHONY FELDMAN WAS THE ACTUAL MURDERER OF JUDY SPENCER AND THE SAME WAS ERROR:

BECAUSE MISSOURI'S "DIRECT CONNECTION RULE," WHICH PROHIBITS CRIMINAL DEFENDANTS FROM INTRODUCING EVIDENCE OF ANOTHER PERSON'S GUILT, SO-CALLED "THIRD PARTY GUILT" EVIDENCE, UNLESS DEFENDANT'S SAID EVIDENCE RISES TO THE LEVEL OF "SUCH PROOF AS DIRECTLY CONNECTS THE [THIRD PARTY] WITH THE CORPUS DELICTI, AND TENDS CLEARLY TO POINT OUT THAT THIRD PERSON AS THE GUILTY PERSON" IS AN UNCONSTITUTIONAL EVIDENTIARY RULE THAT INFRINGES ON FUNDAMENTAL RIGHTS OF CRIMINAL DEFENDANTS, INCLUDING APPELLANT, WIHTOUT A COMPELLING STATE INTEREST FOR THE INFRINGEMENT AND WITHOUT BEING DRAWN SUFFICIENTLY NARROWLY TO SERVE A COMPELLING STATE INTEREST WITHOUT UNNECESSARILY INFRINGING FUNDAMENTAL RIGHTS OF CRIMINAL DEFNEDANTS, INCLUDING APPELLANT; BECAUSE APPELLANT'S OFFER OF PROOF DEMONSTRATED THAT APPELLANT'S PROHIBITED

EVIDENCE PRESENTED STRONGER, MORE DIRECT AND MORE CONVINCING CIRCUMSTANTIAL PROOF OF MR. FELDMAN'S GUILT THAN THE STATE'S CIRCUMSTANTIAL PROOF PROVIDED AGAINST APPELLANT; BECAUSE MISSOURI'S "DIRECT CONNECTION RULE" REQUIRES A GREATER QUANTUM OF PROOF TO OBTAIN MERE ADMISSION OF DEFENSE EVIDENCE OF THIRD PARTY GUILT THAN THE QUANTUM OF PROOF NECESSARY TO OBTAIN A MURDER CONVICTION BEYOND A REASONABLE DOUBT; AND BECAUSE MISSOURI'S DIRECT CONNECTION RULE, AND THE TRIAL COURT'S EXCLUSION OF APPELLANT'S THIRD PARTY GUILT EVIDENCE, IS FOR THE ABOVE REASONS VIOLATIVE OF THE COMPULSORY PROCESS CLAUSE OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS APPLIED TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AS WELL AS THE PARALLEL PROVISIONS OF ARTICLE I, SECTION 18(a) OF THE MISSOURI CONSTITUTION.

Standard of Review

Strict Scrutiny

Because the right to compulsory process, also referred to in *Washington v. Texas*, 388 U.S. 14, 19 (1967), as "the right to present a defense," is a fundamental constitutional right, any state evidentiary rule that infringes on that right will be subjected to strict scrutiny, to determine whether the rule is justified by a compelling state interest and whether the rule must be sufficiently narrowly tailored to fulfill that interest without

unduly impinging upon that right. See, for example, *Bernat v. State*, 194 S.W.3d 863, 867-68 (Mo. banc 2006) and *State v. Brink*, 218 S.w.3d 440, 445 (Mo.App. W.D. 2006), both equal protection cases.

Missouri's "direct connection rule," is a rule of evidence which prevents criminal defendants from adducing evidence of a third party's guilt of the crime charged. Under the direct connection rule, evidence 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. *State v. Miller*, 368 S.W.2d 353, 359-360 (Mo. 1963). "The evidence, to be admissible, must be such proof as directly connects the other person with the corpus delicti, and tends clearly to point out someone besides accused as the guilty person. 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." *State v. Umfrees*, 433 S.W.2d 284, 287-88 (Mo. banc 1968). The direct connection rule is subject to strict scrutiny review.

Argument

Introduction:

The Right To Present A Defense is A Fundamental Right Under Both the United States Constitution and the Constitution of Missouri

> In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor.

U.S. CONST. amend. VI.

> (N)or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

U.S. CONST. amend. XIV.

> [I]n criminal prosecutions, the accused shall have the right to appear and defend . . . to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf ....

MO. CONST. art. I, § 18(a).

In criminal prosecutions, there is a difference between those rights sought to be enforced in the pretrial stage and those rights which make a trial fair. The immediate benefit of the former almost always runs to those who are in fact guilty. By contrast, the innocent, the wrongfully accused, will only be vindicated, if ever, at trial.

The two great rights of the accused at trial are the right to challenge the evidence brought forward by the state and the right to affirmatively make a defense. This latter right, really the right to "compulsory process," but better understood when called the "right to present a defense," *Washington v. Texas*, 388 U.S. 14 (1967), is the right most directly concerned with ensuring that innocent persons are not convicted. This right to compulsory process, the "right to present a defense" in the words of the United States Supreme Court, derives from the Sixth Amendment of the U.S. Constitution and Article

1, Sec. 18(a) of the Missouri Constitution. Since the language of that section embodies the same right to compulsory process as the Sixth Amendment as interpreted by the U.S. Supreme Court in *Washington v. Texas, supra,* the same test for a violation of that right is applicable under both constitutions. *State v. Brown*, 549 S.W.2d 336, 341-42 (Mo. banc 1977); *Alexander v. State*, 864 S.W.2d 354, 359 (Mo.App. W.D. 1993).

The decisions of the United States Supreme Court and the Missouri Supreme Court construing the compulsory process clauses of the United States Constitution and the Constitution of Missouri are among the most important in the development of the rights of the accused. Taken as a whole, they constitutionalize the "Right to Present a Defense" which encompasses the discovery of relevant information, and the acquisition and presentation of defense evidence, notwithstanding rules of evidence, privileges and statutory limitations. This Sixth Amendment right to present a defense is "a fundamental element of due process of law." *Washington*, 388 U.S. at 19. "(A) provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment." *Gideon v Wainwright,* 372 U.S. 335, 342 (1963). Few rights are more fundamental than that of an accused to present witnesses in his own defense. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The right to present a defense is therefore "obligatory upon the States."

As such, the direct connection rule cannot survive absent a compelling state interest in served by the rule, and showing that the rule is sufficiently narrowly drawn to serve that interest without undue infringement upon criminal defendants' fundamental right to present a defense.

The sole physical evidence linking Mr. Nash to Judy Spencer is the presence of his DNA under her fingernails on one hand. Mr. Nash and Ms. Spencer lived together. The uncontroverted evidence was that cohabiters would normally and naturally have one another's DNA under their fingernails. The evidence was also that the presence of a tiny amount of Defendant's DNA under the fingernail[s] of the victim could have resulted from innocent, consensual contact between the two, and could have resulted from innocent secondary or tertiary transfer. Accordingly, the presence of Mr. Nash's DNA under one of Ms. Spencer's fingernails does not tend to indicate Mr. Nash is complicit in her death. The presence of Mr. Nash's DNA admits of multiple innocent explanations.

Most compellingly, the timing of the events of March 11, 1982 render it impossible for Mr. Nash to have murdered Ms. Spencer. He is unquestionably on the phone in his house in Salem, 20 minutes away from Ms. Spencer's resting place at 5:45 a.m. He is uncontrovertedly at work at 8:30 a.m. and on the phone with Ms. Spencer's mother, a mere forty minutes before Ms. Spencer's death at 9:10 a.m. He is again on the phone with Janet Jones from work at 10 a.m., a mere 50 minutes after Ms. Spencer's death. Judy Spencer's killer did not just kill her. He killed her by strangulation. Then he shot her. Then he dragged her into the outhouse foundation. Then he strew her clothing about the area. Then he made his escape. It could not happen.

The evidence of Mr. Feldman's guilt and connection to the murder is much stronger. There is no innocent explanation for the presence of Mr. Feldman's fingerprints on Ms. Spencer's abandoned car. Mr. Feldman lied to the police, falsely denying that he had ever met Judy Spencer and falsely denying that he had ever been to Salem, Missouri

or to Dent County. Three people saw Mr. Feldman with Judy Spencer at the Tower Inn in Salem just days before she was killed. His lies are evidence of his guilt.

Ms. Spencer's abandoned car was a part of the extended crime scene. The presence of Mr. Feldman's fingerprints at the extended crime scene could not be innocently explained, and had to have been placed there by Mr. Feldman sometime after 10:00 p.m. on March 10, 1982 and before 7:30 a.m. on March 11, 1982. Ms. Spencer died at or shortly after 9:10 a.m. on March 11, 1982.

The placement of Mr. Feldman's fingerprints on the car very close in time to Ms. Spencer's death, geographically proximate to the place of her death, the absence of prints Mr. Nash and Ms. Spencer on Ms. Spencer's car, the lies Mr. Feldman told to police about not knowing the victim and having never been to Salem, the fact that Feldman had a relationship with Ms. Spencer which he falsely denied, the fact that Mr. Feldman was present in Salem, Missouri close to the date of Ms. Spencer's death, which presence Mr. Feldman falsely denied, and the absence of any innocent explanation for the physical evidence directly connecting Mr. Feldman with the crime scene, is the proof required that Mr. Feldman committed some act directly connecting him with the crime. Mr. Feldman is the person who was following Judy, frightening her to the point that she needed a police escort to get to her car in the hospital parking lot so that she could safely go home to Mr. Nash. Ms. Spencer was shot with a 12-gauge shotgun. Mr. Feldman shot himself to death in October 2008 with a 12-gauge shotgun. While the circumstantial evidence connecting Appellant to Ms. Spencer near the time of her death is consistent with Mr.

Nash's innocence, the evidence connecting Mr. Feldman to the crime scene and to Ms. Spencer near the time of her death does not have an innocent explanation.

Thus it is obvious that the State's evidence did not rise to the level of "such proof as directly connects Appellant with the corpus delicti, and tends clearly to point out [Appellant] as the guilty person," in the language of the direct connection rule, yet the trial court made Appellant put on a defense, albeit a partial and severely constrained one. Yet the trial court allowed the jury to take the case, and the trial court refused to set aside their verdict.

Missouri's direct connection rule is a rule of law that sets a lower bar for guilt beyond a reasonable doubt in a wholly circumstantial case of murder against one of its citizens, a lower bar for the citizen's murder *conviction*, than it sets for the mere *admission* of circumstantial evidence of another's guilt in that same citizen's defense. In so doing, it deprives the citizen of his rights to compulsory process and due process of law.

And the State consciously, egregiously and unjustly exploited the anomalous situation it had created. At the State's instance, Appellant was barred from introducing third party guilt evidence, yet the State argued the absence of third party guilt evidence at length in both its original closing and in rebuttal. Virtually the last words the State spoke to the jury were to emphasize the absence of the very evidence the State had asked the court to keep from them, in which request the court wrongly acquiesced. Thus the prosecutor having successfully excluded Doc Nash's evidence of third party guilt argued that the failure to introduce such evidence showed that he was the guilty party.

In many regards this case is like *Holmes v. South Carolina*, 547 U.S. 319 (2006). There the Supreme Court, Justice Alito writing for the majority, reversed a murder conviction, holding that the exclusion of defense evidence of third party guilt denied to the defendant a fair trial under the Compulsory Process and Due Process Clauses. There as here, the State's case was almost wholly forensic. There as here, the excluded evidence of third party guilt was stronger than the evidence of the Appellant's guilt. There as here, the State procured the exclusion of third party guilt evidence. There as here, the trial court granted the exclusion of third party guilt evidence on the basis of a state evidentiary rule that served no useful purpose and was disproportionate to any legitimate ends, any compelling state interest, it might promote. There as here, the mechanistic application of an idiosyncratic evidentiary rule deprived the accused of the crux of his defense.

In *Holmes*, "[t]he trial court excluded petitioner's third-party guilt evidence citing *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941), which held that such evidence is admissible if it 'raise[s] a reasonable inference or presumption as to [the defendant's] own innocence' but is not admissible if it merely 'cast[s] a bare suspicion upon another' or 'raise[s] a conjectural inference as to the commission of the crime by another.'" *Holmes, supra* at 323-324 (internal citations omitted). This of course is a formulation remarkably similar to Missouri's direct connection rule. The South Carolina Supreme Court affirmed, citing *Gregory* as well as another idiosyncratic evidentiary rule that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic

evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." *Holmes*, at 324.

Justice Alito wrote that state and federal rulemakers have broad constitutional latitude to establish rules controlling the admission of evidence at trial, but that there exist limits. Noting that the Supreme Court has found criminal defendants' constitutional trial protections in both the Due Process Clause and the Compulsory Process Clause, in either case, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense," noting further that '[t]his right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' This Court's cases contain several illustrations of 'arbitrary" rules,' *i.e.*, rules that excluded important defense evidence but that did not serve any legitimate interests." *Holmes, supra* at 325-26. (internal citations omitted.) "[T]he Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote…." *Id.* at 326.

The "arbitrary" appellation for "rules that serve no legitimate purpose" derives from the seminal case in this area, *Washington v. Texas*, 388 U.S. 14 (1967), a case of first impression. The Texas rule considered in *Washington*, formerly in wide acceptance under the common law and in federal courts, held accomplices incompetent to testify *for* one another, although the state was free to use an accomplice *against* the accused. Washington was charged with murder to which one named Fuller was willing to confess.

Fuller was the only other eyewitness to the event and there was some corroboration of his guilt. Since Fuller was incompetent to testify under the Texas statute, Washington was convicted and sentenced to 50 years.

There were two questions before the Court and both had to be answered in favor of the Petitioner: (1) does the Sixth Amendment compulsory process clause apply to the states; and (2) was the Texas rule of evidence violative of that right. The Supreme Court stated: "We are thus called upon to decide whether the Sixth Amendment guarantees a defendant the right under any circumstances to put his witness on the stand, as well as the right to compel their attendance in court." *Washington,* 388 U.S. at 19.

The Supreme Court recognized that the compulsory process clause was designed to secure more than the presence of the defendant's witnesses: the right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present the defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. *Ibid.*

The Supreme Court first held that the Sixth Amendment is applicable to the states, and then that the Texas accomplice rule was invalid because it arbitrarily denied the accused the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. 388 U.S. at 23. The Texas rule was

considered “arbitrary,” the Court said, because it prevented whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief.

A court cannot arrogate unto itself what is properly the jury’s function. It is the jury that determines credibility of witnesses. It is the jury that determines the weight the evidence should be given. The direct connection rule assumes that juries cannot recognize a bare suspicion, a conjectural inference; that juries cannot properly weigh what one side might argue are disconnected and remote acts, outside the crime itself. The rule presumes that the jury is competent to hear and assess argument in Doc’s defense that slapping Judy once at an unknown time in barely known circumstances when she was drunk and hysterical is a disconnected and remote act, outside the crime itself. The jury is presumed competent to assess a defense argument that when Appellant told Ms. Spencer “that’s the last time you lie to me, bitch” it was not an expression of intended harm, but of disappointment over a broken promise, over a lie. Under the direct connection rule, the jury is presumed competent to assess a defense argument that Ms. Spencer’s own response to the statement was to restyle her hair. But the same jury is presumed by the rule to be incompetent to hear and assess the State’s argument regarding the Feldman evidence that it is merely speculative, conjectural, remote and disconnected. The jury will become confused if the prosecutor makes the argument, but not if defense counsel does.

This is the very definition of an "arbitrary" rule that serves no legitimate purpose. It is the very definition of a rule that is disproportionate to whatever end it might be asserted to promote.

The Exclusion of Third-Party Guilt Evidence Violated

Appellant's Constitutional Right to Call Witnesses in His Defense

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284 (1973), *citing Webb v. Texas,* 409 U.S. 95 (1972); *Washington*, 388 U.S. at 19; *In re Oliver*, 333 U.S. 257 (1948)). As noted in *Holmes*, 547 U.S. at 325, the Court sometimes has derived this right directly from the Fourteenth Amendment's Due Process Clause. *See, e.g., Chambers*, 410 U.S. at 302. In other cases, the Court has located the right in the Sixth Amendment's Compulsory Process Clause. *See, e.g., Washington*, 388 U.S. at 23. Regardless of the precise source, the U.S. Supreme Court has carefully scrutinized state evidentiary rules curtailing a defendant's constitutional right to present a complete defense and has invalidated evidentiary bars to the admission of defense witness testimony. *See, e.g., Rock v. Arkansas*, 483 U.S. 44 (1987)(overturning bar to admission of hypnotically refreshed testimony); *Crane* v. Kentucky, 476 U.S. 683, 691 (1986)(overturning bar on introduction of evidence regarding the circumstances of a confession); *Washington*, 388 U.S. at 23 (overturning bar on testimony by accomplices or accessories).

Foundational to this line of cases is *Chambers v. Mississippi,* where the Court precluded the State from "mechanistically" applying its evidentiary rules to prohibit a

defendant from introducing third-party guilt evidence. 410 U.S. at 302. The Court has also noted the importance of presenting a jury with the kind of complete evidentiary story that Holmes lost when his third-party guilt evidence was excluded. As the Court observed in *Old Chief v. United States,* 519 U.S. 172, 188 (1997), there is "the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be," and juries "may well hold the absence of that evidence against the party" who fails to provide it. *Id.* at 188 n.9.

The State's capable counsel certainly understood this point and exploited it in closing argument emphasizing the absence of the very evidence whose absence he had created. The excluded third party guilt evidence was critical, and its absence rendered Mr. Nash's defense far less persuasive than it should have been.

Ever since *Washington* made the Sixth Amendment applicable to the states, 388 U.S. at 19, the United States Supreme Court has not accepted a state evidentiary rule excluding, as Missouri's direct connection rule does, relevant, competent, reliable, and timely proffered evidence from percipient witnesses who would testify directly to a defendant's innocence. The Court has also looked with particular disfavor on evidentiary rules, like Missouri's, that "burden[] only the defense and not the prosecution." *U.S. v. Scheffer*, 523 U.S. 303 at 316 n.12 (1998) (citing *Washington*, 388 U.S. at 22-23). This Honorable Court should do likewise.

As a general matter, the Court has repeatedly emphasized that state rules inhibiting an accused's right to present a defense may not be "arbitrary" or "'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308, *quoting Rock v.*

Arkansas, 483 U.S. 44, 56 (1987). Missouri's direct connection rule fails this test. As the facts of this case show, the rule arbitrarily excludes relevant, competent, and reliable evidence without valid reason, and establishes a standard for admitting third-party guilt evidence that is grossly disproportionate to any conceivable concern about filtering out evidence that is tangential, repetitive, or likely to cause prejudice or confusion. The Constitution allows no such thing. This Court should so rule.

CONCLUSION

Appellant respectfully prays this Court will, for all the above stated reasons, find the direct connection rule to be an arbitrary and disproportionate evidentiary rule whose time has long passed, and will reject it as violative of criminal defendants' Compulsory Process Clause and Due Process Clause fundamental right to put on a complete defense. Appellant prays this Court will reverse his conviction and remand for a new trial with instructions to the trial court to allow Appellant to put on his defense by allowing his compelling third party guilt evidence as to Anthony Lambert Feldman.

CONCLUSION

Wherefore, Appellant Donald R. Nash prays this Court will enter its Opinion and orders:

1. As to Point I, reversing and setting aside the Judgment of guilt below, declaring that § 565.001 RSMo. 1977, under which Appellant was purportedly charged, was repealed by the Legislature, discharging him from custody, and remanding to the trial court with directions to dismiss the Information herein.
2. As to Point II, reversing and setting aside the Judgment of guilt below, upon a finding that the evidence adduced at trial was as a matter of law insufficient to sustain a conviction of any offense, finding Appellant not guilty and discharging him forthwith.
3. As to Point III, reversing and setting aside the Judgment of guilt below, and if Appellant is not discharged as a result of the Court's rulings on Appellant's other Points Relied On, ordering that the trial court's judgment be set vacated and aside, and a new trial ordered with the trial court instructed to submit to the jury the circumstantial evidence instruction MAI-CR2d 3.42.
4. As to Point IV, reversing and setting aside the Judgment of guilt below, upon a finding that Missouri's direct connection rule is an unconstitutional, arbitrary and disproportionate evidentiary rule and rejecting it as violative of criminal defendants', and particularly Appellant's, Compulsory Process Clause and Due Process Clause fundamental right to present a complete

defense, and if Appellant is not discharged as a result of the Court's rulings on Appellant's other Points Relied On, ordering that the trial court's judgment be set vacated and aside, and ordering a new trial, with the trial court instructed to allow Appellant to present a complete defense by admitting his third party guilt evidence as to Anthony Lambert Feldman.

CERTIFICATION OF COMPLIANCE

I hereby certify that:

1. This Brief complies with the information required by Rule 55.03;

2. This Brief complies with the limitations contained in Rule 84.06(b) and Special Rule No. 1(b);

3. The word count of this Brief is 16,810.

4. The disk containing this Brief and provided to this Court, and the disks containing this Brief served upon opposing counsel, have been scanned for viruses and are virus free;

5. This Brief was prepared using 13 point Times New Roman font, in Microsoft Word 2004.

Respectfully submitted,

_____

Frank K. Carlson #27840
Sarah K. Tupper #60695
THE CARLSON LAW FIRM
17 South Oak Street
Union, Missouri 63084
(636) 583-8300
(636) 583-2523
Email: fcarlson@usmo.com
ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned counsel certifies that he has served two true, accurate, and complete copies of the foregoing instrument and one copy of a disk containing this instrument upon **Chris Koster and Ted Bruce,** Attorney General's Office, P.O. Box 899, Jefferson City, Missouri 65102, this 12th day of October 2010.

_____

Frank K. Carlson