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
20th JUDICIAL CIRCUIT
THE HONORABLE DOUGLAS E. LONG
(Cause No. 08C7-CR00139-02)

APPELLANT'S REPLY BRIEF

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ARGUMENT

Respondent's Brief, p. 7 states that when Doc Nash and Judy Spencer switched cars outside Janet Jones' apartment "Ms. Spencer asked for the keys to her car and Appellant threw them **at** her. (Tr. 370)" (emphasis added). Such is inaccurate and misstates the record. Instead, the record shows that "[h]e threw them **toward** her." (TS 370, line 19.) The misstatement would imply a level of anger toward Ms. Spencer that Doc Nash did not possess that night.

Respondent's Brief, p. 9 states: "Dr. Adelstein also testified that the time of Ms. Spencer's death could not be determined to a reasonable degree of scientific certainty. (Tr. 324)." Such is inaccurate and misstates the record. Instead, the record shows that Dr. Adelstein merely admitted that **he** was unable to determine the time of death to a reasonable degree of scientific certainty, and that it was not possible to determine the exact **cause** of death to a reasonable degree of scientific certainty. (TS 324.) He did not say that time of death could not be determined.

Q. I think the question I had asked you,
Doctor, was whether or not you were able to determine
to a reasonable degree of scientific certainty the
time of death of Judy Spencer?
A. The answer would be no.

****

Q. Do you believe within the field of
pathology that it is possible, under these

20 circumstances, to determine the exact time of death
21 of Judy Spencer?
22 A. There are times when you can determine the
23 exact cause of death. Not in this case.

(TS 324.) The only evidence was that Judy Spencer died at 9:10 a.m. on March 11, 1982. (TS 328-335, 719.) This is important, because it makes it impossible chronologically for Appellant to have been Judy Spencer's killer.

Respondent's Brief, p. 9 states: "Later that night, Ms. Spencer's maroon Oldsmobile was also discovered several miles from the abandoned schoolhouse." Such is misleading and incompletely states the record. Instead, the record shows her car was found at minimum a half-hour's drive from schoolhouse (TS 457.) This is important, because it is one of the facts making it impossible chronologically for Appellant to have been Judy Spencer's killer.

Respondent's Brief, p. 10 states: "Appellant stated that he went looking for Ms. Spencer about 8:00 p.m. that evening on one occasion and then went home for the remainder of the evening. (Tr. 452-453). Appellant denied going out again after that. (Tr. 452-453)." Such is inaccurate and misstates the record. Respondent employs this misstatement to argue at p. 19 that Appellant "lied to the police about being home at his apartment after 8:30 that evening (Tr. 451-452); he was seen driving around town looking for her much later that evening." The record shows no testimony at TS 451-452, or anywhere, to the effect that Appellant had lied about his activities the night before Judy Spencer was killed. Instead, the record shows the following: Appellant told the police

he'd gone out looking for Judy the night of March 10th. Judy had come home around 8 p.m. on the 10th, and he had begun looking for her sometime later. (TS 467.) Contrary to Respondent's claim that Appellant told the police he had gone looking for Ms. Spencer on just "one occasion," according to the police testimony, Appellant and the police did not even discuss whether Appellant had gone out more than once that night to look for Judy. (TS 453.) Appellant and the police did not even discuss what time Appellant got home from looking for Judy on the night of the 10th. (TS 453.) Respondent's misstatement of the record inaccurately portrays Appellant as having lied to the police.

Respondent's Brief, p. 19 refers to "the night of the murder." Such is inaccurate and misstates the record. There was no evidence that Judy Spencer was killed the night of March 10, 1982. Instead, the only evidence of time of death was that Judy Spencer was killed at approximately 9:10 a.m. on March 11, 1982. (TS 328-334, 719.) In fact, the proof that the murder was on March 11th and not on March 10th was so conclusive that the State amended the Information in the middle of trial to allege the 11th as the date of death. This is important, because it is impossible chronologically for Appellant to have killed her the morning of the 11th.

Respondent's Brief, p. 11, states: "After the DNA results were compared, Sgt. Folsom again visited Appellant at his home and told Appellant that his DNA matched the DNA found under Ms. Spencer's fingernails. (Tr. 608). Appellant said that was not possible and his hands began to physically shake. (Tr. 608)." Such is inaccurate and misstates the record. Instead, the record shows that although Sgt. Folsom so testified on direct examination, on cross examination he consulted the transcript of the conversation

and corrected himself. It was the alleged presence of Doc's DNA **both** under Judy's fingernails **and** at the crime scene that Doc said was "not possible." The testimony was thus:

Q. And when you talked to Mr. Nash and he told you it couldn't be possible, you didn't just say to him that his DNA had been found on Judy's fingernails, you said it was found at the crime scene; correct?
A. I believe in reviewing the transcript, I stated it was found at the crime scene and underneath her fingernails. It was during the point in the conversation that you're referring to he interrupted me when I was speaking.
Q. But you coupled the two. You said under her fingernails and at the crime scene; correct?
A. I believe I did, yes, sir.

(TS 631-32.) Appellant had not been to the crime scene. He knew his DNA could not be there. He knew the Trooper's claim was wrong. His hands shook.

Respondent's Brief, p. 11 states: "Ms. Montgomery testified Ms. Spencer's act of washing her hair on the evening of her murder would have removed **any** DNA from underneath her fingernails that had existed prior to the washing. (Tr. 680)" (emphasis added). Such is inaccurate and misstates the record. Instead, the record shows that Ms.

Montgomery said the opposite, that she could **not** make such a claim. On direct examination she said, “I cannot give you a quantity [of DNA] that would or would not persist under the fingernails [after hair washing], but I would expect that [hair washing] would have a great effect.” (TS 680.) She testified on cross examination as follows:

> You cannot say that washing one's hair would remove all foreign DNA from one's hands or remove everything foreign from under one's fingernails, can you?
>
> A. No, I can't.
>
> Q. Washing one's hair would be unlikely to remove -- I'm sorry, let me rephrase that. Washing one's hair would be more likely to remove DNA from the surface of one's hands and fingers than to remove it from under one's fingernails; correct?
>
> A. Yes.

(TS 696.) This is important, because Respondent cannot overcome the uncontroverted evidence from both Appellant’s expert and from Respondent’s own expert, Highway Patrol Crime Lab Supervisor Thomas Grant, that cohabitors would be expected to have one another’s DNA under their fingernails.

Respondent's Brief, p. 18-19, again misstates the same evidence, claiming again that, “[a]ccording to the State’s DNA expert, Ruth Montgomery, the washing of her hair

would remove any DNA from underneath her fingernails. (Tr. 680)." Such is inaccurate and misstates the record, as shown above.

Respondent's Brief, p. 12 states: "Ms. Beine also acknowledged that Ms. Montgomery found as much DNA from Appellant as she found DNA from Ms. Spender under the fingernails. (Tr. 756)." Again, the actual testimony was the opposite, at transcript pages 755-56:

Q. You were aware that in this particular case, Ruth Montgomery found a mixed ratio of DNA between the DNA that was consistent with Mr. Nash and the DNA consistent with Judy Spencer to be a ratio of one-to-one?
A. I am aware that's what her opinion was, yes.
Q. Meaning that there was as much DNA consistent with Mr. Nash as there was consistent with Judy Spencer?
A. I know that that's what her opinion was. I don't agree with that opinion. I know that's what her opinion was.

(TS 755-56.) This is important, because as stated above Respondent cannot overcome the uncontroverted evidence from experts on both sides that it is to be expected that cohabitors naturally carry one another's DNA under their fingernails.

Respondent's Brief, p. 18 claims Appellant argues, or argued, that the DNA under Judy Spencer's fingernails "was the result of 'casual contact' between Ms. Spencer and Appellant." The phrase attributed to Appellant, "casual contact" is in quotation marks, but Respondent does not cite to the record where the quote can be found, because it is not there. Appellant does not assert, and never has asserted, that Appellant's DNA was under Judy's fingernails as a result of casual contact. Respondent here sets up a straw man in order to knock it down by arguing that the State's evidence "established that the contact between [Doc and Judy] was not 'casual,'" (Resp. Brief, 19), again inaccurately quoting Appellant without citation to the record. Doc Nash's DNA was under Judy Spencer's fingernails, because they were cohabitors, because they had had sex two days earlier, and because Judy was at home with Doc **after** she'd washed her hair.

Respondent argues, at p. 19, that "the DNA is direct evidence that the Appellant was the killer of Judy Spencer," and at p. 20 that the DNA is "direct evidence that Appellant was in direct physical contact with the victim…during the time she was murdered" but never explains how that is so. There was no such testimony.

Respondent's Brief, p. 19 states: "the State's evidence in this case places Appellant in the presence of Ms. Spencer during the time of her murder." Respondent fails to cite to the record for this claim. There was no such evidence.

Respondent's Brief, p. 19 states: "[Appellant] lied to the police about being home at his apartment after 8:30 that evening (Tr. 451-452)." Such is inaccurate and misstates the record, as discussed above. Acddditionally, the record shows that Appellant called Janet Jones multiple times the night of the March 10th, including at 8:30, 9:30, and 10:00

p.m. (TS 404, 378.) In 1982 there were no cell phones. There was no evidence of Appellant speaking to Janet Jones by phone except from his home.

Respondent's Brief, p. 19 states: "Further evidence was that Appellant was involved with another woman, Della Wingfield, at the time of the murder (Tr. 388)." Such is inaccurate and misstates the record. Instead, the record shows the opposite, that Appellant did not start seeing Ms. Wingfield until "**after** Judy's death," in the prosecutor's own words at trial. (TS 388, lines 4-5) Respondent uses the misstatement to imply Appellant had a motive to kill Judy Spencer.

Respondent's Brief, p. 19 states: "[Appellant] lied to the police about [his] relationship [with Ms. Wingfield] (Tr. 507-508)." Such is inaccurate and misstates the record. The record shows no such testimony at pages 507-508 or anywhere. The only testimony at pages 507-508 was that Appellant said Ms. Wingfield was a friend of Appellant's daughter. No witness suggested Ms. Wingfield was not in fact Appellant's daughter's friend. Respondent uses the misstatement to imply Appellant had a motive to kill Judy Spencer.

Respondent's Brief, p. 20 states: "The murder was "staged" as a sexual assault (Tr. 438)." The quote is inaccurate and misstates the record. The record shows the only person who uses the word "staged" at trial was Respondent's counsel. (TS 270.)

Respondent argues: "Appellant was able to describe the victim's shoes (from which the ligature came) with an accuracy that can be argued to be unusual. (Tr. 452)." (Resp. Brief, 20.) This is the description Respondent implies is so unusually accurate that only Judy Spencer's killer could have known it: "brown brush suede shoes." (TS

452, line 15). Doc and Judy lived together. After she washed her hair, Judy went home to Doc, argued with him about her drinking and changed clothes. He saw what she was wearing and described it to the police as best he could.

Respondent argues, p. 20: "Additional circumstantial evidence introduced at trial revealed that Appellant asked Janet Jones to call him the morning following the murder to wake him up for work (Tr. 377-378), demonstrating that Appellant knew that Ms. Spencer would not be coming home." The argument is illogical. Judy was last seen by Doc and Ms. Colvin a little before 8 p.m. (TS 467.) Respondent's argument here requires that Doc: somehow, someplace obtained a shotgun and shells; found Judy; killed Judy; somehow got her or her body to the school; partially disrobed her; scattered her clothes about the scene, staging it to look like a sexual assault; dragged her body to the outhouse foundation; gathered up a large number of tree branches, limbs and logs; placed them on the foundation to conceal the body; disposed of her purse; disposed of a shotgun; traveled between Salem, the school and the resting place of Ms. Spencer's car, each of the three locations being a twenty to thirty-minute drive from the others; and still had time to calmly talk on the phone with Janet Jones at 8:30, 9:30 and 10 p.m. (TS 404, 378.) Respondent's argument can't explain why, if Appellant knew Judy was dead at 10 p.m., he was still looking for her at Janet Jones' apartment building between 11 p.m. and midnight. (TS 476-77.) Respondent's argument cannot explain why, if at 10 p.m. on March 10th, "Appellant knew that Ms. Spencer would not be coming home," on the 11th he, as Respondent admits, "drove to Houston looking for Ms. Spencer." (Resp. Brief, 8.)

The State's argument, even if it were not built upon a supporting framework of factual inaccuracies, is incoherent and nonsensical.

POINT I, THE REPEALED MURDER STATUTE

As to Point I, regarding the 1983 repeal of the statute under which Appellant was convicted, both parties agree that "Section 1.160, really has no application whatsoever to the trial and conviction of Appellant." (Resp. Brief, 16.) Accordingly, the parties agree that Section 1.160 does not work to save the repealed statute for the prosecution of Appellant. Therefore the State argues that the language of § 565.001.2 RSMo. (1983) serves that same saving function. It does not, however, because it does not contain saving language like that of Section 1.160, which provides in pertinent part: "No offense committed . . . previous to or at the time when any statutory provision is repealed … shall be affected by the repeal ..., but the trial … shall be had … as if the provision had not been repealed …." (Section 1.160 RSMo.)

Senate Bill 276 (1983) first repealed § 565.001 RSMo. (1977) which defined the crime of Capital Murder. Then it enacted a new Chapter 565, including Section 565.001.2 (1983), which contains what Respondent asserts is the necessary saving language, that any offense committed prior to October 1984 "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 . . . ."

This language does not purport to save the 1977 Capital Murder statute from repeal. Accordingly, Respondent argues that Section 565.001.2 (1983) must be given a

tortured reading, so that it will have the effect of the Section 1.160 repeal language, in order to avoid an "absurd" result. But the Court cannot simply read into section 565.001.2 RSMo. (1983) language the legislature omitted. *Turner v. School Dist. of Clayton*, 318 S.W.3d 660 (Mo. banc 2010).

This Court enforces statutes as they are written, not as they might have been written. It is presumed that the General Assembly legislates with knowledge of existing laws. *Turner*, *supra* at 667. Consequently, the Court must assume that the legislature was aware of the savings language of section 1.160 when it enacted section 565.001.2 in 1983. If the legislature had intended to include in section 565.001.2 saving language like that contained in section 1.160, it easily could have done so. It did not. Instead, the legislature in 1983 extended the effective date of the new Chapter 565 for a year, in order that sufficient time would exist to commence prosecutions for crimes committed under the old statute. Appellant suggests that the legislature chose this as an alternative means of avoiding the "absurd" result Respondent describes.

The courts "cannot supply what the legislature has omitted from controlling statutes. Courts cannot transcend the limits of their constitutional powers and engage in judicial legislation supplying omissions and remedying defects in matters delegated to a coordinate branch of our tripartite government. Moreover, it is not within the Court's province to question the wisdom, social desirability, or economic policy underlying a statute as these are matters for the legislature's determination. The Court must enforce the law as it is written." *Turner*, *supra* at 668 (internal citations of authority omitted). In the present case, that means in 1983 the legislature repealed section 565.001 RSMo. (1977),

defining the crime of Capital Murder, specifically made the criminal saving statute, section 1.160, inapplicable, wrote a new set of homicide statutes, and delayed the effectiveness of the new law for a year to give prosecuting authorities time to commence prosecutions under the old law. Because section 565.001 RSMo. (1977) was repealed, Appellant's charges must be dismissed, and Appellant must be discharged.

POINT II, SUFFICIENCY OF THE EVIDENCE AND POINT III, THE REFUSED CIRCUMSTANTIAL EVIDENCE INSTRUCTION

The Impact Of The Ex Post Facto Clause And Of Section 565.001.2

Both the *ex post facto* clause and the provisions of section 565.001.2 RSMo. (1983) required that the 1982 circumstantial evidence instruction be given as requested by Appellant at trial, and they require this Court to apply the 1982 standard of review in determining the sufficiency of the State's evidence. Respondent seeks to avoid these fatal problems by sweepingly misstating Appellant's *ex post facto* argument and by ignoring here the import of section 565.001.2, despite the fact that Respondent admits elsewhere that the statute requires that 1982 crimes be prosecuted under 1982 laws. (Resp. Brief, 15.)

Section 565.001.2 provides, with emphasis added: "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." The reviewing court is to analyze a statute from the plain and ordinary meaning of the language used in the statute. A criminal statute is to be construed strictly against the state and liberally in favor of the defendant. *Prapotnik v. Crowe*, 55 S.W.3d 914, 917-18 (Mo.App. W.D. 2001). There is nothing ambiguous or extraordinary about this statutory language. It demonstrates the legislature's understanding of the *ex post facto* problems that would obtain if the courts were to apply a 1984 rule of law or procedure to a 1982 crime. In section 565.001 RSMo. (1983), the legislature specifically mandated that 1984 procedures could not be applied at the trial or appellate review of a 1982 crime, but rather that 1982 procedures must be applied. Respondent fatally admits that "[a] murder that occurred in 1982 is to be charged and prosecuted with the laws that existed in 1982." (Resp. Brief, 15.)

Thus Respondent argues that this Court's 1993 elimination of the circumstantial evidence rule as a jury instruction and as a standard of appellate review can be applied to Appellant's 1982 case, because this Court's rules can supersede statutes with which they are in conflict. The argument fails, because as Respondent admits, a rule will not supersede a statute where "the legislature makes it explicitly clear that the statute is intended to supersede the Court's rules." (Resp. Brief, 26.) Here the legislature has done precisely that. The argument also fails because it ignores that a rule may not alter a defendant's substantive rights. *State ex rel. K.D. v. Saitz*, 718 S.W.2d 237, 239 (Mo.App. E.D. 1986). Respondent does not suggest that a citizen's right to be free from *ex post facto* laws is not a substantive right. It is, of course, a fundamental right. Similarly, Respondent does not suggest that a reduction in the quantum of evidence necessary to

obtain a conviction beyond a reasonable doubt is merely procedural. It is obviously substantive. It has been recognized as such by the United States Supreme Court almost from the very moment of the founding of the Republic. *Calder v. Bull,* 3 U.S. 386 (1789).

Accordingly, Respondent seeks to avoid the problem by ignoring major portions of Appellant's Brief and by ignoring this Court's very clear pronouncements on the issue in *State v Grim*, 854 S.W. 2d 403 (Mo. banc 1993), *State v. Chaney,* 967 S.W. 2d 47 (Mo. banc 1998), and *State v. Freeman,* 269 S.W.3d 422 (Mo. banc 2008), as cited by Appellant therein. Respondent stunningly claims that "Appellant fails to offer, however, any legal or factual support for the proposition that the invalidation of the circumstantial evidence instruction[1] by the Court in *State v. Grim* … decreased the quantum of evidence necessary to support a murder conviction and, thus, violated the constitutional prohibition against *ex post facto* laws." (Resp. Brief, 21.) This Court has repeatedly and consistently made unquestionable that the circumstantial evidence rule required "more evidence" to obtain a conviction, imposed a "higher standard" upon the State and required the prosecution to meet a "different burden." This Court has made it very clear that the invalidation of the circumstantial evidence instruction thus decreased the quantum of

[1] Respondent only discusses the circumstantial evidence rule as it applied to jury instructions. Respondent wholly fails to discuss the rule as it applied to appellate review of the sufficiency of the evidence.

evidence necessary to support a murder conviction. Appellant refers the Court to pages 42-43 and 49-50 of Appellant's Brief.

This effort by Respondent to ignore the obvious is telling. It makes plain that Respondent understands it cannot overcome the *ex post facto* problems it brought upon itself by convincing the trial court to deny Appellant's proffered circumstantial evidence instruction. The *ex post facto* problem destroys Respondent's position in multiple ways. At the outset, it means reversal is mandated for the denial of the jury instruction, because a constitutional violation is presumed prejudicial and can only be deemed harmless if the State shows it to be harmless beyond a reasonable doubt. *State v. Berwald*, 186 S.W.3d 349, 361 n.4 (Mo.App. W.D. 2005)(*quoting State v. Wolfe,* 13 S.W.3d 248, 263 (Mo. banc 2000)); *Chapman v. California*, 386 U.S. 18, 24 (1967). The State does not argue that the *ex post facto* violation is harmless beyond a reasonable doubt. The argument would be untenable. Thus the State argues instead that there was no *ex post facto* violation, because the circumstantial evidence rule according to the State did not require more evidence or impose a higher burden on the prosecution. This argument flies in the face of this Court's numerous contrary rulings, and so the State simply ignores them.

Reversal and remand for a new trial is required for this reason.

But the *ex post facto* problem requires outright acquittal for another reason. The State is asking this Court to commit another ex post facto violation by applying to this 1982 case the reduced standard of review that came into existence in 1993 in *Grim*. Because of the *ex post facto* problem, the State is here subjected to a standard of review on the sufficiency of the evidence that it cannot meet. It is for this reason that

Respondent does not argue that its evidence is inconsistent with reasonable hypotheses of Appellant's innocence. The State cannot sustain such an argument, and therefore does not try, and pretends it does not need to. And so the State relies upon bald pronouncements without citations to the record, like: "the DNA evidence was compelling evidence that Appellant murdered Ms. Spencer and the State established this was the only reason for the DNA being present under her left fingernails." (Resp. Brief, 18.) Of course there was no testimony from any of the State's experts to that effect. As argument, it is merely specious.

Because the evidence under any standard of review was insufficient to sustain a conviction, and particularly so under the circumstantial evidence rule, outright acquittal is mandated.

POINT IV, THE EXCLUDED FELDMAN GUILT EVIDENCE

Standard of Review – Strict Scrutiny

Respondent correctly identifies Appellant's offer of proof at trial as to the guilt of Anthony Lambert Feldman as found at transcript pages 916-921, which transcript citation was inadvertently omitted from Appellant's opening Brief. The same is summarized at pages 65-67 of Appellant's Brief.

Respondent does not deny that the trial court's refusal to allow the evidence against Lambert Anthony Feldman infringed upon Appellant's right to compulsory process, which is to say the right to present a defense, but instead argues that the infringement was acceptable, because it was done under the guise of a well-established evidentiary rule permitting trial judges to exclude evidence if its probative value is

outweighed by other factors. Respondent does not deny that Missouri's direct connection rule is such a rule, in that it allows infringement on the right to present a defense based on various factors to be applied by the trial court. Respondent does not deny that the right to present a defense is a fundamental constitutional right. Respondent does not deny that where a state evidentiary rule infringes upon a fundamental constitutional right it will be subjected to strict scrutiny. Respondent cannot deny that strict scrutiny examines whether the rule is justified by a compelling state interest and whether it is sufficiently narrowly tailored to fulfill that interest without unduly impinging upon that right. Accordingly, Respondent's suggestion that the correct standard of review is abuse of discretion is incorrect. This court must apply a strict scrutiny standard.

Preservation of the Error

Respondent is correct that Appellant's only offer of proof was made in a narrative fashion by leave of court, and that narrative offers of proof are permitted. Because of its length, Appellant did not recite the offer verbatim in his Brief, but a reading of the offer shows the narrative was definite and specific and did not recite mere conclusions. (TS 916-21.) There can be no confusion about what evidence Appellant asserts was improperly excluded, because it was recited in great detail in the offer of proof. (TS 916-21.)

Respondent argues that Appellant failed to preserve the error under the 4-step *State v. Newlon* test (Resp. Brief, 35-36), but the record is otherwise. (1) The issue of trial court exclusion of the Feldman guilt evidence was raised at the first opportunity in response to the State's Motion in Limine seeking to exclude such evidence. This was

done in Appellant's Memorandum of Law in opposition to that Motion. (LF 610-613.) (2) That Memorandum stated the specific constitutional provisions violated, by citing the confrontation clause and the due process clause specifically as being violated, and by citing the 6th and 14th Amendments of the United States Constitution and the parallel provisions of the Missouri Constitution specifically as being violated. (LF 610-613.) (3) The Memorandum stated the specific facts that comprise the constitutional violation. (LF 610-613.) (4) The constitutional issue was preserved throughout the criminal proceeding in that the same specific constitutional provisions violated were again recited verbatim (the confrontation clause and the due process clause, the 6th and 14th Amendments of the United States Constitution and the parallel provisions of the Missouri Constitution), and the same facts comprising the violation were again recited verbatim in Appellant's only offer of proof, (TS 916-21), in Appellant's Motion for New Trial, (LF 799-811), and in Appellant's opening Brief at Point IV of Appellant's Points Relied on. Thus, Appellant preserved the error. *State v. Newlon*, 216 S.W.3d 180, 184 (Mo.App. W.D. 2007).

The Proffered Evidence Was Admissible

Respondent argues that the presence of Mr. Feldman's prints on Ms. Spencer's car is meaningless, because "Appellant proffered no evidence that the victim had to have died at [9:10 a.m. on March 11, 1982], and offers absolutely no evidence of that claim on appeal." (Resp. Brief, 30.) This incorrect assertion is made by Respondent repeatedly throughout its Brief. The record is directly to the contrary, as discussed above. The Coroner's determination of that time of death at 9:10 a.m on March 11, 1982, Dr. Dix's autopsy fixing the time of death as no sooner than 9:00 a.m. on March 11, the watch

stopped at 9:12, the of bubbles of wet saliva still present at the corner of the deceased's mouth (State's Exhibit 28), and the fact that her perfume was still discernable when the Nichols brothers found her (TS 726) just before noon on the 11th all overwhelmingly showed that Judy Spencer died at 9:10 a.m. on March 11, 1982. There was no evidence that Judy Spencer was killed the night of March 10, 1982. Instead, the only evidence of time of death was that Judy Spencer was killed at approximately 9:10 a.m. on March 11, 1982. (TS 328-334, 719.) Again, the proof that the murder was on the morning of March 11th and not the night of March 10th was so conclusive that the State amended the Information in the middle of trial to allege the 11th as the date of death.

As to the stopped watch specifically, Respondent argues that, "most important, Appellant made no offer of proof that he had any evidence as to when the watch stopped, or how it stopped." (Resp. Brief, 31)(emphasis in original). That evidence was already before the jury and did not need to be restated in an offer of proof. Respondent is correct to emphasize that this was a spring-driven watch of the type that required winding. The parties had already offered into evidence the photographs of Ms. Spencer's stopped watch. (State's Exhibits 26, 27.) One can plainly see in the photos that the winding stem is pulled out. Everyone of a certain age knows that a wound watch stops when the winding stem is pulled out. All of the evidence shows Ms. Spencer died at 9:10 a.m. on March 11, 1982.

As to the solubility of fingerprints in heavy rain, it is correct that neither Mr. Lock nor Ms. Hardin yet knew what they would be asked about the issue. First, Appellant would suggest that no expert testimony is in fact required on the issue. It could simply be

argued. Second, Appellant is quite confident that any forensic scientist, including Mr. Lock, his affidavit notwithstanding, would be forced to so testify. Tellingly, Ms. Hardin's affidavit does not deny that fingerprints can be dissolved by exposure to heavy rain. Obviously they can. And this is obviously what happened, because neither Doc Nash nor Judy Spencer's prints were on the car after the rain, despite that they had both driven it on March 10.

Respondent suggests that Appellant concealed the fact that two other persons' prints were on the car, and argues that Appellant should explain why the presence of those prints does not make those persons suspect. Appellant conceals nothing. The fact of those prints is stated directly in Appellant's offer of proof. (TS 917.) One of those prints belonged to a John Heyer, who lived near where Ms. Spencer's abandoned car was found. The other was never matched to a name. Those individuals do not rise to the same level of suspicion as Mr. Feldman, because they did not falsely deny knowing Ms. Spencer. They did not falsely deny ever having been in Salem. They did not falsely deny having ever been in Dent County. They were not seen with Ms. Spencer at a tavern in Salem just a few days before her murder. They did not lie about the fact.

Respondent complains that Appellant argued that Mr. Feldman and Ms. Spencer had a relationship based upon the fact they had been together in a bar shortly before her murder. In response, Appellant suggests that it is argument, a fair inference from the known circumstantial evidence.

Respondent argues that Mr. Feldman's being together with Ms. Spencer in a bar in Salem, in Dent County, a few days before her murder could account for his fingerprint

being on her car, but does not suggest how it survived the rain when no one else's did. Respondent does not explain why Mr. Feldman would lie about knowing Ms. Spencer if he put his fingerprints on Ms. Spencer's car innocently.

Respondent argues that Mr. Feldman's lies about knowing Ms. Spencer, about being in Salem and about being in Dent County would be inadmissible hearsay, but Respondent is mistaken. Hearsay is testimony containing an out-of-court statement, not made by the declarant or under oath, offered to prove the truth of matter asserted. If the statement is not offered to prove the truth of the matter asserted, it is not hearsay. The purpose of the hearsay rule would not be served by excluding Feldmann's statements. "Since its value does not rest on the credibility of an out-of-court declarant there is no need for the hearsay rule to safeguard against falsification or inaccuracy." *Plodzien v. Whaley*, 610 S.W.2d 63, 67 (Mo.App. E.D. 1980). *See also State v. Shaw*, 847 S.W.2d 768 (Mo. banc 1993). Appellant would not have offered Mr. Feldman's lies for their truth, but instead for their falsity. Mr. Feldman's lies were admissible.

The fact that Mr. Feldman was known to carry a shotgun in his car in 1982 is probative and admissible, because it contrasts strikingly with the State's failure to show that Appellant owned, had access to or had ever even picked up a shot gun in his life. Its exclusion under a "habit" rule would itself be a compulsory process clause violation. The fact that Mr. Feldman shot himself to death with a 12 gauge shotgun in 2008 supports the fact that a shotgun was Mr. Feldman's weapon of choice.

Respondent argues that because the gun Mr. Feldman killed himself with in 2008 was bought recently in California does not directly connect him to this crime.

Respondent is correct. That is not where the direct connection comes from. Instead, the direct connection is established by the presence of Mr. Feldman's prints on Judy Spencer's abandoned automobile; by the narrow time frame within which they could have been placed there (between 9:00 p.m. on March 10th and 7:30 a.m. on March 11th, according to Mr. Cowan, who found the car and called the police, (TS 543, 546)); by Mr. Feldman's lies about knowing Ms. Spencer, about being in Salem, about being in Dent County; and by Mr. Feldman's admission to his sexual-stalking probation officer that he had had a previous victim.

Respondent's Argument That Missouri's Direct Connection Rule is Constitutional is Insubstantial and Meritless

Respondent states that *Holmes v. South Carolina*, 547 U.S. 319 (2006) is Appellant's sole cited authority to support his confrontation clause argument. (Resp. Brief, 36.) Respondent apparently overlooked Appellant's discussion of his first-cited case, *Washington v. Texas*, 388 U.S. 14 (1967) (App. Brief, 61-64, 69-71), as well as *Chambers v. Mississippi*, 410 U.S. 284 (1973) (App. Brief, 64, 72-73) and numerous other Supreme Court cases. Respondent states that the *Holmes* court "explicitly noted in its decision that it was not questioning the validity of 'rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged.'" (Resp. Brief, 37.) But what the Court actually wrote was that while such rules are widely accepted in the various states, "neither petitioner nor *amici* challenge them here." *Holmes*, at 327. The issue of the constitutional validity of rules like the direct connection rule was not even before the

Court in *Holmes*. Respondent goes on to catalogue cases in which the direct connection rule was affirmed, but cites none in which a confrontation clause challenge had been mounted and rejected.

Respondent denies exploiting the exclusion of the third party guilt evidence during closing argument. Specifically, Respondent denies arguing to the jury the absence of third party guilt evidence, the very evidence the State had convinced the trial court to exclude. Respondent's Brief, at p. 38, states: "a simple reading of the transcript shows the State discussed only the evidence that <u>was</u> admitted and addressed Appellant's argument that Appellant's DNA evidence underneath the victim's fingernails was from 'casual contact.' (Tr. 897-901)" (emphasis in original). Such is inaccurate and misstates the record. First, Appellant did not argue that the presence of Appellant's DNA under her fingernails resulted from casual contact. If one searches the transcript at pages 897-901, as cited by Respondent, it will not be found. Nor will it be found elsewhere in Appellant's Brief. Appellant did not so argue. Second, Respondent's denial that it argued the absence of third party guilt evidence is belied by the record. In reality, the State argued in its initial closing:

> 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. How, if – if Mr. Nash's DNA was in fact only from casual contact, well then, where's her murderers?

(TS 870.) Appellant, of course, was unable in closing to argue to the jury the third party guilt evidence Appellant did possess. Accordingly, Respondent, in final closing argued as follows:

> The one thing I didn't hear in any discussion of for over an hour was this.
>
> If DNA gets under your fingernails so easily, then where's the third sample? Where is the third person? If Mr. Nash's DNA is underneath her fingernail simply because of casual contact, then where's the killer's DNA? Because he did a lot more than have casual contact with her.
>
> And I want you to discuss that among yourselves. I want to you to take whatever time you need.

(TS 906.) Respondent's assertion that it only argued "the evidence that was admitted" is not accurate.

Respondent Brief, p. 39, states that Respondent introduced evidence that the quantity of Appellant's DNA underneath the Ms. Spencer's fingernails[2] meant it could

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[2] In footnote 6, Respondent accuses Appellant of attempting to "perpetuate the falsehood that the DNA was found under a single fingernail of the victim," and cites to a single reference in Appellant's Brief to "one of Ms. Spencer's fingernails." The same is a simple word processing error by Appellant's counsel. Appellant did not and does not make this "one fingernail" assertion. In reality, Appellant's Brief makes reference to the DNA being underneath "fingernails," plural, of one of her hands at least seven times, at App. Brief, pp. 15, 16, 17, and 19. Appellant regrets the error.

not be there because of "casual contact," citing Tr. 678-679. The same is inaccurate and misstates the record. In truth, at Tr. 678-679, we find the State's expert, Ms. Montgomery, testifying that the quantity of Appellant's DNA was too great to be "non-contact DNA," such as touching a surface or holding something.

Respondent's Brief repeats the inaccurate assertion that Ms. Spencer's washing of her hair after her last contact with Appellant would have removed **any** DNA from underneath her fingernails. Such is inaccurate and misstates the record. As shown above, the State's expert testified that she could **not** say that hair washing would remove all foreign DNA from under the fingernails. As shown above, Judy Spencer did **not** wash her hair after her last contact with Appellant. She went home to him after she washed her hair.

Regrettably, Respondent fails to engage in the necessary confrontation clause analysis at all. Respondent fails to identify a compelling state interest allegedly served by the direct connection rule. Respondent fails to acknowledge that there are two types of evidence rules that infringe upon a criminal defendant's weighty interest in a meaningful opportunity to present a complete defense: (1) those that are arbitrary, i.e. those that exclude important defense evidence but do not serve any legitimate purpose; and (2) those that are disproportionate to the purposes they are designed to serve. *Holmes*, at 324-25. Respondent fails to show how flat exclusion of evidence is not disproportionate to whatever purpose the direct connection rule is designed to serve.

Accordingly, this Court should invalidate the direct connection rule, or in the alternative, hold that the evidence submitted to the trial court in Appellant's offer of

proof met the direct connection test and should have been before the jury, and reverse Appellant's conviction.

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, finding Missouri's direct connection rule to be 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 7476.

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,

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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 20th day of December 2010.

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Frank K. Carlson