JULY 2020

DIRECT APPEAL
BY ARDEN LANG
ASSISTANT DEFENDER &
DANIEL YUHAS
DEPUTY DEFENDER

IN THE APPELLATE COURT
OF ILLINOIS,
FOURTH DISTRICT
SPRINGFIELD, ILLINOIS

OF SPECIAL NOTE: BARTON NEVER MET ARDEN LANG WHO DRAFTED THIS APPEAL. IT WAS FILED ON BART'S BEHALF WITHOUT HIS SEEING THE DRAFT. BARTON THOUGHT AT FIRST IT WAS WRITTEN BY HIS

PROSECUTOR CHARLES REYNARD OR HIS FIRST ASSISSTANT STATE'S ATTORNEY TEENA GRIFFIN OR ASSISTANT STATE'S ATTORNEY STEPHANIE WONG SO POORLY WRITTEN IT WAS. BARTON WAS UPSET AND REACHED OUT TO ARDEN LANG'S BOSS, DANIEL YUHAS TO COMPLAIN. THEY GOT INTO AN ARGUMENT. DANIEL YUHAS UNWILLING TO MODIFY IT. THE APPEAL SUBSEQUENTLY DENIED JUST AS BARTON KNEW IT WOULD BE. SEE END OF THIS REPORT TO SEE BARTON'S DETAILED LETTER EXPLAING THE CIRCUMSTANCES SURROUNDING THIS APPEAL AND THE ISSUES TO BE ADDRESSED IN THE APPEAL WE STRONGLY SUGGEST HIS LETTER BE READ FIRST PRIOR TO READING THE APPEAL AND SUBSEQUENT DECISION BY THE APPEALS COURT ITSELF.

BART WRITES: "When reading my original direct appeal brief enclosed you can probably recognize the tell-tale character of it as something I initially thought was actually written by prosecutors and then passed off as authored by my appellate defender. Tacitly meant to appear as if in genuine defense of me. I thought it instead added yet more weight to everyone's obsession with to exclude Misook's involvement in Christina's death. So poorly written and argued (and limited solely to the issue of the suppression of Misook-related evidence) I didn't believe that it was written by my appellate defender. When I contacted Arden Lang by phone she assured me that the appellate brief was legit, was hers, and was a genuine effort to get my (wrongful) conviction reversed. I then contacted her boss, Daniel Yuhas, who also was adamant in vouching for the legitimacy of the brief, refusing to rescind it and replace it with something more persuasive… and coherent. Worse, in gross conflict with the (token and tacit) intent of the brief, Yuhas then was adamant in his effort to assure me that Misook was wholly innocent of any involvement in Christina's death, as if Misook was his own sister or something. I couldn't believe my ears."

NO. 4-99-0679

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. BARTON M. M^{c}NEIL, Defendant-Appellant.	)	Appeal from the Circuit Court of the Eleventh Judicial Circuit, M^{c}Lean County, Illinois. No. 98-CF-633 Honorable G. Michael Prall, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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NOTE: THIS APPEAL WAS REJECTED BY THE APPEALS COURT IN OCTOBER 2021. BART THEN APPEALED THEIR DECISION WHICH THE COURT AGAIN REJECTED. ON APRIL 3, 2002, THE ILLINOIS SUPREME COURT DECIDED AGAINST HEARING IT.

BARTON'S CASE HAS NEVER BEEN BEFORE THE ILLINOIS SUPREME COURT.

POINTS AND AUTHORITIES

I.

THE TRIAL COURT'S RULING PRECLUDING THE DEFENSE OF PRESENTING EVIDENCE THAT MISOOK NOWLIN, AND NOT THE DEFENDANT, COMMITTED THE MURDER, DEPRIVED BARTON M^{C}NEIL OF HIS 6TH AND 14TH AMENDMENT RIGHTS TO PRESENT A DEFENSE.

II.

BARTON M^{C}NEIL'S NATURAL LIFE SENTENCE CANNOT STAND BECAUSE THE STATUTE UNDER WHICH HE WAS SENTENCED IS VOID.

NATURE OF THE CASE

A M^{c}Lean County Indictment, which substituted for an information, charged the defendant with the first degree murder of his child (two counts). Following a bench trial, the defendant was convicted as charged. The trial court subsequently sentenced the defendant to serve a sentence of natural life imprisonment in the Illinois Department of Corrections. The defendant appeals from his conviction and sentence. He does not raise any issues on the pleadings.

ISSUES PRESENTED FOR REVIEW

I.

Whether the trial court's ruling precluding the defense of presenting evidence that Misook Nowlin, and not the defendant, committed the murder, deprived Barton McNeil of his 6th and 14th Amendment rights to present a defense.

II.

Whether Barton McNeil's natural life sentence cannot stand because the statute under which he was sentenced is void.

JURISDICTION

The defendant-appellant asserts that this case constitutes a timely appeal of a final judgment of conviction. The trial court sentenced the defendant on August 11, 1999. (Vol. I, C. 493) Notice of appeal was filed on August 17, 1999. (Vol. I, C. 497) Appellate jurisdiction is conferred by Illinois Supreme Court Rules 602 and 603. (145 Ill.2d R. 602, 603).

STANDARDS OF REVIEW

I.

The trial judge has a wide scope of discretion in ruling on issues of relevancy and materiality and its ruling will not be reversed absent a clear abuse of discretion. ***People v. Enis***, 135 Ill.2d 264, 281, 564 N.E.2d 1155 (1990). As this Court recently found, where the confrontation right is implicated, the applicable standard of review is whether the asserted error was harmless beyond a reasonable doubt or whether a reasonable possibility exists that the error might have contributed to the conviction. ***People v. Prevo***, 302 Ill.App.3d 1039, 706 N.E.2d 505 (4th Dist. 1999), *citing* ***People v. Foley***, 109 Ill.App.3d 1010, 1016, 441 N.E.2d 655 (2nd Dist. 1982).

II.

Because a determination of this issue is a question of law, *de novo* review is appropriate. ***Hatton v. Money Lenders and Assoc., Ltd.***, 127 Ill.App.3d 577, 582, 469 N.E.2d 360 (1st Dist. 1984).

STATEMENT OF FACTS

Barton and Tita McNeil were the parents of three-year-old Christina. They divorced after Mr. McNeil began an affair with Misook Nowlin. (Vol. VIII, R. 22) They maintained a cordial relationship and cooperated in the care of Christina. Sometimes, Mr. McNeil gave Tita extra money for Christina's care. When Tita began working irregular hours as a nurse at Bro Menn Hospital, Barton took on additional child care responsibilities. When his work schedule permitted, he cared for Christina instead of relying on daycare arrangements. Christina would stay at his home as many as four nights a week. (Vol. VIII, R. 22-26) The night Christina died, she was staying at Mr. McNeil's one-bedroom apartment.

Until two months before Christina's death, Barton McNeil and Misook Nowlin had been living together intermittently. Prior to trial, the State succeeded in its motion *in limine*, thereby keeping the defense from presenting evidence that someone other than Barton McNeil was responsible for the death of Christina, which occurred on June 16, 1998.

Misook Nowlin and the Offer of Proof

The defense made an extended offer of proof about Misook Nowlin, which included the following information:

Misook Nowlin and her ex-husband Andy Nowlin shared custody of their daughter Michelle. Michelle lives with Andy. (Vol. IV, R. 108) According to Andy Nowlin's wife, Dawn, in August or September of 1998, Michelle showed them seven bruises she got after her mother whipped her with a paper towel holder. (Vol. IV, R. 110-13) That same evening, Misook put a hand over Michelle's mouth and warned her: "I'm going to kill you. You're going to die tonight." (Vol. IV, R. 114)

Arden, why not cite the court record: "she also said that she couldn't breath, and her mother said, "I will -- I will kill you tonight"

Misook Nowlin and Mr. McNeil had lived together. Tim Wilson testified that in the spring or early summer of 1998, Misook appeared possessive and jealous. Over time, her behavior became abnormal. (Vol. IV, R. 82-83)

Leng Wilson, a long-time co-worker of Barton and Misook, spoke with Misook Nowlin after Christina's death. Nowlin told Leng that Christina had been found dead and asked: "You don't think I did it, do you?" Leng replied: "I don't know." (Vol. IV, R. 84) Misook Nowlin was jealous of Mr. McNeil and was angry because he ended their relationship. Misook told Leng if Barton had not moved out and broken up with her, Christina would still be alive. (Vol. IV, R. 85-86)

Andy Nowlin, Misook Nowlin's ex-husband, spoke with Misook by telephone on June 15 between 9 and 10:30 p.m. Misook told Nowlin that Barton was going to leave her or move out. (Vol. IV, R. 103-05) For a week, and again that night, Misook asked Andy Nowlin to get hold of some marijuana to put in Barton McNeil's car to set him up. Her goal was to get Barton in trouble. (Vol. IV, R. 106) At the hearing on the offer of proof, Misook Nowlin denied asking Andy to get the marijuana. She also stated: "I just joke around with him. I don't ask him seriously. . . ." (Vol. IV, R. 124)

Mr. Nowlin arrived at Misook Nowlin's house between 6:10 and 6:20 a.m. on June 16. He may have told the police he went to Misook's house to transfer his daughter's clothing. (Vol. IV, R. 108) That morning Andy told Misook Barton's responses to questions Andy had posed about the nature of the relationship between Barton and Misook. In the recent past, Misook asked Andy to write down questions she should ask Barton McNeil about their relationship. (Vol. IV, R. 107) Andy testified that when Barton McNeil came to Andy's house one day to pick up some things for Michelle, Andy had asked him the questions he had prepared. He asked Mr. McNeil where the relationship

with Misook was going, whether Barton still loved Misook, and whether they could work things out together. (Vol. IV, R. 108-09)

Misook Nowlin [Kim] stated she invited Barton to dinner at Avanti's on June 15, which was the night before Christina died. Misook testified that at dinner she and Barton argued about the contents of a telephone bill. (Vol. IV, R. 118-19) Misook stated that Barton told her two weeks earlier that he had applied for new jobs, including one in Pekin. During dinner, Barton denied getting the new job. He told Misook he was not moving. (Vol. IV, R. 119-20) Misook became upset and scared. She had been charged with a domestic battery charge in 1997 and Barton M^{c}Neil was listed as victim. The evening of June 15, Barton told her he did not intend to testify on her behalf on June 17. (Vol. IV, R. 120-21)

Misook stated she paid for dinner by check. She had to have Barton write down the amount of the check because she was too upset. Then she signed it. (Vol. IV, R. 122) Misook testified she followed Barton M^{c}Neil's car home from the restaurant to warn him that it was smoking. Barton told her not to follow him. (Vol. IV, R. 121)

At the restaurant, Barton told Misook he was leaving to pickup Christina at her mother's house. (Vol. IV, R. 122)

Waitress Ericka Polson witnessed a five-minute argument at Avanti's Restaurant on June 15. The woman left, returned to sign a check, and left, argued, and left. (Vol. IV, R. 79) The man did not respond. (Vol. IV, R. 79-80) He wrote the check amount and the woman signed the check. (Vol. IV, R 80)

Yuman Aldridge, a friend of Misook Nowlin, received a call from Nowlin at work the day before Christina's death. She did not go to Misook Nowlin's house that night. (Vol. IV, R. 87-89) She did not remember what she told Officer Shepard. (Vol. IV, R. 89-90) She remembered saying she saw Misook Nowlin for about five minutes at Misook

Nowlin's residence. (Vol. IV, R. 102) Ms. Aldridge was having trouble remembering that day. (Vol. IV, R. 90)

Another friend of Misook Nowlin, Susie Kaiser, testified Misook Nowlin, Don Wang, and she went to play pool at ISU and then went to Misook Nowlin's house. (Vol. IV, R. 90-93) Kaiser stayed there until after eleven p.m. Misook Nowlin did not appear upset or angry that night. (Vol. IV, R. 94) Nowlin came to work on June 16 at three p.m. Misook Nowlin wanted to visit Barton M^{c}Neil that night. They were having problems. Susie Kaiser counseled Misook not to go to Barton M^{c}Neil's house. (Vol. IV, R. 96) Kaiser's recollections was confirmed by Misook Nowlin. (Vol. IV, R. 126) Misook asked Kaiser to go to M^{c}Neil's about 11:30 the night of June 15. Misook stated she stayed home by herself after that. (Vol. IV, R. 127) She spoke to her brother in Korea around 12:30 a.m. (Vol. IV, R. 128) The next morning around eight a.m., Misook went to Barton's house for help with a computer project for work. She just kind of missed him and wanted to talk to him. She knew the address and layout of Barton M^{c}Neil's apartment. (Vol. IV, R. 129) Her daughter Michelle had been to the apartment three or four times. (Vol. IV, R. 130)

Don Wang arrived at Misook Nowlin's apartment between 8:00 and 8:30 p.m. on June 15. They left to shoot pool for a little more than an hour. He dropped off the girls at Nowlin's residence about 9:30. (Vol. IV, R. 97, 100, 101) He denied telling Officer Shepard that Misook Nowlin and Susie Kaiser changed their minds and showed up at the Billiards Center a short time after he arrived. (Vol. IV, R. 101)

Officers Larry Shepherd and Marvin Arnold interviewed Misook Nowlin on June 18. The police had learned Nowlin had been at the M^{c}Neil residence the morning of Christina's death. They knew she had a relationship with Mr. M^{c}Neil. Nowlin told the police that, the night of June 15, she had been with a couple of friends at the ISU Billiards Center and that she arrived home about 10:30 p.m. (Vol. IV, R. 62-63) Her friend left at

eleven p.m. that evening. The next morning, her ex-husband came to her house about six a.m. to pick up clothes for their daughter Michelle to wear that day. Nowlin's polygraph test was inconclusive. (Vol. IV, R. 64-65) Originally, Nowlin did not tell the police she went to the Billiards Center. (Vol. IV, R. 65-66)

A DCFS child protection investigator testified she spoke with Michelle Nowlin in September of 1998. Michelle's grade school had filed an abuse report because she developed bruises after spending a weekend visiting her mother. (Vol. IV, R. 67-68) Michelle explained that her mother had hit her with a wooden dowel rod, causing four bruises, including one bruise on each thigh and two on the left hip. Michele said her mother hit her five to eight times. Michelle reported that during the beating, her mother cupped her hand over her mouth and told Michelle: "I will kill you tonight." (Vol. IV, R. 69-70)

Arden, why not cite the court record: "she also said that she couldn't breath, and her mother said, "I will -- I will kill you tonight"

On the morning of June 16, 1998, Bloomington Police Officer Marvin Arnold went to Mr. McNeil's apartment. (Vol. IV, R. 43-46) The dead child was in the bedroom, about three feet from the window. (Vol. IV, R. 47, 53) The window screen on the north wall of the bedroom was torn near the lower inside latch. (Vol. IV, R. 48-49, 52-53) Detective Thomas Sanders noticed spider webs and dead insects suspended in the window extending from the screen mesh to the aluminum window frame. Looking outward, the lower right hand corner of the screen was cut or punched. (Vol. IV, R. 54) As was evident in a photograph taken by Sanders, the screen was hanging slightly off its track. (Vol. IV, R. 56) Thomas did not remember seeing the frame bent when he looked at it June 15. (Vol. IV, R. 60) Another photograph showed a dark spot below the window. There was an inconsistency in the wood. The area was dusted for fingerprints. There were several smudges around the inside of the window, but there were no visible ridges. (Vol. IV, R. 57-58) There were smudges below the sash in the center of the apron. (Vol.

IV, R. 58-59) Mr. McNeil's landlord, Wayne Downen, testified the apartment building has combination screen and storm windows. (Vol. IV, R. 73) Downen usually checks and repairs the condition of window screens when an apartment becomes empty. The defendant moved into his apartment two months before Christina's death. (Vol. IV, R. 72-74) There is a walkway between the front and back of the building. Anyone using the walkway would walk right past the McNeil bedroom window. While he was watering the lawn, Downen did not recall noticing any problems with the bedroom screen's condition. Mr. Downen stated that it was common for tenants to cut the corners of a screen to gain entrance to their apartments when they forget their keys. (Vol. IV, R. 75) He remembered taking a bed from the McNeil apartment to the Salvation Army. (Vol. IV, R. 76)

Misook Nowlin's relationship to Barton McNeil, their argument the night before Christina McNeil's death, the relationship between Misook and her daughter Michelle, Misook's possessive behavior, and her interest in getting Barton into trouble with the law were factors not allowed into evidence in determining whether Barton McNeil was guilty of murdering his child Christina. Following argument, the court granted that part of the State's Motion *in Limine* which barred the defense from presenting evidence that someone other than Barton McNeil committed the offense. (Vol. IV, R. 132-33) The defendant's motion to reconsider that ruling was also denied. (Vol. IV, R. 170-79)

Trial Evidence

June 15 and 16, 1998

At 7:40 a.m. on June 16, the 911 dispatcher received a call that a child was unconscious and not breathing. (Vol. VI R. 33-34) Due to chaotic conditions, the dispatcher could not finish giving Mr. McNeil CPR instructions. (Vol. VI, R. 35) The 911 tape was played. (People's Exhibit No. 13; Vol. VI, R. 36-38) The paramedics arrived at

the M[c]Neil house at 7:44 a.m. Mr. M[c]Neil was holding the door open for them. (Vol. VI, R. 21) He was holding a telephone in his hand and told the paramedics to "hurry." (Vol. VI, R. 27) The police were dispatched about 7:45 a.m. (Vol. VI, R. 11) Christina was in the bedroom lying face up. Her body was angled across the bed. (Vol. VI, R. 13, 22) Officer Karen Baker testified there was no evidence of a struggle. Baker was not the first to see the body. (Vol. VI, R. 16-17) Barton M[c]Neil was distraught and frantic. (Vol. VI, R. 17-22) The paramedics did not perform lifesaving measures. Rigor mortis had already begun. (Vol. VI, R. 22-24)

At the scene, Mr. M[c]Neil stated that Christine had appeared happy between midnight and 12:30 a.m. (Vol. VI, R. 22) Paramedic John Scharufangal and Police Officer Baker did not notice a fan in the bedroom. The body was six to seven feet from the window. (Vol. VI, R. 26)

When Officer Sanders first arrived, he thought there had been a natural death. (Vol. VI R. 116) The crime scene was not clean because of the rescue efforts. (Vol. VI R. 117) Officer Arnold, who arrived at 8:03 a.m., noticed that the defendant's hands were covering his face. He made crying sounds. Officer Arnold stated that Mr. M[c]Neil appeared to be peeking at Mrs. M[c]Neil. Mr. M[c]Neil appeared tired, but calm and cooperative. When Tita M[c]Neil arrived, she cried uncontrollably. (Vol. VI R. 40, 44)

Crime scene technician Thomas Sanders found Christina's body covered to the waist with a blanket. There was a small amount of blood below the nostrils. There were night clothes under her neck and across her left arm. She was wearing underpants. (Vol. VI R. 69-70)

Tita M[c]Neil, a native of the Philippines, testified that she and Barton M[c]Neil divorced in October of 1996. Christina had been born on January 11, 1995. (Vol. VII, R. 189-91) Their visitation order gave Mr. M[c]Neil the right of first refusal when Tita worked.

(Vol. VII, R. 193) On June 15, Ms. McNeil worked from eleven to seven a.m. (Vol. VII, R. 193-94) Mr. McNeil picked up Christina at Tita's house after seven p.m. (Vol. VII, R. 194) At death, Christina was wearing the underpants she had worn the day before. (Vol. VII, R. 195-97) Mrs. McNeil never noticed Christina engaged in abnormal touching of herself. (Vol. VII, R. 197-200)

Mr. McNeil, 40, testified at trial that he took Christina to the drive-thru of McDonald's in Normal between 7:30 and 7:45 p.m. on June 15. There they purchased a hamburger Happy Meal for her. (Vol. VIII, R. 27-28) They arrived at Mr. McNeil's apartment between 7:45 and 8:00. Christina sat at her table and ate while Mr. McNeil logged onto his computer. (Vol. VIII, R. 28) About 8:30, she announced that she was finished. (Vol. VIII, R. 29) Mr. McNeil did not check to see what she had eaten. He went to take a nap. He grabbed some children's books in the bedroom. He then fell asleep on the couch. Christina was reading to herself as she sat at his feet. (Vol. VIII, R. 29-30) Mr. McNeil awoke about 10:30 and announced it was time for bed. He heard Christina changing into his tee shirt for sleeping. (Vol. VIII, R. 32) About 10:30, Christina brushed her teeth and washed her face and hands. Then Mr. McNeil tucked her in for the night and turned the dimmer switch down very low. Mr. McNeil returned to the living room and logged back onto his computer. (Vol. VIII, R. 32-33)

Around midnight, Mr. McNeil heard Christina. She was sitting in bed reading *Go Dog Go.* He told her to go to sleep and returned to the computer. (Vol. VIII, R. 35-37) At two, Mr. McNeil passed the bedroom on the way to the bathroom. Christina was not awake. Mr. McNeil went to sleep on the couch. (Vol. VIII, R. 39) He recalled that there was a thunderstorm around 2:15 or 2:30 a.m. He fell asleep about 2:45 a.m. (Vol. VIII, R. 41) Mr. McNeil cleaned Christina's table about 10:30 and threw away the food and wrappers. There were no fries left. (Vol. VIII, R. 42) He did not volunteer to the police

that he logged onto the computer while Christina was eating since it had nothing to do with her death. (Vol. VIII, R. 79) He did not mention that she announced when she was through eating or that he laid down before she finished eating. (Vol. VIII, R. 80)

Mr. McNeil believed Officer McKinley was mistaken when he stated Mr. McNeil told him he laid down after the meal. (Vol. VIII, R. 81) On direct examination, Mr. McNeil stated it had been extremely warm the night of June 15 to 16. He also told the police the fan was not on because it was relatively cool. (Vol. VIII, R. 82-83) He testified under cross-examination he did not remember the weather conditions or what he had told the police about them. (Vol. VIII, R. 83) He did not tell the police that he thought it odd that Christina appeared so happy at 12:10 p.m. (Vol. VIII, R. 85) He stated that when he checked on her, he took the book from her but did not remove it from the room. (Vol. VIII, R. 85) He denied telling the police when he checked on her at 2:00 a.m., the covers were up around her chin and she was sleeping on her back. (Vol. VIII, R. 86) He could not say for sure when she last ate. He did not empty the food bag to see if she had finished the fries; nor did he inspect the hamburger. When he threw out the wrappers at the end of the night, they felt empty except for a small piece of hamburger. (Vol. VIII, R. 87) He told the police Christina ate 80 *per cent* of her hamburger, all of her french fries and drank all of her milk. Prior to his arraignment, Mr. McNeil stated Christina ate nothing after 8:15 except two sips of pop. (Vol. VIII, R. 88-89) He did not tell the police that the apartment door was left open but he had left the screen door locked. Then after the storm began, he closed the main door also. (Vol. VIII, R. 92-93) He did not tell the police he checked his e-mail in the morning before discovering Christina's body. (Vol. VIII, R. 94-95)

Mr. McNeil stated a swivel fan was mounted in the bedroom window that night. The window held it in place. (Vol. VIII, R. 34) Two weeks earlier, he raised the screen in

order to run an extension cord outside. (Vol. VIII, R. 38-39) Mr. McNeil explained that at night it was pitch black on the side of his apartment where the bedroom window was. (Vol. VIII, R. 44) The only door to his apartment was closed and locked that night. (Vol. VIII, R. 46-48)

Mr. McNeil awoke to his clock alarm around 7:10, arose at 7:19, when the snooze alarm sounded, walked toward the bathroom, and hollered to Christina to awaken. (Vol. VIII, R. 46, 49) After spending 20 minutes in the bathroom, and dilly-dallying in the living room checking his e-mail, Mr. McNeil returned to the bedroom. He noticed Christina had not moved. She was lying on her back at an angle with her head toward the southeast. He realized she was dead. (Vol. VIII, R. 50-51) Mr. McNeil ran to the living room, logged off his computer and called 911. (Vol. VIII, R. 51) He ran into the bedroom and blew into Christina's mouth to perform CPR. He heard a terrible, gurgling scratchy sound. She felt stone cold. He knew resuscitation attempts would be fruitless. (Vol. VIII, R. 58) Blood ran from Christina's nose. He did not hold her nose. (Vol. VIII, R. 59) Mr. McNeil moved Christina's body a little while trying to perform CPR. He stated that contrary to the police report, he blew into her mouth and not her nose. (Vol. VIII, R. 98)

After family and workers left his house, Mr. McNeil went to Tita's house for the afternoon, returning to his apartment between five and six p.m. (Vol. VIII, R. 61-63) At that time, it began to occur to Mr. McNeil that Christina had not died from natural causes. He began examining the bedroom window, noticing two holes in the window screen and a dark mark below the window. The screen was unlatched, bent, and off its track. (Vol. VIII, R. 63-64) He realized the fan was not in the window. (Vol. VIII, R. 65) He noticed that the bushes beneath his front windows had been trampled. (Vol. VIII, R. 71)

Mr. M°Neil stated that in addition to paying child support he helped Tita financially and with errands. He also handled other problems for Tita because he did not want Christina to go to the Philippines with Tita. (Vol. VIII, R. 75)

Mr. M°Neil denied telling Officer M°Kinley he slept in the nude. He said that in part to Detective Wikoff. (Vol. VIII, R. 55-56) He only slept naked if he already slept with his ex-girl friend and later Christina climbed into bed with them, but never at his new apartment. (Vol. VIII, R. 56) He explained that he believed Christina had been asphyxiated because he realized she had been murdered and she had not been stabbed or beaten, and there was no possibility of poisoning. (Vol. IX, R. 69)

Mr. M°Neil denied killing Christina or having sexual contact with her. Prior to her birth, he had wanted Christina to be given up for adoption. (Vol. VIII, R. 76) Tita had complained to him because he smoked in front of Christina and because he slept in the nude with her. (Vol. VIII, R. 78)

Interview

Barton M°Neil gave the police a voluntary narrative statement. He explained that Christina had suffered from asthma. He picked her up at Tita's house about seven p.m. They picked up a Happy Meal at McDonald's in Normal and brought it back to the apartment. She ate the meal from 8:30 to 8:45 p.m. and went to bed about 10:30. (Vol. VI, R. 45) Mr. M°Neil looked in on Christina about 12:10 a.m. He awoke the next morning between 7:20 and 7:25. He went into the bathroom, called out for Christina to wake up, and not unusually, she did not respond. He went into the bedroom. When he checked on her, she was in the same position as when she went to sleep. She did not respond. She was lying in bed with her eyes open. Her feet were cold to the touch. He

knew she was dead. (Vol. VI, R. 46-47) He explained that the blood in her nose came from his attempts at CPR. (Vol. VI, R. 47)

Later in the day of June 16, Barton McNeil called the police department and asked that Misook Nowlin be arrested for murder. (Vol. VI, R. 48) He went to the station house that evening. He explained how Misook Nowlin was responsible for Christina's death. He said he knew before the autopsy that Christina had died of asphyxiation or suffocation. (Vol. VI, R. 49) The defendant was present at police headquarters from 9:00 p.m. to 10:30. The police told him to go home and get some rest. (Vol. VI, R. 50) The defendant asked the police to call him after the autopsy, which was scheduled for the next morning. (Vol. VI, R. 50-51) At 11:10 a.m., when the police returned to the station, Mr. McNeil was waiting for them. At Mr. McNeil's insistence, the second interview was audio and video-taped. (Vol. VI, R. 52)

At trial, Officer McKinley testified that he and Officer Michael Wikoff interviewed Mr. McNeil on June 15 after 7:15 p.m. The defendant said that Christina ate 80 *per cent* of her burger and all her french fries, and they she drank all her milk. (Vol. VII, R. 178-80) Mr. McNeil napped between eight and ten p.m. and then spent 30 minutes getting Christina ready for bed. He then began using his computer. (Vol. VII, R. 181) Around 12:30, she went to sleep again in the bedroom and he went to sleep in the living room. She was on her back with the covers up to her chin. She appeared asleep. (Vol. VII, R. 182-83) He slept from 2:45 to 7:10 a.m. He hit the snooze button when the alarm sounded at 7:10 and awoke again at 7:19. He called to waken Christina. He shook her. He had been in the shower for ten minutes and spent eight minutes on the toilet. (Vol. VII, R. 183) He went to rouse her. She was cold to the touch. At 7:40, he telephoned 911. The dispatchers helped describe CPR to him and he tried it, causing blood to come out of Christina's nose. (Vol. VII, R. 183-84) When he saw her, her feet were pointed

toward the window. Her face was turned left toward the wall. She was on her back. Sometimes they slept together. Normally he slept in the nude. (Vol. VII, R. 185)

Mr. McNeil told the police the autopsy would find that cause of death was asphyxiation. (Vol. VII, R. 186) He stated the screen door to his residence had been locked. He did not observe the bedroom window between 7:40 and 8:00 a.m. (Vol. VII, R. 186)

Mr. McNeil told Officer Shepard that after Christina ate, around 8:30 p.m., she went to the potty. Mr. McNeil napped while she read to herself. He awoke about 10:30 and put her in bed. At 12:10, Mr. McNeil told her it was time to go to sleep. He logged onto the computer. He checked on Christina between 2:00 and 2:30 a.m. She was lying on her back. (Vol. VI, R. 58) Mr. McNeil said he fell asleep about 2:45 a.m. He was awakened the next morning by his alarm. It rang at 7:10. He hit the snooze button, and it rang again at 7:19. He went to the bathroom. He smoked in there and later walked past the bedroom. He called for Christina to get out of bed. There was no response. (Vol. VI, R. 56-57) He showered and called to her again. Then he walked into the bedroom. He touched Christina's stomach. He noticed that her eyes were open. She felt cold, and he knew she was dead. (Vol. VI, R. 57, 58)

Mr. McNeil stated he had to unlock the screen door to let the EMT's into the apartment. (Vol. VI R. 58-59) The bedroom window had white Venetian blinds. Officer Shepard never saw tears in Mr. McNeil's eyes. (Vol. VI R. 60)

Officer Shepard later confronted Mr. McNeil, saying that things were not right with the body and that Mr. McNeil never told anyone that Christina was molested. Shepard did not record this interview. (Vol. VI R. 61)

Taped Interview at Police Station

In the interview on the evening of June 17, which was taped at Mr. McNeil's insistence, Barton McNeil told the police he and Misook had been together three years. Her violent behavior toward him resulted on three to four police contacts. She became hysterical when she did not get her way. She made several suicide attempts. He feared for Christina's safety. The night of June 15, Misook and he had a fight at Avanti's.

After the police left on June 16, after noticing that the fan was disconnected and on the floor, Barton began to think that someone could crawl through the bedroom window. He saw two holes in the screen and called 911 several times. He told the police to search his house and Misook's house for fiber samples. He stated he knew he was a suspect. He showed the police photographs of Misook, Christina, and Misook's daughter Michelle, who often stayed overnight. He expressed the thought that Christina probably had been asphyxiated by a pillow or stuffed animal. There were no signs of trauma or poisoning. Misook had a maniacal desire to have him.

Misook was obsessed with Mr. McNeil and called him at work and home. He moved out twice before finally ending their relationship. Misook was in counseling. She was incredibly jealous of Tita and of Christina. Mr. McNeil thought that it was improbable that a random person committed this offense. Mr. McNeil explained that only Misook, a stranger, or he could be suspects. He had an undying love for Christina and had no motive to kill her.

Christina was tall, of average intelligence, and was good at potty training. She was shy at daycare and was prospering there. She could read as many as 10 words. Mr. McNeil stated he got to Tita's house about 7:10, to McDonald's about 7:30, and home about 7:50. Christina then ate a Happy Meal about 8:00. He fell asleep on the couch about 8:40 and awoke about 10:30. Christina woke him three to four times during that

period. Her books and toys were strewn all over the living room floor. About 10:30, she picked up her toys and put on her Red Lobster nightshirt. Then she went to bed. The books and toys in the bedroom are arranged as she put them away that night. Mr. McNeil stated that Christina urinated about 8:00 or 8:10, in the midst of eating. Around midnight, Mr. McNeil went to the bathroom. Passing the bedroom, he heard Christina playing at reading "Go Dog Go."

He had a restraining order against him because he pulled Tita's hair one night three or four years ago.

Christina has asthma. Tita used to get angry if he smoked in front of Christina. Tita and Barton McNeil divorced because he was having an affair with Misook Nowlin. Tita and he generally got along after the divorce. He gave her lots of extra money when she needed it. They have argued over money. His helping Tita made Misook Nowlin angry. Misook Nowlin is Tita's only enemy. Mr. McNeil used to try to smooth things over between Misook and Tita. He explained that Michelle, Misook's daughter, lived with Misook's ex-husband and only saw her mother every two weeks, despite a more liberal visitation order. Misook is detail-orientated and meticulously conniving. Mr. McNeil asked the police if he could wear a wire when he talked to Misook. He was sure that if he told her he killed Christina and would be going to prison for 30 years, she would confess.

Mr. McNeil said he wished Christina died of natural causes. He opined that there was fiber evidence on the window screen or prints on the aluminum frame from when Misook stood on something to reach the bedroom window.

The defendant used to do four to five nights of child care per week when Tita worked and he did not.

The tape ended at 11:52 p.m.

Physical conditions of the House and Grounds

The windows in the apartment complex were triple tracked storm and screen combinations. The property owner never noticed the holes in the screen between the time the defendant moved into the apartment and the date of Christina's death. (Vol. VIII, R. 10, 11) He stated that it was common for tenants to unlatch screens to gain entry to their apartments when they forgot their keys. (Vol. VIII, R. 13) Officer Randall D. McKinley went to Barton McNeil's residence on June 16 at 6:00 because the defendant insisted on showing him how someone got into the residence. McKinley observed a couple of small holes in the lower screen of the bedroom window. (Vol. VII, R. 168) The window was very high off the ground. There were no scuff marks on the wall under the window. The defendant told him someone poked holes and opened the screen and crawled through the window. (Vol. VII, R. 169) McKinley stated a person would need to stand on something to reach the window. Mr. McNeil also showed Officer McKinley a window fan which was sitting on the floor. He said it was normally in the window. (Vol. VII, R. 170) The defendant agreed to come to the station house to speak with the police. (Vol. VII, R. 171)

Later that night, Officers McKinley and Sanders observed spider webs, an even coating of dust, and a dead bug on the interior of the screen. (Vol. VII, R. 172-73) Nothing about the screen appeared disturbed. (Vol. VII, R. 174-75) Officer McKinley stated there were many webs visible from the screen to the window frame. (Vol. VII, R. 177)

Officer Arnold saw a circular fan on the bedroom floor. From outside he observed a small hole in a corner of the bedroom window screen. (Vol. VI, R. 63) The hole was more like a cut. (Vol. VIII, R. 18) He did not see a disturbance below the bedroom window. No fingerprints were lifted. There were no shrubs in the area. The window

window. No fingerprints were lifted. There were no shrubs in the area. The window ledge had undisturbed dead insects and dust. Some cobwebs extended from the screen mesh onto the frame. (Vol. VI, R. 109) Officer Sanders stated there were no marks or disturbances visible around the area below the window and no problems with the ground. (Vol. VI, R. 75) The second time Sanders went to examine the scene, he observed two holes. (Vol. VI, R. 76-77) A fan lay beneath the window against the wall and some boxes. There were no muddy prints. Officer Shepherd observed one dried water mark or paint dripping on the window trim below the window seal. (Vol. VI, R. 109-10) He could not tell if there were any latent prints on the window. (Vol. VI, R. 110) A concrete walk immediately abuts the window. No grass or greenery lies beneath the window. (Vol. VI, R. 118-19)

There is a slight discoloration on the siding, as seen in Defendant's Exhibit No. 4. Sanders testified he never observed the discoloration at the scene. It might have been a shadow. (Vol. VI, R. 120) Defendant's Exhibit No. 5 showed smudges or parallel marks on the inside of the window. (Vol. VI, R. 120) Sanders did not attempt to lift fingerprints from the area depicted in Defendant's Exhibit No. 5. (Vol. VI, R. 121) These could be marks from a gloved hand. (Vol. VI, R. 122) Defendant's Exhibit No. 6 shows trampled bushes and vegetation below the front window. (Vol. VI, R. 122-23) The latch to the inside of the bedroom window screen is crooked and angled to the right. The window is not sitting completely in its track. In Defendant's Exhibit No. 2, the window appears to be latched and bowed towards the center. (Vol. VI, R. 124-25) The cobwebs are not visible in the photographs. Officer Sanders testified that the webs were visible only by inspection with the bare eye. (Vol. VI, R. 126) Six days earlier the State's photograph did not show trampling. (Vol. VI, R. 138) Sanders did not believe he could remove the screen without disturbing the cobwebs. (Vol. VI, R. 140)

The scene was not sealed until the evening of June 16. (Vol. VI, R. 136)

Ex-neighbor Tara Cheek stated her window at Apartment 4 was open all night. (Vol. VI, R. 164-68) It was stormy, and she is a light sleeper. She heard no noises. (Vol. VI, R. 169) She could have slept through noise. No rain came into her house through the window. (Vol. VI, R. 170) It was very dark outside that night. (Vol. VI, R. 171)

ISU grounds gardener Darcy Loy testified that it rained beginning at 3:00 a.m. on June 16. (Vol. VI, R. 144-46) It rained hardest between 3:30 and 4:00 a.m. (Vol. VI, R. 147)

Forensic Evidence

Several hairs were found on Christina, a child of mixed race. The hairs appeared consistent with Christina's hair samples and dissimilar to Barton M^{c}Neil's hair samples. No semen was found on the body. (Vol. VII, R. 57) There was urine present, which is common at death. (Vol. VII, R. 58) Christina's blood was found on the pillow and pillow case from the bed. Her blood was also present in the vagina, nose, and mouth. (Vol. VII, R. 63, 64, 70-93) There were some matching blood stains on the bedding. (Vol. VII, R. 121-22)

Dr. Violet Hnilica testified that death was caused by smothering and asphyxia. (Vol. VII, R. 119, 136) Bruises around the mouth and nose and in the mid back indicated the application of pressure to those areas. Other bruising was less severe. (Vol. VII, R. 120) (Vol. VII, R. 122-23, 141) The mouth bruises were from some pressure like a pillow or mattress. Dr. Hnilica opined that a shoe or knee in the mid back caused that bruising. (Vol. VII, R. 138) Vaginal and anal inflammation was chronic (days and weeks old) and acute (within hours of death). (Vol. VII, R. 123-24, 126) Dr. Hnilica opined that these injuries were consistent with molestation. (Vol. VII, R. 127) Dr. Hnilica did not think the dilation of the hymen was caused by an adult male's penis. (Vol. VII, R. 145) Dr. Hnilica

estimated that the back bruises occurred within 30 minutes of the asphyxia. (Vol. VII, R. 140)

An analysis of stomach contents revealed that Christina died within two hours of eating french fries unless she became comatose before death. (Vol. VII, R. 134-35) The fries were the only stomach contents. (Vol. VII, R. 148) Dr. Hnilica did not know when Christina ate last. (Vol. VII, R. 156)

The attitude of the body at death was not discernible from the lividity pattern. (Vol. VII, R. 156) The body was fully rigid. Full rigidity occurs within eight to ten hours of death. Lividity begins immediately upon death. (Vol. VII, R. 152, 154)

ISU student Brian Nicoson testified that user name BUGSBUN @ Icenet logged on to his computer on June 15 at 10:39 p.m. and terminated the connection at 7:40 on June 16. (Vol. VI, R. 154-57) There were requests for mail at 7:20 a.m., 7:37 a.m., and 7:37 a.m. The 7:37 entry appeared to be a log on and log off. (Vol. VI, R. 158-61) Log off was at 7:40 a.m. (Vol. VI, R. 162-63) (People's Exhibit No. 12)

ARGUMENT

I.

THE TRIAL COURT'S RULING PRECLUDING THE DEFENSE OF PRESENTING EVIDENCE THAT MISOOK NOWLIN, AND NOT THE DEFENDANT, COMMITTED THE MURDER, DEPRIVED BARTON M^{C}NEIL OF HIS 6TH AND 14TH AMENDMENT RIGHTS TO PRESENT A DEFENSE.

Christina M^{c}Neil died while in her father's care. She came to his home for an overnight visit on June 15. Mr. M^{c}Neil called 911 in the early morning hours of June 16 to report that Christina was not breathing. Later that night, at Mr. M^{c}Neil's insistence, the Bloomington police returned to his apartment to look for evidence that someone had entered the house through the window of the bedroom where Christina slept. After hearing a lengthy offer of proof, the trial court refused to permit the defense to present evidence that the woman with whom Mr. M^{c}Neil was ending a long-term relationship had the motive and opportunity to kill and sexually abuse Christina. That ruling was erroneous in that it kept Mr. M^{c}Neil from presenting a full defense, in violation of the Sixth and Fourteenth Amendments to the United States Constitution. *See* ***Chambers v. Mississippi***, 410 U.S. 284, 289-290, 93 S.Ct. 1038, 35 L.Ed.2d 297, 305 (1973).

Barton M^{c}Neil Had the Right to Present a 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, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The right to offer evidence and testimony of witnesses is essential to the right to present a defense itself, and "[s]tands on no lesser footing than the other 6th Amendment rights." ***Washington v. Texas***, 388 U.S. 14, 18-19, 87 S.Ct. 1920 (1967). Few rights are more fundamental than the right of an accused to present evidence in his own defense. ***Taylor v. Illinois***, 484 U.S. 400, 408, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). Criminal defendants have the right to present relevant, competent evidence and witnesses in their behalf. 484 U.S. at 411. A defendant is entitled to all

reasonable opportunities to present evidence which might tend to create doubt as to his guilt. ***People v. Cole***, 30 Ill.2d 375, 379, 196 N.E.2d 691 (1964).

An accused may attempt to prove that someone else committed the crime with which he is charged as long as the evidence is relevant. ***People v. Ward***, 101 Ill.2d 443, 463 N.E.2d 696, 702 (1984). "'The test of the admissibility of evidence is whether it fairly tends to prove the particular offense charged' [*citation omitted*] and whether what is offered as evidence will be admitted or excluded depends upon whether it tends to make a question of guilt more or less probable, *i.e.*, whether it is relevant." ***People v. Enis***, 135 Ill.2d 264, 564 N.E.2d 1155, 1161 (1990). A trial court may reject offered evidence on grounds of irrelevancy if the evidence has little probative value due to its remoteness, uncertainty, or its possibly unfair prejudicial nature. ***People v. Ward***, 463 N.E.2d at 702.

Illinois law defines relevant evidence as that, "which tend[s] to make the proposition at issue more or less probable." ***People v. Peter***, 55 Ill.2d 443, 303 N.E.2d 398, 408 (1973). Under that standard, the trial court incorrectly excluded evidence to support the defense theory that someone other than Barton M^{c}Neil committed the offense. This evidence was highly relevant to the ultimate issue in the case and was neither remote, uncertain, nor unfair. Because the trial court, as trier of fact, did not consider relevant testimony about a material issue in this case, the exclusion of such testimony deprived Mr. M^{c}Neil's defense of vital evidence. ***Chambers***. The constitutional violation and resulting unfairness in this case justify a new trial.

The Evidentiary Ruling Was Incorrect.

Offer of Proof

Facts linking Misook Nowlin to the murder of Christina M^{c}Neil were contained in an offer of proof. Prior to trial, the defense presented an offer of proof as to the admissibility that someone other than Barton M^{c}Neil committed the offense. The offer contained information that Misook Nowlin and her ex-husband Andy Nowlin shared custody of their

daughter Michelle. Michelle lives with Andy. (Vol. IV, R. 108) According to Andy Nowlin's wife, Dawn, in August or September of 1998, Michelle showed them seven bruises she got after her mother whipped her with a paper towel holder. (Vol. IV, R. 110-13) That same evening, Misook put a hand over Michelle's mouth and warned her: "I'm going to kill you. You're going to die tonight." (Vol. IV, R. 114)

DCFS child protection investigator testified she spoke with Michelle Nowlin in September of 1998. Michelle's grade school had filed an abuse report because she developed bruises after spending a weekend visiting her mother. (Vol. IV, R. 67-68) Michelle explained that her mother had hit her with a wooden dowel rod, causing four bruises including one bruise on each thigh and two on the left hip. Michele said her mother hit her five to eight times. Michelle reported that during the beating, her mother cupped her hand over her mouth and told Michelle: "I will kill you tonight." (Vol. IV, R. 69-70)

Misook Nowlin and Mr. M^{c}Neil had lived together for a few years. Tim Wilson testified that in the spring or early summer of 1998, Misook was possessive and jealous. Over time, her behavior became abnormal. (Vol. IV, R. 82-83)

Leng Wilson, a long-time co-worker of Barton and Misook, spoke with Misook Nowlin after Christina's death. Nowlin told Leng that Christina had been found dead and asked: "You don't think I did it, do you?" Leng replied: "I don't know." (Vol. IV, R. 84) Misook Nowlin was jealous of Mr. M^{c}Neil and was angry because he ended their relationship. She told Leng if Barton had not moved out and broken up with her, Christina's death would not have happened. (Vol. IV, R. 85-86)

Andy Nowlin, Misook Nowlin's ex-husband, spoke with Misook by telephone on June 15 between 9 and 10:30 p.m. Misook told Andy that Barton was going to leave her or move out of their apartment. (Vol. IV, R. 103-05) For a week, and again that night,

Misook asked Andy Nowlin to get hold of some marijuana to put in Barton M[c]Neil's car to set him up. Her goal was to get Barton in trouble. (Vol. IV, R. 106) During the offer of proof, Misook Nowlin denied asking Andy to get the marijuana. She also stated: "I just joke around with him. I don't ask him seriously. . . ." (Vol. IV, R. 124)

Andy Nowlin arrived at Misook Nowlin's house between 6:10 and 6:20 a.m. on June 16. He may have told the police he went to Misook's house to transfer his daughter's clothing. (Vol. IV, R. 108) That morning, Andy told Misook Barton's responses to questions Andy had posed about the nature of the relationship between Barton and Misook. In the recent past, Misook asked Andy to write down questions she should ask Barton M[c]Neil. (Vol. IV, R. 107) Andy testified that when Barton M[c]Neil came to Andy's house one day to pick up some things for Michelle, Andy asked him questions he had prepared. He asked Mr. M[c]Neil where the relationship with Misook was going, whether Barton still loved Misook, and whether they could work things out together. (Vol. IV, R. 108-09)

Misook Nowlin [Kim] stated she invited Barton to dinner at Avanti's on June 15 (the night before Christina died). At dinner, they argued about the contents of a telephone bill. (Vol. IV, R. 118-19) Misook stated that Barton told her two weeks earlier that he had applied for new jobs, including one in Pekin. During dinner, Barton denied getting the new job. He told her he was not moving. (Vol. IV, R. 119-20) Misook became upset and scared. She had a 1997 domestic battery charge, with Barton M[c]Neil named as the victim. Barton told her he did not intend to testify on her behalf on June 17, when she was due to appear in court on that offense. (Vol. IV, R. 120-21)

Misook paid for dinner at Avanti's by check. She had to have Barton write down the amount of the check because she was too upset. Then she signed it. (Vol. IV, R. 122) Misook followed Barton M[c]Neil's car home from the restaurant to warn him that it

was smoking. Barton told her not to follow him. (Vol. IV, R. 121) At the restaurant, Barton told Misook he was leaving to pickup Christina at her mother's house. (Vol. IV, R. 122)

Waitress Ericka Polson witnessed a five-minute argument at Avanti's Restaurant on June 15. The woman left, returned to sign a check, and left, argued, and left again. (Vol. IV, R. 79) The man did not respond to the woman. (Vol. IV, R. 79-80) He wrote the check amount and the woman signed the check. (Vol. IV, R 80)

Thus, the offer of proof asserted that Misook had a history of jealously, possessiveness and violence. She was a woman scorned.

Yuman Aldridge, a friend of Misook Nowlin, received a call from Nowlin at work the day before Christina's death. She did not go to Misook Nowlin's house that night. (Vol. IV, R. 87-89) She did not remember what she told Officer Shepard. (Vol. IV, R. 89-90) She remembered saying she saw Misook Nowlin for about five minutes at Misook's residence. (Vol. IV, R. 102) Ms. Aldridge was having trouble remembering that day. (Vol. IV, R. 90)

Another friend of Misook Nowlin, Susie Kaiser, testified Misook Nowlin, Don Wang, and she went to play pool at ISU and then went to Misook Nowlin's house. (Vol. IV, R. 90-93) Kaiser stayed there until after eleven p.m. Misook Nowlin did not appear upset or angry that night. (Vol. IV, R. 94) Nowlin came to work on June 16 at three p.m. Misook Nowlin wanted to visit Barton M^{c}Neil that night. They were having problems. Susie Kaiser counseled Misook not to go to Barton M^{c}Neil's house. (Vol. IV, R. 96) Kaiser's recollection was confirmed by Misook Nowlin. (Vol. IV, R. 126) Misook asked Kaiser to go to Barton M^{c}Neil's house about 11:30 the night of June 15. Misook stated she stayed home by herself after that. (Vol. IV, R. 127) She spoke to her brother in Korea around 12:30 a.m. (Vol. IV, R. 128) The next morning around eight a.m., Misook went to

Barton's house for help with a computer project for work. She stated she just kind of missed him and wanted to talk to him. She knew the address and layout of Barton M°Neil's apartment. (Vol. IV, R. 129) Her daughter Michelle had been to the apartment three or four times. (Vol. IV, R. 130)

Don Wang arrived at Misook Nowlin's apartment between 8:00 and 8:30 p.m. On June 15, they left to shoot pool for a little more than an hour. He dropped off the girls at Nowlin's residence about 9:30. (Vol. IV, R. 97, 100, 101) He denied telling Officer Shepard that Misook Nowlin and Susie Kaiser changed their minds and showed up at the Billiards Center a short time after he arrived. (Vol. IV, R. 101)

Officers Larry Shepherd and Marvin Arnold interviewed Misook Nowlin on June 18. The police had learned Nowlin had been at the M°Neil residence the morning of Christina's death. They knew she had a relationship with Mr. M°Neil. Nowlin told the police, that on the night of June 15, she had been with a couple of friends at the Billiards Center at ISU and that she arrived home about 10:30 p.m. (Vol. IV, R. 62-63) Her friend left at eleven p.m. that evening. The next morning, her ex-husband came about six a.m. to pick up clothes for their daughter Michelle to wear that day. Nowlin's polygraph test was inconclusive. (Vol. IV, R. 64-65) Originally, Nowlin did not tell the police she went to the Billiards Center. (Vol. IV, R. 65-66)

The offer of proof also contained evidence about the state of Barton M°Neil's bedroom window. On the morning of June 16, 1998, Bloomington Police Officer Marvin Arnold went to Barton M°Neil's apartment (Vol. IV, R. 43-46) The dead child was in the bedroom, about three feet from the window. (Vol. IV, R. 47, 53) The window screen on the north wall of the bedroom was torn near the lower inside latch. (Vol. IV, R. 48-49, 52-53) Detective Thomas Sanders noticed spider webs and dead insects suspended in the window extending from the screen mesh to the aluminum window frame. Looking

outward, the lower right-hand corner of the screen was cut or punched. (Vol. IV, R. 54) As was evident in a photograph taken by Sanders, the screen was suspended slightly off its track. (Vol. IV, R. 56) Thomas did not remember seeing the frame bent on June 15. (Vol. IV, R. 60) Another photograph showed a dark spot below the window. There was an inconsistency in the wood. The area was dusted for fingerprints. There were several smudges around the inside of the window but there were no visible ridges. (Vol. IV, R. 57-58) There were smudges below the sash in the center of the apron. (Vol. IV, R. 58-59)

Mr. McNeil's landlord, Wayne Downen, testified the apartment building has combination screen and storm windows. (Vol. IV, R. 73) Downen usually checks and repairs the condition of window screens when an apartment becomes empty. The defendant moved into his apartment two months before Christina's death. (Vol. IV, R. 72-74) There is a walkway between the front and back of the building. Anyone using the walkway would walk right past the McNeil bedroom window. While he was watering the lawn, Downen did not recall noticing any problems with the bedroom screen's condition. Mr. Downen stated that it was common for tenants to cut the corners of a screen to gain entrance to their apartments if they forgot their keys. (Vol. IV, R. 75) He remembered taking a bed from the McNeil apartment to the Salvation Army. (Vol. IV, R. 76)

Abuse of Discretion

The trial court precluded the defense from presenting testimony developed in the offer of proof that Misook Nowlin committed the offense. That ruling was an abuse of discretion and deprived Barton McNeil of his Sixth Amendment right to present a defense.

People v. Wilson, 149 Ill.App.3d 293, 500 N.E.2d 128 (3rd Dist. 1986), is instructive as to when the defense may present evidence that someone other than the

defendant committed murder. In that case, the defendant argued that he was denied a fair trial when the trial court prevented the defense from attempting to prove that someone other than the defendant committed the two murders. The evidence established that James Reynolds's fingerprints were found at the scene and that he had been arrested the day after the bodies were discovered while using the victims' Corvette. The defense was not allowed to present evidence that Reynolds had been in a violent argument with the victims just hours before their murders.

The defense made a detailed offer of proof which included specifics about the argument. Reynolds testified he made a drug delivery at the victim's apartment the day before the murders. He had been driving a black van with Florida plates. He brought his bull terrier with him to the apartment complex. He testified that after giving Dixon $8,000 worth of cocaine, he left in Dixon's Corvette. Two neighbors of the victims testified they saw a black van with Florida plates and a man with a huge, muscular dog. Then she heard yelling and screaming. She witnessed the argument between Reynolds and the victim, Dixon.

In ***Wilson***, the appellate court concluded that the evidence was neither remote nor speculative and it was coupled with other factors indicating a connection between Reynolds and the crime such as the fingerprints and the fact that Reynolds had the victim's car in his possession the day after the bodies were discovered. The court reversed and remanded the cause for a new trial because the trial court erred in refusing to admit this evidence. ***Wilson***, 500 N.E.2d at 131.

As in ***Wilson***, evidence to support the defense theory that Misook Nowlin committed the offense was relevant and material. Moreover, the offer of proof presented facts which connected Misook to the offense. The offer demonstrates that Misook Nowlin had a motive to kill Christina. Motive, although not an element of murder, may be a

material factor in establishing guilty particularly when the only evidence is circumstantial. ***People v. Whalen***, 238 Ill.App.3d 994, 605 N.E.2d 604, 610 (4th Dist. 1992); ***People v. Enis***, 139 Ill.2d at 281, 564 N.E.2d at 1161. Misook, a woman scorned, had made efforts to get Mr. McNeil in trouble with the law. She used violence before and after this offense. Evidence relating to Misook's motive and state of mind should have been considered by the trier of fact.

Moreover, Misook Nowlin had the opportunity not only to commit this offense, but also any sexual abuse that occurred in the weeks before the offense occurred. She and Christina stayed in the same apartment when Christina visited her father and Misook was living with him. Evidence was presented that Misook was alone for part of the evening of June 15 and the early morning of June 16. The offer of proof exposed the bedroom window as vulnerable to entry. These matters also should have been considered by the trier of fact. The material presented in the offer of proof was neither speculative nor remote. It was relevant to the issue of guilt. The motion *in limine* and offer of proof were heard before Mr. McNeil elected to be tried to the bench. Had the outcome of the motion hearing been different, Mr. McNeil surely would have elected to exercise his right to a jury trial. The court's ruling not only deprived Mr. McNeil of his constitutional right to present a defense but also abridged his right to a jury trial.

For these reasons, this Court should reverse and remand the cause for a new trial, at which the trier of fact will consider the evidence excluded in response to the State's motion *in limine*.

II.

BARTON M^{C}NEIL'S NATURAL LIFE SENTENCE CANNOT STAND BECAUSE THE STATUTE UNDER WHICH HE WAS SENTENCED IS VOID.

Prior to sentencing, the defense filed a motion to declare Section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1998)), unconstitutional. (Vol. II, C. 488-490) In reliance on ***People v. Wheeler***, 299 Ill.App.3d 245, 701 N.E.2d 178 (4th Dist. 1998), the trial court ruled that section 5-8-1(a)(1)(c)(ii) was constitutional. The court imposed a mandatory natural life sentence on Mr. M^{c}Neil. (Vol. IX, R. 26) Subsequently, in ***People v. Wooters***, 188 Ill.2d 500, 501, 722 N.E.2d 1102 (1999), the Illinois Supreme Court has ruled that section unconstitutional. In ***Wooters***, following a bench trial, the defendant was convicted of murdering her infant son and was sentenced under section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1998)). That section prescribed mandatory life imprisonment for any person 17 years or older convicted of murdering a child less than 12 years old, provided the offender was not sentenced to death.

In pertinent part, section 5/5-8-1(a)(1)(c)(ii) stated:

> (A) Except as otherwise provided in the statute defining the offense, a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:
>
> (1) for first degree murder,
>
> * * *
>
> (c) the court shall sentence the defendant to a term of natural life imprisonment when the death penalty is not imposed if the defendant,
>
> * * *
>
> (ii) is a person who, at the time of the commission of the murder, had attained the age of 17 or more and is found guilty of murdering

> an individual under 12 years of age; or, irrespective of the defendant's age at the time of the commission of the offense, is found guilty of murdering more than one victim[.]
>
> 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1998).

The Illinois Supreme Court found that Section 5-8-1(a)(1)(c)(ii) violates article IV, section 8, of the Illinois Constitution. (Ill. Const. 1970, art. IV, § 8) ***Wooters,*** 188 Ill.2d at 520. Therefore, Mr. M°Neil's sentence, which was based on section 5-8-1(a)(1)(c)(ii), is void.

In sentencing Mr. M°Neil, after finding the aggravating factor of the child's age, the Court stated, in pertinent part:

> I might add that in addition I believe that this is an appropriate sentence in this case. The court notes the defendant does have a prior felony conviction. More importantly he held the position of trust or supervision to the victim in this case. The defendant is the father of a young three year old girl who looked for him for support and protection.
>
> I think the evidence establishes that she was a victim of sexual assault as well as of abuse within a few hours as the testimony showed of this murder, and I think the defendant is responsible for that as well.
>
> Obviously the effect upon the victim's mother, Christina's mother was devastating in this case, and was outlined by her when she made her statement on the witness stand and in the statement that she has filed with the court.
>
> In the typical case the court would also find ever, though I am under no obligation to make any findings at all as has been pointed out by the lawyers here, this is a mandatory natural life sentencing case that in this kind of a case a sufficiently severe sentence is also necessary to deter others from committing similar crimes against children which seems to be something in our society which is on the increase.
>
> As I said I think when I found that the State had proved guilt beyond a reasonable doubt in this case there is really no explanation for this. There are no words that I can think of that would adequately express what happened here in terms of its reprehensibility.

> The defendant's statement in allocution certainly in my opinion does nothing to make it inappropriate to impose a sentence under the law that is mandated here.
>
> I think that under the facts of this case the signs called for appropriately reflect the heartlessness of this murder, and the heartlessness of this defendant who committed this murder.
>
> (Vol. IX, R. 64-66)

Because imposition of a natural life sentence is not a valid mandatory sentence under section 5/5-8-1(a)(1)(c)(ii), the sentence in this case could only be justified if it were imposed according to the provisions of the section 5/5-8-1 of the Uniform Code of Corrections. That section provides that the court may impose a term of natural life for first degree murder:

> (b) if the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty[.]
>
> 730 ILCS 5/5-8-1(a)(1)(b) (West 1998).

The trial court in the instant case has not found that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. Therefore, the cause must be remanded to the trial court so that the court may exercise its discretion in sentencing Mr. M^{c}Neil. And yet another reason exists for remanding the cause for resentencing. The United States Supreme Court recently held that unless a factor which increases the maximum authorized sentence involves recidivism, it must be submitted to the jury and proved beyond a reasonable doubt. ***Apprendi v. New Jersey***, 530 U.S. __, ___ S.Ct. ___, ___ L.Ed.2d ___ (2000) (No. 99-478, June 26, 2000). The sentencing provision that authorizes the court to impose a natural life sentence when the murder was accompanied by "exceptionally brutal and heinous behavior indicative of wanton cruelty" contains factors which must be submitted to the trier of fact and proved beyond a reasonable doubt. Even though this case involved a bench trial, assuming *arguendo* that

the trial court believed that Mr. M°Neil qualified for a natural life sentence under 730 ILCS 5/5-8-1(a)(1)(b), it is unclear from the record whether the trial court understood the burden of proof required for a finding of brutal and heinous behavior.

Because Public Act 89-203 has been declared unconstitutional as violative of the single-subject rule, and because the trial court failed to exercise its discretion under 730 ILCS 5/5-8-1(a)(1)(b), this Court should enter an order vacating the natural life sentence and remanding the cause for a new sentencing hearing pursuant to 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1998).

CONCLUSION

Because the trial court's evidentiary rulings precluded Mr. M^{c}Neil from presenting a defense, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the concomitant sections of the Illinois Constitution of 1970, Barton M^{c}Neil respectfully requests that this Court reverse and remand the cause for a new trial. Alternatively, because Mr. M^{c}Neil was sentenced under a constitutionally infirm statute, Mr. M^{c}Neil respectfully requests that this Court vacate the natural life sentence and remand the cause for resentencing.

Respectfully submitted,

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August 4, 2000

Barton McNeal
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Dear Mr. McNeal:

I am sorry that you are dissatisfied with my brief. In order to represent yourself or to hire another attorney to file a brief on your behalf, you must write to the appellate court and ask that your attorney be allowed to withdraw. I cannot do this for you.

Best regards.

Very truly yours,

ARDEN J. LANG
Assistant Defender

AJL/lk

THIS LETTER WAS WRITTEN SOON AFTER BARTON RECEIVED THE FILING AND COMPLAINED TO ARDEN LANG HERSELF VIA A PHONE CALL.

HE THEN REQUESTED TO SPEAK TO HER SUPERVISOR COMPLAINING TO HER BOSS, DEPUTY DEFENDER DANIEL YUHAS

FILED SEPTEMBER 2000

CHARLES REYNARD & STATE'S RESPONSE TO BARTON'S APPEAL

IN THE 4TH DISTRICT APPELLATE COURT OF ILLINOIS

States Reply

NO. 4-99-0679

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
	)	the Eleventh Judicial Circuit
Plaintiff-Appellee,	)	McLean County, Illinois
	)	
vs.	)	No. 98-CF-633
	)	
BARTON M. McNEIL,	)	Honorable
	)	G. Michael Prall
Defendant-Appellant.	)	Judge Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLEE

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POINTS AND AUTHORITIES PAGE

I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN BARRING THE DEFENDANT FROM PRESENTING SPECULATIVE EVIDENCE THAT THE HOMICIDE COULD HAVE BEEN COMMITTED BY ANOTHER INDIVIDUAL 2

II

NATURE OF THE CASE

Following a bench trial, defendant was convicted of first degree murder and sentenced to natural life imprisonment.

ARGUMENT

I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN BARRING THE DEFENDANT FROM PRESENTING SPECULATIVE EVIDENCE THAT THE HOMICIDE COULD HAVE BEEN COMMITTED BY ANOTHER INDIVIDUAL.

The defendant contends that the trial court's ruling precluding him from presenting evidence that Misook Nowlin, and not the defendant, committed the murder, deprived him of his sixth and fourteenth amendment rights to present a defense. The State maintains that the trial court did not abuse its discretion in excluding this evidence.

The defendant may offer evidence to establish that someone other than the defendant may have committed the crime with which he is charged only if and when a close connection can be demonstrated between the third person and the commission of the offenses. Evidence implicating another individual in the offense may be excluded when it has little probative value due to remoteness, uncertainty, possibly unfair prejudicial nature, or its speculative nature. People v. Morgan, 142 Ill.2d 410, 154 Ill.Dec. 534, 568 N.E.2d 755, 773 (1991), reversed on other grounds, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); People v. Enis, 139 Ill.2d 264, 151 Ill.Dec. 493, 564 N.E.2d 1155, 1161-1162 (1990); People v. Whalen, 238 Ill.App.3d 994, 178 Ill.Dec. 810, 605 N.E.2d 604, 610

(4th Dist. 1992); People v. Maberry, 193 Ill.App.3d 250, 140 Ill.Dec. 323, 549 N.E.2d 974, 982 (4th Dist. 1990). The admission of such evidence is within the sound discretion of the trial court and its ruling may not be disturbed absent a clear showing of abuse of that discretion even if the reviewing court might have reached a different conclusion. Morgan, 568 N.E.2d at 773; Enis, 564 N.E.2d at 1161; Maberry, 549 N.E.2d at 982-983. There is no such abuse here.

Prior to trial, the State filed a motion in limine, with attached memorandum of law, requesting exclusion of any evidence or suggestion that Misook Nowlin was involved in, or committed the murder of Christina McNeil. (R. Vol. I, C138-C142) The defendant responded with his own memorandum of law in opposition. (R. Vol. I, C201-C204) Defendant included this issue in his motion for a new trial. (R. Vol. II, C467-C468)

On February 3, 1999, the court conditionally granted the State's motion in limine, stating that unless defendant made an offer of proof of sufficient evidence showing that someone else committed the crime, namely Misook Nowlin, such evidence would not be presented. (R. Vol. IV, 40) On March 4, 1999, the defendant presented his offer of proof. The offer of proof was insufficient to link Misook Nowlin to the homicide.

A. OFFER OF PROOF.

Officer Marvin Arnold testified that a little after 8 a.m. on

June 16, 1998, he went to defendant's small one-bedroom apartment. The dead child was in the bedroom. The window screen on the north wall of the bedroom had a hole near the lower inside latch. (R. Vol. IV, 46-49) [Hereinafter all references are to Volume IV unless otherwise noted.] Detective Thomas Sanders testified that the dead child was about three feet from the window. (R. 53) He noticed spider webs with dead insects suspended from them in the lower right-hand corner of the window extending from the screen mesh to the aluminum window frame. Looking outward, the lower right-hand corner of the screen was cut or punched. (R. 54-55) The screen was slightly off its track. (R. 56) Thomas did not remember seeing the frame bent. (R. 60) A photograph showed a dark spot on the siding below the window. Thomas could not determine that it was anything other than just inconsistencies in the wood. The area was dusted for fingerprints. There were several smudges around the inside of the window but there were no visible ridges. (R. 57-58) There were two smudges below the sash on the apron. (R. 58-59)

Officers Larry Shepherd and Marvin Arnold interviewed Misook Nowlin on June 18. The police had learned that Nowlin had been at defendant's residence the morning Christina had been found dead. They knew she had a relationship with defendant. Nowlin told the police that on the evening of June 15 she had been with a couple of friends at the Billiards Center at ISU and arrived home about 10:30 p.m. (R. 62-63) Her friend left at 11:30 p.m. that evening. The next morning, her ex-husband came about 6 a.m. to pick up clothes

for their daughter Michelle to wear that day. Nowlin's polygraph test was inconclusive. (R. 64-65) Originally, Nowlin did not tell the police she went to the Billiards Center. (R. 65-66)

DCFS child protective investigator Wenger testified she spoke with eight-year-old Michelle Nowlin in September 1998. Michelle's grade school had filed an abuse report because she developed bruises after spending a weekend visiting her mother. (R. 67-68) Michelle related to Wenger that she had been a behavior problem during dinner at a restaurant because she was tired and not hungry. Michelle told Wenger that after returning home her mother had hit her with a wooden dowel rod, causing four bruises including one bruise on each thigh and two on the left hip. Michelle said her mother hit her five to eight times. Michelle reported to Wenger that during the beating, her mother cupped her hand over her mouth, told her to stop screaming, and told Michelle, "I will kill you tonight." (R. 69-70) She believed that her mother wanted her to have Christina's bed, that Christina's bed had been taken to the Salvation Army, and that the bed she was sleeping on was bought at the Salvation Army. (R. 71)

Defendant's landlord, Wayne Downen, testified the apartment building has combination screen and storm windows. (R. 73) Downen usually checks and repairs the condition of window screens when an apartment becomes empty. He could not be positive that there were no holes or bent parts on the windows when defendant moved in. The defendant moved into his apartment two months before Christina's death. (R. 72-74) There is a walkway between the front and back

of the building. Anyone using the walkway would walk right past the defendant's bedroom window. While he was mowing the lawn, Downen did not recall noticing any problems with the bedroom screen's condition. Mr. Downen stated it was common for tenants to cut the corners of a screen to gain entrance to their apartments if they forgot their keys. (R. 75-77) He remembered taking a bed from the defendant's apartment to the Salvation Army. (R. 76)

Waitress Ericka Polson witnessed a five-minute argument at Avanti's Restaurant on the night of June 15. The woman left, returned to sign a check, said a few more things, and then left again. The man did not respond to the woman. (R. 79-80) He wrote the check amount and the woman came back in and signed the check. (R. 80)

Tim Wilson, who knew both defendant and Misook Nowlin, testified that at one time they lived together or dated. In the spring or early summer 1998, Misook was possessive and jealous. Over time, her behavior became abnormal. (R. 82-83)

Leng Wilson, a long-time coworker of defendant and Misook, spoke with Misook after Christina's death. Misook called Leng a couple of times and he finally called her back. Misook told Leng that Christina had been found dead, said she could not believe it, and asked, "You don't think I did it, do you?" Leng replied, "I don't know." (R. 84) Leng testified that Misook was jealous of defendant and angry because he ended their relationship. She told Leng if defendant had not moved out and broken up with her, this would not have happened. If he would have stayed with her,

somebody would have kept an eye on Christina. (R. 85-86)

Yuman Aldridge, a friend of Misook Nowlin, received a call from Nowlin at work the day before Christina was found dead. She testified that she did not go to Misook Nowlin's house that night. (R. 87-88) She also testified she could not remember if she was with Misook that day. She did not remember what she told Officer Shepard. (R. 89-90)

Another friend of Misook Nowlin, Susie Kaiser, testified that the night before Christina was found dead, she went to Misook's house at 8 p.m., Don Wang called, and Don drove them to play pool at ISU about 8:15. About an hour later, they went back to Misook's house. (R. 90-93) Kaiser stayed there until after 11 p.m. Misook did not appear upset or angry that night. (R. 94) Nowlin came to work on June 16 at 3 p.m. Misook Nowlin wanted to visit defendant that night. They were having problems and had broke up. Susie Kaiser counseled Misook not to go to defendant's house. (R. 96)

On June 15, Don Wang arrived at Misook Nowlin's apartment between 8 and 8:30 p.m. and asked Misook and Kaiser if they wanted to shoot pool. They shot pool for a little more than an hour. He dropped off the girls at Nowlin's residence about 9:30. (R. 97, 100-101) He did not believe that he told Officer Shepard that Misook Nowlin and Susie Kaiser changed their minds and showed up at the Billiards Center a short time after he arrived. (R. 101) Misook did not seem upset about anything. (R. 102)

Andy Nowlin, Misook Nowlin's ex-husband, spoke with Misook by phone on June 15 between 9 and 10:30 p.m. Misook told Andy that

defendant was going to leave her or move out. (R. 103-105) A week prior, every time they spoke, and again that night, Misook asked Andy Nowlin if he could get some marijuana to put in defendant's car to set him up. He guessed that she wanted to get him in trouble. (R. 106)

Andy Nowlin testified that he and Misook Nowlin shared custody of their daughter Michelle. Michelle lived with Andy. (R. 108) Andy arrived at Misook Nowlin's house between 6:10 and 6:20 a.m on June 16. He may have told the police he went to Misook's house to transfer his daughter's clothing. His memory was fresher then. She was lying in bed with her back to Andy. (R. 107-108) However, he also remembered giving to Misook defendant's responses to questions Andy had posed a couple of weeks earlier about the nature of the relationship between defendant and Misook. Misook had asked Andy to write down questions she should ask defendant. (R. 107) Andy testified that when defendant came to Andy's house one day to pick up some things for Michelle, Andy asked him questions he had prepared. He asked defendant where the relationship with Misook was going, whether defendant still loved Misook, and whether they could work things out together. (R. 108-109)

Dawn Nowlin, Andy's current wife, testified that in August or September 1998, Michelle showed them seven bruises she got after her mother whipped her with a paper towel holder. (R. 110-113) Dawn testified that Michelle told her that that same evening, Misook put a hand over Michelle's mouth and nose and said, "I'm going to kill you. You're going to die tonight." (R. 114)

Misook Nowlin testified she invited defendant to dinner at Avanti's on June 15, the night before Christina was found dead. She invited Christina also, but he came by himself. They met at the restaurant about 6 p.m. At dinner, they argued about the contents of a phone bill. She asked him about phone calls to Malaysia and whether he had a girlfriend there. He was upset and asked her how she found out those kinds of things. She testified that she was not very upset, but was upset that he was angry when she asked those kinds of questions. (R. 118-119) Misook stated that defendant told her two weeks earlier that he had applied for new jobs, including one in Pekin. During dinner, defendant denied getting the new job. He told her he was not moving. (R. 119-120) Misook became upset and scared. She had a 1997 domestic battery charge, with defendant named as the victim. Defendant told her he did not intend to testify on her behalf on June 17, when she was due to appear in court on that offense. (R. 120-121)

Misook did not eat much and was upset, so she asked him to pay for dinner. He said he had not brought any money. She left, but felt bad and came back because she knew he could not pay. Misook paid for dinner at Avanti's by check. She had to have defendant write down the amount of the check because she was too upset because he always asks her to pay for everything. Then she signed it. (R. 122) Misook followed defendant's car home from the restaurant to warn him that it was smoking. Defendant told her not to follow him. When they parted, Misook asked if he would call her sometime and he said he would. (R. 121) At the restaurant,

defendant told Misook he was leaving to pick up Christina at her mother's house. (R. 122)

She then watched her friends Don and Susie play pool at the ISU Bowling and Billiard Center. (R. 125) Misook testified she asked Kaiser to go to defendant's house about 11:30 the night of June 15. Misook stated she stayed home by herself after that. (R. 127) She spoke to her brother in Korea about 12:30 a.m. (R. 128) About 8 the next morning, Misook went to defendant's house for help with a computer project for work. She stated she just missed him and wanted to talk to him. She knew the address and layout of defendant's apartment. (R. 129) Her daughter Michelle had been to the apartment three or four times to play with Christina. (R. 130) Misook denied calling her ex-husband Andy and asking him to find some marijuana to put in defendant's car. However, the next morning when Andy came over to pick up clothes for Michelle, she explained to him that defendant was not going to testify for her and that she was scared. She testified, "I don't like him doing that, and I asked him maybe--I just joke around with him. I don't ask him seriously, you know, but---." (R. 124)

In ruling on the motion, the court stated:

> [T]he purported motive here is not very strong in terms of commission of a murder to set someone else up, but even that aside I don't think there's sufficient other evidence indicating any close enough connection that would allow this to come in in terms of proving the former girl friend was the perpetrator as opposed to the defendant.
>
> (R. 132-133)

B. ANALYSIS.

The evidence presented at the offer of proof was not sufficient to closely link Misook Nowlin to the homicide. All the defendant established was a possible motive, namely, that Misook was a woman scorned. However, presence of a motive would not be sufficient to require admission of this evidence. See People v. Columbo, 118 Ill.App.3d 882, 74 Ill.Dec. 304, 455 N.E.2d 733, 797 (1st Dist. 1983); People v. Bryant, 105 Ill.App.3d 285, 61 Ill.Dec. 163, 434 N.E.2d 316, 320 (1st Dist. 1982). This is particularly true since Misook was friends with the victim. Thus, the defendant's evidence of a motive is speculative at best. As for Misook's use of violence against her own daughter after this offense, much of this evidence consisted of inadmissible hearsay. While a defendant may attempt to prove someone else committed the crime, the rules of evidence are not suspended. The defendant must comply with established rules of evidence and procedure so that the fairness of the proceedings is assured. See Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973). People v. Hughes, 274 Ill.App.3d 107, 210 Ill.Dec. 623, 653 N.E.2d 818, 824 (1st Dist. 1995) (triple hearsay); People v. Cruz, 162 Ill.App.3d 314, 205 Ill.Dec. 345, 643 N.E.2d 636, 654 (1994) (third party's other crimes evidence admissible under modus operandi and to corroborate third party's confession to instant offense); People v. Wilson, 254 Ill.App.3d 1020, 193 Ill.Dec. 731, 626 N.E.2d 1282, 1301 (1st Dist. 1993) (court questions

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applicability of modus operandi exception to evidence of other crimes of third party, but no showing of striking similarities). See People v. King, 61 Ill.App.3d 49, 18 Ill.Dec. 371, 377 N.E.2d 856, 860 (4th Dist. 1978) (evidentiary problems associated with allowing into evidence mere charges of third party and modus operandi). Further, if evidence could be introduced of a third party's other bad acts without a more specific connection to the particular crime involved, trials could go on ad infinitum and juries would become hopelessly confused with the morass of evidence presented to them.

Nor was there any direct evidence establishing that Misook could have or did commit the offense. Misook was never placed at the scene at the time of the murder. Instead, defendant presented evidence which could, at best, give rise to speculation or conjecture that this individual could possibly have been involved, despite her testimony that she had nothing to do with the murder. Such speculation was not admissible. The defendant's theory relies on a series of conjectural inferences. First, it depends on the assertion that Misook was able to enter the defendant's apartment, sexually abuse and kill the victim, and then leave undetected by the defendant. Second, it depends on the assertion that Misook had motive to sexually abuse the three-year-old child and then murder her. Her alleged motive was directed at defendant, not the victim. See People v. Maberry, 193 Ill.App.3d 250, 140 Ill.Dec. 323, 549 N.E.2d 974, 982-983 (4th Dist. 1990) (evidence that third person resembling the rapist who had motive to attack the victim and who

was seen in the area of the offense wearing clothing similar to the rapist was properly excluded as failing to establish a link between the third person and the crime); People v. Thomas, 145 Ill.App.3d 1, 99 Ill.Dec. 192, 495 N.E.2d 639, 647 (2nd Dist. 1986) (evidence that defendant's brother, who had denied committing the offense, was possible rapist since he had impersonated the defendant before, was at the party where the offense occurred, and changed his appearance after the offense properly excluded in absence of proof the brother committed the offense); People v. Busija, 155 Ill.App.3d 741, 108 Ill.Dec. 742, 509 N.E.2d 168, 172 (1st Dist. 1986) (evidence the victim tentatively identified a third person with a history of similar offenses as resembling the assailant properly excluded as irrelevant); People v. Duckett, 56 Ill.2d 432, 308 N.E.2d 590, 599-600 (1974) (evidence that third party had threatened victim, inquired about the progress of the investigation, and asked if he had been cleared properly excluded as speculative); People v. King, 61 Ill.App.3d 49, 18 Ill.Dec. 371, 377 N.E.2d 856, 859-869 (4th Dist. 1978) (evidence of suspect "fitting" description of assailant who shared some habits of the burglar and who was seen in the area of the crime properly excluded as too general); People v. Howard, 147 Ill.2d 103, 167 Ill.Dec. 914, 588 N.E.2d 1044, 1060 (1991) (no error in exclusion of evidence concerning eyewitness' romantic involvement with the victim, allegedly giving the witness' husband or the victim's wife a motive to kill and the witness a motive to misidentify the perpetrator, where there was no evidence linking either spouse to

this case also overturned

the murder); People v. Whalen, 158 Ill.2d 415, 199 Ill.Dec. 672, 634 N.E.2d 725, 733 (1994) (evidence that regular patron at bar stated he would not hurt owner when told there was a disturbance, that patron was dressed despite the early hour, and that empty can of his brand of beer was found, established speculative link at best); People v. Ward, 101 Ill.2d 443, 79 Ill.Dec. 142, 463 N.E.2d 696, 702 (1984) (testimony that victim's minor brother had also been previously beaten and taken to hospital and testimony whether codefendant had been observed previously beating her children held properly excludable); People v. Morgan, 142 Ill.2d 410, 154 Ill.Dec. 534, 568 N.E.2d 755, 764-765 (1991) (speculative evidence that third party threatened victim a week prior to murder and that third party was later incarcerated in same cell block as an inmate who testified that defendant confessed to him was properly excluded).

The judge did not abuse his discretion in excluding evidence concerning Misook Nowlin's possible involvement in the murder. The link between Misook and the offense was speculative at best.

C. HARMLESS ERROR.

Finally, any error was harmless. The erroneous exclusion of evidence is grounds for a new proceeding where it can be said that the excluded evidence, if considered, would have altered the outcome of the proceeding. People v. Enis, 139 Ill.2d 264, 151 Ill.Dec. 493, 564 N.E.2d 1155, 1165 (1990). While the

identification of defendant as the perpetrator of the murder was an issue, overwhelming evidence linked defendant to the murder. As such, any error in the exclusion of evidence tending to prove the guilt of Misook was harmless. See People v. Page, 163 Ill.App.3d 959, 115 Ill.Dec. 15, 516 N.E.2d 1371, 1383 (4th Dist. 1987) (improper exclusion of testimony identifying two other inmates as contemplating an attack upon a guard harmless). The evidence established that three-year-old Christina McNeil was born to defendant and his ex-wife Tita McNeil. (R. Vol. VII, 189-191) She died from smothering. (R. Vol. VII, 136) She had a bruise around her mouth and nose, scattered bruises on her forehead and chin, and a bruise on her ear. (R. Vol. VII, 120, 123-124) The bruises around her mouth indicated some pressure around her mouth. The deep bruises to her mid-back were consistent with her face being pressed into the bedding with some significant force to the mid-back. The force could have been from a knee. (R. Vol. VII, 138) The bruises to her thumbs and no broken nails or marks on her neck was also more consistent with her being face down. (R. Vol. VII, 139) The injury to the hymen indicated previous stretching or tearing and healing. The pathologist was unable to date that injury. (R. Vol. VII, 123-124) There was chronic inflammation to her vagina and bloody vaginal fluid. (R. Vol. VII, 124-125) The redness to the vagina made the pathologist think that rubbing or contact had occurred very recently, within hours. The chronic inflammation suggested that something had been going on there for days or weeks. (R. Vol. VII, 126) Unless there was overt history

of the child playing with herself, she had been molested. The blood in the vaginal area was also consistent with injury to that area within hours of death. (R. Vol. VII, 127, 163) It was not possible that the blood coming out of her nose was caused by someone attempting CPR. (R. Vol. VII, 132-133) Based on the stomach contents, the pathologist's opinion was that Christina died within two hours of eating potatoes. (R. Vol. VII, 134) The hairs removed from the victim's left hand and forearm and the hair removed from the victim's right hand were of mixed race, being caucasian and mongoloid (the victim was of mixed race), and had immature characteristics consistent with coming from a child. Forensic microscopist Kidd concluded that they could have originated from the victim, but did not originate from defendant. (R. Vol. VII, 14-15) Three of the hairs from the victim's left hand and forearm were forcibly removed. (R. Vol. VII, 16) Serologist Hahn testified that there was blood and urine on the fitted sheet, but no semen. (R. Vol. VII, 52) There was urine, but no blood or semen, on the victim's underwear and t-shirt. (R. Vol. VII, 57) There was human blood but no semen on the pillow case. (R. Vol. VII, 58, 65) There was blood but no semen on the victim's vaginal swab, no blood or semen on the anal swab, and blood but no semen on the oral swab. (R. Vol. VII, 63) Debra Minton, a forensic scientist specializing in DNA analysis, testified that all of the DNA profiles obtained from a hair found in the victim's left hand and the bloodstains on the fitted sheet matched those of the victim. (R. Vol. VII, 92)

On June 15, defendant picked up Christina from his ex-wife's apartment after 7 p.m. (R. Vol. VII, 194) Defendant testified that they picked up a happy meal at 7:30 or 7:45 and arrived at his apartment at 7:45 or 8 p.m. While she ate, defendant logged onto the computer. (R. Vol. VIII, 27-28) About 8:30 p.m. Christina told defendant she was done eating, but he did not inspect the bag of french fries. (R. Vol. VIII, 42) Defendant took a two-hour nap at 8:30 while Christina read books. (R. Vol. VIII, 28) Between 10:30 and 10:45 p.m., Christina went to bed. (R. Vol. VIII, 32) Defendant turned down the dimmer on the ceiling light and tucked her in. He went back out to the living room, cleaned up Christina's happy meal, logged onto the computer, and also had the TV going. He did not think he had the window fan going in the bedroom. (R. Vol. VIII, 33, 42) Defendant testified the fan was in the window when he put Christina to bed. (R. 34) He used the computer for about an hour. As he went to the bathroom about midnight, he passed by Christina's door and heard her voice. Defendant testified it sounded as though she was talking to somebody. Defendant testified he opened the door and she was sitting up right in her bed, smiling from ear to ear. She had a book near where she was sitting and defendant assumed she had been reading. Defendant informed her she needed to go to back to sleep. Defendant assumed she had been sleeping and had been awakened. He found the whole thing strange. (R. Vol. VIII, 35) Defendant testified that it appeared she had some kind of secret joke and the joke was on him. He tucked her in again. The lighting conditions

were extremely dim. (R. Vol. VIII, 36) He did not think it was necessary to inspect the room. When he put her to bed at 10:30, she and her were alone in the apartment. He went back to playing on the computer. (R. Vol. VIII, 37) He presumed the fan was still in the window. He was careful to close the venetian blinds which would hang over the fan as they were in a ground floor apartment. Two weeks earlier he had opened the screen to run an extension cord. The only thing unusual was the screen's good condition. About 2 a.m., defendant walked to the bathroom again. He saw that Christina was not awake, laid down on the couch, and went to sleep. (R. Vol. VIII, 38-39) It thundered heavily about 2:15 or 2:30. He probably fell asleep at 2:45 a.m. (R. Vol. VIII, 41) Defendant testified that he did not leave his apartment at any time before the next morning, other than to perhaps smoke a cigarette. There was one entrance to the apartment. (R. Vol. VIII, 46-47) The storm door to the apartment was locked. (R. Vol. VIII, 48) His alarm clock went off at 7:10, he hit the snooze button, and he got up at 7:19 when the alarm went off a second time. He walked to the bathroom, yelled at Christina to get up, was in the bathroom for about twenty minutes, checked his e-mail on the computer in the living room, and called the Christina again. (R. Vol. VIII, 49-50) He walked around her bed and saw that she was dead. (R. Vol. VIII, 50) He ran into the other room, logged off the computer to free the phone line, and called 911. (R. Vol. VIII, 51) He testified he blew into her mouth one time to attempt CPR. (R. Vol. VIII, 58) Blood then ran from her nose. (R. Vol. VIII, 59) Defendant

testified he left his apartment a little after noon and returned between 5 and 6:00 p.m. to pick up some clothes because he was planning on staying with his ex-wife for a couple of days and because he was beginning to feel that Christina's death might not have been from natural causes. (R. Vol. VIII, 63) He remembered that when the paramedics had been there the fan was not in the bedroom window, but leaning against the wall. (R. Vol. VIII, 65) As he walked past the bedroom window, he noticed two holes cut in the lower corners of the screen, a dark mark below the window, and that the screen was unlatched, bent and off its track. (R. Vol. VIII, 64) The bushes in front of the front windows had also been trampled. (R. Vol. VIII, 71) Defendant then called 911 because he felt Christina had been murdered. (R. Vol. VIII, 66) Defendant testified that he told the detectives who he believed murdered her. (R. Vol. VIII, 68) He testified that he deduced from that lack of wounds and the improbability of the use of fast acting poison that she had been smothered. (R. Vol. VIII, 69) Defendant denied having any sexual contact with Christina, noticing any redness in her vaginal area, or killing her. (R. Vol. VIII, 76)

On cross-examination, defendant testified he would not deny that he had encouraged Tita McNeil to give Christina up for adoption before she was born. (R. Vol. VIII, 76) Defendant testified that Tita had expressed concerns about the fact that he smoked in front of Christina. On June 14, Tita expressed concerns about defendant sleeping nude with Christina. Defendant explained that his ex-girlfriend had told his ex-wife that he routinely slept

nude with Christina and that her daughter Michelle had seen him naked on three occasions. Defendant denied this. (R. Vol. VIII, 78, 101)

Tara Cheek, a neighbor, testified that her bedroom window was open and she heard it storm at different times during the night, but she did not hear any noises outside her bedroom window or coming from defendant's apartment. (R. Vol. VI, 168-169)

Paramedic Scharufangal testified that he was dispatched at 7:41 and arrived at 7:44 a.m. on June 16 at defendant's apartment. (R. Vol. VI, 20-21) The paramedics noticed the child had rigor mortis and asked defendant when he last saw her awake. Defendant said it was between 12 and 12:30 and that she was happy. (R. Vol. VI, 22, 30) The paramedics testified that she was lying on her back with one arm up. (R. Vol. VI, 23) The paramedics did not see a fan. (R. Vol. VI, 26, 32) Officer Baker testified that she received a call to go to defendant's apartment about 7:45 a.m on June 16 in regards to an unresponsive female child. (R. Vol. VI, 11) She did not notice anything out of the ordinary or disturbed in the bedroom. (R. Vol. VI, 13) She stayed while the crime scene was processed for evidence, until all parties had left, and then secured the scene by locking the door. (R. Vol. VI, 15) The only access to the bedroom would have been through a north window and through the door inside the apartment. (R. Vol. VI, 17) She did not recall seeing a fan. (R. Vol. VI, 18)

Detective Arnold testified that he noticed a small amount of blood coming from one of the victim's nostrils. (R. Vol. VI, 42)

There was what he assumed to be blood on the sheet. (R. Vol. VI, 43) When Arnold first approached the scene, defendant appeared to be crying. He was making crying sounds but had his hands over his face so Arnold could not see tears. At some point, he peeked from behind his hands at his ex-wife. (R. Vol. VI, 44) Defendant indicated that he picked up Christina from his ex-wife at 7 p.m. and got her a happy meal which she ate at his apartment between 8:30 and 8:45 p.m. He said he put her to bed about 10:30 and checked on her again at 12:10 a.m. He said he woke up between 7:20 and 7:25 a.m, called out for her to wake up, went to the bathroom, called out to her again, and then went into the bedroom and knew she was dead. (R. Vol. VI, 46) This information was volunteered. When defendant saw Arnold observing the blood on the victim's nose, he said the blood got there when he tried to do CPR by blowing into the victim's nose. (R. Vol. VI, 47) The blinds on the bedroom window were down. (R. Vol. VI, 60) Arnold recalled seeing a fan on the floor. He took a walk around the outside of the window and saw a small hole in the lower west corner of the screen. (R. Vol. VI, 63) He just observed one small hole. (R. Vol. VI, 64)

That evening, Arnold spoke to Lieutenant Butcher who stated that McNeil called the police department and stated that they should arrest his ex-girlfriend for murder. (R. Vol. VI, 48) Arnold spoke to defendant who said that once they did the autopsy it would show that the victim died of asphyxiation/suffocation. He thought his ex-girlfriend was responsible for the death which led him to come up with the cause of death. (R. Vol. VI, 49) Arnold

showing similar things on the other side as well--insects and spider webs. The photo also showed a small cut in the lower left-hand corner of the screen as one looks out the window. (R. Vol. VI, 73-74) Sanders also identified State's Exhibit Nos. 15I, 15J, and 15K as photos of the exterior of the window and the siding around it. Sanders identified State's Exhibit No. 15L as a photo of the front of the apartment building showing the front door, two front windows, and bushes below the windows. (R. Vol. VI, 74) Sanders did not notice any marks or any disturbance around the area below the bedroom window or the front windows from the outside. He did not notice any holes or anything unusual as to the front windows. (R. Vol. VI, 75) He did not notice any markings or fingerprints under the bedroom or front windows. There were dead insects and dust on the window ledge of the bedroom window. There was nothing that appeared to have been moved around. There was no disturbance in the dust on the window ledge. Some of the cob webs extended from the screen mesh to the frame. (R. Vol. VII, 108-109) Inside the bedroom, there were various objects under the window including a fan and boxes. The fan was leaning against the wall, but nothing appeared to have been ajar or disturbed. Sanders did not notice any muddy footprints in any area around the apartment or inside the apartment. (R. Vol. VI, 110) It had stormed the night before. (R. Vol. VI, 131)

About 6 p.m., Detective McKinley asked Sanders if he recalled seeing any holes in the screen. (R. Vol. VI, 76) Sanders said he had seen one. McKinley asked him to reexamine the screen. Sanders

June 22 of the bushes under the front windows showing that they had been trampled. (R. Vol. VI, 121-122) He testified that there was no trampling on June 16. (R. Vol. VI, 139) Sanders identified Defendant's Exhibit No. 1 as an enlargement of a photo he took on June 16 of the lower right-hand corner of the bedroom screen taken from the inside showing a crooked latch and that the screen was not completely in its track. (R. Vol. VI, 123-124) Sanders testified that the photos did not depict the actual spider web, but that in Defendant's Exhibit No. 1 one could see the shadow of an insect suspended. (R. Vol. VI, 126) After he became aware that it was indeed a crime scene, the evening of June 16, Sanders locked the door and put evidence tape across it. (R. Vol. VI, 136-137)

Darcy Loy, an official observer for the National Weather Service, testified that the weather record first recorded rain fall at 3 a.m. on June 16. It recorded three one-hundredths of an inch precipitation at 3 a.m., an additional fifteen one-hundredths at 3:30, an additional three tenths at 4 a.m., an additional seven one-hundredths at 4:30, an additional nine one-hundredths at 5 a.m., an additional five one-hundredths at 5:30, an additional nine one-hundredths at 6 a.m., an additional seven one-hundredths at 6:30, and an additional five one-hundredths at 7 a.m. (R. Vol. VI, 144-145)

Brian Nicoson, a founder of ICENET which provided access to the internet, testified that records showed that defendant logged onto the internet on Monday June 15 at 10:39 p.m. and logged off on Tuesday June 16 at 7:40 a.m. (R. Vol. VI, 156-157) According to

the records, defendant accessed his e-mail at 7:20 and 7:37 a.m. on June 16. (R. Vol. VI, 159)

In sum, Christina McNeil died of smothering while in the defendant's care and within two hours of eating the french fries from her happy meal, which she ate at 8:30 p.m. By conservative estimates, she was dead by 11 p.m. Yet defendant told the police and testified that he saw her alive at 12:10 a.m. Further, defendant was still awake until 2:45 a.m., making unlikely that someone could have entered his small apartment undetected at least until that time. The screen door was locked and there was no sign of entry to the front windows. There were spider webs extending from the screen to the frame on the bedroom window, undisturbed dirt on the window sill, and no sign of disturbance to the objects below the window. The manager of the apartment building explained that tenants had cut holes in the screens, such as those present, in the past to gain entry to their apartments when they had locked themselves out. Also, a person entered the bedroom window would have had to have bring pliers or wire snips to cut holes in the metal screen and a ladder or chair to hoist himself into the window and would have done so without leaving any marks on the siding. The person would have then had to remove the fan from the window and enter without the blinds making noise. The person would then have to take off Christina's underwear (as there was no evidence of blood on her underwear), sexually abuse her, replace the underwear (as she was found wearing her underwear), and then smother her without making any noise, despite the evidence that she put up a

struggle. The physical evidence also indicated that the person also killed her while she was on her stomach and then took the time to turn her over onto her back. The person then left noiselessly, taking the time to close the screen just like it had been before despite the fact that he had heretofore been undetected. Therefore, defendant's theory concerning the murder is not feasible or believable.

Additional evidence that defendant murdered Christina is the fact that he knew the cause of death and that it was a homicide before the autopsy and told the police his a minute detailed time-line even though he had not been asked and kept repeating it. Defendant also volunteered that the blood from her nose came from his attempt at CPR when the pathologist testified that this could not be true. Also, on the video tape, defendant told the police he would rather they arrested him than not arrest anyone at all and that he would take his chances at trial in proving his innocence, not a realistic response for an innocent man. Further, at trial, defendant altered his prior statements to accommodate the pathologist's testimony concerning time of death by testifying that he could not be sure that Christina finished her meal at 8:30. Finally, defendant's motive for killing Christina was the fact that he had been sexually molesting her and perhaps needed to silence her.

Defendant was not prevented from presenting a defense theory that someone else committed the murder where the evidence indicated he told police they should arrest his ex-girlfriend for murder and

that an intruder entered through the bedroom window.

This court should affirm defendant's conviction.

ARGUMENT

II

AS THE STATUTE UNDER WHICH DEFENDANT WAS SENTENCED TO LIFE IMPRISONMENT HAS BEEN HELD UNCONSTITUTIONAL, DEFENDANT'S SENTENCE SHOULD BE VACATED AND THE CAUSE REMANDED FOR RESENTENCING.

Defendant was sentenced pursuant to 730 ILCS 5/5-8-1(c)(ii) of the Unified Code of Corrections, which prescribes mandatory life imprisonment for any person 17 years or older convicted of murdering a child less than 12 years old, provided that the offender is not sentenced to death.

In People v. Wooters, 188 Ill.2d 500, 243 Ill.Dec. 33, 722 N.E.2d 1102, 1113 (1999), the supreme court determined that section 5-8-1(c)(ii) violated the single subject rule and was unconstitutional.

Therefore, defendant's sentence should be vacated and this cause should be remanded for resentencing. Defendant should be sentenced under the proper provisions of the Unified Code of Corrections without application of the amendments enacted within Public Act 89-203, which became effective on July 21, 1995. See People v. Coleman, 311 Ill.App.3d 467, 244 Ill.Dec. 79, 724 N.E.2d 967, 975 (1st Dist. 2000).

CONCLUSION

WHEREFORE, the PEOPLE OF THE STATE OF ILLINOIS respectfully request that this court affirm defendant's conviction, but vacate his sentence and remand for resentencing, and tax costs accordingly.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS

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March 8, 2001

THIS SECOND LETTER OF APOLOGY WRITTEN APPROXIMATELY SEVEN MONTHS BEFORE THE 4TH DISTRICT RENDERED ITS VERDICT

Barton McNeil
Reg. No. K-75924
P. O. Box 112
Joliet, IL 60434

Dear Mr. McNeil:

I have received your letter of February 1 regarding your case which is currently pending in the 4th District Appellate Court.

I am sorry that you are unhappy with your representation; however, I hope that we are successful in your case.

Very truly yours,

Ted Gottfried

TED GOTTFRIED
State Appellate Defender

/c

OCTOBER 24, 2001

APPEAL DECISION

IN THE APPELLATE COURT
OF ILLINOIS,
FOURTH DISTRICT
SPRINGFIELD, ILLINOIS
BY JUDGES
JAMES KNECHT, P.J.
STEIGMANN, J. TURNER

Justice James A. Knecht. James A. Knecht was born in Lincoln in 1944. He was educated at Illinois State University (ISU) and the University Of Illinois College Of Law, graduating with honors in 1973. He was an editor of the Law Review and a member of the Order of the Coif. He served as a law clerk to Illinois Supreme Court Justice Robert C. Underwood (1973-74), as an Associate Circuit Judge (1975-78) and as a Circuit Judge (1978-86) before being elected to the Fourth District Appellate Court in 1986. Judge Knecht is chair of the Appellate Court Administrative Committee. He is a member of the Illinois State and McLean County Bar Associations, the American Judicature Society, the Illinois Judges' Association, the Appellate Lawyers Association, and is a fellow of the Illinois Bar Foundation. He is a member of the Board of Directors of the ISU Foundation Board and the Institute for Collaborative Solutions. He serves on the Illinois Family Violence Coordinating Council and on the National Advisory Board of the Corporate Alliance To End Partner Violence. He has been an adjunct professor at ISU since 1977 and at the University Of Illinois College Of Law since 1994. Judge Knecht is the cofounder and was the charter president of the Robert C. Underwood Inn of Co

Robert J. Steigmann (P.J.) received two degrees from the University of Illinois at Urbana-Champaign, a B.S. in 1965, and a J.D. in 1968. From 1968 to 1969, he was a staff attorney with the Illinois Legislative Reference Bureau, the bill drafting agency of the Illinois General Assembly. From May 1969 to June 1971, he served as an Assistant State's Attorney in Sangamon County (Springfield), Illinois, and from June 1971 to December 1976, he served as an Assistant State's Attorney in Champaign County (Urbana).

In 1976, Judge Steigmann was elected circuit judge for the Sixth Judicial Circuit. As a circuit judge, he spent the great majority of his time holding court in Champaign County, where his caseload consisted primarily of felony and juvenile delinquency cases. In July 1989, the Illinois Supreme Court assigned Judge Steigmann to serve as a justice on the Fourth District Appellate Court. In November 1994, Judge Steigmann was elected to that court and was retained for 10-year terms in 2004 and 2014.

Judge Steigmann has been a frequent lecturer and writer on the subjects of criminal law, criminal procedure, juvenile law, and the rules of evidence. He co-authored Illinois Evidentiary Foundations (2d ed.) (Michie 1997) and the three-volume treatise, Illinois Evidence Manual (4th ed.) (West Group 2006), which he updates annually. He served four years (1992-96) as Chairman of the Illinois Supreme Court

Committee on Pattern Jury Instructions in Criminal Cases. He also serves as an adjunct faculty member at the University of Illinois College of Law, teaching Illinois evidence and civil procedure. From 1997 through 1999, he served as a faculty member of the New York University Law School Institute of Judicial Administration, making presentations to new judges on courts of review.

The Association of Government Attorneys in Capital Litigation (the national death penalty prosecutors' association) has twice asked Judge Steigmann to address its national convention (1999 in Chicago and 2000 in Denver) about how prosecutors should make and protect the trial court record in capital cases.

John W. Turner (Illinois 4th District Appellate Court)

Nonpartisan

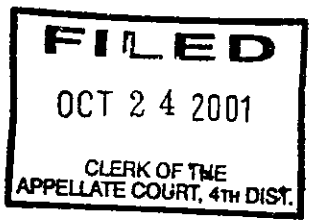
Bachelor's - University of Illinois, 1978
Law - DePaul University College of Law, 1981

John W. Turner is a former justice on the Illinois Fourth District Appellate Court. He was appointed to this position in June of 2001 and was elected to a full term the following year.[1] He was retained in 2012 and his current term ended on December 4, 2022.

Judge Turner worked as a Logan County Public Defender from 1984 to 1987. During this time, he also worked as a private practice lawyer. He was elected a

Logan County State's Attorney in 1988 and served in this position until 1994, when he was elected to the Illinois House of Representatives. He served as a state representative and a private practice lawyer until his appointment to the Appellate Court in 2001. In 2022 John W. Turner did not file to run for retention.

AL



NO. 4-99-0679

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BARTON M. McNEIL, Defendant-Appellant.	)	Appeal from Circuit Court of McLean County No. 98CF633 Honorable G. Michael Prall, Judge Presiding.

ORDER

Defendant, Barton McNeil, was convicted on July 7, 1999 of first degree murder (720 ILCS 5/9-1(a)(1) (West 1998)) after a bench trial in the circuit court of McLean County. He was sentenced on August 11, 1999, to natural life in prison. He argues two points on appeal: (1) the trial court erred in precluding defendant from introducing evidence that a specific third party committed the offense; and (2) his life sentence should be vacated and the case remanded for resentencing because the statute under which he was sentenced, section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1998)), is unconstitutional. We affirm the conviction, vacate the sentence, and remand for resentencing.

The victim in this case, Christina McNeil, three-year-old daughter of defendant, died while in her father's care. Defendant and Christina's mother were divorced and Christina spent the night with defendant on June 15, 1998. Defendant called 911 on the morning of June 16 to report Christina was not

breathing. When paramedics arrived, they found Christina had been dead for several hours. Later that same day, defendant made claims to the Bloomington police department that a third party, specifically his ex-girlfriend, Misook Nowlin, committed the crime. The police returned to defendant's apartment to look for evidence that someone had entered through the window of the bedroom where Christina slept. Murder charges were brought against defendant on June 18.

On appeal, defendant does not contend the evidence was not sufficient to support his conviction but instead challenges the trial court's refusal, after a lengthy offer of proof, to permit evidence that Nowlin had the motive and opportunity to kill and sexually abuse Christina. Defendant maintains this refusal to permit evidence on his behalf prevented him from presenting a full defense to the charges and violated his sixth amendment (U.S. Const., amend. VI) right to offer evidence and testimony of witnesses in his behalf.

An accused may attempt to prove someone else committed the crime with which he is charged (People v. Ward, 101 Ill. 2d 443, 455, 463 N.E.2d 696, 701-02 (1984)), but that right is not without limits. People v. Enis, 139 Ill. 2d 264, 281, 564 N.E.2d 1155, 1161 (1990); People v. Nitti, 312 Ill. 73, 90, 143 N.E. 448, 454 (1924). The rules of evidence still apply. People v. Hughes, 274 Ill. App. 3d 107, 114, 653 N.E.2d 818, 824 (1995). Whether what is offered as evidence will be admitted or excluded depends on whether it tends to make the question of guilt more or less probable; i.e., whether it is relevant. Trial courts may reject offered evidence on the grounds of irrelevancy if it has

little probative value due to remoteness, uncertainty, or its possibly unfair prejudicial nature. Enis, 139 Ill. 2d at 281, 564 N.E.2d at 1161-62.

Evidence someone other than the accused may have committed a crime is relevant and admissible when a close connection is demonstrated between the third person and the commission of the offense. People v. Maberry, 193 Ill. App. 3d 250, 263, 549 N.E.2d 974, 982 (1990). It is properly excluded if it is remote or speculative. People v. Howard, 147 Ill. 2d 103, 143, 588 N.E.2d 1044, 1060 (1991).

The trial court's ruling on the admission of evidence a third party, not the accused, committed the charged offense will not be disturbed absent a clear abuse of discretion even if the reviewing court might have reached a different conclusion. Enis, 139 Ill. 2d at 281, 564 N.E.2d at 1161.

In this case, we find no abuse of discretion. Defendant's proffered evidence began with his suggested motive--a woman scorned. Defendant broke off his relationship with Nowlin shortly before Christina's death. Defendant contended Nowlin was very jealous and possessive in her relationship with defendant. She had taken the breakup very hard and requested her ex-husband to obtain marijuana to plant it in defendant's car to get him into trouble. Nowlin had previously been charged in a domestic violence complaint with defendant as the victim. The trial on this charge was scheduled for only two days after Christina was found dead. Nowlin was going to use defendant as a witness in her own behalf at that trial and the couple argued publicly on the night of June 15 over his refusal to testify for her. After

Christina's death, Nowlin called a friend to tell of the death and asked "You don't think I did it, do you?" and also stated if defendant had not left her, Christina's death would not have happened.

Nowlin and defendant had dinner on the night of June 15 at Avanti's restaurant. Nowlin went back to her apartment after that and a friend of hers came over. They were joined by another friend and the three went out to play billiards. They returned to Nowlin's apartment between 9:30 and 10 p.m. The friends left and Nowlin remained home after asking one of the friends to go to defendant's apartment with her. The friend refused and advised Nowlin not to go either.

Other evidence included the fact Nowlin was the subject of an Illinois Department of Children and Family Services report of abuse to her own daughter in September 1998, three months after Christina's death, in which she beat her daughter with a wooden paper towel bar, held her hand over the girl's mouth and nose, and told her she would kill her. The cause of death for Christina was asphyxiation and suffocation.

Physical evidence of a possible intruder in defendant's apartment included the fact the screen in the only window in the bedroom where Christina's body was found had holes in the corner. Smudges were found both inside and outside the apartment near the window frame. Although attempts were made to obtain finger-prints from the smudges, none were found. Defendant claimed a window fan found in the bedroom was usually in the window. The owner of the apartment complex walks by the sidewalk near the torn screen at least once a week and did not recall a hole in the

screen when he was last there. However, he also stated many tenants remove screens to gain entry when they lock themselves out of their apartments.

There was also testimony from police officers investigating the crime, who stated although they observed holes in the window screen, they also observed undisturbed dust and spider webs containing dead insects surrounding the screen and the window frame. This evidence suggests no intruder entered the apartment through the window.

Nowlin testified she was just joking when she asked her ex-husband to obtain marijuana to get defendant in trouble. She also claimed when she stated the offense would not have occurred if she and defendant had not broken up, she meant she could have protected Christina from defendant.

Taken as a whole, this evidence showed no clear connection between Nowlin and Christina's death. The evidence was not relevant and the trial court did not abuse its discretion in precluding the use of the evidence.

Defendant next contends the statute under which he was sentenced is unconstitutional. He was sentenced pursuant to section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections, which prescribed a mandatory sentence of life imprisonment for any person 17 years or older convicted of murdering a child less than 12 years old. 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1998). In People v. Wooters, 188 Ill. 2d 500, 520, 722 N.E.2d 1102, 1113-14 (1999), the supreme court determined section 5-8-1(a)(1)(c)(ii) then violated the single subject rule and was unconstitutional. Therefore, defendant's sentence should be

vacated and remanded for resentencing. People v Coleman, 311 Ill. App. 3d 467, 477, 724 N.E.2d 967, 975 (2000), appeal denied, 189 Ill. 2d 664, 731 N.E.2d 766 (2000).

For the foregoing reasons, we affirm defendant's conviction for first degree murder, vacate defendant's sentence and remand for resentencing.

Affirmed in part and vacated in part; cause remanded.

KNECHT, J., with STEIGMANN, P.J., and TURNER, J., concurring.

BARTON MCNEIL EXPLAINS HIS DIRECT APPEAL IN DETAIL.

HOW IT CAME TO EXIST.

HOW IT WAS DESTINED TO FAIL.

July 4th, 2022

Hey Chris,

Enclosed are my appeal-related records you asked for. One is the brief filed by my appointed appellate defender, Arden Lang, and her boss, Daniel Yuhas, at 38 pages. The other one is the State's reply authored by Reynard and several others from the appellate prosecutors' office. You already have a copy of the appellate courts' ruling denying me a reversal of my conviction, upholding it instead - but granting a ~~ref~~ reversal of my sentense. Also enclosed is my own self-authored PETITION FOR REHEARING asking the appellate court to reconsider their decision. This too was denied in a ruling that amounted to a single-page document lacking any argumentation, but I can't seem to locate it at this time, it not important in any event. If we need it bad enough a copy of it exists in my courtfile with the circuit clerk.

These documents only pertain to what's known as a "direct appeal" to the 4th District Appellate Court. The direct appeal doesn't concern questions of guilt or innocence but instead concerns any possible constitutional vidations ~~to~~ of my rights as specified in the IL State Constitution and the U.S. Constitution. Moreover, the direct appeal is confined only to the contents of my court record - transcripts and any documentary items submitted into evidence during court proceedings. The "direct appeal" cannot take into consideration anything not in my formal court record, such as evidence never previously brought up in court ~~not~~ not in the court record, or any newly discovered evidence.

After this appeal was denied I filed a PLA (Petition For Leave to Appeal) to the IL St Supreme Court, now without any legal representation. The PLA pretty much mirrored my above self-authored PETITION FOR REHEARING. As is the norm with 99% of PLAs to the IL St. Supreme Court, they declined to even hear the case. The state Supreme Court only grants a tiny fraction of PLA submissions any hearing at all. In response to my PLA effort I received a single-page notice that the IL State Supreme Court declined to hear my case, basically ending my appeal options in State courts.

I don't have a copy of my PLA or the St. Supreme Courts' page

denying their consideration of my case. These records/documents are probably also in my main court file with the county circuit clerk. For reasons specified below I wouldn't advise you wasting any time or effort pursuing these court records and/or issues related thereto.

As you'll see, the appellate court did happen to grant that my "natural life" sentence originally imposed did in fact violate part of the IL State's constitution resulting in a reversal of my sentence, and reversals of many others "natural life" sentences imposed under the (later-un Constitutional) sentence statute enacted by the IL St. Legislature in violation of the Constitutions' "single subject rule". Accordingly, my original natural life sentence was reversed and I was remanded back to McLean County Jail for re-sentencing under prior sentencing guideline statutes.

For our purposes the re-sentencing events are unimportant. But its worth speaking to a little further.

As you recall, Smith was appointed to represent me during resentencing that they all expected to be a wham-bam lightening-fast railroading, again, in to what was sure to be effectively a replacement sentence of "death by prison". I promptly canned Smith and then refused appointment of anyone from the Public Defender's office. Instead of allowing the PD Office to again help prosecutors put it to me, I opted to defend myself insuring that at least SOMEONE would take a meaningful stand on my behalf. Me!

As it happens, at about the same time that the IL St. Supreme Court ruled the "natural life" sentencing statute unconstitutional in the Wooters case, the U.S. Supreme Court ruled unconstitutional any sentence imposed over and above ~~the~~ the statutory norm as a result of uncharged and unproven "aggravating factors", also known as extended term sentences. The US Supreme Courts ruling in Apprendi v New Jersey did not apply retroactively, but did happen to apply to any case then under direct appeal (which I still was at the time, my own soon-to-be extended term sentence not even imposed yet in this re-sentencing process).

The ordinary sentencing statute at the time maxed out at 60 years, I "only" serving 1/2 of that time with good behavior credits, other than the

the natural life sentence option just ruled unConstitutional. Instead the State then sought an extended term sentence of 100 years, granted if the crime happened to be ~~accompanying~~ accompanied by "aggrivating factor" circumstances, one of which was the child-victim's uncontestable young age, another being the claimed accompanyment of sex abuse evidence, as cited by Judge Prall himself. Another factor was whether the crime was brutal and heinous, as are all murders by their very nature.

At any rate, Aprendi court ruled that "aggravating factor(s)" cannot be cited as a means to extend one's prison sentence above its otherwise statutory maximum - in IL the range of sentences for murder being from 30 to 60 years max... UNLESS the particular aggavating factor(s) were specified in the charging instrument, presented to a presumed jury, and proven to exist beyond a reasonable doubt. To qualify for an extended term sentence, according to Aprendi (or Apprendi), each of the one or more aggravating factors had to be AS proven as the defendant's guilt for the offense.

Because my natural life sentence was initially MANDATORY as a result of the conviction itself for killing a child, any wouldbe aggravating factors would be irrelevant to my sentence, thus not needed to be defended against during trial. But once my natural life sentence was reversed and the natural life sentencing statute ruled unConstitutional, I now faced a sentencing range of 30 years on the low side within the usual sentencing statute, up to 60 years, and from there 60 to 100 years if qualifying for an extended term based on the crime's presence of "aggravating factors."

Because of the timing of my case during the peculior intersection between the IL Supreme Court's ruling in Wooters and the US Supreme Court's ruling in Apprendi, mine was now virtually a one-of-a-kind case. Because of these twin sentence-related rulings, enormous motive retroactively existed for my trial defense to have contested every aggravating factor of the State's claims, if not in pursuit of an acquittal then to limit the maximum applicable sentencing range. At the time facing a MANDATORY life sentence upon the conviction alone, so-called aggravating factors' presence had no bearing on the sentencing range. AFTER the Apprendi ruling, the aggravating factors

became enormously important, the (uncontested) presence of which could extend the maximum sentence I otherwise faced from 60 years (30 years with good behavior) all the way to 100 years (50 years with good behavior).

Because of the huge range I only now faced in my sentence in the post-Apprendi world, and in which I SHOULD HAVE faced absent the later-deemed unconstitutional statute mandating my original natural life sentence, I should then be granted an outright retrial during which the proved or disproved presence of an aggravating factor could have a huge bearing on my ultimate sentence.

This whole ~~fisco~~ fiosco ~~amount~~ amounted to providing me a very powerful argument for a whole new trial based upon a previously non-existant enormous range of sentencing outcomes. Indeed, even my jury trial waiver was premised on an automatic natural life sentence upon conviction, in contrast to a retrial whereby a jury would also have to grant beyond a reasonable doubt the presence of aggravating Factors too, in order to extend my prison sentence beyond the otherwise statutory maximum of 60 years - of which today I'd only have 6 more years to serve.

Awaiting resentencing, I researched the caselaw extensively to the extent that I could. During re-sentencing I argued that, because of Apprendi the sentencing range would have been vastly less, and I not qualified for extended term. I further made the case that I should be granted a new trial in which at least a MOTIVE existed to contest the presence of any aggravating factor that might increase my sentence range - a motive that did not previously exist when facing a mandatory life sentence upon the conviction itself. Likewise, I argued that my jury waiver was similarly premised on my automatic life sentence upon conviction. In the post-Apprendi world that applied to my case still under direct appeal at the time, a late-coming motive now existed for me to opt for a jury trial in the event that even if convicted, the jury may rule "not guilty" on the question of the presence/absence of an aggravating Factor leading me to a lengthier sentence range of up to 100 years.

I argued that because of the uniqueness of my case when being

simultaneously implicated by the recent IL Supreme Court ruling in Wooters and the U.S. Supreme Court ruling in Apprendi, that the extended term option that I was soon to face was taken off the table. The State's intended imposition of an extended term sentence is thus warranting a whole new trial whereby aggravating factors would be fiercely contested if only to limit my prison sentence, when not even a motive existed to do so under the later-deemed unconstitutional statute I was originally sentenced under.

I don't know if you ever read all of my re-sentencing transcripts from 3 court hearings in all. And if so, you may not have understood the basis of my arguments. To my knowledge there's no other case like it. Indeed, Griffin pretended to not understand the issue - who knows if Prall did.

Thing is, Christina's age when she died qualified me for extended term all by itself, it surely proven beyond a reasonable doubt, incontestable. But in passing my ~~as~~ original natural life sentence and my later 100 year extended term sentence Prall also cited other uncharged, uncontested, and unproven aggravating circumstances, namely the sex abuse evidence which Smith never opposed, and which was at the time irrelevant to a mandatory natural life sentence. To whatever extent Prall's citation of a sex abuse ~~evidence~~ event(s) played in extending my sentence clear out to 100 years, his reliance on that aggravating factor was a clear violation of Apprendi.

Meanwhile, while awaiting resentencing I filed a half dozen motions, now representing myself, regarding my efforts to retest various pieces of forensic evidence, plus a couple of motions, some only oral motions, relating to the re-sentencing issue. In part, my efforts regarding forensic testing was meant to draw media interest in my case, to limited success, and to establish a solid court record of my exoneration efforts, despite my already-long awareness that the Fix was in.

Similarly, by way of my forensic testing-related motions and/or by way of my self-representation in the sentencing matters, I was attempting to slide in the court's side door all that I could regarding Misocki's involvement in Christina's death, which I knew Smith would never have done. In addition to the multitude of reasons for me to toss Smith

from representing me (while serving as Reynard's secret weapon), I fired Smith because I figured that in representing myself I could invoke Mirsoki's name at every opportunity - her name otherwise wholly absent in the hands of Smith during what they all intended to be a lightening-fast 1-day 5-minute resentencing event. Instead I made it a 3 month event.

After being re-sentenced I quickly filed a post-sentence appeal back to the judge within the required 30-day limit. In several post-resentencing motions and lengthy memorandum of law, all handwritten, I furthered my arguments above citing yet more recent Apprendi-related Illinois caselaw. All to no avail, this might make for some interesting reading, but its entirely beyond the scope and impediacy of our exoneration efforts.

A ~~foot~~ two-inch stack of re-sentencing related paperwork, I did not include it in this package here-in. ~~But~~ In fact I tossed most of it a year or so ago; I simply don't have room for it with all the other more important paperwork for more relevant to our exoneration efforts. But it can all be found in my courtfile with the circuit clerk if you ever want to read it.

At any rate, I was then appointed another appellate defender who then represented ~~me~~ in my direct appeal concerning my newly-imposed extended term sentence of 100 years. This appeal went nowhere also. I have the appeal brief, the State's reply brief, and the Appellate Court's ruling upholding my extended term new sentence of 100 years. Unrelated to our exoneration efforts, I didn't bother to send them to you either - they part of my overall courtfile with the circuit clerk also.

My next project was my original PC which I did myself, lacking any legal representation at the time.

My post-sentencing appeal back to Prall seeking a reversal of his imposition of an extended term sentence to its ultimate max of 100 years no less, based in part on uncharged, unproven, and unchallenged claims of accompanying aggravating factors might make for an interesting read some day - I parsing out the the implications of Apprendi to my resentencing down to the smallest detail, notwithstanding that I was heavily sandbagged by the incontestable fact of Chrislina's age - itself an

aggravating factor qualifying me for an extended term all by itself.

My appointed appellate defender for the sentencing issue did little with all that I had done, this appeal denied by the appellate court too. This attorney never contacted me by phone, and only met with me for 5 minutes at Menard, only because she happened to be visiting many other inmates there on the same day. My first appointed appellate defender never came to see me in person at all, Arden Lang.

When reading my original direct appeal brief enclosed you can probably recognize the tell-tale character of it as something I initially thought was actually written by prosecutors and then passed off as authored by my appellate defender. Tacitly meant to appear as if in genuine defence of me, I thought it instead added yet more weight to everyone's obsession with excluding Misaka's involvement in Christina's death. So poorly written and argued (and limited solely to the issue of the suppression of Misaka-related evidence) I didn't believe that it was written by my appellate defender.

When I contacted Lang by phone she assured me that the appellate brief was legit, was hers, and was a genuine effort to get my (wrongful) conviction reversed. I then contacted her boss, Daniel Yuhas, who also was too adamate in vouching for the legitimacy of the brief, refusing to rescind it and replace it with something more persuasive... and coherent. Worse, in gross conflict with the (token and tacit) intent of the brief, Yuhas then was adamate in his effort to assure me that Misaka was wholly innocent of any involvement in Christina's death, as if Misaka was his own sister or something. I couldn't believe my ears.

FILED NOVEMBER 2001

BARTON MCNEIL DOES NOT GIVE UP.

HIS APPEAL TO HAVE THE APPEALS COURT RE-REVIEW ITS DECISION

Barton analyzes court
Precedents used by the appeals court to affirm his wrongful conviction

(ALSO DENIED)

No. 4 - 99 - 0679

IN THE APPELLATE COURT OF ILLINOIS

4th JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff - Appellee, vs. Barton McNeil Defendant - Appellant	)))))))	APPEAL FROM THE CIRCUIT COURT OF MCLEAN COUNTY, ILLINOIS No. 98 CF 633 HONORABLE Michael Prall Judge Presiding

PETITION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE APPELLATE COURT:

May it please the court:

The appellant requests a rehearing on the judgement issued by the Appellate Court in which the defendant's conviction was upheld. The defendant asserts that the Appellate Justices overlooked several key issues which should have been considered when deciding whether or not to uphold the conviction and/or deny the defendant a new trial. The issues not fully considered by this court are as follows:

I. The court cited several cases as having set a precedent for determining the admittance (or non-admittance) of evidence that the defense wished to present showing that a specific other third party had committed the murder in which the defendant was charged. In the instant case it was the defendant's assertion that Misook Nowlin, the estranged girlfriend of the defendant, had committed the murder of the defendant's daughter, Christina McNeil. An offer-of-proof pre-trial hearing resulted in the Trial Court's ruling that such evidence linking Nowlin to the murder would not be allowed to be presented to the jury during the defendant's trial. The defendant asserts that as a result of that ruling the defendant was precluded from presenting a defense.

C. 600

testimony, or physical evidence linking this defendant to his daughter's murder, combined with the infinately greater degree to which Nowlin was identified, had motive, and was at the center of investigative activity by the investigators, this defendant's presentation of such defense evidencde would have likely made this defendant's guilt much less probable. This defense would be further bolstered by Nowlin's prior domestic battery conviction as well as a post-murder arrest of Nowlin for an attack on another child in which circumstances were nearly identical to that surrounding the murder of Christina McNeil.

For these reasons, this defendant contends that the citation of the Enis case is inappropriate and non-applicable as a support for the Trial Court's decission denying this defense. This defendant further asserts that the Enis case, in actuality, supports this defendants position in that Enis' motive with respect to a prior attack on the murder victim was similar to that of Nowlins with respect to her pre-murder assault on both this defendant and murder victim.

b. The Appeals Court also cited People v Mayberry 193 Ill. App. 3d 250, 140 Ill. Dec. 323 in support of its decission upholding the Trial Court's decision that a jury would not be allowed to hear a defense presentation of evidence implicating Nowlin in the murder of Christina McNeil. Mayberry too is inapplicable to the instant case.

In the Mayberry sexual assault case the victim was "99.9 percent" sure it was the defendant, Scott Mayberry, who had attacked her. In part, evidence used against Mayberry included the existence of a tampered window screen at the victim's home which was used by the attacker to gain entery into her home. Likewise, the tampered window screen found on the bedroom window of Christina McNeil was a paramount piece of evidence this defendant wished to use showing Nowlin's point of entery to the murder scene.

The third party whom Mayberry wished to present evidence as the victim's rapist was that of her former boyfriend, Bob Leonard. However, the victim explicitely stated that it was not Leonard who had attacked her, but that it was the defendant. The eye-witness (victim) both identified Mayberry as her attacker and

claimed that Leonard was not. In addition, Leonard was never questioned by the authorities about this rape, was not polygraphed, asked for a hair sample, or had evidence taken from his home for forensic testing. Like the unnamed party in Enis, Leonard was not treated as a suspect by the authorities in this rape case. Nowlin was polygraphed, questioned repeatedly by detectives, asked to submit a hair sample, and had evidence taken from her home for forensic testing. The disparity between the degree to which Leonard (and Enis' unidentified third party) and that of other third parties in the cases cited by this court - and that of the degree to which Nowlin was treated as a suspect in the instant case makes for an unequal comparison.

Mayberry wished to present evidence found in Leonard's car by the police as a result of an unrelated burglary arrest. This defendant wished to present evidence pertaining to not one, but two arrests of Nowlin for attacks perpetrated against children. One was that described previously which led to Nowlin's conviction for domestic battery against this defendant and the murder victim.

The other child-attack took place shortly following the murder of Christina McNeil. This post-murder attack involved a threat by Nowlin to murder her own daughter combined by an act of smothering. This attack, in which some testimony was heard at this defendant's March 4, 1999 offer of proof hearing, was not unlike the murder by smothering of Christina McNeil. A close connection exists between Nowlin and the murder of Christina McNeil because: 1) the murder victim (along with this defendant) had recently been the victim(s) of domestic battery an the hands of Nowlin; 2) because Nowlin threateded to murder another child while performing an act of smothering - a circumstance nearly identical to the murder by smothering of Christina McNeil, and 3) because Nowlin is being questioned repeatedly, in connection to the murder, by police detectives and DCFS, and that this investigative activity includes a poylgraph exam, a request for Nowlin's hair sample, the aquisition of items from her home for forensic testing, and more.

In addition, Mayberry was strongly implicated in his case. THere was an eye-witness (the victim) who identified Mayberry as the assailiant. There was also forensic evidence in the form of hair fibers and semen / bloodtype ABO evidence which strongly

implicated Mayberry further. Like in Enis, even if Mayberry had presented evidence suggesting Leonard's guilt, the evidence against against Mayberry was so strong, by virtue of the victim's identification of the defendant as her attacker combined by the forensic evidence, that Mayberry's third party evidence would not have made his own guilt less probable. This type of defense is further deminished by the lack of Leonard's treatment by the authorities as a suspect in the Mayberry case.

Again, this type of evidence was absent in the instant case. There was no eye-witness testimony, no forensic evidence linking this defendant to the murder, no motive, nor a confession. Absent strong evidence against this defendent combined with a vastly greater degree to which Nowlin was treated as a suspect along with her propensity to attack other children, would have made this defendant's guilt much less probable.

c. This Appellate Court also refers to People v Howard 147 Ill 2d 103, 167 Ill. Dec. 914 in support of the Trial Courts ruling against a defense presentation of the evidence implicating Nowlin. Stanly Howard wished to persent evidence that the victim was murdered by a jealous husband - and that the murder victim had been having an affair with his wife. The wife, Tecora Mullen, was a witness to the murder of Oliver Ridgell. Like in Mayberry, an eye-witness, Mullen, identified Howard as Ridgell's killer. In addition, Howard actually confessed to the police that he had in fact murdered Ridgell, and that it was an armed robbery attempt.

In Howard we have a strong motive (robbery), an eye-witness idntification of Howard as the killer, and a confession by Howard. These storng indications of Howard's guilt are totally absent in the instant case. Even if Howard had been allowed to point an accusing finger at Mullen's husband provided there was a sufficient connection and relevance to such evidence, it would likely not overcome eye-witness identification of Howard as the killer nor overcome Howard's own confession. Such a defense would not have made Howard's guilt less probable as the evidence against him was overwhelming. In the instant, an eye-witness account is absent as is a confession. Also absent is physical evidence linking this defendant to the murder of Christina McNeil, nor is a motive

present.

While the presentation of evidence of another's guilt would not make a defentant's guilt less probable where eye-witnesses, confessions, physical evidence, and motives are used against the defendant in various combinations, the absence of any similar sort of evidence against the defendant in the instant case would make presentation of third party guilt result in a lesser probability of this defendant's guilt.

In addition, Mullen's husband was not treated as a suspect anywhere near to the same degree that Nowlin was in the instant case. Even if Mullen's husband had been, the eye-witness identification of Howard as the killer, his robbery motive, and his confession would have likely negated any third party evidence of guilt.

In the three cases cited above, the evidence of the defendant's guilt was so strong as to make evidence of another's guilt unpursuasive. Such evidence would not have made these defendant's guilt less probable. Such incriminating evidence against these defendants was absent in the instant case. This defendant's case contained no motive, no eye-witness of this defendant as the attacker, no confession, and no physical evidence linking this defendant to the murder. Absent such evidence, this defendant asserts that the presentation of evidence of Nowlin's guilt would have made this defendant's guilt less probable.

Further more, in the above cited case, the third party evidence was weak. None of the third parties were even treated by the police as suspects at all. Mullen's husband was questioned by the police twice. Leonard was never questioned about the Mayberry case at all, and in Enis the other party was never even identified much less questioned. Nowlin on the other hand was questioned repeatedly by three different investigative bodies, polygraphed, asked to submit a hair sample for comparison purposes (which she refused to submit), had evidence taken from her home for forensic testing, and more. This degree of Nowlin's treatment by the authorities strongly suggests her suspect status. This in and of itself would likely make this defendant's guilt less probable. The absence of strong evidence against this defendant would likely further reduce the probability of this defendant's guilt.

d. The Appellate Court cited other cases in support of the Trial Court's ruling on the inadmissability of evidence pertaining to Nowlin. These are People v Ward, Nitti, and Hughs. The same issues apply to these cases, this defendant contends, that apply to the above cases. These cases all have evidence against the defendant that includes combinations of eye-witness identifications of the defendant(s) as the perpetrator, strong motive evidence, physical evidence linking the defendant(s) to the crime, and / or confession(s).

Similarly, the evidence of the guilt of another party is comparatively weak. In none of these cases does the degree to which these other parties are treated as suspects by the authorities come close to matching that of Nowlin in the instant case.

This defendant contends that none of these case citings are applicable to the instant case. Even with the admittence of evidence of third party guilt in these above cases, the presence of the defendants' motives, eye-witness identification, physical evidence, and confessions dictates that the defendant's guilt would not have been rendered less probable one way or another. These conditions of this defendant's guilt are absent in the instant case in addition to the vastly greater degree of evidence implicating Nowlin. Because of this, this defendant asserts that such evidence is relevant and that it would have made this defendant's guilt much less probable.

II. This defendant also contends that the Trial Courts ruling against the defendant's offer of proof with regards to evidence presentation of Nowlin's guilt was only relevant to a Jury trial. The trial court ruled that such evidence would not be allowed to be presented to a Jury. An offer of proor is typically a hearing held outside the presense of a jury to get a ruling as to whether certain evidence is relevant and subject to jury consideration.

This ruling should not have, and did not, preclude the presentation of such evidence at a bench trial. Even if the case citings above are applicable to the Trial Court's ruling on Nowlin evidence, they are not applicable to a ~~jury~~ bench trial. All of the case citings are relevant only to a Jury trial.

This defendant's instant case was not a jury trial, it was a bench trial. As such, this defendant asserts that he has much

more latitude in the type of evidence which he wishes to present. It is the judge who rules on the weight and relevance of evidence and it's admissibility in a jury trial. In a bench trial it is the trial judge who alone weighs the relevance and weight of evidence during the trial itself, and that bench trial evidence is not precluded by pre-trial offers of proof.

This defendant asserts that the ruling on the offer of proof has no bearing on a bench trial where no jury is present and where the judge alone weighs the evidence even if such evidence were not necessairily appropriate to a jury trial.

Were evidence of Nowlin's guilt presented during the bench trial, the judge could consider such evidence, or dismiss it as irrelevant and not consider it in his final determination of guilt (or lack there-of) should he choose to do so.

In addition, the ruling on Nowlin evidence took place prior to the discovery of certain peices of evidence. At the time of the offer of proof, Nowlins smothering attack upon her own daughter, for which she was arrested, had not yet gone to trial. This conviction would have been crucial either at an offer of proof, or at a bench trial. Forensic evidence had not yet been tested either, and by the time it had been, the offer of proof had long past. The forensic (DNA) test revealed that Nowlin had used an accomplice.

The offer of proof was imcomplete because 1. the State refused to disclose or acknowledge Nowlins prior conviction for domestic battery against the murder victim, 2. nor did the State disclose any documentation pertaining to Nowlin's near smothering murder of her own daughter, 3. forensic testing had not yet been completed, and 4. numerous exculpatory documents incriminating to Nowlin were never disclosed.

Nevertheless, this defendant prays this court to consider that the offer of proof has no bearing on a bench trial, that the accompanying case citings have no bearing on a bench trial, and that at this bench trial, absent a jury, this defendant should have been allowed to put up a defense that included incriminating evidence that the State itself had accumulated against Nowlin.

C-608

In summary, this defendant asserts the Trial Courts ruling resulting from the offer of proof was a denial of his right to put up a defense. And that his right to a Jury trial was denied by this defendant's wish to present a defense.

WHEREFORE, the petitioner respectfully requests a reconsideration of the opinion.

THIS SUBSEQUENT APPEAL TO HAVE THE 4TH RECONSDER ITS DECISION WAS ALSO DENIED.

OF THE CASES CITED IN THE 4TH DISTRICT'S DECISION, TWO WERE LATER REVERSED WITH THE DEFENDENT'S RELEASED.

Respectfully submitted,

ONE CASE CITED AS ILLINOIS CASE LAW WAS DONALD WHALEN WHOSE CASE WAS ALSO BEFORE CHARLES REYNARD HE HAD BEEN WRONGFULLY CONVICTED PRIOR TO BARTON WITH HIS CASE THEN CITED IN SUPPORT OF THE 4TH DISTRICT'S DENIAL.

Barton McNeil
Pro se.

THE OTHER CASE INVOLVING THE PEOPLE VS. ENIS. ENIS WAS A PERSON WHO BARTON SHARED HIS CELL WITH. ENIS NOW WRITES FOR A PRISONER RELATED NEWSLETTER.

Barton McNeil
#K75924
P.O. Box 99
Pontiac, IL 61704

SO TWO OF THE CASE LAWS THAT EXISTED IN 2001 WHEN THE 4TH APPELLATE DISTRICT MADE ITS DECISION, NO LONGER EXIST

TOO BAD FOR BARTON MCNEIL

SO TOO WAS THE ALLOWANCE THAT PUBLIC DEFENDER TRACY SMITH, WHO NEVER BEFORE BEING ASSIGNED BARTON'S CASE WAS A LEAD ATTORNEY ON A MURDER CASE, COULD SERVE AS LEAD ATTORNEY. FOLLOWING BARTON'S WRONGFUL CONVICTION, THE ILLINOIS STATE LEGILATURE PUT INTO PLACE A LAW THAT REQUIRES ANY PUBLICLY ASSIGNED DEFENDER FOR A MURDER DEFENDENT TO HAVE PRIOR LEAD MURDER TRIAL EXPERIENCE.

C-609

AGAIN TOO BAD FOR BARTON MCNEIL.

93062

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

April 3, 2002

Mr. Barton M. McNeil
Reg. No. K-75924
P. O. Box 99
Pontiac, IL 61764

No. 93062 - People State of Illinois, respondent, v. Barton M. McNeil, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 25, 2002.

KNOWN AS THE END OF THE LINE ON THIS IMPORTANT APPEAL