

No. SC85936

THE SUPREME COURT OF THE STATE OF MISSOURI

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STATE OF MISSOURI, )

Respondent/Plaintiff )

vs. )

ALINE J. POWERS, )

Appellant/Defendant )

Case No. SC85936

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Appeal From The Circuit Court of The County of St. Louis  
Hon. David Lee Vincent, III  
Circuit Judge

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**APPELLANT'S SUBSTITUTE BRIEF**

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**I**  
**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>Table of Cases And Authorities</b> .....	<b>2</b>
<b>Statement of Jurisdiction</b> .....	<b>3</b>
<b>Statement of Facts</b> .....	<b>5</b>
<b>Points Relied On</b> .....	<b>10</b>
<b>Argument</b> .....	<b>15</b>
<b>Point I</b> .....	<b>15</b>
<b>Point II</b> .....	<b>24</b>
<b>Point III</b> .....	<b>30</b>
<b>Point IV</b> .....	<b>35</b>
<b>Conclusions</b> .....	<b>40</b>
<b>Rule 84.06(c) Certification</b> .....	<b>41</b>
<b>Certificate of Service</b> .....	<b>42</b>
<b>Appendix w/Index Page</b> .....	<b>43</b>

**ABBREVIATIONS USED**

<b>Appellant's Legal File</b> .....	<b>LF:(page)</b>
<b>Trial Transcript</b> .....	<b>T1:(page)</b>
<b>Sentencing Transcripts</b> .....	<b>T2:(page)</b>

**I(A).**

**Table Of Cases, Statutes And Authorities**

<b>(A) Cases</b>	<b>Pages</b>
<u>Ahrens &amp; McCarron. v. Mullenix</u> , 793 S.W.2d 534 (Mo. App. E.D. 1990)	24,25
<u>Brady v. Maryland</u> , 373 U.S. 83 (1963)	23,28,29
<u>City of Peculiar v. Dorflinger</u> , 723 S.W.2d 424 (Mo. App. 1986)	24,33
<u>Emcasco Ins. Co. v. Donnelly</u> , 607 S.W.2d 460 (Mo. App. E.D. 1980)	31
<u>Molasky v. State</u> , 710 S.W.2d 875 (Mo. App. 1986)	24,33
<u>Nangle v. Brockman</u> , 972 S.W.2d 545 (Mo. App. E.D. 1998)	24,25
<u>Nelson v. Waxman</u> , 9 S.W.3d 601 (Mo. banc 2000)	16,23
<u>People v. Tharpe-Williams</u> , 286 Ill.App.3d 605 , 676 N.E.2d 717 (Ill. 1997)	31,32,33
<u>Phiropoulos v. Bi-State Dev. Agency</u> , 908 S.W.2d 712 (Mo. App. E.D. 1995)	20,21,22
<u>State v. Engleman</u> , 634 S.W.2d 466 (Mo. banc 1982)	28
<u>State v. Langdon</u> , 110 S.W.3d 807 (Mo.banc 2003)	36,38
<u>State v. Louis</u> , 103 S.W.3d 861 (Mo. App. E.D. 2003)	34
<u>State v. Spica</u> , 389 S.W.2d 35 (Mo. banc 1965)	17,18,21,22
<u>State v. Wahby</u> , 775 S.W.2d 147 (Mo. banc 1989)	17,18,21,22
<u>State v. Webber</u> , 982 S.W.2d 317 (Mo. App. 1998)	28

**(B) Statutes and Other Authorities :**

<u>Article V, Section 3 of The Missouri Constitution</u>	4
<u>Rule 23.05</u>	28
<u>Rule 29.11(g)</u>	4
<u>Rule 29.12(b)</u>	34
<u>Rule 83.04</u>	5
<u>§558.016.2, R.S.Mo.</u>	39
<u>§558.016.3, R.S.Mo.</u>	38,39
<u>§558.016.5, R.S.Mo.</u>	39,40
<u>§570.030, R.S.Mo.</u>	37
<u>§570.040, R.S.Mo.</u>	37,38,39

## II.

### Statement of Jurisdiction

This is a criminal appeal from felony class C stealing judgment entered by The Honorable David Lee Vincent, III, Circuit Judge, Circuit Court of The County of St. Louis, Missouri on December 19, 2002 (LF:84).

On April 26, 2002, an amended information (LF:25) charged Powers with committing the felony class C offense of Stealing:Third Offense for allegedly stealing \$24.76 of merchandise from a Shop-N-Sav store in St. Louis County, Missouri, on May 28, 2001.

The jury returned a guilty verdict on May 2, 2002 (LF:58).

Powers filed a timely motion for judgment of acquittal, or, alternatively, motion for new trial (LF:65) on May 28, 2002 after obtaining an order extending the time for filing through May 28, 2002 (LF:64). This motion was deemed denied in its entirety under Rule 29.11(g) because the trial court did not act upon it within ninety (90) days after the filing date.

On December 19, 2002, the trial court entered Sentence And Judgment (LF:84) adjudging Powers guilty of the felony class C offense Stealing: Third Offense and sentenced Powers to nine (9) months incarceration.

On December 26, 2002, Powers filed a timely notice of appeal (LF:82) from the December 19, 2002 judgment.

Powers was released from custody on an appeal bond (LF:87).

This was an appeal from a final criminal judgment of The Circuit Court of The County of St. Louis, Missouri. Therefore, this appeal was within the general appellate jurisdiction of The Missouri Court of Appeals, Eastern Division, as set forth in Article V, Section 3 of The Missouri Constitution (as amended to date). None of the grounds, which under The Missouri Constitution would confer exclusive original upon The Missouri Supreme Court, were present or alleged in this appeal, hence, the appellate jurisdiction of The Missouri Court of Appeals, Eastern District, was invoked.

On February 17, 2004, The Missouri Court of Appeals, Eastern District, filed its' Opinion affirming the trial court's judgment.

On March 4, 2004, Powers filed a timely Motion For Rehearing, or, Alternatively, Motion For Transfer in The Missouri Court of Appeals, Eastern District, which was denied April 1, 2004.

On April 14, 2004, Powers filed a timely Application For Transfer To The Missouri Supreme Court which was granted May 25, 2004.

This Court has jurisdiction under Rule 83.04.

### **III.**

#### **Statement of Facts**

The amended information (LF:25), filed April 26, 2002, charged Appellant Aline J. Powers ("Powers") with the following offenses : (a) Count 01 ... felony class C Stealing:Third Offense for allegedly stealing \$24.76 (T1:238 lines 5-6) of merchandise on May 28, 2001 from a Shop-N-Sav store in St. Louis County and (b) Count 02 ... persistent misdemeanor offender.

The case went to jury trial May 1, 2002 (T1:4).

The State's evidence consisted of the testimony of Shop-N-Sav Loss Prevention Investigator James Toppett ("Toppett") and video tapes marked as State's Exhibit 1 and State's Exhibit 1A.

Shop-N-Sav had sixteen (16) surveillance cameras in the store (T1:184). A multiplex device in the Shop-N-Sav security office video recorded views from the sixteen cameras (T1:176-178).

An operator inside the security office could view the recorded scenes by looking at a monitor in the nature of a television screen (T1:176).

The multiplex video tape could not be played back on a VCR or other common video tape viewing device ... a special multiplex viewing device was necessary to view the original tape (T1:178 lines 14 through 179 line 12).

The original Shop-N-Sav multiplex video tape of the May 28, 2001 events was marked and received into evidence over objection as State's Exhibit 1 (T1:194 lines 11-22). State's Exhibit 1 was not played or viewed at trial because there was no multiplex device available.

Excepting only the testimony re Powers picking up some orange juice when Toppett briefly left the security room area, Toppett's testimony was exclusively based upon what he saw on the multiplex TV screen while Toppett was in the Shop-N-Sav security room (T1:161-166). He had no direct actual "sight-line" to Powers inside the Shop-N-Sav store. Id.

State's Exhibit 1A was a "dubbed" version of selected State's Exhibit 1 views of Powers inside the Shop-N-Sav store May 28, 2001 (T1:179-182).

State's Exhibit 1A is in customary VCR format and is viewable using a typical VCR player (T1:182 lines 16-18).

State's Exhibit 1A was received into evidence over objection (T1:194 lines 11-22).

The State had State's Exhibit 1 and State's Exhibit 1A in their actual possession, custody and control at least by March 20, 2002 (T1:193) and failed to disclose the

same to Powers until after commencement of trial May 1, 2002 ... in a courtroom where multiplex equipment was not available to discover and play the contents of State's Exhibit 1 to the jury.

When Toppett came on duty May 28 he conducted a five minute play-back "test" to determine whether the taping device would record what Toppett observed on the multiplex video monitor ... no test was made to ascertain whether the device taped what was actually happening outside (T1:176 line 23 through 177 line 3; T1:177 lines 4-9).

No trial witness testified as to the reliability or trustworthiness of either the T.V. monitoring system or tape recording equipment to accurately reproduce events as they actually occurred.

No trial witness claimed to have personal, direct first-hand knowledge ... or, personal, direct first-hand observations ... of Powers in the Shop-N-Sav store ... all the testimony was second hand testimony obtained by viewing a T.V. monitor.

The State's Exhibit 1 views deleted and omitted from State's Exhibit 1A included : (a) Powers entered the store accompanied by two males, later identified as her sons [T1:204 line 21 through 205 line 24], (b) Powers passed the check-out lanes when exiting [T1:221 lines 3-12], (c) A male [her son] activated the entrance door electric eye opening the door and allowing Powers to exit the store carrying merchandise [T1:252 lines 9-20; T1:168 lines 12-18] and (d) Powers had a brief conversation with the male [son] after exiting the store, put the merchandise down and walked with the son to the parking lot empty handed [T1:222-227; T1:230-231; T:250 lines 12-25; T251 lines 1-3].

Powers contended the State's Exhibit 1 scenes deleted from, and not included in, State's Exhibit 1A would have circumstantially aided her defense that she had no intent to steal [i.e. Powers believes the deleted scenes probatively showed she came to store to buy cold medicine for her son ... her son accompanied her to the store and waited outside ... the son had a medical emergency and summoned his mother (Sic: Powers) to leave the store and take him to a hospital ... Powers left the store, dropped the cold remedy items outside the door and was walking to her car with her son to take him to the hospital when she was apprehended by Toppett].

State's Exhibit 1A, not State's Exhibit 1, was viewed by the jury in its entirety (T1:194 line 23 through 197 line 18).

The State contended Toppett's testimony and State Exhibit 1A showed Powers stole various small items customarily used to treat a common cold from the Shop-N-Sav store May 28, 2001 ... Sudafed (\$5.59), Theraflu (\$3.39), aspirin (\$3.49), Visine eye drops and a bottle of orange juice (\$5.79) (LF:25; T1:162,237-238).

Toppett testified Powers placed these items in a box Powers picked up in the store because there were no shopping baskets or shopping carts then available for customer use (T1:212-213). At no time did Powers put anything in her purse, pocket, clothes or other secret and/or private place (T1:214-215).

Toppett testified he saw (TV monitor) Powers exit the store with the box in hand (T1:222-227; T1:230-231). He followed her by exiting using the same door. Id. The box containing the items claimed to have been stolen was then located immediately

outside the store exit door next to a pillar on the store sidewalk. id. No one was then in the presence of the box. Id.

Toppett followed Powers onto the parking lot, stopped her and took her into custody for shoplifting ... Toppett then interrogated Powers inside the store security area. Id.; (T1:226-236). Powers wanted to leave ... Toppett handcuffed Powers to secure her until the police arrived shortly thereafter. Id. Toppett then retrieved the box and its contents from the sidewalk immediately outside the store exit door. Id.

Neither the box or the items claimed to have been stolen were offered or received into evidence at trial ... Shop-N-Sav sold them in the ordinary course of its business (T1:240).

St. Louis Police Officer Mark Craig arrived and arrested Powers for stealing based upon Toppett's/Shop-N-Sav's complaint (T1:245-246).

Powers had around \$2,300.00 of cash in her purse at the time she allegedly stole the \$24.76 of merchandise from Shop-N-Sav (T1:248, lines 15-18).

On May 2, 2002, the jury returned its verdict finding Powers guilty of stealing (LF:58).

On May 28, 2002, Powers filed a timely motion for judgment of acquittal, or, alternatively, motion for new trial (LF:65) which was deemed denied under Rule 29.11(g) because the trial court did not act upon it within ninety (90) days after the filing date.

On December 19, 2002, the trial court entered Sentence And Judgment (LF:84) adjudging Powers guilty of the felony class C offense Stealing: Third Offense and sentenced Powers to nine (9) months incarceration.

On December 26, 2002, Powers filed a timely notice of appeal (LF:82) from the December 19, 2002 judgment.

On February 17, 2004, The Missouri Court of Appeals, Eastern District, filed its' Opinion affirming the trial court's judgment.

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On April 14, 2004, Powers filed a timely Application For Transfer To The Missouri Supreme Court which was granted May 25, 2004.

#### **IV.**

#### **Points Relied On**

##### **Point I.**

**The trial court committed prejudicial err by admitting State's Exhibit 1 and State's Exhibit 1A into evidence over objection because The State failed to offer competent evidence to authenticate and lay an adequate foundation for admission of these hearsay exhibits into evidence in that there was no predicate foundational evidence *prima facie* showing (a) the multiplex recording and dubbing devices used to create State's Exhibit 1 and State's Exhibit 1A were**

**trustworthy and accurately recorded events as they actually occurred, (b) State's Exhibit 1A was a complete and unaltered duplicate of the images of Powers in State's Exhibit 1 and (c) the multiplex monitor screen accurately displayed the actual events as they occurred.**

The four most apposite cases are :

Nelson v. Waxman, 9 S.W.3d 601 (Mo. banc 2000)

Phiropoulos v. Bi-State Dev. Agency, 908 S.W.2d 712 (Mo. App. E.D. 1995)

State v. Spica, 389 S.W.2d 35 (Mo. banc 1965)

State v. Wahby, 775 S.W.2d 147 (Mo. banc 1989)

#### **Point II.**

**The trial court committed prejudicial err by admitting State's Exhibit 1A into evidence over objection because (1) the Best Evidence was State's Exhibit 1, (2) State's Exhibit 1 was "available" to The State but was not "available" to The Court, the jury or Powers due to its' multiplex format, (3) State's Exhibit 1A was not admissible as a summary of voluminous records and (4) Powers' Rule 25.03 and Brady constitutional Due Process Rights were violated by non-disclosure of the complete contents of State's Exhibit 1 and State's Exhibit 1A prior to trial in that (a) the original video recording was State's Exhibit 1, (b) State's Exhibit 1 was recorded in multiplex format which was not viewable on standard VCR viewing equipment, (c) State's witness Toppett selectively designated some, but not all, of the State's Exhibit 1 images to be "dubbed" onto State's Exhibit 1A, (d)**

**State's Exhibit 1A contained selectively edited and altered images of Powers from State's Exhibit 1, (e) State's Exhibit 1A was not produced by The State for inspection by Powers until the Noon recess during trial, (f) Powers had no fair, efficient or reasonable opportunity to ascertain and use the favorable Brady material contained on State's Exhibit 1 prior to or at trial and (g) State's Exhibit 1, due to its' multiplex format requiring specialized viewing equipment, was not "available" to Powers to compare to State's Exhibit 1A for video tape completeness and alteration determinations.**

The four most apposite cases are :

Ahrens & McCarron. v. Mullenix , 793 S.W.2d 534 (Mo. App. E.D. 1990)

Brady v. Maryland, 373 U.S. 83 (1963)

Molasky v. State, 710 S.W.2d 875 (Mo. App. 1986)

State v. Engleman, 634 S.W.2d 466 (Mo. banc 1982)

Other cited authority :

Rule 23.05

### **Point III.**

**The trial court committed prejudicial plain error resulting in a manifest injustice and a miscarriage of justice by admitting the testimony of witness James Toppett because Toppett's testimony respecting Powers conduct inside and outside the Shop-N-Sav store May 28, 2001 (1) violated the Best Evidence**

**Rule, (2) was blatant inadmissible hearsay and (3) was the only testimonial evidence incriminating Powers in that (a) Toppett admitted all his testimony respecting Powers, excepting only the "orange juice" testimony, was premised not on his personal observation and knowledge but, rather, was based upon what he viewed on an electronic monitor hooked up to a multiplex recording device, (b) State's Exhibit 1 was the Best Evidence of the content of events set out in Toppett's testimony, (c) Toppett's testimony was offered to prove the truth of the matters second-hand viewed by Toppett and (d) The State offered no substantial or competent evidence to confirm or refute either the accuracy of Toppett's hearsay testimony or the accuracy or completeness of State Exhibit 1 upon which the conviction of Powers depends.**

The four most apposite cases are :

Emcasco Ins. Co. v. Donnelly, 607 S.W.2d 460 (Mo. App. E.D. 1980)

Nelson v. Waxman, 9 S.W.3d 601 (Mo. banc 2000)

People v. Tharpe-Williams, 286 Ill.App.3d 605 , 676 N.E.2d 717 (Ill. 1997)

State v. Louis, 103 S.W.3d 861 (Mo. App. E.D. 2003)

Other cited authority :

Rule 29.12(b)

#### **Point IV.**

**The trial court committed prejudicial err by denying (T:263) Powers motions for judgment of acquittal at the close of The State's case-in-chief (LF:43), at the close of all the evidence (LF:45) and Motion For Judgment of Acquittal, Or,**

Alternatively, Motion For New Trial (LF:65) because The State failed to make a *prima facie* submissible case on Amended Information Count 01 (Stealing: Third Offense) and Count 02 (Persistent Misdemeanor Offender) in that (a) there was no substantial or probative evidence to *prima facie* establish the "intent to steal" essential element of the crime Stealing, (b) the trial court did not make a finding that Powers was "persistent misdemeanor offender" as defined at §558.016.5, R.S.Mo. , (c) the trial court did not make a finding beyond a reasonable doubt on the essential element of felony Stealing:Third Offense that Powers "previously pled guilty or been found guilty on two separate occasions of stealing" as required under §570.030.1, R.S.Mo. and (d) there was no competent or substantial evidence to *prima facie* establish the essential elements of the crime **Stealing:Third Offense.**

The most apposite case is :

State v. Langdon, 110 S.W.3d 807 (Mo.banc 2003)

Other cited authority :

§558.016.2, R.S.Mo.

§558.016.3, R.S.Mo.

§558.016.5, R.S.Mo.

§570.030, R.S.Mo.

§570.040, R.S.Mo.

**V.**

## Argument

### Point I.

The trial court committed prejudicial err by admitting State's Exhibit 1 and State's Exhibit 1A into evidence over objection because The State failed to offer competent evidence to authenticate and lay an adequate foundation for admission of these hearsay exhibits into evidence in that there was no predicate foundational evidence *prima facie* showing (a) the multiplex recording and dubbing devices used to create State's Exhibit 1 and State's Exhibit 1A were trustworthy and accurately recorded events as they actually occurred, (b) State's Exhibit 1A was a complete and unaltered duplicate of the images of Powers in State's Exhibit 1 and (c) the multiplex monitor screen accurately displayed the actual events as they occurred.

#### (A) Standard of Review :

"The admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion.", Nelson v. Waxman, 9 S.W.3d 601, 603 (Mo. banc 2000).

#### (B) Introduction :

This point raises an issue of first impression in Missouri ... namely, whether testimony predicated solely upon observations from a T.V. security monitor (without personally observing the T.V. displayed events first hand) is an adequate foundation to admit into evidence a video tape of the events portrayed on the T.V. monitor screen without a further showing that the equipment accurately displayed and recorded the actual events as they occurred ?

With the frequency of retail store theft cases in Missouri courts, and the almost universal use of in-store videotaping equipment, the evidentiary issue presented in this point is of great importance and general interest to Missouri trial judges, trial attorneys and The Public.

Here, there was a complete absence of testimony from any witness who had competent knowledge concerning the reliability of the equipment used to record State's Exhibit 1 (original multiplex video tape) ... Toppett certainly did not profess to have this mechanical and electrical engineering expertise. No one stepped forward at trial to testify the device, or devices, used to create State's Exhibit 1 (multiplex video tape) was reliable or capable of accurately recording events as they actually occurred.

As shown below, that was fatal to establishment of a proper foundation for admission of State's Exhibit 1 and State's Exhibit 1A because there was no evidence to establish the mandatory foundational predicate to show the trustworthiness and accuracy of the video recording in relation to the events as they actually occurred. Id.

**(C) Foundation Prerequisites :**

The admissibility of motion pictures, audio tapes and video tapes as evidence is determined by the basic principles governing the admissibility of still pictures. State v. Spica, 389 S.W.2d 35, 46 (Mo. banc 1965).

Foundation-wise, there must be reasonably strict adherence to the rules for testing the admissibility of recordings. State v. Spica, 389 S.W.2d at 44.

The foundation necessary to admit a video or sound recording into evidence consists of : (1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of the authenticity and correctness of the recording, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of preservation of the recording, (6) identification of the speakers and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement. State v. Spica, 389 S.W.2d at 44; State v. Wahby, 775 S.W.2d 147, 153 (Mo. banc 1989).

Absent an adequate foundation, the recording is inadmissible hearsay. State v. Spica, 389 S.W.2d at 46.

Here, for the reasons discussed below, Powers claims State's Exhibit 1 and State's Exhibit 1A each failed to satisfy foundation factors (1), (2), (3) and (4) ... and, therefore, it was prejudicial err to receive State's Exhibit 1 and State's Exhibit 1A

**(D) State's Exhibit 1 Not Admissible - Inadequate Foundation :**

In the absence of a witness who has expert knowledge respecting the relevant recording/viewing equipment and its technical reliability for recording events accurately, a lay witness who personally observed the events as they in fact happened

normally would come into court and testify the video tape accurately depicts what they directly and personally saw first-hand. See, State v. Wahby, 775 S.W.2d at 154 ("Sutton testified that the tape he listened to prior to the hearing was the tape he had made, and it accurately reflected the conversation that took place"); State v. Spica, 389 S.W.2d at 46 ("There was testimony that the motion pictures correctly portrayed what could be and was seen by witnesses").

There was no expert witness here to lay a proper foundation.

Further, there was no third party "eye-ball" lay witness. No one came in and testified they personally saw Powers in the store that day or that the State's Exhibit 1 (multiplex original video tape) views of Powers accurately depict what they saw first-hand.

Instead, The State tried to use Toppett to fulfill this critical role ... but, the problem is Toppett did not view the events first hand personally as in Spica and Wahby.

Specifically, Toppett looked at a multiplex monitor showing what the multiplex monitor was recording (not necessarily what was in fact happening) and, of course, the monitor view is the view reproduced on the multiplex State's Exhibit 1 video tape.

Numbers sometime lie ... so do "rigged" pictures and video tapes.

Here, Toppett was not a direct "eye-ball" witness. He saw only what the multiplex machine wanted him to see. He did not see the events as they happened first hand.

Although Toppett testified the multiplex unit records all 16 camera views in "real time" (T1:177, lines 14-16), his testimony is unreliable because he based his

speculative opinion merely by viewing the multiplex TV monitor without comparison of the TV monitor image with a personal simultaneous view of the actual event being recorded and shown on the monitor. There was no evidence showing Toppett was qualified to testify as to the reliability, accuracy or trustworthiness of the multiplex recording unit.

And, Toppett's testimony was insufficient even to show the multiplex recording unit was in fact functioning in a normal or proper fashion on May 28, 2001. Toppett said he "tested" the multiplex recording device when he came in May 28, 2001 by playing back about five minutes of the tape recorded May 27, 2001 and it worked (T1:177,186-187) ... but, Toppett was not present at Shop-N-Sav May 27, 2001 so he does not have personal knowledge whether the multiplex unit was functioning properly and recording all events within surveillance camera-range (T1:188).

And, significantly, Toppett did not first-hand personally observe any of the events (other than the orange juice event) recorded on State's Exhibit 1 so he was incompetent to testify the multiplex machine was operating properly ... all he can testify to is that the multiplex machine recorded some of the May 28, 2001 events which he observed on the multiplex TV monitor.

In sum, Toppett was incompetent to opine whether State Exhibit 1 (or the multiplex monitor he viewed) accurately portrayed the Powers events as they in fact happened May 28 for a very simple reason ... he didn't personally see the events first hand.

The foundational rule requires an independent third party direct "eye-witness" observance of the events to confirm the events recorded are the events as they in fact happened... or, some expert to testify the recording/viewing equipment is trustworthy.

In Phiropoulos v. Bi-State Dev. Agency, 908 S.W.2d 712, 715 (Mo. App. E.D. 1995), the Eastern District reversed and remanded because a video tape was admitted without proper foundation in that the party offering the video tape failed establish it was an accurate and faithful representation of what it purported to show in juxtaposition with the events as they actually occurred based upon direct personal observation from some witness.

The absence of competent testimony from a witness having knowledge of the reliability (or non-reliability) of the equipment used to record State's Exhibit 1 (multiplex video tape) was fatal to admissibility under Spica, Wahby and Phiropoulos v. Bi-State Dev. Agency, supra, for want of an adequate foundation.

It was prejudicial err of to admit State's Exhibit 1 into evidence.

**(E) State's Exhibit 1A Not Admissible - Inadequate Foundation :**

### **General Foundation Deficiencies**

Of course, if The State failed to lay a proper foundation for State's Exhibit 1, then it is obvious State's Exhibit 1A, the dubbed VCR views from State's Exhibit 1, likewise was admitted without proper foundation.

However, even if an adequate foundation was made for admission of State Exhibit 1, State's Exhibit 1A was nonetheless admitted erroneously for want of an adequate foundation.

State's Exhibit 1A came in through Toppett's testimony. Toppett testified he did not dub the tape ... his supervisor Schrader did it in Springfield, Illinois outside of Toppett's presence (T:179 line 21 through 180 line 3). Schrader did not appear at trial. Toppett specifically testified he was not familiar with the dubbing process (T:185 lines 12-19).

Therefore, the absence of competent testimony from a witness having knowledge of the reliability (or non-reliability) of the equipment used to record State's Exhibit 1 (multiplex video tape) and State's Exhibit 1A (dubbed video tape) was fatal to admissibility under Phiropoulos v. Bi-State Dev. Agency, supra.

#### **Alterations And Deletions From Original Tape**

The most clear cut foundational deficiency of State's Exhibit 1A is that it admittedly was a selectively altered, doctored and incomplete version of the original videotape, State's Exhibit 1 ... a clear violation of State v. Spica, supra, and State v. Wahby, supra, foundational factor (4).

Toppett testified he and his Shop-N-Sav supervisor Matt Schrader viewed State's Exhibit 1 and personally selected certain views of Powers to be dubbed onto State's Exhibit 1A (T1:192) ... other State's Exhibit 1 views, such as the view of Powers entering the Shop-N-Sav store with two men May 28, 2001, were not selected by Toppett/Schrader to be "dubbed" onto State's Exhibit 1A "because at the time those two were not involved" in Toppett's/Schrader's opinion (T1:204 line 21 through 206 line 21). This view was deleted.

Also, St. Louis County Police Officer Mark Craig viewed State's Exhibit 1 at the Shop-N-Sav security office May 28, 2001 shortly before arresting Powers (T1:250) ... he testified State's Exhibit 1 showed Powers exiting Shop-N-Sav after her son activated the electric eye to open the exit door (T1:25-252) ... Toppett/Schrader did not select these views of Powers exiting the Shop-N-Sav store (with or without merchandise ???) to be "dubbed" onto State's Exhibit 1A. This view was deleted.

Toppett deemed these deleted State's Exhibit 1 views of Powers not important to the prosecution of Powers (T1:204 line 24 through 206 line 18).

Powers contends the scenes deleted from State's Exhibit 1 and not included in State's Exhibit 1A were prejudicial to her because (1) the original video tape marked State's Exhibit 1 containing these scenes was not available to Powers because of its multiplex format and, therefore, Powers was prevented from playing the same to the jury on a "completeness" theory and (2) these scenes represent probative, admissible evidence to *prima facie* establish Powers' defense (no intent to steal ... she came to store to buy cold medicine for her son ... her son accompanied her to the store and waited outside ... the son had a medical emergency and summoned his mother [Sic: Powers] to leave the store and take him to a hospital ... Powers left the store, dropped the cold remedy items outside the door and was walking to her car with her son to take him to the hospital when she was apprehended by Toppett).

**(F) Conclusions Point I :**

The trial court clearly abused its' discretion and committed prejudicial err by admitting into evidence State's Exhibit 1 and State's Exhibit 1A because The State failed

to lay an adequate foundation to admit these hearsay exhibits into evidence over objection.

The December 19, 2002 (LF:84) judgment should be reversed and remanded for retrial.

### **Point II.**

**The trial court committed prejudicial err by admitting State's Exhibit 1A into evidence over objection because (1) the Best Evidence was State's Exhibit 1, (2) State's Exhibit 1 was "available" to The State but was not "available" to The Court, the jury or Powers due to its' multiplex format, (3) State's Exhibit 1A was not admissible as a summary of voluminous records and (4) Powers' Rule 25.03 and Brady constitutional Due Process Rights were violated by non-disclosure of the complete contents of State's Exhibit 1 and State's Exhibit 1A prior to trial in that (a) the original video recording was State's Exhibit 1, (b) State's Exhibit 1 was recorded in multiplex format which was not viewable on standard VCR viewing equipment, (c) State's witness Toppett selectively designated some, but not all, of the State's Exhibit 1 images to be "dubbed" onto State's Exhibit 1A, (d) State's Exhibit 1A contained selectively edited and altered images of Powers from State's Exhibit 1, (e) State's Exhibit 1A was not produced by The State for inspection by Powers until the Noon recess during trial, (f) Powers had no fair, efficient or reasonable opportunity to ascertain and use the favorable Brady material contained on State's Exhibit 1 prior to or at trial and (g) State's**

**Exhibit 1, due to its' multiplex format requiring specialized viewing equipment, was not "available" to Powers to compare to State's Exhibit 1A for video tape completeness and alteration determinations.**

**(A) Standard of Review :**

"The admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion.", Nelson v. Waxman, 9 S.W.3d 601, 603 (Mo. banc 2000).

**(B) Preliminary Remarks :**

The facts, points, authorities and argument made at Appellant' Substitute Brief, Argument Point I, supra, are hereby incorporated by reference into this Point II.

Should The Court determine an adequate foundation was made for the admission of State's Exhibit 1A, then, nonetheless, as shown below, State's Exhibit 1A was not admissible into evidence under The Best Evidence Rule, under the summary of voluminous records rule, under the rule of completeness and under the holding Brady v. Maryland, 373 U.S. 83 (1963)("Brady").

**(C) Best Evidence Was State's Exhibit 1 :**

The original was State's Exhibit 1 ... the multiplex video tape. State's Exhibit 1A was not an "original" of State's Exhibit 1 in VCR format. State's Exhibit 1A was a "dubbed" altered reproduction of some of the Powers content of the original video State's Exhibit 1. State's Exhibit 1 was "available" to The State ... it was not lost or destroyed in that it was physically present and received into evidence at trial.

From the beginning, Powers challenged the authenticity, completeness and trustworthiness of State's Exhibit 1A (T1:194 lines 13-22; T1:14-15; T1:150 lines 11-13).

Under the circumstances, the admission of State's Exhibit 1A violated the Best Evidence Rule. Molasky v. State, 710 S.W.2d 875, 878 (Mo. App. 1986); City of Peculiar v. Dorflinger, 723 S.W.2d 424 (Mo. App. 1986).

Clearly, the err was prejudicial because it was the only tape played to the jury ... and, it along with the hearsay testimony of Toppett (which also violated the Best Evidence Rule, See Point III Argument, *infra*) was the only evidence offered to make The State's *prima facie* stealing case.

**(D) State's Exhibit 1A Not Admissible As A "Summary" :**

"The general principle relating to the use of a summary of records, as evidence, is that where the evidence is the result of the inspection of many papers, the examination of which cannot conveniently take place in court, a summary in connection with testimony is admissible", Ahrens & McCarron, Inc. v. Mullenix Corp., 793 S.W.2d 534, 539-40 (Mo. App. E.D. 1990). In accord : Nangle v. Brockman, 972 S.W.2d 545 (Mo. App. E.D. 1998).

However, a summary is not admissible unless the proponent of the summary (Sic: The State in the case *sub judice*) "establishes that the records upon which the summary is based are themselves admissible and are available to the opposing party for inspection. Ahrens & McCarron, Inc. v. Mullenix Corp., 793 S.W.2d at 240; Nangle v. Brockman, 972 S.W.2d at 548-49.

Here, The State did not produce either State's Exhibit 1 or State's Exhibit 1A as requested in Powers January 22, 2002 discovery request (LF:10; LF:29 ¶5). On the eve of trial, on April 29, 2002, Powers filed a motion *inter alia* to compel production of a "videotape" which was discovered by Powers to exist by virtue of the testimony in an April 10, 2002 deposition of James Toppett (LF:29).

Trial commenced 9:00 a.m. May 1, 2002 (T1:4).

State's Exhibit 1A was produced for Powers viewing Noon, May 1, 2002 during trial.

State's Exhibit 1 was not "available" to Powers because by the time The State got around to producing it during trial, there was no multiplex equipment available to view the contents of State's Exhibit 1. Therefore, Powers had no practical, efficient or reasonable means to "inspect" State's Exhibit 1 (i.e. the voluminous record) to determine whether State's Exhibit 1A was a complete, accurate, unaltered VCR summary of State's Exhibit 1.

In sum, Powers was sandbagged by The State.

Under the presented circumstances, State's Exhibit 1A did not qualify as an admissible summary of voluminous records. Ahrens & McCarron, Inc. v. Mullenix Corp., supra; Nangle v. Brockman, supra.

**(E) Completeness Rule Violations :**

Admittedly, State's Exhibit 1A was not the "complete" video recording of Powers May 28, 2001 at Shop-N-Sav.

Therefore, under the "completeness rule", Powers was entitled to introduce and play the non-selected portions of State's Exhibit 1 to explain Powers theory of the case that she abruptly left the store because of her son (i.e. the taped portion showing Powers sons there before and after Powers entered and left Shop-N-Sav) and to disprove The State's Exhibit 1A theory of the case that Powers left the Shop-N-Sav merchandise outside the door so she could retrieve it later. See, State v. Engleman, 634 S.W.2d 466, 480 (Mo. banc 1982); State v. Webber, 982 S.W.2d 317, 323-24 (Mo. App. 1998).

But, Powers was prejudicially denied this opportunity (a) due to the tardiness of The State's May 1, 2002 production of State's Exhibit 1 and State's Exhibit 1A for inspection by Powers and (b) the absence of specialized multiplex viewing equipment in the courtroom to permit Powers to discover the actual contents of State Exhibit 1.

Accordingly, because State's Exhibit 1 was not practically or reasonably "available" for timely inspection by Powers she was effectively and prejudicially denied her right to play the entire State's Exhibit 1 video to the jury under the "completeness rule" to aid her theory of defense and to rebut The State's theory of the case.

**(F) Rule 25.03 and Brady Violations :**

There should be no question The State violated its' Rule 23.05 and Brady duty to timely disclose the contents of State's Exhibit 1 and State's Exhibit 1A to Powers ... The State had State's Exhibit 1 and State's Exhibit 1A in their actual possession, custody and control at least by March 20, 2002 (T1:193) and failed to disclose the same to Powers until six weeks later after commencement of trial May 1, 2002 ... and, then at a

time and place where multiplex equipment was not available to discover the contents of State's Exhibit 1.

The content of State's Exhibit 1 was clearly material to the guilt or innocence of Powers and clearly supported her theory of defense (i.e. no intent to steal items ... rather, urgency of the situation involving her sons demanded immediate action to leave the items at Shop-N-Sav and attend to sons). The evidence deleted from State's Exhibit 1A showing Powers' sons both when Powers entered and exited Shop-N-Sav but contained in State's Exhibit 1 would have reasonably had an impact upon the jury to create a reasonable doubt as to Powers guilt or innocence.

Therefore, The State's failure to timely produce State's Exhibit 1 and State's Exhibit 1A for inspection by Powers violated Powers U.S.Const. Fourteenth Amendment Due Process Rights and U.S.Const. Sixth Amendment "Fair Trial" Right under the holding in Brady v. Maryland, 373 U.S. 83 (1963).

**(G) Conclusions Point II :**

The trial court clearly abused its' judicial discretion and committed prejudicial err by admitting into evidence State's Exhibit 1A because State's Exhibit 1A was not admissible into evidence under The Best Evidence Rule, under the summary of voluminous records rule, under the rule of completeness and under the holding Brady v. Maryland, 373 U.S. 83 (1963).

The December 19, 2002 (LF:84) judgment should be reversed and remanded for retrial.

**Point III.**

**The trial court committed prejudicial plain error resulting in a manifest injustice and a miscarriage of justice by admitting the testimony of witness James Toppett because Toppett's testimony respecting Powers conduct inside and outside the Shop-N-Sav store May 28, 2001 (1) violated the Best Evidence Rule, (2) was blatant inadmissible hearsay and (3) was the only testimonial evidence incriminating Powers in that (a) Toppett admitted all his testimony respecting Powers, excepting only the "orange juice" testimony, was premised not on his personal observation and knowledge but, rather, was based upon what he viewed on an electronic monitor hooked up to a multiplex recording device, (b) State's Exhibit 1 was the Best Evidence of the content of events set out in Toppett's testimony, (c) Toppett's testimony was offered to prove the truth of the matters second-hand viewed by Toppett and (d) The State offered no substantial or competent evidence to confirm or refute either the accuracy of Toppett's hearsay testimony or the accuracy or completeness of State Exhibit 1 upon which the conviction of Powers depends.**

**(A) Standard of Review :**

"The admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion.", Nelson v. Waxman, 9 S.W.3d 601, 603 (Mo. banc 2000).

**(B) Preliminary Remarks :**

The facts, points, authorities and argument made at Appellant's Substitute Brief, Argument Point I and Point II, supra, are hereby incorporated by reference into this Point III.

**(C) Toppett's Testimony Was Inadmissible Hearsay :**

Excepting only the testimony that Powers picked up some orange juice when Toppett briefly left the security room area, Toppett's entire testimony was exclusively based upon what he saw on the multiplex TV screen while Toppett was in the Shop-N-Sav security room ... he had no direct actual "sight-line" to Powers inside the Shop-N-Sav store ... he had no first hand, personal observation knowledge of the events he testified to at trial ... he relied upon what he saw second hand on the TV screen (T1:161-166). Just like watching a television set. Blatant inadmissible hearsay. Emcasco Insurance Company v. Donnelly, 607 S.W.2d 460 (Mo. App. E.D. 1980).

In the Eastern District, The State argued "... the fact that Toppett observed appellant's actions on a monitor as the events unfolded did not change the personal nature of his observations", citing People v. Tharpe-Williams, 286 Ill.App.3d 605 , 676 N.E.2d 717 (Ill. 2nd App. 1997). See, Respondent's Brief, page 11 ¶2.

The State also argued monitor Toppett's viewing was analogous to looking at Powers through binoculars. Id.

The State is dead wrong ... the analogy is faulty and the conclusions of law are wrong.

First, the binocular notion does not fly. Binoculars are used when a person observes an object/activity but can't quite make out the details ... binoculars are used to magnify and make the object clearer.

Here, in contrast, Toppett did not directly or personally see Powers. He "saw" what the multiplex monitor wanted him to see ... a mechanical intervention that reproduced Powers' likeness on a screen.

Second, the issue of whether the viewing of events on a video monitor, with no personal observation of the events first-hand, constitutes a hearsay declaration is an issue of first impression in Missouri. That's obvious because The State cites an Illinois decision, Tharpe-Williams, supra, purportedly to support its contention ... no Missouri decision is referred to.

Tharpe-Williams aids Powers, not The State.

Tharpe-Williams analyzed the hearsay issue on a "credibility" basis : "Hearsay evidence is inadmissible because it relies upon the credibility of someone other than the witness ... Objects such as video camera neither have or lack credibility or trustworthiness. If properly operated, there is no reason to suspect that images received from a video camera and displayed on a video monitor are unreliable. As such, the underlying basis for excluding hearsay evidence does not apply to 'out-of-court statements' made by a video camera". People v. Tharpe-Williams, 676 N.E.2d at 609.

In Tharpe-Williams the defendant did not question the foundational proof respecting the monitor system used.

Here, Powers directly attacks the credibility of the monitoring/recording system used to create both State's Exhibit 1 and State's Exhibit 1A. See, Appellant's Substitute Brief, Argument, Point I and Point II, *supra*.

Here, there was no evidence showing either State's Exhibit 1 or State's Exhibit 1A are credible or trustworthy.

This is what distinguishes the case *sub judice* from Tharpe-Williams.

It is respectfully submitted that allowance of the blatant hearsay Toppett testimony coupled with the deficient State's Exhibit 1A (i.e. the sole evidence offered by The State to convict Powers) into evidence at trial created a manifest injustice and a miscarriage of justice warranting "Plain Err" review.

**(D) Toppett's Testimony Violated The Best Evidence Rule:**

Toppett's entire testimony was a recitation of what he observed on the multiplex T.V. screen monitor as recorded in State's Exhibit 1 ... the "contents" of State's Exhibit 1 is the Best Evidence of what Toppett viewed.

State's Exhibit 1 was the Best Evidence of these events. Molasky v. State, 710 S.W.2d 875, 878 (Mo. App. 1986); City of Peculiar v. Dorflinger, 723 S.W.2d 424 (Mo. App. 1986).

Accordingly, Toppett's testimony clearly violated the Best Evidence Rule.

It is respectfully submitted that allowance of Toppett's testimony in violation of the Best Evidence Rule coupled with the deficient State's Exhibit 1A (i.e. the sole evidence offered by The State to convict Powers) into evidence at trial created a manifest injustice and a miscarriage of justice warranting "Plain Err" review.

**(E) Court Should Review This Issue On Plain Error Grounds :**

Powers did not specifically object to the testimony of Toppett at trial either on hearsay or Best Evidence grounds and did not specifically raise the issue in her Motion For Judgment of Acquittal, or, Alternatively, Motion For New Trial (LF:65).

Plain error is evident, obvious and clear error. State v. Louis, 103 S.W.3d 861 (Mo. App. E.D. 2003).

It should be evident Toppett's inadmissible testimony was so prejudicial to Powers that, if left uncorrected, manifest injustice and a miscarriage of justice would necessarily result therefrom ... namely, a finding of guilt against Powers wholly premised upon inadmissible evidence. It is suggested the admission of this inadmissible evidence was outcome determinative.

Powers respectfully requests and prays plain error review under Rule 29.12(b) be undertaken by this Court.

**(F) Conclusions Point III :**

Powers requests plain error review of this point under Rule 29.12(b). The trial court clearly abused its' judicial discretion and committed prejudicial err by admitting into evidence the testimony of James Toppett except for the testimony concerning the orange juice which he personally observed first hand.

The December 19, 2002 (LF:84) judgment should be reversed and remanded for retrial.

**Point IV.**

The trial court committed prejudicial error by denying (T:263) Powers motions for judgment of acquittal at the close of The State's case-in-chief (LF:43), at the close of all the evidence (LF:45) and Motion For Judgment of Acquittal, Or, Alternatively, Motion For New Trial (LF:65) because The State failed to make a *prima facie* submissible case on Amended Information Count 01 (Stealing: Third Offense) and Count 02 (Persistent Misdemeanor Offender) in that (a) there was no substantial or probative evidence to *prima facie* establish the "intent to steal" essential element of the crime Stealing, (b) the trial court did not make a finding that Powers was "persistent misdemeanor offender" as defined at §558.016.5, R.S.Mo. , (c) the trial court did not make a finding beyond a reasonable doubt on the essential element of felony Stealing:Third Offense that Powers "previously pled guilty or been found guilty on two separate occasions of stealing" as required under §570.030.1, R.S.Mo. and (d) there was no competent or substantial evidence to *prima facie* establish the essential elements of the crime Stealing:Third Offense.

**(A) Standard Of Review :**

The evidence is reviewed in the light most favorable to the verdict. State v. Langdon, 110 S.W.3d 807 (Mo.banc 2003). The appellate court accepts as true all evidence and inferences therefrom that tend to prove the defendant's guilt, and disregards all evidence and any inference to the contrary. Id. The task on appellate

review is only to evaluate whether the state produced substantial evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. Id. "But, in so doing, courts will not supply missing evidence or give The State the benefit of unreasonable, speculative or forced inferences". Id. at 811-812.

**(B) Preliminary Remarks :**

The facts, points, authorities and argument made at Appellant's Substitute Brief, Argument Point I, Point II and Point III, supra, are hereby incorporated by reference into this Point IV.

**(C) The State Failed To Make A Submissible Case :**

**General Observation**

There should be no dispute The State failed to make a *prima facie* submissible Stealing:Third Offense (Count 01) and Persistent Misdemeanor Offender (Count 02) if State's Exhibit 1, State's Exhibit 1A and Toppett's testimony are determined by this Court to be inadmissible as contended in this Appellant's Substitute Brief Point I, Point II and Point III.

However, alternatively, should The Court not agree with Powers Appellant's Substitute Brief Point I, Point II and Point III, nonetheless The State still failed to make a *prima facie* case on any amended information charge (LF:25).

Amended information Count 01 charges Powers with having committed the class C felony Stealing:Third Offense under §570.030, R.S.Mo. and §570.040, R.S.Mo.

**State Did Not *Prima Facie* Establish "Intent To Steal" Essential Element**

It is fundamental that an "intent to steal" is an essential element of the crime "stealing" under §570.030, R.S.Mo.

Even allowing the admission of Toppett's testimony, State's Exhibit 1 and State's Exhibit 1A, there still was no substantial evidence directly or circumstantially showing Powers had an intent to steal.

For example, viewing the evidence most favorable to the guilty verdict, the evidence merely showed (a) at no time did Powers put anything in her purse, pocket, clothes or other secret and/or private place [T1:214-215], (b) Powers had a brief conversation with the male [son] after exiting the store, voluntarily put all the merchandise down immediately outside the store exit door and then walked with the son to the parking lot empty handed [T:222-227; T:230-231; T:250 lines 12-25; T251 lines 1-3], (c) no one was standing around or near the abandoned merchandise (T1:222-227; T1:230-231) and (d) Toppett followed Powers onto the parking lot, stopped her empty-handed and took her into custody for shoplifting ... Toppett then interrogated Powers inside the store security area. (T1:226-236).

This evidence is insufficient to generate, even circumstantially, any inference that Powers had an intent to steal the merchandise she voluntarily abandoned immediately outside the Shop-N-Sav exit door.

To suggest this evidence is sufficient is to improperly "supply missing evidence or give The State the benefit of unreasonable, speculative or forced inferences" prohibited under the standard of review. State v. Langdon, 110 S.W.3d 807, 811-812 (Mo.banc 2003).

The State failed to make a *prima facie* "stealing" case and the trial court thereby committed prejudicial error by not entering a judgment of acquittal in favor of Powers.

**Failed To Establish §570.040, R.S.Mo. Essential Element Finding**

The Amended information Count 01 charges Powers with having committed the class C felony Stealing:Third Offense under §570.040, R.S.Mo.

An essential element of that crime requires a finding that Powers "pled guilty or been found guilty on two separate occasions of stealing".

Here, the trial court made no such finding. Instead, the trial court erroneously found "beyond a reasonable that defendant (Sic: Powers) is a prior offender and also a persistent offender, as defined at Chapter 558.016.3" (LF:39; T1:9 lines 11-14).

This was a prejudicially erroneous finding because there was no evidence that Powers pled guilty or was found guilty of committing any prior felony offense. A person cannot be either a "prior offender" or a "persistent offender" under the §558.016.2, R.S.Mo. and §558.016.3, R.S.Mo. definition of those terms unless the person pled or was found guilty of a felony in a prior case.

Therefore, under the applicable standards for review, The State failed to make a prima facie, submissible amended information Count 01 case against Powers because there was no finding on the §570.040, R.S.Mo class C felony Stealing:Third Offense essential element that Powers "pled guilty or been found guilty on two separate occasions of stealing".

Accordingly, the trial court committed prejudicial error by not granting Powers' motion for judgment of acquittal on amended information Count 01.

### **Failed To Establish §558.016.5, R.S.Mo. Essential Element Finding**

Similarly, Amended information Count 02 charges Powers with being a "persistent misdemeanor offender" as defined at §558.016.5, R.S.Mo.

An essential element of being a "persistent misdemeanor offender" under §558.016.5, R.S.Mo. is a finding that Powers "pleaded guilty to or been found guilty of two or more class A or B misdemeanors"

Here, the trial court made no such finding. Instead, the trial court erroneously found "beyond a reasonable that defendant (Sic: Powers) is a prior offender and also a persistent offender, as defined at Chapter 558.016.3" (LF:39; T1:9 lines 11-14).

Therefore, under the applicable standards for review, The State failed to make a prima facie, submissible amended information Count 02 case against Powers because there was no finding that Powers was a "persistent misdemeanor offender" as defined at §558.016.5, R.S.Mo.

Accordingly, the trial court committed prejudicial error by not granting Powers' motion for judgment of acquittal on amended information Count 02.

### **(D) Conclusions Point IV :**

For the reasons and on the grounds set out in this Appellant's Substitute Brief Point IV, the trial court committed prejudicial error by not granting Powers motions for judgment of acquittal on amended information Count 01 and Count 02 and by not granting Powers Motion For Judgment of Acquittal, Or, Alternatively, Motion For New Trial (LF:65).

The December 19, 2002 (LF:84) judgment should be reversed and judgment of acquittal should be entered on both amended information counts.

**VI.**  
**Conclusions**

Based upon the facts, points, authorities and argument contained in this Appellant's Substitute Brief Point I, Point II and Point III, the December 19, 2002 (LF:84) judgment should be reversed and remanded for retrial.

Based upon the facts, points, authorities and argument contained in this Appellant's Substitute Brief Point IV, the December 19, 2002 (LF:84) judgment should be reversed and judgment of acquittal should be entered on both amended information counts.

Respectfully served, filed and submitted this 14th day of June, 2004.

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**Rule 84.06(c) Certification**

Pursuant to Rule 84.06(c) the undersigned hereby certifies this Appellant's Substitute Brief (a) contains the information required by Rule 55.03, (b) complies with the limitations contained in Rule 84.06[b] and (c) contains **8,910 gross words** (no exclusions) determined by The Microsoft Office 2003 Word computer program count (program used to prepare this Appellant's Substitute Brief).

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Arthur G. Muegler, Jr. MoBar #17940

### **Certificate of Service**

The undersigned certifies two (2) true copies of Appellant's Substitute Brief herein [together with one (1) 3 ½" computer diskette, scanned for virus and found to be virus free, containing the same] and this Certificate of Service were served June 11, 2004 by First Class U.S. Mail, postage prepaid, addressed to Respondent's legal counsel Missouri Attorney General Jeremiah W. (Jay) Nixon, Supreme Court Building, P.O. Box 899, Jefferson City, Missouri 65102 .

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Arthur G. Muegler, Jr. MBE #17940

# **APPENDIX**