S.Ct. 87921

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

JEREMY L. BANKS,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit
The Honorable K. Preston Dean, Judge
Division 15

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

Jeremy L. Banks was convicted after a jury trial in the Circuit Court of Jackson County of one count each of murder in the first degree, Section 565.020, RSMo 2000, and armed criminal action, Section 571.015, RSMo 2000. On November 25, 2003, the Honorable K. Preston Dean, Judge of Division 15, sentenced Mr. Banks as a prior and persistent offender to concurrent terms of life in prison without possibility of probation or parole for murder and life in prison for armed criminal action.

On June 27, 2006, the Court of Appeals, Western District, affirmed Mr. Banks's conviction and sentence. Mr. Banks filed a motion for rehearing, which the Court of Appeals denied on August 1, 2006. On September 26, 2006, this Court sustained Mr. Banks's application for transfer to the Missouri Supreme Court. Therefore, the Missouri Supreme Court has jurisdiction to hear this case. Missouri Supreme Court Rule 83.04.

STATEMENT OF FACTS

On September 14, 2002, someone shot Alvon Turner twice in the abdomen with a shotgun and caused his death (Tr. 297, 306-307). No one saw the shooting, and no shotgun was recovered (Tr. 196, 219-220, 261, 265-266, 271, 280, 288, 325).

The police developed Jeremy Banks as a suspect (Tr. 315-318). In October 2001, Jeremy and Alvon had been arrested together on a drug charge; Alvon had implicated Jeremy (Tr. 357-362).[1] Regarding Alvon's death, the state charged Jeremy Banks as a prior and persistent offender with one count each of murder in the first degree, Section 565.020, RSMo 2000, and armed criminal action, Section 571.015, RSMo 2000 (L.F. 1-2, 3-4).

The case went to trial on September 15, 2003 (Tr. 12). Evidence adduced at trial was as follows.

Michelle "Shelly" Evans and Denise Harris-Black were at 1314 East 44th Street in Kansas City, Jackson County, Missouri, on September 14, 2002 (Tr. 188, 202-203, 274). This house had a reputation as a drug house and as a house of prostitution (Tr. 335-336, 352). Shelly and Denise were drinking and greasing their hair inside the house, beside a

[1] The state called a number of lay witnesses to testify at trial. Other people, known only by their first names, were also present at the scene of the shooting but did not testify. For consistency and clarity in the Statement of Facts, the witnesses, Mr. Banks, and those present at the scene will be referred to by their first names, after being initially identified by their full names whenever possible. No disrespect is intended.

large picture window in the front room (Tr. 206-208, 274-276, 285). Shelly was "really drunk" at that time (Tr. 215, 219-220, 285-286).[2] Denise was not only drinking Chivas Regal but was also smoking crack cocaine, which she described as "the drug of our choice" (Tr. 274, 275, 285, 289).

Several other people were at the house, including Alvon Turner, who was sitting on the porch with Jeanette Fox (Tr. 204-205, 209, 262-264, 274-275). At some point, Jeanette went inside to the kitchen to get Alvon a glass of water (Tr. 265).

Shelly and Denise saw Jeremy Banks come up to the porch and talk to Alvon (Tr. 209-210, 275-276). A younger man with Jeremy went out to a white Chevy Caprice and got a shotgun out of the trunk (Tr. 215, 276-279, 287). He handed the gun to Jeremy (Tr. 213-215, 277-279, 280-281). Shelly and Denise decided to "get the hell out of [t]here," so they ran out the back door of the house (Tr. 210, 215-216, 266, 268, 277-278). While they were running, they heard shots being fired (Tr. 210, 280-281).

Jeanette was in the kitchen when she heard some shots and saw the other two women running away (Tr. 265-266, 272). She went out onto the front porch and found Alvon slumping out of a chair (Tr. 211, 266-268). Alvon died of shotgun wounds to the abdomen (Tr. 297, 306-307).

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[2] At trial, Shelly indicated that she was so drunk that the events of the day were "a blur" (Tr. 215, 219-220, 221).

Both Shelly and Denise spoke with Detective Bruce Solomon on the evening of the shooting (Tr. 386). Detective Solomon testified that Shelly and Denise did not appear to be intoxicated or on drugs when he interviewed them (Tr. 388-390).

Alvon's ex-girlfriend, Galanda Cooper, saw Jeremy on September 11, 12, and 13, 2002 (Tr. 225, 236-237, 319). On September 11, Jeremy and his friend Dewayne came to Galanda's apartment building at 4111 Troost and talked to her for a few minutes (Tr. 225-226). Dewayne borrowed Galanda's telephone, then Jeremy and Dewayne went down the street (Tr. 226). They came back later that night with a white Chevy Caprice (Tr. 228).

Jeremy sat next to Galanda while she tried to call Alvon on the phone (Tr. 226-227). Alvon kept hanging up on Galanda (Tr. 227). After Galanda got off the phone, Jeremy started talking about a "discovery" that was about drugs and a murder case (Tr. 228). As Galanda understood it, Alvon and Jeremy "caught a drug case" together and "were telling on each other during that time" (Tr. 228-229). Jeremy said he was "going to get Al and all that," which Galanda understood to mean that he was going to fight Alvon (Tr. 228).

On September 12, Dewayne and Jeremy had a "confrontation" with a man on the other side of Troost (Tr. 230). After the confrontation, Dewayne got a shotgun out of the trunk of the white Chevy Caprice and brought it into Galanda's apartment (Tr. 230-231). Jeremy asked Galanda if they could leave the shotgun in her closet while they went to get some shells (Tr. 231). Galanda said no, so Dewayne and Jeremy took the gun upstairs to another apartment (Tr. 231-232). That day, Jeremy and Dewayne said they were going to

"get" Alvon Turner, which Galanda again understood to mean that they were going to beat him up because of the drug case (Tr. 231-232).

On September 13, Dewayne and Jeremy came to Galanda's apartment around 9:00 p.m. and talked more about the discovery (Tr. 232, 249-252). They again said that they were going to "get" Alvon Turner, and Galanda still thought that they were going to beat him up (Tr. 233). Galanda's cousin, Crystal Stanford, asked Dewayne to take her to the liquor store at 44th and Paseo (Tr. 233, 252, 258). While they were there, they saw Alvon (Tr. 233-234, 252). Dewayne told Crystal that he wished she was not in the car (Tr. 252).

When Dewayne and Crystal returned to Galanda's apartment, they told Jeremy that they had seen Alvon at the store (Tr. 234-235, 252-253). Jeremy and Dewayne left to go back to the liquor store (Tr. 234-235, 252-254).

On the day after Alvon was killed, Jeremy came to Galanda's apartment wearing a blue shirt with his arm tucked inside (Tr. 246). Jeremy told Galanda that someone named Osama bin Laden had asked him if he killed Alvon; Jeremy said that he did not kill Alvon, but he would have, if he had gotten to him first (Tr. 246-247).

After the state rested, one of the jurors, Wayne Oliver, told the court that he was worried about the effect a guilty verdict might have on the jury, because the shooting seemed to be motivated by revenge (Tr. 167, 395-398). The prosecutor asked the court to replace Mr. Oliver with the alternate (Tr. 399). The prosecutor pointed out that it would be inappropriate for the juror to decide the case based on fear and emotion (Tr. 399). The

court granted that request, and Mr. Oliver was replaced by alternate Mary Ann Grayson (Tr. 148, 400-401, 403).

The trial court overruled Jeremy Banks's motion for judgment of acquittal at the close of all the evidence (L.F. 32; Tr. 393-394).

During the state's initial closing argument, the prosecutor argued:

> And who would you expect to be the witnesses in this case at a drug house? A librarian? Your preacher? Someone from church? A guy from the grocery store? No. You're going to expect people who use crack and or [sic] in this lifestyle. That's who's going to be there.

(Tr. 416).

Defense counsel argued that the state's witnesses had been drinking and smoking crack cocaine and that they could not clearly perceive what happened during the shooting (Tr. 420-424, 425-426, 430-431). He noted that there were no police officers at the shooting and that the state's case hinged upon the believability of the state's witnesses (Tr. 428).

During rebuttal closing argument, the prosecutor argued:

> They [the police] didn't just go on the word of a crack addict. They had several witnesses.
>
> And, ladies and gentlemen, when the scene is set and held and we have to go and catch the Devil, there are no angels as witnesses. This is Hell. He is the Devil. They aren't angels. He is guilty beyond a reasonable doubt.

(Tr. 438).

Defense counsel objected and requested a mistrial, stating, "Calling my client a devil is improper argument that was intentional and calls for a mistrial" (Tr. 438). The prosecutor responded that she had made an analogy and that she "set up the analogy properly" (Tr. 438). The following exchange then took place:

Mr. Lamb:[3]	Well, the analogy is improper when you say somebody is Satan.
The Court:	Well, this is certainly something I can worry about later. You have 1:33.
Ms. Parsons:[4]	I'm done with the analogy.
The Court:	Well, overruled.

(Tr. 438).

The jury found Jeremy Banks guilty of murder in the first degree and armed criminal action (L.F. 30-31, 32; Tr. 442-443). In the motion for new trial and suggestions in support thereof, defense counsel preserved the objection to the prosecutor referring to Mr. Banks as "the Devil" (L.F. 34-35, 37, 39-41).

On November 25, 2003, the trial court sentenced Mr. Banks to concurrent terms of life in prison without probation or parole for murder and life in prison for armed criminal action (L.F. 45-47; Tr. 460). This direct appeal follows (L.F. 48).

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[3] Defense counsel Charles Lamb.

[4] Assistant prosecuting attorney Dawn Parsons.

POINT RELIED ON

The trial court abused its discretion in overruling Appellant's objection to the state's improper rebuttal closing argument, because Appellant was denied his rights to due process of law and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the prosecutor argued matters outside the evidence and used epithets against Appellant to inflame the passions of the jury, when the prosecutor argued to the jury that Appellant "is the Devil". Appellant was prejudiced because the evidence against Appellant was not overwhelming and the trial court made no effort to instruct the jury to disregard the state's unnecessary and inflammatory reference to Appellant as "the Devil".

State v. Johnston, 957 S.W.2d 734 (Mo. banc 1997);

State v. Young, 12 S.W. 879 (Mo. 1890)

State v. Barrington, 95 S.W. 235 (Mo. banc 1906);

State v. Goodwin, 217 S.W. 264 (Mo. 1919);

U.S. Const., Amends. V, VI and XIV;

Mo. Const., Art. I, Sections 10 and 18(a); and

Merriam Webster's Collegiate Dictionary (10th Ed., 2002).

ARGUMENT

The trial court abused its discretion in overruling Appellant's objection to the state's improper rebuttal closing argument, because Appellant was denied his rights to due process of law and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the prosecutor argued matters outside the evidence and used epithets against Appellant to inflame the passions of the jury, when the prosecutor argued to the jury that Appellant "is the Devil". Appellant was prejudiced because the evidence against Appellant was not overwhelming and the trial court made no effort to instruct the jury to disregard the state's unnecessary and inflammatory reference to Appellant as "the Devil".

The trial court abused its discretion in overruling Jeremy Banks's objection to the state's closing argument, in which the prosecutor called Mr. Banks "the Devil" (Tr. 438). The prosecutor's argument and the court's ruling violated Mr. Banks's state and federal constitutional rights to due process of law and to a fair trial. The prosecutor's argument that Mr. Banks is "the Devil" was designed to inflame the passions and prejudices of the jury with matters far outside the evidence, by equating Mr. Banks with the epitome of evil. This was not a reasonable inference from the evidence presented at trial. The evidence at trial was not overwhelming, and nothing at trial indicated that Mr. Banks bears any greater resemblance to the Devil than any other person, or that Mr. Banks is inherently more evil than any other person.

During the state's initial closing argument, the prosecutor argued:

> And who would you expect to be the witnesses in this case at a drug house? A librarian? Your preacher? Someone from church? A guy from the grocery store? No. You're going to expect people who use crack and or [sic] in this lifestyle. That's who's going to be there.

(Tr. 416).

Defense counsel argued that the state's witnesses had been drinking and smoking crack cocaine, and that they could not clearly perceive what happened during the shooting (Tr. 420-424, 425-426, 430-431). He noted that there were no police officers at the shooting, and that the state's case hinged upon the believability of the state's witnesses (Tr. 428).

During rebuttal closing argument, the prosecutor argued:

> They [the police] didn't just go on the word of a crack addict. They had several witnesses.
>
> And, ladies and gentlemen, when the scene is set and held and we have to go and catch the Devil, there are no angels as witnesses. **This is Hell. He is the Devil.** They aren't angels. He is guilty beyond a reasonable doubt.

(Tr. 438) (emphasis supplied).

Defense counsel objected and requested a mistrial, stating, "Calling my client a devil is improper argument that was intentional and calls for a mistrial" (Tr. 438). The

prosecutor responded that she had made an analogy and that she "set up the analogy properly" (Tr. 438). The following exchange then took place:

Mr. Lamb:[5]	Well, the analogy is improper when you say somebody is Satan.
The Court:	Well, this is certainly something I can worry about later. You have 1:33.
Ms. Parsons:[6]	I'm done with the analogy.
The Court:	Well, overruled.

(Tr. 438).

The jury found Mr. Banks guilty of murder in the first degree and armed criminal action (L.F. 30-31, 32; Tr. 442-443). In the motion for new trial and suggestions in support thereof, defense counsel preserved the objection to the prosecutor referring to Mr. Banks as "the Devil" (L.F. 34-35, 37, 39-41).

In general, the trial court has considerable discretion in controlling closing argument, and a conviction will be overturned only for an abuse of that discretion to the prejudice of the accused. State v. Walls, 744 S.W.2d 791, 797-798 (Mo. banc 1988).

It is improper for counsel to argue facts outside the record or to present false issues. State v. Storey, 901 S.W.2d 886, 901 (Mo. banc 1995); *see also*, State v. Burnfin, 771 S.W.2d 908, 912 (Mo. App. 1989). Efforts to inflame the passions and prejudices of

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5 Defense counsel Charles Lamb.

6 Assistant prosecuting attorney Dawn Parsons.

the jury by reference to matters outside the record have been condemned as unprofessional conduct. Burnfin, 771 S.W.2d at 912. Name-calling in closing argument is unacceptable, and it is prejudicial where it is personally abusive to the defendant and unconnected to the evidence. *See, e.g.,* State v. Barrington, 95 S.W. 235, 257 (Mo. banc 1906); State v. Goodwin, 217 S.W. 264, 266-267 (Mo. 1919); State v. Hornbeck, 492 S.W.2d 802, 808-809 (Mo. 1973).

A prosecutor has the right to argue the evidence and reasonable inferences from the evidence. State v. Warrington, 884 S.W.2d 711, 718 (Mo. App. 1994). "The prosecutor may prosecute with vigor and strike blows but he is not at liberty to strike foul ones." State v. Nelson, 957 S.W.2d 327, 329 (Mo. App. 1997); *quoting*, Burnfin, 771 S.W.2d at 912. Epithets about a defendant made during closing argument are unnecessary and can rise to prejudicial error if they are sufficient to inflame the jury. Warrington, 884 S.W.2d at 718. When the characterization of a defendant is based on the evidence received at trial, prejudice does not result. *Id.*

It is improper to refer to the defendant as Satan or the Devil. State v. Johnston, 957 S.W.2d 734, 750 (Mo. banc 1997) (finding such reference improper, but not warranting relief where court sustained objection and admonished jury to disregard the statement).

The prohibition against referring to the defendant as Satan, the Devil, diabolical, or the embodiment of evil has been recognized since at least 1890, and this Court has not deviated from this prohibition. *See, e.g.,* State v. Young, 12 S.W. 879, 883-884 (Mo. 1890) (calling defendant "a mean, low-down, wicked, dirty devil" was "mere personal

abuse of the prisoner, and not to be tolerated"; reversed and remanded for new trial); Barrington, 95 S.W. at 257 (Mo. banc 1906) (describing defendant in terms of the devil not reversible error where the trial court promptly rebuked the prosecutor in the presence of the jury); Goodwin, 217 S.W. at 266-267 (Mo. 1919) (statements that defendant "has the devil in her heart" and "is guilty of white slavery" were cause for reversal where trial court did not immediately and sternly rebuke prosecutor).

Despite this long-standing prohibition, the prosecutor in this case personally castigated Mr. Banks, stating, "This is Hell. He is the Devil" (Tr. 438). The prosecutor crossed the line into name-calling and violated the rules of civility and proper closing argument.

The reference to Mr. Banks as the Devil was both personally abusive to Mr. Banks and completely unconnected to the evidence. The prosecutor seemed to think that her intemperate and unacceptable name-calling during argument was excusable because she tried to frame it as an analogy (Tr. 438). Regardless of how she framed it, the prosecutor's statement plainly referred to Mr. Banks as the Devil.

Mr. Banks is not evil incarnate and is not the Devil, nor did he claim to be. There was no evidence that the shooting arose out of devil worship or Satanism. The reference to Mr. Banks as the Devil had absolutely nothing to do with the evidence presented at trial. Mr. Banks is simply a man who was on trial for first degree murder and armed criminal action and who was entitled to a fair trial in a Missouri court.

By referring to Mr. Banks as the Devil and to the house where the shooting took place as Hell, the state portrayed Mr. Banks as somehow in charge of the place where

Alvon Turner was shot. This is contrary to the evidence presented at trial. A man identified as "John" or "Jim" was the resident of the house, although others were staying there at the time (Tr. 204, 205, 262-263, 284-285). There was no evidence that Mr. Banks ever frequented the house prior to the shooting. Although Mr. Turner had been sitting on the porch of the house that afternoon, Mr. Banks did not arrive on the scene until shortly before the shooting took place (Tr. 204-205, 208-211, 264-265, 271, 274-276).

Mr. Banks was prejudiced by the state's argument. The state's evidence was not overwhelming -- no one saw the shooting and no weapon was ever recovered (Tr. 196, 219-220, 261, 265-266, 271, 280, 288, 325). Although Galanda Cooper heard Mr. Banks say before the shooting that he was going to "get" Alvon Turner, she thought that he meant that he was going to fight Alvon or beat Alvon up (Tr. 228, 231-233). The house where the shooting took place was known to the police as both a drug house and a house of prostitution (Tr. 335-336, 352).

Denise Harris-Black and Jeanette Fox were both in custody at time of trial because they had failed to honor their subpoenas for trial (Tr. 260-261, 273-274). Shelly Evans and Denise Harris-Black admitted that they were drunk and/or had been using crack cocaine in the hours before Alvon Turner was shot (Tr. 215, 219-220, 285-286, 274, 275, 285, 289). Shelly testified that she was so drunk that the events of the day were "a blur" (Tr. 215, 219-220, 221). Not satisfied with the testimony of its witnesses, the state impeached Shelly with the statement she made to the police on the evening following the shooting (Tr. 212-214, 217-218, 386), and called Detective Bruce Solomon to testify that

Shelly and Denise did not appear to be intoxicated or on drugs when he interviewed them (Tr. 388-390).

The state undoubtedly had problems with the credibility of its witnesses, but the trial court clearly abused its discretion in permitting the state to resort to name-calling to rectify those problems. The prosecutor knew that a verdict based on emotion and fear was "inappropriate"; she said so when one of the jurors expressed concern about rendering a guilty verdict (Tr. 399). The prosecutor knew how to make a proper comparison that did not resort to name-calling, because she did so in the first part of her closing argument when she argued that the witnesses to a shooting in a drug house would be crack users, rather than librarians or church people (Tr. 416). Defense counsel said nothing during his closing argument that would invite the prosecutor to go outside the bounds of acceptable argument by calling Mr. Banks "the Devil"; he argued only that the state's witnesses were not credible because they had been drinking and smoking crack cocaine and could not clearly perceive what happened during the shooting (Tr. 420-424, 425-426, 428, 430-431). Nevertheless, the state responded with name-calling on rebuttal (Tr. 438).

It is hard to imagine a worse epithet than calling someone "the Devil". In our nation's Judeo-Christian culture, the Devil is well-known as the epitome of evil. The word "devil" is defined as "the personal supreme spirit of evil often represented in Jewish and Christian belief as the tempter of humankind, the leader of all apostate angels, and the ruler of hell"; "an evil spirit"; and "an extremely wicked person". Merriam Webster's Collegiate Dictionary (10th Ed., 2002).

People who do not believe in the existence of the Devil still recognize that referring to another person as the Devil reflects a belief that the other person is evil. The popularity of movies depicting the Devil arises from the fact that those movies have the power to frighten and thereby thrill audiences. Sports teams named after the Devil are popular because our culture imparts power to the image of the Devil.

The reference to Mr. Banks as the Devil was a calculated effort to inflame the jury's passions against Mr. Banks. The jury was called upon to find Mr. Banks guilty based on an emotional response to a perception that he is the personification of evil. Even though the prosecutor knew that it was wrong for the jury to base its decision on emotion or fear (Tr. 399), she called on the jury to do just that.

The prosecutor used her improper and unprofessional argument to inflame the jury against Mr. Banks in an effort to secure a conviction for murder and armed criminal action. Unlike in Johnston, 957 S.W.2d at 750, the trial court took no action to prevent the state's improper closing argument, nor did the court try to limit the impact of that closing argument on the jury. Instead, the court in this case simply overruled the objection (Tr. 438). One of the last things the jury heard before going into deliberations was the prosecutor's exhortation, "This is Hell. He is the Devil" (Tr. 438). The jury was permitted to consider this improper characterization during its deliberations.

The trial court also should have sustained the objection to the state's improper argument that Mr. Banks is "the Devil" because the state's *ad hominem* attack on Mr. Banks was unprofessional and demeaning to the legal system. Judge Holliger noted in his dissenting opinion in this case in the Court of Appeals, Western District:

> Judges, lawyers, and observers have for a number of years increasingly decried the incivility between lawyers themselves and towards parties and witnesses in judicial proceedings. The use of vituperative language, if not acceptable, has become too tolerated. In trial, counsel sometimes seem to believe that zealous advocacy permits, if not demands, that opponents be personally derided and that cases should be decided by appeals to prejudice, fear, envy, and bias, regardless of whether those emotions have anything to do with the facts and law of the case. Rhetoric is too often substituted for logic and reason.
>
> And although every witness, party, opposing counsel, and other participant in a trial is a victim and injured by such conduct, the ultimate victim is our system of justice itself. . . . It is tragic that the common observation of laymen is that it is just lawyers being lawyers.

State v. Banks, WD 63647, slip op. at 7 (Mo. App., W.D. June 27, 2006) (Holliger, J., dissenting). Judge Holliger went on to note that both lawyers and the courts have done little to stem such behavior, and that risk of improper attacks during closing argument is deemed worth taking, because the likelihood of any real consequence is slight. *Id.* at 7-8.

The trial court abused its discretion in overruling defense counsel's objection to the state referring to Mr. Banks as "the Devil" during rebuttal closing argument. The prejudice that this argument caused to both Jeremy Banks and to our system of justice demands that the prosecutor be held accountable. Jeremy Banks respectfully requests that this Court reaffirm that it is improper to refer to the accused in a criminal case as the

Devil. Mr. Banks therefore respectfully requests that this Court reverse his convictions and sentences and remand this cause for a new trial.

CONCLUSION

Based on the foregoing Argument, Jeremy Banks respectfully requests that this Court reverse his convictions and sentences and remand this case for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Susan L. Hogan, hereby certify as follows:

1. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification and the certificate of service, the brief contains 4,572 words, which does not exceed the 31,000 words allowed for an appellant's brief.

2. The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which the Public Defender System installed on November 3, 2006. According to that program, this disk is virus-free.

3. Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 on November 3, 2006.

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Susan L. Hogan

APPENDIX