

**IN THE
MISSOURI SUPREME COURT**

DAVID M. BARNETT,)	
)	
Appellant,)	
)	
vs.)	No. SC84806
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY FIRST JUDICIAL CIRCUIT, DIVISION 17
THE HONORABLE LARRY L. KENDRICK, JUDGE**

APPELLANT’S REPLY BRIEF

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JURISDICTIONAL STATEMENT

The jurisdictional statement from David's original brief is incorporated by this reference.

STATEMENT OF FACTS

The Statement of Facts that appears in the original brief is incorporated herein by this reference. The following correction is made to the State's Statement of Facts. The State asserts that David went to the Schnuck's store on Brentwood in the early morning of February 5, 1996, suggesting that this occurred **after** the Barnetts were killed.

(Resp.Br.14). The record clearly shows that David spent the night of February 4, 1996, the night before they were killed, awake and in the cold vestibule of the store. (Tr623-24,630).

POINTS RELIED ON

I. A HEARING IS WARRANTED

The motion court clearly erred in denying David's post-conviction claims without an evidentiary hearing because this Court's Rules encourage granting evidentiary hearings and the pleadings here provided the motion court with allegations that were sufficient to allow that court to meaningfully apply the *Strickland* standard and to decide whether relief was warranted. Further, this Court's promulgation of Rule 29.16 demonstrates the policy that post-conviction counsel in death penalty cases have sufficient training and expertise competently to perform their required duties. Since a major component of post-conviction counsel's duties is the preparation and filing of the amended motion, counsel must demonstrate knowledge of and compliance with the applicable Rules so that the movant can obtain a hearing on his viable claims. If the pleadings that post-conviction counsel in death penalty cases file are denied without a hearing because they do not comply with the Rules, counsel's appointment renders the policies behind Rule 29.16 meaningless. Finally, since virtually identical pleadings have led to evidentiary hearings in other capital post-conviction cases, the denial of a hearing in this case is an inconsistent application of state law and renders the process arbitrary and capricious. (Responds to Respondent's Points I-V).

Wilkes v. State, 82 S.W.3d 925 (Mo.banc 2002);

Winfield v. State, No.SC84244 (Mo.banc, 12/24/02);

Rule 29.16

II.

The motion court clearly erred in denying a hearing on David's claim that counsel was ineffective for failing to investigate and provide information about David's background, specifically regarding his mother and her family, because this ruling denied David's rights to due process, a fundamentally fair trial, effective assistance of counsel, and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that while counsel investigated parts of David's background and provided information to her expert witnesses, she neglected even to pursue significant aspects of his background related to his mother and her family. Had counsel considered those areas, she would have discovered, and then made available to her expert witnesses: David's birth family's extensive history of alcohol and other substance abuse; David's biological mother's alcohol abuse and lack of pre-natal care during her pregnancy with David; David's birth family's extensive history of Depression and other mental illnesses; and the genetic and environmental effect these factors had upon David's development. Had any expert witnesses had access to this information, they would have explained to the jury who David was and why events unfolded as they did and thus have given the jury reasons not to impose death, but to choose life. (Responds to Point I).

Williams v. Taylor, 529 U.S. 362 (2000);

Simmons v. Luebbers, 299 F.3d 929 (8th Cir. 2002).

III.

The motion court clearly erred in refusing a hearing on David's claim that counsel was ineffective for not timely objecting to the state's late disclosure of Officer Granat's testimony that David's shoes only became available for sale in the St. Louis area three days before he killed his grandparents because that ruling violated David's rights to due process, effective assistance of counsel, a fundamentally fair trial and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that the state failed to disclose Granat's information, which directly contradicted his deposition testimony, and, had counsel timely objected, a reasonable probability exists that the court would have taken remedial action. Granat's testimony formed the foundation for the state's argument that David deliberated in killing his grandparents since, it asserted, he sneaked into their house through the bathroom window, which evinced his motive in entering the house that morning. Since the defense theory was that David killed his grandparents but had not deliberated and the jury was out over 19 hours in guilt phase, this testimony and argument were highly prejudicial. But for this testimony, a reasonable probability exists that the result would have been different. The motion states facts not refuted by the record, that, if proved, would warrant relief. (Responds to Point II).

Strickland v. Washington, 466 U.S. 668 (1984).

IV.

The motion court clearly erred in denying an evidentiary hearing on David's claim that counsel was constitutionally ineffective in failing to object to repeated references to alleged prior bad acts because that claim states facts not refuted by the record, that, if proved, would warrant relief. David alleged that counsel failed to object to testimony by Officer Morris that John Barnett had told him that David had been "arrested by Ladue the other day;" to testimony by Rhonda James that David had been smoking marijuana in the days leading up to the killings, and to testimony by Detective Nelke that he had shown David's mug shot when doing a neighborhood canvass. David also alleged that counsel did not object to this testimony, which raised the inference of prior bad acts, and that, especially in a case in which the jury deliberated for over 19 hours in guilt phase, David was prejudiced. If proved, these facts would show that David was denied due process, effective assistance of counsel, a fundamentally fair trial and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 17, 18(a) and 21 of the Missouri Constitution. Trial counsel's failures to object were unreasonable, cannot be deemed strategic, especially based merely on the cold record, and it cannot be stated with any degree of certainty that the jury did not consider this inadmissible evidence in ultimately finding that David deliberated in killing his grandparents. (Responds to Point III).

State v. Tokar, 918 S.W.2d 753 (Mo.banc 1996).

V.

The motion court clearly erred in denying a hearing on David's claim that counsel was ineffective for failing to call Clifford and Leona Barnett's children, John Barnett, Lana Barnett-Campbell and Polly Barnett-Hargett, to testify that they, as Christians and raised in a Christian family, did not believe in the death penalty and wanted David to be sentenced to life without probation or parole not death because this ruling denied David's rights to due process, a fundamentally fair trial, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that the State repeatedly argued and presented evidence that the Barnetts were Christians and the State called Lana Barnett-Campbell in penalty phase as a victim impact witness to testify about her loss upon her parents' death. The State thus opened the door to evidence that, as Christians, the Barnetts' children did not condone the sentence that the State was seeking.

State v. Bolds, 11 S.W.3d 633 (Mo.App.,E.D. 1999);

Harris v. Alabama, 513 U.S. 504 (1995);

United States v. Durham, 868 F.2d 1010 (8th Cir. 1989).

ARGUMENT

I. A HEARING IS WARRANTED

The motion court clearly erred in denying David's post-conviction claims without an evidentiary hearing because this Court's Rules encourage granting evidentiary hearings and the pleadings here provided the motion court with allegations that were sufficient to allow that court to meaningfully apply the *Strickland* standard and to decide whether relief was warranted. Further, this Court's promulgation of Rule 29.16 demonstrates the policy that post-conviction counsel in death penalty cases have sufficient training and expertise competently to perform their required duties. Since a major component of post-conviction counsel's duties is the preparation and filing of the amended motion, counsel must demonstrate knowledge of and compliance with the applicable Rules so that the movant can obtain a hearing on his viable claims. If the pleadings that post-conviction counsel in death penalty cases file are denied without a hearing because they do not comply with the Rules, counsel's appointment renders the policies behind Rule 29.16 meaningless. Finally, since virtually identical pleadings have led to evidentiary hearings in other capital post-conviction cases, the denial of a hearing in this case is an inconsistent application of state law and renders the process arbitrary and capricious. (Responds to Respondent's Points I-V).

The Respondent argues that the motion court properly denied David's motion without an evidentiary hearing because his amended motion was fatally defective.

(Resp.Br23-30,31-32,35,37,39-40,45,47,50,54). David does not concede that his pleading is defective. Rather, he maintains that each claim is sufficiently pled to warrant a hearing and he has responded specifically to that aspect of the Respondent's assertions in the individual points of his opening brief. Further, David directs this Court's attention to the amended motion itself, which references specific records and witnesses as to facts relevant to the claims. *See, e.g. LF40-56.*

David also maintains that the Respondent desires that this Court utilize the wrong standard to determine whether a hearing is warranted. The Respondent's position is premised upon a misapprehension of controlling law.

Finally, this Court's promulgation of Rule 29.16 demonstrates that, should this Court find that post-conviction counsel have filed a pleading that completely fails to comply with this Court's pleading rules, this Court must remand to the motion court for appointment of new, competent counsel who will then file an adequate pleading.

The Respondent begins the attack on David's amended motion by citing *Morrow v. State*, 21 S.W.3d 819 (Mo.banc 2000) and cases cited therein. (Resp.Br.21). Tellingly, the Respondent ignores the starting point for any discussion of what is required under Rule 29.15, the Rule itself. As even the *Morrow* Court acknowledged, "An evidentiary hearing is **not** required where 'the motion and the files and records of the case **conclusively show that movant is entitled to no relief.**'" *Morrow v. State*, 21 S.W.3d at 822 (emphasis added). It is, therefore, unsurprising that this Court, in *Wilkes v. State*, 82 S.W.3d 925 (Mo.banc 2002), after citing the text of the Rule, cautioned motion courts that:

the rules encourage evidentiary hearings. *See Rule 29.15(h)*. Nothing in the text of Rule 29.15 suggests that the pleading requirements are to be construed more narrowly than other civil pleadings. Thus, a movant may successfully plead a claim for relief under Rule 29.15 by providing the motion court with allegations sufficient to allow the motion court to meaningfully apply the *Strickland* standard and decide whether relief is warranted.

Id. at 929. Hypertechnical pleading requirements, which preclude evidentiary hearings and stymie the search for truth, are not consistent with due process. If this Court applies Rule 29.15 as written, it will find that the presumption in favor of an evidentiary hearing has been met since the motion and the files and the records in this case do not conclusively establish that David is entitled to no relief.

In November, 1996, this Court enacted Rule 29.16. Rule 29.16 sets forth the professional requirements that post-conviction counsel in death penalty cases must have prior to entering their appearance. (A2-A3). At least one of the two attorneys appointed to represent post-conviction litigants in death penalty cases are required to have “attended and successfully completed” within two years of the appointment, at least 12 hours of training on post-conviction capital representation **and** have at least three years litigation experience in criminal law **and** have been counsel in at least five post-conviction class A felony cases **and** have been counsel in at least three felony jury trials or five direct appeals in felony cases. *Rule 29.16(b)*.

Why do we make these requirements of capital post-conviction counsel? Because the enactment of a rule or legislation is not deemed to be a useless act, *Cub Cadet Corp.*

v. Mopec., Inc., 78 S.W.3d 205 (Mo.App.,W.D.2002), surely the rule had a purpose. Presumably, that purpose was to provide competent counsel to capital post-conviction litigants. However, no matter how fluent post-conviction counsel is in capital litigation—from issue spotting, to investigation of claims, to examination of witnesses, without first having filed an amended motion that is sufficient to provide the movant with an evidentiary hearing on those viable claims, all of the requirements of Rule 29.16 are meaningless. They convert the post-conviction litigant’s day in court into a hollow shell.

The pleadings in this case are remarkably similar to those filed in *John E. Winfield v. State*, No.SC84244 (Mo.banc, 12/24/02).¹ In *Winfield*, however, the motion court granted an evidentiary hearing, over the state’s objection that the pleadings were deficient. By contrast, here, the motion court denied a hearing, holding that the pleadings were deficient.

In *Winfield*, which also arose in St. Louis County, the state’s response to post-conviction counsel’s pleadings was practically identical to that filed here. The amended motion, written by the same post-conviction counsel, was also startlingly similar to David’s. The state’s Motion to Dismiss Without an Evidentiary Hearing notes the “lengthy dissertation” about Winfield’s family background “without stating the source of the information.” It further argues that “Occasional attributions ‘are insufficient to overcome appellant’s defective motion.’” (WinfieldPCRLF185). Yet, in *Winfield*, with

¹ David requests that this Court take judicial notice of its files in *Winfield v. State*, No.SC84244.

precisely the same kind of pleadings, a hearing was granted. This inconsistent application of state law renders the process arbitrary and capricious, denying due process. See, *Oliver v. Wainwright*, 795 F.2d 1524, 1530 (11th Cir. 1986); *U.S. ex rel. Hawthorne v. Cowan*, 224 F.Supp.2d 1178 (N.D.Ill.2002). David's death sentences are not reliable.

This Court should review the merits of David's claims presented in his amended motion because, under *Wilkes v. State, supra*, and *Rule 29.15*, the pleading is sufficient to warrant granting a hearing. If this Court finds the pleadings so defective as to not warrant granting a hearing, under the policies of *Rule 29.16*, this Court should remand to the motion court for reappointment of counsel so that an adequate pleading can be filed on David's behalf.

II.

The motion court clearly erred in denying a hearing on David's claim that counsel was ineffective for failing to investigate and then provide information about David's background, specifically regarding his mother and her family, because this ruling denied David's rights to due process, a fundamentally fair trial, effective assistance of counsel, and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that while counsel investigated parts of David's background and provided information to her expert witnesses, she neglected even to pursue significant aspects of his background related to his mother and her family. Had counsel considered those areas, she would have discovered, and then made available to her expert witnesses: David's birth family's extensive history of alcohol and other substance abuse; David's biological mother's alcohol abuse and lack of pre-natal care during her pregnancy with David; David's birth family's extensive history of Depression and other mental illnesses; and the genetic and environmental effect these factors had upon David's development. Had any expert witnesses had access to this information, they would have explained to the jury who David was and why events unfolded as they did and thus have given the jury reasons not to impose death, but to choose life. (Responds to Point I).

The State's brief never addresses the merits of the claim presented in David's opening brief. It never responds to the claim that, although counsel adduced evidence in mitigation of punishment and argued vigorously for a life without parole verdict, she

never provided her expert witnesses with information about David's birth and birth family. That information would have given the jury the critical information it needed to choose life. The evidence before the jury kept them out for more than sixteen hours. As in *Simmons v. Luebbers*, 299 F.3d 929, 939 (8th Cir. 2002), "had this [additional] evidence been presented, there is a reasonable probability that at least one of the jurors would have voted against the imposition of the death penalty."

The State notes that Drs. Ardekanni, Kleinschmidt and Schultz testified about David's mental problems, which were diagnosed in 1992. (Resp.Br.28-29). The State apparently believes that, because Drs. Ardekanni, Kleinschmidt and Schultz testified about David's history of mental health problems, counsel's performance cannot be deemed inadequate. Yet, when Dr. Ardekanni testified that, as early as 1992, David suffered from Depression, he also testified that Depression has a genetic basis. (Tr1110).

Counsel put on a substantial amount of evidence in penalty phase, **none** of that evidence even touched on this aspect of the case. She elicited from her expert that Depression has a genetic basis yet she failed to investigate and then adduce any evidence that would have shown David's genetic background—a biological family riddled with mental health and substance abuse problems. This evidence "might well have influenced the jury's appraisal of [David's] moral culpability." *Williams v. Taylor*, 529 U.S. 362, 397 (2000). The jury heard the end of the story but never heard the prologue and Chapter One. And, without the beginning of the story, the jury could not accurately determine what penalty to impose.

This Court must remand for an evidentiary hearing on these claims.

III.

The motion court clearly erred in refusing a hearing on David's claim that counsel was ineffective for not timely objecting to the state's late disclosure of Officer Granat's testimony that David's shoes only became available for sale in the St. Louis area three days before he killed his grandparents because that ruling violated David's rights to due process, effective assistance of counsel, a fundamentally fair trial and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that the state failed to disclose Granat's information, which directly contradicted his deposition testimony, and, had counsel timely objected, a reasonable probability exists that the court would have taken remedial action. Granat's testimony formed the foundation for the state's argument that David deliberated in killing his grandparents since, it asserted, he sneaked into their house through the bathroom window, which evinced his motive in entering the house that morning. Since the defense theory was that David killed his grandparents but had not deliberated and the jury was out over 19 hours in guilt phase, this testimony and argument were highly prejudicial. But for this testimony, a reasonable probability exists that the result would have been different. The motion states facts not refuted by the record, that, if proved, would warrant relief. (Responds to Point II).

The State misstates David's position in an attempt to cloud the issue presented by the State's failure to disclose critical evidence until the midst of trial. The State informs

this Court that David believes the un-disclosed evidence was “prejudicial because it corroborated other evidence that showed that he climbed into the victims’ home through a window.” (Resp.Br.31). Just as the State did on the direct appeal, here it attempts to escape from the trial record. It again asserts that the issue at trial was whether David killed the Barnetts. This was never at issue. The issue was whether David deliberated. (See Tr596). And, as to that issue, the un-disclosed evidence was critical.

The State acknowledges here that the State’s “theory was that appellant came into the victim’s (sic) home through a window, instead of a door, when he entered the home to wait for the victims.” (Resp.Br.32). The State ignores, however, that, at trial, the State repeatedly argued in rebuttal closing that David had deliberated precisely **because** David had entered the house through the bathroom window. (Tr945-46,949-51,966,968).

The State would have this Court insulate from review the State’s misconduct at trial. The question must be whether, in a case in which only the defendant’s mental state is truly at issue, and in which, despite the brutality of the crimes, the jury is out more than nineteen hours in guilt phase, we are confident that this error did not affect the outcome. *Strickland v. Washington*, 466 U.S. 668 (1984). This Court should remand for an evidentiary hearing.

IV.

The motion court clearly erred in denying an evidentiary hearing on David's claim that counsel was constitutionally ineffective in failing to object to repeated references to alleged prior bad acts because that claim states facts not refuted by the record, that, if proved, would warrant relief. David alleged that counsel failed to object to testimony by Officer Morris that John Barnett had told him that David had been "arrested by Ladue the other day;" to testimony by Rhonda James that David had been smoking marijuana in the days leading up to the killings, and to testimony by Detective Nelke that he had shown David's mug shot when doing a neighborhood canvass. David also alleged that counsel did not object to this testimony, which raised the inference of prior bad acts, and that, especially in a case in which the jury deliberated for over 19 hours in guilt phase, David was prejudiced. If proved, these facts would show that David was denied due process, effective assistance of counsel, a fundamentally fair trial and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 17, 18(a) and 21 of the Missouri Constitution. Trial counsel's failures to object were unreasonable, cannot be deemed strategic, especially based merely on the cold record, and it cannot be stated with any degree of certainty that the jury did not consider this inadmissible evidence in ultimately finding that David deliberated in killing his grandparents. (Responds to Point III).

The State argues that this Court should deny relief on this claim because counsel did not plead that trial counsel's failures to object were not strategic. (Resp.Br.39). This argument is circular, at best. The claim raised was that counsel was ineffective for failing to object to the evidence of prior unrelated bad acts. (PCRLF162-65). Since it is a defense to an ineffectiveness allegation that counsel had a strategic reason for the action taken, it would be redundant to require a pleading to assert not only that the action was ineffective but that it was not the result of a strategic decision. Moreover, the State's arguments that counsel may have not wanted to object because of a strategic reason—to not highlight certain evidence—(Resp.Br.39,41,43) demonstrates the need for an evidentiary hearing. After all, it is through an evidentiary hearing, at which counsel can be questioned about her actions, that the motion court can accurately determine whether counsel was ineffective or had a strategic reason for what she did. *State v. Tokar*, 918 S.W.2d 753, 768 (Mo.banc 1996). The State's reliance on *Tokar* is inapposite since a hearing was granted in that case and the question before this Court was whether post-conviction counsel had proved the claim at the evidentiary hearing.

This Court should remand for an evidentiary hearing on this claim.

V.

The motion court clearly erred in denying a hearing on David’s claim that counsel was ineffective for failing to call Clifford and Leona Barnett’s children, John Barnett, Lana Barnett-Campbell and Polly Barnett-Hargett, to testify that they, as Christians and raised in a Christian family, did not believe in the death penalty and wanted David to be sentenced to life without probation or parole not death because this ruling denied David’s rights to due process, a fundamentally fair trial, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 18(a) and 21 of the Missouri Constitution in that the State repeatedly argued and presented evidence that the Barnetts were Christians and the State called Lana Barnett-Campbell in penalty phase as a victim impact witness to testify about her loss upon her parents’ death. The State thus opened the door to evidence that, as Christians, the Barnetts’ children did not condone the sentence that the State was seeking.(Responds to Point V).

At trial, the State sought to portray Mr. and Mrs. Barnett in the most sympathetic light possible—elderly Christians, murdered by their adopted grandson. The State introduced Exhibit 29N, a photograph of the Barnetts’ bedroom that had Christian overtones and, even in guilt phase opening, told the jury that “Clifford and Leona Barnett had a right to peacefully and sweetly live out their lives on **God’s** terms.” (Tr944). This Court recognized on direct appeal that “the jury was made well aware that the victims

were religious.” *State v. Barnett*, 980 S.W.2d 297, 304 (Mo.banc 1998). Yet, the State has consistently declared inadmissible the Christian-based beliefs of the Barnett family—that, consonant with the teachings of Christ and of Clifford and Leona Barnett, the Barnett children, including David’s adoptive father, John, do not wish or require David’s death as retribution or atonement for their parents’ deaths.

The State here does not challenge that, at trial, the State put religion on the table. (Resp.Br.51-54). Instead, it argues that the younger Barnetts’ beliefs would not have been admissible although the State opened the door to them. (Resp.Br.53). The State is incorrect. Both state and federal courts repeatedly have held that, when one party injects an issue into a case, the opposing party “may offer otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue.” *State v. Bolds*, 11 S.W.3d 633, 639 (Mo.App.,E.D. 1999); *State v. Petty*, 967 S.W.2d 127, 143 (Mo.App.,E.D. 1998); *United States v. Durham*, 868 F.2d 1010, 1012 (8th Cir. 1989); *State v. Ralls*, 918 S.W.2d 936,939 (Mo.App.,W.D. 1996).

Since the principal justification for capital punishment is retribution, *Harris v. Alabama*, 513 U.S. 504, 518 (1995); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976), it would have been of critical importance in this case for the jury to hear that the Barnetts’ family, as Christians, did not want the death penalty since they did not seek retribution. This Court should remand for an evidentiary hearing.

CONCLUSION

For the reasons set forth in this appellant's opening and reply briefs, appellant requests that this Court remand for an evidentiary hearing. In the alternative, as to original Point VI, appellant requests that this Court reverse and remand for a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of January, 2003, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, Missouri.

Janet M. Thompson

CERTIFICATE OF COMPLIANCE

I, Janet M. Thompson, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2002, in Times New Roman, size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 4,789 words, which does not exceed the 25 % of the 31,000 words allowed for an appellant's opening brief.

The floppy disk(s) filed with this brief contain(s) a copy of this brief. The disk(s) has/have been scanned for viruses using a McAfee VirusScan program. According to that program, the disk(s) is/are virus-free.

Janet M. Thompson