

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC 90332
)	
ANTOINE TERRY,)	
)	
Appellant.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
NINETEENTH JUDICIAL CIRCUIT
THE HONORABLE PATRICIA S. JOYCE, JUDGE**

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Antoine Terry appeals his conviction following a jury trial in the Circuit Court of Cole County, Missouri, for first degree statutory rape, § 566.032.¹ On May 6, 2008, the Honorable Patricia S. Joyce sentenced Mr. Terry to seven years imprisonment (L.F. 27),² and notice of appeal was timely filed on May 9, 2008 (L.F. 30). After the Missouri Court of Appeals, Western District, issued its opinion in WD 69672, this Court granted Mr. Terry's application for transfer pursuant to Rule 83.04. This Court has jurisdiction of this appeal under Article V, Section 3, Mo. Const. (as amended 1976).

¹ All statutory citations are to RSMo 2000, unless otherwise stated.

² The Record on Appeal consists of a legal file (L.F.) and a transcript (Tr.).

STATEMENT OF FACTS

Appellant, Antoine Terry, incorporates herein by reference the Statement of Facts from the opening brief he filed in the Court of Appeals, as though set out in full.

ARGUMENT

I.

The doctrine of destructive contradictions is not limited to inherent contradictions in a witness' testimony – it also applies where the testimony is “opposed to known physical facts.” A.W. 's testimony was opposed to known physical facts because Antoine was not the father of her baby.

I. Destructive contradictions.

The State misunderstands Antoine's argument as to the doctrine of destructive contradictions, and its statement of the doctrine is incomplete and misleading.

The State claims that the doctrine of destructive contradictions “applies only when a witness's testimony is internally contradictory, not when it conflicts with other evidence.” (Resp.Br. 18), citing, *State v. Davison*, 46 S.W.3d 68, 80 (Mo.App. W.D. 2001). In *Davison*, Judge Stith, writing for the Western District, first said that “[t]he doctrine of ‘destructive contradictions’ provides that a witness's testimony loses probative value when his or her statements at trial are so inconsistent, contradictory and diametrically opposed to one another that they rob the testimony of all probative force.” *Id.* at 79, citing, *T.L.C. v. T.L.C.*, 950 S.W.2d 293, 295 (Mo. App. W.D. 1997).

The *Davison* Court then went on to say that the doctrine:

. . . is properly invoked *only* when “the testimony is so ‘inherently incredible, self-destructive or opposed to known physical facts’ on a

vital point or element that reliance on the testimony is necessarily precluded.” *State v. Wright*, 998 S.W.2d 78, 81 (Mo.App. W.D. 1999).

Davison, 46 S.W.3d at 79 (emphasis of word “only” in original; remainder added).

Thus, *Davison* does not say what the State claims – that the doctrine may only be invoked when the testimony is inherently contradictory, and not when it is opposed to known physical facts.

So the doctrine of destructive contradictions is not an outmoded relic when applied to cases where the defendant is charged with a sexual offense. (Resp.Br. 18, n.4). The flaw in applying the rule is the State’s, not Antoine’s.

The State also misunderstands Antoine’s argument that A.W. ’s testimony boils down to a claim that she had sex only with her baby’s father that summer of 2007. (Resp.Br. 20-21). Antoine did not mischaracterize A.W. ’s testimony. She said:

Q. And was there anyone else during the course of that summer that you were having sex with?

A. No.

(Tr. 88).

Q. And do you believe that Antoine Terry then is the father of your baby?

A. Yes.

(Tr. 95).

Therefore, what Antoine argued as to A.W.'s testimony is correct:

- 1) A.W. had sex with one person;
- 2) That person was the father of her baby.

Ergo, since Antoine was not the father, he did not have sex with A.W. .

The State wants it both ways. It wants this Court to hold that the standard of review demands that it treat every word A.W. said as true, then it argues that her words do not mean what they say, that she had sex only with the baby's father. The problem is that if one substitutes Antoine's name for the generic labels used above, then A.W.'s testimony was not true. As we now know, if A.W. had sex with only one person in the summer of 2007, that person was not Antoine –she lied about that. And if she had sex with Antoine that summer, nevertheless he was not the father of her baby, so she had sex with someone else – she lied about that. A.W.'s testimony was “so contradictory and in conflict with physical facts, surrounding circumstances and common experience, that its validity [was] thereby rendered doubtful.” *State v. Sladek*, 835 S.W.2d 308, 310 (Mo. banc 1992), quoting, *State v. Harris*, 620 S.W.2d 349, 353 (Mo. banc 1981).

Instead of seeking justice – meaning a trial at which the jury deciding the facts is allowed to hear that A.W. perjured herself in the State's first attempt to convict Antoine – the State seeks to prohibit that evidence from ever seeing the light of day.

As for corroboration, the State is correct that the officer's testimony that Antoine admitted having sex with A.W. is corroborative, in the sense that it

supported her. But Antoine's point was that it was not authoritative evidence such as medical tests, or an eyewitness, or a true confession – for example, one on video that could be shown to the jury, or that was written in Antoine's own hand. Wolters's testimony added nothing to A.W.'s except another question of credibility for the jury to resolve.

II. Remand – Newly Discovered Evidence.

In its response to Antoine's motion to remand, the State asks this Court to overrule *State v. Mooney*, 670 S.W.2d 510 (Mo.App. E.D. 1984). (Resp. Suggestions in Opposition 8). It seeks to repudiate the core principle recognized by the Court:

In the absence of any rule or statute relative to the situation we have in this case, i.e. where the only witness who testified to the essential factual elements of the crime of child molestation has allegedly recanted and knowledge of the witness's recantation did not come to appellant's attention until after appellant was sentenced, and too late to be preserved for appellate review in a timely filed motion for new trial, we are of the opinion that we have the inherent power to prevent miscarriages of justice in a proper case by remanding the case to the trial court with instructions that the appellant be permitted to file a motion for new trial upon the grounds of newly discovered evidence.

Id. at 515-16. But the State offers no compelling reasons to curtail the courts' authority to ensure justice.

In *Mooney*, the Court carefully and thoroughly considered the issue of its authority to see that justice is done. It noted that, even where the time for filing a motion for new trial has expired, “there is authority for the trial judge to grant a new trial in any case in which the accused was found guilty of a crime on the basis of false testimony, where the trial court is satisfied that perjury had been committed, and that an improper verdict or finding was occasioned thereby.” *Id.* at 514-15, citing, *State v. Coffman*, 647 S.W.2d 849 (Mo.App. W.D. 1983).

Although the defendant in *Coffman* filed a motion to vacate his conviction after the time for filing a motion for new trial had expired, the Court observed that in, even though the motion was untimely, the trial court, “with the consent of the defendant, could have ordered a new trial on its own initiative [*sic*] before judgment was entered and a sentence was imposed.” *Id.* at 851.

The *Mooney* Court also quoted from this Court’s opinion in *State v. Harris*:

It would be patently unjust for a trial judge to refuse to grant a new trial in any case in which an accused was found guilty of a crime on the basis of false testimony, and the court “if satisfied that perjury had been committed and that an improper verdict or finding was thereby occasioned,” * * * would be under a duty to grant a new trial. That is to say “[w]here it appears from competent and satisfying evidence that a witness for the prosecution has deliberately perjured himself and that without his testimony accused would not have been convicted, a new trial will be granted.”

Mooney, 670 S.W.2d at 515, quoting, *State v. Harris*, 428 S.W.2d 497, 500 (Mo. 1968).

The *Mooney* Court also quoted from *Donati v. Gualdoni*, in which this Court said:

No verdict and resultant judgment, in any case, could be said to be just if the result of false testimony. The trial court had the duty to grant a new trial if satisfied that perjury has been committed and that an improper verdict or finding was thereby occasioned.

Mooney, 670 S.W.2d at 515, quoting, *Donati v. Gualdoni*, 358 Mo. 667, 216 S.W.2d 519, 521 (1949). The Court then distinguished the cases on which the State relies: *State v. Johnson*, 286 S.W.2d 787 (Mo. 1956), *State v. Sadowski*, 256 S.W. 753 (Mo. 1923), *State v. Worley*, 353 S.W.2d 589 (Mo. 1962), and *State v. McKinney*, 475 S.W.2d 51 (Mo. 1971):

Here the victim whose testimony was the only evidence to establish the crime of which appellant was convicted has allegedly recanted. If it is “patently unjust” for a trial judge to refuse to grant a new trial in a case where the finding of guilt was based upon false testimony, is it any less unjust to deprive an appellant of an opportunity to present that issue to the trial court because he did not learn of the fact that the victim’s testimony was false until after the time for filing a motion for new trial has expired? He cannot bring it to the trial court’s attention by a motion

under Rule 27.26 nor writ of error coram nobis. (citations omitted). We are of the opinion that in a case of this kind appellant must have some forum in the judicial system to present this issue, particularly where the case is still in the process of appeal.

Mooney, 670 S.W.2d at 515. Rather than repudiate *Mooney*, the Court should follow it, and make it clear that the mission of the appellate courts of this state is to further the cause of justice.

The appellate courts are not averse to remanding to the trial court for additional factual determinations in situations other than where there are claims of newly-discovered evidence. In *State v. Wilder*, 946 S.W.2d 760, 765 (Mo.App. E.D. 1997), the Court of Appeals remanded for a factual determination as to whether the defendant's silence during interrogation was pre- or post- *Miranda*.³ This Court has also remanded cases while an appeal is pending to address *Batson*⁴ issues. *State v. Smulls*, 935 S.W.2d 9, 14 (Mo. banc 1996) ("While the appeal was pending, the State filed a motion for temporary remand to the trial court for 'gender *Batson*' findings. This Court sustained the State's motion and the cause was temporarily remanded to the trial court."). *Also see, State v. Post*, 804 S.W.2d 862, 862-63 (Mo.App. E.D. 1991), *abrogation on other grounds recognized in State v. Carter*, 78 S.W.3d 786 (Mo.App. E.D. 2002) (defendant moved during the pendency of the appeal to

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴ *Batson v. Kentucky*, 476 U.S. 79 (1986).

remand for a new trial by reason of newly discovered evidence of juror misconduct; Court of Appeals remanded for a hearing, and ultimately remanded for a new trial).

The State's approach would also prohibit such remands, because there is no reasonable basis on which to distinguish a claim of newly-discovered evidence from a *Batson* claim or from a *Miranda* issue. The justification for the power to remand for factual findings is that it ensures that the appellate courts base their decisions on all pertinent facts.

The State cites *Wilson v. State*, 813 S.W.2d 833, 834-35 (Mo. banc 1991), for the proposition that a claim based on newly discovered evidence "should be raised in a petition for *habeas corpus* or in an application for executive clemency." (Resp. Suggestions 5). But *Wilson* was an appeal of the denial of a Rule 24.035 motion. *Id.* at 834. This Court overruled Wilson's motions – filed on the morning of oral argument – to allow him to file a substitute Rule 24.035 motion, and to either supplement the record on appeal or remand to for a hearing on newly discovered evidence. *Id.* The Court said that the, "subject matter of the latter motion . . . has no bearing on the voluntariness of Wilson's guilty plea," and that the "post-conviction relief rules are not a proper vehicle for the examination of claims of newly discovered evidence." *Id.*, citing, *inter alia*, *State v. Mims*, 674 S.W.2d 536, 539 (Mo. banc 1984)

The *Wilson* Court pointed out that a Rule 24.035 proceeding "is not the proper vehicle" to relitigate guilt or innocence. 813 S.W.2d at 834. "Newly discovered evidence, if available, may better serve Wilson in a Petition for a Writ of Habeas Corpus under Rule 91, . . . in a Motion to Withdraw Guilty Plea under Rule 29.07(d),

or in a request for a pardon from the governor under the Missouri Constitution.” *Id.* at 834-35 (citations omitted). But Antoine is still on direct appeal. He *is* still litigating his guilt or innocence. Thus, *Wilson* has no application, nor should it form the basis for the change advocated by the State.

It is crucial to keep in mind that the newly discovered evidence in this case involves perjury by the State’s prime witness – the alleged victim. Whether knowingly or not, the State convicted Antoine on the basis of A.W. ’s perjury. This Court has said that as a general rule “a conviction which results from the deliberate or conscious use by a prosecutor of perjured testimony violates due process and must be vacated.” *Mims*, 674 S.W.2d at 538. Antoine recognizes that this requires showing that the prosecutor knew about the perjury, and there is no such suggestion in the record here. But this Court has not held that such knowledge is absolutely required, and the better-reasoned rule is to the contrary. Indeed, in *Mims*, the Court recognized earlier Missouri authority for reversing a conviction without showing knowing use by the State:

. . . it is not clearly defined what relief, if any, must be afforded a defendant whose conviction results from perjury which was not known to be false by the prosecutor at the time of trial. Authority exists for the proposition that the trial court has the duty to grant a motion for new trial where it is shown that movant’s conviction resulted from the use of perjured testimony. (*Citing, inter alia, Harris*, 428 S.W.2d at 500).

Mims, 674 S.W.2d at 538-39.

The Court also noted decisions by the Court of Appeals to the contrary, but then went on, “[a]nyhow, in this case it is unnecessary to determine whether a defendant may successfully challenge his conviction on the basis of perjured testimony unknown to the prosecutor in either a motion for new trial or a collateral proceeding under Rule 27.26, since the perjury was known to movant at the time of his trial and not disclosed by him either to the court or to the prosecutor.” *Id.* at 539 (emphasis added). Therefore, there is no decision of this Court that knowledge of the perjury on the part of the prosecutor is an absolute requirement of such a claim. In fact, the language in *Harris* that it would be “patently unjust for a trial judge to refuse to grant a new trial” where the accused was found guilty of a crime on the basis of false testimony and an improper verdict resulted (428 S.W.2d at 500), applies equally where the prosecutor does not know of the perjury.

Antoine recognizes that the Court also said:

By this opinion we do not intend to relax or depart from the rule that in order to vacate a judgment claimed to have been procured by false testimony under Criminal Rule 27.26 it is a requirement that it be alleged and proved that the State knowingly used false testimony or knowingly failed to correct testimony which it knew to be false.

Id. at 502-03. But that statement concerns raising such claims in postconviction collateral attacks on the judgment—there, under former Rule 27.26. It does not apply to claims such as Antoine’s, raised on direct appeal.

The State relied to a great extent on A.W. 's pregnancy to corroborate what is now known to be her perjured testimony. The prosecutor argued to the jury that this case was not a "he-said-she-said" case because of that physical evidence (Tr. 147). Again, even "mere" impeachment in such a case is a total refutation of the State's theory of prosecution. *United States v. Bagley*, 473 U.S. 667 (1985), establishes that impeaching evidence is exculpatory evidence and can establish one's innocence – it is "evidence favorable to an accused[.]" *Id.*, at 676, quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963). It "may make the difference between conviction and acquittal." *Id.* Exculpatory evidence that must be disclosed includes impeaching evidence of a critical witness. *Id.*

A.W. 's testimony was perjured, and it substantially affected the outcome of the trial and undermined confidence in that outcome. See, *Mims*, 674 S.W.2d 536, 538; *United States v. Agurs*, 427 U.S. 97, 103 (1976). That is true even where that perjury is not knowingly used by the State. Antoine is entitled to a new trial, or at least a hearing on his claim of newly discovered evidence. In the alternative, the Court should remand to the trial court to conduct a hearing on this issue. Remanding Antoine's cause to the trial court will allow that court to address this matter and determine any factual issues necessary to resolve this issue before requiring Antoine to wait through the appeal, and possibly the postconviction process, before gaining relief.

II.

The excluded evidence would have shown an alternative source of A.W. 's pregnancy because it would have shown she was sexually active with others before Antoine, and the claim that it was too remote in time to relate to her pregnancy depends solely on the credibility of her story that the intercourse was in the fall of 2006 and she became pregnant in the summer of 2007, but since her credibility was already at issue because of her admission that she lied, it is illogical to base a ruling that the evidence was immaterial solely on her nonexistent credibility. The evidence therefore went to a "crucial issue directly in controversy."

The State's argument is illogical. It says that A.W. 's lie about having sex with others was irrelevant (Resp.Br. 27), even though it goes directly to her credibility, where she went before the jury and swore that Antoine was the only one – at least *that* summer.

The State's argument is essentially that the subject of A.W.'s lie was immaterial, because *she said* that she did not have sex with anyone else last summer. (Resp.Br. 26-27, 29). But how is it legitimate, and how does it comport with Antoine's right to present a defense, when the State claims that because he did not have specific evidence that the sexual intercourse that she admittedly had with others occurred during the time when she got pregnant, that he cannot present her lie about

sex at an earlier time and ask the jury to decide whether her replacement story was the truth or just another lie?

The State, having a witness who admitted that she lied, asks this Court to accept without question her flustered explanation, which was, essentially: “You’re right I lied, but trust me, I’m not lying now when I tell you that that other sex was irrelevant because it was way before I got pregnant.” That is the basis of the State’s argument that A.W.’s lie was about a collateral matter, and would not have shown an alternate source of her pregnancy. (Resp.Br. 27).

The State claims that the argument in *State v. Madsen*, 772 S.W.2d 656 (Mo. banc 1989), is “strikingly similar” to Antoine’s argument. (Resp.Br. 28). But in *Madsen*, this Court specifically pointed out that the defendant did not argue that the victim’s alleged lie brought the case within one of the exceptions. *Id.*, at 659 (“None of the exceptions recognized by the rape shield law would apply here, and we are informed of no circumstances by reason of which this victim’s prior conduct would be otherwise material in this case.”). That is completely unlike Antoine’s case, where A.W.’s lie was material to the issue of her pregnancy and the State’s claim that it corroborated her testimony.

Nor is *State v. Smith*, 996 S.W.2d 518 (Mo.App. W.D. 1999), like Antoine’s case. (Resp.Br. 28). In *Smith*, the alleged victim’s lie was about her sexual activity with others, but again there was no claim that the subject matter of the lie related to an exception under the rape shield statute. *Id.*, at 521. Indeed, it is unclear why the Court discussed § 491.015 at all, because the opinion notes that the defendant sought only to

inquire as to the *fact* of the victim's lie – interestingly, exactly what the trial court permitted here – not its subject. *Id.*, at 521-22. But again, the case does not support the State's claim that the lie about having sex in the fall of 2006 could not have allowed the jury to infer that . A.W. lied about Antoine being the father of her baby – which he was not.

Finally, the State misunderstands Antoine's reference to *State v. Long*, 140 S.W.3d 27 (Mo. banc 2004). (Resp.Br. 30-31). He did not claim his case was like the defendant's in *Long*. Rather, he simply pointed out that this Court said in *Long* that “[a]n issue is not collateral if it is a ‘crucial issue directly in controversy[,]’” and that “[a]n evidentiary rule rendering non-collateral, highly relevant evidence inadmissible must yield to the defendant's constitutional right to present a full defense.” *Id.*, at 31, *citing*, Mo. Const. Art. 1, § 18(a). Importantly, the Court also said that where “a witness' credibility is a key factor in determining guilt or acquittal, excluding extrinsic evidence of the witnesses' prior false allegations deprives the fact-finder of evidence that is highly relevant to a crucial issue directly in controversy; the credibility of the witness.” *Id.*

From this, Antoine then argued that, as in *Long*, “the trial court deprived Antoine's jury of evidence that was highly relevant to . A.W. 's credibility – the central issue in the case – and thereby denied Antoine's state and federal constitutional right to present a defense.” (App.Br. 37). His point – which the State's misstatement does not change – is not that the rape shield statute does not apply simply because he claimed that . A.W. 's credibility was at issue. Rather, because her

lie about her sexual activity in 2006 permitted an inference that she also had other sexual partners in 2007 – during the time she became pregnant – the lie went directly to her credibility about a “crucial issue directly in controversy”: that Antoine had sex with her, as “proved” by the fact that she was pregnant and said the baby was his (Tr. 88, 95, 147).

The State cannot escape the fact that it relied on A.W. ’s pregnancy as physical proof of her allegations, and the consequence of that reliance is that the issue of her pregnancy was highly relevant. Therefore, her lie about not being sexually active in 2006 related to her credibility about her sexual partners in the summer of 2007.

For these reasons, as well as those set out in his opening brief, Antoine asks this Court to reverse his conviction and remand for a new trial, at which the jury is allowed to hear all relevant evidence.

III.

The prejudice from the prosecutor’s improper questioning was greater here than in *Savory* and *Roper*, because Antoine did not employ the same tactic, the evidence against him was not as great as in those cases, the prosecutor exacerbated the error in argument, and Antoine’s simple denial did not open the door to the improper questions.

The State’s attempts to cast this case in the mold of *State v. Savory*, 893 S.W.2d 408 (Mo.App. W.D. 1995), and *State v. Roper*, 136 S.W.3d 891 (Mo.App. W.D. 2004), fails. The State claims that the Court of Appeals found in both cases that “the prejudicial effect of the questioning was lessened because there was a dramatic difference between the testimony presented on behalf of the State and the defendant, so that the disagreement between the prosecution and defense witnesses would have been readily apparent to the jury irrespective of the prosecutor’s questions.” (Resp.Br. 38).

But that was only part of why relief was not granted in those cases. In *Savory*, there was also the factor that some of the improper questioning was not of the defendant, but of other defense witnesses, and as to those witnesses the questioning was largely about collateral matters. 893 S.W.2d at 409-10. The Court also noted that, “[t]he defendant has failed to show that he was prejudiced by the questions, especially since defense counsel asked N.G. similar questions during cross-examination.” *Id.*, at 411. Nothing like that happened in Antoine’s case.

And in *Roper*, the Court noted that the State did not exacerbate the improper questioning by referring to it in argument, and it “ultimately” found no manifest injustice because of the substantial evidence of the defendant’s guilt. 136 S.W.3d at 903.

Here, A.W. ’s and the officer’s credibility versus Antoine’s was the entire case, and the State’s unfair advantage from the improper questioning was exacerbated by the argument about Wolters having no reason to lie and having greater credibility than Antoine (Tr. 147-50).

The State also claims that Antoine “opened the door” to the prosecutor’s misconduct when defense counsel asked Antoine about what he said to the officer. (Resp.Br. 39). But all it can cite for this claim is the question, “Did you tell the officer you had had sex with her at one time or another[,]” to which Antoine responded, “No, sir.” (Resp.Br. 39; Tr. 123). There was no question whether Wolters lied, as in *Savory*. This “direct contradiction” of the officer’s testimony (Resp.Br. 39), is exactly what this Court said in *Holliman v. Cabanne*, 43 Mo. 568, 570 (1869), was the proper way to broach the subject: “Witnesses should not give their opinions upon the truth of a statement by another witness, though they may do the same thing in effect by denying the fact stated.” That was what Antoine did – he denied that he said what Wolters claimed he said.

Finally, Antoine points out that there was no objection in *Roper*, 136 S.W.3d at 902, while here, counsel made some objections, just not always on the proper ground, as the State’s brief points out in detail. (Resp.Br. 34-36). So Antoine is not asking for

the completely uninvited interference as did the defendant in *Roper*. Here, the trial court knew, as shown by its rulings when a proper objection was made, that the questions were improper and that defense counsel sought to exclude them. So the consideration of not trying a litigant's law suit, *id.*, is not present here.

Therefore, for these reasons and those stated in his opening brief, Antoine asks the Court to reverse his conviction and remand for a new trial to remove the injustice caused by the prosecutor's improper questioning.

CONCLUSION

For the reasons set forth in Point I, herein and in the opening brief he filed in the Court of Appeals, appellant Antoine Terry respectfully requests that this Court reverse his conviction and sentence and discharge him therefrom, or in the alternative, remand for a hearing on newly-discovered evidence. For the reasons set forth in Points II and III, herein and in his opening brief, Antoine respectfully requests that this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached reply brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 5,123 words, which does not exceed the 7,750 words allowed for a reply brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan, updated in December, 2009. According to that program, these disks are virus-free.

On the _____ day of December, 2009, two true and correct copies of the foregoing reply brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to James B. Farnsworth, Assistant Attorney General, 221 W. High Street, Jefferson City, MO 65102.

Kent Denzel