**IN THE**
**MISSOURI SUPREME COURT**

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| **MARK GILL,** | **)** | |
| | **)** | |
| **Appellant,** | **)** | |
| | **)** | |
| **vs.** | **)** | **No. SC 89831** |
| | **)** | |
| **STATE OF MISSOURI,** | **)** | |
| | **)** | |
| **Respondent.** | **)** | |

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**APPEAL TO THE MISSOURI SUPREME COURT**
**FROM THE CIRCUIT COURT OF NEW MADRID COUNTY, MISSOURI**
**THIRTY-FOURTH JUDICIAL CIRCUIT**
**THE HONORABLE J. MAX PRICE, JUDGE**

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# APPELLANT'S REPLY BRIEF

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## JURISDICTION AND STATEMENT OF FACTS

Both original statements are incorporated here.

## POINTS RELIED ON

**I.**

## BRADY VIOLATION – COMPUTER'S SEXUAL CONTENT

**The motion court clearly erred in overruling Gill's claim respondent violated *Brady v. Maryland* and Rule 25.03 in not disclosing Lape's computer's sexual contents because it was proper rebuttal to respondent's portrayal of Lape as a "Good Samaritan," "saint," "Mr. Mom," and person with Lincolnesque character or would have prevented respondent from so misrepresenting Lape's character because Officer James and Swingle knew the computer's contents, Swingle affirmatively misrepresented and misled counsel that there was nothing significant on Lape's computer, and Swingle was required to apprise counsel of Lape's computer's contents.**

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

*Taylor v. State*,262S.W.3d231(Mo.banc2008);

*Booth v. Maryland*,482U.S.496(1987);

*Payne v. Tennessee*,501U.S.808(1991);

U.S. Const. Amends. VIII, XIV.

## II.

## INEFFECTIVE ASSISTANCE – COMPUTER'S SEXUAL CONTENT

**The motion court clearly erred in overruling Gill was denied effective assistance of counsel as counsel's performance was deficient in failing to uncover Lape's computer's sexual contents because Gill's codefendant Brown's counsel did. Gill was prejudiced because had his counsel uncovered Lape's computer's contents, then they could have used it to rebut respondent's misrepresentations about Lape's character or prevented entirely such misrepresentations as co-defendant Brown's counsel successfully did and Gill would not have been convicted of first degree murder and death sentenced.**

*Wiggins v. Smith*,539U.S.510(2003);

*State v. Butler*,951S.W.2d600(Mo.banc1997);

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

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases Guideline 10.7.

## IV.

## SIGNING STATE'S FINDINGS

**The motion court clearly erred in signing respondent's findings in that respondent's "Proposed" Findings are part of this Court's record and this Court has not consistently required movants file a Rule 75.01 motion. Further, respondent's findings were expressly contrary to its own computer expert and officer in charge, Officer James' testimony, that Lape authored the sexual chats, James concluded Lape was "a pervert," and there was nothing to link Gill to having placed pornography on Lape's computer. Adopting respondent's findings in the face of James' testimony and adopting other like findings unsupported and contradicted by the evidence shows a lack of independent judicial judgment.**

*Taylor v. State*,262S.W.3d231(Mo.banc2008);

*Smith v. Groose*,205F.3d1045(8thCir.2000);

*Worthington v. Roper*,2009WL878704(E.D.,Mo.2009);

U.S. Const. Amends. VIII, and XIV.

## ARGUMENT

### I.

### BRADY VIOLATION – COMPUTER'S SEXUAL CONTENT

**The motion court clearly erred in overruling Gill's claim respondent violated *Brady v. Maryland* and Rule 25.03 in not disclosing Lape's computer's sexual contents because it was proper rebuttal to respondent's portrayal of Lape as a "Good Samaritan," "saint," "Mr. Mom," and person with Lincolnesque character or would have prevented respondent from so misrepresenting Lape's character because Officer James and Swingle knew the computer's contents, Swingle affirmatively misrepresented and misled counsel that there was nothing significant on Lape's computer, and Swingle was required to apprise counsel of Lape's computer's contents.**

Respondent argues there was no *Brady* violation because it made Lape's computer available for inspection and provided counsel with Officer James' Encase report, which included Lape's file directories(Resp.Br.18-19).

#### ***Brady* Was Violated**

'"Under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), due process is violated when the prosecutor suppresses evidence that is favorable to the defendant and material to either guilt or punishment."' *Taylor v. State*,262S.W.3d231,240(Mo.banc2008)(quoting *State v. Salter*,250S.W.3d705,714(Mo.banc2008)). The Taylor prosecutor violated *Brady* when he failed to disclose a memorandum. *Taylor*,262S.W.3d at 240-48. In *Taylor*,

the prosecutor testified at the 29.15 hearing that "he made a conscious *choice* not to disclose it to the defense (or the court). At the motion hearing, Mr. Ahsens testified that he did so because he *personally* 'saw no relevance whatsoever to [Mr. Taylor's] case' in the memorandum." *Id.*241(Court's emphasis and alterations). This Court in *Taylor* stated: "Despite this evidence, the motion court **adopted the prosecution's self-serving finding** that his failure to disclose this memorandum was made in good faith." *Id.*242(emphasis added).[1]

Swingle testified that he told Gill's counsel that he did not know of anything important on Lape's computer(Ex.95 at 31). Gill's counsel testified Swingle informed them that there was nothing important or relevant on Lape's computer (29.15Tr.175-76,304-05). Swingle did not believe there was anything relevant on Lape's computer(29.15Ex.95 at 89-91). Even though Swingle knew about the pornography, he did not inform counsel about it(29.15Ex.72:29.15Ex.95 at 13-14,23-26). Officer James knew about the pornography(29.15Ex.93 at 22-24).

The Taylor prosecutor made the "conscious choice" not to disclose the memorandum *Brady* required he disclose. Swingle,and James, made the "conscious choice" to not inform Gill's counsel of Lape's computer's contents. *See Taylor*. Even worse than *Taylor* was that Swingle misrepresented to Gill's counsel there was

[1] Judicial notice of this Court's file in *Taylor v. State*,262S.W.3d231(Mo.banc2008) SC88063 is requested. In *Taylor*, like here, the 29.15 court signed Assistant A.G. Bruce's Findings. *See Taylor*, 29.15 Legal File at 863.

**NOTHING** relevant on Lape's computer, while Swingle knew Lape's computer contained inappropriate sexual contents. When Swingle chose not to reveal to defense counsel the sexual content, because it was irrelevant, he engaged in the same conduct as Taylor's prosecutor. Moreover, when Swingle affirmatively misrepresented there was nothing relevant on Lape's computer he "suppressed" evidence favorable to Gill and material to guilt or punishment. *See Taylor*. Even though the U.S. Supreme Court has determined that "**[n]o doubt** a capital defendant **must be allowed to introduce relevant evidence in rebuttal** to a victim impact statement," Swingle decided Lape's computer's sexual content was irrelevant. *See Booth v. Maryland*,482U.S.496,518(1987)(dissent which became majority in *Payne v. Tennessee*,501U.S.808(1991)). *See also, Simmons v. South Carolina*,512U.S.154,164(1994)(post *Payne* decision holding where state relies on evidence to ask for death "elemental due process principles operate to **require admission** of the defendant's relevant evidence in **rebuttal**")(emphasis added).

Respondent lifts out of context from *State v. Swiggart*,458S.W.2d251(Mo.1970) that it is not required to conduct trial counsel's investigation(Resp. Br.20). There defense counsel made a generalized request to look at "all evidence favorable to him" which did not fall within *Brady*. *Id*.253. Here, in contrast, Swingle affirmatively misrepresented to counsel that there was nothing relevant on Lape's computer. Because of Swingle's affirmative misrepresentation about Lape's computer's contents, counsel relied on it and did not investigate.

*Brady* prohibits "active" or "passive" deception. In *Brady*, the Court discussed that its holding was a logical extension of *Mooney v. Holohan*,294U.S.103(1935) and *Napue v. Illinois*,360U.S.264(1959). *See Brady*,373U.S.at 86-87. *Mooney* prohibited "deliberate deception." *Brady*,373U.S.at 86. In contrast, in *Napue* the Court held the state cannot stand back and allow false matters "to go uncorrected." *Brady*,373U.S. at 87. *See also*, *Chambers v. Beard*,2009WL2191748 *33 (M.D. Pa. July 22, 2009)(*Brady's Mooney* and *Napue* discussion holds prosecution cannot "obtain a conviction through active or passive 'deception"'). In *Napue*, the prosecutor elicited testimony the prosecutor knew was false, but passively chose not to correct. *Napue*,360U.S. at 265.

Swingle actively deceived defense counsel when he misrepresented there was nothing relevant on Lape's computer. *See Brady* discussion of *Mooney*. Respondent asserts there was no *Brady* violation because Swingle acted passively when he did not tell counsel about Lape's computer's sexual content and, therefore, it was up to counsel to find it(Resp.Br.18-20). Like in *Napue*, Swingle could not passively stand by and not inform counsel of Lape's computer's contents. *See Brady* discussing *Napue*. Whether this Court believes Swingle's conduct was active or passive, both violate *Brady*.

In arguing counsel was not ineffective for failing to have investigated Lape's computer's contents, based on the Encase report's file names, respondent states: "it was not at all clear that the material was child pornography or otherwise obscene"(Resp.Br.41). This Court should not condone respondent's taking the

position that the contents of the Encase report were facially insufficient to put counsel on notice that they needed to investigate Lape's computer's contents and that Swingle could passively stand by and not inform Gill's counsel of Lape's computer's contents.

**"Good Samaritan" "Saint," "Mr. Mom," Lincolnesque**

**Character Prejudice**

In Swingle's opening statement, the jury heard Lape had been "a [G]ood [S]amaritan" affording Gill a place to live because Gill "was down and out and needed a place to stay"(T.Tr.587). Swingle stated Gill lived with Lape because Attorney Davis was a mutual friend who had made Lape aware of Gill's circumstances(T.Tr.587).

In Turlington's opening statement, she told the jury it would hear evidence Lape was not "a [G]ood [S]amaritan"(T.Tr.626).

Swingle continued his "Good Samaritan" theme when he argued in guilt closing that Lape "had given this man a place to stay, a roof to have over his head," and that resulted in his death(T.Tr.1084).

To counter Swingle's guilt closing argument defense counsel argued that Swingle in opening characterized Lape as "a [G]ood [S]amaritan" because he provided Gill a place to live(T.Tr.1102). Counsel urged that the reason Lape allowed Gill to live with him was because he wanted Gill to beat-up Megan's boyfriend and not because Lape was "a [G]ood [S]amaritan"(T.Tr.1102-05). Counsel urged the jury not be mislead by the "[G]ood [S]amaritan" portrayal(T.Tr.1113).

In the "Good Samaritan" parable, the generous Samaritan aided a seriously injured traveler, who had been attacked, when no one else would. *See* Luke 10:30-37. The Samaritan provided that help even though Samaritans were hated, while others held in societal high regard, including a priest, passed by without helping. The parable's point is the "Good Samaritan" was a person of sterling character, despite how Samaritans were regarded, and had displayed great character when others who should have been expected to act the same had not. Swingle attributed a "Good Samaritan" character to Lape. Gill's counsel's focused on dispelling that portrayal.

Respondent relies on *State v. Hall*,982S.W.2d675(Mo.banc1998) and *State v. Isa*,850S.W.2d876(Mo. banc1993) for a victim's character being inadmissible. In *Hall* and in *Isa*, unlike here, respondent had not injected in the first instance the victims' character. *Hall*,982S.W.2d at 681; *Isa*,850S.W.2d at 895.

In *Anderson v. State*,361S.E.2d270,271(Ga.Ct.App.1987), it was proper to admit evidence of the defendant's bad character, even though a defendant's character is generally inadmissible, because the defense injected defendant was acting as a "Good Samaritan." While *Hall* and *Isa* state general prohibitions against victim character evidence, Swingle injected into the State's case that Lape was a "Good Samaritan" and Gill was entitled to rebut that. *Cf. Anderson.*

Respondent asserts: "the prosecutor's reference to Victim as a "Good Samaritan" was not a statement about Victim's character, but instead was simply an attempt to explain why Appellant was living in Victim's house"(Resp.Br.24). Swingle could have told the jury that Lape's and Gill's shared friend, Davis, arranged

for Gill to live with Lape because Gill did not have a place to live and not portrayed Lape as a "Good Samaritan."

The "Good Samaritan" theme also pervaded penalty. Swingle portrayed Lape as an upstanding pillar of the community who possessed stellar morals and integrity.

Lape's sister Diane testified she had prepared a photo album that she brought to Swingle because she "wanted [Swingle] to see the person" he represented(T.Tr.1171). Diane recounted Lape's upstanding Catholic upbringing having attended Catholic school(T.Tr.1170). Diane testified about a picture of Lape at her First Communion(T.Tr.1172). Diane described pictures of Lape at Easter and Christmas(T.Tr.1173-74,1176,1183).

Diane identified and described picture after picture of Lape with his daughter Megan from Megan's hospital birth through her high school graduation(*See* App.Br.7-8 detailed account). Diane read from her prepared statement: "the proudest and happiest day of Ralph's life was the day his daughter Megan was born"(T.Tr.1187). Lape behaved like "Mr. Mom"(T.Tr.1187).

Diane identified a Mother's Day picture and recounted how Lape took over the chores of opening her pool because of their father's death(T.Tr.1182). Diane read from her prepared statement that she "heard stories about Ralph's generosity"(T.Tr.1190).

Diane's testimonial to Lape's character included Lape was better than most people because he did not "gossip"(T.Tr.1184). Growing-up, Lape defended Diane from other children(T.Tr.1186).

Respondent argues Diane's "Mr. Mom" testimony was not subject to rebuttal because it "did not imply that [Lape] was a perfect human being"(Resp.Br.28). The "Mr. Mom" comment was immediately preceded by Diane's having stated that the day Lape's daughter was born was "the proudest and happiest day of [his] life" such that she could "still see the image of [Lape] holding that little baby" (T.Tr.1187). The "Mr. Mom" comment had been earlier preceded by Diane's identifying and describing picture after picture of Lape with his daughter from Megan's hospital birth through her high school graduation(*See* App.Br.7-8 detailed rendition). Swingle painted Lape as an extraordinary father. An extraordinary father would not engage in on-line sexual chats about his sexual attraction for his daughter's anatomy, and therefore, the undisclosed evidence was proper rebuttal.

Lape's brother-in-law Mitch described how Lape reflected the old west's best values(T.Tr.1195). Mitch testified about Lape having helped him push his car to a gas station and Lape's concern for his sister Diane(T.Tr.1196).

Respondent asserts Mitch's old west values testimony was not subject to rebuttal because Mitch "did not say that [Lape] unfailingly followed those lessons"(Resp.Br.27-28). Mitch's testimony clearly espoused that Lape lived those values to the fullest daily, it was not necessary that Mitch say Lape "unfailingly" lived them(T.Tr.1195).

Lape's brother Steven recounted actions involving getting Steven to school under hostile conditions and caring for Steven's broken arm(T.Tr.1218-20). Steven described how Lape's school teachers had held him in high regard(T.Tr.1220).

Steven recounted Lape's personal strength in adversity when Lape did not seek other's help during rough financial times(T.Tr.1220-21). Lape was so "generous" that he loaned a friend money to pay for the friend's wife's funeral(T.Tr.1221).

Steven invoked a quote from Lincoln's Gettysburg address as epitomizing Lape's character(T.Tr.1221-22). The Lincoln quote was: "The world will little note, or long remember what we say here. But they will **never forget** what we did here"(T.Tr.1221-22)(emphasis added). After reciting that quote, **Steven's last words to the jury** were: "I will **never forget** Ralph"(T.Tr.1221-22)(emphasis added).

Respondent asserts Steven's Lincoln testimony merely conveyed Steven's sense of loss(Resp.Br.27). The Lincoln quote espouses that Lincoln subscribed to the view that a person's good deeds will have lasting benefit for society's greater good, even after the person is gone. Steven's statements were that Lape had lived the life values that Lincoln espoused and society will be better for what Lape did. Lape's computer's contents were not in keeping with Lincoln's values and Gill was entitled to rebut that portrayal. *See State v. Gardner*,8S.W.3d66,72(Mo.banc1999), *Booth, Payne, and Simmons v. South Carolina.*

Evidence is proper rebuttal if it tends to explain, counteract, repel, or disprove the opposing party's evidence. *State v. Gardner*,8S.W.3d at 72. Lape's computer's sexual content counteracted, repelled, and disproved that Lape was a person of high morals and exceptional integrity. The computer's content counteracted, repelled, and disproved Lape possessed the character and integrity of the "Good Samaritan," a "saint," "Mr. Mom," and a Lincolnesque character**.** A person who possessed such

qualities would not have child pornography on his computer, would not have boasted on-line to having engaged in sex with minors, would not have solicited on-line sex with minors, created a profile posting his erect penis, and created profiles that listed as his "hobbies" sex of all kinds. *See* App.Br.19-26. "Mr. Mom" would not engage in on-line sexual chats about his sexual attraction for his daughter's anatomy. *See* App.Br.22. All this evidence rebutted respondent's portrayal of Lape as a person of sterling character. *See State v. Gardner, Booth, Payne, and Simmons v. South Carolina.*

Respondent argues Gill was not prejudiced even though co-defendant Brown was sentenced to life because in Brown's trial respondent's witnesses were not permitted to read their prepared statements(Resp.Br.31-32). This argument actually **PROVES** Gill was prejudiced and Swingle's testimony makes that point.

The reason Brown's counsel were able to preclude the introduction of the victim impact witnesses' written statements was because they knew about Lape's computer's sexual contents. If Gill's counsel had had the same knowledge, then they could have done the same. In Brown's case, in response to Brown's counsel having learned of all Lape's computer's sexual contents, Swingle filed a motion to prohibit them from presenting what they knew(29.15Ex.95 at 44-47). In *Brown*, Judge Storie ruled the defense could not present the computer evidence unless Lape was cast as "a saint"(29.15Ex.95 at 46-47). Swingle testified that in *Brown* he presented no evidence that opened the door to Lape's computer's sexual contents(29.15Ex.95 at

46-47). Swingle alerted his witnesses not to cast Lape as "a saint" or Lape's computer's contents would be admissible(29.15Ex.95 at 48-52,68).

Diane's prepared written statement testimony read at Gill's trial included: (1) Lape was the eldest, "the example for all the rest," and shouldered that responsibility "never complaining"(T.Tr.1186); (2) Lape defended Diane against other children(T.Tr.1186); (3) Lape's generosity growing-up included driving Diane to see friends so that Lape did not have his own social life(T.Tr.1186); (4) the day Lape's daughter was born was "the proudest and happiest day of [his] life" such that she could "still see the image of [Lape] holding that little baby"(T.Tr.1187);(5) Lape acted like "Mr. Mom"(T.Tr.1187); (6) she had heard stories about Lape's "generosity"(T.Tr.1190). All of Steven's testimony, *supra*, was done through his prepared written statement(T.Tr.1218-22).

Respondent argues Lape's computer's sexual content was inadmissible because there were no "sweeping, general statements about [Lape's] moral uprightness"(Resp. Br.26-27). Respondent argues that no witness ever used the word "saint" in their testimony and that it was counsel Kenyon who utilized that term(Resp.Br.26-27). Respondent's witnesses did not have to use the word "saint" because that was how Swingle had his witnesses portray Lape. Kenyon's description of how Swingle portrayed Lape as a "saint" through Swingle's witnesses accurately characterizes what Swingle did(29.15Tr.172-74).

Respondent misrepresents there is a consensus across states that evidence of the type at issue here has been uniformly excluded(Resp.Br.28-30). Respondent

never addresses that the U.S. Supreme Court has held that a defendant has an absolute right to rebut victim impact evidence. *See, Booth, Payne, and Simmons v. South Carolina, supra.* There cannot be any such consensus because that would be contrary to these cases. Respondent's cases are from its 29.15 findings (29.15L.F.516,525-26) and none of them have held proper victim impact rebuttal can be excluded. App.Br.53-54. Instead, the A.G.'s findings rely on cases where defendants sought in the first instance to inject the victim's character or the evidence was improper rebuttal. Neither applies here.

This Court will not find decisions stating a defendant can offer the type of proper rebuttal that could have been offered here because a defendant who was allowed to present such evidence, but still was convicted and death sentenced, has nothing available to appeal on that issue. Moreover, the state cannot appeal such an adverse trial ruling when a defendant was convicted and death sentenced.

Respondent asserts it could have made arguments Gill was responsible for Lape's computer's sexual contents, and therefore, had Gill's counsel relied on Lape's computer's contents it would have been harmful(Resp.Br.32-35). Officer James, respondent's computer expert and officer in charge, testified that he had concluded from his analysis that Lape authored the sex chats, his entire review of Lape's computer caused him to conclude Lape was "a pervert," there was nothing on Lape's computer to link Gill to placing child pornography on Lape's computer, the pornography was placed on Lape's computer before Gill began living with Lape, and if there had been any evidence to connect Gill or Brown to having placed illegal

pornography on Lape's computer, then James would have alerted Swingle(29.15Ex.93 at 26,38-39,48-49). The purported arguments respondent claims that it could make are contrary to its own officer in charge and state's computer expert's conclusions.

Throughout respondent's brief, it references a 29.15 pleading factual allegation that the failure to disclose Lape's computer's contents was prejudicial to a guilt defense that Gill killed Lape because Gill saw Lape's computer's contents and killed Lape because of his reaction to what he viewed(*See*,*e.g.*,Resp. Br.16,22-24,92-93,95). That particular allegation was not advanced anywhere in Gill's brief, and therefore, respondent's arguments are irrelevant.

Withholding Lape's computer contents was prejudicial to a reliable determination that Gill was guilty of first degree murder, rather than second degree, because it allowed Swingle to cast Lape in guilt as a "Good Samaritan." By casting Lape as a "Good Samaritan," Swingle was able to create the misperception Gill's case was even more aggravated than it otherwise was because anyone who would kill a "Good Samaritan" must be guilty of first degree murder since no one would ever kill a "Good Samaritan," and therefore, the jury was led to conclude Gill must be guilty of first degree murder, rather than second degree. All the undisclosed computer evidence could have been used to rebut respondent's guilt phase "[G]ood [S]amaritan" portrayal or to dissuade respondent from such portrayal and the first degree murder guilt determination was fundamentally unfair. *See State v. Gardner*.

New guilt and penalty phases are required.

## II.

## INEFFECTIVE ASSISTANCE – COMPUTER'S SEXUAL CONTENT

**The motion court clearly erred in overruling Gill was denied effective assistance of counsel as counsel's performance was deficient in failing to uncover Lape's computer's sexual contents because Gill's codefendant Brown's counsel did. Gill was prejudiced because had his counsel uncovered Lape's computer's contents, then they could have used it to rebut respondent's misrepresentations about Lape's character or prevented entirely such misrepresentations as co-defendant Brown's counsel successfully did and Gill would not have been convicted of first degree murder and death sentenced.**

This Court has recognized that "[i]t is well-established that effective representation under the Sixth Amendment requires counsel to appropriately investigate, prepare, and present the client's case." *Taylor v. State*,262S.W.3d231,249(Mo.banc2008). Counsel's performance must conform to the degree of skill, care, and diligence of reasonably competent counsel. *State v. Butler*,951S.W.2d600,610(Mo.banc1997). A decision not to investigate must be reasonable under prevailing professional norms. *Id.*610.

### Counsels' Deficient Performance

According to respondent, counsels' performance was not deficient even though in the Encase report "some of the file names were provocative and may have indicated the presence of pornography"(Resp.Br.40-41). Respondent argues further that counsel had no reason to believe there was sexual content on Lape's computer or that

it would matter because Gill had admitted participating in Lape's death(Resp.Br.39-40).

In *Wiggins v. Smith*,539U.S.510,524(2003), the Court recognized the A.B.A. Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases are the constitutional yardstick for measuring counsel's performance. Guideline 10.7 titled "Investigation" provides counsel "at every stage" have a duty to conduct thorough investigation as to guilt and penalty, even when a defendant made admissions about the crime's facts and there is "overwhelming evidence of guilt." *See* A.B.A. Guidelines reproduced at 31 Hofstra L.Rev.913,1015 (2003)(see reply brief's Appendix). The Commentary to Guideline 10.7 directs as to physical evidence that counsel should with the assistance of appropriate experts conduct appropriate analyses. *Id*.1020.

When Gill was arrested, Lape's computer's hard drive was with him(T.Tr.961-63). Gill admitted to his interrogators that the purpose he and Brown used Lape's computer for was to transfer money from one of Lape's accounts to another so it could be accessed with Lape's ATM card(T.Tr.828). Many file names in the Encase report on their face suggested sexual content and should have given counsel reason to believe there was sexual content on Lape's computer(*See* App.Br.14,67 reproducing portion of Encase report). Knowing that Gill and Brown had only taken Lape's hard drive to access Lape's bank accounts should have then led reasonable counsel, who had carefully reviewed the Encase report, to conclude that file names suggestive of sexual content must have been put on Lape's computer by Lape. Reasonable counsel

possessing that knowledge would have wanted to know the details of the contents of Lape's computer and enlisted appropriate experts to then examine Lape's computer hard drive who would have found all its sexual contents. *See* Comment to A.B.A. Guideline 10.7 at 31 Hofstra L.Rev. at 1020. Moreover, with that knowledge reasonable counsel would have interviewed or deposed James about what he had found when he generated his Encase report.

Lape's file names in James' Encase report standing alone should have been reason enough for reasonable counsel to want to interview or depose James and then uncover Lape's computer's sexual contents. Counsel knew Gill's and Brown's purpose in using Lape's computer was to access Lape's bank accounts and not to put files on Lape's computer whose name suggested improper sexual contents, and therefore, should have questioned James about Lape's computer's file names.

Most telling that Gill's counsel's performance was deficient was that Brown's counsel uncovered and incorporated into their defense strategy Lape's computer's sexual contents. James testified the Encase report was given to Brown's counsel Zembles(29.15Ex.93 at20-21). Because Brown's counsel carefully reviewed the Encase report they then obtained Lape's computer's hard drive's contents(29.15Ex.93 at 32-38,45-46). James testified Lape's computer's contents were put on a disc for Brown's counsel when Brown's counsel requested them(29.15Ex.93 at 32-38,45-46). Computer expert Chatten, who testified at Gill's 29.15 hearing about Lape's computer's contents, was the expert Brown's counsel used to uncover Lape's computer's contents(29.15Tr.604).

In Brown's case, in response to Brown's counsel's having learned of all Lape's computer's sexual content, Swingle moved to prohibit them from presenting what they knew(29.15Ex.95 at 44-47). In *Brown* Judge Storie ruled the defense could not present the computer evidence unless Lape was cast as "a saint"(29.15Ex.95 at 46-47). Swingle testified that in *Brown* he presented no evidence that opened the door to Lape's computer's sexual contents(29.15Ex.95 at 46-47). Swingle alerted his witnesses not to cast Lape as "a saint" or the sexual content evidence would be admissible(29.15Ex.95 at 48-52,68).

In *Butler*, this Court found counsel was ineffective for failing to uncover evidence supporting the defense someone other than the defendant had committed the homicide that resulted in a death sentence. *Butler*,951S.W.2d at 606-610. Butler's counsel's performance was deficient because all the evidence was readily available to counsel if counsel had done proper investigation. *Id.*608. Counsel's investigation was deficient because all the relevant information "was available from police reports or witness lists provided by Butler and his family." *Id.*608. Here, like the *Butler* police reports, counsel had James' Encase report. Brown's counsel, who had the Encase report, used that report to uncover Lape's computer's sexual contents. Brown's counsel performed as reasonable counsel and Gill's did not. Brown's attorneys' actions establish that not conducting the investigation that would have uncovered Lape's computer's contents was unreasonable under prevailing professional norms. *See Butler* and A.B.A. Guideline 10.7.

**Gill Was Prejudiced**

Respondent argues Judge Breckenridge's Western District decision in *Gennetten v. State*,96S.W.3d143(Mo.App.,W.D.2003) is inapplicable because Lape's computer contents would not have provided Gill a defense to murder(Resp.Br.43). What Brown's counsel accomplished through their use of Lape's computer's sexual content and Brown's life verdict establish prejudice.

Gill was prejudiced because there was evidence which could have been used to rebut respondent's punishment witnesses. *See Taylor v. State*,262S.W.3d231,237-48(Mo.banc2008)(defendant was prejudiced by absence of evidence that could have been used to contradict state's witness). Moreover, Swingle testified that in *Brown* he did nothing to open the door to the sexual content evidence and his witnesses were alerted not to portray Lape as a "saint," and thus, demonstrates how Gill was prejudiced(29.15Ex.95 at 46-47,48-52,68). Brown's attorneys kept Swingle and his witnesses from casting Lape as the "Good Samaritan," a "saint," "Mr. Mom," and Lincolnesque in character because they had the computer evidence. Gill's attorneys testified that having the computer's sexual content would have allowed them to dissuade respondent from portraying Lape as a person of stellar personal integrity (29.15Tr.172-74,180-81,187,194;29.15Ex.11 at 3855-56), and that is in fact, what Brown's attorneys successfully did.

Unlike in *Gill*, the victim impact witnesses did not talk about Lape's generosity in Brown's penalty phase(29.15Ex.95 at 62). Unlike in *Gill*, Mitch did not get into how the old west had taught him and Lape valuable character lessons(29.15Ex.95 at 67). In *Brown*, there was no mention of Lape having loaned a friend money to pay for

the friend's wife's funeral(29.15Ex.95 at 70-71). Moreover as respondent has pointed out in *Brown*, Swingle's witnesses were not permitted to read their written statements(Resp.Br.31-32).

Gill was also prejudiced as to guilt because had counsel had Lape's computer's contents they could have prevented Swingle's casting Lape as a "Good Samaritan."

**Counsel Would Have Relied On Lape's Computer's Contents**

Respondent asserts the 29.15 judge "believed that for strategic reasons" Gill's counsel would not have relied on Lape's computer's sexual contents(Resp.Br.43). Respondent lifts out of context Kenyon's "kicking a corpse" testimony(Resp.Br.43 relying on Kenyon at 29.15Tr.172). Respondent also argues Turlington testified that there are risks in disparaging too much a victim (Resp.Br.43-44). Respondent further asserts Kenyon and Turlington speculated they would have utilized the contents of Lape's computer, but the 29.15 judge disbelieved them(Resp. Br.44).

This Court needs to consider Kenyon's "kicking a corpse testimony" in context. Kenyon testified:

> Q. And when did you have -- so you reviewed this in a month. Had you known about this at the time of trial, how would you have used it?
>
> A. We would have alerted -- it's difficult to know exactly how it would have been used in trial, because we are in a precarious position as defense attorneys in this case because there's an expression which seems like a callous expression, but it's very true and we use it in our trade, which is you don't kick

a corpse. In penalty phase, you don't try and slam a victim by showing bad things that the victim may have done. That generally doesn't go over well with juries.

Q. All right.

A. So you have to be very careful about introducing anything that in any way demeans or disrespects the memory of the person who was the deceased. But on the other hand, having that information in your hand, you can utilize it as a bargaining chip, if nothing more, with the prosecuting attorney's office letting them know that should you attempt to try and paint a picture of the victim as being an angel, it is important that the jury does get the whole picture. And so it would probably have been something -- I don't suspect it would have been something that I would have made any effort to try and introduce in the defendant's case in chief in the penalty phase. But it certainly would have been something that I would have strongly considered using in rebuttal or even for cross examination purposes of State's witnesses to the extent that they would adduce evidence that the victim was a saint.

Q. Do you think that Mr. Lape was painted as a saint in your case?

A. Yes.

Q. So from what you're saying is if you had this information and he was painted as a saint, would you have used it?

A. Yes.

(29.15Tr.172-73). Kenyon indicated without reservation that had he known of Lape's computer's sexual contents that he would have used it to rebut respondent's evidence or to prevent respondent from misrepresenting Lape as a person of outstanding integrity.

Turlington testified that "too much" disparaging of a victim can be detrimental(29.15Tr.320). Turlington also testified she would have used Lape's sexual chats to rebut the state's portrayal of him(29.15Tr.307). Turlington thought Lape's chats about his daughter especially went to rebutting respondent's portrayal of Lape as an exceptional father(29.15Tr.307). Turlington indicated that Lape's sexual chats recounting him having been sexually involved with 13 and 15 year old girls would have rebutted the state's portrayal of Lape as a person of outstanding character and an upstanding citizen(29.15Tr.307-08).

This Court should give no deference to any A.G. findings. *See* Point IV. James testified that he had concluded from his analysis that Lape authored the sex chats, his entire review of Lape's computer caused him to conclude Lape was "a pervert," there was nothing on Lape's computer to link Gill to placing the child pornography on Lape's computer, the pornography was placed on Lape's computer before Gill began living with Lape, and if there had been any evidence to connect Gill or Brown to having placed illegal pornography on Lape's computer, then James would have alerted Swingle(29.15Ex.93 at 26,38-39,48-49).

This Court should order new guilt and penalty phases.

## IV.

## SIGNING STATE'S FINDINGS

**The motion court clearly erred in signing respondent's findings in that respondent's "Proposed" Findings are part of this Court's record and this Court has not consistently required movants file a Rule 75.01 motion. Further, respondent's findings were expressly contrary to its own computer expert and officer in charge, Officer James' testimony, that Lape authored the sexual chats, James concluded Lape was "a pervert," and there was nothing to link Gill to having placed pornography on Lape's computer. Adopting respondent's findings in the face of James' testimony and adopting other like findings unsupported and contradicted by the evidence shows a lack of independent judicial judgment.**

Respondent makes two procedural arguments about Gill's challenge to the judge signing respondent's findings.

### Procedural Arguments – State's Disregard For Fairness And Truth

First, respondent argued this claim should not be reviewed because respondent's Proposed Findings were not part of the appellate record(Resp.Br.48). In response to that argument, undersigned counsel obtained a New Madrid County Court Deputy Clerk's affidavit that stated Gill's court casefile did not contain Proposed Findings from Assistant A.G. Bruce and did not contain any correspondence from Bruce relating to Proposed Findings. *See* Ex. 99 and this Court's order of August 24, 2009 on Gill's August 13, 2009 Motion. Undersigned counsel then obtained from the

files transferred to me copies of Bruce's Findings and Bruce's cover letter to the 29.15 judge served on Gill's circuit court counsel. *See* Gill's motion. Undersigned counsel provided respondent's counsel, Assistant A.G. Farnsworth, with copies of the Deputy Clerk's affidavit, Bruce's Findings, and Bruce's cover letter. *Id*. Farnsworth would only stipulate that the copies of Bruce's Findings and Bruce's cover letter were true and correct copies of those documents. *Id*. Farnsworth **refused** to stipulate that the copies of Bruce's documents could be **filed** with this Court as part of the appellate record. *Id*. Because Farnsworth refused to stipulate that the documents could be filed as part of the appellate record, undersigned counsel moved this Court to accept them as part of the record on appeal and that motion was conditionally sustained. *See* August 24, 2009 order.

The New Madrid County casefile docket entries reflect Gill's counsel filed Proposed Findings(29.15L.F. 4). There is no docket entry for Bruce having filed Proposed Findings(29.15L.F.1-4).

New Madrid County is in the 34th Judicial Circuit and the Circuit Clerk's mailing address is 450 Main St. New Madrid, Mo. 63869. *See* State Judicial Directory at 50.

Bruce's Findings cover letter was addressed to Judge Price at P.O. Box 551 Salem, Mo. 65560. *See* Ex.98 cover letter. That address is used by the Judges of 42nd Judicial Circuit. *See* State Judicial Directory at 55.

Bruce did not submit a document labeled "Proposed Findings," but submitted a document labeled "Findings." *See* Ex.98 Proposed Findings at 1. Undersigned counsel has compared line by line and side by side Bruce's "Proposed Findings" and the signed findings, which show the 29.15 judge signed verbatim Bruce's findings. *See* Ex.98;29.15L.F.510-43. Bruce's "Proposed Findings," left blank lines for the date to be written in and a blank signature line for the judge's signature. *See* Ex.98 Proposed Findings at 1,34. The judge wrote in the date in the blank lines and placed his signature on the signature line(*See* Ex.98 Proposed Findings at 1,34;29.15L.F.510-43).

*In Taylor v. State*,262S.W.3d231(Mo.banc2008), SC88063, Taylor challenged the 29.15 judge having signed Bruce's findings. *See* Taylor's initial brief Point XI at 106-109 and Taylor's 29.15 Legal File at 863.[2] Taylor's 29.15 Legal File, like Gill's Legal File, did not contain Bruce's Proposed 29.15 findings because, like here, Bruce submitted a document denominated as "Findings" with lines for the 29.15 judge to insert the date and the judge's signature. *See* Taylor's 29.15 Legal File Index and Legal File pages 863-69,939. On Taylor's appeal, Bruce represented respondent and Bruce did not complain about the absence of Proposed Findings from the Legal File or dispute that Taylor's judge signed Bruce's Findings. *See* Bruce's *Taylor* brief at Point IV pages 36-37.

[2] Point I of this reply brief, requested judicial notice of this Court's casefile in *Taylor v. State*,262S.W.3d231,240(Mo.banc2008) SC88063.

Gill's brief relied on a videotape deposition of Gill's brother Carl, but undersigned counsel did not have its transcript(App.Br.120). Before Farnsworth filed respondent's brief, he requested undersigned counsel stipulate that a copy of a transcript of that videotape was a true and correct copy and that the State could **file** that transcript. Undersigned counsel stipulated to the accuracy and to the **filing** of that transcript. *See* Stipulation filed July 31, 2009. Farnsworth has relied on that transcript. *See*, *e.g.*, Resp.Br.80,103 relying on "T.Ex.M."

In *Smith v. Groose*,205F.3d1045,1051(8thCir.2000), the defendant's Missouri conviction violated due process and was reversed because respondent took contradictory positions as to critical facts in the co-defendant's trial. The inconsistent positions in *Smith* evidenced a disregard for fairness and the search for truth. *Id*.1051.

What the State has done in making its argument about the absence of its "Proposed" Findings from the record on appeal and in refusing to stipulate that its "Proposed" Findings could be **filed** with this Court serves only to underscore the conduct it displayed in having the 29.15 judge sign its "Findings." Through the expedient of substituting Farnsworth for Bruce as counsel, the state has argued that Gill's claim could not be reviewed because its "Proposed" Findings were absent from the record. While the docket sheets do not reflect Bruce ever filed his "Proposed" Findings with the Circuit Clerk (29.15L.F.1-4), even if Bruce did, they could never be subsequently identified as "Proposed" since they were denominated as "Findings" with lines for the judge to handwrite the date and write his signature, which he did.

Bruce knows Judge Price signed Bruce's "Findings," which were not denominated as "Proposed." If Bruce were counsel on appeal, he could not have in good faith maintained that the record was devoid of his "Proposed" Findings because he never submitted a document denominated "Proposed," which could ever be subsequently identified as such, much less after the judge signed his "Findings." Bruce did not attempt to make in *Taylor* the arguments Farnsworth has made about Bruce's Proposed Findings not having been included in the 29.15 record on appeal. Through respondent substituting Farnsworth for Bruce, the State has pursued a position it knows is contrary to the facts and shows a disregard for fairness and the search for truth. *Cf. Smith v. Groose. See also, Giglio v. United States*,405U.S.150,151-52(1972)(government could not maintain through expedient of substituting different prosecutor unindicted co-conspirator was not promised a deal when original prosecutor made such promise). That disregard for fairness and truth is further highlighted by Farnsworth's refusal to stipulate to filing with this Court documents that he acknowledged Bruce submitted to the 29.15 judge, but the Circuit Clerk could not provide.

Respondent's second argument is Gill was required to file a Rule 75.01 motion(Resp.Br.48-50). Respondent relies on *State v. Kenley*,952S.W.2d250(Mo.banc1997). While this Court stated such a motion should have been filed in *Kenley*, this Court fully reviewed Kenley's claim on the merits. *Id.*260-66.

This Court's Rule 75.01 *Kenley* statement is at odds with this Court's historical treatment of that Rule. In *Rubbelke v. Aebli*,340S.W.2d747,750-51(Mo.1960), this Court indicated Rule 75.01 is not to be used as a substitute for an appeal. *Kenley* is at odds with *Rubbelke* because filing a Rule 75.01 motion would be using that Rule as a substitute for an appeal. In any event, this Court should do as it did in *Kenley*, fully review Gill's claim. When a procedural rule that is not firmly established and regularly followed is applied to adversely impact a convicted defendant's rights, the due process clause is violated and the claim is reviewable for the first time in federal court. *Ford v. Georgia*,498U.S.411,422-24(1991). Because this Court provided full review of Kenley's claim, it is constitutionally required to treat Gill's claim the same. *See Ford*.

In *v. Zink v. State*,278S.W.3d170,191-92(Mo.banc2009), Zink challenged the 29.15 judge having signed the state's findings and there was no Rule 75.01 motion filed. *See* Zink 29.15 Legal File at 805-1198[3] This Court gave Zink's claim full review and said nothing about the absence of a Rule 75.01 motion. Because this Court did not require a Rule 75.01 motion in *Zink*, it is constitutionally required to treat Gill's claim the same. *See Ford*.

**Officer James' Testimony**

Respondent's characterization of Officer James' testimony as "assumptions" further illustrates the state's pervasive disregard for fairness and truth(Resp.Br.51-53).

[3] Judicial notice of this Court's *Zink v. State*, SC88279, casefile is requested.

Respondent asserts there was evidence suggesting someone else used Lape's computer to do the sexual chats because of access to Lape's passwords(Resp.Br.52). Officer James never expressed the opinion that because Lape's computer passwords were near his computer and Lape's account was used after his death that in any way cast doubt on his findings Lape was responsible for Lape's computer's sexual content(Resp.Br.52). According to respondent, James' reference to Lape as "a pervert" was a comment intended to convey that he did not believe Lape was the type of person who would have put child pornography on his computer(Resp.Br.53). James' testimony, as the state's computer expert, shows he concluded Lape was responsible for Lape's computer's sexual contents.

James' deposition testimony was:

Q. What did you tell him [Swingle] about that [the sexual chats]?

A. I remember telling him that there was chat conversations in there where he was talking to what appeared to be underage people, you know.

Q. And when would you have –

A. And, you know, there when I say "he," it's always –it's always a problem putting someone at a computer keyboard. But it was my assumption that it was Ralph Lape carrying on these conversations, based on several things, but –

Q. Based on what?

A. The user ID name. Seemed like – I can't remember some of those names, but seemed like **I found other things** that associated his name with

those, maybe a profile or something, but had his profile, and it was part of his Yahoo chat name.

**But I'm a policeman, and I suspect it was Ralph Lape doing those things.**

(Ex.93 at 26)(emphasis added)

……

Q. And what was your feeling on that, or what was your opinion about all that information, turning that over?

A. About turning it over to?

Q. To the defense or anybody.

A. Well, I thought, I don't know what it's got to do with anything. But I knew Ralph Lape. **I didn't know he was a pervert until I got his computer.**

(Ex.93 at 38-39)(emphasis added)

……

Q. As far as investigating the crime was concerned, you didn't find anything on that computer, you didn't find anything on that computer that would have linked Mark Gill up with that child pornography, correct?

A. No. And in fact, I think I looked to see if I could figure out if it was someone else besides Ralph Lape. But if I remember right, seemed like the dates that I found that the – that the child pornography was created – because the regular porn just, you know, doesn't matter. But seemed like it was back in the – earlier in the spring or something before Mark Gill was supposed to have

moved in with him. So I assume that it was Gill – I mean Ralph Lape or someone in Ralph Lape's house at his computer doing it.

Q. Okay. Now that child pornography being a crime, if you had been able to connect Mark Gill up with it, you would have told Morley [Swingle] about that, wouldn't you?

A. Probably, yes.

Q. Because you would have said, here's another charge that –

A. Not that it would matter when you're facing capital murder, but yeah. I've added on things like that before on serious cases, and I would have told Morley about it then, yes. If I would have found that it was connected to Mark Gill or –

Q. Or Justin Brown, for that matter?

A. Or someone else. Right. Right.

(Ex.93 at 48-49).

Despite James' testimony, the 29.15 judge signed the A.G.'s findings that the state could credibly argue Gill was responsible for Lape's computer's sexual content(29.15L.F.514,521-22,526,532-33,535). In *Worthington v. Roper*,2009WL878704 *20,27,28,31(E.D.,Mo.2009), the District Court refused to defer to state court "findings" because they were unsupported by the factual record in the death sentenced petitioner's habeas action. The District Court then independently reviewed Worthington's claims because of that deficiency. *Id*.20,27,28,31. This Court should not sanction "findings" unsupported by the factual record. *Worthington*.

All of respondent's assertions that someone other than Lape could have been responsible for Lape's computer's contents is refuted by its trial evidence Lape had lived alone(T.Tr.636). The 29.15 evidence showed the sexual content that was placed on Lape's computer was put there before Gill began living with Lape(*See* App.Br.78-82).

If the state had known about Lape's computer's child pornography prior to his death and had prosecuted him, it would undoubtedly have relied on James' findings that Lape was responsible for all Lape's computer's sexual contents and that James had concluded Lape was "a pervert."

This Court should reverse and remand with directions that Gill's 29.15 be reheard by a different judge to exercise independent judgment and not just sign the A.G.'s findings.

## CONCLUSION

For all the reasons discussed in the original and reply briefs this Court should grant the following. Points I, II, III, and V - new guilt and penalty phases. Points VI and VII - a new penalty phase. Point IV - remand for a new 29.15 hearing, before a new judge to exercise independent judgment and not just sign the A.G.'s findings. Point VIII – impose life without parole.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,728 words, which does not exceed twenty-five percent of the 31,000 words (7,750) allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in August, 2009. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief with brief appendix and a floppy disk containing a copy of this brief were mailed postage prepaid this 26th day of August, 2009, to Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

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William J. Swift

# APPENDIX

# APPENDIX TO BRIEF CONTENTS