IN THE
MISSOURI SUPREME COURT

MICHAEL TAYLOR,	**)**	
	)	
Appellant,	**)**	
	)	
vs.	**)**	**No. SC 88063**
	)	
STATE OF MISSOURI,	**)**	
	)	
Respondent.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE LUCY D. RAUCH, JUDGE

APPELLANT'S REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

***RULES*:**

***OTHER*:**

JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

Both original statements are incorporated here.

POINTS RELIED ON

I.

DRESSELHAUS MEMO

The motion court clearly erred rejecting respondent prejudicially withheld Dresselhaus' Ex.2 memo that would have led to impeaching respondent's critical witness, Perschbacher, for falsely accusing Police Deputies Steck and Ainley of crimes because:

A. Steck's and Ainley's testimony was admissible under *State v. Long* as prior untruthful acts of Perschbacher showing Perschbacher's bad reputation for truthfulness;

B. Wolfrum and Turlington testified they would have called Steck and Ainley, as well as Highway Patrol Colonel Stottlemyre, and wanted to impeach Perschbacher with Ahsens' leniency letter and Dresselhaus' destruction of Perschbacher's letters so they did not believe Perschbacher was entirely and adequately discredited;

C. Wolfrum's and Turlington's satisfaction with having shown Perschbacher's racism does not establish Perschbacher was sufficiently discredited because Ahsens argued pretrial and in penalty closing Perschbacher's racism was irrelevant because Michael's cellmate victim was African-American;

D. Ahsens represented he had disclosed "<u>everything</u>" on Perschbacher and at Ahsens' 29.15 testimony he admitted <u>knowingly</u> withholding Ex.2;

E. Ahsens argued Perschbacher was the reason to believe respondent's experts and Perschbacher supported death;

F. Ahsens wrote Perschbacher a leniency letter "<u>dictate[d</u>]" by "<u>fundamental fairness</u>," three weeks after trial and one month before sentencing, because Perschbacher was "<u>helpful"</u> and "<u>aided"</u> respondent;

G. Ahsens testified at the 29.15 he was "being kind" to Perschbacher in his leniency letter, but this was only after two other capital cases Ahsens tried were reversed because he was caught having withheld critical evidence and Ahsens' newly formulated purported generosity towards Perschbacher is contrary to his closing arguments relying on Perschbacher's <u>credibility</u> and his leniency letter; and

H. The 29.15 court failed to exercise independent judgment when it signed respondent's findings Perschbacher was sufficiently impeached and unbelievable because that directly contradicts Ahsens' closing arguments and leniency letter and demonstrates a disregard for fairness and the search for truth.

State v. Long,140S.W.3d27(Mo.banc2004);

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

State v. Cleveland,583S.W.2d263(Mo.App.K.C.D.1979);

State v. Phillips,940S.W.2d512(Mo.banc1997).

II.

PERSCHBACHER'S FALSE INFORMATION VIOLATIONS

The motion court clearly erred denying counsel was ineffective for failing to impeach Perschbacher with his Corrections records showing he had many providing false information violations and for failing to call Corrections officials Armontrout, Rhodes(Lawson), Contis, Silvy, Dicus, Reeves, and Hall to testify about them because Perschbacher's false information violations and these witnesses' testimony were admissible under *State v. Long* as prior acts of untruthfulness to show Perschbacher's bad reputation for truthfulness. Counsel's failure to impeach Perschbacher with his false information violations was prejudicial because counsel told the trial court they especially needed those portions of Perschbacher's Corrections file that contained violations for providing false information because that type of impeachment was especially powerful impeachment.

State v. Long,140S.W.3d27(Mo.banc2004);

State v. McCarter,883S.W.2d75(Mo.App.,S.D.1994).

V.

PATROL COLONEL STOTTLEMYRE - IMPEACH PERSCHBACHER

The motion court clearly erred denying counsel was ineffective for failing to call Highway Patrol Colonel Stottlemyre to impeach Perschbacher's trial assertions that he helped solve a Tarkio murder by providing the police the location where the victim's body could be recovered and that the body was found "exactly where" Perschbacher told the police it would be because Stottlemyre would have testified Perschbacher had nothing to do with recovering the victim's body and a high school hunter found the body.

Kenley v. Armontrout,937F.2d1298(8thCir.1991).

XVI.

IMPROPER COMPETENCY EVIDENCE

The motion court clearly erred denying counsel was ineffective for failing to object to guilt evidence from Scott that he found Michael competent to proceed in the prior case and that Vlach found Michael competent to proceed here in that §552.020.14 prohibits introducing any finding of competency to proceed and the jury knew the trial court for each case had found Michael competent to proceed based on Scott's and Vlach's testimony because Michael could not have been convicted in the prior case and on trial here had each trial court not found him competent to proceed.

Anderson v. State,196S.W.3d28(Mo.banc2006);

State v. McCarter,883S.W.2d75(Mo.App.,S.D.1994);

Section 552.020.14.

XVII.

MICHAEL IS SCHIZOPHRENIC AND NOT A FAKER

The motion court clearly erred denying counsel was ineffective for failing to call experts Peterson, Gelbort, and Moldin to establish Michael is genuinely schizophrenic because Moldin believed all of Michael's 1992 I.Q. scores together suggested possible cognitive impairments and Gelbort's neuropsychological testing did not assess for mental retardation such that these witnesses' testimony on Michael's I.Q. scores were not harmful as I.Q. scores must be considered with adaptive functioning in deciding on mental retardation.

Johnson v. State,102S.W.3d535(Mo.banc2003).

XVIII.

DR. CAUL - MICHAEL IS MENTALLY RETARDED AND SCHIZOPHRENIC

The motion court clearly erred denying counsel was ineffective for failing to call Dr. Caul and for not requesting a mental retardation instruction because Caul would not have expressed any opinions about Michael's competency to proceed in violation of §552.020.14 and Caul would have provided the evidence lacking at trial needed for a mental retardation instruction.

Johnson v. State,102S.W.3d535(Mo.banc2003);

Section 552.020.14.

ARGUMENT

I.

DRESSELHAUS MEMO

The motion court clearly erred rejecting respondent prejudicially withheld Dresselhaus' Ex.2 memo that would have led to impeaching respondent's critical witness, Perschbacher, for falsely accusing Police Deputies Steck and Ainley of crimes because:

A. Steck's and Ainley's testimony was admissible under *State v. Long* as prior untruthful acts of Perschbacher showing Perschbacher's bad reputation for truthfulness;

B. Wolfrum and Turlington testified they would have called Steck and Ainley, as well as Highway Patrol Colonel Stottlemyre, and wanted to impeach Perschbacher with Ahsens' leniency letter and Dresselhaus' destruction of Perschbacher's letters so they did not believe Perschbacher was entirely and adequately discredited;

C. Wolfrum's and Turlington's satisfaction with having shown Perschbacher's racism does not establish Perschbacher was sufficiently discredited because Ahsens argued pretrial and in penalty closing Perschbacher's racism was irrelevant because Michael's cellmate victim was African-American;

D. Ahsens represented he had disclosed "everything" on Perschbacher and at Ahsens' 29.15 testimony he admitted knowingly withholding Ex.2;

E. Ahsens argued Perschbacher was the reason to believe respondent's experts and Perschbacher supported death;

F. Ahsens wrote Perschbacher a leniency letter "dictate[d]" by "fundamental fairness," three weeks after trial and one month before sentencing, because Perschbacher was "helpful" and "aided" respondent;

G. Ahsens testified at the 29.15 he was "being kind" to Perschbacher in his leniency letter, but this was only after two other capital cases Ahsens tried were reversed because he was caught having withheld critical evidence and Ahsens' newly formulated purported generosity towards Perschbacher is contrary to his closing arguments relying on Perschbacher's credibility and his leniency letter; and

H. The 29.15 court failed to exercise independent judgment when it signed respondent's findings Perschbacher was sufficiently impeached and unbelievable because that directly contradicts Ahsens' closing arguments and leniency letter and demonstrates a disregard for fairness and the search for truth.

Perschbacher is a snitch witness. Respondent claims that was made "obvious at trial"(Resp.Br.37). While the jury learned Perschbacher was a snitch, it was not made "obvious" what an unreliable liar snitch Perschbacher is. In fact,

Ahsens considered Perschbacher so reliable he argued the jury should convict and sentence Michael to death because of Perschbacher's testimony(Tr.1452-56,1555).[1] The following exchange, from Wolfrum's Perschbacher cross-examination, is illustrative of how Perschbacher was not shown to be the liar that he is:

> Q. But over the years you claim a lot of people have confessed to you [on murder cases]?
>
> A. Oh, they did. I don't claim they did.

(Tr.1277). Perschbacher's testimony left the **unrefuted impression** he was a **reliable** snitch. Jailhouse snitch testimony is among the leading causes of wrongful capital convictions with such witnesses' testimony later discovered as false. *Report of The [Illinois] Governor's Commission On Capital Punishment, George H. Ryan Governor*(April 15, 2002) at 122. *See also, State v. Beine*,162S.W.3d483,485(Mo.banc2005)("notorious unreliability of jailhouse snitches"). Michael's conviction and sentence is wrongful because it is premised on an unreliable liar snitch who claimed to have evidence Michael was faking mental illness on the advice of inmate White-Bey.

This case was a battle over whose experts to believe. Ahsens made Perschbacher respondent's pivotal witness in guilt and penalty closing arguments as to why respondent's experts, and not Michael's experts, should be believed and

[1] Ahsens' arguments are in the Appendix bound into this reply brief at A-2-A-7.

why death was appropriate(Tr.1452-56,1555). Ahsens argued Perschbacher's testimony White-Bey had advised Michael to fake mental illness established respondent's experts should be believed, and therefore, Michael was guilty of first degree murder(Tr.1452-56). This Court cannot let stand a conviction and sentence based on the testimony of snitch Perschbacher, who respondent endorsed to the jury as providing the pivotal evidence against Michael, when Ahsens hid a critical memo that would have culminated in calling police officers Steck and Ainley to show Perschbacher is a lying snitch. *See* Illinois Governor's Report and *Beine*.

Michael's counsel believed the success of Michael's defense turned on whether the jury believed Michael's Father of Darkness schizophrenic auditory hallucinations were real or manufactured(Ex.142-pg.28). While counsel did not contest Michael killed his cellmate, they urged the jury to find that he was not guilty by reason of mental disease or defect. Thus, contrary to respondent's assertion that guilt or innocence was undisputed (Resp.Br.22), Michael's guilt or innocence was **the issue** the jury had to decide.

Long Authorizes Extrinsic Evidence Of Any Witness'

Bad Reputation For Truthfulness

Officers Steck and Ainley would have provided evidence Perschbacher has a bad reputation for truthfulness. They would have established Perschbacher's bad reputation for truthfulness through showing Perschbacher had falsely accused them of crimes to Dresselhaus, the same investigator who spoke to Perschbacher about Michael.

Respondent asserts Steck's and Ainley's testimony that Perschbacher had made false accusations of criminal conduct against them to Dresselhaus was inadmissible under *State v. Long*,140S.W.3d27,31-32(Mo.banc2004) because *Long* was limited to evidence of a victim's prior false allegations and *Long* stated evidence of prior misconduct is inadmissible(Resp.Br.22). This Court's *Long* analysis began:

> Missouri law allows a party to attack the credibility of witness by demonstrating the witnesses' bad character for truth and veracity.

Long,140S.W.3d at 30. *See, also, State v. Cleveland*,583S.W.2d263,266 n.5(Mo.App.K.C.D.1979)(proof of a witness' "general bad character" is not admissible, but bad reputation for truthfulness is admissible). "If [a witness] cannot be trusted to make a truthful report to authorities, the jury may reasonably infer that [the witness] cannot be trusted on the witness stand." *State v. Williams*,492S.W.2d1,6(Mo.App.,St.L.D.1973).

This Court concluded Long, who was convicted of sexual assault, should have been allowed to call witnesses to testify the victim had made prior false sexual assault accusations because that went to the victim's bad reputation for truthfulness. *Long*,140S.W.3d at 30-32. This Court expressly did not limit *Long* to challenging a victim's reputation for truthfulness and did just the opposite noting 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**.

Long,140S.W.3d at 30-31(emphasis added). Under *Long*, evidence of a **witness**' prior false statements are admissible as evidence of bad reputation for truthfulness and that evidence can include calling witnesses to establish that reputation.

In *Long*, this Court rejected respondent's argument that what the defendant was offering constituted extrinsic evidence of bad conduct. *Id.*30. Because respondent's arguments are the same as in *Long*, they must be rejected. The evidence that could have been offered here was evidence of Perschbacher's **bad reputation for truthfulness**.

Michael's case is unlike *Rousan v. State*, 48S.W.3d576(Mo.banc2001)(Resp.Br.22). It was not error to quash a subpoena for the personnel files of the officers who interrogated Rousan. *Id.*589-90. They did not have to be disclosed because there was no showing the officers' files went to their reputation for truthfulness. *Id.*589-90. In contrast, Police Officers Steck and Ainley would have established that Perschbacher had made false allegations against them to Dresselhaus, the same investigator who spoke to Perschbacher about Michael. Steck and Ainley's testimony was not collateral because it went to Perschbacher's reputation for truthfulness.

Williams v. State,168S.W.3d433,441(Mo.banc2005) is, likewise, irrelevant (Resp.Br.22) because there the evidence did not go to witness Cole's reputation for truthfulness. *Williams v. State* is noteworthy because it explained that under

Long that "a **witness**," not just a victim, may be impeached with extrinsic evidence that shows bad reputation for truthfulness. *Id.*441. Evidence Cole was a domestic abuser and drug user was general bad character evidence and did not go to Cole's bad reputation for truthulness. *Id.*441. *See Cleveland, supra*.

Counsel Wanted To Call Steck And Ainley

Counsel testified they would have wanted Ex.2, to interview Steck and Ainley, to confront Perschbacher with his lies about them, and to call them to impeach Perschbacher(Ex.118A-pgs.133-39;Ex.118C-pg.15-16;29.15Tr.522-25). Turlington's testimony included:

> Q. And would you, as the defense counsel, have wanted the jury to know that Scott Perschbacher had made these false claims against a law-enforcement officer?
>
> A. Yes.
>
> Q. Would you have wanted to call Officer Steck to testify that Scott Perschbacher's claims about him were false?
>
> A. Yes.

(Ex.118A-pg.135).

****

> Q. And would you, as defense counsel, have wanted to confront Scott Perschbacher at trial about making false claims about Officer Ainley?
>
> A. Yes.

Q. And would you, as defense counsel, have wanted the jury to know that Scott Perschbacher made false claims about Officer Ainley?

A. Yes.

Q. And would you, as defense counsel, have wanted to call Officer Ainley as a witness to testify that Scott Perschbacher's claims about him were false?

A. Yes.

(Ex.118A-pg.135-36).

Similarly Wolfrum testified:

Q. Would the defense have wanted to confront Scott Perschbacher at trial about making false claims about Officer Steck?

A. Well, that's a hard question to answer for only this reason. I mean, I don't think you would want to confront him if he was going to say I said that and it's true, and, yes, that's the absolute truth. If it's going to stop there, maybe not.

Q. Would you have wanted to call Officer Steck to testify that the claims about him made by Scott Perschbacher were false?

A. If you could do that, yes. I mean that's why I was qualifying my answer.

(29.15Tr.523).

****

Q. And would you, as defense counsel, have wanted the jury to know that Scott Perschbacher made false claims about this officer [Officer Ainley] to Mr. Dresselhaus?

A. If it could be established that he had made false claims, you would want the jury to know that.

Q. Would you have wanted to call Officer Ainley to testify at trial that Scott Perschbachermade false claims about him?

A. I believe so.

(29.15Tr.525).

Respondent asserts that because Michael's counsel testified they were very pleased with themselves about the quality of Wolfrum's Perschbacher cross-examination and they perceived it as compelling that makes Ahsens' withholding Ex.2 non-prejudicial(Resp.Br.20-21). That argument ignores that both of Michael's attorneys testified they wanted the evidence Officers Steck and Ainley could have provided and **they would have called them to impeach Perschbacher**. What counsels' testimony about Steck and Ainley establishes is that while they were pleased with the caliber of Wolfrum's work, that effort would have been made that much more compelling had they had Steck and Ainley's evidence.

Moreover, contrary to respondent's findings, that the motion court signed, and in keeping with respondent's disregard for fairness and truth, both counsel did not perceive Wolfrum's Perschbacher cross as so superlative and so stellar that

they did not want to present other evidence to impeach Perschbacher. Wolfrum and Turlington testified they would have wanted to impeach Perschbacher with evidence that the head of the Highway Patrol, Colonel Stottlemyre, provided that Perschbacher fabricated he was responsible for finding the victim's body in a Tarkio murder(Ex.118C-pg.7;29.15Tr.652-53). *See* Point V. Wolfrum and Turlington testified that if they had known Ahsens' intention to write the leniency letter,[2] then they would have cross-examined Perschbacher about it(Ex.118A-pgs.238-39;29.15Tr.642-44). *See* Point VI. Wolfrum and Turlington testified that had they known Dresselhaus had destroyed letters from Perschbacher they would have wanted the jury to know that because the reasonable inference was respondent was hiding evidence(Ex.118A-pg.140;29.15Tr.533). *See* Point XII.

The prejudice to Michael in Ahsens withholding Ex.2, as to compelling impeachment of Perschbacher that was not done, is underscored by the two police officers, Steck and Ainley, not being called. Moreover, the Highway Patrol's Superintendent Colonel Stottlemyre (Point V) could have impeached Perschbacher. This was only compounded by counsel not utilizing the impeachment that the Potosi law enforcement personnel who know Perschbacher is incredible from their day-to-day contact with him could have provided(Point VIII). If Ahsens had not hid Ex. 2, then Steck and Ainley would have been witnesses. Moreover, except for counsels' ineffectiveness numerous other law

[2] Ahsens' leniency letter is in the Appendix bound into this reply brief at A-1.

enforcement personnel, including the head of the Highway Patrol, would have been witnesses. A truly compelling impeachment of Perschbacher could have been done through the jury hearing from all these law enforcement personnel, who because of their law enforcement status would have been especially credible.

Counsel were unable to call Steck and Ainley because Ahsens represented to the court and counsel he had disclosed **"everything"** he had on Perschbacher(Tr.15)(emphasis added). Despite having affirmatively represented he had disclosed "everything," Ahsens admitted in his 29.15 testimony he **knowingly** withheld Ex.2 which would have led to Steck and Ainley and their testimony(29.15Tr.303-04). Moreover, Dresselhaus testified he and Ahsens had discussed Ex.2's contents pre-trial(29.15Tr.281).

Cross-Examination Did Not Seriously

Undermine Perschbacher's Credibility

Respondent points to some of Wolfrum's cross-examination to show Perschbacher was shown to be incredible(Resp.Br.20). On direct, Ahsens had already elicited Perschbacher's criminal history(Tr.1257-58), so Wolfrum's cross-examination (Tr.1271-74) on that subject added nothing.

Perschbacher was not impeached with his psychiatric treatment(Resp.Br.20). Perschbacher denied he had been treated at St. Anthony's psychiatric ward(Tr.1281). In fact, the 29.15 showed Perschbacher had escaped from there(Ex.14-pg.4). Perschbacher only acknowledged having psychiatric prescriptions without any follow-up(Tr.1282). That must be contrasted to the

29.15 evidence showing a psychiatrist has diagnosed Perschbacher as having bipolar disorder, attention deficit disorder, and anxiety attacks for which he is prescribed Lithium, Risperdal, and Ativan(Ex.73-pg.26;Ex.123-pg.30;Ex.129-pg.7-8; Ex.7B-pgs.373-77).

Cross-examination of Perschbacher about his conduct violations (Resp.Br.20) was limited to showing Perschbacher had gotten many violations for bad behaviors and Perschbacher denying violations his corrections records showed he had(Tr.1282-85). Wolfrum's questioning did not show how Perschbacher's violation history established a bad reputation for truthfulness and that Perschbacher denied violations his corrections records showed he had. *See* Original Brief Points II and X.

What is significant about Perschbacher's contact with the state and him having asked for favorable treatment (Resp.Br.20) is Perschbacher **denied** he was getting any favorable treatment for testifying against Michael(Tr.1285-89). Wolfrum began that line of inquiry with the following:

> Q. And you certainly wouldn't object if testifying in this case did you some good on your time?
>
> MR. AHSENS: I'm going to object to that, Your Honor, that's irrelevant and immaterial. Of course he wouldn't object **if that were the case**.

(Tr.1285)(emphasis added). In his objection, Ahsens' created the impression for the jury respondent would not seek to help Perschbacher on his cases because of

his testimony against Michael. Ahsens' reinforced that impression on redirect eliciting: (1) Perschbacher sought favors from Ahsens' office, but got none; and (2) any deals Perschbacher got from Jefferson County were the product of Perschbacher's attorney's work and not Ahsens' or Rupp's intervention(Tr.1294-95). Moreover, Ahsens hammered home that impression in penalty rebuttal, arguing Perschbacher got a good deal, but Perschbacher testified Ahsens and Rupp had nothing to do with it(Tr.1555). After having created that impression, three weeks after the jury's death verdict and one month before Michael's sentencing, Ahsens wrote the Jefferson County Prosecutor advocating leniency for Perschbacher because his testimony:

> **"was helpful in attacking the defendant's claim of mental disease or defect and aided us in successfully prosecuting the case."**

(Ex.63-pg.44)(emphasis added)(Ex.7A-pg.28;Ex.7B-pgs.373-77). Ahsens continued: "**fundamental fairness dictates** I inform you of his cooperation for whatever weight you think it deserves"(Ex.63-pg.44)(emphasis added).

Respondent seeks to make much that counsel testified they were especially pleased in having shown Perschbacher's racism (Resp.Br.20-21). Counsel should have known showing Perschbacher's racial animus gave them little towards discrediting Perschbacher. When counsel sought Perschbacher's Corrections file pretrial, looking for racial animus evidence, Ahsens opposed disclosure arguing: "the victim is black, the defendant is black. So, I'm having a hard time understanding why he has a particular bias against one black man over

another…."(11/12/02Mot.Tr.46). In penalty closing argument, Ahsens urged the jury to rely on Perschbacher's testimony to impose death, despite Perschbacher's racial animus, arguing:

> Apparently he's [Perschbacher] not fond of black people. All right. If that's the case why does he care if a black man [victim Shackrein Thomas] is killed? **There is no reason for him to lie.**

(Tr.1555)(emphasis added). Because of Ahsens' pretrial arguments, counsel should have known showing Perschbacher's racial animus gave them little and Ahsens drove that point home in closing argument.

Throughout respondent's brief it relies on testimony from counsel about how they believed Wolfrum's cross-examination was compelling.[3] Counsels' opinions about their perceived success are irrelevant. Ahsens argued the jury should find Michael guilty of first degree murder and reject not guilty by reason of mental disease or defect **because Perschbacher was the reason** why the State's experts, and not Michael's experts, should be believed on whether Michael genuinely suffered from a mental illness or was a faking malingerer(Tr.1452-56). Ahsens was so confident in Perschbacher's **credibility** that he characterized

[3] Because it is impossible to respond to all Points where respondent has relied on Michaels' counsels' perceptions that Wolfrum did a commendable job discrediting Perschbacher, the responsive arguments in this Point are equally applicable to other Points.

Perschbacher in guilt argument as "a bonus" who came to Ahsens' attention when Pereschbacher wrote to Ahsens' investigator, Dresselhaus(Tr.1453-54). Ahsens' confidence in Perschbacher's crediblity was reasserted in penalty argument when he argued: "There is no reason for him to lie."(*See supra* Tr.1555). Ahsens' was so grateful for Perschbacher's testimony that he wrote Perschabacher a leniency letter stating Perschbacher's testimony was "**helpful**" and "**aided**" Ahsens in discrediting Michael's defense of mental disease or defect and that Ahsens' felt compelled to write because "**fundamental fairness dictate[d]**" he do so(Ex.63-pg.44)(Ex.7A-pg.28;Ex.7B-pgs.373-77). In light of Ahsens' having relied on Perschbacher so much as the **credible** witness to the jury and then did the same with the Jefferson County prosecutor, there can be only one conclusion - counsel did not act as reasonable counsel in their efforts to discredit Perschbacher and those efforts were inadequate. *See State v. McCarter*, 883S.W.2d75,78(Mo.App.,S.D.1994)(counsel's strategy must be objectively reasonable and sound). Moreover, counsels' perceptions that Wolfrum's Perschbacher cross-examination was compelling simply cannot be viewed as accurate in light of Ahsens' closing arguments relying on Perschbacher and Ahsens' leniency letter.

Respondent's *Brady* violation here requires a new trial for the same reasons a new penalty phase was ordered in *State v. Phillips*,940S.W.2d512(Mo.banc 1997). In *Phillips*, respondent withheld an audiotape containing evidence an accomplice, and not Phillips, was responsible for dismembering the victim.

Id.516-18. The only aggravator found against Phillips was based on dismemberment. *Id*.517. Perschbacher was respondent's critical witness for why its experts should be believed. Ahsens argued Perschbacher was the "bonus" who made respondent's experts the ones to believe and not Michael's experts(Tr.1453-54) and whose experts to believe was the only issue the jury had to decide in guilt. In penalty, Ahsens again relied on Perschbacher's testimony to support death arguing: "There is no reason for him to lie."(Tr.1555). Steck and Ainley, like the undisclosed audiotape in *Phillips*, would have established why respondent's portrayal of the facts was not the truth.

Respondent's Disregard For Fairness And Truth

Respondent has argued Michael was not prejudiced because Ahsens testified he did not believe Perschbacher came across as credible(Resp.Br.20 relying on 29.15Tr.339). Ahsens testified as follows:

Q. And in the letter you indicate that you came to this determination that Mr. Perschbacher's testimony was "helpful to the prosecution"?

A. Yes, that's what I wrote, although probably I was being kind. (29.15Tr.339).

Respondent vigorously opposed disclosing Ex.2 to 29.15 counsel(29.15Tr.268-69,283-84). When Ahsens testified, two other death penalty cases he tried had been reversed because he had done the same thing he did here - withheld critical evidence from defense counsel(*See* Ex.76-*Barton* new trial;Ex.77-*Tisius* new penalty hearing;29.15Tr.306-20). The reason respondent so

vigorously opposed revealing Ex. 2 was it knew if Ex.2's contents came to light that could show Ahsens had again withheld critical evidence and that would result in reversing another Ahsens capital case. When Ahsens testified, he knew he needed to try to make it appear Perschbacher was not the linchpin Ahsens had made Perschbacher out to be to the jury and to the Jefferson County prosecutor. That is why Ahsens claimed, in his newly formulated purported generosity towards Perschbacher, that he was "being kind" to Perschbacher in his leniency letter as to Perschbacher's role in Michael's case.

Respondent claims it has not taken inconsistent positions as to Perschbacher from Michael's trial to his 29.15(Resp.Br.35-36). According to respondent, it believed and continues to believe Perschbacher's testimony was truthful, but Perschbacher's testimony just was incredible(Resp.Br.35-36). Ahsens' guilt and penalty arguments and his Jefferson County leniency letter show Ahsens believed during trial and within weeks of trial Perschbacher was a **credible** witness, not just truthful. If Ahsens had thought that Perschbacher had come across incredible then, Ahsens would not have made Perschbacher's testimony such a critical piece in closing arguments. Moreover, Ahsens would not have written his leniency letter and said the things he did there, if Perschbacher had been incredible. What has changed, as to respondent's portrayal of Perschbacher's credibility, is that Ex.2 came to light and with it Officers Steck's and Ainley's testimony, as well as numerous other compelling areas that counsel could have and should have used to impeach Perschbacher, but counsel just failed

to do without any justifiable reasonable strategy. *See* Points II,III,IV,V,VII,VIII, and X and *McCarter, supra*.

In *Smith v. Groose*,205F.3d1045,1047,1051-53(8thCir.2000), the Court reversed a thirteen year old murder conviction where the State of Missouri obtained convictions against multiple defendants for the same offense while relying on factually contradictory inconsistent evidence and theories. The contradictory positions constituted "foul blows" violating due process. *Id*.1051. Due process was violated because the inconsistent positions went to "the core" of respondent's case. *Id.*1052. The *Smith* Court reasoned: '"our system of the administration of justice suffers when any accused is treated unfairly."' *Id*.1052(*quoting Brady v. Maryland*,373U.S.83,87(1963)).

In respondent's 29.15 findings that the motion court signed, and in its brief, respondent has claimed Perschbacher was incredible and disbelieved. In contrast, Ahsens argued to the jury in guilt and penalty, that Perschbacher provided the critical **credible** evidence for convicting Michael of first degree murder and imposing death(Tr.1452-56,1555). Ahsens thought Perschbacher was such a credible witness that he wrote Perschbacher's leniency letter because Perschbacher was "**helpful**" and "**aided**" Ahsens in discrediting Michael's defense of mental disease or defect and Ahsens' felt compelled to write because "**fundamental fairness dictate[d**]" he do so.(Ex.63-pg.44)(Ex.7A-pg.28;Ex.7B-pgs.373-77). If Ahsens had not **believed** Perschbacher had been a **credible** witness, then "**fundamental fairness**" would not have "**dictate[d**]" Ahsens write the leniency

letter. Respondent's inconsistent positions on Perschbacher's credibility is a "foul blow" that goes to "the core" of its case and violates due process. *See Smith*.

The motion court's act of signing respondent's findings, that contradicted Ahsens' assessment of Perschbacher's credibility until it was exposed that Ahsens knowingly withheld Ex.2 and falsely represented to the court he had disclosed "**everything**" he had on Perschbacher, likewise, violates due process. In *State v. Kenley*,952S.W.2d250,281(Mo.banc1997), Judge Stith dissented noting that when a 29.15 court signs findings there should be evidence it exercised independent judgment. Before the motion court signed respondent's 71 page findings it directed respondent to insert the word "not" where it was obviously omitted because otherwise respondent's findings would have granted Michael relief and to delete one sentence relating to 29.15 expert Dr. Vlietstra(29.15L.F.865-68). While those actions show the 29.15 judge **read** respondent's findings, that action does not establish she exercised **independent judgment**. Signing respondent's findings repeatedly rejecting the claims involving Perschbacher on the grounds Perschbacher was incredible(29.15L.F.865-68,871-73,875,877-78,926-35) when Ahsens relied on Perschbacher as credible in closing arguments and wrote his leniency letter because Perschbacher was so effective shows a lack of independent judgment. *See Kenley* (Stith, J. dissenting).

Morover, one factor Judge Stith's *Kenley* dissent focused on to conclude there was a lack of independent motion court judgment when it signed respondent's findings, was the movant's 29.15 experts were uniformly found

incredible. *Kenley*,952S.W.2d281,284. The same happened here and that is what the Attorney General always does. *See*, Points XI, XVII, XVIII, and XXII.[4]

To permit such findings to stand in the face of respondent's actions renders Michael's 29.15 hearing a meaningless illusory formality devoid of any sense of due process. *See Smith*. That is true because the findings are the Attorney General's findings and not a judge exercising her responsibility and obligation of independent judgment as a neutral arbiter of the facts.

This Court should order a new trial.

[4] The one sentence the motion court directed the Attorney General to remove from its findings on Dr. Vlietstra stated her testimony would have taken too long(29.15L.F.865-68). The Attorney General was not directed to remove its finding Vlietstra was incredible(29.15L.F.917-18).

II.

PERSCHBACHER'S FALSE INFORMATION VIOLATIONS

The motion court clearly erred denying counsel was ineffective for failing to impeach Perschbacher with his Corrections records showing he had many providing false information violations and for failing to call Corrections officials Armontrout, Rhodes(Lawson), Contis, Silvy, Dicus, Reeves, and Hall to testify about them because Perschbacher's false information violations and these witnesses' testimony were admissible under *State v. Long* as prior acts of untruthfulness to show Perschbacher's bad reputation for truthfulness. Counsel's failure to impeach Perschbacher with his false information violations was prejudicial because counsel told the trial court they especially needed those portions of Perschbacher's Corrections file that contained violations for providing false information because that type of impeachment was especially powerful impeachment.

In *State v. Long*,140S.W.3d27,31-32(Mo.banc2004), this Court held evidence of a witness' bad reputation for truthfulness is admissible and that evidence can include calling witnesses to establish that bad reputation. *See* Reply Brief Point I discussion. The many incidents of Perschbacher having conduct violations for providing false information and the witnesses who could have testified about those occurrences were admissible under *Long* because they go to Perschbacher's bad reputation for truthfulness. Respondent asserts Perschbacher's false information violations are evidence of prior bad acts, and therefore,

inadmissible(Resp.Br.24-25). As discussed in reply brief Point I, respondent's same argument was rejected in *Long*.

Trial counsel wanted to use Perschbacher's violations for providing false information, but simply neglected to do it. When counsel did not get all of Perschbacher's Corrections records during trial, Turlington argued it was critical to have those dealing with Perschbacher's prison conduct because violations for providing false information would be especially powerful impeachment(Tr.856). Counsel's strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). There was no objectively reasonable and sound reason for failing to cross-examine Perschbacher about violations for providing false information because they would have established his bad reputation for truthfulness. *See Long*.

According to respondent, Wolfrum was correct in not trying to offer evidence of Perschbacher's conduct violations for giving false information because he could not introduce collateral extrinsic evidence(Resp. Br.25). Respondent relies on Wolfrum's testimony: "I'm not sure that if there had been an objection that I can cross-examine inmates with conduct violations. I mean, they are not like prior convictions"(Resp.Br.25 quoting 29.15Tr.581). Conduct violations for giving false information and corrections officials who could testify about them were admissible under *Long* to show Perschbacher's bad reputation for truthfulness. That Turlington had argued having Perschbacher's violations for providing false information was valuable impeachment establishes any decision

Wolfrum made to not use Perschbacher's false information violations was not reasonable. *See McCarter*. Evidence Perschbacher had a bad reputation for truthfulness is not collateral. *See Long*. The relevance of this evidence was not in whether Perschbacher was guilty of prison violations(Resp.Br.24-25), but that he had violations for providing false information which establish Perschbacher's bad reputation for truthfulness.

As it did in Point I, respondent argues Perschbacher was incredible and adequately impeached with his racial animus(Resp.Br.23,26 and relying on Ex.142-pg.27). As discussed in greater detail in reply brief Point I, Ahsens' closing arguments relying on Perschbacher as the credible witness and Ahsens' Jefferson County prosecutor leniency letter establish Ahsens and respondent believed Perschbacher had been a very effective **credible** damaging witness.

A new trial is required.

V.

PATROL COLONEL STOTTLEMYRE - IMPEACH PERSCHBACHER

The motion court clearly erred denying counsel was ineffective for failing to call Highway Patrol Colonel Stottlemyre to impeach Perschbacher's trial assertions that he helped solve a Tarkio murder by providing the police the location where the victim's body could be recovered and that the body was found "exactly where" Perschbacher told the police it would be because Stottlemyre would have testified Perschbacher had nothing to do with recovering the victim's body and a high school hunter found the body.

Respondent's disregard for fairness, truth, and accurate presentation of the record continues.

Counsel did not interview or investigate Stottlemyre(Ex.118C-pg.7;29.15Tr.651,654). Turlington and Wolfrum both testified they would have wanted to impeach Perschbacher with evidence Stottlemyre provided that Perschbacher fabricated he was responsible for finding the victim's body in the Tarkio case(Ex.118C-pg.7;29.15Tr.652-53).

Relying on the trial transcript respondent asserts counsel through strategic questioning sought to create the implication Perschbacher's claims several people confessed to him to murders was unbelievable(Resp.Br.28 relying on Tr.1277-78). Counsel never provided any testimony to support this assertion. Respondent has included a strategy claim trial counsel never embraced.

Failing to interview witnesses relates to preparation and not strategy. *Kenley v. Armontrout*,937F.2d1298,1304(8thCir.1991). Lack of diligence in investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Id*.1304. Because counsel never interviewed or investigated Stottlemyre, they did not make a strategy decision about him(Ex.118C-pg.7;29.15Tr.651-54). *See Kenley*.

Michael's original brief stated the following:

> Stottlemyre, the Highway Patrol's Superintendent, would have testified he investigated **a never solved** Tarkio, Missouri murder for which John Caudill was questioned(29.15Tr.544-50). A high school hunter found the body and it was not found because of any information Perschbacher supplied(29.15Tr.544-49).

See App. Br. at 80(emphasis added here). Perschbacher testified at trial the Tarkio victim's body was found "exactly where I said it would be"(Tr.1278). Perschbacher claimed he "solved" the Tarkio case in the sense that he was responsible for the police being able to find the victim's body. Respondent asserts this claim lacks merit because Perschbacher did not testify he solved the Tarkio case in the sense, as Ahsens cast Perschbacher here, as having "helped" or "aided" in prosecuting the Tarkio case(Resp.Br.29-30). Michael's original brief, quoted *supra*, recited Stottlemyre testified the case was never solved in the sense that someone was successfully prosecuted for the Tarkio murder. Stottlemyre would have provided valuable impeachment as to Perschbacher's claim the victim's body

was found “exactly where I said it would be”(Tr.1278). Stottlemyre would have impeached Perschbacher because Stottlemyre testified a high school hunter found the victim’s body and it was not found because of any information Perschbacher supplied(29.15Tr.544-49).

A new trial is required.

XVI.

IMPROPER COMPETENCY EVIDENCE

The motion court clearly erred denying counsel was ineffective for failing to object to guilt evidence from Scott that he found Michael competent to proceed in the prior case and that Vlach found Michael competent to proceed here in that §552.020.14 prohibits introducing any finding of competency to proceed and the jury knew the trial court for each case had found Michael competent to proceed based on Scott's and Vlach's testimony because Michael could not have been convicted in the prior case and on trial here had each trial court not found him competent to proceed.

Respondent improperly introduced evidence Michael was found competent to proceed in his prior conviction and here. That evidence violated §552.020.14.

Scott testified he found Michael competent to proceed in the prior case (Tr.1188,1212-14). Vlach testified he found Michael competent to proceed here(Tr.1327-28,1361-62;Ex.34).

Section 552.020.14 prohibited Scott's and Vlach's competency to proceed testimony. In *Anderson v. State*,196S.W.3d28,34-35(Mo.banc2006), counsel performed unreasonably when counsel failed to object to the same type testimony heard here, but Anderson was not prejudiced.

Counsel's strategy choices must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). Respondent relies on testimony from Turlington that she wanted competency to proceed evidence

admitted for the jury to understand competency to proceed and not guilty by reason of mental disease or defect are different(Resp.Br.52). This was not a reasonable strategy. *See Anderson*. Scott's and Vlach's testimony Michael was found competent was inadmissible because it can only confuse the jury and was prejudicial. *See* §552.020.14 and Original Brief's cases at 141-142.

Respondent argues §552.020.14 did not prohibit Scott and Vlach's testimony because it prohibits only "a finding" of the court and Scott and Vlach's testimony was not a court finding(Resp.Br.54). The jury knew Michael was convicted of murder in the prior case (Tr.295-96) and he was then on trial for killing his cellmate. The courts' findings Michael was competent to proceed for both cases were in fact introduced when Scott and Vlach testified because the jurors knew Michael could not have been convicted in the prior case and on trial for killing his cellmate unless "the court" in each case had found Michael competent to proceed. Section 552.020.14 prohibited Scott's and Vlach's testimony. To adopt respondent's §552.020.14 argument would nullify that provision's purpose of preventing confusing the jury and directly conflicts with *Anderson*.

A new trial is required.

XVII.

MICHAEL IS SCHIZOPHRENIC AND NOT A FAKER

The motion court clearly erred denying counsel was ineffective for failing to call experts Peterson, Gelbort, and Moldin to establish Michael is genuinely schizophrenic because Moldin believed all of Michael's 1992 I.Q. scores together suggested possible cognitive impairments and Gelbort's neuropsychological testing did not assess for mental retardation such that these witnesses' testimony on Michael's I.Q. scores were not harmful as I.Q. scores must be considered with adaptive functioning in deciding on mental retardation.

Michael's original brief argued Drs. Peterson, Gelbort, and Moldin should have been called because they would have presented compelling evidence demonstrating Michael is genuinely schizophrenic and not a faker/malinger. Respondent claims counsel was not ineffective for failing to call Drs. Gelbort and Moldin because Gelbort testified to an I.Q. of 81, Gelbort did not conclude Michael was mentally retarded, and Moldin testified to an overall I.Q. of low average because their testimony would have refuted Michael's Point XVIII mental retardation claim Dr. Caul should have been called to establish mental retardation(Resp.Br.58 relying on 29.15Tr.62,124,147).

In opening statement, counsel told the jury it would be hearing mental retardation evidence(Tr.779). The trial court did not commit plain error when it did not instruct the jury on mental retardation because the "sparse evidence" of

mental retardation did not support the instruction. *State v. Taylor*,134S.W.3d21,28-29(Mo.banc2004).

In *Johnson v. State*,102S.W.3d535(Mo.banc2003), this Court remanded for a new penalty phase where the jury was to be given the option of not imposing death because of mental retardation. That remand was ordered where there was conflicting evidence on mental retardation. *Id*.538-541. Johnson's case had widely varying I.Q. scores. One expert measured Johnson's I.Q. at 70. *Id*.540. Another expert found a full scale I.Q. of 84, a performance score of 86, and verbal score of 83. *Id*.540. Despite the wide ranging I.Q. scores, this Court concluded "reasonable minds" could differ as to whether Johnson suffered from mental retardation. *Id*.540. The reason a mental retardation finding was possible in *Johnson*, despite an I.Q. score as high as 86, is that §565.030.6 does not have any numerical I.Q. cutoff for determining whether someone is or is not mentally retarded. *Id*.540-41. Also, §565.030.6, requires that in determining whether someone is mentally retarded, such that he is ineligible for death, the person's deficits and limitations in adaptive behaviors be considered. *Id*.540-41.

Moldin testified he had reviewed Michael's 1992 test scores someone else obtained(29.15Tr.61-62). Those showed: (1) verbal I.Q. - below average; (b) performance I.Q. – average; and (c) overall I.Q. - low average "or maybe on the verge of borderline intellectual functioning"(29.15Tr.62). Moldin thought these I.Q. scores **all viewed together** suggested Michael might have cognitive impairments(29.15Tr.62).

Gelbort testified he did not conduct an evaluation of Michael intended to assess for mental retardation(29.15Tr.147-48). Gelbort's neuropsychological evaluation did not include specific testing needed to assess for mental retardation(29.15Tr.148).

Michael's seven year old verbal I.Q. score was 68(Ex.83-pg.38-40;Ex.1-pg.870) and ten year old score 69(Ex.83-pgs.38-40;Ex.1-pg.870). These I.Q. scores were obtained before Michael was ever charged with any offense.

As this Court recognized in *Johnson*, I.Q. scores are not determinative because adaptive functioning is required to be considered under §565.030.6. In fact, there was much impaired adaptive functioning evidence available from Michael's family, friends, and teachers that counsel failed to present. *See* Point XIV.

In *Johnson*, a finding of mental retardation was still possible where there was an I.Q. score of 86, and therefore, Gelbort finding an I.Q. score of 81 would not preclude finding mental retardation. That Gelbort did not find Michael was mentally retarded was not harmful because his testing was not designed to assess mental retardation(29.15Tr.147-48). Moldin's I.Q. finding that all of Michael's 1992 I.Q. scores viewed together suggest the possibility of cognitive impairment (29.15Tr.62) supports finding mental retardation. Gelbort's and Moldin's testimony was not harmful to Michael's mental retardation claim regarding counsels' failure to call Caul. Moreover, Michael's I.Q. scores of 68 and 69, when

he was seven and ten years old respectively, were lower than Johnson's lowest score, *supra*.

Respondent misrepresents what Moldin said about MMPI scores that it relied on at trial through Blanchard and Vlach to claim malingering(Resp.Br.58). Moldin did not admit the validity scores for malingering established Michael scored high for malingering(Resp.Br.58-59 relying on 29.15Tr.84-86). Moldin said that he did not see any inaccuracies in the *scoring* of the MMPI answers, but took issue with the *interpretation* of the scores because of Michael's psychotic history(29.15Tr.84-86). Moldin then explained the scoring could support one of two conclusions: Michael suffered from schizoaffective disorder or he was malingering(29.15Tr.84-86). Moldin had earlier opined Michael suffers from scizoaffective disorder, and therefore, did not endorse Blanchard's and Vlach's interpretation of the MMPI answers(29.15Tr.31-33,38).

A new trial or at minimum a new penalty phase is required.

XVIII.

DR. CAUL - MICHAEL IS MENTALLY RETARDED AND SCHIZOPHRENIC

The motion court clearly erred denying counsel was ineffective for failing to call Dr. Caul and for not requesting a mental retardation instruction because Caul would not have expressed any opinions about Michael's competency to proceed in violation of §552.020.14 and Caul would have provided the evidence lacking at trial needed for a mental retardation instruction.

Respondent asserts Michael's argument counsel should have called Dr. Caul is inconsistent with his argument Drs. Scott and Vlach were prohibited from testifying under §552.020.14(Resp.Br.59). Scott's and Vlach's testimony were objectionable under §552.020.14 because they testified to having found Michael competent to proceed(Tr.1188,1212-14,1327-28,1361-62;Ex.34). *See* Point XVI. Respondent could have properly called Scott and Vlach to testify to such matters as their diagnoses and their supporting reasons, but what Scott and Vlach were prohibited from doing under §552.020.14 was testifying to having found Michael competent to proceed. **Nothing** in Michael's original brief asserted Caul should be allowed to testify to his finding on Michael's competency to proceed. Thus, there is no inconsistency between Michael's arguments as to Caul versus Scott and Vlach.

As it did as to Drs. Gelbort and Moldin, see reply brief Point XVII, respondent relies on an I.Q. score as controlling(Resp.Br.60). That Michael's full scale I.Q. is 76 and falls in the borderline range is not dispositive. *See Johnson v. State*,102S.W.3d535(Mo. banc 2003)(I.Q. 86 score did not foreclose a jury finding mental retardation because §565.030.6 has no numerical I.Q. cut-off and requires considering deficits and limitations in adaptive behaviors and "reasonable minds" could differ as to whether Johnson was mentally retarded). *See* Reply Brief Point XVII. Moreover, Michael's I.Q. scores of 68 and 69, when he was seven and ten years old respectively, were lower than Johnson's lowest score. *See Johnson*,102S.W.3d at 540(I.Q. 70 score).

On direct appeal, the trial court did not commit plain error when it did not instruct on mental retardation because the "sparse evidence" of mental retardation did not support the instruction. *State v. Taylor*, 134S.W.3d21,28-29(Mo.banc2004). Caul's review of Michael's history and own testing placed Michael in the mentally retarded range on some measures(Ex.111-pgs.27,35-36,50-53), and borderline intellectual ability range on others(Ex.111-pgs.29,34,48,51-52). Caul's testimony would have provided the evidence that was lacking to get a mental retardation instruction. If the jury had been instructed on mental retardation, then "reasonable minds" could have concluded Michael was mentally retarded and ineligible for death. *See Johnson*.

This Court should order a new trial or at minimum a new penalty phase.

CONCLUSION

For the reasons discussed in this reply brief and the original brief, Michael Taylor requests the following: Points I, II, III, IV, V, VI, VII, VIII, X, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXIII a new trial; Point VI a remand to allow discovery; Point IX a remand with directions to disclose whether Steck and Ainley were investigated and if so any results; Point XI a new 29.15 hearing before a different judge; Points XIV, XV, XVII, XVIII, XIX, XX, XXII, XXV a new penalty hearing; and Points XXI, XXIV 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 _____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 July, 2007. 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 16th day of July, 2007, to Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

_____
William J. Swift

APPENDIX

APPENDIX TO REPLY BRIEF CONTENTS