

IN THE
MISSOURI SUPREME COURT

DANNY WOLFE,)	
)	
Appellant,)	
)	
vs.)	No. 84259
)	
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CAMDEN COUNTY, MISSOURI
TWENTY-SIXTH JUDICIAL CIRCUIT
THE HONORABLE JAMES P. ANDERTON, JUDGE

APPELLANT'S STATEMENT, BRIEF & ARGUMENT

Melinda K. Pendergraph, MOBar #34015
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone(573) 882-9855
FAX(573) 875-2594

INDEX

	<u>Page</u>
TABLE OF AUTHORITIES.....	3-9
JURISDICTIONAL STATEMENT.....	10
STATEMENT OF FACTS.....	11-14
POINTS RELIED ON.....	15-34
ARGUMENT	
I. Larry Graham.....	35-47
II. Cox’s Hair.....	48-53
III. Hileman.....	54-74
IV. Independent Pathologist.....	75-78
V. Cox is Lying.....	79-91
VI. Misleading the Jury: Cox’s Lies and Other Suspects.....	92-95
VII. Terry Smith.....	96-108
VIII. Activity at Walters	109-113
IX. Challenging Experts	114-120
X. More Evidence of Innocence.....	121-124
XI. Immunity.....	125-129
XII. Statement	130-136
XIII. Evidence of Other Crimes.....	137-141
XIV. Appellate Counsel.....	142-146

XV. Family Asks for Death.....	147-149
XVI. Mitigation.....	150-154
CONCLUSION.....	155

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Alcorta v. Texas</i> , 355 U.S. 28 (1957)	44
<i>Antwine v. Delo</i> , 54 F.3d 1357 (8th Cir. 1995).....	51, 84, 104
<i>Beltran v. Cockrell</i> , 294 F.3d 730 (5th Cir. 2002).....	16, 43, 83
<i>Berger v. United States</i> , 295 U.S. 78 (1935)	107, 127
<i>Blackburn v. Foltz</i> , 828 F.2d 1177 (6th Cir. 1987)	129
<i>Bloomer v. United States</i> , 162 F.3d 187 (2nd Cir. 1998).....	143
<i>Bonner v. State</i> , 765 S.W.2d 286 (Mo. App. W.D. 1989).....	132, 133
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).... 19, 24, 26, 45, 47, 50, 51, 53, 58, 65, 67, 69, 70, 84, 99, 105,	117, 118, 119
<i>Brown v. City of North Kansas City</i> , 779 S.W.2d 596 (Mo. App. W.D. 1989)	29, 127
<i>Burden v. Zant</i> , 24 F.3d 1298 (11th Cir. 1994)	32, 146
<i>Burger v. Kemp</i> , 483 U.S. 776 (1987)	145
<i>Carriger v. Stewart</i> , 132 F.3d 463 (9 th Cir. 1997)	19, 21, 70, 84
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973).....	104
<i>City of Springfield v. Thompson Sales Company</i> , 71 S.W.3d 597 (Mo. banc 2002).....	140
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986)	24, 104
<i>Crivins v. Roth</i> , 172 F.3d 991 (7th Cir. 1999).....	69
<i>Cuyler v. Sullivan</i> , 446 U.S. 335 (1980)	32, 145, 146
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974).....	61

<i>Deatrick v. State</i> , 392 N.E.2d 498 (Ind. App. 1979).....	67
<i>Deck v. State</i> , 68 S.W.3d 418 (Mo. banc 2002)	73, 144
<i>Dilosa v. Cain</i> , 279 F.3d 259 (5th Cir. 2002).....	17, 51
<i>Dixon v. Snyder</i> , 266 F.3d 693 (7th Cir. 2001).....	128, 129
<i>Driscoll v. Delo</i> , 71 F.3d 701 (8th Cir. 1995).....	21, 83, 84, 91
<i>East v. Johnson</i> , 123 F.3d 235 (5th Cir. 1997).....	58
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982).....	152, 153
<i>Edwards v. Arizona</i> , 451 U.S. 477 (1981)	134
<i>Evitts v. Lucy</i> , 469 U.S. 387 (1985).....	32, 107, 129, 133, 143, 144
<i>Funk v. Commonwealth</i> , 842 S.W.2d 476 (Ky. 1993).....	51
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977).....	149
<i>Gaiimo v. State</i> , 41 S.W.3d 49 (Mo. App. E.D. 2001)	103
<i>Giglio v. U.S.</i> , 405 U.S. 150 (1972).....	67, 72, 93, 94, 95
<i>Green v. Georgia</i> , 442 U.S. 95 (1979)	104
<i>Hadley v. Goose</i> , 97 F.3d 1131 (8th Cir. 1996).....	16, 26, 42, 43, 83, 88, 117, 118
<i>Hayes v. State</i> , 711 S.W.2d 876 (Mo. banc 1986)	67
<i>Henderson v. Sargent</i> , 926 F.2d 706 (8th Cir. 1991).....	25, 28, 77, 103, 111, 113, 123
<i>Hoffman v. Sate</i> , 800 So.2d 174 (Fla. 2001).....	51
<i>Kenley v. Armontrout</i> , 937 F.2d 1298 (8th Cir. 1991).....	112, 152
<i>Kenner v. State</i> , 709 S.W.2d 536 (Mo. App. E.D. 1986).....	22, 30, 31, 95, 128, 133, 134, 139
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986).....	132
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	17, 45, 51, 71, 104, 105

<i>Lockett v. Ohio</i> ,438U.S.586(1978).....	154
<i>Mapes v. Coyle</i> ,171F.3d.408(6thCir.1999)	143
<i>Martinez-Macias v. Collins</i> ,979F.2d1067(5thCir.1992).....	128,129
<i>Miranda v. Arizona</i> ,384U.S.436(1966).....	30,134
<i>Mooney v. Holohan</i> ,294U.S.103(1935)	44,73
<i>Moore v. State</i> ,827S.W.2d213(Mo.banc1992).....	17,20,53,76,77
<i>Morrow v. State</i> ,21S.W.3d819(Mo.banc2000)....	41,51,57,83,93,103,111,117,119,123,127,132,139,148,152
<i>Napue v. Illinois</i> ,360U.S.264(1959).....	16,22,44,72,93,94,95
<i>Northern Mariana Islands v. Bowie</i> ,243F.3d1109(9thCir.2001)	73,74
<i>Paradis v. Arave</i> ,240F.3d1169(9thCir.2001).....	26,119
<i>Payne v. Tennessee</i> ,501U.S.808(1991).....	33,148
<i>Pointer v. Texas</i> ,380U.S.400(1965)	149
<i>Pyle v. Kansas</i> ,317U.S.213(1942).....	44
<i>Riley v. Wyrick</i> ,712F.2d382(8thCir.1983).....	132,133
<i>Rock v. Arkansas</i> ,483U.S.41(1987).....	104
<i>Roe v. Delo</i> ,160F.3d416(8thCir.1998).....	107,129,133,143
<i>Sederes v. State</i> ,776S.W.2d479(Mo.App,E.D.1989)	19,59
<i>Skipper v. South Carolina</i> ,476U.S.1(1986).....	34,152
<i>Smith v. Secretary Dept. Of Corrections</i> ,50F.3d801(10thCir.1995).....	112
<i>State ex rel. Munn v. McKelvey</i> ,733S.W.2d765(Mo.banc1987).....	29,125,126,127,128
<i>State v. Armentrout</i> ,8S.W.3d99(Mo.banc1999).....	64

<i>State v. Bernard</i> , 849 S.W.2d 10 (Mo. banc 1993).....	31, 139, 140
<i>State v. Bolds</i> , 11 S.W.3d 633 (Mo. App. E.D. 1999).....	63
<i>State v. Burnfin</i> , 771 S.W.2d 908 (Mo. App. W.D. 1989).....	133, 140
<i>State v. Butler</i> , 951 S.W.2d 600 (Mo. banc 1997).....	24, 25, 28, 42, 77, 103, 104, 111, 113, 123
<i>State v. Chaney</i> , 967 S.W.2d 47 (Mo. banc 1998).....	26, 32, 114, 115, 116, 143, 155
<i>State v. Culkin</i> , 791 S.W.2d 803 (Mo. App. E.D. 1990).....	29, 127
<i>State v. Griffin</i> , 756 S.W.2d 475 (Mo. banc 1988).....	123
<i>State v. Hammonds</i> , 651 S.W.2d 537 (Mo. App. E.D. 1983).....	94, 95
<i>State v. Harris</i> , 64 S.W.2d 256 (Mo. 1933).....	77, 153
<i>State v. Hayes</i> , 785 S.W.2d 661 (Mo. App. W.D. 1990).....	86, 153
<i>State v. Howard</i> , 805 So.2d 1247 (La. App. 2002).....	61
<i>State v. Huff</i> , 789 S.W.2d 71 (Mo. App. W.D. 1990).....	135
<i>State v. Jackson</i> , 495 S.W.2d 80 (Mo. App. KCD 1973).....	149
<i>State v. Kelly</i> , 439 S.W.2d 487 (Mo. 1969).....	30, 134
<i>State v. Luleff</i> , 729 S.W.2d 530 (Mo. App. E.D. 1987).....	94, 95
<i>State v. McCarter</i> , 883 S.W.2d 75 (Mo. App. S.D. 1994).....	140
<i>State v. McCauley</i> , 831 S.W.2d 741 (Mo. App. E.D. 1992).....	77, 86, 153
<i>State v. Middleton</i> , 998 S.W.2d 520 (Mo. banc 1999).....	63, 64
<i>State v. Ofield</i> , 635 S.W.2d 73 (Mo. App. W.D. 1982).....	61, 62, 118
<i>State v. Phillips</i> , 940 S.W.2d 512 (Mo. banc 1997).....	17, 51, 52, 53, 118
<i>State v. Pinkus</i> , 550 S.W.2d 829 (Mo. App. S.D. 1977).....	58
<i>State v. Roberts</i> , 948 S.W.2d 577 (Mo. banc 1997).....	133, 134, 136

<i>State v. Robinson</i> ,835S.W.2d303(Mo. banc 1992).....	18,58
<i>State v. Scott</i> ,943S.W.2d730(Mo.App.W.D.1997).....	120
<i>State v. Sladek</i> ,835S.W.2d308(Mo.banc1992).....	139
<i>State v. Storey</i> ,901S.W.2d886(Mo.banc1995).....	95,127,134,139
<i>State v. Sumlin</i> ,820S.W.2d487(Mo.banc1991).....	143
<i>State v. Taylor</i> ,929S.W.2d209(Mo.banc1996).....	41
<i>State v. Taylor</i> ,944S.W.2d925(1997).....	33,148,149
<i>State v. Vinson</i> ,854S.W.2d615(Mo.App.S.D.1993)	29,127
<i>State v. Weiss</i> ,24S.W.3d198(Mo.App.W.D.2000)	22,94
<i>State v. Whitfield</i> ,837S.W.2d503(Mo.banc1992)	16,26,45,119
<i>State v. Williams</i> ,492S.W.2d1(Mo.App.E.D.1973).....	84
<i>State v. Williams</i> ,87S.W.2d175(1935).....	21,80
<i>State v. Wise</i> ,879S.W.2d494(Mo.banc1994).....	80
<i>State v. Wolfe</i> ,13S.W.3d248(Mo.banc2000).....	10,11,80,81,84,85,87,99,107
<i>State v. Yowell</i> ,513S.W.2d397(Mo.banc1974)	133
<i>Strickland v. Washington</i> ,466U.S.668(1984).....	41,42,70,76,84,128,139,142,149
<i>U.S. v. Agurs</i> ,427U.S.97(1976).....	44,72,94
<i>U.S. v. Bagley</i> ,473U.S.667(1985).....	45,58,69,118,119
<i>U.S. v. Boyd</i> ,55F.3d239(7thCir.1995).....	67
<i>U.S. v. Cortez</i> ,935F.2d135(8thCir.1991).....	135
<i>U.S. v. Cuffie</i> ,80F.3d514(D.C.Cir.1996).....	65
<i>U.S. v. Dotson</i> ,799F.2d189(5thCir.1985).....	135,136

<i>U.S. v. Durham</i> , 868F.2d1010(8thCir.1989)	63
<i>U.S. v. Golyansky</i> , 1291F.3d1245(10thCir.2002).....	58
<i>U.S. v. Jimenez</i> , 256F.3d330(5thCir.2001).....	58
<i>U.S. v. Lindstrom</i> , 698F.2d1154(11thCir.1983).....	58
<i>U.S. v. Pryce</i> , 938F.2d1343(D.C. 1991)	58
<i>U.S. v. Scheer</i> , 168F.3d.445(11thCir.1999).....	47
<i>U.S. v. Wallach</i> , 935F.2d445(2dCir.1991)	73
<i>White v. Helling</i> , 194F.3d937(8thCir.1999)	47
<i>Williams v. Taylor</i> , 529U.S.362(2000)	28,34,41,42,123,152,153
<i>Woodson v. North Carolina</i> , 428U.S.280(1976)	73,143

CONSTITUTIONAL PROVISIONS

U.S.Const.,Amend.V	18,19,23,24,30,32,54,96,130,134,142
U.S.Const.,Amend.VI....	15,16,17,18,19,20,21,22,23,24,25,26,27,28,29,30,31,32,33,34,35,48,54,75,79,92,96,109,114,121,125,130,137,142,145,147,150
U.S.Const.,Amend.VIII.....	18,19,31,32,33,34,54,73,125,142,147,148,150
U.S.Const.,Amend.XIV.....	15,16,17,18,19,20,21,22,23,24,25,26,27,28,29,30,31,32,33,34,35,48,54,75,79,92,96,109,114,121,125,130,142,147,148,150
Mo.Const.,Art.I, Sect.18(b).....	33,147,149
Mo.Const.,Art.I, Sect.32.1(3).....	148
Mo.Const.,Art.V.,Sect.3	10
Mo.Const.,Art.V.,Sect.10.....	10

STATUTES

Sect.491.074..... 15,16,35,42,43

Sect.491.205.1..... 128

Sect.565.030.4..... 33,147,148

Sect.565.035.....32,143

Sect.595.010..... 148

RULES

Rule 4-1.9.....32,145

Rule 4-3.4(b).....29,125,126,127

Rule 25.03(a).....27,45,119

Rule 29.15.....10,12,41

OTHER

Report of the Governor’s Commission on Capital Punishment, April 15, 2002,
http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/24,106

JURISDICTIONAL STATEMENT

Appellant, Danny Wolfe, was jury-tried in Camden County Circuit Court for two counts of first degree murder, two counts of armed criminal action, and first degree robbery(Ex.Hx3,at519-22)¹ and sentenced to death on the murder counts and consecutive life terms on the remaining counts. *Id.* This Court affirmed his convictions and sentences on appeal. *See, State v. Wolfe*, 13S.W.3d 248(Mo.banc2000).

After his direct appeal, Mr.Wolfe filed a *pro se* and amended Rule 29.15 motion(L.F. 17-66,99-451). The circuit court denied the motion after an evidentiary hearing(L.F. 813-935). Because a death sentence was imposed, this Court has jurisdiction of this appeal. Art.V.,Sec.3,10(as amended-1982); Standing Order, 6/16/1988.

¹ References to the record on appeal are as follows: postconviction legal file - L.F., evidentiary hearing transcript - Tr., postconvictions exhibits - Ex., trial transcript(T.Tr.). The motion court took judicial notice of the underlying criminal file, including the trial transcript, direct appeal legal file and this Court's opinion(Tr.36). Accordingly, Mr.Wolfe asks this Court to judicially notice its file in *State v. Wolfe*, S.Ct.No.81372.

STATEMENT OF FACTS

Mr. Wolfe was convicted of two counts of first degree murder, two counts of armed criminal action and first degree robbery and sentenced to death and three consecutive life sentences(Ex.Hx3,at520-22). This Court affirmed on direct appeal, with two members dissenting. *State v. Wolfe*,13 S.W.3d 248(Mo.banc2000).

The Walters were found murdered at their home in Greenview, Missouri, near the Lake of the Ozarks on Sunday, February 23, 1997(T.Tr.803,815). Mr.Walters was in his red Cadillac, shot in the back of the head with a .25 caliber gun, and Mrs.Walters was inside their home with a gunshot wound to the chest and multiple stab wounds(T.Tr.817-19,824,835,843,1047,1055). Initially, the police focused on Terry Smith, since he had robbed George Lane, another elderly gentleman in the area(Tr.1676-79). However, on February 27,1997, Jessica Cox, claimed to have witnessed the murders early Thursday, February 20th(T.Tr.1334-Ex.Fx7). For her cooperation, she received full immunity(Ex.-Fx7,T.Tr.1286-87).

Once Cox implicated Mr.Wolfe, the investigation's focus became Mr.Wolfe(Ex.Dx3,Lx4,at9,Tr.363,955-57). No physical evidence tied him to the scene, but police found .25-caliber ammunition in the dumpster at his motel(T.Tr.1466-68). Cox's best man at her wedding testified that about a week before the murders, Mr.Wolfe tried to sell him a .25 caliber handgun(T.Tr.1499-1500). About a week later, Mr.Wolfe sold him loose quarters, significant, since quarters were around the Walters stolen safe(T.Tr.1345,1380,1498-99).

Mr. Wolfe denied involvement in the crime to police (T.Tr.1395-98, Ex.3A-3B). The State's case relied primarily on Cox (T.Tr.1086-1313) and Paul Hileman, a jailhouse informant who said that Mr. Wolfe confessed to him while they were jailed (T.Tr.1549-52).

Mr. Wolfe's defense was that Cox lied and framed him (T.Tr.1972). He picked her up at a bar at closing and took her home, but she left the next morning and they did not commit this crime together (T.Tr.1971-72).

Jurors deliberated twelve hours before convicting Mr. Wolfe (T.Tr.2037).

In his Rule 29.15 motion, Mr. Wolfe asserted numerous claims of ineffective assistance of counsel and prosecutorial misconduct, mostly claims of innocence (L.F.99-451). Much of the evidence discredited Cox and her story. Larry Graham, a local businessman, told police in the days following the murders that the Walters were in his store Friday or Thursday, after Cox said they were killed (Exs.II, JJ, KK, Tr.216-18, 222, 225, 226-28, 242-43). An independent pathologist found they most likely died 1-1/2 days before the bodies were found, after Cox said they were killed (Tr.302, 304, 335, 345). Police seized Cox's hair, but it was not disclosed to the defense (Ex.Rx8, Tr.1126). Post-trial testing showed Cox's hair matched a hair in an ammunition box in the dumpster behind Mr. Wolfe's hotel, and a hair on the backseat of the Walters' car (Tr.981-83, 988-89, 997). Cox had a history of criminality and repeatedly lied and blamed others to get out of trouble (Exs.G, Sx6, Tx6, Tr.928-31, 1015-18, 1043-48).

In January 1997, Smith and Cox went to Lane's house, asked if he and his wife, Reeder, would go out with them(Ex.Dx4,Tr.1090). Lane's wife refused for fear Cox and Smith would rob them(Ex.Dx4,Tr.1091). Reeder had seen Smith and Cox together several times around the time of the murders(Ex.K,at7-8,13-15). Smith was violent, especially when using drugs(Ex.K,at9,16,20), and often used methamphetamine(Tr.15-16,Ex.Cx3).

Smith planned to rob the Walters, knowing they kept much money at home(Ex.Cx3,Tr.766). Smith needed money for methamphetamine(Ex.Hx4-Tr.207). Smith and Dayton drove by the Walters' two or three times(Ex.Cx3,Tr.767,781). Smith obtained .25 caliber guns for the crime (Tr.163-68,596-97,658-59,765-66,1191,1394,1469).

On February 19,1997, Wednesday evening, Cox was in a Blazer(Ex.Hx6,at317) and Frank Bryant saw such a vehicle at the Walters(Tr.235-36,239,Ex.MM). Others saw cars and people at the Walters after Cox claimed they were dead(Tr.235-36,239,785-90). The Rickeys, who found Mr.Walters' body, thought they saw him Thursday or Friday(Ex.Jx6,at5,13-14,Ex.Kx6,at4-5,13,Tr.1546,1558,1568).

Much evidence presented on post-conviction challenged Hileman's testimony. Hileman had a history of lying and mental illness(Tr.540-41,550-Ex.E,at11,Ex.F,at12). He thought President Clinton conspired to keep him in a mental hospital and David Letterman talked to him through the television(Ex.E,at13,32,Ex.C,at2,10,16,21,28,42, Ex.F,at17,23,25). Hileman told cellmates he would get some dirt on Mr.Wolfe, to get his time cut and would do anything to get out of jail(Ex.I,at5,7,30,31, Ex.J,at11-

12,Ex.Tx3,Ex.Wx7). He threatened to kill a state witness and her family if she did not lie for him in court(Ex.Ex5). Prosecutor, Icenogle, promised to help obtain transfers in prison for his testimony, a promise never disclosed to the defense(Tr.1692). Hileman pled guilty to one count of property damage and his other charges-burglary, stealing, attempted arson, passing a bad check, and tampering with a witness-were dismissed after he testified(Exs.Bx5,Zx7,Ax8,Cx8-Bx8).

Additional claims of ineffectiveness and prosecutorial misconduct were raised(L.F.156-80,205-30,235-62,262-67,267-78,278-88).² After seven days of testimony and numerous documentary exhibits supporting the claims, the court denied relief(L.F.694-810). The court denied a motion to reopen the evidence based on Hileman's attorney's affidavit that Hileman had a deal for his testimony, and Hileman's mental health records(L.F.938-1199,Tr.1819-20).

² To avoid repetition, the facts relating to all issues and the court's rulings are further developed in the Argument.

POINTS RELIED ON

I. Larry Graham Told Police the Walters Were In His Store on Thursday or Friday

The motion court clearly erred in denying Mr. Wolfe's claims that counsel was ineffective for failing to impeach Larry Graham with his prior inconsistent statements made to Officers Matthews, Sederwall, and Mays and Investigator Miller and Icenogle's objection, nondisclosure, and instructions to officers violated Mr. Wolfe's rights to effective assistance of counsel, due process, and a fair trial, U.S. Const., Amends. 6, 14, and Sect. 491.074, in that counsel admitted that when Graham testified he may have seen the Walters on Wednesday, it "threw her" and she did nothing to recover, although she wanted jurors to know about his prior inconsistent statements that the Walters were in his store on Thursday or Friday; and Icenogle knew Graham had told police twice that he had seen the Walters on Friday, so his "speculative" objection misled jurors and falsely suggested that no such statement was made; Icenogle had a duty to disclose all impeaching statements Graham made; and Icenogle committed misconduct in repeatedly attempting to get witnesses who remembered seeing the Walters alive on Thursday or Friday to change their recollection. Mr. Wolfe was prejudiced because, if the Walters were alive after Wednesday, he could not have killed them. Graham's statements were important to jurors since they requested to see the police report of Graham's interview.

Hadley v. Goose, 97 F.3d 1131(8thCir.1996);

Beltran v. Cockrell, 294 F.3d. 730(5thCir.2002);

State v. Whitfield, 837 S.W.2d 503(Mo.banc1992);

Napue v. Illinois, 360 U.S. 264(1959);

U.S.Const.,Amends.6,14;

Sect.491.074.

II. Jessica Cox's Hair

The motion court clearly erred in denying Mr. Wolfe's claims that the State failed to disclose Cox's hair and misled counsel into believing Cox's hair was never seized; or alternatively, counsel was ineffective for failing to test the hair against a hair found in an ammunition box in the dumpster behind Mr. Wolfe's motel, and a hair found in the back seat of the Walters' Cadillac, because Icenogle's actions and counsel's failure violated Mr. Wolfe's rights to due process, a fair trial, and effective assistance of counsel, U.S. Const., Amends. 6, 14, in that when counsel asked for the hair or any reports of testing, the State said "I'm not too sure if Ms. Cox had her hair and blood taken" and that no testing had been done, counsel relied on those misstatements and went to trial thinking Cox's hair had not been seized, although the police had seized it. Mr. Wolfe was prejudiced because testing showed the hairs in the dumpster and car matched Cox, supporting counsel's defense that Cox framed Mr. Wolfe by placing the ammunition in the dumpster, impeached Cox's assertions that she had never seen the gun, let alone the ammunition, and rendered doubtful her story that she only witnessed the murder from the driver's seat since her hair was found where the shooter must have been.

State v. Phillips, 940 S.W.2d 512(Mo.banc1997);

Kyles v. Whitley, 514 U.S. 419(1995);

Dilosa v. Cain, 279 F.3d 259(5thCir.2002);

Moore v. State, 827 S.W.2d 213(Mo.banc1992);

U.S. Const., Amends. 6, 14.

III. Hileman: Jailhouse Informant

The motion court clearly erred in denying relief and erred in failing to reopen the evidence because counsel was ineffective in failing to investigate and impeach Hileman, and Icenogle failed to disclose impeaching information, improperly objected, and presented a witness he knew was unreliable, denying Mr. Wolfe due process, a fair trial, effective counsel, and freedom from cruel and unusual punishment, U.S. Const., Amend. 5, 6, 8, 14 in that:

- A. Hileman is mentally ill: he is paranoid schizophrenic and delusional;**
- B. counsel failed to investigate records and witnesses, Hawk, Murdock, Eichinger, Failing and Breen, that proved that Hileman lied about Mr. Wolfe confessing, would say anything to reduce his sentence, threatened a state witness and her family if she did not lie under oath, and had a history of lying and blaming others;**
- C. the State failed to reveal inducements and impeaching material: all charges were dismissed; Icenogle promised to help Hileman get favorable treatment in prison; docket entries by assistant prosecutors, and a note in Hileman's file showed a deal; and Hileman's records showed a pattern of lying, a history of mental illness, and jurors was misled about an Illinois conviction, his deals, and his treatment in prison; and**
- D. given Hileman's lying and mental illness, Mr. Wolfe's conviction and sentence is unreliable.**

State v. Robinson, 835 S.W.2d 303(Mo.banc1992);

Sederes v. State, 776 S.W.2d 479(Mo.App,E.D.1989);

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

Carriger v. Stewart, 132 F.3d 463(9thCir.1997);

U.S.Const.,Amend.5,6,8,14.

**IV. Independent Pathologist: Walters Likely Killed on Friday or Saturday-
Not Early Thursday Morning**

The motion court clearly erred in denying Mr. Wolfe's claim that counsel was ineffective for not investigating the time of death and calling an independent pathologist, like Thomas Bennett, M.D., because this denied Mr. Wolfe effective assistance of counsel, U.S. Const., Amends. 6, 14, in that an independent review of the autopsy reports, witness accounts of the condition of Walters' bodies, weather conditions and other physical evidence showed they were likely killed 1 1/2 days before they were found and this evidence would have supported Mr. Wolfe's defense that Cox was lying when she said he shot the Walters Thursday morning at sunrise.

Moore v. State, 827 S.W.2d 213 (Mo. banc 1992);

U.S. Const., Amends. 6, 14.

V. Jessica Cox Is Lying

The motion court clearly erred in denying Mr. Wolfe's claim that counsel was ineffective in failing adequately to investigate and present evidence regarding Cox's lying and guilt, through witnesses and related exhibits, such as Tucker, Lister, Kline, Kelly, Nichting, Smith, Schmidt, and Clark, because the failure denied Mr. Wolfe effective assistance of counsel, U.S. Const., Amends. 6, 14, in that counsel unreasonably failed to investigate and present: Cox's pattern of engaging in criminal conduct and then lying to escape consequences; Cox had a gun before the murders; Cox's admissions that she had to clean out her apartment before going to the police, had committed the crime with two other men, not Mr. Wolfe, and would get something out of the murder; Cox's prior inconsistent statements showing she was lying and Mr. Wolfe could not have committed the crime; and evidence of the hotel manager's phone call to Mr. Wolfe and her knowledge about his tool box, all of which revealed Cox's lies and Mr. Wolfe's innocence.

Driscoll v. Delo, 71 F.3d 701 (8th Cir. 1995);

State v. Williams, 492 S.W.2d 1 (Mo. App. E.D. 1973);

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997);

U.S. Const., Amends. 6, 14.

VI. The State Kept Out Evidence and Then Suggested It Did Not Exist

The motion court clearly erred in denying Mr.Wolfe's claim that the State kept out evidence of other suspects and Cox's prior lies and then improperly suggested that no other suspects existed and Cox had never lied and counsel was ineffective in failing to object because this denied Mr.Wolfe due process, a fair trial and effective assistance of counsel,U.S.Const.,Amends.6,14, in that the State cannot mislead jurors, keeping out evidence and then suggest it does not exist and counsel unreasonably failed to object to this improper conduct. Mr.Wolfe was prejudiced as Cox's credibility was key to a conviction and the Smith evidence supported his defense that he did not kill the Walters.

Napue v. Illinois, 360 U.S. 264(1959);

State v. Weiss, 24 S.W.3d 198(Mo.App.W.D.2000);

Kenner v. State, 709 S.W.2d 536(Mo.App.E.D.1986);

U.S.Const.,Amends.6,14.

VII. Terry Smith Evidence

The motion court clearly erred in denying Mr. Wolfe's claim that counsel was ineffective in not investigating and presenting evidence that Terry Smith and Cox robbed and killed the Walters, that the State failed to disclose exculpatory evidence of Smith's involvement and appellate counsel failed to raise the issue on appeal, denying due process, compulsory process, right to present a defense, and effective assistance of counsel, U.S. Const., Amends. 5, 6, 14, in that counsel failed to investigate police reports identifying Smith as the initial suspect, interview and adequately present documents, a map and testimony through witnesses Lane, Reeder, Dayton, Garrison, Elliott, Moss, Purvis, Palmer, Spencer, Dwyer that:

- 1) Smith knew the Walters kept large amounts of cash at home;**
- 2) Smith needed money for his methamphetamine habit;**
- 3) Smith was violent and desperately needed cash;**
- 4) Smith robbed another elderly victim in Greenview shortly before he robbed and killed the Walters;**
- 5) Smith cased the Walters' only days before the murder admitting he planned to rob them;**
- 6) Smith obtained .25 caliber guns to commit the crime;**
- 7) Smith and Cox were seen together just before the murder;**
- 8) Cox was in a Blazer before the murder and a Blazer was at the Walters' just before the bodies were discovered;**
- 9) Smith was the prime suspect when the bodies were discovered.**

Undisclosed reports corroborated Dayton's account and linked Smith to the robbery and murders. Had jurors heard this evidence, a reasonable probability exists the outcome would have been different.

State v. Butler, 951 S.W.2d 600(Mo.banc1997);

Crane v. Kentucky, 476 U.S.683(1986);

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

U.S.Const., Amends.5,6,14;

Report of the Governor's Commission on Capital Punishment,

April 15, 2002,

http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/

VIII. Activity at the Walters' Showed Cox Lied

The motion court clearly erred in denying Mr. Wolfe's claims that counsel was ineffective for not investigating and calling: Frank Bryant, who saw a Bronco or Blazer, and another vehicle, at the Walters' on Wednesday, February 19, 1997, the day Cox admitted riding in such a vehicle; Cecil McConnell, who saw a Bronco or Blazer there on Saturday, February 22, 1997, after the Walters were supposedly killed; Glenda Carnahan-Wilson, who saw a brown vehicle there, parked beside the Cadillac on Sunday, February 23, 1997; Leonard and Charles Rickey, who saw Mr. Walters alive on Thursday or Friday, and knew he habitually sat in his car during the day; and not eliciting from Cox, her admission that she was in a Blazer near the time of the murders, because counsel's failure denied effective assistance of counsel, U.S. Const., Amends. 6, 14, in that counsel failed to interview Bryant and had no legitimate reason for not calling these witnesses. Mr. Wolfe was prejudiced as all this activity showed Cox checked-out the Walters to rob them, and lied by saying Mr. Wolfe shot and killed them early Thursday morning.

State v. Butler, 951 S.W.2d 600 (Mo. banc 1997);

Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991);

U.S. Const., Amends. 6, 14.

IX. Challenging Experts: Physical Evidence Supported Mr.Wolfe's Innocence

The motion court clearly erred in denying Mr.Wolfe's claim counsel ineffectively failed to impeach the State's experts, Green, Smith and Dix, and present favorable evidence and the State failed to disclose impeaching material, denying due process and effective assistance of counsel,U.S.Const.,Amends.6,14, in that counsel failed to impeach Green with her deposition that thousands of shoes had the same pattern as the one found at the scene; the State did not disclose and counsel did not discover Smith's pro-prosecution memo in another death case, *State v. Timothy Chaney* that she wanted to help the prosecution all she could, drafted mock questions for the prosecutor, and told him how to damage the defense; and the State failed to disclose Dr. Dix's changed opinion that most of the gunshot pellets lodged inside Mrs.Walters' body and did not leave her body and counsel failed to question Dix regarding his prior statement or properly object to the nondisclosure. Mr.Wolfe was prejudiced as Icenogle argued Mr.Wolfe left footprints at the scene saying, "what's the odds" of finding similar patterns; Smith was important to the State's case as her testimony suggested Mrs.Walters put her hands up and begged for her life; and Dix's changed opinion caught defense counsel by surprise, destroying her theory Mrs.Walters was shot outside, contrary to Cox's story.

Hadley v. Goose, 97 F.3d 1131(8thCir.1996);

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

State v. Whitfield, 837 S.W.2d 503(Mo.banc1992);

Paradis v. Arave, 240 F.3d 1169(9thCir.2001)(1959);

U.S.Const.,Amends.6,14;

Rule 25.03.

X. More Evidence Mr. Wolfe is Innocent

The motion court clearly erred in denying Mr. Wolfe's claim that counsel was ineffective in not calling Russell Britt or offering Exhibits Ux5(1&2), Gx7, Hx7, and Ix7, Mr. Wolfe's shoes, pictures and papers, because that denied effective assistance of counsel, U.S. Const., Amends. 6, 14, in that counsel didn't investigate Mr. Wolfe's normal activities and personal items, showing he was gainfully employed, and wore a different size shoe than those seized from Port Valero and introduced. This evidence would have negated Cox's allegations about Mr. Wolfe and the State's theory that Mr. Wolfe needed money and committed the crimes.

State v. Butler, 951 S.W.2d 600 (Mo. banc 1997);

Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991);

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

U.S. Const., Amends. 6, 14.

XI. Illegal “Immunity Agreement”

The motion court clearly erred in denying Mr.Wolfe’s claim that Icenogle lacked authority to grant Cox immunity and counsel was ineffective in failing to object to the illegal agreement, to Officers Bowling and Schmidt, and Cox's testimony, and the State's opening and closing; and in failing to raise the immunity claim on appeal, because Mr.Wolfe was denied due process, a fair trial and effective assistance of counsel,U.S.Const.,Amends.6,14; Rule 4-3.4(b), in that prosecutors lack inherent authority to grant immunity, thus Icenogle gave Cox an illegal inducement, and counsel failed to object to the illegal agreement, testimony and argument. Mr.Wolfe was prejudiced since prosecutors repeatedly emphasized their illegal agreement and argued it showed Cox’s truthfulness.

State ex rel. Munn v. McKelvey, 733 S.W.2d 765(Mo.banc1987);

Brown v. City of North Kansas City,779 S.W.2d596(Mo.App.W.D.1989);

State v. Culkin, 791 S.W.2d 803(Mo.App.E.D.1990);

State v. Vinson, 854 S.W.2d 615(Mo.App.S.D.1993);

U.S.Const.,Amends.6,14;

Rule 4-3.4(b).

XII. Mr. Wolfe's Statement Should Have Been Suppressed

The motion court clearly erred in denying Mr. Wolfe's claim that his statement should have been suppressed and counsel should have properly objected to it, Schmidt's testimony, and Icenogle's closing argument and challenged it on appeal, because this denied due process, counsel, a fair trial, confrontation and effective assistance of counsel, U.S. Const., Amends. 5, 6, 14, in that the statement contained inadmissible evidence of prior bad acts and a prior arrest; Mr. Wolfe invoked his right to silence; the officers opined Mr. Wolfe was guilty, Cox was truthful and Mr. Wolfe was "cool as ice." Mr. Wolfe was prejudiced since Schmidt testified about Mr. Wolfe's demeanor, and Icenogle emphasized his statement, drinking, drug use, and demeanor to find him guilty.

Kenner v. State, 709 S.W.2d 536 (Mo. App. E.D. 1986);

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

State v. Kelly, 439 S.W.2d 487 (Mo. 1969);

U.S. Const., Amends. 5, 6, 14.

XIII. Evidence of Other Crimes

The motion court clearly erred in denying Mr. Wolfe's claim that other crimes should have been excluded because this denied effective assistance and due process, U.S. Const., Amends. 6, 8, 14, in that counsel elicited and didn't object to evidence and argument of bad acts and crimes, including:

- 1) a photo of Mr. Wolfe at the Sheriff's Department before his arrest;**
- 2) a police photo of Mr. Wolfe wearing a red sweatshirt before his arrest;**
- 3) his fingerprints were compared before Cox came forward;**
- 4) he had marijuana in jail;**
- 5) he wanted to waste taxpayer money by filing frivolous motions;**
- 6) Cox's concern he would handcuffs and rape her; and**
- 7) he drove an unregistered, unlicensed truck around the Lake for two years;**

Mr. Wolfe was prejudiced since these references denied him a trial in which he was tried only for the instant charges. A reasonable probability exists that had counsel properly objected, the evidence would have been excluded and Mr. Wolfe would not have been convicted.

Kenner v. State, 709 S.W.2d 536 (Mo. App. E.D. 1986);

State v. Bernard, 849 S.W.2d 10 (Mo. banc 1993);

U.S. Const., Amends. 6, 8, 14.

XIV. Appellate Counsel

The motion court clearly erred in denying Mr.Wolfe’s claim that he was denied effective assistance of counsel, his right to present a defense, to confrontation, due process, and free from cruel and unusual punishment, U.S.Const.,Amends.5,6,8,14 in that appellate counsel failed to challenge:

- 1) sufficiency of the evidence to support a death sentence;**
- 2) counsel’s conflict in representing Mr.Wolfe on the murder charge and**

then negotiating with Icenogle to have Hileman testify against Mr.Wolfe; which had merit; case-law supported, were preserved, and counsel pursued substantially weaker issues.

Evitts v. Lucy, 469 U.S. 387(1985);

State v. Chaney, 967 S.W.2d 47(Mo.banc1998);

Cuyler v. Sullivan, 446 U.S. 335(1980);

Burden v. Zant, 24 F.3d 1298(11thCir.1994).

U.S.Const.,Amends.5,6,8,14;

Sect.565.035;

Rule 4-1.9.

XV. Walters' Family Asks For Death

The motion court clearly erred in denying Mr. Wolfe's claim the State improperly solicited the Walters' family's opinions about penalty, submitted the opinions for the PSI, and argued they wanted death; and counsel failed to object to the statements, violating due process, confrontation, effective assistance of counsel and to individualized, non-arbitrary or capricious sentencing, U.S. Const., Amends. 6, 8, 14; Mo. Const., Art. I, Sect., 18(b), Sect., 565.030.4, in that the family's opinions about the appropriate sentence were irrelevant and highly prejudicial, encouraged the sentencer to choose death based on caprice and emotion, not reason, exceeded Section 565.030.4's scope, denied Mr. Wolfe the opportunity to cross-examine or rebut counsel unreasonably failed to object, and Mr. Wolfe was prejudiced as Judge Dickerson explicitly relied on the PSI to conclude death was appropriate.

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

State v. Taylor, 944 S.W.2d 925(Mo.banc1997);

U.S. Const., Amends. 6, 8, 14;

Mo. Const., Art. I, Sect., 18(b).

Sect., 565.030.4.

XVI. Good Conduct in Jail and Childhood

The motion court clearly erred in denying Mr. Wolfe's claim that counsel ineffectively failed to investigate and call Deputy Keith Eichinger and Lois Patton because this denied effective assistance of counsel, and right to present mitigation, U.S. Const., Amends. 6, 8, 14, in that counsel failed to investigate Patton and whether Eichinger would testify. Eichinger, Jail Superintendent, found Mr. Wolfe a good inmate, made him a trustee, and was willing to testify; Patton knew Mr. Wolfe as a child, her mother took him into their home, because he lacked food, clothing, shelter, love and care. Mr. Wolfe was prejudiced since they would have justified jurors giving Mr. Wolfe life and neither were biased. A reasonable probability exists that had they been called, jurors would have sentenced Mr. Wolfe to life.

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

Skipper v. South Carolina, 476 U.S. 1(1986);

U.S. Const., Amends. 6, 8, 14.

ARGUMENT

I. Larry Graham Told Police the Walters Were In His Store on Thursday or Friday

The motion court clearly erred in denying Mr. Wolfe's claims that counsel was ineffective for failing to impeach Larry Graham with his prior inconsistent statements made to Officers Matthews, Sederwall, and Mays and Investigator Miller and Icenogle's objection, nondisclosure, and instructions to officers violated Mr. Wolfe's rights to effective assistance of counsel, due process, and a fair trial, U.S. Const., Amends. 6, 14, and Sect. 491.074, in that counsel admitted that when Graham testified he may have seen the Walters on Wednesday, it "threw her" and she did nothing to recover, although she wanted jurors to know about his prior inconsistent statements that the Walters were in his store on Thursday or Friday; and Icenogle knew Graham had told police twice that he had seen the Walters on Friday, so his "speculative" objection misled jurors and falsely suggested that no such statement was made; Icenogle had a duty to disclose all impeaching statements Graham made; and Icenogle committed misconduct in repeatedly attempting to get witnesses who remembered seeing the Walters alive on Thursday or Friday to change their recollection. Mr. Wolfe was prejudiced because, if the Walters were alive after Wednesday, he could not have killed them. Graham's statements were important to jurors since they requested to see the police report of Graham's interview.

Larry Graham was a key defense witness as the Walters came to his Meat Market shortly before they were killed. Graham twice told police that he saw them on Friday and then he said on Thursday at 11:00 a.m. Graham's statements showed that Cox was lying when she said Mr. Wolfe killed the Walters on Thursday morning at sunrise. Yet jurors never heard about Graham's exculpatory statements to police. The jurors wanted to know about them, they asked to see a police report of Graham's interview. Because of counsel's failures and the prosecutor's misconduct jurors never knew the truth.

The Facts

When the police found the Walters dead, they discovered fresh meat in the Walters' refrigerator. So police interviewed Graham to see when the Walters were in his store. On February 24, 1997, Graham told police he saw them the previous Friday, February 21st around 12:30 p.m.(Ex.II,Tr.216-18,222). The next day, Officer Sederwall re-interviewed Graham(Ex.JJ,Tr.224-26). Again, Graham said he had seen them on Friday, but thought it was at 11:00 a.m.(Ex.JJ,Tr.225). His memory was good; he recalled specific details, including what they purchased, 2- 1 lb. packages of ground chuck, 2 ribeye steaks and 1 package of bacon(Ex.JJ,Tr.225).

After Cox came forward, on February 28th, Officers Sederwall and Mays interviewed Graham again(Ex.KK,Tr.226-228,242-43). Graham thought the Walters came into his market Thursday around 11:00 a.m.(Ex.KK,Tr.228,243-44).

Icenogle endorsed Graham as a witness, both in the original information and on November 16, 1998, the first day of trial(Exs.Fx3,at53-Hx3,at448). Defense counsel obtained the reports of Graham's first three interviews(Tr.1115-16), and then had her

investigator, Tami Miller, interview Graham(Tr.1116-17). Consistent with those reports, Graham said he had been on a trip and came home Wednesday, February 19th(Tr.1084, Ex.Dx6). He did not go to work on Wednesday. *Id.* He thought he saw the Walters in his shop on Thursday, but it could have been Friday. *Id.* Miller interviewed Graham several times, personally and by phone. *Id.* Graham always said it was Thursday or Friday and was sure it could not be Wednesday(Tr.1085). Miller knew immediately how significant the information was to the defense(Tr.1085-86). Graham directly contradicted Cox's allegations, and showed that Mr.Wolfe could not be guilty(Tr.1086).

At trial, counsel discussed the importance of Graham's testimony in her opening statement(T.Tr.796). She told jurors that Graham had seen the Walters on Thursday or Friday. *Id.* He was in Illinois, and did not go to work on Wednesday. *Id.*

On November 16th, Officer Sederwall testified(T.Tr.815-40). On cross-examination, counsel asked Sederwall if he interviewed Graham in the days following the murder and marked the report of one of his interviews as Defense Exhibit A(T.Tr.837-38). However, counsel never asked Sederwall about the contents of the report or the days Graham said he saw the Walters(T.Tr.837-38). The report was never admitted into evidence(T.Tr.2035).

Immediately after Sederwall testified, Icenogle instructed³ him to interview Graham again(Tr.232,1699-1700). At 1:50 p.m., Sederwall asked Graham if he was

³ Icenogle's action violated the court's order that testifying witnesses not discuss their testimony with anyone during the proceedings(Tr.717).

"absolutely sure" he was in Illinois on the Wednesday before February 23rd(Ex.LL-Tr.232). Graham said, no, that he returned on Tuesday night(Ex.LL,Tr.232). Sederwall then told Graham that the Walters could have been in the market on Wednesday(Ex.LL-Tr.232). Graham responded, "I'm not sure." (Ex.LL). Sederwall faxed his report to Icenogle at 2:34 pm, but no one gave the report to the defense(Tr.233,1121,1734-35, Ex.0x8). Icenogle did not remember seeing the faxed report, but remembered Sederwall told him the information it contained(Tr.1700,1739).

The defense called Larry Graham as its final witness(T.Tr.1891-98). Graham was uncertain when he saw the Walters. On direct he said, "I believe it was Thursday," but could not really pinpoint it to Thursday(T.Tr.1891-94). Counsel tried to account for the lack of memory, saying "I know it has been awhile since you've been interviewed or told anyone?" (T.Tr.1894). Neither Graham, nor Icenogle corrected counsel and revealed that he had actually been interviewed by an officer only days earlier. Counsel then asked Graham what he had told the officers:

Q. Was it possible you told them Friday? (T.Tr.1895).

Icenogle objected as "calling for speculation," *Id.*, although he knew that on both February 24th and 25th, just days after the offense, Graham had told officers he saw the Walters Friday.

On cross-examination, Graham said the Walters could have been in his shop on Wednesday, and he knew they were not there Friday(T.Tr.1896). He said it could have been Wednesday or Thursday, because he returned from Chicago Tuesday evening(T.Tr.1896-97).

On redirect, counsel did not recover from this surprise testimony(Tr.1119-22). Counsel wanted jurors to know the truth, that Graham had told officers, in the days following the murders, that he had seen the Walters on Friday and, during the third interview, said possibly Thursday(Tr.1121). Yet counsel did not impeach Graham with his prior inconsistent statements(Tr.1122). Instead, Graham denied ever saying that he was in Illinois until Wednesday and that he saw the Walters Friday or Thursday(T.Tr.1897-98). Nobody--defense or prosecution--corrected this false testimony.

In counsel's closing, she argued Graham was a "little confused" and had initially told police he had seen the Walters alone on Friday, then Thursday, and only stated Wednesday when he testified(T.Tr.1997). But, the argument was not evidence and jurors were told as much(MAI-CR 3d-302.06,Ex.III,at32).

Jurors deliberated for more than 12 hours and asked to see the police report or Graham's interview(Tr.1121,T.Tr.2035). Since it had not been admitted, the court would not provide it to them. *Id.*

Graham Statement Timeline

- 2/20/97 (sunrise): Time Cox says Walters killed
- 2/23/97: Walters found dead
- 2/24/97: Graham tells police Walters in store on Friday, 2/21/97
- 2/25/97: Graham tells police Walters in store on Friday, 2/21/97
- 2/28/97: Graham tells police Walters in store 11 am, Thurs, 2/20/97



20½ months elapse

- 11/16/98: 1st day of trial
Graham tells police not sure when Walters in store
Graham says returned from Illinois Tuesday, 2/18/97
- 11/20/98: Graham testifies Walters in store Wednesday or Thursday
Denies telling police Walters in store on Friday or Thurs.
- 11/21/98: Jury asks to see Graham Police Report/Court refuses since not admitted

(Exs.II,JJ,KK,LL,Tr.216-18,224-28,232-33,242-44,2084-86,1699-1700,T.Tr.2035).

Claims

Mr. Wolfe's motion alleged ineffective assistance of counsel in failing to use the reports or call Officers Matthews, Sederwall, and Mayes and Investigator Miller to impeach Graham with his prior inconsistent statements(L.F.106-08) and denial of due process and a fair trial from the prosecutor's misconduct(L.F.108-11).

The motion court denied all the claims(L.F.819,822-25). It presumed trial strategy, ruled the failure to impeach a witness was not ineffective as counsel need not call unhelpful witnesses(L.F.819). Since Graham testified that he thought he saw the Walters on Thursday, and it may have been Wednesday, counsel was not ineffective for failing to impeach him with his prior statements Friday(L.F.823-24).

Standard of Review

The motion court's findings and conclusions are review for clear error. *Morrow v. State*, 21 S.W.3d 819,822(Mo.banc2000); Rule 29.15. Findings and conclusions are "clearly erroneous" if after reviewing of the entire record, the court has the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209(Mo.banc1996).

Ineffective Assistance of Counsel

To establish ineffective assistance, Mr. Wolfe must show that counsel's performance was deficient and that it prejudiced his case. *Strickland v. Washington*, 466 U.S. 668(1984); *Williams v. Taylor*, 529 U.S. 362,390-91(2000). Mr. Wolfe must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would

have been different." *Id.*; *State v. Butler*, 951 S.W.2d 600,608(Mo.banc1997). A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

Contrary to the court's finding, counsel's performance was deficient. Counsel admitted that Graham was a critical witness for her defense. Graham's original statements to police proved that Cox was lying since the Walters were alive after she said they were killed(Tr.1114,1119-22). Counsel wanted jurors to know that Graham first told the police that he had seen the Walters Friday(Tr.1121). She argued that to jurors in her opening and closing(T.Tr.796,1997). Counsel unreasonably failed to adduce this helpful information, to impeach Graham, and as substantive evidence to prove Mr.Wolfe's innocence. Sect.491.074.⁴ Counsel *Hadley* admitted as much, and the court's finding of trial strategy is inconsistent with the record.

Counsel's failure to impeach is like that in *Hadley v. Goose*, 97 F.3d 1131(8thCir.1996). There, counsel was ineffective in handling a police officer's testimony that conflicted with a police report. *Id.* Counsel had police reports regarding officers' investigation of footprints found in the snow outside the victim's trailer. *Id.* at 1133. Officer Breeden testified as the State's final witness that shoeprints were found in the snow on the victim's porch. *Id.* He drew a diagram showing the tracks leaving the victim's trailer, disappearing in the road, reappearing and leading to "Hadley's trailer." *Id.* Breeden said the prints were "very similar in size and general shape." *Id.* Counsel never asked Breeden about the police reports that contradicted his testimony. *Id.* He didn't call the officers to testify about the footprints. *Id.* Counsel's failure to impeach the

officer with the prior reports or by calling the officers was ineffective, as was the failure to present exculpatory evidence. *Id.* at1136.

In *Beltran v. Cockrell*, 294 F.3d. 730(5thCir.2002), counsel's failure to impeach eyewitnesses' testimony that Beltran was the only person they had chosen from a photographic array with their prior, tentative identifications of other people constituted ineffective assistance. Counsel's strategy was unreasonable, since the tentative identification was exculpatory and would have raised a doubt about Beltran's guilt. *Id.,at734.*

Similarly here, counsel failed to impeach Graham with police reports that were inconsistent with his testimony and were exculpatory. Counsel failed to call Officers Matthews, Sederwall, Mays or Investigator Miller, to whom Graham repeatedly told he saw the Walters on Thursday or Friday. These statements were admissible for impeachment and substantive evidence, Sect.491.074, and could have been argued for the truth. That Graham had seen the Walters alive after the time Cox said they were killed, and at a time Mr.Wolfe had an alibi would have proven his innocence.

The court's suggestion that impeachment would not be helpful is wrong. That Graham remembered seeing the Walters on Friday or Thursday just days after their bodies were found was critical to the defense. Jurors knew the significance, they asked to see Exhibit A, one of the police reports of Graham's interview. Jurors wanted to know what Graham had told the police just days after the Walters were killed. They wanted to know when Graham had seen the Walters. The only reason they did not know is because

⁴ All statutory references are to RSMo2000.

counsel failed to impeach Graham and introduce his prior inconsistent statements that were exculpatory and showed that Mr. Wolfe was innocent.

Misleading jurors with "Speculation" Objection

Graham told officers twice that he saw the Walters alive on Friday (Exs. II and JJ- Tr. 216-18, 222, 224-26). At trial, Graham denied saying this (T. Tr. 1897-98). Icenogle failed to correct this false testimony and encouraged it, suggesting—in the hearing of jurors—it was mere speculation that Graham said Friday (Tr. 1895). The court's finding that the objection was to the form of the question (L.F. 823) is clearly erroneous. Icenogle knew it was both "possible" and true that Graham said he saw the Walters alive on Friday. Icenogle never corrected Graham's false testimony, and did everything to prevent jurors from knowing the truth.

A conviction obtained by the use of evidence or testimony the state knows is false violates Due Process. *Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942). It matters not whether the state solicited the false evidence or allowed it to be considered without correction. *Alcorta v. Texas*, 355 U.S. 28 (1957). The State may not use false testimony to convict an accused or false testimony that reflects on a witness's credibility. *Napue v. Illinois*, 360 U.S. 264 (1959). Under *Napue*, a conviction "must be set aside if there is *any* reasonable likelihood that the false testimony could have affected the judgment of the jury." *U.S. v. Agurs*, 427 U.S. 97, 103-104 (1976).

That likelihood exists. Jurors wanted to see the police report (T. Tr. 838, 2035- Tr. Ex. A). Graham told officers in the days after the murders that he saw them alive

Friday. Had jurors known the truth, a reasonable likelihood exists that Mr. Wolfe would not have been convicted.

Failing to Disclose Sederwall's 11/16/98 Interview

On November 16, 1998, Icenogle listed Larry Graham as a witness(Ex.Hx3,at449). Despite that filing, the motion court found that disclosure was not required since he was not subpoenaed(L.F.824). The Court also forgave nondisclosure because it was "not intentional." *Id.* It concluded that the 11/16/98 interview was not impeaching and nondisclosure did not prejudice Mr. Wolfe since the State did not mention it at trial(L.F.824-25). These findings are clearly erroneous.

The State was obliged to disclose Sederwall's report under the Due Process Clause, *Brady v. Maryland*, 373 U.S. 83,87(1963); *U.S. v. Bagley*, 473 U.S. 667(1985); and Rule 25.03(a). This rule is designed to prevent "surprise" evidence being introduced at trial. *State v. Whitfield*, 837 S.W.2d 503,507(Mo.banc1992).

The court's finding that nondisclosure was not intentional misses the point. Nondisclosure violates due process "irrespective of the good faith or bad faith of the prosecution." *Kyles v. Whitley*, 514 U.S. 419,437(1995). Icenogle knew about the information contained in the report and had a duty to learn of the faxed report. *Kyles*, *supra* at 437-38.

Mr. Wolfe was prejudiced because had jurors known that in the days immediately following the murder, Graham consistently said he saw the Walters alive on Thursday or Friday and only changed his statement during the trial itself, a reasonable probability exists that the outcome would have been different. This information would have changed

the whole case. It undermined Cox's contention that the Walters were killed on early Thursday morning at daybreak. This was not trivial. It was the heart of the defense. The jurors cared about Graham's statements to police.

The report also would have put counsel on notice that Graham equivocated during Sederwall's most recent interview. Counsel should have been ready to put Graham's prior statements before jurors. Without the report, counsel was blind-sided by Graham's radically changed testimony.

Reinterviewing Witnesses Until They Agree With State's Theory

Police officers interviewed Graham four times to see if he was "absolutely certain" about when he saw the Walters at his store(Exs.II,JJ,KK,LL). The court found no evidence supported the claim of misconduct in interviewing witnesses until they change their recollection(L.F.825). This finding is clearly erroneous.

While no officer admitted to badgering Graham or trying to shape his testimony, the evidence shows officers repeatedly interviewed witnesses whose testimony did not fit the state's case(Exs.II,JJ,KK,LL,Sx7,Tx7). Graham repeatedly said he saw the Walters alive after Cox said they were dead. On February 24th, one day after the bodies were discovered, when events were still fresh, he remembered seeing them on Friday. The next day, he again told the officers he saw the Walters on Friday. Graham's account did not fit with Cox's story and officers re-questioned him. Graham moved the date to Thursday, but since that did not help the State enough, Icenogle had an officer talk to Graham again, more than 20 months after he saw the Walters. Icenogle got what he wanted, an uncertain witness who was so confused he could not help the defense.

The State should not intimidate witnesses or coach them to say whatever it needs to make its case. See *U.S. v. Scheer*, 168 F.3d 445(11thCir.1999)(government's failure to disclose the prosecutor's intimidation of key prosecution witness violated due process and was reversible error); *White v. Helling*, 194 F.3d 937(8thCir.1999)(withheld evidence regarding timing of victim's identification of defendant as robber was material under *Brady*). In *White v. Helling*, like here, the witness did not provide the information the State needed to win its case, so officers kept interviewing him, coaching him until his testimony fit within their theory.

Graham saw the Walters alive after Cox said they were killed. Yet jurors never knew the truth. They asked for the police report, but were denied that opportunity, because of counsel's ineffectiveness. The jurors were misled, and no one told them the truth. Mr. Wolfe should receive a new trial.

II. Jessica Cox's Hair

The motion court clearly erred in denying Mr. Wolfe's claims that the State failed to disclose Cox's hair and misled counsel into believing Cox's hair was never seized; or alternatively, counsel was ineffective for failing to test the hair against a hair found in an ammunition box in the dumpster behind Mr. Wolfe's motel, and a hair found in the back seat of the Walters' Cadillac, because Icenogle's actions and counsel's failure violated Mr. Wolfe's rights to due process, a fair trial, and effective assistance of counsel, U.S. Const., Amends. 6, 14, in that when counsel asked for the hair or any reports of testing, the State said "I'm not too sure if Ms. Cox had her hair and blood taken" and that no testing had been done, counsel relied on those misstatements and went to trial thinking Cox's hair had not been seized, although the police had seized it. Mr. Wolfe was prejudiced because testing showed the hairs in the dumpster and car matched Cox, supporting counsel's defense that Cox framed Mr. Wolfe by placing the ammunition in the dumpster, impeached Cox's assertions that she had never seen the gun, let alone the ammunition, and rendered doubtful her story that she only witnessed the murder from the driver's seat since her hair was found where the shooter must have been.

At 12:20 p.m., May 2, 1997, Officer Schmidt took hair samples from Jessica Cox at the Macks Creek Clinic (Ex. Rx8). The State never disclosed this evidence to the defense (Tr. 1126). Counsel never discovered it when they looked at the physical evidence the State possessed (Tr. 1127). The defense first learned of the samples shortly before

trial when counsel deposed Cox(Ex.Gx6,at297-98). Counsel filed a Motion to Compel Discovery, stating:

During the deposition of Jessica Cox, Ms. Cox indicated that she had given samples of her hair, blood and fingerprints to members of law enforcement. No reports concerning *the taking* of these samples, nor any lab reports concerning the testing of these materials has ever been turned over to the defense;

(Ex.Hx3,at405-08)(Emphasis added). At the hearing on the motion, counsel again asked for “reports of the *taking* of those samples or any results if those were sent to the lab.”(T.Tr.208). The State responded: “I’m not too sure if Ms. Cox had her hair and blood taken, but if it was taken, there was no report generated, so there’s no report to turn over”(T.Tr.210).⁵ The State said it “does not possess, after making due diligence, any of the things they’ve asked for in this motion . . .” *Id.*

Counsel went to trial believing no samples had been taken(Tr.1126). Counsel wanted the samples to test the hair found in the ammunition box in the dumpster behind Mr.Wolfe’s motel and the hairs found in Walters’ Cadillac(Tr.1127,1421). Counsel’s defense strategy was to attack Cox(Tr.1190). The hair would have supported counsel’s argument that Cox placed the ammunition in the dumpster to frame Mr.Wolfe(Tr.1422).

⁵ Icenogle also testified that before trial, he was unaware of reports on the hair or the hair pulling done on Jessica Cox(Tr.1701).

This physical evidence showed that Cox, not Mr. Wolfe, was in the car since her hair was in the back passenger seat where the shooter sat(Tr.1421).

A comparison of Cox's hair to the State's samples(Ex.69-the single strand of hair found inside the ammunition box found in the dumpster; and Ex.70-the fibers from the rear of the car in the Walters' Cadillac) was positive showing only similarities and no dissimilarities(Tr.981-83,988-89). Criminalist Donald Smith believed both the hair from the ammunition box and the hair from the Cadillac came from Cox(Tr.989,997).

Despite this evidence, the court denied(L.F.858-59,867-68) Mr. Wolfe's claims of due process violations and ineffective assistance of counsel(L.F.169-72,179-80). On the *Brady* claim, the court ruled that the hair was neither exculpatory nor impeaching, but corroborated Cox's testimony that Cox and Mr. Wolfe were at his motel room the night before the murders and in the Walters' Cadillac when Mr. Wolfe shot Mr. Walters-(L.F.858-59). The court found that prosecutors were unaware hair had been seized and since the number of hairs available for examination was small, Smith's testimony was unpersuasive(L.F.857-59).

On the ineffectiveness claim, the court found since counsel cross-examined an expert at trial about a long hair found in the cartridge box in the dumpster and argued⁶ it was not Mr. Wolfe's(T.Tr.1534,1973), no prejudice existed(L.F.859). Additionally, the court reasoned the hair in the dumpster corroborated Cox's testimony, thus, counsel was

⁶ Counsel's argument was not based on evidence, since no evidence was presented regarding whose hair was in the cartridge box.

not ineffective for failing to present cumulative, unhelpful evidence(L.F.858). These findings and conclusions are clearly erroneous. *Morrow, supra*.

Brady violation

Whether or not the nondisclosure of Cox's hair was intentional, prosecutors had a duty to discover this evidence, in police hands, and disclose it. *Kyles, supra*. See also *State v. Phillips*, 940 S.W.2d 512,516(Mo.banc1997)(failure to disclose audio-taped statement in custody of police was *Brady* violation). Numerous cases have found the failure to disclose hair evidence to be reversible error, irrespective of the prosecutor's good or bad faith. *Hoffman v. Sate*, 800 So.2d 174,179(Fla.2001)(hair analysis excluding Hoffman as source of evidence in female victim's hands); *Dilosa v. Cain*, 279 F.3d 259,263(5thCir.2002)(a "Negroid type hair" on the bed next to victim's body and a non-Caucasian head or pubic hair found on the rope around the victim's neck); *Funk v. Commonwealth*, 842 S.W.2d 476, 481-82(Ky.1993)(hair particles found on the victim that would have placed her at a party that occurred after the time of death).

A state postconviction judge's finding that a witness is unpersuasive does not defeat a claim of prejudice under *Brady*. *Kyles, supra* at 1573. The small number of hairs only goes to the weight jurors would give the evidence. *Id*; Also see, *Antwine v. Delo*, 54 F.3d 1357,1365(8thCir.1995)(question is "whether jurors - not the motion court - would have found the evidence credible").

Contrary to the court's findings, Cox's hair did not corroborate her testimony. It contradicted it and supported Mr.Wolfe's defense. Cox testified that she never saw Mr.Wolfe with a gun, let alone with ammunition(T.Tr.1138,1213,1223,1223-24). She

only saw the gun as she glanced over at Mr. Walters when he was shot. *Id.* Cox also denied being in the back of the car, asserting she drove (Tr.1133-37). According to Cox, only Mr. Wolfe was in the back passenger seat (Tr.1134). Based on her testimony and the dumpster search, the State argued Mr. Wolfe killed Mr. Walters with the ammunition found in the dumpster (T.Tr.773-74,1956). The State mocked as "wild theories of innocence" the theory Cox framed a man (T.Tr.2016). It argued Mr. Wolfe threw away the ammunition (T.Tr.2019,2023).

The State suppressed the physical evidence that would have supported Mr. Wolfe's defense that Cox framed Mr. Wolfe (T.Tr.1972). Counsel noted Cox had easy access to the dumpster and the incriminating items were found in bags separate from Mr. Wolfe's paperwork (T.Tr.2013). Counsel emphasized that none of Wolfe's hair or fibers were found at the scene (T.Tr.791,1793). That Cox's hair was in the ammunition box in the dumpster would have supported the theory that Cox threw it in the dumpster to frame Mr. Wolfe. It would have contradicted her testimony that she was an innocent bystander, unaware a shooting would occur, never seeing a gun. Rather, she handled the ammunition herself.

Cox's hair in the Cadillac further contradicted her testimony. It was found in the back seat where the shooter sat. However, Cox denied ever being in the back seat. In contrast, Mr. Wolfe's hair was never found in the car. This evidence would have supported Mr. Wolfe's claims of innocence that the State called "wild theories".

This Court must reverse as it did in *State v. Phillips, supra* at 516-17. There, the State failed to disclose an audiotaped statement that minimized Phillips' involvement in

dismemberment, and showed her son was the depraved party. *Id.* at 517. It was material since, in the State's closing, it argued for death based on dismemberment. *Id.* This Court concluded that a reasonable probability existed that had the excluded evidence been disclosed to the defense, the result would have been different. *Id.* Confidence in the outcome was undermined. *Id.*

Like *Phillips*, the State's argument shows how important the excluded evidence was. Cox's hair suggested that she, not Mr. Wolfe, placed the ammunition in the dumpster. Cox's hair showed that she, not Mr. Wolfe, was in the back of the car. It showed she was a liar, willing to frame an innocent man for murder. Her hair was a critical piece of evidence that supported the defense. It should have been disclosed.

Ineffective Assistance

If no *Brady* violation occurred, counsel was ineffective for failing to discover the hair and have it tested. *See, e.g., Moore v. State*, 827 S.W.2d 213(Mo.banc1992)(counsel ineffective for failing to obtain requested blood tests showing defendant could not have been source of semen found on victim's bed). The court denied this claim, ruling that the hair evidence would have been cumulative and was not helpful to the defense. However, the hair evidence placed Cox with the ammunition and in the back seat of the car, where the actual shooter was. It supported Mr. Wolfe's defense that Cox framed him. This evidence would have precluded the State from denigrating Mr. Wolfe's defense as "wild theorie;" it would have been supported by real, physical evidence. Jurors deliberated more than 12 hours. Cox's hair may have been the strand of evidence to change the outcome. It calls the guilty verdict into question. A new trial must result.

III. Hileman: Jailhouse Informant

The motion court clearly erred in denying relief and erred in failing to reopen the evidence because counsel was ineffective in failing to investigate and impeach Hileman, and Icenogle failed to disclose impeaching information, improperly objected, and presented a witness he knew was unreliable, denying Mr. Wolfe due process, a fair trial, effective counsel, and freedom from cruel and unusual punishment, U.S. Const., Amend. 5, 6, 8, and 14 in that:

- A. Hileman is mentally ill: he is paranoid schizophrenic and delusional;**
- B. counsel failed to investigate records and witnesses, Hawk, Murdock, Eichinger, Failing and Breen, that proved that Hileman lied about Mr. Wolfe confessing, would say anything to reduce his sentence, threatened a state witness and her family if she did not lie under oath, and had a history of lying and blaming others; and**
- C. the State failed to reveal inducements and impeaching material: all charges were dismissed; Icenogle promised to help Hileman get favorable treatment in prison; docket entries by assistant prosecutors, and a note in Hileman's file showed a deal; and Hileman's records showed a pattern of lying, a history of mental illness, and jurors was misled about an Illinois conviction, his deals, and his treatment in prison; and**
- D. given Hileman's lying and mental illness, Mr. Wolfe's conviction and sentence is unreliable.**

Jailhouse informants have every incentive to manufacture confessions to obtain favorable treatment. Paul Hileman poses even greater concerns: he is psychotic, thinking David Letterman speaks to him through television and that President Clinton conspired to keep him confined in a mental hospital. Hileman lied about Mr. Wolfe and would say anything to reduce his sentence. He threatened to kill a witness and her family if she did not lie at his preliminary hearing. Hileman benefited from his testimony: his pending charges were dismissed and Icenogle wrote letters to prison officials. He had a deal, contrary to Icenogle's assertions. Thus, the motion court should have granted Mr. Wolfe's motion claiming: (1) Hileman was mentally ill, counsel was ineffective in failing to investigate; (2) counsel was ineffective in failing to investigate records and witnesses to prove he lied; (3) the State failed to reveal inducements and other impeaching material; and (4) his conviction and sentence is unreliable (L.F.141-56).

A. Hileman's Mental Illness

Hileman's mental health problems started at age 13(Tr.540,Ex.F,at12). He was admitted to a mental facility and prescribed Mellaril and Thorazine, antipsychotic medications(Tr.540-41,550,Ex.E,at11,Ex.F,at12). Pretrial records revealed mental illness: in 1991, he had confused thinking, persecutory feelings and depression; in 1996, he was suicidal; in 1997, at the same time he was making the allegations against Mr. Wolfe, Hileman wrote bizarre letters, showing psychotic symptoms and behaviors(Tr.541-42,Ex.A,at570-71,Ex.B,Ex5).

Hileman's letters continued after trial. He wrote to Governor Vilsack, Senator McCain, and Governor Bush(Ex.E,at13,Ex.C,at2,10,16,21,28,42,Ex.G,at16-17,22,26,35).

Hileman stated President Clinton was black and had Muslims running the country (Ex.E,at13,Ex.C,at2,10,16,21,28,42). Clinton conspired against Hileman for exposing him and made his life hell(Ex.E,at13,32,Ex.C,at2,10,16,21,28,42). Clinton gave him subliminal messages and David Letterman and Governor Bush were sending him special messages through television and threatening him(Ex.F,at17,23,25). Hileman lied to people because he had to protect himself(Ex.C,at21).

Thus, DOC psychiatrists and a psychologist found Hileman was psychotic, suffering from paranoid schizophrenia, or a delusional or psychotic disorder(Tr.551-Exs.E,at24,32,Ex.F,at18,19,27-28,Ex.G,at16,18,22-23,45-46). Hileman was paranoid, thinking officers conspired against him(Ex.E,at12-13,19,20,22,23,25, Ex.C,at25-26,Ex.G,at16,21,40). He was delusional(Ex.E,at20,23,Ex.C,at9-10,Ex.F,at18,20-Ex.G,at21,38-39,41,43). Hileman had manic behaviors: rapid movements, rapid speech, and excessive letter writing; a psychotic break; and was placed on suicide watch(Ex.E-at13-14,19,22,23,25,26,29-30).

Dr. Daniel agreed with these doctors' findings; Hileman suffered from paranoid schizophrenia and a delusional disorder(Tr.548). Schizophrenia is a major mental illness affecting one's thought process, emotions, behavioral perceptions and judgment(Tr.555-56). This mental disease affected Hileman's judgment, ability to observe, evaluate the circumstances surrounding him, and distorted his perception(Tr.557). Dr. Daniel believed Hileman suffered from paranoid schizophrenia prior to 1998 when he testified against Mr.Wolfe(Tr.569). So did Hileman's treating psychiatrist, Dr.Nnanji(Ex.G,at47-48).

Shortly after trial, Hileman sent Icenogle letters detailing Clinton's conspiracy to put him in a mental place and hide him(Tx4,at12,14-15,17,19,Ex8,Fx8). Hileman sent Icenogle copies of his letters to McCain and Bush(Ex.Tx4,at17-21,Ex.Ex8). He wanted McCain to investigate Geraldo Riveria and Katie Couric for their roles in the conspiracy (Tx4,at26-28). Hileman gave Icenogle assurances about the accuracy of his information: "None of this is made up or a lie and I would in good conscience testify to it under oath to God"(Tx4,at30).

The court denied the claims about Hileman's mental illness, ruling that post-trial letters were not available to counsel, nothing in depositions, at trial, and in Hileman's prior cases indicated his mental illness, Dr. Nnanji did not have background records documenting the mental problems, and an expert could not testify about Hileman's credibility(L.F.843-47,851). These findings are clearly erroneous, *Morrow, supra*.

The court refused to reopen the evidence to consider Hileman's 1983-84 records from the Mental Health Institute that verified his mental health treatment at age 13 and the antipsychotic medications he received(L.F.948-1199:R.105,106,112,136,180,186).⁷ At the time of his discharge, Hileman was excessively suspicious and paranoid(R.62,-100,122,175,186), with his level of excessive suspiciousness and paranoia increasing through out treatment(R.150,180). He believed peers were talking about him, even though the staff knew they were not(R.35A,140B). He falsely accused the staff of lying

⁷ The Mental Health records were attached to the Motion to Reopen(L.F.948-1199).

Citations are to the original numbering on the records.

about him(R.36). He lied throughout his stay and often falsely blamed others- (R.27,28A,53,100,110,153). These records supported Dr.Daniel's diagnosis(L.F.942) and corroborated Dr.Nnanji's findings, which the court found were without record support(L.F.844).

Mental illness is relevant both to impeach a witness and determine competence. *State v. Robinson*, 835 S.W.2d 303,306-07(Mo.banc1992); *U.S. v. Golyansky*, 1291 F.3d 1245,1248(10thCir.2002); *East v. Johnson*, 123 F.3d 235,238(5thCir.1997); *U.S. v. Lindstrom*, 698 F.2d 1154,1163-64(11thCir.1983). *U.S. v. Jimenez*, 256 F.3d 330,343-44(5thCir.2001)(paranoia and schizophrenia is relevant for impeachment).

Hallucinations are relevant to a witness' ability to discern reality. *U.S. v. Pryce*, 938 F.2d 1343,1346(D.C.1991); and *East v. Johnson, supra* at 238. Mental illness can cripple a witness' memory. *State v. Pinkus*, 550 S.W.2d 829,839-40(Mo.App,S.D.1977).

Hileman's mental illness and bizarre hallucinations call into question whether he could distinguish reality from his fantasies and whether he was competent. Contrary to the court's conclusion that an expert could not testify, a psychiatrist can assist in challenging the witness' competence and can testify. *Robinson, supra*, at 306.

The prosecution must produce such exculpatory information under *U.S. v. Bagley*, 473 U.S. at 674-77 and *Brady v. Maryland*, 373 U.S. at 86-89. *Robinson, supra* at 306. While some courts would allow the prosecution to evade this duty by never gaining "possession" of the medical record, this Court rejected such an approach, saying it "fails to recognize the nature of the prosecutor's role in the system." *Id.* at 306-07.

Here, Icenogle knew about Hileman's mental problems; he told the trial court that counsel was using his pretrial letters to show he was crazy(T.Tr.1554). Icenogle had a duty to disclose all exculpatory material, including information verifying Hileman's mental illness.

Additionally, counsel's failure to investigate Hileman's mental illness was ineffective. *See, Sederes v. State*, 776 S.W.2d 479,480(Mo.App,E.D.1989)(counsel's failure to investigate complaining witness' history of mental illness warrants a hearing). Contrary to the court's findings(L.F.843-44,851), Hileman's bizarre statements did not begin after trial. Hileman's pretrial letters showed he was crazy(T.Tr.1554). He was constantly complaining, causing trouble and making strange allegations(Ex.Qx5,at24,and Depo.Exs). Yet, counsel asked not a single question about Hileman's prior mental health treatment or drugs he was taking when they deposed him(Tr.603,758). Counsel obtained no prison records, mental health records, or criminal files(Tr.602-03,758,1187). The prison records referenced mental problems, but counsel did not know this since they made no attempt to get them. Counsel admitted they did not have sufficient time to investigate Hileman and were unprepared for trial(Tr.594-96,601,756).

While many hallucinations were reported after trial when Hileman was committed for mental treatment, his prolific and bizarre letters surfaced in 1997, at the same time he was making his allegations against Mr.Wolfe, a whole year before trial(Tr.542,Ex.Ex5). Additionally, the uncontroverted psychiatric evidence indicated that his paranoid schizophrenia or delusional disorder did not suddenly appear in 2000, it was present at

the time of Mr. Wolfe's trial(Tr.569,ExG,at47-48). All the signs were there, counsel simply failed to look.

Counsel Failed to Investigate Hileman's Lying

Cellmates Never Interviewed

John Hawk was in the cell next to Hileman and knew he was worried about the time that he was facing, especially the witness tampering charge(Ex.I,at4,5,30). Hileman said he was a 3-time loser and faced a lot of time(Ex.I,at5). Hileman did not think Mr.Wolfe was actually guilty, but said he was going to get some dirt on Wolfe so he could get his time cut(Ex.I,at5,7,30). Hileman would do anything to get himself out of trouble(Ex.I,at31).

David Murdock, Hileman's cellmate, knew Hileman was worried about the time he was facing-40 years(Ex.J,at5-6,13). Hileman said he could not handle that much time(Ex.J,at8,13). He had charges for a no-accounts check, stealing, threatening his girlfriend and painting her cat, and tampering with a witness(Ex.J,at7). Hileman wanted Murdock to write letters to his girlfriend on his behalf, and to testify that jailers brought drugs into the jail even though they had not(Ex.J,at7-11). Hileman was trying any method he could to get out of the pending charges(Ex.J,at11-12,Ex.Tx3,Ex.Wx7).

Icenogle never told the defense that Murdock was incarcerated in Pulaski County Jail; so they could obtain his testimony(Ex.W,Tr.608,612-15). Counsel did not contact Probation or Parole to find Murdock(Tr.608).

Contrary to the court's findings(L.F.847-48), counsel was ineffective. Both Hawk and Murdock knew Hileman had a motive for lying and Hawk heard Hileman admit he

was getting dirt on Mr. Wolfe to get a time cut. A witness' bias and motive to lie is always admissible and relevant. *State v. Ofield*, 635 S.W.2d 73,75(Mo.App.W.D.1982). A party may prove that bias through extrinsic evidence. *Id.* "The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308,316(1974). Counsel absolutely wanted jurors to know Hileman admitted he was lying about Mr. Wolfe(Tr.596,614-15).

The court's finding that counsel made reasonable efforts to locate Hawk but his family was uncooperative(L.F.848) is contrary to the record. While counsel made minimal efforts to contact Hawk by telephoning a family member and leaving a message, counsel admitted they ran out of time due to the court's denial of their continuance motion and late disclosure of Hileman (Tr.594-96,601,614-15,756). *See, State v. Howard*, 805 So.2d 1247(La.App.2002)(denial of continuance to allow preparation time resulted in ineffective assistance).

Officials Knew Hileman Lied

Keith Eichinger, Jail Superintendent, knew Hileman was a trouble-maker(Ex.N,at4-5,9). He was always stirring the pot, making unfounded allegations against others(Ex.N,at8-10,24-25). In contrast, Eichinger could trust Mr. Wolfe and he never caused trouble(Ex.N,at6-8,17-18).

George Failing, Hileman's parole officer, knew Hileman was desperate to get transferred out of jail; he could not stand being there(Ex.Qx5,at13-14,19,24). He told Failing he was trying to get probation, saying "if I could just 'somehow' convince

Icenogle that I'm worth the chance.”(Ex.Qx5,Depo.Ex.G). Failing received numerous letters from Hileman, including one with drugs(Ex.Qx5,at16,Depo.Ex.E,Tr.819-20,825-27,833). Hileman failed his urine test(Ex.Qx5,at28) and admitted getting high in jail(Tr.825-27). Hileman commented, “I'd rather be in prison than this place if I can't be free.”(Ex.Qx5,at31).

Failing also knew Hileman from Failing's days as a correctional officer(Ex.Qx5-at4-5). Once Hileman got upset because he could not get transferred out to general population with his boyfriend, he started swinging at an officer(Ex.Qx5,at5-6).

Thomas Breen, from the Missouri Highway Patrol, investigated Hileman's allegations that jailers were bringing drugs into jail(Tr.246,249,Ex.Wx7). Witness after witness refuted these claims(Tr.254,Ex.Wx7). Hileman gave contradictory statements(Tr.264). Breen discovered that Hileman was trying any method he could to get out of his pending charges(Tr.254,Ex.Wx7). Hileman offered to take a polygraph, but Icenogle canceled it and the rest of the investigation, after Hileman agreed to testify against Mr.Wolfe(Tr.256,258-60,263-65,268-69,Ex.Wx7).

Counsel wanted Eichinger, Failing and Breen to testify, but never made offers of proof and had no reason for this failure(Tr.1178-89,1184-85).

Contrary to the court's finding that Eichinger's testimony would not have made any difference since Hileman admitted lying about the jailers and the problems he caused(L.F.848-49), bias and motive are always admissible, through extrinsic evidence.

Ofield, supra.

Similarly, the court's finding that much of Failing's testimony was hearsay and inadmissible(L.F.849) is clearly erroneous. Failing knew that Hileman wanted probation and if that failed, to go to prison. Hileman believed that the conditions in prison were much better than at the jail, and was desperate to be transferred. He was doing everything possible to get released or transferred. Again, this went directly to Hileman's motive to lie about Mr.Wolfe and was admissible.

Contrary to the court's ruling that Hileman's sexual preferences were not proper subject matter for impeachment(L.F.849), Hileman raised this issue when he lied and said he had to be transferred to another prison because of his testimony against Mr.Wolfe. Hileman made a big deal about how his life was in danger and how prices had been placed on his head (T.Tr.1585-97,1589-90,1593,1596-97). The truth was that Hileman had problems in prison, because he lied, was a troublemaker and because he was bisexual(Ex.E,Ex.C,at24-25,Ex.Qx5,at 5-6). Failing knew it and his records confirmed it. *Id.*

When one party injects an issue into a case, the opposing party "may offer, otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue." *State v. Bolds*, 11 S.W.3d 633,639(Mo.App.E.D.1999). "The doctrine of opening the door allows a party to explore otherwise inadmissible evidence on cross-examination when the opposing party has made unfair prejudicial use of related evidence on direct examination." *U.S. v. Durham*, 868 F.2d 1010,1012(8thCir.1989). This Court recognizes this doctrine, calling it the "curative admissibility doctrine." *State*

v. Middleton, 998 S.W.2d 520,528(Mo.banc1999); and *State v. Armentrout*, 8 S.W.3d 99,111(Mo.banc1999).

Finally, Breen's testimony about Hileman and his investigation about his allegations were admissible, contrary to the court's ruling(L.F.850-51). Breen verified what Murdock and Hawk knew, that Hileman lied, was trying anything possible to get out of jail, and once Icenogle decided to call him as a witness, he cancelled the scheduled polygraph and Breen's investigation. This was relevant to show Hileman's motive to lie. Not only did Icenogle not disclose impeaching information, but he did everything possible to avoid further impeachment from being discovered.

Records Showing Hileman Lied

Hileman put some of his antics in writing, admitting he was going to play a trick on another inmate(Ex.Ux4). He admitted lying about his stories(Ex.Cx5). He vowed not to go back to prison and said, "I will do anything and everything not to be convicted."(Ex.Cx5).

At the same time that Hileman made his allegations against Mr.Wolfe, he wrote threatening letters to Cassandra Martin, his former girlfriend who was the State's witness against Hileman in his attempted arson and property damage cases(Ex.Ex5,at2). He wrote: "yes I do want to kill you and in fact plan to"(Ex.Ex5,at2). Hileman told Martin that her "days were numbered witch" and warned that he would kill her so "painfully and slowly, that you will actually beg me to just go on and kill you"(Ex.Ex5,at2). He also threatened her family. *Id.* He remarked, "I am truly the most dangerous man you will ever meet in your life."(Ex.Ex5,10/15/97letter,at2). Hileman knew guys who would take

her out if he went to prison. *Id.* Later, Hileman wrote to Martin and told her how she could make him forgive her, by lying for him at the preliminary hearing(Ex.Ex5-10/17/97letter,at3). He coached her, saying all she needed to say was: “I don’t remember” and the judge would throw out the case. *Id.* Icenogle had copies of these letters; they were attached to the Sheriff Department’s Report and formed the basis of the tampering charge filed by Mr. Icenogle(Ex.Ex5).

This was not the first threat Hileman made against state witnesses(Ex.Xx4). He threatened to kill Amanda Lister, his 15 year old girlfriend if she turned herself into authorities. *Id.* Icenogle also had this investigative report. *Id.*

Counsel admitted they obtained none of Hileman’s prior prison records, mental health records, or criminal files(Tr.594-96,601,602-03,756,758,1187). Nevertheless, the court found since Hileman admitted pending charges at trial, counsel was not ineffective in failing to investigate them(L.F.850). Hileman’s threats to Martin, a state witness, were relevant and admissible, contrary to the court’s ruling (L.F.851). If Hileman was willing to have another perjure herself to keep himself out of jail, he was willing to lie himself to achieve the same result. *See, U.S. v. Cuffie*, 80 F.3d 514,517(D.C.Cir.1996)(that prosecution witness lied under oath in previous proceeding was "material" for *Brady*).

C. Failure to Disclose

Inducements

When Hileman agreed to testify, he had at least 6 charges pending in Camden County: burglary, stealing, property damage, attempted arson, passing a bad check and tampering with a witness(Exs.Bx5,Zx7,Ax8,Cx8,Bx8). He also had a bad check charge

pending in Morgan County(Ex.A,at90). Other charges could have been brought, since he had drugs in jail(Ex.Qx5,at16,Depo.Ex.E,Tr.819-20,825-27,833). Hileman pled guilty to one count of property damage and all of the other charges were dismissed after he testified(Exs.Ax8,Bx8,Cx8).

Despite this wonderful outcome, Icenogle insisted that Hileman did not have a deal, agreement or understanding regarding the pending cases(Tr.1660,1661,1662-64,1668,1669). He disavowed the offer made by Brian Keedy his assistant(Tr.1596-97). According to Icenogle, the offer entered in the docket sheet: “Ten and go on any combination of cases necessary to reach that number, defendant can choose charges to plead to” was made without his approval(Tr.1596-97). Icenogle also attributed 4/13/98 and 5/11/98 docket entries that suggested there would be no trial to Mr. Keedy(Tr.1598-99). One pending case had a 2/25/98 docket entry, stating “set to next millennium”-(Tr.1607-08,Ex.Jx8). Again, Icenogle attributed to this an assistant(Tr.1607-08).

However, Icenogle admitted he promised Hileman that he would request out-of-state transfers(Tr.1692). Hileman cashed in on this promise. Only days after his testimony, Hileman wrote to Icenogle telling him not to forget about him and asking him to talk to the superintendent about his status as a witness so he could be released from administrative segregation(Ex.Hx8,Tr.1692-93,1715-16). Soon after, Hileman wrote back to Icenogle, thanking him for getting him out of the hole(Ex.Ix8,Tr.1717,1719). However, Hileman had additional requests. He wanted an out-of-state transfer (Ex.Ix8,Tr.1693,1720). Icenogle obliged him, writing a letter on his behalf(Tr.1693).

Later, Hileman decided it would be better if he were transferred back to Moberly and again received Icenogle's assistance(Ex.Tx4,at24,Tr.1725-26).

The court denied the claims, finding no plea agreement existed and Icenogle was concerned for Hileman's safety(L.F.850). The court would not reopen the evidence, based on the affidavit of Ken Clayton, Hileman's counsel, who reviewed Hileman's file in the property damage case and found a note reflecting an agreement with the prosecutor's office to plead guilty to one charge and have 3 pending charges be left pending until after Mr.Wolfe's trial, at which time Hileman would receive concurrent time(L.F.1205-07).

The court clearly erred. *Brady* requires disclosure of any benefits given to a government informant. *Giglio v. U.S.*,405 U.S.150(1972); *Hayes v. State*, 711 S.W.2d 876 (Mo.banc1986). *See, also, Deatrick v. State*,392 N.E.2d 498(Ind.App.1979)(prosecutor's writing to a parole board, even though the board was not bound by letter, was *Brady* violation); and *U.S. v. Boyd*, 55 F.3d 239(7thCir.1995)(favors or benefits by U.S. Attorney's Office to government witnesses must be disclosed).

Here, Icenogle evaded his obligation under *Brady* by insisting there was no formal deal or agreement as to other charges or the sentence Hileman would receive(Tr.1660-62,1664,1668-69). *Giglio*, *Deatrick*, and *Boyd*, all establish that favors or benefits received in prison are lenient treatment that must be disclosed, whether Icenogle was really concerned for Hileman's safety or not.

The docket entries of two assistant prosecutors proved a deal was reached and the State never had any attention of trying Hileman on the pending charges(Ex.Jx8,Tr.1596-99). The affidavit of Hileman's attorney, Ken Clayton, confirmed the deal(L.F.1205-07).

Prior Convictions

In 1987, Hileman pled guilty to the felony of theft and received 3 years imprisonment(Ex.D). Icenogle had a copy of this conviction in his file to charge and prove Hileman was a persistent offender(Tr.1625-30,Ex.Xx7,at5). When Hileman pled guilty to forgery, Icenogle knew that he was on parole from the Hancock County Illinois felony(Ex.Xx7,at2). His sentences ran concurrent with the Illinois conviction(Ex.Xx7-at14). Icenogle also had a handwritten note about the conviction in his file in Mr.Wolfe's case, but Icenogle could not tell whose handwriting was on the note(Tr.1624-25Ex.Kx8).

Despite this, Icenogle objected at trial to the use of this felony conviction, saying it was a juvenile conviction(T.Tr.1577,Ex.D). The court sustained Icenogle's objection, ordered defense counsel's question stricken from the record, and instructed the witness not to answer(T.Tr.1577-79). Icenogle admitted that he should have known about the prior conviction and said he made this "idiotic" mistake in the "heat of battle"(Tr.1631-32). Since counsel had not obtained any of the records of Hileman's prior convictions, she did not know exactly what the charge was(Tr.617-20,1185-87,Ex.D).

The court found Icenogle objected to the Illinois conviction in the heat of battle, not in bad faith, and since Hileman admitted numerous felony convictions, it did not matter that jurors could not consider the Illinois conviction(L.F.851).

Icenogle had a duty to disclose records of Hileman's prior convictions, impeaching material under *Bagley* and *Brady*, and his good or bad faith was irrelevant. In *Crivins v. Roth*, 172 F.3d 991,996(7thCir.1999), the state's failure to provide a witness's criminal records denied him due process. The opportunity to ask about criminal history is no substitute for disclosure. *Id.* Here, counsel only had a list of Hileman's convictions and admitted she did not know what his Illinois conviction was. Thus, when Hileman lied, she could not impeach him. When Icenogle improperly objected, she could not counter with the truth.

Prison Records

Hileman's DOC Records showed that he had numerous conduct violations, was a constant disciplinary problem and often was placed in administrative segregation as a result(Ex.A,at54,135,149,153,162,163,164,170,188,199,200,202,210, 221,253,255,265, 266,270,275,276,277,278-79,281,283,288,289,2990,292,294,299-300,302,303-04,306-07,308-09,315-16,318,320-21,32324,323,339,342,346,351,352,353-54,356-58,360,364-65,367-78,370,372-73,375,377,382,386,387,394-95,403,421-22,424-25,427-28,429-30,431,432-33,434-35,436,438-39,440-41,442-43,445-46,44,9,450-51,454-55,456-57,458-59,46-61,462-63,467,468,523-24,525-26,527-28,529,530,531-32,533-34,538,539-40,541-42,543,545-46,547-48,549-50,551-52,553-54,556,557-58,559-60,567-69,570-71,572-73,574-75,576,580-81,583-84,587-88,590,591-92,593-94,595-96,598-99,601-02,604-06,608-09,611-12,613-14,615-16,617-18,619-20,622-23,625,627-28,631-32,633). He lied and made up things to get transferred(Ex.A,at255). He repeatedly gave officers false information(Ex.A,at283,360,431,449,570-71). He altered a document to avoid

work(Ex.A,at294). He sanded places off a fan to remove another's name(Ex.A,at367-68). He threatened an officer to get transferred(Ex.A,at308-09,311-12). He asked a Seargent to write him up for a major violation so he could be transferred(Ex.A.323-24). Officers said he really had no enemies in population, but was making this up as an excuse to get moved(Ex.A,at255).

Icenogle never disclosed these records and the court ruled they were inadmissible for impeachment(L.F.847). The ruling is clearly erroneous. In *Carriger v. Stewart*, 132 F.3d 463,479-82(9thCir.1997), the State's failure to produce Dunbar's Corrections file, showing a long history of lying and attempt at pinning his crimes on others violated *Brady*. *Id.*,at 479-82. Even though the individual prosecutors never possessed Dunbar's file, they had a duty to learn of exculpatory evidence. *Id.*,at 479. The error was prejudicial since the prosecutor vouched for Dunbar's credibility and assured that "if there was any indication of his guilt or complicity in this, he would be on trial with Carriger." *Id.*,at 480. Like Hileman, Dunbar was impeached with some prior convictions. *Id.*,at 481. However, his pattern of lying to the police and blaming others to cover up his own guilt was significant. *Id.*,at 481. Here, too, Hileman's records were also important to show Hileman's long history of lying and blaming others.

Prejudice

Under either *Brady* or *Strickland*, this Court must determine whether a reasonable probability exists that had jurors heard all this impeaching evidence, the outcome would have been different. The central issue is whether the confidence in the outcome is

undermined. *Kyles, supra*. This Court must look at all the suppressed evidence together with that evidence admitted at trial.

The jurors never knew about Hileman's mental illness, that he was paranoid schizophrenic, causing him to hallucinate and have delusions. The jurors never knew that he had a long history of lying to gain benefits for himself. They never knew that he admitted lying about Mr. Wolfe to reduce his sentence and was willing to do anything to get out of jail, like threaten to kill a witness if she did not lie under oath for him. Jurors never knew that Hileman was indeed getting benefits for his testimony -- he would get transfers in prison due to his testimony. All his pending charges were dismissed. He had every expectation that this would happen as assistant prosecutors indicated they did not intend to try the charges. Given all this suppressed evidence that jurors never heard, this Court's faith in the outcome must be shaken.

The State's case was not strong, no physical evidence connected Mr. Wolfe to the offense. Jurors deliberated 12 hours. Icenogle argued Hileman's testimony in closing saying Mrs. Walters begged for her life(T.Tr.1961). Cosgrove vouched for his credibility saying if Hileman had not spoken to Mr. Wolfe, "I never would have put him on the stand"(T.Tr.2022). He emphasized that the defense was not able to impeach Hileman(T.Tr.2027). He repeated that Hileman did not get a deal(T.Tr.2027-28). Given the State's emphasis on Hileman's testimony and the weakness of the State's case, all the impeaching evidence would have made a difference. A new trial must result.

Misleading Jurors

In addition to suppressing favorable testimony, the prosecutor also knowingly relied on or condoned the use of Hileman's false testimony. *See Giglio* and *Napue*, *supra*. A conviction "must be set aside if there is *any* reasonable likelihood that the false testimony could have affected the judgment of jurors." *Agurs*, 427 U.S.at103.

Here, Hileman falsely claimed he was receiving no benefits for his testimony(T.Tr.1552-53,1587,1593), when he was. He lied about being scared for his life(T.Tr.585-97,1589-90,1593,1596-97). He barely had walked away from the witness stand when he asked the prosecutor to have him released from admistrative-segregation. He asked to be transferred back to Moberly, the very prison where he claimed he was in the greatest danger. He lied about his Illinois conviction(T.Tr.1577), and the prosecutor compounded the lie by objecting to it. Given all these false statements and the State's reliance on them to convict Mr.Wolfe, this Court must find "reasonable likelihood the false testimony affected the verdict."

D. Conviction and Sentence is Unreliable

Perhaps the most troubling aspect of this case is the State's continued support of Hileman and his testimony, even when on notice that he is lying and crazy. Before trial, Icenogle knew that Hileman had threatened to painfully torture and kill Martin and her family if she did not lie at his preliminary hearing(Ex.Ex5). Icenogle knew that Hileman lied about jailers bringing drugs into the jail(Ex.Wx7). He knew that the *Breen* investigation showed that Hileman lied about Wolfe too. *Id.* Icenogle admitted Hileman's pretrial letters showed he was "crazy"(T.Tr.1554). In spite of all the lies and

evidence of mental illness, Icenogle relied on Hileman to gain a conviction and death sentence.

When faced with additional evidence of Hileman's mental illness after trial, Icenogle did not admit his mistake in relying on Hileman's testimony. He acknowledged Hileman's letters regarding Clinton and the media were "somewhat bizarre," but dismissed them as not relating to the case(Tr.1600). The State suggested in its cross-examinations of the mental health experts, that Hileman was not really mentally ill, he was malingering(Tr.580-81,Ex.F,at45-46,55,Ex.G,at65-67). Hileman was simply manipulative, scheming to get a benefit(Tr.580-81). The State's position is that Hileman can lie about everything under the sun, but should be believed when he says Mr.Wolfe confessed to Hileman.

Icenogle had a duty to investigate Hileman once he was on notice that he lied and was crazy. *Northern Mariana Islands v. Bowie*, 243 F.3d 1109,1114-15(9thCir.2001); *Mooney v. Holohan*, 294 U.S.103,104(1935)(condemning the use of a false testimony as violative of due process). The prosecutor cannot "turn a blind eye to the manifest potential for malevolent disinformation." *Bowie, supra*,at 1114, quoting *U.S. v. Wallach*, 935 F.2d 445(2dCir.1991). Prosecutors must appreciate the perils of using rewarded criminals as witnesses and should take all "reasonable measures to safeguard the system against treachery." *Bowie, supra*,at 1116.

Due process and the 8th Amendment require reliability in capital sentencing proceedings. *Woodson v. North Carolina*, 428 U.S. 280,305(1976); and *Deck v. State*, 68 S.W.3d 418,430(Mo.banc2002)(recognizing the qualitative difference between death and

imprisonment). Here, neither Mr. Wolfe's conviction, nor his sentence is reliable. They rested on jailhouse informant who suffered from paranoia schizophrenia and had a pattern of lying to benefit himself.

The Court cannot condone a prosecutor who will "not develop any evidence or information that would either hurt their case or damage the credibility of their conniving witnesses." *Id.* at 1118. Hileman was that conniving witness. As a result, Mr. Wolfe's conviction and sentence should be reversed.

**IV. Independent Pathologist: Walters Likely Killed on Friday or Saturday
Not Early Thursday Morning**

The motion court clearly erred in denying Mr. Wolfe's claim that counsel was ineffective for not investigating the time of death and calling an independent pathologist, like Thomas Bennett, M.D., because this denied Mr. Wolfe effective assistance of counsel, U.S. Const., Amends. 6, 14, in that an independent review of the autopsy reports, witness accounts of the condition of Walters' bodies, weather conditions and other physical evidence showed they were likely killed 1 1/2 days before they were found and this evidence would have supported Mr. Wolfe's defense that Cox was lying when she said he shot the Walters Thursday morning at sunrise.

When were the Walters shot and killed? The answer was critical to proving Mr. Wolfe's guilt or innocence. Cox said they were killed Thursday morning, but that did not fit with much of the physical evidence. Dr. Jungles examined the bodies shortly after they were found at 1 p.m. on Sunday (T.Tr. 978-1013). His initial impression, based on the rigor mortis, was that they were dead 24-36 hours (T.Tr. 989-90). Mrs. Walters still had rigor-her spine did not twist and her trunk seemed firm (Tr. 1009-10). That Mr. Walters had been sitting dead in a car for three days, close to a busy highway did not seem plausible (T.Tr. 991). But Jungles testified nothing was inconsistent with the killings occurring early Thursday morning (T.Tr. 1004, 1013).

Dr. Dix was noncommittal, saying he could not determine the time of death (T.Tr. 1053-54, 1067). When pressed by Icenogle, Dix said the physical evidence

did not preclude death occurring Thursday morning(T.Tr.1079-80). He agreed it could have occurred later Thursday or Friday(T.Tr.1084-85).

Counsel admitted that, despite the importance of this issue, she never consulted with or retained an independent pathologist to investigate the time of death and testify regarding those findings(Tr.1191). Had counsel investigated and called a qualified expert, jurors would have heard the Walters were most likely killed late Friday(2/21), or early Saturday(2/22), 1 1/2 days before their bodies were discovered Sunday at noon(Tr.302,304,335,345). This opinion was based on the bodies' reported stiffness, rigor mortis, decomposition, skin slippage, and outside temperature(Tr.286-300,300-303). Dr.Bennett thought it unlikely they were killed early Thursday morning, although that was within the range of possibility(Tr.336,343-44). Based on their physical condition, Thursday morning was improbable. *Id.*

The court denied Mr.Wolfe's claim of ineffectiveness, since Dr.Bennett could not rule out Thursday morning as a possibility(L.F.853-54). It found, counsel was not ineffective for not presenting this "cumulative" evidence and not shopping for a more favorable expert. *Id.* These findings and conclusions are clearly erroneous. *Morrow, supra.*

Counsel was ineffective *Strickland, supra.* She unreasonably failed to conduct basic investigation of this critical issue, time of death, and Mr.Wolfe was prejudiced.

Counsel's failure is akin to *Moore v. State*,827 S.W.2d 213,215-16(Mo.banc1992).

There, counsel's failure to request blood tests, readily available evidence, fell outside the range of reasonably competent behavior. *Id.* Had such tests been conducted, they would

have shown that Moore could not be the source of semen found on the victim's sheet. *Id.* The evidence created a reasonable probability of a different result. *Id.*

Similarly, here, counsel failed to consult with scientific experts regarding the time of death, even though such evidence was readily available. Time of death was critical to the defense that Cox was lying and Mr. Wolfe could not have committed the crime. Counsel admitted her failure - she consulted no pathologist. Mr. Wolfe never asked that his attorney "shop" for a particular expert, only that she conduct a basic investigation of this critical issue, as is constitutionally-required. *See State v. Butler*, 951 S.W.2d at 608-10; *Henderson v. Sargent*, 926 F.2d 706, 710-12 (8th Cir. 1991) (failure to investigate, develop and introduce evidence that another committed the offense constitutes ineffective assistance of counsel).

Contrary to the court's ruling, Dr. Bennett's testimony was not cumulative. "Evidence is said to be cumulative when it relates to a matter so 'fully and properly proved by other testimony' as to take it out of the area of serious dispute." *State v. McCauley*, 831 S.W.2d 741, 743 (Mo. App. E.D. 1992); *see State v. Harris*, 64 S.W.2d 256 (Mo. 1933).

Time of death was seriously disputed. It was not fully and properly proven. Dr. Dix could not determine a time of death and Dr. Jungles changed his initial opinion that the Walters were killed 24-36 hours before they were found. Both said the physical evidence was consistent with the time of death being early Thursday morning. In contrast, Dr. Bennett recognized that the physical evidence was inconsistent with the Walters being killed over three days before they were found. Rigor mortis, skin slippage,

decomposition, and the environment pointed to 1 1/2 days or late Friday, around midnight, or early Saturday, as the most likely time of death. Just because Dr. Bennett acknowledged Thursday morning was unlikely, but within the realm of possibility, the court wrongly discounted his testimony that late Friday evening was the most likely time of death.

The State's case hinged on Cox's story that the Walters were killed Thursday morning. Dr. Bennett's testimony called that into question, creating a reasonable probability that the outcome would have been different. A new trial should result.

V. Jessica Cox Is Lying

The motion court clearly erred in denying Mr. Wolfe's claim that counsel was ineffective in failing adequately to investigate and present evidence regarding Cox's lying and guilt, through witnesses and related exhibits, such as Tucker, Lister, Kline, Kelly, Nichting, Smith, Schmidt, and Clark, because the failure denied Mr. Wolfe effective assistance of counsel, U.S. Const., Amends. 6, 14, in that counsel unreasonably failed to investigate and present: Cox's pattern of engaging in criminal conduct and then lying to escape consequences; Cox had a gun before the murders; Cox's admissions that she had to clean out her apartment before going to the police, had committed the crime with two other men, not Mr. Wolfe, and would get something out of the murder; Cox's prior inconsistent statements showing she was lying and Mr. Wolfe could not have committed the crime; and evidence of the hotel manager's phone call to Mr. Wolfe and her knowledge about his tool box, all of which revealed Cox's lies and Mr. Wolfe's innocence.

At trial, Jessica Cox suggested she was an innocent bystander who witnessed a murder. She portrayed herself as a vulnerable person, duped by Mr. Wolfe. She supposedly had no idea that the Walters would be robbed and killed; she would never have done such a thing. Cox even said that she wanted to help them and prevent the crime. Cox claimed she was scared for her life, afraid Mr. Wolfe would rape and kill her.

Defense counsel knew her story was lies. Cox was violent, she had robbed and stolen, and was perfectly content to create stories to cover her tracks. She told the "he

tried to kidnap and rape me” story so often her friends and coworkers never took her seriously. Her false stories were similar and showed a pattern of lying, to conceal her own misconduct. Had counsel reasonably investigated and presented all relevant evidence, jurors would have known Cox lied about Mr.Wolfe too.

1. Cox’s Violent History, Life of Crime and False Stories

Cox was violent and often in trouble(Ex.Gx6,at96-103). She admitted duking it out with Kristy Amite, beating Wendy Smith’s head on the bathroom floor of Risky’s, a local bar, and fighting with “preppies” in school. *Id.* She punched a man in the face because he called her a name, and was thrown out of the bar. *Id.*,101-103. Had Cox only been violent and engaged in criminal acts, counsel could not have introduced them to impeach her. *See, State v. Wolfe*,13 S.W.3d at258, citing *State v. Wise*,879 S.W.2d 494,510(Mo.banc1994); and *State v. Williams*,87 S.W.2d 175,182(1935). But jurors should have heard about Cox’s long history of committing crimes and then lying to get out of trouble.

When Cox was only 12, she stole her stepdad’s truck and wrapped it around a tree(Ex.Gx6,at45,162-63). Cox called the police and lied that she was kidnapped. *Id.*,at 163. She convincingly described the supposed kidnapper. *Id.* Unfortunately, a man fitting her description came along and the police arrested him. *Id.* When Cox went to the station, she saw officers booking the innocent man. *Id.*,at 166. Cox admitted she had made the whole story up, to escape trouble. *Id.*

Had this been a single incident, 10 years before the charged offense, it might not have been relevant to impeach Cox. This was what the trial judge and this Court

thought(Tr.1277-78). *See, State v. Wolfe, supra* at 257-58. Had the defense done its job, the courts and jurors would have known this was not the only incident but was just the first of many criminal actions followed by false accounts to deflect the blame.

In the late '80s and early '90s, Cox lived and had a child with Kenneth Andrew-Tucker(Tr.1015). On occasion, Cox left, not returning home(Tr.1015-16). One night Tucker, Cox and others were partying and Cox decided to leave with a stranger(Tr.1016). An hour or so later, she called Tucker saying that she was locked in a closet, afraid for her life and some guys were going to rape her(Tr.1016). Tucker ignored her claims as he did not take her seriously(Tr.1016). Cox returned home a day or so later(Tr.1017).

Cox and Tammy Lister, a school friend, stayed together in the early '90s(Tr.1040-41). Cox told Lister that she planned to go to the outlet mall, wait in the elevator for unsuspecting victims, and then hit them over the head, and steal from them(Tr.1043-44). In December, 1992 or January, 1993, Lister and Cox went to a Wal-Mart in Eldon(Tr.1044-45). Cox stole a purse with credit cards and cash, which she used in other stores(Tr.1047). Later, when Lister was arrested, Cox let her take the fall, although Cox had forged the owner's signature(Tr.1048,Ex.Gx6,at87-88).

In November, 1995, Darren Klein and Ryan Gilmore lived in Osage and both worked at the Polo Outlet(Tr.926-27). They played pool in a Tuesday night league(Tr.927). While playing one night at a bar, they met Jessica Cox (Tr.928). Gilmore brought her home, then had sex and ended up fighting, because she bit his penis(Tr.928;Ex.Tx6). He threw her out of the apartment(Ex.Tx6). Cox was angry, banging on the door(Tr.929).

Cox decided to get even. Two or three weeks later, she broke into Klein's apartment at 2:00-3:00 a.m., while he was sleeping(Tr.929). Cox put her foot on Klein's throat and demanded to know where his roommate was(Tr.929-30,Ex.Gx6,at49). He told her Gilmore had moved and she left(Tr.930). When Klein arose later, he realized she had stolen his keys, wallet, checkbook, clothes, pool stick and everything else of value(Tr.930,Ex.Sx6). She tore the stereo and speakers from his car and took everything from the backseat(Tr.930-31,Ex.Sx6). Klein reported the burglary to the Osage Police Department(Tr.931,Ex.Sx6). Later, Cox falsely accused Gilmore of raping her(Ex.Sx6).

Cox admitted telling police a man had raped her(Ex.Gx6,at48-52). The police did not take her seriously(Ex.Gx6,at52-53). They refused to give her a ride to her home in Eldon, making her walk home from Osage Beach (Ex.Gx6,at53).

On February 20, 1997, Cox again lied, claiming she had been kidnapped, tied up and almost raped, until she escaped(T.Tr.1160-61,1237-39). Cox said she was treated at the hospital for her injuries(T.Tr.1237). Her lies were detailed-the supposed kidnapper handcuffed her to a door, tied her up with loose, torn fabric and took her to a cabin in Camdenton(T.Tr.1161,1237). He left to get other men to rape her(T.Tr.1239). When her friends investigated, they discovered she never went to the hospital for treatment(T.Tr.1162-63,1245-47). Confronted with her lie, Cox then told her story about Mr.Wolfe(T.Tr.1163).

Jurors had to assess Cox's truthfulness. Yet, they never heard that Cox habitually got into trouble and then falsely accused others. Counsel only tried to admit one incident when Cox was 12(T.Tr.1277-78), which the State argued was too remote. Counsel never

countered that the story was just one of a long list showing Cox's pattern of lying. This failure was unreasonable since counsel said she wanted to elicit everything to impeach Cox(Tr.1146-47). Counsel could not remember why she did not utilize the Tucker and Lister information for impeachment(Tr.1151,1166,1169,1173). Counsel did not think Klein was definite enough about Cox and the details, but admitted she never got police reports in which he described in detail Cox, her 4 year old child, everything she stole, and her false public accusations(Tr.1173-75).

The court denied Mr.Wolfe's claims of ineffectiveness in not investigating and presenting evidence showing Cox was lying, finding the failure to impeach Cox with prior inconsistent statements was strategic; Tucker, Lister and Kline's testimony was inadmissible; and Tucker and Kline were not credible(L.F.830-832,864).

These findings are clearly erroneous, *Morrow, supra*. Failing adequately to impeach a witness can be ineffective assistance. *Hadley v. Goose, supra* at 1133-36(failure to impeach a police officer's testimony with police reports and other officers' accounts regarding footprints in the snow); *Driscoll v. Delo*, 71 F.3d. 701,709-11(8thCir.1995)(failure to impeach the state's eyewitness with prior inconsistent statement, in which Driscoll never admitted to stabbing the victim); *Beltran v. Cockrell, supra*(failure to impeach eyewitnesses' testimony that defendant was only person picked from photographic array with prior, tentative identifications of other party).

“There is no objectively reasonable basis on which competent defense counsel could justify a decision not to impeach a state's eyewitness whose testimony, as the district court points out, took on such remarkable detail and clarity over time.” *Driscoll*,

supra at 710. The *Driscoll* court found prejudice under *Strickland* since the impeachment would have had a “pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture . . .” *Id.*

Had counsel adequately impeached Cox, jurors would have likely found she was lying and Mr. Wolfe was not guilty. Contrary to the court's findings, Cox's long history of criminal behavior and subsequent lies to extricate herself from trouble would have been admissible. *State v. Williams*, 492 S.W.2d 1,6-7(Mo.App.E.D.1973). This Court distinguished *Williams* because Cox's single fabrication when she was 12, nearly 11 years pre-trial, was too remote to be relevant. *Wolfe, supra* at 258. In *Williams*, the false report occurred "recently." *Wolfe, supra* at 259. Had counsel discovered and presented Cox's recent fabrications, they would have been relevant and admissible. *Williams*. *See, also, Carriger v. Stewart*, 132 F.3d at 471 (informant's pattern of lying to police and shifting blame to others is relevant impeachment).

The court found Tucker and Kline incredible, but state postconviction judges findings that witnesses are unpersuasive do not defeat prejudice claims under *Brady*. *Kyles, supra* at 1573; *Antwine, supra*. Since counsel called Tucker as a defense witness(T.Tr.1792-97), she was not concerned about his credibility. Moreover, the State hardly cross-examined him(T.Tr.1796-97). Counsel had no excuse for not presenting Cox's prior fabrications since they directly impacted her truth and veracity. She was the lynchpin of the State's case--her credibility was key to conviction or acquittal.

2. Cox Had A Gun

Cox told jurors she never owned or handled a gun(T.Tr.1276). Suzanne Kelly and Kurt Nichting knew otherwise(Tr.138-39,143,147-49,945,946-48). Nichting lent her a 9 mm. pistol and ammunition in November, 1996, three months *before* the murders-(Tr.947). Cox claimed someone broke into her apartment and she was scared to be left alone(Tr.947). Several months later, Cox returned the gun(Tr.948). Cox told Kelly she had a gun, contrary to what she told jurors(Tr.138-39,143,147-49).

Counsel wanted to establish that Cox had a gun before the murders(Tr.1203). She knew this was going to be contested, because during her deposition Cox denied having one(Ex.Gx6,at92-94). Cox asserted she never owned or carried a gun. *Id.* She said she never even touched one, except when she was 8 on New Year' Eve(Ex.Gx6,at93-94). Counsel knew that Kelly disputed Cox, but did not follow-up to determine who gave Cox the gun(Tr.1204). Counsel never interviewed Kurt Nichting(Tr.1204).

The court ruled Kelly's testimony about Cox having a gun and Cox's admission were hearsay and inadmissible and since this occurred after the murders, did not provide a viable defense(L.F.828-29). Since counsel did not know about Nichting, she was not ineffective in not interviewing and calling him, and his testimony was cumulative to Wendy Smith's(LF.865-66).

These findings are clearly erroneous. Cox's admission to Kelly that she had a gun was a prior inconsistent statement, directly contradicting her testimony that she never owned or handled one. Her statement was admissible, had counsel laid the proper foundation: (1) whether she made the statement and (2) whether it was true. *Wolfe, supra* at 261. *When* Cox had a gun did not change matters--she claimed she never had a gun.

But, if timing were an issue, Nichting stated he loaned her a gun a few months before the murder. The court's suggestion that since counsel did not know about Nichting she was effective is contrary to the record. Counsel admitted that she deposed Kelly and Kelly told her a man loaned Cox a gun. Kelly knew the man's first name, Kurt, but got his last name wrong. Counsel simply failed to follow up on Kelly's information.

To suggest Nichting's testimony was cumulative to Wendy Smith's ignores reality. Wendy Smith testified at trial, describing seeing Cox with a .25 caliber gun at a party(T.Tr.1744-47). The State challenged this testimony, having a deputy bring guns into the courtroom from the evidence room to show that Smith could not tell the guns' caliber(T.Tr.1757-84). Nichting's testimony was critical to corroborate Smith and prove this disputed issue. Whether Cox had a gun was hotly contested and not cumulative. *State v. McCauley, supra* at 743. "Testimony by a single witness can never be discounted as 'merely cumulative.'" *State v. Hayes*, 785 S.W.2d 661,663(Mo.App.W.D.1990). Nichting's testimony was critical.

3. Cox's Admissions:

Cox told Wendy Smith she had to "clean out" her apartment before she went to the police to report Mr.Wolfe(Tr.1151). Counsel knew about this pretrial admission, but could not remember why she did not elicit it(Tr.1151-52).

In February, 1997, Cox told Joyce Whittle about the murders before going to the police. Cox said that she had been doing drugs with two men she knew and they went to look at a car(Tr.Ex.HH). While there, one of the men shot the man in the back of the head. *Id.* The three then went into the house and stole a lot of money. *Id.* The two men

hid at her house. *Id.* Counsel failed to introduce this damning evidence because she failed to lay an adequate foundation by asking Cox if the statement were true (T.Tr.1276-77). *State v. Wolfe, supra* at 261.

Cox told Suzanne Kelly she would get something out of the Walters' crime (Tr.135). Kelly responded, "you go girl" (Tr.135). Counsel had no reason to not elicit this information from Kelly; counsel wanted to elicit all the impeaching information she could (Tr.1146-47).

Since neither Smith nor Whittle testified at the evidentiary hearing, the court found these claims waived (L.F.830,861-62).

The court's suggestion that Smith and Whittle needed to testify misconstrues Mr. Wolfe's claims. Counsel ineffectively failed to lay a proper foundation for impeaching Cox with her admission to Whittle by failing to ask Cox if the statement was true (L.F.174). *Wolfe, supra* at 261. The ineffectiveness lay with counsel's failure to lay a proper foundation, not the testimony. Smith told counsel about Cox's admission that she had to clean out her apartment before going to the police in her sworn deposition (Tr.1151-52). Counsel unreasonably failed to impeach the witness.

4. Cox's Times Don't Add Up

Counsel failed to impeach Cox with prior inconsistent statements regarding when she went to the hospital. When deposed, Cox said Mr. Wolfe and she went to a cigarette store in Camden at 9:00 a.m., then drove to Lake Ozark where he dropped her off at the hospital at 9:30 to 9:45 a.m. (Ex.Hx6, at 402, 412, 415-16). She called for a ride,

waiting 20-25 minutes(Ex.Hx6,at419). When she got home, she looked at the clock; it was 10:36 a.m(Ex.Hx6,at420).

Counsel also failed to introduce Defense Exhibit B, the report of police officers' initial interview with Cox at her attorney's office.

Counsel, failed to justify these failures(Tr.1146-47,1152), yet the court found she was effective and exercised strategy(L.F.830-31,864). But the record shows otherwise. Counsel had no reason for failing to impeach Cox with her prior inconsistent statements. Like *Hadley v. Goose, supra*, the failure to impeach was unreasonable as jurors never learned of exculpatory information.

Impeachment on the time Cox said she was with Mr.Wolfe was critical as it showed she was lying. Had jurors heard her original statement that Mr.Wolfe dropped her off at 9:30 or 9:45 a.m., they would have known Cox was lying, since Mr.Wolfe could prove that at 9:12 a.m., he was buying paint at High Brothers Lumber Store(T.Tr.1846-50). Conveniently, at trial, after the receipt from High Brothers was disclosed, Cox's memory changed and she claimed to arrive at the hospital at 8:30 or 9:00 a.m.(T.Tr.1157).

Exhibit B was important, because it showed that Cox did not mention what Mr.Wolfe was wearing in her original statement to officers(Ex.Fx7). That description first came days later, after police arrested Mr.Wolfe and searched his apartment and Port Valero. Cox initially never mentioned handcuffs(Ex.Fx7), which first came up after officers seized some from Mr.Wolfe's room. By the time of trial, they were front and center(T.Tr.1110-1172,1194,1307). Finally, the report of Cox's "drive-through" showed

officers everywhere she supposedly went with Mr. Wolfe, mentioned neither Port Valero, nor the cigarette store(Ex.Fx7). This was critical as Mr. Wolfe's asserted Cox never went to his work-sites on Thursday morning.

5. Monica Clark

Monica Clark, the Williamsburg Inn manager, talked to police on February 28, 1997, days after the offense(Ex.Nx6). Clark called Mr. Wolfe on February 20, 1997, Thursday at 8:30 a.m., when Cox said he was driving around with her(Ex.Nx6,Ex.L,at17) Since Mr. Wolfe lived in the room directly above Clark, she could hear him(Ex.L,at17). Mr. Wolfe stored his tools in Clark's basement until he got a truck toolbox(Ex.Nx6). On Sunday, February 23, 1997, Mr. Wolfe had the toolbox stored in her garage; she recalled the date, because they tried to call locksmiths who worked Sundays(Ex.L,at19-20). Before Sunday, Ms. Clark never saw the tool box on the truck(Ex.L,at20).

Counsel had this police report, but did not remember Clark saying she called Mr. Wolfe Thursday morning(Tr.1144-45). She talked to Clark, but could not recall if she knew when Mr. Wolfe got his toolbox for his truck(Tr.1144).

The court held Clark's testimony regarding the toolbox contradicted Marrie [sic] Parle's testimony and the testimony regarding the phone call contradicted Mr. Wolfe's statement to authorities(L.F.827). Contrary to these findings, Clark's testimony would not have been harmful. Rather, both the phone call and tool box were important facts for the defense. If Mr. Wolfe was at home at 8:30 a.m. as Clark testified, he could not have been with Cox in his truck. This would have shown Cox was lying.

Although the toolbox seemed a minor detail, it fit counsel's theory that Cox was lying and framing Mr.Wolfe(T.Tr.2002). Cox first saw the toolbox on Mr.Wolfe's truck when she and the officers drove by the Youngs, on February 27th. She added details to her story as she went along. Cox said Mr.Wolfe got into the toolbox to get tools⁸ to open the safe(T.Tr.1146). However, since Mr.Wolfe did not even have a toolbox on his truck on the 20th, he could not have retrieved tools from it.

Mr.Wolfe was prejudiced by counsel's failure to call Clark. She was an objective, disinterested witness, with no reason to lie. Instead, counsel called Mary Parle, Mr.Wolfe's girlfriend, to support her defense that Mr.Wolfe was at home early Thursday morning and did not even have the toolbox on his truck on Thursday. The State easily discredited her saying she loved Mr.Wolfe and made "unbelievable falsifications" (T.Tr.2025). Such an argument would not have been possible had Clark been called to prove these critical facts.

Clark's testimony was also consistent with Mr.Wolfe's statement(Ex.Mx3,at31). He gave police only estimates of the time he went to Cigarette Outlet. *Id.*

Summary

Cox had a pattern of getting into trouble and then lying her way out. She was willing to deflect the blame to innocent parties. Jurors never knew about her lies. Cox had at least two guns around the murders, a .25 caliber and a 9 millimeter, but she falsely

⁸ Forensic evidence proved that Mr.Wolfe's tools could not have made the pry marks on the safe; they were too wide(T.Tr.947-48).

testified she had never handled a gun. Cox's times did not add up; they showed Mr. Wolfe could not have been with her when she claimed. Her story took on "remarkable detail and clarity over time." *Driscoll, supra* at 710. Cox accused Mr. Wolfe of murder. Had counsel performed adequately, jurors would have known the truth: that Cox cried wolf so often, she could not be believed. Unfortunately, jurors did not know the truth about Cox and when she cried "Wolfe" this time, Mr. Wolfe was wrongfully convicted.

Because of counsel's ineffectiveness, this Court should reverse and remand for a new trial.

VI. The State Kept Out Evidence and Then Suggested It Did Not Exist

The motion court clearly erred in denying Mr. Wolfe's claim that the State kept out evidence of other suspects and Cox's prior lies and then improperly suggested that no other suspects existed and Cox had never lied and counsel was ineffective in failing to object because this denied Mr. Wolfe due process, a fair trial and effective assistance of counsel, U.S. Const., Amends. 6, 14, in that the State cannot mislead jurors, keeping out evidence and then suggest it does not exist, and counsel unreasonably failed to object to this improper conduct. Mr. Wolfe was prejudiced as Cox's credibility was key to a conviction and the Smith evidence supported his defense that he did not kill the Walters.

Before trial, the state moved to exclude evidence that someone else committed the murders (T.Tr. 727-31). It was successful. The court disallowed evidence regarding Terry Smith (T.Tr. 1408, 1425). Having excluded this evidence, Icenogle then elicited from Officer Bowling that no other "leads or any focus as to the possible perpetrator" existed until Jessica Cox came forward (T.Tr. 1026). This was untrue. Police immediately suspected Terry Smith, because he had robbed another elderly man, George Lane, who lived in the same area (Tr. 1676-79). The police ran a NCIC records-check on Smith on February 25, 1997, two days before Cox came forward (Exs. Ix4, Sx5). Police submitted Smith's fingerprints to the Missouri Highway Patrol Crime Lab for comparison to ones at the scene (Ex. Kx4, at 8). Police planned to interview Barbara Reeder about Mr. Walters

allegedly having bragged about having lots of money(Ex.Mx4). But when Cox implicated Mr.Wolfe, further investigation into Smith or other suspects was cancelled(Ex.Mx4). The case was “closed”(Ex.Dx3).

Icenogle admitted he knew the police initially suspected Smith(Tr.1677). Smith’s other victim, George Lane, lived close to the Walters(Tr.1678). The police knew about the Lane case, because George was the father of Frank Lane, a Camden County Sheriff’s Department Dispatcher(Tr.1678).

The State also moved to exclude evidence of Cox’s prior bad acts not resulting in convictions, even those that demonstrated her untruthfulness(T.Tr.732-33). The State argued her false accusation leading to an arrest of an innocent man was collateral, since Cox was only 12. *Id.* The trial court agreed and excluded her prior lie(T.Tr.1278). Having excluded this evidence, the State then asked Richard Kremenak whether Cox had ever “told some major lie or engaged in some major fabrication”(T.Tr.1767). The State let jurors believe Cox was simply “two-faced” and never did “anything real major as far as her being perhaps untruthful.” *Id.*

Mr.Wolfe asserted the prosecutors’ misconduct denied due process and a fair trial, *Napue* and *Giglio*, and counsel was ineffective for failing to object(L.F.205,214-15,227-28). The court found Mr.Wolfe had not shown Bowling’s testimony was false and that Mr.Wolfe was prejudiced-(L.F.880). It found that since Kremenak was a defense witness and counsel had elicited Cox’s reputation for truthfulness, the cross-examination was not improper and no prejudice resulted(L.F.903-04). These findings are unsupported by the record and are clearly erroneous. *Morrow,supra.*

False and Misleading Evidence

The State's use of false or misleading evidence to convict an accused denies due process and a fair trial. *Napue* and *Giglio, supra*. It matters not whether the prosecutor elicits the false evidence or simply lets it go uncorrected. *Id.* A *Napue* violation will result in reversal "if there is *any* reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103-104.

Missouri courts also condemn prosecutor exclusion of evidence and suggestions to jurors that it does not exist. *State v. Weiss*, 24 S.W.3d 198 (Mo.App.W.D.2000); *State v. Luleff*, 729 S.W.2d 530 (Mo.App.E.D.1987); and *State v. Hammonds*, 651 S.W.2d 537 (Mo.App.E.D.1983).

Like *Weiss*, *Luleff*, and *Hammonds*, the prosecutors kept out evidence, vigorously arguing that evidence of other suspects, like Terry Smith, be excluded. They did not want jurors to hear evidence of Cox' lies, her major fabrication resulting in an innocent man's arrest. Then they affirmatively misled jurors into believing that no such evidence existed. The court's findings that the prosecutors' actions were appropriate are erroneous since appellate courts have repeatedly found this creates such a manifest injustice as to be plain error.

Mr. Wolfe was prejudiced. The State's case hinged on Cox. To convict, jurors had to believe she was telling the truth. The State kept out evidence of a major fabrication, and then told jurors it didn't happen. The State wanted to suggest Cox was only two-faced. The false testimony that she had never told a major lie could have affected jurors's judgment.

Ineffective Assistance

Counsel's failure to object to the improper questioning of Bowling and Kremenak was ineffective. *See, State v. Storey*, 901 S.W.2d 886, 901- (Mo. banc 1995) (counsel's failure to object to prejudicial argument is ineffective assistance of counsel). To prove prejudice, Mr. Wolfe must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Williams, supra*. Counsel had no reason for failing to object (Tr. 1240-42, 1258) and, under *Luleff* and *Hammonds*, counsel should have known the prosecutors' actions were improper. *Napue* and *Giglio* instructed counsel that presenting false and misleading evidence was improper. Counsel's actions were unreasonable.

In *Kenner v. State*, 709 S.W.2d 536 (Mo. App. E.D. 1986), counsel was ineffective for failing to object to prejudicial evidence of other crimes. Like *Kenner*, the State engaged in objectionable conduct, keeping out evidence and then suggesting it did not exist. Like *Kenner*, Mr. Wolfe was prejudiced. Cox's credibility was key to a conviction. Yet evidence of Cox's prior fabrication was kept from jurors and then the State misled them into believing that Cox had never lied before.

Similarly, the defense wanted to establish who really killed the Walters. The State excluded evidence that Smith may have committed the crime, and then misled jurors into believing the State had no "leads or any focus as to the possible perpetrator" until Jessica Cox came forward (T. Tr. 1026).

Whether based on the prosecutor's misconduct or counsel's ineffectiveness, this Court should reverse and remand for a new trial.

VII. Terry Smith Evidence

The motion court clearly erred in denying Mr. Wolfe's claim that counsel was ineffective in not investigating and presenting evidence that Terry Smith and Cox robbed and killed the Walters, that the State failed to disclose exculpatory evidence of Smith's involvement and appellate counsel failed to raise the issue on appeal, denying due process, compulsory process, right to present a defense, and effective assistance of counsel, U.S. Const., Amends. 5, 6, 14, in that counsel failed to investigate police reports identifying Smith as the initial suspect, interview and adequately present documents, a map and testimony through witnesses Lane, Reeder, Dayton, Garrison, Elliott, Moss, Purvis, Palmer, Spencer, Dwyer that:

- 1) Smith knew the Walters kept large amounts of cash at home;**
- 2) Smith needed money for his methamphetamine habit;**
- 3) Smith was violent and desperately needed cash;**
- 4) Smith robbed another elderly victim in Greenview shortly before he robbed and killed the Walters;**
- 5) Smith cased the Walters' only days before the murder admitting he planned to rob them;**
- 6) Smith obtained .25 caliber guns to commit the crime;**
- 7) Smith and Cox were seen together just before the murder;**
- 8) Cox was in a Blazer before the murder and a Blazer was at the Walters' just before the bodies were discovered;**
- 9) Smith was the prime suspect when the bodies were discovered.**

Undisclosed reports corroborated Dayton's account and linked Smith to the robbery and murders. Had jurors heard this evidence, a reasonable probability exists the outcome would have been different.

Police immediately suspected that Terry Smith killed the Walters. He had robbed another elderly man from the area(Tr.1677-78). He had a burglary/car theft ring, stealing cars to buy and make methamphetamine(Tr.385;Ex.HH). On February 25, 1997, police did a records check on Smith and started investigating him, finding more than 24 arrests for burglaries, stealing, drugs, assaults, robberies and murder (Ex.Ix4,at1,Ex.Sx5,Tr.869).

Police requested the Crime Lab compare Smith's fingerprint samples to those found at the crime scene(Ex.Kx4at2,Ex.Lx4at9). Police interviewed witnesses for information regarding Smith's possible connection to the murders(Ex.Jx4,Tr.377,385). However, once Cox came forward, police canceled their investigation(Ex.Lx4at9,Tr.955-57). The "case [was] closed" once Mr.Wolfe was arrested(Ex.Dx3,Tr.363).

Counsel knew Smith was the original suspect and the police had not pursued leads, but did not investigate Smith(Tr.648,520,659-60,1189). As trial approached, Icenogle disclosed Paul Hileman as a witness(Tr.591-92,Ex.Lx3). Counsel scrambled to investigate Hileman and his allegations(Tr.594-96). During this investigation, Phil Dayton confirmed what police originally suspected(Tr.596-97,658-59,1191, 1394,1469). Smith planned to rob the Walters and obtained .25 caliber guns to do it(Tr.597). However, with so little time to prepare for trial, counsel could not fully investigate Smith(Tr.598). They were so desperate they asked the State's help in investigating-

(Tr.598-99). The State's attorneys did not want to find exculpatory evidence. Their goals were to establish "Smith told Wolfe about the Walters' residence and Smith is alibied for murders"(Ex.Nx8). They met neither--finding no connection between Smith and Mr.Wolfe, nor an alibi for Smith. However, when their investigation uncovered helpful information for the defense, it was not disclosed(Tr.624-36,639,645,1122-24). Only the unhelpful information was provided(Ex.29,43,44,59,Tr.1425-35).

Although counsel did not fully investigate Smith, they found some information linking him to the crime(Tr.624-36,Exs.DD,Cx3,Ax4,Bx4,Cx4,Dx4,Fx4,Gx4). They tried to adduce this evidence, but the State thwarted them. Pre-trial, the State moved in limine to exclude evidence that Smith committed the murders(T.Tr.727-29). Counsel argued this evidence was admissible through Phillip Dayton, Barbara Reeder, and Criminalist Kathleen Green(T.Tr.729-30).

Offers of proof established that Reeder saw Smith and Cox together in January 1997 and Dayton and Smith at her home(T.Tr.1403-04,1413-14). In early January 1997, Dayton and Smith traveled from Kansas City to Camden County to burglarize a car lot(T.Tr.1411-12). While there, Smith discussed robbing "two old people," whom Dayton believed were the Walters, in Greenview(T.Tr.1412-13). Smith and Dayton made several drive-bys of the Walters' house, yet Dayton could not identify the house from a photo counsel showed(T.Tr.1412-13).

Smith had two .25 caliber guns, obtained from two juveniles(T.Tr.1413). One had similar class characteristics to the gun that killed Mr.Walters, although Green believed it

had not(T.Tr.961-62). Green could not eliminate the second gun as the murder weapon without examining it, but it was destroyed in a fire(T.Tr.973-75,1423).

Dayton declined to help Smith with the robbery; he was in Jackson County Jail on a probation violation(T.Tr.1414). The trial court denied the defense offers of proof(T.Tr.1409,1425) and prohibited counsel from eliciting police leads about Smith(T.Tr.1033-1035) or whether Cox knew Smith and Reeder(T.Tr.1277-1278).

Counsel included the Smith claim in the new trial motion(Ex.HHHat500,504-05), but appellate counsel did not raise it on appeal. *State v. Wolfe*,13 S.W.3d at 276,n.9 (Wolff, J.,dissenting).

Mr.Wolfe's amended motion alleged counsel's ineffectiveness in not investigating and presenting all available evidence that Smith robbed and killed the Walters, and the state's non-disclosure of exculpatory information under *Brady*(L.F.129,132-40,179), which denied a fair trial, right to present a defense, and due process. Appellate counsel was ineffective in not briefing the Smith issue(L.F.199-205).

On December 31, 1996 or January 1, 1997, Kenneth Palmer and Brian Mummert traded two .25 caliber-laser-sighted handguns to Smith and Dayton for methamphetamine(Tr.163-68,765-66). On January 6, 1997, Dayton and Smith stole two cars from Lakeway Motors in Osage Beach (Ex.Cx3,Tr.153-55,765,Ex.DD).⁹ They brought the cars to Angela Dawn Elliott's house, met with Fred Moss, and asked about borrowing a ski mask(Tr.193,200,203,208-09,Ex.Cx3). They left one of the cars with

⁹ Smith pled to receiving stolen property and his 5-year sentence was suspended(Ex.Y).

Moss(Tr.195,210) and tried to sell Moss a small handgun with a laser-sight(Tr.198,207-Ex.HH). They also tried to sell him a television and computer monitor(Tr.207). Smith needed money to make methamphetamine(Ex.Hx4,Tr.207). Moss loaned them \$100.00, keeping the gun as collateral(Tr.207-08). A few days later, Dayton paid Moss, who returned the gun to Dayton, who handed it to Smith(Tr.208,213-14). Elliott positively identified Smith when interviewed by police(Tr.200-01).

In January 1997, Smith and Cox went to Lane's¹⁰ house, asked for his wife, Reeder, and asked if they would go out with them(Ex.Dx4,Tr.1090). Lane told his wife when she came home from school and she said, "no way"(Tr.1090-91). Reeder was afraid Cox and Smith would assault and rob them(Ex.Dx4,Tr.1091).

Like the Walters, Lane had money(Tr.1091). Although Reeder testified in an offer of proof regarding Smith and Cox(Tr.1401et al.), counsel failed to elicit all relevant information. Reeder and her husband, Lane, lived in Greenview(Ex.K,at11). Reeder saw Smith and Cox together several times around the murders(Ex.K,at7-8,13-15). They came to her house a couple of times and to her school(Ex.K,at8). Smith was often violent, especially when strung-out on drugs(Ex.K,at9,16,20). Smith was a speed freak, used lots of methamphetamine, and was "tweaked out" like a mad-man(Tr.15-16,Ex.Cx3). He and Dayton were drug-buddies and often were together(Ex.K,at11). Smith broke into and

¹⁰ Lane died February 16, 1999(Ex.K,at12,Tr.1089-90) and the motion court considered his pretrial interview as evidence of his testimony(Ex.Dx4,Tr.1091).

ransacked Reeder's house(Ex.K,at18-19). Reeder was afraid Smith would kill her and Lane(Ex.K,at9).

Dayton testified in an offer of proof(Tr.1410 et al.), but counsel failed to elicit all relevant information. Smith asked Dayton to help him rob an elderly couple, knowing they kept lots of money(\$30,000-40,000) in the house(Ex.Cx3,Tr.766).¹¹ Smith lived close by the Walters, as shown by a map(Ex.Bx3,Tr.867). Smith and Dayton drove by their house two or three times at night(Ex.Cx3,Tr.767,781). Dayton described the house in detail(Cx3,Tr.767). Counsel never showed Dayton photos of the Walters' residence from the road, the way he viewed it(T.Tr.1412,Tr.767-68,774-76). Had counsel done so, Dayton would have positively identified the house as the one Smith wanted to rob(Tr.776,Exs.J,I,andMx5).

Counsel admitted they failed adequately to investigate Smith(Tr.625,632, 634). Counsel were not prepared; they were learning information during the trial(Tr.635). Counsel had not interviewed Kenneth Palmer, John Garrison, Angela Elliott, Van Purvis, William Frederick Moss(Tr.157,170,201,212,639,641-44). They did not get the police file about the stolen car(Tr.645,Ex.Gx4). Counsel lacked reasons for not calling Lane(Tr.635,1402). Counsel did not interview witnesses and prepare because they ran out of time; they wanted to follow up on leads(Tr.642,644,644-45,647,663,1505-Exs.A-x4,Bx4,Cx4,Dx4,Ex4,Fx4,Gx4,Hx4,Kx4). Their investigator felt she had good leads, but she had no chance to follow-up(Tr.1527). Counsel thought they may not have presented sufficient evidence to link Smith to the robbery and murders(Tr.664). Co-counsel

believed Dayton provided the direct connection(Tr.1406). Counsel wanted jurors to hear this evidence(Tr.665).

The State had exculpatory information it never disclosed(Tr.1122-24,1470). Police reports dated 11-18-98, establish Dayton's statements directly linking Smith to the Walters' robbery and murders(Ex.Cx3,Tr.355-56). Dayton identified the Walters' house as that which he and Smith had staked out and described how they drove by the house several times(Ex.Cx3). Dayton also reported seeing an older 4-door car for sale(Cx3,Tr.1470). Detective Dwyer's¹² 11-10-98 report regarding interviews with Kenneth Palmer and Brian Mummert revealed they positively identified Dayton as one of the men to whom they gave the .25 guns(Ex.FF,Tr.167-68,356-57). Mummert couldn't identify Smith from the police photo showing Smith clean- shaven(Tr.168-69,Ex.GG). He described Smith as having tattoos, scrubby looking, with long hair(Tr.169). When shown a photo of Smith as he appeared in January, 1997(Ex.EE), he identified him(Tr.166-67,169-70). Trial counsel never saw that 1997-photo(Tr.1124).

Appellate counsel didn't raise the Smith issue because she thought the defense lacked what they needed to link Smith to the crimes and preservation problems existed(Tr.404-05).

The court denied this claim(L.F.831,833-43,867,871-72), finding Reeder and Dayton not credible due to prior convictions(L.F.833,834,839,840-41), and the evidence did not sufficiently link Smith to the robbery and murders(L.F.831-32,834-42,867). It

¹¹ Police found \$22,000 in cash at the Walters' after their deaths(Tr.916).

¹² Dwyer provided the reports to Icenogle(Tr.355-57).

found counsel's failure to investigate reasonable trial strategy(L.F.835), and prosecutors had no obligation to disclose information from unendorsed witnesses, and the information was not exculpatory(L.F.837-38, 841). These findings are clearly erroneous, *Morrow, supra*.

Trial Counsel was Ineffective

Counsel must investigate others who may have committed the crime. *Butler*,951 S.W.2d at 606-10; *Henderson, supra*. "There is no reasonable trial strategy that would lead competent counsel to decline investigation into documented allegations that there may have been an alternate perpetrator." *Gaiimo v. State*,41 S.W.3d.49,54-(Mo.App.E.D.2001).

In *Butler, supra* at 607,609, the police initially suspected the victim's nephew who had a drug problem and stole from his family. *Id.,at* 607. He drove a car consistent with one seen near the victim's body. *Id.* He had the opportunity to commit the offense as he left work early. *Id.,at* 607-08. He had a ring similar to the victim's. *Id.* Counsel was ineffective for not investigating and presenting this evidence. *Id.,at* 608-10. Although the evidence was not an eyewitness, a confession or physical evidence, it was sufficient to "directly" connect him to the crime. *Id.,at* 609.

Here, counsel knew from police reports that police initially suspected Smith, who robbed another elderly man who lived close by. Smith had a drug problem and was desperately needing money to feed his habit. He was an IV-user and was wild and violent. Smith stole from innocent people and businesses. Smith and Cox were together just before the offense looking for potential victims. Cox was in a vehicle matching one

seen at the Walters' house near the time of their deaths(Ex.Hx6,at317). Smith knew they kept lots of cash and drove by their house staking it out to rob. Smith was directly connected to the robbery and murder. Had counsel adequately investigated, they could have discovered and presented this evidence.

The court's suggestion that this evidence insufficiently linked Smith to the crimes is contrary to *Butler*, and violates Mr.Wolfe's constitutional right to present a defense. *Rock v. Arkansas*,483 U.S.41,55(1987). A defendant is entitled to call witnesses whose testimony is material and favorable. *Id.*; *see also, Chambers v.Mississippi*,410 U.S. 284,287-90(1973)(hearsay rule used to exclude evidence someone else confessed frustrated defendant's efforts to develop an exculpatory defense); *Green v. Georgia*,442 U.S.95,96-97(1979)(excluding as hearsay testimony codefendant admitted crime violated due process). The Constitution guarantees a defendant a meaningful opportunity to present a complete defense. *Crane v.Kentucky*,476 U.S.683,690(1986). The court raised the bar for admissibility that another committed the crime so high it violated Mr.Wolfe's right to present a defense.

The court's finding that Dayton and Reeder were incredible was insufficient to deny relief. Counsel tried to call them, even knowing their criminal history. Only inadequate investigation connecting Smith to the offense precluded their testimony. A state postconviction judge's finding that a witness is not credible does not defeat a claim. *Kyles,supra* at 1573; and *Antwine,supra* at 1365. Credibility is for jurors to decide.

The Hileman late disclosure left counsel scrambling to track down leads that another committed the offense. However, counsel knew of Smith for over a year and did

nothing to investigate him. No reasonable trial strategy justifies the failure to investigate an alternate perpetrator. If counsel's failure to investigate is considered reasonable, due to the State's late disclosure of Paul Hileman, and the court's failure to grant a continuance, Mr. Wolfe was denied a fair trial, his right to present a defense and due process.

Brady Violation

The State's failure to disclose police reports verifying Dayton's information about Smith denied Mr. Wolfe a fair trial and due process. *Brady, supra*, at 87. Suppressing evidence favorable to an accused violates due process if the evidence is material to guilt or punishment. *Id.*; *Kyles, supra*. The prosecutor and police must disclose evidence. *Kyles, supra*, at 437. Since materiality is whether a reasonable probability the outcome would have been different or a probability sufficient to undermine confidence in the outcome, the court should have asked whether the suppressed information "could be reasonably taken to put the whole case in such a different light as to undermine confidence" in jurors's verdict. *Kyles, supra*, at 435.

A *Brady* violation occurred. The 11-18-98 report identified the Walters' house as the house Smith staked-out to rob, and Dayton described how he and Smith drove by and observed it several times(Ex.Cx3). The 11-10-98 supplemental report corroborated Dayton, as Palmer and Mummert positively identified Dayton as one of the two men who received the guns(Ex.FF).

These reports would have led to additional exculpatory information. Police initially showed Palmer and Mummert Smith's 1998 mug shot; Smith was short-haired,

clean-shaven(Ex.FFandGG). His 1997 mug shot showed him unshaven, long, unkempt hair, as witnesses described him(Ex.EE). Palmer would have identified Smith had he been shown this photo.

Police reports corroborated Dayton's allegations against Smith, provided a direct link to the crimes, and would have resulted in this evidence being admitted. Without this evidence, Mr.Wolfe's trial was unfair, the verdict unworthy of confidence.

Obligation to Do Justice

The State initially considered Smith the primary suspect, but dropped him once Mr.Wolfe was arrested. This is like Illinois where 13 innocent men landed on death row. Report of the Governor's Commission on Capital Punishment, April 15, 2002, http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/ A thorough study of the cases revealed common themes: 1) relatively little solid evidence connected the defendants to the crimes and 2) uncorroborated testimony of someone with something to gain. *Id.,at 8.* Both occurred here.

The Illinois Commission recommended "after a suspect has been identified, the police should continue to pursue all reasonable lines of inquiry, whether these point towards or away from the suspect." *Id.,at 20.* Police often have "tunnel vision," "confirmatory bias." *Id.* Once they find a suspect, their investigation becomes marshalling facts and evidence to convict him, not continuing to objectively investigate other suspects. *Id.* Police should thoroughly investigate a crime, not build a case against a specific individual, *Id.,* since "confirmatory bias" results in innocent peoples' convictions and death sentences.

Here, police stopped investigating everyone else once Mr. Wolfe was arrested. They “closed” the case, canceling their inquiries into Smith. Prosecutors went along, not wanting to find exculpatory information, but to build a case against Mr. Wolfe (Ex. N_x8). “The American jury trial is a search for truth, not a ceremony to confirm official truth.” *State v. Wolfe, supra*, at 276 (Wolff, J., dissenting). A prosecutor’s interest “in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. U.S.*, 295 U.S. 78, 88 (1935). The State’s actions denied Mr. Wolfe a fair trial and due process. Jurors only heard evidence that fit the State’s theory, not that Smith may have committed the crime.

If this Court concludes counsel was effective and presented enough to connect Smith to the crimes, appellate counsel ineffectively failed to raise this issue on appeal. *Evitts v. Lucy*, 469 U.S. 387, 396-97 (1985) (due process guarantees right to effective assistance of counsel on direct appeal). *See, also, Roe v. Delo*, 160 F.3d 416 (8th Cir. 1998) (failure to raise viable issues on appeal constitutes appellate counsel ineffectiveness).

A reasonable attorney under similar circumstances would have appealed this issue, since this evidence formed Wolfe's defense and showed his innocence. Contrary to counsel’s assertions (Tr. 405), the claim was properly preserved (T. Tr. 961-74, 1401-25) (Ex. H_x3, at 500, 504-05).

Mr. Wolfe was prejudiced. The State’s case was weak, relying on an accomplice who received complete immunity for her testimony and a jail-house snitch. Neither was credible. No physical evidence connected Mr. Wolfe to the offense. Without the Smith

evidence, jurors deliberated 12 hours. Had they heard this evidence, a reasonable probability exists they would have had a reasonable doubt about whether Mr. Wolfe committed the murder.

Mr. Wolfe should receive a new trial.

VIII. Activity at the Walters' Showed Cox Lied

The motion court clearly erred in denying Mr. Wolfe's claims that counsel was ineffective for not investigating and calling: Frank Bryant, who saw a Bronco or Blazer, and another vehicle, at the Walters' on Wednesday, February 19, 1997, the day Cox admitted riding in such a vehicle; Cecil McConnell, who saw a Bronco or Blazer there on Saturday, February 22, 1997, after the Walters were supposedly killed; Glenda Carnahan-Wilson, who saw a brown vehicle there, parked beside the Cadillac on Sunday, February 23, 1997; Leonard and Charles Rickey, who saw Mr. Walters alive on Thursday or Friday, and knew he habitually sat in his car during the day; and not eliciting from Cox, her admission that she was in a Blazer near the time of the murders, because counsel's failure denied effective assistance of counsel, U.S. Const., Amends. 6, 14, in that counsel failed to interview Bryant and had no legitimate reason for not calling these witnesses. Mr. Wolfe was prejudiced as all this activity showed Cox checked-out the Walters to rob them, and lied by saying Mr. Wolfe shot and killed them early Thursday morning.

On February 19, 1997, Wednesday evening, Jessica Cox rode in a Blazer (Ex. Hx6, at 317). That evening at 6:00 p.m., Frank Bryant saw a Blazer or Bronco and another vehicle at the Walters' (Tr. 1535-36, Ex. Mx6). Three days later, Saturday, between 11:00 a.m. and 3:00 p.m., Cecil McConnell saw a white Blazer or Bronco at the Walters' (Tr. 235-36, 239, Ex. MM).

Bryant was suspicious when he saw the two vehicles(Tr.1537). The SUV was silver and blue, with a white or gray stripe in the middle(Tr.1536,1540). The other car, a brand-new, green Continental, turned in front of Bryant into their driveway(Tr.1536).

On Sunday morning, Glenda Carnahan-Wilson drove by the Walters' on her way to church(Tr.785). She saw a brown car parked beside the red Cadillac and an older man sitting on the Cadillac's passenger side, hunched over, leaning toward the driver side(Tr.785-787). When Wilson again passed at 11:20 a.m., she again noticed the brown car which had moved(Tr.788-89). Wilson thought something was wrong; the man was in the same position, and the brown car was parked weirdly, like someone was ready to get away(Tr.787,790). The brown car stood out(Tr.787).

Cars were not all people saw at the Walters' in the days after Cox said they died. Leonard and Charles Rickey saw Mr.Walters alive(Ex.Jx6,Ex.Kx6,Tr.1546,1558,1568). Initially, Leonard said he last was at Walters' 2-3 days before he found the bodies Sunday(Ex.Jx6,at5). When pressed he thought he probably saw him Thursday (Ex.J,at13-14). He remembered Mr.Walters liked to sit in his car during the day(Ex.J,at6-7). Leonard Rickey consistently believed he last saw Mr.Walters 2-3 days before he found him dead probably Thursday(Tr.1558,1568). He thought it was 2-3 days, but it was possible it could have been 3-4 days(Tr.1564,1568). He remembered Mr.Walters' often sat in his car; sometimes 2-3 times per week(Tr.1559-60).

Charles Rickey thought he saw Mr.Walters Friday, a couple of days before they found the body(Ex.Kx6,at4-5) Charles was pretty sure it was Friday(Ex.Kx6,at13). He denied it was Wednesday(Ex.Kx6,at17). He remembered being at the Walters' Thursday

or Friday and was pretty sure he saw Mr. Walters(Ex.Kx6,at18-22). Charles consistently believed they dumped sewage Thursday or Friday, and was pretty sure it was not Wednesday(Tr.1546). When they dumped, they usually saw Mr. Walters(Tr.1549-52). He noticed nothing unusual at the Walters'(Tr.1556).

What was occurring at the Walters? If they were killed early Thursday morning, as Cox claimed, why did so many people see these cars thereafter? Had the real murderer returned? Was it coincidence Cox was in the same type of vehicle that was at the Walters'? Were the Rickeys mistaken that they saw Mr. Walters alive Thursday or Friday? Jurors asked none of these questions because they heard none of this evidence. Counsel never presented it, despite having these witnesses' statements to police.

The motion court found counsel not ineffective, ruling the selection of witnesses was strategic and none of these witnesses would have provided a viable defense(L.F.817-19,826-27). These findings are clearly erroneous. *Morrow,supra*.

Counsel Was Ineffective

Counsel was obliged to investigate and present evidence of another's guilt. *Butler*; and *Sargent,supra*. In *Henderson*, counsel failed to investigate and pursue evidence that the victim's husband may have committed the murder, especially since the evidence was consistent with the alibi defense. *Id.,at* 710- 711. Counsel must investigate everyone who may know about guilt or innocence. *Id.*

Strategy?

The activity at the Walters' called Cox's storey into question. Other witnesses' accounts made it much more likely that the Walters were killed later, perhaps by someone driving a Blazer, like that in which Cox was seen Wednesday evening.

Counsel never interviewed Bryant, although she had a police report outlining his statement(Tr.1143-44). Thus, she could have no strategy for not calling him. *Kenley v. Armontrout*,937 F.2d 1298,1304(8thCir.1991)(failure to investigate relates to trial preparation, not strategy). She had no reason, let alone a reasonable strategy, for not calling McConnell(Tr.1137,1374), Carnahan-Wilson(Tr.1130), and Charles Rickey(Tr.1141). The court's trial strategy findings are unsupported by the record. *See, Smith v. Secretary Dept. Of Corrections*,50 F.3d 801,829(10thCir.1995)(reviewing courts should scrutinize factual findings to insure sufficient evidentiary bases support them).

Counsel did not call Leonard Rickey because she believed he was not definite enough on when he saw Mr.Walters(Tr.1139-40). But counsel had no reason for not calling him about Walters' habit of sitting in his parked car for hours on end(Tr.1140). Later, she admitted that never really considering calling both Rickeys to establish when they last dumped sewage and saw Mr.Walters alive(Tr.1141). Counsel easily could have elicited Charles Rickey's information when he testified at trial(T.Tr.801-13).

Counsel inexplicably didn't elicit Cox's admission from her pretrial deposition that she was in a Blazer around the murders (Tr.1137-38;Ex.Hx6,at317). Cox's admission combined with eyewitness accounts of a Blazer or Bronco at the Walters, cast doubt on her tale.

Viability Defense?

The motion court's suggestion this evidence would not have provided a viable defense is clearly erroneous. Under *Henderson* and *Butler*, counsel must investigate leads that others may be guilty and one's client is innocent. Counsel's defense was to attack Cox and call witnesses who saw the Walters alive after Cox said they were murdered(Tr.1190). Placing Cox in a Blazer like one seen at the night around the murders would have supported that defense. The activity suggesting the Walters were killed days after Cox claimed would have supported the defense. That Mr. Walters sat in his car several times a week supported why Kenneth Stoller saw him in his car on Thursday(T.Tr.1927-29).

Jurors deliberated 12 hours on guilt. They wanted to know if Larry Graham really saw the Walters alive on Thursday or Friday. The evidence, suggesting Cox lied and the Walters were killed later, created a reasonable probability that the outcome would have been different. That she was in a vehicle like one at the Walters' home is compelling evidence supporting Mr. Wolfe's defense. The motion court should have granted relief. A new trial should result.

IX. Challenging Experts: Physical Evidence Supported Mr. Wolfe's Innocence

The motion court clearly erred in denying Mr. Wolfe's claim counsel ineffectively failed to impeach the State's experts, Kathleen Green, Jenny Smith and Dr. Dix, and present favorable evidence and the State failed to disclose impeaching material, denying due process and effective assistance of counsel, U.S. Const., Amends. 6, 14, in that counsel failed to impeach Green with her deposition that thousands of shoes had the same pattern as the one found at the scene; the State did not disclose and counsel did not discover Smith's pro-prosecution memo in another death case, *State v. Timothy Chaney* that she wanted to help the prosecution all she could, drafted mock questions for the prosecutor, and told him how to damage the defense; and Icenogle failed to disclose Dix's changed opinion that most of the gunshot pellets lodged inside Mrs. Walters' body and did not leave her body and counsel failed to question Dix regarding his prior statement or properly object to the nondisclosure. Mr. Wolfe was prejudiced as Icenogle argued Mr. Wolfe left footprints at the scene saying, "what's the odds" of finding similar patterns; Smith was important to the State's case as her testimony suggested Mrs. Walters put her hands up and begged for her life; and Dix's changed opinion caught defense counsel by surprise, destroying her theory Mrs. Walters was shot outside, contrary to Cox's story.

Three state experts gave the State ammunition for their weak case: Green--shoeprints; Smith--gunshot residue; and Dix--shotgun pellets. But counsel didn't impeach the experts on critical matters and the State didn't disclose impeaching material.

Kathleen Green: Shoeprints at the Scene

Much of the physical evidence was inconclusive, but the State tried to make it seem incriminating. When Green compared shoeprints at the house and shoes seized from Port Valero, she said they had the same class characteristics and a "unique tread," more unusual than she normally sees(T.Tr.939,941). Counsel never asked her about her earlier deposition conclusion--"thousands" of shoes could have made the prints(Ex7,at72). Green didn't even map the individual characteristics, as they were insufficient for comparison(Ex.7,at67). Icenogle pounced, arguing: "he left behind footprints," asking "what's the odds?" (T.Tr.1962). Had counsel done her job and impeached Green, jurors would have known that thousands of shoes could have made those prints.

Jenny Smith: Memo Reveals Her Pro-prosecution Bias

Jenny Smith speculated about the gunshot residue on the Walters' hands(T.Tr.1536). Mrs.Walters' high concentration on the back of her left hand, Smith said, was consistent with her raising it to gases as the gun was shot. *Id.* Jurors never knew it was more likely Mrs.Walters struggled over the shotgun(Ex.Qx7).

Jurors also never heard Smith was not neutral but had a pro-prosecution bias, advocating for the state and wanting to damage the defense(Ex.Cx6). In another death case, *State v. Timothy Chaney*, her memo to Assistant Attorney General Ahsens revealed: "I want to help you all I can" (Tr.1066-68,Ex.Cx6). "I feel confident that your charming ways will inspire a lucid, coherent and utterly convincing testimony out of me!!!"(Tr.1070,Ex.Cx6). "You could really do damage here."(Tr.1073,1074-75). The

defense in *Chaney* never received the memo(Tr.1078). The memo bore a note “do not disclose”(Ex.Cx6). Counsel here never had this impeaching information; but she wanted to know it(Tr.1081-82,1192).

The State argued Smith’s testimony with impunity(T.Tr.1960-61,2024-25). They said the gunshot residue showed Mrs.Walters had her hands up, begging for her life, crying, "Oh God, please don't kill me. Please don't kill me"(T.Tr.1961).

Dix: Where Were All the Shotgun Pellets?

Dr. Dix did not seem a helpful State’s witness. He could not provide a time of death and gave the defense physical evidence contradicting Cox's story. His autopsy report twice said most of the charge exited Mrs.Walters' body(Ex.Lx7,at3). He described the exit wound as "a ragged defect with pellet marks around the lower margin measuring 5x2 1/2 inches." *Id.* Counsel interviewed Dix about his findings(Tr.1200). Dix asked counsel if any pellet holes were in the house. *Id.* Counsel said no, Dix responded Mrs.Walters must have been shot outside. *Id.* According to Dix, not all the pellets were inside the body and if Cox accurately stated she was shot inside, the house would be damaged. *Id.*

Based on Dix's finding, counsel developed a strategy-no pellets or no damage proved Cox was lying(T.Tr.793,898,943-44,1170,1987-88). She revealed this strategy in her opening(T.Tr.793), questioned witnesses about the lack of shotgun pellets on the home’s floor or wall(T.Tr.898); asked State experts about the number of shotgun pellets taken from Mrs.Walters and the amount normally found in one ounce of shot(T.Tr.943-

44). Icenogle knew this issue was important, arguing the controversy required the autopsy photos be admitted(T.Tr.1043-44).

Icenogle contacted Dix before he testified and asked him for further analysis(T.Tr.1083,1169). Dix reviewed the autopsy photos and changed his written findings now concluding no exit wound existed and most of the charge stayed in the body(T.Tr.1075-76,1078,1083-84). Icenogle never disclosed this changed opinion(T.Tr.1168-71,Tr.1206). Counsel was caught flat-footed in trial with a theory without evidentiary support(T.Tr.1170). She failed properly to object to the non-disclosure(Tr.1226) and acknowledged she should have interviewed Dix better(Tr.1424). She never recovered, arguing that Mrs.Walters was not shot in the house, although the evidence was otherwise(T.Tr.1987-88)

The court denied the ineffective assistance and *Brady* violation claims(L.F.855-56,861,862-63,865). Its findings are unsupported and clearly erroneous. *Morrow,supra*.

Green

The court found that cross-examination is a strategic decision and counsel's testimony she had no reason for not eliciting that thousands of shoes could have made the prints-was inconclusive(L.F.861). It found such impeachment was not a viable defense. *Id.*

Failing to impeach this critical witness was ineffective, just as in *Hadley v. Goose*. There, counsel's failure to impeach an officer regarding footprint evidence from the scene was unreasonable. *Id.* Prejudice ensued from the prosecutor's closing emphasizing the prints as a basis for a conviction. *Id.*

Counsel failed to impeach, despite knowing about Green's prior statement from her pretrial deposition. Green's conclusion that thousands of shoes could have made the prints at the scene was exculpatory information jurors needed. Without it, Icenogle argued Mr. Wolfe left footprints at the scene(T.Tr.1962). Since the evidence of guilt was weak and jurors deliberated 12 hours, a reasonable probability exists that, had counsel acted reasonably, the outcome would have differed.

Smith

The court concluded that not disclosing Smith's pro-prosecution memo was not a *Brady* violation and counsel was not ineffective in failing to impeach Smith since she called her(L.F.855-56), ignoring that the State first called her as a State witness(T.Tr.-1504-1536).

Under *Brady*, due process requires disclosure of all exculpatory information, including impeachment. *See, Bagley, supra; Phillips, supra*. A witness's memorandum showing her bias toward the prosecution is impeaching. A witness's bias is never irrelevant. *Olfield, supra, at 75*. A party may prove that bias through extrinsic evidence. *Id.*

Counsel was surprised by the memo(Tr.1192). Without it, she could not impeach Smith or make an informed decision about whether to call her. The State's nondisclosure prevented adequate preparation before trial and impeachment of Smith.

Not impeaching a state's witness can constitute ineffective assistance of counsel. *Hadley, supra*. Smith's testimony was important allegedly showing Mrs. Walters raised her hands, begging for her life(T.Tr.1960-61,2024-25).

Dix

The court found counsel's cross examination strategic, her testimony was inconclusive and didn't rebut that strategy(L.F.862-63), and Mr.Wolfe failed to show that counsel's failure to object to the nondisclosure would have prevailed (L.F.865). These findings are clearly erroneous, *Morrow,supra*.

Nondisclosure of Dix's changed opinion was a discovery violation and a *Brady* violation. Rule 25.03(a)(5) requires disclosing the results of experts' physical examinations and scientific tests, experiments or comparisons. "The Rule is designed to prevent 'surprise' evidence before being introduced at trial." *State v.Whitfield,supra* at 507. Saying a proper objection to disclosure would not succeed is contrary to Rule 25.03 and *Whitfield*. Nondisclosure of Dix's conversation with Icenogle and changed opinion also violated due process under *Brady* and *Bagley,supra*.

Paradis v.Arave,240 F.3d 1169(9thCir.2001), also involved a *Brady* violation. The State didn't disclose the prosecutor's handwritten notes recording the medical examiner's medical opinions regarding time and location of the victim's death. *Id*.at 1173. These notes were material to prove whether the victim died in the state where the body was found, something necessary to establish jurisdiction, and to prove Paradis' actual innocence. *Id*.at 1173-74. Had the notes been disclosed, the result would likely have been different--their suppression undermined confidence in the outcome. *Id*.at 1177.

Failing to disclose Dix's changed opinion undermines confidence in the outcome. Counsel's strategy was based on Dix's original opinion that Mrs.Walters could not have

been shot inside the house. This strategy was stated in counsel's opening(T.Tr.793), in her cross-examinations(T.Tr.898,943-44,1075-76,1083-84), in her closing(T.Tr.1987-88). Counsel recognized the damage, as she was caught in the middle of trial with a theory lacking evidentiary support(T.Tr.1170).

Had the State fulfilled its obligation, counsel could have adequately prepared a defense. *See, State v. Scott*, 943 S.W.2d 730,739(Mo.App.W.D.1997)(a defendant must have the opportunity to formulate a defense before trial and the state's failure to disclose defendant's statements prevented that). Had the State disclosed impeaching evidence and counsel properly objected to nondisclosure, a reasonable probability exists that the outcome would have been different. This Court should reverse for a new trial.

X. More Evidence Mr.Wolfe is Innocent

The motion court clearly erred in denying Mr.Wolfe's claim that counsel was ineffective in not calling Russell Britt or offering Exhibits Ux5(1&2), Gx7, Hx7, and Ix7, Mr.Wolfe's shoes, pictures and papers, because that denied effective assistance of counsel,U.S.Const.,Amends.6,14, in that counsel didn't investigate Mr.Wolfe's normal activities and personal items, showing he was gainfully employed, and wore a different size shoe than those seized from Port Valero. This evidence would have negated Cox's allegations about Mr.Wolfe and the State's theory that Mr.Wolfe needed money and committed the crimes.

Counsel ineffectively failed to investigate, call Russell Britt and present evidence that when Cox said Mr.Wolfe committed these crimes, he was gainfully employed and lacked the monetary motive the State suggested. His shoe size was different than what the State said was connected to the crime. Mr.Wolfe was prejudiced since the State portrayed Mr.Wolfe as desperate for money, when he was working hard and making ends meet.

In February, 1997, Russell Britt hired Mr.Wolfe to paint condominiums at Port Valero in Sunrise Beach(Tr.178-80). He had hired Mr.Wolfe before and knew he was a reliable worker, an excellent painter who always completed the job(Tr.180-183), was nonviolent and did not steal(Tr.182). As was his practice, Britt paid Mr.Wolfe \$800.00 when he contracted with him(Tr.183).

On Thursday morning, February 20, 1997, Mr. Wolfe came to Britt's home and had coffee with him(Tr.183-84). Mr. Wolfe obtained Britt's key to get his painting equipment for another job, since he could not work at Port Valero in the rain(Tr.184-86). Mr. Wolfe acted normally(Tr.185).

Mr. Wolfe's personal items at the time of his arrest also showed he was gainfully employed and acting normally when Cox said he committed this crime(Exs.Gx7,Hx7-Ix7). A "things to do" note showed on March 1, he had a job at the Super 8 in Osage Beach from 9:00 a.m. to 5:00 p.m.(Ex.Gx7,Tr.1207-08). Similarly, a note pad indicated the money he made at Port Valero and the Cigarette Outlet and listed his expenses-(Ex.Hx7,Tr.1208-10). Another note described a building, directions and a time, again showing Mr. Wolfe was working and making money(Ex.Ix7,Tr.1211).

At trial, Mr. Wolfe wore a pair of brown suede shoes, Arizona brand, Size 7½, medium(Tr.935,Ex.Ux5-1). Mr. Wolfe wanted his attorneys to introduce his shoes to show the Size 10 shoes seized from Port Valero could not be his(T.Tr.2044,Ex.Hx3-at477-78,Tr.934-35). Counsel didn't do so; instead calling Mr. Wolfe's girlfriend who testified he wore a size 8(T.Tr.1865). The State argued she was not credible and was lying(T.Tr.2025).

Counsel had no reason for not fully investigating and presenting this evidence showing Mr. Wolfe's normal activities(Tr.1193,1202,1207-11). Counsel did not believe Mr. Wolfe's shoes at trial would be helpful(Tr.1383-84).

The court found counsel effective(L.F.854,856-57): Britt's testimony would not have provided Mr. Wolfe with a viable defense; no reasonable probability existed that it

would have changed the result(L.F.856-857); photos of Mr.Wolfe's motel room were inadmissible and did not provide a defense(L.F.866); and the failure to present the shoes did not prejudice Mr.Wolfe(L.F.854). These findings are clearly erroneous, *Morrow-supra*.

First, counsel had a duty to investigate her client's innocence. *Butler and Henderson,supra*. Secondly, contrary to the court's ruling, the photos were admissible. *State v.Griffin*,756 S.W.2d 475,483(Mo.banc1988)(numerous items of evidence, including photographs of those items, discovered at or near the crime scene, were relevant to show the condition of the crime scene and the nature of the police investigation). The photos were relevant as they refuted the State's evidence of Mr.Wolfe's supposed motive, his need for money.

Secondly, the court utilized the wrong standard to assess prejudice. *Williams v. Taylor,supra*. Reviewing courts must look at the omitted evidence and that adduced at trial, rather than reviewing each piece of evidence in isolation. *Id*. Yet, that is exactly what the court did here.

Upon a proper review, this Court will find prejudice. Prosecutors argued that Mr.Wolfe was always broke and needed money(T.Tr.1948,2023). This established Mr.Wolfe's supposed motive for the crimes. Had counsel presented evidence that Mr.Wolfe was gainfully employed and acting normally, Cox's allegations would have been called into question.

The State argued Parle's suggestion that Mr.Wolfe wore a different size shoe than the size 10 seized at Port Valero was an "unbelievable falsification"(T.Tr.2025). Yet,

Mr.Wolfe sat at trial wearing 7½ shoes(Tr.934-35). But jurors never knew this.

Mr.Wolfe was prejudiced since the State argued Parle was incredible; the shoes introduced were Mr.Wolfe's and his footprints were at the scene(T.Tr.2025,1962).

The State's case was weak and rested on Cox, an incredible witness. Jurors deliberated for 12 hours. If the omitted evidence is viewed with everything presented at trial, Mr.Wolfe was prejudiced. Counsel was ineffective. A new trial should result.

XI. Illegal “Immunity Agreement”

The motion court clearly erred in denying Mr. Wolfe’s claim that Icenogle lacked authority to grant Cox immunity and counsel was ineffective in failing to object to the illegal agreement, to Officers Bowling and Schmidt, and Cox's testimony, and the State's opening and closing; and in failing to raise the immunity claim on appeal, because Mr. Wolfe was denied due process, a fair trial and effective assistance of counsel, U.S. Const., Amends. 6, 8, 14; Rule 4-3.4(b), in that prosecutors lack inherent authority to grant immunity, thus Icenogle gave Cox an illegal inducement, and counsel failed to object to the illegal agreement, testimony and argument. Mr. Wolfe was prejudiced since prosecutors repeatedly emphasized their illegal agreement and argued it showed Cox’s truthfulness.

Icenogle lacked authority to enter into an immunity agreement with Cox. Such agreements were prohibited by law. Yet counsel failed to challenge the agreement as illegal or raise the claim on appeal. Counsel also failed to object to testimony and argument that the agreement showed Cox was truthful. The State even used its own illegal agreement as a reason to convict Mr. Wolfe, assuring jurors the agreement was for truthful testimony.

On February 27, 1997, Jessica Cox went to her lawyer’s office and he and Icenogle negotiated a so-called “immunity agreement” in exchange for her testimony against Mr. Wolfe (T.Tr.1286, Ex.525). Icenogle lacked authority to grant immunity. *State ex rel. Munn v. McKelvey*, 733 S.W.2d 765, 769-70 (Mo. banc 1987). *See also*, Rule 4-

3.4(b): “A lawyer shall not: falsify evidence, counsel or assist a witness to testify falsely, or *offer an inducement to a witness that is prohibited by law.*”

Counsel failed to object to the illegal grant of immunity(Tr.1224). Her failure was not strategic, she had no reason for not objecting to the prosecutor’s lack of legal authority(Tr.1224). Counsel did not want the jurors to see the immunity agreement-(T.Tr.1287-89). The trial court not only admitted the agreement, it made a copy for each juror(T.Tr.1289).

Counsel failed to object to the State’s opening statement that it granted Cox immunity for her "truthful testimony"(T.Tr.767). Two officers and Cox herself talked about the immunity(T.Tr.1028,1179,1362). Bowling said Cox's attorney advised him to ask Cox anything as a result of the immunity: "She was going to tell us everything she knew about this incident"(T.Tr.1028). Schmidt said they went to Cox's attorney's office to see if her story held water(T.Tr.1362). Cox testified about the immunity(T.Tr.1179). In closing, the State argued Cox had told the truth(T.Tr.2029). Trial counsel had no reason for her failures to object(Tr.1242,1247,1249,1262,1273-74). Appellate counsel missed the immunity issue, raising it first in her rehearing motion, trying to get the meritorious issue before this Court(Tr.397-398).

The court denied relief, ruling that an objection at trial to the immunity agreement or a claim on appeal would not have been meritorious(L.F.862). It believed since the decision to file an information was within the prosecutor’s sound discretion, the claim lacked merit. *Id.* It also found testimony about the immunity was proper, no prejudice resulted; and the failures to object to the opening and closing were strategic and would

have been meritless(L.F. 881,888,890,908). These findings are clearly erroneous.

Morrow, supra.

Icenogle lacked authority to grant immunity. *McKelvey, supra* at 769-70. When he entered into the agreement, every Missouri appellate court had recognized this principle. *Id.*; *Brown v. City of North Kansas City*, 779 S.W.2d 596, 598 (Mo.App.-W.D.1989); *State v. Culkin*, 791 S.W.2d 803, 815 (Mo.App.E.D.1990); *State v. Vinson*, 854 S.W.2d 615, 620 (Mo.App.S.D.1993). These decisions did not equate granting immunity with not filing an information. Instead, this Court voiced its “long-standing hostility” toward prosecutorial immunity:

Offering immunity ... is a dangerous practice, human nature being what it is, and is a clear invitation to [witnesses] to commit perjury. It is the kind of practice too, that is certain to be abused by law enforcement officials to the detriment of innocent people.

McKelvey, supra at 769 (citation omitted).

Icenogle gave Cox a clear invitation to commit perjury, something she historically did. Cox had every incentive to implicate Mr. Wolfe and minimize her involvement. That Icenogle made the agreement contingent on “truthful” testimony made it no more valid. *Vinson, supra* at 618 (agreement to testify “fully and truthfully” invalid).

Icenogle’s immunity agreement violated his duty of fairness to Mr. Wolfe. Rule 4-3.4(b). It was an “inducement to a witness that is prohibited by law.” *Id.* It also violated Mr. Wolfe’s rights to due process and a fair trial. The prosecutor is obliged to do justice, not merely win. *Berger, supra*, at 88; *Storey, supra*, at 901.

Significantly, Icenogle made no attempt to comply with the provisions of Sect.491.205, effective in August, 1997, which requires that a prosecutor request immunity in writing to a circuit judge who must remain independent of the case and cannot preside at any subsequent criminal trial or ancillary proceeding. Sect.491.205.2. The application must offer proof and meet criteria carefully outlined by the Legislature. *Id.* The person testifying may be subject to perjury for giving false testimony. Sect.491.205.1. Here, Icenogle did not even try to follow the statute, despite this Court's warning that "[g]iven that the immunity power is subject to such abuse, this Court concludes that this power does not inhere in the office of prosecutor, but rather that Missouri prosecutors may obtain the authority to grant immunity only after legislative deliberation and the approval of *carefully drawn legislation.*" *McKelvey, supra* at 769(emphasis added).

The court's finding that Icenogle had such authority is contrary to the law. An objection to the illegal agreement would have been meritorious. Counsel's performance was deficient and caused prejudice. *Strickland, supra.*

Failing to object to prejudicial, inadmissible evidence is deficient. *Kenner v. State, supra*(not objecting to prejudicial evidence of other crimes was ineffective). Like *Kenner*, here, counsel should have been aware of the evidence's illegal nature and she was aware of its prejudicial impact. It was unreasonable for counsel to not know that prosecutors may not grant immunity. *See, Dixon v. Snyder*, 266 F.3d 693(7thCir.-2001)(counsel's ignorance of law regarding admissibility of prior inconsistent statements was ineffective); *Martinez-Macias v. Collins*, 979 F.2d 1067(5thCir.1992)(counsel

ineffective for not calling a disinterested alibi witness, because claimed risked opening the door to extraneous criminal incident inadmissible under Texas law); *Blackburn v. Foltz*, 828 F.2d 1177(6th Cir.1987)(counsel ineffective for misunderstanding law and advising defendant not to testify because he could be impeached which three prior convictions that could have been suppressed). Like *Dixon*, *Collins* and *Blackburn*, counsel never researched the law and thus did not object. She admitted having no reason for not objecting(Tr.1224,1242,1249,1262,1273-74).

Appellate counsel unreasonably failed to raise this meritorious issue on appeal. Mr.Wolfe is entitled to effective assistance of appellate counsel. *Evitts v.Lucey*, *Roe v. Delo*, *supra*. Counsel acknowledged this claim had significant merit; she included it in her rehearing motion to try to place it before the Court(Tr.397-98). This Court's decision in *McKelvey* shows that, had it been raised, this Court would have reversed.

Mr.Wolfe was prejudiced. The State's illegal agreement formed the basis for convicting Mr.Wolfe. It was emphasized in voir dire(T.Tr.378,379), and throughout trial(T.Tr.767,1293-94,1313,2023). The immunity agreement was not raised in passing. It was mentioned often, especially with Cox(T.Tr.1026-27,1029,1164-65,1178-79,1264,1265,1286,1286-87,1292,1293,1293-94,1296,1313). The court copied the agreement for each juror to review(Ex.525,T.Tr.1289). At the end of the case, the prosecutor said he knew Cox had told the truth(T.Tr.2029).

Given the repeated references to the immunity agreement and the State's reliance on it to show Cox was truthful, counsel's failure to object and to raise the issue on appeal prejudiced Mr.Wolfe. A new trial must result.

XII. Mr. Wolfe's Statement Should Have Been Suppressed

The motion court clearly erred in denying Mr. Wolfe's claim that his statement should have been suppressed and counsel should have properly objected to it, Schmidt's testimony, and Icenogle's closing argument and challenged it on appeal, because this denied due process, counsel, a fair trial, confrontation and effective assistance of counsel, U.S. Const. Amends. 5, 6, 14, in that the statement contained inadmissible evidence of prior bad acts and a prior arrest; Mr. Wolfe invoked his right to silence; and the officers opined Mr. Wolfe was guilty, Cox was truthful and Mr. Wolfe was "cool as ice." Mr. Wolfe was prejudiced since Schmidt testified about Mr. Wolfe's demeanor, and Icenogle emphasized his statement, drinking, drug use, and demeanor to find him guilty.

Police interrogated Mr. Wolfe, making an audio-tape that was incomplete due to a voice-activated recorder (T.Tr. 1393-96). Some questions and answers were missing, yet the court played the tape and provided a transcript to each juror (T.Tr. 1395-96, 1398). Mr. Wolfe initially agreed to talk, but later said he wanted the interrogation to stop (Ex.Mx3, at 32, 34, 35, 38, 51). The officers ignored his requests. Mr. Wolfe's statement included references to his drug and alcohol use, drug treatment, and a 2/13/97 arrest (Ex.Mx3, at 6-7, 8-10, 13, 28, 35, 36, 42, 43-44, 48). Officers repeatedly opined Mr. Wolfe was guilty and Cox told the truth (Ex.Mx3, at 31-33, 36, 38-39, 39-40). They described Mr. Wolfe as "cool," "cool as ice" (Ex.Mx3, at 38, 48, 49).

Counsel filed no pre-trial suppression motion. After jury selection, counsel unsuccessfully moved to redact references to drug and alcohol use and the prior arrest(T.Tr.718-23). Before Interrogator Schmidt testified, counsel objected again to the tape and transcript because they referred to prior alcohol and marijuana use, drug treatment, and a 2/13/97 arrest, and portions of the tape were missing(Tr.1382-1385). The court overruled the objections(T.Tr.1384). When the State offered the tape and transcript, counsel stated "no objection"(T.Tr.1395), and the tape was played(T.Tr.1398). Schmidt commented Mr.Wolfe was "cool" while interrogated(T.Tr.1430-31). During closing, Icenogle argued Mr.Wolfe spent "virtually every night drinking"(T.Tr.1948); "had a drug habit"(T.Tr.1948); drinks every night and has a drug problem(T.Tr.1951-52). He "bet" Mr.Wolfe "wasn't sober" the night of the murder. *Id.* In penalty phase, Cosgrove argued Mr.Wolfe was "cold" and "cool," a reason this case warranted death(T.Tr.2113).

Counsel challenged the taped statement in the new trial motion(Ex.Hx3, at507,508-509) and *pro se* new trial motion(Ex.Hx3,at 471-74). Appellate counsel did not litigate this error(Ex.Jx3).

Mr.Wolfe alleged counsel's ineffectiveness regarding the tape, and to testimony and argument about it(L.F.221,242,243,258, 262-67,398-99).

Counsel claimed she filed no suppression motion because she liked much in the tape and wanted to use it(Tr.1278-79). She acknowledged objecting to it since it lacked portions, referred to alcohol and drug use, and a prior arrest(Tr.1276). Counsel did not mean to waive her objection(Tr.1276). Counsel had no explanation for not objecting to

officers' opinions that Mr. Wolfe was guilty, Cox was truthful, and calling Mr. Wolfe "cool as ice"(Tr.1276-68,1249-50). She could not recall why she did not object to arguments emphasizing Mr. Wolfe's drug and alcohol use(Tr.1266-67).

Appellate counsel failed to raise this issue because she thought a preservation problem existed(Tr.410-11). After writing her brief, she saw a case reversing because officers expressed opinions about guilt(Tr.415-16). Counsel was "horrified," because she missed the issue(Tr.416). Counsel did not recall why she failed to raise the error(Tr.416-18). She thought the references were improper, but did not know if she recognized them during briefing. *Id.* Counsel was bothered by the tape; it started, stopped and an officer admitted missing portions were exculpatory(Tr.417). She believed Mr. Wolfe invoked his right to silence(Tr.419). She may not have fully thought-through all the taped statement's problems(Tr.418).

The court ruled counsel exercised reasonable trial strategy and objecting to the tape would have lacked merit(L.F.909-10); issues regarding Mr. Wolfe's arrest and drug use would not have warranted reversal, had appellate counsel raised it(L.F.926); Schmidt's testimony regarding demeanor was not objectionable(L.F.891); and counsel strategically did not object to the arguments, objections were meritless and no prejudice resulted(L.F.908). These findings are clearly erroneous, *Morrow, supra*.

Counsel Ineffectively Failed to Seek Suppression

Counsel can be ineffective for not filing meritorious suppression motion. *Kimmelman v. Morrison*, 477 U.S.365(1986); *Riley v. Wyrick*, 712 F.2d382,385-(8thCir.1983); *Bonner v. State*, 765 S.W.2d 286,288(Mo.App.W.D.1989). Such claims

must be evaluated for reasonable conduct and prejudice. *Id.* The problems with the audiotaped statement reveal it should have been suppressed. Counsel was ineffective.

Evidence of Other Crimes Should Have Been Redacted

Counsel did not act reasonably with the taped statement. Although counsel said she wanted the tape admitted, she did not want references to Mr. Wolfe's prior bad acts and arrest. Had counsel not objected, she would have been found ineffective. *Kenner v. State, supra* at 539-41. *See, also, State v. Burnfin*, 771 S.W.2d 908, 913 (Mo. App. - W.D. 1989) (allowing deliberating jury to view inadmissible arrest report of prior theft prejudicial error).

However, counsel waited until trial to ask for redaction of the prior arrest and other bad acts. Unsuccessful, counsel later inadvertently waived her objection saying "no objection" when Icenogle moved for admission (T.Tr. 1395, Tr. 1276). Counsel acknowledged error; did not intend to waive the matters, and thought her prior objection preserved it (Tr. 1276). Counsel forfeited her client's appellate rights by not objecting at trial. *Riley, supra, citing State v. Yowell*, 513 S.W.2d 397, 402-03 (Mo. banc 1974). Counsel wanted prior crimes excluded and the claim preserved for appellate review. She simply failed properly to object and was ineffective.

Alternatively, if the statement issue was properly preserved for appeal by the earlier objection, appellate counsel was ineffective by failing to raise this meritorious issue. *Evitts v. Lucey, Roe v. Delo, supra.*

In *State v. Roberts*, 948 S.W.2d 577, 590-91 (Mo. banc 1997), the trial court should have excised portions of Roberts' statement describing other crimes and prior bad acts,

that were inadmissible to prove any issues. But, since the evidence of Robert's guilt was overwhelming, there was "virtually no danger that jurors would have found Roberts guilty of murder to which he confessed because he drove too fast, stole license plates and committed a minor burglary." *Id.*

In contrast, here guilt was hotly contested and jurors deliberated twelve hours. Mr. Wolfe never confessed, steadfastly maintaining his innocence. Icenogle argued the prior bad acts as proof of guilt (T.Tr.1948,1950,1951,1952). Icenogle began his closing highlighting Mr. Wolfe's drinking and drug habit (T.Tr.1948). He emphasized Mr. Wolfe's bar-hopping, opining he probably drank a lot every night, and saying "I bet he wasn't sober" (T.Tr.1950-52). Icenogle further emphasized Mr. Wolfe's drug problem (T.Tr.1951). These references were all in the opening portion of the closing, before counsel said anything.

Like *Storey, supra* at 900-03, counsel ineffectively failed to object since evidence of other crimes is so inflammatory as to be prejudicial. *Kenner, supra*. Contrary to the court's findings, she had no reason not to object (Tr.1266-67).

Miranda: Mr. Wolfe Invoked His Right to Remain Silent

If, while in custody, one indicates one wishes to remain silent, interrogation must cease. *Miranda v. Arizona*, 384 U.S.436,473-74(1966). Even if one initially agrees to be questioned, if one later invokes any *Miranda* rights, interrogation must cease. *Edwards v. Arizona*, 451 U.S.477,484-85(1981). Continued interrogation after a defendant indicates he wanted to remain silent violates the 5th Amendment. *State v. Kelly*, 439 S.W.2d 487,488-89(Mo.1969). Mr. Wolfe wanted to remain silent. He said he was

through with the conversation and had nothing more to say(Ex.Mx3,at32). Officers kept questioning; he repeated, "That's all I got to say about that"(Ex.Mx3,at34). Questioning continued, Mr.Wolfe repeatedly said he had nothing else to say(Ex.Mx3,at35). His words were ignored; the questioning continued. Mr.Wolfe tried again to tell relentless officers "That's all I got to say about it"(Ex.Mx3,at38). His final invocation was ignored(Ex.Mx3,at51).

Reasonable counsel would have moved to suppress Mr.Wolfe's statement. Counsel's claim that she wanted the statement admitted is contrary to her objections to the statement and requests that it be excluded. Mr.Wolfe was prejudiced, the State used Mr.Wolfe's statements as evidence of guilt(T.Tr.1948,1950,1951,1952,1952-53,1954,1964,2017,2018-19,2023).

Officers' Opinions of Guilt, Cox's "Truthfulness" and Comments About Mr.Wolfe

The statement was inadmissible because it contained officers' opinions of Mr.Wolfe's guilt, Cox's truthfulness and Mr.Wolfe's demeanor-"cool;" "cold as ice." Schmidt also testified about his opinions(T.Tr.1430-31).

Officers' beliefs or opinions regarding Mr.Wolfe's truthfulness are irrelevant and inadmissible. *U.S. v.Cortez*,935 F.2d 135,139-40(8thCir.1991);*U.S. v.Dotson*,799 F.2d 189,192-93(5thCir.1985);*State v.Huff*,789 S.W.2d 71,80(Mo.App.W.D.1990). In *Cortez*, the court abused its discretion in letting officers who did the criminal investigation testify that the defendant and his witnesses were untruthful. 935 F.2d at 139. In *Dotson*, the officers' opinion testimony, that the defendant should not be believed, was inadmissible. Otherwise, the state could avoid having to prove guilt, but could simply offer the "good"

officer's belief that these "bad" people were guilty. *Id.* at 194. Since a prosecutor may not personally opine a defendant is not credible, letting his witnesses do it is equally improper. *Id.*

Mr. Wolfe was prejudiced. The officers' believed Mr. Wolfe lied Cox told the truth; he must be guilty and was cold as ice. These opinions invaded the province of jurors, judging the witnesses' credibility. The state's case rested on Cox's truthfulness. Opinion testimony about who jurors should believe was prejudicial.

Counsel ineffectively failed to object to this evidence and argument. The tape could have been edited to remove inadmissible, unfairly prejudicial material. *Roberts, supra*, or Schmidt could have testified to the admissible portions of the statement, telling jurors what Mr. Wolfe said. Counsel lacked reasons for not objecting, had requested portions be redacted, and that the tape be excluded (T.Tr. 718-23, 1249-50, 1276-78, 1266-67, 1383-85), but did nothing as the State repeatedly emphasized other crimes in closing.

Because of counsel's ineffectiveness, Mr. Wolfe should receive a new trial.

XIII. Evidence of Other Crimes

The motion court clearly erred in denying Mr. Wolfe's claim that other crimes should have been excluded because this denied effective assistance and due process, U.S. Const., Amends. 6, 14, in that counsel elicited and didn't object to evidence and argument of bad acts and crimes, including:

- 1) a photo of Mr. Wolfe at the Sheriff's Department before his arrest;**
- 2) a police photo of Mr. Wolfe wearing a red sweatshirt before his arrest;**
- 3) his fingerprints were compared before Cox came forward;**
- 4) he had marijuana in jail;**
- 5) he wanted to waste taxpayer money by filing frivolous motions;**
- 6) Cox's concern he would handcuffs and rape her; and**
- 7) he drove an unregistered, unlicensed truck around the Lake for two years;**

Mr. Wolfe was prejudiced since these references denied him a trial in which he was tried only for the instant charges. A reasonable probability exists that had counsel properly objected, the evidence would have been excluded and Mr. Wolfe would not have been convicted.

The State's case was weak, so it built its case with prior bad acts evidence. It adduced a prior arrest, drug and alcohol use, a photo on file at the Sheriff's office, and police photo of Mr. Wolfe wearing a red sweatshirt before his arrest. Jurors heard Mr. Wolfe had marijuana in the jail; he wanted to waste taxpayer money with frivolous motions, and Cox feared he would handcuff and rape her. Icenogle even argued

Mr.Wolfe drove an unregistered, unlicensed truck looking for innocent Walters to rob. Counsel never objected to this onslaught. She increased the prejudice, eliciting Mr.Wolfe's prints were sent to the crime lab for comparisons before Cox came forward and before his arrest, highlighting his criminal history. Counsel was ineffective. The evidence was prejudicial and requires reversal.

Before Mr.Wolfe's arrest, Officer Schmidt obtained a photo of him from the Sheriff's Office and Cox identified Mr.Wolfe from it(T.Tr.1342-43). Officer Purvis testified police already had a photo of Mr.Wolfe wearing a red sweatshirt before his arrest(T.Tr.1790-91). Criminalist Eidson testified Mr.Wolfe's fingerprints were submitted to the crime lab for comparison on February 25, 1997,¹³ two days before Cox accused Mr.Wolfe(T.Tr.1334-35,1824).

Hileman eagerly provided as much damaging information as possible, reporting Mr.Wolfe had marijuana in jail and wanted to waste taxpayers' money by filing frivolous motions(T.Tr.1546,1547-48). Cox suggested Mr.Wolfe was a bad person since she feared he would handcuff her(T.Tr.1111). Cox claimed that she was afraid Mr.Wolfe was going to rape her(T.Tr.1307).

¹³ Eidson's deposition shows his dates were wrong(Ex.Lx4). Eidson said the initial request for fingerprint comparisons came February 22, 1997, before the bodies were found(Ex.Lx4). Jurors had the false impression Mr.Wolfe was a suspect, independent of Cox.

Icenogle's closing emphasized Mr. Wolfe's bad acts (T.Tr. 1948, 1948-49, 1950, 1951, 1952, 1953-54).¹⁴ He suggested Mr. Wolfe drove an unlicensed, unregistered truck for two years (T.Tr. 1948), to rob unsuspecting, innocent Walters without detection.

Counsel did not object to this evidence and could not recall why not (Tr. 1243, 1248, 1252, 1258, 1265-66). She objected once to the handcuffs, but overlooked challenging it in the new trial motion (Tr. 1247-48). She couldn't explain why she elicited from Edison his comparison of Mr. Wolfe's fingerprints on February 25, 1997, before Cox came forward, but did not consider this testimony prejudicial (Tr. 1224-25).

The motion court denied these claims (L.F. 864, 882-83, 888, 889, 893-94, 904, 908). These findings are clearly erroneous. *Morrow, supra*.

Counsel is ineffective for not objecting to prejudicial evidence, *Kenner, supra*; and improper argument, *Storey, supra*. To establish ineffective assistance, Mr. Wolfe must show a deficient performance and prejudice. *Strickland, supra*. To prove prejudice, reasonable probability must exist that, "but for counsel's errors, the result of the proceeding would have been different." *Id.*

This evidence was inadmissible and prejudicial. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993). Normally, such evidence must be excluded because it raises "a legally spurious presumption of guilt in the minds of the jurors." *State v. Sladek*, 835 S.W.2d 308, 311 (Mo. banc 1992). Limited exceptions include: motive; intent; absence of

¹⁴ All arguments about Mr. Wolfe's taped statement are detailed in Point XII.

mistake or accident; common scheme or plan, and identity. *Bernard, supra*. This evidence must be rigidly scrutinized if admitted. *Id*.

This evidence fit within no recognized exception. That police already had Mr.Wolfe's picture and fingerprints reveal his prior criminal history, compounding the prejudice from admitting the prior arrest in his statement. His criminal history was irrelevant and highly prejudicial. *Burnfin, supra*(prior arrest record highly prejudicial).

Hileman's allegation Mr.Wolfe had marijuana in the jail was irrelevant. The motion court nonetheless suggested since Hileman "volunteered" the statement counsel need not object(L.F.894). Its finding that Icenogle did not emphasize the marijuana ignores the State's closing argument(L.F.894;T.Tr.1948,1950,1951,1952).

That Hileman "volunteered" Mr.Wolfe's alleged statements(L.F.894) made no less prejudicial, nor counsel's failure to object more reasonable. This Court has recognized how prejudicial injecting taxes or costs is for a case. *City of Springfield v. Thompson Sales Company*,71 S.W.3d 597(Mo.banc2002). Cosgrove's argument, emphasizing frivolous lawsuits established prejudice(T.Tr.2133).

Cox's speculation Mr.Wolfe would handcuff and rape her was also irrelevant and highly prejudicial. Contrary to the court's findings, that Mr.Wolfe said he would not use them(L.F.882-83,888) did not alleviate the prejudice. *See,State v. McCarter*,883 S.W.2d 75(Mo.App.S.D.1994)(unproven allegation of crime is prejudicial).

Icenogle's argument that Mr.Wolfe drove an unlicensed, unregistered truck was false and prejudicial. Police found Mr.Wolfe through his license(T.Tr.1339-41).

Nevertheless, the State wanted jurors to believe Mr. Wolfe drove through around the Lake robbing people in a truck that could not be easily identified.

The court erroneously found counsel strategically decided not to object(L.F.908), although she admitted she recalled no reasons(Tr.1265-66). Counsel repeatedly, ineffectively failed to object to other bad acts. Mr. Wolfe was prejudiced since the references were numerous and emphasized in closing. A new trial should result.

XIV. Appellate Counsel

The motion court clearly erred in denying Mr. Wolfe's claim that he was denied effective assistance of counsel, his right to present a defense, to confrontation, due process, and free from cruel and unusual punishment, U.S. Const., Amends. 5, 6, 8, 14 in that appellate counsel failed to challenge:

- 1) sufficiency of the evidence to support a death sentence; and**
- 2) counsel's conflict in representing Mr. Wolfe on the murder charge and then negotiating with Icenogle to have Hileman testify against Mr. Wolfe; which had merit; case-law supported, were preserved, and counsel pursued substantially weaker issues.**

Appellate counsel failed to raise meritorious claims. Although counsel thought the State's evidence was terrible, and lacking reliability, she did not argue it was insufficient to support a death sentence. Counsel failed to raise pre-trial counsel's conflict of interest in representing Mr. Wolfe and then negotiating with Icenogle for her other client, Hileman, to testify against Mr. Wolfe, mistakenly believing she had to show prejudice for a conflict of interest claim. These issues were meritorious, warranting reversal and stronger than many issues she raised.

Counsel Was Ineffective

To establish ineffectiveness, Mr. Wolfe must demonstrate counsel failed to exercise the customary skill and diligence of a reasonably-competent lawyer and prejudice. *Strickland, supra*. A defendant is entitled to effective assistance of appellate

counsel. *Evitts v. Lucey*, 469 U.S. at 396-97; and *Roe v. Delo*, *supra*. Counsel need not raise every possible claim, but not raising a claim having “significant merit raises an inference that counsel performed beneath professional standards.” *State v. Sumlin*, 820 S.W.2d 487, 490 (Mo. banc 1991). The presumption of reasonableness can be overcome if she neglects to raise significant, obvious issues while pursuing substantially weaker ones, *Bloomer v. United States*, 162 F.3d 187, 193 (2nd Cir. 1998), and if the error was timely objected to and the omission was a reasonable strategic decision. *Mapes v. Coyle*, 171 F.3d 408, 427-28 (6th Cir. 1999).

Strength of Evidence

Counsel failed to address proportionality, including “strength of evidence” although it is statutorily required in death penalty cases. Section 565.035. *State v. Chaney*, 967 S.W.2d 47 (Mo. banc 1998). Since “death is different,” the Constitution requires heightened reliability in sentencing proceedings. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Counsel recognized the evidence was of “terrible” quality and lacked reliability (Tr. 419-20). Counsel knew of *Chaney*, but simply did not consider challenging the sentence (Tr. 419, 420). She knew she should have (Tr. 420).

Nevertheless, the motion court denied this claim, because this Court had distinguished *Chaney* when upholding Mr. Wolfe’s sentence on direct appeal (L.F. 918). That this Court did not, *sua sponte*, reverse does not mean it would not have vacated the death sentence had the claim been properly briefed. Effective assistance of counsel is mandated because the guiding hand of counsel is important. *Evitts v. Lucey*, *supra*, at 394. Counsel “must play the role of an active advocate, rather than a mere friend of the court.”

Id. Our adversarial system relies on counsel to recognize and raise legal issues. *Id.* This Court has recognized that an issue's merits on direct appeal is not dispositive on issues of counsel's ineffectiveness. *Deck v.State*,68 S.W.3d 418,425-29(Mo.banc2002).

Counsel admitted this issue was meritorious and she missed it. The State's evidence was unreliable, and was a single eyewitness, with questionable credibility who got total immunity, and a crazy "jail-house snitch," who would do or say anything to get out of jail. No physical evidence connected Mr.Wolfe to the murders--his tools could not have made the pry-marks on the safe, no blood-evidence, no fingerprints connected him. Counsel recognized the evidence was "terrible" and lacked reliability(Tr.419-20). The motion court should have found her ineffective. Mr.Wolfe was prejudiced, as a reasonable probability exists that had it been raised, this Court would have reduced his sentence to life without parole.

Conflict of Interest

Counsel ineffectively failed to appeal pretrial counsel's conflict of interest. Although appellate counsel challenged Hileman's "late disclosure", she did not assert he should have been excluded based on the conflict, a claim raised pre-trial(Ex.Hx3,at497-98). Appellate counsel unreasonably did not raise this issue because she thought she had to prove prejudice(Tr.451,452-53). The motion court's finding that no conflict existed(L.F.925) is contrary to the record.

Mr.Wolfe's prior attorney, Dierdre O'Donnell, represented Hileman. She negotiated with Icenogle, offering Hileman to testify against Mr.Wolfe, her former client(Ex.Vx6,at29-30,T.Tr.78-80,94,96). O'Donnell told her supervisor, Ruth Schulte,

Hileman would plead to one charge and the remaining charges would be dismissed(T.Tr.101). Upon discovering the negotiations, Schulte recognized the conflict and transferred Hileman's case to someone else(T.Tr.89,91,92,93).

For a Sixth Amendment claim, a defendant "must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*,446U.S.335-350(1980). Once both prongs of *Cuyler* are established, a defendant need not show prejudice for reversal. *Burger v. Kemp*,483 U.S.776,783(1987).

The record established an actual conflict and adverse impact. Rule 4-1.9 provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

O'Donnell and her supervisor, Schulte, represented Mr.Wolfe on these charges(T.Tr.77-79). O'Donnell met with Mr.Wolfe when he was first detained and advised him(Ex.Ux6). O'Donnell also represented Hileman(T.Tr.79-80). O'Donnell learned Hileman claimed to have information against Mr.Wolfe and would testify against him to help himself. O'Donnell did not withdraw or seek Mr.Wolfe's consent to continue her representation, but told Icenogle what Hileman said about her former client, Mr.Wolfe(T.Tr.94-96). She negotiated with Icenogle for Hileman(Ex.Vx6,at29-30). She told Schulte that Hileman would plead to one charge and the others would be dismissed(T.Tr.101). As a result, Hileman testified Mr.Wolfe confessed to the killings bragging and saying Mrs.Walters begged for her life(T.Tr.1549-51). Icenogle used this

testimony to corroborate Cox; for guilt and for the depravity of mind
aggravator(T.Tr.1961,2022,2027-28,2119,2132).

In *Burden v. Zant*,24 F.3d 1298(11thCir.1994) a conflict of interest existed. When *Burden's* pretrial counsel made a deal with the prosecutor that a second suspect, whom counsel also represented, would not be prosecuted in exchange for his testimony against *Burden*. *Id.*,at 1300-01. This actual conflict adversely affected performance. *Id.*,at 1304-05. Prejudice was presumed, although pretrial counsel did not represent Burden at trial. *Id.*

O'Donnell, Mr.Wolfe's pretrial counsel, negotiated for her other client to testify against him. His testimony helped the State gain a conviction and death sentence. The conflict, precluded Mr.Wolfe's trial counsel from investigating and developing impeaching information against Hileman. When counsel tried to investigate how Hileman benefited, his counsel refused to answer, citing ethical rules(T.Tr.80,81,82-83,87,89,91,92,93,Ex.Ux6,at10,12,14).

Appellate counsel did not raise this issue solely because she thought she had to show actual prejudice, contrary to *Cuylar*. Had it been raised, this Court would have reversed. The conflict was obvious to Schulte and trial counsel. It should have been obvious to appellate counsel.

This Court should reverse and remand for a new trial.

XV. Walters' Family Asks For Death

The motion court clearly erred in denying Mr. Wolfe's claim the State improperly solicited the Walters' family's opinions about penalty, submitted the opinions for the PSI, and argued they wanted death; and counsel failed to object to the statements, violating due process, confrontation, effective assistance of counsel and to individualized, non-arbitrary or capricious sentencing, U.S. Const. - Amends. 6, 8, 14; Mo. Const., Art. I, Sect. 18(b), Sect. 565.030.4, in that the family's opinions about the appropriate sentence were irrelevant and highly prejudicial, encouraged the sentencer to choose death based on caprice and emotion, not reason, exceeded Section 565.030.4's scope, denied Mr. Wolfe the opportunity to cross-examine or rebut counsel unreasonably failed to object, and Mr. Wolfe was prejudiced as Judge Dickerson explicitly relied on the PSI to conclude death was appropriate.

Icenogle solicited Walters' opinions on what penalty Mr. Wolfe should receive (Ex. Kx7). He told family "[i]t also will be helpful to the Judge to have this information during final disposition of your case." Had he simply utilized the opinions in exercising discretion, there may have been no problem. However, he submitted their opinions for inclusion in the PSI (Ex. Jx7).

At sentencing, he stated: "The State will speak for the Walters' family, and they have also done so themselves in the PSI, and those statements make it abundantly clear that they are in favor of the punishment of death in this case" (Tr. 2165). Son Bobby Duea

strongly believed Mr. Wolfe should die to send a message(Ex.Jx7,at3). The Walters' sisters, Patsy Green and Rita Hatchell, who did not testify at trial, stated, "I hope he gets the death sentence" and "This man needs to be executed." *Id.* Lena's sister, Amia Pope, who did not testify, stated, "I think he should have the death penalty rather than spending a few years in prison and get out and kill someone else's loved ones." *Id.* at 3-4.

The PSI also identified "Walters" neighbor, Gary Lavanche, and family friends Jim and Dorothy Boring; none testified at trial. *Id.* Their families deeply feel loss; Dorothy Boring has nightmares; they and others feel unsafe; they lock their doors and the Borings "now ... keep a loaded gun in the house." *Id.*

Counsel unreasonably¹⁵ failed to object(Tr.2165). Shaw had no explanation for not objecting(Tr.1217-18).

The motion court denied relief, ignoring *Payne v. Tennessee*,501 U.S.808(1991), *Taylor,supra*, and Sect.565.030.4(L.F.930-31). Instead, it relied on Mo.Const.,Art.I-Sect.32.1(3) and Sect.595.010 providing crime victims the right to be informed and heard at sentencing(L.F.931). It found no prejudice, since nothing showed the judge considered the evidence. *Id.* These findings are clearly erroneous. *Morrow,supra*.

Opinions about the crime, defendant and sentence violate the Eighth and Fourteenth Amendments. *Payne v. Tennessee,supra*,at 830,n.2;Sect.565.030.4. *Taylor,supra* at 938. Since many witnesses had never testified, Mr.Wolfe lacked any

¹⁵ McKerrow also represented Leon Taylor at his first trial, where that objection was made and held meritorious. *State v. Taylor*,944S.W.2d 925,934-38(Mo.banc1997).

opportunity to rebut their claims. *Gardner v. Florida*, 430 U.S.349(1977), and confront and cross-examine them. *Pointer v. Texas*, 380 U.S.400(1965) *See, also*, Mo.Const., Art.I, Sect.18(b); *State v. Jackson*, 495 S.W.2d 80,84(Mo.App.KCD-1973)(Missouri Constitution guarantees "face to face" confrontation). Counsel unreasonably failed to object. *Strickland, supra*. Unlike *Taylor*, where Judge Mauer expressly said he was *not* considering the improper victim impact evidence, Judge Dickerson explicitly relied on the PSI in imposing death(Tr.2166-67). A reasonable probability exists Mr.Wolfe would not have been sentenced to death, absent this evidence.

This Court should reverse and remand for a new penalty phase.

XVI. Good Conduct in Jail and Childhood

The motion court clearly erred in denying Mr. Wolfe's claim that counsel ineffectively failed to investigate and call Deputy Keith Eichinger and Lois Patton because this denied effective assistance of counsel, and right to present mitigation, U.S. Const., Amends. 6, 8, 14, in that counsel failed to investigate Patton and whether Eichinger would testify. Eichinger, Jail Superintendent, found Mr. Wolfe a good inmate, made him a trustee, and was willing to testify; Patton knew Mr. Wolfe as a child, her mother took him into their home, because he lacked food, clothing, shelter, love and care. Mr. Wolfe was prejudiced since they would have justified jurors giving Mr. Wolfe life and neither were biased. A reasonable probability exists that had they been called, jurors would have sentenced Mr. Wolfe to life.

Counsel hired a prison expert, Dr. James Aiken, to testify that Mr. Wolfe functioned well in prison, but the State called Aiken a paid hack, testifying frequently for capital defendants (T.Tr. 2088-2109). That challenge would have been impossible with Camden County Jail Superintendent, Keith Eichinger. Eichinger had worked there nearly 20 years; was familiar with Mr. Wolfe and considered him a good inmate, never violent and never causing problems (Ex.N, at 5-8). Mr. Wolfe was such a good inmate Eichinger made him a trustee. *Id.* Eichinger would have testified had he been called. *Id.*, at 15.

Counsel failed to call Eichinger, not because she thought he was unhelpful. She assumed he would refuse to testify (Tr. 671-72). Counsel believed he would not

jeopardize his official position to help. *Id.* Eichinger was willing to testify truthfully, not “help” or “hurt” either party. *Id.*,at 15. He was a jailer, doing his job. Based on his nearly 20 years of experience, he recognized good inmates and could separate them from troublemakers like Hileman. *Id.*,at 8-9.

Counsel’s trial strategy was to present as much information about Mr.Wolfe’s upbringing as she could(Tr.665). Nevertheless, counsel only called two witnesses about Mr.Wolfe’s childhood, a sister, Brenda Kerns(T.Tr.2073-87), and a juvenile officer(T.Tr.2063-72). Counsel never interviewed Lois Patton, a friend of Mr.Wolfe’s, who knew him from childhood(Tr.669,Ex.P,at13). Counsel admitted that she knew about Patton(Tr.669). Her investigator documented their need to find Patton(Ex.Px4). Yet, they failed to follow-up on her(Tr.669). Counsel admitted a non-family member who could corroborate Mr.Wolfe’s childhood would have been helpful to their theory(Tr.669-70).

Patton fit the bill, remembering Mr.Wolfe’s terrible childhood; with insufficient food and clothing(Ex.Pat7). Danny’s father was an alcoholic and always drank. *Id.*,at 9-10. He could never support his children, but drank and offered his under-age children drinks. *Id.* Danny’s stepmother, Joanne Wolfe, was bizarre, treating Danny as a boyfriend, not a son, and expected him to provide her money. *Id.*,at 10-11. She even wanted him to date older women when he was a teenager. *Id.* Eventually, Danny was forced to sleep on the streets, so Patton’s mother took him into their home. *Id.*,at 5. In return, Danny mowed the lawn, and helped around the house. *Id.*,at 5-6,12-13. Danny

was easy going, talking for hours. *Id.*,at 12. Danny had a good sense of humor, never raising his voice. *Id.*,at 13.

Counsel's admitted she never interviewed Patton, and never determined Eichinger's availability, yet the motion court found counsel effective(L.F.912-16). The court found witness selection trial strategy; no prejudice from counsel's failure to interview and call Patton, since Mr.Wolfe never proved counsel knew or should have known about her; Mr.Wolfe had no contact with her for years and her testimony was cumulative to Brenda Kerns(L.F.915). It found Eichinger's testimony cumulative to Aiken and witness selection trial strategy(L.F.916). These findings are clearly erroneous. *See, Morrow,supra.*

Counsel Failed to Adequately Investigate: Failure Was Not Strategic

Counsel must thoroughly investigate mitigating evidence. *Williams v.Taylor, supra.* Good conduct in jail is mitigating. *Skipper v. South Carolina*,476 U.S.1(1986). Troubled childhood evidence is mitigating. *Eddings v.Oklahoma*, 455U.S.104,110(1982). Decisions not to present evidence made without adequate investigation are "not protected by the presumption in favor of counsel." *Kenley v. Armontrout,supra*,at1304.

Counsel failed thoroughly to investigate all mitigation. She knew Mr.Wolfe's conduct while in jail would be an issue, hiring a prison expert to testify. Predictably, the State cross-examined the expert about charges for testimony and how often he testified for capital defendants(Tr.2102-04). Eichinger had no such bias but was a jailer doing his job. Counsel had no strategic reason for not calling Eichinger but wrongly assumed he

would not testify. Eichinger would have testified to the truth--Mr.Wolfe was a good inmate.

Counsel lacked reasons for not calling Patton. She failed to investigate her(Tr.669-70). Patton could have presented as much information about Mr.Wolfe's childhood. *Id.*,at 669. To discount her testimony simply because she had little contact with Mr.Wolfe recently(L.F.915) is contrary to *Williams* and *Eddings*. Further, a troubled childhood is relevant mitigating evidence--even background records are important mitigation. *Id.*

Neither Witness Was Cumulative

“Cumulative evidence is additional evidence of the *same* kind tending to prove the same point as other evidence already given.” *State v. Harris*,64 S.W.2d 256(Mo.1933)- (emphasis added). Evidence is cumulative if it relates to a matter so fully proved by other evidence and is not in serious dispute. *McCauley,supra*,at743. “Corroborative testimony by a single witness can never be discounted as ‘merely cumulative.’” *Hayes,supra*,at663.

James Aiken was a paid expert; Eichinger, Jail Superintendent, was not. His opinions were based on personal observations and experiences, not paid record reviews. Eichinger had no reason to lie. He was credible because he was a jailer, precisely the kind of witness jurors would find helpful. *See Williams, supra*.

Patton was not a family member and thus was a different kind of witness from Mr.Walter's sister. Suggesting her testimony was cumulative is unsupported by the record, and violates the requirement that all relevant mitigating circumstances be

considered when deciding a defendant's sentence. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Mr. Wolfe was prejudiced by counsel's failure to investigate and present Eichinger and Patton. The evidence of guilt was weak. Had jurors heard this evidence, a reasonable probability exists jurors would have sentenced Mr. Wolfe to life. This Court should reverse and grant a new penalty phase.

CONCLUSION

Based on the arguments in Points I-XV, Mr. Wolfe asks this Court to reverse and remand for a new trial; based on those is Points XV-XVI, a new penalty phase; and based on the *Chaney* error in XIV, a life sentence.

Respectfully submitted,

Melinda K. Pendergraph, MOBar #34015
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
(573) 882-9855

Certificate of Compliance

I, Melinda K. Pendergraph, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains _____ words, which does not exceed the 31,000 words allowed for an appellant's brief.

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

One true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of September, 2002, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Melinda K. Pendergraph

Certificate of Service

I, Melinda K. Pendergraph, hereby certify that two true and correct copies of the attached brief and floppy disk(s) containing a copy of this brief were hand-delivered, on this ____ day of _____ 2002, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65101.

Melinda K. Pendergraph