

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 REPLY BRIEF

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JURISDICTIONAL AND FACT STATEMENT

Appellant, Danny Wolfe, incorporates the Jurisdictional Statement and Statement of Facts of his original brief.

POINTS RELIED ON

I. Larry Graham's Exculpatory Statements

The motion court clearly erred in denying Mr. Wolfe's claims relating to Graham's prior inconsistent statements that he saw the victims alive on Thursday or Friday, because they violated Mr. Wolfe's constitutional rights and Sect.491.074, in that the record shows that counsel wanted these statements in evidence; the State knew Graham had told police twice that he had seen the Walters on Friday, so his "speculative" objection misled jurors; the State had a duty to disclose all impeaching statements since Graham was endorsed as a state witness; fundamental fairness required disclosure; and the inconsistent statements rebutted Mr. Wolfe's alibi defense.

State v. Wells, 804 S.W.2d 746(Mo.banc1991);

State v. Rodriguez, 985 S.W.2d 863(Mo.App.W.D.1998);

State v. Grant, 784 S.W.2d 831(Mo.App.E.D.1990);

Wardius v. Oregon, 412 U.S. 470(1973);

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

Sect.491.074.

II. Jessica Cox's Hair

The motion court clearly erred in denying Mr. Wolfe's claims relating to nondisclosure and failure to compare Cox's hair to 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, violating Mr. Wolfe's constitutional rights to due process, a fair trial, and effective assistance of counsel, in that:

- 1) the State's duty to disclose was independent of defense counsel's request;
- 2) exculpatory evidence includes physical evidence, not just testing results;
- 3) materiality does not require a showing that Mr. Wolfe would have been acquitted, rather the evidence must undermine confidence in the verdict and the hair evidence puts the case in a different light;
- 4) the weight to be given evidence is for the jury; and
- 5) Cox altered her testimony to protect herself.

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

U.S. v. Agurs, 427 U.S. 97(1976);

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

U.S. v. Haskins, 536 F.2d 775(8thCir.1976); and

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 of counsel's ineffectiveness and the State's nondisclosure of impeaching evidence against Hileman, denying Mr. Wolfe his constitutional rights in that:

Hileman is crazy, proven by his mental problems as a teen, records in existence before trial, and his delusions in prison;

Both records and witnesses showed that Hileman was a habitual liar and lied about Mr. Wolfe;

Hileman expected favorable treatment for his testimony: favors from the prosecutor, dismissal of his pending charges, and a note in Hileman's file showed that he had an agreement in exchange for his testimony.

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

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

Wilkes v. State, 82 S.W.3d 925(Mo.banc2002);

State v. Hayes, 785 S.W.2d 661(Mo.App.W.D.1990); and

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

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

The motion court clearly erred in denying Mr. Wolfe's claims relating to the State's excluding evidence of other suspects and Cox's prior lies and then suggesting this evidence did not exist denying Mr. Wolfe his constitutional rights in that the claims were pled, are cognizable, and proven by the evidence.

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

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

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

VII. Terry Smith Evidence

The motion court clearly erred in denying Mr.Wolfe's claims regarding Terry Smith having committed the robbery and murder denying Mr.Wolfe his constitutional rights in that the credibility of Mr.Wolfe's evidence was a matter for the jury; counsel wanted Dayton and Reeder to testify, despite any credibility problems; their testimony was corroborated by independent witnesses and verified by police; and the State relied on non-credible witnesses at trial and should not be allowed to exclude the same type of defense evidence.

Kyles v. Whitley, 514 U.S. 419(1995); and
U.S.Const.,Amends.5,6,14.

ARGUMENT

I. Larry Graham's Exculpatory Statements

The motion court clearly erred in denying Mr. Wolfe's claims relating to Graham's prior inconsistent statements that he saw the victims alive on Thursday or Friday, because they violated Mr. Wolfe's constitutional rights and Sect.491.074, in that the record shows that counsel wanted these statements in evidence; the State knew Graham had told police twice that he had seen the Walters on Friday, so his "speculative" objection misled jurors; the State had a duty to disclose all impeaching statements since Graham was endorsed as a state witness; fundamental fairness required disclosure; and the inconsistent statements rebutted Mr. Wolfe's alibi defense.

The jury did not hear the truth at Mr. Wolfe's trial. The State did everything it could to prevent the jury from knowing that Larry Graham, the owner of Larry's Meat Market, told police that he saw the victims alive either on Friday or Thursday, after the time when Cox said they were killed. Now, the State wants this Court to ignore the truth too.

Ineffective Assistance

Counsel failed to tell the jury about Mr. Graham's statements to the police in the days following the Walters' killing, that he saw them alive on Friday or Thursday, after when Cox said they were killed. Any reasonable defense counsel would want a jury to know these exculpatory statements and defense counsel admitted that she did

too(Tr.1119-22). The State discounts defense counsel's testimony, calling it an "attempt to understate her performance," a "willingness to admit her ineffectiveness," and that "it strains credulity to suggest that counsel was so surprised by Graham's testimony as to be rendered incapable of doing anything in response."(Resp.Br., at 10,11,12).

The record refutes the State's argument. In defense counsel's opening, she told jurors:

Another individual that saw Mr. and Mrs. Walters alive after Thursday morning at 7:00 AM is Larry Graham. Larry Graham owns a meat market that Mr. and Mrs. Walters would frequent at least three times a week. He, once again, is very familiar with these individuals, and he will tell you that he saw them either Thursday or Friday around eleven o'clock. And again, this murder was to have occurred around six or seven in the morning on Thursday. And the reason he knows it was not before that day was he had been to Illinois and he came back and did not go to work on Wednesday, but came back to work on Thursday and that's when he saw them.

And he will tell you that when officers came to talk to him about it, he was unable to find a receipt but asked them how they knew the Walters had been to the store, and he was told there had been fresh meat in the bottom portion of the refrigerator that had Larry's Meat Market wrapping on it, and the wrapping and label was his.

And he does recall Mr. and Mrs. Walters coming in either Thursday or Friday, and they bought two packages of ground chuck, ribeye steaks and one package of bacon.

Again, both of these people know Mr. and Mrs. Walters, they can pinpoint when they saw them because of circumstances that were happening in their lives around this time.

(T.Tr.796-97).

Counsel expected to elicit this evidence from her final witness-Graham. What the jury heard from Graham was much different. The witness was equivocal, could not remember details, and simply lied when he said that he never told the police that he saw the Walters alive on Friday(T.Tr.1895). He ultimately said that he saw them on Wednesday or Thursday, and he could not be sure of which day(T.Tr.1896-97).

The State's suggestion that counsel was satisfied with this testimony and that the "testimony tended to prove – without much equivocation – that the victims were in his market during business hours on Thursday, several hours after the murders"(Resp.Br.,at 12) is again refuted by the record.

In her closing, defense counsel argued:

Another big problem that Jessica Cox has in her story is that Mr. and Mrs. Walters were seen alive after the time that they were supposedly murdered. *Larry Graham comes in here, and he gets a little confused now on what day of the week this may have been. He initially tells officers Friday, he then tells them Thursday.* Wednesday doesn't happen

to come out until he testifies and the reason he knows those dates is because he'd been out of town. He knows what days he worked, what days he didn't work.

(T.Tr.1997)(emphasis added).

Unfortunately, no evidence supported this argument, since counsel did not introduce Graham's statements to the police. Counsel's failure was exploited by the State in its closing:

And *the defense can only bring one person in*, Mr. Morgan - - and I mean him no disrespect - - but only *one person in the entire lake area that says he saw them alive after they were in fact dead*. And that is the same guy that says he saw an Arabian driving the car by himself the day before.

Ms. Shaw talked about how there's some guys or people who just want to be where the action is and get involved. You'll recall Mr. Morgan is the one that went down to the Major Case Squad to provide this information. And he also testified he was, quite understandably, very upset at that time because of the condition of his ailing wife.

(T.Tr.2026).

Yet, the State argues that Mr. Wolfe was not prejudiced by counsel's failure (Resp.Br.,at12-13) . Without Graham's prior statements to police, the State was able to argue that the defense had failed to rebut Cox's story. The State knew that Graham's testimony was totally useless, since he was unsure if he saw the victims on Wednesday

(before Cox said they were killed) or Thursday. The State discredited Morgan both in cross-examination and during its closing argument.

The jury had to decide whether Mr. Wolfe was guilty, and whether to believe Cox's version or Morgan's testimony. They struggled with their decision for more than twelve hours and asked what Graham had told the police in the days following the deaths. (Tr.1121,T.Tr.2035). The record shows how important Graham's testimony was to the jury. Unfortunately, the jury never heard the truth when deciding whether Mr. Wolfe was guilty or innocent.

The State suggests that it "it strains credulity to suggest that counsel was so surprised by Graham's testimony as to be rendered incapable of doing anything in response." (Resp.Br.,at12). But her opening and closing suggest that is precisely what happened. Additionally, the evidence presented at the 29.15 hearing shows that counsel thought Graham was a solid defense witness, as he had been so consistent in the past. He had been interviewed three times by the police before trial and had always said that he saw the Walters alive on Thursday or Friday.

Furthermore in the weeks before trial, counsel's investigator interviewed Graham(Ex.Dx6). He told her that he had been to Illinois on the Wednesday prior to the murder and did not work that day(Ex.Dx6). He came back to work on Thursday and knew the Walters came in either that Thursday or Friday(Ex.Dx6). He was sure they came in when he got back from his trip not before(Ex.Dx6). Thus, that counsel was surprised by Graham's changed testimony was understandable, but her failure failure to respond by putting his exculpatory statements before the jury was not. *See, e.g. Hadley v.*

Groose, 97 F.3d 1131(8thCir.1996) (failure to impeach witness with exculpatory statements was ineffective).

The failure to pursue one single important item of evidence may demonstrate ineffective assistance of counsel. *State v. Wells*, 804 S.W.2d 746,748(Mo.banc1991). In *Wells*, counsel was on notice of a letter that suggested a codefendant, rather than Wells, committed the murder. *Id.*, at 747. Counsel failed to obtain the letter and present it to the jury. *Id.* Despite the strength of the evidence against Wells (two codefendants allegedly witnessed Wells committing the murder, and Wells' repeated confessions), counsel was ineffective. *Id.*, at 748-49.

Like *Wells*, here counsel was on notice that Graham had provided exculpatory statements to police in the days following the murders. These statements directly refuted Cox's version of events and proved Mr.Wolfe's innocence. The State's case was not nearly as strong as *Wells*. Mr.Wolfe had not confessed to police. The State did not have two eyewitnesses, but only one, Cox who had obtained immunity in exchange for her testimony. The State's other witness, a jail house informant, had lied before. No physical evidence tied Mr.Wolfe to the crime. Without the Graham statements, the jury deliberated for twelve hours. Jurors asked what Graham had told the police. There is a reasonable probability that had counsel given the jury this information, the result of the proceedings would have been different.

Due Process Violations

The State is also to blame, both for misleading the jury and for failing to disclose impeaching information to the defense. Yet the State wants to avoid responsibility,

calling these claims “trial error.”(Resp.Br., at 14). This Court has rejected such a suggestion in the past. *See, e.g., Hayes v. State*, 711 S.W.2d 876(Mo.banc1986); and *Hutchison v. State*, 59 S.W.2d 494,496(Mo.banc2001). In both *Hayes* and *Hutchison*, the Court addressed, in a postconviction action, the State’s failure to disclose information to the defense, under *Brady v. Maryland*, 373 U.S. 83(1963), and the State’s misleading the jury with false information. *Napue v. Illinois*, 360 U.S. 264(1959). Those are precisely the claims raised here, and they should be addressed.

Further, the claims could not have been raised on direct appeal. The State hid the report of its interview of Graham during the trial. Thus, it was not part of the direct appeal record. The State should not be heard to complain about Mr.Wolfe raising this claim at the earliest opportunity. Contrast *State v. Carter*, 955 S.W.2d 548,555(Mo.banc1997) cited by the State(Resp.Br.,at14). There, the nondisclosure could have been raised on direct appeal; it involved the incompetence of a medical examiner that was a matter of public record one year before trial. *Id.*

Graham told the police, not once, but twice, that he had seen the Walters on Friday. So when defense counsel asked, “Is it possible that you told them Friday,” it was improper and misleading to object to that as “calling for speculation.”(T.Tr.1895). The State’s assertion that it was not the prosecutor’s responsibility to “correct” a defense witness(Resp.Br.,at15) is wrong. He has a constitutional duty to correct the false impression of the facts. *Napue*, 360 U.S. at 269.

Contrary to the State’s argument that the prosecutor was simply objecting to the form of the question (Resp.Br., at 14), the State was doing everything possible to keep

Graham's prior statements from the jury. The State knew the importance of Graham's testimony; it sent an officer to interview him during the trial itself, in violation of the trial judge's sequestration order.

The State's argument that it had no duty to disclose Graham's inconsistent statement(Resp.Br.,at15) is also contrary to the law. The State urges this Court to excuse nondisclosure of its endorsed witness, saying Graham was not subpoenaed¹ by the State. Thus, under Rule 25.03(a), the State never intended to call Graham at trial.(Resp.Br.,at 15). The State cites no case for such a proposition, and appellant has found none to support this contention.

The State's endorsement of Graham as its witness must control. Rules of discovery are intended to provide notice to counsel and give them a decent opportunity to prepare. *State v. Whitfield*, 837 S.W.2d 503(Mo.banc1992);

Here, the State filed two endorsements of Graham, one with the original information(Ex.Fx3,at53), and one on the first day of trial, the same day it ordered Sederwall to interview Graham(Ex.Hx3,at449). Thus, under both Rule 25.03 and under the due process clause, the State had an obligation to disclose Graham's statements to

¹ Many witnesses may be called who are not under subpoena. Further, a return of a state's subpoena is not provided to defense counsel. Thus, counsel would have no idea who the State's witnesses were going to be, if counsel could not rely on the State's endorsement in preparing for trial.

Officer Sederwall. *Brady, supra*; and *U.S. v. Bagley*, 473 U.S. 667(1985)(the State had a duty to disclose impeaching statements).

Even if Graham could be disavowed as a state witness, the prosecution's nondisclosure violated Mr. Wolfe's rights to due process, to a fair trial and to prepare his defense. In *State v. Rodriguez*, 985 S.W.2d 863(Mo.App.W.D.1998), the State failed to disclose that a key defense witness, Vanloo, had told prosecutors of his intent to recant his earlier deposition testimony, wherein he had admitted that the drugs in question were his. Vanloo testified at trial that the defendant had asked him to sell the controlled substance on an earlier occasion. The *Rodriguez* court reversed, because the defendant was denied the opportunity to properly prepare a defense. *Id.* at 866. The failure to disclose Vanloo's change of story gave the State the unfair benefit of having the defendant destroyed by one of his own witnesses. *Id.* at 867.

Similarly, in *State v. Grant*, 784 S.W.2d 831(Mo.App.E.D.1990), Grant called a witness, Green, to support his self-defense. Unknown to the defendant, the prosecution had in an audiotaped statement in which Green told the prosecutor that Grant had made a statement contradicting his self-defense theory. On cross-examination, the prosecutor elicited Grant's statement that he "didn't need a knife, he could have [whipped] them without it." *Id.* The court reversed; if defense counsel had known of the statement prior to trial, he would not have called Green, and could have prepared to discredit him if the State decided to call him. *Id.* at 836. "The prosecutor's failure to disclose Green's audiotaped statement neatly set defendant up to be destroyed by one of his own witnesses at . . . trial." *Id.*, at 837.

As in *Rodriguez* and *Grant*, the prosecutor failed to disclose Graham's changed testimony that he returned from Illinois on Tuesday, worked Wednesday and possibly could have seen the Walters on Wednesday. The prosecutor knew that the change from seeing the victims on Thursday or Friday (after Cox said they were killed) to Wednesday or Thursday set Mr. Wolfe up to be destroyed by his final witness at trial. Had counsel obtained this information before the witness testified, she could have prepared Graham by showing him his other police reports or would have been ready to offer his prior inconsistent statements, both to impeach him and as substantive evidence of Mr. Wolfe's innocence. Section 491.074. Without this information, counsel was unprepared and did not introduce the exculpatory statements.

Graham's interview with Sederwall rebutted Mr. Wolfe's alibi defense and should have been disclosed. *Wardius v. Oregon*, 412 U.S. 470(1973); and *State v. Curtis*, 544 S.W.2d 580,582(Mo.banc1976). The State knew that if the victims were killed later in the day on Thursday or on Friday, Mr. Wolfe could not have committed the crime. Graham's testimony was crucial to his defense. The ends of justice is best served by a system of liberal discovery that gives both parties the maximum amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. *Wardius*, 412 U.S. at 473. "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." *Wardius, supra* at 474 (*quoting, Williams v. Florida*, 399 U.S. 78,82 (1970)).

Here, the State did everything possible to keep the jury from knowing the truth, that Graham told police the victims were alive on Thursday or Friday, after the time when Cox said they were killed. The jury wanted to know the truth, they asked to see the report of Sederwall's interview. This Court should reverse and grant a new trial.

II. Jessica Cox's Hair

The motion court clearly erred in denying Mr. Wolfe's claims relating to nondisclosure and failure to compare Cox's hair to 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, violating Mr. Wolfe's constitutional rights to due process, a fair trial, and effective assistance of counsel, in that:

- 1) the State's duty to disclose was independent of defense counsel's request;**
- 2) exculpatory evidence includes physical evidence, not just testing results;**
- 3) materiality does not require a showing that Mr. Wolfe would have been acquitted, rather the evidence must undermine confidence in the verdict and the hair evidence puts the case in a different light;**
- 4) the weight to be given evidence is for the jury; and**
- 5) Cox altered her testimony to protect herself.**

The jury never heard the truth about the physical evidence. The police took a sample of Cox's hair and it was consistent with a hair found in the ammunition box, placed in Mr. Wolfe's dumpster, and in the back seat of the victim's car, where the shooter sat when he or she shot Mr. Walters. The reason the jury never knew this is that the State never disclosed the hair to the defense.

The State argues that the defense did not really want the hair; had counsel wanted to test the hair, she could have taken hair from Cox²(Resp.Br.,at19-20). According to the State, its duty to disclose evidence goes only to results of testing, not the physical evidence itself(Resp.Br.,at19). In the next breath, the State tells this Court that counsel wanted to test the hair and she was effective, since she took “every reasonable step at her disposal to determine whether the state was holding samples of Cox’s hair”(Resp.Br.,at 21). The State cannot have it both ways; its arguments do not withstand scrutiny.

State Has Duty to Disclose Even In Absence of Request By Defense

Contrary to the State’s suggestion, counsel’s request for samples **and** for testing results did not limit the State’s duty to disclose the taking of the hair. If anything, this request should have put the State on notice that the defense had not received this evidence and was interested in Cox’s hair. The State must disclose exculpatory information, including impeaching information, even without a request by the defense. *U.S. v. Agurs*, 427 U.S. 97(1976). Thus, counsel’s reliance on the State’s representations that no hair had been taken, and no reports generated, did not absolve the State of its constitutional duty.

Exculpatory Evidence Includes Physical Evidence, Not Just Testing

² While stating that “counsel knew she had hair,” and “Cox’s hair was fungible,” the State suggests that the defense could have simply gone to this witness and seized her hair. The State cites no authority for this proposition; and appellant doubts trial judges would authorize defendants to seize hair from State witnesses at will.

The State suggests that the hair itself is not exculpatory and thus, need not be disclosed (Resp.Br.,at19). The State cites *Strickler v. Greene*, 527 U.S. 263, 280 (1999), but that case discussed the nondisclosure of documents prepared by an eyewitness, not physical evidence. Under the State's rationale, the State could simply choose not to test physical evidence that would exonerate a defendant and by not testing evidence, would then have no duty to disclose the physical evidence to the defense. Under this theory, the semen that subsequently exonerated Moore would never have been disclosed. *Moore v. State*, 827 S.W.2d 213(Mo.banc1992). Blood samples that could establish innocence through DNA testing would never be revealed.

Prejudice

The State suggests that nondisclosure by the State and counsel's failure to have Cox's hair tested was not prejudicial, that the benefits of testing would have been minimal (Resp.Br.,at23-25). According to the State, there is no reasonable probability that with the hair evidence, the jury would have found Mr. Wolfe was not involved in the murders (Resp.Br.,at35), thereby acquitting him. The State applies the wrong standard in analyzing prejudice. "Materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in defendant's acquittal (whether based on the presence of a reasonable doubt or acceptance of an explanation for the crime that does not inculcate the defendant)." *Kyles v. Whitley*, 514 U.S. 419,434(1995). The question is not whether Mr. Wolfe would more likely than not have received a different verdict with the hair evidence, but whether in the absence he received a fair trial. *Id.* The issue is whether the verdict is worthy of confidence. *Id.*

Materiality is not a sufficiency test. *Id.*, at 434-35. Rather, one must show that “the favorable evidence could reasonably be taken to put the whole case in such a different light to undermine confidence in the verdict.” *Id.*, at 435.

Here, evidence that Cox’s hair was consistent with hairs in the ammunition box in the dumpster and on the back seat of the Cadillac would put the case in a different light. This evidence would have supported defense counsel’s argument that Cox placed the ammunition in the dumpster to frame him(T.Tr.1973,1974,1980-81,2004,2013).

Without the hair comparison evidence, the State responded that counsel was asserting “wild theories of innocence”(T.Tr.2016) and “Cox certainly is not the mastermind of the most unbelievable, incredible frame-up the defense wants you to believe in”(T.Tr.2032).

Had the State disclosed the hair evidence, counsel’s defense would have had evidentiary support and could not have been dismissed as a “wild theory” or an “unbelievable, incredible frame-up.” This evidence puts the case in a different light. It undermines confidence in the verdict.

Weight to Give Hair Evidence Is For Jury

The State also suggests that the motion court found lacking the scientific basis for the expert’s hair comparisons(Resp.Br.,at23-24). Notably, the State’s argument cites to the State’s cross-examination of the expert(P.Tr.1001-02,1003-04,1009-10), not the court’s findings (Resp.Br.,at24). What the motion court actually found was that due to the small number of hairs available for the examination, the testimony was unpersuasive (L.F.857). This did not make the hair evidence inadmissible, but would only go to the weight to give the expert’s opinion. *U.S. v. Haskins*, 536 F.2d 775,779(8thCir.1976) (the

credibility of the hair expert and the weight to be given to his testimony was for the jury to determine). See, also, *Kyles, supra* at 449, f.n.19, where the Court discussed the State postconviction judge's finding that the testimony was not convincing. The judge's observation could not have possibly affected the jury's appraisal of the witnesses' credibility at the time of the trial. *Id.*

The State ignores that expert opinion about hair comparisons is admissible in Missouri. *State v. White*, 621 S.W.2d 287(Mo.1981); *State v. Kelly*, 539 S.W.2d 106, 109-10(Mo.banc1976); *State v. Merritt*, 591 S.W.2d 107,112-13(Mo.App.W.D.1979); *State v. Dayton*, 535 S.W.2d 479,483(Mo.App.W.D.1976). Certainly, the State has relied on hair and fiber evidence when it has been helpful to support a conviction and death sentence. See, e.g., *State v. Chaney*, 967 S.W.2d 47(Mo.banc1998). To suggest that hair is admissible only when it helps the State and not when it aids the defense is disingenuous.

Cox Altered Her Testimony To Avoid Embarrassment

Finally, the State tries to minimize the value of hair evidence by providing an explanation contrary to that presented at trial(Resp.Br.at 25). The State now admits Cox was untruthful and that she altered her testimony about the events on February 20th. "Cox minimized her actions and omitted certain, perhaps personally embarrassing, entanglements between her and appellant."(Resp.Br.,at 25). Surely, if Cox was willing to perjure herself to cover up "personally embarrassing entanglements between her and appellant," she would be willing to lie to minimize her culpability in murdering two innocent, elderly people. Cox told the jury that she never handled a gun, she supposedly

had no part in the murder, yet a hair consistent with hers was found in the ammunition box placed in Mr. Wolfe's dumpster.

This evidence would have supported Mr. Wolfe's defense that Cox committed this murder with someone else, Terry Smith, and that Cox framed Mr. Wolfe for the murder. The hair evidence puts the whole case in a different light; it undermines confidence in the verdict. 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 of counsel's ineffectiveness and the State's nondisclosure of impeaching evidence against Hileman, denying Mr. Wolfe his constitutional rights in that:

Hileman is crazy, proven by his mental problems as a teen, records in existence before trial, and his delusions in prison;

Both records and witnesses showed that Hileman was a habitual liar and lied about Mr. Wolfe;

Hileman expected favorable treatment for his testimony: favors from the prosecutor, dismissal of his pending charges, and a note in Hileman's file showed that he had an agreement in exchange for his testimony.

The jury never heard the truth about the State's jail house informant. He was crazy, he had a pattern of lying to benefit himself, and he expected to receive favorable treatment as a result of his testimony. Yet the State would have this Court uphold Mr. Wolfe's conviction and sentence, ignoring all the problems with Hileman and the reliability of his assertions.

Hileman Is Crazy

A. Mental Problems When A Teen

First, the State wants this Court to ignore that Hileman was given antipsychotic medications and was treated in a mental facility when he was 13-14 years

old(Resp.Br.,at27,f.n.4). The motion court refused to reopen the evidence to consider Hileman's mental health records(Tr.1819-20). These records supported doctors' findings that Hileman had a history of mental illness, was paranoid schizophrenic and delusional. Having objected to this evidence, the State now argues that no evidence of mental illness existed before trial(Resp.Br.,at27-28).

B. Records Available Before Trial

The State also ignores other evidence of Hileman's mental illness. According to the State, *none* of the records indicated mental disease or defect and "no expert testified that, on the basis of these records, Hileman was incompetent to testify in November 1998."(Resp.Br.,at28). However, two doctors concluded that Hileman was incompetent to testify at Mr.Wolfe's trial(Tr.569,Ex.G,at47-48). Dr. Daniels reviewed many records in existence at the time of trial in reaching this decision(Tr.526-31). The review included prison records, mental health records, letters written by Hileman before trial, Hileman's threats to witnesses, Cassandra Martin and Amanda Lister,³ and his prior criminal record.
Id.

³ Dr. Daniel testified about Ex.Xx4, the investigative report regarding Hileman's threats to Lister (Tr.528). However, the actual exhibit was not admitted into evidence as noted by the State (Resp.Br.,at39), and appellant should have referenced the testimony, rather than the exhibit.

Similarly, in Point V, respondent criticizes appellant's reference to Ex.Nx6, Monica Clark's police report (Resp.Br.,at56,f.n.20). Clark testified about her report

Dr. Daniel recognized indications of mental illness from the records prior to 1998 (Tr.540-41). In 1996, Hileman had suicidal thoughts. *Id.* In 1991, he had confused thinking and feelings of persecution, was depressed and received counseling (Tr.542,561). His 1997 letters showed psychotic symptoms and behavior and his sentences did not make sense(Tr.542,562-63). Based on these records, all in existence before trial, Dr. Daniels concluded that Hileman’s paranoia and delusional disorder existed in 1998(Tr.568). Hileman’s treating physician agreed(Ex.G,at47-48). The State is wrong in saying none of the records indicated mental illness and no doctor found Hileman incompetent.

C. Delusions and Mental Treatment In Prison

The evidence of mental illness in this case is startling. Hileman believes President Clinton conspired with famous media people, like Katie Couric, to keep him in a mental institution and David Letterman communicated with him through the television (Ex.Tx4,at17,19,26,27). Hileman shared his delusions with the State in letters. *Id.* Hileman even offered to testify about the conspiracy against him, saying: “I would in good conscience testify to it under an oath to God.” *Id.*, at 30. This should have put the State on notice that they just convicted a man and sentenced him to death on the word of a lunatic. It should have given the State reason to doubt the conviction and sentence. Yet, not a single mention of the delusions made its way into the State’s brief. The State

(Ex.L,at21-22,27-28) and appellant should have referenced the testimony rather than the report itself. However, these facts were before the motion court.

wants this Court to ignore all evidence of mental illness, whether it surfaced before, during, or after trial.

Pattern Of Lying

A. Prison Records

Hileman's prison records showed a pattern of lying to benefit himself (Ex.A). Contrary to the State's argument (Resp.Br.,at29), the State has a duty to disclose such records. *Carriger v. Stewart*, 132 F.3d 463, 479-80(9thCir.1997)(when state decides to rely on a jail-house informant with a long criminal history, it must turn over all information bearing on the witness's credibility, including prison records; if the records are not in the State's possession, it should obtain them).

B. Witnesses That Knew Hileman Lied

Hileman's cellmates, his parole officer, the Jail Superintendent, and an investigator from the Missouri Highway Patrol all knew that Hileman lied and made unfounded allegations against others, including Mr.Wolfe. The State argues that Mr.Wolfe's amended motion did not adequately plead these witnesses' testimony (Resp.Br.,at34-36,f.n.7-11).⁴

⁴ The State makes similar claims about inadequately pleading in Point IX, relating to nondisclosure of Dix's changed opinion and Point XI, the prosecutorial misconduct in granting Cox immunity (Resp.Br.,at 83,86). Again, a review of the amended motion shows the claims were properly pled (L.F.176,178,406-08,174-76)

The amended motion specifically identified each of these witnesses and provided notice of the precise claims raised (L.F.141-56). For example, the amended motion alleged that Murdock would have testified “Hileman made up claims about jailers bring drugs into the Camden County Jail in order to be able to get out of jail, and that Hileman said he was ‘trying any method he could think up to get out of his pending charges.’” (L.F.145). Yet, the State complains that Murdock testified to the additional details that Hileman could not handle 40 years and asked him to write letters and testify that jailers brought drugs into the jail (Resp.Br.,at 34,f.n.7). Similarly, the amended motion alleged that Hawk would testify that “Hileman told him that Mr.Wolfe was not good for the murders and was innocent of the murders; that Hileman believed he was facing a 99 year sentence and was paranoid and frightened about that; and that Hileman said he would do anything to get his sentence reduced.” (L.F.146-47). Despite this specificity, the State complains about Hawk’s testimony that Hileman was especially worried about tampering charge and his status as a three-time loser. He wanted to get some dirt on Mr.Wolfe. (Resp.Br.,at35,f.n.8). Compare also claims relating to Eichinger(L.F.148-49), Failing (L.F.149), Breen(L.F.152) and the State’s complaints(Resp.Br.,at36,f.n.9-11).

The State’s argument disregards *Wilkes v. State*, 82 S.W.3d925(Mo.banc2002). “Nothing in the text of Rule 29.15 suggests that the pleading requirements are to be construed more narrowly than other civil pleadings.” *Id.* At 928. Reasons for some slight disparity in the pleadings and testimony include: “conjecture or speculation as to what a witness will say. Faded recollections, subtle questioning and, sometimes, outright

dishonesty all conspire against precisely forecasting what a witness might say.” *Id.*, at 928.

Here, a common sense reading of the amended motion shows that the claims were sufficiently pled, and the witnesses established that Hileman lied about Mr. Wolfe. They should have been called to impeach him at trial.

Hileman Expected Favorable Treatment

1) Favors From the Prosecutor

The State admitted that it promised to contact prison officials on Hileman’s behalf to help him get transfers (Tr.1692), yet the State says this was not a “deal or inducement” for testimony (Resp.Br., at 41-42). Whatever the State wants to call it, Hileman expected to receive benefits as a result of his testimony, which should have been disclosed. See, e.g. *U.S. v. Boyd*, 55 F.3d 239 (7th Cir. 1995) and the other cases discussed in App.Br., at 67.

2) Pending Charges

Hileman had numerous felony charges pending against him when he decided to provide testimony against Mr. Wolfe. Docket entries showed that the state never intended to take these cases to trial (Tr.1596-99, 1607-08, Ex.Jx8). In fact, none of the cases were tried; they were all dismissed after the State obtained its conviction and sentence against Mr. Wolfe (Ex.Ax8, Bx8, Cx8). Despite the testimony, the State now disputes the case number on one of the docket sheets (Resp.Br., at 40). The case number (97-4480) on Ex.Gx8 shows the case was filed in 1997, at the same time of Hileman’s other charges (97-4038FX, 97-4039FX, and 97-4484FX). Perhaps Ex.Gx8 reflected an additional

charge, not disclosed to Mr. Wolfe, or as the prosecutor testified it was a docket sheet from a pending case (Resp.Br.,at40). In any event, it showed that Hileman had an offer that was never disclosed to Mr. Wolfe. The offer was: “10 and go on any combination of cases to reach that number. Defendant can choose the charges to plead to.” (Ex.Gx8).

3) The Note In Hileman's File

After months of denying it made any deals with Hileman, Mr. Wolfe finally discovered the smoking gun – a note from his file. Phelps County Prosecutor, Ken Clayton, who represented Hileman revealed:

There is a note in this file reflecting that ***there was an agreement with the Camden County Prosecutor's Office*** that Mr. Hileman was to plead guilty in case CR297-4038FX, and the three cases on which I represented him were to be left pending until after Danny Wolfe's trial, at which time Mr. Hileman would plead guilty to something regarding the pending charges, and he would receive concurrent sentences regarding that later guilty pleas.

I was not informed of this information by Camden County Prosecutor James Icenogle or Ms. O'Donnell at the time I represented Mr. Hileman.

(L.F.1207)(emphasis added). Incredibly, the State dismisses this as “an expected chronology and outcome in Hileman's pending case”(Resp.Br.,at41), that need not be disclosed. Whatever, the State wants to call it, this “agreement” or understanding should have been disclosed to Mr. Wolfe and to the jury at his trial. *See, Brady, Napue, and Hutchison, supra.* The State has done everything possible to hide the truth and to have courts ignore this evidence.

Prejudice

The State argues that none of this evidence would have made a difference to the jury, the evidence was simply “cumulative” to that presented at trial(Resp.Br.,at34-37). The State ignores that the jury never heard any evidence of Hileman’s mental illness. The jury never heard any evidence about Hileman’s pattern of lying to benefit himself, as revealed in prison records. And the jury never heard what Hileman expected in exchange for his testimony: favors from the prosecutor and charges to be dismissed.

The jury heard from one of Hileman’s cellmates, Phil Dayton, whom the State impeached at trial and argued was incredible(T.Tr.1624-35,2022,2027-28).⁵ Thus, Murdock and Hawk would have provided corroboration for Dayton’s testimony, which was critical. *State v. Hayes*, 785 S.W.2d 661,663(Mo.App.W.D.1990) (corroboration is critical, and corroborative testimony by a single witness can never be discounted as “merely cumulative”).

All of this suppressed evidence, when considered along with all the evidence introduced at trial, undermines confidence in the jury’s verdict. A new trial should result.

⁵ In Point VII, the State flips its position and argues that Dayton was so incredible that this Court should not consider evidence that Terry Smith committed the crime.

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

The motion court clearly erred in denying Mr. Wolfe's claims relating to the State's excluding evidence of other suspects and Cox's prior lies and then suggesting this evidence did not exist denying Mr. Wolfe his constitutional rights in that the claims were pled, are cognizable, and proven by the evidence.

Contrary to the State's argument(Resp.Br.at 60), this claim was sufficiently pled, both as to ineffective assistance of counsel and to due process violations, under *Napue v. Illinois*, 360 U.S. 264(1959)(L.F.205,214-15,227-28). These claims are cognizable, *Hutchison* and *Hayes*, *supra*. And unlike *Carter*, *supra*, they could not have been raised on direct appeal, since police reports of all the leads were not before the Court.

The State kept out evidence that Smith committed the crime and then elicited false testimony from Officer Bowling that no other suspects existed before Cox came forward(T.Tr.1026). The State asked:

Q. Other than that, did you have any leads or any focused as to a possible perpetrator?

A. Not at that time, no.

(T.Tr.1026). The State now modifies the question on appeal to say any "meaningful" leads(Resp.Br.at61).

The State had leads about Smith. George Lane, the Sheriff's dispatcher's father had been robbed by Smith(Tr.1677-78). Lane had seen Smith and Cox together, shortly

before the murders, looking for someone to rob(Ex.Dx4). Smith's associate, Barbara Reeder heard Mr.Walters brag about having lots of money(Ex.Mx4). The police assigned two officers to interview Reeder. *Id.* Police asked the Highway Patrol to compare Smith's fingerprints to those found at the crime scene(Ex.Kx4,at2). Police ran a criminal check on Smith and discovered a long criminal history, that included violent offenses (Ex.Ix4). He had been arrested for violent offenses, including a murder. *Id.* He was convicted of multiple counts of assault, including a police officer. *Id.* He had a long history of stealing, burglarizing and committing drug offenses. *Id.* However, all these leads about Smith were canceled once Cox came forward(Ex.Kx4,at8,Ex.Mx4,Ex.Nx4).

The jury never heard the truth about these leads, because the State kept out this evidence and then lied to the jury that it did not exist. This conduct had been repeatedly condemned. *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). Unfortunately, the State fails to acknowledge these cases.

Similarly, the jury did not hear the truth about Cox's prior lies and false reports against others. Yet, the State sees nothing wrong with the cross-examination of Kremenak that Cox had never told a "major lie or engaged in some major fabrication" (T.Tr.1767)(Resp.Br.at62).

The State kept the truth from the jury about Smith and Cox's prior lies, and then suggested no such evidence existed. A new trial must result.

VII. Terry Smith Evidence

The motion court clearly erred in denying Mr.Wolfe's claims regarding Terry Smith having committed the robbery and murder denying Mr.Wolfe his constitutional rights in that the credibility of Mr.Wolfe's evidence was a matter for the jury; counsel wanted Dayton and Reeder to testify, despite any credibility problems; their testimony was corroborated by independent witnesses and verified by police; and the State relied on non-credible witnesses at trial and should not be allowed to exclude the same type of defense evidence.

The jury did not hear the truth at trial, that Terry Smith planned to rob the Walters, obtained .25 caliber guns to commit the crime, drove by their house on several occasions in the days before they were killed, and was with Cox shortly before the crime. The jury never knew that a Bronco or Blazer was seen at the victims' home near the time they were killed, the kind of vehicle Cox admitted being in the night before she says she witnessed the killing. Nevertheless, the State argues this was not sufficient to connect Smith to the Walters' robbery and murder(Resp.Br.at68-72).

In attacking the strength of this evidence, the State says that the witnesses providing this evidence (Phil Dayton and Barbara Reeder) were not credible (Resp.Br.at68). The State never addresses that counsel wanted to call both witnesses, despite any credibility problems they might have. The State also ignores *Kyles, supra* at 449, f.n.19 (credibility is for the jury, not the postconviction judge).

Additionally, much of the evidence was from sources other than Dayton and Reeder. Lane, a respected member of the community, provided much of this evidence, linking Smith and Cox, and their motive to rob elderly people. Police and witnesses independently verified Dayton's account of the stolen .25 caliber guns and prior burglary of Lakewoods Motors (Tr.153-55163-68,193,195,200,203,208-09,210,765-66,Ex.Cx3,Ex.DD,Ex.FF,Ex.Hx4).

The testimony against Smith was just as credible as the evidence the State relied on to convict Mr.Wolfe. At trial, the State apologized for Cox, saying:

I wish he'd gone down to the Sunday School to get her because she sure would have made a better witness.

But you know what, that isn't where you get people to go help you with your robberies. You don't go to church. You go to a bar. You find people who do drugs, you find people who drink, who hang out in bars. You find people who wouldn't be believed if they talk. You find people who can be intimidated. You find people who might fool around. You find somebody living on the seamy, underbelly of life.

(T.Tr.1951).

The State was willing to rely on Cox and Hileman to support its conviction, but insists the same type of evidence was not credible enough for the defense to present. The State cannot have it both ways. A new trial should result.

CONCLUSION

Based on the arguments in this and his original brief, Mr. Wolfe asks this Court to reverse and remand for a new trial.

Respectfully submitted,

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Certificate of Compliance

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

The attached reply 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 7,645 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this reply brief contains a complete copy of this reply brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in December, 2002. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached reply brief and a floppy disk containing a copy of this reply brief were hand-delivered this 16th day of December, 2002, to Shaun Mackelprang, Assistant Attorney General, Jefferson City, Missouri 65102.

Melinda K. Pendergraph