

No. 90503

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In the  
Missouri Supreme Court

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STATE OF MISSOURI,

Respondent,

v.

ZACKARY L. STEWART,

Appellant.

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Appeal from Greene County Circuit Court  
The Honorable Timothy W. Perigo, Judge

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SUBSTITUTE RESPONDENT'S BRIEF

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## **JURISDICTIONAL STATEMENT**

This appeal is from a conviction for first degree murder, §565.020,<sup>1</sup> obtained in the Circuit Court of Greene County, for which appellant was sentenced to life without the possibility of parole. The Court of Appeals, Southern District, affirmed appellant's conviction on direct appeal. *State v. Stewart*, No. SD29233 (Mo.App.S.D., October 2, 2009). This Court granted appellant's motion for transfer of this case on December 22, 2009. Therefore, jurisdiction lies in this Court. Article V, §10, Missouri Constitution (as amended 1982).

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<sup>1</sup> All statutory cites are to RSMo 2000 unless otherwise noted. The record in this case consists of a trial transcript (Tr.) and legal file (LF).

## STATEMENT OF FACTS

Appellant was charged by information in Stone County with first degree murder and armed criminal action (LF 6-7). By stipulation, venue was changed to Greene County (LF 2). On March 24, 2008, this cause went to trial before a jury in the Circuit Court of Greene County, the Honorable Tim Perigo presiding (LF 11; Tr. 8).

Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following:

At 12:26 a.m. on November 29, 2006, David Dulin called 911 (Tr. 205). He sounded very excited (Tr. 205). Dulin gave his address and said that two white men, in their 20's and 30's, had come in and shot him twice in the head (Tr. 206; St.Exh. 5). The 911 operator remained on the phone with Dulin (St.Exh. 5). Dulin lay down on the floor while he spoke with the operator (St.Exh. 5). Dulin said he was shot with a .22 (St.Exh. 5). Dulin said they fought over the gun (St.Exh. 5). Dulin said he did not know who shot him, but that one of the men said that he was the "Eby girl's boyfriend." (St.Exh. 5). Dulin said the assailants were from the nearby town of Hurley (St.Exh. 5). Dulin said he could not move and he could not breathe (St.Exh. 5). He crawled to the door and lay in the doorway (St.Exh. 5).

Stone County Sheriff's Deputy Donovan Jacobson was the first to arrive at the scene (Tr.210-211). Jacobson found Dulin lying in the doorway of the home (Tr. 216-217). Jacobson asked Dulin if anyone was still in the home, but Dulin was only able to lift his head a few inches and mumble incoherently (Tr. 217; St.Exh. 5). Dulin never said anything after that (Tr. 224). Jacobson made a protective sweep of the house (Tr. 217-218). Jacobson then

reported that the scene was secure for the medics (Tr. 223). The paramedics arrived shortly thereafter (Tr. 224). Dulin was subsequently determined to be dead at the scene (Tr. 301).

Another deputy arrived, and he and Jacobson checked the house again, more thoroughly (Tr. 224-225). The furniture in the living room had been moved around (Tr. 304). A broken set of dentures was found below the coffee table (tr. 306). Numerous pieces of broken dentures were found throughout the living room (Tr. 306). There was blood “pretty much everywhere” in the living room (Tr. 228). A shell casing was located by a rock by the TV stand (Tr. 310-311). Another shell casing was found in front of the TV (Tr. 312). Yet another was found underneath the TV stand (Tr. 313). One spent .22 bullet was found in a large pool of blood in the room (Tr. 315, 316). All of the casings were .22 (Tr. 315). A bloody cell phone was found lying next to a keyboard on the floor (Tr. 316-317). A bloody hat was also found in the large pool of blood (Tr. 318-320). A number of guns were found in the house, but Dulin’s Walther P-22 pistol, which he kept on a cabinet just beside his recliner in the living room, was missing (Tr. 244-252, 267, 324-326).

The officers observed that Dulin had an entrance wound above his left nipple from a small caliber weapon. His shirt had a corresponding large powder burn mark right below the button with a hole in the middle of the burn (Tr. 337-338). Another entrance wound with corresponding hole and powder burn of the shirt was in Dulin’s stomach area (Tr. 338).

An autopsy revealed an entrance wound above and behind the left ear; the bullet went through the scalp, caused a superficial breaking of the skull and slight bruising of the brain, and then left out the back of the skull (Tr. 365-366). Another shot entered through Dulin’s left cheek and into the back of the neck, without hitting anything vital (Tr. 369-370). Soot

around the entrance wound indicated that the gun was less than 12 inches away when the shot was fired, and was probably either touching or just about touching the skin (Tr. 370). Dulin suffered another gunshot wound to the left chest, near the left nipple (Tr. 370). The bullet went through the muscle and the left second rib, the upper lobe of the left lung, and then through another rib before it came to rest (Tr. 370). There was soot on the skin, indicating that this was another near range shot, either touching the skin or very close to touching the skin (Tr. 370-371). This injury would have caused the lung to fill with blood, making it difficult to breathe and would have resulted in pain whenever the victim tried to breathe or move (Tr. 375-376). The final gunshot wound was just above the belly button, and hit the colon, liver, and diaphragm, before going through the ribs in the back and coming to rest (Tr. 371). This wound was also a contact or near contact wound (Tr. 371). The two head shots would not have been fatal (Tr. 371-372). The shot that hit the liver and colon would have been fatal (Tr. 372). The gunshot wound to the chest, however, was the fatal shot (Tr. 376). Dulin also had some bruises on his lower left leg (Tr. 377).

Three bullets and a fragment were recovered from Dulin's body in the course of the autopsy (Tr. 569-570). The bullets were consistent with bullets fired from Dulin's P-22 revolver (Tr. 627-628). The four cartridge casings recovered were fired from Dulin's gun (Tr. 632).

Based on the blood spatter evidence, it was determined that Dulin's head was close to the floor when he was shot (Tr. 433-434). The soot ring above the left breast pocket on Dulin's shirt indicated that the gun was likely in contact with the shirt when it was fired (Tr. 435). The soot ring on the entrance wound above the victim's navel also indicated that the

gun was in contact with Dulin when it was fired (Tr. 436). The blood patterns in the living room were consistent with the victim having moved around after he had been shot (Tr. 427, 437).

On December 1, 2006, the police contacted appellant and asked him to come down to the Sheriff's Department to talk, which appellant agreed to do (Tr. 391). Appellant said that he had no knowledge of the case (Tr. 392). Appellant, however, volunteered comments about when the crime purportedly occurred (12:30 a.m.) and the caliber of the weapon involved (.22) (Tr. 393). The police had not released this information (Tr. 393-394). Appellant said that if he was going to kill someone, he would not use a .22 caliber weapon, "something he would have to shoot four or five times with to kill them." (Tr. 394). In fact, four shots had been fired in the altercation wherein Dulin was killed (Tr. 394). During the interview, appellant was open and relaxed when talking about matters other than the homicide, but when they talked about the homicide itself, appellant became more closed and guarded (Tr. 410). At no point during the interview did police give appellant any information about the investigation or the crime scene (Tr. 395).

On February 17, 2007, Springfield police officer Dennis Shook had pulled onto the lot of a Kum and Go convenience store in Springfield when he saw a person sitting in a car (Tr. 517). Shook ran the license plate of the car and determined that it belonged to a person that had a parole violation warrant for a bank robbery (Tr. 517). Shook pulled his car behind the vehicle and got out (Tr. 517). When he approached the vehicle, he found that the driver was gone; a passenger in the vehicle said that he had gone into the store (Tr. 517).

Ofc. Shook approached the driver in the store and told him that he needed him to step outside (Tr. 518). The driver became extremely nervous and said, “Oh, I’m done for now.” (Tr. 518). The driver kept saying that he was “done for.” (Tr. 518). Shook handcuffed him and asked him if he had a weapon on him, but the man didn’t answer (Tr. 518). Shook reached into the man’s jacket and pulled out a .22 caliber Walther P-22 handgun (Tr. 519). Shook ran a check on the gun’s serial number and learned that it was a stolen weapon that had been used in a homicide in Stone County (Tr. 520).

On March 23, 2007, appellant was incarcerated in the Stone County jail for two weeks on a DWI charge (Tr. 462, 470). On March 28, 2007, Sheriff’s Detective Karl Wagner interviewed appellant based on information that Wagner had received (Tr. 579-580). Wagner told appellant that he had a witness who saw him in a car with Leo Connelly and Christy Pethoud just down the road from the victim’s home on the night of the homicide (Tr. 582). Appellant said that he was not involved, he did not know anything, and that he had never left his sister’s house that night (Tr. 582-583). Wagner informed appellant that they had found the murder weapon, but appellant still maintained that he was not involved (Tr. 583).

After the interview, appellant was taken to an isolation cell because law enforcement was planning to search Connelly’s residence and car and law enforcement did not want appellant to let anyone know (Tr. 585). Later that evening, Wagner was told that appellant wanted to speak with him (Tr. 586). Appellant was crying, scared, and upset (Tr. 586). Appellant told Wagner that while he never left the house that night, he thought that Leo Connelly was responsible for the murder (Tr. 587). Appellant did not say why he thought

Connelly did it (Tr. 587). Appellant observed that one could get to Dulin's house from Connelly's house in just a few minutes (Tr. 587). Appellant said that he had been working on a car over at Connelly's residence that night and stayed the night (Tr. 587). He said that they had smoked some marijuana and had been drinking (Tr. 587). Appellant said that he got tired, took his clothes off, and went to sleep on the couch, leaving his clothes on the coffee table or on the floor right in front of him (Tr. 588). Appellant said that Connelly and Pethoud had gone to bed and got into an argument (Tr. 588). Pethoud came out and talked to appellant and then went back to their room and went to sleep (Tr. 588).

After this interview, appellant was again returned to an isolation cell (Tr. 588). In the meantime, the police searched Pethoud's car and Connelly's residence (Tr. 589, 593). A hooded sweatshirt with a spot of blood on the sleeves was found in the backseat, and there was a spot of what appeared to be dried blood on the dashboard and the passenger seat (Tr. 594). The police talked to Pethoud, who gave details about the night that differed from appellant's story (Tr. 590). When confronted with this, appellant still denied doing anything, and said that he had given the matter over to God (Tr. 590). After this interview, appellant was returned to his cell block (Tr. 598).

Appellant shared a cell block with Coty Pollard and Victor Parker (Tr. 465, 524). When appellant returned from the isolation cell, appellant told Pollard and Parker that the authorities were thinking of charging him with murder (Tr. 470, 525-526). Pollard asked appellant if he did it, and appellant said no (Tr. 472). Appellant said that he was home sleeping on a couch when it happened (Tr. 472). Appellant said that he wasn't sure if God would forgive him for knowing about it or being asleep on the couch (Tr. 474, 526). Parker

told appellant that if he didn't do it, he had nothing to worry about (Tr. 474, 526). Pollard and Parker told appellant that he was lying, and that he should tell them what really happened if he was going to talk to them (Tr. 474). Appellant told Pollard and Parker that Leo Connelly was the one who had shot Dulin (Tr. 472, 527). Appellant said that he was either drunk in the back of the car or at home sleeping on the couch, and that he didn't know anything about it except that Connelly might have shot Dulin in the head (Tr. 473, 527-528). Appellant told Pollard and Parker other stories as well, but ultimately said that there was six of them, and that he was the one who had shot Dulin (Tr. 472).

Specifically, appellant said that he, Leo Connelly, Paula Eby, Christy Pethoud, and Mark and Robert Myers all went to Dulin's house in search of dope (Tr. 475, 528-529). Appellant said that they arrived in two vehicles; he, Connelly, and Pethoud were in a white Escort, and the others were in a Jeep Cherokee (Tr. 475, 533). Connelly knocked on the door; the others were behind him (Tr. 505). Appellant and one of the others were supposed to hold Dulin down while the others looked for drugs (Tr. 475, 529). Dulin was able to grab a .22 caliber pistol, but appellant took it from him and shot him five times, and then they all left (Tr. 475, 529-530). Appellant said that he shot Dulin in the head and in the stomach (Tr. 530). Appellant said that he shot two or three times, and then backed off, but then shot Dulin again (Tr. 531). Everyone then became "frantic" and decided "to get out of there." (Tr. 531). When they left, appellant and Connelly were in a white Ford Escort and everyone else was in the other vehicle (Tr. 475, 532). Appellant and Connelly went to Connelly's house (Tr. 475). Appellant burned his clothes in a barrel and gave the gun to Connelly, who was supposed to get rid of it (Tr. 476, 538-539). Appellant said that the police "didn't have anything on him"

because they thought there were only three people, they were wrong about which way they left Dulin's home, and they were wrong about who was in the Escort when they left (Tr. 476, 531-533). After that night, appellant continued to talk to Pollard and Parker about his involvement in the murder, including the fact that the police had nothing on him (Tr. 477, 511, 533, 536).

The day after appellant told this story, Pollard and Parker informed the jailer about what appellant had said (Tr. 479, 534). Pollard and Parker both eventually spoke with Karl Wagner separately (Tr. 480, 535, 601). Pollard had known nothing about the murder until appellant told him (Tr. 484). Parker had not known any of the details of the murder prior to talking to appellant (Tr. 524, 535-536, 603-605).

Appellant did not testify in his own defense, but did present the testimony of his sister, Christy Pethoud, who denied that anyone, including appellant, left her house on the night of the murder (Tr. 650-655).

After the close of evidence, instructions, and argument by counsel, the jury, upon deliberation, found appellant guilty of first degree murder (LF 11-12, 49).<sup>2</sup> The trial court subsequently sentenced appellant to life without the possibility of parole (LF 12-13, 53).

The Court of Appeals, Southern District, affirmed appellant's conviction and sentence on direct appeal. *State v. Stewart*, No. SD29233 (Mo.App.S.D., October 2, 2009). On December 22, 2009, this Court granted transfer of this case.

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<sup>2</sup> The state dismissed the armed criminal action count during the instruction conference (LF 13).

## ARGUMENT

### I.

**The trial court did not abuse its discretion in denying appellant’s motion for new trial on the grounds of newly discovered evidence.**

Appellant contends that after trial he discovered evidence that Tim Seaman (appellant’s brother-in-law) had allegedly confessed to the murder of David Dulin, and thus appellant was entitled to a new trial. But appellant’s claim is without merit because Tim Seaman did not confess to Dulin’s murder and Seaman’s statements would not have been admissible because they were hearsay and were not admissible as statements against penal interest under *Chambers v. Mississippi*.

#### **A. Standard of review.**

The trial court has substantial discretion in ruling on a motion for new trial based upon newly discovered evidence, and the appellate court will not disturb its decision absent abuse of discretion. *State v. Rutter*, 93 S.W.3d 714, 730 (Mo.banc 2002). An “abuse of discretion” occurs when the trial court’s ruling is clearly against the logic of the circumstances then before the trial court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Fassero*, 256 S.W.3d 109, 115 (Mo.banc 2008). Where reasonable persons can differ about the propriety of the action taken by the trial court, no abuse of discretion will be found. *State v. Johnson*, 207 S.W.3d 24, 40 (Mo.banc 2006).

In reviewing the denial of a motion for new trial based upon newly discovered evidence, the appellate court defers to the trial court's superior position from which to determine credibility. *State v. Garner*, 976 S.W.2d 57, 60 (Mo.App.W.D. 1998).

**B. Relevant facts.**

During the state's case, Captain Tim Gideon testified that State's Exhibit 23, a bloody cap that had been found at the crime scene, had not originally been tested for DNA purposes because they believed that the hat belonged to Dulin, inasmuch as it was found on the floor next to him, the hat was covered with blood, and there was a tear and hole in the hat that appeared to be in close proximity to one of the bullet wounds to Dulin's head, assuming Dulin had been wearing the cap when shot (Tr. 635-636). During the course of the trial, a DNA test was conducted because the victim's family said that they did not ever recall the victim having a hat like that (Tr. 637). The jury heard the following stipulation:

The cap, Exhibit 23, was analyzed for DNA purposes on Wednesday, March 26, 2008. A DNA profile was developed. The profile is characteristic of a mixture of at least three individuals. The major component of the mixture is consistent with the profile from David Dulin. Zackary Stewart and Leo Connelly are eliminated as contributors to the mixture.

A CODIS, C-O-D-I-S, hit also occurred. CODIS is a state data bank of DNA profiles. The hit was identified as Timothy Lee Seaman. The hit was verified by re-analysis. A hit should be considered an investigative lead. For confirmation a new reference standard should be obtained.

(Tr. 640-641).

During the defense's case, it was established that Timothy Seaman was appellant's brother-in-law (Tr. 644).

The prosecutor acknowledged in rebuttal closing argument that Timothy Seaman may have had the hat on at some time, but they had no idea of knowing when that was and they did not know whether Timothy Seaman had any sort of relationship to the victim (Tr. 723).

In his motion for new trial, appellant asserted that he had discovered new evidence:

The defendant requests a new trial based on new evidence discovered since the jury's verdict. The new evidence consist [sic] of Timothy Seaman's brother has indicated that Timothy Seaman confessed to him that he murdered David Dulin. Such evidence, if known at the time of trial, could have been presented and would have resulted in defendant being found not guilty of murder in the first degree.

(LF 51).

At the hearing on the motion for new trial, appellant presented testimony from Robert Bales, the nephew of Tim Seaman. Bales testified that he met with his uncle, Timothy Seaman, and John Mills (Tr. 751). Tim told Bales that "he and Mills were at the house where it happened, and that's pretty much it, that they saw it." (Tr. 751). Tim did not mention any other names (Tr. 751). Mills and Tim Seaman were drinking when Bales saw them, and Mills threw up (Tr. 751). Bales reported that Tim said that Mills vomited "because of what he saw the night before, I guess." (Tr. 751). Tim never mentioned any other names and never identified the murder victim (Tr. 751, 753). Appellant had not pled in

his motion for new trial that Bales's testimony was newly discovered evidence that warranted a new trial (LF 50-52).

Appellant then called Detective Karl Wagner to testify (Tr. 753). Defense counsel for appellant explained that normally she would have asked the court for a writ of body attachment for Randy Seaman (Tim Seaman's brother) for failing to appear, as well as a continuance to procure the appearance of Tim Seaman<sup>3</sup> (Tr. 753). Defense counsel further explained that after discussing the matter with the prosecutor, they had agreed "to the testimony of Karl Wagner being admitted for what Randy and Tim would testify to if they were here." (Tr. 753). The trial court responded, "In other words, you are not going to object to hearsay?" (Tr. 754). The prosecutor said he would not (Tr. 754).

Wagner then testified that as part of a follow-up investigation, he spoke with Randy Seaman on April 4, 2008<sup>4</sup> (Tr. 754). Wagner had received a tip that Tim Seaman had admitted to Randy that Tim had taken someone's life (Tr. 755). Randy told Wagner that Tim had been at his house, they had been drinking, and Tim had been "crying to him" about problems he had been having with his estranged wife, Candy Seaman,<sup>5</sup> and the kids (Tr.

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<sup>3</sup>Randy Seaman did not appear to testify at the motion for new trial hearing, despite the fact that he had been served with a subpoena (Tr. 745). Appellant was unable to locate Timothy Seaman (Tr. 746-748).

<sup>4</sup>This conversation occurred after appellant's trial, which commenced on March 24, 2008 (LF 11; Tr. 8).

<sup>5</sup>Candy Seaman is appellant's sister.

755). The conversation shifted and Tim said something about him having taken someone's life and asking how one dealt with that (Tr. 755). Randy said that this conversation occurred "around Thanksgiving," shortly after Dulin's homicide<sup>6</sup> (Tr. 755-756). Randy told Tim he was "[j]ust going to have to deal with it and move on." (Tr. 756). Randy thought that Tim was drinking and just "blowing smoke" and so did not take it seriously (Tr. 756).

Randy took Tim's statement more seriously when he heard about the hat found at Dulin's home (Tr. 756). Randy indicated that Tim associated with John Mills and that Tim drove a light tan or white vehicle (Tr. 757).

On or about May 7, 2008, Wagner spoke with Randy Seaman again (Tr. 757). Wagner had received information from Paul Connelly that during a conversation with Randy's wife or girlfriend that they had more details about Tim's statement and that Tim had discussed that there had been a struggle (Tr. 757-758). So Wagner went back to talk to Randy to see if he had more information (Tr. 758). Randy said that he did not know anything more than what he had told Wagner the first time (Tr. 758). Randy said that Tim had not said anything more to him than what Randy had already reported (Tr. 758). Wagner showed Randy a photograph of the hat; Randy said that it was either Tim's hat or that Tim had had a hat identical to that for a long period of time (Tr. 758). Randy said that he would testify in court that Tim didn't give him any details about what happened or who was there, just that he had taken someone's life (Tr. 759).

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<sup>6</sup> Dulin was killed on November 29, 2006, six days after Thanksgiving, which fell on November 23, the fourth Thursday of November in 2006.

According to Randy, Tim did not identify whose life he allegedly took (Tr. 759). Wagner had talked to Tim prior to appellant's trial, but Tim asserted that he had not known the victim and had never been to his house (Tr. 760). Tim also said that he had never seen the hat before or owned one like it (Tr. 761). Wagner spoke with other persons, some of whom said that Tim Seaman had a cap like the one found at the scene and other persons saying they had never seen Tim Seaman with a cap like that (Tr. 761).

After having spoken with Randy, Det. Wagner tried to find any evidence that John Mills was at the scene at the time of the murder, but other than Robert Bales's statement, Wagner found no evidence tying Mills to the murder scene (Tr. 762). Wagner also spoke with Mr. Mills in the course of this investigation (Tr. 762).

Appellant also submitted, as part of the hearing on the motion for new trial, a lab report confirming that Timothy Seaman could not be eliminated as a contributor to the DNA on the hat (Tr. 749).

The trial court, after considering arguments by counsel, found that the evidence was not exculpatory and overruled appellant's motion for new trial (Tr. 768).

### **C. Analysis.**

New trials based on newly discovered evidence are disfavored. *State v. Ryan*, 229 S.W.3d 281, 288 (Mo.App.S.D. 2007). A new trial is warranted based on newly discovered evidence only where the defendant shows that: (1) the evidence has come to the knowledge of the defendant since the trial; (2) it was not owing to want of due diligence that it was not discovered sooner; (3) the evidence is so material that it would probably produce a different

result on a new trial; and (4) it is not cumulative only or merely impeaching the credibility of the witness. *State v. Rutter, supra.*

**1. The DNA result is not newly discovered evidence.**

In appellant's substitute brief, appellant for the first time suggests that the confirmed DNA result is newly discovered evidence that warrants a new trial (App.Br. 19-20). This claim is untenable.

To begin, appellant should not even be allowed to raise this particular claim at this stage of the case. Supreme Court Rule 83.08(b) states that a substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." Appellant never argued in his initial appellate brief filed in the Court of Appeals, Southern District, that he was entitled to a new trial because of newly discovered evidence involving DNA. Nor did he raise this claim to the trial court in the motion for new trial (LF 51-52). Appellant cannot add this claim to his substitute brief.

In any event, the DNA evidence is not newly-discovered evidence. The jury in appellant's case heard that the DNA on the hat did not match appellant; they heard that it did match Timothy Seaman, the victim, and an unknown third person (Tr. 640-641). Defense counsel argued in closing that none of the forensic testing done revealed anything to implicate appellant in the death of the victim (Tr. 698). Specifically, defense counsel argued as follows:

[T]he lab results came back that the DNA samples that were taken from that hat did not match Zack Stewart. He was eliminated as a possibility. And it didn't match Leo Connelly. But it was verified by re-analysis to contain the

DNA of Timothy Seaman, Candy Seaman's husband. And while for confirmation a new reference standard should be obtained, they did verify through re-analysis that it was Mr. Seaman's DNA on that hat.

(Tr. 699). This clearly was not newly discovered evidence.

Appellant acknowledges that it is not "completely new evidence." (App.Br. 19). But appellant complains that it was not discovered in time for the defense to use it in a meaningful way or for the jury to give it the substantial weight appellant feels the evidence deserves (App.Br. 19-20). But the fact that the DNA test was not conducted until the middle of trial, and the fact that it was not introduced until the end of the state's case does not make it newly discovered evidence.

As this Court has stated, a new trial is warranted based on newly discovered evidence only where the defendant shows, among other things, that: (1) the evidence has come to the knowledge of the defendant since the trial; and (2) it was not owing to want of due diligence that it was not discovered sooner. *State v. Rutter, supra*. In the present case, the evidence did not come to appellant's knowledge after the conclusion of the trial. Appellant knew about the DNA evidence prior to presenting his own case, and appellant knew about the bloody hat all along. Nor could appellant say that it was not owing to want of due diligence that the DNA evidence was not discovered sooner. The hat was always available for DNA testing had the defense wanted to do so (and of course, the state was never required to perform DNA testing, so the blame cannot be laid at the feet of the state for not testing it until the middle of trial). Respondent also notes that appellant did not request a continuance to give him more time to find a meaningful way to use the evidence. Appellant has not cited

any authority, and respondent does not know of any, which would support a finding that the DNA evidence in this case was “newly discovered evidence” that would warrant a new trial. Appellant’s claim in this regard, if it can even be considered at this point, is without merit.

## **2. Tim Seaman’s statements do not warrant a new trial.**

The claim that appellant did raise to the trial court and the Court of Appeals is that Tim Seaman’s statements were newly discovered evidence. There appears to be no question that this evidence did not come to either the state or defendant’s knowledge until after the conclusion of the trial. Appellant asserts that it was not owing to lack of due diligence that the evidence was not discovered earlier, but does not explain how it could not have discovered the evidence earlier (App.Br. 20-21). But even assuming *arguendo* that the evidence could not have been discovered earlier, appellant is not entitled to a new trial because appellant failed to prove that the evidence in question would have been admissible or that it was so material that it would have probably produced a different result at a new trial.

Appellant’s proposed new testimony would not be admissible at a new trial. Bales’s testimony regarding Tim Seaman’s out-of-court statements would be hearsay. As for Detective Wagner’s testimony, there are two levels of hearsay – (1) Randy Seaman’s out-of-court statements as to (2) Tim Seaman’s out-of-court statements. Appellant failed to prove that any of this testimony would overcome a hearsay objection at a new trial.<sup>7</sup>

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<sup>7</sup> Respondent notes that the prosecutor made no hearsay objection at the motion for new trial as to Detective Wagner’s testimony regarding Randy’s out-of-court statements, and

Appellant spends much of his brief arguing that the statements were credible (App.Br. 21, *et seq.*). But the threshold issue is how the statements would be admissible at trial as they are unquestionably hearsay.<sup>8</sup> Appellant asserts they are admissible as statements against penal interest (App.Br. 22-23). But the statements in question do not meet the criteria for admission as statements against penal interest.

Statements against penal interest are admissible under very limited circumstances where due process is implicated and where circumstances strongly indicate the reliability of the statement. *State v. Robinson*, 90 S.W.3d 547, 551 (Mo.App.S.D. 2002). This limited exception initially arose in *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), where the United States Supreme Court, “under the facts and circumstances” of that particular case, found that the rationale and policies of Mississippi’s common law rule excluding declarations against penal interest were largely diminished when

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in fact waived such an objection (Tr. 754). The fact that the prosecutor declined to object so as to allow the defense to make its record would not preclude the state from objecting to such testimony at a new trial and does not establish that the evidence in question would be admissible if a new trial were held.

<sup>8</sup> Appellant, in his brief, asserts that whether the evidence was hearsay is “not the standard.” (App.Br. 22). But evidence that is inadmissible is not material, and thus the fact that the evidence is hearsay is critical to the analysis. *See State v. Rogers*, 758 S.W.2d 199 (Mo.App.E.D. 1988) (holding that defendant failed to prove that newly discovered evidence was material where the evidence in question was inadmissible hearsay).

the declarant was *available* for cross-examination at trial *and* where there were sufficient indicia of reliability. *Chambers*, 410 U.S. at 301.

In *State v. Turner*, 623 S.W.2d 4 (Mo.banc 1981), this Court, when faced with the question of whether a declaration against penal interest should come into evidence, analyzed *Chambers*, and observed that the circumstances which required admission of the hearsay in *Chambers* were not present in *Turner* where the declarant was unavailable. *Id.* at 9. This Court further observed “that the dangers inherent in opening the door to extrajudicial confessions made by one not a party to the proceeding militate against extending the rule of *Chambers* beyond the facts presented there.” *Id.*

Shortly after this Court decided *Turner*, some confusion arose about the rule that had been adopted. In *State v. Carroll*, 629 S.W.2d 483, 485 (Mo.App.W.D. 1981), the Western District stated that this Court had held that “when an unavailable witness makes a declaration against penal interest, ‘where substantial indicia of reliability appear and declarant’s complicity if true would exonerate the accused, declarant’s averments against an interest penal in nature may not be excluded...’” But, in fact, as outlined above, *Turner* did not require that the witness be unavailable; rather, *Turner* adopted *Chambers* which allowed for admission of the statement when the witness was *available* for cross-examination.

Subsequent cases continued to misstate *Turner*, and some went so far as to suggest that *Turner* required that the declarant be unavailable. For example, in *State v. Brooks*, 693 S.W.2d 211, 212 (Mo.App.W.D. 1985), the Western District, citing *Turner*, stated:

Cases have focused on two basic *requirements* before such hearsay is admissible: 1) the declarant is unavailable and 2) there is a "substantial indicia

of reliability." [citation omitted]. Both prongs of this test must be satisfied for the declaration [against penal interest] to be allowed.

(emphasis added).

It is essentially from this point on that Missouri law has *required* that the declarant be unavailable before the statement against penal interest can come in,<sup>9</sup> despite the fact that both the United States Supreme Court in *Chambers* and this Court in *Turner* clearly relied on the fact that the declarant was available for cross-examination in allowing the statement in, as this cross-examination provided a way of testing the reliability of the statements. Respondent is not aware of a Missouri Supreme Court decision that explains this incongruity.<sup>10</sup>

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<sup>9</sup> See, e.g., *State v. Brooks*, 693 S.W.2d 211 (Mo.App.W.D. 1985); *State v. Jennings*, 815 S.W.2d 434, 447 (Mo.App.E.D. 1991); *State v. Danback*, 886 S.W.2d 204, 208 (Mo.App.E.D. 1994); *State v. Davidson*, 982 S.W.2d 238, 242 (Mo. 1998); *State v. Guinn*, 58 S.W.3d 538, 542 (Mo.App.W.D. 2001); *State v. Anglin*, 45 S.W.3d 470, 471 (Mo.App.W.D. 2001); *State v. Robinson*, 90 S.W.3d 547, 551 (Mo.App.S.D. 2002); *State v. DeClue*, 128 S.W.3d 864, 869 (Mo.App.S.D. 2004); *State v. Jackson*, 248 S.W.3d 117, 126 (Mo.App.S.D. 2008); and *State v. Bisher*, 255 S.W.3d 864, 869 (Mo.App.S.D. 2008).

<sup>10</sup> There are Supreme Court cases which apply the law as it currently stands, but they do not offer an explanation for the inconsistency with *Chambers* and *Turner*. A Court of Appeals case, *State v. Guinn*, 58 S.W.3d 538, 544 (Mo.App.W.D. 2001), observed that a hearsay exception in civil cases for declarations against penal interest have generally

And indeed, respondent cannot discern any reason to make unavailability a *requirement* before allowing in a purported statement against penal interest. The longstanding rule in Missouri is that statements against penal interest are *not* admissible in criminal proceedings except in limited circumstances that strongly indicate the reliability of the statement. *State v. Robinson*, 90 S.W.3d 547, 551 (Mo.App.S.D. 2002). *Requiring* that the declarant be unavailable is in essence requiring that a means of testing the reliability of a statement be absent before the statement can be considered admissible. In short, because unavailability adds nothing to the reliability of the statement, respondent submits that the Court should reaffirm the rule of *Chambers* and its initial application of that rule in *Turner*. At the least, availability of the declarant should weigh in favor of admissibility of the statement, while unavailability – although it need not bar admissibility – should at least

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included a requirement that unavailability be shown, and that as other states and the federal rules of evidence have expanded this exception to criminal cases, they have likewise included an element of unavailability. *Id.* In *Guinn*, the state argued that a requirement of unavailability resulted in “the effective abolition of Missouri’s common law rule barring admission of declaration against penal interest.” *Id.* The Court in *Guinn* said that it might have been persuaded by the State’s argument, but for the fact that the Missouri Supreme Court described unavailability as an element of the *Chambers* rule in *State v. Davidson*, 982 S.W.2d 238, 242 (Mo.banc 1998). But the *Davidson* court gave no rationale for including this element in contravention of *Chambers* and *Turner*.

weigh against admissibility of the statement as it does not tend to support the reliability of the statement.

In the present case, the declarant of the statement, Timothy Seaman, was unavailable. Under *Chambers* and *Turner*, this would be grounds for deeming the statements inadmissible, not admissible as appellant argues. And on that basis, the trial court's ruling should be upheld, but, in any event, Tim Seaman's alleged out-of-court statements are inadmissible regardless of Seaman's availability

**a. Bales's testimony would be inadmissible.**

Bales's testimony regarding Tim Seaman's alleged out-of-court statements is inadmissible hearsay as Seaman's out-of-court statements would be offered for the truth of the matter asserted. Appellant's argument that the statements would be admissible as statements against penal interest is without merit.

Appellant cannot show that there is substantial reliability to Tim Seaman's alleged declaration to Robert Bales. *State v. Anglin*, 45 S.W.3d 470,473 (Mo. App. W.D. 2001). For a statement to be considered reliable, the statement (1) must be "in a very real sense self-incriminatory and unquestionably against interest;" (2) the statement must be made spontaneously to a close acquaintance shortly after the crime; and (3) the statement must be corroborated by other evidence in the case. *Id.* These three indicia must be met to support admission of the statement into evidence. *Id.*

Tim Seaman's statement was not admissible under *Chambers v. Mississippi*. Tim's statement was not self-incriminatory; it did not say that he took any part in any crime that occurred at Dulin's residence. At the most, Seaman's statement suggested his presence, but

mere presence at a crime scene is insufficient to support a conviction. *State v. Barnum*, 14 S.W.3d 587, 591 (Mo.banc 2000).

In addition to the foregoing, before a statement against penal interest is admissible, the statement must also exonerate the defendant. *State v. DeClue*, 128 S.W.3d 864, 869 (Mo.App.S.D. 2004). Tim Seaman's statement to Bales does not exonerate appellant. Seaman did not say that it was he, not appellant, who shot and killed Dulin. Seaman's drunken statement to Bales did not take responsibility for the murder and did not state that appellant was not responsible for the murder. At the most, Seaman's statement acknowledged Seaman's presence at the scene; but this does not exonerate appellant, particularly where appellant made several statements to two people acknowledging that he shot Dulin.

Appellant suggests that Bales's testimony would prove that appellant was not there because Tim told Bales that he and Mills were there, and Dulin (the victim) told authorities that there were two men (App.Br. 23). To begin, Tim's statement could not be used to prove that only he and Mills were present because Tim's statement as to Mills's presence would not be admissible, as that portion of his statement under no circumstances would be a statement against Tim's penal interest. *See, e.g., State v. Blankenship*, 830 S.W.2d 1, 8 (Mo.banc 1992) (holding that to the extent a portion of the declarant's statement is not against declarant's interest, it is excludable as hearsay). In any event, Tim's statement does not necessarily mean that he and Mills were the only two people present, nor does it in any way exclude the possible presence of other people. Nor does Dulin's statement that he was shot by two men preclude the possibility that other persons were present. Appellant's

statements were that he and one other person were assigned to watch Dulin while other persons searched the house for drugs (Tr. 475, 529). It would certainly be understandable that Dulin was focused on and concerned with the two people who were restraining him and who eventually shot him, not the others. In any event, at the time Dulin spoke to the 911 operator, Dulin could have been entirely mistaken as to how many people were at his home, given that Dulin's perceptions had been grossly affected by his rapidly deteriorating physical condition. As the record shows, Dulin was not even aware that he had been shot in the chest and stomach, reporting to the 911 operator only that he had been shot in the head (St.Exh. 5; Tr. 206).<sup>11</sup>

Since Bales's testimony was neither incriminatory as to Tim Seaman, nor exculpatory as to appellant, it would not be admissible under *Chambers v. Mississippi*. Due to the inadmissibility of the evidence, as well as the fact that the evidence is not exculpatory,

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<sup>11</sup> Citing to Occam's Razor, that, all things being equal, the simpler explanation is probably true, appellant suggests it is more likely that Dulin's 911 call is correct and that there were only two men. Respondent respectfully suggests that the simpler explanation is that Dulin, who did not even tell the 911 operator he was shot in the chest and abdomen, was not as coherent as appellant suggests, and referred only to the two men whom he personally encountered and who caused him injury. This is more consistent with appellant's statement regarding the shooting, which was corroborated by the physical evidence and involved substantially more than 2 people in the crime. This argument is hardly a "forced inference to conjure up more" (App.Br. 27), inasmuch as appellant's statement referenced 6 people.

appellant has failed to show that the evidence in question was so material as to produce a different result and it cannot be said that the trial court abused its discretion in denying appellant's motion for new trial. *See State v. Rogers*, 758 S.W.2d 199, 201 (Mo.App.E.D. 1988) ( holding that defendant failed to prove that newly discovered evidence was material where the evidence in question was inadmissible hearsay).

## **2. Wagner's testimony would be inadmissible.**

Likewise, Wagner's testimony regarding Randy Seaman's out-of-court statements regarding Tim Seaman's out-of-court statements would be inadmissible hearsay. Randy Seaman's statements were not admissible under *Chambers v. Mississippi*. Randy Seaman's statements were not against *his* interest; it was merely a report that he purportedly heard Tim Seaman make an admission allegedly against Tim's interest. This was not a statement that was self-incriminatory and unquestionably against Randy's interest. Nor was Randy Seaman's statement spontaneously made to a close acquaintance shortly after the crime; it was made to police as the result of questioning. *See State v. Hutchison*, 957 S.W.2d 757, 762 (Mo.banc 1997) (statement made to police officer during interrogation is not a statement made spontaneously to a close acquaintance).

While the prosecutor did not object, at the motion for new trial hearing, to Wagner's testimony regarding Randy Seaman's hearsay statements, this does not establish that Wagner's testimony would not be objectionable at a new trial. Wagner clearly would not be able to testify as to Randy Seaman's statements as they are hearsay and do not fall within the narrow exception created under *Chambers v. Mississippi*, as demonstrated above.

Wagner's testimony was offered at the motion for new trial to prove what Randy would testify to if called at trial. But Wagner's testimony does not demonstrate that Randy *would* testify at a new trial, and given that Randy failed to abide by his subpoena, the trial court had no reason to believe that Randy would appear to testify if a new trial were granted. Absent Randy or Tim's appearance, there would be no way to get Tim's statements before the jury.

But even if the trial court were to assume that Randy would indeed appear and testify as to Tim's statements at a new trial, it would be of no account because Tim's statements are also hearsay and do not fall within the *Chambers v. Mississippi* exception. To begin, Tim's statement to his brother does not inculcate him in Dulin's murder because Tim *never* identified who he allegedly killed, how he allegedly killed him, or where or when the purported murder even happened. According to Wagner, Randy said that he would testify in court that Tim didn't give him any details about what happened or who was there, just that he had taken someone's life (Tr. 759). It is unknown if Tim's reference to "him taking a life" was even a reference to a murder; Tim could, for example, have been referring to an accident he was involved in which resulted in someone's death. But even if Tim's statement is considered inculpatory to the extent that it suggests he might have committed a crime at some point in his life, it is not inculpatory as to Dulin's murder. *See, e.g., State v. Danback*, 886 S.W.2d 204 (Mo.App.E.D. 1994) (out-of-court statement that declarant "did it" with rape victim did not prove that declarant raped victim on date in question and did not exonerate defendant).

Nor is Tim's statement to his brother exculpatory as to appellant. Tim's statement, even if taken as true, on its face does not establish that appellant did not shoot David Dulin. In fact, Tim's statement that he, at some unspecified time and place and in some unspecified manner may have been "responsible" for taking an unknown person's life, could be completely believed and yet not contradict in the least appellant's repeated statements to Victor Parker and Coty Pollard that appellant shot Dulin in the head and stomach with a .22 after a struggle over the gun. Tim never said anything that would preclude finding appellant to be Dulin's murderer, and Tim never said anything that indicated that he, not appellant, was the killer.

Tim "saying something about having taken someone's life" – without giving any details as to who was killed or when, where, or how this purportedly happened –even if believed, did not establish that Tim murdered Dulin. Tim's statements, even if believed, did not preclude appellant from being Dulin's killer. And there was evidence to contradict Tim's statement, given that appellant did admit to killing Dulin by shooting him in the head and the stomach with a .22 after a struggle over the gun, all of said details being corroborated by other evidence. *See, e.g., Trotter v. State*, 736 S.W.2d 536, 539 (Mo.App.W.D. 1987) (holding that newly discovered evidence was not so material as to produce a different result where the evidence at trial included admissions made by the defendant to a fellow inmate which was overheard by two persons).

Nor is Tim's statement substantially corroborated. The fact that a hat with Tim (and someone else's) DNA on it was found at the scene does not corroborate Tim's statement that he may have taken someone's life at some point in some unknown manner. Indeed, given

the movable, transferable nature of a hat and the fact that Tim had familial connections with several of the people appellant said was involved,<sup>12</sup> it is not inconceivable that someone else wore the hat that night, perhaps the unidentified third party whose DNA was found on the hat. Given the presence of a third party's DNA on the hat and the relationships between all of the people, the mere presence of the hat at the scene does not prove that Tim Seaman was there, and certainly doesn't prove that Tim Seaman killed David Dulin.

Appellant spends much of his brief rearguing the evidence at trial and asserting how Timothy Seaman's statements could have made a difference (App.Br. 26-32). But appellant's arguments are not well-taken. On pages 26-27 of his brief, appellant asserts that there were either only two men present and appellant was elsewhere, or Tim and Mills, along with appellant, killed Dulin (App.Br. 26). Appellant argues that the first scenario, that there were only two men present and appellant was elsewhere, is consistent with Dulin's claim that two men, one being the Eby girl's boyfriend, were the intruders (App.Br. 26). This is not so, given that neither Tim nor John Mills was a "boyfriend" of an Eby girl. Tim was the husband of an Eby girl; he would not have called himself a "boyfriend," and respondent is not aware of any relationship between John Mills and any of the Eby girls. And, as

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<sup>12</sup> Tim Seaman was appellant's brother-in-law; he was the brother-in-law of Christy Pethoud, who according to appellant was present along with her live-in boyfriend, Leo Connelly; Tim was the son-in-law of Paula Eby, who according to appellant was present that evening, along with Paula Eby's boyfriend, Mark Meyers, and Mark's son Robert Meyers (Tr. 475, 528-529, 642-644).

discussed earlier, Dulin's statement to the 911 operator about two men was correct to the extent that there were two men involved in the assault on him, but does not address whether other people were in the house or waiting outside the house keeping watch. In fact, it is appellant's statement to Pollard and Parker that he and "one of the others" (which would include Leo Connelly (the boyfriend of Christy Pethoud, an "Eby girl") and Mark Myers, the boyfriend of Paula Eby) were to hold Dulin down while the others looked for drugs that is consistent with Dulin's 911 call, to the extent that Dulin's 911 call can be considered a reliable report as to what happened.

Appellant argues that his second scenario, that appellant, Tim, and John Mills killed Dulin, is inconsistent with Dulin's 911 call and the testimony of Pollard and Parker.<sup>13</sup> As discussed earlier, to the extent Tim's statement suggests John Mills was present at the scene, this statement would not come into evidence and, in any event, is completely uncorroborated by any trial evidence or any further investigation by the police (Tr. 761-762). In any event, this scenario is not necessarily inconsistent with Dulin's 911 call, as he very well could have been referring only to the people who were assigned to watch him and who were involved in the assault on him. Nor is it necessarily inconsistent with the testimony of Pollard and

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<sup>13</sup> Appellant also states that they are inconsistent with the state's argument to the jury (App.Br. 26). Inasmuch as Tim's statements were newly discovered evidence, it is no wonder that the state did not include them in their theory of the case, as presented and argued to the jury.

Parker as to appellant's statement.<sup>14</sup> Tim Seaman (and John Mills) could have been involved in the crime but had not entered into the victim's house. Seaman, for example, could have driven the parties there or he could have been acting as a lookout.

Appellant argues that “[a]bsolutely no evidence places Zack and Tim Seaman together the night of the murder – not Tim's confessions, not the snitch testimony, and no physical evidence.” (App.Br. 26). This is true if each bit of evidence is considered in isolation. But considering the totality of the evidence, it could be that Tim was present when appellant killed Dulin; Tim could have been outside when appellant killed Dulin; Tim might not have been there at all, and someone else wore Tim's hat that night. There are numerous scenarios that can be drawn from considering the totality of the evidence.

Appellant further argues that placing Tim and Zack together at the scene results in an “incoherent theory” that is “inconsistent with any theory the state put forward at trial.” (App.Br. 27-28). But the state cannot be faulted for not including Tim in its theory of the case at trial, given that Tim's statements suggesting possible involvement did not come forward until after the trial. As for appellant's argument that Tim Seaman “was the ‘Eby

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<sup>14</sup> Appellant tries throughout his brief to disparage the testimony of Pollard and Parker as “snitches.” (App.Br. 25, n. 6). Pollard's and Parker's testimony was credible, as it recounted details that they could not have known about the crime and the crime scene and could not have learned from any other source. Moreover, the jury found Pollard and Parker credible, and the trial judge, in finding Tim Seaman's statements to be non-exculpatory, would have considered those statements in the light of Pollard and Parker's testimony.

girl's boyfriend," (App.Br. 28), as discussed above, this is not well taken, as Tim was in fact a husband, not a mere boyfriend. The state has not and is not positing conflicting theories; it is acknowledging the possibility that Tim, along with the others, *may* have been involved in some way.<sup>15</sup> But Tim's involvement, to the extent it may or may not have occurred, does not change nor diminish in any way the evidence that appellant killed Dulin.

Moreover, the question now on appeal is not what the evidence might or might not have shown. The question is whether Seaman's statements were even admissible. Tim Seaman's statements cannot make a difference if they cannot be admitted, and they cannot be admitted as they are hearsay. The statements can only be admitted if the statements, in and of themselves, bear substantial indicia of reliability by meeting the criteria of *Chambers v. Mississippi*. But they do not, in that the statements either do not inculcate Timothy Seaman, do not exonerate appellant, or both. Seaman's statements can be wholly believed, but there is nothing in them that precludes appellant from being guilty of Dulin's death.<sup>16</sup> Where the newly discovered evidence is not admissible, there is frankly nothing left to discuss.

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<sup>15</sup> Appellant's argument that the state is presenting two contradictory prosecutorial theories is a bit of a red herring, inasmuch as the state is not doing that and this is not the issue on appeal.

<sup>16</sup> Even the dissent below in the Southern District acknowledged that the majority opinion was correct in stating that the new evidence did not prove that appellant was not involved in the crime. *State v. Stewart*, No. SD 29233 *slip op.*, (Mo.App.S.D. 2009, Oct. 5, 2009), *dissenting opinion at 4*.

The cases on which appellant relies in his brief are distinguishable. In *State v. Mooney*, 670 S.W.2d 510 (Mo.App.E.D. 1984), the defendant was convicted of child molestation solely on the child's testimony, and the child subsequently recanted. Thus, the victim actually acknowledged that the crime had never occurred. In *State v. Phillips*, 940 S.W.2d 512 (Mo.banc 1997), the case was remanded for a new sentencing hearing because, after trial, the defendant's son stated that he alone, and not the defendant, had dismembered the victim's body, thus exculpating the defendant of the statutory aggravator.

Both *Mooney* and *Phillips* involved *admissible* evidence, and thus are of no assistance here as Tim Seaman's statements are inadmissible. But in the present case, Tim Seaman's statements, if even admissible, do not establish that appellant did not kill David Dulin. Seaman never stated that he killed Dulin. Seaman never stated that appellant was not involved. At most, Seaman acknowledged being present at the scene, but his mere presence is not enough to exculpate appellant, given that appellant could have shot Dulin in Seaman's presence. Indeed, the jury was already aware that Seaman might have been present at the scene, given that his DNA (along with that of the victim and another unidentified person) was found on a bloody cap at the scene. There is no reason to believe that Seaman's statement regarding his presence at the scene would have resulted in a different verdict, and Seaman never admitted to personally killing Dulin or said anything that would exculpate appellant.

Since neither Wagner's nor Randy Seaman's testimony was incriminatory as to Tim Seaman, or exculpatory as to appellant, it would not be admissible under *Chambers v. Mississippi*. Due to the inadmissibility of the evidence, as well as the fact that the evidence

was not exculpatory, appellant has failed to show that the evidence in question was so material as to produce a different result and it cannot be said that the trial court abused its discretion in denying appellant's motion for new trial. *See State v. Rogers*, 758 S.W.2d 199, 201 (Mo.App.E.D. 1988) (holding that defendant failed to prove that newly discovered evidence was material where the evidence in question was inadmissible hearsay).

Since none of the alleged new evidence was admissible or material, it cannot be said that the trial court abused its discretion in denying appellant's motion for new trial. Appellant's claim is without merit and should be denied.

**CONCLUSION**

In view of the foregoing, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains \_\_\_\_\_ words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this \_\_\_\_\_ day of February, 2010, to:

Rosalynn Koch  
Office of State Public Defender  
1000 West Nifong  
Columbia, MO 65203

\_\_\_\_\_  
KAREN L. KRAMER