

**IN THE
SUPREME COURT OF MISSOURI**

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
Vs.)	No. SC 90503
)	
ZACKARY LEE STEWART,)	
)	
Appellant.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
THIRTY-FIRST JUDICIAL CIRCUIT, DIVISION
THE HONORABLE TIMOTHY W. PERIGO, JUDGE**

APPELLANT’S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Zackary Stewart appeals his conviction following a jury trial in the Circuit Court of Greene County, Missouri, for first degree murder, § 565.010 .¹ He was sentenced to life imprisonment without possibility of probation or parole. After the Missouri Court of Appeals, Southern District, issued its opinion, this Court granted application for transfer pursuant to Rule 83.04. This Court has jurisdiction of this appeal under Article V, Section 3, Mo. Const. (as amended 1976).

¹ All statutory citations are to RSMo 2000, unless otherwise stated.

STATEMENT OF FACTS

At 12:26 a.m. on November 29, 2006, the Stone County 911 dispatch center received a call from David Dulin, reporting that two men had just come to his house on Tin Can Hollow Road outside Hurley and shot him twice in the head (Tr. 204-05). Dulin spoke with the operator for 27 minutes before authorities arrived at his home (Tr. 208, 210).

The authorities found Dulin lying on his stomach in the doorway (Tr. 216). Dulin lifted his head and mumbled (Tr. 217). There was a great deal of blood in the living room (Tr. 228).

Dulin's nephew Dustin Lloyd checked the scene for the authorities (Tr. 255). One gun, a Walther P-22, was missing but nothing else had been taken (Tr. 267). According to Lloyd, Dulin usually had a gun on him when he answered the door (Tr. 268). Dulin also kept a shotgun behind the front door and a Ruger .44 there also, as well as other guns in the house (Tr. 252). He preferred his P-22 and kept in on the stand next to his recliner (Tr. 271).

The front door showed no signs of forced entry (Tr. 350). There was a bloody cap on the floor by a speaker box (Tr. 442). Pieces of a broken set of dentures were scattered throughout the house (Tr. 306).

Dulin was shot four times; once above his left ear, once through his cheek, once through his lung and once through his liver and colon (Tr. 365-71). He bled to death from his lung injury (Tr. 385).

Dulin had several pieces of furniture in his living room. To the left of his front door was a cabinet like a bookcase; next were some guitars in the southwest corner; then a couch with a coffee table in front; a doorway; in the northwest corner a recliner; a small cabinet to the left of the chair; then another doorway, and back to the front door (Tr. 250).

Blood spatter evidence indicated that Dulin had been shot in front of one of the cabinets (Tr. 250, 444). He was down with his head off the floor when he was shot; blood spattered the wall six to eighteen inches off the floor (Tr. 444). There was no blood on a couch that was in the living room, but transfer stains indicated that Dulin had sat in his easy chair after being shot (Tr. 429).

The authorities listened to the 911 tape and heard Dulin tell the operator that he had fought with the two men over the weapon (Tr. 353). The two men were in their 20's and 30's (Tr. 353). One of the men said he was the "Eby boy's girlfriend" (Tr. 343). Paula Eby's boyfriend was Mark Myers (Tr. 354).

Paula had two daughters, Candy Seaman and Christy Pethoud, and one son, appellant Zackary Stewart, who was eighteen at the time (Tr. 643). Candy was married to Tim Seaman but was living with Joel Holden (Tr. 396). Christy lived with Leo Connelly (Tr. 411).

After learning of the incident, Gary Brown contacted the authorities (Tr. 275). He informed them that at about 11:45 p.m. November 28 he was out raccoon hunting and saw a white car at the intersection of C.C. and Log Cabin (Tr. 275, 279, 280). The driver had dark hair and was scruffy-looking and unshaven (Tr. 238). He was leaning against the window (Tr. 289). Brown recalled that the driver's side of the car was unusual, as if the window was broken (Tr. 290). The car turned right and drove slowly toward Hurley (Tr. 282).

In February 2007 Springfield police ran a license plate check at a convenience store and received a hit for a parole violation (Tr. 515-17). The officer approached the car's driver, who became nervous and said, "oh I'm done for now" (Tr. 518). The driver, Joseph Shoemaker, had a gun in his pocket (Tr. 519). The gun was test fired and was found to match bullet casings that had been recovered from Dulin's home (Tr. 632).

In March, 2007, detective Karl Wagner received information and decided to speak with Zack (Tr. 579).² Zack was brought in on a driving while intoxicated charge and put in jail (Tr. 579-80). Detective Wagner, along with Troopers Larry Wolters and Roger Renken, told him that someone had witnessed him in a car with Connelly and Christy just down the road from Dulin's home the night of the incident (Tr. 583).

They also told him that the air coming out of him "may be his last free air" and that he might be facing the death penalty (Tr. 449). They told him that the question was whether he wanted to be charged with first or second degree murder or be a witness (Tr. 449). The authorities asked Zack if there might be any reason for his DNA to be at the scene, and he said no (Tr. 439).

Zack told the officers that he spent the night at Christy and Connolly's house and never left (Tr. 583). He and Connelly worked on a car, watched television, and drank some beer (Tr. 411). Zack slept on the

² The source of this information did not testify at trial, though the state gratuitously pointed out that she gave enough information to support a warrant. This was under the guise of establishing that all information was being kept private, as demonstrated by the warrant being filed under seal (Tr.599). The informant's name was Alesha and she was in jail (Tr. 476-77).

sofa and when he awoke he heard that someone had been shot (Tr. 401). His Uncle Chuck came by and discussed what he had heard on his scanner (Tr. 403).

While talking with the officers, Zack was relaxed but they noticed that he became more guarded as the interview focused more on the incident (Tr. 410). They also thought it significant that Zack “actually mentioned a .22 caliber” when they had only told him that the weapon was a small caliber weapon (Tr. 393).³

After the interview, the officers placed Zack in isolation so that they could search Connelly's house without him tipping anyone off (Tr. 585). That evening Zack asked to speak with Detective Wagner (Tr. 585). He was crying and upset and stated that he thought that Connelly might have killed Dulin (Tr. 587). He offered no explanation (Tr. 587).

On March 29 Paula and Candy visited Zack at the jail (Tr. 595). Unknown to Zack, Detective Wagner listened in on the conversation (Tr. 597). Zack did not admit to anything (Tr. 597).

Zack was released back to the cell he had been sharing with Coty Pollard and Victor Parker (Tr. 470-71). Parker was a friend of Pollard's

³ Zack had told them “from what I hear, that’s what he was shot with, like a .22 or something” (Tr. 416).

mother, and Pollard and Parker had gotten high together before (Tr. 490). They had been in jail several months by this time and when they learned that Zack might be charged with murder, they convinced him that they could help him (Tr. 471). They also convinced Zack that investigators were watching him; and that he should stay in the cell because the investigators would know he was guilty if he came out; and under the same rationale he should give them all his food (Tr. 478-79).

According to Pollard and Parker, Zack told them that he might be charged with murder (Tr. 525). Pollard and Parker indicated that they began talking about God and that Zack asked if he could be forgiven for something like that (Tr. 526). Parker told Zack that he could get a change of venue if multiple members of his family were involved (Tr. 549). He told Zack that he would help him, bond him out, and get him a change of venue, but Zack would have to confess to him (Tr. 494, 549-50). According to Parker, Zack trusted him and thought Parker was trying to help him (Tr. 493).

According to Pollard and Parker, Zack stated that he, Leo, Paula, Christy, Mark and Robert went over to Dulin's to "take his dope" (Tr. 528). Zack and Robert guarded Dulin while the others searched the house (Tr.

529).⁴ Dulin managed to pull a gun out of an end table, and Zack struggled with him (Tr. 530). Zack was able to wrestle the gun away from Dulin and he shot Dulin in the head and stomach (Tr. 530). He shot Dulin two or three times, and tried to back off because he was frightened (Tr. 531). Dulin came back up at him, and Zack shot him again (Tr. 531).

After that, everyone panicked and left (Tr. 531). They drove to a roadside park, changed clothing, put their old clothes in a barrel, and set the barrel on fire (Tr. 539). Connelly was to dispose of the gun, but police later found it (Tr. 538).

On March 30 Parker and Pollard approached Detective Wagner and told them that Zack had confessed to them but they wanted to have Parker's attorney present (along with pizza and cigarettes for Pollard), if they reported it (Tr. 492). They related their information to Detective Wagner and the prosecutor on April 3 (Tr. 549-50, 554). Wagner called for Zack and told him what Parker and Pollard said (Tr. (Tr. 617). Zack denied telling them anything (Tr. 618). Wagner tried to discuss some

⁴Parker testified that Dulin was on the couch (Tr. 529). Pollard did not mention a couch (Tr. 475). Both said that Dulin was able to grab a gun (Tr. 475, 529). According to Dulin's nephew, no guns were near the couch (Tr. 250). There was no blood on the couch (Tr. 429).

theories that might minimize Zack's guilt to help him feel better about telling the truth (Tr. 622).

Pollard, who was in jail on a probation violation for burglary, theft, receiving stolen property, and tampering, was later continued on probation (Tr. 467-68, 509). Parker, in jail on probation violation for drug charges, was released on his own recognizance on April 20 (Tr. 554). He was facing charges of manufacturing a controlled substance and receiving stolen property (Tr. 540). Parker was sentenced to seven and three years imprisonment with a 120-day callback (Tr. 540). Detective Wagner also made calls on his behalf to other counties (Tr. 554).

Zack was charged with first degree murder, § 565.010, and armed criminal action, § 571.015 (L.F. 6). The state adduced the evidence outlined above at trial

On the second day of trial, Tuesday, Wagner showed the victim's family the evidence and the family told Wagner that the hat did not belong to the victim (Tr. 637). The authorities had believed it to be Dulin's because a tear in the hat matched somewhat with a bullet hole in Dulin's head (Tr. 637-8).

On the third day of trial, investigators took the cap to Jefferson City for testing (Tr. 640). Preliminary testing indicated the DNA of three people

was on the cap – Dulin’s, Tim Seaman's, and other unknown DNA. Tim Seaman was not one of the people who were allegedly with Zack. The laboratory was not specifically requested to compare Tim's DNA; it obtained a match via the CODIS database (Tr. 640).

Christy Pethoud, Zack's sister, testified that after work on November 28, she and Connelly picked up her children at her grandmother's home, which is also where Zack lived (Tr. 646, 650). Zack asked to go home with them, so they took him along (Tr. 650). They ate, watched movies, and went to bed (Tr. 651-52). Nobody left the house that night (Tr. 653). Christy had a white Ford Escort but it never had any damage to the side window (Tr. 657). Connelly drove a red truck (Tr. 657). After this testimony, Zack again moved for judgment of acquittal (L.F. 23-24).

The state dismissed the armed criminal action count (L.F. 49). During closing, the argued that Zack had told Pollard and Parker that Dulin was on the floor when he was shot (Tr. 678).⁵

The state also argued that a DNA “hit” was not a “match” (Tr. 722). It could not be confirmed without having Seaman’s DNA, and without confirmation it was “for investigative purposes only” (Tr. 722-23). It speculated that the presence of the cap did not prove Tim’s presence at the

⁵ Dulin being on the floor was not mentioned at trial (Tr. 475, 530).

scene; Tim may have had the cap on one time but it could have been eight years before (Tr. 723). What the case “was really about” was Zack’s confession to Parker and Pollard (Tr. 724). The state theorized that Zack, Leo, and Christy came to Dulin’s home together but Zack left with Leo (Tr. 726).

The jury found Zack guilty of first degree murder (L.F. 49). Zack filed a motion for new trial, alleging that after trial the defense learned that Tim Seaman had confessed to his brother that he had killed somebody and that DNA testing had indicated the dentures had unknown DNA on them (L.F. 51-52).

The trial court held a hearing on the motion. By stipulation the state agreed that the DNA hit on Tim was confirmed (Tr. 749).

Robert Bales, Tim Seaman's nephew, testified that Tim was the first person to tell him of Dulin's death (Tr. 750). Tim confided that he and John Mills were at the house when it happened and they saw it (Tr. 751). Mills was present and did not dispute this (Tr. 751). The two were drinking (Tr. 751). Mills vomited, and Tim told Robert that was because of what he had seen the night before (Tr. 751).

Detective Wagner testified that he had received a tip that Tim had confessed to his brother Randy that he had taken someone's life (Tr. 755).

Randy told him that around Thanksgiving they were drinking and Tim was upset over his problems with Candy and the children (Tr. 755). He then told Randy that he had taken someone's life and asked how to deal with that (Tr. 755). Randy did not take Tim seriously until he heard during trial that Tim's DNA was found on the cap that was at the scene (Tr. 640, 756). Randy recognized the hat as Tim's (Tr. 758).

Tim drove a light tan or white vehicle (Tr. 757). Randy verified that the cap resembled one that Tim wore (Tr. 757). Detective Wagner only learned of Randy's information after Zack was convicted (Tr. 757).

Detective Wagner interviewed Tim, who denied knowing Dulin or being in his house (Tr. 760). Tim's story changed during the conversation (Tr. 761). He denied owning the hat (Tr. 761). Detective Wagner interviewed Tim's acquaintances, some of whom said it was his hat and others who had never seen him wearing it (Tr. 761). Wagner was not able to place Mills at the scene, but he was told that Tim and Mills "ran around together all the time" (Tr. 762).

The trial court ruled that Tim's statement was not exculpatory as to Zack, because it did not prove that he was not present when Dulin was killed (Tr. 768). The court denied Zack's motion for new trial and

sentenced him to life imprisonment without parole (Tr. 774). This appeal followed (L.F. 56).

POINT RELIED ON

The trial court erred and abused its discretion in overruling Zack's motion for a new trial based on the post-trial discovery of Tim Seaman's confession to the murder, because this ruling violated his right to a fundamentally fair trial and to present evidence in his defense, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the Constitution of the State of Missouri, Article I, §§ 10 and 18(a), in that the newly-discovered evidence would likely result in Zack's acquittal on retrial as it furnished a reasonable alternative theory of his innocence, that Tim Seaman killed Dulin, that was coherent and consistent with all the evidence.

State v. Mooney, 670 S.W.2d 510 (Mo. App., E.D. 1984);

State v. Whalen, 49 S.W.3d 181, 184 (Mo.banc 2001);

Bankhead v. State, 182 S.W.3d 253 (Mo. App. E.D. 2006);

State v. Robinson, 90 S.W.3d 547, 553 (Mo. App., S.D.2002);

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

Mo. Const., Art. I, §§ 10 and 18(a); and

Rules 29.11 and 78.05.

ARGUMENT

The trial court erred and abused its discretion in overruling Zack's motion for a new trial based on the post-trial discovery of Tim Seaman's confession to the murder, because this ruling violated his right to a fundamentally fair trial and to present evidence in his defense, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the Constitution of the State of Missouri, Article I, §§ 10 and 18(a), in that the newly-discovered evidence would likely result in Zack's acquittal on retrial as it furnished a reasonable alternative theory of his innocence, that Tim Seaman killed Dulin, that was coherent and consistent with all the evidence.

After trial, evidence came to light that was not available to Zack before. The DNA hit on Tim Seaman was confirmed (Tr. 749). Seaman had confessed to murdering someone but his brother did not believe him until he learned that Tim's cap was found in Dulin's house (Tr. 856). Seaman also admitted to being present when Dulin was killed (Tr. 751). This new evidence pointed to Tim Seaman and Mills, not Zack and Connelly, as the killers. Zack was entitled to a new trial.

Newly Discovered Evidence

Rule 29.11 provides that the trial court may grant a new trial upon good cause shown. In order to be entitled to a new trial based on evidence newly discovered after trial, the defendant must show: 1) the evidence has come to his knowledge since conclusion of the trial; 2) it was not owing to want of due diligence that it was not discovered earlier; 3) it is not cumulative only or merely impeaching the credibility of a witness; and 4) it is so material that it would probably produce a different result on a new trial. *State v. Amrine*, 741 S.W.2d 665, 674 (Mo. banc 1987).

New trials based on the post-trial discovery of new evidence are not favored, and the trial court has substantial discretion in ruling upon such claims. *Id.* Nevertheless, a reviewing court is less deferential to the trial court's decision to deny a motion for new trial than when the court has granted such relief. *See State v. Stone*, 869 S.W.2d 785, 787 (Mo. App., W.D. 1994).

DNA result

The DNA hit on Tim Seaman was proven at trial by a stipulation (Tr. 640). Therefore, the match is not completely new evidence. Nevertheless, it was not produced in sufficient time for the defense to use it in any

meaningful way, nor for the jury to give it the substantial weight that such crucial evidence would have.

It was only introduced at the end of the state's case (Tr. 640). The actual confirmation of the match did not come until the motion for new trial. Due to this timing, the state was able to argue to the jury that it should have minimal impact (Tr. 423).

The defense was unable to point this out in opening statement or to question the authorities about any actions that they did or did not take in response to the DNA evidence. This information, if known, would have caused the jury to view the evidence differently from the beginning. The DNA evidence was not available for the jury until the end of trial, and the jury never knew that it was a conclusive hit. This new information was reliable and contradicted the state's theory that Zack, Leo and Christy were at Dulin's home (Tr. 726).

Tim Seaman's Confession met the Criteria for a new trial

A. The Statements were Credible

The first three criteria are not at issue. The state admitted that the defense did not learn of Tim's confession until after trial, and that the defense was not to blame for the late discovery (Tr. 766). The evidence

was not cumulative to any other evidence, and it did not merely impeach Tim's credibility. Tim did not testify.

The fourth factor is essentially a determination of prejudice and is the most significant of the factors listed. *Stone, supra*. To meet the requirement that newly-discovered evidence would probably produce a different result on retrial, such evidence need only be “credible and reasonably sufficient to raise a substantial doubt in the mind of a reasonable person as to the result in the event of a new trial.” *Id.*

At the motion hearing, the state argued that Tim's statement was hearsay and was thus inadmissible. It also argued that the jury would have convicted Zack even if they learned of Tim's confession (Tr. 766). The trial court agreed that the evidence was not exculpatory (Tr. 768)

The state did not cast any doubt upon this evidence or any person's credibility. Cases in which such evidence has been found to be not credible are generally cases in which the declarants were felons (such as Parker and Pollard) and were severely impeached at trial, e.g. *Amrine*, 741 S.W.2d at 674; or where some were in jail and others were friends of the defendant, *State v. Williams*, 652 S.W.2d 102, 114 (Mo. banc 1983).

Here, the trial court did not find that the witnesses lacked credibility, nor was there a basis for such a finding. One of the witnesses

who testified to Tim's inconsistent statements and lying about his hat was the chief investigating officer.

The circumstances under which Tim's statements were made support their credibility. Tim's statement to Bales that he and Mills had been present at the murder, was made the day after the incident and corroborated by Mills' vomiting as well as by the DNA on the cap that places Tim at the scene (Tr. 750-51). Randy's statement to Wagner is credible because Randy was Tim's brother and there was no evidence of any motive to fabricate (as opposed to Parker and Pollard). Tim was drinking with Randy and divulged his admission voluntarily in the course of discussing all his family problems (Tr. 755).

In the end, it is for the jury to determine credibility and whether the statements are exculpatory. The appellate court is not a "super juror." *State v. Freeman*, 269 S.W.3d 422, 424 (Mo. banc 2008).

The trial court accepted the state's argument that the evidence was hearsay (Tr. 766-68). That is not the standard. The statements were credible. Nevertheless, due process may require the trial court to admit the statement if "(1) the declarant is unavailable as a witness; (2) the statements, if true, would exonerate the defendant; and (3) the statements carry substantial indicia of reliability." *State v. Robinson*, 90 S.W.3d 547,

553 (Mo. App., S.D.2002). *See also, Chambers v. Mississippi*, 410 U.S. 284, 300 (1973) (due process requires admission of statement if (1) the statement must be self-incriminatory and undeniably against self-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 admissible evidence)

Tim was unavailable as a witness; efforts to locate and subpoena him were fruitless (Tr. 752). His confessions, if believed, were incriminatory. Dulin told the 911 operator that there were only two men present, and Tim told Bales that he and Mills were there (Tr. 751). Randall further corroborated this with Tim's confession that he killed someone (Tr. 756).

These statements were also made spontaneously, and shortly after the offense. Bales testified that Tim told him about it the next day (Tr. 751).

Finally, corroborating evidence exists. Bales saw Mills vomiting, and Tim attributed this to what he had seen (Tr. 751). The only DNA in the entire house was traced to Tim, not Zack (Tr. 640). Tim denied owning a cap like the one recovered from Dulin's home, but Randy and others had seen him wearing it, and the DNA is conclusive evidence that Tim had

some contact with the hat. Tim also drove a light tan or white vehicle (Tr. 757). This testimony was not inadmissible hearsay, and it was credible.

The evidence was exculpatory as to Zack

Secondly, this evidence likely would have persuaded the jury that Zack was not involved in Dulin's murder. Concededly, Tim did not specifically tell Bales that Zack was innocent (Tr. 750). He related that he and Mills were present and did not mention Zack; this indicates that they were the only two there.

Furthermore, Tim's statements, if credited by the jury, create insurmountable difficulties for the state's increasingly diverging theories of guilt. What is known from the evidence is that

- (1) Dulin spoke coherently and told authorities that there were two men, one being the Eby girl's boyfriend (Tr.343);
- (2) There was no sign of forced entry, and Dulin was shot on the ground (Tr. 350);
- (3) There was no end table by the couch and the lamp was by the easy chair in Dulin's home, on the other side of an easy chair (Tr. 250);

- (4) Zack's cellmates told authorities that Zack admitted that he, Leo, and four others broke into the house and Zack shot Dulin when Dulin was getting up from the sofa, when Dulin grabbed a gun from an end table by a lamp (Tr. 530);
- (5) After the incident two men were seen in a car that had some damage to the window area (Tr. 290); and
- (6) The DNA of Tim Seaman, married to Candy Eby and who was not identified by the cellmates, was found at the scene (Tr. 749).⁶

⁶ Review of the above reveals, disturbingly, that the only evidence tying Zack to the murder is the testimony of two jailhouse snitches. This Court has noted the "notorious unreliability of jailhouse snitches..." *State v. Beine*, 162 S.W.3d 483, 485 (Mo.2005). It has allowed the state to "bolster its rather meager case with evidence of the jailhouse snitch..." *State v. Barton*, 240 S.W.3d 693, 713 (Mo. banc 2007) (Wolff, J., dissenting).

Here, the state has not bolstered its case with such evidence; that is the evidence against Zack. And that evidence is demonstrably false on a number of counts. It is inconsistent with the state's theory of the case (Tr. 726). A conviction relying solely upon such evidence is at best a highly questionable conviction.

A. Unreasonable Inferences

Dulin reported two intruders; there were dentures with unknown DNA; Brown saw two men; Tim Seaman was present at the scene. Thus, given Tim's statements, either there were only two men present and Zack was elsewhere, or Tim and Mills, along with Zack, killed Dulin.

Both scenarios are inconsistent with the jailhouse informants' testimony. Pollard and Parker's testimony is discredited.

The first scenario is consistent with Dulin's claim that "two men," one being the Eby girl's boyfriend, were the intruders. The second is inconsistent with Dulin's testimony as well as the snitch testimony. Most importantly, it is inconsistent with the state's theory as argued to the jury (Tr. 726).

Absolutely 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. Zack introduced evidence that he was with Leo and Christy. This evidence might not be believed by a jury, but "[s]imply because a defendant's self-serving statements [or evidence] may not be credible does not give the jury license to speculate on what happened when there is nothing else to go on. *State v. O'Brien*, 857 S.W.2d 212, 220 (Mo.banc 1993)

“There is much truth to the logic of Occam's Razor that, all things being equal, the simpler explanation is probably true.” *L.W. Matteson, Inc. v. U.S.* 61 Fed.Cl. 296, 310 (Fed.Cl., 2004). The simple explanation, that Dulin was correct and there were two men, is preferable to a convoluted explanation that there were three (or more) and Dulin mentioned only two during his entire half-hour conversation with the dispatcher.

Courts may "not supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences." *State v. Whalen*, 49 S.W.3d 181, 184 (Mo.banc 2001). If Dulin recounted two men, it is a forced inference to conjure up more. In *Whalen*, the defendant shot at an officer who was in the doorway to his bedroom, and the Court refused to allow an inference that he was aware that other officers were standing behind him when he was shooting. *Id.* Here, to infer a link between Zack and Tim Seaman, or to infer Zack's presence at Dulin's house, is to engage in impermissible conjecture. The state's theory must accommodate the facts, not vice versa.

B. Inconsistent Theories of Guilt

Placing Tim and Zack together also results in an incoherent theory of Zack's guilt that is a denial of due process. The novel suggestion is

inconsistent with any theory the state put forward at trial. The state argued that Zack, Leo and Christy were doing dope and went to Dulin's home for more (Tr. 674). Zack killed Dulin there (Tr. 675). The state came up with this theory by selective use of evidence given by Parker and Pollard, disregarding the enormous problem of how Paula and the others fit in. But the state insisted throughout the entire trial that Zack and Leo acted together (Tr. 674).

When it turned out that Tim Seaman, not Leo, was the "Eby girl's boyfriend", the theory suddenly became that Zack and *Tim* were together. This theory did not arise from the evidence. It arose solely out of a motive to salvage Zack's conviction in the face of the new evidence. But it is improper to posit such conflicting theories.

The state cannot, consistent with due process, present two contradictory prosecutorial theories in prosecuting co-defendants. *Bankhead v. State*, 182 S.W.3d 253 (Mo. App. E.D. 2006). *See also, Smith v. Goose*, 205 F.3d 1045 (8th Cir. 2000) ("[T]he use of inherently contradictory theories violates the principles of due process" *Id.* at 1052, for "[t]he State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth." *Id.* at 1051).

Smith and *Bankhead* applied to different cases involving co-defendants, not varying theories within one prosecution. Nevertheless, the principle holds here as well, and with equal force should prohibit the trial court from convicting a criminal defendant upon incoherent and inconsistent theories of guilt.

The theories are inconsistent, because the only evidence linking Zack with Dulin is the snitch testimony; the evidence linking Tim Seaman with Dulin only refers to John Mills; and the no evidence coherently places both Tim and Zack together at the scene. The only rationale for putting them together is to incorporate the new evidence while still upholding the conviction

Were all of this evidence to be admitted upon a retrial, the final DNA results would be considered along with Tim's admissions to his brother and nephew. Against all of this the jury would weigh the credibility of two jailhouse snitches who were admitted liars; who contradicted each other⁷ as well as the known facts. Had the jury heard about Tim's confession, it would have had ample reason to disbelieve

⁷ For example, Pollard testified that he and Parker persuaded appellant to give them his food so that he would look innocent (Tr. 478) while Parker denied having ever doing this (Tr. 565).

Pollard and Parker's testimony. As noted by the dissent in the Southern District on p. 4:

The prosecution did not present a case that involves Tim. If someone else committed the murder with one other person, who was not Defendant, then the evidence is exculpatory. At the very least, the new evidence potentially places two witnesses to the murder at the scene, one of whose DNA was found on a blood-soaked hat next to Victim's body—a hat his own brother attributed to him but he later denied ever owning. The new evidence allows for alternative inferences to be drawn regarding who the two men Victim told the 9-1-1 operator he saw were, who owned the light-colored vehicle seen down the road from Victim's house following the murder, and which “Eby girl” Victim was referring to in his 9-1-1 call.

In *State v. Mooney*, 670 S.W.2d 510 (Mo. App., E.D. 1984), the defendant was convicted of child molestation solely upon the child's testimony. While his appeal was pending he learned that the complainant had recanted. He filed a motion pursuant to Rule 29.11(f) and 78.05, along with an affidavit. The court held that the conviction could not be just if it was the result of false testimony and remanded to the trial court for the

filing of a motion for new trial on the grounds of the child's recantation.

670 S.W.2d 515-16.

In *State v. Phillips*, 940 S.W.2d 512 (Mo. banc 1997), the Court considered the effect of exculpatory evidence that the state had withheld from the defense. The defendant was convicted of murder and sentenced to death after the victim was killed and dismembered. Her son Buddy had claimed that he and the defendant had killed the victim and he alone dismembered her body. The Court held that the defendant was entitled to a new sentencing hearing because the statement "clear[ed] Phillips of involvement in that aspect of murder – the disposition of the body....Buddy, more than Phillips, was the depraved party." 940 S.W.2d at 517.

The Court rejected the state's argument that Buddy's statement was hearsay and inadmissible. The statements were made spontaneously to a close friend; they were corroborated by other evidence; and they were against interest. *Id.* The same is true of Tim's statements.

The state argued that the killer's identity comes from Zack's supposed confessions, "taken together and intertwined with the physical evidence from the scene" (Tr. 676). These contradict each other.

Would a reasonable juror have a substantial doubt as to the result if, on retrial, the jury would hear that Tim Seaman told his nephew that he and John Mills were present when Dulin was killed, and that Tim had told his brother that he killed someone? The reasonable answer is “yes”.

As the dissent pointed out on p. 4 of the slip opinion:

While the majority is correct in stating that the new evidence does not prove that Defendant was not involved the crime, its conclusion overlooks the fact that this evidence presents an alternative theory of the case—one that could very well leave a reasonable doubt as to Defendant's guilt in the mind of a reasonable juror. The majority seems to evaluate the new evidence based on the answers (or lack thereof) it provides, but I am concerned with the substantial questions it raises. Where new evidence raises substantial questions, as it does in this case, the answers to those questions should be determined by a jury.

Zack proved that the newly-discovered statements entitled him to a new trial based on newly-discovered evidence. This Court should reverse his conviction and remand for the prosecutor's determination of how and against whom to proceed, based upon the new evidence.

CONCLUSION

For the reasons set forth above, Zack requests that this Court reverse and remand his case for further proceedings.

Respectfully submitted,

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Certificate of Compliance and Service

I, Rosalynn Koch, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 6,170 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in January, 2010. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 29th day of January, 2010, to Shaun Mackelprang, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Rosalynn Koch

APPENDIX

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