IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC97229
	)	
DANIELLE ZUROWESTE,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF
WARREN COUNTY, MISSOURI
TWELFTH JUDICIAL CIRCUIT, DIVISION ONE
THE HONORABLE WESLEY DALTON, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

Carol D. Jansen, Mo. Bar No. 67282
Attorney for Appellant
Woodrail Centre
1000 West Nifong
Building 7 Suite 100
Columbia, Missouri 65203
(573) 777-9977
Fax (573) 777-9974
Email: Carol.Jansen@mspd.mo.gov

INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

RULES:

OTHER:

JURISDICTIONAL STATEMENT

Appellant, Danielle Zuroweste, appeals her conviction by a Warren County jury for possession of a controlled substance under section 195.202, RSMo Cum. Supp. 2011. The Honorable Wesley Dalton sentenced Ms. Zuroweste to 7 years in prison. Judge Dalton further recommended Ms. Zuroweste be placed in a 120-day institutional treatment program under section 559.115, RSMo Cum. Supp. 2013.

Jurisdiction of this appeal was originally in the Missouri Court of Appeals, Eastern District. Mo. Const. art. V, sec. 3; section 477.050, RSMo 2000. This Court thereafter granted Ms. Zuroweste's application for transfer, so this Court has jurisdiction. Mo. Const. art. V, secs. 3 and 10; Rule 83.04.

STATEMENT OF FACTS

A. Introduction

At Danielle Zuroweste's trial, the jury was presented with an empty 2-inch by 2-inch transparent orange Ziploc baggy. (Tr. 197, 207, 294). Officer John Beekman had seized the baggy from the driver's side floorboard of Ms. Zuroweste's cluttered, messy car.[1] (Tr. 197-98, 201, 207, 299). The jury was asked to convict her of possession of the trace amount of methamphetamine found in the baggy. (Tr. 36, 308, L.F. 13-14). As argued by the state, "the central contested issue in this case" was "what the defendant knew, what did she know[?] Did she know it was meth?"

Officer Beekman testified he noticed a white powdery residue in the baggy when he first saw it in the car. (Tr. 197). But, as admitted by the state, the baggy was empty when he presented it to the jury. (Tr. 197, 207, 294). The white residue was no longer visible. (Tr. 294). Similar to Officer Beekman's testimony, Daniel Krey, the senior forensic scientist with the police crime lab, testified that the baggy looked different at trial than prior to testing because "a lot of the powder ha[d] been rinsed in [his] testing." (Tr. 241). The orange baggy tested positive for trace amounts of methamphetamine. (Tr. 240, 242-44). The substance in the baggy weighed 0.0 grams. (Ex. 7).

---

[1] Officer Beekman also seized two marijuana pipes from the car. (Tr. 205). One pipe was found in the pocket of a jacket that was draped over the driver's side seat. (Tr. 203, 209). The other pipe was found in Ms. Zuroweste's wallet, which was found in the front passenger seat. (Tr. 203, 210). Ms. Zuroweste pleaded guilty to possession of the two pipes prior to trial. (Tr. 34-36).

On September 26, 2015, while incarcerated at the Warren County jail, Ms. Zuroweste called her friend who was watching her children. (Tr. 181, 224, 249, 253; Ex. 8). The call occurred 5 days after Ms. Zuroweste was arrested. (Tr. 188, 203-04).

At trial, the state introduced the recording of Ms. Zuroweste's call as evidence of Ms. Zuroweste's knowledge of the trace amount of methamphetamine in the baggy. (Tr. 181, 224, 249, 253; Ex. 8). The state characterized this call as Ms. Zuroweste confessing that she had a problem with methamphetamine and as her "admission of guilt." (Tr. 182, 295-96).

The state also introduced a videotape of Ms. Zuroweste's stop that allegedly showed her making "furtive movements" as well as testimony that Ms. Zuroweste was nervous when she was stopped and that she cried when she was arrested. (Tr. 196, 214-15, 204, 280, Ex. 5). The jury convicted Ms. Zuroweste of possession of the trace amount of methamphetamine. (Tr. 312).

B. Late Disclosure of the Jailhouse Telephone Call

On June 10, 2016, Ms. Zuroweste filed a request for discovery. (Supp. L.F. 1). As part of this request, Ms. Zuroweste requested, "Any written or recorded statements and the substance of any oral statements made by the defendant[.]" (Supp. L.F. 1). On June 28, 2016, the state answered: "Such statements, if they exist, are forwarded under separate cover as necessary." (Supp. L.F. 3). On September 6, 2016, her trial date was set for November 14, 2016. (L.F. 11).

Despite Ms. Zuroweste's request for discovery, the state, however, did not inform Ms. Zuroweste that it intended to introduce the jailhouse telephone call at trial until Thursday, November 10, 2016, at approximately 4:40 p.m. (Tr. 12). Friday, November 11, 2016, was a holiday.[2] Due to the holiday, defense counsel's office was closed during the 3-day weekend. (Tr. 14). Ms. Zuroweste's trial began Monday, November 14, 2016. (L.F. 11).

The state also did not disclose any of the additional calls Ms. Zuroweste made from the county jail. (Tr. 20-21). On the same day as it disclosed the single jailhouse telephone call, the state notified defense counsel it intended to endorse Matt Schmutz to lay the foundation for the telephone call. (Tr. 11).

Prior to trial, Ms. Zuroweste moved to exclude the telephone call and all testimony related to the telephone call as a sanction for the state's failure to timely disclose the call pursuant to Rules 25.03 and 25.08. (L.F. 26-28). Defense also objected to the state's motion to endorse Matt Schmutz to lay the foundation for the telephone call. (Tr. 11, L.F. 29)

At a pretrial hearing on the motion, defense counsel testified that because her workplace was closed, "the investigator wasn't at work" and there was "no way that [she] [could] work on getting more information for [the call]." (Tr. 14). She argued this was especially significant because Ms. Zuroweste had been in custody at the jail for several days, yet the state only disclosed one telephone call.

[2] Specifically, November 11, 2016 was Veteran's Day. Veterans Day in the United States, https://www.timeanddate.com/holidays/us/veterans-day, last visited November 2, 2017, at 11:20 a.m.

(Tr. 14). At this point, defense counsel did not know whether other telephone calls existed. (Tr. 14, 19-20).

Defense counsel further argued the state's failure to timely disclose the telephone calls prejudiced Ms. Zuroweste because she was "unable to seek out any further calls that may put this call into context" and did not have the time to "be able to offer any kind of evidence to counteract what the State will present to the jury[.]" (Tr. 19-20). Defense counsel also informed the trial court that these late disclosures "ha[d] been happening quite a lot." (Tr. 14).

In response to Ms. Zuroweste's contention that the disclosure of the telephone call was untimely, the state argued it disclosed the call as soon as it got it and that defense counsel "had several days to do whatever she wanted with it" because the call was disclosed on late Thursday afternoon. (Tr. 15). The state justified its late disclosure of the jailhouse telephone call by arguing that such late disclosures occur because it has "to juggle the trial docket," it doesn't always know "what case is going sometimes until days before[,]" and because "the State's having to prep multiple cases for trial [] but we don't know which one's going to go until days before[.]" (Tr. 16).

Additionally, the state argued the defense was not prejudiced because Ms. Zuroweste knew her call was monitored and knew she made the call. (Tr. 15, 19). The state also argued the defense was not prejudiced from not having all of the additional calls Ms. Zuroweste made from jail because "[t]here's nothing

exonerating on the calls." (Tr. 21). The state offered to make a disc of the additional telephone calls after the pretrial hearing. (Tr. 20).

The trial court acknowledged that the telephone call may have affected whether or not Ms. Zuroweste took a plea or choose to testify. (Tr. 17). But the trial court reasoned that because the telephone call was admissible and defense "at least [had] time to look at it and listen to it," that it was going to grant the state's motion to endorse Matt Schmutz and deny Ms. Zuroweste's motion to exclude the telephone call. (Tr. 21).

C. Evidence at Trial

The state referenced the telephone call frequently during trial. During its opening argument, the state characterized this telephone call as Ms. Zuroweste "confessing" to her friend "that she knows she's messed up from using methamphetamine[.]" (Tr. 182). The state told the jury Ms. Zuroweste confessed by stating, "I learned my lesson," "I knew it was bad," "I knew it was wrong," "My friends and family will be disappointed in me," and "I'm never doing it again because I have to get back to my kids." (Tr. 181-82).

Additionally, the state argued Ms. Zuroweste never told her friend the police "got [her] hooked up for something [she] didn't do" or she "didn't know the stuff was there." (Tr. 182). Instead, the state contended the jail call was evidence Ms. Zuroweste possessed the methamphetamine because she said, "I did wrong,

I've learned my lesson" and did not say "I didn't do anything, I didn't even know it was there[.]" (Tr. 182-83).

At trial, the state laid a foundation for the telephone call and admitted the call into evidence. (Tr. 224, 247, 249-250). The call was played for the jury. (Tr. 250). During closing argument, the state argued the telephone call was evidence of "the central contested issue in this case[,]" namely, "what the defendant knew, what did she know[?] Did she know it was meth?" (Tr. 294).

The state emphasized the telephone call was evidence Ms. Zuroweste knew of the presence and the nature of the trace amount of methamphetamine. (Tr. 293-94). Repeatedly quoting from her call, the state argued "[s]he's talking about the methamphetamine," and, therefore, that the call was an "admission of guilt" that showed she knew that she possessed the trace amount of methamphetamine. (Tr. 283-90, 295-96, 305).

The state also urged the jury to request the telephone call during their deliberations:

> When you go back to the jury room you can ask for State's Exhibit 8. You can listen to it again if you'd like. All you've got to do is send a note out to the judge, we want to hear that evidence again.

(Tr. 305). The jury retired to deliberate at 3:41 p.m. (L.F. 14). About 10 minutes later, the jury took the state up on its offer and requested the call. (Tr. 309, L.F. 50). The telephone call was played for them in the jury room. (Tr. 310-11). The jury convicted Ms. Zuroweste of possession of the trace amount of methamphetamine. (Tr. 312).

D. Hearing on Motion for a New Trial Prior to Sentencing

Prior to sentencing, the trial court heard argument on Ms. Zuroweste's motion for a new trial, which included claims that the trial court erred in overruling her motion to exclude the jailhouse telephone call and related testimony as a sanction for the late disclosure, in allowing the state to discuss the telephone call during opening argument, in admitting the telephone into evidence at trial, and in granting the state's motion to endorse Matt Schmutz. (Tr. 317, L.F. 55-57, 61-62). Ms. Zuroweste later filed a supplemental motion for a new trial, which included discussion of the Eastern District Court of Appeals' recently published opinion, *State v. Johnson*, 513 S.W.3d 360 (Mo. App. 2016). (L.F. 68-70).

At the hearing, defense counsel argued that *Johnson*, 513 S.W.3d at 368-369, was analogous Ms. Zuroweste's case. As explained by defense counsel, in *Johnson* the Eastern District held that a late disclosure of a jailhouse telephone call the Friday night before trial violated the defendant's right to a fair trial. (Tr. 318).

The state argued *Johnson* was distinguishable because the prosecutor in *Johnson* admitted he withheld the call after he obtained it in order to ambush the defense. (Tr. 320). The state argued that in Ms. Zuroweste's case there were no allegations that the state's late disclosure was purposeful. (Tr. 321). Additionally, the state asserted that Ms. Zuroweste's trial strategy was not affected by the late disclosure because there was no indication she intended to testify at trial, unlike the defendant in *Johnson*. (Tr. 321).

Moreover, relying on *State v. Carlisle*, 995 S.W.2d 518 (Mo. App. 1999), the state argued the late disclosure of the call did not result in "fundamental unfairness" because the telephone call was duplicative of other evidence and, therefore was not "outcome determinative." (Tr. 324). Specifically, the state argued Ms. Zuroweste was not prejudiced by the late disclosure because the telephone call was cumulative of other "consciousness of guilt" evidence presented at trial, such a video showing Ms. Zuroweste making "furtive movements" when she was stopped by Officer Beekman. (Tr. 324-25).

Lastly, the state argued Ms. Zuroweste was not prejudiced by the late disclosure of the call because defense counsel had "four days"[3] to review the telephone call. (Tr. 322-23). The state argued that although the call was disclosed over a holiday weekend that "[obviously] … we all work over weekends when we have a trial that starts on the Monday." (Tr. 323). Additionally, the state argued defense counsel did not seek a continuance and the call was "one call" that was "only a few minutes." (Tr. 322-23).

In response, defense counsel again reiterated Ms. Zuroweste was prejudiced by the late disclosure since defense counsel's office was closed over the 3-day holiday weekend and she could not, therefore, conduct any investigation that would have allowed her to put the single disclosed jailhouse call in context. (Tr. 323). She said that had the disclosure of the call been timely "it very well may

[3] Because the call was not disclosed until 4:40 p.m. on the Thursday before the 3-day holiday weekend, defense counsel had at best 3 ½ days to review the call and only 20 minutes of normal "business hours" to review the call.

have" affected her trial strategy. (Tr. 323). Defense counsel argued Ms. Zuroweste also "might have chosen to testify in her own defense but because she didn't have time to make that consideration and we didn't have time to go over [the calls] then she doesn't have, I think, a fair trial." (Tr. 324).

The trial court overruled Ms. Zuroweste's motion for a new trial. (Tr. 325). It sentenced her 7 years in prison and recommended she be placed in a 120-day institutional treatment program under section 559.115, RSMo Cum. Supp. 2013. (Tr. 335, L.F. 71-72). This appeal timely followed.

POINT RELIED ON

The trial court erred in admitting into evidence Exhibit 8, the telephone call Ms. Zuroweste made from the Warren County jail, and testimony related to Exhibit 8, because the statements on the telephone call were presented at trial in violation of Rule 25.03(A) and Ms. Zuroweste's rights to due process of law and a fair trial before an impartial jury, as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the state failed to disclose the telephone call until the Thursday evening before her Monday morning trial, when Friday was a holiday and defense counsel's office was closed during the 3-day weekend, and the state could have timely obtained the calls through a reasonable and diligent inquiry, and, therefore, due to the late disclosure counsel was unable to adequately prepare Ms. Zuroweste's defense or to ensure that the single disclosed telephone call was presented in the full context of the additional jailhouse telephone calls that were not disclosed, resulting in fundamental unfairness to Ms. Zuroweste.

State v. Johnson, 513 S.W.3d 360 (Mo. App. 2016);

State v. Henderson, 410 S.W.3d 760 (Mo. App. 2013);

Merriweather v. State, 294 S.W.3d 52 (Mo. banc 2009);

State v. Carlisle, 995 S.W.2d 518 (Mo. App. 1999);

United States Constitution, Amendment XIV;

Missouri State Constitution, Article I, Section 10; and

Rules 25.02, 25.03, and 25.08.

ARGUMENT

The trial court erred in admitting into evidence Exhibit 8, the telephone call Ms. Zuroweste made from the Warren County jail, and testimony related to Exhibit 8, because the statements on the telephone call were presented at trial in violation of Rule 25.03(A) and Ms. Zuroweste's rights to due process of law and a fair trial before an impartial jury, as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the state failed to disclose the telephone call until the Thursday evening before her Monday morning trial, when Friday was a holiday and defense counsel's office was closed during the 3-day weekend, and the state could have timely obtained the calls through a reasonable and diligent inquiry, and, therefore, due to the late disclosure counsel was unable to adequately prepare Ms. Zuroweste's defense or to ensure that the single disclosed telephone call was presented in the full context of the additional jailhouse telephone calls that were not disclosed, resulting in fundamental unfairness to Ms. Zuroweste.

A. Standard of Review and Preservation

"In reviewing an alleged discovery violation, [a reviewing court] must answer two questions: first, whether the State's failure to disclose the evidence violated Rule 25.03, and second, if the State violated Ruled 25.03, then what is the appropriate sanction the trial court should have imposed." *State v. Henderson*,

410 S.W.3d 760, 764 (Mo. App. 2013). "The determination of whether the State violated a rule of discovery is within the sound discretion of the trial court." *State v. Johnson*, 513 S.W.3d 360, 364 (Mo. App. 2016). "Likewise, determining whether a sanction should be imposed for a discovery violation is within the court's discretion." *Id.* at 364-65. "In reviewing criminal discovery claims, [a reviewing court] will overturn the trial court only if 'fundamental unfairness' to the defendant resulted and the court thus abused its discretion." *Id.* at 365.

Prior to trial, Ms. Zuroweste's defense counsel filed a motion to exclude the telephone call and all testimony related to the telephone call as a sanction for the state's failure to timely disclose the call pursuant to Rule 25.03 and 25.08. (L.F. 26-28). During trial, Ms. Zuroweste's defense counsel timely objected when the state began discussing the telephone call during its opening argument. (Tr. 180). She then timely objected when the state introduced Exhibit 8 and when Officer Beekman testified he heard Ms. Zuroweste's voice on Exhibit 8. (Tr. 224-225). She again objected when the state moved to admit Exhibit 8 during Mr. Schmutz's testimony. (Tr. 250). The call was played for the jury over her objection. (Tr. 250). Ms. Zuroweste also included this claim in her motion for a new trial. (L.F. 52-70). Accordingly, this issue is preserved for appellate review.

B. The State Violated Rule 25.03 By Untimely Disclosing Ms. Zuroweste's Jailhouse Telephone Calls

Rule 25.03 provides, in relevant part, that the state "shall, upon written request of defendant's counsel, disclose to defendant's counsel such part or all of the following material and information within its possession or control designated in said request: . . . (2) Any written or recorded statements and the substance of any oral statements made by the defendant[.]" Additionally, Rule 25.03 extends the state's duty to timely disclose the materials requested by the defendant to include requested materials that are "in the possession or control of other government personnel." In such cases, "the state shall use diligence and make good faith efforts to cause such materials to be made available to defense counsel." Rule 25.03(C). "[T]he burden is on the state to show that its search [for materials in the possession of other government personnel] was diligent." *Merriweather v. State*, 294 S.W.3d 52, 56 (Mo. banc 2009).

Discovery requests must be answered within 10 days after service of the request from the defendant. Rule 25.02. Once a request for materials has been made, the state must supplement its response when "a party discovers information which he would have been required to disclose under the request or order[.]" Rule 25.08.

The purpose of Rule 25.03 is to provide the defendant with his or her due process right "to prepare his case in advance of trial and avoid surprise." *Johnson*, 513 S.W.3d at 364. "[S]imple justice requires that the defendant be permitted to

prepare and meet what loom[s] as the critical elements of the case against him." *Id.* Additionally, "[t]he quest for pre-trial discovery is not merely to assist the defendant or the state but to arrive at the truth." *State v. Willis*, 2 S.W.3d 801, 806 (Mo. App. 1999) (quoting *State v. Perkins*, 710 S.W.2d 889, 894 (Mo. App. 1986). Accordingly, this rule is "not mere etiquette nor is compliance discretionary." *Id.* "Missouri courts have consistently reversed convictions based on a defendant's statements that the prosecutor failed to disclose in violation of Rule 25.03(A)(2)." *State v. Henderson*, 410 S.W.3d 760, 766 (Mo. App. 2013).

1. The State Violated Rule 25.03 Because it Could Have Timely Obtained Ms. Zuroweste's Jailhouse Telephone Calls Through a Reasonable and Diligent Inquiry

On June 10, 2016, Ms. Zuroweste's defense counsel filed a request for discovery, including "any written or recorded statements and the substance of any oral statements made by the defendant[.]" (Supp. L.F. 1). On September 6, 2016, Ms. Zuroweste's trial was set for November 14, 2016. (L.F. 11). Yet, the state did not disclose the September 26, 2015 jailhouse telephone call until over two months later, on November 10, 2016, at 4:40 p.m., before a 3-day holiday weekend. (Tr. 12). As scheduled in September, Ms. Zuroweste's trial began on the morning of November 14, 2016. (L.F. 11). The state did not disclose any of the additional jailhouse telephone calls it had in its possession. (Tr. 20).

In response to Ms. Zuroweste's motion to exclude the telephone call, the state argued "it disclosed the call as soon as it got it[.]" (Tr. 15). Rule 25.03(C), however, "imposes 'an affirmative requirement of diligence and good faith on the

state to locate records not only in its own possession or control but also in the control of other governmental personnel[.]" *Johnson*, 513 S.W.3d at 365. If the state's diligence is in dispute, it is the state's burden to show it acted with diligence. *Merriweather*, 294 S.W.3d at 56. Diligence is defined as "caution or care," "persevering application: devoted and painstaking application to accomplish an undertaking," and "speed or haste." Webster's Third New International Dictionary of the English Language 633 (3d ed. 2002).

Here, as in *Johnson*, "there is nothing in the record indicating the State diligently and in good faith sought to locate the recordings . . . in time to comply with [the defendant's] discovery request." The recordings of the telephone calls were in the control of the Warren County jail more than a year before trial. *Id.* In fact, these calls were in the possession of the Warren County jail before defense counsel's initial discovery request was made.

The state did not present any evidence it requested recordings of the calls in June 2016, following defense counsel's discovery request, or even in September 2016, when the case was docketed for trial in November. Nor did the state present any evidence it had attempted to timely obtain the recordings of the jailhouse telephone calls but encountered delays due to the Warren County jail.

Instead, the state admitted it was at fault for the late disclosure, stating the late disclosure occurred because it had to "juggle the trial docket" and "prep multiple cases for trial" without knowing "which one's going to go until days before[.]" (Tr. 16). By the state's own admission, it did not act with "caution or

care," "preserving application," or "speed or haste." As such, the state admitted it ignored the "diligence" duty imposed by Rule 25.03 solely to accommodate the prosecutor's busy schedule. The state, in effect, treated Ms. Zuroweste's discovery request as a form motion without any legal effect. Instead, the discovery request pursuant to Rule 25.03 should have acted as a trigger, which the state ignored at its peril.

Because the state presented no evidence it timely requested the jailhouse phone calls, and admitted fault for the late disclosure, the state did not meet its burden to show that it "use[d] diligence and [made] good faith efforts" to timely disclose the telephone call to the defense. *See Merriweather*, 294 S.W.3d at 56. Having failed to act with diligence and good faith to obtain the jailhouse telephone recordings, the state violated Rule 25.03.

2. Ms. Zuroweste's Knowledge She Made the Telephone Calls Does Not Preclude a Finding That the Defense Was "Surprised" By the Untimely Disclosure

At trial, the state argued Ms. Zuroweste could not be surprised by the jailhouse telephone calls because she knew about them. (Tr. 15, 19). The state's argument is in direct contradiction with the plain language of Rule 25.03. The Rule requires the state to disclose "[a]ny written or recorded statements and the substance of any oral statements made by the defendant[.]" Certainly, a defendant will almost always know of his or her written, recorded or oral statements – yet the Rule requires the state to timely disclose such statements to the defense and imposes an affirmative duty on the state to use good faith and diligence to obtain

such statements if they are in the possession of other government personnel. As such, to argue that the state is only required to disclose statements of which the defendant is "unaware" contradicts the plain language of the Rule.

Notably, Rule 25.03 was promulgated in 1973, ten years after *State v. Brady*, 373 U.S. 83 (1963). Rule 25.03 does not, however, merely codify *Brady* but imposes additional duties on the state. For example, this Court has explained that although *Brady* does not require the state to "discover information it does not possess," Rule 25.03 expressly imposes such an affirmative duty on the state. *Merriweather*, 294 S.W.3d at 56. Likewise, although a *Brady* violation does not exist "where the defendant knew or should have known of the material," Rule 25.03 expressly requires disclosure of defendant's written, recorded, or oral statements. This Court, therefore, in promulgating Rule 25.03, intended to impose additional protections to the defendant.

Moreover, the Court of Appeals' resolution of this issue is persuasive. *Johnson* instructs that although a defendant may be unsurprised that jailhouse telephone calls exist, this does not preclude a defendant from being surprised at learning "of the State's plan to introduce—or the actual introduction of—such evidence of trial" after the state fails to timely disclose the evidence following proper requests for discovery. *Id.*

In *Johnson*, the Eastern District held that the purpose of Rule 25.03 was "not limited to preventing defendants from being surprised by the mere existence of particular untimely-disclosed evidence, but rather extended more broadly to

protecting the defense against surprise at learning of the State's possession of such evidence, or of the State's plan to introduce – or the actual introduction of – such evidence at trial." *Id.* As held in *Henderson*, 410 S.W.3d at 765, "if the State can be forgiven its duty to disclose a statement of the accused on the basis that the accused must have already known about the statement because he made it, then we will have eviscerated Rule 25.03(A)(2)."

Here, as in *Johnson*, Ms. Zuroweste's counsel was "surprised" by the late disclosure of the jailhouse telephone calls because the telephone calls were not disclosed until the night before a 3-day holiday weekend before a Monday morning trial, during which time Ms. Zuroweste's counsel's office was closed. Under these facts, there was a reasonable likelihood that Ms. Zuroweste's counsel was prevented from preparing a meaningful defense to counter the state's "surprise" evidence. *See Johnson*, 513 S.W.3d at 367.

Additionally, this case is factually distinguishable from *State v. Bynum*, 299 S.W.3d 52, 59 (Mo. App. 2009). In *Bynum*, defense counsel did not receive a copy of a 911 call, which the state intended to present at trial, until the morning of trial. *Id.* Defense counsel had, however, disclosed the existence of this call to the state in its response to the state's request for discovery. *Id.* The Eastern District held that "the Defendant cannot claim unfair surprise with regards to the tape of which he had knowledge prior to trial yet choose not to locate." *Id.* at 62.

First, to the extent that the Eastern District's 2009 holding in *Bynum* conflicts with its 2016 holding in *Johnson*, *Johnson* overruled *Bynum sub silencio*.

As discussed above, Rule 25.03 provides additional duties on the state, which surpass those required by *Brady*. Additionally, Rule 25.03 imposes a duty on the state to "disclose to defendant's *counsel*." (Emphasis added). Under the plain language of the Rule, a *defendant's* knowledge of written, recorded or oral statements may not be imputed to *defense counsel*.

Additionally, in contrast to *Bynum*, in the case at bar there is no evidence that Ms. Zuroweste's defense counsel affirmatively knew Ms. Zuroweste made the telephone calls. The state, in fact, acknowledged that, at best, defense counsel was "presumably aware that such a recording might theoretically exist[.]" (Resp. Br. 19). Defense counsel's "presumptive awareness" that a recording of a call might "theoretically" exist falls far short of defense counsel's absolute knowledge of the discovery evidence, as were the facts in *Bynum*.

Rule 25.03 required the state to act in diligence and good faith to locate the recording of the jailhouse telephone call and to timely disclose it to defense counsel so that Ms. Zuroweste's counsel could fairly prepare a defense to the state's case against her. Having failed to do so, the state cannot deflect blame for violating Rule 25.03 by shifting the burden of discovery and disclosure from the state to the defendant and defense counsel. Accordingly, the state violated Rule 25.03 by failing to timely disclose the jailhouse telephone calls even though Ms. Zuroweste may have known the calls had been made.

3. The State's Lack of "Bad Faith" in Disclosing the Telephone Calls Does Not Preclude a Finding That the State's Late Disclosure of the Telephone Calls Violated Rule 25.03

The Eastern District issued its opinion in *Johnson* subsequent to Ms. Zuroweste's jury trial but prior to her sentencing. As such, defense counsel filed a supplemental motion for a new trial following the publication of *Johnson*, arguing that *Johnson* was analogous to the case at bar. (L.F. 68-70). At a pre-sentencing hearing, the state argued that *Johnson* was distinguishable because in *Johnson* the state admitted that its late disclosure was done to ambush the defense and in Ms. Zuroweste's case there was no such allegation. (Tr. 320-21).

Although *Johnson* may be distinguishable on this fact, insofar as defense did not allege the prosecutor deliberately intended to "ambush" Ms. Zuroweste by delaying the production of the jailhouse telephone calls once the prosecutor obtained them, Missouri courts have held that the state's late disclosure of requested evidence violates Rule 25.03 even absent a finding that the late disclosure was due to "bad faith." Nor does the plain language of Rule 25.03 support an interpretation that the Rule is only violated if the state acts in "bad faith" in not turning over the requested discovery once it obtains it.

In *Henderson*, 410 S.W.3d at 764, the state failed to disclose a booking form until after the trial began despite the fact that the defendant had timely filed a discovery request. *Id.* at 763. On the second day of trial, the state disclosed the booking form, stating that it had "just obtained" it. *Id.* at 764. The Eastern District held that the state violated Rule 25.03 "by failing to timely disclose the

booking form in response to the defendant's discovery request[.]" *Id.* Moreover, the Eastern District concluded that although the state's failure to disclose evidence was not "egregious" or based on "an intent to surprise," a lack of disclosure due to "oversight" still warranted a finding that the state violated Rule 25.03. *Id.* at 766.

Likewise, in *State v. Willis*, 2 S.W.3d at 804, the state failed to disclose two letters the defendant had written while in jail until a pre-trial suppression hearing held the morning of the first day of trial. The state argued that it had not intended to use the letters prior to the defendant's testimony at the suppression hearing. *Id.* at 803. The Western District Court of Appeals affirmed the trial court's finding that the state had violated Rule 25.03. *Id.* at 803, 809. Neither *Henderson* nor *Willis* relied on a finding that the state had acted in "bad faith." *See also State v. Carlisle*, 995 S.W.2d 518, 520 (Mo. App. 1999) (noting that the state did not contest a violation of Rule 25.03 where the prosecutor did not disclose a defendant's written confession until the day of trial because she did not previously know of its existence).

Nor should the state's "caseload" defense of its late disclosure excuse its violation of Rule 25.03. The state justified its late disclosure of the jailhouse telephone call by arguing that such late disclosures occur because it has "to juggle the trial docket," it doesn't always know "what case is going sometimes until days before[,]" and because "the State's having to prep multiple cases for trial [] but we don't know which one's going to go until days before[.]" (Tr. 16). While the state's caseload concerns may be legitimate, a heavy caseload cannot excuse

adherence to mandatory rules. A defendant's rights to due process and to a fair trial cannot be sacrificed because of an overtaxed criminal justice system.

Additionally, Supreme Court Rules are interpreted using the same established standards for statutory interpretation. *State v. Feldt*, 512 S.W.3d 135, 149 (Mo. App. 2017). "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning." *State v. Graham*, 516 S.W.3d 925, 927 (Mo. App. 2017). "When interpreting [Rules], courts do not presume that the [Court] has enacted a meaningless provision." *Edwards v. Gerstein*, 237 S.W.3d 580, 581 (Mo. banc 2007).

The plain language of Rule 25.03(C) requires the state to use diligence and make good faith efforts to cause [materials in the possession or control of other government personnel] to be made available to defense counsel." A holding that Rule 25.03 is only violated if the state withholds discovery once it has obtained it would make Rule 25.03 nearly meaningless as it would allow the state to routinely practice "inattention and good faith" or "inadvertence and good faith" to excuse its delays in producing discovery. This Court has likewise held that "[i]nadvertence and good faith do not excuse a failure to comply with Rule 25.03." *Merriweather* 294 S.W.3d at 56.

Importantly, a holding to the contrary would make compliance with Rule 25.03 discretionary and "mere etiquette" and may provide the state with an incentive to delay seeking relevant and easily obtainable discovery until the eve of

trial. *See Johnson*, 513 S.W.3d at 364. Certainly, this was not the intention of this Court in enacting these Rules. As such, a party's intentional neglect or inadvertence to seek obtainable discovery, as the state admitted here, is still a strategy of "trial-by-ambush," which this Court should not condone and which Rule 25.03 was specifically designed to avoid. *See Johnson*, 513 S.W.3d at 365-66.

Moreover, Ms. Zuroweste's case is distinguishable from *State v. Pitchford*, 514 S.W.3d 693 (Mo. App. 2017), where the Eastern District held the state did not violate Rule 25.03 by disclosing hundreds of hours of jailhouse telephone calls on the morning of trial because "there was no evidence of the State attempting to surprise the defendant." First, unlike Ms. Zuroweste's defense counsel, who filed a request for discovery approximately 5 months before trial, the defendant in *Pitchford* did not file a written request for discovery. (Supp. L.F. 1); *Id.* at 699. Additionally, in *Pitchford*, the state testified that it had not planned to subpoena the defendant's telephone calls until it learned of possible witness tampering the Thursday before a Monday trial. *Id.* The state immediately subpoenaed the calls and disclosed the calls it intended to introduce at trial to the defense the evening before trial. *Id.*

Because no request for discovery was made, the Eastern District in *Pitchford* held that "[u]nless and until defendant makes a request for discoverable information or material, the State cannot be in violation of Rule 25.03 for failing to produce it." *Id.* This is because the plain language of Rule 25.03 requires a

"written request of defendant's counsel" to trigger the state's obligations to produce discovery. Without the request from the defendant pursuant to Rule 25.03, the state in *Pitchford* had no obligation to produce discovery pursuant to the requirements of Rule 25.03. Thus, the facts in *Pitchford* cannot be analogized to the facts in the case at bar. Additionally, to the extent *Pitchford* contains dicta suggesting that the state cannot violate Rule 25.03 unless the state withholds evidence in "bad faith" and attempts to "intentionally surprise the defendant" by failing to disclose discovery once it has obtained it, as argued above, such dicta goes against this Court's precedent and the plain reading of Rule 25.03. *See Merriweather*, 294 S.W.3d at 56.

Accordingly, even if the state did not fail to timely disclose the jailhouse telephone calls once it eventually requested them and obtained them, the state's late disclosure following Ms. Zuroweste's request for discovery still violated Rule 25.03.

4. Ms. Zuroweste Was Not Obligated to Seek a Continuance Due to the State's Late Disclosure of the Telephone Call

The state may argue that even if the state's disclosure of Ms. Zuroweste's inculpatory statements on the telephone calls was late, Ms. Zuroweste "waived" this claim because she sought only the exclusion of the evidence and not a continuance. The Eastern District correctly rejected this argument in *Johnson*, 514 S.W.3d at 368.

In *Johnson*, the Eastern District held "the [defendant's] failure to ask for a continuance [had] no bearing on whether the State's violation and introduction of the [jailhouse calls] resulted in fundamental fairness" where the state failed to timely disclose the defendant's inculpatory statements, "which categorically carry great weight with the jury and demand disclosure." *Id.* (parenthetically quoting *State v. Willis*, 2 S.W.3d 801, 807 (Mo. App. 1999)); *see also Henderson*, 410 S.W.3d at 76 (holding the state's failure to timely disclose an inculpatory statement was "uniquely prejudicial"). Under these facts, "Missouri appellate courts have declined to hold it against the defendant that he [or she] failed to ask for a continuance." *Id.*

As argued above, here, although the state did not intentionally *withhold* the jailhouse telephone call once it obtained it, the state admitted it *intentionally* violated the Rule by waiting to obtain Rule 25.03 discovery until it knew the trial was imminent. (Tr. 16). The state, as such, failed to "use diligence and make good faith efforts" to timely obtain the tapes from the jail in violation of the Rule. Where the state has intentionally violated the Rule, the defendant should not be tasked with remedying the state's violation by requesting a continuance.

Moreover, a defendant should not be forced to seek a continuance – thus prolonging the defendant's uncertainty, anxiety and concern about his or her future and potentially waiving any constitutional claims to a right to a speedy trial – due to the *state's* failure to timely disclose discovery. *See State v. Sisco*, 458 S.W.3d 304, 314 (Mo. banc 2015) (discussing whether a delay prejudiced a defendant in

the context of a speedy trial claim). Although Ms. Zuroweste was out on bond, the concern and anxiety from a delay would have weighed particularly heavily on her given her need to plan for not only her own future but for the future of her two children, who had already lost their father and been subject to a custody-dispute. (Tr. 193, 327-28); *see also See State v. Sisco*, 458 S.W.3d 304, 314 (Mo. banc 2015). In this case, where the state admitted it failed to timely seek Rule 25.03 discovery from the Warren County jail, it would be unjust to require Ms. Zuroweste to "cure" the state's intentional violation of Rule 25.03 and seek a lengthy continuance, as would be required to prepare an adequate defense to the state's late disclosure of Ms. Zuroweste's inculpatory statements.

Under the facts of this case, this Court should follow the holding in *Johnson* that a defendant's failure to seek a continuance should not be held against the defendant when the state has failed to timely disclose the defendant's inculpatory statements.

C. The State's Violation of Rule 25.03 Resulted in Fundamental Unfairness to Ms. Zuroweste

"[T]he question of whether fundamental unfairness resulted turns on whether there was a reasonable likelihood that timely disclosure of untimely-disclosed evidence would have affected the result of the trial." *Johnson*, 513 S.W.3d at 364-65. "[F]undamental unfairness may be found where the State's failure to disclose resulted in the defendant's genuine surprise at learning of the

unexpected evidence and there was at least a reasonable likelihood that the surprise prevented meaningful efforts by the defendant to consider and prepare a strategy for addressing the State's evidence." *Id.*

Additionally, "[t]he State's 'failure to produce a statement of the accused is in a different category from failure to disclosure a witness or a photograph." *Henderson*, 410 S.W.3d at 764. "Because they carry such great weight with the jury, inculpatory statements demand disclosure, and a violation of the rule of disclosure requires examination with grave suspicion." *Id.* at 765; *see also id.* at 766.

On June 10, 2016, Ms. Zuroweste's defense counsel filed a request for discovery, requesting: "Any written or recorded statements and the substance of any oral statements made by the defendant[.]". (Supp. L.F. 1). Despite Ms. Zuroweste's request for discovery, the state, however, did not inform Ms. Zuroweste that it intended to introduce the jailhouse telephone call at trial until Thursday, November 10, 2016, at approximately 4:40 p.m., which was 3 ½ days before trial and immediately before a 3-day holiday weekend during which time defense counsel's office was closed. (Tr. 12, 14).

In contrast to the 3 ½ days that the state contended was adequate for Ms. Zuroweste to prepare a defense to her statements on the jailhouse telephone call, which the state characterized as "an admission of guilt" and a "confession," the state had over a year to prepare its case against her. (Tr. 295-96). Ms. Zuroweste was left without adequate time to investigate the call or place the

call in context. (Tr. 182). She was left without time to address the new evidence by altering her theory of the case, which was destroyed by this "surprise" evidence. (Tr. 182). Likewise, she was left without time to prepare a sufficient defense based on mitigating evidence that may have been discovered with additional investigation. (Tr. 182). Moreover, due to the untimely disclosure of the telephone calls, Ms. Zuroweste did not have sufficient time to decide whether she might plead guilty or testify in her own defense. (Tr. 324). The untimely disclosure of the jailhouse telephone call thus resulted in fundamental unfairness to her.

1. The Late Disclosure Resulted in Fundamental Unfairness Because Ms. Zuroweste Was Unable to Place the Jailhouse Telephone Call in the Context of the Additional Calls That Were Not Disclosed Until the Morning of Trial

At the pre-trial hearing on Ms. Zuroweste's motion to exclude the telephone call, she argued that because her office was closed the Friday, Saturday, and Sunday following the state's disclosure of the telephone call at 4:40 p.m., on Thursday, she was "unable to seek out any further calls that may [have] put this call into context" or "offer any kind of evidence to counteract what the State will present to the jury[.]" (Tr. 19-20). Notably, the state had possession of the additional calls but failed to disclose them to defense counsel until the morning of trial. (Tr. 20-21).

In response, the state argued that although it had not disclosed any of the additional jailhouse telephone calls, "[t]here's nothing exonerating on the calls."

(Tr. 21). Having failed to disclose any of the additional calls, the state merely offered to make Ms. Zuroweste a disc of all of the additional calls the morning of trial. (Tr. 20).

Unlike the disclosure requirements under *Brady*, Rule 25.03 does not, however, provide that the state must only disclose any of defendant's statements that it deems to be "exonerating." *See Brady*, 373 U.S. at 87 (holding "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment[.]); *see also State ex rel. Clemons v. Larkins*, 475 S.W.3d 60, 78 (Mo. banc 2015) (holding that to prevail on a *Brady* claim, a defendant must show "the evidence at issue is favorable to him either because it is exculpatory or impeaching."). In contrast to *Brady*'s disclosure requirements, Rule 25.03 requires the state to disclose "*any* written or recorded statements and the substance of any oral statements made by the defendant."

Moreover, the prosecutor, who is seeking the defendant's conviction, is not in an ethical position to decide which evidence is relevant to the defendant and might be used to evade the defendant's conviction. Such "cherry picking" by the state thus subverts the purpose of Rule 25.03 to provide the defendant with his or her due process right "to prepare his case in advance of trial" and "prepare and meet what loom as the critical elements of the case against him." *Johnson*, 513 S.W.3d at 364.

Furthermore, it is not relevant that the single telephone call was disclosed 3 ½ days prior to trial and not merely on the eve of trial or during trial. The relevant inquiry is whether "there was a reasonable likelihood that the surprise prevented meaningful efforts by the defendant to consider and prepare a strategy for addressing the State's argument." *Johnson*, 513 S.W.3d at 365. Here, because the calls were disclosed immediately prior to a 3-day holiday weekend when defense counsel's office was closed, and contained inculpatory statements that the state called her "confession" and "admission of guilt," Ms. Zuroweste was prevented a "meaningful" opportunity to "prepare a strategy to for addressing the State's argument. (Tr. 14).

Accordingly, the untimely disclosure of the jailhouse telephone calls thus resulted in fundamental unfairness to Ms. Zuroweste because she was unable to properly investigate the additional jailhouse telephone calls.

2. The Late Disclosure Resulted in Fundamental Unfairness Because the Jailhouse Telephone Call was Not Merely Cumulative of Other Evidence Introduced at Trial

At the hearing on her motion for a new trial, the state argued that the telephone call was cumulative of other "consciousness of guilt" evidence presented at trial, such a video showing Ms. Zuroweste making "furtive movements" when she was stopped. (Tr. 324-35). The state relied on *Carlisle*, 995 S.W.2d at 522, to argue that "the time and presence of other evidence prevents fundamental unfairness" and "[h]ere the evidence . . . was cumulative to the other evidence that was presented and that was consciousness of guilt." (Tr. 322-23).

The state's argument – that Ms. Zuroweste's "furtive movements" and nervousness have the same evidentiary weight as what the state deemed as an "admission of guilt" and her "confession – is not persuasive.

In *Carlisle*, a defendant made both a written and an oral confession of her role in stealing a car. *Id.* at 519-520. Following the defendant's request for discovery, including "any written or recorded statements and the substance of any oral statements made by the Defendant," the state disclosed the defendant's oral confession. *Id.* at 520, 522. The state failed to disclose the written confession until the morning of trial, after voir dire. *Id.* at 520. The prosecutor claimed she did not previously know about the written statement. *Id.* Defense counsel moved for a continuance, which was denied. *Id.* The trial court instead granted the defense a half-day recess. *Id.*

The state did not contest that it had violated Rule 25.03 but argued that the late disclosure did not result in fundamental unfairness to the defendant. *Id.* at 520-21. The Eastern District agreed that because the trial court had granted a half-day continuance, which it reasoned allowed the defendant "enough time to deal with the evidence in the same manner had it been timely disclosed," and because the defendant's oral confession was "clearly duplicative of the evidence established by the oral confession," that the late disclosure was not outcome determinative. *Id.* at 522. In the case at bar, however, the jailhouse telephone call was not "clearly duplicative" of the video of the stop or of any other "consciousness of guilt" evidence presented at trial.

In *Henderson*, 410 S.W.3d at 764, the Eastern District acknowledged that a defendant's inculpatory statement is unlike other evidence. As such, "[t]he State's 'failure to produce a statement of the accused is in a different category from failure to disclosure a witness or a photograph." *Id.* "Because they carry such great weight with the jury, inculpatory statements demand disclosure, and a violation of the rule of disclosure requires examination with grave suspicion." *Id.* at 765; *see also id.* at 766.

Here, unlike in *Carlisle*, 995 S.W.2d at 522, the state did not have an additional "independent confession" from Ms. Zuroweste. As such, the state's reliance on *Carlisle* to argue that the other evidence introduced was "duplicative" of the jailhouse telephone calls strains the narrow holding in *Carlisle*. In fact, in *Carlisle*, the Eastern District acknowledged that "[t]here is substantial case law to support [a defendant's] position that late disclosure of a confession affects the outcome of a trial" and that "Missouri courts have consistently reversed convictions based on a defendant's statements that the prosecutor failed to disclose." *Id.* at 521. The Eastern District acknowledged that its holding in *Carlisle* was based on factual differences from previous cases. *Id.* at 522. Additionally, unlike in *Carlisle*, the record does not indicate that defense counsel was given any additional time to address the jailhouse telephone calls that the state disclosed on the morning of trial.

Moreover, although the state introduced the video of the traffic stop that allegedly showed Ms. Zuroweste's "furtive movements" and also introduced

Officer Beekman's testimony that Ms. Zuroweste cried when she was arrested, such "consciousness of guilt" evidence was weakened because the state also found two marijuana pipes in the car and charged her with possession of the pipes. (Tr. 205). Without Ms. Zuroweste's statements on the jailhouse telephone call, the jury could have believed that her side-to-side movements in the car were limited to an attempt to conceal the marijuana pipes, which were found in the pocket of a jacket draped over the driver's side seat and in her wallet in the front passenger seat. (Tr. 203, 209-10). Likewise, the jury could have believed that she was upset just because she was being arrested regardless of whether she was guilty of the charged offenses.

Given the weakness of this "consciousness of guilt" evidence, the state repeatedly relied on the jailhouse telephone call to argue that Ms. Zuroweste had knowledge of the trace amount of methamphetamine found in the orange baggy. The state quoted Ms. Zuroweste's statements from the telephone call repeatedly during opening argument, arguing that her words were a confession to her friend that she was using methamphetamine and that her silence in disclaiming her charge of possession of methamphetamine indicated her guilt. (Tr. 182). The state then admitted and published the call during trial. (Tr. 250). During closing argument, the state again repeatedly quoted Ms. Zuroweste's statements from the telephone call, and twice called her statements on the call "an admission of guilt." (Tr. 295-96). The state argued, "She's talking about methamphetamine [on the call]. And this is how you hold her responsible." (Tr. 298). The state then

encouraged the jury to request to hear the telephone during deliberations. (Tr. 305).

Moreover, even if *en arguendo* other evidence "strongly implicate[d] [Ms. Zuroweste], . . . this does not absolve the State of its duty to disclose statements to the defendant." *Henderson*, 410 S.W.3d at 765. "If clear violations are condoned, then any unfairness, even the defendant's due process rights, can be swept aside by saying the evidence against the convicted person was so strong there would be no change in the outcome." *Id.; see also Willis*, 2 S.W.3d at 809. To this point, in *Willis*, the Western District notes Judge Somerville's admonishment that improperly admitted evidence should "never been declared harmless unless it can be said to be so without question, and that in order to declare so the record should demonstrate that the jury disregarded or was uninfluenced by the improper evidence." *Willis*, 2 S.W.3d at 809 (quoting *State v. Charles*, 572 S.W.2d 193, 199 (Mo. App. 1978).

Here, no other evidence strongly implicated Ms. Zuroweste's guilt that she had knowledge of the trace amount of methamphetamine. The methamphetamine that was found in the orange baggy was so scant that it weighed nothing when tested. (Ex. 7). Moreover, the trace amount of methamphetamine had been completely rinsed from the baggy during testing such that the jury was only presented with an empty baggy. (Tr. 241).

As such, this Court cannot find that the improper admission of the telephone call was "harmless," i.e, that the jury disregarded or was uninfluenced

by the telephone call. *Id.* In this case, not only did the state repeatedly rely on the telephone call in its attempt to prove Ms. Zuroweste's knowledge of the trace amount of methamphetamine, characterizing the call as a "confession" and an "admission of guilt," it encouraged the jury to request a replaying of the telephone call during deliberations, which it did. *See State v. Zetina-Torres*, 400 S.W.3d 343, 357 (Mo. App. 2013) (holding the fact the jury requested some of the late disclosed evidence supports the defense's argument that this newly discovered evidence may have had an impact on the outcome of the trial, thus establishing prejudice."). Under these facts, the state's violation of Rule 25.03 resulted in fundamental unfairness to Ms. Zuroweste.

3. The Late Disclosure Resulted in Fundamental Unfairness Because Ms. Zuroweste Did Not Have Sufficient Time to Adequately Prepare a Defense to the Telephone Call

As acknowledged by the state, the central question in Ms. Zuroweste's trial was whether she knew that the orange plastic baggy found in her car contained a trace amount of methamphetamine. Although Officer Beekman and Officer Krey testified that they observed a white powdery residue in the bag, the methamphetamine in the baggy had no weight when tested, and when presented to the jury the baggy no longer contained any methamphetamine. (Tr. 197, 207, 241, 294). As evidenced by defense counsel's cross-examination of Mr. Krey and its closing argument, the defense's theory of the case was that Ms. Zuroweste did not know that the trace amount of methamphetamine was in the orange baggy because she could not see it.

During Ms. Zuroweste's cross-examination of Mr. Krey, she asked him whether the lab report indicated that there was a "trace amount" of evidence and whether this meant that there was "no measurable weight." (Tr. 244). Mr. Krey responded that this was correct and that "[t]race in [his] laboratory is defined as less than zero point one grams." (Tr. 244). Then, during closing argument, defense counsel argued that the state did not prove beyond a reasonable doubt that Ms. Zuroweste knew about the trace amount of methamphetamine in the baggy because the baggy presented to the jury showed that "there was nothing there," because the substance was so scant that it could not even be measured, and because such a baggy was easily overlooked in her messy car. (Tr. 298-99). Defense counsel argued that when Ms. Zuroweste was stopped by Officer Beekman that she was not aware of the methamphetamine "because you can't even see it. You can't even see it." (Tr. 300).

The state used Ms. Zuroweste's statements on the jailhouse telephone call to directly contradict her theory that she could not see the trace amount of methamphetamine in the orange baggy. These statements were "damning documentary evidence" that she knew the baggy contained methamphetamine. *See Henderson*, 410 S.W.3d at 766. Yet the state argued that by disclosing the telephone call at 4:40 p.m., on a Thursday before a holiday, it provided defense with sufficient time to investigate the telephone call and employ a new trial strategy—even though it acknowledge prior to trial that it failed to disclose any of the additional jailhouse telephone calls. *See id.*

In so arguing, the state appears to invite defense counsel to provide an indigent defendant with ineffective assistance of counsel. For example, had the state timely disclosed the telephone calls and had Ms. Zuroweste's defense counsel failed to listen to the calls until it was too late to investigate them, this Court would likely find that defense counsel's representation "fell below an objective strategy of reasonableness" insofar as "counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances." *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Although here the state is at fault for untimely disclosing the evidence, the state's late disclosure of a defendant's statements should not force a defense attorney to prepare for a client's trial in a manner that a Court would usually find to be unreasonable and ineffective under the *Strickland* standard. *See id.*

Additionally, the state argues that the late disclosure of the telephone call was not outcome determinative although the call was disclosed at 4:40 p.m., before a 3-day holiday weekend because "[obviously] . . . we all work over weekends when we have a trial that starts on Monday." While the state merely speculated that defense counsel intended to work over the 3-day holiday weekend before trial, the record is silent on this issue. Moreover, even if she intended to work, the state's violation of Rule 25.03 should not require defense counsel to abandon her intended trial preparation over the weekend and scramble to react to the state's late disclosure of inculpatory evidence that was characterized as Ms. Zuroweste's "confession." Additionally, the state's argument, in effect, takes the

contrary positions that defense counsel was so busy she would have already been planning to work the weekend before trial, but at the same time, suggests defense counsel had so little to do she would have sufficient time to revamp her entire trial strategy.

Moreover, as argued above, under the facts in this case, defense counsel lacked any opportunity to address the new evidence when the state failed to disclose *all* the jailhouse telephone calls made by Ms. Zuroweste and defense counsel could not conduct any additional investigation because her office was closed over the 3-day holiday weekend. (Tr. 323). Ms. Zuroweste's genuine surprise at learning of the state's plan to use this evidence at trial, coupled with her inability to investigate the context of the single jailhouse call or any other mitigating evidence during the 3-day holiday weekend when her office was closed, resulted in "at least a reasonable likelihood that the surprise prevented meaningful efforts by the defendant to consider and prepare a strategy for addressing the State's evidence." *Johnson*, 513 S.W.3d at 365.

4. **The Late Disclosure of the Jailhouse Telephone Call Resulted in Fundamental Unfairness Because Ms. Zuroweste Did Not Have Sufficient Time or Sufficient Information to Decide Whether to Plead Guilty or Testify at Trial**

Without adequate time to review the entirety of the jailhouse telephone calls and investigate whether any mitigating evidence could be presented, defense counsel argued that Ms. Zuroweste did not have sufficient time to consider whether she should testify at trial or whether she should take the plea agreement

offered by the state. Defense counsel testified that Ms. Zuroweste "might have chosen to testify in her own defense but because she didn't have time to make that consideration and we didn't have time to go over [the calls] then she doesn't have, I think, a fair trial." (Tr. 324).

Although Ms. Zuroweste testified that she did not wish to plead guilty to possession of methamphetamine and did not wish to testify at trial, a defendant should not be forced to hastily make such weighty decisions in a 3 ½ day period due the state's failure to timely disclose evidence. (Tr. 24, 255). Nor should a defendant be forced to make such decisions without full knowledge of the discoverable evidence she had requested. The state's violation of Rule 25.03 thus resulted in fundamental unfairness to Ms. Zuroweste.

Accordingly, because the state violated Rule 25.03 and because the late disclosure of the evidence resulted in fundamental unfairness to her, the trial court erred in overruling her motion to exclude the jailhouse telephone call and in admitting the call and related testimony into evidence at Ms. Zuroweste's trial.

CONCLUSION

Because the state violated Rule 25.03 and this violation created fundamental unfairness to Ms. Zuroweste, Ms. Zuroweste's conviction for possession of a controlled substance must be reversed. Ms. Zuroweste respectfully requests this Court to remand this case for a new and fair trial. Under the facts in Ms. Zuroweste's case, where the state intentionally failed to comply with the disclosure requirements under Rule 25.03, Ms. Zuroweste requests this Court to order the jailhouse telephone calls excluded as a sanction for the state's Rule 25.03 violation.

Respectfully submitted,

/s/ Carol Jansen

_____

Carol D. Jansen, Mo. Bar No. 67282
Attorney for Appellant
Woodrail Centre
1000 West Nifong
Building 7 Suite 100
Columbia, Missouri 65203
(573) 777-9977
Fax (573) 777-9974
Email: Carol.Jansen@mspd.mo.gov

Certificate of Compliance and Service

I, Carol D. Jansen, 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 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 10,388 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 1st day of October, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Evan Buchheim, Assistant Attorney General, at Evan.Buchheim@ago.mo.gov.

/s/ Carol Jansen

_____

Carol D. Jansen, Mo. Bar No. 67282