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 REPLY 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*:**

RULES:

OTHER:

ARGUMENT

I. Rule 25.03 imposes an affirmative requirement of diligence and good faith on the state to locate records in the control of other governmental personnel

Rule 25.03(A) requires the state, upon the written request of the defendant, to disclose "[a]ny written or recorded statements . . . made by the defendant[.]" Rule 25.03(C) further requires the state to "use diligence and make good faith efforts to cause such materials to be made available to defense counsel" if the requested materials are discoverable under the Rule and are "in the possession or control of other governmental personnel."[1] The state has the burden to show its "search [for materials in the possession of other governmental personnel] was diligent." *Merriweather v. State*, 294 S.W.3d 52, 56 (Mo. banc 2009). Despite the plain language of the rule and this Court's precedent in *Merriweather*, the state failed to show it made *any* attempt to locate Ms. Zuroweste's jailhouse telephone calls prior to the last business day before trial, nearly 5 months after defense counsel's motion for discovery. (Supp. L.F. 1).

A. Discovery of jailhouse telephone calls by the state is routine. Here, the prosecutor did not use diligence and good faith efforts to make the jailhouse telephone calls available to the defense

Danielle Zuroweste was arrested on September 21, 2015. (L.F. 6). She was then booked and detained in the Warren County jail, where she was held until she posted bond two weeks later, on October 5, 2015. (L.F. 1-2; Tr. 202-04, 275-

[1] A nearly identical provision is included in subsection (h) in the amended version of Rule 25.03.

26). On September 25, 2015, at 7:29 p.m., while still in the Warren County jail, Ms. Zuroweste made a telephone call to a friend. (Tr. 249, Ex. 8). The call was recorded. (Ex. 8).

There was nothing unique about Ms. Zuroweste's use of the jail's telephone system. The state, in fact, concedes that the recordings of Ms. Zuroweste's calls from jail were a "routine, administrative act by the Warren County Sheriff's Office, which recorded the calls of every jail inmate." (Resp. Br. 22). Moreover, such calls are routinely used to prosecute defendants.

Yet, in its Respondent's brief, the state attempts to excuse the prosecutor's lack of diligence and good faith efforts to obtain the calls on the premise that the prosecutor somehow did not know such calls existed prior to Thursday, November 10, 2016, at 4:40 p.m. (Resp. Br. 24-25). This argument contradicts the record before this Court, defies common sense, and does not comport with the requirements of Rule 25.03.

First, at trial, the state did not argue it was unaware of the calls. Instead, the state argued it did not request the calls earlier because it was "difficult to juggle the trial docket" and because it "doesn't know what case is going sometimes until days before[.]" (Tr. 16). Significantly, the state did not assert it was unaware of the *availability* of the calls – only that it was unaware the calls contained inculpatory evidence until it finally requested and reviewed them on the Thursday before trial. As such, the record does not support the state's last-minute

attempt to recast its violation of Rule 25.03's diligence and good faith requirements as mere ignorance of the existence of the telephone calls.

Second, given that jailhouse telephone calls are routinely recorded and routinely requested by the prosecution, the state concedes "[t]he prosecutor's apparent request for Defendant's jail-call recordings may demonstrate that he was aware of the possibility that such a recording might exist." (Resp. Br. 24). The state's suggestion to the contrary – that the availability of recorded jailhouse telephone calls was "unknown" to an experienced prosecutor – is not believable. (Resp. Br. 23-25). Moreover, "the duty to disclose includes not only information actually known to the prosecutor, but also information that she may learn through reasonable inquiry." *State v. Henderson*, 410 S.W.3d 760, 765 (Mo. App. 2013). Given the routine use and availability of such phone calls, the prosecutor could have learned about the calls through "reasonable inquiry."

Most importantly, however, the record shows that the state's failure to use diligence and make good faith efforts to cause these calls to be made available to defense counsel stems not from its lack of awareness of the calls but from its misunderstanding of Rule 25.03. At trial, the state attempted to excuse its conduct by claiming it only had a duty to turn over "any evidence the State has that it intends to use against the defendant." (Tr. 20). Based on this misunderstanding of the law, the state argued it complied with discovery rules because it turned over the telephone call "as soon as the State got the evidence[.]" (Tr. 17, 20).

But, the state did not disclose the single telephone call *as soon as* it got it. Instead, once the state obtained all of Ms. Zuroweste's jailhouse telephone calls, the state first took the time to listen to all of the calls, then took more time to decide which calls were useful to its prosecution of Ms. Zuroweste, and only once it was certain of its trial strategy, did the state finally disclose the single telephone call to defense counsel.

Although the state may have disclosed the telephone once it determined the telephone call was *inculpatory*, Rule 25.03 requires the state to use diligence and make good faith efforts to make *any* of the defendant's written or recorded statements available if they are possessed or in the control of other governmental personnel. Rule 25.03 neither requires nor allows a prosecutor to *only* disclose those recorded statements that are inculpatory.

Consequently, in contrast to the prosecutor's argument that it could not comply with the Rule because it was juggling trial dockets and did not know which cases were going to trial, compliance with Rule 25.03 requires little time or effort by the state and should not be affected by such factors. To comply with Rule 25.03's requirement to disclose the recorded statements made by the defendant while in jail, the state needed only to make a routine administrative request to the jail and subsequently provide copies of any calls to defense counsel once the calls were provided by the jail. Because the prosecutor did not need to review the calls before disclosing them, a prosecutor's busy trial docket would not

affect the state's ability to use diligence to request or disclose this type of discovery.

B. Pursuant to Rule 25.03, defense counsel properly requested discovery of the jail house phone calls by filing its discovery motion

Supreme Court Rules are interpreted using the same established standards as statutory interpretation. *State v. Feldt*, 512 S.W.3d 135, 149 (Mo. App. 2017). "The Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *State v. Ajak*, 543 S.W.3d 43, 52 (Mo. banc 2018). Additionally, "[i]n construing a statute, courts cannot 'add statutory language where it does not exist'; rather, courts must interpret 'the statutory language as written by the legislature.'" *Peters v. Wady Indus., Inc.*, 489 S.W.3d 784, 792 (Mo. banc 2016). Despite these well-known canons of interpretation, the state attempts to add exceptions to Rule 25.03 in an effort to excuse its failure to disclose Ms. Zuroweste's jailhouse telephone call.

The state argues its duty under Rule 25.03 was excused because defense counsel could have requested a copy of the jail house telephone calls. (Resp. Br. 24). But the plain language of Rule 25.03 imposes a broad duty on the state to obtain and disclose such records to the defense. Rule 25.03 has no language that hints at an exception to the state's broad duty to use diligence to try to obtain these records. Additionally, Rule 25.03 contains no language suggesting the state's duty to locate and disclose records in the control of other governmental personnel exists only for those records *unavailable* to defense counsel by other means. Nor does

the rule contain any language suggesting the state's affirmative duty under the rule is limited to records *unknown* to the defendant.

Based on the plain language of Rule 25.03, this Court should decline to follow any precedent from the Court of Appeals suggesting the state must only comply with Rule 25.03 if the requested discovery is *unavailable* and *unknown* to the defense. Although the state may take umbrage to Rule 25.03's broad discovery requirement, its compliance with the Rule is nonetheless mandatory. *State v. Willis*, 2 S.W.3d 801, 806 (Mo. App. 1999).

C. The state willfully violated Rule 25.03

The state contends even if it violated Rule 25.03 its violation was not "willful" because it "fulfilled [its] duty under the discovery rules to supplement the discovery disclosure when [it] became aware of the previously unknown information and material." (Resp. Br. 26). Without citation to precedent, the state contends "[t]he relevant inquiry in determining *whether* a discovery violation occurred is when the State came into possession of the recording in relation to when the recording was disclosed to defense counsel." (Resp. Br. 26). In so arguing, the state neglects Rule 25.03(C)'s requirement to use "diligence" to search for records possessed by or in the control of other governmental personnel and instead asserts that the state cannot "willfully" violate Rule 25.03 so long as it discloses the discovery soon after receiving it.

The state's argument fails for two reasons. First, no Missouri precedent suggests that a violation of Rule 25.03 occurs only if the state *willfully* violates the

Rule. Instead, under Rule 25.18, whether the state's violation of a discovery rule is "willful" relates to the remedy for the violation and not the violation itself.

Secondly, even if a discovery violation only occurs if the state willfully violates Rule 25.03, under the facts in this case, the state willfully violated the Rule. Webster's Third New International Dictionary defines "willful" as "done deliberately: not accidentally or without purpose: intentional; self-determined." Webster's Third New International Dictionary of the English Language 2617 (3d ed. 2002). As such, a "willful" violation need not be done in "bad faith."

The state is correct there is no evidence the prosecutor withheld the jailhouse telephone call once it reviewed the calls, found an inculpatory call, and decided to use the telephone call at trial. But, as argued above, the state admitted it failed to use "diligence" to search for the calls to accommodate the prosecutor's busy and uncertain trial schedule. (Tr. 16). As such, even if the prosecutor's failure to comply with Rule 25.03 was not done in bad faith, i.e., with a intent to purposely sabotage the defense, the prosecutor "willfully" violated Rule 25.03 by delaying its request for the jailhouse telephone calls until the state had time in its schedule to review the calls. Under this definition, the prosecutor's violation of the Rule was "willful."

D. Conclusion

Although Rule 25.03 imposed an affirmative duty on the state to use diligence and good faith efforts to obtain Ms. Zuroweste's statements that were

possessed by other governmental personal, the state failed to use diligence to request and obtain Ms. Zuroweste's jailhouse telephone calls. The record shows the state's lack of diligence in requesting the telephone calls was not due to its unawareness of the calls but was done solely to accommodate its own schedule and desire to review the telephone calls before disclosing them. Rule 25.03 does not, however, allow a prosecutor's busy trial schedule or desire to review calls as an exception to compliance with the Rule. Accordingly, the state did not meet its burden to show it used diligence and good faith efforts to search for the jailhouse telephone calls and make them available to defense counsel. With no recognized exception for its noncompliance, the state's untimely disclosure of the jailhouse telephone calls violated Rule 25.03.

II. The trial court erred in failing to remedy the state's untimely disclosure of what the state repeatedly called Ms. Zuroweste's "confession" and "admission of guilt," which resulted in fundamental unfairness

Prior to trial, Ms. Zuroweste filed a motion to exclude the jailhouse phone calls. (L.F. 26). In this motion, Ms. Zuroweste's defense counsel requested the trial court to "preclude the introduction of the jail phone call made by Defendant on September 26, 2015 at 7:29 p.m. and any and all testimony relating to that telephone call . . . *or any such relief this Court deems necessary*." (L.F. 26) (Emphasis added). Yet, in contradiction to the record before the Court, the state asserts defense counsel only sought the complete exclusion of the jail-call recording from evidence. (Resp. Br. 27-29).

In fact, defense counsel invited the trial court to fashion a remedy of its choice not once, but twice. (L.F. 26-27). In support of her request for relief, defense counsel stated, "Pursuant to Rule 25.18, when a party fails to comply with an applicable discovery rule or an order issued thereto, the Court may exclude such evidence *or enter such other order as it deems just under the circumstances*." (L.F. 27) (Emphasis added). In light of defense counsel's request for relief other than the exclusion of the call, the state's argument that defense counsel "waived" any objection to the late disclosure of the telephone call by failing to request anything other than the call's exclusion, is without merit. (Resp. Br. 41-43).

Moreover, under Rule 25.18:

> If any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to make disclosure of material and information not previously disclosed, grant continuance, exclude such evidence, or enter such other order as it deems just under the circumstances. Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

As such, under Rule 25.18, the trial court's remedy for a discovery violation is not limited to the remedy proposed by any party but rests in the trial court's sound discretion. Yet, the trial court failed to exercise its authority under Rule 25.18 to order any remedy to the state's violation of Rule 25.03, despite acknowledging that the telephone call may have affected Ms. Zuroweste's decision to plead guilty or testify. (Tr. 17, 21). The trial court's failure to remedy the late disclosure of Ms. Zuroweste's "confession" and "admission of guilt," and

the admission of this phone call and related evidence at trial, resulted in fundamental unfairness.

A. The state's violation resulted in fundamental unfairness because 3 days and 7 hours,[2] only 20 minutes of which were business hours, was not sufficient to "devise a strategy" to negate Ms. Zuroweste's "confession"

The state admits defense counsel's strategy at trial "was to argue that the State failed to prove knowing possession of the baggy of methamphetamine residue found on the floorboard." (Resp. Br. 28). Although the state acknowledges defense's strategy, and, thus, impliedly acknowledges that the late disclosed "confession" was "damning" evidence against defense's theory, it contends defense counsel had "*ample* time . . . to consider this evidence in formulating a [new] defense strategy" and "sufficient" time "to ameliorate any effect from an untimely disclosure." (Resp. Br. 36, 43) (Emphasis added).

This Court has held, "[t]he purpose of discovery is permit the defendant a *decent* opportunity to prepare in advance for trial and avoid surprise." *State v. Mease*, 894 S.W.2d 98, 108 (Mo. banc 1992) (emphasis added). "The focus of a denial of discovery is whether there is a reasonable likelihood that denial of discovery affected the result of the trial." *Id.* "When the trial court declines to impose a sanction, [the reviewing court] must determine whether the State's violation resulted in fundamental unfairness or bore a real potential for

[2] The state repeatedly claims defense counsel had "4 days" to consider the evidence. (Resp. Br. 29, 34, 38). This does not accord with the record before this Court.

substantively altering the outcome of trial." *State v. Johnston*, 957 S.W.2d 734, 750 (Mo. banc 1997). "Fundamental unfairness occurs in discovery violation cases when the State's failure to disclose results in defendant's genuine surprise at learning of an unexpected witness or evidence and the surprise prevents *meaningful* efforts by the defendant to consider and prepare a strategy for addressing the state's evidence." *Id.* (emphasis added).

In her opening brief, Ms. Zuroweste details myriad ways in which defense counsel's inability to prepare a new defense and investigate the context of the late disclosed calls likely altered the outcome of trial. (App. Br. 32-44). In response, the state flippantly counters that 3 days and 7 hours, over a holiday weekend when defense counsel had no access to her investigator or other support staff, provided Ms. Zuroweste's defense counsel "ample" and "sufficient" time to formulate a new defense to what the state repeatedly called Ms. Zuroweste's "admission of guilt" and "confession." (Resp. Br. 38). The state argues Ms. Zuroweste "cannot create fundamental unfairness by claiming that the evidence was overly incriminating without showing how the timing of the disclosure affected the result of trial." (Resp. Br. 38).

Yet, Ms. Zuroweste has shown that the timing of the disclosure affected the result of trial. At the pretrial hearing on defense counsel's motion to exclude the evidence, defense counsel argued 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). Although the state faults

defense counsel with offering only "an unspecified claim that she was unable to prepare a defense to the recording" and unable to fully investigate the calls, the state's dismissal of defense counsel's statements is misguided given that defense counsel's lack of a concrete plan to specifically address the "confession" was directly related to the state's violation of Rule 25.03 and late disclosure of the call. (Resp. Br. 28).

For example, on the telephone call Ms. Zuroweste mentioned "Ryan." (Ex. 8). Ms. Zuroweste said Ryan introduced her to "it," that she knew it was "wrong," and that she shouldn't be doing "it." (Ex. 8). With only 3 days and 7 hours available to investigate "Ryan," it would be unlikely defense counsel could locate or interview him without the assistance of her investigator and with other trial preparation looming. Nor would it be likely defense counsel could locate or interview the friend whom Ms. Zuroweste called from jail. Given that both marijuana and a plastic baggy with methamphetamine residue were found in Ms. Zuroweste's car, further investigation could have provided context to Ms. Zuroweste's call. The state's violation of Rule 25.03 foreclosed this opportunity.

This Court has held "the truth is best revealed by a decent opportunity to prepare in advance of trial," and, therefore, it "strive[s] for best practices which will best promote the quest for truth." *State v. Scott*, 479 S.W.2d 438, 442 (Mo. banc 1972). The state's position that the 3 days and 7 hours during a 3-day holiday weekend when defense counsel's office was closed and support staff was

unavailable was "ample" time to prepare a defense against the late disclosed telephone call assaults this Court's principle that litigation is "the quest for truth."

In contrast, instead of promoting a "quest for truth," the state's position that this "eleventh hour" disclosure still provided "ample" and "sufficient" time to the defense, promotes a disregard for defense counsel's time and a disrespect for the importance each criminal proceeding has for the individual defendant who is facing a loss of his or her liberty. This Court should decline to promote such principles.

B. The late disclosure resulted in fundamental unfairness because Ms. Zuroweste did not have sufficient time to decide whether to plead guilty

Having granted the state's motion to endorse the foundational witness for the jailhouse telephone calls and overruled Ms. Zuroweste's motion to exclude the jailhouse telephone call, the trial court immediately inquired into Ms. Zuroweste's decision not to plead guilty. (Tr. 21). The following exchange occurred:

Court: So my understanding is an offer was made, Miss Zuroweste, that – Did you say it was treatment court?

State: We'd offered treatment court back, back last summer I believe in June your Honor.

Court: And you understand what treatment court is; correct?

Defendant: Yes, sir.

Court: And if you were to go into treatment court, and I would follow that recommendation, if you went into treatment court and you successfully made it through you'd be able to come back and withdraw your plea of guilty and the charge would be dismissed by the State; you understand that?

Defendant: Yes, sir.

Court: The felony charge would be dismissed.

Defendant: Yes.

Court: And you understand if you go forward with trial today they're not gonna make that recommendation and that – I'm assuming they are not gonna make that recommendation if you were found guilty to me, that's off the table at this point. Then you could be subject to up to seven years in the State penitentiary; you understand that?

Defendant: Yes, sir.

Court: And you wish to reject that –

Defendant: Yes, sir.

Court: -- recommendation and proceed to trial today?

Defendant: Uhm, can I ask something?

Court: Yes.

Defendant: A lot of the reason why I said no to drug court is because I live two hours away and I know that I – I'm a single mom with two, their father passed away. I know that I cannot –

Court: Where do you live?

Defendant: In Imperial.

Court: Imperial, Missouri.

Defendant: I know that I cannot fulfill it.

Court: Were we allowed to transfer it to Imperial?

State: I'm not certain. I honestly don't know, Judge. If I'd known that was the sticking point certainly that's something we would have addressed. I'd also point out, you know, I don't

> know what a[] SAR would say so I don't want to make an official rec, but defendant doesn't have a criminal history. This seems to be the type of thing that would not result in a conviction typically.

(Tr. 21-23).

Following this exchange, the state suggested it would "consider" a suspended imposition of sentence "dependent on how the defendant [did] on the [sentencing assessment report]." (Tr. 21-23.). Although the state suggested it would "consider" a suspended imposition of sentence, it made no firm offer of this sentence. Ms. Zuroweste chose not to plead guilty following a brief discussion with her defense counsel. (Tr. 24).

The state argues Ms. Zuroweste had sufficient time to consider whether to accept the state's previous offer of treatment court because she had "four days after the disclosure" to consider the state's offer. (Resp. Br. 30). As shown by the record, Ms. Zuroweste strongly suggested she would plead guilty to treatment court if she could remain in Imperial where she resided with her two children. (Tr. 22-23). The state admitted it did not have time to address this. (Tr. 23).

Had the state complied with Rule 25.03's requirement to use "diligence" to search for the jailhouse telephone calls, the telephone calls would have been timely disclosed to defense, and Ms. Zuroweste and the state could have found out if Ms. Zuroweste could have attended drug court in Jefferson County. In the alternative, had this option not been possible, with more time to consider the effect the untimely disclosed telephone calls may have had at trial, Ms. Zuroweste may

have been able to make arrangements to move back to Warren County to attend treatment court. These options were foreclosed due to the state's violation of Rule 25.03, which resulted in fundamental unfairness. Moreover, such a holding may implicate defendant's due process rights to a speedy trial.

C. Defense counsel did not waive any objection to the late disclosed telephone calls by failing to request a continuance

The state repeatedly suggests defense counsel cannot complain of fundamental unfairness from the state's violation of Rule 25.03 because defense counsel did not expressly request a continuance. (Resp. Br. 34, 39-43). As stated above, defense counsel's motion to exclude the evidence requested the trial court to "preclude the introduction of the jail phone call made by Defendant on September 26, 2015 at 7:29 p.m. and any and all testimony relating to that telephone call . . . *or any such relief this Court deems necessary*." (L.F. 26). Additionally, under Rule 25.18, the trial court had authority to order a continuance to remedy the state's violation of Rule 25.03.

Additionally, even should this Court consider defense counsel failure to *expressly* request a continuance at the pretrial hearing on her motion to exclude, this Court should decline to hold this against her under the facts of this case, where the state willfully violated Rule 25.03 in order to best accommodate its own schedule to review the jailhouse telephone calls. *See State v. Johnson*, 513 S.W.3d 360, 368 (Mo. banc 2016); *Henderson*, 410 S.W.3d at 766. When the state has willfully violated discovery rules, which in this case resulted in the "eleventh

hour" disclosure of the defendant's "confession" and "admission of guilt," a holding that defense counsel must attempt to remedy the state's willful violation by expressly requesting a continuance or fear "waiving" its objection to the state's violation effectively eviscerates the Rule. Under such a holding, the state would have no incentive to comply with the Rule knowing defense counsel must request a continuance.

III. This Court should exclude the jailhouse telephone calls as a sanction to the state's willful violation of Rule 25.03

"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." *Henderson*, 410 S.W.3d at 764. Rule 25.18 further provides, "Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court." Should this Court find the state violated Rule 25.03 and that this violation created fundamental unfairness, this Court must decide the appropriate sanction the trial court should have imposed.

Rule 25.03(C) required the state to use "diligence and good faith efforts" to obtain and disclose the telephone calls. In *Johnson*, the Western District Court of Appeals found the state violated the Rule and created fundamental unfairness when it "acted deceptively or in bad faith, with the intention to disadvantage the defendant." 513 S.W.3d at 369.

In many ways, this case is the companion case to *Johnson*. Here, the state may not have acted in "bad faith." Instead, the state acted with a willful lack of diligence – solely to accommodate its own schedule and without regard for the requirements of Rule 25.03 or the needs of the defense. Moreover, although the state congratulates itself on "only" disclosing one 5-minute telephone call on the eve of trial instead of the nearly 24-hours of calls that were disclosed late in *Johnson*, this "good fact" exists only because the state in the case at bar completely disregarded Rule 25.03's requirement to disclose "any" statements of the defendant and choose only to disclose that statement it intended to use at trial. (CITE Resp. Br. 26, 43).

Here, as in *Johnson*, such a "blatant discovery violation . . . is inexcusable, [and] should not be repeated." 513 S.W.3d at 368. As such, should this Court find the state violated Rule 25.03, this Court should further hold the trial court erred in not excluding the evidence as a sanction under Rule 25.18. In the alternative, should this Court merely remand for a new trial with the late disclosed evidence still admissible, the state's willful violation of the Rule will be implicitly condoned and such blatant violations will likely continue.

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 willfully 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 reply 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 4,863 words, which does not exceed twenty-five percent of the 31,000 words (7,750) allowed for an appellant's reply brief. On this 26th day of November, electronic copies of Appellant's Substitute Reply Brief 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