IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
APPELLANT,	)	
	)	
vs.	)	**No. SC84452**
	)	
CECIL L. BARRINER,	)	
	)	
RESPONDENT.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF WARREN COUNTY
TWELFTH JUDICIAL CIRCUIT
THE HONORABLE EDWARD D. HODGE, JUDGE

APPELLANT'S REPLY BRIEF

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CLARIFICATION OF FACTS

Appellant offers the following clarification of facts. There was no evidence that "*telephones* in the living room were missing" (Resp.Br.17). Debbie Dubois testified that the phone in the living room was not in its usual place, and a phone cord in Irene's room had been "pulled out and no phone [was] attached (T579-80, 785-86). In Candi's room, there was "part of the telephone" that had been torn (T799). Three telephones were seized from Cecil's home (Resp.Br.22; T827,885). The phones were never identified as phones from the Sisk household (T885).

Officer Hinesly examined the VCR's that Kevin Dennis received from Cecil; they did not match the brand of the VCR missing from the Sisk home (Resp.Br. 19-20; T1128). When introduced himself to Cecil, Officer Hinesly did not merely say he was conducting an investigation (Resp.Br.19). Officer Hinesly said he "was investigating the murder of Candi Sisk" and Cecil asked, "Candi is dead?" (T094). The second time that Officer Hinesly interviewed Cecil, he did not simply tell Cecil "that his story had not checked out" and describe other

information that the "police had discovered over the previous twenty-four hours" (Resp.Br. 20). Officer Hinesly "was past the point of wanting to know the who, what, when, and where" of the murders; "at that point" Hinesly "felt [Cecil] was definitely involved" and "was really, basically, there to listen to why it occurred" (T1107).

The notes and testimony of the chemist who did the DNA analysis indicated that the DNA results on the Barriner's car driver's side door handle showed the sample "was consistent with being a mixture of Irene Sisk's blood" and another person's blood (Resp.Br.23, T957-59). The notes actually stated that the sample "could be" or "might be" a mixture of more than one person's DNA; the notes indicated it was also possible that the sample "could not be" or "might not be" a mixture of more than one person's DNA (T963, 966-67). The chemist could not determine the source of the DNA: it could have been from blood on the handle, but it could also have been from someone who touched the door handle before or after the spot of blood was left on the handle (T936). The blood on the handle might not have been human blood (T931); other spots on the Barriner's car were tested and identified as deer blood (T927-28).

REPLY ARGUMENT

(Replying to Respondent's Argument Point 1)

Respondent's argument -- that the trial court did not err in excluding evidence that hair seized from, on, and around the victims did not match Cecil or the victims because the offers of proof failed to demonstrate the relevance and materiality of this evidence -- must fail because: 1) at trial the state admitted that the hairs did not match Cecil or the victims; 2) the record clearly shows that the trial court and the prosecutors understood that the state's objection was to the defense eliciting evidence that the hairs did not match Cecil or the victims, and the court expressly so stated in sustaining the state's objection; and 3) the offer of proof in this case was more than adequate in that a) it showed the existence of exculpatory evidence -- seized hairs seized from the crime scene that did not match the defendant, b) in reviewing an offer of proof, the appellate court considers all pertinent portions of the record and does not excise non-testimonial statements made by the parties or the judge, and c) an offer of proof need not disprove potential rebuttal evidence.

The state conceded at trial that the hair seized from the crime scene, from

Candi, and from Irene did not match Cecil, Candi or Irene. The state, having argued at trial that the hair evidence was not admissible because "[there has been no connection of the hair evidence in any of this ***to any individuals connected in this case***" (T859; emphasis added), having failed to disagree when defense counsel argued that hair that was "seized from the scene, sent to the lab, compared with the Defendant, and ruled to exclude the Defendant and the victims... is exculpatory" (T860), and having failed to clarify, object, or correct the judge when he "sustain[ed]" the state's "motion in limine" and ordered defense counsel "not to offer evidence that certain hair samples that were retrieved were not related to either the Defendant or the victims" (T861), now tries to convince this Court that the hair evidence was correctly excluded because at the offer of proof "the evidence did not show that hairs seized from around the bodies of Candy or Irene were excluded from belonging to either of them" (Resp.Br. 25).

Despite affirmatively stating at trial that the hairs did not match ***anyone*** in the case (T859), respondent now, for the first time in the history of this case, claims that "[t]e proposed evidence did not exclude the victims themselves" and there is a "likely possibility" that "the hairs found on Candy's thigh and in

the knots used to tie Irene's hands" belonged to the victims" (Resp.Br. 31). Notwithstanding a complete lack of evidentiary support, respondent argues that the evidence was correctly excluded because the evidence did not show that the seized hairs were not dog hairs (Resp.Br. 31).

Respondent belatedly attempts to justify the exclusion of the hair evidence at trial (and neutralize its admission that the hairs seized at the scene did not match ***anyone*** in the case) on the theory that the hairs might have matched Candi and Irene because, according to respondent, the offer of proof did not show that the hairs did not match Candi and Irene. This disingenuous argument is refuted by respondent's own admission at trial that the hairs did not match ***anyone*** in the case and by its previous failure -- at and before both trials -- to present this theory as a basis for excluding the evidence.

Before the first trial, the state filed moved to preclude the defense from arguing, based on fingerprints that were found by the state but not tested, that the "there are other suspects or other persons" who had committed the crime ... without satisfying the evidentiary prerequisite that they tie that other suspect to the crime scene somehow" (PrevLF10; PrevT174-75). In response to the motion, defense counsel pointed out that although the state might not be

obligated to seize all evidence, in this case there were fingerprints "lifted from the scene" and "also hairs that were found that were found at the scene and reported as items gathered" (PrevT234). Defense counsel argued that this was different then a case in which no evidence had been gathered (PrevT234-35). At no time did the prosecutor claim that the hairs had been tested and shown to match Candi and Irene (PrevT233-36).

The issue surfaced again at the previous trial before the state's direct examination of Officer Windham. At the bench, out of the hearing of the jury, defense counsel advised the trial court that he proposed to cross-examine Officer Windham about his collection of hairs from the scene (T1133-34). The assistant attorney general, although indicating that he understood that the hairs had been tested and did not match Cecil, opposed the proposed defense questioning about the hairs because it could leave "the jury to speculate that it could be the hair of a person other than the defendant" (PrevT 1134).

Again, the prosecution did not object that the hair evidence was irrelevant because the hairs matched Candi and Irene (PrevT 1133-35). The state did not object when defense counsel questioned Officer Windham about seizing hairs from the crime scene (PrevT1168-71).

When, at the first trial, defense counsel cross-examined criminalist Randall about his comparison of the hairs seized from the crime scene with Cecil's hair, the state objected that this violated the trial court's ruling on the motion in limine (PrevT1232-33). Defense counsel explained that he would ask Mr. Randall only about his comparison of the seized hair with Cecil's hair -- not about other comparisons or comparisons not performed (PrevT1233). The state clarified that defense counsel was "not going to talk about other comparisons" (PrevT1233). The state did not argue that the cross-examination was irrelevant because the hairs matched Candi and Irene (PrevT1232-34).

On redirect examination, the prosecutor questioned Mr. Randall about how hairs were examined (PrevT1235). He then elicited from Mr. Randall that his comparison of Cecil's hair with the hairs seized from the Sisk residence were "dissimilar" (PrevT1236). The prosecutor never asked Mr. Randall whether the hairs matched Candi and Irene (PrevT1232-36).

Nothing was different at the present trial. Despite numerous opportunities prior to and during the most recent trial to try to exclude the hair evidence because it matched Candi and Irene and therefore was not exculpatory, the state never gave this as a reason for excluding the evidence (A1-3; T859-61,990-

92, 1182-83, ST3-7). It is only now, on appeal, that for the first time ever the state attempts to justify the exclusion of this evidence by insinuating -- never expressly stating -- that the seized hairs matched Candi and Irene.

The reason for the state's failure to make this argument earlier is patent: there is nothing to support it. Nor is the state actually contending, now, that the seized hairs matched Candi and Irene.

Rather, the state now argues that the defense offer of proof failed to establish that the proposed evidence was relevant. According to the state, to establish relevance, the defense offer of proof had to show that the evidence was exculpatory, and to show that the evidence was exculpatory, the defense had to show that the evidence did not match other logical sources of the hairs: Candi and Irene.

Respondent, however, fails to cite any authority to support its argument that physical evidence not matching the defendant is only exculpatory if there is also evidence to eliminate other likely or "possible" sources of the evidence. Although appellant has not found a case that explicitly defines the term "exculpatory evidence," appellant has found cases in which the appellate court provided a working definition of that term by declaring certain evidence to be

"exculpatory" because it did not identify or match the defendant. Contrary to respondent's argument, there is no indication in these cases that the "exculpatory evidence" must also exclude the victims.

This Court's cases are helpful. In ***State v. Thompson***, 68 S.W.2d 393 (Mo.banc 2002), in support of the defense that defendant Thompson was not guilty, defense counsel brought out in cross-examination what this Court referred to as "exculpatory facts": 1) the police crime scene technicians found no evidence in Thompson's car linking him to the murder, and 2) "[f]ingerprints found by the police near the crime scene did not match Thompson's." ***Id***. at 394-95. The defense in ***Thompson***, as in the present case, was that the defendant was not guilty. Nothing in ***Thompson*** suggests that the fingerprints in Thompson were exculpatory and admissible only because there was evidence that excluded the victims or others who might have left the prints as the source of the prints.

The defense in ***State v. Butler***, 951 S.W.2d 600 (Mo.banc 1997) was quite different from the defenses in ***Thompson*** and in the present case. In ***Butler***, the defense was that the crime was committed by a specific person -- a nephew of

the victim.[1] ***Id***. at 606. To support its theory that a particular third person had killed the victim, the defense attempted to introduce evidence that the nephew "had motive and opportunity" to commit the crime. ***Id***.

Butler was a consolidated appeal comprising the appeals from Butler's conviction at trial and from the denial of postconviction relief. ***Id***. at 601. In evaluating Butler's claim that his attorney was ineffective, this Court found that trial counsel's performance was deficient: "had defense counsel properly investigated the crime, a substantial amount of evidence incriminating Malloy would have been uncovered and presented to the jury." ***Id***. at 610. But finding deficient performance is not dispositive of a claim of ineffectiveness; the deficient performance must also prejudice the defendant. ***Id***. at 608 citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Butler is significant to the present case ***not*** because it found defense counsel's performance deficient but because, in evaluating whether counsel's deficient performance was prejudicial, this Court considered the overall

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[1] This kind of defense, pointing to another, specific, particular individual -- whether identified by name or otherwise -- as the perpetrator of the crime, appears to be what AAG Smith was referring to in the present case (T859-60).

strength of the state's case against ***Butler***. As part of the prejudice analysis, under the heading "***Exculpatory Evidence***" the Court addresses evidence *unrelated* to the defense that "Malloy did it." This exculpatory evidence, the Court found, "would have weakened the prosecution's case." ***Id***.

The "exculpatory evidence" identified in ***Butler*** included "tests on fingernail scrapings taken from the victim and fibers taken from Butler's clothing" and the absence of "any blood on Butler's clothing." ***Id***. The opinion did not report the kind of tests nor did it report the results of the "tests on fingernail scrapings taken from the victim." The opinion does not report whether the scrapings were compared to Butler or to anyone else; it simply says the fact that tests were done was exculpatory. Likewise, the opinion simply reports that the fibers taken from Butler's clothing "did not match."

A fair reading of this portion of the opinion in ***Butler*** is that evidence that fails to link a defendant to a crime or to a crime scene is exculpatory and admissible at trial. Such evidence is precisely what the defense in the present case attempted to put before the jury: hair evidence seized from the crime scene and the victims did not match Cecil's hair and therefore linked him to the crime scene.

Cases from other jurisdictions also suggest that the term "exculpatory evidence" should not be extended to require the proponent to prove more than the fact that evidence that would likely link the defendant to the crime or the crime scene fails to do so. *See*, *e.g.*, ***Sanders v. English***, 950 F.2d 1152, 1161 (5th Cir.1992) (that defendant's fingerprints did not match those found on packages of cigarettes dropped by the assailant during the crime was "exculpatory'); ***Hall v. Iowa***, 705 F.2d 283, 292 (8thCir. 1983) ("Hall's hair sample was actually exculpatory, since tests revealed that it did not match hair found in the victim's hands"); ***United States v. Barton***, 995 F.2d 931, 934 (9th Cir. 1993) ("The Supreme Court has ... defined exculpatory evidence as evidence which is "favorable to an accused" and "material either to guilt or to punishment").

The foregoing cases suggest that exculpatory physical evidence need not include proof that other sources of the evidence have been excluded. This does not mean that the defense could not present such evidence. And certainly, if evidence existed showing that the physical evidence not matching the defendant matched the victim, the state would be free to use it.

But to require, as the state appears to argue, that the defense must show that the seized hairs did not match other likely sources of those hairs, would

impose an unnecessary, cumbersome, and unconstitutional burden on the defendant's right to present a defense. In the present case, such a requirement preclude the defense from presenting this evidence unless the defense could show that the hairs were tested and did not match such people as the investigating officers who walked through the crime scene and seized evidence, and Candi's aunt and Irene's daughter -- Debbie Dubois -- who found the bodies and, further, stood right next to Candi's bed. The logical extension of the state's argument would mean that in cases involving non-matching physical evidence -- such as shoeprints, fingerprints, footprints, blood, fibers, etc. -- the defense would have to show that the evidence did not match any other possible source. In other words, in a case in which the victim was stabbed, and fingerprints on the knife did not match the defendant, the defendant could not elicit the non-matching fingerprint evidence without first eliminating all possible sources of that print. If shoeprints not matching the defendant's shoes were found at the scene of a burglary in a house occupied by six people, presumably, the defendant would be required to show that the shoeprints did not match any of the residents of the house.

A far more logical, constitutional, and less onerous method of addressing

the matter of whether evidence not matching the defendant matches another person already exists. It is called rebuttal evidence. If the state has evidence to show that physical evidence -- prints, fibers, hair, blood, etc. -- that fails to connect the defendant to the crime or the crime scene is not exculpatory because it matches someone else -- the victim, the person who found the victim, an officer seizing evidence -- the state is entitled to present that evidence in rebuttal.

In ***State v. Richardson***, 838 S.W.2d 122 (Mo.App.E.D.1992), the state defendant attempted to introduce a videotape of a vacant building -- which the defendant made during the trial -- to rebut the testimony of two police officers who claimed they had observed a drug deal from a window of the building. ***Id***. at 123-24. The defense wanted to use the tape to show that the officers could not have seen a drug deal because, as shown by the tape, the windows and doors of the building were boarded. ***Id***. at 124-25. The state objected that because the tape depicted only the outside and was not taken from the inside of the building, it failed to show what the officers could have seen from within the building and that the tape did not document when the building was boarded. ***Id***.

The Eastern District held that the offer of proof was sufficient, the tape relevant, and it was admissible. "Evidence need only be relevant, not conclusive, and it is relevant if it logically tends to prove a fact in issue or corroborates relevant evidence which bears on a principal issue." ***Id***. at 124 *citing* ***State v. Mercer***, 618 S.W.2d 1, 9 (Mo. banc 1981).

Contrary to the state's argument, a court reviewing an offer of proof need not excise statements made by counsel and consider only the offer's testimonial portions. An offer of proof is not limited "to the responses of a witness made only in response to questioning by the party making the offer." ***Smith v. Kansas City Southern Ry. Co.***, 87 S.W.3d 266, 278 (Mo.App.W.D. 2002). "Instead, all of the matters within the offer of proof, whether they be questioning by the party, that party's opponent, or the court, should be considered within the gamut of the offer of proof." ***Id***.

In the present case, the offer of proof was more than adequate. It was only necessary that the defense establish that the hairs seized at the crime scene did not match Cecil. But, in addition, through defense counsel's statements, and through the statements of AAG Smith, and through the comments of the trial court, there was no doubt that both parties and the trial court understood that

the proffered evidence would also show that the hairs did not match Candi and Irene.

For these reasons, respondent's argument fails. As in appellant's initial brief, appellant asks that the Court reverse the judgment of the trial court and remand for a new trial.

CONCLUSION

For the foregoing reasons, appellant affirms the Conclusion of his initial brief and prays that this Court will reverse the judgment of the circuit court and remand for a new trial or, alternatively, a new penalty phase proceeding.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). According to the "Word Count" function of Microsoft "Word," the brief contains a total of 3,622 words.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program and according to that program is virus-free.

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were delivered this ___ day of _____, 20___, to Adriane Crouse, Office of the Attorney General, Supreme Court Building, 207 High Street, Jefferson City, Missouri 65101.

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