IN THE DISTRICT COURT OF SUBLETTE COUNTY, WYOMING

NINTH JUDICIAL DISTRICT

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| THE STATE OF WYOMING, | ) | |
| | ) | Criminal Action No. 2009-766 |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| TROY DEAN WILLOUGHBY | ) | |
| | ) | |
| Defendant. | ) | |

## ORDER GRANTING DEFENDANT'S MOTION FOR NEW TRIAL

This matter came before the Court for an evidentiary hearing on the 1st day of August, 2011 on the Defendant's Motion For New Trial Pursuant To W.R.Cr.P.33(b) (*sic*).[1] The Defendant appeared in person and with his attorneys, Kerri M. Johnson and Robert E. Oldham from the Public Defender's Office. The State appeared by and through Terry L. Armitage from the Attorney General's Office. The Court heard testimony from three witnesses and received exhibits, including audio recordings and transcripts thereof, and heard argument from counsel. The Court has reviewed and considered the Defendant's Motion and attachments, the Defendant's Supplemental Motion and attachments, the State's Response and attachments, the pleadings in the file, transcripts of trial testimony, as well as the testimony, exhibits, and argument from the hearing.

***Procedural Background***

The Defendant was arrested on March 1, 2009 and, after a 10 day jury trial, was convicted on January 29, 2010 of the first degree murder of Lisa Ehlers over 25 years earlier. The jury deliberated for just over two hours before reaching a verdict. The Defendant appealed his conviction. The Wyoming Supreme Court affirmed his conviction on June 8, 2011. The Defendant then filed a Petition for Rehearing in the Wyoming Supreme Court alleging prosecutorial misconduct for withholding evidence. The Wyoming Supreme Court issued its Order Denying Petition For Rehearing June 16, 2001, suggesting that the Defendant's remedy regarding newly discovered evidence was to file a motion for new trial pursuant to W.R.Cr.P. 33(c). The Defendant then filed his Motion For New Trial on June 17, 2011.

***Background Facts***

In October of 2008 a "cold case" investigative team from Sublette County, Wyoming began reinvestigating the murder of Lisa Ehlers. The victim had been shot to death outside her car in a turnout at the south end of the Hoback Canyon just before 6:00 a.m. on June 21, 1984. There was no physical evidence tying the Defendant to the scene, and a murder weapon was never found.

The State's theory of the case at trial was that the Defendant murdered Ms. Ehlers after a drug deal gone bad earlier that morning between the Defendant and Ms. Ehlers in Jackson,

[1] Defendant brought his motion "on the basis of newly discovered evidence within two years after the final judgment" (Introduction to Defendant's Motion For New Trial) which is addressed at W.R.Cr.P. 33(c).

Wyoming. The State elicited testimony from two key witnesses, Rosa Hosking (the Defendant's wife at the time of the murder) and Tim Basye (a friend of the Defendant's), placing the Defendant in Jackson from the late morning or afternoon of the preceding day, June 20th, into the pre-dawn hours of June 21st. The witnesses testified they went to bars and "partied" with the Defendant, ending up at a private party and "doing" drugs and alcohol until they left with the Defendant for Daniel, Wyoming. They testified they were with travelling with the Defendant until they came upon the scene of the crime, where Basye testified he saw the Defendant shoot the victim; Hosking said she heard a shot.

The Defendant's theory of the case at trial was alibi. The defense team argued that the Defendant was at work on a shift at a drilling rig at the time of the murder, relying on a work log for June 21, 1984 containing the Defendant's name. The defense also argued that testimony of the two main witnesses (Hosking and Basye) placing the Defendant at the crime scene and implicating him was unreliable due to threats made to them by investigators, inconsistencies of their stories over time, and due to investigators having fed evidence about the crime to the witnesses and "manufacturing" their memories.

During interrogation by investigators, the Defendant initially maintained that he was at work the morning of the murder. After eleven hours of interrogation one day, and two and one-half hours of interrogation the next day, the Defendant stated that he was at the scene but did not commit the crime, and implicated another suspect in the case, Bob Crews. The Defendant recanted five days later. The defense argued the Defendant was forced to change his story because investigators used Hosking's and Basye's statements that the Defendant was at the scene against him, and they "threatened" that the Defendant was their number one suspect in the murder unless he came up with a better story about Bob Crews having something to do with the murder.

The State also introduced a jailhouse "confession" by the Defendant through the testimony of a fellow inmate at the Sublette County Jail. The defense characterized the confession as common jailhouse talk and generally a denial of the crime (e.g., statements by the Defendant preceded by phrases such as "I wouldn't have done . . .", "I didn't do. . ."), and suggested the inmate's testimony was unreliable, characterizing the inmate as a jailhouse "rat" who was facing several felony charges.

*I. Suppression of Exculpatory Evidence*

The Defendant contends that he is entitled to a new trial because the State improperly suppressed evidence that would have been favorable and material to his defense.

*A. Background*

On June 10, 2011, two days after the Defendant's murder conviction was confirmed on appeal, the Sublette County & Prosecuting Attorney's Office gave notice to the defense team of previously undisclosed evidence.[2] The Office believed the evidence to be exculpatory regarding the Defendant's whereabouts at the time of the victim's murder.

The evidence consisted of a police report and witness statements (collectively "the report") involving the Defendant on the late night of June 20, 1984 and the early morning hours of June 21, 1984. The police report was authored by then-Undersheriff Hank Ruland of the Sublette County Sheriff's Office (SCSO). Ruland's police report states that thirty-eight minutes after midnight on June 21, 1984, he called and spoke to the Defendant at his home in Daniel, Wyoming. The Defendant reported that three individuals (named in the report) were harassing the Defendant and his wife. While en route to the Defendant's home to investigate further, Ruland was dispatched back to the Sheriff's Office to meet the three individuals. At the office,

[2] The Sublette County Attorney's Office was under the new leadership of Neal Stelting, who was not the prosecutor in the Willoughby murder case, and who took office in January of 2011 while the Defendant's appeal was pending.

the three individuals reported that they had been to Defendant's residence and that the Defendant had thrown a rock at their car and broken out a window. Each of the three individuals filled out a hand-written statement. Each statement is dated June 21, 1984 with times of the statements noted just after 1:00 a.m. Each statement describes a similar incident with the Defendant that began in the late evening of June 20, 1984 and culminated in a confrontation with the Defendant at his home in Daniel just after midnight. The statements indicate the individuals each saw and/or spoke to the Defendant's wife, Rosa, at some point during the incident.

The report was brought to the attention of the prosecutor's office by the SCSO through the efforts of Detective Lance Gelhausen, who had been aware of the existence of the report during the cold case team investigation of the murder. Gelhausen was concerned the report had not been disclosed to the defense during the investigation and prosecution of the Defendant, due to the date and time of the report indicating the Defendant and his wife were in Daniel on the late night preceding and the early morning of the murder (as opposed to being in Jackson "partying" before the murder, as described by the State's two key witnesses). Gelhausen urged the leadership team (LT) of the cold case investigative unit, Captain Brian Ketterhagen of the SCSO and Investigator Randy Hanson of the Sublette County Attorney's Office, to disclose the report.[3] Gelhausen also brought the report to the attention of the County & Prosecuting Attorney at the time, Ms. Lucky McMahon.

Gelhausen was also concerned about the report because it was "lost" for a period of time, and he was responsible for the report since it had been checked out to him upon direction of Capt. Ketterhagen. In the course of attempting to locate the file and discussing the disclosure of the report, Gelhausen made tape recordings (the tapes) of a telephone conversation and several face-to-face meetings with the LT and one with the County Attorney between June 15 and October 15, 2009. The tapes have been admitted as evidence in this matter, as has Gelhausen's Deputy Report of July 26, 2011 summarizing the saga of the undisclosed report.

***B. The Tapes, the Report, and Discovery***

Reviewing the tapes, Gelhausen's report and the testimony at the hearing on August 1, 2011, and the pleadings in this matter, the Court finds as follows[4]:

1. The LT had knowledge of the file containing the report in December of 2008, thirteen months before the trial of the Defendant.
2. The file containing the report was sought by the LT in an effort to go through the Defendant's criminal records for a possible alibi: "to see if he has some sort of alibi . . . 'cause he was in so much trouble during that same time frame" and they wanted to check because "he may have something that pops up there."
3. In addition to the report, the file contained a hand-written note or letter authored by Rosa (contents currently unknown) that appeared to disturb the LT, and as stated by Gelhausen: "that we had to just, I don't know, we had to discredit basically, find out from her what the situation was."
4. When interviewed in February or March of 2010, Rosa was not shown the report or her hand-written letter, but was asked what she remembered about the rock throwing incident. Rosa reportedly stated that it happened after, but right after, the murder. Rosa was not shown the report or letter "because she spit back exactly what I wanted her to say."
5. The LT destroyed the letter after the interview with Rosa: "I didn't want it to get somehow inadvertently stuck in discovery and it raises some kind of eyebrow."
6. The LT knew the prosecutor was concerned about the discovery of the report and whether it was exculpatory: "when Lucky said 'Do I have to give it to them?' I said no, she said 'Are you positive?' and I said absolutely. . . because Rosa said it

[3] References to the leadership team (LT) may refer to one, or the other, or both Captain Ketterhagen and Randy Hanson. For purposes of analysis, knowledge of one is imputed to the other, and to the prosecution.
[4] The quotes that follow are taken from the tapes.

happened afterwards."

7. By October 6, 2009, the LT knew the report was exculpatory, but was concerned about not having turned the report over to the defense team earlier: "well, you know you may be right. It's exculpatory. . . We need to decide when we discovered it."
8. By October 7, 2009, the LT is still looking for the file containing the report, but clearly knows that the report is exculpatory and that it should have been turned over earlier. The LT believed that the date on the report must have been a mistake, but worried that it fit into the defense plan "perfectly" – i.e. that the Defendant told the LT he was at the scene so they would "leave him alone."
9. The LT believed that the defense was entitled to the report and entitled to on-going discovery: "But I know all they're entitled to is anything that is in reference to Troy Willoughby, but what they're telling the Judge, they don't trust, and they probably have a right not to at this point." (laughter)
10. The LT recognized that the jury should decide if there was a mistake in the report date or how to explain the incident on the same date as the murder, and they should not rely on Rosa's recollection. Nevertheless, when Gelhausen suggests "I don't see how we can't turn that over," the LT saw a dilemma: "But see here's the problem, it's exculpatory and so we did not give it up."
11. The LT discussed whether the defense could prove the LT looked at the report closely enough to realize it was the same date (as the murder). The LT was worried about whether their fingerprints might be on the file, but decided to just "keep our mouths shut" and "just let it ride" because "they may not even find it" and "if they find out that we knew, that it's exculpatory, and - - - he's gonna (expletive) walk." The LT concluded that the "best thing is we didn't know it existed. Why would we be looking through the night of June 21, 1984 file after Willoughby puts himself there? Why in the (expletive) would it be in there anyway? I'd say, well it wasn't in there." The LT noted that the prosecutor could also get sanctioned for failing to turn over the report.
12. The LT stated that the Defendant had "an ironclad alibi if we can't put him at the crime scene at 6 a.m." because the Defendant only admitted he was there, but denied the killing.
13. The County Attorney, Ms. McMahon, was on notice of the report when Gelhausen talked with her about it on November 9, 2009. The prosecutor had not read the report, but had relied on the LT's representation that the incident occurred on a date after the murder. At the hearing on August 1, 2011, the County Attorney testified that after the meeting with Gelhausen, she directed the LT to "look into it," and was once again later told that the incident happened after the crime. The County Attorney also confirmed that the report was not included in discovery when the defense team came to her office to look through discovery.
14. There is no evidence that the special prosecutor, Tony Howard, knew about the report. He testified at the August 1, 2011 hearing that had he known about it, he would have disclosed it to the defense and conducted follow-up investigation with the witnesses.
15. Beyond mentioning the incident (not the report) to Rosa Hosking to see what she recollected and when the incident may have occurred, there is no evidence that the report or its contents were ever disclosed to Basye by the LT, or that he was questioned about it in relation to his testimony putting the Defendant and Hosking in Jackson on the afternoon and evening preceding the murder, and in the early morning of the murder in Jackson and later at the crime scene.
16. Two of the three individuals involved in the incident described in the report were never talked to about the report before the Defendant's trial, and they could not recall the exact date of the incident in relation to the murder. The third individual was contacted by the LT before the trial, but could not recall the exact date of the incident.
17. Subsequent investigation by Gelhausen, detailed in his report of July 26, 2011, indicates dispatch notes corroborating the dates on the report. Nothing was found to indicate that Undersheriff Ruland had been called out on the incident a day later, and the report date was consistent with Ruland's work schedule (Ruland was scheduled to

be off the day after the reported incident).

18. The Defendant filed a Demand for Discovery on June 2, 2009 that included all documents material to the preparation of the Defendant's defense, all reports or information compiled during the investigation and subsequent arrest of the Defendant, all material known to the State of Wyoming, or which may become known, or which through due diligence may be learned from the investigating officers or the witnesses in this case, which are favorable to the accused, and any and all other exculpatory information or material discoverable pursuant to *Brady v. Maryland* (cite omitted).
19. On September 30, 2009, the Defendant filed a Memorandum and Motion to Compel Discovery and a demand for *Brady* material, including evidence "known only to police investigators and not to the prosecutor." The Defendant urged that any other exculpatory information the State had in its possession, even if it thought the Defense knew about it, should be turned over immediately. The State's response, filed October 9, 2009, declared its commitment to providing all discoverable materials and stated that it had, on June 10, 2009, provided copies of everything in their possession that was discoverable.
20. On Dec. 1, 2009, Defendant filed another Motion to Compel, which included the results of scientific testing "as well as any other discovery under W.R.Cr.P. 16; *Brady* and its progeny." Once again the State asserted that it "is diligently submitting all discovery under W.R.Cr.P. 16, *Brady* and its progeny." Further, it assured that "[t]he State's intention, is now and has always been, to provide ALL discoverable material in a timely fashion. The State has invited the Defense to inspect the evidence, exhibits and discovery in the possession of the State, piece by piece, to ensure that nothing has been inadvertently omitted."

*C. Standard of Review*

A new trial may be granted to a Defendant if required in the interest of justice. *W.R.Cr.P. 33.* When a motion for new trial is brought on the basis of newly discovered exculpatory evidence that was wrongfully withheld from the Defendant, a *Brady* analysis is required. *Lawson v. State,* 242 P.3d 993, 1000 (Wyo. 2010); *Davis v. State,* 47 P.3d 981, 985 (Wyo. 2002); *U.S. v. Josleyn,* 206 F.3d 144, 151 (1st Cir. 2000).

The Wyoming Supreme Court explained the *Brady* analysis in the case of *Davis v. State,* and noted considerations where the suppression of evidence involves the reliability of key witnesses and evidence known only to the police:

> In *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court set forth the basic principle that the prosecution violates due process by suppressing favorable evidence that is material either to the guilt or to the punishment of the accused, "irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S.Ct. at 1196-97. Later the Court extended the *Brady* rule by holding that the prosecution violates due process by suppressing information concerning the reliability of a key witness when such impeachment evidence would be material to guilt or innocence, finding that when the reliability of a given witness may well be determinative of guilt or innocence, important evidence affecting credibility may be *Brady* material. *Giglio v. United States,* 405 U.S. 150, 153-54, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). The duty to disclose impeachment and exculpatory evidence applies even though there has been no request by the accused. *United States v. Agurs,* 427 U.S. 97, 107, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976); *United States v. Bagley,* 473 U.S. 667, 680-81, 105 S.Ct. 3375, 3382-83, 87 L.Ed.2d 481 (1985); *Strickler v. Greene,* 527 U.S. 263, 280, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999). "Moreover, the rule encompasses evidence 'known only to police investigators and not to the prosecutor.' In order to comply with *Brady,* therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the

government's behalf in this case, including the police.' " *Strickler*, 527 U.S. at 280-81, 119 S.Ct. at 1948 (*citing Kyles v. Whitley*, 514 U.S. 419, 437-38, 115 S.Ct. 1555, 1567-68, 131 L.Ed.2d 490 (1995)).

*Davis v. State*, 47 P.3d 981, 985 (Wyo. 2002). Succinctly stated, "[i]n order to establish a *Brady* violation, a defendant must demonstrate that the prosecution suppressed evidence, the evidence was favorable to the defendant, and the evidence was material." *Lawson v. State*, 242 P.3d 993, 1000 (Wyo. 2010).

In explaining materiality, the court goes on to state the well known standard:

> Evidence is material, only when a reasonable probability exists that the result of the proceeding would have been different had the evidence been disclosed. *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383; *Thomas v. State*, 2006 WY 34, ¶ 15, 131 P.3d 348, 353 (Wyo. 2006). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Lawson v. State*, 242 P.3d 993, 1000 (Wyo. 2010), citing *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196–97.

*Id.* The *Lawson* court explains the reasoning behind the *Brady* rule:

> The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on States certain duties consistent with their sovereign obligation to ensure 'that justice shall be done' in all criminal prosecutions." *Cone v. Bell*, —— U.S. ——, 129 S.Ct. 1769, 1772, 173 L.Ed.2d 701 (2009), citing *United States v. Agurs*, 427 U.S. 97, 111, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). The rule exists to "ensure that a miscarriage of justice does not occur." *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196–97.

*Id.* Materiality of withheld evidence and its effect are mixed questions of law and fact. *Davis v. State*, 47 P.3d 981, 985-86 (Wyo. 2002). The cumulative effect of the withheld evidence must be considered in light of all the circumstances "with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." *Lawson v. State*, 242 P.3d 993, 1000-01 (Wyo. 2010), *quoting Bagley*, 473 U.S. at 683, 105 S.Ct. at 3384.

The Court's duty, then, is to determine whether the government's failure to disclose evidence favorable to the defendant deprived the defendant of a fair trial under *Brady* by considering whether the "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Davis v. State*, 47 P.3d 981, 985 (Wyo. 2002), *quoting Strickler* at 290, 119 S.Ct. at 1952 (*quoting Kyles*, 514 U.S. at 435, 115 S.Ct. at 1566).

***D. Analysis***

***1. Suppression of the Report***

The record is clear that the State failed to disclose the report and affirmatively withheld the report from the Defendant. The State does not contest this point, except in so far as to argue that evidence is not considered to be "suppressed" and is not really newly discovered evidence if the Defendant "knew, or should have known about the essential facts permitting him to take advantage of any exculpatory evidence." *Hicks v. State*, 187 P.3d 877, 883 (Wyo. 2008), *quoting Chauncy v. State*, 127 P.3d 18, 24 (Wyo. 2006) (*quoting United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982)). The State claims that since the report has to do with an incident regarding the Defendant himself, he had the knowledge and the ability to take advantage of such exculpatory evidence as Rosa Hosking and the three individuals involved in the confrontation with the Defendant might possibly provide.

The argument is appealing at first glance. It ignores, however, the failure to disclose the contents of the report (police report and written witness statements) that were in the hands of the prosecution, and the effect of not producing them. Just because the Defendant is acquainted with the potentially exculpatory witnesses, does not mean that he has equal availability to the police report and the witnesses' written statements. The three individuals involved in the incident could not remember the date of the incident in relation to the murder, nor could Undersheriff Ruland. Rosa Hosking *thought* the incident happened after the murder, but was never shown the police report or the witness statements. The police report and witness statements were important evidence, and perhaps the only reliable evidence, of when the incident occurred in relation to the murder. The failure of the State to produce the report deprived the Defendant of the opportunity to interview the witnesses with respect to the incident and their statements, deprived the Defendant the opportunity to bolster his alibi by presenting the evidence at trial, and foreclosed the opportunity for the Defendant to impeach the witnesses at trial if they testified differently than set forth in the police report and witness statements. The denial of such exculpatory evidence constitutes suppression under *Brady*. *See Hicks at* 884.

The Defendant exercised due diligence in attempting to discover the evidence withheld by the prosecution. As noted earlier, the Defendant made several discovery requests demanding all *Brady* material, including all documents *compiled* in the investigation favorable to the accused. Indeed the LT did not want to discover the report to the Defendant because they believed it *was* so favorable to the Defendant and supported his alibi. The State cannot bar production of the report claiming it is not new evidence, in the face of the Defendant's exercise of due diligence in attempting to gain the report held solely by the prosecution.

Finally, it should be noted that the Defendant was tried for the crime over twenty-five years after its occurrence. If he had remembered the incident in relation to the murder, one can assume he would have interviewed the witnesses and presented evidence they might conceivably furnish to bolster his alibi defense. The record is replete with evidence of witnesses faded memories, conflicting statements, and incomplete recollections. Even if the Defendant is presumed to have recall of this incident a quarter-century earlier, such information would not necessarily have led him to the report of this incident, or his access to it. As stated by the LT, we "will just keep our mouths shut" and "maybe they won't even find it." Such tactics comport more with a system built on the notion of hide-and-seek, rather than a search for the truth.

***2. Report is Favorable Evidence to the Defendant***

The record is also clear that the report is favorable evidence for the Defendant, since it supports his alibi and serves to impeach the testimony of the two key State witnesses, Hosking and Basye. The State does not contest this issue and instead focuses on the materiality of the report, which is next addressed.

***3. Report is Material Evidence***

The State forcefully argues that the report is not material and that the Defendant's Motion for New Trial must fail on this prong of the *Brady* test. The State pursues two lines of argument that are intertwined. First, the State characterizes the report as simply impeachment evidence pertaining to Hosking and Basye, noting that the credibility of those witnesses was "thoroughly attacked" at trial, and that this further impeachment evidence is simply cumulative and of no material effect. Next, the State argues that the report does not serve to contradict any material part of testimony of the two witnesses who were at the murder scene, and in light of "overwhelming evidence of the Defendant's guilt," the report is immaterial.

In its brief, the State takes the position that a new trial should not be granted on the grounds of newly discovered evidence where the evidence is useful only to impeach a witness, citing two Wyoming Supreme Court cases that did not involve *Brady* violations. However, "because impeachment is integral to a defendant's constitutional right to cross-examination,

there exists no pat distinction between impeachment and exculpatory evidence under *Brady*." *United States v. Hughes*, 33 F.3d 1248, 1252 (10th Cir. 1994) (*citing* other 10th Circuit cases). Moreover, the Wyoming Supreme Court has noted that impeachment evidence pertaining to an important witness that can be used to discredit the witness or cast doubt on the witnesses veracity "is usually material." *Davis v. State*, 47 P.3d 981, 985 (Wyo. 2002).

The State then looks to the Wyoming Supreme Court case of *Hicks v. State*, 187 P.3d 877 (Wyo. 2002) for support, where the court noted that such impeachment evidence is "not always material." *Id.* at 884. However, in *Hicks* the court noted that the key witness Martinez had his credibility "vigorously assaulted" on the grounds of inducement and previous perjury, and the impeachment evidence at issue served *only* to discredit Martinez on another point that was, at best, "tangentially related" to the main evidence. *Id.* The court went on to state that the suppression of "one additional piece of cumulative information" does not render a "verdict unworthy of confidence." *Id.* at 884-885, *quoting Chauncy v. State*, 127 P.3d 18, 24 (Wyo. 2006).

The *Hicks* case most dramatically differs from the case at hand in that the report here is central to bolstering the Defendant's alibi. First, it lends support to his defense that he was working at the time of the murder by showing he was in Daniel in the late hours of June 20, 1984 and in the early morning hours of June 21, 1984. Second, it provides impeachment of the State's two key witnesses of their statements that they were with the Defendant in Jackson from the late morning or afternoon of June 20, 1984 through the early morning hours of June 21, 1984, until they returned to Daniel with the Defendant, placing him at the crime scene. This evidence directly supports the Defendant's alibi defense, is contrary to the State's theory of the case placing the Defendant in Jackson for an extended time before committing the offense, and is potentially significant impeachment evidence of key State witnesses. Such evidence is more than just "tangentially related" to the main evidence, or merely "one additional piece of cumulative information."

It is further noted that while the defense sought to impeach Hosking and Basye generally on the grounds of threats, inducement, inconsistent stories, and "being fed evidence," the defense did not have the opportunity to cross-examine them about the dates in the report that may have fueled doubt about the witnesses' stories of the murder and the hours preceding it. The Wyoming Supreme Court recently reiterated the importance of cross-examination as it relates to witness credibility: "[c]ounsel should be allowed to 'expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.'" *Downing v. State*, 2011 WY 113, ¶ 12, *quoting Hannon v. State*, 84 P.3d 320, 331-32 (Wyo. 2004) (*quoting United States v. DeSoto*, 950 F. 2d 626, 629 (10th Cir. 1991). Without the report, the Defendant had "opportunities for chipping away on cross-examination," but perhaps "not for the assault that was warranted." *Kyles v. Whitley*, 514 U.S. 419, 443, 115 S.Ct. 1555, 1570 (1995). Additionally, the report may have provided the opportunity to attack "the thoroughness and even the good faith of the investigation" and perhaps highlight the "uncritical attitude" of the investigators. *Id.* 514 U.S. at 445, 115 S.Ct. at 1571.

Finally, the State argues that there is overwhelming evidence of guilt such that the failure to disclose the report is simply not material. While the Wyoming Supreme Court noted on direct appeal of this case that there was "overwhelming evidence of the appellant's guilt," they were working from a record that showed that after evaluating all the evidence, including the key testimony of Hosking and Basye, the jury convicted. *Willoughby v. State*, 2011 WY 92, ¶12. The jury did not have the opportunity to re-consider the State's theory of the case and re-evaluate the Defendant's alibi and re-weigh the key witnesses' testimony in the face of the report. There is a different calculus regarding the weight of the evidence in light of the suppression of the report. In some respects it is like the clock striking thirteen; it is not only wrong, but it calls into question the twelve that came before it.

The State could not argue that the physical evidence here amounts to overwhelming evidence of guilt. It is difficult to know how the jury would have evaluated the testimonies of

Hosking and Basye with the disclosure of the report, how it would have affected the defense strategy and perhaps the development of other evidence, and how the jury might have weighed the remaining evidence. However, it is clear that the testimonies of Hosking and Basye were critical to the State in placing the Defendant at the scene, committing the murder, and refuting the Defendant's alibi. If the jury felt Hosking and Baseye were not worthy of belief, they would be left with the Defendant's admission that he was at the scene, but did not commit the crime (after initially denying his presence for approximately thirteen and one-half hours, but being told he needed to come up with a story and that Hosking and Basye placed him at the scene), and a jailhouse confession with its inherent frailties that have already been discussed.

The fact that the physical evidence is inconclusive, and concerns about the veracity of the key witnesses and the Defendant's admissions does not mean, certainly, that the jury may not have found sufficient evidence to convict. However, "[t]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same." *Davis v. State*, 47 P.3d 981, 987 (Wyo. 2002), *quoting Kyles*, 514 U.S at 453, 115 S.Ct. at 1575.

It is difficult to have confidence in the verdict when the suppressed report tends to support the Defendant's alibi, tends to call into question significant parts of the State's theory of the case, tends to call into question the thoroughness and good faith of the investigation, and tends to challenge the credibility and reliability of the State's key witnesses proffered as an eye and an ear witness to the crime.[3] It is important to remember that the touchstone of materiality is the "reasonable probability" of a different result, not whether it is more likely than not a different verdict would result with evidence. The question is whether the Defendant received a fair trial in the absence of the evidence, which is defined as a trial verdict worthy of confidence. *Davis* at 987.

Considering the favorable and material evidence that was suppressed, not to mention the fashion in which it was suppressed, one cannot stretch fairness "to the point of calling this a fair trial." *Kyles*, 514 U.S at 454, 115 S.Ct. at 1575. The State in its role as prosecutor has a special obligation

> not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Berger v. U.S.*, 295 U.S. 78, 87, 55 S.Ct. 629, 633 (1935). The failure to disclose the report here deprived the Defendant of a fair trial under *Brady* because the "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Davis* at 985.

***2. Extrajudicial Publicity***

The Defendant's Motion for New Trial was prompted by the disclosure of the report to the Defendant by the Sublette County & Prosecuting Attorney's Office. The current County Attorney was not involved in the prosecution of this matter. It appears the County Attorney acted promptly, dutifully, and ethically in disclosing the report to the Defendant once he became aware of its existence. This is a commendable action and one that should be expected from the State in its mission to seek justice, and not to merely convict.

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[3] The State asserts that the testimony of Hosking and Basye are not "provably false." That is not the test of materiality under *Brady*.

The Court feels compelled to note, however, that the extensive pre-trial publicity in this matter played no part in the Court's decision to grant the Defendant a new trial. Notwithstanding the prosecutor's publicly announced opinion that the suppression of the report constituted a violation of the Defendant's constitutional rights and would most likely result in the Defendant's conviction being overturned, the Court has an independent duty to make that determination as a part of the judicial branch – separate and apart from the executive branch of which the prosecutor is a part.

In this case, after a full analysis, the Court came to a result that agreed with the prosecutor's opinion. It may undermine confidence in the criminal justice system, however, if a court were to come to a different conclusion than that announced by a prosecutor before the case was fully considered. In this case, the Court understands that the prosecutor was motivated for the right reason in attempting to right a wrong, and intended no harm. The Court notes this in assurance there has been no influence, undue or otherwise, brought upon the Court due to the extra-judicial publicity.

*3. Conclusion*

The Court is excruciatingly aware of the angst and pain a decision granting a new trial in a murder case must cause the victim's family and friends. This is not to mention both predictable and unpredictable repercussions upon others who have been involved in or touched by this case, and the amount of effort and resources that must again be summoned if the case is re-tried.

The Court suspects that the evidence withheld in this matter was done under a misguided zeal that the disclosure of the report may result in a failure of justice, in the eyes of the investigators, because they "knew" the Defendant was guilty. If this philosophy prevails, the danger is that there *will be* a failure of justice because of the mentality that the ends justify the means; justice as measured by the government and not by the jury. Such an approach threatens to render the constitutional safeguards of every citizen nothing more than a diaphanous shield incapable of defending assaults upon his fundamental rights. We tell every jury that there can be no victory, except in ascertaining the truth. And in every criminal prosecution, there can be no victory unless justice is done.

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THE COURT THEREFORE FINDS, PURSUANT TO W.R.Cr.P. 33(a), THAT A NEW TRIAL IS REQUIRED IN THE INTEREST OF JUSTICE, AND

IT IS THEREFORE HEREBY ORDERED THAT THE DEFENDANT'S MOTION FOR NEW TRIAL BE AND THE SAME HEREBY IS GRANTED AND DEFENDANT'S CONVICTION IS VACATED.

DATED this 16th day of August, 2011.

Honorable Timothy C. Day
District Judge