IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0301

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TODD CARLISLE FISHER

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Seventh Judicial District Court,
Dawson County, the Honorable Michael B. Hayworth, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
KRISTINA L. NEAL
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
krneal@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
KATIE F. SCHULTZ
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

BRETT J. IRIGOIN
Dawson County Attorney
121 S. Douglas Avenue
Glendive, MT 59330

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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I. Todd Fisher has established the physical evidence left at the crime scene was material evidence with exculpatory value to the defense, and the State failed to preserve this evidence.

A. The crime scene trace physical evidence was irreplaceable.

The cornerstone of a *Brady* due process violation is that suppressed evidence was material to a defendant's guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215(1963); *State v. Colvin*, 2016 MT 129, ¶12, 383 Mont. 474, 372 P.3d 471. Within the meaning of *Brady*, evidence is material if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Smith v. Cain*, 565 U.S. 73, 75, 132 S. Ct. 627, 18 L. Ed. 2d 571 (2012). When evidence is permanently lost, as opposed to just being suppressed or nondisclosed, courts face "the treacherous task of divining the import of the material whose contents are unknown and, very often disputed." *California v. Trombetta*, 467 U.S. 479, 486, 104 S. Ct. 2528, 2533, 81 L. Ed. 2d 413 (1984).

In *United States v. Cooper*, government agents seized laboratory equipment from Cooper, a suspected methamphetamine manufacturer.

United States v. Cooper, 983 F. 2d 928 (9th Cir. 1993). Cooper immediately told government agents that the equipment was used in his legitimate chemical manufacturing business and was neither capable of nor configured to produce methamphetamine. *Cooper*, 983 F. 2d at 931. Government agents knew that Cooper did have a legitimate chemical manufacturing business. Independent experts later testified that were the equipment configured as Cooper said, it would not have been capable of producing methamphetamine. *Cooper*, 983 F. 2d at 931. Before the equipment was examined it was destroyed as part of a routine procedure. *Cooper*, 983 F. 2d at 931.

The Ninth Circuit, in *Cooper*, concluded that the equipment's exculpatory value was apparent before destruction. *Cooper*, 983 F. 2d at 931. Following *Cooper*, evidence need not be "certain" to exonerate a defendant to qualify as having "exculpatory value" under *Trombetta*. *Cooper*, 983 F. 2d at 931. This conclusion is affirmed by the Court's explicit reference to the destroyed lab equipment's value as "potentially exculpatory evidence." *Cooper*, 983 F. 2d at 931. Additionally, the Court in *Cooper* found pictures taken of the equipment were

inadequate, as well as general testimony about the nature of the destroyed equipment. *Coope*r, 983 F. 2d at 932.

As in *Cooper*, Todd lost physical evidence which can never be replaced. When Deputy Hoagland destroyed the crime scene, he admitted he knew it still contained trace evidence such as blood evidence, hair evidence, DNA evidence and fiber evidence. (Trial Tr. (Tr.) 1020.) Once these materials were destroyed, Todd lost any opportunity to test this evidence to demonstrate another person had been in Wilbur's room. Although Waldo photographed the blood spatter, the trace evidence was nonetheless lost. Like *Cooper*, Waldo's pictures of the crime scene were inadequate and irrelevant in comparison to testing of potentially exculpatory trace evidence.

B. **The State's failure to preserve this evidence prejudiced Todd.**

Law enforcement seized Wilbur and Todd's home when they began their investigation. (Tr. 333-334.) Law enforcement then maintained possession of the home once Todd was arrested. (Tr. 824.) Sheriff Canen took responsibility for the keys and was able to specifically direct

Deputy Hoagland to the keys' location. (Tr. 824.) Thus, the crime scene was in law enforcement's possession and control.

While law enforcement is not required to gather evidence on behalf of an accused, it may not, through its wrongful actions, fail to preserve evidence that has an apparent exculpatory value before it is destroyed. *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1981). "The government may have a duty to *preserve* evidence after the evidence is gathered and in possession of the police." *Miller v. Vasquez*, 868 F. 2d 1116 (9th Cir. 1989) *quoting Trombetta*, 467 U.S. at 488-490, 104 S. Ct. at 2533-2534, (emphasis in original.)

In *Trombetta*, the defendants, charged with DUIs, argued the State violated their due process rights when the arresting officers failed to preserve samples of breath samples, after the results of the Intoxilyzer test. *Trombetta*, 467 U.S. at 482, 104 S. Ct. at 2530. California law enforcement officers did not ordinarily preserve samples of defendants' breaths. *Trombetta*, 467 U.S. at 482-483, 104 S. Ct. at 2530-2531. The Court found the officers were acting "in god faith and in accord with their normal practice" when they disposed of the samples. *Trombetta*, 467 U.S. at 488, 104 S. Ct. at 2533.

Here, contrary to *Trombetta* and the cases relied upon by the State, the destruction of the evidence was anything but routine. The State has minimized that not only did law enforcement fail to preserve the evidence, but the ultimate destruction of the evidence was by a fellow deputy that stood to personally inherit the victim's ranch once Todd was convicted. The State's failure to preserve the crime scene, and the trace evidence contained in the crime scene, deprived Todd of his constitutional right to due process.

II. Todd Fisher had no obligation to produce fingerprints, and the prosecutor's cross examination of his expert and the prosecution's closing argument criticizing his failure to do so shifted the burden of proof to Todd and denied him a fair trial.

Todd presented an expert witness to explain to the jury the shoddy police work by failing to correctly take Todd's fingerprints and failing to compare the fingerprint found on the safe with any of the other suspects. Despite objections from defense counsel, the prosecutor cross-examined Todd's fingerprint expert on why the defense team had not conducted its own testing. (Tr. 1365.) Then, in closing argument, the prosecutor continued its theme of shifting the burden of proof to Todd. (Tr. 1794-1795.) The prosecutor told the jury during closing

arguments, ""But when they bring an expert in here, who has done something. Who said he did do a fingerprint analysis, who said he could have done one, but, then, he didn't then the question is: Well, why not? That's a fair question. Why Because if it's so dang important then why didn't Mark Beck do it." (Tr. 1794-1795.)

The Supreme Court of Florida faced a similar factual scenario in *Hayes v. State*, 660 So. 2d 257 (Fla. 1995). The State charged Robert Hayes with first-degree murder despite no witnesses and flaws in the physical evidence. *Hayes*, 660 So. 2d at 259. Hayes presented expert testimony that challenged the procedures used by the company that conducted the DNA tests. *Hayes*, 660 So. 2d at 259. During redirect of the crime lab expert, over defense counsel's objection, the court allowed the prosecution to elicit questions whether the defense had requested any testing of the blood stains. *Hayes*, 660 So. 2d at 265. The prosecutor then commented during closing arguments on the failure of the defense to test hairs found at the scene of the murder. *Hayes*, 660 So. 2d at 265.

The Court in *Hayes* reversed and held the State cannot comment on a defendant's failure to produce evidence because doing so could

erroneously lead the jury to believe the defendant carried the burden of introducing evidence. *Hayes*, 660 So. 2d at 265 (citation omitted). The Court explained:

> The prosecutor's questions and statements in the instant case may have led the jury to believe that Hayes had an obligation to test the evidence found at the scene of the murder and to prove that the hair and blood samples did not match his own. Clearly, Hayes had no such obligation.

Hayes, 660 So. 2d at 265. The Court also rejected the State's argument that any error was remedied with a curative jury instruction. *Hayes*, 660 So. 2d at 266. The Court additionally rejected the State's harmless error argument, "[w]hile evidence exists in this case to establish Hayes committed this offense, physical evidence also exists to establish someone other than Hayes committed the offense." *Hayes*, 660 So. 2d at 266. *See also*, *Cribbs v. State*, 111 So.3d 298 (Fla. 2013) *citing Hayes,* 660 So. 2d at 265 (reversible error when State cross-examined defense investigator on what he did not do, as a defendant is not obligated to present evidence or witnesses and such argument by the prosecutor invited the jury to compare investigations rather than hold the State to its burden)

Contrary to the State's argument, the prosecutor's questioning of Beck and the prosecutor's closing arguments were not just challenging Beck's credibility but rather, as in *Hayes*, invited the jury to convict Todd because Todd had not proven it was somebody else that committed the offense. Like *Hayes*, Todd was entitled to challenge the law enforcement procedures and failures. However, Todd had no obligation to conduct his own fingerprint testing when law enforcement failed to do so. The State's questioning of Beck and closing argument comments could have erroneously led the jury to believe Todd carried a burden of introducing evidence. After defense counsel's objections, the court and prosecutor's curative reminders to the jury regarding the State's burden of proof did little to undo the damage of the State's repeated implications that Todd had failed to produce evidence that could have cleared his name.

The prosecutor's misconduct, by insinuating Todd had a responsibility to provide evidence of his innocence, denied Todd the right to a fair trial. While circumstantial evidence existed to frame Todd, Todd was not the only suspect in Wilbur's death. (Tr. 327, 793, 860.)

Brett and Leann Hoagland stood to gain a substantial financial windfall with Wilbur's death and Todd's conviction. (Tr. 808, 997, 1677.) Inheriting Wilbur's ranch was exactly what Leann needed to subsidize her horse business. (Tr. 1601.) The Hoaglands were shrewd. They arranged for the cleaning of the crime scene and destruction of the crime scene evidence, obtained detailed personal information about Wilbur, and then attempted to obtain numerous death certificates and close bank accounts. (Tr. 1113-1114, 1260, 1640-1643; DC 370.) Yet, even though law enforcement claimed to consider them suspects, law enforcement never tested the gun for Leann's DNA or tested Brett or Leann's fingerprints to determine if they matched the fingerprint on the safe. (Tr. 1055, 1170, 1414.) Todd, with his social awkwardness and solitary lifestyle, provided an easy scapegoat. The State denied Todd a fair trial when it capitalized on his failure to conduct his own testing to prove his innocence.

CONCLUSION

Todd respectfully requests this Court find the district court erred when it denied his motion to dismiss, reverse his conviction, and dismiss with prejudice. Alternatively, Todd requests this Court find the

prosecution denied him a fair trial and reverse his conviction and remand for a new trial.

Respectfully submitted this 14th day of June, 2021.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Kristina L. Neal
KRISTINA L. NEAL
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 1,819, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kristina L. Neal
KRISTINA L. NEAL

CERTIFICATE OF SERVICE

I, Kristina L. Neal, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 06-14-2021:

Kathryn Fey Schulz (Govt Attorney)
215 North Sanders
P.O. Box 201401
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

Brett Irigoin (Attorney)
121 S. Douglas Avenue
Glendive MT 59330
Representing: State of Montana
Service Method: E-mail Delivery

Electronically signed by Kim Harrison on behalf of Kristina L. Neal
Dated: 06-14-2021