IN THE
MISSOURI SUPREME COURT

LEONARD TAYLOR,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. 92166**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
21ST JUDICIAL CIRCUIT, DIVISION 14
THE HONORABLE JAMES R. HARTENBACH, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Leonard Taylor was convicted of four counts of first degree murder, Section 565.020,RSMo2000 and four counts of armed criminal action, Section 571.015,RSMo 2000. He was sentenced to death on each murder count and to consecutive life sentences on the armed criminal action counts. This Court affirmed Mr. Taylor's convictions and sentences. *State v. Taylor*, 298S.W.3d482(Mobanc2009).

After his direct appeal, Mr. Taylor timely filed a Rule 29.15 motion that was amended by counsel. The circuit court denied several claims without an evidentiary hearing and denied the remainder of the claims after a hearing. Because death sentences were imposed in the underlying case, this Court has jurisdiction of this appeal. Mo.Const.,Art.V.,Sect.3.

STATEMENT OF FACTS

Appellant, Leonard Taylor, was charged with four counts of first degree murder and four counts of armed criminal action (L.F.736-49).[1] The case proceeded to trial in February 2008, and the following evidence was adduced:

Late on the afternoon of December 3, 2004,[2] family members asked the police to check on the welfare of Angela Rowe and her three children, Alexus (11), Acqreya (6), and Tyrese (5), at their house in Jennings, St. Louis County, Missouri (Tr.819-20,838,1188-90;G.R.Depo49-50,52). No doors or windows were open, so the police entered a bedroom through the window (Tr.821-22,829). The police found the three children, deceased and lying in a bed in the master bedroom (Tr.825,937). Police found Angela, also deceased, covered with blankets in the bedroom that they had initially entered (Tr.826,832). Angela's live-in boyfriend, Leonard Taylor, was not there (Tr.825,828,1044;G.R.Depo50,52-3).

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[1] Record citations are as follows: 29.15 hearing transcript (PCRTr.); 29.15 legal file (PCRL.F.); 29.15 supplemental legal file (Supp.PCRL.F.); trial transcript (Tr.); direct appeal legal file (L.F.); and exhibits admitted at the underlying trial by the State (St.Ex. __) and by the Defense (Def.Ex. __). The transcript of Perry Taylor's statement to the police was filed in the direct appeal (PerryTr.), and the deposition of Gerjuan Rowe was filed in the direct appeal (G.R.Depo.). Undersigned counsel will also file with this Court the exhibits admitted at the 29.15 hearing (Mov.Ex. __).

[2] All dates concerning the time period of the crimes refer to 2004.

Each victim died from a gunshot to the head (Tr.1182-83,1186,1189-91). Angela also had a graze wound to her chest and a bullet wound to her left arm (Tr.1177-82). Alexus and Acqreya had two gunshot wounds to the head, and Tyrese had one gunshot wound to the head (Tr. 1184-85, 1189-90).

Clues from the Crime Scene

The medical examiner's investigator, analyzing the bodies at the scene, noted that Angela's body was still in rigor mortis, which typically occurs 10-12 hours post-mortem and remains for 24-36 hours (Tr.1208-09). His report included that the air-conditioning was set at the lowest setting and that the deceased's body temperature was very cold (Tr.1220-21).

By the time of the autopsy, rigor mortis had passed (Tr.1209,1210). None of the conditions typically seen in the later stages of decomposition were present (Tr.1203-05,1213). At trial, the medical examiner opined that the bodies would have been in the house up to two to three weeks (Tr.1196). At a prior deposition, he opined that the time of death was most likely two or three days before they were discovered (Tr.1201,1206-07,1219-20).

There were no signs of forced entry, and the house was not ransacked (Tr. 829,979-80). The thermostat was set on cool, and the house was noticeably cold (Tr.822,829,911,957-58). The odor of decomposition was not very strong (Tr. 832-33,834,1015-16).

There were stacks of unopened newspapers in the living room (Tr.935,952,1018). The mail slot was full, and numerous items of mail were also in the house (Tr.821,935,952).

No officer recalled opening any mail (Tr.835,913,933-34,1021-22,1046-47,1591). If an officer had opened an item of mail, the standard practice required that to be documented (Tr.835,934,1022,1046). No report indicated that the police had opened any mail (Tr.1581-84,1588).

Angela's pay stub, dated and postmarked November 24, was found open in the house (Tr.1581;Def.Ex.A). The earliest it could have arrived was November 26 (Tr.1699). Angela's phone bill, with a billing date of November 27 and a probable mailing date of November 29, was also found open in the house (Def.Ex.B,B-1;Tr.1626-27,1625-27,1629). There was an envelope in the front room addressed to Angela and postmarked November 22 from California (Tr.914). The letter inside contained a message, "Is your man faithful? Eventually it all comes out. Enjoy it now because he's not yours" (Tr.913).

Newspapers, dated November 26, 27, 28, 29, and December 1 were found on the front lawn (Tr.982-86,1003-04;St. Exs.56,58,59,60,61,62). The newspapers for November 30, December 2, and December 3 were not outside, and the police did not check the unopened newspapers inside the house (Tr.1018).

There was a bullet hole in a closet door frame in the master bedroom, where the children were found (Tr.915,987-88). A spent projectile was found on the closet floor (Tr.987-90).

Initial Statements of Witnesses regarding their Last Contact with the Victims

After the bodies were found on December 3, the police interviewed the victims' family, friends, and neighbors. That evening, Angela's sister, Gerjuan Rowe, told police that she last saw Angela the prior weekend, November 27-28 (G.R.Depo.26,50,52-3,60-1, 73-5,83-4).[3] She saw Angela on November 27 when Angela came by her house to lend her fifty dollars (G.R.Depo.26,52-3,73-5,83-4). She got a phone call from Angela on November 28 at 3:00 or 4:00 a.m. (G.R.Depo.26,60-1,73-5,83-4).

Angela's neighbor, Elmer Massey, told police that he saw Angela and the children the weekend after Thanksgiving, November 27-28 (Tr.1602-03). Sometime during the week of November 29, he noticed a light-skinned black man leave Angela's house but duck back inside as Elmer pulled up (Tr.1603,1610).[4]

On December 4, the police interviewed the children's aunts, Beverly and Sherry Conley (Tr.1673,1682).[5] Beverly stated that Alexus had called her the previous Saturday night, November 27 or early Sunday morning, November 28 (Tr.1672-74). Sherry stated that she had last spoken with Alexus and Acqreya on the Saturday after Thanksgiving, November 27 (Tr.1707-08). Sherry stated that on Sunday, November 28 at 10 a.m., she spoke with Angela about plans for the upcoming December 3 weekend (Tr.1682,1708).

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[3] The police erased the taped interview of Gerjuan Rowe (Tr.919,938,1054).

[4] Elmer did not identify Leonard as the man he saw (Tr.1605-06).

[5] The police erased the taped interviews of Beverly and Sherry Conley (Tr.919,940, 1056-57).

On December 5, Angela's friend, Kathy Barnes, told police that she last spoke with Angela on November 24 at about 10:30 p.m. (Tr.1240-41). She remembered the call because it was the night before Thanksgiving (Tr.1241). Within the last few weeks of Angela's life, Kathy noticed that she acted strangely (Tr.1239).

Tyrone Conley, the children's father, had custody of the children during the weekend of November 19 (Tr.838,841,847). On Monday, November 22, he met Angela at a McDonald's to return the children (Tr.841). Tyrone saw a brown Capri following Angela (Tr.844). He had met Leonard one time before in 2001, and the driver of the Capri looked like Leonard (Tr.844-45).[6] Angela was not walking straight, was acting "a little weird," and said that she needed to hurry (Tr.842-43).

Angela last showed up for work on November 20 (Tr.1161-62). She called in on November 21, stating that she had been in a car accident (Tr.1163,1167). Although she was scheduled to work on November 26, she did not call or show up (Tr.1164,1170-72). Angela had seemed nervous and emotional in the prior month (Tr.1166).

The children went to school on November 22 and 23 but were off the rest of the week for Thanksgiving break (Tr.1228). They were supposed to return to school on November 29 but did not (Tr.1229).

Leonard Gone from November 26 Onward

Although he lived with Angela when in Missouri, Leonard had a wife, Debrene, in California (Tr.1090,1245,1260). He traveled often for business and carried bags of

[6] However, Tyrone could not identify Leonard in the courtroom (Tr.846).

merchandise (Tr.1089-90,1260). On November 26 at about 6:00 a.m., Leonard knocked at his sister-in-law Elizabeth's door and asked for a ride to the airport (Tr.1247,1258). Elizabeth had taken Leonard to the airport on prior occasions (Tr.1259-60). Leonard stated that he had been outside in his car, a green Blazer, since midnight (Tr.1248). Leonard had four or five bags, more than he usually had when traveling (Tr.1251,1260). Leonard came into Elizabeth's home, put papers wrapped around a box on the table in the foyer, and asked Elizabeth to give those to his brother, Perry Taylor (Tr.1277-78,1283). After they loaded the car, Leonard threw what appeared to be a dark, long-barreled revolver into the sewer (Tr.1253-54,1260-61,1282).[7]

On the way to the airport, Leonard told Elizabeth that he was leaving because people were trying to kill him and it could be the last time she saw him alive (Tr.1255). He warned her that she would hear things about him that were not true (Tr.1254). Leonard checked in for his flight at 7:45 a.m. using the name Louis Bradley (Tr.1288).[8] The flight reservations for Louis Bradley had been made the day before by Debrene (Tr.1287).

Perry picked up the Blazer from Elizabeth's house, and Elizabeth gave him the papers wrapped around the box (Tr.869,906-07,1264,1278).

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[7] In October 2004, Leonard was seen with a black, long-barreled revolver (Tr.1096-97). Previously, Elizabeth testified that she could not identify the type of gun that Leonard possessed on November 26 (Tr.1262-63).

[8] Leonard had been using this alias for at least as far back as March 2004 (Tr. 1288).

On December 7, the police searched the sewer near Elizabeth's home but found no weapon (Tr.1030-31,1293-95). The sewer had been cleaned on December 2, and its contents had been taken to a dump (Tr.1295-96,1300). Officers searched the dump but found nothing (Tr.1300-02).

Perry Taylor's Statements

Perry was an over-the-road truck driver with Gainey Transportation in 2004 (Tr.854,894,897,1077). Perry did not have a permanent residence and stored his belongings and Blazer at Angela's home (Tr.869,898, 906). Recently, Angela had called him, screaming to "come get his shit" because she was going to move (Tr.1067-68).

Gainey's GPS records reflected that Perry's truck was in the St. Louis area from 3:45 p.m. on November 25 (Thanksgiving Day) through November 30 (Tr.896,1065,1072-73,1285-86).[9] After that, the truck traveled through many states (Tr.1285-86).

On December 4, the police called Perry, who stated that he was last at Angela's home on Thanksgiving Day, November 25, when he walked there to retrieve his Blazer (Tr.1700). Later, while in Georgia, Perry was pulled from his truck by police, questioned about the murders, and released (Tr.892-93,900,1058).

[9] Perry's cell phone records also showed that on November 24 and 25, Perry was in Michigan and then arrived in the St. Louis area later on November 25 (Tr.1445-49;St.Ex.223).

On December 5, Perry was arrested in New Jersey (Tr.855-56,893,1058). Perry told the police that he went to Angela's home on Monday, November 29 to pick up his Blazer (Tr.1597,1066). Perry said that he noticed a few newspapers and knocked on the door but received no response (Tr.1597). When he opened the console of his Blazer, he noticed a box of ammunition (Tr.1599).

After he was released, he drove his truck to St. Louis, where he was arrested by police on December 8 (Tr.893-94). He was questioned from 10:46 p.m. to 1:46 a.m. (St.Ex.196A;Tr.1032,1035,1058,1068;PerryTr.154). A detective told Perry, "the answers that you [give] probably in the next fifteen or twenty minutes are probably going to dictate the good portion of what happens to the rest of your life" (Tr.1060). At trial, Perry testified that the statement that he gave to police on December 8-9 was coerced and not true (Tr.860,864-65,866,878,881-84,900-03,908).

Perry told the detectives that he did not return to St. Louis until November 26 (the day after Thanksgiving) (Tr.1063-64,1073). Perry said that he encountered bad weather in Michigan and had to shut down the truck (Tr.1064).

Perry denied any role in the murders and claimed that Leonard had confessed to him (PerryTr.9;Tr.860). He stated that he was on the road November 24,[10] and Leonard called him on his cell phone and asked to borrow money (PerryTr.15,18,110;Tr.860). Leonard said that he needed to get away because he had killed Angela

[10] Perry initially told the police that the phone call from Leonard was a week and a half to two weeks before Thanksgiving (Tr.1063).

(PerryTr.15;Tr.860). Angela came at him with a knife, and he could not get her off him, so he shot her two or three times (PerryTr.15-16,112-13;Tr.861). He needed to kill the children because they witnessed it (PerryTr.16;Tr.861-62). After Leonard hung up, Perry repeatedly tried to call him back but got no answer (PerryTr.16;Tr.862). Leonard called Perry later and again confessed (PerryTr.17-18;Tr.863).

On November 24, Perry told his girlfriend, Betty, that Leonard said that he killed Angela and the children (Tr.1079-80).[11] He said that Angela attacked him with a knife, so he shot her and the children (Tr.1081-82). Perry said Leonard shot Angela once, but she got up, so he shot her in the head (Tr.1082). On November 25, Thanksgiving Day, Perry got a call on his cell phone, while he was at Betty's house (Tr.1080-82). Perry said, "Man, what the fuck you still doing there?" (Tr.1082). When he hung up, Perry told Betty that Leonard said he was waiting for a letter to arrive from his wife and that he had turned on the air conditioning (Tr.1083,1090).

Leonard Arrested on December 9.

On December 9, the police conducted surveillance of the home of Leonard's girlfriend in Kentucky (Tr.1303,1305-07). The police observed Leonard leave the home by lying on the floorboard of a car (Tr.1306-07). Leonard had a parole violation warrant for forgery and identified himself as Jason Lovely (Tr.921,1073,1306-07,1311,1318-19,1335-36).

[11] Betty also testified that the first phone call she received from Perry, stating that Leonard had confessed, was Tuesday morning, November 23 (Tr.1085).

At the time of Leonard's arrest, the police seized luggage (Tr.921-22,1320,1324). One of the bags contained Leonard's glasses, which were later examined (Tr.922,929-31,1249-50,1331,1342,1671). The luggage also contained false identifications and pamphlets and tools to create false identifications (Tr.1325-30, 1341). There were also two Greyhound bus itineraries for Jason Lovely (Tr.1329).

Forensic Testing

Ten bullets, recovered from the victims and the scene, were fired from the same gun, which was either a .38 or .357 caliber (Tr.1142-45,1150-51). A box of .38 special cartridges, found in Perry's Blazer, could be fired from either a .38 or .357 (Tr.1121-23,1153-54). A spent shell casing, found in Perry's Blazer, was consistent with the boxed ammunition (Tr.1121-23,1135,1153-54,1156).

No bloody clothing was found in the luggage seized at Leonard's arrest (Tr.1333, 1384,1386). The State conducted phenolphthalein tests on 42 items from the luggage (Tr. 1379-80). Only two, the glasses and a watch, tested presumptively positive for blood (Tr.1374-75,1387). Nothing was visible on these items, and the presumptively positive result on the glasses was a "weak reaction" (Tr.1375-76,1391,1392-96). Confirmatory testing on the watch showed that the substance was not blood (Tr.1388). No confirmatory testing was done on the glasses; instead, DNA testing was done (Tr. 1378,1380,1398,1467-68). The sample was miniscule and contained two or more partial DNA profiles (Tr.1467-68,1479-80,1500, 1505). The chemist could not exclude Angela as a donor (Tr.1468,1509). That partial profile appeared in 1 in 12,930 in the African-American population (Tr.1469). The chemist could not confirm it was Angela's DNA

(Tr.1468,1499,1501,1503). Even if Angela's DNA, it could have been saliva, skin, or hair, and not blood (Tr.1487,1503).

Phone Records

At trial, the State called Cathy Herbert, who worked for Charter Communications and provided Charter's records of Angela's landline telephone, which reflected *all* outgoing calls and some, but not all, incoming calls (Tr.1509-13,1516,1550-51;St.Ex.220). The prosecutor created several graphs from the Charter records. State's Exhibit 215 showed the calls from Angela's number to check her own voicemail, and those voicemail calls stopped on November 25 (Tr.1522-24;St.Ex.215). State's Exhibit 217 showed two calls from Angela's landline to Gerjuan's number on November 24 and none thereafter (Tr.1524-25;St.Ex.217).

State's Exhibit 218 showed three calls on November 21 from Angela's landline to Aunt Beverly's numbers and none afterwards (Tr.1525-26). State's Exhibit 219 showed the calls between Angela's number and Aunt Sherry's numbers; there were two calls on November 13 and a final call on December 3 (Tr.1526).

State's Exhibit 213 showed outgoing calls from Angela's number from November 24 at 8 a.m. through December 4 (Tr.1527-28). There were nine outgoing calls on November 24, and those calls were made to Valerie Burke (2), Perry Taylor (5), and Southwest Airlines (2) (Tr.1528-29).[12]

[12] Valerie Burke was an old friend of the Taylors (Tr.857).

State's Exhibit 212 showed outgoing calls from Angela's landline from November 1 through December 4 (Tr.1521-22;St.Ex.212). From 9:50 a.m. on November 25 through November 29 at 8:54 a.m., there were only calls forwarding to voicemail on Angela's landline (Tr.1530). There were no outgoing calls and no incoming calls that Charter was aware of (Tr.1530-31).

The only calls reflected on Angela's landline records, between the final outgoing call to Perry on November 25 at 9:41 a.m. and the final incoming call at 6:18 p.m. on December 3 were calls going into voicemail except six calls highlighted yellow (Tr.1531-33). The "yellow" calls were records of incoming calls to Angela's landline, provided to Charter by another carrier for internal billing purposes (Tr.1523-24,1532). Charter did not have all information about those "yellow" calls, so it was not known whether the incoming call was answered or went to voicemail (Tr.1532-33,1537-38).

Ms. Herbert went through each of the "yellow" calls and opined that each of those calls, except for one call, likely went into voicemail (Tr.1533-38). Ms. Herbert opined that the call preceding each "yellow" call was a portion of that same call that went to voicemail (Tr.1533-38). Ms. Herbert opined that the "yellow" calls went to voicemail, because (after she reformatted the records) the duration of the "yellow" call provided by the other carrier was virtually the same as the duration of the preceding call that went into voicemail (Tr.1534-37,1553).

Ms. Herbert provided the above explanation as to each "yellow" call and preceding call, except as to the "yellow" call on November 29 at 8:56 a.m. (Tr.1534).

Ms. Herbert testified that because that "yellow" call only had a duration of "0," the call would not have been answered (Tr.1534).

During cross-examination, Ms. Herbert testified that she originally provided Charter records for Angela's landline, Defendant's Exhibit LL, to the defense in January 2007 (Tr.1539;Def.Ex.LL). A couple of weeks before the trial in February 2008, she reformatted and corrected the durations of the "yellow" calls from the outside carriers and created a new set of records using newer equipment (Tr.1540,1553;Def.Ex.LL; St.Ex.220). The original Charter records provided different information regarding the durations of the "yellow" incoming calls than the information contained in the later Charter records, which were used by the State at trial (Tr.1541;St.Ex.220;Def.Ex.LL).

She reformatted the records, which corrected the durations of the following "yellow" incoming calls:

- November 29 at 8:56 a.m., from 27 seconds to 0 seconds;
- November 29 at 6:59 p.m., from 12 seconds to 9 seconds;
- November 29 at 8:51 p.m., from 1 minute, 33 seconds to 29 seconds;
- December 1 at 9:37 a.m., from 7 seconds to 1 minute, 25 seconds;
- December 1 at 7:29 p.m., from 29 seconds to 6 seconds;
- December 3 at 8:34 a.m., from 1 minute, 13 seconds to 3 seconds.

(Tr.1544-47;St.Ex.220;Def.Ex.LL). The records also reflected that the duration of a yellow incoming call on November 24 at 8:05 p.m. was changed from 1 minute, 14 seconds to 0 seconds (St.Ex.220;Def. Ex.LL).

The State called Dan Jensen, a records custodian for Sprint Nextel (Tr.1410). He brought into court call detail records, which is raw data directly from the phone switch, for Leonard's cell phone and Perry's cell phone (Tr.1411-12,1566;St.Exs. 223, 224,260). He also brought into court the billing records for Gerjuan's cell phone (Tr.1412,St.Ex.252). These records were admitted into evidence without defense objection (Tr.1412).

The Sprint records captured all outgoing and incoming calls in the network (Tr. 1415). Gerjuan's records indicated what number she dialed when making outgoing calls but did not indicate the number for calls coming in (Tr.1451-52,1453-54). Rather, Gerjuan's records reflected an incoming call only by the designation "incoming" (Tr.1450-51). On November 23, Gerjuan's cell called Angela's landline seventeen times (Tr.1426). From November 24 through December 3, there were no outgoing calls from Gerjuan's cell to Angela's landline (Tr.1426).

Mr. Jensen testified that there was one outgoing call from Leonard's cell phone to Angela's landline on November 22 and none thereafter (Tr.1429). There were no phone calls at all from Leonard's cell to Angela's landline after November 23 (Tr.1429-31).

The phone records showed the following phone calls during the late night of November 23 and the early morning of November 24:

- Leonard's cell called his wife, Debrene's number at 11:15 p.m. and 11:23 p.m., and the calls lasted 52 seconds and 60 seconds;
- Leonard's cell called his mom, Jessie Bland's number at 11:23 p.m., and the call lasted 18 seconds;

- Leonard's cell called Perry's cell at 11:24 p.m., and the call lasted approximately 11 minutes;
- Leonard's cell called Jessie's number at 11:35 p.m., and the call lasted approximately 8 minutes;
- Perry's cell called Leonard's cell at 11:42 p.m., and the call lasted approximately 9 minutes;
- Debrene's number called Leonard's cell at 11:45 p.m., and the call lasted approximately 6 minutes;
- Leonard's cell called Perry's cell at 12:05 a.m., and the call lasted approximately 10 minutes;
- Debrene's number called Leonard's cell at 12:07 a.m., and the call lasted approximately 10 minutes;
- Jessie's number called Perry's cell at 12:47 a.m., and the call lasted approximately 5 minutes.

(Tr.1431-35,1437-38,1440-42;St.Exs.223,224,260). Both Debrene and Perry called Leonard other times during the late night of November 23 and early morning of November 24, and some of the other calls were routed (Tr.1448;St.Exs.233,234,236,237).

Angela and Gerjuan's records also reflected the following calls during the late night of November 23 and the early morning hours of November 24:

- Gerjuan's cell called Angela's landline at 11:52 p.m., and the call lasted approximately 10 minutes;

- Angela's landline called Gerjuan's cell at 12:22 a.m., and the call lasted 6 minutes and 9 seconds.

(St.Exs.220,252).

Leonard and Perry's cell phone records also showed the following calls between Leonard, Perry, Jessie, and Debrene on December 3, the day that the bodies were discovered:

- Perry's cell called Leonard's cell at 4:45 p.m.,[13] and the call lasted 21 seconds;
- Perry's cell called Leonard's cell at 4:46 p.m., and the call lasted 25 seconds;
- Leonard's cell called Debrene's number at 6:28 p.m., and the call lasted less than 3 minutes;
- Perry's cell called Jessie's number at 7:05 p.m., and the call lasted approximately 3 minutes.

(Tr.1435-39,1443-44;St. Exs.223,224,235,238,242,260).

At trial, two defense witnesses deviated from their initial statements to the police, after considering the Charter records. The defense called Beverly Conley, the children's aunt, who testified that Alexus called her late one evening (Tr.1673). Beverly told the police that the call occurred at approximately midnight on November 27 (Tr.1674).

[13] Leonard's cell phone records reflected the Eastern Time Zone of 5:45 p.m. and 5:46 p.m. on December 3, but undersigned counsel has included the Central Time Zone time here (4:45 p.m. and 4:46 p.m.) and throughout this brief, unless otherwise designated (Tr.1436-37;St.Ex.283).

Later, after Beverly spoke to the prosecutor's office and viewed the Charter Communications records of Angela's landline, she realized that she was mistaken about the date of Alexus' phone call (Tr.1674-77). The Charter records indicated that the last call between her number and Angela's landline was on November 21 (Tr.1677).

The defense also called Sherry Conley, another aunt (Tr.1680). Before trial, she saw the Charter records and State's Exhibit 219, which is a graph of calls made to and from Angela's landline (Tr.1691-92). According to the records, no calls were made to or received from Sherry's number and Angela's landline between November 26-30 (Tr.1691-92). Based on the records and the graph, Sherry disavowed her prior statement that she had talked to the victims on November 27 and 28 (Tr.1691-92).

The jury began deliberations at 7:17 p.m. and returned guilty verdicts on all counts at 11:51 p.m. (Tr.1783,1785;L.F.1186-1209).

The Penalty Phase

In the penalty phase, the State presented evidence, including a certified copy of the conviction, that Leonard raped his stepdaughter in 2000 (Tr.1806-09). The State also introduced a certified copy of the convictions, judgment, and sentence for: 1991 possession with intent to distribute; 1992 forcible rape; and 2001 forgery and stealing (Tr.1802-05,1809). The State also presented victim impact testimony from three relatives (Tr.1810-18).

Mitigation evidence included a stipulation that Leonard was a respectful inmate who had earned placement in the honor dorm through good behavior and a good work ethic; he was respectful and had few rule violations (Tr.1821-22;Def.Ex.RR).

The jury recommended death for the first degree murder counts, and the court imposed death on those counts (Tr.1851,1859-60;L.F.778,1410-14). The court imposed consecutive life sentences on the armed criminal action counts (Tr.1861;L.F1410-14). This Court affirmed Leonard's convictions and death sentences on the direct appeal. *State v. Taylor*, 298S.W.3d482(Mo.banc2009).

29.15 Proceedings

Appointed counsel filed a motion for the State to disclose any Charter Communications disclaimer in its possession (PCRTr.2-5; PCRL.F.2,30-36). The prosecutor stated that Charter did not provide any disclaimer or information that its records did not reflect all outgoing calls (PCRTr.5-7;PCRL.F.37).

Mr. Taylor's timely-filed Amended Motion included claims challenging the accuracy and reliability of the Charter and Sprint phone records, claims that trial counsel failed to adduce additional evidence during the guilt phase, and claims that counsel failed to object during the voir dire and guilt phase closing argument (PCRL.F.38-227). The Court held a hearing on two claims related to the phone records and denied other claims without a hearing (PCRL.F.276).

At the hearing, Christopher Avery, Senior Counsel for Charter, testified that Charter began its landline telephone service (the service provided to Angela) in the St. Louis area in the summer of 2004 (PCRTr.89-91). At the time of the hearing in 2011, Charter included a standard disclaimer in response to records requests for call detail records (PCRTr.92-3;Mov.Ex.11). That disclaimer advises that Charter "…DOES NOT keep or have records for every incoming or outgoing call made or received by our

telephone subscribers. The absence of a record for a particular call(s) on the attached log does not mean that such call(s) was not made…" (Mov.Ex.11). Charter began using that disclaimer in 2009 (Mov.Exs.11,12;PCRTr.93).

At some point after June 2005 and before March 2006 (and at the time of the trial in February 2008), Charter routinely included in its response letter for telephone records, the following disclaimer language:

> Please be aware that Charter's billing records from which the above information is obtained are subject to human error and Charter cannot always guarantee the accuracy of such records. You should not rely solely on this information and should always independently corroborate the information Charter provides you with other information you have concerning the identity of the individual.

(Mov.Ex.12;PCRTr.95-6). Charter used the disclaimer language to make clear to the requesting party that Charter's records may contain errors or omissions (PCRTr.96).

From 2005 through 2008, if an attorney had asked Mr. Avery whether Charter guaranteed the accuracy of its telephone records or for any disclaimer language used by Charter, he would have told them that Charter does not guarantee the accuracy of its records and would have provided them with the relevant disclaimer language (PCRTr. 97). He would have been available to testify at the trial in February 2008 (PCRTr.97-8).

Cathy Herbert, the Charter records custodian who testified at trial, testified that she was aware that Charter used disclaimers and did not guarantee one hundred percent accuracy of its records (PCRTr.38-9).

At the time of the trial, Ms. Herbert believed that the Charter records contained *all* outgoing calls (PCRTr.82). At the post-conviction hearing, Ms. Herbert compared the Charter records for Angela's landline with the Sprint records for Perry and Leonard's cell phones (PCRTr.48-9;Mov.Exs.2,2A,7,8;St.Exs.220, 223,224). Ms. Herbert then testified at the hearing, contrary to her trial testimony, that "there is obviously a discrepancy, and it is possible that one or the other [record] could be incorrect or not contain all [phone calls]" (PCRTr.41-53;Tr.1512-13,1516,1521-22,1524-31;Mov.Exs.2,2A,5,6,7,8;St.Exs.218,219, 220,223,224,260). Specifically, Ms. Herbert acknowledged that certain *outgoing* phone calls made from Angela's Charter landline appear on the Sprint records of Perry and Leonard's cell phones that received the call (as an incoming call), but *do not appear on the Charter landline records as an outgoing call* (PCRTr.41-53;Mov.Exs.2,2A,5,6,7,8;St.Exs.218,219,220,223,224,260). Those calls are as follows:

- A-1, Sprint record of Leonard Taylor's cell showing two calls received from Angela's landline on November 22 at 7:55 a.m. and 7:57 a.m.
- A-2, Charter record of Angela's landline, *not* showing the two outgoing calls underlined on A-1.
- A-3, Sprint record of Leonard Taylor's cell showing two calls received from Angela's landline on November 23 at 10:22 p.m. and 10:27 p.m.
- A-4 and A-5, Charter record of Angela's landline, *not* showing the two outgoing calls underlined on A-3.

- A-6, Sprint record of Perry Taylor's cell showing a call received from Angela's landline on November 24 at 4:53 p.m. Eastern Time Zone.
- A-7, Charter record of Angela's landline, not showing the outgoing call underlined on A-6 (either at 3:53 Central Time or at 4:53 Eastern Time).

(*See* Appendix A-1-A-7;PCRTr.49-53;St.Exs.220,223,224,260;Mov.Exs.2,2A,7,8). The above calls occurred between November 22 and December 3, the time period charged (L.F.54-57,1133,1138,1143,1148).

Had trial counsel asked Ms. Herbert to examine the Sprint records of Perry and Leonard's cell phones and compare those records with the Charter records, she would have done so (PCRTr.48). She would have testified at trial that "there is obviously a discrepancy" and, evidently, the Charter records did not contain all outgoing calls (PCRTr.53-4,88).

At the hearing, Ms. Herbert also compared the Charter records of Angela's landline with the Sprint record of Gerjuan's cell number (314-517-1270) (PCRTr.54-66;Mov.Exs.2A,9;St.Exs.220,252). When Gerjuan's cell phone records (314-517-1270) reflected an outgoing call to Angela's landline (314-395-1512), the Charter landline records reflected an incoming call from a different number (314-878-1575) (PCRTr.56-65). This happened for seventeen calls (*See* Appendix A-8-A-15;Mov.Exs.2A,9;St.Exs.220,252).

Had trial counsel asked Ms. Herbert to compare the Sprint record of Gerjuan's cell phone with the Charter record of Angela's landline, she would have done so (PCRTr.66). She would have informed the jury that the Charter records, on seventeen occasions,

showed an incoming call different from the actual number calling Angela's landline (PCRTr.66).

In addition, certain outgoing phone calls made from Angela's landline to Gerjuan's cell are not reflected on the Sprint record as an "incoming" call (PCRTr.66-9;Mov.Exs.2A,9;St.Exs. 220,252). According to the records, that occurred seven times (*See* Appendix A-16-A-21; Mov.Exs.2A,9;St.Exs.220,252). Ms. Herbert testified that she would have been willing to make the above comparison at trial and that the Sprint record for Gerjuan's cell number did not reflect all incoming calls (PCRTr.69-70).

Ms. Herbert also testified at the post-conviction hearing regarding the changes in durations of the "yellow" incoming calls provided by outside carriers (PCRTr.74-79). When the information from the outside carriers came to Charter, it was not in a readable form until the records were formatted by Charter (PCRTr.74-75). She determined that the durations of incoming calls provided by other carriers had been improperly formatted in the initial set of Charter records (PCRTr.74-75;Mov.Ex.2A;St.Ex.220). She did not recall how she found the errors but believed that she noticed that "the time was way off" (PCR Tr.75-76). After she found the errors, she ran the records through "probably 12 times after that" to make sure it was correct (PCRTr.75-76).

She was asked why the initial records were improperly formatted and how she was able to change that (PCRTr.75-76). She responded: "The format that that duration is sent electronically …by another carrier are in a different format when they get to us, that could not use the same algorithm that was used to format the Charter durations" (PCRTr. 76). She testified previously at a pre-trial deposition that she was unable to determine

how the program that she used to format the new records made the determination of the duration of the phone calls from the outside carriers (PCRTr.77).

Post-conviction counsel also called Dan Jensen, the Sprint Nextel records custodian, who testified at the trial (PCRTr.101). Mr. Jensen testified at trial that the Sprint call detail records of Perry and Leonard's cell phones captured all incoming and outgoing calls in the Sprint network (PCRTr.104;Tr.1415;St.Exs.223,224).

Mr. Jensen testified at trial that Sprint's billing records for Gerjuan's cell phone did not indicate the telephone number for incoming calls but rather designated them merely as "incoming" (PCRTr.104;Tr.1451-52;St.Ex.252). He was not asked at trial whether the word "incoming" would show up every time someone called her cell number, but testified initially at the post-conviction hearing that "that's exactly how it works" (PCRTr.105).

After comparing Charter's records with Sprint's records, Mr. Jensen testified (as Ms. Herbert had) that certain outgoing calls made from Angela's landline to Gerjuan's cell are not reflected on the Sprint records as "incoming" calls (PCR Tr.112-15;Mov.Exs.2A,9;St.Exs.220,252;A-16-A-21).

Mr. Jensen also agreed that when Gerjuan's cell called Angela's landline, the Charter records showed a different incoming number (PCRTr.111-12).

Mr. Jensen compared the Charter records of Angela's landline with the Sprint call detail records of Leonard's cell (PCRTr.106-08;Mov.Exs.2A,7). Like Ms. Herbert, Mr. Jensen acknowledged that the Sprint record of both Perry and Leonard's cell phones

showed incoming calls from Angela's landline and yet the Charter record of Angela's landline did not show corresponding outgoing calls (PCRTr.106-10;Mov.Exs.2A,7,8).

Mr. Jensen compared Perry and Leonard's Sprint cell phone records (PCRTr.116). Perry's record showed an incoming call from Leonard's cell on November 24 at 1:05 a.m., Eastern Time, but Leonard's record did not show a corresponding outgoing call (PCRTr.116;Mov.Exs.7,8;A-22-A-25). In addition, Perry's record showed an outgoing call to Leonard's cell on November 25 at 9:10 a.m., but a corresponding call was not reflected on Leonard's record (PCRTr.116;Mov.Exs.7,8;A-22-A-25). Mr. Jensen explained that Sprint does not guarantee one hundred percent accuracy of its records (PCRTr.117).

Mr. Jensen would have been willing to make the above comparisons and would have testified at trial as he did at the hearing (PCRTr.110-11,112,116,117).

Trial counsel, Bevy Beimdiek, Karen Kraft and Robert Wolfrum, testified that they were not aware that the Charter records did not show all outgoing calls and, as such, were not aware that Ms. Herbert's testimony that the Charter records showed *all* outgoing calls was false (PCRTr.142-43,179,194). If they had known, they would have brought that out at trial (PCRTr.143,166,179-80,194).

If the Charter records did not show all outgoing calls, the records were not reliable to prove calls not made (PCRTr.168,184). Further, any inaccuracies or omissions of the Charter records would have also aided the defense, because "the records gave us problems with some of the other testimony that we needed from people such as Beverly Conley, Sherry Conley, …and Gerjuan Rowe" (PCRTr.182-83). When the Charter

records were discussed among the team members in preparation for trial, the attorneys viewed those records as being devastating (PCRTr.161,168,180).

The trial attorneys were also not aware that on seventeen occasions Gerjuan's number showed up as a different incoming number on Charter's records of Angela's landline (PCRTr.144,180,195-96). Rather, Attorney Beimdiek believed at the time of trial that the calls from Gerjuan to Angela were just not showing up on the Charter records (PCRTr. 144). Provided with the new information that Gerjuan's number appeared as a different incoming number on Charter's records, Beimdiek nevertheless believed that it was more advantageous to argue what she believed at the time of trial (PCRTr.145,163). However, Attorney Kraft testified that they would have cross-examined Ms. Herbert about the fact that Gerjuan's number appeared as a different number on the Charter records (PCRTr.180).

The trial attorneys were not aware that Sprint's records for Gerjuan's cell did not indicate an "incoming" for every time she was getting an incoming call, such that there were times that Angela's landline record indicated that she had made an outgoing call to Gerjuan's cell number but there was no corresponding "incoming" on Gerjuan's records (PCRTr.146,181,196-97). If they had known, they would have brought that out at trial (PCRTr.146,181).

The trial attorneys were not aware that there were instances when Perry's record indicated calls to or from Leonard's cell and there was not a corresponding call reflected on Leonard's records (PCRTr.146,181,197). The attorneys would have brought that out at trial (PCRTr.146-47,181-82).

The trial attorneys were not aware that Charter employed disclaimer language regarding its records and did not guarantee the accuracy of its records (PCRTr.147-48, 182,198). Had they known that, they would have brought that out at trial (PCRTr.148-49,182,198).

Attorney Beimdiek did not recall having any kind of admission from the Sprint records custodian that Sprint could not guarantee the accuracy of its records (PCRTr.149). If she had known, she would have adduced such evidence at trial (PCRTr.149).

If trial counsel had known of the issues with the Charter and Sprint records, they would have considered objecting to the admission and use of the records at trial (PCRTr.150,184-85).

Counsel also testified that approximately five weeks before trial, the prosecutor called and indicated that the Charter representative had created a new set of records (PCRTr.136,176-77,191-92). The trial attorneys did not recall any discussion about challenging or objecting to the second set of Charter records or Ms. Herbert's testimony regarding the change in the durations of the "yellow" calls (PCRTr.138,178, 193).

The hearing court denied Leonard's claims (PCRL.F.323-54).[14] This appeal follows (PCRL.F.356-58).

[14] The specific findings of the hearing court and additional facts and evidence, related to the post-conviction claims, are set forth in the Arguments of this Brief.

POINT I

The hearing court clearly erred in denying Appellant's claim regarding omissions and inaccuracies in the telephone records, because 1) counsel failed to (a) adequately examine the records, (b) cross-examine the records custodians regarding omissions and inaccuracies in the records, and (c) elicit that Charter and Sprint did not guarantee the accuracy of its records, and 2) the Charter records custodian testified falsely that the Charter records of the victims' telephone contained *all* outgoing calls, thereby violating Appellant's rights to due process, a fair trial, the effective assistance of counsel, and to be free from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a),21, in that the jury did not hear that the Charter records did not include all outgoing calls, the Sprint records did not contain a complete record of all calls made, the Charter records sometimes reflected a different number than the actual incoming number, and Charter and Sprint did not guarantee the accuracy of its records. Appellant was prejudiced, because: the State used the phone records to prove calls *not* made (when the records were not reliable for that purpose); the State used the records to discredit defense witnesses' initial statements concerning their last phone contact with the victims; and the jury relied on false testimony in reaching its verdicts. But for the false testimony and counsel's failures concerning the records, there is a reasonable probability of a different outcome of the trial.

Gill v. State, 300S.W.3d225(Mo.banc2009);

Driscoll v. Delo, 71F.3d701(8th Cir.1995);

Sanders v. Sullivan, 863F.2d218(2nd Cir.1988);

Durley v. Mayo, 351U.S.277(1956);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const. Art.I,Secs.10,18(a),21;

Rule 29.15.

POINT II

The hearing court clearly erred in denying Appellant's claim that trial counsel was ineffective for failing to object to: 1) the admission of the Charter and Sprint phone records; and 2) the Charter records custodian's testimony regarding her change of the durations of the "yellow" incoming calls, which data was collected and recorded by outside carriers, and her opinion that those incoming calls went into voicemail, because this denied Appellant his rights to the effective assistance of counsel, due process and freedom from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a),21, in that: 1) Charter and Sprint's computer systems were not shown to produce accurate results and the records custodians testified at the post-conviction hearing that Charter and Sprint did not guarantee one hundred percent accuracy of their records; and 2) the Charter records custodian was not sufficiently familiar with the outside carriers' practices to reformat and interpret the outside carriers' data. Leonard was prejudiced because: 1) the State used the Charter and Sprint records to prove calls *not* made (when the records were not reliable for that purpose); and 2) the State used the Charter records custodian's testimony and opinion about the "yellow" incoming calls to argue that those calls went into voicemail (as the victims had been killed).

State v. Dunn, 7S.W.3d427(Mo.App.,W.D.1999);

Cach, LLC v. Askew, 358S.W.3d58(Mo.banc2012);

State v. Reynolds, 746N.W.2d837(Iowa2008);

State v. Daniels, 179S.W.3d273(Mo.App.,W.D.2005);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const. Art.I,Secs.10,18(a),21;

Section 490.680,RSMo2000;

Rule 29.15.

POINT III

The motion court clearly erred in denying a hearing on Appellant's claim that counsel was ineffective for failing to adduce, through cross-examination of State witnesses, favorable evidence from the phone records, including evidence: 1) to impeach Betty Byers' testimony that Perry Taylor was at her home on Thanksgiving and told her that Appellant confessed; 2) that there was a phone call to Southwest Airlines on November 23, 2004 (and calls attributable to the victims were made after that); and 3) that, according to Charter's records of the victims' landline, there was no call to or from Appellant from October 17-November 5, a twenty-day period of time, because this denied Appellant due process, a fair trial, effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends.5,6,8,14; Mo. Const., Art. I, Secs.10,18(a),21, and Rule 29.15(h), in that the amended motion alleged facts, not conclusions, that entitled Appellant to relief, namely that counsel unreasonably failed to adduce evidence favorable to the defense, which prejudiced Appellant, in that the evidence would have impeached Byers' testimony and would have shown that inferences the State drew from the phone records were not warranted.

Black v. State, 151S.W.3d49(Mo.banc2004);

Coleman v. State, 256S.W.3d151(Mo.App.,W.D.2008);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const. Art.I,Secs.10,18(a),21;

Rule 29.15.

POINT IV

The motion court clearly erred in denying a hearing on Appellant's claim that counsel was ineffective for failing to object to: 1) the prosecutor's statement during voir dire that the panel members could have a lean towards the death penalty where children were killed; and 2) the prosecutor's closing argument that the phone records did not support Gerjuan's testimony that she spoke with Angela on November 28, because this denied Appellant due process, a fair trial, effective assistance of counsel, the right to a fair and impartial jury, and subjected him to cruel and unusual punishment, U.S. Const., Amends.5,6,8,14; Mo. Const., Art. I, Secs.10,18(a),21, and Rule 29.15(h), in that the amended motion alleged facts, not conclusions, that entitled Appellant to relief, namely that: 1) the prosecutor's statement during voir dire misstated the law; and 2) the prosecutor's closing argument commented on evidence that had been excluded at the State's request. The motion also properly alleged prejudice, in that the prosecutor's improper comments resulted in a substantial deprivation of Appellant's right to a fair trial.

State v. Clark, 981S.W.2d143(Mo.banc1998);

State v. Wacaser, 794S.W.2d190(Mo.banc1990);

State v. Hammonds, 651S.W.2d537(Mo.App.,E.D.1983);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const. Art.I,Secs.10,18(a),21;

Section 494.470,RSMo2000;

Rule 29.15.

ARGUMENT I

The hearing court clearly erred in denying Appellant's claim regarding omissions and inaccuracies in the telephone records, because 1) counsel failed to (a) adequately examine the records, (b) cross-examine the records custodians regarding omissions and inaccuracies in the records, and (c) elicit that Charter and Sprint did not guarantee the accuracy of its records, and 2) the Charter records custodian testified falsely that the Charter records of the victims' telephone contained *all* outgoing calls, thereby violating Appellant's rights to due process, a fair trial, the effective assistance of counsel, and to be free from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a),21, in that the jury did not hear that the Charter records did not include all outgoing calls, the Sprint records did not contain a complete record of all calls made, the Charter records sometimes reflected a different number than the actual incoming number, and Charter and Sprint did not guarantee the accuracy of its records. Appellant was prejudiced, because: the State used the phone records to prove calls *not* made (when the records were not reliable for that purpose); the State used the records to discredit defense witnesses' initial statements concerning their last phone contact with the victims; and the jury relied on false testimony in reaching its verdicts. But for the false testimony and counsel's failures concerning the records, there is a reasonable probability of a different outcome of the trial.

The bodies of Angela Rowe and her three children were found on December 3, 2004 at approximately 5:30 p.m. (Tr.820,825-27). The date they were killed was unknown (Tr.1196,1202,1206). It was undisputed that Leonard, Angela's live-in boyfriend, left the St. Louis area the morning of November 26 and did not return until after his arrest (Tr.1287-88;PCRTr.158,169,188,200-01). The State argued that Leonard killed the victims before he left on November 26, and the defense argued that the victims were still alive on November 26 (Tr.1732,1734,1735,1748,1773,1779).

The Phone Records Evidence at Trial

The Charter Records

The State called Cathy Herbert, a records custodian for Charter Communications (Tr.1509-10). She testified that the records for Angela Rowe's landline reflected *all* outgoing calls and some, but not all, incoming calls (Tr.1511-13,1516,1550-51;St.Ex.220). The prosecutor created several graphs from the Charter records. State's Exhibit 215 showed the calls from Angela's landline to check her own voicemail, and those voicemail calls stopped on November 25 (Tr.1522-24;St.Ex.215). State's Exhibit 217 showed two calls from Angela's landline to her sister, Gerjuan Rowe's number on November 24 and none thereafter (Tr.1524-25;St.Ex.217). Because the Charter records of Angela's landline did not catch all incoming calls, there could have been calls from Gerjuan's number to Angela's landline without appearing on the Charter records (Tr.1551-52).

State's Exhibit 218 showed three calls on November 21 from Angela's landline to Beverly Conley's numbers and none afterwards (Tr.1525-26). State's Exhibit 219

showed the calls between Angela's landline and Sherry Conley's numbers; there were two calls on November 13 and a final call on December 3 (Tr.1526).

State's Exhibit 213 showed outgoing calls from Angela's landline from November 24 at 8 a.m. through December 4 (Tr.1527-28). There were nine outgoing calls on November 24 to Valerie Burke (2), Perry Taylor (5), and Southwest Airlines (2) (Tr.1528-29).[15]

State's Exhibit 212 showed outgoing calls from Angela's landline from November 1 through December 4 (Tr.1521-22;St.Ex.212). From 9:50 a.m. on November 25 through November 29 at 8:54 a.m., there were only calls forwarding to voicemail on Angela's landline (Tr.1530). There were no outgoing calls and no incoming calls that Charter was aware of (Tr.1530-31).

The Charter records included incoming calls that were highlighted yellow; these records were provided to Charter by another carrier for internal billing purposes (Tr.1523-24,1532). The only calls reflected on the Charter records, between the final outgoing call to Perry on November 25 and the final incoming call on December 3 were calls to voicemail except six calls highlighted yellow (Tr.1531-33). Ms. Herbert went through each of the six "yellow" calls and opined that each likely went into Angela's voicemail, except one with a duration of "0" (Tr.1533-38).

At trial, two defense witnesses deviated from their initial statements to the police after considering the Charter records. Beverly Conley, the children's aunt, testified that

[15] Valerie Burke was an old friend of the Taylors (Tr.857).

Alexus called her late one evening (Tr.1673). Beverly told the police that the call occurred at approximately midnight on November 27 (Tr.1674). Later, after Beverly spoke to the prosecutor and viewed the Charter records, she believed she was mistaken about the date of Alexus' phone call (Tr.1674-77). The Charter records indicated that the last call between her number and Angela's landline was on November 21 (Tr.1677).

Sherry Conley, another aunt, testified that she saw the Charter records and State's Exhibit 219, a graph of calls made to and from Angela's landline (Tr.1680,1691-92). According to the records and graph, no calls were made to or received from Sherry's numbers and Angela's landline between November 26-30 (Tr.1691-92). Therefore, Sherry disavowed her prior statement that she had talked to the victims on November 27 and 28 (Tr.1691-92).

The Sprint Records

The State also called Dan Jensen, a records custodian for Sprint Nextel (Tr.1410). He brought into court the Sprint call detail records, which is raw data directly from the phone switch, for Leonard's cell phone and his brother, Perry Taylor's cell phone (Tr.1411-12,1566; St. Exs.223,224,260). He also brought the Sprint billing records for Gerjuan's cell phone (Tr.1412,St.Ex.252).

The Sprint records captured all outgoing and incoming calls in the network (Tr.1415). Gerjuan's records indicated the number she dialed when making outgoing calls but did not indicate the number for calls coming in (Tr.1451-52,1453-54). Rather, Gerjuan's records reflected an incoming call only by the designation "incoming" (Tr.1450-51). On November 23, Gerjuan's cell called Angela's landline seventeen times

(Tr.1426). From November 24 through December 3, there were no outgoing calls from Gerjuan's cell to Angela's landline (Tr.1426).

Mr. Jensen testified that there was one outgoing call from Leonard's cell to Angela's landline on November 22 and none thereafter (Tr.1429-31).

The phone records showed the following phone calls during the late night of November 23 and the early morning of November 24:

- Leonard's cell called his wife, Debrene's number at 11:15 p.m. and 11:23 p.m., and the calls lasted 52 seconds and 60 seconds;
- Leonard's cell called his mom, Jessie Bland's number at 11:23 p.m., and the call lasted 18 seconds;
- Leonard's cell called Perry's cell at 11:24 p.m., and the call lasted approximately 11 minutes;
- Leonard's cell called Jessie Bland's number at 11:35 p.m., and the call lasted approximately 8 minutes;
- Perry's cell called Leonard's cell at 11:42 p.m., and the call lasted approximately 9 minutes;
- Debrene's number called Leonard's cell at 11:45 p.m., and the call lasted approximately 6 minutes;
- Leonard's cell called Perry's cell at 12:05 a.m., and the call lasted approximately 10 minutes;
- Debrene's number called Leonard's cell at 12:07 a.m., and the call lasted approximately 10 minutes;

- Jessie Bland's number called Perry's cell at 12:47 a.m., and the call lasted approximately 5 minutes.

(Tr.1431-35,1437-38,1440-42;St.Exs.223,224,260). Both Debrene and Perry called Leonard other times during the late night of November 23 and early morning of November 24, and some of the other calls were routed, which usually meant that the phone call was routed into voice mail (Tr.1448;St.Exs.233,234,236,237).

Angela and Gerjuan's records also reflected the following calls during the late night of November 23 and the early morning hours of November 24:

- Gerjuan's cell called Angela's landline at 11:52 p.m., and the call lasted approximately 10 minutes;
- Angela's landline called Gerjuan's cell at 12:22 a.m., and the call lasted 6 minutes and 9 seconds.

(St.Exs.220,252).

Leonard and Perry's cell phone records also showed the following calls between Leonard, Perry, Jessie, and Debrene on December 3, the day that the bodies were discovered:

- Perry's number called Leonard's number at 4:45 p.m.,[16] and the call lasted 21 seconds;

[16] Leonard's cell phone records reflected the Eastern Time Zone of 5:45 p.m. and 5:46 p.m. on December 3, but undersigned counsel has included the Central Time Zone time

- Perry's number called Leonard's number at 4:46 p.m., and the call lasted 25 seconds;
- Leonard's number called Debrene's number at 6:28 p.m., and the call lasted 173 seconds (less than 3 minutes);
- Perry's number called Jessie Bland's number at 7:05 p.m., and the call lasted 224 seconds (approximately 3 minutes).

(Tr.1435-39,1443-44;St.Exs.223,224,235,238,242,260).

The Post-conviction Claim

Leonard asserted in the Amended Motion that trial counsel was ineffective for failing to adequately examine the phone records for the time period charged (November 22-December 3), discover inaccuracies and omissions in the records, discover that Charter and Sprint did not guarantee the accuracy of its records, and adduce that information through cross-examination of the records custodians. He also claimed that his convictions violated his rights to due process and freedom from cruel and unusual punishment, because the jury relied on false testimony (that the Charter records captured *all* outgoing calls) in reaching its verdicts (PCRL.F.111-167).

Appointed counsel filed a motion for the State to disclose any Charter Communications disclaimer in its possession (PCRTr.2-5;PCRL.F.2,30-36). The

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here (4:45 p.m. and 4:46 p.m.) and throughout this brief (unless otherwise designated) (Tr.1436-37;St.Ex.283).

prosecutor stated that Charter did not provide any disclaimer or information that its records did not reflect all outgoing calls (PCRTr.5-7;PCRL.F.37).

The Phone Records Evidence at the Post-conviction Hearing

Christopher Avery

At the hearing, Christopher Avery, Senior Counsel for Charter, testified that Charter began its telephone service (the service provided to Angela Rowe) in the St. Louis area in the summer of 2004 (PCRTr.89-91). At the time of the hearing in 2011, Charter included a standard disclaimer in response to records requests (PCRTr.92-3;Mov.Ex.11). That disclaimer advised that Charter:

> …DOES NOT keep or have records for every incoming or outgoing call made or received by our telephone subscribers. The absence of a record for a particular call(s) on the attached log does not mean that such call(s) was not made or received but, rather, means that a record of such call(s) was not recorded by our system. Further, some of the information contained herein is provided by third-party carriers and is subject to error. These records are provided "as is" without representations and/or warranties of any kind.

(Mov.Ex.11). Charter began using the above specialized disclaimer in 2009 (Mov.Exs.11,12;PCRTr.93).

At some point after June 2005 and before March 2006 (and at the time of trial in February 2008), Charter routinely included in its response letter for telephone records, the following disclaimer language:

> Please be aware that Charter's billing records from which the above information is obtained are subject to human error and Charter cannot always guarantee the accuracy of such records. You should not rely solely on this information and should always independently corroborate the information Charter provides you with other information you have concerning the identity of the individual.

(Mov.Ex.12;PCRTr.95-6). Charter used the disclaimer language to make clear to the requesting party that Charter's records may contain errors or omissions (PCRTr.96).

From mid-2005 through 2008, if an attorney had asked Mr. Avery whether Charter guaranteed the accuracy of its telephone landline records or for any disclaimer language used by Charter, he would have told them that Charter does not guarantee the accuracy of its records and would have provided them with the relevant disclaimer language (PCRTr.97). He would have been available to testify at the trial in February 2008 (PCRTr.97-8).

Mr. Avery acknowledged that he had previously appeared at the pre-trial depositions of Cathy Herbert and did not mention the disclaimer language or that Charter did not guarantee its records (PCRTr.98-100).

Cathy Herbert

Cathy Herbert, the Charter records custodian who testified at trial, testified at the post-conviction hearing (PCRTr.36,39-40). When Ms. Herbert worked at Charter, she was aware that Charter used disclaimers and did not guarantee the accuracy of its records

(PCRTr.38-9). At the time of the trial, Ms. Herbert believed that the Charter records contained *all* outgoing calls (PCRTr.82).

At the post-conviction hearing, Ms. Herbert compared Charter's records for Angela's landline with Sprint's records for Perry and Leonard's cell phones (PCRTr.48-9;Mov.Exs.2,2A,7,8;St.Exs.220,223,224,260). Ms. Herbert testified, contrary to her trial testimony, that "there is obviously a discrepancy, and it is possible that one or the other [record] could be incorrect or not contain all [phone calls]" (PCRTr.41-53;Tr.1512-13,1516,1521-22,1524-31;Mov.Exs.2,2A,5,6,7,8; St.Exs.218,219,220,223,224,260). Specifically, Ms. Herbert acknowledged that certain *outgoing* calls made from Angela's landline appeared on Sprint's records of Perry and Leonard's cell phones that received the call (as an incoming call), but *do not appear on Charter's records of Angela's landline as an outgoing call* (PCRTr.41-53;Mov.Exs.2,2A,5,6,7,8;St.Exs.218,219,220,223,224,260). Those calls are included in the Appendix of this brief:

- A-1, Sprint's record of Leonard's cell, showing two calls received from Angela's landline on November 22 at 7:55 a.m. and 7:57 a.m. (for 31 seconds and 16 seconds);
- A-2, Charter's record of Angela's landline, *not* showing the two outgoing calls underlined on A-1;
- A-3, Sprint's record of Leonard's cell, showing two calls received from Angela's landline on November 23 at 10:22 p.m. and 10:27 p.m. (for 31 seconds and 22 seconds);

- A-4 and A-5, Charter's record of Angela's landline, *not* showing the two outgoing calls underlined on A-3;
- A-6, Sprint's record of Perry's cell, showing a call received from Angela's landline on November 24 at 4:53 p.m. Eastern Time Zone (for ten seconds);
- A-7, Charter's record of Angela's landline, *not* showing the outgoing call underlined on A-6 (either at 3:53 Central Time or at 4:53 Eastern Time).

(*See* Appendix A-1-A-7;PCRTr.49-53;St.Exs.220,223,224,260;Mov.Exs.2,2A,7,8). The above calls occurred between November 22 and December 3, the time period charged (L.F.54-57,1133,1138,1143,1148).

Had trial counsel asked Ms. Herbert to compare Sprint's records of Perry and Leonard's cell phones with Charter's records, she would have been willing to do so (PCRTr.48). She would have testified at trial that "there is obviously a discrepancy" and, evidently, the Charter records did not contain all outgoing calls (PCRTr.53-4,88). Ms. Herbert could not explain why the Charter records did not show all outgoing calls (PCRTr.54).

At the hearing, Ms. Herbert also compared Charter's records of Angela's landline with Sprint's records of Gerjuan's cell (314-517-1270) (PCRTr.54-66; Mov.Exs.2A,9;St.Exs.220,252). When Gerjuan's cell phone records (314-517-1270) reflected an outgoing call to Angela's landline (314-395-1512), Charter's records reflected an incoming call from a different number (314-878-1575) (PCR Tr.56-65). This happened for seventeen calls (*See* Appendix A-8-A-15;Mov.Exs.2A,9;St.Exs.220,252).

There were several reasons why the incoming number reflected on Charter's records might be a number other than the actual calling number (PCRTr.65). It was possible that, in 2004, that incoming number was a routing number, a "spoof number," or could have belonged to a different carrier (PCRTr.65,84).

Had trial counsel asked Ms. Herbert to compare Sprint's records of Gerjuan's cell phone with Charter's record of Angela's landline, she would have done so (PCRTr.66). She would have informed the jury that Charter's records, on seventeen occasions, showed an incoming call different from the actual number calling Angela's landline (PCRTr.66).

In addition, certain outgoing phone calls made from Angela's landline to Gerjuan's cell were not reflected on Sprint's record of Gerjuan's cell as "incoming" calls (PCRTr.66-9;Mov.Exs.2A,9;St.Exs.220,252). According to the records, that occurred seven times (*See* Appendix A-19-A-21; Mov.Exs.2A,9;St.Exs.220,252). Ms. Herbert testified that she would have been willing to make the above comparison and would have testified at trial that Sprint's records for Gerjuan's cell did not reflect all incoming calls (PCRTr.69-70).

Dan Jensen

Post-conviction counsel also called Dan Jensen, the Sprint records custodian, who testified at trial (PCRTr.101). Mr. Jensen testified at trial that the Sprint call detail records of Perry and Leonard's cell phones captured all incoming and outgoing calls in the Sprint network (PCRTr.104;Tr.1415;St.Exs.223,224). Mr. Jensen also testified at trial that Sprint's billing records for Gerjuan's cell did not indicate the telephone number for incoming calls but rather designated them merely as "incoming"

(PCRTr.104;Tr.1451-52;St.Ex.252). He was not asked at trial whether the word "incoming" would show up every time someone called Gerjuan's cell, but he testified at the post-conviction hearing initially that "that's exactly how it works" (PCRTr.105).

Mr. Jensen testified (as Ms. Herbert had) that certain outgoing phone calls made from Angela's landline to Gerjuan's cell are not reflected on Sprint's records as "incoming" calls (PCRTr.112-15;Mov.Exs.2A,9;St.Exs.220,252;A-16-A-21). Mr. Jensen was not able to definitively answer why that occurred (PCRTr.115). However, he believed that some incoming calls are not billed so would not appear on the bill, such as calls not answered or calls to a phone that has been powered off (PCRTr.115,120).

Mr. Jensen was also asked about the fact that when Gerjuan's cell called Angela's landline, Charter's records showed a different incoming number, and he was unable to explain that (PCRTr.111-12).

Mr. Jensen compared Charter's records of Angela's landline with Sprint's records of Perry and Leonard's cell phones (PCRTr.106-08;Mov.Exs.2A,7). Like Ms. Herbert, Mr. Jensen acknowledged that Sprint's records of both Leonard and Perry's cell phones showed incoming calls from Angela's landline and yet Charter's record of Angela's landline did not show corresponding outgoing calls (PCRTr.106-110;Mov.Exs.2A,7,8).

Mr. Jensen compared Perry's cell phone records with Leonard's cell phone records (PCRTr. 116). Perry's record showed an incoming call from Leonard's cell on November 24 at 1:05 a.m., Eastern Time, but Leonard's record did not show a corresponding outgoing call (PCRTr.116;Mov.Exs.7,8;A-22-A-25). In addition, Perry's record showed an outgoing call to Leonard's cell on November 25 at 9:10 a.m., but a

corresponding call was not reflected on Leonard's records (PCRTr.116;Mov.Exs.7,8;A-22-A-25).

Mr. Jensen explained that Sprint does not guarantee one hundred percent accuracy of its records (PCRTr.117). One Sprint record could show a call while another record does not show the corresponding call, because the call was roaming on another wireless carrier's network (PCRTr.118-19,122,126-27). The Sprint records may have also contained an error due to hardware or software failure (PCRTr.129-30).

Mr. Jensen would have been willing to make the above comparisons at trial and would have testified at trial as he did at the hearing (PCRTr.110-11,112,116,117).

Trial Counsel

Trial counsel, Bevy Beimdiek, Karen Kraft and Robert Wolfrum, testified that the defense strategy was to determine any potential for activity in the home after Leonard left the area on November 26 (PCRTr. 157). It was also important to review the State's evidence and investigate the entire crime period charged, which began on November 22 (PCRTr.170-71).

The defense strategy was "based on the information [counsel] had at the time" (PCRTr.186-87). Counsel were not aware that the Charter records did not show all outgoing calls (PCRTr.142,179,194). They were not aware that Ms. Herbert's testimony that the Charter landline records showed *all* outgoing calls was false (PCRTr.143,179,194). If they had known, they would have brought that out at trial (PCRTr.143,166,179-80,194).

If the Charter records did not show all outgoing calls, then the Charter records were not reliable to prove calls not made (PCRTr.168,184). Further, any inaccuracies or omissions of the Charter records would have also aided the defense, because "the records gave us problems with some of the other testimony that we needed from people such as Beverly Conley, Sherry Conley,…and Gerjuan Rowe" (PCRTr.182-83). When Charter's records of Angela's landline were discussed among the team members, counsel viewed those records as being devastating to the defense (PCRTr.161,168,180).

Before trial, counsel were not aware that on seventeen occasions Gerjuan's cell showed up as a different incoming number on Charter's records of Angela's landline (PCRTr.144,180,195-96). Rather, Attorney Beimdiek believed that the calls from Gerjuan to Angela were just not showing up on Charter's records (PCRTr.144). Provided with the new information that Gerjuan's cell appeared as a different incoming number on Charter's records, Attorney Beimdiek nevertheless believed that it was more advantageous to argue what she believed at the time of trial (PCRTr.145,163). However, Attorney Kraft testified that they would have cross-examined Ms. Herbert about the fact that Gerjuan's number appeared as a different incoming number on Charter's records (PCRTr.180).

Counsel were not aware that Sprint's billing records for Gerjuan's cell did not indicate an "incoming" for every time she was getting an incoming call, such that there were times that Charter's record of Angela's landline indicated that Angela's landline made an outgoing call to Gerjuan's cell but there was no corresponding "incoming" on

Gerjuan's records (PCRTr.146,181,196-97). If they had known, they would have brought that out at trial (PCRTr.146,181).

Counsel were not aware that there were instances where Perry's records indicated calls to or from Leonard's cell and there was not a corresponding call reflected on Leonard's records (PCRTr.146,181,197). Counsel would have brought that out at trial (PCRTr.146-47,181-82).

Counsel were not aware that Charter employed a disclaimer regarding its records and did not guarantee the accuracy of its records (PCRTr.147-48, 182,198). Rather, Charter represented to counsel that the Charter records included *all* outgoing calls (PCRTr.147). Attorney Beimdiek testified that they were "stuck with that representation" (PCRTr.147-48). Had counsel been aware of disclaimer language employed by Charter and that Charter did not guarantee the accuracy of its records, they would have adduced evidence of that (PCRTr.148-49,182,198).

Attorney Beimdiek did not recall having any kind of admission from the Sprint records custodian that Sprint could not guarantee the accuracy of its records (PCRTr.149). If she had known, she would have adduced such evidence at trial (PCRTr.149).

The Circuit Court's decision

The hearing court denied the claim. With regard to the disclaimer, the hearing court found that trial counsel was not ineffective for failing to discover a disclaimer that did not exist and was not given to them (PCRL.F.345).

With regard to the evidence that Sprint's records of Gerjuan's cell did not show all calls, the court found that Leonard did not prove that Angela's outgoing calls to Gerjuan had to appear in Sprint's billing records of Gerjuan's cell (PCRL.F.346).

With regard to all of Angela's outgoing calls to Leonard's cell not appearing on Charter's records of Angela's landline, the court found that it was possible that Leonard's cell did not answer those calls from Angela's landline (because there was no tower activity listed for those calls in Sprint's records of Leonard's cell and because Sprint's records of Leonard's cell contained a mobile role of "3," which meant that the records did not contain complete information) (PCRL.F.347).

With regard to the discrepancies between Perry's and Leonard's records, the hearing court found that there was only one call, from Perry's cell to Leonard's cell, which was not reflected in Sprint's records of Leonard's cell (PCRL.F.348). Mr. Jensen explained that a call might not be reflected on Sprint's records if the call is "roaming" on another wireless carrier's network or due to equipment failure (PCRL.F.348).

The hearing court found that the discrepancies amounted to a minute fraction of all the calls and did not make any of the testimony about the records false (PCRL.F.348). Although Leonard proved that there were differences in the records, he did not prove that the records were inaccurate (PCRL.F.349). In addition, "[t]he discrepancies affect the weight to be accorded to the records, not their admissibility" (PCRL.F.349).

Standard of Review

This Court must review the hearing court's findings for clear error. *Sanders v. State,* 738S.W.2d856,857(Mo.banc1987);Rule 29.15(k).

Part 1—Ineffective Assistance of Counsel for Failure to Adequately Examine the Phone Records and Adduce Evidence of Omissions and Inaccuracies in the Records and Evidence that Charter and Sprint did not Guarantee the Accuracy of its Records

To establish ineffective assistance of counsel, Leonard must show that his counsel's performance was deficient. *Strickland v. Washington*, 466U.S.668(1984). To prove prejudice, Leonard must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Butler*, 951S.W.2d600,608(Mo.banc1997).

Trial counsel did not conduct an adequate review and investigation of the phone records. Due to counsel's inadequate examination and investigation of the records, counsel failed to adduce, through cross-examination of Ms. Herbert and Mr. Jensen, evidence that: Sprint and Charter did not guarantee the accuracy of its phone records; at the time of trial, Charter routinely provided a disclaimer with its records to advise the requesting party that Charter's records may contain errors or omissions; Charter's records of Angela's landline did not show all outgoing calls; the Sprint call detail records did not show all calls; Gerjuan's billing records did not reflect an "incoming" for every incoming call; and when Gerjuan's cell called Angela's landline, a different number showed up as the incoming number on Charter's records of Angela's landline (PCRTr.41-54,56-70,82,88,95-8,106-19,122,126-27,129-30,142-44,146-49,179-82,194-98;Mov.Exs.2,2A,5,6,7,8,9,12;St.Exs.218,219, 220,223,224,252,260).

It is well-established that effective representation under the Sixth Amendment requires counsel to appropriately investigate, prepare, and present the client's case.

Taylor v. State, 262S.W.3d231,249(Mo.banc2008). Defense counsel must, at a minimum, conduct a reasonable investigation enabling counsel to make informed decisions about how best to represent the client. *In re Pers. Restraint of Davis*, 152 Wash.2d647,721-22,101 P.3d1(Wash.2004). Failing to conduct investigation relates to preparation, not strategy. *Kenley v. Armontrout*, 937F.2d1298,1304(8th Cir.1991). Lack of diligence in investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Id*. "An argument based on trial strategy or tactics is appropriate only if counsel is fully informed of facts which should have been discovered by investigation." *Clay v. State*, 954S.W.2d344,349(Mo.App.,E.D.1997). "Strategic choices made after less than a thorough investigation are only reasonable to the extent that reasonable professional judgment would support the choice not to investigate further." *Anderson v. State*, 66S.W.3d770,776(Mo.App.,W.D.2002).

A defendant seeking relief under a "failure to investigate" theory "must show a reasonable likelihood that the investigation would have produced useful information not already known to defendant's trial counsel." *Davis*, 152Wash.2d at 739. "In assessing the reasonableness of an attorney's investigation … a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539U.S.510, 527(2003).

In addition, the failure to adequately cross-examine or impeach a state's witness can constitute a basis for ineffective assistance of counsel. *Barnum v. State*, 52S.W.3d 604,607-08(Mo.App.,W.D.2001); *Black v. State*, 151S.W.3d49,51(Mo.banc2004). The

movant has the burden of establishing that the impeachment would have provided him with a defense or would have changed the outcome of the trial. *Barnum*, 52S.W.3d at 608, *citing State v. Phillips*, 940S.W.2d512,514(Mo. banc 1997).

In *Gill v. State*, 300S.W.3d225(Mo.banc2009), this Court held that defense counsel was ineffective for failing to follow up on a report concerning the content of the victim's computer. *Id.* at 234. The State provided defense counsel with a report containing information from the victim's computer, which was in the car with Gill at the time of his arrest. *Id.* at 228. The report included a list of instant message accounts and a list of the users with whom the accounts exchanged messages. *Id.* Some of the entries on the report should have alerted the trial attorneys to the presence of pornography. *Id.* at 228,233. But the attorneys did not investigate the computer's contents regarding the possibility of inappropriate sexual content. *Id.* at 228. The co-defendant's attorneys investigated the contents of the computer and discovered sexually explicit and inappropriate materials, including child pornography. *Id.* at 230. In the co-defendant's case, the prosecutor did not present good character evidence of the victim because he wanted to avoid opening the door to the content of the victim's computer. *Id.* at 230-31. The co-defendant was sentenced to life without parole. *Id.* at 231. During Gill's trial, however, the prosecutor presented good character evidence of the victim at the penalty phase. *Id.* at 229,233. Because defense counsel did not discover the content of the victim's computer, counsel did not use that evidence to rebut the State's evidence of the victim's good character. *Id.* at 233. Further, had defense counsel been aware of the computer's content, they could have made known to the prosecutor that they intended to

use such evidence in rebuttal and thereby have prevented the prosecutor from adducing evidence of the victim's good character. *Id.* at 234. This Court held that a reasonably competent attorney would have "carefully reviewed the report filed by the State," conducted further investigation of the computer's contents and discovered the child pornography and other inappropriate content, and rebutted the State's character evidence. *Id.* at 233. This Court also held that Gill was prejudiced, because there was a reasonable probability that the jury, having been provided with an alternate description of the victim, would not have recommended a death sentence. *Id.* at 234. *See also Clay v. State*, *supra*, 954 S.W.2dat347-49(Counsel was ineffective for failing to investigate and cross-examine an eyewitness regarding prior, inconsistent statements that identified others as the possible gunman and not the defendant).

In *Driscoll v. Delo*, 71F.3d701(8thCir.1995), the State appealed from the federal district court's determination that defense counsel was ineffective for failing to investigate and cross-examine a State's expert about serology tests performed on a knife. *Id.* at 703. Driscoll was sentenced to death for a prison guard's murder, which took place after a group of inmates charged several guards. *Id.* at 705. At the end of the fighting, one officer, Jackson, was dead and five others stabbed or injured. *Id.* At least thirty inmates were injured and one was seriously wounded by a shotgun pellet. *Id.* Driscoll made an incriminating statement that he "stabbed at" an officer after he was hit by someone. *Id.* Other evidence against Driscoll included the eyewitness testimony of two inmates and incriminating statements Driscoll reportedly made to other inmates. *Id.* Three guards identified another inmate as the person that stabbed Officer Jackson. *Id.*

Before trial, the State provided defense counsel with a laboratory report, stating that the blood found on Driscoll's clothing, type O, matched Officer Jackson's blood type and the blood found on Driscoll's knife, type A, matched Officer Maupin. *Id.* at 707. At trial, the State presented two theories to explain the lack of the victim's blood on Driscoll's knife: either that the type O blood was wiped away when Driscoll stabbed Maupin, or that type O blood is masked from detection because of the additional presence of type A blood. *Id.* The latter theory was supported by testimony of State expert, Dr. Su, that when type A and O blood are mixed, an antigen test will not reveal the type O blood. *Id.* Neither the State nor the defense asked Dr. Su whether she used any other tests to establish with certainty the presence or absence of type O blood on Driscoll's knife. *Id.* In fact, Dr. Su had performed another test, which could determine the presence of type O blood, and discovered no type O blood on the knife. *Id.* at 707-08. But the jury was not informed of that test. *Id.* at 708. Defense counsel testified that although he reviewed the lab reports, he did not interview Dr. Su. *Id.* Trial counsel was not aware, at the time of trial, of any scientific evidence that could have rebutted the state's serology evidence. *Id.*

The Eighth Circuit wrote that the combination of the prosecution's presentation of serology evidence and the defense's total lack of rebuttal left the jury with the impression that Driscoll's knife likely had been exposed to both type A and type O blood. *Id.* The Eighth Circuit concluded that, after considering the circumstances as a whole, counsel's failure to prepare for the introduction of the serology evidence, to subject the State's theories to the rigors of adversarial testing, and to prevent the jury from retiring with an

inaccurate impression, fell short of reasonableness under prevailing professional norms. *Id.* at 709. The Eighth Circuit also held that there was a reasonable probability that, absent counsel's errors, the jury would have had reasonable doubt with respect to Driscoll's guilt. *Id.*

In *Black v. State*, *supra*, Mr. Black asserted that his counsel was ineffective for failing to cross-examine and impeach four witnesses with their prior inconsistent statements. *Id.* at 51. At the trial of the case, the State presented testimony that Mr. Black deliberated, prior to stabbing the victim, by following the victim's truck, approaching the truck, reaching in through the window, and stabbing the victim one time, which caused the victim's death. *Id.* at 52-53. Mr. Black's defense theory was that he did not deliberate and that he stabbed the victim after the victim got out of the truck and tried to hit him with a beer bottle. *Id.* at 53. This Court found that the prior inconsistent statements of three of the State's witnesses would have supported the defense that the victim got out of the truck before he was stabbed. *Id.* at 53. The Court also determined that another key State's witness could have been impeached regarding the time that the victim and the witness began drinking alcohol and that this would have gone to impeach the witness's ability to accurately perceive the events and would have supported the defense claim that the victim was belligerent. *Id.* at 54. This Court then concluded:

> The evidence defense counsel failed to offer here did not relate to a matter so fully and properly proved by other testimony as to take it out of the areas of serious dispute. To the contrary, the impeaching evidence focused on the very root of the matter in controversy.

> The unoffered evidence, admissible both for impeachment and as substantive evidence, went to a central, controverted issue on which the jury focused during deliberations. If believed by the jury, there is a reasonable probability that the outcome of the trial would have been different. Accordingly, this Court determines that counsel's ineffectiveness was so prejudicial as to undermine this Court's confidence in the outcome of the trial.

Id. at 56-58 (internal citations and quotations omitted).

In the case at bar, defense counsel possessed the phone records before trial and understood that the records went to the central issue in the case, *i.e.* whether the victims were still alive when Leonard left town (PCRTr.161-71,179-89,194-98,201-02). Counsel, however, did not conduct a careful review of the records (PCRTr.165-66,172-73). A careful review of the phone records and subsequent investigation (as set forth above) would have led counsel to discover that the records contained inaccuracies and omissions and that Ms. Herbert and Mr. Jensen could not guarantee the accuracy of the records (PCRTr.41-53,56-70,92-8,105-12,115-17,129-30) . Ms. Herbert and Mr. Jensen should have only been able to testify that the records were a reflection of the calls that the company recorded or that an outside carrier recorded and forwarded to Charter.

The limits of what the records could actually prove were a critical discovery, because the State used the records to prove calls *not* made and the records were not reliable and accurate for that purpose. The limits of what the records could actually prove were also a critical discovery because the absence of certain phone calls on the

records caused two defense witnesses (Sherry and Beverly Conley) to disclaim their initial statements, that the victims called them after Leonard left town on November 26 (Tr.1673-77,1691-92).

Considering the above circumstances, counsel failed to carefully review the records, which were used by the State as evidence of Leonard's guilt and to discredit the defense witnesses' initial statements to the police. Defense counsel failed to subject this evidence to the rigors of adversarial testing and failed to prevent the jury from deliberating with an inaccurate impression of what the phone records could actually prove. Counsel's failure to carefully review and investigate the records and then cross-examine Ms. Herbert and Mr. Jensen to reveal the inaccuracies and omissions in the records and evidence that Charter and Sprint did not guarantee the accuracy of its records, fell short of reasonableness under prevailing professional norms. *Strickland*, 466U.S. at 687; *Driscoll*, 71F.3d at 709.

Leonard was prejudiced. Prejudice is shown where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466U.S. at 687-88. "It is not enough for the [movant] to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. However, a movant is not required to show that the error "more likely than not altered the outcome of the case." *Id.* The *Strickland* test falls somewhere between those two extremes, and the issue becomes what effect the evidence would have had if it had been before the jury. *Trimble v. State*, 693S.W.2d267,274

(Mo.App.,W.D.1985). The Court also held that prejudice is established by demonstrating that "the errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466U.S. at 687. "[I]t is not the purpose of *Strickland* to set an impossible standard." *Blankenship v. State,* 23S.W.3d 848,851(Mo.App.,E.D.2000). "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have an isolated, trivial effect." *Strickland,*466 U.S. at 695-96.

In this case, the Charter and Sprint phone records were devastating to the defense for several reasons. The State used the records to argue to the jury that Angela did not make an outgoing call on or after November 26 (when Leonard left town) because she had been killed (Tr.1521-33,1742-44,1773-74).

The State used the records to argue that Leonard did not attempt to call the victims, after November 26 because he knew that they were deceased (Tr.1429-31, 1735): "And I asked Mr. Jensen were there any other calls that went past [November] 23rd? He said no. [Leonard's] connection to Angela Rowe ends on the 23rd. Why isn't he calling her? … There's no one to call back to, ladies and gentlemen, they're gone" (Tr.1735).

The State used the records to argue that Gerjuan did not talk to Angela after Leonard left town (Tr.1746-47,1773-74): "So whatever the defense wants to say about Gerjuan Rowe what you know from these facts is that the last call – Charter counts only outgoing calls, the last outgoing call to Gerjuan Rowe was on [November] 24th at 12:22 a.m." (Tr.1747). "…Gerjuan Rowe's Sprint, which captured the incoming and outgoing,

you will not find the victim's number after 11/23" (Tr.1747). "Don't get confused about the records. Charter says they collect all outgoing calls. Angela Rowe's calls to Gerjuan stop on [November 24], that is correct. Gerjuan Rowe's calls stop on this date, that is correct. Angela's records [and] Gerjuan's records show all outgoing calls…" (Tr.1773-74).

The State used the records to inform Sherry and Beverly Conley that the phone calls from the victims would have occurred before Thanksgiving and they were mistaken in their belief that they had talked to the victims after Thanksgiving, November 25 (Tr. 1674-77,1691-92,1774). The State used the records to discredit Sherry and Beverly's initial statements to the police, by arguing that the Charter records did not show outgoing calls to Sherry and Beverly from the victims' phone after Thanksgiving, November 25 (Tr.1742-43): "Beverly Conley, Sherry Conley, Gerjuan Rowe, have all been wrong. The Charter records don't show they're correct in their numbers. They were under extreme grief and tragedy and they were mistaken" (Tr.1775).

In addition, evidence raising questions about the omissions and inaccuracies of the Charter records, along with Ms. Herbert's inability to explain the omissions or inaccuracies, would have impacted the jury's assessment of her expertise (PCRTr.82,41-54,65-66,84,88). The jury would have given less weight to Ms. Herbert's opinion testimony that the incoming calls occurring after the last outgoing call to Perry Taylor on November 25, likely went into voicemail and were not answered (Tr.1531-38).

Trial counsel knew that the State would use the records in closing to argue that Leonard did not call Angela after November 26 because he knew that the victims were

deceased (Tr.1638,1645-46,1651-57,1663-65). Counsel sought the admission of certain hearsay statements (including Angela's statements to Gerjuan that Leonard was often gone for long periods of time without calling Angela and Angela's notations on a calendar of Leonard's absence and lack of contact), to rebut that inference or to show that the inference was not warranted (Tr.1048-50,1637-38,1643-47;G.R.Depo.29-30,33-4,44). The trial court denied the admission of Angela's statements on hearsay grounds; the defense then moved to bar the State from arguing any inference (that Leonard knew the victims were dead) from the evidence that Leonard did not call Angela after November 26 (Tr.1638,1640,1646-47,1653,1655). The court refused, finding that the State could argue any reasonable inferences from the evidence (Tr.1640). However, had trial counsel closely examined the phone records and adduced evidence, as was adduced at the post-conviction hearing, the State could not have drawn any reasonable inferences from the phone-records evidence about phone calls *not* made (PCRTr.41-53,56-70,92-8,105-12,115-17,129-30). Rather, the phone-records evidence could prove, at most, only those calls that Charter and Sprint recorded or that an outside carrier recorded and forwarded to Charter.

Counsel's failure to ascertain and adduce evidence of the limits of what the phone records could prove had a pervasive effect on the inferences to be drawn from the phone records and altered the evidentiary picture. The jury deliberated for four and one-half hours as to Leonard's guilt (Tr.1783-85). During its deliberations, the jury asked for and received all of the phone records (L.F.1185). But for counsel's omissions regarding the phone records, there is a reasonable probability of a different outcome of the trial.

Part 2—Leonard's Convictions were obtained in Violation of his Rights to Due Process and to be Free from Cruel and Unusual Punishment, because the Jury relied on False Testimony in reaching its Verdicts.

At trial, Ms. Herbert testified that the Charter records of Angela Rowe's landline telephone contained all outgoing calls (Tr.1511-13,1516,1550-51;St.Ex.220). As a result of that testimony, the State used the Charter records to prove calls not made (Tr.1521-33, 1524-26,1530-31,1742-44,1746-47,1773-74). Subsequently, the evidence at the post-conviction hearing demonstrated that such testimony was false (PCRTr.41-53,82;Mov. Exs.2,2A,5,6,7,8;St.Exs.218,219,220,223,224,260). At the time of trial, the prosecutor was not aware that Ms. Herbert's testimony was false (PCRTr.2-7;PCRL.F.2,30-37).

Undersigned counsel acknowledges that Missouri courts have held that a post-conviction movant must show that the State deliberately or consciously used false testimony, in order to prove a due process violation and obtain post-conviction relief. To prevail on a post-conviction claim that the defendant was denied due process because he was convicted through the use of false testimony, the defendant has the burden to show: 1) that the testimony was false; 2) the State knew it was false; and 3) his conviction was obtained as a result of the perjured testimony. *Ferguson v. State*, 325S.W.3d400,407 (Mo.App.W.D.2010); *State v. Kelley*, 953S.W.2d73,92(Mo.App.,S.D.1997); *DeClue v.*

State, 579S.W.2d158,159(Mo.App.,E.D.1979); *State v. Harris*,428S.W.2d497,502-03(Mo.1968); and *State v. Eaton*, 280S.W.2d63,66(Mo. 1955). [17]

[17] The federal circuit courts are split as to whether a conviction stemming from false testimony, unknowingly adduced by the prosecutor, violates due process. *See Sanders v. Sullivan*, 863F.2d 218,222(2nd Cir.1988) (Due process violated when credible recantation of testimony would most likely change outcome of trial and state leaves conviction in place); *Maxwell v. Roe*, 628F.3d 486,506-07(9th Cir. 2010) (Conviction based in part on false evidence, even if presented in good faith, violated due process); and *Curran v. Delaware*, 259F.2d707,712-13(3rd Cir1958) (Detective's false testimony constituted a denial of due process, even though perjury not known by prosecutor). *See also Jones v. Kentucky*, 97F.2d 335,338(6th Cir.1938) (Defendant awaiting execution was convicted on the basis of false testimony of eyewitnesses, and the court found due process violation). *But Cf. Burks v. Egeler*, 512F.2d221,229(6th Cir.1975) (The court questioned applicability of *Jones v. Kentucky* and required prosecutorial involvement in false testimony for due process violation.). Other courts have also held that false testimony alone does not establish a due process violation: *Reddick v. Haws*, 120F.3d714,718 (7th Cir.1997); *Jacobs v. Singletary*, 952F.2d1282,1287n.2(11th Cir.1992); *Elliott v. Beto*, 474F.2d856, 857(5th Cir.1973); *Reed v. United States*, 438F.2d1154,1155(10th Cir.1971); *Thompson v. Garrison*, 516F.2d 986,988(4th Cir.1975); *Coggins v. O'Brien*, 188F.2d130, 141(1st Cir.1951); *Taylor v. United States*, 229F.2d826,832(8th Cir.1956). The State courts are also divided on this issue. *See Riley v. State*, 567P.2d 475,476(Nev.1977) (due

Undersigned counsel respectfully requests that this Court re-examine the law and find a due process violation and a basis for post-conviction relief when a criminal conviction stems from false testimony, regardless of whether the prosecutor knew or should have known of its falsity. This Court should do so for the following reasons:

First, Missouri courts have recognized a denial of due process warranting a new trial when it is discovered during direct appeal that a State's witness has given false testimony. In *State v. Mooney*, 670S.W.2d510(Mo.App.,E.D.1984), the defendant on direct appeal filed a motion to file newly discovered evidence including a taped conversation wherein the complaining witness stated that he had lied under oath and made up his testimony at trial. *Id.* at 512. The defendant claimed that refusal to consider the newly discovered evidence would deny him due process, justice without delay, and an

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process violation for unknowing use); *Case v. Hatch*, 183P.3d 905,911(N.M.2008) (same); *People v. Yamin*, 257N.Y.S.2d11,19(1965) (same); *Ex Parte Napper*, 322S.W.3d202,242(Tex.Crim.App.2010) (same); and *Bean v. State*, 809P.2d506, 508(IdahoApp.1990), *affd with modification*,809P.2d493(1991) (same). *See also Robinson v. Commonwealth*, 181S.W.3d30,38(Ky.2005) (Probation officer misinformed jury as to good time credit, and court held that use of false testimony violated due process when the testimony was material "irrespective of the good faith or bad faith of the prosecutor."). *But see People v. Brown*, 660N.E.2d964,970 (Il.1995) (limiting relief to cases where there is knowledge by state); *State v. Lotter*,771N.W.2d551, 563(2009) (same); and *State v. Thiel*, 515N.W.2d186,191 (N.D.1994) (same).

adequate remedy. *Id.* at 512. The Court of Appeals, quoting *Donati v. Gualdoni*, 216S.W.2d519,521(Mo.1949), wrote:

> No verdict and resultant judgment, in any case, could be said to be just if the result of false testimony. The trial court had the duty to grant a new trial if satisfied that perjury has been committed and that an improper verdict or finding was thereby occasioned.

Id. at 515. The Court of Appeals remanded the case to permit the defendant to file a Motion for New Trial to assert the claim that the complaining witness had recanted and that the verdict was the result of perjured testimony. *Id.* at 516.

Thus, the Missouri courts have granted a new trial, where the verdict was shown to be the result of false testimony, without requiring a showing that the prosecutor knew of the testimony's falsity. However, in a post-conviction proceeding, because claims of newly discovered evidence are generally prohibited, the courts will only permit a claim that the verdict was based on false testimony when the State knowingly used the perjured testimony. *Ferguson*, 325S.W.3d at 406. Undersigned counsel respectfully asserts that there should be no distinction between discovery of false testimony during the direct appeal and discovery during the post-conviction case.

Second, the United States Supreme Court has suggested that a conviction based on false testimony violates due process, even if the prosecutor was unaware of the falsity at trial. In *Durley v. Mayo*, 351U.S.277(1956), the Supreme Court granted certiorari to consider whether due process was offended by convictions, which were later found to rest upon perjured testimony when the prosecutor did not know of the testimony's falsity at

trial. *Id.* at 287. Although the Court ultimately held that jurisdiction was lacking, four Justices would have reached the merits and would have found a clear due process violation:

> It is well settled that to obtain a conviction by the use of testimony known by the prosecution to be perjured offends due process.… While the petition did not allege that the prosecution knew that petitioner's codefendants were lying when they implicated petitioner, the State now knows that the testimony of the only witnesses against petitioner was false. No competent evidence remains to support the conviction. Deprivation of a hearing under these circumstances amounts in my opinion to a denial of due process.
>
> Perhaps a hearing on the charges would dispel them. But on the present record, we have a grave miscarriage of justice involving an invasion of federal rights guaranteed by the Fourteenth Amendment.

Id. at 290-91 (internal citations omitted).

In *Mesarosh v. United States*, 352U.S.1(1956), the Government learned that one of its witnesses was unreliable and had made untrue statements in other proceedings. *Id.* at 3-7. The witness was a paid government informant, who was employed to infiltrate the Communist Party. *Id.* at 10. After Mesarosh's conviction for conspiracy to overthrow the government and to organize the Communist Party, the Government learned that the witness had testified falsely in other proceedings and advised the court and the parties. *Id.* at 9-10. The Supreme Court held that it did not matter whether the witness's prior

untruthfulness constituted perjury or was caused by a psychiatric condition. *Id.* at 9. The witness's credibility has been wholly discredited, and the dignity of the United States Government "*will not permit the conviction of any person on tainted testimony*." *Id. (italics added).* The Court reversed and remanded for a new trial, because the witness "poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity." *Id.* at 14. "The untainted administration of justice is certainly one of the most cherished aspects of our institutions." *Id. quoting McNabb v. United States*, 318U.S.332 (1943). *See also Giglio v. United States*, 405U.S.150(1972) (new trial required when Government witness testified falsely on matters relating to credibility and prosecutor should have been aware of the falsehood); *Pyle v. Kansas,* 317U.S.213,215-16(1942) (State's witness vouched that he was forced to give perjured testimony against Pyle under threat by police, and Supreme Court held allegations sufficient to charge deprivation of constitutional rights.); *Cf Hysler v. Florida*, 315U.S.411,413(1942) ("Mere recantation of testimony" does not justify voiding conviction on due process grounds).

In *Mooney v. Holohan*, 294U.S.103,112(1935), the Supreme Court held that the requirement of due process, in safeguarding the liberty of the citizenry against the State's actions, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. *Id.* at 112. "The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *United States v. Agurs*, 427 U.S. 97, 110, fn17 (1976), *quoting Brady v.*

Maryland, 373U.S.83,87(1963). "Society wins not only when the guilty are convicted but when criminal trials are fair…" *Brady, supra.*

The Court has refined this principle over the years, finding due process violations when a prosecutor fails to correct testimony he knows to be false, *Alcorta v. Texas*, 355 U.S.28(1957), even when the falsehood goes only to the witness's credibility. *Napue v. Illinois*, 360U.S.264(1959).

The Court has also extended the principle to require the disclosure of exculpatory evidence, regardless of the good or bad faith of the prosecutor. *See Brady*, 373U.S. at 87 (Suppression of co-defendant's confession to the actual homicide deprived Brady of due process, irrespective of good faith or bad faith of prosecution.); *Agurs*, 427U.S. at 110 ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."); *Kyles v. Whitley*, 514U.S.419,438(1995) (granting relief based on of non-disclosure even though prosecutor did not have all exculpatory information until after trial).

Based on the above, this Court should not consider the good faith or bad faith of the prosecutor in determining a due process violation as a result of the use of false testimony. As the Second Circuit wrote in *Sanders v. Sullivan*, 863F.2d218(2nd Cir.1988):

> There is no logical reason to limit a due process violation to state action defined as prosecutorial knowledge of perjured testimony or even false testimony by witnesses with some affiliation with a government agency. Such a rule elevates form over substance. It has long been axiomatic that due process requires us to observe that fundamental fairness essential to the

> very concept of justice. It is simply intolerable that under no circumstance will due process be violated if a state allows an innocent person to remain incarcerated on the basis of lies. A due process violation must of course have a state action component. We believe that Justice Douglas accurately articulated the appropriate definition that accords with the dictates of due process: a state's failure to act to cure a conviction founded on a credible recantation by an important and principal witness, exhibits sufficient state action to constitute a due process violation.

Id. at 224 (internal quotations and citations omitted).

Last, academic commentary supports the position that a due process violation can occur when a conviction stems from false testimony, whether or not the prosecutor knew of the falsity or the witness was a government agent:

> The established standard of certain courts, to the effect that a conviction based on false evidence is unassailable unless the defendant can prove a knowing use by the prosecution, appears inadvisable. Judicial concern in these cases should concentrate on vouchsafing the right of a fair trial to the convicted person. Hedged with the appropriate standards requiring the defendant to demonstrate materiality of the tainted evidence, the more liberal approach advocated here would threaten only those final judgments which merit unsettlement.

Carlson, Ronald L., *False or Suppressed Evidence: Why a Need for the Prosecutorial Tie?,* 1969 Duke L.J.1171,1197-88. *See also* Wolf, Daniel, *I Cannot Tell a Lie: The*

Standard for New Trial in False Testimony Cases, 83Mich.L.Rev.1925,1934,n.33(1985). *See also* Bowen Poulin, Anne, *Convictions Based on Lies: Defining Due Process Protection,* 116PennSt.L.Rev.331,393-94(2011) (Due process protects against unfairness of proceeding, and analysis should focus only on whether false testimony rendered trial and resulting conviction unfair.).

The above case law and rationale provide a strong basis for this Court to re-examine this issue and determine that due process is violated by a conviction stemming from false testimony. "Few rules are more central to an accurate determination of innocence or guilt than the requirement … that one should not be convicted on false testimony." *Ortega v. Duncan*, 333F.2d102,109(2nd Cir.2003). This Court should hold that Leonard's convictions, stemming in part from false testimony, violated his rights to due process, as guaranteed by the United States and Missouri Constitutions. U.S. Const., Amends. V, XIV; Mo. Const. Art. I, Sec. 10.

In addition to the above, the decision in capital cases must reflect a heightened degree of reliability under the Eighth Amendment's prohibition of cruel and unusual punishments. *McCleskey v. Kemp,* 107S.Ct.1756,1795(1987). Heightened reliability is required at all stages of a capital proceeding. *Schiro v. Farley,* 114S.Ct.783,793(1994).

The aforementioned case law requires the movant to prove prejudice where a conviction stems from false testimony. In cases of the State's knowing use of false testimony, "the [Supreme] Court has consistently held that a conviction … must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs,* 42U.S. at 103. In *Sanders v. Sullivan, supra,* the Second

Circuit held that in cases of false testimony alone, in order to trigger a due process violation, the new evidence must be so material that, but for the false testimony, the defendant probably would not have been convicted. *Id.*, 863F.2d at 225-26.

Leonard has met both of the above tests for prejudice. As set forth in Part 1 of this Argument, the Charter phone records were devastating to the defense for several reasons. The State used the records to argue to the jury that Angela did not make an outgoing call on or after November 26 (when Leonard left town) because she had been killed (Tr.1521-33,1742-44,1773-74). The State used the records to argue that Gerjuan did not talk to Angela after Leonard left town (Tr.1746-47,1773-74). The State used the records to inform Sherry and Beverly Conley that the phone calls from the victims would have occurred before Thanksgiving and they were mistaken in their belief that they had talked to the victims after Thanksgiving, November 25 (Tr.1674-77,1691-92,1774). The State used the records to discredit Sherry and Beverly Conley's initial statements to the police, by arguing to the jury that Sherry and Beverly were mistaken because Charter's records did not show outgoing calls to Sherry and Beverly from the victims' phone after November 25 (Tr.1742-43).

The false testimony concerning the Charter records had a pervasive effect on the inferences to be drawn from the records and altered the evidentiary picture favorably for the State. The jury deliberated for four and one-half hours as to Leonard's guilt (Tr.1783-85). During its deliberations, the jury asked for and received the phone records (L.F.1185). But for the false testimony concerning the Charter records, there is a probability that Leonard would not have been convicted.

Conclusion, Parts 1 and 2

The hearing court denied this claim, because: 1) counsel cannot be faulted for not discovering the Charter disclaimer; 2) Ms. Herbert and Mr. Jensen provided possible explanations for the discrepancies between Charter's and Sprint's records; 3) the discrepancies amounted to a small number of calls and did not make any testimony false; and 4) the discrepancies affected the weight of the records, not the records' admissibility (PCRL.F.345-49).

The hearing court's findings are clearly erroneous. First, had counsel thoroughly examined the phone records, they would have noticed the omissions and inaccuracies. This in turn would have led them to confront the records custodians, who would have then testified, as they did at the post-conviction hearing, that Charter and Sprint did not guarantee the accuracy of the records (PCRTr.38-9,117-19,122,126-27,129-30).

Second, it does not matter that Ms. Herbert and Mr. Jensen offered possible explanations for the discrepancies. The point was that the discrepancies existed. This meant that a person could have made a call from the victims' landline without that activity being reflected on Charter's records. Overall, the discrepancies demonstrated that both Sprint's and Charter's records were not reliable to prove calls not made (PCRTr.168,184). Yet, the State used the records for that purpose at trial (Tr.1429-31,1521-33,1735,1742-44,1746-47,1773-74). Ms. Herbert and Mr. Jensen should have only been able to testify at trial that the records are a reflection of the calls that Charter and Sprint recorded or that an outside carrier recorded and forwarded to Charter.

Third, certain discrepancies between Charter's and Sprint's records do, in fact, make certain trial testimony regarding the records false. At trial, Ms. Herbert testified that Charter's records of Angela's landline contained all outgoing calls (Tr.1511-13,1516,1550-51;St.Ex.220). Subsequently, a comparison of Charter's records with Sprint's records demonstrated that such testimony was false (PCRTr.41-53,82;Mov.Exs.2,2A,5,6,7,8;St.Exs.218,219,220,223,224,260).

Fourth, the discrepancies do affect the weight of the records, and it was essential to make the jury aware of the discrepancies to prevent them from deliberating with a false impression of what the records proved.

The hearing court's decision is clearly erroneous. This Court should reverse Leonard's convictions for first degree murder and remand the case for a new trial.

ARGUMENT II

The hearing court clearly erred in denying Appellant's claim that trial counsel was ineffective for failing to object to: 1) the admission of the Charter and Sprint phone records; and 2) the Charter records custodian's testimony regarding her change of the durations of the "yellow" incoming calls, which data was collected and recorded by outside carriers, and her opinion that those incoming calls went into voicemail, because this denied Appellant his rights to the effective assistance of counsel, due process and freedom from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a),21, in that: 1) Charter and Sprint's computer systems were not shown to produce accurate results and the records custodians testified at the post-conviction hearing that Charter and Sprint did not guarantee one hundred percent accuracy of their records; and 2) the Charter records custodian was not sufficiently familiar with the outside carriers' practices to reformat and interpret the outside carriers' data. Leonard was prejudiced because: 1) the State used the Charter and Sprint records to prove calls *not* made (when the records were not reliable for that purpose); and 2) the State used the Charter records custodian's testimony and opinion about the "yellow" incoming calls to argue that those calls went into voicemail (as the victims had been killed).

At trial, the State relied heavily on the phone records to show that the victims were dead before Leonard left town (on November 26) and to defeat the defense theory that Aunt Beverly and Aunt Sherry spoke with the victims after November 26. Despite the

importance of the phone records, counsel failed to adequately examine the records, investigate their accuracy, and object to the admission of the records and inadmissible testimony regarding the records.

Leonard alleged in the post-conviction case that reasonably competent counsel would have conducted an investigation of the phone records and would have objected to the admission of the records on the basis that the records were not reliable and the State did not lay a sufficient foundation (PCRL.F.111-130). Leonard also asserted that reasonable counsel would have objected to Ms. Herbert's testimony regarding her changes of the durations of the phone calls provided by other carriers and to her opinion that in her experience, those calls went into voicemail (PCRL.F.104-110).

The Evidence at Trial

The Charter Records

At trial, the State called Cathy Herbert, a records custodian for Charter Communications (Tr.1509-10). Ms. Herbert had been employed at Charter for three years and in the telecommunications industry for thirteen years (Tr. 1510). Her primary responsibility was to respond to records requests (Tr.1509-10). In addition, "[w]e configure the equipment that provides telephone service to telephone subscribers, [and] … we configure the type of equipment that records the records" (Tr.1510). She had worked with telephone equipment for six years (Tr. 1510).

State's Exhibit 220 were the call records for Angela Rowe's Charter landline (Tr. 1511-12). Various pieces of equipment were used in producing the Charter records, but the main mechanism was "a telephone switch," which processed the calls (Tr. 1510).

The call records for Angela's Charter landline reflected *all* outgoing calls and some, but not all, incoming calls (Tr.1511-13,1516,1550-51;St.Ex.220). The records were "fair and accurate" and were admitted into evidence without defense objection (Tr.1512-13).

The prosecutor created several graphs from the Charter records. State's Exhibit 215 showed the calls from Angela's number to check her own voicemail, and those voicemail calls stopped on November 25 (Tr.1522-24;St.Ex.215). State's Exhibit 217 showed two calls from Angela's number to Gerjuan's number on November 24 and none thereafter (Tr.1524-25;St.Ex.217). Because Charter's records of Angela's landline did not catch all incoming calls, Gerjuan's number may have called Angela's number without the call appearing on Charter's records (Tr.1551-52).

State's Exhibit 218 showed three calls on November 21 from Angela's number to Aunt Beverly's numbers, and none after that (Tr.1525-26). State's Exhibit 219 showed two calls between Angela's number and Aunt Sherry's numbers on November 13 and a final call on December 3 (Tr.1526).

State's Exhibit 213 showed outgoing calls from Angela's number from November 24 at 8 a.m. through December 4 (Tr.1527-28). Nine outgoing calls on November 24 were made to Valerie Burke (2), Perry Taylor (5), and Southwest Airlines (2) (Tr.1528-29).[18]

State's Exhibit 212 showed the outgoing calls from Angela's landline from November 1 through December 4 (Tr.1521-22;St.Ex.212). From 9:50 a.m. on November

[18] Valerie Burke was an old friend of the Taylors (Tr.857).

25 through November 29 at 8:54 a.m., there were only calls forwarding to voicemail on Angela's landline (Tr.1530). There were no outgoing calls and no incoming calls that Charter was aware of (Tr.1530-31).

The Charter records included incoming calls that were highlighted yellow; these records were provided to Charter by another carrier for internal billing purposes (Tr.1523-24,1532). The only calls reflected on the Charter records, between the final outgoing call to Perry on November 25 and the final incoming call on December 3 were calls to voicemail except six calls highlighted yellow (Tr.1531-33). Charter did not have all information about those "yellow" calls, so it was not known whether those calls were answered or went to voicemail (Tr.1532-33,1537-38). Those calls were "not recorded necessarily by the same equipment that recorded the other records that [Charter] provided" (Tr.1532).

Ms. Herbert went through each of the "yellow" calls and opined that each call, except for one call, likely went into Angela's voicemail (Tr.1533-38). Ms. Herbert opined that the call preceding each "yellow" call was a portion of that same call that went to voicemail (Tr.1533-38). Charter recorded the preceding part of the call that went to voicemail, and the other carrier then recorded the portion of the incoming call that went to Angela's number (Tr.1533,1535). Charter did not have a record of the "incoming" portion of that call because it did not record all incoming calls (Tr.1534).

Ms. Herbert opined that the "yellow" calls went to voicemail, because (after she reformatted the records) the duration of the "yellow" call provided by the other carrier was virtually the same as the duration of the preceding call that went into voicemail

(Tr.1534-37,1553). In addition, the time of each "yellow" call and the call preceding it were close, given that the other carriers may not have the exact time as Charter (Tr.1533,1535-37).

Ms. Herbert provided the above explanation as to each "yellow" call and preceding call, except as to the "yellow" call on November 29 at 8:56 a.m. (Tr. 1534). The call preceding that "yellow" call occurred on November 29 at 8:44 a.m. (Tr.1534). Ms. Herbert suggested that because that "yellow" call only had a duration of "0," that meant that the call was under one second and would not have been answered (Tr.1534).

During cross-examination, Ms. Herbert testified that she originally provided Charter's records for Angela's landline, Defendant's Exhibit LL, to the defense in January 2007 (Tr.1539;Def.Ex.LL). A couple of weeks before the trial in February 2008, she reformatted and corrected the durations of the "yellow" calls from the outside carriers and created a new set of records using newer equipment (Tr.1540-42,1553; Def.Ex.LL;St.Ex.220). The original Charter records provided different information regarding the durations of the "yellow" incoming calls than the information contained in the later Charter records, which were used by the State at trial (Tr.1541;St.Ex.220;Def.Ex.LL). Ms. Herbert's explanation of how and why she changed the duration of the "yellow" calls, was as follows:

> …[T]he difference between the two records is that I found in reviewing the records for [my] testimony I found that there was a difference in the way the duration of the call between the records that we

record and the records that are given to us by a third party have a different amount of number of digits.

So in formatting the original set of records it was unable to take into account the missing digits in the duration for only those calls provided to us by the outside carrier.

So upon evaluation and looking at them, I was able to determine there was a discrepancy, and I was able to go back and correct that to correct the durations for those calls.

(Tr.1541).

Ms. Herbert changed the durations of the following "yellow" incoming phone calls:

- November 29 at 8:56 a.m., from 27 seconds to 0 seconds;
- November 29 at 6:59 p.m., from 12 seconds to 9 seconds;
- November 29 at 8:51p.m., from 1 minute, 33 seconds to 29 seconds;
- December 1 at 9:37 a.m., from 7 seconds to 1 minute, 25 seconds;
- December 1 at 7:29 p.m., from 29 seconds to 6 seconds;
- December 3 at 8:34 a.m., from 1 minute, 13 seconds to 3 seconds.

(Tr.1544-47;St.Ex.220;Def.Ex.LL). The records also reflected that the duration of a yellow incoming call on November 24 at 8:05 p.m. was changed from 1 minute, 14 seconds to 0 seconds (St.Ex.220;Def. Ex.LL). After these changes, the duration of each "yellow" call provided by the other carrier was virtually the same or the same as the

duration of the preceding call that went into voicemail (except for the call on November 29 at 8:56 a.m.) (Tr.1534-37).

Because the "yellow" call information came from an outside carrier, Charter's equipment was unable to provide information as whether the phone may have been off hook (Tr.1548,1552-53). The "new records" that Ms. Herbert provided a couple weeks prior to trial were "more accurate" than the records provided more than a year earlier (Tr.1553).

At trial, two defense witnesses deviated from their initial statements to the police after considering the Charter records. Aunt Beverly testified that Alexus called her late one evening (Tr.1673). Beverly told the police that the call occurred at approximately midnight on November 27 (Tr.1674). Later, after Beverly spoke with the prosecutor and viewed the Charter records, she realized she was mistaken about the date of Alexus' phone call (Tr.1674-77). The Charter records indicated that the last call between her number and Angela's landline was on November 21[19] (Tr.1677).

The defense also called Aunt Sherry (Tr.1680). Prior to trial, she saw the Charter records and State's Exhibit 219, which is a graph of calls between her numbers and Angela's number (Tr.1691-92). According to the records, there were no calls made to or

[19] However, there was testimony that the children were with the Conleys (and not at home with Angela) from November 19-22 and the weekend of November 11, so the children would not have called Aunt Beverly (Conley) from their home landline on November 21 (Tr.841,847,1678-79,1695).

from her number to Angela's landline from November 26-30 (Tr.1691-92). She disclaimed her prior statement that she had talked to the victims on November 27 and 28 (Tr.1691-92).

The Sprint Records

Through Dan Jensen, a records custodian for Sprint Nextel, the Stated elicited the Sprint call detail records, which is raw data directly from the phone switch, for Leonard and Perry's cell phones (Tr.1410-12,1566;St.Exs.223,224,260). It also brought forth the Sprint billing records for Gerjuan's cell phone (Tr.1412,St.Ex.252). These records were admitted into evidence without objection (Tr.1412).

The Sprint records captured all outgoing and incoming calls in the network (Tr.1415). Gerjuan's records showed the number she dialed for outgoing calls but did not show the number for incoming calls (Tr.1451-52,1453-54). Rather, incoming calls were merely designated as "incoming" (Tr.1450-51). On November 23, Gerjuan's cell made seventeen calls to Angela's landline (Tr.1426). From November 24 through December 3, there were no outgoing calls from Gerjuan's number to Angela's number (Tr.1426).

Mr. Jensen reviewed the Sprint cell phone records of Leonard and Perry, as well as graphs created by the prosecutor from those records (Tr.1436-29,1431-34,1437,1440-41; St.Exs.227,230,231,232,233,234,236,239,241). There was only one outgoing call from Leonard's cell phone to Angela's landline, and that occurred on November 22 (Tr.1429). There were no phone calls at all from Leonard's Sprint cell phone to Angela's landline after November 23 (Tr.1429-31).

The records of Leonard and Perry's cell phones reflected several calls during the late night of November 23 and the early morning of November 24, between Leonard, Perry, their mother, and Leonard's wife (Tr.1431-35,1437-38,1440-42,1448; St.Exs.220,223,224,233,234,236,237,252,260). Leonard and Perry's cell phone records also showed calls between Leonard, Perry, their mother, and Leonard's wife on December 3, the day that the bodies were discovered (Tr.1435-39,1443-44; St.Exs.223,224,235,238,242,260).

Additional Evidence at the Post-conviction Hearing

Christopher Avery

At the hearing, Christopher Avery, Senior Counsel for Charter Communications, testified that Charter began its landline telephone service (the service provided to Angela) in the St. Louis area in the summer of 2004 (PCRTr.89-91). At the time of the hearing (in 2011), Charter included a standard disclaimer in response to records requests (PCRTr.92-3;Mov.Ex.11). That disclaimer advised that Charter:

> …DOES NOT keep or have records for every incoming or outgoing call made or received by our telephone subscribers. The absence of a record for a particular call(s) on the attached log does not mean that such call(s) was not made or received but, rather, means that a record of such call(s) was not recorded by our system. Further, some of the information contained herein is provided by third-party carriers and is subject to error. These records are provided "as is" without representations and/or warranties of any kind.

(Mov.Ex.11). Charter began using the above specialized disclaimer in 2009 (Mov.Exs.11,12;PCRTr.93).

At some point after June 2005 and before March 2006 (and at the time of the trial in February 2008), Charter routinely included in its response letter for telephone records, the following disclaimer language:

> Please be aware that Charter's billing records from which the above information is obtained are subject to human error and Charter cannot always guarantee the accuracy of such records. You should not rely solely on this information and should always independently corroborate the information Charter provides you with other information you have concerning the identity of the individual.

(Mov.Ex.12;PCRTr.95-6). Charter used the disclaimer language to make clear to the requesting party that Charter's records may contain errors or omissions (PCRTr.96). No disclaimer language was used by Charter in responding to a record request in 2004 and the first part of 2005 (Mov.Ex.12;PCRTr.95).

From 2005 through 2008, if an attorney had asked Mr. Avery whether Charter guaranteed the accuracy of its telephone landline records or for any disclaimer language used by Charter, he would have told them that Charter does not guarantee the accuracy of its records and would have provided them with the relevant disclaimer language (PCRTr. 97). He would have been available to testify at the trial in February 2008 (PCRTr.97-8).

Cathy Herbert

Cathy Herbert, the Charter records custodian who testified at trial, testified at the post-conviction hearing (PCRTr.36,39-40). She began her employment with Charter in 2005 or 2006 and was employed there for two years (PCRTr.37). As part of her job duties, she provided records in response to subpoena requests (PCRTr.37).

She had worked in the phone industry, including at GTE, AT&T, Sprint Communications, XO Communications, and Charter, since approximately 1993 (PCRTr.79-80). She worked primarily with landlines telephones and "never really worked in the cellular side of the industry" (PCRTr.80).

Ms. Herbert testified that when she worked at Charter, she was aware that the company used disclaimers and did not guarantee one hundred percent accuracy of its records (PCRTr.38-9). At the time of the trial, Ms. Herbert believed that the Charter records contained *all* outgoing calls (PCRTr.82).

Ms. Herbert compared Charter's records of Angela's landline with Sprint's records of Perry and Leonard's cell phones (PCRTr.48-9;Mov.Exs.2,2A,7,8;St.Exs.220, 223,224,260). She testified, contrary to her trial testimony, that "there is obviously a discrepancy, and it is possible that one or the other [record] could be incorrect or not contain all [phone calls]" (PCRTr.41-53;Tr.1512-13,1516,1521-22,1524-31;Mov.Exs.2,2A,5,6,7,8;St.Exs.218,219, 220,223,224,260). Specifically, Ms. Herbert acknowledged that five *outgoing* phone calls made from Angela's landline appear on Sprint's records of Perry and Leonard's cell phones that received the call (as incoming calls), but *do not appear on Charter's records as outgoing calls* (A-1-A-7;PCRTr. 41-

53;Mov.Exs.2,2A,5,6,7,8;St.Exs.218,219,220,223,224,260). The calls occurred on November 22, 23, and 24, which was during the time period charged of November 22-December 3 (L.F.54-57,1133,1138,1143,1148).

Ms. Herbert also compared Charter's records of Angela's landline with Sprint's records of Gerjuan's cell (PCRTr.54-66;Mov.Exs.2A,9;St.Exs.220,252). When Gerjuan's cell records (314-517-1270) reflected an outgoing call to Angela's Charter landline (314-395-1512), the Charter records reflected an incoming call from a different number (314-878-1575) (A-8-A-15;PCRTr.56-65;Mov.Exs.2A,9;St.Exs. 220,252). This happened seventeen times (*See* Appendix A-8-A-15;Mov.Exs.2A,9;St.Exs.220,252).

In addition, certain outgoing phone calls from Angela's landline to Gerjuan's cell are not reflected on Sprint's records as "incoming" calls (A-19-A-21;PCRTr.66-9;Mov.Exs.2A,9;St.Exs.220,252). According to the records, that occurred seven times (*See* Appendix A-16-A-21;Mov.Exs.2A,9;St.Exs.220,252).

Ms. Herbert testified that she would have been willing to make the above comparisons and would have testified at trial that: 1) evidently, Charter's records did not contain all outgoing calls; 2) when Gerjuan's cell called Angela's landline, a different incoming number appeared on Charter's records; and 3) Sprint's records for Gerjuan's cell did not reflect "incoming" calls at times when Angela's landline called Gerjuan's cell (PCRTr.48,65-66,69-70,83-84). Ms. Herbert could not explain why the Charter records were not showing all outgoing calls and could only offer possible reasons for the discrepancies between Sprint's records and Charter's records (PCRTr.54,65-66,83-84,86-88).

With regard to the "yellow" incoming calls, which was data provided by outside carriers, Ms. Herbert testified at the post-conviction hearing that that when the information from the outside carriers came to Charter, it was not in a readable form until the records were formatted by Charter (PCRTr.74-5, 77-79). She determined that the durations of incoming calls provided by other carriers had been improperly formatted in the initial set of Charter records (PCRTr.74-75;Mov.Ex.2A; St.Ex.220). She did not recall how she found the errors but believed that she noticed that "the time was way off" (PCRTr.75-76). After she found the errors, she ran the records through "probably 12 times after that" to make sure it was correct (PCRTr.75-6).

She explained that the durations "…sent electronically …by another carrier are in a different format when they get to us, that could not use the same algorithm that was used to format the Charter durations" (PCRTr. 76,78). She testified previously at a pre-trial deposition that she was unable to determine how the program that she used to format the new records made the determination of the durations of the phone calls from the outside carriers (PCRTr.77). She was also unable to determine why some of the durations after being reformatted became longer and some became shorter (PCRTr.77-79).

Dan Jensen

Dan Jensen, the Sprint Nextel records custodian who testified at trial, testified at the post-conviction hearing (PCRTr.101). He testified at trial that Sprint's records of Perry's and Leonard's cell phones captured all incoming and outgoing calls in the Sprint network (PCRTr.104;Tr.1415). He also testified at trial that Gerjuan's records did not

indicate the telephone number calling in but rather designated "incoming" when she had an incoming call (PCRTr.104;Tr.1451-52). He was not asked at trial whether the word "incoming" would show up every time someone called Gerjuan's cell number, but initially testified at the post-conviction hearing that "that's exactly how it works" (PCRTr.105).

At the post-conviction hearing, Mr. Jensen testified (as Ms. Herbert had) that certain outgoing calls shown on Charter's records of Angela's landline to Gerjuan's Sprint cell are not reflected on Sprint's record as an "incoming" call (PCR Tr.112-15;Mov.Exs.2A,9;St.Exs.220,252;A-16-A-21). Mr. Jensen was not able to definitively answer why that occurred (PCRTr.115). However, he believed that there were incoming calls that were not billed and would not have appeared on the bill, such as calls not answered or calls to a phone that had been powered off (PCRTr.115,120).

Like Ms. Herbert, Mr. Jensen was also unable to explain why Charter's records of Angela's landline showed a different incoming number (and not Gerjuan's cell number), when Gerjuan's cell called Angela's landline (PCRTr.111-12).

Mr. Jensen compared Charter's records of Angela's landline with Sprint's call detail records of Leonard and Perry's cell phones (PCRTr. 106-08;Mov.Exs.2A,7). Like Ms. Herbert, Mr. Jensen acknowledged that Sprint's records of both Leonard and Perry's cell phones showed incoming calls from Angela's landline and yet Charter's records of Angela's landline did not show corresponding outgoing calls (PCRTr.106-110;Mov.Exs.2A,7,8).

Mr. Jensen compared Sprint's records of Perry's cell phone with Sprint's records of Leonard's cell phone (PCRTr. 116). Perry's record showed an incoming call from Leonard's cell on November 24 at 1:05 a.m., Eastern Time, but Leonard's cell phone record did not show a corresponding outgoing call (PCRTr.116;Mov.Exs.7,8;A-22-A-25). In addition, Perry's record showed an outgoing call to Leonard's cell on November 25 at 9:10 a.m., but a corresponding call was not reflected on Leonard's record (PCRTr.116; Mov.Exs.7,8;A-22-A-25).

Mr. Jensen explained that Sprint does not guarantee one hundred percent accuracy of its records (PCRTr.117). Where one Sprint record shows a call but another record does not show the corresponding call, the call could have been roaming on another wireless carrier's network (PCRTr.118,122,126-27). It was also possible that Sprint's records contained an error due to hardware or software failure (PCRTr.129-30).

Mr. Jensen would have been willing to make the above comparisons and would have provided the same testimony at trial that he did at the hearing (PCRTr.110-11,112, 116,117). Mr. Jensen has, in his experience, discovered discrepancies between the phone records of two different companies and has testified regarding discrepancies between two sets of Sprint records (PCRTr.118,126).

Trial Counsel

Trial counsel, Bevy Beimdiek, Karen Kraft and Robert Wolfrum testified at the hearing that they were not aware that Charter's records did not show all outgoing calls (PCRTr.142,179,194).

They also were also not aware that on seventeen occasions, Gerjuan's number showed up as a different incoming number on Charter's records of Angela's landline (PCRTr.144,180,195-96).

They were not aware, before trial, that Sprint's records for Gerjuan's cell did not indicate an "incoming" for every time she was getting an incoming call (PCRTr.146,181,196-97). Thus, there were times that Angela's landline made an outgoing call to Gerjuan's cell but there was no corresponding "incoming" call on Gerjuan's records (PCRTr.146,181,196-97).

Counsel were not aware that there were instances where Perry's record indicated calls to or from Leonard's cell but there was no corresponding call reflected on Leonard's records (PCRTr.146,181,197).

They were not aware that Charter employed disclaimer language regarding its records and did not guarantee the accuracy of its records (PCRTr.147-48, 182,198). Rather, Charter represented to trial counsel that the Charter records included *all* outgoing calls (PCRTr.147).

Counsel were not aware that Sprint did not guarantee the accuracy of its records (PCRTr.149).

Counsel testified that if they had known of the issues with Charter's and Sprint's records, they would have considered objecting to the admission and use of the records at trial based upon the lack of sufficient reliability (PCRTr.150,184-85). There was no trial strategy reason for not doing so (PCRTr.150,185,198).

Counsel also testified that approximately five weeks before trial, the prosecutor called and indicated that Ms. Herbert had created a new set of records (PCRTr.136,176-77,191-92). They did not consider objecting to the new set of records or to Ms. Herbert's testimony regarding the change in the durations of the "yellow" calls and her opinion that the "yellow" calls likely went into voice mail (PCRTr.138,178,193).

The Hearing Court's Decision

The hearing court denied the claim that counsel should have objected to the admission of the phone records, finding that: the discrepancies between the phone records did not make the entire records inadmissible; Ms. Herbert and Mr. Jensen offered possible explanations for some of the discrepancies; the discrepancies may be due to reasons that have nothing to do with the accuracy of the records; and the discrepancies affected the weight of the records, not their admissibility (PCRL.F.345-46,348-49).

The hearing court denied the claim that counsel were ineffective for failing to object to Ms. Herbert's testimony and opinion about the "yellow" calls, because Ms. Herbert's training and experience qualified her to offer opinions on matters contained in the records (PCRL.F.342-43). In addition, trial counsel cross-examined Ms. Herbert about the shortcomings in the records, and Ms. Herbert conceded that she could not testify that the calls were not answered because she was not present in the home (PCRL.F.342-43).

Standard of Review

This Court must review the hearing court's findings for clear error. *Sanders v. State*,738 S.W.2d 856,857(Mo.banc1987).

To establish ineffective assistance, Leonard must show that his counsels' performance was deficient and that it prejudiced his case. *Strickland v. Washington*, 466U.S.668(1984). To prove prejudice, Leonard must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id; State v. Butler*, 951S.W.2d600,608(Mo.banc1997).

Counsel can be ineffective for failing to object. *Kenner v. State*, 709S.W.2d 536,539(Mo.App.,E.D.1986); *Butler v. State*, 108S.W.3d18,27(Mo.App.,W.D.2003); *State v. Storey*, 901S.W.2d886,901(Mo.banc1995). Failing to object can constitute ineffective assistance of counsel if it resulted in a substantial deprivation of the accused's right to a fair trial. *Schnelle v. State*, 103S.W.3d165,176(Mo.App.,W.D.2003).

Part 1, Counsel was Ineffective for Failing to Discover Omissions and Inaccuracies in the Phone Records and Object to the Admission of the Records.

A record of an act shall be competent evidence if: 1) the custodian testifies to its identity and the mode of its preparation; 2) it was made in the regular course of business, at or near the time of the act; and 3) in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission. Section 490.680,RSMo2000; *In re the Estate of Newman v. Schlotter*, 58S.W.3d640, 647(Mo.App.,W.D.2001). Business records consisting of computer printouts are admissible under Section 490.680, "provided the business regularly employs electronic computer equipment to enter and store information and the three required foundational showings of the statute are satisfied with respect to the entries reflected thereon." *Id.* at 646. The trial court has considerable discretion in determining whether a sufficient

foundation exists to support the admission of business records, provided that the minimal requirements are met. *State v. Carruth*, 166S.W.3d589,591(Mo.App.,W.D.2005); *State v. Tillman*, 289S.W.3d282, 294(Mo.App.,W.D.2009). "The bottom line" regarding the admission of business records is a discretionary determination by the trial court of their trustworthiness. *Peters v. Johnson & Johnson Products, Inc.*, 783S.W.2d442, 444(Mo.App.,E.D.1990).

However, some courts distinguish computer-generated data, such as records of telephone connections recorded by a computer, from computer-stored data and require, as a foundation for the admission of computer-generated data, authentication by a showing that the machine was functioning properly and produced accurate results. In *State v. Armstead*, 432So.2d837(La.1983), the Louisiana Supreme Court viewed a printout of computer-generated data, which occurred by the computer recording the source of various telephone connections as it was making them, differently from printouts of human statements fed into a computer. *Id.* at 839-40. "With a machine… there is no possibility of a conscious misrepresentation, and the possibility of inaccurate or misleading data only materializes if the machine is not functioning properly." *Id.* at 840. The Court therefore viewed the computer-generated data, a printout of a telephone trace of calls that the computer was programmed to make and record the source of, as demonstrative evidence of a scientific test or experiment. *Id.* at 839, 841. Although the defendant did not object based on insufficient foundation (but instead objected that the person who made the record should have testified), the Court wrote further that "…we are satisfied from the testimony of [the security manager for Southwestern Bell], that the

procedure performed by the telephone company computer demonstrated that the data was accurate and reliable enough to justify its admission." *Id.* at 841.

See also People v. Holowko, 486N.E.2d877,879(Ill.1985) (Results of computerized telephone tracing equipment are not hearsay, and their admission into evidence requires only foundation proof of method of recording of information and proper functioning of device.); *State v. Kandutsch*,799N.W.2d 865,876-80(Wis.2011) (Testimony by Department of Corrections agents at to accuracy and reliability of Electronic Monitoring Device equipment was sufficient foundation for admission of report generated by EMD); *State v. Carter*, 762So.2d662,679-81(La.App.2000) (Computer printouts that represent only by-product of machine operation and do not reflect computer-stored human entries are not hearsay); *GE Money Bank v. Morales*,773 N.W.2d533,537(Iowa2009)(Self-generated computer records are not hearsay, and admissibility is determined by evaluation of reliability and accuracy of process involved in making record); *People v. Dinardo*,801N.W.2d73,79(Mich.App.2010)("When …fact is asserted by non-human entity, such as clock 'telling the time'…, 'statement' is not hearsay…;" as such, result of Datamaster machine, which self-generated test result and printed result on paper ticket, was not hearsay.).

In contrast with the above, several federal courts interpreting the Federal Rules of Evidence governing hearsay have considered computer reports as hearsay and have permitted their admission upon a foundation demonstrating that the records fit within the business records exception to the bar on hearsay. *See* Adam Wolfson,Note,"*Electronic Fingerprints": Doing Away with the Conception of Computer-Generated Records as*

Hearsay, 104 Mich.L.Rev.151,155,fn33(Oct.2005), *citing United HealthCare Corp. v. Am. Trade Ins. Co.*,88F.3d563,574,fn7(8th Cir. 1996); *United States v. Pendergrass*, 47F.3d1166(4thCir.1995); *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38F.3d627,633(2ndCir.1994); *United States v. Cestnik*,36F.3d 904,909-10(10thCir.1994); *United States v. Blackburn*,992F.2d666,670-72(7thCir.1993); *United States v. Moore*, 923F.2d910,914-15(1stCir.1991); *United States v. Spine*, 945F.2d143,148-49(6thCir.1991); *United States v. Hutson*,821F.2d1015,1019-20(5thCir. 1987); *United States v. Miller*,771F.2d1219,1237-38(9thCir.1985); *United States v. Glasser*, 773F.2d1553,1559(11thCir.1985); *United States v. Kim*,595F.2d755,762(D.C.Cir.1979); *United States v. Liebert*,519F.2d542,547(3rdCir.1975); *See also United States v. Yeley-Davis*,632 F.3d673,678-79(10thCir.2011) (Although the Tenth Circuit held that cell phone records were not testimonial, the Court also noted that cell phone records qualified as business records and were admissible if the proponent laid the proper foundation for admission of records as business records.).

The Missouri Court of Appeals held that a computer-generated report of computer-recorded data documenting a phone call from a particular phone, *if properly authenticated as being reliable,* was not hearsay because it was not the statement of a human declarant. *State v. Dunn*, 7S.W.3d427,431-32(Mo.App., W.D.1999)(italics added). In *Dunn*, the defendant asserted that the trial court erred in admitting into evidence computer-generated telephone billing records which established that a telephone call was made from the victim's number to her son's number and that the call lasted from 7:19 p.m. until 7:32 p.m. *Id.* at 431. The defendant asserted that the evidence was

hearsay and was not admissible pursuant to the business record exception to the hearsay rule, Section 490.680,RSMo. *Id.*

The circuit court ruled that the following testimony was sufficient reassurance of reliability to make the telephone business records admissible, and the Court of Appeals agreed: The computer-generated record was a billing record prepared by Southwestern Bell Telephone Company and billed on behalf of AT&T. *Id.* A manager in Southwestern Bell's security office explained how the computer-generated telephone bills were made. *Id.* She testified as follows: her responsibilities included keeping custody of Southwestern Bell's records; Southwestern Bell kept billing records for other long-distance companies, including AT&T; the other companies send AMA tapes, which are billing tapes that say a call took place on certain date and time from the originating number and went to a terminating number; the AMA tapes are generated when Southwestern Bell tracks, via a call made by the customer, the long-distance carrier that is used by the customer, and Southwestern Bell sends the call over the network of the long-distance carrier (such as AT&T) and then the long-distance carrier ends up with the terminating end of the call; this is all done over the computer; the long-distance carriers send daily tapes and Southwestern Bell puts that information on the customer's bill; in the normal course of business, she maintained the records in Southwestern Bell's facility or computers; the information contained within the records and the records were produced within thirty days of the time period of the bills. *Id.*

In determining the admissibility of the phone records, the Court of Appeals held that a "trace report, which tracks a telephone call made to a specific number and which is

generated by a telephone company's computer, is not hearsay." *Id., citing* Strong, John W., McCormick on Evidence,Vol.2,Sec.294 (4th Ed.,West1992). Because records of this type are not the counterpart of a statement by a human declarant, they should not be treated as hearsay, but rather their admissibility should be determined on the basis of the reliability and accuracy of the process involved. *Id.* The Court of Appeals quoted the Tennessee Supreme Court's decision in *State v. Hall*, 976S.W.2d121(1988), *cert. denied*, 526U.S.1089(1999):

> [C]omputer generated records are not hearsay: The role that the hearsay rule plays in limiting fact finder's consideration to reliable evidence received from witnesses who are under oath and subjected to cross-examination has no application to the computer generated record in this case. *Instead, the admissibility of the computer tracing system records should be measured by the reliability of the system, itself, relative to its proper functioning and accuracy.* …In this case, the record reflects that persons with special knowledge about the operation of a computer system gave evidence about the accuracy and reliability of the computer tracing so as to justify the admission of the computer printouts. Here, ….there was testimony from …[the records custodian for GTE telephone company in Texas]. He testified that AT&T's billing system is highly reliable and that all local phone companies doing business with AT&T have the exact same billing system…. [H]is testimony was sufficient to confirm the reliability of the telephone bill[.] *Id.* at 147.

Id. at 432 (italics added). *See also State v. Taylor*, 803N.W.2d746, (Neb.2011) (Court determined that sufficient authentication supported admission of cell phone records by testimony of customer operations coordinator for cell phone company that: his duties included keeping records for company; he was familiar with how company created and kept records of cell phone calls; process involved recording of information about a call on a hard drive of company's computer servers; records made and saved included various information; and computer servers where records are stored are serviced and tested by company on regular basis to make sure of accuracy.); *State v. Hawkins*, 98Cal.App.4th1428,1450,1452(Cal.App.2002) (Trial court did not abuse its discretion in admitting computer printout of date computer files were last accessed because state adduced evidence that computer clock was functioning properly; any evidence that computer time could have been changed went to the limits on probative value of printouts and affected weight, not admissibility.).

In the case at bar, counsel should have discovered and adduced evidence of the omissions and inaccuracies in the records and objected to the admission of the records. Such objection would have been successful, because: 1) a comparison of the available phone records demonstrated that the records contained inaccuracies and omissions; and 2) the State adduced no evidence that the companies' computer systems reliably produced accurate results (rather, the records custodians testified at the post-conviction hearing that their companies did not guarantee one hundred percent accuracy of their records) (PCRTr.38-9,117,129). Mr. Jensen also testified that, in his five years of experience, he previously observed discrepancies between the phone records of two different companies

and had been asked to explain discrepancies between two sets of Sprint's records (PCRTr.118,126).

Per the Missouri Court of Appeals' decision in *Dunn*, the reliability of the computer systems or accuracy of the computer systems' results is a prerequisite to the admission of computer-generated records. *Dunn*, *supra*, 73 S.W.3d at 431-32. Here, a comparison of the available records demonstrated inaccuracies and omissions within the records. This further necessitated the requirement of evidence that the computer systems, which collected and recorded the data, were reliable or produced accurate results. However, no such evidence was adduced, as the records custodians testified at the post-conviction hearing that their companies do not guarantee one hundred percent accuracy of their records (PCRTr.38-9,117,129).

Given the harmful nature of the phone-records evidence, trial counsel had an obligation to discover and adduce evidence of the records' deficiencies and the lack of any guarantee of accuracy, and then object to the admission of the computer-generated records due to an insufficient foundation. Counsel's failure to do so was not reasonable under prevailing professional norms. *Strickland v. Washington*, 466U.S. at 687.

Had counsel adduced evidence of the problems with the phone records and objected to their admission, the trial court would have sustained the objection or, at the very least, would have admitted the records for the limited purpose of showing only calls recorded by Charter and Sprint or calls recorded by an outside carrier and forwarded to Charter.

Leonard was prejudiced by counsel's omissions, because the phone records were devastating to the defense. As set forth in Argument I, the State used the records to argue that Angela did not make an outgoing call on or after November 26 (when Leonard left town) because she had been killed (Tr.1521-33,1742-44,1773-74). The State used the records to argue that Gerjuan did not talk to Angela after Leonard left town (Tr.1746-47,1773-74). The State used the records to convince Sherry and Beverly Conley that the phone calls from the victims must have occurred before November 25 and that their initial statements to the police, that they spoke with the victims after November 25, must have been wrong (Tr.1674-77,1691-92,1742-43,1774). But for counsel's failure to adduce evidence concerning the inaccuracies and omissions in the phone records and object to the admission and use of the records at trial, there is a probability that Leonard would not have been convicted.

In addition, counsel's failure to object to the admission of the records substantially deprived Leonard of his right to a fair trial, because the State used the records to prove calls not made and the records were not reliable for that purpose. The hearing court clearly erred in finding that the records were not shown to be inaccurate and were admissible (PCRL.F.345-46,348-49).

Part 2—Counsel was Ineffective for Failing to Object to Ms. Herbert's Testimony regarding her Changes of the Durations of the Six Incoming Phone Calls, which Records were Provided by Outside Carriers, and her Opinion that Five of Those Calls, which Occurred after Leonard left town, Likely went into Voicemail.[20]

In *Cach, LLC v. Askew*, 358S.W.3d58,60(Mo.banc2012), Askew appealed a judgment in favor of the debt collector, CACH, who had been assigned an outstanding debt owed by Askew on a credit card account originally owned by Providian Bank. The account was originally owned by Providian Bank but then was assigned to several other companies before ending up with CACH. *Id.*

At trial, CACH offered an exhibit to show that it owned Askew's debt. *Id.* It sought admission as a business record pursuant to Section 490.680,RSMo. *Id.* CACH tried to lay a foundation through the testimony of the records custodian for the company that owned CACH. *Id.* She admitted that she was not the records custodian for the second company that owned the debt, had not worked for the third company, and had no personal knowledge of the business practices of the first company at the time it owned the debt. *Id.* at 60-61.

[20] Ms. Herbert testified that five of the six "yellow" calls, incoming after Leonard left town, went into voicemail and one of the six "yellow" calls had a duration of "0" (after she reformatted the records) and would not have been answered (Tr.1534,1544-47;St.Ex.220;Def.Ex.LL).

Askew objected that the exhibit was hearsay and lacked proper foundation. *Id.* at 61. Admission of the exhibit was prejudicial, because it was the only evidence showing that CACH had standing to pursue collection of the debt. *Id.* On appeal, Askew asserted that the circuit court erred in admitting the exhibit, because the records custodian was not qualified to lay a foundation for the admission of the exhibit as a business record. *Id.* at 63.

Reversing, this Court held that, "[t]o be a 'qualified witness' who can lay the foundation for a business record pursuant to Section 490.680, [the witness] must have sufficient knowledge of the business operation and methods of keeping records of the business to give the records probity." *Id.* at 64,65. The records custodian lacked sufficient knowledge of when or how the exhibit was prepared. *Id.* at 64. "To allow [the record custodian's] testimony to satisfy Section 490.680 would be contrary to the statute because it was insufficient to create the probability of trustworthiness on which the statute relies." *Id.*

In *State v. Reynolds*,746 N.W.2d 837(Iowa2008), the defendant appealed his convictions for theft and six counts of forgery. *Id.* at 839. At trial, the State called a bank employee, who testified that she received e-mail communications known as "error messages" from the Federal Reserve indicating that the money orders cashed by the defendant were counterfeit. *Id.* at 840. She also testified that the bank routinely received error messages via e-mail from the Federal Reserve in the course of the bank's business, that the emails in the exhibits were from the Federal Reserve, and that the e-mails were sent to notify the bank of a "counterfeit postal money order." *Id.* The State used that

testimony in an attempt to lay a foundation for admission of ten exhibits, each of which included a copy of the subject money order, various documents created by the bank, and a copy of the error message from the Federal Reserve advising the bank of the counterfeit status of the subject money order. *Id.* No one from the bank or from the Federal Reserve gave testimony explaining how the Federal Reserve error reports were generated and sent. *Id.*

The Supreme Court of Iowa held that the trial court erred in admitting the error messages from the Federal Reserve, because the testimony was insufficient to satisfy either the business records requirement that the statements in the error messages were made "by a person with knowledge" or that they were made by a reliable, non-hearsay, computer-generated source. *Id.* at 843. "The fact that third-party hearsay is contained in an otherwise-admissible business record does not cleanse it of the 'untrustworthy' hearsay taint." *Id.* at 842-43. Further, there was insufficient evidence to show that the records were created through a fully automated and reliable process involving no human declarant. *Id.* at 843. The Court ultimately held that trial counsel was ineffective for failing to object to testimony regarding the contents of the Federal Reserve error reports (although counsel objected to the error reports themselves), because there would have been insufficient evidence had counsel raised the meritorious hearsay objection. *Id.* at 845.

In the case at bar, Ms. Herbert did not possess sufficient knowledge of the outside carriers' operations and methods of calculating the durations of the phone calls to

reformat the durations of the "yellow" incoming calls from the outside carriers and offer an opinion about whether those incoming calls were picked up or went into voicemail.

Ms. Herbert's trial and hearing testimony included that: She had been employed at Charter for two or three years and in the telecommunications industry for thirteen years (Tr.1510;PCRTr.37). Ms. Herbert's primary job responsibility was to respond to records requests, and she testified that: "[w]e configure the equipment that provides telephone service to telephone subscribers, [and] … we configure the type of equipment that records the records" (Tr.1509-10;PCRTr.37).

Charter did not have all information about the "yellow" calls, because the calls were "not recorded necessarily by the same equipment that recorded the other records that [Charter] provided" (Tr.1532-33,1537-38,1548,1552-53).

When the information from the outside carriers came to Charter, it was transmitted digitally and not in a readable form until the records were formatted by Charter's equipment (PCRTr.74-6,78). When the information was run through initially, the records were improperly formatted (PCRTr.75,78-9). Ms. Herbert did not recall how she found the errors but believed that she noticed "the time was way off" (PCR Tr.75-76).

Charter recorded the durations of the phone calls differently than the outside carriers, as the two used a different amount of digits (Tr.1541). In formatting the initial records, Charter's equipment did not take into account the missing digits in the durations (Tr.1541). After Ms. Herbert found the errors, she ran the records through "probably 12 times after that," using other equipment, to make sure it was correct (Tr.1540-42,1553;PCRTr.75-6).

She testified at a pre-trial deposition that she was unable to determine how the program that she used to format the new records determined the duration of the phone calls from the outside carriers (PCRTr.77). She was also unable to determine why some of the durations after being reformatted became longer and some became shorter (PCRTr.77-8,79).

After Ms. Herbert reformatted the outside carriers' data, she opined that the "yellow" calls likely went to voicemail, because the duration of the "yellow" calls provided by the other carriers were virtually the same as the duration of the preceding calls that went into voicemail (Tr. 1534-37,1553).

Based on the above, Ms. Herbert was not shown to have a sufficient understanding of the outside carriers' methods or computer systems to "correct" or interpret the data regarding the durations of the "yellow" incoming calls. Overall, her testimony indicated that: she believed that the data from the outside carriers was initially formatted improperly because the durations looked "way off;" based on the result not appearing correct to her, she ran the outside carriers' data through, using a newer computer program; the result then looked correct to her as the durations of the "yellow" incoming calls then matched the preceding calls, which were recorded by Charter and went into voicemail (PCRTr.75-79).

However, the law required Ms. Herbert to have some understanding or information of the computer program that could be used to correctly interpret the outside carriers' data. She could not simply run the outside carriers' data through using a different computer program until she got what appeared to her to be the correct result.

Rather, per this Court's decision in *Cach, LLC, supra*, she was required to have familiarity with the outside carriers' practice. She could then use the correct computer program, according to the outside carriers' practice, to correctly interpret the outside carriers' data.

Counsel's failure to object to Ms. Herbert's testimony (regarding her changes in the durations of the "yellow" calls and her opinion that those calls went into voicemail) fell short of reasonableness under prevailing professional norms. *Strickland*, 466U.S. at 687.

Leonard was prejudiced. The State adduced evidence of the "corrected" durations of the "yellow" calls and Ms. Herbert's opinion that five of the "yellow" calls that occurred after Leonard left town, went into voicemail, and one had a duration of "0," to show that the victims did not answer any call after Leonard left town (because they had been killed). During closing argument, the prosecutor reminded the jury that Ms. Herbert testified that those incoming calls, occurring after Leonard left town, went into voicemail (Tr.1743). This evidence was critical, because the contested issue in the case was whether the victims were alive after Leonard left town (Tr.1732,1734,1735,1748,1773,1779). But for counsel's failure to object to Ms. Herbert's testimony and opinion, as set forth above, there is a reasonable probability of a different outcome of the trial.

In addition, counsel's failure to object to Ms. Herbert's testimony and opinion about the "yellow" calls resulted in a substantial deprivation of Leonard's right to a fair trial, because the State used Ms. Herbert's testimony as proof that the "yellow" calls

incoming after Leonard left town went into voicemail. But as set forth above, Ms. Herbert was not qualified to interpret the outside carriers' data, and the jury should not have been permitted to consider her opinion regarding the outside carriers' data.

Based on the above, the hearing court's findings that Ms. Herbert's training and experience qualified her to offer opinions on the matters contained in the records, was clearly erroneous (PCRL.F.342-43). In addition, although Ms. Herbert conceded at trial that she could not know for sure whether the calls were picked up, the jury still heard and considered her "expert" opinion that the "yellow" calls occurring after Leonard left town went into voicemail (PCRL.F.342-43).

Conclusion, Parts 1 and 2

In *State v. Daniels*, 179S.W.3d273(Mo.App.,W.D.2005), Daniels asserted that the trial court improperly allowed the state to present positive test results obtained when the police sprayed luminol in areas of his house and cars. *Id.* at 280. The luminol testing was only scientifically valid as a preliminary test to show that blood may be present and was not scientifically conclusive, and no confirming tests for the presence of blood were presented at trial. *Id.* Yet, despite the acknowledgements of the crime scene technicians that luminol is only a preliminary test, both technicians were allowed to opine that the positive luminol test results indicated that blood was present. *Id.* at 284. The introduction of the luminol tests without corroborative test results implied to the jury that the victim's blood was present at the locations tested. *Id.* In closing, the prosecutor encouraged the jury to rely on the presumptive positive luminol tests as proof for the presence of blood. *Id.* at 285. The Court of Appeals reversed and wrote that,

"Introduction of the positive luminol tests were offered to effectively prove the presence of human blood without first conducting a *Frye* hearing to determine whether such evidence satisfied the *Frye* test and constituted an abuse of discretion and error that prejudiced Mr. Daniels." *Id.* at 284.

Likewise, in the case at bar, the jury was encouraged to rely on the phone records as proof that: 1) the records proved calls not made; and 2) there was no incoming call to Angela's landline, which was picked up, after Leonard left town. Yet those inferences could not be reasonably drawn from the records and the evidence presented. Leonard respectfully requests that this Court reverse his convictions and remand the case for a new trial.

ARGUMENT III

The motion court clearly erred in denying a hearing on Appellant's claim that counsel was ineffective for failing to adduce, through cross-examination of State witnesses, favorable evidence from the phone records, including evidence: 1) to impeach Betty Byers' testimony that Perry Taylor was at her home on Thanksgiving and told her that Appellant confessed; 2) that there was a phone call to Southwest Airlines on November 23, 2004 (and calls attributable to the victims were made after that); and 3) that, according to Charter's records of the victims' landline, there was no call to or from Appellant from October 17 -November 5, a twenty-day period of time, because this denied Appellant due process, a fair trial, effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends.5,6,8,14; Mo. Const., Art. I, Secs.10,18(a),21, and Rule 29.15(h), in that the amended motion alleged facts, not conclusions, that entitled Appellant to relief, namely that counsel unreasonably failed to adduce evidence favorable to the defense, which prejudiced Appellant, in that the evidence would have impeached Byers' testimony and would have shown that inferences the State drew from the phone records were not warranted.

In the amended motion, Leonard alleged that counsel was ineffective for failing to adduce through cross-examination of the State's witnesses (Cathy Herbert, Dan Jensen, and Betty Byers) favorable evidence from the available telephone records, including evidence: 1) to impeach Betty Byers' testimony that Perry was at her home on Thanksgiving (November 25) and told her that Leonard confessed; 2) that there was a

phone call to Southwest Airlines from the victims' landline on November 23 (and calls attributable to Angela were made after that); and 3) that, according to Charter's records of the victims' landline, there was no call to or from Leonard from October 17 (the date that the Charter records began) through November 5, a twenty-day period of time (PCRL.F.74-85).

The motion court denied a hearing on the claims, finding that Leonard was not prejudiced (PCRL.F.335-37). As to the first subpoint, the court also determined that trial counsel impeached Ms. Byers about the timing of Perry's first phone calls to her and that Ms. Byers stated that the calls were one or two days prior to Thanksgiving (Tr.1085;PCRL.F.336). Ms. Byers was confident that she first learned of the murders on Thanksgiving, November 25, from Perry (Tr.1082,1089;PCRL.F.336).

As to the second subpoint, the court also determined that the phone call to Southwest Airlines on November 23 could show that a trip was planned before the homicides but could also show that the call was in contemplation of the murders (PCRL.F.336). Without testimony of who made the call and why, the fact that a call was made is speculative about the purpose of the call (PCRL.F.336).

As to the third subpoint, the court also found that the lack of any phone calls between the victims' and Leonard's phone numbers at an earlier period of time would not show whether Leonard and Angela called each other from other phones (PCRL.F.337). Thus, no inference could be drawn from such evidence (PCRL.F.337).

Standard of Review

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21S.W.3d819,822(Mo.banc2000); Rule29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929S.W.2d209(Mo.banc1996).

A motion court must hold an evidentiary hearing if (1) the movant cites facts, not conclusions that, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record; and (3) the matters complained of prejudiced the movant. *Wilkes v. State*, 82S.W.3d925,929(Mo.banc2002); Rule29.15(h).

Subpoint 1

During trial, the State adduced evidence that Leonard told Perry that he had committed the murders (Tr.854-84,891,1034-42,St.Ex.196B). Perry denied that, and he denied telling Betty Byers, his former girlfriend, that Leonard had confessed to him (Tr.854-84,903). When asked about whether he spent the night at Ms. Byers' home after he got back to St. Louis in late November 2004, Perry testified that it was possible that he spent one night at Ms. Byers' home the weekend after Thanksgiving but that when he first got back to St. Louis, he spent the night in his truck (Tr.866-68). He did not recall spending the night at Ms. Byers' home on Thanksgiving (November 25) (Tr.874).

The State called Ms. Byers to testify regarding her contact with Perry, and she testified as follows: She dated Perry in 2004 (Tr.1077). Her home number was 314-868-6744, and her cell number was 314-973-5740 (Tr.1078). On November 24, she received a call from Perry, and Perry eventually told her that Leonard had killed the victims

(Tr.1078-80). Perry arrived in St. Louis on Thanksgiving (November 25) (Tr.1080).[21] He came to her home on Thanksgiving and had dinner with her that night (Tr.1081). Perry again told her that Leonard confessed (Tr.1081-82). At some point, she and Perry were sitting in her bedroom and Leonard called Perry, who asked Leonard why he was still at the victims' home (Tr.1082-83).

During cross-examination, defense counsel brought out that Ms. Byers had previously testified at a deposition that the first time that Perry told her that Leonard had confessed was when Perry was at her home on Thanksgiving (Tr.1089).

Subsequently, in his amended motion, Leonard alleged that before trial, trial counsel deposed Ms. Byers, who testified that Perry arrived at her home at approximately 1:30 p.m. on Thanksgiving and that he was there all night and spent the night (ByersDepo.Tr.33-34;PCRL.F.76). Leonard also alleged that counsel had Perry's cell phone records, which reflected that Perry called Ms. Byers' home or cell number at the following times on Thanksgiving: 2:31-2:35 p.m.; 8:34-8:40 p.m.; 8:50 p.m.; and 9:46

[21] The parties entered into a stipulation that the records of Perry's employer, Gainey Transportation, showed that Perry's truck was in the St. Louis area from 3:45 p.m. on November 25 through 1:07 p.m. on November 30 (Tr.1285-86). If Perry spent the next night, November 26, with Ms. Byers, it would not have made sense that Perry allegedly asked Leonard why he was still at the victims' home, as Leonard flew out of town the morning of November 26 (Tr.1288).

p.m. (St.Ex.223, pp.5-6;Tr.1412;PCRL.F.76-77). The records also reflected that Perry called Ms. Byers' cell the next morning at 9:02 a.m. (St.Ex.223,p.6;PCRL.F.77).

Leonard alleged that given Ms. Byers' trial testimony, it was necessary for counsel to cross-examine her regarding her deposition testimony as to when Perry was at her home on Thanksgiving (or initially ask her, because she may have continued to claim that Perry was there from approximately 1:30 p.m. on Thanksgiving until the next day) and then point out that Perry's cell phone records showed otherwise (PCRL.F.77). The phone records supported Perry's testimony that he did not spend the night with Ms. Byers on Thanksgiving and Perry's denial that he then made any statements to her that Leonard had confessed (and that Leonard specifically said he was still in the victims' house and had turned on the air-conditioning) (PCRL.F.77). Where Ms. Byers' and Perry's testimony was inconsistent, the jury would necessarily have had to determine which of the two was telling the truth (unless it disregarded the testimony of both) (PCRL.F.77). As such, counsel had an obligation to inform the jury, through the available phone records, that Perry called Ms. Byers on four different occasions during the late afternoon and evening of Thanksgiving—if he was at her home as she testified, why would he call her? (PCRL.F.77-78).

The above allegations were not refuted by the record and properly alleged a basis for relief. The failure to adequately cross-examine or impeach a State's witness can constitute a basis for ineffective assistance of counsel. *Barnum v. State*, 52S.W.3d604, 607-08(Mo.App.,W.D.2001); *Black v. State*, 151S.W.3d49,51(Mo.banc2004).

In *Black v. State*, Mr. Black appealed the denial of his Rule 29.15 motion and asserted that his counsel was ineffective for failing to cross-examine and impeach four witnesses with their prior inconsistent statements. *Id.* at 51. At the trial of the case, the State presented testimony that Mr. Black deliberated, prior to stabbing the victim, by following the victim's truck, approaching the truck, reaching in through the window, and stabbing the victim one time. *Id.* at 52-53. Mr. Black's defense theory was that he did not deliberate and that he stabbed the victim after the victim got out of the truck and tried to hit him with a beer bottle. *Id.* at 53. This Court found that the prior inconsistent statements of three of the witnesses would have supported the defense. *Id.* at 53. The Court also determined that another key State's witness could have been impeached regarding the time that the victim and the witness began drinking alcohol and that this would have gone to impeach the witness's ability to accurately perceive the events and would have supported the defense claim that the victim was belligerent. *Id.* at 54. The Court then concluded:

> The evidence defense counsel failed to offer here did not relate to a matter so fully and properly proved by other testimony as to take it out of the areas of serious dispute. To the contrary, the impeaching evidence focused on the very root of the matter in controversy. The unoffered evidence, admissible both for impeachment and as substantive evidence, went to a central, controverted issue on which the jury focused during deliberations. If believed by the jury, there is a reasonable probability that the outcome of the trial would have been different. Accordingly, this Court determines that

> counsel's ineffectiveness was so prejudicial as to undermine this Court's confidence in the outcome of the trial.

Id. at 56-58 (internal quotations and citations omitted).

Likewise, in the case at bar, Perry's statements about Leonard's alleged confession were a controverted issue in the case. The State called Ms. Byers to adduce evidence of prior, inconsistent statements of Perry about Leonard's alleged confession. The defense had available evidence, i.e. Perry's cell phone records, which would have cast doubt on Ms. Byers' testimony and would have supported Perry's testimony. Counsel's failure to adduce that evidence through the cross-examination of Ms. Byers (and point out the phone calls from Perry to Ms. Byers through the testimony of the Sprint records custodian) fell below the standard of care that a reasonably competent attorney would exercise under similar circumstances. *Strickland*, 466U.S. at 687.

Leonard also alleged in the amended motion that he was prejudiced (PCRL.F.80). Impeaching Ms. Byers with Perry's phone records was another basis to attack her testimony (PCRL.F.80). Defense counsel pointed out at trial that Ms. Byers had earlier under oath said that Perry first told her of Leonard's confession at her home on Thanksgiving (when she testified at trial that they discussed it before Thanksgiving over the phone) (PCRL.F.80). The phone records, which show that Perry was not at her home on Thanksgiving, was another basis to demonstrate that Ms. Byers was not recalling the events accurately (PCRL.F.80). This would have cast doubt on her testimony regarding Leonard's alleged confession (PCRL.F.80). But for counsel's omission, there is a reasonable probability of a different outcome of the guilt phase (PCRL.F.80).

The motion court clearly erred in determining that counsel adequately impeached Ms. Byers and that Leonard was not prejudiced by counsel's failure to confront Ms. Byers with the phone records showing that Perry called her several times on Thanksgiving (PCRL.F.335-37). Leonard respectfully requests that this Court reverse the motion court's decision and remand the case for an evidentiary hearing on this claim.

Subpoint 2

During the trial, the State adduced evidence and argued that Angela's last call with Gerjuan was on November 24 at 12:22 a.m. for approximately six minutes (Tr.1524-25). The State theorized that Angela was killed shortly thereafter and adduced evidence that Leonard flew out of St. Louis on Southwest Airlines on November 26 (Tr.1287). The State adduced evidence that the only outgoing calls from Angela's landline on November 25 were to Valerie Burke, Perry Taylor, and Southwest Airlines (Tr.1528-29). As such, the evidence indicated that Leonard called Southwest Airlines to get flight information on November 25 and then left the next day, and the prosecutor argued that Leonard, and not Angela, made those outgoing calls (Tr.1742)

During trial, the defense brought out through Betty Byers' testimony that Leonard flew in and out of St. Louis frequently (Tr.1089-90). The defense also adduced evidence from Elizabeth Williams that she had driven Leonard to the airport on prior occasions (Tr.1259-60). Leonard's defense included that him leaving town on November 26 was not unusual (Tr.1089-90,1748,1773).

Subsequently in the amended motion, Leonard alleged that counsel should have cross-examined Cathy Herbert, Charter's records custodian, and adduced from the

available Charter records, that there was a call from Angela's landline to Southwest Airlines on November 23 at 2:25 p.m. (and calls attributable to Angela were made after that) (PCRL.F.80-82;St.Ex.220). Leonard alleged that this demonstrated that he was already gathering information from Southwest Airlines, prior to the time that the State argued that the victims were killed (PCRL.F.81).

The above allegations were not refuted by the record and properly alleged a basis for relief. The failure to adduce evidence, which rebuts the State's theory of guilt and creates a favorable inference for the defense, can constitute a basis for ineffective assistance of counsel. *Coleman v. State*, 256S.W.3d151(Mo.App.,W.D.2008).

In *Coleman v. State*, the defendant argued on appeal from a burglary conviction that his trial attorney was ineffective for failing to adduce evidence of his preexisting foot injury. *Id.* at 156. The Court of Appeals held that evidence of the preexisting injury: would have rebutted the State's theory that the defendant could not run because he hurt himself kicking in the door of the home (which was done by the first burglar); and would have supported an inference that the defendant was not the second burglar, who was seen running by an eyewitness. *Id.* at 156. The Court held that counsel was ineffective for failing to adduce evidence of the preexisting foot injury and further found prejudice, because the evidence supported Mr. Coleman's defense that he was not one of the burglars and the evidence of guilt was not overwhelming. *Id.* at 157-58.

Likewise, in the case at bar, evidence that a phone call was made to Southwest Airlines on November 23 would have rebutted the State's theory, which included that: Leonard and Angela got into a fight during the late night of November 23 or early

morning hours of November 24; Leonard killed the victims; Leonard looked for a way to get out of town on November 24 and 25; and Leonard left town on November 26 (Tr.1734-35,1742). The evidence also created a favorable inference for the defense, which included that Leonard traveled often and so it was not unusual for him to leave town on the 26th – this evidence would have shown that someone from Angela's number was already calling for flight information on November 23 (Tr.1089-90,1748,1773). Counsel's failure to adduce this favorable evidence fell below the standard of care that a reasonably competent attorney would exercise under similar circumstances. *Strickland v. Washington*, *supra*.

Leonard also alleged in the amended motion that he was prejudiced (PCRL.F.81-82). Leonard alleged that the evidence supported the defense theory that the fact that he called Southwest on November 25 and then flew out of St. Louis on November 26 was not proof that he had committed the crimes (PCRL.F.81-82). Rather, the records showed an earlier phone call to Southwest Airlines on November 23 (PCRL.F.81-82;St. Ex.220,p.26).[22] But for counsel's omission, there is a reasonable probability of a different outcome of the guilt phase of the trial (PCRL.F.82).

[22] The parties had stipulated to the subscribers for various telephone numbers and that Southwest Airlines' telephone number was 800-435-9792 (L.F.1103-05). A review of Charter's records for Angela's landline shows an outgoing call made to that number on November 23 (St.Ex.220,p.26).

Based on the above, the motion court clearly erred in determining that Leonard was not prejudiced because the evidence was speculative and the phone call to Southwest Airlines on November 23 could also show that the call was in contemplation of the murders (PCRL.F.336-37). Leonard respectfully requests that this Court reverse the motion court's decision and remand the case for an evidentiary hearing on this claim.

Subpoint 3

During the trial, the State adduced the following evidence: State's Exhibit 232 was a bar graph showing outgoing calls from Leonard's cell phone to Angela's landline from November 20 through December 6 (Tr.1429). There was only one outgoing call from Leonard's cell phone to Angela's landline, and that occurred on November 22 (Tr.1429). There were no phone calls at all from Leonard's cell phone to Angela's landline after November 23 (Tr.1429-31). The State used that evidence to argue that Leonard did not attempt to call the victims after November 26 because he knew that they were dead (Tr.802,810-11,1429-31,1735).

Subsequently, in the amended motion, Leonard alleged that counsel should have cross-examined Cathy Herbert and adduced evidence that, according to Charter's records of Angela's landline, there was no call to or from Leonard's cell phone from October 17 through November 5, a twenty-day period of time (PCRL.F.82-85;St.Ex.220, pp.1-9). Specifically, Leonard alleged that counsel had Angela's landline records, which (for the first full day) began on October 17 (PCRL.F.82;St.Ex.220). Counsel also had information from Gerjuan's deposition and Angela's calendar that Leonard would leave town for long periods of time and not call Angela; in fact, counsel unsuccessfully

attempted to elicit that deposition testimony and calendar at trial (PCRL.F.83;Tr.1637-8;GerjuanDepo.Tr. 29-30). Defense counsel wanted to elicit the calendar and Gerjuan's testimony to counter the State's evidence that inferred that Leonard did not call after he left on November 26 because he knew the victims were dead (PCRL.F.83;Tr.1638).[23] Counsel failed to adduce evidence that Charter's records of Angela's landline showed an earlier, twenty-day period of time, where there was no record of phone contact between Leonard's cell number and Angela's landline (PCRL.F.83;St.Ex.220).

The above allegations were not refuted by the record and properly alleged a basis for relief. The failure to adduce evidence, which rebuts the State's theory of guilt and creates a favorable inference for the defense, can constitute a basis for ineffective assistance of counsel. *Coleman v. State*, *supra*, 256S.W.3d at 156-58.

As in the *Coleman* case, evidence that there was no record of telephone contact between Leonard and Angela, on a prior occasion for a twenty-day period of time, would have rebutted the State's argument that Leonard did not call Angela after he left St. Louis because he knew she was dead. Counsel's failure to adduce this favorable evidence,

[23] Leonard's direct appeal counsel raised an issue in the direct appeal that the trial court erred in excluding Gerjuan's testimony and Angela's calendar entries that Leonard was often away for days without calling Angela, and this Court held that Gerjuan's testimony and the calendar entries were inadmissible hearsay. *State v. Taylor,* 298S.W.3d482,498 (Mo.banc2009).

which was at their fingertips, fell below the standard of care that a reasonably competent attorney would exercise under similar circumstances. *Strickland*, *supra*.

Leonard also alleged in the amended motion that he was prejudiced (PCRL.F.84-85) Specifically, Leonard alleged that the prosecutor urged the jury to believe it was unusual for Leonard to be away from Angela without calling and his failure to call showed consciousness of guilt – he knew that Angela was dead: "[Leonard's] connection to Angela Rowe ends on the 23rd. Why isn't he calling her? He's calling his wife a lot. There's no one to call back to, ladies and gentlemen, they're gone" (PCRL.F.84-85;Tr.1735). Counsel possessed evidence to refute this argument but failed to adduce it (PCRL.F.85). But for counsel's omission, there is a reasonable probability of a different outcome of the guilt phase of the trial (PCRL.F.85).

Based on the above, the motion court clearly erred in determining that Leonard was not prejudiced because the evidence would not show that Leonard and Angela called each other from other phones (PCRL.F.337). Leonard respectfully requests that this Court reverse the motion court's decision and remand the case for an evidentiary hearing on this claim.

ARGUMENT IV

The motion court clearly erred in denying a hearing on Appellant's claim that counsel was ineffective for failing to object to: 1) the prosecutor's statement during voir dire that the panel members could have a lean towards the death penalty where children were killed; and 2) the prosecutor's closing argument that the phone records did not support Gerjuan's testimony that she spoke with Angela on November 28, because this denied Appellant due process, a fair trial, effective assistance of counsel, the right to a fair and impartial jury, and subjected him to cruel and unusual punishment, U.S. Const., Amends.5,6,8,14; Mo. Const., Art. I, Secs.10,18(a),21, and Rule 29.15(h), in that the amended motion alleged facts, not conclusions, that entitled Appellant to relief, namely that: 1) the prosecutor's statement during voir dire misstated the law; and 2) the prosecutor's closing argument commented on evidence that had been excluded at the State's request. The motion also properly alleged prejudice, in that the prosecutor's improper comments resulted in a substantial deprivation of Appellant's right to a fair trial.

Subpoint 1

During the voir dire proceedings, the prosecutor instructed the veniremembers during the second small panel, that a mother and her three children were killed and then, a short time later, stated that it did not matter if the veniremembers had leanings toward the death penalty or life without parole as the appropriate punishment, as long as they were able to keep an open mind (Tr.229). During the fourth small group, the prosecutor instructed a veniremember, who initially stated that she could not consider life without

parole “if three little kids were killed,” that “it’s okay to have a lean [toward death]” (Tr.295-300). And during the eighth small group, the prosecutor instructed a veniremember, who indicated that, where three children were killed, it would be difficult for him to consider life without parole, that leaning towards a particular sentence was okay, so long as he could keep an open mind (Tr.459-61). Veniremembers Raymond Hartgraver and Arthur Pruett, who heard the prosecutor’s instruction during the small-group voir dire, served on the jury (Tr.216,280-81;L.F.1070).

Subsequently, Leonard alleged that counsel was ineffective for failing to object to the prosecutor’s statements to the veniremembers that it was okay to lean towards a particular punishment based on a fact of the case, i.e. that three children were killed (PCRL.F.100-01). The motion court denied the claim without a hearing, finding that the statement was a correct statement of the law because veniremembers, who lean towards one particular punishment, are not disqualified if they can consider both punishments, citing *State v. Ramsey*, 864S.W.2d320,336(Mo.banc1993) (PCRL.F.340-41).

Standard of Review

This Court must review the motion court’s findings for clear error. *See* Point/Argument III, *Morrow v. State*, 21S.W.3d819,822(Mo.banc2000); Rule29.15(k). A motion court must hold an evidentiary hearing if (1) the movant cites facts, not conclusions that, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record; and (3) the matters complained of prejudiced the movant. *Wilkes v. State*, 82S.W.3d925,929(Mo.banc2002); Rule29.15(h).

The Amended Motion Alleged a Basis for Relief

In the Amended Motion, Leonard specifically alleged that the prosecutor misstated the law during voir dire and cited the relevant portions of the transcript (PCRL.F.100-01).

Contrary to the motion court's findings, Leonard also properly alleged a basis for relief. Counsel can be ineffective for failing to object. *Kenner v. State*, 709S.W.2d 536,539(Mo.App.,E.D.1986); *Butler v. State*, 108S.W.3d18,27(Mo.App.,W.D.2003); *State v. Storey*, 901S.W.2d886,890(Mo.banc1995). Failing to object can constitute ineffective assistance of counsel if it resulted in a substantial deprivation of the accused's right to a fair trial. *Schnelle v. State*, 103S.W.3d165,176(Mo.App.,W.D.2003).

In addition, counsel can be ineffective in jury selection. *Presley v. State*, 750 S.W.2d602,608(Mo.App.,S.D.1988) (counsel ineffective for failing to challenge for cause a juror who said he would be partial to the State because of his experience as a victim of a crime); *State v. McKee*, 826S.W.2d26,28-29(Mo.App.,W.D.1992) (counsel ineffective for failing to challenge for cause jurors who admitted they would hold it against the defendant if he did not testify); *James v. State*, 222 S.W.3d 302,307-308(Mo.App.,W.D.2007) (counsel ineffective for failing to challenge a juror who indicated that she would draw a negative inference from a defendant's failure to testify); *White v. State*, 290S.W.3d162,166-167(Mo.App.,E.D.2009) (counsel ineffective for failing to strike a juror who stated that he could not be fair to the defendant). *See also Winn v. State*, 871S.W.2d756,763(Tx.App.1993) (counsel ineffective for conducting inadequate voir dire, asking most venirepersons only a few questions and asking most,

"any reason you could not be fair?" The cursory questioning resulted from a lack of preparation).

A defendant is entitled to a fair and impartial jury. U.S. Const. Amends. VI,XIV; Mo. Const., Art.I,Sec.18(a); *State v. Clark*, 981S.W.2d143,146(Mo.banc1998). A case involving a child victim can implicate personal bias and disqualify prospective jurors. *State v. Clark*, 981S.W.2d at 147, *citing State v. Wacaser*, 794S.W.2d190(Mo.banc 1990). "The trial court must strike for cause prospective jurors when they exhibit prejudicial bias because the victim is a child." *State v. Clark, supra, citing State v. Wacaser*, 794S.W.2d at 191-93.

In *Wacaser*, the defendant asserted that the trial court committed reversible error in overruling her challenge for cause to two veniremembers. *Id.* at 191. One of the members, Mr. Beavers, indicated a bias and stated that because the case involved a child victim, he would have a tendency to lean towards the death penalty. *Id.* at 192. This Court held that the challenge for cause to Beavers should have been sustained: "He had formed an opinion on the matter of punishment and gave no assurance that he would be likely to change his opinion. The opinion was not based on rumors *but on facts which would necessarily be brought out in evidence*." *Id.* at 192-3(italics added). *See also State v. Ervin*, 835S.W.2d905,914(Mo.banc1992) ("To qualify as a juror, the venireperson must be able to enter upon that service with an open mind, free from bias and prejudice."); Section 494.470,RSMo2000 (No person who has formed an opinion concerning the matter or any material fact in controversy that may influence his or her judgment shall be sworn as a juror.).

Based on the above case law, it was a misstatement of the law to inform the veniremembers that it was okay to have a lean towards the death penalty or a particular punishment, where the case involved three children. Undersigned counsel acknowledges that this Court has previously held that a trial court properly denied a defense strike for cause where a juror indicated that he leaned toward the death penalty but could vote for either punishment. *State v. Ramsey*, 864S.W.2d320,336(Mo.banc1993). However, in the case at bar, the prospective jurors were told that it was acceptable to lean towards the death penalty *given a specific fact of the case, i.e., that three children were killed* (Tr.229,295-300,459-61). While the law permits a juror to have a lean towards the death penalty generally in cases of murder (as long as the juror will realistically consider both punishments), the law does not permit a juror to be biased towards death due to a particular fact or non-statutory aggravator present in the case. *State v. Clark, supra; State v. Wacaser, supra.*

As such, the prosecutor misstated the law, and Leonard properly asserted a basis for relief (PCRL.F.100-01). A prosecutor may not make arguments contrary to, or misstating, the law or the instructions. *State v. Blakeburn*, 859S.W.2d170,174 (Mo.App.,W.D.1993). Counsel's failure to object to the prosecutor's misstatement of the law during small-group voir dire fell below the standard of care that a reasonably competent attorney would exercise under similar circumstances. *Strickland v. Washington*, 466U.S.668,687(1984).

Leonard also properly alleged in the amended motion that he was prejudiced (PCRL.F.100-01,110). But for counsel's omission, there is a reasonable probability of a

different outcome of the guilt phase of the trial (PCRL.F.110). The prosecutor's misstatement of law resulted in a substantial deprivation of Leonard's right to a fair trial (PCRL.F.94).

Based on the above, the motion court clearly erred in determining that the challenged statement was a correct statement of the law (PCRL.F.340-41). Leonard respectfully requests that this Court reverse the motion court's decision and remand the case for an evidentiary hearing on this claim.

Subpoint 2

During trial, the defense adduced evidence that Angela's sister, Gerjuan, told the police that she received a phone call from Angela on November 28 at 3:00 or 4:00 a.m. (which was after Leonard left town on November 26) (G.R.Depo60-61,73-74). Gerjuan's Sprint cell phone records did not show all incoming calls but showed that Gerjuan called the Amoco at 4:36 a.m. on November 28 (St.Ex.252,p.77). Gerjuan testified at a deposition that she spoke to Angela at approximately 3:00 or 4:00 a.m. and Angela said that she was at the Amoco pay phone (G.R.Depo60-61,73-74;Tr.1652-53,1655-57,1663-65).

The State knew that a record existed corroborating the alleged call between Angela and Gerjuan on November 28. However, through a hearsay objection, the State prevented the jury from learning that when Angela spoke with Gerjuan on November 28, Angela was at a pay phone at an Amoco station (Tr.1652-55). The excluded testimony would have tied the November 28 call listed in Gerjuan's phone records to Angela. Yet, during closing, the State argued that no record existed of phone calls between Gerjuan

and Angela after November 24, since no calls showed up on Angela's *home phone* records (Tr.1524-5,1746-47,1773-75).

Subsequently, Leonard alleged in the Amended Motion that counsel were ineffective in failing to object to the prosecutor's closing argument that no record existed of any phone call between Gerjuan and Angela after November 24, since no such call showed up on Charter's records of Angela's landline (PCRL.F.95-97).[24] The motion court denied the claim without a hearing, finding that the prosecutor's argument was not objectionable, and Leonard was not prejudiced because the jury heard Gerjuan's deposition testimony that she spoke to Angela after Leonard left the St. Louis area (PCRL.F.338-41).

Standard of Review

This Court must review the motion court's findings for clear error. *See* Point/Argument III, *Morrow*, 21S.W.3d at 822; Rule29.15(k). A motion court must hold an evidentiary hearing if (1) the movant cites facts, not conclusions that, if true, would

[24] In the direct appeal, this Court reviewed an argument challenging these comments by the prosecutor and found "[i]t was not plain error to allow these statements." *State v. Taylor*, 298S.W.3d482,510(Mo.banc2009). Because the appropriate standard of prejudice in a post-conviction proceeding is lower than the prejudice required when an issue is raised as plain error in the direct appeal, *Deck v. State*,68S.W.3d418,427-428(Mo.banc2002), this Court's opinion in the direct appeal does not preclude consideration of this issue in this appeal.

entitle him to relief; (2) the factual allegations are not refuted by the record; and (3) the matters complained of prejudiced the movant. *Wilkes*, 82S.W.3d at 929;Rule29.15(h).

The Amended Motion Alleged a Basis for Relief

In the Amended Motion, Leonard specifically alleged that during closing argument, the prosecutor improperly commented on excluded evidence and cited the relevant portions of the transcript (PCRL.F.95-97). Contrary to the motion court's findings, Leonard also properly alleged a basis for relief. Counsel can be ineffective for failing to object. *Kenner v. State*, *supra*, 709S.W.2d at 539; *Butler v. State*, *supra*, 108S.W.3d at 27; *State v. Storey*, *supra*, 901S.W.2d at 901. Failing to object can constitute ineffective assistance of counsel if it resulted in a substantial deprivation of the accused's right to a fair trial. *Schnelle v. State*, *supra*, 103S.W.3d at 176.

In addition, while counsel has wide latitude in closing, his argument must not go beyond the evidence presented, misstate the evidence, or introduce irrelevant and prejudicial matters. *State v. Rush*, 949S.W.2d251,256(Mo.App.,S.D.1997). Further, Missouri courts have recognized that it is error for a prosecutor to "comment on or refer to evidence or testimony that the court has excluded." *State v. Hammonds*, 651S.W.2d 537,539(Mo.App.,E.D.1983) (Even though state had a strong case and review was for plain error, reversal was warranted by state's argument referring to evidence court had excluded); *See also State v. Weiss*, 24S.W.3d198,199-200,204(Mo.App.,W.D. 2000)(State's comments on excluded evidence were "intentional and deliberate" misstatements, warranting reversal even under plain error analysis).

Based on the above, the prosecutor's argument was improper. The prosecutor knew that Gerjuan had testified that she spoke to Angela on the phone at Amoco, rather than on Angela's home phone, because the prosecutor was able to successfully keep out that testimony. The prosecutor, by arguing that Charter's records of Angela's landline proved that there was no such call, took unfair advantage of the evidence that he was able to exclude and misled the jury. Counsel's failure to object to the prosecutor's improper argument fell below the standard of care that a reasonably competent attorney would exercise under similar circumstances. *Strickland*, 466U.S. at 687.

Leonard also properly alleged in the amended motion that he was prejudiced (PCRL.F.95-97). But for counsel's omission, there is a reasonable probability of a different outcome of the guilt phase of the trial (PCRL.F.110). The prosecutor's improper closing remarks resulted in a substantial deprivation of Leonard's right to a fair trial (PCRL.F.94).

Based on the above, the motion court clearly erred in determining that the prosecutor's argument was not objectionable and that Leonard was not prejudiced (PCRL.F.338-41). Leonard respectfully requests that this Court reverse the motion court's decision and remand the case for an evidentiary hearing on this claim.

CONCLUSION

Based on Arguments I and II, Appellant respectfully requests that the Court vacate the convictions and death sentences and remand the case for a new trial. Based on Arguments III and IV, Appellant respectfully requests that the Court reverse the motion court's denial of relief without a hearing and remand the case for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Mr. Shaun Mackelprang, Office of the Attorney General, is a registered user of the electronic filing system and, on May 8, 2012, a complete copy of this document was delivered to Mr. Shaun Mackelprang through the electronic filing system.

/s/ Jeannie Willibey
Jeannie Willibey

Certificate of Compliance

I, Jeannie Willibey, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 30,440 words, which does not exceed the 31,000 words allowed for an appellant's brief.

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