Sup. Ct. # 89294

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

LEONARD S. TAYLOR,

Appellant.

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 BRIEF

ROSEMARY E. PERCIVAL, #45292
Office of the State Public Defender
Capital Litigation Division
920 Main Street, Suite 500
Kansas City, Missouri 64105
Tel: (816)889-7699
Fax: (816)889-2088
rosemary.percival@mspd.mo.gov
Counsel for Appellant

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JURISDICTIONAL STATEMENT

Leonard S. Taylor was convicted of four counts of first-degree murder, §565.020, and four counts of armed criminal action, §491.075, in the Circuit Court of St. Louis County.[1] He was sentenced to death on each murder count and to consecutive life sentences on the armed criminal action counts. Notice of appeal was timely filed. This Court has exclusive jurisdiction of the appeal. Mo. Const.,Art.V,§3.

[1] All statutory references are to the Missouri Revised Statutes, 2000 edition, unless otherwise noted.

STATEMENT OF FACTS[2]

Late on the afternoon of December 3rd, 2004, 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 at 2039 Park Lane, in St. Louis County (Tr.820,1188-90;G.R.Depo.49-50,52). The police forced entry and found Angela and the children shot dead (Tr.821-23,825-26). Angela's live-in boyfriend, Leonard Taylor, was not there (Tr.825,828,1044; G.R.Depo.50,52-53).

That evening, Angela's sister Gerjuan told police that she last saw Angela the prior weekend, November 27th-28th (G.R.Depo.26,50,52-53). She had seen Angela on the 27th when Angela came by her house to lend her $50 (G.R.Depo.52-53,73). She got a phone call from Angela on the 28th, at 3:00 or 4:00 a.m. (G.R.Depo.60-61,73-74).

Also on December 3rd, Angela's neighbor, Elmer Massey, told police he saw Angela and the children the weekend after Thanksgiving, November 27-28th (Tr.1602-03). Sometime during the week of the 29th, he noticed a light-skinned black man leave Angela's house but duck back inside as Elmer pulled up (Tr.1603,1610).[3]

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[2] The Record on Appeal consists of a trial transcript ("Tr."); a legal file ("L.F.); deposition transcript of Gerjuan Rowe ("G.R.Depo."), and additional transcripts referenced by date (*i.e.*, "8/11/05-Tr."). Because multiple family members are discussed, counsel will refer to individuals by first name. No disrespect is intended.

[3] Elmer identified someone other than Leonard as the man he saw (Tr.1605-06).

The next day, on December 4th, police interviewed the children's aunts Beverly and Sherry (Tr.1673,1682).[4] Beverly revealed that Alexus had called her the previous Saturday night, November 27th, or early Sunday morning, November 28th (Tr.1672-74). Sherry stated that on November 28th at 10:00 a.m., she spoke with Angela about plans for the upcoming December 3rd weekend (Tr.1682,1708). She could hear the children in the background and heard Alexus yell that she could not wait to see Beverly the next weekend (Tr.1689-91,1708).

On December 5th, Angela's friend Kathy told police she last spoke with Angela on November 24th, at about 10:30 at night (Tr.1241). She remembered the call because it was the night before Thanksgiving and she was preparing Thanksgiving dinner (Tr.1241).

Tyrone Conley, the children's father, last saw Angela and the children on November 22nd, when he returned the children to Angela at a nearby McDonald's (Tr.845). He had the children for the weekends of November 12th and 19th (Tr.841). When Angela drove into the parking lot, someone seemed to be following her in a car (Tr.844). The man was a light skinned black male (Tr.844).[5] Angela was in a hurry to leave (Tr.843). She acted strange, did not walk straight, and said she was in pain (Tr.842-43).

Angela last showed up for work on November 20th (Tr.1161-62). She called in on November 21st, stating she had been in a car accident (Tr.1163). Although she was

[4] The police erased Beverly and Sherry's videotaped interviews (Tr.918-19,938,940-41).

[5] The man looked like Leonard, but Tyrone could not say it was Leonard (Tr.844-45).

scheduled to work on November 26th, she did not call or show up (Tr.1164). Angela had seemed nervous and emotional in the prior month (Tr.1166).

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

Clues from the Crime Scene

When the police first arrived at the house, the doors and windows were secure, so a window was forced open and an officer crawled inside (Tr.820-22). Initially, nothing seemed out of the ordinary except that the house was cold (Tr.822,829,914). The thermostat was set on cool, at a little above 50° (Tr.957-58;St.Ex.11). A television played (Tr.822). There were no signs of forced entry (Tr.979-80). The children were covered by blankets in their mother's bed (Tr.822,825-26,832,834). Angela was covered by blankets in the bedroom through which the first officer had come (Tr.826,832). Only after the bodies were discovered was any smell noticeable (Tr.836-37).

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). Acqreya had two gunshots to her head, above and in front of her right ear (Tr.1184-85). Tyrese was shot once behind his left ear, and Alexus was shot twice in the back of the head (Tr.1189-90).

The medical examiner's investigator, analyzing the bodies at the crime scene, noted that Angela's body was still in rigor mortis, which occurs 10-12 hours post-mortem

and remains for 24-36 hours (Tr.1208-09). None of the conditions typically seen in the later stages of decomposition – skin slippage, liquid seeping from the skin, bloating, autolysis, livor mortis, or marbling of the skin – were present (Tr.1203-05,1213). The medical examiner, believing that the victims had last been seen on November 27th, opined that the condition of the bodies was consistent with having last been seen on the 27th, but most likely the bodies had been there just 2-3 days (Tr.1199-1201,1206-07).

Mail was stuffed in the mail slot and lying around the house, and stacks of unopened newspapers were in the living room (Tr.821,935-36). Newspapers dated November 26th through December 1, 2004 were in the front yard (Tr.821,982-86,1003-04). The newspapers for December 2nd and 3rd were not outside, and the police did not check the dates of the unopened newspapers inside the house (Tr.1018). A relative reported that, in the days before the bodies were found, she drove by the house several times; one day there was a bunch of mail, but the next time, it was all gone (Tr.1696-98).

Several items of mail were found at the house (Tr.912,1580-81,1588-89). An anonymous letter to Angela stated, "Is your man faithful? Eventually it all comes out. Enjoy it now because he's not yours" (Tr. 912-13,1590-91). The envelope was postmarked November 22nd from California (St.Ex.139). Angela's paycheck, dated and postmarked November 24th, was found open in the house (D.Ex.A;Tr.1581). The earliest it could have arrived was November 26th (Tr.1699). Angela's phone bill, with a billing date of November 27th and a probable mailing date of November 29th, was also found open at the house (Ex.B,B-1;Tr.1626-27). No officer recalled opening these letters at the

house, and typically, if an officer opens mail at a crime scene, he would include that fact in a report (Tr.934,1581-84,1021-22).

Police found a driver's license at the house with Leonard's photo but the name "Terrance Carter" (Tr.920).

Leonard Gone from November 26th Onward

Although he lived with Angela when in Missouri, Leonard also had a wife, Debrene, in California (Tr.1260). He travelled often for business and carried bags of merchandise (Tr.1260). On November 26th, at about 6:00 a.m., Leonard knocked at his sister-in-law Elizabeth's door and asked for a ride to the airport (1247). He stated that he had been outside Elizabeth's house 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). He dressed nicely, as he normally did (Tr.1260). After they loaded the car, Leonard threw what appeared to be a long-barreled revolver into the sewer (Tr.1253-54,1282)[6]. Several times, he urged Elizabeth to put the Blazer in the garage, but she refused (Tr.1250-51,1257).

On the way to the airport, Leonard told Elizabeth that he was leaving St. Louis because people were trying to kill him and it could be the last time she saw him alive

[6] In October 2004, Leonard was seen with a black, long barreled revolver (Tr.1096-97).

(Tr.1255). He warned 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).[7]

The next day, November 27th, Leonard was in California (Tr.1256-57). Three days later, he traveled eastward, arriving in Georgia on December 2nd (St.Ex.251).

On December 7th, police searched the sewer but found no weapon (Tr.1293-95). The sewer had been cleaned December 2nd, its contents sucked out and taken to a dump (Tr.1295-96,1300). Officers raked through the dump but found nothing (Tr.1300-01).

Perry's Statement/s

Leonard's brother Perry was an over-the-road truck driver (Tr.1077). He stored his belongings at Angela's house (Tr.1067). He left his Blazer there too and allowed her to drive it (Tr.869). Recently, Angela had called him, rambling and screaming to "come get his shit" because she was going to move (Tr.1067-68). Perry was in St. Louis from 3:45 p.m. on November 25th to 1:00 p.m. on November 30th (Tr.896,1285-86).

On December 4th, Perry was pulled from his truck in Atlanta, Georgia and questioned about the murders (Tr.892). He told police that he was last at Angela's house on November 25th to retrieve his Blazer (Tr.1700). On December 5th, he was detained in New Jersey and again was questioned about the murders (Tr.893). He told police he went to Angela's house on November 29th to retrieve his Blazer (Tr.1066,1597). He knocked at Angela's front door, but got no response (Tr.1597-98).

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

On December 8th, Perry was in St. Louis when he again was taken into custody (Tr.893-94). He was questioned from 10:46 p.m. to 1:46 a.m. (St.Ex.196-A;Tr.1035, 1068). An officer told Perry, "the answers that you [give] probably in the next fifteen or twenty minutes are probably going to dictate the next good portion of what happens to the rest of your life" (Tr.1060). Perry responded, "you have threatened me with my job, my future, my freedom. You all talking about five to seven years for some shit that I didn't do" (Tr.1061). The officer told Perry to consider it a threat (Tr.1061-62).

Perry denied any role in the murders and claimed that Leonard had confessed to him (Perry-Tr.9). He stated that he was on the road the day before Thanksgiving (November 24th), when it was either just getting dark or late at night, and Leonard called him on his cell phone and asked to borrow money (Perry-Tr.15,18,110). He said he needed to get away because he had killed Angela (Perry-Tr.15). Angela came at him with a knife, and he could not get her off him, so he shot her two or three times (Perry-Tr.15-16,112-13). He needed to kill the children because they witnessed it (Perry-Tr.16). After Leonard hung up, Perry repeatedly tried to call him back but got no answer (Perry-Tr.16). Leonard called Perry later and again said he killed Angela and then the children (Perry-Tr.17-18). Afterwards, Perry called his mother (Tr. 18).

On November 24th, Perry told his girlfriend, Betty, that Leonard said he killed Angela and the children (Tr.1079-80).[8] He said that Angela attacked him with a knife, so

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

he shot her and then 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 25th, Perry got a call on his cell phone at Betty's house (Tr.1082). 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 in California and that he had turned on the air conditioning (Tr.1083).

Leonard Arrested

On December 9th, Leonard was arrested in Kentucky (Tr.1306-07). He had a parole violation warrant for forgery and identified himself as Jason Lovely (Tr.1311,1318-19,1335). Luggage seized from the car contained pamphlets, including "Degrees by Mail," "Fraud Report, the Conman's Survival Manual," "The Paper Trip III, Master Guide to New Identity," "ID by Mail," and "Identity New," downloaded from the internet in July 2004 (Tr.1325-27;St.Ex.53). The bag also contained two Illinois birth certificates, one blank and the other for Jason Anthony Richardson (Tr.1330). There was a Missouri identification card with Leonard's picture but the name Jason Lovely and a birth certificate for Jason Lovely (Tr.1329). There was a package of ink and a rubber stamp (Tr.1328).

Forensic Testing

Ten bullets were fired, all from the same gun, which was either a .38 or .357 caliber (Tr.1144-45,1150-51). A box of .38 special cartridges, found in Perry's Blazer,

could be fired from either a .38 or .357 and are designed for a revolver (Tr.1121-23,1153-54).

No bloody clothing was found in the luggage seized at Leonard's arrest (Tr.1384,1386). The State conducted phenolphthalein tests on 42 items from the luggage (Tr.1379-80). Only two, sunglasses and a watch, tested presumptively positive for blood (Tr.1374-75). Nothing was visible on these items (Tr.1376). Confirmatory testing on the watch showed that the substance was not blood (Tr.1388). No confirmatory testing was done on the sunglasses; instead, DNA testing was done (Tr.1467). The sample was very small, at .03 nanograms per microliter (Tr.1467,1480). It contained two or more partial DNA profiles (Tr.1467-68,1500,1505). Comparing the profiles to the DNA profiles of the victims, the chemist could exclude the children as donors, but not Angela (Tr.1468). This partial profile appears in 1:12,930 in the African-American population (Tr.1469). The chemist could not confirm it was Angela's DNA (Tr.1468,1503). It was possible that, if Angela's DNA, it was saliva, skin, or hair, not blood (Tr.1487,1503). The chemist agreed that DNA material can be transferred many ways, like sneezing, coughing, or touching something (Tr.1484).

Phone Records

Phone records show that on November 23rd, Leonard spoke briefly with Debrene at 11:15 p.m. and at 11:21 (St.Ex.224,p.5). At 11:23, he called his mother (St.Ex.239). At 11:24, he spoke with Perry for eleven minutes (St.Ex.224,p.5). He then spoke again with his mother (St.Ex.239). At 11:42, Perry called Leonard, and they spoke for nine

minutes (St.Ex.224,p.5). Leonard spoke with Debrene three more times within the next few hours (St.Ex.236). He called Perry again at 12:05 a.m. and they spoke for about ten minutes (St.Ex.224,p.6). Both Debrene and Perry called Leonard multiple other times, but the calls were routed to voice mail (St.Ex.233,234,236,237).

On November 23rd, at 11:52 p.m., Gerjuan called Angela, and they spoke for ten minutes (St.Ex.252,p.66). Angela called Gerjuan again at 12:21 a.m. on November 24th (St.Ex.220,p.27). The last call from Angela's house to Aunt Beverly was on November 21st, and the last call to or from the house to Aunt Sherry was on November 13th (St.Ex.218,219). No calls were made from Angela's house from November 26th onward (St.Ex.212).

Trial

Leonard was charged with four counts of first-degree murder and four counts of armed criminal action (L.F.736-49). On July 22, 2005, he filed a request for speedy trial under 217.450, *et seq*. (L.F.76-77). He objected to all continuance requests while the 180-day speedy trial period was pending (9/16/05-Tr.2-6;8/1/06-Tr.59-60;L.F.666). The court denied Leonard's motions to dismiss (L.F.454-89,598-603,611).

Pretrial, defense counsel objected that the phenolphthalein and DNA test results should be excluded due to late disclosure (L.F.645-48). The State waited until November, 2006 to test items seized in December, 2004 (Tr.1355-56,1361;L.F.647). It disclosed the phenolphthalein results ten weeks pretrial, and the DNA results five weeks pretrial ((L.F.646). But for the late disclosure, counsel were ready for trial (L.F.648). Counsel argued that allowing the late disclosure would force them to request another

continuance, violating Leonard's speedy trial rights (L.F.647-48). They argued that the evidence should be excluded because it lacked probative value and, without confirmatory testing, was far too speculative (L.F.723-27;Tr.1378-79,1381,1469-70). The court allowed late disclosure and granted counsel's subsequent continuance request, over Taylor's objection (Tr.76).

Over objection, the court sustained the State's motion to strike Venireperson Tumminia for cause (Tr.212). She stated that she had qualms about the death penalty, but could be fair and follow the court's instructions (Tr.203).

At trial, numerous witnesses deviated from their initial statements. Aunt Beverly and Aunt Sherry testified that their initial statements to the police must have been wrong, because the phone records did not show any calls on the dates they thought they spoke to Angela (Tr.1679,1692). Angela's friend Kathy testified that she must have gotten the date wrong too, when she said she had spoken with Angela on November 24th; she now believed that the call occurred on November 22nd (Tr.1237). Finally, the medical examiner testified that the bodies could have been in the house 2-3 weeks (Tr.1196). He explained that, although he had known when he wrote his report that the house was very cold, the temperature was not "part of [his] psyche" (Tr.1220-21,1223,1225).

Because Perry testified that his statement to police was coerced, the State played portions of his videotaped statement (Tr.1042). Over objection, the State played portions in which a detective stated he believed Perry was innocent and was correct as to the date Leonard allegedly confessed (Tr.1038-40;St.Ex.196-B at 9,110).

The court allowed the parties to read portions of Gerjuan's deposition into evidence, since she was unavailable (Tr.1571). Leonard asked to present Gerjuan's testimony that when she spoke with Angela early Sunday the 28th, Angela was calling from a pay phone at an Amoco gas station (Tr.1652;G.R.Depo.61). The court ruled the testimony inadmissible hearsay (Tr.1653,1655).

Leonard also asked to introduce portions of Gerjuan's deposition, stating that Leonard was often gone long periods without calling Angela, and that Leonard's brother or cousin lived at Angela's house too (Tr.1048-50,1637-38,1643-45;Depo.29-30,33). Leonard sought to introduce Angela's calendar, which recorded the dates that Leonard was away without calling, and Angela's checkbook, which showed she had written a check dated November 27th (Tr.1048-50,1637-38,1643-45;Depo.29-30,33). The court denied these requests on hearsay grounds (Tr.1638,1640,1646-47).

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). When the court ordered Leonard removed from the courtroom, a bailiff handcuffed him in front of the jury (Tr.1785-86). Counsel's request for a mistrial was denied (Tr.1786-87).

In penalty phase, the State presented evidence that in 2000, Leonard raped his sixteen-year-old step-daughter (Tr.1806-08). He threatened that if she told, he would kill her mother and two siblings (Tr.1809). The State introduced a certified copy of the judgment/sentence and that of convictions for: 1991 possession with intent to distribute; 1992 forcible rape; and 2001 forgery and stealing (Tr.1802-05,1809). The State presented victim impact testimony from three relatives (Tr.1810-18).

The only mitigating evidence presented was 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; and he had never used drugs while incarcerated, harmed others, or tried to escape (D.Ex.RR).

The jury recommended death (L.F.778). It found that Leonard had one or more serious assaultive convictions; each murder was committed during the commission of another homicide; and the crimes involved depravity of mind in that Leonard planned to kill more than one person (L.F.1304). The court imposed death (L.F.1411-12). Notice of appeal was timely filed (L.F.1418-29).

POINT I

The trial court erred and clearly abused its discretion in excluding Gerjuan's testimony that, when she and Angela spoke on November 28, 2004, Angela told her she was at a pay phone at an Amoco station, because the testimony was admissible (1) under an exception to the rule barring hearsay, (2) under the due process clause, and/or (3) because the State opened the door to it, and refusing to let the jury consider this crucial evidence violated Leonard's rights to due process, confrontation and cross-examination, present a defense, and a fair trial, U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a), in that the testimony fell under a hearsay exception since it concerned Angela's present sense impression of her actions at that moment, and, alternatively, the defense should have been allowed to cure the false inference created by the State that, if Angela's phone records did not show the November 28th phone call, Angela and Gerjuan must not have spoken on that date.

Chambers v. Mississippi, 410 U.S. 284 (1973);

Green v. Georgia, 442 U.S. 95 (1979);

State v. Myers, 248 S.W.3d 19 (Mo.App.E.D.2008);

State v. Newell, 710 N.W.2d 6 (Iowa 2006);

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

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

POINT II

The trial court erred and clearly abused its discretion in (1) excluding Gerjuan's testimony that (a) Leonard was often away for days without calling Angela and (b) Angela made notations in her calendar of the days that Leonard was away without calling, and (2) refusing to let jurors view the calendar, admitted as defense exhibit II, because the testimony and notations in the calendar fell under an exception to the rule barring hearsay and were admissible as curative evidence because the State opened the door to it, and refusing to allow the jury to consider this crucial evidence violated Leonard's rights to due process, confront and cross-examine the witnesses against him, present a defense, and a fair trial, U.S.Const., Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a), in that (1) the testimony fell under a hearsay exception since it concerned either Angela's present sense impression of Leonard's actions or her state of mind; (2) even if it did not qualify as a hearsay exception, the State may not mechanistically apply the hearsay rule to exclude critical, reliable evidence; and (3) the State opened the door to the testimony and evidence by creating the false inferences that (a) Leonard's absence and lack of any phone calls to Angela meant he knew she was dead, when actually Leonard often was away for days without calling; and (b) Angela's absence from work on November 26th meant she was already dead, when actually she was not at work because she thought she had the day off.

Chambers v. Mississippi, 410 U.S. 284 (1973);

Green v. Georgia, 442 U.S. 95 (1979);

State v. Davis, 290 S.E.2d 574 (N.C.1982);

Mariner Health Care, Inc. v. Estate of Edwards ex rel. Turner, 964 So.2d 1138 (Miss.2007);

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

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

POINT III

The trial court erred and clearly abused its discretion in refusing to let the jury view Defense Exhibit II, a checkbook admitted into evidence, that showed that Angela wrote a check dated November 27, 2004 and thus the court violated Leonard's rights to due process, confrontation and cross-examination, to present a defense, and a fair trial, U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10, 18(a), because the check was relevant and did not contain hearsay, in that the fact that Angela wrote a check dated November 27th helped prove she was alive after Leonard left town on November 26th, and the check fell under a hearsay exception in that it related to Angela's then existing state of mind or physical condition, and/or was a verbal act.

Chambers v. Mississippi, 410 U.S. 284 (1973);

People v. Howard, 575 N.W.2d 16 (Mich.App.1997);

Spurlock v. Comm'r of Internal Revenue, 85 T.C.M. 1236 (TaxCt.2003);

United States v. Pang, 362 F.3d 1187 (9thCir.2004);

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

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

POINT IV

The trial court erred and clearly abused its discretion in excluding Gerjuan's testimony that Angela told her Leonard's brother or cousin lived at Angela's house and thus denied Leonard his rights to due process, confrontation and cross-examination, to present a defense, and a fair trial, U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,Secs.10,18(a), because the testimony was admissible under the Due Process Clause and/or because the State opened the door to it, in that the defense should have been allowed to cure the false inference the State created that Leonard must have committed the crimes because there was no sign of forced entry and only Leonard had access to the house.

Chambers v. Mississippi, 410 U.S. 284 (1973);

State v. Fenton, 941 S.W.2d 810 (Mo.App.W.D.1997);

State v. Myers, 248 S.W.3d 19 (Mo.App.E.D.2008);

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

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

POINT V

The trial court erred and clearly abused its discretion in overruling Leonard's objections to State's Exhibits 176 (swabbing from sunglasses), 178 (report on phenolphthalein test), and 179 (report on DNA testing), letting the State present testimony regarding the phenolphthalein and DNA test results, and admitting the exhibits, in violation of Leonard's right to a fair trial and due process, U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a), because the evidence lacked probative value and was unreliable, speculative, and misleading, in that (1) the State effectively represented that the weakly positive phenolphthalein test result showed blood was present even though no confirmatory test was conducted; and (2) the speck found on the sunglasses was a combination of DNA material from at least two donors and was so minute that it could not be confirmed as Angela's DNA, but even if it were, (a) it was not necessarily blood but could have been hair, skin, or saliva and (b) since Angela and Leonard lived together, it could have been transferred long ago, in any number of innocuous ways.

Brenk v. State, 847 S.W.2d 1 (Ark.1993)

Frye v. United States, 293 F. 1013 (D.C.Cir.1923)

State v. Daniels, 179 S.W.3d 273 (Mo.App.W.D.2005)

State v. Driscoll, 55 S.W.3d 350 (Mo.banc 2001)

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

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

POINT VI

The trial court abused its discretion in overruling defense counsel's motion to exclude testimony and evidence regarding blood and DNA testing on State's Exhibit 158, sunglasses, and in continuing the trial, because the alternative remedy of continuing the trial failed to alleviate unfairness, violating Leonard's rights to due process, a fair trial, and a speedy trial, U.S.Const.,Amends.V,VI,XIV;Mo.Const., Art.I,Secs.10,18(a),§217.450, *et seq.*,Mo.Sup.Ct.R.25.03, in that the State, without any valid justification, waited almost two years to test the sunglasses and surprised Leonard with the "presumptive blood" results ten weeks before trial, and the DNA results five weeks before trial, knowing that counsel would need additional time to review the test results and prepare to defend against them, and that Leonard had requested a speedy trial under Section 217.450, *et seq*..

State v. Martin, 103 S.W.3d 255 (Mo.App.W.D.2003);

State v. Gray, 230 S.W.3d 613 (Mo.App.S.D.2007);

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

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

§217.450, *et.seq.*; and

Mo.Sup.Ct.R.25.03,25.18.

POINT VII

The trial court erred in proceeding to trial, entering judgment against Leonard, and sentencing him, in violation of Leonard's right to due process, U.S.Const.,Amends.V,XIV;Mo.Const.,Art.I,Sec.10, and a speedy trial, §217.450(Missouri's Uniform Mandatory Disposition of Detainers Law (UMDDL)), because the court lost jurisdiction over the case well before the February 2008 trial, in that Leonard filed a proper request for disposition of the detainer under the UMDDL on July 22, 2005 and the 180-day period was not validly tolled since Leonard objected to the court allowing his initial counsel to withdraw, he objected to every continuance while the 180-day period was running, and the final continuance was caused solely by the State's unjustified two-year delay in obtaining DNA testing.

State ex rel. Public Defender Commission v. Williamson, 971 S.W.2d 835 (Mo.App.W.D.1998);

State v. Davis, 903 S.W.2d 930 (Mo.App.W.D.1995);

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

Mo.Const.,Art.I,Sec.10; and

§217.450, *et.seq.*.

POINT VIII

The trial court erred and abused its discretion in overruling Leonard's motion to exclude from Perry's redacted videotaped statement (St.Ex.196-B) Detective Zlatic's opinions regarding Perry's innocence and the accuracy of his last statement to the police, in admitting Exhibit 196-B, and in letting the jury view it, and thereby violated Leonard's rights to due process, a fair trial, and a fair and impartial jury, U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a), because Zlatic's opinions – that Perry did not commit the charged crimes and Perry correctly guessed that Leonard confessed to Perry the day before Thanksgiving – vouched for Perry's credibility and invaded the province of the jury on two crucial issues, in that the detective's opinion was based on hearsay, and the detective was in no better position than the jury to assess witness credibility and draw conclusions from the evidence.

State v. Bybee, 254 S.W.3d 115 (Mo.App.W.D.2008);

State v. Link, 25 S.W.3d 136 (Mo. banc 2000);

State v. Presberry, 128 S.W.3d 80 (Mo.App.E.D.2003);

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

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

POINT IX

The trial court erred and abused its discretion in overruling Leonard's objections and sustaining the State's motion to strike Kathleen Tumminia for cause, thereby violating Leonard's rights to due process, trial by a fair, impartial and fairly selected jury, a fair and reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,Secs.10, 18(a),21, because Tumminia expressed no views that would substantially impair the performance of her duties as a juror or her ability to follow the instructions or her oath, in that, although Tumminia had qualms about the death penalty, she could be fair, follow the court's instructions, and "deal realistically with it."

Adams v. Texas, 448 U.S. 38 (1980);

Gray v. Mississippi, 481 U.S. 648 (1987);

Wainwright v. Witt, 469 U.S. 412 (1985);

Witherspoon v. Illinois, 391 U.S. 510 (1968);

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

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

POINT X

The trial court plainly erred and abused its discretion in failing to intervene *sua sponte* when the State repeatedly made improper comments during closing, because the arguments denied Leonard his rights to due process and a fair trial, U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a), in that the State (1) commented on evidence that had been excluded at the State's request by arguing that no phone records supported Gerjuan's statement that she spoke with Angela on November 28th; and (2) argued, "believe me if there's somebody else that could refute Dr. Burch [Leonard] would have put them on the stand," because the State improperly shifted the burden of proof and drew an adverse inference from Leonard's failure to present such a witness, when that witness was equally available to both sides.

State v. Crawford, 32 S.W.3d 201 (Mo.App.S.D.2000);

State v. Hammonds, 651 S.W.2d 537 (Mo.App.E.D.1983);

State v. Luleff, 729 S.W.2d 530 (Mo.App.E.D.1987);

State v. Weiss, 24 S.W.3d 198 (Mo.App.W.D.2000);

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

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

Mo.Sup.Ct.R.30.20.

POINT XI

The trial court abused its discretion in overruling Leonard's request for mistrial after the Court visibly handcuffed Leonard before removing him from the courtroom, because the Court had no cause to do so other than the fact of conviction, thereby violating Leonard's rights to due process and a fair and reliable sentencing, U.S.Const.,Amends.V,VIII,XIV;Mo.Const.,Art.I,Secs.10,21, in that handcuffing Leonard was inherently prejudicial – it communicated to the jury that he was a danger to the community, and adversely affected the jury's perception of Leonard's character.

Deck v. Missouri, 544 U.S. 622 (2005);

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

Mo.Const.,Art.I,Secs.10,21.

ARGUMENT I

The trial court erred and clearly abused its discretion in excluding Gerjuan's testimony that, when she and Angela spoke on November 28, 2004, Angela told her she was at a pay phone at an Amoco station, because the testimony was admissible (1) under an exception to the rule barring hearsay, (2) under the due process clause, and/or (3) because the State opened the door to it, and refusing to let the jury consider this crucial evidence violated Leonard's rights to due process, confrontation and cross-examination, present a defense, and a fair trial, U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a), in that the testimony fell under a hearsay exception since it concerned Angela's present sense impression of her actions at that moment, and, alternatively, the defense should have been allowed to cure the false inference created by the State that, if Angela's phone records did not show the November 28th phone call, Angela and Gerjuan must not have spoken on that date.

Three of Angela's relatives and one neighbor told police that they had seen or spoken with Angela and/or the children after November 26th, the date Leonard left St. Louis (Tr.1602-03,1672-74,1682,1689-91,1708;G.R.Depo.52-53,73). In its case in chief, the State attacked these statements by showing the absence of a record of any such calls from Angela's home phone, or any calls from the three relatives to Angela on the dates in question (Tr.1677-78,1691-92). Yet the defense was not allowed to rebut, by showing that when Angela and Gerjuan spoke on the 28th, Angela was at a pay phone.

Thus, the absence of this call from Angela's home phone records did not defeat Gerjuan's repeated assertions that she spoke with Angela on November 28th.

While the defense showed that Gerjuan had a call on the date and time she said she spoke with Angela, it was precluded from tying that call to Angela. Since there was no other evidence that Angela ever used any other phone, the jury must have concluded that Angela did not speak with Gerjuan on November 28th. The jury was led to believe that if they had spoken, Gerjuan's records would have shown Angela's phone number, and Angela's home phone records would have shown that call. In closing, the State stressed the phone records, arguing they "tell a story" and, because Angela's home phone records did not show a call to Gerjuan on November 28th, Gerjuan must have been wrong when she stated she spoke with Angela on that date (Tr.1724,1746-47).

The jury would have heard a different story had Gerjuan been allowed to testify that Angela stated she was at a pay phone at an Amoco station. That statement would have tied the phone call on Gerjuan's phone records to Angela and strengthened Gerjuan's credibility (D.Ex.BB,p.77). This was important, since the State painted Gerjuan as a drug user who was mistaken about when she spoke with Angela (G.R.Depo.72-73,85;Tr.1774). Had the jury known Angela was at a pay phone at an Amoco station, it would have believed that Gerjuan did in fact speak with Angela on November 28th, and the jury also would have been more likely to believe the rest of Gerjuan's statement to the police – that she met with Angela after the 26th to borrow money (G.R.Depo.27-28,52-53).

Standard of Review and Preservation

A trial court has broad discretion in determining the admissibility of evidence, and its determination will not be disturbed on appeal absent a clear abuse of discretion. *State v. Wahby*, 775 S.W.2d 147, 153 (Mo.banc 1989). The court abuses its discretion when its ruling "is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State v. Taylor*, 134 S.W.3d 21, 26 (Mo.banc 2004).

This issue is preserved. Defense counsel argued at trial that they should be allowed to elicit from Gerjuan that Angela stated she was calling from a pay phone at an Amoco gas station (Tr.1652-57,1663-65). The court sustained the State's hearsay objection (Tr.1652-55,1657,1663-65). Defense counsel included this issue in the new trial motion (L.F.1359-60).

A Missing Piece of the Puzzle

It is undisputed that Leonard Taylor flew out of St. Louis in the early morning of November 26, 2004 and did not return until after his arrest (Tr.810-11,1287-88,1734;St. Ex.251). Thus, if Angela and the children were alive after 8:00 a.m. on November 26th, Leonard could not be guilty of the charged crimes.

In the days following the December 3rd discovery of the bodies, three of Angela's relatives and a neighbor told police that they had spoken with or seen Angela and/or the children after November 26th. On December 3rd, Angela's neighbor, Elmer Massey, told

police he saw Angela and the children the weekend after Thanksgiving (Tr.1602-03).[9] On December 4th, the children's Aunt Beverly told police that Alexus had called her the previous Saturday night, November 27th, or early Sunday morning, November 28th (Tr. 1672-74). Beverly reiterated to her stepfather that she had spoken with Alexus that past Saturday, November 27th (Tr.1675-76). The children's Aunt Sherry also told police that she had spoken with Angela on November 28th at 10:00 a.m., about plans for the upcoming December 3rd weekend (Tr.1682,1708). She told police that she heard the children in the background and heard Alexus yell that she could not wait to see Beverly the next weekend (Tr.1689-91,1708).[10]

Gerjuan told police on December 3rd that she saw Angela on Saturday, November 27th, and spoke with her by phone early Sunday, November 28th (G.R.Depo.26). She told police she had seen Angela on the 27th when Angela came by her house to lend her $50 (G.R.Depo.52-53,73). She testified at deposition that, "my sister was alive up until the 27th, I know she was…. My sister had to be murdered the week of the 28th, 29th, 30th. I talked to my sister. I know I did. And I think everything started falling off on the 27th"

[9] In 2004, Thanksgiving fell on November 25th, so the next Saturday was November 27th (Tr.1597).

[10] The State alleged that Sherry must have confused the weekends, but the children were with their father the two weekends preceding Thanksgiving (November 12-14 and 19-21) (Tr.1695). Beverly could not have called Angela's house and heard the children in the background then.

(G.R.Depo.24). She testified that she got a phone call from Angela on the 28th, at 3:00 or 4:00 a.m. (G.R.Depo.60-61,73-74).

Because Gerjuan was unavailable to testify at trial, the court let the parties read portions of her deposition transcript into evidence (Tr.1571). The State objected on hearsay grounds to those portions where Gerjuan testified that, when she spoke with Angela early Sunday the 28th, Angela was not calling from her home phone but from a pay phone at an Amoco station (Tr.1652;G.R.Depo.61). Angela told Gerjuan she was calling from a pay phone and asked Gerjuan to pick her up (G.R.Depo.62,73-75). Defense counsel argued that they should be allowed to elicit the testimony since the State argued that Angela's home phone records showed all calls made between Angela and Gerjuan, yet this call would not register in Angela's phone records (Tr.1652-53,1655-57,1663-65). Counsel argued that, even though she could introduce Gerjuan's cell phone records to show a call on the 28th in the early morning, it was much more valuable to have Gerjuan's testimony that this specific call was with Angela at the Amoco station (Tr.1654).[11] Because Gerjuan only knew that Angela was calling from a pay phone

[11] Gerjuan's phone records indicate she made a phone call at 4:36 a.m. on November 28th to 314-381-2823, in St. Louis (D.Ex.BB). The White Pages website, reverse look-up, indicates that this number belongs to an Amoco gas station. *See* http://www.whitepages.com/search/ReversePhone?full_phone=314-381-2823&localtime=survey (site last visited 10/22/08).

because Angela said so, the court ruled the testimony inadmissible hearsay (Tr.1653,1655).

The trial court erred in sustaining the State's objection to Gerjuan's testimony that Angela told her that she was calling from a pay phone at an Amoco station. The testimony was admissible as an exception to the rule barring hearsay, as a statement of Angela's present sense impression. Even if it is not a present sense impression, it was nonetheless admissible under the Due Process Clause since it was essential to cure the false conclusion encouraged by the State that Gerjuan could not have spoken with Angela on the 28th because Angela's phone records did not reflect it. The State opened the door to this testimony by the calculated inferences its evidence created.

Present Sense Impression

A hearsay statement is any out-of-court statement used to prove the truth of the matter asserted and that depends on its veracity for its value. *Smulls v. State*, 71 S.W.3d 138, 148 (Mo.banc 2002). Hearsay is generally inadmissible because the declarant is not subject to cross-examination about her perceptions, the reliability of her observations, and any potential bias she may have; her statement is not under oath; and the jury cannot gauge her demeanor. *Bynote v. National Super Markets Inc.*, 891 S.W.2d 117, 120 (Mo.banc 1995); *State v. Tyra*, 153 S.W.3d 341, 346 (Mo.App.S.D.2005). Hearsay is admissible when it falls under certain exceptions, or when circumstances exist that "assure the trustworthiness of the declarant's statement despite the absence of cross-examination, the oath, and the fact finder's ability to observe the declarant's demeanor."

State v. Crump, 986 S.W.2d 180, 188 (Mo.App.E.D.1999). "A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case." *Rock v. Arkansas*, 483 U.S. 44, 61 (1987).

One exception to the hearsay rule is an out-of-court statement of a present sense impression. *Crump*, 986 S.W.2d at 188. To qualify, the statement must be uttered simultaneously, or almost simultaneously, with an act or event, describe or explain the event or act, and the declarant must have perceived the event or act with her own senses. *State v. Smith*, 265 S.W.3d 874, 879 (Mo.App.E.D.2008).

Several indicia of trustworthiness support admission of present sense impressions. *Id*. Because the declarant relates events as they happen, or immediately afterwards, she lacks time to twist events or for her memory to fade. See 2 ***McCormick on Evidence*** §271, at 251 (6th ed.2006); *State v. Flesher*, 286 N.W.2d 215, 217 (Iowa 1979)(reliable because there is "little or no time for calculated misstatement"). Often, other evidence corroborates the declarant's statement and she is available for cross-examination. *Id*.

Two Missouri cases deal with present sense impression. In *Smith*, 265 S.W.3d at 876-77, the defendant fatally stabbed her boyfriend, Moore, but claimed self-defense. Moore's cousin testified that, during prior phone conversations with Moore, she heard Smith screaming in the background, and Moore stated, "Here she comes with a knife." *Id*. at 877. The Eastern District held that Moore's hearsay statement lacked sufficient indicia of reliability because he was not subject to cross-examination and no evidence corroborated his statement. *Id*. at 879.

In *Crump*, 986 S.W.2d at 182, police chased and arrested Crump on an outstanding warrant. As an officer retraced Crump's path, a bystander, Riney, reported that while Crump ran, he threw an object onto the roof. *Id*. Police found a baggy of cocaine there. *Id*.

At trial, Riney testified that it looked like Crump threw something on the roof and that another bystander, Price said, "'Look, he's throwing something on the roof.'" *Id*. at 183-84. The Eastern District concluded that Riney's testimony that Price stated, "Look, he's throwing something on the roof," was hearsay, but was admissible as an exception to the rule barring hearsay, as a present sense impression. *Id*. at 188. Price and Riney testified and were available for cross-examination, and defense counsel had not objected when similar hearsay was presented earlier. *Id*. at 188-89.

While these cases stressed the declarant's availability for cross-examination, many courts have allowed testimony regarding present sense impressions despite the declarant's absence. In *State v. Newell*, 710 N.W.2d 6, 19 (Iowa 2006), the murder victim's statement was introduced through her estranged husband. He testified that, as he spoke to her over the phone, she told him that the defendant was listening to their conversation. *Id*. at 17. The testimony was admissible as a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." *Id*. at 19.

In *McBeath v. Commonwealth*, 244 S.W.3d 22, 37 (Ky.2007), Mairs testified that he was with his friend, Thomas, when Thomas got a telephone call. Mairs could tell a man was on the line, but could not hear what was said. *Id*. After Thomas hung up, he

told Mairs that the call was from the defendant, who was looking for a gun. *Id*. Thomas did not testify at trial. *Id*. at 37, fn.41. The Kentucky Supreme Court held that Mairs could testify about Thomas' statement, since it was a present sense impression of the phone conversation. *Id*. at 38-39. A conversation on the telephone is an "event which may be described or explained within the meaning of the present sense impression exclusion to the hearsay rule." *Id*. at 38.

In *State v. Price*, 952 So.2d 112, 115-16 (La.App.1st Cir.2006), a passenger in the defendant's truck was killed when the defendant drove drunk and lost control. En route, the passenger called a friend and said the defendant "was messed up" and she wanted him to pull over. *Id*. The friend's testimony of what the passenger told him during the phone call was deemed admissible as the passenger's present sense impression of events as they transpired. *Id*. at 120-21.

In *People v. Coleman*, 16 A.D.3d 254 (N.Y.A.D.1st Dept.2005), the court let the State play the tape of a 911 call made by an unidentified caller who did not testify at trial. The caller reported an attack against a man and a woman at a specific location. *Id*. at 254. The 911 operator obtained a description of the assailant but otherwise only asked the caller to repeat information the caller already volunteered. *Id*. The caller's statement to the 911 operator was held admissible as a present sense impression. *Id*.

Angela's statement to Gerjuan that she was calling from a pay phone at an Amoco station is a present sense impression. It was uttered simultaneously with her phone call, it described the event of the call, and Angela perceived this event with her own senses. *Smith*, 265 S.W.3d at 879. Although Angela was not available for cross-examination,

her statement was otherwise reliable. The usual purposes of cross-examination – to test the basis of the declarant's perceptions, the reliability of her observations, and any potential bias – do not apply. It is hard to imagine how the State could cross-examine a witness on her perceptions, observations, and bias, regarding such a simple statement of fact. She would not have been mistaken or confused that she was at a pay phone and had no reason to lie to her sister. In fact, Angela told Gerjuan where she was because Gerjuan was supposed to pick up Angela (G.R.Depo.62). Finally, Gerjuan's phone records corroborate that she had a phone call at 4:36 a.m. on November 28th with 314-381-2823, an Amoco station in St. Louis (D.Ex.BB).[12]

Due Process Mandated Admission – Necessary to Confront and Rebut State's Evidence

Rules of evidence may not be mechanistically applied to deny a defendant rights essential to due process and a fair trial. See, *e.g.*, *Rock*, 483 U.S. at 55; *Green v. Georgia*, 442 U.S. 95, 97 (1979); *Davis v. Alaska*, 415 U.S. 308, 317-19 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). One minimum essential of a fair trial is the defendant's right to offer testimony in his defense. *Chambers*, 410 U.S. at

[12] See, *supra*, fn.11. Leonard acknowledges that Gerjuan's phone records show a call to, not from, the Amoco station (D.Ex.,p.77). Nonetheless, whether the call was to or from Angela, (1) Gerjuan vouched that she spoke with Angela in the early morning hours of the 28th, (2) Angela said she was at a pay phone at an Amoco station; and (3) a call to an Amoco station appears on Gerjuan's phone records at that date and time.

294, 302. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The opportunity to be heard "would be an empty one if the State were permitted to exclude competent, reliable evidence…when such evidence is central to the defendant's claim of innocence." *Id*.

The Supreme Court has overturned convictions where evidentiary rules – such as rules barring hearsay, hypnotically-refreshed testimony, or impeaching one's own witnesses – were applied to bar the defense from presenting reliable, crucial evidence. In *Green*, the two defendants, Green and Moore, abducted a woman and, separately or together, raped and killed her. 442 U.S. at 95-96. In separate trials, both were found guilty and sentenced to death. *Id*. at 96. At Moore's trial, the State presented evidence that Moore admitted he had killed the victim when Green was absent. *Id*. At Green's trial, however, the court refused to allow that evidence in penalty phase, since it was hearsay not within any statutory exception. *Id*.

The Supreme Court held that excluding the evidence denied Green due process. *Id*. at 97. The excluded evidence was "highly relevant to a critical issue" and "substantial reasons existed to assume its reliability." *Id*. The Court stressed that the "hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id*.

In *Chambers*, the trial court sustained the State's hearsay objection to the testimony of three witnesses who would have testified that someone other than the

defendant admitted killing the victim. 410 U.S. at 292-93. The Supreme Court held that the trial court erred in sustaining the hearsay objection, because all three statements carried considerable assurances of reliability. *Id*. at 300. The testimony of the three witnesses was critical to Chambers' defense. *Id*. at 302. "[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id*. See also *Davis*, 415 U.S. at 317-19 (1974)(statute making juvenile court records confidential could not be applied to prevent cross-examination of crucial prosecution witness about juvenile court record).

Relying on these cases, Missouri courts have refused to mechanistically apply the rape shield statute, §491.015, RSMo, when doing so would interfere with the defendant's right to a fair trial. In *State v. Douglas*, 797 S.W.2d 532 (Mo.App.W.D.1990), the defendant was charged with sexually assaulting his stepdaughter. *Id*. at 533. A pediatrician who had examined the stepdaughter testified for the State to the absence of hymenal tissue "consistent with penile penetration of the vagina." *Id*. at 534. Because the stepdaughter told the pediatrician that she had been sexually active with her boyfriend in the previous months, defense counsel asked to cross-examine her about that sexual activity. *Id*. The court refused, because §491.015 barred evidence of specific instances of prior sexual conduct. *Id*.

The Western District, citing *Davis* and *Chambers*, found error in excluding this "salient" evidence. *Id*. at 535. The pediatrician's testimony was intended to support the stepdaughter's testimony that the defendant had had sexual intercourse with her. *Id*. at 534. The intended inference was that the lack of hymenal tissue was attributable to the

defendant. *Id*. "The defendant was put to an unfair advantage when he was not allowed to counter the inference by showing that other sexual activity could have accounted for the absence of the hymen." *Id*. To let the State "show that [the stepdaughter's] hymen was absent, with the clear and calculated implication that its absence was caused by intercourse with the defendant, then to forbid defendant to show that [the stepdaughter] had had intercourse with another" denied a fair trial. *Id*. at 535-36.

Similarly, in *State v. Samuels*, 88 S.W.3d 71, 75 (Mo.App.W.D.2002), the State elicited that the 9-year-old victim's physical condition was consistent with sexual abuse involving penile penetration. When the defense wished to show that the child had disclosed that other men had raped her, the court sustained the State's objection based on the rape shield statute. *Id*. at 76-77. On appeal, the State conceded that it had opened the door. *Id*. at 78. The Western District agreed, holding that, since the State used the victim's physical abnormalities to infer that the abnormality was due to the defendant's abuse, he was "constitutionally entitled to put on a defense showing an alternative source." *Id*. at 81-82. Forbidding him from presenting this "curative evidence" denied him due process. *Id*. at 83.

Here, the trial court erred in mechanistically applying the hearsay rule to bar Gerjuan's testimony that Angela spoke with Gerjuan from a pay phone at an Amoco station. This evidence, even if hearsay, was otherwise reliable and central to proving Leonard's innocence. It was "curative evidence," responding to the State's theory that, if Angela's phone records did not show a call to or from Gerjuan after November 26th, Gerjuan must have been mistaken about speaking with Angela. Because the State

created this inference, the defense should have been allowed to rebut it, even with hearsay testimony.

The State Opened the Door to the Testimony

In Missouri, the line has blurred between two scenarios in which one party may "open the door" to let the other party introduce otherwise inadmissible evidence. Under the first, the curative admissibility doctrine, when one party introduces inadmissible evidence, the opposing party may introduce otherwise inadmissible evidence to rebut or explain negative inferences thus created. *State v. Middleton*, 998 S.W.2d 520, 528 (Mo.banc 1999).

The second scenario, while often termed curative admissibility,[13] is more accurately termed "specific contradiction." *State v. White*, 920 A.2d 1216, 1221 (N.H.2007). Under this doctrine, a party may present otherwise inadmissible evidence to explain or counteract a negative inference raised by an issue the opposition injected. *State v. Myers*, 248 S.W.3d 19, 25 (Mo.App.E.D.2008); *State v. Fenton*, 941 S.W.2d 810, 813 (Mo.App.W.D.1997); *State v. Jones*, 134 S.W.3d 706, 716 (Mo.App.S.D.2004), quoting *State v. Lingar*, 726 S.W.2d 728, 734-35 (Mo.banc 1987); see also *Barnett v. State*, 103 S.W.3d 765, 773 fn.5 (Mo.banc 2003), citing *United States v. Durham*, 868

[13] See, e.g., *State v. Weaver*, 912 S.W.2d 499, 510 (Mo.banc 1995); *State v. Fenton*, 941 S.W.2d 810, 813 (Mo.App.W.D.1997); *State v. Phillips*, 939 S.W.2d 502, 505 (Mo.App. W.D.1997).

F.2d 1010, 1012 (8thCir.1989)(party may introduce "otherwise inadmissible evidence on cross-examination when the opposing party has made unfair prejudicial use of related evidence on direct examination"). The initial evidence need not have been inadmissible, but must have created a misimpression or misled the jury. *State v. Weaver*, 912 S.W.2d 499, 510 (Mo.banc 1995)("[u]nder the doctrine, a party must first have introduced evidence, even though it might be technically inadmissible evidence"), citing *State v. Shurn*, 866 S.W.2d 447, 458 (Mo.banc 1993); *Fenton*, 941 S.W.2d at 813.

Missouri courts have repeatedly used this doctrine to allow the State to introduce otherwise inadmissible evidence after the defendant presented admissible but misleading evidence. In *Myers*, 248 S.W.3d at 22-23, the defendant introduced two statements of a key State witness and emphasized how short both statements were. Although the defense's questioning was admissible, it left the impression that the witness had omitted relevant facts. *Id*. Because the defense "opened the door," the State could introduce the witness' third statement, even though it contained hearsay statements of the deceased victim. *Id*. at 25.

In *State v. Couch*, 256 S.W.3d 64, 72 (Mo.banc 2008), the defendant asked the State's expert witness whether the complaining witnesses fit the description of children who make false allegations. This questioning "opened the door" to the expert's testimony why he believed they did not. *Id*. at 72. "[W]here the defendant has injected an issue into the case, the State may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue that defendant injects." *Id*.

In *State v. Bolds*, 11 S.W.3d 633, 637-38 (Mo.App.E.D.1999), the defendant's former girlfriend testified for the State that she had lived with the defendant in an apartment from which the police seized evidence. On cross, the defense elicited that the apartment's lease was in the girlfriend's name but she left because she was scared. *Id*. at 638. Because the defense "opened the door," the State could elicit that the victim was scared because the defendant had hit her and was very violent. *Id*. at 639.

In *State v. East*, 976 S.W.2d 507, 511 (Mo.App.W.D.1998), defense counsel elicited on cross-examination that the arresting officer found no weapons on the defendant. This questioning created the false impression that the defendant was unarmed when arrested. *Id*. It "opened the door" for the State to present "curative evidence" on re-direct that the officer found an unrelated knife in the defendant's easy reach. See also *State v. White*, 941 S.W.2d 575, 580-81 (Mo.App.E.D.1997)(State could present otherwise inadmissible evidence of defendant's post-arrest silence to rebut false impression left by defense); *State v. Hamilton*, 892 S.W.2d 371, 379 (Mo.App.E.D. 1995)(same); *Fenton*, 941 S.W.2d at 812-13 (after defendant portrayed State witness as an out-of-control drug user, State could elicit that defendant had asked witness to commit robberies and witness used drugs to make himself useless to defendant); *State v. Baldwin*, 808 S.W.2d 384, 391-92 (Mo.App.S.D.1991)(defendant implied police misconduct in detaining defendant for four hours, so State could present evidence that defendant was taking polygraph).

Here, the State knew pretrial that one neighbor and three relatives told police that they had seen or spoken with Angela and/or the children after November 26th (Tr.1602-

03,1672-74,1682,1689-91,1708;G.R.Depo.52-53,73). The State had to prove they were mistaken. Thus, it presented records of all calls from Angela's home telephone to Gerjuan, to Beverly, and to and from Sherry (St.Ex.213,220,252). It created graphs showing how many and when calls were made (St.Ex.212,215,217-19). It elicited from Beverly and Sherry that there was no record of any call with Angela on the dates they told the police they had spoken with her (Tr.1677-78,1691-92). Because there was no such record, the women admitted they must have been wrong (Tr.1677-78,1691-92). The clear implication was that, if there was no record of a call from Angela's house to Gerjuan, Gerjuan also must have been mistaken.

Without knowing that Angela spoke with Gerjuan from a pay phone, the jurors would assume she talked to Gerjuan from her home. And, since there was no record of a call from her home on the 28th, Gerjuan and Angela must not have spoken then. Jurors would assume Gerjuan had mixed up her dates and did not see or speak with Angela after November 26th. Without this testimony, Leonard could only show Gerjuan spoke with someone in the early morning of November 28th. Leonard could not prove the call was with Angela without Gerjuan's testimony that Angela was on a pay phone at an Amoco station.

The State had elicited the same type of hearsay it objected to with Gerjuan. It elicited that Beverly told police that Angela's daughter Alexus called her <u>from home</u> (Tr.1677). It then used the phone records to show no record existed of a call that day from Angela's home (Tr.1678-79). The defense likewise should have been allowed to show that Angela was speaking with Gerjuan from a pay phone at an Amoco station, so

that the defense could then demonstrate from Gerjuan's phone records that such a call occurred.

The State's evidence created the false impression that if, Gerjuan actually spoke with Angela on November 28th, the call would appear on Angela's home phone records. The State encouraged this false belief in closing:

> Gerjuan Rowe. Look at the records here on Gerjuan Rowe. Phone calls from the victim's house to Gerjuan. Those two calls I told you about the early morning hours, twenty-two minutes after midnight on the 24th. That's her sister. We played – we read into evidence Gerjuan's depo. Of course Gerjuan first time says last time I talked to her was the 20th and 21st, the correct weekend. But when she's questioned again she changes.
>
> She has drug problems, drug convictions. Very upset about this. You heard the depo. She kind of makes it to where the 27th, 28th where all these phone calls were happening, there's trouble, there was a falling out, she said. Probably the defendant and the victim.
>
> Look at the amount of calls that happened on the 21st, 22nd, 23rd. She's correct, she has the wrong weekend.
>
> I also asked Dan Jensen, did you go through Gerjuan Rowe's records line by line? And when was the last time her outgoing called the victim's house? November 23rd. 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 the 24th at 12:22 a.m., twenty-two minutes after midnight. And that's from the victim to her sister Gerjuan Rowe.

And if you look at the records, Gerjuan Rowe's Sprint, which captured the incoming and outgoing, you will not find the victim's number after 11/23. Two cell phone companies or one house company and one cell phone, there's absolutely no communication between these two women, sisters, from 11/24 after the – after twenty-two minutes after the hour ever again.

(Tr.1746-47).

In final closing, the State again encouraged the jury to believe its false contention that if there was no call from Angela's home phone to Gerjuan on November 28th, they must not have spoken then:

Don't get confused about the records. Charter says they collect all outgoing calls. Angela Rowe's calls to Gerjuan stop on this date, that is correct. Gerjuan Rowe's calls stop on this date, that is correct. Angela's records show all outgoing calls, you will never – excuse me, Gerjuan's records show all outgoing calls. And you'll never see Angela's number on there after the 23rd.

This is wrong, she testified her records show she talked to her on the 22nd, she testified why there was a mix up.

(Tr.1773-74). The State stressed Gerjuan's drug and alcohol problems and confusion, that she changed the date when Angela lent her money and did not know where Angela lived (Tr.1774,1777). The State again stressed no phone call appearing on Angela's

phone records: "None of these calls show up on Gerjuan or Angela's records. You know and they got Sherry and everybody else" (Tr.1774).

> 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. The cell phone records show it.

(Tr.1775).

The State's evidence and argument encouraged the false belief if there was no record of Gerjuan and Angela's November 28th phone call on Angela's home phone records, they did not speak. It encouraged jurors to conclude Gerjuan must have mistaken the dates about the phone call and her meeting with Angela on the 27th. Because the State encouraged this false belief, the defense was entitled to elicit Gerjuan's testimony that Angela spoke with Gerjuan from a pay phone at the Amoco. The State's actions in this case opened the door, through the specific contradiction doctrine, to this testimony.

Excluding this exculpatory defense evidence violated Leonard's confrontation rights. "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). By excluding evidence that undermined the State's evidence, the court precluded the defense from subjecting the State's case to the rigorous testing the Confrontation Clause requires. The convictions are unreliable and cannot stand.

Exclusion Prejudiced Leonard

The exclusion of admissible evidence creates a presumption of prejudice, rebuttable by facts and circumstances of the particular case. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo.banc. 2003). The State cannot meet that burden. Barring the defense from presenting Gerjuan's testimony was extremely prejudicial.

The State stressed that phone records "are important because they tell a story" (Tr.1724). It used Leonard's cell phone records to Perry, his mother, and his wife, and the absence of his calls to Angela, to argue Leonard's guilt (St.Ex.223-24,227,230-39,241-42;Tr.1724,1735). It used phone records of Angela, Beverly, Sherry, and Gerjuan to preemptively challenge defense evidence (St.Ex.213,220,252; Tr.1677-78,1691-92). It even created graphs to depict who was calling whom and when (St.Ex.212,215,217-19). It had to defeat four people's statements to police during the first days of the investigation that Angela and the children were alive after November 26th, when Leonard left St. Louis. Its extensive closing argument shows just how vital phone records were (Tr.1746-47,1773-75).

The State's case was largely circumstantial. It lacked physical evidence linking Leonard to the crimes. The weakness of its case was shown by the lengths to which it stretched credibility in arguing that an infinitesimally small speck of Angela's DNA, found on Leonard's glasses, was blood spatter from the crimes (Tr.1455-70;1744-46).[14]

[14] A speck of Angela's DNA material – weighing 0.03 nanogram and invisible to the human eye – was found on Leonard's eyeglasses (Tr.1480). A nanogram is one billionth

The State's theory was that Leonard killed the victims on November 23rd, sparking a flurry of phone calls between him, his brother, Perry, his wife, and his mother (Tr.811-12,1724-26). The State argued that, in the first of these phone calls to Perry, at 11:24 p.m. on November 23rd, Leonard confessed to the crimes (Tr.811;St.Ex.196B). But phone records show that Angela was still alive at that time. Gerjuan's phone records show that, at 11:52 on November 23rd, ½ hour after Leonard allegedly killed Angela, Gerjuan called Angela and they spoke for ten minutes (St.Ex.252,p.66). Angela's phone records show that an hour after Leonard allegedly killed her, at 12:22 on November 24th, she spoke with Gerjuan for at least six minutes (St.Ex.220,p.27).

Perry gave a videotaped statement to police, vouching that Leonard confessed to him (St.Ex.196B). At trial, he recanted, explaining that, when he gave that statement, police had pulled over his eighteen-wheeler three times, in three different states (Tr.855,860,866,883-84,892-93). On video, he told police, "you have threatened me with my job, my future, my freedom" (Tr.1061). He felt threatened being charged with a crime for which he could serve seven years (Tr.1061). The officer repeatedly told Perry to consider it a threat (Tr.1061-62). The officer also stated, "the answers that you [give] probably in the next fifteen or twenty minutes are probably going to dictate the next good portion of what happens to the rest of your life" (Tr.1060).

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of a gram (Tr.1480). Defense counsel equated the size of this speck to one millionth the size of a grain of sugar (Tr.1480,1762).

Perry also gave police conflicting details. He initially said that Leonard confessed to the crimes almost two weeks before Thanksgiving, but later stated it was 1-2 days before Thanksgiving (Tr.1063). He told police he did not return to St. Louis until after Thanksgiving, but GPS records show that he was there on Thanksgiving (Tr.1064-65). Perry told New Jersey officers he retrieved his Blazer from Angela's house, and gave differing dates of when he was there; later, he denied ever going to the house and stated he retrieved the Blazer from Elizabeth Williams (Tr.869,1597,1065-66,1700). He gave differing stories about whether he argued with Angela about retrieving his belongings from the house (Tr.899,1067-68).

The State's case is also plagued by the sheer number of people who, within a few days after the bodies were discovered, when memories were freshest, told police they had seen or spoken with Angela after she supposedly was killed. Angela's close friend Kathy told police on December 5th that she spoke with Angela on the evening of November 24th (Tr.1240-41). She remembered because it was the night before Thanksgiving, and she repeated that account at deposition 1½ years later (Tr.1237-38,1241). On December 3, 2004, Angela's neighbor Elmer told police that he saw Angela and the children the weekend after Thanksgiving (Tr.1602-03). On December 4th, the children's Aunt Beverly told police Alexus called her the previous Saturday night or early Sunday morning, November 27th or 28th (Tr.1672-76). The children's Aunt Sherry also told police she spoke with Angela on November 28th at 10:00 a.m., to discuss plans for her December 3rd weekend with the children (Tr.1682,1708). She told police she heard the children in the background and heard Alexus yell that she could not wait to

see Beverly the next weekend (Tr.1689-91,1708). Although the State argued that Beverly and Sherry must have mixed up weekends, the children spent the prior two weekends with their father, not Angela (Tr.1695). Beverly could not have spoken with Angela those weekends and heard the children playing. Finally, Angela's sister Gerjuan insisted, "my sister was alive up until the 27th, I know she was…. My sister had to be murdered the week of the 28th, 29th, 30th. I talked to my sister. I know I did." (G.R.Depo.24). Gerjuan also vouched that she saw Angela on the 27th when she borrowed $50 from her (G.R.Depo.52-53,73).

After Leonard left town Elmer Massey saw a man – not Leonard – sneaking around Angela's house during the week of the 29th (Tr.1605). Mail that would have been delivered after Leonard left was found opened (D.Ex.A,B,B-1). When Angela's aunt went by the house in the days before discovery of the body, no lights were on, yet lights and television were on when the bodies were discovered (Tr.1696;G.R.Depo.63). The aunt noted that one day lots of mail was at the door, and the next time, it was gone (Tr.1697-98).

Finally, the bodies' condition casts doubt on the State's theory that the victims were killed November 23rd. Initially, the medical examiner placed the most likely date of death as 2-3 days before the bodies were discovered (Tr.1202). When he made that calculation, he had been told that the house temperature was 50-55°, so he had no valid reason for his changed opinion (Tr.1225). His investigator noted that Angela's body was still in rigor mortis, which occurs 10-12 hours post-mortem and remains for 24-36 hours (Tr.1208-09). None of the conditions typically seen in the later stages of decomposition

– skin slippage, liquid seeping from the skin, bloating, autolysis, livor mortis, or marbling of the skin – were present (Tr.1203-05,1213). There was very little odor – the first officer entering the house climbed through a window next to Angela's body but smelled nothing until he pulled the blankets off the victims, and even then, the smell was faint (Tr.832-34,836-37).

The jurors deliberated for 4½ hours, showing the evidence was far from overwhelming (Tr.1783,1785). The court's refusal to let the jury consider Gerjuan's testimony that she and Angela spoke on November 28th when Angela was at a pay phone unfairly tipped the scales in favor of the State. The excluded evidence would have corroborated the defense theory that Angela was still alive on November 28th, after Leonard had left town. This was critical evidence for the defense.

"Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81 (1958)(Stewart, J., concurring). "There is no gainsaying that arriving at the truth is a fundamental goal of our legal system." *United States v. Havens*, 446 U.S. 620, 626 (1980). It is never more essential that the jury arrive at the truth, considering all relevant facts, than in a capital murder trial. The accuracy of the jury's determination of guilt or innocence is paramount, for without 100% accuracy, an innocent man can be sentenced to die or a murderer can be set free.

Yet, here, the court let the State hide relevant facts so the jury could not accurately assess the credibility of Gerjuan's statement to police, repeated under oath in her deposition, that Angela was alive after Leonard left town. The court's refusal to let

Leonard elicit facts central to his claim of innocence and crucial to the jurors' search for the truth and to correct the State's false inferences violated Leonard's state and federal constitutional rights to due process, confront and cross-examine witnesses against him, present a defense, and a fair trial. U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs. 10,18(a).

This Court must reverse.

ARGUMENT II

The trial court erred and clearly abused its discretion in (1) excluding Gerjuan's testimony that (a) Leonard was often away for days without calling Angela and (b) Angela made notations in her calendar of the days that Leonard was away without calling, and (2) refusing to let jurors view the calendar, admitted as defense exhibit II, because the testimony and notations in the calendar fell under an exception to the rule barring hearsay and were admissible as curative evidence because the State opened the door to it, and refusing to allow the jury to consider this crucial evidence violated Leonard's rights to due process, confront and cross-examine the witnesses against him, present a defense, and a fair trial, U.S.Const., Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a), in that (1) the testimony fell under a hearsay exception since it concerned either Angela's present sense impression of Leonard's actions or her state of mind; (2) even if it did not qualify as a hearsay exception, the State may not mechanistically apply the hearsay rule to exclude critical, reliable evidence; and (3) the State opened the door to the testimony and evidence by creating the false inferences that (a) Leonard's absence and lack of any phone calls to Angela meant he knew she was dead, when actually Leonard often was away for days without calling; and (b) Angela's absence from work on November 26th meant she was already dead, when actually she was not at work because she thought she had the day off.

Just as the State used the hearsay rule to bar evidence that Angela spoke with Gerjuan from a pay phone at an Amoco station, it relied on the hearsay rule to bar Gerjuan's testimony that Angela told her Leonard was often gone for long periods, and that Angela made calendar notations when Leonard was away without calling. The jurors were not allowed to examine the calendar, even though it had been admitted into evidence, so they also could not see that Angela had written that she was off work on November 26th. Gerjuan's testimony and the calendar entries were not hearsay. They were exceptions to the rule barring hearsay, as a daily written statement of Angela's present sense impressions of Leonard's actions or as evidence of Angela's state of mind. Even if the evidence did not qualify as a hearsay exception, due process mandates that critical, reliable evidence not be mechanistically barred. Finally, the testimony and evidence was admissible as curative evidence. The State had presented evidence and argument that, since Leonard did not call Angela after he left on November 26th, he must have known she was already dead. Leonard was entitled to elicit – and the jury was entitled to know – that Leonard often was away for days without calling, and, just the month before, had been gone for two six-day periods without calling Angela. To cure the State's false inference that Angela did not show up for work on November 26th because she was dead, her calendar notations would show she was not at work because she thought she had the day off.

Standard of Review and Preservation

Trial courts have broad discretion in determining the admissibility of evidence, and that determination will not be disturbed on appeal absent a clear abuse of discretion. *State v. Wahby*, 775 S.W.2d 147, 153 (Mo.banc 1989). The court abuses its discretion when its ruling "is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State v. Taylor*, 134 S.W.3d 21, 26 (Mo.banc 2004).

This issue is preserved. After hearing both parties' arguments, the court sustained the State's hearsay objection (Tr.1637-47). Defense counsel included this issue in the motion for new trial (L.F.1358-61).

The Facts

The State disclosed in its opening statement that it would present evidence that Leonard was "on the run" and never called Angela after November 23rd (Tr.802,810-11). It introduced Leonard's cell phone records (St.Ex.224) and created a graph of his calls to Angela's house (Tr.1429;St.Ex.232). It elicited that Leonard never called there after November 23rd (Tr.1430-31).

In response, the defense wished to elicit from Angela's sister Gerjuan that Leonard typically was away six days out of seven and often didn't call Angela when away (Tr.1637;G.R.Depo.29-30). The State objected that Gerjuan's knowledge was based solely on what Angela told her and was hearsay (Tr.1637-38). Defense counsel argued that the testimony was necessary to counter the State's evidence that implied that

Leonard never called after he left because he knew the victims were dead (Tr.1638). Counsel argued that because the State implied that Leonard was acting oddly by not calling, they should be allowed to show this was typical for their relationship (Tr.1639). The court sustained the State's objection (Tr.1638,1640).

The State also objected, on hearsay grounds, to Gerjuan's testimony about Angela's calendar notations (Tr.1641-42). Gerjuan identified the calendar as Angela's and confirmed the notations were in Angela's handwriting (G.R.Depo.33). Alternatively, defense counsel asked that the jury view the calendar, which had been admitted (D.Ex.II;Tr.1643). Counsel explained that, for instance, at the end of August, Angela made repeated entries indicating "no call, no show" (Tr.1644). For each day of July, Angela wrote, "Didn't come home yet L.T." (Tr.1645). Again, counsel argued the evidence was essential to rebut the State's inferences that Leonard did not call because he knew Angela was dead (Tr.1645). Counsel also argued the notations went to Angela's state of mind (Tr.1643,1645). The court sustained the objections and ruled the jury could not view the calendar (Tr.1643-44,1646-47).

In closing, the State argued the phone records "are important because they tell a story. Cell phone records are the devil to defendants" (Tr.1724). Referring to Leonard's cell phone records, the State commented that it wanted to get the "Sprint records talking" (Tr. 1724). It stressed the absence of calls from Leonard to Angela after the 23rd was evidence Leonard had killed her:

> These are the calls to the victim Angela Rowe. Last outgoing call is November 22nd. And I asked Mr. Jensen were there any other calls that

went past the 23rd? He said no. This 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.

(Tr.1735).

Present Sense Impressions

A hearsay statement is any out-of-court statement used to prove the truth of the matter asserted and that depends on its veracity for its value. *Smulls v. State*, 71 S.W.3d 138, 148 (Mo.banc 2002). Hearsay is generally inadmissible because the declarant is not subject to cross-examination about her perceptions, the reliability of her observations, and any potential bias she may have; her statement is not under oath; and the jury cannot gauge her demeanor. *Bynote v. National Super Markets Inc.*, 891 S.W.2d 117, 120 (Mo.banc 1995); *State v. Tyra*,153 S.W.3d 341, 346 (Mo.App.S.D.2005). Hearsay is admissible when it falls under certain exceptions, or when circumstances exist that "assure the trustworthiness of the declarant's statement despite the absence of cross-examination, the oath, and the fact finder's ability to observe the declarant's demeanor." *State v. Crump*, 986 S.W.2d 180, 188 (Mo.App.E.D.1999).

One exception to the hearsay rule is an out-of-court statement of a present sense impression. *Id*. at 188. To qualify, the statement must be uttered simultaneously, or almost simultaneously, with an act or event; describe or explain the event or act; and the declarant must have perceived the event or act with her own senses. *State v. Smith*, 265 S.W.3d 874, 879 (Mo.App.E.D.2008). Present sense impressions are trustworthy,

because the declarant relates events as they are happen or immediately afterwards, so she lacks time to twist events or for her memory to fade. *Id*. Often, other evidence corroborates the declarant's statement and she is available for cross-examination. *Id*.

The declarant's availability for cross-examination, however, is not a requirement for admission. In many cases, the present sense impression was admissible despite the declarant's absence at trial. See, e.g., *State v. Newell*, 710 N.W.2d 6, 17, 19 (Iowa 2006) (murder victim's statement came in through testimony of her estranged husband that, as he talked to her by phone, she stated that the defendant was listening to their conversation); *McBeath v. Commonwealth*, 244 S.W.3d 22, 37-39 (Ky.2007) (defendant's friend took 5th at trial, so other person allowed to testify that friend told him defendant called him looking for gun); *State v. Price*, 952 So.2d 112, 115-16, 120-21 (La.App.1stCir.2006)(decedent's statement came in through friend's testimony that, right before fatal accident, decedent called and said defendant was driving drunk).

Like Angela's calendar entries, diary or journal entries of an unavailable declarant may be admissible as present sense impressions. See, *e.g.*, *Mariner Health Care, Inc. v. Estate of Edwards ex rel. Turner*, 964 So.2d 1138, 1150-51 (Miss.2007) (journal entries kept by decedent's unavailable relative regarding her observations of decedent and his care at nursing home were admissible as present sense impressions); *United States v. Sheets*, 125 F.R.D. 172, 174 fn.2 (D.Utah1989)(diary entries).

A diary may be admissible if "a close examination of the diary itself and the circumstances surrounding its creation indicates that the diary contains particularized guarantees of trustworthiness." *Parle v. Runnels*, 387 F.3d 1030, 1040 (9thCir.2004). In

Sheets, the wife's diary entries about her husband's knowledge of his business had circumstantial guarantees of trustworthiness warranting their admission. 125 F.R.D. at 177. They did not appear to be "frivolous, made in jest or scorn, or in any way unreliable" as to what the defendant told her. *Id*. Made soon after the conversations, there was little time for distortion and no reason for the wife "to lie to herself or to make false negative statements in her diary." *Id*. The entries were in the wife's handwriting, and nothing suggests she was unreliable. *Id*. See also *Davis v. Allsbrooks*, 778 F.2d 168, 177-78 (4thCir.1985) (murder victim's diary admissible, because entries were in victim's handwriting, journal presumably was kept regularly, and victim had no motive to lie).

In *State v. Davis*, 290 S.E.2d 574, 586-87 (N.C.1982), the court admitted an entry from the murder victim's diary that stated she awoke at 8:15 and noted the weather and when another person came and went. The entry was offered to show the victim was still alive at 8:15 on the day her body was found. *Id*. at 586. The appellate court held that the diary had a "reasonable probability of truthfulness." *Id*. at 587. There was "simply no reason whatsoever to believe that a woman would lie in her personal diary" about such a mundane matter. *Id*.

Angela's statement to Gerjuan that Leonard was away most of the time and her calendar notations showing he often did not call while away qualified as present sense impressions. Angela regularly recorded whether Leonard was with her or away (see Appendix). On dates he was away, she typically recorded whether he called her. On October 12th, she wrote, "Left Again Afternoon No Talk" (L.F.1398). For October 13-18, she wrote "No Talk" (L.F.1398). For October 19th, she wrote, "Surprised me came

Home here when I got home We had sex" (L.F.1398). He left again on October 21st (L.F.1398). For October 22-27, she wrote either, "No talk to him" or "No call no show" (L.F.1398). Angela made entries daily, so they were recorded while her memory was still fresh, and she had no motivation to falsify them. *Smith*, 265 S.W.3d at 879. There is no reason to believe the notations were anything but a true and reliable record of when Leonard was away and when he didn't call her.

Angela's November 26th Calendar Entry Was Admissible as Evidence of Her State of Mind

Angela recorded "off" for November 26th and "work" for November 27th and 28th (L.F.1399). "Out-of-court statements offered to prove knowledge or state of mind of the declarant are not hearsay." *State v. Brown*, 998 S.W.2d 531, 546 (Mo.banc 1999); see also *People v. Howard*, 575 N.W.2d 16, 30 (Mich.App.1997)(murder victim's appointment book admitted into evidence under state of mind exception, because it showed her intention to go to defendant's mother's house on date and approximate time she was killed). The November 26th entry showed Angela's state of mind – her belief that she was not scheduled to work that day.

Angela's state of mind on whether she was supposed to work on the 26th was critical. The State had to convince the jury that the victims were killed before Leonard left town on the 26th. It wanted the jury to believe Angela did not go to work on the 26th because she was already dead. Angela's belief that she was off work on the 26th was

critical, since it rebuts the State's inference. Angela missed work not because she was dead but because she thought she was off work that day.

Admission of Angela's Statement Was Mandated by the Due Process Clause and Was Necessary to Confront the State's Evidence

Rules of evidence may not be mechanistically applied to deny a defendant rights essential to due process and a fair trial. See, e.g., *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *see* Arg. I. One minimum essential of a fair trial is the defendant's right to offer testimony in his defense. *Chambers v. Mississippi*, 410 U.S. 284, 294,302 (1973). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

The Supreme Court has overturned convictions where evidentiary rules – like rules barring hearsay, hypnotically-refreshed testimony, or impeaching one's own witnesses – were applied to bar the defense from presenting reliable, crucial evidence. In *Green*, the trial court excluded, on hearsay grounds, the co-defendant's admission of sole responsibility for the murder. 442 U.S. at 95-96. This denied Green due process. *Id*. at 97. The excluded evidence was "highly relevant to a critical issue" and "substantial reasons existed to assume its reliability." *Id*. The Court stressed that the "hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id*.; see also *Chambers*, 410 U.S. at 292-93 (trial court excluded critical defense evidence, on hearsay

grounds, that someone else admitted killing victim: "Where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice").

Relying on these cases, Missouri courts have refused to mechanistically apply the rape shield statute, §491.015, RSMo, when doing so would interfere with the defendant's right to a fair trial. In *State v. Douglas*, 797 S.W.2d 532, 535-36 (Mo.App.W.D.1990), the appellate court held that it would deny the defendant a fair trial to "allow the State to show that [the victim's] hymen was absent, with the clear and calculated implication that its absence was caused by intercourse with the defendant, then to forbid defendant to show that [she] had had intercourse with another." In *State v. Samuels*, 88 S.W.3d 71, 75 (Mo.App.W.D.2002), the State used the victim's physical abnormalities to draw an inference that the abnormality was due to the defendant's abuse, so the defendant was "constitutionally entitled to put on a defense showing an alternative source." *Id*. at 81, 82. Forbidding the defendant from presenting this "curative evidence" denied him his right to due process. *Id*. at 83.

The trial court erred in mechanistically applying the hearsay rule to bar (1) Gerjuan's testimony that Angela stated Leonard was often away, (2) Gerjuan's testimony that Angela recorded days Leonard was away without calling her, and (3) presenting the calendar to the jury. This evidence, even if hearsay, bore considerable assurances of reliability and was highly relevant to two critical issues. It was "curative evidence," responding to the State's theory that Leonard did not call home because he knew Angela was already dead, and that Angela did not go to work on the 26th because she was dead.

The jury was entitled to know that Leonard often was gone for days without calling home, and that Angela believed she was not scheduled to work on the 26th. The jury should not have been allowed to use that evidence to convict Leonard, without seeing the full picture.

The State Opened the Door to the Testimony

In Missouri, a party may "open the door" to introduction of otherwise inadmissible evidence by the other party in two ways. When one party introduces inadmissible evidence, the opposing party may introduce otherwise inadmissible evidence to rebut or explain negative inferences the first party's evidence raised. *State v. Middleton*, 998 S.W.2d 520, 528 (Mo.banc 1999). A party also may present otherwise inadmissible evidence to explain or counteract a negative inference raised by an issue the opposition injects. *State v. Myers*, 248 S.W.3d 19, 25 (Mo.App.E.D.2008); *see* Arg. I for additional authorities. The initial evidence need not have been inadmissible, but must have somehow created a misimpression or misled the jury. *State v. Weaver*, 912 S.W.2d 499, 510 (Mo.banc 1995)("[u]nder the doctrine, a party must first have introduced evidence, even though it might be technically inadmissible evidence")(emphasis added).

Missouri courts often allow the State to introduce otherwise inadmissible evidence after the defendant presented admissible but misleading evidence. See, e.g., *Myers*, 248 S.W.3d at 22-23, 25; *State v. Couch*, 256 S.W.3d 64, 72 (Mo.banc 2008); *State v. Bolds*, 11 S.W.3d 633, 637-39 (Mo.App.E.D.1999); *State v. East*, 976 S.W.2d 507, 511 (Mo.App.W.D.1998); *State v. White*, 941 S.W.2d 575, 580-81 (Mo.App.E.D.1997);

Fenton, 941 S.W.2d at 812-13; *State v. Hamilton*, 892 S.W.2d 371, 379 (Mo.App.E.D. 1995); *State v. Baldwin*, 808 S.W.2d 384, 391-92 (Mo.App.S.D.1991); *see* Arg. I for case summaries.

Federal courts have approved admission of diary entries to cure false inferences created by the other party's evidence or to otherwise advance the trial's truth-seeking function. In *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 625 (8thCir.1983), Patricia Kehm's family sued for product liability after Mrs. Kehm died. Over a hearsay objection, the court let Mrs. Kehm's sister read several entries from Mrs. Kehm's diary professing her love for her family. *Id*. The plaintiffs argued that the diary entries dispelled the inference that family members' testimony had exaggerated Mrs. Kehm's goodness as a person and mother. *Id*. The federal court held that the trial court had not abused its discretion in letting the jury hear the diary entries. *Id*.; see also *United States v. Hobson*, 519 F.2d 765, 772-73 (9thCir.1975)(defendant's diary used to impeach defendant).

The State urged this 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:

> These are the calls to the victim Angela Rowe. Last outgoing call is November 22nd. And I asked Mr. Jensen were there any other calls that went past the 23rd? He said no. This 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.

(Tr.1735). The defense should have been allowed to refute that false belief by showing that Leonard was often gone for days without calling Angela. In fact, just the month before, Leonard had been away for two separate six-day periods without ever calling Angela (L.F.1398). This evidence was essential for the jury to evaluate the State's argument that Leonard's eight-day absence showed his guilt. Had the jury known that just the month before, Leonard had been away for two six-day stretches without calling Angela, it would have discounted his eight-day absence. The State should not have been allowed to secure a conviction, especially in a capital case, based upon false inferences and half truths.

The State also urged the jury to believe that Angela's absence from work on November 26th indicated she was already dead (Tr.1164-65;1778-79). Leonard should have been allowed to rebut by showing that Angela believed she was not scheduled to work that day (L.F.1399).

Excluding these two crucial aspects of the defense denied Leonard confrontation. "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." M*aryland v. Craig*, 497 U.S. 836, 845 (1990). The State's "consciousness of guilt" argument was not subjected to testing, let along rigorous testing, because the defense was barred from presenting evidence to rebut it. Similarly, the defense was barred from rebutting the State's argument that Angela did not go to work because she was already dead by the 26th.

Exclusion Prejudiced Leonard

The exclusion of admissible evidence creates a presumption of prejudice, rebuttable by facts and circumstances of the particular case. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo.banc. 2003). The State cannot meet that burden. In a case based largely on circumstantial evidence, Leonard was severely prejudiced by this unfair and untrue evidence of Leonard's "consciousness of guilt" and the State's misleading argument that Angela's absence from work meant she was already dead.

As discussed in Argument I, the State lacked physical evidence linking Leonard to the crimes. The State argued that Leonard must have killed the victims late November 23rd, sparking a flurry of phone calls to his brother, mother, and wife, but Angela and Gerjuan's phone records show they spoke at 11:52 on November 23rd and again at 12:22 on November 24th (St.Ex.252,p.66; St.Ex.220,p.27). Although Perry gave police a videotaped statement vouching that Leonard confessed to him, he recanted that statement at trial, explaining how the statement was coerced by the officers' threats (St.Ex.196B; Tr.855,860,866,883-84,892-93;1061-62). Perry gave police conflicting stories (Tr.1063-68). The State's case is also plagued by the sheer number of people who, within a few days after the bodies were discovered, when memories were freshest, told police they had seen or spoken with Angela after she supposedly was killed (Tr.1237-38,1240-41,1602-03,1672-76,1682,1689-91,1708; G.R.Depo.24,52-53,73). Activity occurred at Angela's house after Leonard left town – a man was seen at the house, recent mail was found opened, and lights were turned on (Tr.1605,1696;D.Ex.A,B,B-1;G.R.Depo.63). Finally, the condition of the bodies, with very little sign of decomposition, showed that the

victims must have been killed after Leonard left town (Tr.832-34,836-37,1202-05,1208-09,1213).

The jurors deliberated for four and a half hours, showing that the evidence was far from overwhelming (Tr.1783,1785). Because there was no physical evidence and so many conflicts within the evidence, the State depended on Leonard's alleged consciousness of guilt in obtaining convictions. Evidence refuting the State's "consciousness of guilt" argument and showing another reason why Angela was not at work on the 26th would have made a difference. Barring the defense from refuting the State's evidence unfairly tipped the scales in favor of the State.

"Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81 (1958)(Stewart, J., concurring). Ascertaining the truth is "a fundamental goal of our legal system." *United States v. Havens*, 446 U.S. 620, 626 (1980). Never is truth more essential than in capital murder trials. The accuracy of the jury's determination of guilt is paramount, for without 100% accuracy, innocent men can be sentenced to die. The court's refusal to let Leonard elicit facts central to his claim of innocence and crucial to the jurors' search for the truth and to correct the State's false inferences violated Leonard's federal and state constitutional rights to due process, confront and cross-examine the witnesses against him, present a defense, and a fair trial. U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I, Secs.10,18(a).

This Court must reverse.

ARGUMENT III

The trial court erred and clearly abused its discretion in refusing to let the jury view Defense Exhibit II, a checkbook admitted into evidence, that showed that Angela wrote a check dated November 27, 2004 and thus the court violated Leonard's rights to due process, confrontation and cross-examination, to present a defense, and a fair trial, U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10, 18(a), because the check was relevant and did not contain hearsay, in that the fact that Angela wrote a check dated November 27th helped prove she was alive after Leonard left town on November 26th, and the check fell under a hearsay exception in that it related to Angela's then existing state of mind or physical condition, and/or was a verbal act.

The key issue at trial was whether Angela was still alive when Leonard left town on November 26th. Yet the court barred Leonard from presenting evidence that Angela wrote a check dated November 27th. Excluding this critical, exculpatory evidence denied Leonard his state and federal constitutional rights to due process, confrontation and cross-examination, to present a defense, and a fair trial. U.S.Const.,Amends.V,VI,XIV;Mo. Const.,Art.I,Secs.10,18(a).

Standard of Review and Preservation

Trial courts have broad discretion in determining the admissibility of evidence, and that determination will not be disturbed on appeal absent a clear abuse of discretion. *State v. Wahby*, 775 S.W.2d 147, 153 (Mo.banc 1989). Abuse of discretion occurs when

the ruling "is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State v. Taylor*, 134 S.W.3d 21, 26 (Mo.banc 2004).

Trial courts also have discretion to publish evidence to the jury. *State v. Wolfe*, 13 S.W.3d 248, 250 (Mo.banc 2000). Abuse of discretion occurs when the decision was clearly against reason and resulted in an injustice to the defendant. *Id*. at 260-61.

This issue is preserved. Defense counsel raised the issue fully at trial and included it in the new trial motion (Tr.1642-47;L.F.1361-62).

The Checkbook Was Admitted But Kept from the Jury

A detective testified that he seized numerous items from Angela's house, including Angela's calendar and checkbook (Tr.1049-50). The checkbook contains a carbon copy behind each check, so that once a check is written, the duplicate remains as record of what was written (D.Ex.II). The checkbook contained a duplicate of a check dated November 27, 2004 (D.Ex.II).

When defense counsel moved to admit the checkbook and calendar, the State objected that they contained hearsay (Tr.1048-50). The court admitted the exhibits but deferred deciding whether jurors would be allowed to view them (Tr.1050-51). Later, defense counsel asked that the jury be allowed to view the calendar and checkbook (Tr.1643). The State objected that the checkbook contained hearsay and Angela was unavailable for cross-examination (Tr.1643,1646-47). The court sustained the objection (Tr.1643-44,1647).

The Checkbook Was Properly Admitted, So the Jury Should Have Viewed It

"A number of foundational requirements must be met before a document may be received into evidence, including relevancy, authentication, the best evidence rule, and hearsay." *Healthcare Services of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 615 (Mo.banc 2006). The checkbook met each of these requirements.

The checkbook was relevant. Evidence is relevant if it establishes "by any showing, however slight," that it is more or less likely the defendant committed this crime. *United States v. Mora*, 81 F.3d 781, 783 (8thCir.1996). The test is whether the offered evidence tends to prove or disprove a fact in issue or corroborates other relevant evidence. *State v. Rousan*, 961 S.W.2d 831, 848 (Mo.banc 1998). Before evidence can be excluded as irrelevant, it must appear so beyond a doubt. *State v. O'Neil*, 718 S.W.2d 498, 503 (Mo.banc 1986); *State v. Girardier*, 801 S.W.2d 793, 796 (Mo.App.E.D.1991). If any doubt exists about whether evidence is relevant, it should go to the jurors so they can draw their own conclusions. *State v. Rowe*, 838 S.W.2d 103, 111 (Mo.App.E.D. 1992).

The defense theory was that Leonard was not guilty, since, when he left St. Louis on November 26th, Angela and the children were still alive. In support, Leonard presented evidence that a neighbor and three of Angela's relatives told police in the days after the bodies were discovered, that they had seen or spoken with Angela and/or the children the weekend of November 27-28th **(**Tr.1602-03,1672-74,1682,1689-91,1708;G.R.Depo.52-53,73). Leonard elicited that the bodies' condition showed that the victims probably died just several days before their discovery on December 3rd

(Tr.1202,1208-09). He also elicited that mail found opened at the house was not even sent until after November 27th (D.Ex.A,B,B-1). Leonard tried to present evidence, excluded by the court, proving that Angela spoke with Gerjuan on November 28th (Tr.1652-57,1663-65). Leonard needed to prove the victims were still alive on November 27th.

Evidence that Angela wrote a check dated November 27th was relevant to whether she was still alive then. While Angela could have post-dated the check, an equal, if not more plausible inference is that she wrote the check on November 27th. The fact that the jury could have drawn different inferences from this evidence does not require its exclusion. "Where different inferences are reasonably deducible [from the facts and circumstances of the case], it is for the [jurors] to determine which inference shall be drawn." *State v. Butler*, 24 S.W.3d 21, 27 (Mo.App.W.D.2000). Notably, the State did not object to the checkbook as irrelevant.

The State never challenged the check's authentication. The court admitted the checkbook before it was authenticated, but ruled it hearsay, not to go to the jury (Tr.1048-51,1646-47). The prosecutor recognized it was Angela's handwriting, complaining that defense counsel would try to elicit what "the victim writes down" (Tr.1048). Defense counsel asserted that a witness would authenticate the check (Tr.1643-44).

As a carbon copy, the duplicate check satisfied the best evidence rule. "[C]arbon copies have the status of duplicate originals and hence are not within the scope of the best evidence rule." *Gannon v. Nelsen*, 827 S.W.2d 278, 282 (Mo.App.S.D.1992). A carbon

copy is considered an original instrument, admissible without demonstrating the original's unavailability. *City of Peculiar v. Dorflinger*, 723 S.W.2d 424, 427 (Mo.App.W.D.1986).

Finally, the check did not contain hearsay. A hearsay statement is any out-of-court statement used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value. *Smulls v. State*, 71 S.W.3d 138, 148 (Mo.banc 2002). The check was admissible as an exception to the rule barring hearsay, in that (1) it related to Angela's then existing state of mind or physical condition; and (2) it was a verbal act.

The check demonstrates Angela's belief that she was alive and physically able to write a check on November 27th. Out-of-court statements of a victim's present mental condition can be admissible under the state of mind exception to the hearsay rule. *State v. Rios*, 234 S.W.3d 412, 422 (Mo.App.W.D.2007). The statements must be relevant, and the relevance must outweigh any prejudicial effect. *Id*. The check evidences Angela's belief that she was writing the check on November 27th and hence was still alive on that date. This was a crucial issue. *People v. Howard*, 575 N.W.2d 16, 30 (Mich.App. 1997)(murder victim's appointment book admitted into evidence under state of mind exception, because it showed her intent).

The check also was admissible as verbal conduct. Out-of-court statements offered as evidence of legally-operative verbal conduct are not hearsay. *United States v. Pang*, 362 F.3d 1187, 1192 (9thCir.2004). "Checks fall squarely in this category of legally-operative verbal acts that are not barred by the hearsay rule." *Id*.; see *Spurlock v.*

Comm'r of Internal Revenue, 85 T.C.M. (CCH) 1236, 1240 (Tax Ct.2003) ("A check is a negotiable instrument, a legally operative document, and falls within the category of 'verbal acts' which are excludable from the hearsay rule."); *United States v. Dababneh*, 28 M.J. 929, 935 (N.M.C.M.R.1989)("checks themselves, together with the tellers' markings and routing stamps,...are commercial events which create legal rights and obligations, and therefore no exception to hearsay need be found [to admit checks into evidence]").

One essential of a fair trial is the defendant's right to offer testimony in his defense. *Chambers v. Mississippi*, 410 U.S. 284, 294, 302 (1973). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The opportunity to be heard "would be an empty one if the State were permitted to exclude competent, reliable evidence…when such evidence is central to the defendant's claim of innocence." *Id*. Barring the jury from viewing the check denied Taylor each of these constitutional guarantees.

Leonard was prejudiced by the court's refusal to let the jurors learn that Angela wrote a check dated November 27, 2004. The key issue was whether Angela was alive after Leonard left St. Louis on November 26th. The check answered that issue. As discussed more fully in Argument I, the State's evidence was largely circumstantial, and no physical evidence linked Leonard to the crimes. The State's evidence was far from overwhelming. The State cannot rebut the presumption of prejudice created by the

exclusion of this crucial evidence. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo.banc. 2003).

This Court must reverse.

ARGUMENT IV

The trial court erred and clearly abused its discretion in excluding Gerjuan's testimony that Angela told her Leonard's brother or cousin lived at Angela's house and thus denied Leonard his rights to due process, confrontation and cross-examination, to present a defense, and a fair trial, U.S.Const.,Amends.V,VI,XIV; Mo.Const.,Art.I,Secs.10,18(a), because the testimony was admissible under the Due Process Clause and/or because the State opened the door to it, in that the defense should have been allowed to cure the false inference the State created that Leonard must have committed the crimes because there was no sign of forced entry and only Leonard had access to the house.

The State created the false inference that since there was no forced entry to the house, Leonard must be guilty. After all, it argued, he was the "only person" with access to the house. The State's argument opened the door to Gerjuan's testimony that Leonard's brother, Perry, or his cousin lived in the basement. Excluding this critical evidence violated Leonard's state and federal constitutional rights to due process, confrontation and cross-examination, to present a defense, and a fair trial. U.S.Const., Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a).

In opening, the prosecutor stressed that, when the police arrived at Angela's house, "the doors are locked, the windows are locked" and "all doors, three doors of that home were not broken down, they were not damaged, they were locked" (Tr.786-87). He repeated, "the house…showed no signs of forced entry" (Tr.788). Valuable items

like the television and stereo were undisturbed, and "the house was not ransacked" (Tr.788). He stressed there was "no forced entry" (Tr.789).

The State presented three officers and seven exhibits to show there was no forced entry. Officer Lee, the first officer at the house, testified that all the windows and doors were locked; the front door was undamaged; the house was not ransacked; and nothing appeared to be missing (Tr.821,824-25,829). State's Exhibits 4 and 5 were photographs of the front door (Tr.824-25). Detective Joyce testified that the house not ransacked; nothing was out of place; and the doors and windows were undamaged (Tr.914-15). Officer Profitt identified more photographs: Exhibit 30 – the locked, undamaged back door; Exhibits 51, 52, and 53 – the undamaged basement door, locks and doorjamb; and Exhibit 69 – the undamaged back door (Tr.968,979-81,990).

Defense counsel asked to read to the jury portions of Gerjuan's deposition in which she stated that Angela told her that Leonard's brother or cousin lived in her basement (Tr.1647-49;G.R.Depo.44). The court sustained the State's objection that Gerjuan's testimony was hearsay (Tr.1648-49).

The State argued in closing that, because there was no forced entry, Leonard was guilty. "And extremely important, ladies and gentlemen, that house is locked, there are three doors, you can see all the photos you want to see. But it's locked up, [the police] had to break through the window" (Tr.1736). "Clean house. Not ransacked. … Door's fine, door's not broken." (Tr.1739). In final closing, it stressed, "If somebody was out to kill [Angela] they would have kicked down the front door, they would have shot her, the kids would have been scrambling…" (Tr.1779-80). "Only one person can get that close

to these children. Only one person. And it's this man right here that's been sitting here all week." (Tr.1780).

Standard of Review and Preservation

A trial court's broad discretion in determining the admissibility of evidence will be disturbed on appeal if a clear abuse of discretion exists. *State v. Wahby*, 775 S.W.2d 147, 153 (Mo.banc 1989). Abuse of discretion occurs when the ruling "is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State v. Taylor*, 134 S.W.3d 21, 26 (Mo.banc 2004).

This issue is preserved (Tr.1647-49;L.F.1359-60).

Excluding Evidence that Someone Like Perry Had Access to the House Violated Leonard's Constitutional Rights

Leonard was denied due process and a fair trial, because he was not allowed to present his full defense and the State was allowed to present misleading and untrue evidence and argument. By excluding evidence that undermined the State's evidence, the court precluded Leonard from subjecting the State's case to the rigorous testing envisioned by the Confrontation Clause.

Rules of evidence may not be mechanistically applied to deny a defendant rights essential to due process and a fair trial. See, e.g., *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Green v. Georgia*, 442 U.S. 95, 97 (1979); *Davis v. Alaska*, 415 U.S. 308, 317-19

(1974); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). One minimum essential of a fair trial is the defendant's right to offer testimony in his defense. *Id*. at 294, 302. Criminal defendants must have "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The opportunity to be heard "would be an empty one if the State were permitted to exclude competent, reliable evidence…when such evidence is central to the defendant's claim of innocence." *Id*.

In Missouri, a party may present otherwise inadmissible evidence to explain or counteract a negative inference raised by an issue the opposition injects into the trial. *State v. Myers*, 248 S.W.3d 19, 25 (Mo.App.E.D.2008); *State v. Fenton*, 941 S.W.2d 810, 813 (Mo.App.W.D.1997).[15] The initial evidence need not have been inadmissible, but must somehow have created a misimpression or misled the jury. *State v. Weaver*, 912 S.W.2d 499, 510 (Mo.banc 1995) ("[u]nder the doctrine, a party must first have introduced evidence, even though it might be technically inadmissible evidence").

Through three witnesses and seven exhibits, the State repeatedly stressed that there was no forced entry and nothing of value was taken (Tr.821,824-25,829,914-15,968,979-81,990). The clear inference was that Leonard was guilty, since he was the only other person living there. Although the jury knew that Perry kept some belongings

[15] For additional authority, see Arg.I, *supra*.

at the house while he was on the road, it was not aware that he actually lived there.[16] The jury should have heard that Perry actually lived at the house in determining the weight to give to the fact that there was no forced entry.

In a case built largely on circumstantial evidence, the suggestion that only Leonard had access to the house was critically important. The State strenuously and repeatedly elicited that there was no forced entry into the house. In the final moments of its rebuttal, it emphasized, "Only one person can get that close to these children. Only one person. And it's this man right here that's been sitting here all week." (Tr.1780). The jury was entitled to know this argument was false – another man, Perry, also had access to the house, a man who lied to police about his whereabouts, placed himself at the house during the week the victims were killed, and recently fought with Angela (Tr.869,899,1063-68). The State cannot rebut the presumption that excluding this evidence prejudiced Leonard. *State v. Barriner*, 111 S.W.3d 396, 401 (Mo.banc. 2003); *see* Argument I (discussing weakness of State's case).

This Court must reverse.

[16] Although Gerjuan stated that Leonard's brother or cousin lived in the basement, she likely was referring to Perry (Gerjuan Depo.44). Whether brother or cousin, another person had access to the house.

ARGUMENT V

The trial court erred and clearly abused its discretion in overruling Leonard's objections to State's Exhibits 176 (swabbing from sunglasses), 178 (report on phenolphthalein test), and 179 (report on DNA testing), letting the State present testimony regarding the phenolphthalein and DNA test results, and admitting the exhibits, in violation of Leonard's right to a fair trial and due process, U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a), because the evidence lacked probative value and was unreliable, speculative, and misleading, in that (1) the State effectively represented that the weakly positive phenolphthalein test result showed blood was present even though no confirmatory test was conducted; and (2) the speck found on the sunglasses was a combination of DNA material from at least two donors and was so minute that it could not be confirmed as Angela's DNA, but even if it were, (a) it was not necessarily blood but could have been hair, skin, or saliva and (b) since Angela and Leonard lived together, it could have been transferred long ago, in any number of innocuous ways.

Although the defense was barred from presenting crucial exculpatory evidence, the State was allowed to present evidence that lacked probative value and was unreliable, speculative, and misleading. A miniscule speck on a pair of sunglasses tested weakly positive for the possible presence of blood. DNA testing could not confirm that the substance was blood or that Angela was actually the donor. Only a partial DNA profile could be developed and the sample was a mixture of two or more donors. Even if the

speck was Angela's genetic material, she and Leonard lived together. The speck could have been saliva, skin, or hair and could have been transferred by many activities of normal cohabitation. Allowing this unreliable, speculative, and misleading evidence violated Leonard's state and federal constitutional rights to a fair trial and due process. U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a).

The Forensic Testing

At Leonard's arrest, police seized a pair of sunglasses from a bag in the car in which he was a passenger (5/9/07-Tr.69-70;St.Ex.158;Tr.1331). Leonard had worn the sunglasses in the past (Tr.1098). No forensic evidence was visible on the sunglasses, but a chemist swabbed them in nine places (Tr.1376-77). One spot gave a weak positive reaction for the possible presence of blood (Tr.1377,1391).[17] The chemist tested with phenolphthalein, which reacts positively to blood and other substances, including rust and batteries like those in the bag with the sunglasses (Tr.1395,1400-01).

The sample was so small that confirmatory testing would have expended the sample (Tr.1378,1380). Instead, the State sent the miniscule, .03 nanogram per microliter, sample for DNA testing (Tr.1467,1480). It contained two or more partial DNA profiles (Tr.1467-68,1500,1505). Comparing the profiles to the DNA profiles of

[17] Of the 42 other items tested from the travel bag, only a watch reacted presumptively positive for blood, but confirmatory testing showed it was not blood (Tr.1374-75,1379-80,1387-88).

the victims, the chemist could exclude the children as donors, but not Angela (Tr.1468). This partial profile appears in 1:12,930 in the African-American population (Tr.1469). The chemist could not confirm it was Angela's DNA (Tr.1468,1503). It was also possible that, if Angela's DNA, it was saliva, skin, or hair, not blood (Tr.1487,1503). The chemist agreed that DNA material can be transferred many ways, like sneezing, coughing, or touching something (Tr.1484).

Pretrial, defense counsel moved to exclude any evidence or argument that the substance found was blood or was presumptively blood (L.F.723-27). The court conducted a hearing under *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923)(1/30/08-Tr.70). Evidence showed that the phenolphthalein test is sensitive for blood, but reacts not just to blood (1/30/08-Tr.71,91). Other substances, like semen, potato, tomato sauce, red kidney bean, horseradish, or bleach, react similarly (1/30/08-Tr.86-88,90). A positive reaction does not guarantee that the substance is blood (1/30/08-Tr.71-72,91-92). The test is generally accepted within the forensic science community as a presumptive, but not confirmatory, test for blood (1/30/08-Tr.73-75,98). The court overruled counsel's objection and allowed evidence of the presumptive presence of blood (L.F.998).

At trial, the court overruled defense counsel's objections to State's exhibits 176 (swabbing), 178 (report regarding phenolphthalein test), and 179 (DNA test report) and admitted those items (Tr.1378-79,1381,1469-70). It overruled counsel's continuing objection to testimony regarding testing of the speck found on the glasses (Tr.1373-74). It overruled counsel's objection that the evidence was so miniscule it lacked probative

value (Tr.1461-65). In closing, the State argued the speck was blood spatter from the crimes (Tr.1744-46).

Standard of Review and Preservation

A trial court enjoys broad discretion in ruling on whether to exclude or admit evidence. *State v. Madorie*, 156 S.W.3d 351, 355 (Mo.banc 2005). Its rulings will not be overturned absent a clear abuse of discretion. *Id*. It abuses its discretion when its ruling is clearly against the logic of the circumstances then before it and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. Brown*, 939 S.W.2d 882,883-84 (Mo.banc 1997).

This issue is preserved for review. Counsel objected to the evidence pretrial, at trial, and in the motion for new trial (Tr.780-83,807,1373-74,1461-62; L.F.723-27,1349-52,1354-55).

Evidence Regarding the Phenolphthalein Test Was Inadmissible

The court abused its discretion in allowing evidence regarding the phenolphthalein test, because (1) the State used it to show that the speck tested was in fact blood, even though the phenolphthalein test is only a presumptive, not conclusive, test for the presence of blood; and (2) without any testing confirming the speck was blood, the probative value of the evidence was vastly outweighed by the danger the jury would be misled.

To admit an expert witness' testimony or the results of scientific procedures in criminal cases, "the testimony must be based on scientific principles that are generally accepted in the relevant scientific community." *State v. Daniels*, 179 S.W.3d 273, 281 (Mo.App.W.D.2005); see also *Frye*, 293 F. at 1013.

In *Daniels*, the defense moved for a *Frye* hearing to show that the State's luminol testing, without confirmatory testing, was not scientific evidence proving the presence of blood and therefore was inadmissible. *Id*. The court denied the hearing, yet let the State call two forensic chemists who testified that luminol testing of Daniels' home and car showed the possible presence of blood. *Id*. at 279. The chemists acknowledged that confirmatory testing was not conducted. *Id*. at 280. A defense expert explained that substances other than blood may give a false positive in luminol tests, so confirmatory testing is essential. *Id*. at 282-83. Confirmatory testing was done on some areas and showed those substances were not blood. *Id*. at 280-81. In closing, the State argued the luminol tests showed blood was present. *Id*. at 284.

The Western District reversed. *Id*. at 285. "[P]ositive luminol test results may satisfy *Frye* if offered only for the limited purpose of being a preliminary test for the presence of blood when additional scientific tests confirm the presence of blood." *Id*. at 283. By introducing the luminol tests without corroborative test results, the State implied that blood was present. *Id*. at 284. The State's closing argument exacerbated the prejudice by urging the jurors to believe the luminol tests were conclusive proof of blood. *Id*. at 284-85.

Like *Daniels*, this Court should reverse. Here, a *Frye* hearing showed that the

phenolphthalein test, like luminol testing, is generally accepted within the forensic science community as a presumptive, not confirmatory, test for blood (1/30/08-Tr.73-75,98). Nonetheless, the State presented the weakly positive phenolphthalein test results as evidence that the speck on Leonard's sunglasses was Angela's blood, without follow-up tests to confirm it was blood. Although the State conducted DNA testing, that testing still did not show the miniscule speck was blood. As in *Daniels*, upon confirmatory testing, another spot that tested presumptively positive for blood was determined not to be blood (Tr.1388). And, as in *Daniels*, the State urged the jurors to consider the speck blood splatter:

> Prosecutor: DNA. Big fight about it. Small amount. One in twelve thousand nine hundred thirty, I believe, that it's the victim. But the one thing Lisa was consistent on, it's the victim's blood, it's not the kids it's the victim –
>
> Defense Counsel: Objection, that's a misstatement of the testimony.
>
> The Court: The jury will recall the testimony.
>
> Prosecutor: Thank you, Your Honor. Think about the glasses….You just kill somebody and there's blood splatter all over the room, not one piece of clothing of his had any blood on it. He's been on the road fourteen, fifteen days. He's either pitched them, washed them. What's one thing you're not going to get rid of? Your glasses. Did he clean them? Of course he cleaned them. If there's anything on your glasses right here you'll clean them. Kind of funny the blood was found on the nose piece.
>
> Defense Counsel: Objection, mischaracterization of the testimony.

The Court: The jury will recall the evidence. You got five minutes.

Prosecutor: Thank you, Your Honor. Remember that, the one nose piece is where they swab, and detected – I mean it .03 nanograms of blood, but that's one –

Defense Counsel: Objection, Your Honor, I have to object, nobody testified that it's blood.

Prosecutor: I will take that back, Your Honor. It was presumptively tested for blood. There wasn't enough to take a chance on not being able to test a confirmatory test without doing DNA. That was a call by Molly, that was the right call to make. It was presumptive blood. We have a bloody room, a bloody struggle, and a piece of blood of Angela Rowe's on his glasses.

(Tr.1744-46).

Evidence of the Phenolphthalein and DNA Tests Were Neither Logically Nor Legally Relevant

The phenolphthalein and DNA test results were also inadmissible because they lacked any probative value and threatened to confuse and mislead the jurors. Due process mandates that guilt be established by probative evidence. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). Courts must be diligent "against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 364 (1970). This Court must assure that, in finding facts, jurors do not do so based on sheer speculation. *State v. Grim*, 854 S.W.2d 403, 414 (Mo.banc

1993). "The possibility that a thing may [have] occur[red] is not alone evidence, even circumstantially, that the thing did occur." *Boyington v. State*, 748 So.2d 897, 901 (Ala.Crim.App.1999). Admitting this forensic evidence denied Leonard due process and a fair trial because the State obtained his convictions with speculative evidence, wholly lacking probative value, which misled and confused the jurors.

Admissible evidence must be both logically and legally relevant. *Murrell v. State*, 215 S.W.3d 96, 116 (Mo.banc 2007); *State v. Driscoll*, 55 S.W.3d 350, 354 (Mo.banc 2001). Evidence is logically relevant if it has "some legitimate tendency to establish directly the accused's guilt of the charges" *id*.; or if it "tends to make the existence of any material fact more or less probable than it would be without the evidence." *State v. Sladek*, 835 S.W.2d 308, 314 (Mo.banc 1992).

Evidence is legally relevant "only if its probative value outweighs its prejudicial effect." *Driscoll*, 55 S.W.3d at 354. In determining relevance, the court should assess whether the evidence will cause unfair prejudice or confusion of the issues, mislead the jury, or cause undue delay, waste of time, or needless presentation of cumulative evidence. *Sladek*, 835 S.W.2d at 314.

Evidence regarding the speck on Leonard's glasses was logically irrelevant because it had no legitimate tendency to establish Leonard's guilt. The speck was infinitesimally small – naked to the human eye, at .03 nanograms per microliter

(Tr.1480).[18] It was never confirmed as blood (Tr.1398). The phenolphthalein test registered only a weak positive reaction (Tr.1391). Because the speck was so minute, the chemist could only locate a partial DNA profile, and the sample contained DNA from at least one other unknown donor (Tr.1468,1505-06). While it could not exclude Angela, it could not confirm that she was the donor (Tr.1468,1503). Even if Angela's DNA, the speck could have been skin, hair, or saliva (Tr.1487). Since Leonard and Angela lived together, there were many innocuous ways the speck could have been transferred to the sunglasses (Tr.1484-86). Finally, there is no telling how long the speck had been on the sunglasses. The evidence was far too speculative to legitimately tend to establish Leonard's guilt.

The evidence was not legally relevant because its prejudicial effect vastly outweighed its probative value. In *Brenk v. State*, 847 S.W.2d 1, 8 (Ark.1993), the Arkansas Supreme Court weighed the probative value and prejudicial effects of evidence of luminol test results absent confirmatory testing. Luminol tests disclosed the possible presence of a minute amount of blood, but additional testing could only confirm the substance was human blood, not that it was the victim's blood. *Id*. The State's expert, however, testified he believed the testing showed the presence of blood and introduced photographs of the areas tested. *Id*. The Court held that without follow-up testing, the luminol test results had no probative value and did nothing to establish it was the victim's

[18] A nanogram is one billionth of a gram (Tr.1480). Defense counsel equated the size of this speck to one millionth the size of a grain of sugar (Tr.1480,1762).

blood, or that the substance was related to the charged crimes. *Id*. The expert's testimony and luminol photographs also were prejudicial:

> This was likely to be misleading and confusing to the jury such that even the cross-examination establishing that what caused the reaction in the photos…was only possibly blood cannot cure the prejudice that certainly resulted.

Id. at 10.

Leonard's jurors were misled to believe that the miniscule speck was blood splatter from the crimes. The prosecutor argued that the DNA expert consistently stated that the speck was Angela's blood and repeatedly referred to the speck as blood splatter (Tr.1744-46). As in *Daniels*, jurors were encouraged to disregard that the only other substance that tested presumptively positive for blood was confirmed not to be blood. Since four people were shot from close range, jurors would expect the perpetrator to have blood on him. It was unfair and misleading to let the State mislead the jurors into believing that this infinitesimal speck on the sunglasses was Angela's blood, spattered from the crimes, when no testimony established that it was.

This Court must reverse.

ARGUMENT VI

The trial court abused its discretion in overruling defense counsel's motion to exclude testimony and evidence regarding blood and DNA testing on State's Exhibit 158, sunglasses, and in continuing the trial, because the alternative remedy of continuing the trial failed to alleviate unfairness, violating Leonard's rights to due process, a fair trial, and a speedy trial, U.S.Const.,Amends.V,VI,XIV;Mo.Const., Art.I,Secs.10,18(a),§217.450, *et seq.*,Mo.Sup.Ct.R.25.03, in that the State, without any valid justification, waited almost two years to test the sunglasses and surprised Leonard with the "presumptive blood" results ten weeks before trial, and the DNA results five weeks before trial, knowing that counsel would need additional time to review the test results and prepare to defend against them, and that Leonard had requested a speedy trial under Section 217.450, *et seq*..

When Leonard was arrested on December 9, 2004, various items were seized from the car in which he was a passenger (Tr.1318-19). One travel bag contained personal items, including a pair of sunglasses (St.Ex.158;Tr.1331). The items were brought to Missouri on December 10, 1994 and stored by the police (Tr.921,1333-34).

Leonard's first discovery request was made February 16, 2005 (L.F.50-51). He sought all reports or statements of experts, including results of physical and scientific tests, experiments or comparisons (L.F.50). On September 15, 2005, he requested notice of whether the State would use DNA evidence, the name of the lab conducting DNA testing, and the type of DNA testing conducted; whether the State had physical evidence

submitted for analysis or examination; and all records and reports of any laboratory or forensic examinations or analysis (L.F.87-88,91-93,95)

On May 25, 2006, Leonard filed a request for return of his personal property (Tr.1364;L.F.181-94). In response, on August 16, 2006, an investigator from the prosecutor's office retrieved the travel bag and its contents from the police department and secured them at the prosecutor's office (Tr.931,1355). Almost three months later, on November 8, 2006, the investigator brought the bag and sunglasses to the crime lab for testing (Tr.1355-56,1361; L.F.647). By then, the trial, already continued several times, was scheduled to start May 30, 2007 (8/11/05-Tr.6;9/16/05-Tr.4;8/24/06-Tr.65; L.F.96,443).

On March 22, 2007 – about two months before trial – the State disclosed a January 26, 2007 lab report indicating that Leonard's sunglasses had tested presumptively positive for blood (L.F.646). On April 24, 2007, the State disclosed a April 19, 2007 DNA lab report indicating that Angela could not be excluded as the donor of the substance on Leonard's sunglasses (L.F.646). On April 27th, the State disclosed additional material about the DNA testing (L.F.646).

On April 30, 2007, defense counsel requested exclusion of evidence of the phenolphthalein and DNA testing due to the State's unexplained two-year delay in testing (L.F.645-48). Otherwise, counsel would be forced to seek another continuance, solely to prepare for this evidence (L.F.647). They would need to further investigate the evidence, gather additional discovery, seek expert assistance, and consider further testing (L.F.647).

Counsel reminded the court that Leonard had asserted his right to a speedy trial (L.F.645-48).

On May 9, 2007, prosecutors attempted to justify their lateness. According to one, the delay was caused by Leonard's May 2006 request for his property (Tr.74). He claimed they brought the items to their office for copying and wanted to test the glasses before they returned them (Tr.75). These items were not tested initially, because "[t]hat would have been up to the police officer, but at the insistence of defendant receiving those that's why we made the decision to go ahead and have those tested when they weren't done previously" (Tr.75). Another prosecutor vouched that they did not know the crime lab planned to conduct DNA testing and the lab "took it upon themselves" to do it (Tr.73-74). He asserted they disclosed the reports once they received them and did not purposely withhold evidence (Tr.73-74).

The court overruled Leonard's motion to exclude (Tr.76). Counsel was forced to request a continuance, over Leonard's objection (L.F.32,663-67). The court granted the continuance, "in the interest of justice … understanding that the request is being made reluctantly and only due to the facts and circumstances that gave rise to this motion" (Tr.76).

Standard of Review and Preservation

The trial court has discretion to exclude evidence as a sanction for violation of discovery rules. *State v. Walkup*, 220 S.W.3d 748, 757 (Mo.banc 2007); Rule 25.18. This Court will reverse only where the trial court's exercise of discretion results in

fundamental unfairness to the defendant. *State v. Destefano*, 211 S.W.3d 173, 181 (Mo.App.S.D.2007).

Counsel preserved this issue for review by raising it by pre-trial motion, making a continuing objection at trial, and including it in the motion for new trial (L.F.645-48,1328-32;Tr.1373-74).

Exclusion Was Necessary

"The purpose of discovery is to permit defendant a decent opportunity to prepare in advance for trial and avoid surprise." *State v. Mease*, 842 S.W.2d 98, 108 (Mo.banc 1992). Discovery rules "aid in the truth finding aspect of the legal system." *State v. Scott*, 943 S.W.2d 730, 735 (Mo.App.W.D.1997). They "seek to foster … expedited trials … and the opportunity for effective cross-examination." *State v. Wells*, 639 S.W.2d 563, 566 (Mo.banc 1982). Late disclosure violates due process when the delay prevents the defendant from receiving a fair trial, *i.e.*, when disclosure is made too late for the defendant to make use of any benefits of the evidence. *Moore v. Casperson*, 345 F.3d 474, 493 (7thCir.2003).

Rule 25.03(A)(5) provides that, upon the defense's written request, the State shall disclose "[a]ny reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons." Rule 25.18 authorizes sanctions on parties that do not comply with discovery rules. The court may order the party to disclose the material, grant a continuance, exclude the evidence, or enter another order as it deems just. *Id*. In

determining the sanction, "the focus is generally on the removal or amelioration of any prejudice" that the party has suffered by the other party's discovery violation. *State v. Martin*, 103 S.W.3d 255, 260 (Mo.App.W.D.2003). The trial court must tailor the remedy to alleviate harm to the defense. *State v. Wolfe*, 13 S.W.3d 248, 259 (Mo.banc 2000).

Reversal is warranted when the sanction is fundamentally unfair to the defendant. *Martin*, 103 S.W.3d at 260. When the defendant alleges the trial court should not have permitted the State's late disclosure, the reviewing court should consider:

(1) whether the defendant waived the objection;

(2) whether the State intended to surprise the defendant or acted deceptively or in bad faith intending to disadvantage the defendant;

(3) whether the defendant was, in fact, surprised and suffered disadvantage; and

(4) whether the type of testimony given might have been readily contemplated by the defendant.

State v. Gray, 230 S.W.3d 613, 617 (Mo.App.S.D.2007). Fundamental unfairness exists if a reasonable likelihood exists that the failure to disclose affected the result of the trial. *Wolfe*, 13 S.W.3d at 259.

Here, Leonard never waived his objection to the State's late disclosure. He objected pre-trial, during trial, and after trial (L.F.645-48,1328-32;Tr.1373-74).

The State acted in bad faith in waiting almost two years to test the evidence. "Exclusion of a witness may be proper when no reasonable justification is given for the

failure to disclose the witness." *Martin*, 103 S.W.3d at 262. The justifications for the State's delay are nonsensical. While one prosecutor stated that the lab just "took it upon themselves" to conduct the testing, another blamed Leonard, for requesting that his personal property be returned and thereby requiring its testing (Tr.73-75). Prosecutors knew that Leonard had repeatedly and strenuously insisted upon a speedy trial (L.F.77-78,454-89,598-603;Tr.8/11/05-Tr.4,6;9/16/05-Tr.2-6;8/1/06-Tr.59-60). Waiting almost two years before conducting tests of physical evidence was inexcusable. The State also delayed after the reports were completed – almost two months to disclose the phenolphthalein test results (L.F.646).

Leonard was surprised and disadvantaged by the late disclosure. The State dropped the "presumptive blood" test result on counsel ten weeks pre-trial and the DNA test results just five weeks pre-trial (L.F.646). Defense counsel needed to hire experts to review test results and procedures and conduct their own testing (L.F.647). Extracting and comparing DNA is a complicated, lengthy procedure. Late disclosure of DNA and presumptive blood test results and the accompanying expert witnesses cannot be remedied as easily as the late disclosure of a lay witness. DNA evidence, in particular, can be "particularly strong in that it [is] based on objective, scientific principles." *Gray*, 230 S.W.3d at 617. The Southern District has recognized "the prejudicial effect that DNA evidence threatens due to its technical and persuasive nature when a defendant does not have an opportunity to seek evidence from other experts that might rebut it." *Id*. at 618 fn.4. Defense counsel could not have prepared for this highly technical evidence in

five weeks, especially since counsel was completely surprised by it and would have had their time already slotted for other pre-trial tasks.

Finally, Leonard could not have contemplated that, having seized the evidence in December 2004, the State would suddenly produce lab findings in mid-March and late April, 2007. Even had Leonard known that the State was conducting testing, he could not have anticipated those results. He could not have guessed that one of nine spots tested on the sunglasses would have a weak positive reaction to the phenolphthalein test, as possibly blood, or that it was .03 nanograms per microliter. He could not have anticipated that only a partial DNA profile could be extracted from that substance and that the substance had at least two donors. Leonard could not have anticipated or prepared for this evidence.

The court's refusal to exclude the presumptive blood and DNA testing was fundamentally unfair. The court knew its refusal would force counsel to request a continuance (Tr.76). The court granted the continuance request "in the interest of justice … understanding that the request is being made reluctantly and only due to the facts and circumstances that gave rise to this motion" (Tr.76). Since Leonard had vehemently asserted his speedy trial right under §217.450, et seq., this continuance was not a remedy but a further violation of Leonard's rights.

Fully aware of Leonard's speedy trial request, the State should have done everything possible to ensure full disclosure so that both parties would be ready for the May 30th trial setting. Instead, it waited almost two years to send physical evidence to the lab for testing and then dumped the results on the defense just weeks before trial. By

denying the motion to exclude, the court forced defense counsel, over Leonard's objection, to request another continuance. The court violated Leonard's state and federal constitutional rights to due process, a fair trial, and a speedy trial. U.S.Const.,Amends.V, VI,XIV;Mo.Const.,Art.I,Secs.10,18(a),§217.450, *et seq.*,Mo.Sup.Ct.R.25.03.

This Court must reverse the convictions and order the charges dismissed[19], or alternatively, reverse for a new trial wherein the evidence is excluded.

[19] See Argument VII, *infra*.

ARGUMENT VII

The trial court erred in proceeding to trial, entering judgment against Leonard, and sentencing him, in violation of Leonard's right to due process, U.S.Const.,Amends.V,XIV;Mo.Const.,Art.I,Sec.10, and a speedy trial, §217.450(Missouri's Uniform Mandatory Disposition of Detainers Law (UMDDL)), because the court lost jurisdiction over the case well before the February 2008 trial, in that Leonard filed a proper request for disposition of the detainer under the UMDDL on July 22, 2005 and the 180-day period was not validly tolled since Leonard objected to the court allowing his initial counsel to withdraw, he objected to every continuance while the 180-day period was running, and the final continuance was caused solely by the State's unjustified two-year delay in obtaining DNA testing.

If an inmate files a proper request for disposition of a pending detainer, the court must try the case within 180 days, or it loses jurisdiction. §217.450 *et seq.*, Uniform Mandatory Disposition of Detainers Law (UMDDL). The State conceded that Leonard properly requested a speedy trial on July 22, 2005 (L.F.99). Leonard objected to the removal of his first attorney and to each of defense counsel's continuance requests up until August 24, 2006 and again on May 9, 2007 (8/11/05-Tr.4,6; 9/16/05-Tr.2-6; 8/1/06-Tr.59-60; L.F.666). The 180-day period under the UMDDL expired, and the trial court lost jurisdiction, on January 18, 2006. Even if it retained jurisdiction then, it lost jurisdiction by the time of trial since the last continuance was caused solely by the State's

unjustified two-year delay in seeking DNA testing. By proceeding to trial, entering judgment, and sentencing Leonard, the court violated the UMDDL and Leonard's right to due process. U.S.Const.,Amends.V,XIV;Mo.Const.,Art.I,Sec.10,§217.450, *et seq*..

Leonard's Statutory Speedy Trial Right

The UMDDL "provides for the prompt disposition of detainers based on untried state charges pending against a prisoner held within this state's correctional system." *State ex rel. Kemp v. Hodge*, 629 S.W.2d 353, 354 (Mo.banc 1982). §217.450 provides that an inmate may request final disposition of any untried indictment for which a detainer has been lodged. The case must be tried within 180 days after the court and prosecutor receive the request, but the time period may be tolled for "such additional necessary or reasonable time as the court may grant, for good cause shown in open court, the offender or his counsel being present…. The parties may stipulate for a continuance or a continuance may be granted if notice is given to the attorney of record with an opportunity for him to be heard." §217.460. The State has the burden of showing that the 180-day period should be extended. *State v. Laramore*, 965 S.W.2d 847, 850 (Mo.App.E.D.1998).

The UMDDL created a liberty interest entitled to procedural due process protection under the Fourteenth Amendment. *Vitek v. Jones*, 445 U.S. 480 (1980). Although one may not have a "constitutional or inherent right" to a particular liberty interest, once a state has afforded the opportunity for that interest, due process

protections must be invoked to ensure that the state-created right is not arbitrarily denied or abrogated. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Preservation and Standard of Review

Whether the court violated the defendant's right under the UMDDL is a jurisdictional issue. *State v. Nichols*, 207 S.W.3d 215, 219 (Mo.App.S.D.2006). Thus, counsel's failure to preserve the issue for appeal did not waive it. *State v. Burdette*, 134 S.W.3d 45, 51-52 (Mo.App.S.D.2004). "Jurisdictional issues present questions of law, which we review *de novo* and without deference to the circuit court's determination." *State ex rel. Garrett v. Dally*, 188 S.W.3d 111, 113 (Mo.App.S.D.2006).

Procedural History

On December 10, 2004, a complaint was filed charging Leonard with four counts of first degree murder and four counts of armed criminal action (L.F.39-43). On February 14, 2005, private counsel, Joseph Hogan, entered his appearance (L.F.48).

In July, 2005, Leonard filed an "Inmate's Request for Disposition of Indictments, Informations or Complaints" from within the Department of Corrections, (L.F. 76-77). It was delivered to the circuit court and the prosecuting attorney on July 22, 2005 (L.F.77).

Hogan moved to withdraw on August 11, 2005 (8/11/05-Tr.2). He stated that he had not been paid, and the State indicated it would seek death (8/11/05-Tr.2-3). Hogan would stay on the case if the State compensated him (8/11/05-Tr.2). Leonard objected to Hogan's withdrawal and asserted he could pay (8/11/05-Tr.4,6). He reminded the court,

the Honorable Larry Kendrick, that he had asserted his speedy trial right under the UMDDL and would not waive it (8/11/05-Tr.2-5). The prosecutor also objected to Hogan's withdrawal, citing the delay engendered by appointing new counsel and Leonard's speedy trial request (8/11/05-Tr.5). The court let Hogan withdraw, ordered that Leonard be screened for Public Defender services, continued the case "for good cause shown" to September 16, 2005, and ordered that the time be tolled under the UMDDL (8/11/05-Tr.6).

On August 26, 2005, a public defender entered her appearance for Leonard (L.F.81). After the State filed notice of aggravating circumstances, three capital public defenders entered on September 15th (L.F. 85).

On September 16, 2005, Leonard's new attorneys requested a trial setting past the date required under the UMDDL (9/16/05-Tr.3-4). Leonard refused to waive his speedy trial right and insisted no one else could waive it for him (9/16/05-Tr.5). He stated that, although his new attorneys had other cases, "had the judge not removed my other attorney, then we'd be ready for trial" (9/16/05-Tr.5). The court granted the request "for good cause shown," ruling that Leonard's statutory right to a speedy trial was outweighed by the court's obligation to provide him a fair trial with effective counsel (L.F.96; 9/16/05-Tr.4). It set the case for trial on October 11, 2006 (9/16/05-Tr.4).

On November 14, 2005, the State requested reconsideration, noting Leonard had properly requested a speedy trial and thus, the case had to be tried by January 21, 2006

(L.F. 99-100).[20] It argued that defense counsel had not explained how their caseload justified the continuance (L.F.100).

On November 22nd, the court heard the State's motion to reconsider (11/22/05-Tr.7). The court noted Leonard's continuing objection to a continuance (11/22/05-Tr.7). Defense counsel noted the case's complexity, the investigation still required, their trial schedule, and the need for further discovery (11/22/05-Tr.9-15). The State responded that defense counsel had few cases actually set for trial, and it urged that Leonard's case be set sooner, to avoid problems with the speedy trial request (11/22/05-Tr.15-16). The court overruled the State's motion to reconsider (11/22/05-Tr.18). Finding the continuance request reasonable and necessary, it noted the need for discovery from different states and defense counsels' schedules (11/22/05-Tr.18).

On July 24, 2006 – now a year after Leonard's request for a speedy trial – defense counsel asked the court to continue the October 11th trial setting (L.F.200-14). Counsel cited their settings in other capital cases, budget cuts, further needed investigation, the State's delay in disclosing its evidence in aggravation, the need to depose witnesses, and discovery not yet provided by the State (L.F. 200-14). They stressed the distance they had to travel to visit Leonard at Potosi Correctional Center and its limited visiting hours (L.F.210-11).

[20] The court acknowledged that the 180-day period, unless tolled, would expire January 18, 2006 (11/22/05-Tr.11).

On August 1, 2006, Judge Kendrick heard the motion (8/1/06-Tr.33-61). Leonard again strenuously refused to waive his right and stated he would proceed to trial even if counsel were unprepared (8/1/06-Tr.60). He argued that the court already lacked jurisdiction (8/1/06-Tr.60). Judge Kendrick found the continuance request supported by good cause, but he denied it given Leonard's refusal to waive his right to a speedy trial (L.F.228;8/1/06-Tr.60-61).

On August 22, 2006, counsel filed a motion to reconsider and attached Leonard's consent to the continuance, which maintained that his speedy trial right had already been violated and reiterated that he did not waive his prior request under the UMDDL (L.F.237-40;8/24/06-Tr.63-64). The court continued the trial to May 30, 2007 (L.F.443;8/24/06-Tr.65).

On September 19, 2006, the case was transferred from Judge Kendrick to Judge Hartenbach (L.F.452). On October 2, 2006, Leonard filed a *pro se* motion to dismiss due to the UMDDL violation (L.F.454-89).

On March 22, 2007, about two months before trial, the State disclosed a January 26, 2007 lab report indicating Leonard's sunglasses had tested presumptively positive for the presence of blood (L.F.646). The State had waited until November, 2006 to send the glasses to the lab for testing (L.F.647). On April 12, 2007, Leonard filed another *pro se* motion to dismiss, based on the UMDDL (L.F.598-603). The court denied the motion (L.F.611).

On April 24, 2007, the State disclosed a DNA lab report dated April 19, 2007, indicating that Angela could not be excluded as the donor of the DNA material on

Leonard's sunglasses (L.F.646). Counsel requested that the DNA evidence be excluded due to the State's unexplained two-year delay in seeking the testing (L.F.645-48). Otherwise, counsel would be forced to seek another continuance, solely to prepare for the DNA evidence (L.F.647). Counsel was ready to proceed to trial but for the late disclosure (L.F.648). Counsel reminded the court that Leonard had asserted his speedy trial right under the UMDDL (L.F.645-48). The court refused to exclude the evidence, so counsel was forced to request a continuance, over Leonard's objection (L.F.32,663-67). The court granted the continuance "in the interest of justice…understanding that the request is being made reluctantly and only due to the facts and circumstances that gave rise to this motion" (Tr.76). Trial was continued to, and commenced on, February 20, 2008 (L.F.690).

August 11, 2005 to October 11, 2006: 427 Days

The 180-day period under the UMDDL was not properly tolled from August 11, 2005 to October 11, 2006. Even though the court knew Leonard filed a proper request for speedy trial under the UMDDL, it let private counsel, Joseph Hogan, withdraw. Hogan entered his appearance on February 14, 2005 (L.F.48). When Leonard asserted his speedy trial right on July 22, 2005, Hogan had represented him for five months. As the prosecutor acknowledged, Hogan's withdrawal on August 11, 2005 necessitated a delay, which was a problem since Leonard had requested a speedy trial (8/11/05-Tr.5). Given Leonard's speedy trial request, the court should not have allowed Hogan to withdraw.

The court had discretion to deny Hogan's motion to withdraw. *State v. Christeson*, 50 S.W.3d 251, 261 (Mo.banc 2001). Trial courts have required private attorneys to continue to represent their clients, even without compensation.[21] For example, in *State ex rel. Public Defender Commission v. Williamson*, 971 S.W.2d 835, 836 (Mo.App.W.D.1998), two assistant public defenders, Brewer and Short, represented Defendant Jackson at trial. A mistrial was declared. *Id*. By the time of the retrial, Brewer had been dismissed from her position. *Id*. at 836-37. The court nonetheless ordered Brewer to represent Jackson upon retrial. *Id*. at 837. Because the court lacked authority to order the Public Defender Commission to compensate Brewer, Brewer was forced to represent Jackson without payment. *Id*. at 838-39.

The *Williamson* Court relied on *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. banc 1981). There, a court ordered an attorney to represent an indigent defendant without payment or reimbursement of his expenses when funds the Legislature appropriated for indigent defense ran out. *Wolff*, 617 S.W.2d at 64-65. Recognizing that the funding deficit was creating a crisis, this Court called upon the Missouri Bar "without apology." *Id*. at 65. The practice of law is business and a profession "in the spirit of public service where economic rewards are definitely an incidental." *Id*. The lawyer has an "obligation selflessly to serve." *Id*. at 66, citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 368 (1977). It stressed the Missouri lawyers' oath, "I will never reject, from any

[21] Leonard advised the court that he could pay Hogan (8/11/05-Tr.4), but prison restrictions made it hard for him to contact his family to arrange payment (L.F.457-58).

consideration personal to myself, the cause of the defenseless or the oppressed, or delay any person's cause for lucre or malice." *Id*. at 66-67. While recognizing its obligation to deal fairly and justly with lawyers, the Court recognized "our first obligation [is] to secure to the indigent accused all of his constitutional rights and guarantees." *Id*. at 67. If the trial court could not appoint counsel for an indigent defendant, to protect the defendant's constitutional rights, the charges must be dismissed. *Id*.

Hogan's withdrawal conflicted with Leonard's right to a speedy trial. Given Leonard's UMDDL request, time was of-the-essence. Hogan had represented him for five months, and new attorneys would start from scratch, requiring additional time to prepare, necessitating a continuance. Leonard objected repeatedly to Hogan's withdrawal and new counsels' continuance requests (8/11/05-Tr.4,6; 9/16/05-Tr.2-6; 8/1/06-Tr.59-60; L.F.666). Only after the 180-day period expired and the court lost jurisdiction did Leonard reluctantly agree to one continuance (L.F.239). Leonard maintained that the court had already lost jurisdiction and he was not waiving his prior objections (L.F.239).

Because the court never should have allowed Hogan to withdraw, this case is distinguishable from *State ex rel. Wolfrum v. Wiesman*, 225 S.W.3d 409 (Mo.banc 2007). If the defendant exercises his right to counsel but objects to further delay, counsel may obtain a continuance if it "is based on reasonable grounds showing the delay is for good cause." *Id*. at 412. Here, the trial court forced an unnecessary continuance. This delay, attributable to the State through the court's action, cannot toll the UMDDL's 180-day time period.

May 30, 2007 to February 20, 2008: 266 Days

Even if the UMDDL clock was not running from August 11, 2005 to May 30, 2007, it ran between May 30, 2007 and February 20, 2008. This delay was caused solely by the State's late disclosure of DNA evidence.

When Leonard was arrested on December 9, 2004, sunglasses were seized from his luggage (L.F.645). Yet the State waited almost two years, until November 8, 2006, to seek their testing (L.F.646). The State never validly explained that delay but tried to shift blame to Leonard, because in May, 2006 he asked that his sunglasses be returned, thereby prompting their testing (Tr.73-75).

On March 22, 2007 – about two months before trial's scheduled start – the State disclosed a January 26, 2007 lab report indicating that the sunglasses tested presumptively positive for blood (L.F.646). On April 24, 2007, the State disclosed a DNA lab report, indicating the DNA material on the sunglasses could not exclude Angela (L.F.646).

Because the State waited so long to seek testing and dropped the DNA evidence on the defense just five weeks pre-trial, counsel sought its exclusion (L.F.645-48). Counsel advised that, unless the evidence was excluded, they would be forced to request a continuance based solely on the late disclosure, and this would conflict with Leonard's speedy trial request (L.F.645-48). But for the late disclosure, counsel was ready to proceed to trial (L.F.648). The court refused to exclude the evidence, so counsel was forced to request a continuance, over Leonard's objection (L.F.32,663-67). The trial was continued to, and commenced on, February 20, 2008 (L.F.690).

Although the State did not request this continuance, its action precipitated it. Knowing Leonard had requested a speedy trial, the State waited almost two years to seek testing of his sunglasses and then dumped DNA test results in his lap just five weeks pre-trial. The defense needed time to review the results and prepare an adequate defense to that evidence. "State caused delay, even where there is no deliberate attempt to delay the trial or hamper the defense, weighs against the State." *State v. Davis*, 903 S.W.2d 930, 936 (Mo.App.W.D.1995). But for the State's negligent failure to seek timely testing, counsel would not have been forced to request a continuance. As the court acknowledged, the continuance request was "made reluctantly and only due to the facts and circumstances that gave rise to this motion" (Tr.76). The 266-day delay from May 30, 2007 to February 20, 2008 – caused solely by the State's negligence – cannot toll the 180-day period of the UMDDL. When the case went to trial on February 20, 2008, the court had lost jurisdiction.

This Court must reverse Leonard's convictions, vacate the sentences, and order him discharged with prejudice.

ARGUMENT VIII

The trial court erred and abused its discretion in overruling Leonard's motion to exclude from Perry's redacted videotaped statement (St.Ex.196-B) Detective Zlatic's opinions regarding Perry's innocence and the accuracy of his last statement to the police, in admitting Exhibit 196-B, and in letting the jury view it, and thereby violated Leonard's rights to due process, a fair trial, and a fair and impartial jury, U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a), because Zlatic's opinions – that Perry did not commit the charged crimes and Perry correctly guessed that Leonard confessed to Perry the day before Thanksgiving – vouched for Perry's credibility and invaded the province of the jury on two crucial issues, in that the detective's opinion was based on hearsay, and the detective was in no better position than the jury to assess witness credibility and draw conclusions from the evidence.

Defense counsel moved pretrial to bar the State from playing Perry's videotaped statement to the jury (L.F.1073-91). Counsel objected that Detective Zlatic's opinion that Perry did not commit the crimes was speculation and inadmissible opinion evidence (L.F.1075). Counsel objected to any portions of the tape where detectives commented on Perry's credibility (L.F.1074,1081-83).

At trial, over defense counsel's objections, the jurors viewed a redacted version of the statement. The first segment started with Zlatic's opinion:

Zlatic: Right, but you didn't do it.

Perry: No, I didn't have anything to do with it.

Zlatic: Right.

(St.Ex.196-B,p.9). Later, Perry expressed his very uncertain belief that Leonard confessed the day before Thanksgiving, and Zlatic confirmed, "Okay. I think you're right" (St.Ex.196-B,p.110). The issue is included in the new trial motion (L.F.1335-36).

A trial court enjoys broad discretion in deciding to exclude or admit evidence. *State v. Madorie*, 156 S.W.3d 351, 355 (Mo.banc 2005). Its rulings will not be overturned absent a clear abuse of discretion. *Id*. It abuses its discretion when its ruling is clearly against the logic of the circumstances then before it and is so arbitrary and unreasonable it shocks the sense of justice and indicates a lack of careful consideration. *State v. Brown*, 939 S.W.2d 882,883-84 (Mo.banc 1997).

"Generally, a lay witness may not testify regarding the witness' opinion on a matter in dispute because the lay witness lacks specialized knowledge about the matter and, therefore, the jury and lay witness are in equal positions to form an accurate opinion." *State v. Presberry*, 128 S.W.3d 80, 86 (Mo.App.E.D.2003). When the jurors are as capable as the witness to draw conclusions from the facts, opinion testimony is usually inadmissible. *Id*. at 86. Lay witnesses must be restricted to statements of fact. *State v. Mitchell*, 847 S.W.2d 185, 186 (Mo. App.E.D.1993).

In *Presberry*, 128 S.W.3d at 86, the defendant was charged with a crime caught on videotape. Because the videotape's quality was poor, the State presented the testimony of police officers that the person in the videotape was the defendant. *Id*. at 87-88. The appellate court found plain error, since the testimony was based solely on reviewing

evidence that was equally available to the jurors. *Id*. at 89. The officers, as lay witnesses, were no more likely than the jury to correctly identify the defendant. *Id*.*;* see also *State v. Burgett*, 848 S.W.2d 613, 615 (Mo.App.E.D.1993) (improper for wife to testify that she believed her husband committed charged crime).

Zlatic, a lay witness, had no specialized knowledge to assess Perry's credibility or innocence any better than the jurors. Even if considered an expert, Zlatic's opinions were still inadmissible. Police officers can become "expert" witnesses through knowledge gained by practical experience. *State v. Marks*, 721 S.W.2d 51, 56 (Mo.App.W.D.1986). Nonetheless, expert witnesses must not invade the province of the jury. *State v. Hendrix*, 883 S.W.2d 935, 940 (Mo.App.W.D.1994). An expert's opinion "should never be admitted unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of a subject, to draw conclusions from the facts proved." *State v. Sloan*, 912 S.W.2d 592, 596 (Mo.App.E.D.1995).

"The general rule is that expert testimony is inadmissible if it relates to the credibility of witnesses because it invades the province of the jury." *State v. Couch*, 256 S.W.3d 64, 68 (Mo.banc 2008). Witnesses may testify to "specific facts that discredit the testimony of another witness, as long as the witness does not comment directly on the truthfulness of another witness." *State v. Link*, 25 S.W.3d 136, 143 (Mo.banc 2000). Thus, a police officer may testify explaining the general concept of false sightings and state specific facts that would discredit another witness' account that she saw the victim with a man who did not resemble the defendant. *Id.* But he could not go "one step further and say that the police classified the information…as a false sighting." *Id.*

Expert opinion evidence also cannot be introduced if based on unreliable hearsay. "It has long been the rule in this State that, with rare exception, an expert may not give an opinion based on hearsay." *State v. Bybee*, 254 S.W.3d 115 (Mo.App.W.D.2008). While §490.065.3 relaxes that rule, the facts the expert considers must be reasonably reliable. Eyewitness observations do not satisfy the reliability criteria. *Bybee*, 254 S.W.2d at 118.

In *Bybee*, the key issue was whether the defendant had been driving the car. 254 S.W.3d at 118. A highway patrolman constructed an accident reconstruction based on witness interviews, and he concluded the defendant drove the car. *Id*. at 117-18. But, because his conclusion was based solely upon witness statements, it was inadmissible. *Id*. at 118. The patrolman "simply made a credibility determination and accepted it as fact, and his expertise in accident reconstruction did not make him any more competent to judge the credibility of the witnesses and reach that conclusion than the trier of fact." *Id*. Letting the jury consider the patrolman's opinion that the defendant was the driver, based solely on the patrolman's assessment of the witnesses' credibility, gave the witnesses' statements and his opinion "an undeserved authority that could unduly sway a jury." *Id*. A new trial was warranted. *Id*.

Detective Zlatic's expressions of belief in Perry's innocence and credibility invaded the province of the jury. Zlatic had no more ability to wade through the evidence, assess credibility, and determine guilt or innocence than the jurors. The State redacted the videotaped statement and could have omitted Zlatic's opinions. Instead, it gratuitously began the redacted videotape with Zlatic's opinion that Perry did not commit the charged crimes (St.Ex.196-B,p.9). Nor did the jury require Zlatic's help in

determining whether Perry was correct in guessing that Leonard called him the day before Thanksgiving. Zlatic's response to Perry – "Okay. I think you're right" – was simply Zlatic's opinion, vouching for Perry's accuracy (St.Ex.196-B,p.110).

Zlatic's opinion testimony was particularly damaging for the defense. The defense sought to show that another person, possibly Perry, committed the crimes. A neighbor saw someone – not Leonard – sneaking around Angela's house during the week of the 29th (Tr. 1605). Perry had argued with Angela (Tr.899,1067-68). Perry lied to police that he was not in St. Louis on Thanksgiving, although GPS records showed he was (Tr.1064-65). He gave conflicting stories about whether he went to Angela's house to pick up his Blazer (Tr.869,1065-66). Bullets were found in the Blazer (Tr.1121-22).

The State bolstered Perry's account and vouched for his credibility about the timeline and his innocence by showing that an experienced detective believed in Perry's innocence and Perry's shaky guess that Leonard confessed the day before Thanksgiving. The State needed jurors to believe Perry on when Leonard called him, because Perry's story needed to fit the State's timeline and match the phone records. Zlatic's vouching "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

Zlatic's opinions as to Perry's credibility likely swayed the jurors. During deliberations, the jury requested the transcript of Perry's trial testimony and the videotape and transcript of his statement (L.F.1185). They watched the videotape again (Tr.1783-84). The jurors likely gave the detective's opinion great weight, when it should have carried none. They may have believed he had special knowledge of additional evidence

not before them. *State v. Evans*, 820 S.W.2d 545, 547 (Mo.App.E.D.1991). Like a prosecutor who opines about a witness' credibility during closing, for a detective "to sit as a thirteenth juror personally evaluating credibility improperly invites the jury to rely on his personal evaluations." *State v. Roberts*, 838 S.W.2d 126, 130 (Mo.App.E.D.1992).

Letting the jury consider Zlatic's opinions on two crucial issues violated Leonard's rights to due process, a fair trial, and a fair and impartial jury. U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a).

This Court must reverse.

ARGUMENT IX

The trial court erred and abused its discretion in overruling Leonard's objections and sustaining the State's motion to strike Kathleen Tumminia for cause, thereby violating Leonard's rights to due process, trial by a fair, impartial and fairly selected jury, a fair and reliable sentencing, and freedom from cruel and unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,Secs.10, 18(a),21, because Tumminia expressed no views that would substantially impair the performance of her duties as a juror or her ability to follow the instructions or her oath, in that, although Tumminia had qualms about the death penalty, she could be fair, follow the court's instructions, and "deal realistically with it."

The trial court erred in striking for cause Venireperson Kathleen Tumminia, based on her views on the death penalty. Tumminia stated she could be fair and follow the court's instructions (Tr.203). The court's error in sustaining the State's motion to strike Tumminia for cause violated Leonard's state and federal constitutional rights to due process, trial by a fair, impartial and fairly selected jury, a fair and reliable sentencing, and freedom from cruel/ unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,Secs.10,18(a), 21.

Although the trial court has broad discretion in determining the qualifications of jurors, its ruling should be reversed when it is against the weight of the evidence and constitutes a clear abuse of discretion. *State v. Johnson*, 244 S.W.3d 144, 158 (Mo.banc 2008). The trial court may only remove a capital juror if her views "would prevent or

substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). The court must have the "definite impression" that the juror would be unable to faithfully and impartially apply the law. *Id*. at 426. If she is excluded on any broader basis, the death sentence cannot be carried out. *Witherspoon v. Illinois*, 391 U.S. 510, 522, n.21 (1968).

Tumminia did not respond immediately when the State asked if anyone was so against the death penalty that they could not consider imposing it (Tr.165-66). Later, she indicated she had qualms about the death penalty, would have difficulty, and was unsure she could impose it (Tr.166). She was uncertain how she felt because she had never seriously considered whether she could impose death (Tr.166). She found the question overwhelming (Tr.166). It was not a black/white issue (Tr.167). With so much to consider – "all the words like aggravated, mitigating, Judge's instructions" – she could not give a "yes" or "no" (Tr.167). When asked if she would always vote for life, she responded, "I'm not sure which way I would go" (Tr.168). She stated "perhaps" she could never impose death; she might have trouble sleeping at night (Tr.168). When pushed to commit that she could not consider the full range of punishment, she responded, "I'm just saying I'm on the fence, and I don't know if I could be open to the whole range of possibilities that you're offering" (Tr.168-69).

Upon defense counsel's questioning, Tumminia explained that as a debate coach, she had published balance sheets for and against the death penalty (Tr.202). It was overwhelming for her, because "there's so many sides and issues involved" (Tr.202). She had participated in vigils at Potosi as a member of Amnesty International (Tr.202).

Asked if she could realistically consider both punishments, the following exchange occurred:

> Tumminia: I think I could be fair and firm, I think I could isolate what takes place from my emotional concerns about life, my more – I guess spiritual leanings toward my faith and such. I think I could be fair, if I had a balance sheet in front of me.
>
> Defense counsel: …[D]o you think you could follow the Court's written instructions–
>
> Tumminia: Yes.
>
> Defense counsel: –as they've been described to you here this morning?
>
> Tumminia: I think I could deal realistically with it.

(Tr.203).

The court sustained the State's motion to strike Tumminia for cause (Tr.212). It stressed her equivocation during the State's questioning and no direct answer to whether she could consider both punishments (Tr.210). The issue is included in the new trial motion (L.F.1332-33).

The court clearly abused its discretion in striking Tumminia. Her answers did not indicate that her views on the death penalty would substantially impair or prevent the performance of her duty as a juror. *Witt*, 469 U.S. at 424. While she admitted to qualms about the death penalty, there was no showing that she could not faithfully and impartially apply the law. *Id*. at 426. Tumminia did not equivocate, as the court suggested, but was merely working through a complicated issue – one she had never

seriously considered before, which was not black or white, and which was complicated by legal terms like "aggravating" and "mitigating" (Tr.166-67). Not all jurors can immediately give full and firm answers to this question. Failure to do so does not require a strike for cause. It is error to "exclude jurors whose only fault was to take their responsibilities with special seriousness." *Adams v. Texas*, 448 U.S. 38, 50-51 (1980). Tumminia needed to analyze the question before giving an answer. But, once given time to ponder the question, Tumminia responded that she could be fair, put aside her personal concerns about the issue, and follow the court's instructions (Tr.202-203). She stated she could "realistically deal with it", by which she must have been referring to the main topic at hand, whether she could impose the death penalty (Tr.203).

Tumminia's alleged equivocation was not a valid basis for a strike for cause, since she ultimately stated she could follow the court's instructions. In *Gray v. Mississippi*, 481 U.S. 648 (1987), Venireperson Bounds was "clearly qualified to serve as a juror" even though the trial court characterized her as "totally indecisive" and complained "she says one thing one time and one thing another." *Id*. at 656 fn.7, 659. "[A]lthough the voir dire of member Bounds was somewhat confused, she ultimately stated that she could consider the death penalty in an appropriate case." *Id*. at 653. Similarly, although Tumminia never expressly stated she could impose death, she stated the equivalent – she could follow the court's instructions and could "realistically deal with it," *i.e.*, the death penalty (Tr.203).

The State stressed Tumminia's participation in vigils at Potosi for Amnesty International. This may be a basis for a peremptory strike, but is not proper grounds for a cause strike.

> [N]ot all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart v. McCree, 476 U.S. 162, 176 (1986). Tumminia was qualified to serve despite qualms about the death penalty: "[I]t is entirely possible that a person who has a 'fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law-to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." *Adams*, 448 U.S. at 44-45.

"[T]he decision whether a man lives or dies must be made on scales that are not deliberately tipped toward death." *Witherspoon*, 391 U.S. at 521-522 n.20. Striking Tumminia for cause improperly tipped the scales toward death by creating a jury "uncommonly willing to condemn a man to die." *Id*. at 521. Leonard's death sentences cannot stand. *Gray*, 481 U.S. at 657-58.

This Court must re-sentence Leonard to life imprisonment without parole or remand the cause for a new trial.

ARGUMENT X

The trial court plainly erred and abused its discretion in failing to intervene *sua sponte* when the State repeatedly made improper comments during closing, because the arguments denied Leonard his rights to due process and a fair trial, U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a), in that the State (1) commented on evidence that had been excluded at the State's request by arguing that no phone records supported Gerjuan's statement that she spoke with Angela on November 28th; and (2) argued, "believe me if there's somebody else that could refute Dr. Burch [Leonard] would have put them on the stand," because the State improperly shifted the burden of proof and drew an adverse inference from Leonard's failure to present such a witness, when that witness was equally available to both sides.

The trial judge has the responsibility of maintaining decorum in the courtroom. *United States v. Young*, 470 U.S. 1, 10 (1985). It court must exercise its discretion to control prosecutorial misconduct *sua sponte*, if need be, to ensure that every defendant receives a fair trial. *State v. Roberts*, 838 S.W.2d 126, 131 (Mo.App.E.D.1992). In capital cases, closing arguments must receive a "greater degree of scrutiny" than those in non-capital cases. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985).

Because counsel did not object and/or did not include these issues in the motion for new trial, Leonard requests plain error review. Rule 30.20. For reversal under plain error review, Leonard must establish that the argument was improper and that it had a

decisive effect on the outcome of the trial and would amount to a manifest injustice or miscarriage of justice if the error were left uncorrected. *State v. Lyons*, 951 S.W.2d 584, 596 (Mo.banc 1997).

Comments on Excluded Evidence

The State knew that a record existed of Angela and Gerjuan's call on November 28th. But, through its hearsay objection, the State prevented the jury from learning that when Angela spoke with Gerjuan on November 28th, she was at a pay phone at an Amoco station. The excluded testimony would have tied the November 28th call listed in Gerjuan's phone records to Angela. Yet, during closing, the State repeatedly argued that no such record existed, since the call did not show up on Angela's home phone records (Tr.1746-47,1773-75). See Arg. I, *supra*. The State also knew that Leonard was often gone long stretches without calling Angela, yet it argued in closing that Leonard's absence without calling meant that he knew she was already dead (Tr.1735). See Arg. II, *supra*.

Reversal is warranted, because 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*, 651 S.W.2d 537, 539 (Mo.App.E.D.1983) (even though State had 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*, 24 S.W.3d 198, 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); *State v. Luleff*, 729 S.W.2d 530 (Mo.App.E.D.1987).

Improper Adverse Inference and Burden Shifting

The State may not argue an adverse inference from the defendant's failure to call a witness who is equally available to both parties. *State v. Wallace*, 43 S.W.3d 398, 404 (Mo.App.E.D.2001). "Only when the missing witness is 'peculiarly available' to one party should the court consider whether the party's failure to call the witness supports the inference that the witness could have testified adversely to that party if called." *State v. Crawford*, 32 S.W.3d 201, 206-07 (Mo.App.S.D.2000). Whether a witness is equally available is determined by three factors: "(1) one party's superior ability to know or identify the witness; (2) the nature of the testimony expected to be given by the witness; and (3) a relationship between a party and the witness which indicates a likelihood that the witness would testify more favorably for one party than the other." *Id*.; see also *State v. Perry*, 820 S.W.2d 570, 574 (Mo.App.E.D.1991) (argument that defendant did not bring in expert witnesses could be considered adverse inference in broad sense).

The medical examiner, Dr. Burch, provided testimony that helped and hindered both sides. The defense elicited and stressed Burch's initial opinion that the most likely time frame for the victims' death was 2-3 days before discovery (Tr.1199-1201;1206-07); whereas the State relied on Burch's amended opinion, that the bodies could have been in the house 2-3 weeks (Tr.1196). Both sides could have benefitted from the testimony of a second expert to confirm the parts of Burch's testimony that helped them, and refute the

parts of Burch's testimony that hurt them. Yet the State put the burden of proof on the defense, arguing, "believe me if there's somebody else that could refute Dr. Burch they would have put them on the stand" (Tr.1778).

The jurors should not have been allowed to draw an adverse inference from the absence of a second expert to confirm or deny Burch's findings. The date of death was crucial. The jury should not have been led to believe the State's version, just because the defense did not present its own expert to confirm Burch's initial opinion that the victims had probably just been dead 2-3 days before discovery.

The arguments "so infected the trial with unfairness as to make the resulting conviction[s] a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); U.S.Const.,Amends.V,VI,XIV;Mo.Const.,Art.I,Secs.10,18(a).

This Court must reverse.

ARGUMENT XI

The trial court abused its discretion in overruling Leonard's request for mistrial after the Court visibly handcuffed Leonard before removing him from the courtroom, because the Court had no cause to do so other than the fact of conviction, thereby violating Leonard's rights to due process and a fair and reliable sentencing, U.S.Const.,Amends.V,VIII,XIV;Mo.Const.,Art.I,Secs.10,21, in that handcuffing Leonard was inherently prejudicial – it communicated to the jury that he was a danger to the community, and adversely affected the jury's perception of Leonard's character.

In *Deck v. Missouri*, 544 U.S. 622, 624 (2005), the Supreme Court held that, "the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, *unless* that use is 'justified by an essential state interest' – such as the interest in courtroom security – specific to the defendant on trial." *Id.* at 624. "[G]iven their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." *Id.* at 632. It held that, "the defendant need not demonstrate actual prejudice to make out a due process violation" where the court without adequate justification has forced a defendant to wear visible shackles. *Id.* at 635.

Here, the court ruled that Leonard would attend trial without visible physical restraints (L.F.436-37;Tr.60). But, after the guilty verdicts, a bailiff "placed handcuffs on Mr. Taylor's wrists right in front of everybody" (Tr.1785-86). The court responded that,

"[h]e's just been convicted of four counts of Murder in the First Degree" (Tr.1786). The court denied counsel's request for a mistrial (Tr.1786-87). This issue is included in the motion for new trial (L.F.1324-26).

At the hearing on the motion for new trial, the prosecutor stated that he had been told by security personnel, and he in turn told the court, that Leonard intended to act out during trial (Tr.1855-56). He argued that the handcuffs were not prejudicial, since the jury knew Leonard was in jail (Tr.1856). Defense counsel responded that there had been no hearing and Leonard had done nothing to disrupt the proceedings (Tr.1856). The court overruled the motion for new trial (Tr.1856-57).

The use of restraints is within the trial court's discretion. *State v. Sanders*, 903 S.W.2d 234, 239 (Mo.App.E.D.1995). *Id*. As in *Deck*, the trial court abused its discretion in handcuffing Leonard before the jury. Other than the fact of conviction, Leonard had done nothing to warrant the use of visible handcuffs. The record discloses no outbursts or concerns expressed by the court. No essential state interest particular to this case warranted the use of the handcuffs. The court's action violated Leonard's right to due process under the Fifth and Fourteenth Amendments and his right to a fair and reliable sentencing under the Eighth Amendment. *Deck*, 544 U.S. at 632; U.S.Const.,Amends.V,VIII,XIV;Mo.Const.,Art.I,Secs.10,21.

The State must prove "beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." *Deck*, 544 U.S. at 635. But it cannot. Shackling is "inherently prejudicial." *Id*. at 628. It undermines the fairness of the penalty phase fact-finding process by suggesting to the jury that the defendant is a

danger to the community, a factor relevant to the sentencing determination "even where the State does not specifically argue the point." *Id*. at 633. Shackling also adversely affects the jury's perception of the defendant's character. *Id*. The use of shackles can be a "thumb [on] death's side of the scale" because it "inevitably undermines the jury's ability to weigh accurately all relevant considerations-considerations that are often unquantifiable and elusive-when it determines whether a defendant deserves death." *Id*.

The shackling was especially prejudicial here, because Leonard's evidence in mitigation was that he was a respectful inmate who had earned placement in the honor dorm through good behavior and a good work ethic; he was respectful, had few rule violations, and had never harmed anyone in prison or tried to escape (D.Ex.RR). The court's use of handcuffs was silent rebuttal of this mitigating evidence – it communicated that Leonard was not a good prisoner, would be a danger to others in the future, and should be sentenced to death.

This Court must reverse.

CONCLUSION

Leonard Taylor respectfully requests the following remedies:

Arguments I-V and VIII-X: remand for a new trial;

Argument VI: reversal and dismissal of charges, or alternatively, a new trial;

Argument VII: reversal and dismissal of charges;

Arguments XI: vacating death sentences and imposition of life without parole.

Respectfully submitted,

_____
ROSEMARY E. PERCIVAL, #45292
ASSISTANT APPELLATE DEFENDER
Office of the State Public Defender
Western Appellate Division
920 Main Street, Suite 500
Kansas City, Missouri 64105-2017
Tel: (816) 889-7699
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were mailed, postage prepaid, along with a disk containing the brief, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102; on the 31st day of December, 2008.

_____
Rosemary E. Percival

Certificate of Compliance

I, Rosemary E. Percival, 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 30,656 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

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Rosemary E. Percival, #45292
ASSISTANT PUBLIC DEFENDER
Office of the State Public Defender
Western Appellate Division
818 Grand Boulevard, Suite 200
Kansas City, MO 64106-1910
816/889-7699
Counsel for Appellant