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 REPLY 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

INDEX[1]

Page

[1] Taylor maintains each of the arguments presented in his Opening Brief. Only those arguments to which he finds it necessary to reply are contained herein.

TABLE OF AUTHORITIES

CASELAW:

U.S. CONSTITUTIONAL AMENDMENTS:

MISSOURI CONSTITUTION:

REVISED MISSOURI STATUTES:

SUPREME COURT RULES:

JURISDICTIONAL STATEMENT

Leonard incorporates the Jurisdictional Statement from page 10 of his Opening Brief.

STATEMENT OF FACTS

Leonard incorporates the Statement of Facts from pages 11-23 of his Opening Brief, but also notes that the State has included several mistakes in its Statement of Facts. The State alleges that when Perry asked him why he was still in the house, Leonard responded, "They dead" (Resp.Br.16). Instead, it was Perry who stated, "They dead" (Tr.1083). Also, the State alleges that in his redacted statement, Perry stated that Elizabeth gave him a box of bullets that he put in the armrest of the Blazer (Resp.Br.19). Nowhere in the redacted statement is such a statement present (St.Ex.196-B) and at trial, Perry testified that the box of shells was already in the car (Tr.907). Finally, the State asserts that the victims all were past rigor mortis (Resp.Br.22). Dr. Burch testified that "when I looked at them," *i.e.*, on December 4th, they were past rigor mortis (Tr.1194). However, Burch's investigator went to the crime scene on December 3rd and 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).

ARGUMENT I

A. The State Opened the Door to the Testimony

The biggest flaw in the State's argument is its refusal to acknowledge the long-standing, varied line of cases that recognize the great unfairness of allowing one party to skew the evidence and mislead the jury because evidence that would complete the picture was typically barred by statute or rule of evidence. First, the State argues that *Chambers v. Mississippi*, 410 U.S. 284 (1973) has no relevance here because Leonard has not proven the criteria for admission of confessions by uncharged third parties (Resp.Br.at 43). The State misses the point. Leonard cited *Chambers* not to say that the evidence fit within the *Chambers* criteria for third party confessions, but rather, to highlight the Supreme Court's recognition that trial courts err by applying the hearsay rule so mechanistically that they prevent the jury from hearing crucial exculpatory evidence. Along this same vein, Leonard cited *Rock v. Arkansas*, 483 U.S. 44 (1987)(enforcing *per se* rule barring certain testimony, despite corroborating evidence, was error); and *Green v. Georgia*, 442 U.S. 95, 97 (1979)(trial court should have admitted testimony, even though it was hearsay, given its clear reliability and significance to a crucial jury determination).

The State also misses the point regarding the rape shield cases (Resp.Br.43-44). There too, Missouri courts have recognized that when the State's evidence creates a false impression with the jury, the defense should be allowed to cure the false impression, even with evidence that otherwise would be inadmissible. See App.Br. at 47-48. In the rape shield cases, the evidence was not inadmissible because it was hearsay, but because it

was barred by the rape shield statute. The rationale is the same: "a rule of evidence, whether it has its origin in statute … or in common law … may not be narrowly or mechanistically applied to deprive a defendant of rights to confront and cross-examine witnesses and to call witnesses in his own defense, both rights essential to due process and guaranteed by the Fourteenth Amendment." *State v. Douglas*, 797 S.W.2d 532, 535 (Mo.App.W.D.1990), citing *Chambers*, 410 U.S. at 302, and *Davis v. Alaska*, 415 U.S. 308, 317-19 (1974).

In *Douglas*, the Court of Appeals held that, "[t]o allow the State to show that Tracy'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 Tracy had had intercourse with another, was violative of defendant's right to a fair trial." 797 S.W.2d at 535-36. Here, to allow the State to argue that Angela's phone records show no calls with Gerjuan after November 24th, with the clear and calculated implication that Angela never spoke with Gerjuan after the 24th, then to forbid defendant from presenting evidence that linked Angela to the November 28th Amoco gas station call, violated Leonard's right to a fair trial.

The State argues that it can skew the evidence at trial, leaving the jury with a false impression, and only if the State first presented inadmissible evidence, would the defense be able to present inadmissible evidence to cure the problem (Resp.Br.44-45). The State completely ignores the several pages of cases discussed in Leonard's opening brief that show that Missouri courts often allow the State to introduce otherwise inadmissible evidence to counter admissible but misleading evidence presented by the defense

(App.Br.49-51). If the State is allowed to introduce otherwise inadmissible evidence to counter defendant's admissible but misleading evidence, the defense should be allowed to do the same.

But even under the curative admissibility doctrine, the evidence should have been allowed. 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 from home (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). But if it was hearsay for Gerjuan to testify that Angela was calling from a pay phone, then it would also be hearsay for Beverly to testify that Alexus was calling from home. The defense should have been allowed to show that Angela was speaking with Gerjuan from a pay phone at an Amoco station, so it then could demonstrate from Gerjuan's phone records that such a call occurred.

B. Present Sense Impression

The State argues that Angela's statements over the phone as to where she was and what she was doing do not qualify as present sense impressions, because neither Angela nor Gerjuan testified at trial (Resp.Br.40-41). There is no requirement that Angela testify. The present sense impression is an exception to the rule barring hearsay. Thus, it is presumed that the declarant will not be present to testify. If the declarant were required to testify, her perceptions would not be hearsay. And, as Leonard addressed in his opening brief, many jurisdictions have upheld the admission of present sense impressions despite the absence of the declarant (App.Br.43-44).

The Eastern District did not require the presence of the declarant in *Lindsay v. Mazzio's Corp.*, 136 S.W.3d 915 (Mo.App.S.D.2004). Lindsay sustained injuries after she fell in a restaurant. *Id*. at 918. An unknown observer who was eating lunch next to the site of the fall said, "That floor is wet there." *Id*. The Court of Appeals held that the unknown observer's statement would be admissible as a present sense impression to show that the floor was wet. *Id*. at 923. The fact that the observer, being unknown, likely would not testify at trial did not affect the admissibility of his/her statement.[2]

The State argues that *State v. Smith*, 265 S.W.3d 874, 879 (Mo.App.E.D.2008) and *State v. Crump*, 986 S.W.2d 180, 188 (Mo.App.E.D.1999) require that the declarant testify. But in *Smith*, the court noted that "in most cases," a witness can corroborate the statement and "often," the declarant will be available to testify. *Id*. at 879. It held that the murder victim'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. Here, in contrast, although Angela did not testify, the phone records corroborated the fact of a phone call with an Amoco gas station.

In *Crump*, 986 S.W.2d at 188, the mere fact that the witness heard the declarant make the statement simultaneously with the event he observed qualified the testimony as a present sense impression. As icing on the cake – but not a requirement – the appellate court added that the declarant and the witness to the statement testified at trial. *Id*. The

[2] The appellate court was considering the admissibility of the present sense impression in its review of a grant of summary judgment in favor of the defendant. *Id*. at 917, 923.

appellate court also noted that the defense had failed to object to four prior instances of similar testimony. *Id*. at 188-89.

The State also argues that the statement was inadmissible because Gerjuan did not testify in person (Resp.Br.41). The court determined that Gerjuan was unavailable to testify, so the court admitted portions of her deposition into evidence and allowed both parties to read them to the jury in lieu of her in-court testimony (Tr.1571). Because Gerjuan had been deposed, both sides had had ample opportunity to question her about the phone conversation. "Under Missouri law, depositions of witnesses are used as evidence in all respects as though the witnesses orally testified in open court." *Gage v. Morse*, 933 S.W.2d 410, 423 (Mo.App.S.D.1996); Rule 25.13; §492.400.1, RSMo 2000 ("depositions taken and returned in conformity to the provisions of sections 492.080 to 492.400 may be read and used as evidence in the cause in which they were taken, as if the witnesses were present and examined in open court on the trial thereof"). Gerjuan's testimony must be considered the same as if she testified in court.

Next, the State argues that Angela's statement about what she was doing was not a present sense impression, because it was "not the perception of an event while it is occurring and such a comment does not describe or explain an event" (Resp.Br.41). Angela perceived an "act or event," *i.e.*, the fact that she was standing at a gas station payphone speaking with Gerjuan. It was not an extraordinary event, but it does not need to be, to qualify as a present sense impression. *Commonwealth v. Coleman*, 326 A.2d 387, 389 (Pa.1974) (there is no necessity for the presence of a startling occurrence or accident). Unlike excited utterances, present sense impressions "do not result from the

shock or excitement produced by a startling or unusual occurrence." *Smith*, 265 S.W.3d at 879. In *Lindsay*, 136 S.W.3d at 923, the appellate court held that the hearsay statement of an unknown observer that the restaurant floor was wet was admissible as a present sense impression. In *State v. Newell*, 710 N.W.2d 6, 17, 19 (Iowa 2006), a witness was allowed to testify, as a present sense impression, that the murder victim stated, over the phone, that the defendant was standing there listening. In *State v. Wooten*, 972 P.2d 993 (Ariz.App.1998), a witness testified, as a present sense impression, that the murder victim stated, over the phone, that she heard the defendant at her apartment door. So too the defense should have been allowed to present Angela's present sense impression of what she was perceiving as she spoke with Gerjuan.

Finally, without any supporting authority, the State asserts that Gerjuan's testimony is not a present sense impression, because Gerjuan asked Angela where she was (Resp.Br.41). Spontaneity is not a requirement for a present sense impression. All that is required is that: (1) the statement must be uttered simultaneously, or almost simultaneously, with an act or event; (2) the statement must describe or explain the event or act; and (3) the declarant must have perceived the event or act with his or her own senses. *Smith*, 265 S.W.3d at 879.

C. Prejudice

The State is wrong in arguing that there was no prejudice (Resp.Br.45-46). One neighbor and three relatives (Angela's sisters Gerjuan and the children's aunts Sherry and Beverly) 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). To try to

prove these people were mistaken, the State 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. After all, there was no evidence that Angela ever spoke with her sisters from pay phones. The jury was urged to believe that all of Angela's calls would be registered on her home phone records. They were urged to believe that if Gerjuan's statement that she spoke with Angela on the 28th was not corroborated by a call on Angela's home phone records, she must have been mistaken. Without a way to tie the gas station call to Angela, the jurors would assume that Gerjuan, like the others, 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 certainly exploited the absence of the crucial link between Angela and the gas station call by arguing 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 continued:

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 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).

Finally, excluding testimony that Angela was speaking from a pay phone was prejudicial, because the testimony rebutted the State's assertion that the drop-off of calls from Angela's house showed that she was dead. The lack of phone calls from Angela's

could be explained by the fact that she was leaving the house to make her calls from pay phones. Leonard was denied a fair trial by the court's exclusion of this crucial testimony that would have shown Angela was still alive after he left St. Louis and would have explained the lack of calls from her home phone.

ARGUMENT II

There are three segments of this Argument: (1) that the jury should have heard testimony from Angela's sister Gerjuan that Leonard typically was away six days out of seven and often did not call Angela when away; (2) that the jury should have seen Angela's properly admitted calendar for its entries that showed Leonard was often away for days on end without calling; and (3) that the jury should have seen Angela's properly admitted calendar for its entry of "off" for November 26th indicating Angela's belief that she did not need to go to work.

Counsel fully preserved the argument that Gerjuan's testimony and the calendar notations about Leonard's absences without calling were admissible (segments 1 and 2, *supra*) (Tr.1637-47; L.F.1358-61). To the extent that the third segment of the argument – that the "off" notation went to Angela's state of mind – was not preserved, counsel requests review for plain error under Rule 30.20.

The State argues that Gerjuan's testimony about Leonard's absences and about the calendar entries, and the calendar entries themselves, are hearsay that do not fit within the state of mind exception to the rule barring hearsay (Resp.Br.56-58). It fails to address Leonard's argument that the testimony and calendar entries are admissible as present sense impressions. And, as in Argument I, the State ignores the long-standing, varied line of cases that recognizes that if one party skews the evidence or misleads the jury, the other party may present evidence to erase the misperception, even if that evidence would otherwise be inadmissible. See App.Br. 70-74. At trial, the State skewed the truth by urging the jury to believe that Leonard did not call Angela after he left St. Louis on the

26th because he knew she was already dead (Tr.1735). The State thereby opened the door to Gerjuan's testimony and the calendar entries, which showed that there was nothing unusual about Leonard's silence – he was often gone long periods and often did not call while he was away.

The State argues that the jurors would not be able to understand what the entries meant (Resp.Br.59). But within the context of the entire calendar, the entries are self-evident (L.F. 1388-1402; *see also* Appendix of Appellant's opening Brief, at A2-A16). The primary purpose of the calendar seems to be documenting Angela's contacts with "L.T.", *i.e.*, Leonard Taylor (L.F.1388-1402; App.Br. at A2-A16). Angela started writing in the calendar in the last half of February 2004 (L.F.1390;App.Br.at A4). Most of the calendar entries documented whether "L.T." had come home yet (L.F.1388-1402;App.Br. at A2-A16). During April, Angela started to record daily whether she spoke with L.T. (L.F.1392;App.Br. at A6). She continued recording virtually every day until she started a new job on August 4th (notably, her employer confirmed at trial that she started this job in August 2004) (L.F.1396;Tr.1159). Starting in August, Angela's entries became more concise, but still very understandable, recording when Leonard was away and when he did not call her (L.F.1396-99;App.Br. at A10-A13). In October, the entries show that Leonard was away for two six-day periods without calling Angela (L.F.1398;App.Br. at A12). Given that the State urged the jurors to consider Leonard's absence without calling as consciousness of guilt, the jurors were entitled to know that there was another explanation and that Leonard was not acting out of the ordinary.

The State argues that because Leonard's defense was alibi, the state of mind exception does not apply (Resp.Br.58). But Angela's state of mind was relevant to a specific point – whether she believed that she was supposed to work on November 26th. The State argued at trial that Angela did not go to work on the 26th because she was already dead (Tr.1735). But if Angela believed that she was off, she would not have gone to work. The fact that she wrote "off" for November 26th is not being offered for its truth, to show that she was in fact not scheduled to work, but rather to show that she believed she was not scheduled. The jury was entitled to consider whether Angela did not show up for work because she thought she was not scheduled to work, as opposed to the State's argument that she was already dead.

Although the court suggested that the defense use Angela's phone records to show that Leonard often did not call, this would not have served the same purpose as Gerjuan's testimony and the calendar entries. Without the calendar entries, the jury would not learn when Leonard was away and when he was home. During the time he was home, Leonard may not have called Angela. There would be no way to distinguish between (a) the lack of phone calls because Leonard was with Angela and did not need to call her; and (b) the lack of calls when he was away.

It is ironic that the State criticizes the defense for wanting the jury to consider alleged "inferential hearsay" (Resp.Br.57). The State's entire case is built on inferences and circumstantial evidence. It urged the jury to infer from the fact that Leonard did not call Angela that he is guilty of murdering her (even though Angela's own entries show a prior pattern of silent absences). It urged the jury to infer from the fact that an

infinitesimal speck of genetic material, possibly Angela's, possibly blood, was found on Leonard's sunglasses, that it must be blood splatter from the crimes (even though Angela and Leonard lived together and there was no way of knowing what the speck actually was, where it came from, and how long it had been there). It urged the jury to infer that because Leonard had an identification card in another name that he was on the run after killing Angela (even though Leonard was a known forger and had used the fake identity well before the crimes occurred). The State asked the jurors to stretch to find questionable inferences throughout the trial. Surely, the jurors should be allowed to consider Angela's handwritten entries, in conjunction with Gerjuan's testimony, to determine what those entries meant in relation to the State's argument that Leonard did not call Angela because he knew she was dead.

ARGUMENT VI

The State cannot shift the blame for waiting almost two years to conduct blood and DNA testing by asserting that the decision to test was a police matter until Leonard requested his property back (Resp.Br.77). The prosecutor certainly could have requested that the evidence be tested at an earlier date. The purpose of inventorying the property seized from Leonard was "to ensure there are no specific items that need to go to a lab; clothing that might have blood or other DNA material on it" (Tr.922). The delay in testing items seized from Leonard is attributable to the State, regardless of whether fault lay with the police, the crime lab, or the prosecutor. See *United States v. Dog Taking Gun*, 7 F.Supp.2d 1118, 1121-22 (D.Mont.1998) (though prosecutor was not at fault, government bore fault for FBI's one year delay in conducting DNA testing); *Grant v. State*, 913 So.2d 316, 321 (Miss.App.2005)(State bears "burden of showing that it acted with due diligence in submitting evidence to the crime lab for examination").

The State waited almost two years to conduct routine criminal investigation, checking the glasses for blood, all the time knowing that Leonard had asserted his right to a speedy trial (L.F.646). The prosecutor should have determined as early as October 2005 whether it would be using DNA results. After all, on September 15, 2005, defense counsel prodded the State by requesting 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).

Leonard requested the return of his property on May 25, 2006 (L.F.181). In August 2006, an investigator for the prosecutor's office decided the sunglasses should be tested for DNA before returning them to Leonard (Tr.1355).[3] On August 16, 2006, the investigator retrieved the property from the Jennings Police Department and brought them to the prosecutor's office (Tr.1355). Almost three months later, on November 8, 2006, he brought the property to the crime lab (Tr.1361). Although the lab tested the sunglasses on November 8-9th, 2006, defense counsel did not receive the lab report, dated January 26, 2007, until March 22, 2007 (Tr.1390; L.F.522,646). The report indicated that the eyeglasses had tested presumptively positive for blood but that the sample was too small for further testing (L.F.646). But then a month later, about five weeks before trial, on April 20, 2007, the State advised counsel that a DNA report would be forthcoming (L.F.646). Defense counsel received the DNA report on April 24, 2007 and more material relating to the DNA evidence on April 27, 2007 (L.F. 646). Those materials indicated that the DNA testing was concluded by January 12th, although the lab waited until April 19th to write its report (Tr.71). By May 9, 2007, defense counsel was still awaiting some of the DNA testing data (Tr.72). Trial was scheduled to start just three weeks later, on May 30, 2007 (L.F.443). Dropping the "presumptive blood" and DNA

[3] The randomness of the State's actions is shown by the fact that of the three pairs of glasses seized from Leonard, only one pair was tested (St.Ex.178). The other two pairs were returned to Leonard without any testing, the day before the third pair was sent to the crime lab (Tr.1699-1700).

test results on the defense so soon before trial must be a discovery violation. The proper remedy was exclusion, not a continuance.

ARGUMENT VII

A. The Final Continuance

The State argues that none of the delays in this case can be counted against the State, because each continuance was sought by defense counsel (Resp.Br.91). But whose fault was it, really, that the case had to be continued the final time? It is true that defense counsel requested the continuance, but they had absolutely no choice given the prosecution's negligence in waiting almost two years to conduct basic investigation and then surprising defense counsel with DNA test results shortly before trial. Leonard was given a Hobson's choice – forfeit his right to a speedy trial, or forfeit his right to the effective assistance of counsel.

This was a State-caused delay. 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 defense was otherwise ready to go to trial (L.F.648). It would be manifestly unfair to count the last continuance against Leonard when the only reason defense counsel grudgingly had to ask for the continuance was that the State waited so long to conduct basic forensic testing.

The State faults Leonard for not citing any cases that hold that the granting of a continuance, as a remedy for a discovery violation, can constitute a violation of a defendant's right to a speedy trial (Resp.Br.80). Although this appears to be a case of first impression in Missouri, other states and a federal court have held that delay caused by the prosecution's discovery violation should be held against the State. "In appropriate circumstances a defense continuance does not waive the speedy trial rule where there has

been an inexcusable delay in providing discovery, or other violation of defense discovery rights." *State v. T.G.*, 990 So.2d 1183, 1184 (Fla. App. 2008), *citing State v. Naveira*, 873 So.2d 300, 307 (Fla.2004).

> Where material discovery is furnished at a time which will not enable the defendant to make use of it in the preparation of his defense before the expiration of the speedy trial time limits, the court may properly continue the case to a date beyond those limits, charge the continuance to the State, and thereafter grant the defendant's motion for discharge based on the speedy trial violation.

State v. Del Gaudio, 445 So.2d 605, 611 (Fla. App. 1984). *See also State v. Allen*, 134 P.3d 976, 982 (Or.App.2006) (continuance, caused by State's discovery violation, is charged against the State); *State v. Wamsley*, 594 N.E.2d 1123, 1126 (Ohio App.1991)(defense continuance caused by State's willful, prejudicial nondisclosure is charged against the State).

The Washington Supreme Court has also held:

> We agree that if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights.

State v. Price, 620 P.2d 994, 996 (Wash. 1980); *State v. Michielli*, 937 P.2d 587, 595 (Wash. 1997)(interjection of new facts into the case when the State had not acted with due diligence forced defendant to choose between right to speedy trial and right to effective assistance of counsel, justifying dismissal of charges).

In *United States v. Dog Taking Gun*, 7 F.Supp.2d 1118, 1120 (D.Mont.1998), the FBI had all the evidence in its possession for over a year before conducting DNA testing, because its lab was so busy. The prosecutor faxed the test results to defense counsel immediately upon receiving them. *Id*. at 1119. The federal court held that a continuance was appropriate, to allow the defense to prepare for the DNA evidence. *Id*. at 1121. It noted that the defendant's "denial of culpability makes the evidence particularly relevant especially given the persuasive character of DNA evidence." *Id*. The court, however, charged the delay against the prosecution for purposes of the defendant's statutory right to a speedy trial, since it was caused by the government's lack of diligent preparation in processing evidence. *Id*. at 1121-22.

B. Earlier Continuances

The State is also wrong in arguing, regarding the earlier continuances, that defense counsel's request for a continuance can trump the defendant's assertion of his right to a speedy trial. A defendant may not be forced to choose between constitutional rights. *Simmons v. United States*, 390 U.S. 392-94 (1968); *State v. Samuels*, 965 S.W.2d 913, 920 (Mo.App.W.D.1998). Yet here, Leonard's right to a speedy trial was subjugated to his right to the effective assistance of counsel, even though Leonard insisted that of the two rights, he would rather have a speedy trial. Like the Agreement on Detainers, the

UMDDL has no provision that counsel can assert their will over the defendant's express dissent. *See*, *e.g.*, *Enright v. United States*, 434 F.Supp. 1056, 1057 (D.C.N.Y.1977). To the extent that *State ex rel. Wolfrum v. Wiesman*, 225 S.W.3d 409 (Mo.banc 2007) holds otherwise, it should be reconsidered.

ARGUMENT VIII

The State argues that the "trial court correctly concluded that from the context of the interview, the officer was asking questions, not expressing an opinion about the facts of the case" (Resp.Br.98). The problem is that the jury did not receive this evidence in the same context as the court. The State relies on earlier portions of Perry's statement to argue that those portions show that Zlatic's comments were questions, not his opinion as to Perry's lack of involvement in the crimes (Resp.Br.96-97). But the jury did not hear those earlier portions of Perry's statement. The redacted statement played to the jury started immediately with the following:

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

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

Zlatic: Right.

(Ex. 196-B at 9). Thus, the jury would have believed that Zlatic was agreeing with Perry, expressing his opinion that Perry was not involved in the crimes.

The State argues that "the officer's comments … were in the form of questions or restatements of what Perry had already said and simply gave context to the statements Perry was making" (Resp.Br.100). Again, the State's assertion is not borne out by the record. When Perry expressed his very uncertain belief of which day Leonard confessed, Zlatic did not restate what Perry said, nor was his response mere context:

Zlatic: Because he had already told you before Thanksgiving what had happened, right?

Perry: Yeah.

Zlatic: Was that the day before? Two days before?

Perry: He probably told me that – well, I want to say the day before Thanksgiving.

Zlatic: So the day before Thanksgiving –

Perry: I'm thinking, I'm not even sure about that, I think so.

Zlatic: ***Okay. I think you're right***.

Perry: If I had to guess, I would say the day before.

(Ex.196-B at 110)(emphasis added). This is not a restatement of what Perry had said. It was Zlatic's personal opinion that Perry was correct. It gave credence to Perry's shaky belief by suggesting to the jury that Zlatic had outside knowledge which confirmed that shaky belief.

ARGUMENT X

A. Comments on Excluded Evidence

After obtaining the exclusion of Gerjuan's "hearsay" testimony that Angela told her she was calling from a pay phone at an Amoco gas station, the State exploited the absence of that evidence in closing. The State denied the defense the ability to connect Angela to Gerjuan's phone record for November 28th, but then argued that all the phone records showed there was no communication between the two women: "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. 1747). The State also argued, "None of these calls show up on Gerjuan or Angela's records" (Tr. 1774).

The State incorrectly argues that Leonard cannot succeed on this claim because the evidence was not excluded as the result of a discovery violation (Resp.Br. 121-22). But this principle does not relate solely to cases involving the exclusion of evidence based on discovery violations. In fact, the Eastern and Western Districts of the Court of Appeals have each reversed, under plain error review, when evidence had been excluded as hearsay. In *State v. Weiss*, 24 S.W.3d 198, 199-200 (Mo.App.W.D.2000), the defendant allegedly obtained access to the checking account of a victim who shared the defendant's name, by the bank's mistake. The defendant took money from the account, and he was charged with stealing. *Id*. at 200. At trial, the defendant attempted to show that he had received "buyout" money when he retired, which he thought he was accessing when he was getting the victim's money. *Id*. at 200-201. The court excluded evidence of the

buyout money as hearsay. *Id*. at 201. In closing, the State argued that the defendant had failed to produce documentation that the buyout money ever existed. *Id*. at 201-202. No objection was lodged, and the defendant was convicted. *Id*.

The Court of Appeals agreed that the State had committed misconduct warranting a new trial even under plain error analysis. *Id*. at 202-204. The court stressed the "intentional and deliberate nature" of the misstatements. *Id*. at 204. It further stressed that the prosecutor had foreseen the effect of the buyout document on the jury, since he sought its exclusion before the issue arose at trial so that (1) the jury would never know of the document and would not think that the State was trying to hide it from them, and, more importantly, (2) so that he could argue the defendant's failure to present the document meant it did not exist. *Id*. The State's "distasteful tactic" warranted relief under plain error review. *Id*.

In *State v. Luleff*, 729 S.W.2d 530 (Mo.App.E.D.1987), the defendant was convicted of receiving a stolen tractor. At trial, defense counsel tried to introduce a receipt for the sale of the tractor, but the court sustained the State's hearsay objection. *Id*. at 535. The Court of Appeals found that, although the State successfully excluded the receipt from evidence, it then took advantage by arguing that no receipt existed. *Id*. at 536. The court held that the State's argument "were tantamount to an absolute denial of the existence of any such document." *Id*. It granted a new trial, because the "error affected defendant's substantial rights and resulted in manifest injustice." *Id*.

B. Drawing an Adverse Inference

The State argues that the prosecutor's argument – "believe me if there's somebody else that could refute [the medical examiner] they would have put them on the stand" – was proper retaliation to defense counsel's closing (Tr.1778)(Resp.Br.123). It argues that "a prosecutor may retaliate to an issue raised by the defense even if the prosecutor's comment otherwise would be improper" and that a "prosecutor may rebut defense counsel's argument if the defense counsel opens the door to an otherwise questionable line of argument." (Resp.Br.123). It is ironic that while the State insists that the defense may open the door to the State's using "an otherwise questionable line of argument," the State refuses to acknowledge that the defense should have that ability too. *See* Args. I, II, III, and IV.

PROPORTIONALITY REVIEW

The State is incorrect in arguing that Leonard's sentence was proportionate. The trial court erred in accepting the jury's death penalty verdicts and in sentencing Leonard to death, in violation of his rights to due process, fundamental fairness, reliable, proportionate sentencing, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, and Section 565.035.3(3). This Court should apply *de novo* review and also consider similar cases where death was not imposed. The Court should reduce Leonard's sentences to life imprisonment without parole, based on the weakness of the evidence of guilt, the unreliability of the State's evidence, the State's destruction of evidence, and the lack of a true penalty phase trial.

Section 565.035 allows this Court to set aside a death sentence when it believes that (1) the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors; (2) the evidence does not support the aggravating factors; or (3) the sentence is disproportionate to the sentences imposed in similar cases, considering the crime, the strength of the evidence, and the defendant.

A. Similar Cases

This Court must "compare[e] each death sentence with the sentences imposed on similarly situated defendants to insure that the sentence of death in a particular case is not disproportionate" and ensure a "meaningful basis [exists] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Gregg v.*

Georgia, 428 U.S. 153, 198 (1978). Consideration of whether there were "similarly situated defendants" who were not sentenced to death "is an essential part of any meaningful proportionality review." *Walker v. Georgia*, 2008 WL 2847268 (2008)(Stevens, J., respecting denial of cert.).

> [F]ailure to acknowledge … cases outside the limited universe of cases in which the defendant was sentenced to death creates an unacceptable risk that [the reviewing court] will overlook a sentence infected by impermissible considerations.

Id. at 5.

Thus, in considering whether Leonard's death sentences were proportionate, this Court should consider the following cases where the defendant received a sentence of life without parole:

- Richard DeLong strangled a nine-month pregnant woman and her three children;
- James Schnick killed seven people, including a 7 and an 8 year-old shot twice in the head as they lay in bed, and a 2-year-old shot in the head in his playpen. *State v. Schnick*, 819 S.W.2d 330, 331-32 (Mo.banc 1991);
- Donnie Blankenship shot and killed five people execution-style during a grocery store robbery. *State v. Blankenship*, 830 S.W.2d 1 (Mo.banc 1992);
- Eric Beishline killed four people. *State v. Beishline*, 926 S.W.2d 501, 505 (Mo. App.W.D.1996);

- Lorenzo Gilyard killed six women. *State v. Gilyard*, 257 S.W.3d 654, 655 (Mo. App.W.D.2008).

B. Strength of the State's Evidence

In proportionality review, the Court must consider the strength of the State's evidence. *State v. Chaney*, 967 S.W.2d 47, 60 (Mo.banc 1998). The State's evidence was circumstantial and far from overwhelming. *See* App. Br. at 56-60. While the defense was barred from presenting crucial exculpatory evidence, the State was allowed to elicit highly speculative, unreliable evidence. The State destroyed evidence, *i.e.*, the initial videotaped statements of Beverly and Sherry Conley, that supported Leonard's defense (Tr.918-19), yet the videotape of Perry Taylor's interview, which hurt the defense, survived intact. Because the State destroyed these tapes, the jurors could not accurately assess the State's claim that the women's initial statements were inaccurate because the women were so distraught. For the sake of expediency, over defense counsel's objection, guilt phase closing arguments started very late in the afternoon and deliberations started at 7:17 at night (Tr. 1704, 1783). The jurors were forced to consider four days worth of complex evidence, including DNA evidence, multiple charts, and over 250 exhibits, at a time of the day when they would have been exhausted from a long day in court. In penalty phase, the only mitigating evidence presented was a written stipulation that Leonard had been a good prisoner (Tr. 1821-22). These factors rendered both the guilty verdicts and the death sentences unreliable.

C. De Novo Review

De novo review is appropriate in death cases. In *Cooper Industries v. Leatherman Tool Group Inc.*, 532 U.S. 424, 436 (2001), the Supreme Court held that appellate courts should apply *de novo* review to awards of punitive damages. It justified *de novo* review of these awards based on the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishment. *Id.* at 433-34. *De novo* review "helps to assure the uniform treatment of similarly situated persons that is the essence of law itself." *Id.* at 436; see also *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 584 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *State v. Black*, 50 S.W.3d 778, 793-99 (Mo.banc 2001)(Wolfe, J., dissenting). Certainly, if this type of independent review is warranted in cases where only money is at stake, it must also apply when a human life is at stake.

Upholding a death sentence under these circumstances violates the Eighth Amendment's requirement of heightened scrutiny of a capital sentence. *Woodson v. North Carolina*, 420 U.S. 280, 305 (1976). It also violates Leonard's rights to due process and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 21 of the Missouri Constitution. This Court must vacate the death sentences and resentence Leonard to life without the possibility of parole.

CONCLUSION

Leonard Taylor incorporates the Conclusion from page 136 of his Opening Brief.

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 Evan Buchheim, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102; on the 6th day of April, 2009.

_____
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 7,662 words, which does not exceed the 7,750 words allowed for a Reply 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.

_____

Rosemary E. Percival, #45292
ASSISTANT PUBLIC DEFENDER
Office of the State Public Defender
Western Appellate Division
920 Main Street, Suite 500
Kansas City, MO 64105-2017
816/889-7699
Counsel for Appellant