Case no. SC89343

IN THE MISSOURI SUPREME COURT

EARL FORREST,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Platte County
Honorable Owens Lee Hull Jr., Judge

RESPONDENT'S STATEMENT, BRIEF, AND ARGUMENT

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Table Of Contents

Table Of Authorities

Cases

Statutes

Statement of Facts

I. The murders

Earl Forrest and Harriet Smith had a falling out. Tr. 841, 852. Forrest believed that Smith owed him a trailer and a lawnmower because he introduced her to a source to buy methamphetamine. *Id.* Forrest and Smith also argued about Forrest failing to help Smith around her house. Tr. 841.

On December 9, 2002, Forrest, who had been drinking whiskey, drove to Harriett Smith's house. Tr. 1065-66. Forrest went into the house while Gamblin remained in the car. Tr. 1068. Smith and victim Michael Wells, a friend of Smith's, were in the living room. Tr. 873.

Forrest entered the house and told Smith, "All I asked you for was a [f---ing] lawnmower". Tr. 875. Smith told Forrest to calm down. *Id.* Forrest then pulled out a gun and fired two shots. Tr. 876. One shot hit Wells; the other hit Smith. Tr.877. Wells died from this shot to the head. Tr. 959, 961.

Smith, screaming, ran out of the house and got into Gamblin's car. Tr. 1068-69.[1] She put the car in reverse and hit a tree. Tr. 1069-70. Meanwhile, Forrest came outside and fired the gun into the air. Tr. 1070. He walked up to Gamblin's car and got in on the passenger side. Tr. 1070-71. Smith got the car unstuck and drove back towards the house. Tr. 1072. Smith and Forrest then got out of the car and walked into Smith's house. Tr. 1072. Forrest shot Smith in her bedroom. Tr. 845, 879. Smith died from two gunshots to the head. Tr. 955-957. Forrest also shot Smith twice in the back, twice in her left hand, and once in her right leg. Tr. 947, 948, 949.

Forrest then came back outside carrying the gun and a metal lockbox. Tr. 1073. After returning home, Forrest shot the lockbox to open it. Tr. 1074. There was $25,000 worth of methamphetamine in the box. Tr. 1076. Forrest took some of the methamphetamine. Tr. 1075.

Meanwhile, Dent County Sheriff Bob Wofford and Deputy Sharon Joann Barnes arrived at Forrest's house to ask him about the murders. Tr. 1006, 1077, 1173. Forrest told Gamblin to answer the door. Tr. 1078.

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[1] The police later found Smith's blood on the driver's seat in Gamblin's car. Tr.1034, 1159-1163.

Sheriff Wofford asked Gamblin if Forrest was there. Tr. 1078, 1174. As Forrest walked toward the door, he took a gun from behind his thigh. Tr. 1175-1176.Forrest squatted down beside the door, raised his gun, pointed it out the door, and began shooting. Tr. 1079, 1176. Forrest killed Deputy Barnes and wounded Sheriff Wofford. Tr. 1006, 1177-1178.

Sheriff Wofford called for help. Tr. 1178, 1179. The gunfight resumed when the other officers arrived. Tr. 1010, 1180. Inside the house, Gamblin was shot in the shoulder and back and Forrest took a bullet to the face. Tr. 1080. Forrest then put some methamphetamine in his mouth and announced his surrender. Tr. 1081.

Two Missouri State Highway Patrol officers ordered Forrest to crawl out of the house. Tr. 907, 924,1022. They arrested Forrest. Tr. 925, 1023. Forrest had a large hunting knife in a sheath attached to his belt. Tr. 908, 1023.

Inside Forrest's home, the police found .22 caliber Ruger semiautomatic pistol. with blood on it and a .22 caliber semiautomatic rifle. Tr. 1031, 1123. The pistol and rifle could have fired the bullets in each of the murders. Tr. 1132-1147. The police found an empty

magazine next to the pistol, a full box of 100 rounds of .22 caliber ammunition, and a partially used box of 100 rounds of .22 caliber ammunition. Tr. 1123. They also found the brown metal lockbox containing large bags of methamphetamine that Forrest stole from Harriet Smith. Tr.1123.

II. Forrest's guilt-phase defense

Forrest did not testify in his own behalf during the guilt phase. He presented one witness: Dr. Robert Smith, a psychologist. Tr. 1199. Dr. Smith diagnosed Forrest with dysthymic disorder, cognitive disorder, and substance dependence. Tr. 1207-1208. He also found that Forrest had damage to the frontal lobes of his brain. Tr. 1207.

III. The State's penalty-phase evidence

During the penalty phase, the State presented evidence regarding Forrest's illegal possession of a concealed .22 caliber handgun, his illegal possession of a four-inch-long-gravity-type knife, his illegal possession of a .44 Ruger handgun, and his possession of a substantial amount of methamphetamine. Tr. 1313-1314. All of these events took place in Livermore, California. Tr. 1307-1308. The State also presented evidence that in a separate California incident, Forrest possessed

several bags of methamphetamine, drug paraphernalia, stolen checks, and cash. Tr. 1325. The State also presented evidence regarding the impact of the victims' deaths on their families. Tr. 1330-1343. Finally, the State produced evidence of Forrest's California convictions for possession of dangerous drugs, possession of marijuana, transport, sale, or manufacture of a controlled substance, possession of a concealed firearm, and possession of a firearm by a felon. Tr. 1350-1351; St. Ex. 60 and 61.

IV. Forrest's penalty-phase defense

A. The "good person" mitigation evidence

Forrest's brother William testified that Forrest was an alcoholic, Tr. 1366, that Forrest's father was an alcoholic, Tr. 1365, that Forrest's father beat Forrest up in front of the neighbors, Tr. 1369-1370, and that Forrest's father screamed at Forrest, Tr. 1372. He also testified that he did not know any controlled substances that Forrest had not tried. Tr. 1380. Finally, he testified that he once stabbed Forrest in the stomach. Tr. 1385-1386.

Four of Forrest's stepchildren, one of his ex-girlfriends, and three of his friends testified that Forrest was a good person and a good father.

Tr. 1398-1410, 1446, 1453-1460, 1461-1466, 1467-1497, 1593-1594, 1608-1609, 1614-1653. Clayton Forrest, one of his stepchildren, also testified that petitioner Forrest introduced him to the Mormon Church. Tr. 1629-1630. Nancy Young, an ex-girlfriend, also testified that she allowed Forrest to be with her children even though he had been convicted of several crimes and "actively" made, used, and sold methamphetamine. Tr. 1497-98.

Craig Cranholm, one of Forrest's friends from California, testified that Forrest loved animals, Tr. 1445, that he rode motorcycles with Forrest, Tr. 1444, and that he and Forrest sold drugs, Tr. 1445. Susan and Doug Del Mastro testified that they used methamphetamine with Forrest. Tr. 1598, 1601. Forrest was under the influence of methamphetamine around children. Tr. 1612.

Angelia Gamblin, a witness to the murders at issue, testified that Forrest was "very much fun to be around." Tr. 1504. She also still cared for Forrest despite his crimes. Tr. 1510. A Missouri Highway Patrol officer testified that Forrest asked how Deputy Barnes was doing after Forrest was taken to a hospital on the day of the murders. Te. 1394-96.

B. The mental health mitigation evidence

Dr. Robert Smith, a psychologist, testified about Forrest's addiction to alcohol and methamphetamine. He opined that Forrest was under the influence of an extreme emotional disturbance at the time of the murders due to dysthymic disorder, substance dependence, and cognitive disorder, not otherwise specified, due to frontal lobe damage. Tr. 1418-19, 1429. In other words, Forrest's functioning was impaired. Tr. 1424.

Dr. Michael Gelbort, a neuropsychologist, testified that Forrest had impairment in the right front portion of his brain that affected visual processing and impulse control. Tr. 1543-1544. Alcohol and drug use exacerbated those problems. Tr. 1549-1550. Dr. Gelbort also testified that brain scans such as an MRI or CT scan would "rarely" demonstrate this type of impairment. Tr. 1553-1555. PET scans or SPECT scans "possibly" could identify the impairment. Tr. 1555.

Dr. Roswell Lee Evans, a psychiatric pharmacist, testified that Forrest was in an alcoholic blackout at the time of the crimes. Tr. 1576-1578, 1583

V. The jury's findings

The State charged Forrest with three counts of first-degree murder. D.A.L.F. 78-83. The jury convicted Forrest of all three counts. Tr. 1274-1275. Following the penalty-phase of the trial, the jury recommended death sentences on all three counts. Tr. 1744-1746. The jury found the following aggravating circumstances:

1. Forrest committed the murder of Harriet Smith while he was engaged in the commission of the murder of Michael Wells, Forrest murdered Harriet Smith for the purpose of receiving money or any other thing of monetary value from Harriett Smith. Tr. 1744-1745.
2. Forrest murdered Michael Wells for the purpose of receiving money or any other thing of monetary value from Smith. Tr. 1745-1746.
3. Forrest murdered Joann Barnes, a peace officer engaged in the performance of her official duty. Tr. 1746.

The trial court sentenced Forrest to death for each of the three counts of first-degree murder. Tr. 1784. This Court affirmed Forrest's

convictions and sentences. *State v. Forrest*, 183 S.W.3d 218 (Mo. 2006). The Supreme Court denied certiorari review. *Forrest v. Missouri*, 549 U.S. 840 (2006).

VI. The PCR proceeding

Forrest filed a *pro se* PCR motion in the Platte County Circuit Court. PCR L.F. 7-12. The motion court appointed counsel, and counsel filed an amended motion. PCR L.F. 55-273.

Upon the State's motion, PCR L.F. 274-299, the motion court dismissed, without a hearing, Forrest's claims 8(c), subclaims 1, 2, 3, 6, and 7 (counsel was ineffective for failing to object to penalty-phase evidence and the prosecutor's opening statement), claim 8(d) (counsel was ineffective for failing to object to the prosecutor's closing arguments), claim 8(h) (counsel should have argued that Joann Barnes was not a peace officer when Forrest murdered her), claim 8(i) (counsel failed to object to the pecuniary gain aggravator), claim 8(l) (a challenge to the penalty-phase jury instructions); claim 8(n) (counsel should have called an expert witness to testify that jurors do not understand the penalty-phase jury instructions), claim 8(o) (a challenge to Missouri's clemency proceedings), and claim 8(p) (a challenge to Missouri's

proportionality review). PCR L.F. 274-299, 337. The motion court later denied claim 8(m), a challenge to Missouri's method of lethal injection, without a hearing. PCR L.F. 376-377

The motion court held an evidentiary hearing on Forrest's remaining claims. Forrest presented the testimony of his trial attorneys, a medical doctor, a psychologist, a psychiatric pharmacologist, a neuropsychologist, three friends, and an investigator. PCR Tr. iv-vii; App. Ex. 53 and 57. The State presented the testimony of retired Highway Patrol Sergeant Ralph Roark. PCR Tr. vi. The motion court then denied all Forrest's remaining claims. PCR L.F. 369-399.

Standard of Review

The standard of review for denial of a 29.15 motion is clear error. "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Moss v. State*, 10 S.W.3d 508, 511 (Mo. 2000).

The majority of Forrest's claims allege ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, Forrest must satisfy the two pronged *Strickland* test: he must show that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise in similar circumstances, and he must show that he was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to prove prejudice, Forrest must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. A reasonable probability under *Strickland* is "a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694.

Argument

I. Trial counsel reasonably decided not to obtain a PET scan of Forrest's brain

The State notes at the outset of this point that the State made many of the arguments in this point in *State v. David Zink*, no. SC88279 (argued and submitted Jan. 17, 2008).

A. Motion court testimony

1. Dr. David Preston

Dr. David Preston, a physician practicing in nuclear medicine, testified as an expert witness in Forrest's behalf. PCR Tr. 78. Dr. Preston conducted a positron emission tomography (PET) scan of Forrest's brain. PCR Tr. 90. A PET scan allows an examiner to evaluate the glucose use, and thus the relative activity, of various organs of the body. PCR Tr. 84.

In a PET scan, doctors first place the patient in a controlled environment such as a quiet dark room and wait for them to relax. PCR Tr. 92. They then inject a radioactive tracer named flurodeoxyglocose (FDG) into the patient. *Id.* FDG imitates glucose and goes to the areas of the body that are using glucose. *Id.* As the body does not metabolize

FDG, the FDG remains in the body for a certain amount of time. *Id*. The doctors then scan the body, in this case the brain, to determine where the FDG has ended up. *Id*. Doctors then put the digital data readouts into a computer and process it though various algorithms. *Id*. The end result is a chart demonstrating relative FDG levels in the brain. *Id*.

Dr. Preston found that there was decreased activity in the frontal lobe of Forrest's brain. PCR Tr. 98-99; Pet. Ex. 17 at 3. The frontal lobe is responsible for thinking, behavioral planning, and executive functioning. PCR Tr. 99. Second, he found an asymmetry between the right and left frontal and parietal lobes with the right frontal lobe generating excessive activity. PCR Tr. 103-104; Pet. Ex. 17 at 3. Third, he found a reduction of activity in the cingulate gyrus, a communication system between the frontal lobes and the limbic system. Pet. Ex. 17 at 3. Dr. Preston supported his findings by comparing Forrest's results with the NeuroQ database maintained by the University of California at Los Angeles. PCR Tr. 95-96; Pet. Ex. 16 at 2-3.

Some of the abnormalities in Forrest's brain could have been caused by a closed head injury, such as being hit by a baseball bat. PCR

Tr. 120. The abnormalities also could have been caused by Forrest's use of methamphetamine, PCP, and other drugs. *Id.*

Dr. Preston also testified that the PET scan could not predict future criminal behavior or determine a person's state of mind in the past. PCR Tr. 130. Further, Dr. Preston could not make any diagnosis of a psychological condition in Forrest's case. PCR Tr. 130-131. "The most" that Dr. Preston could say is that Forrest had a "major deficiency" in glucose uptake in the frontal lobes. PCR Tr. 131.

2. Dr. Roswell Lee Evans

Dr. Evans, a psychiatric pharmacist, testified at Forrest's trial. PCR Tr. 216. Dr. Evans testified that Dr. Preston's report was consistent with Dr. Gelbort's pre-trial findings and that Dr. Preston's report would have helped to "illustrate" his findings. PCR Tr. 241-242, 243. Further, Dr. Preston's report would not have altered any of Dr. Evans's ultimate conclusions. PCR Tr. 252

3. Dr. Michael Gelbort

Dr. Gelbort, a neuropsychologist, prepared a pretrial report and testified at Forrest's trial. PCR Tr. 483-484. Dr. Gelbort found at trial that Forrest had impairment in the right front portion of his brain that

affected visual processing and impulse control. Tr. 1543-1544. Dr. Preston's report was consistent with Dr. Gelbort's findings and would have "enhanced" Dr. Gelbort's testimony. PCR Tr. 492-493. Put another way, it would have increased Dr. Gelbort's comfort level from "96 percent" to "98 percent." PCR Tr. 510.

Dr. Gelbort also testified that he could not make any inference about the nature or depth of Forrest's mental health issues based on the PET scan. PCR Tr. 512.

4. Dr. Robert Smith

Dr. Smith, a clinical psychologist, testified at Forrest's trial as well as the PCR evidentiary hearing. PCR Tr. 133. As at trial, he diagnosed Forrest with dysthymic disorder, cognitive disorder, and substance dependence. PCR Tr. 139. He testified that Dr. Preston's report supports the findings that he and Dr. Gelbort made prior to trial. PCR Tr. 156. Dr. Smith also stated that nothing in Dr. Preston's report would have changed his diagnosis. PCR Tr. 158. Dr. Smith also did not need a PET scan to diagnose Forrest with dysthymic disorder or substance abuse. PCR Tr. 161-162. Further, a PET scan did not suffice to diagnose these mental impairments. PCR Tr. 161.

5. Counsel's actions

Several doctors recommended to Forrest's attorneys that the defense further investigate the possibility of brain injury. PCR Tr. 538, 541.Counsel Sharon Turlington was aware of the benefits of a PET scan and had used them in other trials. PCR Tr. 534. Turlington had worked with Dr. Preston before. PCR Tr. 535.

Turlington filled out a "E-request" for a PET scan in September 2004. PCR Tr. 541. She knew at that time that a PET scan could "potentially" show brain damage. PCR Tr. 542. Turlington contacted Dr. Ken Smith, head of neurosurgery at St. Louis University, and asked him to conduct the scan. PCR Tr. 544. Dr. Gelbort also called Dr. Smith to request the scan. PCR Tr. 504-505, 546. Dr. Smith refused to perform a PET scan without first performing an MRI. PCR Tr. 544, 545, 546.

Turlington testified that she did not want Forrest to undergo a PET scan if the state could find out about it. PCR Tr. 632, 635. She testified that if the state knew about the scan, they would be able to use it if the results were negative (and thus detrimental to Forrest). PCR Tr. 632. Turlington believed that she could not obtain a scan *ex parte*

due to Missouri Supreme Court's decision in *State v. Anderson*, 79 S.W.3d 420, 434 (Mo. 2002).

Turlington also testified that she did not want an MRI performed because she believed that an MRI would not show any brain damage. PCR Tr. 634. She was afraid that the state could use the negative findings from an MRI to attack the PET scan results. PCR Tr. 634.

B. The motion court's findings

The motion court accepted Dr. Preston's testimony dealing with the PET scan, the results of the PET scan, and the medical basis for the PET scan as true. PCR L.F. 392. The motion court also found credible all the doctors' testimony that a PET scan did not establish a definite connection to any specific mental disease or defect. *Id.* The motion court found that the doctors could not use to PET scan to corroborate their diagnoses because of a lack of any generally accepted scientific method connecting personality disorders and physical deficits in the brain. *Id.*

The motion court found that counsel acted reasonably for three reasons. First, the motion court held that counsel's decision not to pursue a PET scan was reasonable because counsel could not order the examination *ex parte* and did not want the state to know about the scan.

PCR L.F. 393. Second, the motion court found that Dr. Preston's testimony would have been cumulative to Dr. Smith's testimony and Dr. Gelbort's testimony. PCR L.F. 393-394. Third, the motion court found that Dr. Preston's testimony would have been inadmissible in the guilt phase. PCR L.F. 395. The motion court also held that Forrest could not show prejudice in either the guilt or penalty phases due to the overwhelming evidence against him and that horrific nature of the murder. PCR L.F. 395-396.

C. Analysis

1. Counsel reasonably did not want the State to know about the test

Counsel's reasonable strategic decisions cannot constitute ineffective assistance of counsel. *Strong v. State*, 263 S.W.3d 636, 642 (Mo. 2008). Turlington's decision not to request a PET scan was a reasonable strategic decision.

First, Turlington did not order the scan because she felt that she could not do it *ex parte* and she did not want the state to know about the scan. Turlington was correct that she could not file *ex parte*. In *State v. Anderson*, 79 S.W.3d 420, 434 (Mo. 2002), the defendant filed an *ex*

parte motion requesting that he be transported to a St. Louis hospital for mental health and neurological tests. This Court held that the *ex parte* request violated Rule 20.04 and that the defendant was required to serve a copy of the motion on the state. *Id.*

Further, any request for testing would be based on *Ake v. Oklahoma,* 470 U.S. 68 (1985). The Supreme Court held in *Ake* that an indigent defendant is entitled to court-appointed mental health experts when necessary. 470 U.S. at 82-83. The question here was not whether Forrest was entitled to an expert of his own choosing. The question was whether Forrest should be transported to a hospital. "*Ake* did not create a shield behind which the defense could obtain *ex parte* rulings on the merits of the case or on contested issues." *State v. Tokar*, 918 S.W.2d 753, 765 (Mo. 1996). Any *ex parte* motion that Forrest would have filed would have asked for a ruling on a disputed issue. Forrest was not entitled to *ex parte* review of his case.

Therefore, Turlington was correct that the State would have discovered the test. She did not want the State to discover the test in case the test turned out negative. She therefore reasonably decided not

to pursue the PET scan. This reasonable strategic decision is not ineffective assistance of counsel.

2. Dr. Preston's testimony was cumulative

Dr. Smith testified that Dr. Preston's report supports the findings that he and Dr. Gelbort made prior to trial and that nothing in Dr. Preston's report would have changed his diagnoses. PCR Tr. 156. Dr. Evans testified that Dr. Preston's report was consistent with Dr. Gelbort's pre-trial findings and that Dr. Preston's report would have helped only to "illustrate" his findings. PCR Tr. 241-242, 243. Dr. Gelbort testified that Dr. Preston's report was consistent with his findings and that Dr. Preston's report would have "enhanced" Dr. Gelbort's testimony and increased Dr. Gelbort's comfort level from "96 percent" to "98 percent." PCR Tr. 492-493, 510. Dr. Gelbort testified at trial that Forrest suffered from impairment in the right front portion of his brain that affected visual processing and impulse control. Tr. 1543-1544.

Dr. Preston's testimony would have only "illustrated" or "enhanced" the expert testimony that Forrest presented at trial. Dr. Preston added no new diagnoses. He only added supporting facts to the

diagnoses presented at trial. Adding additional methods of proof, as Forrest wishes to do here, does not change the substance of the trial evidence. This evidence is cumulative to the testimony of Drs. Smith, Evans, and Gelbort. *Black v. State*, 151 S.W.3d 49, 56 (Mo. 2004). This Court has long held that counsel is not ineffective for failing to present cumulative testimony. *Goodwin v. State*, 191 S.W.3d 20, 38 (Mo. 2006); *Storey v. State*, 175 S.W.3d 116, 138 (Mo. 2005); *Skillicorn v. State*, 22 S.W.3d 678, 683 (Mo. 2000).

Put another way, counsel is not ineffective for failing to request a PET scan when the jury already knew about the defendant's brain damage. *Walls v. State*, 926 So.2d 1156, 1171 (Fla. 2006). On a related note, Forrest cannot show prejudice because the scan results because a mental health expert had testified about the defendant's problems and the scan results were not necessary to the diagnosis. *Ferrell v. State*, 918 So.2d 163, 176 (Fla. 2005).

This Court should reject Forrest's attempt to render counsel ineffective for failing to put on supporting evidence because there is no end to possible supporting evidence. Here, the PET scan is the supporting evidence. Other medical tools could potentially provide

supporting evidence, such as an x-ray, an MRI, a SPECT scan, or a CT scan, and with the rapid advance of technology, refinements of these tests or entirely new tests may come into existence. Must counsel subject a defendant to every possible test that may support a diagnosis? Must counsel put all of the supporting evidence before a jury? Requiring counsel to do so will place a near-impossible burden on defense attorneys, especially in capital cases. The requirement that Forrest seeks also will put even more financial pressure on the Public Defender's Office, who will have to pay for many more expensive medical tests in cases where a defendant's mental state is at issue. This Court should avoid that result by leaving strategic decisions about which medical tests to pursue up to counsel.

3. Dr. Preston's testimony would have been inadmissible in the guilt phase

Forrest's guilt-phase mental health strategy was to show diminished capacity, or in other words, the inability to deliberate. Diminished capacity requires a defendant to show that he has a mental disease or defect and that the mental disease or defect made it

impossible for him to have the required mental state for deliberation. *Nicklasson v. State*, 105 S.W.3d 482, 484 (Mo. 2003).

The experts in the motion court testified that the PET scan could not demonstrate the existence of the types of mental diseases or defects that Forrest suffers from. Dr. Preston testified that the PET scan could determine a person's state of mind in the past. PCR Tr. 130. Further, He also could not make any diagnosis of a psychological condition. PCR Tr. 130-131. "The most" that Dr. Preston could say is that Forrest had a "major deficiency" in glucose uptake in the frontal lobes. PCR Tr. 131. Dr. Smith did not need a PET scan to diagnose Forrest with dysthymic disorder or substance abuse. PCR Tr. 161-162. Dr. Gelbort could not make any inference about the nature or depth of Forrest's mental health issues based on the PET scan. PCR Tr. 512.

Missouri courts use the *Frye* test to determine the admissibility of scientific evidence. Under this test, results of a scientific procedure "may be admitted only if the procedure is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" *State v. Kinder*, 942 S.W.2d 313, 327 (Mo. 1996), quoting *State v. Davis*, 814 S.W.2d 593, 600 (Mo. 1991), *quoting Frye v. United*

States, 293 F. 1013, 1014 (D.C. Cir. 1923). "Admission of an expert's opinion concerning scientific evidence depends upon wide acceptance in the relevant scientific community of its reliability." *State v. Erwin*, 848 S.W.2d 476, 480 (Mo. 1993); *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. 1984). Further, "expert testimony should be excluded if it does not assist the jury or if it unnecessarily diverts the jury's attention." *State v. Brown*, 998 S.W.2d 531, 549 (Mo. 1999); *State v. Lawhorn,* 762 S.W.2d 820, 823 (Mo. 1988).

In this case, the PET scan could not show that Forrest suffered from a mental disease or defect. Dr. Preston has testified in the past that "the images produced by the [PET scan] could not predict behavior and did not have a causal relationship to criminal behavior." *United States v. Purkey*, 428 F.3d 738, 753 (8th Cir. 2005).

Therefore, under *Frye*, the PET scan evidence would have been inadmissible in the guilt phase to show that Forrest suffered from a mental disease because there is no generally accepted medical practice making that link. This evidence was also irrelevant in the guilt phase; Dr. Smith testified that he did not need a PET scan to diagnose Forrest. PCR Tr. 161-162. This evidence therefore could not have helped the jury

to determine if Forrest had a mental disease or defect because it does not address any of the diagnostic criteria. It therefore was irrelevant and inadmissible. *Brown*, 998 S.W.2d at 549.

This Court has repeatedly held that counsel in not ineffective for failing to offer inadmissible evidence. *Williams v. State*, 168 S.W.3d 433, 441 (Mo. 2005); *State v. Ferguson*, 20 S.W.3d 485, 507 (Mo. 2000). Forrest's claim thus fails with respect to the guilt phase.

4. Forrest cannot show prejudice

In order to show prejudice, Forrest must demonstrate a reasonable probability that the result of the trial would have been different if counsel had presented Dr. Preston's testimony. *Strickland*, 466 U.S. at 694. This Court characterized the evidence of Forrest's guilt as "overwhelming." *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. 2006). This Court was correct. Forrest killed Joann Barnes, a sheriff's deputy. He killed Harriet Smith in order to steal methamphetamine. He killed Michael Wells because he was at Smith's house. There is not a reasonable probability that Dr. Preston's testimony would have changed that result, especially considering that neither Dr. Preston nor any other doctor could have definitively linked the PET scan results and the

diagnoses of dysthymic disorder and substance abuse and that Dr. Smith testified that Forrest had brain damage.

Similar logic applies to the penalty phase. "The question is whether, when all the mitigation evidence is added together, is there a reasonable probability that the outcome would have been different?" *Storey v. State*, 175 S.W.3d 116, 160 (Mo. 2005), quoting *Hutchison v. State*, 150 S.W.3d 292, 306 (Mo. 2004). Further, "the defendant 'must show that, but for his counsels' ineffective performance, there is a reasonable probability that the jury would have concluded after balancing the aggravating and mitigating circumstances, death was not warranted.'" *Storey*, 175 S.W.3d at 160, quoting *Rousan v. State*, 48 S.W.3d 576, 582 (Mo. 2001). In this case, the jury's verdict would not reasonably have changed after hearing Dr. Preston's evidence.

In addition to the horrific details of the murder presented in the guilt phase, the State produced penalty-phase evidence about Forrest's multiple prior convictions for drugs and weapons violations. The State also produced substantial evidence that Forrest used, made, and sold methamphetamine.

In contrast to this powerful evidence, Dr. Preston's testimony would have had minimal value. The PET scan would not present any new findings to the jury. It would attempt to only provide medical proof of Forrest's dysthymic disorder and substance abuse and justify his horrific criminal offense, a step that the doctors admit could not be done. Simply put, this evidence was weak.

Dr. Preston's testimony would also have been damaging for Forrest's mitigation case. Dr. Preston testified that the increased activity in Forrest's frontal lobes could have been the result of Forrest's use of methamphetamine and other drugs. PCR Tr. 120. The State thus could have agued to the jury that Forrest's drug use caused his brain deficits and that Forrest was responsible for the results of his drug abuse.

Presenting Dr. Preston's testimony would not have created a reasonable probability that the result of the trial would have been different in light of the horrific facts of this case. This Court has declined to find *Strickland* prejudice in light of particularly egregious crimes such as those in this case:

> When all of the evidence is viewed together, in this case, there is no question that the jury sentenced [Forrest] to death because of his horrendous murder and not because counsel did not object more often or complain about any of the claims in these points relied on, in any combination.

Storey, 175 S.W.3d at 159-160. This Court should affirm the motion court's denial of this claim.

II. Trial counsel reasonably decided not to introduce evidence that Forrest injured his head during a violent drug deal

Forrest contends that his attorneys should have introduced Forrest's medical records from the Valley Memorial Hospital in California. App. Br. at 55-62. These records would have shown that Forrest was treated in the emergency room after he was hit by a baseball bat, that he had two suicide attempts, and that he received in-patient treatment for depression, alcohol addiction, and drug addiction. Pet. Ex. 11.

Forrest also alleges that counsel should have corrected Dr. Gelbort when he testified that Forrest may have misreported that he was hit by a baseball bat. App. Br. 55-62.

A. Trial counsel's testimony

Trial counsel David Kenyon testified that he did not want the jury to hear about the incident in which Forrest was hit over the head with a baseball bat because it was not "mitigation friendly." Kenyon Depo. 34. Kenyon would not have wanted to introduce the medical records through a mental health expert because the state could inquire about the circumstances of the baseball bat incident. *Id.*

Kenyon explained that the incident involved a drug sale. *Id.* at 69. Another man had bought drugs from Forrest and had not paid him. *Id.* Forrest later purchased drugs from that man and did not pay him. *Id.* at 70. A women lured Forrest back to a hotel under pretenses of either sex or drugs. *Id.* When Forrest arrived in the hotel room, the other man in the drug deals "smashed" him with a baseball bat. *Id.* Kenyon specifically wanted to keep any evidence that Forrest sold drugs away from the jury and "especially" any evidence of violent drug deals. *Id.* at 71-72.

Counsel Sharon Turlington testified that she did not introduce the records to correct Dr. Gelbort because she did not feel that it was crucial to the case. PCR Tr. 532-533.

B. The motions court's findings

The motion court found that counsel reasonably chose not to put the medical records into evidence to discuss the baseball bat incident because details about that incident would have damaged Forrest's case. PCR L.F. 390-391. The court found that the testimony about Forrest's drug and alcohol addiction would have been cumulative to the testimony presented by Dr. Smith, Dr. Evans, and Dr. Gelbort. *Id.* at 391. The motion court also found that Forrest could not show prejudice. *Id.*

C. Analysis

Counsel is not ineffective for failing to admit evidence that would damage their client's case. Here, if counsel had attempted to introduce the medical records through a mental health expert such as Dr. Gelbort, counsel would have opened the door to discussion of the baseball bat incident. The jury most likely would not have been impressed by Forrest's involvement in a violent drug deal. Counsel reasonably kept this damaging evidence out.

Forrest was not prejudiced by counsel's decision not to introduce the records about his drug abuse and depression. Dr. Smith testified

about Forrest's depression, alcoholism, and methamphetamine addiction. Tr. 1419-30. Dr. Gelbort detailed Forrest' thirty-year history of substance abuse. Tr. 1545-51. Dr. Evans testified at length about Forrest's addictions to alcohol and methamphetamine. Tr. 1572-1585. Further testimony about Forrest's depression and drug use would have been cumulative. Counsel is not ineffective for failing to adduce cumulative evidence. *Goodwin v. State*, 191 S.W.3d 20, 38 (Mo. 2006); *Storey v. State*, 175 S.W.3d 116, 138 (Mo. 2005).

Forrest also cannot show prejudice because counsel did not introduce evidence about the suicide attempts. Both of those suicide attempts occurred within one week and were directly related to substance abuse and Forrest's breakup with his girlfriend. Pet. Ex. 11 at 17, 28. These two suicide attempts do not demonstrate that Forrest is crazy. They both resulted from a romantic breakup, a circumstance not present here. In comparison to the brutal nature of the three murders, Forrest's past record, and the mitigation evidence Forrest put on, the suicide attempts are insignificant. Forrest cannot show a reasonable probability that the result of the trial would have been different if counsel had introduced this evidence.

III. Trial counsel reasonably decided not to put on cumulative mitigation evidence

Forrest alleges that counsel was ineffective for failing to call Anthony Jacobs, a friend, Dennis Smock, a former employer, and Curt Fuller, a former neighbor. App. Br. 63-70.

A. Anthony Jacobs

Anthony Jacobs testified that Forrest was a "fun guy" to be around. PCR Tr. 187. Jacobs knew Forrest in California. *Id*. at 186. He rode motorcycles with Forrest. *Id*. at 188. He testified that Forrest was good with Doug Del Mastro's children. *Id*. at 189. He also testified that Forrest drank a lot of alcohol and used methamphetamine. *Id*. at 189-191.

The motion court found that this testimony was cumulative and that counsel was not ineffective for failing to adduce cumulative testimony. The motion court was correct. Both Doug and Sue Del Mastro testified that Forrest was good with their children. Tr. 1593-1594, 1608-1609. Angelia Gamblin testified that Forrest "was very much fun to be around." Tr. 1504. The record is replete with evidence that Forrest used alcohol and methamphetamine. Tr. 1419-30, 1545-51,

1572-1585. Craig Cranholm testified that Forrest rode motorcycles. Tr. 1444. Counsel is not ineffective for failing to present cumulative evidence. *Goodwin v. State*, 191 S.W.3d 20, 38 (Mo. 2006); *Storey v. State*, 175 S.W.3d 116, 138 (Mo. 2005).

B. Dennis Smock

Smock testified that he employed Forrest as a roofer in California. PCR Tr. 168, 175. He employed Forrest for two to four years in the late 1980 and early 1990s. PCR Tr. 168. He did not promote Forrest because Forrest would have struggled with the additional responsibility. *Id.* at 171-172. Smock remembered that Forrest occasionally would miss work due to alcohol. *Id.* at 175, 180-181. Smock also discussed religion with Forrest and referred Forrest to missionaries from the Church of Jesus Christ of Latter-day Saints (the Mormon Church). *Id.* at 173-175.

The motion court found that Smock's testimony about religion was cumulative. PCR L.F. 398. This determination was correct. Clayton Forrest testified that Forrest arranged for him to be introduced to the Mormon Church, that Forrest occasionally went to church with him, and that Forrest attended his baptism. Tr. 1929-1630. Smock's testimony would have been cumulative. Counsel is not ineffective for

failing to present cumulative evidence. *Goodwin v. State*, 191 S.W.3d 20, 38 (Mo. 2006); *Storey v. State*, 175 S.W.3d 116, 138 (Mo. 2005).

C. Curt Fuller

Forrest did not mention Curt Fuller in his amended motion. Instead, he pled that counsel should have called Duane Fuller, Curt's brother, as a witness. PCR L.F. 173-175, 187-188. Forrest moved to amend his amended PCR motion by interlineation to substitute Curt Fuller for Duane Fuller. PCR L.F. 344-349. The State objected, arguing that Rule 29.15(g) prohibited that amendment. PCR L.F. 356-358. The motion court allowed the amendment. PCR Tr. 68.

Curt Fuller testified via deposition. Pet. Ex. 53. He was Earl Forrest's neighbor when Forrest was in grade school and high school. *Id.* at 6-7. Fuller testified that Forrest's father drank. *Id.* at 16. He described an incident in which Forrest's father hit him publicly. *Id.* at 18-20. He also testified that Forrest used drugs and alcohol. *Id.* at 21.

The motion court found that Fuller's testimony was cumulative to William Forrest's testimony. PCR L.F. 397-398.

First, the motion court erred in allowing Forrest to amend his PCR motion to include Curt Fuller. The law is well-established that

"amendments of a Rule 29.15 motion are not governed by the Rules of Civil Procedure [including Rule 55.33] but by Rule 29.15(f)."[2] *Kilgore v. State*, 791 S.W.2d 393, 395 (Mo. 1990); *State v. Vinson*, 800 S.W.2d 444, 447 (Mo. 1990). Further, the time limits in Rule 29.15 bar any amendment to a Rule 29.15 motion made more than sixty days after counsel is appointed. *Id.* Rule 29.15's time limits are constitutional and mandatory. *Day v. State*, 770 S.W.2d 692, 695 (Mo. 1989). Forrest's amendment was untimely. The circuit court should not have considered it.

The motion court did correctly find that Fuller's testimony was cumulative. William Forrest, petitioner Forrest's brother, testified that Forrest was an alcoholic, Tr. 1366, that Forrest's father was an alcoholic, Tr. 1365, that Forrest's father beat Forrest up in front of the neighbors, Tr. 1369-1370, and that Forrest's father screamed at Forrest, Tr. 1372. He also testified that he did not know any controlled substances that Forrest had not tried. Tr. 1380. Fuller's testimony added nothing of substance to Forrest's case. It was cumulative. Counsel is not ineffective for failing to present cumulative evidence.

[2] The version of Rule 29.15(f) at issue in *Kilgore* is now Rule 29.15(g).

Goodwin v. State, 191 S.W.3d 20, 38 (Mo. 2006); *Storey v. State*, 175 S.W.3d 116, 138 (Mo. 2005).

D. Forrest was not prejudiced

In order to show prejudice, Forrest must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. He cannot do so.

The testimony of these witnesses is, for the most part, cumulative to testimony presented at trial. Thus, the jury already heard these facts and chose to recommend the death penalty. Forrest cannot show a reasonable probability that the jury would have changed its mind had he presented the same evidence through different witnesses. He therefore cannot show prejudice.

IV. This Court's proportionality review is proper

Forrest alleges that this Court's proportionality review violates both the Eighth Amendment and Mo.Rev.Stat. §565.035.6. App.Br. at 71-80. He alleges that this Court is required to compare his case to other cases in which the death penalty was not imposed. *Id.*

This Court has repeatedly rejected identical claims. *Glass v. State*, 227 S.W.3d 463, 476 (Mo. 2007); *State v. Edwards,* 116 S.W.3d 511, 549-550 (Mo. 2003); *Lyons v. State,* 39 S.W.3d 32, 44 (Mo. 2001); *State v. Clay,* 975 S.W.2d 121, 146 (Mo. 1998). This Court should do likewise here.

The only new argument that Forrest presents is Justice Stevens' statement regarding the denial of certiorari in *Walker v. Georgia,* 129 S.Ct. 453 (2008). Justice Stevens criticized the Georgia Supreme Court's "perfunctory" proportionality review because it did not consider cases in which a defendant was sentenced to life imprisonment. *Id.* at 455-457.

Justice Stevens' statement is not governing law. In many ways, it is merely a reaffirmation of his concurrence in *Pulley v. Harris*, 465 U.S. 37, 54 (1984). Further, Justice Stevens' statement is contrary to the Court's decision in *Pulley v. Harris,* 465 U.S. 37 (1984). The Court there held that proportionality review is not mandated by the Constitution. *Id.* at 44-46, 50-51. The Court specifically rejected Justice Stevens' assertions to the contrary. *Id.*

Pulley is the governing law. It has not changed despite Justice Stevens' 2008 restatement of his 1984 views on the need for

proportionality review. Thus, there is no reason for this Court to reconsider long-settled law on this issue.

V. Forrest was not prejudiced by testimony that he had a large hunting knife on his belt when he was arrested after a shootout with the police

Forrest alleges that trial counsel was ineffective for failing to object to evidence that the Forrest was armed with a large hunting knife at the time of his arrest. App. Br. 81-87

Highway Patrol Corporal Henry Folsom and Highway Patrol Sergeant Ralph Roark testified at trial that Forrest had a large knife attached to his belt when he was arrested. Tr. 908, 1023, The State also introduced into evidence State's Exhibit 45, which showed a "large hunting or survival-type knife." Tr. 1036. Sergeant Roark brought the knife that he confiscated from Forrest to the PCR hearing. PCR Tr. 607. He testified that the knife in State's Exhibit 45 and the knife he removed from Forrest's belt were the same knife. PCR Tr. 608. The knife had a 9.5 inch blade. *Id*. at 606.

The motion court found that Roark's testimony was credible and that there was only one knife. PCR L.F. 381-382. The motion court also

found that testimony about the knife was admissible because it demonstrated "Forrest's condition and state of mind immediately after" his gun battle with the police. *Id.* at 382. The motion court also found that Forrest could not show prejudice because of the substantial evidence that Forrest had other weapons at the time of the crime. *Id.* at 382-383.

The motion court was correct. Evidence is admissible if it is legally and logically relevant. *State v. Tisius*, 92 S.W.3d 751, 760 (Mo. 2002). Legal relevance requires a balance between the probative value and the prejudicial effect of the evidence. *Id.* Evidence is logically relevant when it has "some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial." *State v. Davis*, 211 S.W.3d 86, 88 (Mo. 2006), *quoting State v. Bernard*, 849 S.W.2d 10, 13 (Mo. 1993).

The evidence is logically relevant because it tended to show that Forrest had a plan to murder law enforcement officers. One of the elements of first-degree murder is deliberation, "cool reflection for any period of time however brief." Mo.Rev.Stat. §§565.002 and 565.020 (2000). The fact that Forrest armed himself with a nine-inch hunting knife (as well as a pistol and a rifle), as well as his gun battle with the

police, demonstrates that he wanted to harm the police and shows deliberation.

Further, the presence of a knife on Forrest's person immediately after the gunfight with the police provides a complete picture of the crime and Forrest's arrest. The State is entitled to show the jury a complete picture of a crime and may use uncharged misconduct to do so. *State v. Johnson*, 207 S.W.3d 24, 42 (Mo. 2006); *State v. Mayes*, 63 S.W.3d 615, 631 (Mo. 2001); *State v. Clayton*, 995 S.W.2d 468, 481 (Mo. 1999).

The knife was also legally relevant. It tended to show that Forrest deliberated on the murder of Deputy Barnes and intended to have a violent fight with the police when they came to arrest him for the other two murders. These probative details outweigh any undue prejudice to Forrest. Therefore, evidence about the knife was admissible. Counsel is not ineffective for failing to make a meritless objection. *Middleton v. State*, 103 S.W.3d 726, 741 (Mo. 2003).

Further, Forrest cannot show prejudice from the admission of the knife. The guilt phase evidence demonstrated that he murdered Harriet Smith to steal $25,000 worth of methamphetamine from her. He shot

Smith once, talked her back into her house, and then fatally shot her. He shot Michael Wells simply because he was a witness to the murder of Smith. Then, when the police came to question him, he murdered Deputy Joann Barnes before she even had the chance to draw her gun. He then wounded the Dent County Sheriff and engaged in a shootout with other police officers. In light of this evidence, there is not a reasonable probability that the result of the guilt phase would have been different if counsel had successfully objected to the evidence about the knife.

He also cannot show prejudice in the penalty phase. The fact that Forrest had a knife on his belt when he was arrested pales in comparison to the circumstances of the murders. Further, the state introduced ample evidence that Forrest was dangerous due to his prior offenses, including illegal possession of a concealed .22 caliber handgun, illegal possession of a four-inch-long-gravity-type knife, and illegal possession of a .44 Ruger handgun. Tr. 1313-1314. Forrest also had been convicted in California for possession of a concealed firearm, and possession of a firearm by a felon. Tr. 1350-1351; St. Ex. 60 and 61. The jury had ample evidence before it to conclude that Forrest was a

dangerous person and used weapons illegally. Forrest therefore cannot show a reasonable probability that the jury would have voted for life imprisonment absent the evidence about the knife.

VI. Forrest's prior convictions were properly before the jury

Forrest alleges that counsel was ineffective for failing to object to State's Exhibits 60 and 61. App. Br. 88-94. He contends that State's Exhibit 60 contains inadmissible hearsay and that State's Exhibit 61 was not properly certified. *Id.*

State's Exhibit 60 is a certified copy of Forrest's records from the California Bureau of Criminal Information and Analysis. State's Exhibit 61 is a certified copy of Forrest's Santa Clara, California, conviction for possession of a concealed weapon.

The motion court found that State's Exhibit 60 was properly certified under Mo.Rev.Stat. §490.220 (2000). PCR L.F. 384. The motion court then found that State's Exhibit 60 was never passed to the jury. *Id.* The prosecutor orally told the jury that Exhibit 60 contained Forrest's convictions for possession of dangerous drugs and possession of marijuana. *Id.*

The motion court found that State's Exhibit 61 was not properly certified under Mo.Rev.Stat. §490.130 (2000) because a California judge did not certify it. *Id*. at 385 The motion court found that the information in State's Exhibit 61, Forrest's conviction for possession of a concealed firearm, was contained in State's Exhibit 60. *Id*.

The motion court correctly decided this claim. Mo.Rev.Stat. §490.220 (2000) provides that "all … exemplifications of office books, kept in any public office of … a sister state, not appertaining to a court, shall be evidence in this state" if the keeper of those records attests to their validity and attaches his seal (if he has one). Missouri courts have consistently held that prison records demonstrating prior convictions are admissible under §490.220 if they are properly authenticated. *State v. Brown*, 476 S.W.2d 519, 523 (Mo. 1972); *State v. Dismang*, 151 S.W.3d 155, 161 (Mo.App. S.D. 2004); *State v. Myers*, 538 S.W.2d 892, 895-96 (Mo.App. St.L.D. 1976).

The records in State's Exhibit 60 were prepared by Dennis Cross, the keeper of records for the Bureau of Criminal Information and Analysis, California Department of Justice. St. Ex. 60 at 1. Cross certified that he was the legal keeper and custodian of the records and

that the records were true and correct copies St. Ex. 60 at 2. Cross also attached his seal. *Id*. These records met the statutory requirements for admission into evidence under §490.220. Counsel is not ineffective for failing to make a meritless objection. *Middleton v. State*, 103 S.W.3d 726, 741 (Mo. 2003).

Forrest makes much ado about the fact that these records contained hearsay evidence about his past crimes. He cannot show any prejudice from whatever hearsay was in the records because the jury was never presented with the records. The circuit court found that the prosecutor told the jury only that Exhibit 60 showed a 1968 conviction for possession of dangerous drugs and possession of marijuana, Tr. 1350-51. PCR L.F. 385. Further, the motion court found that Exhibit 60 was never passed to the jury, Tr. 1351-52, 1742. PCR L.F. 385. Forrest presents no evidence to the contrary. The hearsay evidence therefore could not have had any effect on the jury's verdict. Forrest therefore cannot show a reasonable probability that the result of the trial would have been different.

Forrest likewise cannot show *Strickland* prejudice due to the improper admittance of State's Exhibit 61. The key information in that

exhibit, that Forrest was convicted in Santa Clara County, California, on one count of conviction for possession of a concealed weapon, was also in State's Exhibit 60. St. Ex. 60 at 6. Thus, even if counsel had successfully objected to Exhibit 61, the key information from that exhibit was properly before the jury. Forrest cannot show prejudice from the admission of cumulative evidence. *State v. Glass*, 136 S.W.3d 496, 519 (Mo. 2004); *Moss v. State*, 10 S.W.3d 508, 512 (Mo. 2000).

Finally, Forrest does not dispute that he actually has all of the prior convictions demonstrated in State's Exhibits 60 and 61. He also does not dispute that the State could have obtained correctly certified copies of all of those exhibits. Forrest cannot complain that the jury was correctly told about his past convictions.

VII. The prosecutor properly asked the venire whether they could return a death verdict in an open courtroom

Forrest contends that counsel was ineffective for failing to object to portions of the prosecutor's *voir dire* questioning. App. Br. 95-100.

The prosecutor asked the following question:

I'll tell you that if the jury should come back with a verdict of death, while all of -- all twelve must agree to that verdict,

> you come back into the courtroom, sit in the jury box just as you are now, the defendant would be present, all the lawyers would be present, anybody who wandered in off the street, after all, this is an open courtroom, anyone can attend, and your verdict would be announced to the defendant, and it would therefore be announced that you and your fellow jurors had voted that he should die, could you do that?

Tr. 370-371. The prosecutor asked other venire panels similar questions.[3] Tr. 523-524, 529-530, 599, 621-622. All of these questions were follow-up questions to individual venirepersons who expressed hesitation about voting for the death penalty. *Id.*

The motion court found that these questions were proper because they were analogous to asking venirepersons whether they could sign a death verdict as the foreperson. PCR L.F. 378. Thus, any motion opposing those questions would have been denied. *Id.*

This Court has "repeatedly rejected the claim that asking whether a prospective juror could sign a death verdict if selected as foreperson

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[3] The death qualification was done in small groups of twelve to fifteen venirepersons. Tr. 11-14, 137.

improperly seeks a commitment from the venireperson." *State v. Kreutzer*, 928 S.W.2d 854, 866 (Mo. 1996). *See State v. Chambers,* 891 S.W.2d 93, 102 (Mo. 1994); *State v. Parker*, 886 S.W.2d 908, 921 (Mo. 1994); *Clemmons v. State,* 785 S.W.2d 524, 529 (Mo.1990).

The questions approved in *Kreutzer* mirror the ones in this case:

Q: Do you believe you could sign a death verdict if it were your role to do so and return it in open court?

A: No, sir, I don't think I could.

Q: All right. You sound very definite.

A: I'm quite sure of that. That's the way I feel now....

Q: You're saying that you don't think under any circumstances that you could sign a death verdict[?] ...

A: Yes, sir, that's probably exactly what I'm trying to say.

928 S.W.2d at 865-866. There, the prosecutor specifically asked the venireperson whether he could return a death verdict in open court. The prosecutor asked the same basic question in this case.

There is no fundamental difference between asking a venireperson if he could sigh a death verdict and asking him if he could acknowledge that verdict in open court. Both questions test whether a venireperson

can actually return a death sentence. If a venireperson cannot return a death sentence, he or she cannot comply with their oath and cannot serve as a juror. *See Wainwright v. Witt,* 469 U.S. 412, 424 (1985).

Jurors also are required to publicly state their verdict if the jury is polled. Forrest's attorneys requested that the jury be polled in this case. Tr. 1747-1764. Thus, it is not a theoretical question as to whether the jurors could publicly acknowledge the verdict. It was required of them to do so. The prosecutor properly asked them whether they could do so.

Forrest contends that the prosecutor's question on this topic invoked passion and put the jury on notice that the community expected a death verdict. App. Br. 99-100. That argument flatly misreads the prosecutor's question. He asked whether the venirepersons could acknowledge a death sentence. Tr. 370-371. In other words, the hard question in the prosecutor's mind was imposing death. If, as Forrest contends, the prosecutor had wanted to use community pressure against a jury, he would have asked whether the venirepersons could return a sentence of life and highlighted the egregious facts of this case, thus signaling the jurors that the community would not approve of a life sentence.

The prosecutor's question was proper. Any objection would have been overruled. Counsel is not ineffective for failing to make a meritless objection. *Middleton v. State*, 103 S.W.3d 726, 741 (Mo. 2003).

VIII. The prosecutor's closing arguments were proper

Forrest contends that the counsel was ineffective for failing to object to the prosecutor's closing arguments in both the guilt and penalty phases. App. Br. 101-104.

The prosecutor made the following argument in the guilt phase: "You know this is murder in the first degree in all three instances. I simply ask that you do your duty." Tr. 1265. The motion court held that both of these arguments were proper. PCR L.F. 338 at ¶5.

The motion court was correct. This Court has repeatedly held that a prosecutor may argue that the jury has a duty to uphold the law. *State v. Roberts*, 948 S.W.2d 577, 594 (Mo. 1997); *State v. Mallett*, 732 S.W.2d 527, 537 (Mo. 1987); *State v. Preston*, 673 S.W.2d 1, 8 (Mo. 1984). The prosecutor did nothing more than that in his guilt phase argument.

Forrest challenges the bolded portion of the following penalty-phase argument:

> I was struck when I read some of what Edmond Burke [an] English philosopher … said, "All that is necessary for evil to triumph is for good men to do nothing."
>
> You could send him to prison. He knows all about prison. I suggest to you that's tantamount to doing nothing. It's not enough. Three people are dead. **Society is depending upon you. Do your duty. It doesn't have to be easy. It shouldn't be. But it needs doing.**

Tr. 1733.

Forrest challenged the non-bolded portion of this argument on direct appeal. This Court held the argument to be a proper discussion of mercy. *State v. Forrest*, 183 S.W.3d 218, 228 (Mo. 2006). This court also approved the prosecutor's comments on societal self-defense. *Id*. The challenged "duty" comment is nothing more than a continuation of those arguments. As such, it was proper.

Forrest cites *Viereck v. United States*, 318 U.S. 236 (1943) in support of his point. The closing argument in that case was completely different from the one here. There, in the case of a man for failing to

register as the agent of a German company during World War II, the prosecutor argued that:

> In closing, let me remind you, ladies and gentlemen, that this is war. This is war, harsh, cruel, murderous war. There are those who, right at this very moment, are plotting your death and my death; plotting our death and the death of our families because we have committed no other crime than that we do not agree with their ideas of persecution and concentration camps.
>
> This is war. It is a fight to the death. The American people are relying upon you ladies and gentlemen for their protection against this sort of a crime, just as much as they are relying upon the protection of the men who man the guns in Bataan Peninsula, and everywhere else. They are relying upon you ladies and gentlemen for their protection. We are at war. You have a duty to perform here.
>
> As a representative of your Government I am calling upon every one of you to do your duty.

318 U.S. at 248 n.3. The Court stated that this argument was "an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice." 318 U.S. at 247. The argument in *Vierick* directly suggested that citizens had a duty to be soldiers in World War II. Here, in contrast, the prosecutor's comments were directly related to evidence of Forrest's guilt on all three counts of first-degree murder, the lack of any evidence to support a lesser verdict, and the propriety of three death sentences. *Vierick* does not control this case.

Neither does *United States v. Young*, 470 U.S. 1 (1985). There, the prosecutor argued that

> If you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors in finding facts as opposed to the law that this Judge is going to instruct you, you think that's honor and integrity then stand up here in Oklahoma courtroom and say that's honor and integrity; I don't believe it.

Id. at 5-6. The prosecutor there told the jurors that they could not perform their jobs as jurors if they acquitted the defendant. Here,

in contrast, the prosecutor never told the jury that they could not return a life sentence. Instead, he argued that they needed to protect society from Forrest by recommending the death penalty. That argument was proper. *Forrest*, 183 S.W.3d at 228. *Young* does not control this case.

Finally, Forrest cannot show prejudice. With regard to the guilt phase, there was overwhelming evidence that Forrest committed all three murders and that he deliberated. With respect to the penalty phase, the "duty" comment was a small part of permissible arguments about mercy and about societal self-defense. The vast majority of those proper arguments would have been before the jury even if counsel had objected. Further, the state presented a strong case for the death penalty based on the circumstances surrounding the murders, Forrest's prior convictions, and the fact that he killed a sheriff's deputy. Forrest therefore cannot show a reasonable probability that the result of the trial would have been different if counsel had objected.

IX. The prosecutor's opening statement was proper

Forrest contends that counsel was ineffective for failing to object to the prosecutor's "improper personalization" during his penalty-phase

opening statement. App. Br. 105-108. He objects to the following statements:

> I believe that we -- that -- that the following statutory aggravating circumstances you will find proven beyond a reasonable doubt …
>
> *****
>
> I think the evidence has shown and will show is that the murder of Michael Wells was committed while the defendant was engaged in the commission of another unlawful homicide, that being of Harriett Smith.
>
> *****
>
> I think you will find -- it will be my position and that the evidence will show that the aggravating circumstances are proven.

Tr. 1298, 1299, 1300.

The motion court denied this claim without a hearing, finding that Forrest had not pled claims that entitled him to relief. PCR L.F. 338.

The motion court was correct. "One of the purposes of opening statement is to point out the significance of the evidence." *State v.*

Murray, 744 S.W.2d 762, 774 (Mo. 1988). Further, the prosecutor may present his theory of the case in an opening statement. *White v. State*, 939 S.W.2d 887, 902 (Mo. 1997). The prosecutor here set out the evidence that would be shown and explained that the evidence was necessary to prove the aggravating circumstances. His statements were proper. Any objection would have been meritless. Counsel is not ineffective for failing to make a meritless objection. *Middleton v. State*, 103 S.W.3d 726, 741 (Mo. 2003).

Further, even if the statements were not proper (and counsel should have objected), Forrest cannot show prejudice. The prosecutor produced evidence supporting each aggravating circumstance that he told the jury about in his opening statement. This Court found on direct appeal that the evidence supported the aggravating circumstances beyond a reasonable doubt. 183 S.W.3d at 232. Further, "the impact of an opening statement diminishes after introduction of evidence, instructions, and closing argument." *State v. Hutchison*, 957 S.W.2d 757, 765 (Mo. 1997). In the penalty phase of this capital case, the jury heard emotional testimony and eloquent arguments. These three brief statements did not create a reasonable probability that the jury would

have disregarded the remainder of the penalty phase. Forrest cannot show *Strickland* prejudice.

X. Trial counsel reasonably decided not to call Dr. Mark Cunningham as a witness

Forrest contends that counsel should have called Dr. Mark Cunningham as a penalty-phase witness. App. Br. 109-116.

A. Dr. Cunningham's testimony

Dr. Cunningham is a clinical and forensic psychologist. PCR Tr. 257. Dr. Cunningham testified that Forrest was disposed to commit violent crimes due to his genetic predisposition to substance abuse, his parent's alcoholism, his brain dysfunction, prior physical and emotional abuse, emotional neglect, and domestic violence. PCR Tr. 299-365. Dr. Cunningham described his methodology as follows:

> this is a view of behavior and life outcome that says that choice, even the choice to engage in profoundly destructive and criminal acts, doesn't just arise out of nothing, but all behavior arises out of this interaction of bio-psycho-social-formative factors, many of which the person had no choice about at all. And so it's the idea that you get a choice after

> the formative bio-psycho-social influences that you didn't get a choice about.

PCR Tr. 287. He also described his theory as

> So now the questions are not, could he control himself, but, what diminished his control; not did he have a choice, but what shaped the choice; not did he know right from wrong, but what formed and shaped his morality and value system; but not so much, what did he do, but how did we get here, or, how was this person impaired or damaged as they came to this offense?

PCR Tr. 280. Dr. Cunningham stated that he did not inquire about Forrest's past violent acts because they were not relevant to his analysis. *Id.* at 437-438.

Dr. Cunningham also testified that Forrest had a low risk for poor prison behavior due to his age and prior behavior in prison. PCR Tr. 412-417. He felt that he did not need to inquire into the specifics of Forrest's violent past in the community because those actions "were not relevant to his risk of violence in prison." *Id.* at 440. He also felt that the fact that Forrest killed a uniformed sheriff's deputy, wounded a

sheriff, and shot at other law enforcement officers was irrelevant based on his statistical analysis. *Id.* at 453.

B. Trial counsel's testimony

Counsel David Kenyon testified that he and counsel Sharon Turlington chose not to call Dr. Cunningham because they believed that calling him would allow that State to inquire about a previous homicide that Forrest allegedly committed in California and because Dr. Cunningham's preliminary assessment would not have been helpful to Forrest's case. Kenyon Depo. at 20-21, 67-68. Counsel Turlington testified that, based on her conversation with David Kenyon, they made a decision not to call Dr. Cunningham because his testimony would not be helpful. PCR Tr. 520-521.

C. The motion court's findings

The motion court found that Dr. Cunningham was not a credible witness based on his failure to consider the circumstances of the murders, his failure to consider, in relation to Forrest's adjustment to prison, the fact that Forrest killed a sheriff's deputy, his condescending statements about juries, his financial bias, and his in-court demeanor. PCR L.F. 387-388. The motion court also found that counsel made a

reasonable strategic decision not to call Dr. Cunningham because doing so would have opened the door to testimony about a past homicide in California that Forrest may have committed. *Id*. at 288-389. Further, the motion court found that the jury did not need Dr. Cunningham to tell them how to weigh mitigating evidence. *Id*. at 389. Finally, the motion court found that Forrest was not prejudiced. *Id*.

D. Analysis

1. Dr. Cunningham was not a credible witness

This Court does not reconsider credibility decisions made by trial courts. *State v. Johnson*, 207 S.W.3d 24, 44 (Mo. 2006); *State v. Rousan,* 961 S.W.2d 831, 845 (Mo. 1998). "This Court will defer to a trial court's credibility determination even on an expert witness." *Clayton v. State*, 63 S.W.3d 201, 209 (Mo. 2001); *State v. Simmons,* 955 S.W.2d 752, 773 (Mo. 1997). Counsel is not ineffective for failing to call a witness whose testimony was not credible.

2. Counsel reasonably decided not to call Dr. Cunningham as a witness

The motion correctly found that counsel made a reasonable strategic decision not to call Dr. Cunningham because counsel did not

want to "open the door" to testimony about a prior California homicide. The motion court specifically found that counsel's testimony on this point was credible. PCR L.F. 388-389. This Court defers to the motion court's credibility finding. *Johnson*, 207 S.W.3d at 44.

This decision was reasonable. Forrest was accused of three murders. As counsel Kenyon put it, evidence about a separate murder that Forrest committed would be "incredibly damaging to his case as far as the penalty phase." Tr. 92. Counsel knew that Dr. Cunningham could testify about risk factors for Forrest's childhood and his future dangerousness in prison. Kenyon Depo. 16. Counsel balanced these two matters and decided not to call Dr. Cunningham. This decision, made with a full knowledge of the facts and law, is unchallengable under *Strickland*. 466 U.S. at 690.

Forrest alleges that counsel could not have known about the California murder at the time that they decided not to call Dr. Cunningham. He is wrong. Counsel Kenyon spoke with Dr. Cunningham on May 21, 2004. Kenyon Depo. 17. The State told counsel Turlington about the California murder on May 28, 2004. D.A.L.F. 441. The State provided 300 pages of discovery to Kenyon on June 15, 2004.

Id. The record does not show when Kenyon and Turlington met to discuss whether to retain Dr. Cunningham.

Counsel knew within a week of talking to Dr. Cunningham that Forrest possibly committed a murder in California. They received 300 pages of discovery about that murder two weeks after that. It is not unreasonable to infer that counsel waited to decide on Dr. Cunningham until they knew more about the California homicide. At the very least, the record does not make it impossible for counsel to have known about the California homicide before they decided not to hire him.

3. Dr. Cunningham's testimony about the effects of mitigation evidence was inadmissible

Dr. Cunningham's testimony was a cleverly-designed effort to use science to demonstrate that Forrest should not be executed because of the mitigation evidence. Forrest admits that Dr. Smith and William Forrest provided much of the factual background for Dr. Cunningham's testimony. App. Br. 115. So what would Dr. Cunningham have testified about?

Dr. Cunningham testified that the purpose of his testimony was to show that jury how to weigh mitigating factors. He stated that

> the jury … has no idea what mitigation is and less concept of moral culpability, or what to do with the history that they get of damaging and impairing factors and how it relates to the blameworthiness of the defendant.

PCR Tr. 290. He later stated that the jury had to have a "clear concept" of his model of mitigation and that every jury in a capital case needs to hear an expert such as him. *Id.* at 291, 466. He concluded his discussion about Forrest's risk factors by stating that "there was very little in the way of testimony that would give the -- the jury a mechanism to give informed weight to the history of these factors that they heard." *Id.* at 366.

Dr. Cunningham's "scientific analysis" is a subterfuge. The point of his testimony is to provide statistical analysis that demonstrates that a capital defendant should not be executed. He severely underestimates the capability of a jury to hear evidence in mitigation and to apply it. He wants to "guide" the jury through "science," a path that will end in life imprisonment in every case. He thus tries to set up the jury for what is, in essence, a directed verdict for life on the basis of "science."

In doing so, he invades the province of counsel's arguments and the court's instructions. Counsel's arguments lay out the evidence of mitigation and how it applies to the case. The court's instructions set out the law applying to consideration of mitigation. The jury thus has a mechanism to understand and apply mitigation evidence. Dr. Cunningham's testimony is essentially a legal primer for the jury and, as such, is inadmissible.

4. Forrest cannot show prejudice

As Forrest admits, Dr. Smith and William Forrest testified about Forrest's background. App. Br. 115. Dr. Cunningham would have added nothing more. His effort to "guide" the jury to a life verdict through suspect scientific analysis would have been inadmissible. Thus, Dr. Cunningham would have had nothing new to present about Forrest's childhood and background.

Dr. Cunningham's discussion of future dangerousness would not have aided Forrest either. His statistical analysis simply was not believable. He felt that he did not need to inquire into the specifics of Forrest's violent past in the community because those actions "were not relevant to his risk of violence in prison." *Id.* at 440. He also felt that

the fact that Forrest killed a uniformed sheriff's deputy, wounded a sheriff, and shot at other law enforcement officers was irrelevant based on his statistical analysis. *Id.* at 453.

A reasonable juror would believe that Forrest's past violent acts was indicative of how he would act in prison. A reasonable juror also would understand that Forrest's murder of a law enforcement officer would relate to his interactions with prison guards. Dr. Cunningham's refusal to admit these basic points would have deeply damaged his credibility. There is not a reasonable probability that this flawed statistical analysis would have changed the jury's verdict.

For these reasons, Forrest cannot demonstrate *Strickland* prejudice.

XI. Forrest's lethal injection claim is not cognizable

Forrest contends that lethal injection as administered by the State of Missouri may cause him undue pain and is therefore unconstitutional. App.Br. 117-121. This Court has consistently held that this claim is not cognizable in a Rule 29.15 proceeding. *Goodwin v. State*, 191 S.W.3d 20, 40 (Mo. 2006); *Williams v. State*, 168 S.W.3d 433, 446 (Mo. 2005); *Worthington v. State*, 166 S.W.3d 566, 582-83 (Mo.

2005); *Morrow v. State*, 21 S.W.3d 819, 828 (Mo. 2000). This Court should deny it.

XII. Forrest's clemency claim is not cognizable

Forrest contends that Missouri's clemency process is arbitrary and capricious because then-Governor Mel Carnahan granted Darrell Meese clemency upon request of Pope John Paul II. App.Br. 122-124. This Court has held that claims of this type are not ripe in a Rule 29.15 motion unless a defendant has sought clemency. *Middleton v. State*, 80 S.W.3d 799, 817 (Mo. 2002). Forrest has not requested clemency. This Court should deny this claim.

Conclusion

For these reasons, this Court should affirm the circuit court's judgment.

Respectfully submitted,

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Certificate Of Compliance And Service

I hereby certify that the attached brief complies with the limitations contained in Rule 84.06(b) of the Supreme Court of Missouri and contains 13,036 words, excluding the cover and this certification, as determined by Microsoft Word 2003 software; that the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using Norton Anti-virus software, and is virus-free; and that a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, on January 8, 2009, to:

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