IN THE
MISSOURI SUPREME COURT

TRAVIS GLASS,	)	
	)	
Appellant/Cross-Respondent,	)	
	)	
vs.	)	No. SC 87852
	)	
STATE OF MISSOURI,	)	
	)	
Respondent/Cross-Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CALLAWAY COUNTY, MISSOURI
THIRTEENTH JUDICIAL CIRCUIT, DIVISION II
THE HONORABLE GARY OXENHANDLER, JUDGE

CROSS-RESPONDENT'S BRIEF AND APPELLANT'S REPLY

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JURISDICTIONAL AND FACT STATEMENTS

Appellant/Cross-Respondent, Travis Glass, adopts the Jurisdictional Statement and the Statement of Facts in his original brief.

POINTS RELIED ON

I. Autopsy Report – Crawford Violation

Counsel should have known that legal precedent supported excluding an autopsy report unless the accused has an opportunity to confront its author; Missouri law did not preclude an objection on confrontation grounds; the business records exception has limits and does not apply to testimonial statements prepared for litigation; autopsy reports are testimonial since their primary purpose is to prove past events relevant to a homicide prosecution; and failing to object to inadmissible evidence can constitute ineffective assistance of counsel if the evidence is prejudicial.

Davis v. Washington, 126 S.Ct. 2266 (2006);

Diaz v. United States, 223 U.S. 442 (1912);

Palmer v. Hoffman, 318 U.S. 109 (1943); and

State v. Justus, 205 S.W.3d 872 (Mo. banc 2006).

II. Inconsistent Theories

Counsel has a duty to conduct a thorough investigation regardless of the client's directives and develop a reasonable defense consistent in guilt and penalty phases. The record does not support counsel's assertions that they deferred to their client in arguing his innocence. Counsel told jurors in guilt phase that Glass didn't do it, but, if he did, he didn't deliberate, and then, in penalty phase, said he was sorry for what he had done. By pursuing that course, counsel acted neither as their client's mouthpiece nor as his advocate.

Rompilla v. Beard, 545 U.S. 374 (2005);

Florida v. Nixon, 125 S.Ct. 551 (2004); and

Middleton v. State, 103 S.W.3d 726 (Mo. banc 2003).

IV. Exclusion of Glass' Medical and School Records

Background records are relevant mitigating evidence that counsel must investigate; trial counsel made proper offers of proof to submit medical and school records; and Glass was prejudiced by the records' exclusion since his background was mitigating and a central issue in penalty phase. The State challenged Glass' family members' recollections and jurors likely would find the family biased whereas records provided objective, convincing proof of Glass' low intellectual functioning, meningitis and brain damage, and his resulting life-long struggles.

Tennard v. Dretke, 542 U.S. 274 (2004);

Williams v. Taylor, 529 U.S. 362 (2000);

Hutchison v. State, 150 S.W.3d 292 (Mo. banc 2004); and

State v. Roberts, 948 S.W.2d 577 (Mo. banc 1997).

V. Glass' Good Conduct in Jail

Counsel's failure to call Sgt. Robert Harrison and Deputy Fred Cave who would have testified that Glass was an excellent inmate – one of the best they had ever had - was not a strategic decision, but an unreasonable error made from a lack of investigation. Even if Glass once complained about not getting pizza at the jail, that complaint was not "extremely damaging evidence" that justified forgoing favorable mitigating evidence that he was the best inmate ever at the jail.

Williams v. Taylor, 529 U.S. 362 (2000); and

Bucklew v. State, 38 S.W.3d 395 (Mo. banc 2001).

VI. Voir Dire: Counsel Not Prepared

Counsel must voir dire on whether jurors can consider mitigating evidence or whether they will automatically impose the death penalty, since this is critical to determining if venirepersons can consider the entire range of punishment and follow the law. When counsel is ineffective in voir dire, prejudice is presumed since the error is structural.

Morgan v. Illinois, 504 U.S. 719 (1992);

Middleton v. State, 103 S.W.3d 726 (Mo. banc 2003);

State v. Clark, 981 S.W.2d 143 (Mo. banc 1998); and

Anderson v. State, 196 S.W.3d 28 (Mo. banc 2006).

XII. Counsel's Failure to Object to Erroneous Aggravating Circumstance Instruction

The motion court did not clearly err in finding counsel ineffective for failing to object to the aggravating circumstance instruction on kidnapping. The instruction failed to follow the substantive law on kidnapping as it did not specify the felony Glass allegedly intended to commit and did not define any felony for the jury. This left the jury free to speculate on what constituted a felony and not hold the State to its burden of proof. The jury did not find the facts necessary to increase Glass' punishment to death. Because the jury rejected the other statutory aggravation the State submitted, Glass was prejudiced. The kidnapping aggravator was the sole aggravator the jury found.

Woodson v. North Carolina, 428 U.S. 280 (1976);

State v. Bucklew, 973 S.W.2d 83 (Mo. banc 1998);

State v. Smith, 32 S.W.3d 532 (Mo. banc 2000); and

MAI-CR3d 319.24.

XIII. Failure to Investigate and Present Readily Available Mitigation

This Court should review the entire record in determining whether the motion court erred. Trial counsel had a duty to investigate all reasonably available mitigation but failed to do so. Counsel failed to investigate and present Glass' treating physician and teachers who could have testified about Glass' impaired intellectual functioning. Counsel did not investigate and present other mitigating evidence from Glass' teachers, probation officers and friends. Glass was prejudiced since impaired intellectual functioning is inherently mitigating and critical to the jury's assessment of whether death is appropriate. Yet the jury never heard this evidence, since counsel called only family and friends to testify about his background.

Tennard v. Dretke, 542 U.S. 274 (2004);

Hutchison v. State, 150 S.W.3d 292 (Mo. banc 2004);

Wiggins v. Smith, 539 U.S. 510 (2003);

Rompilla v. Beard, 545 U.S. 374 (2005).

XIV. Failure to Investigate and Present Expert Testimony

Counsel failed to investigate and present expert testimony of Glass' neuro-psychological deficits, his impaired intellectual functioning, including learning deficits, and his alcohol impairment. The motion court properly evaluated the experts and counsel's testimony, found the experts credible and that counsel's justifications for their failures unreasonable. Glass was prejudiced since the expert testimony would have provided mitigating evidence of Glass' impairments and low intellectual functioning and the jury heard no expert testimony or evidence from others about these impairments.

Tennard v. Dretke, 542 U.S. 274 (2004);

Hutchison v. State, 150 S.W.3d 292 (Mo. banc 2004); and

Rompilla v. Beard, 545 U.S. 374 (2005).

ARGUMENT

I. Autopsy Report – Confrontation Violation

Counsel should have known that legal precedent supported excluding an autopsy report unless the accused has an opportunity to confront its author; Missouri law did not preclude an objection on confrontation grounds; the business records exception has limits and does not apply to testimonial statements prepared for litigation; autopsy reports are testimonial since their primary purpose is to prove past events relevant to a homicide prosecution; and failing to object to inadmissible evidence can constitute ineffective assistance of counsel if the evidence is prejudicial.

Counsel Did Not Have to Anticipate a Change in the Law

The State argues that counsel was not ineffective for failing to anticipate a change of law since *Crawford* was not decided at the time of his trial (Resp. Br. at 14). This argument ignores that, at the time of Glass' trial, the only United States Supreme Court decision reviewing the admission of an autopsy report had ruled that admitting such a report without the opportunity to cross-examine its author violates the Confrontation Clause. *Diaz v. United States*, 223 U.S. 442, 449-50 (1912).

In *Diaz*, the accused had offered into evidence, without qualification, an autopsy report favorable to him. *Id*. at 450. Had the accused not consented to its admission, the autopsy report would have been inadmissible, because it was

hearsay, and "because the accused was entitled to meet the witnesses face to face." *Id*. The Court found that the accused could waive his right to confrontation and did so by offering the report into evidence. *Id*. at 450-51.

Given *Diaz*, neither trial counsel, nor appellate counsel needed to "anticipate a change" in the law. Rather, they should have been familiar with Supreme Court precedent decided years earlier.

The State never addresses appellate counsel's failure to raise the confrontation violation. Reasonable counsel would have known this issue had substantial merit. Defense attorneys were litigating the issue before Glass' trial. *State v. Crawford*, 54 P.3d 656 (Wash. 2002). Crawford's counsel filed his petition for certiorari on March 10, 2003, nearly four months before the record on appeal was filed, on July 31, 2003, in Glass' case (Ex. 3C). The Supreme Court granted certiorari in *Crawford v. Washington*, No. 02-9410, on June 9, 2003, more than a month before the record was filed and six months before appellate counsel filed Glass' opening brief (Ex. 35).[1] *Crawford* was argued on November 10, 2003, more than a month before counsel filed Glass' brief (Ex. 35). *Crawford v. Washington*, 541 U.S. 36 (2004) was decided the same day counsel filed her reply brief and before the case was submitted to this Court (Ex. 37, H.Tr. 501-02). Counsel admitted that she thought *Crawford* applied to the admission of the

[1] Counsel filed the appellant's brief on December 12, 2003, out of time, with leave from this Court.

autopsy report, but failed to take any steps to present the issue to this Court (H.Tr. 503).

Given *Diaz* and *Crawford*, both trial and appellate counsel should have known that admitting the autopsy report without its author's testimony violated Glass' right to confrontation.

Admissibility in Missouri

The State argues that, because Missouri cases held autopsy reports admissible as business records, *citing Mahan v. Sykes*, 971 S.W.2d 307, 316 (Mo. banc 1988); *State v. Rhone*, 555 S.W.2d 839 (Mo. banc 1977); and *State v. Weaver*, 912 S.W.2d 499 (Mo. banc 1995) (Resp. Br. at 15), a confrontation violation could not legitimately be raised here. That argument stretches the law past its breaking point.

Rhone and *Mahan* never addressed autopsy reports' admissibility under the business records exception. Rather, *Rhone* dealt with laboratory results, *Rhone*, 555 S.W.2d at 841, and *Mahan* addressed blood test results that a Public Health Counselor kept. *Mahan*, 971 S.W.2d at 309-10.

Second, the dissent in *Rhone*, questioned the wholesale admission of all business records in a criminal prosecution. *Rhone*, 555 S.W.2d at 843-47 (Bardgett, J., dissenting). The majority's sole authority for applying the business record exception were civil cases that did not implicate confrontation concerns. *Id.* at 843. In criminal cases, by contrast, the United States Supreme Court had differentiated hearsay rules from its Sixth Amendment confrontation analysis. *Id.*

at 845-46, discussing *California v. Green*, 399 U.S. 149 (1970); *Mattox v. United States*, 156 U.S. 237 (1895). And, as the Rhone dissent highlighted, Missouri law prohibits admitting "memorandum made by a member of the prosecution team to be utilized solely for the criminal case against this defendant." *Rhone*, 555 S.W.2d at 847, *citing Kitchen v. Wilson*, 335 S.W.2d 38, 44 (Mo. 1960).

The State's reliance on *Mahan*, *supra*, is also of limited value because *Mahan* never addressed the Confrontation Clause. *Mahan*, 971 S.W.2d at 316-17. Rather, Mahan's challenge to the blood samples' admission was based on the State's failing to lay a proper foundation and establish a proper chain of custody. *Id*.

Similarly, *Weaver* did not raise a confrontation challenge, but argued that the autopsy report should not have been admitted because it was hearsay. *State v. Weaver*, 912 S.W.2d at 517. This Court ruled that the report was admissible under the business records exception to the hearsay rule. *Id*. The custodian of the autopsy report testified as to its identity, the mode of preparation and that it was made in the regular course of business. *Id*. On that basis, the Court ruled it was admissible. *Id*. The Court never addressed whether admitting an autopsy report under the business records exception violates the Confrontation Clause.

Parameters of the Business Records Exception Identified in *Crawford*

Citing *Crawford*, 541 U.S. at 56, the State correctly notes that the Supreme Court specifically identified "business records" as examples of non-testimonial statements that do not violate the right to confrontation (Resp. Br. at 15). The

Court did not intend, however, for courts and state legislatures to eviscerate the right of confrontation simply by labeling classic, traditional testimonial statements as "business records." The Court's analysis focuses not on what the statement is labeled, but on its function.

Non-testimonial business records are records made for "the systematic conduct of the business as a business," not memoranda or reports prepared in anticipation of litigation. *Palmer v. Hoffman*, 318 U.S. 109, 113 (1943). Business records are considered trustworthy because the records are "routine reflections of the day to day operations of a business." *Id*. at 113-14. To extend the business records exception to accident reports prepared in anticipation of litigation would open "wide the door to avoidance of cross-examination." *Id*. at 114. The Court has refused to read the business records exception so broadly. Thus, the critical issue is whether the records are kept in the systematic conduct of business or created for litigation. *Id*. In *Palmer*, accident reports were not business records like "payrolls, accounts receivable, accounts payable, bills of lading and the like." *Id*.

Thus, the business records exception that *Crawford* references must be viewed in light the Court's precedents, including *Palmer* and *Diaz*. When viewed in this light, the exception refers to the "early shop book rule," records of a business' day to day operations. *Palmer*, *supra* at 113-14.

Autopsy Reports Are Testimonial

Relying on out-of-state cases, the State argues that autopsy records are not testimonial (Resp. Br. at 16-18). Noticeably absent from its brief is any reference to *Davis v. Washington*, 126 S.Ct. 2266 (2006) or this Court's decision in *State v. Justus*, 205 S.W.3d 872 (Mo. banc 2006), which define "testimonial" statements.

In *Justus*, using the test set forth in *Davis*, this Court held that a child witness' out-of-court statements to a DFS worker and to a child advocate were "testimonial" "as there was not an ongoing emergency and because the primary purpose of the interrogation was to prove past events relevant to a later criminal prosecution." *Id*. at 874, 879. The key inquiry is whether the statement is taken to resolve an emergency or the declarant is describing past events. *Id.; Davis* 126 S.Ct. at 2276-77. Also key is the setting in which the statements were made – formal v. informal - and whether it was part of a government investigation. *Justus*, 205 S.W.3d 880. The declarant need not be a government worker if he is acting as a government agent or is eliciting statements for law enforcement purposes. *Id*.

Given these principles, autopsy reports clearly are testimonial. The primary purpose is to establish past events – the medical causes of death – for later criminal prosecution. Here, two Missouri Highway patrolmen and a County Coroner attended the autopsy (Tr. 752-53). They were investigating the cause of death in anticipation of a homicide prosecution; they were not addressing an on-going emergency. Section 58.720.1, RSMo 2005 directed that the medical

examiner provide evidence "useful in establishing the cause of death and deliver it to the prosecuting attorney." The medical examiner complied, obtaining samples for comparison with a sexual assault kit seized from Glass (Tr. 786).

The State's argument that the autopsy report was simply prepared as required by statute and was not manufactured at the prosescution's request (Resp. Br. at 17) ignores reality. Law enforcement notified the medical examiner of "the known facts concerning the time, place, manner and circumstance of the death." Section 58.720.1. Police officers attended the autopsy. The medical examiner was an arm of the State and part of its investigatory team. *Cf. Martinez v. Wainwright*, 621 F.2d 184, 186-87 (5th Cir. 1980) (state had a duty to disclose "rap sheet" in medical examiner's possession since the medical examiner was an arm of the government and a state investigative agency similar to police officers).

Davis and *Justus* require that the autopsy report be viewed as testimonial and thus, inadmissible under the Sixth Amendment's Confrontation Clause. The State ignores *Davis* and *Justus*, relying instead on out-of-state cases (Resp. Br. at 16-18). But, such decisions are of "limited usefulness" since they all were decided without the benefit of *Davis* and *Hammon*. *Justus*, 205 S.W.3d at 880, n. 10 (noting the limited value of out-of-state cases on the admission of child-witness statements).

The State's authority also directly conflict with *Crawford* and *Davis*. For instance, the Kansas Supreme Court, quoted extensively in the State's brief, rested on the autopsy reports' reliability to justify admitting them (Resp. Br. at 16-17),

quoting State v. Lackey, 120 P.3d 332 (Ks. 2005). The *Lackey* court found that autopsy reports contain "routine and descriptive" observations and medical examiners have "little incentive to fabricate the results." *Id*. at 351. This analysis misses the point. 911 operators make "routine and descriptive" observations when taking 911 calls. So do DFS workers and child advocates. But the issue is not whether the observations are "routine and descriptive." Rather, what is their primary purpose – to meet the needs of an ongoing emergency or to gather facts for a criminal investigation. *Davis*; *Justus*, *supra*. Here, the autopsy report recorded medical examiner's observations to prove past events - the medical cause of death - for a later criminal prosecution.

The *Lackey* Court's rationale that medical examiners have "little incentive to fabricate the results" goes to whether autopsy reports are reliable, not whether they are testimonial. In overruling *Ohio v. Roberts*, 448 U.S. 56 (1980), *Crawford* specifically rejected this reliability analysis. *Crawford* held that the admissibility standard developed in *Roberts,* which permitted hearsay evidence if it fell within a firmly rooted hearsay exception or had other indicia of reliability, was a "malleable standard [that] often fails to protect against paradigmatic confrontation violations." *Crawford,* 541 U.S. at 60. In applying *Roberts* to testimonial statements, juries had been allowed to hear evidence, not subject to cross-examination, based on trial judges' determinations that the evidence was reliable. That reliability test was unpredictable, and permitted the admission of "core

testimonial statements that the Confrontation Clause was plainly meant to exclude." *Id*. at 63.

Experience has proved false *Lackey's* suggestion that medical examiners are unbiased, not requiring cross-examination. Perhaps the most notorious example is Dr. Ralph Erdmann, who faked autopsies and whose testimony aided in twenty capital convictions in Texas. Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 Va. J. Soc. Pol'y & L. 439, 449-53 (1997); Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 Cornell L. Rev. 1305, 1318 n. 74 (2004).

Dallam County District Attorney Barry Blackwell said, "call him 'McErdmann' . . . 'He's like McDonald's - billions served.'"[2] Former Dallas County assistant medical examiner Linda Norton said, "Dr. Erdmann routinely performs 'made-to-order autopsies that support a police version of a story.'"[3] And Tommy J. Turner, a judicially-appointed investigator in the Erdmann case,

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[2] Giannelli, *supra*, n. 74, quoting Roy Bragg, *New Clues May Be Dug from Grave: Furor Touches on Autopsies, Brains*, Houston Chron., Mar. 28, 1992, at 1A.

[3] Giannelli, *supra*, n. 74, quoting, Chip Brown, *Pathologist Accused of Falsifying Autopsies, Botching Trial Evidence*, L.A. Times, Apr. 12, 1992, at A24; Richard L. Fricker, *Pathologist's Plea Adds to Turmoil: Discovery of Possibly Hundreds of Faked Autopsies Helps Defense Challenges*, A.B.A. J., Mar. 1993, at 24.

said "If the prosecution theory was that death was caused by a Martian death ray, then that was what Dr. Erdmann reported." Giannelli, *supra*, n. 74.

In Florida, Dr. Shashi Gore, the chief medical examiner for Orange and Osceola Counties, "mistakenly described a child as being black in an autopsy report when the baby, in fact, was white. Henry Pierson Curtis & Amy C. Rippel, *Criticism, Blunders Mar Medical Examiner's Exit*, Orlando Sentinel, Aug. 31, 2003, at A1. He also gave a detailed description of the child's heart in the autopsy report. But there was no heart in the body. *Id*. It already had been harvested for an organ donation." *Id.*

In Tennessee, prosecutors dropped charges in a first-degree murder case when test results in the victim's autopsy were proven wrong. Natalia Mielczarek, *Mother Not Killer, State Concedes*, Tennessean, Nov. 13, 2004, at 1A. Margaret Mignano had been charged with killing her daughter, Ashley, who had cerebral palsy, with an overdose of Phenobarbital. *Id*. The charges stemmed from an autopsy report that indicated Ashley's body contained lethal levels of Phenobarbital. *Id*. The autopsy reported the level at 106 micrograms per milliliter of blood, but a later re-test established it at 23.7 to 27.3 micrograms. *Id*.

In California, state officials accused a medical examiner of "extreme departure from the standard of care and/or incompetence" because of a botched autopsy. Matthew B. Stannard, *Board Finds Ex-Coroner's Work Lacking; Husband Charge After 1995 Autopsy*, S.F. Chron., July 30, 2002, at A 13. The medical examiner initially found the victim committed suicide, then changed his

report to homicide. *Id*. After the husband was found not guilty, an independent re-examination of the body showed that the medical examiner had failed to dissect or examine the woman's neck, failed to save key evidence, and failed to photograph and document the autopsy. *Id*.

In Texas, Dr. Patricia Moore's supervisors criticized her performance in conducting autopsies and revised her findings in some child autopsies. Andrew Tilghman, *Autopsies by Former Examiner Reviewed; Several Cases Got a Second Look After Questions About Neutrality*, Hous. Chron., July 22, 2004, at A1. Moore had been finding Shaken Baby Syndrome at a considerably higher rate than occurs in the general population. *Id*. After investigation, her supervisors changed the conclusions in several cases. *Id*. They admonished Moore for appearing biased in favor of prosecutors and for "not understanding the objectives of neutral medical-legal investigation." *Id*.

In West Virginia, Fred Zain, a serologist at the State Police Crime Lab, gave false testimony in criminal prosecutions. *In Matter of W.Va. State Police Crime Lab*, 438 S.E.2d 501 (1993). A special judge found that "Zain intentionally and systematically gave inaccurate, invalid, or false testimony or reports." *Id*. at 520. The misconduct was so egregious that the West Virginia Supreme Court found "as a matter of law, any testimonial or documentary evidence offered by Zain at any time in any criminal prosecution should be deemed invalid, unreliable, and inadmissible in determining whether to award a new trial in any subsequent habeas corpus proceeding." *Id.*

The West Virginia's finding did not stop Zain. Instead, he moved to Texas where the Bexar County medical examiner hired him. Hal Parfait, *Million Dollar Error*, Idaho Observer, March 2006. Zain continued to perjure himself and falsify his DNA analysis reports in court. *Id*.

Missouri has not been immune to these problems. In 1998, a Jackson County Circuit Court found that Dr. Michael Berkland had falsified autopsies. Chris George & Denis Wright, *Former Jackson County Coroner Mike Berkland Provides the Brains for a Scandal in Florida*, Pitch Weekly: Kansas City Strip, Aug. 30, 2001, reproduced at www.onlinejournal.com. Other doctors discovered un-dissected brains, revealing that Berkland had never performed eight autopsies and had fabricated the autopsy reports in those cases. *Id*. After Berkland lost his medical license and was banned from performing autopsies in Missouri, he moved to Florida to practice there. *Id*.

These examples show why this Court must reject the State's argument that cross-examining medical examiners is unnecessary since their work is "routine" and they have "little incentive to fabricate results." (Resp. Br. at 16-17), quoting *State v. Lackey*, 120 P.3d 332 (Ks. 2005). Such assumptions about any witness, even medical examiners, are dangerous, especially when life and liberty are at stake.

The State would have this Court find no constitutional violation by suggesting that excluding autopsy reports if the medical examiner does not testify will preclude prosecuting homicides (Resp. Br. at 16-18). But the State never

explains this quantum leap in logic. On the rare occasion that a medical examiner dies before trial, the State can lay a foundation for the pictures taken at the autopsy and the evidence seized. Here, for example, a coroner and two police officers attended the autopsy and could lay the foundation for evidence seized. Further, an independent medical examiner can review the evidence and provide independent opinions regarding the cause of death without reading the autopsy report to the jury and testifying about its conclusions.

On the other hand, if the State is allowed to introduce an autopsy report without calling the medical examiner who performed the autopsy, a defendant has no opportunity to confront the examiner regarding his findings and conclusions. Here, the State went even further, introducing Dr. Dix's vita to bolster the absent witness' credibility. Contrary to the State's argument that Glass failed to argue how the vita prejudiced him (Resp. Br. at 18), he specifically argued that "[t]he State proffered Dix's vita to show his credibility, knowing that Glass could not confront him (Tr. 743-44, 748, Ex. 58)" (App. Br. at 59). Why else would the State have offered the vita of a non-testifying witness?

The Failure to Object Properly to Prejudicial Evidence Can Constitute Ineffective Assistance of Counsel and is Cognizable in a Postconviction Action

Citing *State v. Beckermann*, 914 S.W.2d 861 (Mo. App. E.D. 1996), the State argues that the failure to object cannot constitute ineffective assistance of counsel (Resp. Br. at 16, 21-22). It never justifies that broad interpretation of *Beckermann*, given the conflicting decisions in *Kenner v. State*, 709 S.W.2d 536,

539 (Mo. App. E.D. 1986); *Copeland v. Washington*, 232 F.3d 969, 974-75 (8th Cir. 2000); *State v. Storey*, 901 S.W.2d 886, 901 (Mo. banc 1995); and *Deck v. State,* 68 S.W.3d 418 (Mo. banc 2002). Indeed, *Beckermann* is of limited value, because there, Beckermann complained that counsel failed to file a motion for judgment of acquittal. *Beckermann*, *supra* at 864. Beckermann never established how this failure prejudiced him under *Strickland*.

By contrast, the failure to object to prejudicial evidence that violates the defendant's right to confrontation can constitute ineffective assistance of counsel. *State v. Wyble*, 211 S.W.3d 125, 136, n.2 (Mo. App. W.D. 2007) (Ellis, J. concurring). In *Wyble*, the trial court allowed trial counsel to have a continuing confrontation objection to the testimony of a child's out-of-court statements. *Id*. 129. Counsel then failed to raise this issue in his new trial motion and did not preserve the issue for review. *Id*. The Court of Appeals found the admission of the child's victim's hearsay testimony was not plain error given the strength of the evidence. *Id*. at 131-32. Judge Ellis concurred, but made clear that trial counsel would likely be found ineffective for failing properly to preserve the claim for review:

> The case presents the unique situation where we must affirm the conviction on this direct appeal, but it is almost certain that Wyble will be granted a new trial in the ensuing Rule 29.15 proceeding based on counsel's failure to preserve the error.

Id. at 136, n. 2 (Ellis, J., concurring).

Counsel's negligence in failing properly to object or preserve a claim for review should be evaluated like any other ineffective assistance of counsel claim: were counsel's actions reasonable, and did counsel's actions result in prejudice? Once this Court evaluates both trial and appellate counsel's actions here, it should find counsel ineffective for failing properly to object and raise on appeal the denial of Glass' right to confront his accuser – when the State admitted the autopsy report in this case with out the medical examiner testifying.

II. Inconsistent Theories

Counsel has a duty to conduct a thorough investigation regardless of the client's directives and develop a reasonable defense consistent in guilt and penalty phases. The record does not support counsel's assertions that they deferred to their client in arguing his innocence. Counsel told jurors in guilt phase that Glass didn't do it, but, if he did, he didn't deliberate, and then, in penalty phase, said he was sorry for what he had done. By pursuing that course, counsel acted neither as their client's mouthpiece nor as his advocate.

Travis Glass told his attorneys that he wanted an acquittal (H.Tr. 425-27, Ex. 22, 238). Glass, only 21 years old, had never before been in serious trouble, having had one stealing conviction for which he did no jail time, but was placed on probation (Tr. 1140, 1187, 1392, Exs. 52 and 53). Glass had impaired intellectual functioning, possibly from brain damage (H.Tr. 142-43, 151-63, 170, 173, 363-73, 374-75, Exs. 17 and 31). Under these circumstances, counsel's strategy that proffered inconsistent defenses was unreasonable.

The State suggests that attorneys are nothing more than a mouthpiece for their client, that once Glass told his attorneys he wanted an acquittal, they were obligated to defer to his wishes (Resp. Br. at 19-20). The Supreme Court has ruled otherwise. *Rompilla v. Beard*, 545 U.S. 374 (2005). There, Rompilla was disinterested in helping his attorneys investigate and prepare a mitigation case. *Id.* at 381. At times, he would not even talk to them, announcing he was "bored being

there listening" and returning to his cell. *Id*. He told them his childhood and schooling had been normal. *Id*. He even obstructed their efforts, sending them on wild goose chases. *Id*. Even Rompilla's actions did not relieve his attorneys of their duty to fully investigate and present relevant mitigating evidence.

Similarly, Glass' desire to be acquitted did not relieve counsel of their duty to investigate the case, communicate their findings with Glass, and prepare a reasonable defense based on the facts.

Rompilla is consistent with a long line of cases ruling that a criminal defendant has authority over certain fundamental decisions: whether to plead guilty, waive a jury, testify, or take an appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). By contrast, counsel, not the client, has the principal responsibility to conduct the defense. *Id*. at 753, n.6; *New York v. Hill*, 528 U.S. 110, 114-15 (2000). Counsel is responsible for developing the defense strategy. *Wainwright v. Sykes*, 433 U.S. 72, 93, n. 1 (1977) (Burger, C.J., concurring). Counsel, not the client, should determine what arguments to pursue. *Hill*, 528 U.S. at 115. Counsel had a duty to fully investigate the facts, relate those facts to Glass, develop a reasonable defense strategy, and not present inconsistent defenses.

Counsel did not escape their duty, simply because Glass wanted to be acquitted. Counsel still had a duty to investigate the facts of the case. ABA Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-

4.1, 3d ed (1993).[4] The ABA Guidelines are "guides to determining what is reasonable." *Rompilla*, 545 U.S. at 387, *quoting Wiggins v. Smith*, 539 U.S. 510, 524 (2003) and *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Citing *Middleton v. State*, 103 S.W.3d 726, 736 (Mo. banc 2003), the State argues that counsel must defer to the client's wishes. But *Middleton* is different. There, the client adamantly asserted his innocence. *Id*. at 737. Significantly, he had never confessed to committing the crime.

By contrast, Glass had confessed to the police (Tr. 826-32, 1022-33, Trial Exs. 38 and 40). While the police admitted they fed Glass details and he adopted many of their suggestions (Tr. 837, 1028, 1035-36, 1038-39, 1050-51), counsel knew the confession would be admitted since the trial court overruled the

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[4] **Standard 4-4.1 Duty to Investigate**

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. *The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt* or the accused's stated desire to plead guilty.
>
> (Emphasis added).

defense's motion to suppress the statements more than two months before trial (Ex. 3A at 12).

The State suggests that it is "disingenuous" for Glass to raise counsel's ineffectiveness, since counsel pursued the defense Glass wanted (Resp. Br. at 26). Trial counsel did not pursue the defense he wanted. Rather, she tried to appease him by arguing he was innocent (Tr. 1113-26) and concurrently arguing he was guilty of second degree murder (Tr. 1112). Counsel fulfilled neither her client's wishes, nor her duty as an advocate in arguing inconsistent defenses.

Glass got the worst of all worlds - - an attorney who argued inconsistent defenses in guilt phase, thereby losing credibility with the jury for both phases. Then, after having heard an innocence argument, jurors were undoubtedly incredulous when counsel told them in penalty phase that Glass was sorry for having committed the crime (Tr. 1379).

The State's argument that Glass has not shown prejudice (Resp. Br. at 26) is contrary to *Florida v. Nixon*, 543 U.S. 175, 191-92 (2004). The State would like to limit the reach of that case, which illustrates the importance of presenting consistent defenses in guilt and penalty phases. The *Nixon* Court found counsel effective precisely because he presented consistent defenses. The Court cautioned those who would present inconsistent defenses, noting that such actions "don't work" and "[t]he jury *will* give the death penalty to the client and, in essence, the attorney." *Id.* (*emphasis added*). The precise situation, condemned in *Nixon*, occurred here. And, as the Court noted, prejudice resulted.

Counsel was ineffective for presenting inconsistent theories at trial. This Court should reverse and remand for a new trial.

IV. Exclusion of Glass' Medical and School Records

Background records are relevant mitigating evidence that counsel must investigate; trial counsel made proper offers of proof to submit medical and school records; and Glass was prejudiced by the records' exclusion since his background was mitigating and a central issue in penalty phase. The State challenged Glass' family members' recollections and jurors likely would find the family biased whereas records provided objective, convincing proof of Glass' low intellectual functioning, meningitis and brain damage, and his resulting life-long struggles.

The State does not defend the trial court's exclusion of Glass' school records and medical records as "irrelevant and immaterial" in penalty phase (Resp. Br. at 44-50). The State's silence is not surprising, since a client's background is relevant mitigation that jurors must be allowed to consider. *See e.g., Tennard v. Dretke*, 542 U.S. 274 (2004) (evidence of impaired intellectual functioning); *Smith v. Texas*, 543 U.S. 37, 44 (2004) (evidence of capital murder defendant's troubled childhood, 78 IQ, and his participation in special education classes was relevant mitigation) and other cases discussed in Glass' original brief.

Obtaining a client's school and medical records is critical to understanding a client's background. Courts require counsel to investigate such mitigating evidence. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (counsel ineffective for failing to investigate and present *records* that graphically described

Williams' "nightmarish childhood," prison *records* recording his good conduct in prison, and evidence of borderline mentally retardation and his poor school performance); *Rompilla v. Beard*, 545 U.S. 374, 382 (2005) (counsel ineffective for failing to investigate *records* of prior conviction); *Hutchison v. State*, 150 S.W.3d 292, 305 (Mo. banc 2004) (counsel ineffective for failing "to obtain *readily available records* showing mental illness, sexual abuse and impaired intellectual functioning."). In *Hutchison*, for example, this Court said, "[t]he information about Hutchison's troubled background and impaired intellectual ability contained in Dr. Parrish's records would have provided significant evidence for mitigation not heard by the jury." *Id.* at 305. Counsel should have investigated and obtained Hutchison's school records, which would have shown his difficulty in school and placement in special education. *Id*. at 305-06.

Here, trial counsel investigated the records, uncovered mitigating evidence, and offered the records into evidence (Tr. 1352-55). But the trial court excluded them as irrelevant and immaterial (Tr. 1353, 1354-55). Appellate counsel had a duty to raise this erroneous exclusion on appeal. She unreasonably failed to do so.

The State asks this Court to forgive appellate counsel's failure because trial counsel was ineffective by making an inadequate offer of proof (Resp. Br. at 46-50). The record belies this assertion.

Counsel offered Trial Exhibits 29, 30, 31, to which the prosecutor objected as "irrelevant and immaterial" (Tr. 1352). When the trial judge sustained the

objection, he received the exhibits as offers of proof (Tr. 1353). Counsel went further and told the court why they were relevant.

As to Exhibit 29, Hannibal Ambulatory Care Center medical records, counsel stated:

> They indicate that Travis Glass' weight is 297 pounds back on March the 30th of 1994. It indicates that his weight was 307 pounds on September 22nd of 1995. And we believe that those records are relevant because they corroborate what we're trying to establish to this jury was that the defendant was grossly overweight when he was a child and it gives more credence to him being teased as a child. We think that's relevant.

(Tr. 1353). The record bears out counsel's claim. One of Glass' sisters, Tina Hammel, stated that other kids called Travis "Pork Chop," teasing him about his weight (Tr. 1261). She recalled he once had weighed over 300 pounds (Tr. 1261). Glass' other sister, Tonya Gollaher, also remembered his weight problem, he once reached 350 pounds, but she never noticed him being ridiculed (Tr. 1230-31). Given this family testimony, it was relevant and important to corroborate Glass' obesity during his school years, especially since counsel had not called teachers who recalled the teasing (See Point XIII, *infra*) and since Glass had lost a lot of weight while awaiting trial (Tr. 825). More importantly, the records provided an independent, unbiased source of information about critical facts counsel wanted the jury to consider.

Even though family testimony and records are distinct, *Black v. State*, 151 S.W.3d 49, 56 (Mo. banc 2004) and *State v. Perry*, 879 S.W.2d 609 (Mo. App., E.D. 1994), the State never acknowledges this distinction.

Counsel also explained the relevance of Exhibit 30, Glass' Palmyra school records.

> And we believe those records are relevant so that the jury can examine his grades and helps provide additional information about what kind of a student he is. And we believe this is all relevant as far as penalty phase in terms of giving the jury as much information as we possibly can about the defendant so that they can make an intelligent decision, a well-reasoned and informed decision on punishment. And I believe that we're entitled to do provide the jury with as much information as we can on the defendant.

(Tr. 1353-54). Again, the record bears out counsel's proffer on the records' relevance. These records showed that Glass struggled in school (Ex. 5 at 1). He had low scores on standardized testing in several subjects (Ex. 5 at 7). He was passed from one grade level to the next, with no correlation to his skills and ability (Ex. 5 at 40-41). There was no downside to the school records since Glass had no disciplinary problems. *Id.* He was in fact once "Student of the Month." *Id.* at 1.

No teachers testified at trial so the jury heard nothing about what type of student he was. His mother and father were not involved in Glass' parenting, so they could not testify about his school performance. Glass' grandparents were

elderly and neither testified at trial. One uncle testified at trial about Glass' school performance and he concluded that Glass had "excelled" at Palmyra High School (Tr. 1289). This family member's concept of "excelling" lies in stark contrast to reality. The excluded records revealed the opposite – that Glass was low-functioning and struggled. Glass' functioning was like that deemed mitigating in *Rompilla* and *Williams*.

Counsel explained the relevance of Exhibit 31, the Blessing Hospital records, which documented Glass' meningitis.

> Those records corroborate what other witnesses in this case have testified to with respect to Travis being brought to the hospital when he was 23 months old. Lethargic and unresponsive. And it confirms that he was diagnosed with bacterial meningitis and that also supports what witnesses that we have had testify concerning - - And like I said Judge, I believe that when defendant's life is on the line, a jury needs to make a decision about whether or not to sentence this boy to life imprisonment or the death penalty, I think that the jury, and I think there's case law to support the idea that the jury is, that the defendant is entitled to have the jury have as much information as they can about him. And whether or not they want to give this a little tiny weight or a whole lot of weight is up for I believe them to decide. I believe it is relevant and request that the Court reconsider

its ruling and permit those exhibits to be admitted into evidence for the purposes stated.

(Tr. 1354).

The records confirm the truth of counsel's offer of proof. Glass was "semi-comatose," with a "permanent brain damage" prognosis (Ex. 1, at 5-6). They corroborated the family's account of Glass' hospitalization and his deficits from the meningitis (Tr. 1239-40, 1308).

The State asserts no prejudice resulted from the records' exclusion because Glass' aunt and sisters testified about the meningitis (Resp. Br. at 49). The State cites to the entirety of the transcript of these three witnesses in support (Resp. Br. at 49, citing (Tr. 1225-39, 1255-69, 1298-1313)). The transcript reveals that Glass' sister, Tina, never testified about the meningitis at all, perhaps because she was only 7 or 8 when it occurred (Tr. 1255-68). Glass' other sister, Tonya, recalled that he was really sick, had a high fever, his eyes rolled back in his head, and he was shaking (Tr. 1239). She said the medical diagnosis was spinal [sic] meningitis (Tr. 1239). In response to her testimony, the prosecutor emphasized Tonya's lack of contact with Glass, especially in the 15 years since she had lived at home with him (Tr. 1239-40).

Glass' aunt, Connie Patre, was best positioned to discuss his meningitis. She rushed him to the hospital when she saw his seizure-like symptoms and high temperature (Tr. 1302-03). But again, the transcript bears out counsel's proffer

and demonstrates that the records were necessary to corroborate Patre's testimony. The State cross-examined her as follows:

> Q. Ms. Patre, this incident you described where the defendant was two years old, do you have any reason to believe that has had any impact on his behavior as an adult?
>
> A. They told us it's possible that he could do some brain damage.
>
> Q. That's not what I asked you. I asked you, do you have any reason to believe you know whether or not that has had any impact on his behavior as an adult?
>
> Mr. Kenyon: I'm going to object, Your Honor. She answered that question fairly and honestly.
>
> Mr. Ahsens: Well, no.
>
> The Court: Just a minute, gentlemen. Let the court rule the objection. The objection will be overruled. You may ask your question. Please [sic] will respond to the question.
>
> Q. Ms. Patre, I'm not trying to be difficult. But do you know whether that incident has had any impact on his behavior as an adult, yes or no, please?
>
> A. No. I don't.
>
> Q. Okay. Thank you.
>
> Nothing further.

(Tr. 1308). Counsel's redirect tried to clarify the basis for her knowledge, but the State stopped the inquiry with hearsay objections:

> Q. You don't know that that incident didn't have, doesn't have?
>
> A. I don't know if it does or it doesn't. I don't know. *I'm not a doctor*. I don't know.
>
> Q. You were told by the doctors - -
>
> Mr. Ahsens: Objection to what she may have been told by others.
>
> Mr. Kenyon: This, he opened - -
>
> The Court: The objection will be sustained. Let's proceed.
>
> Mr. Kenyon: I don't have any further questions.

(Tr. 1309) (emphasis added).

The meningitis incident dominated Patre's cross and re-direct, demonstrating its importance to the State and the defense. But, as Ms. Patre said, she wasn't a doctor, so without the medical records, the jurors never heard the doctor and nurses' account of the incident. Jurors never knew that family members were not exaggerating and that Glass had been "semi-comatose," with a prognosis of "permanent brain damage" (Ex. 1 at 5-6).

The State's objection to the records which were relevant and material should have been overruled. Appellate counsel should have raised the claim on appeal.

The State's reliance (Resp. Br. at 49-50) on *State v. Roberts*, 948 S.W.2d 577, 596-97 (Mo. banc 1997) is misplaced. There, counsel admitted background

records, including medical, school Division of Family Services, and jail records, at trial. *Roberts, supra* at 596. Three mental health experts relied on these records in reaching their opinions and testified about them. *Id*. at 596-97. Since the 1000 + page records included irrelevant and prejudicial information, including numerous prior bad acts and uncharged crimes, this Court found no abuse of discretion in declining to provide the jury with the records during their deliberations. *Id*. Notably, in *Roberts*, the information counsel wanted to present was before the jury and he could argue it. Here, by contrast, the Court excluded the records so the jury could never consider them.

This Court should reject the State's argument that the records were simply cumulative to the family's testimony and therefore their exclusion was not prejudicial (Resp. Br. at 49-50). The record demonstrates the significance of the meningitis incident and how important it was for the jury to see the prognosis of "permanent brain damage." His school records demonstrated the effects of his brain damage, with low intellectual functioning and his struggles in school. The medical records confirmed Glass' obesity.

The State's closing argument highlights the records' importance. The State argued that Glass had "no great abnormality about him or his behavior" (Tr. 1368). His medical records showed otherwise. The State later argued that jurors did not know an "awful lot about his background" (Tr. 1387). While true, this was in part due to the State's objections and the trial court's exclusion of the background records.

Excluding the background records made a difference. Glass was only twenty-one, and had only one prior conviction for stealing (Tr. 1187). The jury deliberated more than five hours deciding punishment (Tr. 1391). Glass' medical and school records were important. Jurors could have considered his diagnosis of brain damage, his poor functioning and his struggles in school. They would have realized how obese Glass was as a teen, giving credence to his sister's account of the teasing, including calling him "Pork Chop," and the hurt that must have built up inside him. The State hit the nail on the head when it said the jurors didn't know much about Glass' background. They were entitled to know this information.

Appellate counsel should have briefed this meritorious issue. She was ineffective. This Court should reverse and remand for a new penalty phase.

V. Glass' Good Conduct in Jail

Counsel's failure to call Sgt. Robert Harrison and Deputy Fred Cave who would have testified that Glass was an excellent inmate – one of the best they had ever had - was not a strategic decision, but an unreasonable error made from a lack of investigation. Even if Glass once complained about not getting pizza at the jail, that complaint was not "extremely damaging evidence" that justified forgoing favorable mitigating evidence that he was the best inmate ever at the jail.

The State argues that counsel's failure to call Sgt. Robert Harrison and Deputy Fred Cave to testify about Glass' model behavior was reasonable trial strategy (Resp. Br. at 53). This argument ignores the record and the law that counsel cannot make reasonable strategic decisions without an adequate investigation.

Trial counsel forthrightly admitted that he never even interviewed Harrison, who had worked at the jail nine years, before ruling Harrison out as a witness (H.Tr. 124-25, Ex. 22 at 89-90). Harrison described Glass as "one of the best inmates we've ever had in there [jail]" (H.Tr. 124). Counsel knew that jurors put a lot of stock in law enforcement officers' testimony. *Id*. at 87. Counsel acknowledged that, had he interviewed Harrison, he would have called him to testify (Ex. 22 at 90). The record does not support the State's claim that counsel's failure to call Harrison was a strategic decision.

While counsel completely failed to investigate Harrison, he took some steps to talk with Deputy Cave. But, even this investigation was last minute and incomplete. While Glass was jailed on the murder charges, Judge Conley authorized deputies to transport Glass to the Veteran's Hospital in Columbia to see his ailing grandfather (H.Tr. 114-15). Counsel knew this was unusual and wanted the jury to hear about Cave transporting Glass to see his grandfather (Ex. 22, at 86). Yet, counsel never talked to Cave before trial and only endorsed him on the first day of trial. *Id*. at 87; Ex. 15. Cave, who served as bailiff, first learned he might be a defense witness when he heard counsel read his name to jurors during voir dire. Ex. 22, at 86.

During a break, Cave approached defense counsel and asked why he had listed him as a witness. *Id*. Counsel then learned what Cave could say about his client. Glass was the first, and only, inmate charged with first degree murder who was allowed to visit someone outside the jail (H.Tr. 119). Glass behaved and gave the deputy no problems (H.Tr. 116-17).

Contrary to the State's argument that counsel strategically decided not to call Cave, counsel admitted that he couldn't remember why he didn't call Cave. *Id*. at 85. He believed that Cave would have been an excellent witness. *Id*. While counsel could not recall why he failed to call Cave, whom he endorsed, he remembered that one jailer had said that Glass had complained about inmates not being allowed to have pizza at the jail. *Id*. at 88-89. Counsel did not think this reflected well on Glass' character. *Id*. But, counsel had no idea if Deputy Cave

was even aware of this incident. *Id*. at 89. And the State elicited nothing from Cave about this incident or anything negative about Glass. The record reveals counsel's inadequate investigation and does not support the finding that counsel strategically decided not to call Cave.

Even if counsel had made a conscious decision not to call Cave because of the "pizza incident," this would have been unreasonable. The State exaggerates, calling Glass' complaint about not getting pizza "extremely damaging testimony." (Resp. Br. at 53). This spin, according to the State, made it reasonable to forego these officers' testimony that Glass was the best inmate they had ever seen, Glass gave officers no problems, and he traveled to visit his ailing grandfather without incident, simply because some officer might have revealed that Glass once complained about not getting pizza. Such a complaint is hardly the damaging testimony the State suggests. While it may show some immaturity, it is not prior bad acts or crimes.

Counsel is ineffective for failing to investigate and to present favorable mitigation, even if that presentation would result in disclosing some negative information to the jury. *Williams v. Taylor*, 529 U.S. 362, 390 (2000). In *Williams*, counsel failed to investigate and present mitigating evidence, including prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet. *Id*. at 395-96. Prison officials would have described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way." *Id*. at 396. A certified public

accountant who, as part of his prison ministry, had visited Williams frequently in jail, would have testified that Williams "seemed to thrive in a more regimented and structured environment," and that Williams was proud of his carpentry degree earned while imprisoned. *Id*.

In addition to this positive information, Williams' records would have included truly damaging evidence, not an isolated complaint about pizza. The records revealed that Williams committed three separate crimes for aiding and abetting larceny at age 11. *Id*. at 396. His criminal history got progressively worse, including incarceration for breaking and entering at age 15. *Id*. By contrast to the proffered mitigation that he behaved well, records established that he pulled a false fire alarm and caused problems for the staff. *Id*. The Court held that even these repeated crimes and bad behavior did not justify foregoing the favorable mitigation. *Id*.

Had Glass' counsel reasonably investigated, he would have been in a position to consider the benefits of Harrison and Cave's testimony and weigh it against potentially damaging testimony. Counsel did not investigate and was therefore never in a position to make that assessment. The State's hindsight is unpersuasive. *Williams* teaches the complaint about pizza hardly justifies foregoing favorable mitigation showing that Glass was an excellent inmate who never gave the jailers any trouble; who was respectful and compliant; who was the best inmate Harrison had ever had in nine years.

The State's reliance on *Bucklew v. State*, 38 S.W.3d 395 (Mo. banc 2001) is

curious since it is so different than Glass' case. In *Bucklew*, counsel investigated Bucklew's behavior in jail. *Id*. at 398. Counsel knew that Bucklew had escaped from the county jail while awaiting trial. *Id*. He also knew that Bucklew had numerous disciplinary infractions and guards had made negative comments about Bucklew. *Id*. Based on this investigation, counsel chose to call a Boone County jailer to testify to Bucklew's good behavior while in jail. *Id*. Counsel chose not to hire and call a corrections expert to testify about Bucklew's risk of escaping and posing a danger to other inmates. *Id*. Counsel decided that calling an expert would open the door to numerous disciplinary infractions and negative comments, which the jury would hear only if the expert testified. *Id*. The value of the expert's testimony was questionable since he could not testify with certainty that Bucklew would not escape. *Id*. This Court held that choosing the Boone County jailer, not an expert, as a witness was reasonable, made after a through investigation. *Id*.

Unlike *Bucklew*, here, counsel did not investigate the *Skipper*[5] evidence. While Bucklew had numerous disciplinary violations, Glass had none. Bucklew had escaped while in jail; jailers transported Glass without incident to visit his grandfather in the Veterans' Hospital. Jailers had many negative comments about Bucklew; Harrison and Cave had only positive comments about Glass. The only negative thing counsel's investigation revealed about his young client was a single complaint from an unknown officer about not getting pizza. Finally, Bucklew's

[5] *Skipper v. South Carolina*, 476 U.S. 1 (1986).

counsel presented evidence of Bucklew's good behavior in prison, choosing to do so through a jailer rather than a paid defense expert. By contrast, Glass' counsel presented no evidence of his good behavior even though he thought the jailers' testimony would have been credible and convincing mitigation. Far from supporting the State's argument, *Bucklew* establishes counsel's ineffectiveness.

This Court should reverse the denial of relief and remand for a new penalty phase.

VI. Voir Dire: Counsel Not Prepared

Counsel must voir dire on whether jurors can consider mitigating evidence or whether they will automatically impose the death penalty, since this is critical to determining if venirepersons can consider the entire range of punishment and follow the law. When counsel is ineffective in voir dire, prejudice is presumed since the error is structural.

The State suggests counsel has no duty to inquire about whether jurors can consider the specific mitigating circumstances in his case, like age, his family background, alcohol addiction, drinking on the night of the offense, lack of a significant criminal history, and good character and good relationships with family and friends (Resp. Br. at 56). According to the State, such questions would be improper because counsel would be seeking a commitment (Resp. Br. at 56-57). The State relies on *Middleton v. State*, 103 S.W.3d 726, 735-36 (Mo. banc 2003), but *Middleton* does not support the State's position. Rather, it establishes that counsel easily could have asked about specific mitigation.

At Middleton's trial, his attorney asked Juror Holt whether she could consider mental health evidence as a mitigating factor. *Id*. at 735. She responded that she could, but thought that some uses of mental health evidence went too far. *Id*. Counsel then asked her about the specific mitigating factors of drug and alcohol use. *Id*. Holt told counsel she was unsure whether she could consider drug and alcohol use mitigating. *Id*. On appeal, the issue was whether counsel

was ineffective for failing to strike Holt for cause. *Id*. at 735-36. This Court found no ineffectiveness, since Holt could consider evidence in mitigation. *Id*. While counsel properly questioned jurors about the specifics, she could not require a juror to commit to consider particular evidence as mitigating. *Id*. Thus, counsel acted reasonably and was not ineffective. *Id*. at 736.

Middleton is consistent with this Court's decisions that promote wide latitude on voir dire, including questions about specific facts. In *State v. Clark*, 981 S.W.2d 143 (Mo. banc 1998), for example, the trial court abused its discretion by limiting voir dire, and precluding defense counsel from asking about veniremembers' ability to be fair and follow the law, given the victim's age. *Id*. at 147. "A defendant's right to an impartial jury" must include "an adequate *voir dire* to identify unqualified jurors." *Id*. at 146, *quoting Morgan v. Illinois,* 504 U.S. 719, 729 (1992). Asking only "general fairness and follow-the-law questions" is insufficient. *Clark*, 981 S.W.2d at 147 (citations omitted). As this Court warned, "[i]f only generic questions are asked, biased jurors 'could respond affirmatively, personally confident that [their] dogmatic views are fair and impartial, while leaving the specific concern unprobed.'" *Id. quoting Morgan*, 504 U.S. at 735. Thus, voir dire requires "the revelation of some portion of the facts of the case." *Clark*, 981 S.W.2d at 147, quoting *State v. Leisure*, 749 S.W.2d 366, 373 (Mo. banc 1988). And, when counsel fails to sufficiently describe the facts, a defendant's right to an impartial jury is jeopardized. *Clark*, 981 S.W.2d at 147. Some "inquiry into the critical facts of the case is essential to a defendant's right

to search for bias and prejudice in the jury who will determine guilt and mete out punishment." *Id.*

Here, counsel failed to ask jurors about any of the specific facts that would constitute mitigation, like age, family background, alcohol addiction, drinking on the night of the offense, lack of a significant criminal history, good character and good relationships with family and friends. Counsel had no reasonable explanation for their failure. They were simply unprepared, not knowing what evidence they were going to present or what experts they would call (Ex. 22, at 196-97, H.Tr. 419-20). This Court's decisions show that counsel's failure was unreasonable. Without such a voir dire, Glass could not receive a fair and impartial jury.

Perhaps realizing the unreasonableness of counsel's inaction, the State argues that Glass has not shown that his particular jurors were unable or unwilling to follow the court's instructions – that he was prejudiced (Resp. Br. at 58). The State's argument misses the mark, because, when counsel is ineffective in voir dire, the error is structural and prejudice is presumed. *Anderson v. State*, 196 S.W.3d 28, 40 (Mo. banc 2006); *Knese v. State*, 85 S.W.3d 628, 633 (Mo. banc 2002). "A death sentence imposed by a jury tainted with structural error must be vacated." *Anderson*, 196 S.W.3d at 40, *citing Gray v. Mississippi*, 481 U.S. 648, 660 (1987).

The State also tries to minimize counsel's failure to ensure that jurors knew that age was a mitigating circumstance, claiming that the jury was properly

instructed (Resp. Br. at 58-60). The State ignores that, since age was not listed as a statutory mitigating factor (Ex. 3C, at 418), the jury was never told age *should* be considered as a reason not to give death. The lack of a specific instruction, along with the prosecutor's suggestion that jurors could not consider age in applying the law (Tr. 426-27), likely misled jurors into thinking they could not consider age as a basis for a sentence less than death.

Here, counsel was ineffective, denying Glass a fair and impartial jury. Due to this structural error, this Court should grant a new penalty phase.

Response to State's Appeal[6]

XII. Counsel's Failure to Object to Erroneous Aggravating Circumstance Instruction

The motion court did not clearly err in finding counsel ineffective for failing to object to the aggravating circumstance instruction on kidnapping. The instruction failed to follow the substantive law on kidnapping as it did not specify the felony Glass allegedly intended to commit and did not define any felony for the jury. This left the jury free to speculate on what constituted a felony and not hold the State to its burden of proof. The jury did not find the facts necessary to increase Glass' punishment to death. Because the jury rejected the other statutory aggravation the State submitted, Glass was prejudiced. The kidnapping aggravator was the sole aggravator the jury found.

Here, the jury received no explanation as to what was required to convict Glass of kidnapping. The aggravating circumstance instruction failed to follow the substantive law on kidnapping. It neither specified the felony Glass allegedly intended to commit, nor defined any felony for the jury. Without such guidance, the jury could find whatever conduct it thought might be a felony sufficient to

[6] Glass uses the numbers of the State's Points Relied On for clarity. The State raised three issues on appeal.

sentence Glass to death. The motion court did not clearly err[7] in finding counsel ineffective for failing to challenge this instruction.

Law on Kidnapping

The State acknowledges that MAI-CR3d 319.24 requires that, when the crime of kidnapping occurs, jurors must be instructed on the specific felony the defendant intended to commit (State's App. Br. at 81). The MAI also requires that the specific felony be defined. MAI-CR3d 319.24. The Approved Instruction provides in relevant[8] part:

Kidnapping: For Facilitation or Flight from a Felony

(If) you find and believe from the evidence beyond a reasonable doubt:

First, that (on) (on or about) [*date*], in the (City) (County) of ____, State of Missouri, the defendant (removed [*name of victim*] from [*place from which removed* (confined[*name of victim*] for a substantial period), and

[7] This Court reviews the motion court's judgment for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15(k). The State failed to set out the standard of review as required by Rule 84.04 (e); *White v. State*, 192 S.W.3d 487, 490 (Mo. App. S.D. 2006).

[8] Glass only quotes the portion of the MAI that addresses "kidnapping for facilitation of the felony" since the jury found that and rejected the instruction's "injuring or terrorizing the victim" portion. The entire MAI is included in the appendix (A-1).

Second, that [*Insert one of the following. Omit brackets and number.*]

[I] such (removal) (confinement) was by means of forcible compulsion and was without the consent of [*name of victim*],

***

Third, that [*Insert one of the following. Omit brackets and number.*]

[1] defendant (removed) (confined) [*name of victim*] for the purpose of (facilitating the commission of [***name of felony***]) (facilitating flight after the commission of [***name of felony***]),

then you will find the defendant guilty (under Count ___) of (the class B felony of) kidnapping.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense (under this instruction).

***

([***Insert a definition of the felony.***])

MAI-CR3d 319.24 (emphasis added). The Notes on Use require the felony be defined.

5. This instruction contains the direction "[*Insert a definition of the felony.*]." This direction refers to the felony named in paragraph Third, option [*1*].

A definition of the felony must be included in the instruction if option [1] is used. It shall be inserted immediately before the last paragraph of the instruction.

Id. (Emphasis added).

Contrary to the MAI, the instruction in Glass' case neither specified the felony Glass supposedly intended to commit, nor defined the felony. Rather, the instruction provided, that Glass had removed the victim without her consent from the place where she was found or unlawfully confined her without her consent for the purpose of "facilitating the commission of *any felony* or flight thereof" (Ex. 3C at 415) (emphasis added).

The State agrees that, had the kidnapping offense been submitted in guilt phase, this instruction would have been erroneous. But, since, it was "merely an aggravator," the State argues the object felony need neither be specified nor defined (State's App. Br. at 81).[9] The State has it backwards. Since aggravators are facts necessary to increase punishment, more scrutiny, not less, should occur in penalty phase. *See e.g. Deck*, 68 S.W.3d at 430. After all, "there is a significant constitutional difference between the death penalty and lesser punishments." *Id.*

[9] This Court rejected a similar argument in *State v. Storey*, 986 S.W.2d 462, 463-65 (Mo. banc 1999); and *State v. Mayes*, 63 S.W.3d 615 (Mo. banc 2001) (failure to give no adverse inference instruction in penalty phase was error even when MAIs only provided that it be given in guilt phase).

quoting, Beck v. Alabama, 447 U.S. 625, 637 (1980). "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Deck,* 68 S.W.3d at 430, *quoting Beck*, at 638, n. 13 and *Woodson v. North Carolina,* 428 U.S. 280, 305 (opinion of Stewart, Powell and Stevens, JJ.). The motion court recognized this need for heightened reliability. It properly relied on *Woodson* in granting relief (L.F. 806).

Jury Did Not Make Factual Findings Required to Increase Punishment

The jury found a single aggravator, that Glass removed the victim from her home without her consent "for the purpose of facilitating the commission of a felony or flight thereafter." (Ex. C at 424). But, what felony did Glass purposely try to commit? The State argued sexual assault (Tr. 1366-67), but the jury rejected that argument, acquitting Glass of torture or depravity of mind based on a sexual assault (Ex. 3C at 415, 424). The State now argues that the jury could find any felony it wanted, but never explains how jurors would know what a "felony" is without an instruction giving them guidance.

Legal terms must be defined. *See e.g. State v. Farris*, 125 S.W.3d 382 (Mo. App. W.D. 2004) (refusal to instruct jury on definition of possession constituted plain error, in trial for attempt to manufacture methamphetamine, even though pattern jury instruction for offense did not require definition); *State v. Ludwig*, 18 S.W.3d 139 (Mo. App. E.D., 2000) (trial court's failure to define required mental state of "reckless" was reversible error, where lay definition of reckless included

words such as careless and negligent, and jury could have convicted defendant based on those lesser culpable mental states); *State v. Harrison*, 996 S.W.2d 704 (Mo. App. W.D., 1999) (verdict directors that did not include new statutory definition on "pornographic for minors" element required reversal). The State never explains how the jury could find a felony without it being specified and defined.

As the motion court found, the instruction "gave jurors a roving commission to consider any bad acts which jurors believed movant may have committed to be 'felonies' which would allow them to find the aggravating circumstance." (L.F. 808).

"Contemporaneous Multi-Crime Event"

The State suggests that, for the "murder committed in the course of a felony" aggravator, the jury need not find a particular felony, only a "contemporaneous, multiple-crime event." (State's App. Br. at 82-83). In support, the State cites *State v. Bucklew*, 973 S.W.2d 83, 94-95 (Mo. banc 1998) and *State v. Smith*, 32 S.W.3d 532, 555-56 (Mo. banc 2000). Neither case supports the State's argument. Rather, they support the motion court's findings.

In *Smith*, the jury found the defendant guilty of two counts of first degree murder for the stabbing deaths of his former girlfriend, Brandie Kearnes, and her stepfather, Wayne Hoewing. *Id*. at 540. Smith parked his truck thirty yards from the residence, entered through the basement door, took off his shoes and went upstairs. *Id*. at 539-40. He scuffled with Kearnes and stabbed her eight times. *Id*.

at 540. He then entered Hoewing's bedroom, climbed on top of him and stabbed him eleven times. *Id*. Hoewing scared him away by grabbing a loaded gun. *Id*. Based on these facts, the jury found multiple aggravators. As to Kearnes, the jury found two: 1) the murder was committed during the commission of another unlawful homicide; and 2) the murder was committed while Smith was engaged in a burglary. *Id*. at 541. As to Hoewing, the jury found the same two aggravators and that the murder involved depravity of mind. *Id*.

This Court found that the trial court *erred* in submitting an aggravating circumstance instruction that neither named the object crime for burglary nor defined it. *Id*. at 555. The instruction defined burglary as "knowingly enters unlawfully or remains unlawfully in a building or inhabitable structure for the purpose of committing a *crime therein*." *Id*. (emphasis in opinion). This Court held that the instruction should have specified the specific crime that Smith had the purpose of committing when he entered the residence. *Id*.

Having found error, this Court examined the prejudice from the faulty instruction. *Id*. It found no prejudice, because all of the evidence indicated that Smith had intended to murder when he entered the house. *Id*. at 555-56. Since that crime had been instructed upon and defined, the jury did not have a roving commission to decide what offense was intended. *Id*. Additionally, even if the erroneous portion of the instruction were stricken, the penalty would be upheld since at least one other aggravator remained for each murder. *Id*. Under the law then, that was all required for the jury to recommend death. *Id*.

Here, by contrast, the erroneous instruction prejudiced Glass. The kidnapping aggravator was the sole aggravator the jury found. If it were stricken, no basis for a death sentence remained. And, unlike *Smith*, all the evidence did not point to a single undisputed crime, like murder, upon which the jury had been instructed. Instead, at trial, the State argued the intended crime must have been sexual assault (Tr. 1366-67). But, the jury specifically rejected that as the object crime when it rejected the torture or depravity of mind aggravator (Ex. 3C at 415, 424). On appeal, the State has shifted course and changed its theory. It now argues that the intended felony "may" be the murder (State's App. Br. at 83). Or maybe Glass intended some other felony. *Id*. We can only guess or speculate. This is precisely the roving commission the motion court found the Constitution prohibits (L.F. 808).

Bucklew does not support the State's position either. Bucklew never challenged the aggravating circumstances instruction, but complained that the trial court erred in accepting the verdict, because its language differed slightly from the instruction. *Bucklew*, 973 S.W.2d at 94. The jury found Bucklew had committed a kidnapping "during the *murder* of Michael Sanders" and a burglary "during the *murder* of Michael Sanders." *Id*. Even though the verdict's words were not identical to the instructions, they conveyed that Bucklew had committed the burglary and kidnapping as part of the murder. *Id*. at 94-95.

Unlike *Bucklew*, here, the instruction neither specified nor defined the object crime for kidnapping. And unlike *Bucklew*, where the jury specified the

underlying felony it found, Glass' verdict leaves us guessing. Who knows what the jury concluded was a felony? The erroneous instruction gave no guidance.

Jury Must Find Facts Necessary to Increase Punishment

Relying on *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); and *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (L.F. 806), the motion court also recognized that the Sixth and Fourteenth Amendments require that any fact that increases punishment, other than a prior conviction, must be submitted to a jury and proven beyond a reasonable doubt. Statutory aggravators increase punishment and must be proven beyond a reasonable doubt. *Ring*; and *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003). This Court must reject the State's "it's merely an aggravator" argument.

Requirement of Unanimity

The State argues that jurors need not be unanimous in finding how the kidnapping was committed (State's App. Br. at 81-82). The State cites no death penalty cases for this proposition, but instead relies on two felony cases. *State v. Dooley*, 851 S.W.2d 683, 686-87 (Mo. App. E.D. 1993) (burglary, kidnapping and assault convictions); and *State v. Davis*, 963 S.W.2d 317, 323-24 (Mo. App. W.D. 1997) (first degree murder conviction, but sentenced to life without parole making aggravators irrelevant on appeal).

In *Dooley*, the court held that, where a disjunctive submission involves the purpose by which the crime is committed, no prejudice results because unanimity is required only on the ultimate issue of guilt or innocence. *Dooley*, 851 S.W.2d at

686-87. In *Davis*, an accomplice liability case, the issue was whether the verdict director for first degree murder adequately submitted deliberation. *Davis*, 963 S.W.2d at 323-24. The Court found that the disjunctive submission on how the crime was committed was not error since the jury had to find unanimously that Davis deliberated and committed first degree murder. *Id*.

The State cites no death penalty case for its argument that unanimity is not required on aggravating circumstances. In capital cases, unanimity is constitutionally required. *State v. Goucher*, 111 S.W.3d 915, 918 (Mo. App. S.D. 2003). "In *non-capital cases*, a state criminal defendant has no federal constitutional right to a unanimous jury verdict," *citing Johnson v. Louisiana*, 406 U.S. 356, 359-60 (1972); and *Apodaco v. Oregon*, 406 U.S. 404, 406 (1972). *Goucher* recognized a different rule for capital cases on unanimity, supporting the motion court's findings (L.F. 806-07).

Glass had a state constitutional right to a "trial by twelve people that unanimously concur" in his guilt before he could be convicted. *Goucher*, 111 S.W.3d at 917; Mo. Const. Article I, Section 22(a). Consistent with this fundamental right, Missouri instructions require unanimity on each aggravator (Ex. 3C, at 415-16). The instruction tells jurors: "on each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance." *Id*.

Even if the State is correct in asserting that the means of committing an aggravator need not be unanimously found, as long as the jury is unanimous on the

ultimate finding, the State never explains how the jury's verdict here met that requirement. Unlike *Dooley* and *Davis*, the State did not submit alternative means of committing the crime. Rather we have a single, un-specified, un-defined legal term - "felony," which gave the jury a roving commission to find that Glass had committed the crime during a kidnapping.

Evidence Insufficient to Support Aggravator

The motion court found appellate counsel ineffective for failing to raise the insufficiency of evidence on the sole aggravator (L.F. 809). The State argued that this aggravator was supported by a sexual assault (Tr. 1367). But the jury rejected that the evidence supported a sexual assault when the instructions submitted the assault (Ex. 3C, at 415, 424). Trial counsel included this claim in the new trial motion (Ex. 3C, at 474). Under these circumstances counsel's failure to challenge sufficiency was unreasonable (L.F. 809).

The State argues the motion court erred in this finding (State's App. Br. at 83-85). Its argument ignores the record. First, the State suggests that, by rejecting the depravity of mind aggravator, the jury did not really reject the sexual assault theory. It asserts that the narrowing requirement for "depravity of mind," which includes a finding of sexual assault, does not apply to "outrageously and wantonly vile, horrible and inhuman." (State's App. Br. at 84). The State never explains why the narrowing requirement only applies to half the aggravator – the "depravity of mind" half, and not the "outrageously and wantonly vile, horrible or inhuman" half. Narrowing is designed to avoid the unconstitutional infirmity the

Supreme Court recognized in *Maynard v. Cartwright*, 486 U.S. 356 (1988), finding the "especially heinous, atrocious, or cruel" aggravating circumstance unconstitutionally vague. *See also*, *State v. Preston*, 673 S.W.2d 1, 11 (Mo. banc 1984); *State v. Griffin*, 756 S.W.2d 475 (Mo. banc 1988) (discussing the narrowing requirement). The jury's rejection of the sexual assault was just that, whether for purposes of depravity of mind, outrageously and wantonly vile, horrible or inhuman, or the object crime of the kidnapping.

Apparently recognizing the weakness of its argument, the State argues that the guilt phase finding of first degree murder is sufficient to make Glass eligible for the death penalty. It argues:

> The evidence was sufficient to find that appellant had committed the murder (as he had already been found guilty) which would have satisfied the finding that appellant had the purpose to commit the murder.

(State's App. Br. at 85). Under this circular argument, any defendant convicted of first degree murder would be eligible for the death penalty because he had the purpose to commit the murder. This has never been the law in Missouri and would be unconstitutional since aggravating circumstances must provide real narrowing to reserve the death penalty for those most deserving of it. *Gregg v. Georgia*, 428 U.S. 153 (1976) (upheld Georgia's guided discretion statute because aggravating circumstances narrowed those eligible for death); *Woodson v. North*

Carolina, 428 U.S. 280 (1976) (statute making death mandatory for first degree murder was held unconstitutional).

The State finally argues that different jurors "could have found that appellant had the purpose to commit different felonies" (State's App. Br. at 85). The State never cites to the record to reveal what those felonies might be. The motion court properly reviewed the evidence and the jury's written findings. The motion court did not clearly err.

Court Should Affirm

Counsel was ineffective for failing to object to the flawed aggravating circumstance instruction. Counsel should have known that the offense of kidnapping, when based on committing a felony, requires the felony be specified and defined. Counsel wanted to raise all meritorious challenges to the aggravating circumstance instruction (Ex. 22, at 219-28, H.Tr. 557), but failed because they did not know the law (L.F. 804). Had counsel objected, the trial court would have been required to submit the appropriate instruction – one that specified and defined the felony. *State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997). Failing to object because counsel erroneously interpreted the law was ineffective, *Butler v. State*, 108 S.W.3d 18, 26 (Mo. App. W.D. 2003), as was failing to raise the issue on appeal, *Roe v. Delo*, 160 F.3d 416 (8th Cir. 1998) (L.F. 804). Submitting faulty instructions in penalty phase can constitute ineffective assistance of counsel. *Deck v. State*, 68 S.W.3d 418, 429 (Mo. banc 2002).

Counsel was ineffective for not challenging this aggravating circumstance instruction. Accordingly, this Court should affirm the motion court's grant of penalty phase relief.

XIII. Failure to Investigate and Present Readily Available Mitigation

This Court should review the entire record in determining whether the motion court erred. Trial counsel had a duty to investigate all reasonably available mitigation but failed to do so. Counsel failed to investigate and present Glass' treating physician and teachers who could have testified about Glass' impaired intellectual functioning. Counsel did not investigate and present other mitigating evidence from Glass' teachers, probation officers and friends. Glass was prejudiced since impaired intellectual functioning is inherently mitigating and critical to the jury's assessment of whether death is appropriate. Yet the jury never heard this evidence, since counsel called only family and friends to testify about his background.

Initially, this Court should decide whether to review this claim, because the State's Cross-Appellant's Brief fails to comply with the briefing rules. As a general rule, a case should be decided on its merits, not on technical deficiencies. *Christeson v. State*, 131 S.W.3d 796, 799, n. 5 (Mo. banc 2004). Yet this Court should not serve as an advocate for any party to an appeal. *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978). The reviewing court should not have to sift through the record on appeal when the brief provides virtually no transcript citations in the argument section of the brief. *Jones v. State*, 172 S.W.3d 876, 879 (Mo. App. S.D. 2005). Rule 84.04 (i) requires that "all statements of fact and

argument shall have specific page references to the legal file or the transcript." *White v. State*, 192 S.W.3d 487, 490 (Mo. App. S.D. 2006).

The State's brief does not comply with these rules. The motion court made detailed findings of fact and conclusions of law regarding counsel's failure to investigate and call 21 witnesses in penalty phase (L.F. 779-94). The State specifies only five of these witnesses by name and refers the two probation officers by their titles (State's App. Br. at 100-03). The State does not discuss the testimony of the remaining 14 witnesses. Rather, the State merely references their depositions by exhibit number and the entire transcript portion of their testimony: (Exhibits 39-56, 60: PCR Tr. 43-68) (State's App. Br. at 100). The State also fails to cite trial counsel's specific testimony addressing each witness, explaining why he failed to investigate and call the witness (State's App. Br. at 86-103). Instead, the State would have this Court and opposing counsel sift through the record to evaluate the claims.

The State's deficiencies are especially troublesome in this post-conviction appeal because the motion court's findings and conclusions are presumed correct and the State has the burden of establishing error warranting relief. *Jones*, 172 S.W.3d at 878. If this Court reviews the State's appeal of the motion court's granting penalty phase relief on this claim, this Court should review for clear error.

While the State cites the appropriate standard of review, it fails to apply it (State's App. Br. 96-97). This Court is to review the "*entire record*" when

reviewing the findings and conclusions for clear error. *State v. Taylor*, 944 S.W.2d 925, 938 (Mo. banc 1997). The State encourages this Court to review the record selectively, cherry-picking only those statements useful to defeating a claim of ineffectiveness. The State ignores most of the record, never discussing the testimony of Glass' treating physician and most of his teachers, who the motion court found credible and compelling. The State also ignores most of trial counsel's testimony, in which he admitted his failure to investigate and lack of strategic reasons for failing to present evidence of Glass' impaired intellectual functioning. When this Court reviews the *entire* record, not just selected portions, it will find ample support, for the motion court's finding that counsel was ineffective in failing to present mitigating evidence.

The motion court found that trial "counsel's failure to investigate and call school officials and prior professionals was deficient and prejudicial since jurors perceive non-family members as more 'disinterested' witnesses." (L.F. 779), *citing, State v. Hayes*, 785 S.W.2d 661, 663 (Mo. App. W.D. 1990). The failure to call particular teachers and a prior doctor was especially prejudicial, since they would have testified about his impaired intellectual functioning, which is "inherently mitigating" and "critical to the jury's assessment of whether to impose the death penalty." (L.F. 779). *Tennard v. Dretke*, 124 S.Ct. 2562, 2571 (2004) and *Hutchsion v. State*, 150 S.W.3d 292, 297 (Mo. banc 2004). The State never discusses *Tennard* and *Hutchison*. (State's App. Br. at 86-103).

The motion court also found counsel ineffective for failing to investigate and present all substantial mitigating evidence (L.F. 779-81). Again the motion court relied on Supreme Court cases in making this finding, *citing*, *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), and *Rompilla v. Beard*, 545 U.S. 374 (2005). The State fails to acknowledge any of these cases. (State's App. Br. at 86-103). A review of the motion court's findings show they were well-reasoned and based on these cases and the facts.

Dr. Scherr – Glass' Treating Physician

The motion court found counsel ineffective for failing to investigate, interview and call Dr. Barry Scherr, M.D. (L.F.781-82). Dr. Scherr admitted Glass to the hospital for bacterial meningitis[10] when Glass was only 23 months old (Ex. 2 at 8-9). Glass vomited; had trouble breathing; had a seizure, and was "quite lethargic" (Ex. 2 at 9). At one point, he was only responsive to pain and became blue around his lips (Ex. 2 at 10). Glass' illness was so severe, he almost died (Ex. 2 at 11). The long-term consequences of bacterial meningitis include permanent brain damage, learning disabilities, motor problems, speech delays, and hyperactivity (Ex. 2 at 13-14).

The motion court found that trial counsel was on notice of Dr. Scherr before trial, since he had obtained Glass' medical records, which listed Scherr as

[10]The inflammation of the meninges surrounding the brain causes the brain damage (Ex. 2 at 18-19, 22).

the treating physician (L.F. 781, citing Ex. 1, Ex. 2, at 22, Ex. 22 at 48-50). Counsel had no "good reason" for not interviewing or calling Scherr to testify (L.F. 781, Ex. 22 at 51). Counsel wanted the jury to hear Scherr's information (Ex. 22 at 52). The motion court correctly found that this was a failure to investigate and could not be justified on strategic grounds.

The motion court found counsel's failure to interview and call Scherr "especially prejudicial" since the trial court had excluded Glass' medical records (L.F. 781-82). Testimony about the severity of meningitis and its long-term risks would have been significant mitigating evidence of impaired intellectual functioning (L.F. 782). Dr. Scherr's testimony was mitigating standing alone, but even more so when combined with teachers' testimony about Glass' impairments, and Dr. Gelbort and Burns' testimony about his neuropsychological deficits and learning disabilities (L.F. 782, n. 7).

Contrary to the State's argument that this information was before the jury through Glass' aunt (State's App. Br. at 103), as the motion court explained, the aunt admitted during cross-examination that she did not know meningitis' effects (L.F. 782, citing Tr. 1308). She was "not a doctor" and "didn't know" if the meningitis affected Glass later (L.F. 782, citing Tr. 1308-09). The prosecutor objected based on hearsay, successfully precluding any mention of what the doctor had advised the family when treating Glass for meningitis (L.F. 782, citing Tr. 1309).

As the motion court found, the aunt's testimony about Glass' meningitis was not a substitute for Dr. Scherr (L.F. 782). The aunt lacked a doctor's expertise and jurors likely viewed her less credible due to her personal interest in the case. Glass' case was like *Hutchison*, where Hutchison's mother testified briefly about his learning disability and placement in special education (L.F. 782). Even though the subject matter was briefly mentioned at trial, it was not a substitute for records and expert testimony. *Id*. And, counsel did not view the aunt's testimony as an effective substitute for the medical records or Scherr's testimony (L.F. 782, citing Ex. 22 at 290-91). The motion court properly concluded that counsel was ineffective for failing to investigate and call Dr. Scherr to testify.

Teachers – Impaired Intellectual Functioning[11]

The motion court also found counsel ineffective for not investigating and calling teachers, each of whom would have shown Glass' impaired intellectual functioning (L.F. 782-89). The motion court carefully detailed each teacher's testimony and counsel's testimony about his failure to investigate and call them. *Id*. The State ignores most of these findings and all the testimony supporting them, and asks this Court to reverse the motion court, based on two teachers'

[11] The motion court divided the teachers into two groups, those testifying about Glass' impairments and those providing background information.

comments (State's App. Br. at 101-02). The entire record, not selected portions, shows why this Court should affirm.

Kay Obermann, Glass' third grade teacher, recalled that Glass did not do well academically and "struggled with his classes" (L.F. 782, quoting Ex. 39 at 5-6). Obermann referred him to a federal Title I program for extra help with reading and tried to help him after school. *Id*. Obermann found Glass' deficits significant - his failing grades were not common among students (L.F. 72-83, Ex. 39 at 8). Obermann passed Glass to fourth grade, even though he was failing academically. Because of Glass' large physical size, she worried he would "stand out" physically from other kids if he were held back (L.F. 783, Ex. 39 at 7).

The motion court found that counsel had obtained Glass' school records and tried to admit them at trial (L.F. 783). Even though Obermann's name and notes appeared in these school records, counsel never contacted her before trial (LF. 783, citing Ex. 5 at 2, 14-16, 39-42, and Ex. 22 at 45). Counsel said he failed to interview Obermann because her notes reflected that she once met with Glass' mother at a parent-teacher conference (L.F. 783, Ex. 22 at 45-46), Ex. 5, at 39). The court found counsel's inaction unreasonable, since attending a single parent-teacher conference did not contradict the overwhelming evidence that Glass' mother abandoned him when he was a baby (L.F. 783). Foregoing mitigating evidence because it might include something harmful was unreasonable (L.F. 783, relying on *Hutchison*, 150 S.W. 3d at 305, and *Williams v. Taylor*, 529 U.S. at 395-96, n. 19).

"Obermann would have provided significant mitigating evidence of [Glass'] impaired intellectual functioning and below-grade level performance as early as third grade – facts the jury heard from no other source." (L.F. 783). In reaching this conclusion, the motion court relied on *Hutchison*. There, this Court condemned counsel's failure to investigate and present school records showing a history of difficulty in school and placement in special education. (L.F. 783). The motion court also recognized, that *Rompilla v. Beard* found "test scores showing a third grade level of cognition after nine years of schooling" mititgating (L.F. 783, *citing*, *Rompilla*, at 125 S.Ct. at 2468).

The State never addresses these factually-accurate findings and legally well grounded conclusions.

The motion court also granted a new penalty phase because counsel failed to call Clarence "Butch" Fore, Glass' sixth or seventh grade math teacher (L.F. 783-84, Ex. 41 at 4). Fore remembered Glass "struggled" with basic math skills, once, Glass tearfully telling Fore, "he couldn't divide" (Ex. 41 at 4-5). Fore then worked with Glass individually to try to improve his skills (Ex. 41 at 5-6). Counsel's investigator contacted Fore, but counsel neglected to call him (L.F. 784). Counsel could provide no reasonable explanation for this failure (L.F. 784, Ex. 22, at 23). The motion court concluded that counsel was unreasonable for the same reasons as the Obermann claim (L.F. 784). Having heard Fore's testimony, the motion court found it significant mitigating evidence of Glass' impaired

intellectual functioning and below-grade level performance. *Id*. Once again, the State never addresses these findings (State's App. Br. at 86-103).

The State also never challenges the motion court's grant of penalty phase relief due to counsel's failure to investigate and call Martha Myers, Glass' math teacher in 10th or 11th grade (L.F. 784-85). Meyers described Glass as a slow student, with the same symptoms as students diagnosed with a "processing deficit" (L.F. 784, Ex. 40 at 4-6). Other kids picked on Glass because of his large physical size (L.F. 784, Ex. 40 at 7). Despite his struggles, Glass received an award for good behavior in high school (L.F. 784, Ex. 40 at 8).

Counsel never even contacted Myers before trial, even though Glass' school records identified either his teachers or his classes at Palmyra School District (L.F. 784-85, Ex. 40 at 10, Ex. 22 at 18, 30-31, 39, Ex. 5). Accordingly, counsel did not know what mitigating evidence Myers could offer (L.F. 784, Ex. 22 at 39-40). Counsel admitted that, had he contacted Myers, he would have wanted to call her as a witness (Ex. 22 at 40-41). As the motion court found, counsel's failure to call Myers was a failure to investigate and cannot be justified on strategy grounds (L.F. 784). Counsel failed to "discover all reasonably available mitigating evidence." (L.F. 785, *quoting Wiggins v. Smith*, 539 U.S. at 524). The motion court agreed with counsel's assessment that Myers' testimony was mitigating and the jury did not hear such mitigation from any other source (L.F. 785).

The motion court also considered the testimony of Maggie Queen, Glass' high school science teacher (L.F. 785-86). Queen remembered Glass as a "quiet student" who did not cause problems (L.F. 785, Ex. 44 at 3-5). His grades were not good and he needed some extra help (L.F. 785, Ex. 44 at 5). When Glass was in Queen's class, they had no resource room teacher or special education program to help students with learning difficulties (L.F. 785, Ex. 44 at 5).

Like so many other witnesses, counsel never interviewed Queen (L.F. 785, Ex. 44 at 6-7). The motion court found counsel's failure unreasonable (L.F. 785). Since counsel had a list of teachers for all Glass' classes, he was on notice of who had taught at the school (L.F. 785, Ex. 22, at 30-31). Counsel had a duty to follow up and discover this mitigating evidence (L.F. 785). Counsel could not determine whether Queen had useful information without interviewing her (L.F. 785). The motion court found counsel's failure prejudiced Glass, since she would have provided significant mitigating evidence of Glass' impaired intellectual functioning and need for special education services, services unavailable at Glass' school (L.F. 785-86). The State never mentions Queen or her testimony that Glass was a "quiet student" who caused no problems.

Teachers – Mitigating Background Information

In addition to these teachers, the motion court found counsel ineffective for failing to investigate and present teachers' testimony that would have provided mitigating evidence of Glass' background and good character (L.F. 786-89).

Almost every teacher commented on what a good kid Glass was, he never caused problems and even got an award for his good behavior. The State ignores all this testimony. Instead, the State refers to Debbie Roberts, another teacher, saying she would have testified Glass "could be aggressive at times during her class" (State's App. Br. at 101-02). The State fails to review Roberts' entire testimony. Roberts said Glass could be aggressive at times, but never was abusive or violent (Ex. 45 at 13). She had never seen him hit anyone. *Id.* The State also ignores Roberts' testimony the court found mitigating, like her knowledge of Glass' participation in band and vocal ensemble (L.F. 789, Ex. 45 at 9). Counsel acknowledged that Roberts' testimony about Glass' love for music was consistent with their penalty phase theme and he had no reason for not calling her to testify (Ex. 22, at 24).

The State mentions one other teacher, Donna Brown, Glass' 10th grade English teacher, and says that counsel strategically decided, after investigation, not to call her (State's App. Br. at 101). According to the State, since Brown was close to the victim's family and did not want to testify, counsel reasonably chose not to call her. *Id.* The State argues that her "testimony was basically that appellant was quiet, enjoyed music, was not a discipline problem, and was disappointed when he did not get into college." *Id.* The State concludes that such testimony was "merely cumulative" to evidence of trial witnesses. *Id.*

Again, the State selects part of the testimony to suit its purposes and ignores that which defeats its claim. But, if this Court reviews the "entire record,"

it will find that Brown not only described Glass as a quiet, bashful person who liked music and band, but revealed significant information about Glass' grandfather who raised him. Glass' grandfather's appearance at a parent-teacher made a lasting impression (Ex. 42 at 7-8). "When somebody's parent comes in and they've been drinking, you would like to think that the one point in their life they wouldn't drink, that would be when they were coming to meet the teachers. But there was a smell of alcohol on him" (Ex. 42 at 8).

The motion court considered all of Brown's testimony and found counsel ineffective (L.F. 786). Glass' jurors never heard from any source, that Glass's grandfather drank and attended a parent-teacher conference smelling of alcohol (L.F. 787). Rather, the family all down-played the grandfather's drinking, saying he had quit drinking years earlier, after he shot Glass' mother when she was pregnant with Glass' older sister (Tr. 1237, 1264-65, 1348). The motion court found the grandfather's drinking when he attended the "a parent-teacher conference would have indicated to jurors that the grandfather's parenting of [Glass] was likely not the best." (L.F. 787).

The motion court found that counsel's explanation for not calling Brown unreasonable (L.F. 786). Counsel's investigator interviewed Brown before trial, but counsel did not call Brown because she knew the victim's family and preferred not to testify (L.F. 786, Ex. 22 at 20, Ex. 6). Counsel acknowledged he wanted the jury to hear Brown's information (L.F. 786, Ex. 22 at 21). Brown testified that she would have obeyed a trial subpoena, and she would have testified truthfully as

she did in the postconviction case, because "[y]ou can't change the truth" (L.F. 786, quoting Ex. 42, at 12-13). The court did not err.

The State ignores other teachers the motion court considered in finding counsel ineffective. Eric Churchwell, Glass' middle and high school industrial arts teacher, remembered Glass' obesity (L.F. 787, Ex. 48 at 4, 6). Glass, who did well in industrial arts, because it was a "hands-on" class, never caused trouble (L.F. 787, Ex. 48 at 4, 6, 7). But, Churchwell considered him an "at risk" student academically because his family life was not good. (L.F. 787, Ex. 48 at 7-8). Glass' father and mother were not there for him, and he was raised by elderly grandparents, for whom education was not a priority (L.F. 787, Ex. 48 at 7-8). Glass' obesity also caused people to view him differently (L.F. 787, Ex. 48 at 9).

The motion court reviewed Churchwell's and counsel's testimony and found that counsel had never interviewed Churchwell (L.F. 787, Ex. 48, at 9, Ex. 22 at 34). Churchwell was readily discoverable from the school records (L.F. 787, Ex. 22 at 30-31). Relying on *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991); *Wiggins v. Smith*, 539 U.S. at 524; and *Hutchison*, 150 S.W.3d at 308; the court found counsel's failure to call Churchwell was a failure to investigate, which cannot be justified on strategy grounds (L.F. 787).

The motion court also found counsel should have interviewed Judy Caldwell, a counselor at Glass' middle school, who remembered Glass as a heavy-set boy (L.F. 787-88, Ex. 46 at 3-4). One of Caldwell's duties was to handle complaints about students from teachers (L.F. 787, Ex. 46 at 5). Glass was not the

subject of any significant complaints, although he and some other boys once broke a window in shop class (L.F. 787, Ex. 46 at 5). Like Churchwell, counsel never contacted Caldwell solely because he did not think she would have useful information (L.F. 787, Ex. 22 at 32). This constituted a failure to investigate, unjustified on strategy grounds (L.F. 787-88). That Glass was not a disciplinary problem was significant mitigating evidence jurors should have considered (L.F. 788).

The jurors also should have considered Elaine Longacre, Glass' eighth grade health teacher's, testimony (L.F. 788). Longacre remembered Glass' was a "very large boy," an "outcast," who other students teased (L.F. 788, Ex. 43 at 4-5). They would not include him in activities. *Id*. Longacre had no problems with Glass, he wasn't violent or aggressive and always behaved in health class (L.F. 788, Ex. 43 at 6). As with so many teachers, counsel failed to even interview Longacre (L.F. 788, Ex. 22 at 35-36). The motion court found that counsel failed in his duty to "discover all reasonably available mitigating evidence," (L.F. 788), *quoting, Wiggins v. Smith*, 539 U.S. at 524. Contrary to counsel's suggestion that it would not be "prudent" to interview Longacre, not investigating was unreasonable (L.F. 788).

Vince Matlick, Glass' middle school physical education teacher, remembered that, while Glass was not a good athlete, but he worked hard and tried (L.F. 788, Ex. 5 at 2, 6). He never caused problems in school. *Id*. Matlick thought Glass' grandfather was eccentric, since he wore neither shoes nor socks.

Id. Joe Brandenburg, Glass' eighth grade science teacher, remembered Glass was quiet and extremely large for his age (L.F. 789, Ex. 47 at 4). Even though both teachers were listed in the school records, counsel failed to interview them. (L.F. 788-89, Exs. 5, 22 at 29-30, 37, 38,). The motion court concluded counsel's failure was unreasonable and prejudiced Glass (L.F. 788-89). The testimony was mitigating. *Id*.

Given the motion court's detailed findings, the State's argument that the court clearly erred in finding counsel ineffective for failing to investigate and call teachers to testify must be rejected. The State asserts that this testimony did not show Glass had impaired functioning, but, at most, showed he "struggled in some subjects" but "was able to learn and that at he was not motivated." (State App.'s Br. at 103). The motion court reviewed all the teachers' testimony, not selective portions of two. The motion court correctly found that this testimony showed Glass' low functioning, his struggles in school, attempts to do better, and his good character. It showed his lack of support from his family, his alcoholic grandfather, and the teasing he endured. This evidence was not cumulative, as the State asserts, since not a single teacher testified. The motion court heard the teachers' testimony, and found them credible, disinterested witnesses, unlike the family members counsel called. The motion court's findings and conclusions should be affirmed.

Probation Officers

The motion court also reviewed the testimony of Bruce Capp and Kevin Knickerbocker, Glass' probation officers, and found counsel was ineffective for failing to adequately investigate and present their mitigating testimony (L.F. 789-90). At penalty phase, the State introduced, as aggravating evidence, a certified copy of Glass' prior conviction for felony stealing (T.1187). The motion court recognized counsel's duty "to neutralize the aggravating circumstances advanced by the state." (LF. 789), *quoting, Ervin v. State*, 80 S.W.3d 817, 827 (Mo. banc 2002) and *Wiggins v. Smith*, 539 U.S. at 524.

Bruce Capp supervised Glass' probation from late 1998 through early 2000 and they met once a month (L.F. 789-90, Ex. 53 at 4-5). Glass had no probation violations (L.F. 789-90, Ex. 53 at 9). Kevin Knickerbocker supervised Glass' probation after Capp (L.F. 790, Ex. 52 at 4). He, too, saw Glass once a month, and then placed him in a program in which he supervised Glass through the mail (L.F. 790, Ex. 52 at 5-6). Glass had no probation violations until the charged offense (L.F. 790, Ex. 52 at 7, 10).

The motion court found counsel ineffective for not calling either officer (L.F. 789-90). Counsel's investigator interviewed Capp, but counsel did not call him because he was going to be out of country the week of trial (L.F. 790, Ex. 22 at 53-36). Counsel also thought his information not helpful since Capp failed to note substance abuse, mental health or family issues (L.F. 790, Ex. 22 at 53-56). Counsel knew about Knickerbocker, but never interviewed him, so he had no idea

what he could add (L.F. 790, Ex. 22 at 58-60). Counsel did not think the officers' testimony would be consistent with his theme that Glass' life went downhill after high school graduation. *Id.*

The motion court did not accept counsel's developing a theme before he had investigated and found counsel's justifications unreasonable (L.F. 790). Counsel argued in closing that the murder was "simply out of character" for Glass (Tr. 1385) and committed while he was "extremely intoxicated." (Tr. 1372). Capp and Knickerbocker's testimony would have supported this argument and reduced the prejudicial impact of his prior stealing conviction (L.F. 790).

The State argues that counsel was reasonable, but never explains how the failure to investigate is reasonable. It suggests that calling the officers would have harmed Glass by again pointing out his criminal history (State's App. Br. at 101). Under this rationale, counsel may never rebut or neutralize aggravators, since adducing mitigating evidence would always involve discussing the State's aggravation. This Court and the Supreme Court has rejected this argument. *Ervin*, 80 S.W.3d at 827; *Wiggins v. Smith*, 539 U.S. at 524. *See, also, Rompilla,* 545 U.S. 374 (counsel had a duty to investigate aggravating evidence the State intended to present and elicit mitigation uncovered through that investigation).

Friends and Acquaintances

The motion court also found counsel ineffective for not investigating or calling Glass' friends and acquaintances (L.F. 790). While counsel called three acquaintances at trial, counsel's investigation was incomplete and Glass was

prejudiced (L.F. 790-94). The State only discusses one[12] witness the court identified – Chris Brandstat (State's App. Br. at 100-01). This Court should review the *entire* record, not just the selective portion the State presents.

Lesley Lehenbauer remembered Glass as helpful to her and others in high school band (L.F. 790, Ex. 51 at 4, 6). He was nice and never caused problems. *Id*. Counsel's investigator had interviewed Lehenbauer and counsel wanted the jury to hear her testimony (L.F. 790, Ex. 22 at 64-65). Counsel did not call her only because she preferred not to be involved in the trial and was concerned about "negative" reactions from the community if she were to testify (L.F. 790, Ex. 22 at 64, Ex. 11). The court found this justification for foregoing mitigation unreasonable.

> Investigation . . . would be an empty duty if counsel, having obtained the evidence, fails to take the steps necessary to produce the evidence at trial: "A competent lawyer's duty is to utilize every voluntary effort to persuade a witness who possesses material facts and knowledge of an event to testify and then, if unsuccessful, to subpoena him to court to allow the judge to use his power to persuade the witness to present material evidence."

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[12] The State also discusses Debra Boutwell who had seen Glass drinking at a bar (State's App. Br. at 102). Since the motion court did not find ineffective counsel's failure to interview Boutwell, Glass does not discuss her further.

(L.F. 791), *quoting*, *Perkins-Bey v. State*, 735 S.W.2d 170, 171 (Mo. App. E.D. 1987) (citation omitted). Lehenbauer testified in the postconviction case and would have testified similarly had she been subpoenaed at trial (L.F. 791, Ex. 51, at 8-9).

Andrew Fuqua, who was also in high school band with Glass, liked him (L.F. 791, Ex. 49 at 5). Glass participated in Andrew's church and sang in the youth choir (L.F. 791, Ex. 49 at 7). Tim Fuqua, Andrew's father, met Glass through Glass' grandfather who raised him (L.F. 791, Ex. 50 at 3-4, 6). Tim, who found Glass respectful and polite, encouraged Glass to attend church, which he did for a while (L.F. 791, Ex. 50, at 7-10). But Glass lacked family support - his grandfather would not attend church (L.F. 791, Ex. 50 at 7-10). Glass received no positive feedback from his family (L.F. 791, Ex. 50 at 11). Tim cringed when he heard Glass' uncle tell him, "You're as worthless as tits on a boar hog" (L.F. 791, Ex. 50 at 11-12). Tim felt that Glass needed love and acceptance, but received none at home (L.F. 791, Ex. 50 at 12).

The motion court found that counsel knew about Tim and Andrew since Glass had provided their names before trial (L.F. 791, Ex. 22 at 68-69, Ex. 7, at 3). Trial counsel's records show that neither witness was interviewed before trial although Andrew thought he might have been contacted (L.F. 791, Ex. 22 at 69, Ex 50 at 12-13). Counsel could provide no reasonable explanation for failing to interview these witnesses (L.F. 791-92).

Counsel also did not contact Christopher Brandstatt, even though Glass had provided his name (L.F. 792, Ex. 55 at 10, Ex. 22 at 60-61, Ex. 7 at 2). Brandstatt was in band, choir and football at various times with Glass (L.F. 792, Ex. 55 at 4-5). Glass was friendly, but people made fun of him because of his large size (L.F. 792, Ex. 55 at 6). The football team cast Glass aside because he was too slow (L.F. 792, Ex. 55 at 7). Brandstatt remained friends with Glass until Glass borrowed his truck and blew out the engine (L.F. 792, Ex. 55 at 7-8). Brandstatt recalled that Glass changed after high school and lost a job because of stealing (L.F. 792, Ex. 55 at 9).

Counsel had no explanation for failing to investigate Brandstatt (L.F. 792, Ex. 22 at 61). Of course, without investigating him, counsel could not evaluate whether to call him. In hindsight, counsel would have wanted to present much of Brandstatt's testimony to the jury, but would have weighed the negative testimony (L.F. 792, Ex. 22 at 61-62, 256-57). On this record, the court found counsel ineffective. Counsel's failure was a failure to investigate and therefore, could not be justified on strategic grounds (L.F. 792). Brandstatt's testimony was mitigating and consistent with the defense at trial (L.F. 792). The court found it more mitigating than harmful, especially since jurors had already heard about Glass' prior stealing conviction (L.F. 792-93).

George Mottu attended high school with Glass and remembered people made fun of him because of his size (L.F. 793, H.Tr. 45-50). Despite this, Glass behaved well, enjoyed band, was kind and would give you the shirt off his back

(L.F. 793, H.Tr. 50-52). After high school, Glass wanted to attend a religious college, but could not since he was "too new at being a Christian" (L.F. 793, H.Tr. 53). He also lacked money to attend school, and given his learning deficits could not get an academic-based scholarship (L.F. 793, H.Tr. 53). Glass was depressed (L.F. 793, H.Tr. 53).

Sarah Ladue also knew Glass, a friendly and nice person (L.F. 793, Ex. 60 at 7-10). He never caused trouble and always did what was asked of him (L.F. 793, Ex. 60 at 7-8, 10).

As with so many other witnesses, counsel interviewed neither Mottu nor Ladue (L.F. 793, Ex. 22 at 75, 77-78). The court found this failure unreasonable (LF. 793). Counsel had a duty to "discover all reasonably available mitigating evidence" (L.F. 793, *quoting Wiggins v. Smith*, 539 U.S. at 524). The State never addresses counsel's failure to investigate Mottu and Ladue.

Counsel also failed to call June Reidinger, who would have testified that Glass came into her bar alone on several mornings and drank (L.F. 793, Ex. 54 at 4). Glass was quiet and polite, but seemed sad, never smiling (L.F. 793, Ex. 54 at 5). He seemed lonely, lost in his thoughts. *Id*.

Counsel could not explain why he did not call Reidinger although her recollection showed Glass' loneliness (L.F. 793, Ex. 22 at 66-67). Since Reidinger had never seen him drunk, counsel rationalized, he was concerned the evidence might not be that helpful. *Id*. Also, Reidinger knew the victim's family and counsel thought she might be asked victim-impact questions. *Id.*

The motion court found these explanations did not justify foregoing this mitigating evidence (L.F. 793-94). That Glass was drinking in the morning showed the extent of his drinking problem and would have supported counsel's defense that Glass was "extremely intoxicated" when he committed the murder (L.F. 793-94, Tr. 1372). The jury had heard victim-impact testimony, so not calling Redinger did not keep that testimony from the jury (L.F. 794). The helpful mitigation outweighed the potential harm (L.F. 794). Counsel was ineffective.

The motion court carefully considered all of the evidence and applied the law in evaluating counsel's duties. Significantly, the motion court evaluated the totality of the evidence in determining prejudice (L.F. 759). It said:

> In deciding prejudice from counsel's failure to investigate a client's life history, courts should evaluate the totality of the evidence, *Wiggins*, 539 U.S. at 536, 123 S.Ct. 2527, [2543]. The question is whether, when all the mitigation evidence is added together, is there a reasonable probability that the outcome would have been different?

(L.F. 760, n. 2, *quoting*, *Hutchison v. State*, 150 S.W.3d at 306).

The State ignores this standard, and considers only the evidence presented at trial (State's App. Br. at 86-93). The entire record reveals, however that trial counsel only presented evidence of Glass' upbringing - his family background. He didn't present evidence of impaired intellectual functioning. He didn't call the doctor who treated him for meningitis. He didn't call any teachers. He did not call probation officers. He didn't call jail guards to testify about Glass' good

behavior there. *See* Point V, *supra*. He called not a single expert to testify about his neurological deficits, low intellectual functioning, alcohol dependence, and how it impacted him. *See* Point XIV, *infra*.

When this Court reviews the entire record, it will be left with the inescapable conclusion that the motion court carefully considered all the evidence, evaluated witnesses' credibility, and properly found counsel ineffective in failing to investigate and present mitigating evidence. This Court should affirm.

XIV. Counsel's Failure to Present Expert Testimony

Counsel failed to investigate and present expert testimony of Glass' neuro-psychological deficits, his impaired intellectual functioning, including learning deficits, and his alcohol impairment. The motion court properly evaluated the experts and counsel's testimony, found the experts credible and that counsel's justifications for their failures unreasonable. Glass was prejudiced since the expert testimony would have provided mitigating evidence of Glass' impairments and low intellectual functioning and the jury heard no expert testimony or evidence from others about these impairments.

The motion court found counsel ineffective for failing to consult with and call four expert witnesses to testify in mitigation of punishment, finding impaired intellectual functioning inherently mitigating (L.F. 794-802), *citing Tennard v. Dretke*, 542 U.S. 274 (2004); and *Hutchison v. State*, 150 S.W.3d 292, 297 (Mo. banc 2004) (L.F. 794-95). Although Glass' jury heard from no experts, the State challenges the motion court's finding on four experts. Since counsel investigated and consulted with Dr. Smith, a psychologist, and provided a reasonable strategy for not calling him (Ex. 22, at 106-09, 268-71), Glass only addresses three of the experts in this response. The motion court found counsel ineffective, taking the experts, individually or together (L.F. 794, 796, 802).

Neuropsychologist

Before trial, Dr. Gelbort, a neuropsychologist, evaluated Glass and administered standardized tests (H.Tr. 325-30, 343-60). That testing revealed that Glass has neuropsychological deficits that impair higher thinking functions like abstract reasoning, problem-solving and comprehension (H.Tr. 363-73, Ex. 17 at 3-4). Because Glass' temporal lobe functions are impaired, he has learning and memory difficulties (H.Tr. 367-68, Ex. 17 at 4). Glass' cognitive abilities are lower than average, and he has problems with impulsivity (H.Tr. 369-71, Ex. 17 at 3-4).

Dr. Gelbort considered the potential causes of Glass' deficits. Meningitis was a likely culprit (H.Tr. 374). Alcohol is poison to a baby, so Glass' mother's alcohol consumption during her pregnancy exposed Glass to a neurotoxin (H.Tr. 375). (H.Tr. 375). Glass' alcohol use likely contributed to his memory dysfunction (H.Tr. 374). Gelbort provided his report to trial counsel, but was not called to testify (H.Tr. 376-77, Ex. 17).

Counsel, who was handling her first death penalty trial, testified that she feared Dr. Gelbort's testimony would open the door to child pornography seized from Glass' grandparents' home before trial (H.Tr. 402, 446). Counsel acknowledged Dr. Gelbort's evaluation and testing did not encompass pornography. Rather, he tested for brain damage and neurological impairments (H.Tr. 446, 447). Counsel could not recall what materials she provided to each expert (H.Tr. 449). But, Dr. Gelbort remembered. He reviewed Glass' school

records and the medical records that detailed his meningitis (H.Tr. 341, 381-82). Dr. Gelbort told counsel he had no information about pornography (H.Tr. 377, 378, 446). His tests had nothing to do with sexual issues and his report contained no references to them (H.Tr. 378-79).

Counsel worried that Dr. Gelbort's testimony would not be meaningful without another psychologist testifying (Ex. 22 at 97-98). Co-counsel admitted that this did not make sense and acknowledged that Dr. Gelbort could have testified about his testing and Glass' neuropsychological impairments without the testimony of another expert. *Id*. at 98-100.

The motion court evaluated these three witnesses' testimony, decided which were credible, and found that "Dr. Gelbort's neuropsychological examination was not designed to cover topics such as child pornography or sex, and Dr. Gelbort had no information or opinions on the matters." (L.F. 797). The motion court also found counsel's rationale unreasonable since the pornography, seized from Glass' grandparents' home, was never linked to Glass (L.F. 796-97). Several adults had access to the home computer and the trial court ruled that the State had not produced any evidence linking it to Glass (L.F. 796). Dr. Gelbort's neuropsychological evaluation was a free-standing evaluation, not dependent on other experts' opinions (L.F. 797). Accordingly, counsel's rationale for not calling him was unreasonable (L.F. 796-97).

Relying on trial counsel's testimony, the State asserts Dr. Gelbort was aware of pornography (State's App. Br. at 111-12). The State ignores that the

motion court heard the three witnesses' testimony on this issue, found Dr. Gelbort credible and believed Dr. Gelbort had never considered the evidence. The motion court rejected trial counsel's testimony to the contrary. Both counsel and Dr. Gelbort testified before the motion court and the court actively questioned each witness (H.Tr. 397-99 470-72). The court specifically questioned counsel about her proffered reason for not calling Dr. Gelbort (H.Tr. 470). The motion court was in the best position to consider the witness' testimony and decide credibility. A reviewing court should defer to the motion court's credibility determinations. *Houston v. State*, 623 S.W.2d 565, 567 (Mo. App. E.D. 1981).

The motion court found that counsel's failure to call Dr. Gelbort prejudiced Glass since neuropsychological deficits have "powerful, inherent mitigating value" (L.F. 797, *citing*, *Hutchison*, 150 S.W.3d at 307-08). It found Glass' case even more compelling than *Hutchison*, because in *Hutchison*, Dr. Bland testified. Thus, Hutchison's jury heard some mental health evidence from a clinical psychologist, whereas Glass' jury heard no mental health experts (L.F. 795), *citing* *Hutchison*, 150 S.W.3d at 309 (Limbaugh, J., dissenting). The motion court recognized that this was a close case in which the jury deliberated more than six hours in penalty phase (L.F. 797, Tr. 1391). The court found a reasonable probability that, had the jury heard Dr. Gelbort's testimony about Glass' impaired intellectual functioning, the result would have been different (L.F. 797).

A Learning Disability Expert

Counsel did not follow up on Gelbort's testing by retaining or consulting a learning disability expert and obtaining further testing (Ex. 22 at 111-12). Counsel knew that Glass had academic problems (Ex. 22, at 111). He also knew that he had neuro-psychological deficits (Ex. 17).

Dr. Teresa Burns, a Speech and Language pathologist, evaluated Glass post-trial (H.Tr. 132-36). She reviewed background materials, including medical and school records and teachers' depositions (H.Tr. 135-36). She administered formal, standardized tests (H.Tr. 135-36).

The testing showed that Glass' aptitude functioning - his ability to learn - is well-below age level in many areas (H.Tr. 142-43, Ex. 31 at 8, Ex. 65). Glass' reasoning skills were low (H.Tr. 151, 154-55, 162-63, Ex. 31 at 3). His measured reasoning skills placed him in the 18th percentile and fluid reasoning was 25th percentile. *Id*. His fluid reasoning is that of an 11-year-old (Ex. 31 at 3). He had lots of problems with concept formation; his scores placed him in the 9 year and 5 month level (H.Tr. 162).

Glass had deficits with written language too. His broad written language achievement ranked in the 14th percentile (H.Tr. 159). His basic writing skills were in the 20th percentile (H.Tr. 160). His Written Expression Achievement score was only in the 22nd percentile (H.Tr. 160).

Burns testing revealed Glass has a learning disability (H.Tr. 170). Burns pointed to factors leading to this disability: meningitis and his mother's drinking alcohol during her pregnancy (H.Tr. 173).

The motion court found counsel was ineffective for failing to investigate or consult a learning disability expert (L.F. 797-98). Counsel failed to notice "red flags," like Glass' academic problems and neurological deficits (L.F. 797). Counsel had no strategic reason for his failure. It simply did not occur to him to do further testing (L.F. 798, Ex. 22, at 11-12).

The motion court found Glass was prejudiced. An evaluation would have revealed Glass' limited intellectual functioning and his deficits (LF. 798). The motion court analogized counsel's failure to Hutchison's counsel's failures to follow-up on information in an expert's report and present evidence of learning disorders (L.F. 798), citing *Hutchison*, 150 S.W.3d at 307-08. The motion court also found this type of evidence mitigating under *Rompilla v. Beard*, 125 S.Ct. at 2468. (L.F. 798). There, the Court found test scores showing defendant's low level-functioning, despite nine years of schooling, to be mitigating.

The State disagrees with the motion court's findings, saying counsel conducted a thorough investigation and, since counsel was unfamiliar with Burns, he could not be ineffective for not calling her (State's App. Br. at 116-17). This Court has rejected the State's argument.

> Hutchison does not claim that the specific experts who testified at the motion hearing should have been called at trial.

> *Indeed, there is no claim that trial counsel knew about these specific experts*. Hutchison merely argues that this type of expertise should have been pursued.

Hutchison v. State, 150 S.W.3d at 307 (emphasis added). Like *Hutchison*, Glass argued that counsel should have sought the expertise of those who could have testified about his impaired intellectual functioning, whether Dr. Burns or another qualified expert.

The State also asks this Court to reverse, because Burns acknowledged that along with his deficits, Glass had some abilities (State's App. Br. at 117). According to the State, since Glass' learning deficits did not cause him to commit this "heinous murder," the deficits are not mitigating. *Id*. The Supreme Court has rejected the argument. *See*, *Tennard v. Dretke*, 542 U.S. 274 (2004) (evidence of impaired intellectual functioning is inherently mitigating at penalty phase of capital case, regardless of whether defendant has established nexus between his mental capacity and crime); and *Smith v. Texas*, 543 U.S. 37, 44 (2004) (evidence of capital murder defendant's troubled childhood, his IQ of 78, and his participation in special education classes was relevant mitigation).

Pharmacologist

Dr. Terry Martinez, a toxicologist and pharmacologist, evaluated Glass post-trial (H.Tr. 209). Based on police reports, witness accounts and Glass' statements, Martinez calculated Glass' blood alcohol content on the night of the crime (H.Tr. 218-20). He used a pharmakinetic extrapolation, based on Glass'

weight, the type of alcohol, and the time he drank (H.Tr. 219-21). Martinez concluded that Glass was severely impaired, with his cognitive judgment, memory, and judgment adversely affected (H.Tr. 221-23). His capacity to appreciate the criminality of his conduct and conform to the requirements of the law was substantially impaired and he suffered from an extreme mental and emotional disturbance (H.Tr. 223-24).

Counsel telephoned Dr. Martinez and asked him about his fees (Ex. 22, at 119-20). Counsel did no further investigation. He did not consult an expert to evaluate Glass' consumption of alcohol and its effects on him (L.F. 800).

The motion court found counsel's failure to consult an expert unreasonable (L.F. 800-01). Counsel wanted the jury to hear that Glass' ability to appreciate the criminality of his conduct and to conform it to the requirements of law was substantially impaired (L.F. 801, Ex. 22 at 117-18). Counsel also wanted the jury to hear the expert opinion that Glass acted under extreme mental or emotional disturbance. *Id*.

Like counsel, the motion court found this evidence mitigating. As the motion court found, a dependence on alcohol "might have extenuating significance" (L.F. 801), *quoting*, *Rompilla v. Beard*, 125 S.Ct. at 2463. The motion court also found that the failure to investigate and present "pharmacological evidence of the effects of drug and alcohol addiction on [defendant's] intellectual functioning and evidence of defendant's "poly-substance dependence" was ineffective (L.F. 801), *quoting*, *Hutchison*, 150 S.W.3d at 307.

As the motion court found, the jury heard no evidence to support the submission of any statutory mitigating circumstances (L.F. 801, Ex. 3C at 418). Martinez's testimony would have formed the basis of proof sufficient to give the mitigating circumstances of substantial impairment and extreme emotional distress, under Sections 565.032.3 (2) and (6) (L.F. 801), RSMo. He also could have told jurors about alcohol's effects on the brain and how persons like Glass, with a family history of alcoholism, are predisposed toward this disease (L.F. 801). The motion court found this "powerful" mitigation (L.F. 801).

The State suggests that Martinez' testimony was based on Glass' self-report of how much he drank and therefore, was of limited value (State's App. Br. at 118-21). The motion court directly addressed the self-reporting issue with Dr. Martinez, examining him about it at the hearing (H.Tr. 236-40). The motion court asked Martinez how reliable Glass' account of the amount he drank could be if he had memory loss (H.Tr. 237-38). Martinez responded that he took a range from three calculations: the police report, the victim's mother, bartender's, description in her deposition of the amount Glass drank, and Glass' report (H.Tr. 238-39). Under any of these potential scenarios, he concluded, Glass would have been impaired, although the degree of impairment would have varied (H.Tr. 239-40).

In its findings, the motion court considered Martinez' testimony and noted that he had considered evidence independent of Glass' self-report (L.F. 801). Other witnesses verified Glass' drinking and Martinez' opinions had substantial mitigating value (L.F. 801-02).

Glass was not prejudiced, the State argues, since jurors know about alcohol's effects and Martinez would have added nothing to penalty phase. *Id*. at 121. This Court has rejected this argument, finding such testimony mitigating. *Hutchison*, 150 S.W.3d at 307.

The motion court questioned Dr. Martinez and the other experts at the hearing and carefully evaluated their testimony. This Court should defer to the motion court's findings that the witnesses provided compelling, powerful mitigation. As the motion court ruled, had counsel called one or more of these experts, it may have not been necessary to call each and every witness. But here, counsel called no one to testify about Glass' impairment (L.F. 802). The motion court found such testimony could have tipped the scales in favor of a life sentence.

Unlike the State, the motion court recognized the importance of presenting all available mitigation at trial:

> *The decision to impose the death penalty, whether by a jury or a judge, is the most serious decision society makes about an individual*
>
> . . .

(L.F. 759, *quoting, State v. Debler*, 856 S.W.2d 641, 656 (Mo. banc 1993)) (emphasis in court's findings). The motion court did not clearly err. This Court should affirm the grant of penalty phase relief.

CONCLUSION

The motion court properly granted a new penalty phase, and this Court should reject the State's claims otherwise (Points XII-XIV). The motion court should have granted guilt phase relief as well. Glass requests a new trial based on Points I – III. Should this Court reverse the motion court's grant of penalty phase in the State's appeal, then this Court should grant Glass relief as follows:

Points III – VIII, X, a new penalty phase;

Points IX, a remand for a hearing and discovery on the lethal injection claim; and

Point XI, vacate the death sentence and re-sentence Glass to life without probation or parole.

Respectfully submitted,

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Certificate of Compliance and Service

I, Melinda K. Pendergraph, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 22,402 words, which does not exceed the 27,900 words allowed for a cross respondent and reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in March, 2007. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were hand-delivered this 7th day of March, 2007, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Melinda K. Pendergraph