

IN THE
MISSOURI SUPREME COURT

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

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

APPELLANT’S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Travis Glass, was jury tried and convicted of first degree murder, §565.020 RSMo 2000,¹ in the Circuit Court of Callaway County. The jury assessed punishment at death. This Court affirmed in *State v. Glass*, 136 S.W.3d 496 (Mo. banc 2004), *cert. denied*, 543 U.S. 1058 (2005).

Glass filed a *pro se* Rule 29.15² motion, which appointed counsel amended. The motion court granted a hearing on all claims except whether Missouri's lethal injection method for executing prisoners violated the Eighth Amendment's prohibition against cruel and unusual punishment (L.F. 352-477, H.Tr. 37-40, 400).³

The motion court granted penalty phase relief on three issues. It found that counsel was ineffective for failing to: (1) investigate and present mitigating evidence; (2) investigate and present expert testimony in mitigation; and (3) object

¹ All statutory references are to RSMo 2000, unless otherwise indicated.

² All references to rules are to VAMR, unless specified otherwise.

³ Record citations are as follows: evidentiary hearing transcript (H.Tr.); legal file of 29.15 appeal (L.F.); trial transcript (Tr.); direct appeal legal file (D.L.F.); and exhibits (Ex.). Glass requests that this Court take judicial notice of its files in *State v. Glass*, S.Ct. No. 85128. The motion court took judicial notice of the preliminary hearing, trial transcript, legal file documents, and trial exhibits at the evidentiary hearing (H.Tr. 40-41).

and raise the error of the trial court's having submitted a jury instruction on an aggravating circumstance that submitted the murder was committed in the course of a kidnapping, but did not define what crime was intended to be committed during the kidnapping (L.F. 759, 779-802, 804-10). The motion court denied the claims relating to guilt phase issues and the remaining penalty phase issues (L.F. 760-79, 802-04).

On May 5, 2006, Glass timely filed an appeal from the denial of relief (L.F. 815-16). The State filed an appeal on the same day from the grant of penalty phase relief (L.F. 817-18). Therefore, this cross-appeal is before the Court. Rule 84.05(b).

Because a death sentence was imposed in the underlying trial, this Court has exclusive appellate jurisdiction. Art. V, §3, Mo. Const. (as amended 1982); Standing Order, June 16, 1988.

STATEMENT OF FACTS

Travis Glass, who was 21 at the time of the charged offense, was convicted of first degree murder and sentenced to death (Tr. 1140, 1392). His jury trial⁴ lasted four days: the first day encompassed voir dire; the second day was the State's case in chief; the third day was for guilt phase instructions, closings, guilt phase deliberations, State's penalty phase evidence, one defense witness; and the fourth day was the defense case, instructions, closings and more than six hours of deliberations (Tr. 327-1394).

In penalty phase, defense counsel called Glass' family members and three acquaintances (Tr. 1225-1355). The penalty phase evidence focused on Glass' family background. He is the youngest of three, having two older sisters, Tonya and Tina (H.Tr. 1225-26, 1255-56, 1334-36). His mother, Sandra Glass, didn't raise any of her children, but handed them off to her parents (H.Tr. 1227, 1229, 1256-59, 1271, 1285, 1299-1300, 1339, 1343-45). Glass' father was never part of his life (H.Tr. 1256-59, 1292, 1304, 1341-42). He grew up thinking he had died, but really his identity was never revealed as Glass had been the product of a one-night stand (H.Tr. 1226, 1341). Glass was sick when he was two years old with meningitis (H.Tr. 1239, 1302-03).

⁴ For a detailed account of the evidence presented at trial, *see State v. Glass*, 136 S.W.3d 496 (Mo. banc 2004), *cert. denied*, 543 U.S. 1058 (2005).

Glass had a problem with alcohol⁵ (H.Tr. 1238, 1273-76, 1291-92). His mother drank alcohol, even when pregnant with Glass (H.Tr. 1238, 1265, 1273, 1346-47). His grandfather was an alcoholic, but stopped drinking when he shot his daughter, Sandra, while she was pregnant with Tonya (H.Tr. 1237, 1264-65, 1272-73, 1348).

Glass was a talented musician and artist (H.Tr. 1233-34, 1244, 1260-61, 1262-63, 1277, 1285-86, 1304-05, 1318-19). He loved playing the saxophone (H.Tr. 1244, 1262, 1318-19). He helped others at school and was nice to his classmates (H.Tr. 1244-48, 1252-53). He was large and had been ridiculed about his weight since he was a small child (H.Tr. 1261-62).

Glass went to church with friends from school (H.Tr. 1323-29). He enjoyed the music and singing (H.Tr. 1326-28). Glass' life went downhill when he graduated from high school and could not get into college (H.Tr. 1265-66, 1277, 1330-33). His family loved Glass (H.Tr. 1295, 1307, 1321, 1352).

After his direct appeal, Glass filed a 29.15 motion, alleging, among other things, counsel's ineffectiveness for failing to investigate and present mitigating evidence (L.F. 128-50, 203-34). Counsel failed to investigate and call any professionals, such as doctors and teachers who had treated or dealt with Glass before the charged offense. *Id.*

⁵ The Court sustained the prosecutor's hearsay objection to Glass' sister's testimony about Glass' drinking problem (H.Tr. 1265).

Treating Physician

Counsel failed to investigate, interview and call Dr. Barry Scherr, M.D. (L.F. 145, 227-28). Scherr had admitted Glass to the hospital for bacterial meningitis when Glass was only 23 months old (Ex. 2 at 8-9). Glass vomited and had trouble breathing (Ex. 2 at 9). He had a seizure and was 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 severe and he almost died (Ex. 2 at 11).

The long-term consequences from bacterial meningitis are severe, encompassing permanent brain damage, learning disabilities, motor problems, speech delays, and hyperactivity (Ex. 2 at 13-14). The inflammation of the meninges surrounding the brain causes the brain damage (Ex. 2 at 18-19, 22).

Counsel never interviewed Dr. Scherr before trial, but knew about him because counsel had obtained medical records that showed Scherr was Glass' treating physician (Ex. 1, Ex. 2, at 22, Ex. 22 at 48-50). Counsel had no "good reason" for not interviewing Scherr or not calling him to testify (Ex. 22 at 51). Counsel wanted the jury to hear Scherr's information (Ex. 22 at 52). The trial court excluded Glass' medical records as irrelevant and immaterial (T.1352-55). The motion court found counsel was ineffective for not interviewing and calling Dr. Scherr to testify (L.F. 781-82).

School Teachers

Counsel also failed to call any of Glass' teachers or school officials to testify (L.F. 128-50, 203-34). Kay Obermann, Glass' third grade teacher, recalled

that Glass did not do well academically and “struggled with his classes” (Ex. 39 at 4-6). Obermann referred him to a Title I program for extra help with reading (Ex. 39 at 5). She also tried to help Glass after school (Ex. 39 at 5-6). Glass’ failing grades were not common among students (Ex. 39 at 8). Obermann passed Glass along to fourth grade, even though he was failing academically. Because of Glass’ large physical size; she worried that Glass would “stand out” physically from other kids if he was held back in third grade (Ex. 39 at 7).

Clarence “Butch” Fore was Glass’ sixth or seventh grade math teacher (Ex. 41 at 4). He remembered how Glass “struggled” with basic math skills (Ex. 41 at 4). One day, Glass tearfully told Fore that he couldn’t divide (Ex. 41 at 5). Fore then worked with Glass one-on-one to try to improve his skills (Ex. 41 at 5-6).

Martha Myers, Glass’ math teacher in tenth or 11th grade described Glass as a slow student (Ex. 40 at 4, 6). Glass had the same symptoms as other students who had been diagnosed as having a “processing deficit” (Ex. 40 at 6). Other kids picked on Glass because of his large physical size (Ex. 40 at 7). Despite his struggles, Glass received an award for good behavior in high school (Ex. 40 at 8).

Maggie Queen, Glass’ high school science teacher, recalled him as a quiet student who did not cause problems (Ex. 44 at 3-5). His grades were not good and he needed some extra help (Ex. 44 at 5). But, when Glass was in her class, they had no resource room teacher or special education program to help students who had trouble learning (Ex. 44 at 5).

Donna Brown, Glass' tenth grade English teacher, described Glass as a quiet, bashful person who liked music and band (Ex. 42 at 3-5). He was not violent and didn't fight (Ex. 42 at 6). Brown recalled that Glass' grandfather came to a parent-teacher conference smelling of alcohol (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). Brown knew that Glass wanted to attend music school after high school, but couldn't because he did not get a scholarship (Ex. 42 at 8-9). Brown tried to help Glass get a scholarship, but the school had none (Ex. 42 at 9).

Eric Churchwell, Glass' middle and high school industrial arts teacher remembered how big Glass was (Ex. 48 at 4, 6). Glass did well in industrial arts, a "hands-on" class (Ex. 48 at 6). He never caused trouble (Ex. 48 at 7). But Churchwell considered him an "at risk" student academically because his family life was not good. Glass' father and mother were not around for him, and he was raised by his elderly grandparents, for whom education was not a priority (Ex. 48 at 8). Glass' obesity also caused people to view him differently (Ex. 48 at 9).

Judy Caldwell, a counselor at Glass' middle school, also remembered Glass as a heavy-set boy (Ex. 46 at 3-4). One of Caldwell's duties was to handle complaints about students from teachers (Ex. 46 at 5). Glass was not the subject of any significant complaints, although he once broke a window in shop class with

some other boys (Ex. 46 at 5). She never had to see Glass in her office for any problems (Ex. 46 at 5).

Elaine Longacre, Glass' eighth grade health teacher, also remembered Glass' size-he was very large (Ex. 43 at 4-5). A lot of other students teased him and would not include him in activities; he was an outcast (Ex. 43 at 5). Longacre never had any problems with Glass (Ex. 43 at 5). He wasn't violent or aggressive (Ex. 43 at 6). He behaved in health class (Ex. 43 at 7).

Vince Matlick, Glass' middle school physical education teacher, remembered that Glass was not a good athlete, but worked hard, and therefore, did fine in P.E. class (Ex. 5 at 2, 6). He never caused problems in school. *Id.* Matlick thought that Glass' grandfather was an eccentric man, since he wore neither shoes nor socks. *Id.*

Joe Brandenburg, Glass' eighth grade science teacher, also remembered Glass was extremely large for his age and very quiet (Ex. 47 at 4). Glass was an average student in science class (Ex. 47 at 4).

Glass participated in band and vocal ensemble (Ex. 45 at 7, 9). Debbie Higbee Roberts was his band teacher in middle and high school, the activity Glass loved most. *Id.*

Counsel obtained Glass' school records before trial (Ex. 22 at 16-17, 44-45; Ex. 5). The trial court excluded them as irrelevant and immaterial (1352-55). These records listed many of the teachers, yet counsel failed to contact them (Ex. 5 at 2, 14-16, 39-42). The motion court considered counsel's reasons for failing to

investigate and call these witnesses (Ex. 22, at 20-46) and determined counsel was ineffective (L.F. 782-89). Many of the teachers could have established Glass' life-long intellectual impairments and learning deficits. *Id.*

Probation Officers

At penalty phase, the State introduced, as aggravating evidence, a certified copy of Glass' prior conviction for felony stealing (T.1187). Counsel called neither of Glass' probation officers to testify in penalty phase (L.F. 145-47).

Bruce Capp supervised Glass' probation from late 1998 through early 2000 and met with Glass once a month (Ex. 53 at 4-5). Glass had no probation violations during that time (Ex. 53 at 9). Kevin Knickerbocker supervised Glass' probation after Capp (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 (Ex. 52 at 5-6). Glass had no probation violations until the charged offense (Ex. 52 at 7, 10).

The motion court found counsel ineffective for failing to call either officer (L.F. 789-90). The court found counsel's justifications for not calling them (Ex. 22 at 53-56, 58-60) unreasonable (L.F. 790).

Friends and Acquaintances

Lesley Lehenbauer was in high school band with Glass (Ex. 51 at 4). Glass was really helpful to Lehenbauer and others in band class (Ex. 51 at 6). He was nice and never caused any problems. *Id.*

Andrew Fuqua was also in high school band with Glass and liked him (Ex. 49 at 5). Glass participated in Andrew's church and sang in the youth choir (Ex. 49 at 7).

Tim Fuqua, Andrew's father, met Glass through Tim's acquaintance with Glass' grandfather (Ex. 50 at 3-4). Tim knew that Glass was raised by his grandparents (Ex. 50 at 6). Tim found Glass respectful and polite (Ex. 50 at 9). Tim encouraged Glass to attend Tim's church, which he did for a while (Ex. 50, at 7-10). Glass' grandfather would not attend church (Ex. 50 at 7-10). Tim noticed that Glass received no positive feedback from his family (Ex. 50 at 11). Tim cringed when he heard Glass' uncle say to Glass, "You're as worthless as tits on a boar hog" (Ex. 50 at 11-12). Tim felt that Glass needed love and acceptance, but received none at home (Ex. 50 at 12).

Christopher Brandstatt was in school band, choir and football at various times with Glass (Ex. 55 at 4-5). Glass was friendly, but people made fun of him because of his large size and weight (Ex. 55 at 6). The football team cast Glass aside because he was too slow (Ex. 55 at 7). Brandstatt remained friends with Glass until Glass borrowed his truck and blew out the engine (Ex. 55 at 7-8). Brandstatt noticed that Glass changed after high school and lost a job because of stealing (Ex. 55 at 9).

George Mottu went to high school with Glass and also remembered people made fun of him because of his size (H.Tr. 45-50). Despite this, Glass behaved well and enjoyed participating in the school band (H.Tr. 50-51). Glass was kind

and “would give you the shirt off his back” (H.Tr. 52). After high school, Glass wanted to attend a religious college (H.Tr. 53). Glass could not attend since he did not qualify for the religious program-he was too new at being a Christian (H.Tr. 53). He lacked money to attend school and could not get a scholarship (H.Tr. 53). Glass was depressed-he had nowhere to go and not much of a future (H.Tr. 53).

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

The motion court found counsel ineffective for failing to call these friends in mitigation (L.F. 790-94). Counsel failed to interview Tim Fuqua, Brandstatt, Mottu and Ladu. *Id.* The failure to investigate was unreasonable and prejudiced Glass. *Id.*

Expert Witnesses

The motion court also concluded that counsel was ineffective for failing to consult with and call expert witnesses to testify in mitigation of the punishment (L.F. 794-802). The court found that impaired intellectual functioning is inherently mitigating, 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). Glass’ jury heard from no mental health experts (L.F. 795).

Neuropsychologist

Before trial, Dr. Gelbort, a neuropsychologist, evaluated Glass and administered standardized tests (H.Tr. 325-30, 343-60). His testing showed that

Glass suffers from neuropsychological deficits that impair higher thinking functions such as abstract reasoning, problem-solving and comprehension (H.Tr. 363-73, Ex. 17 at 3-4). Glass has learning and memory difficulties, his temporal lobe functions are mildly impaired (H.Tr. 367-68, Ex. 17 at 4). Glass' cognitive abilities are slower than average, and he has problems with impulsivity (H.Tr. 369-71, Ex. 17 at 3-4).

Dr. Gelbort thought the meningitis was a likely culprit of some of Glass' deficits (H.Tr. 374). His mother's alcohol consumption during her pregnancy exposed Glass to a neurotoxin (H.Tr. 375). Alcohol is poison to a baby (H.Tr. 375). Glass' alcohol use also would contribute 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).

A Learning Disability Expert

Counsel did not follow up on Gelbort's testing by retaining or consulting a learning disability expert (Ex. 22 at 111-12). 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 and 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 a number of areas (H.Tr. 142-43, Ex. 31 at 8, Ex. 65). He ranked in the 32nd percentile in mathematics aptitude and in the 25th percentile in fluid reasoning (H.Tr. 151, 154-55). His math achievement ranked in the 17th

percentile (H.Tr. 157). 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 similarly low in the 22nd percentile (H.Tr. 160). Glass' scores for concept formation placed him in the 9 year and 5 month level (H.Tr. 162). He ranked in the 18th percentile on this test which measured reasoning skills (H.Tr.162-63). Glass' fluid reasoning is that of an 11-year-old (Ex. 31 at 3). Some of his math and writing skills placed him at the level of a 12 or 13-year-old (Ex. 31 at 3).

Burns concluded that Glass has a learning disability (H.Tr. 170). Burns believed the meningitis Glass suffered was significant (H.Tr. 173). Another factor likely affecting Glass's intellectual functioning was his mother's drinking alcohol during her pregnancy (H.Tr. 173).

Psychologist

Before trial, Dr. Robert Smith, a psychologist, evaluated Glass (H.Tr. 241-46). Smith conducted a comprehensive psycho-social history, including psychological testing and document review (H.Tr. 248). He reviewed medical, legal, educational and employment records (H.Tr. 248).

Smith found that Glass' family background was the most significant factor in his psychological development (H.Tr. 249-50). Glass' parents abandoned him, leaving him to his maternal grandparents (H.Tr. 250-51). Glass' family had a history of alcoholism that affected Glass, predisposing him toward developing alcoholism (H.Tr. 251, 254-55, Ex. 27 at 5-7). Children of alcoholics are five

times more likely to be addicted than the population in general (H.Tr. 255). His mother's alcohol use during her pregnancy would have affected Glass' central nervous system while he was inside her womb (H.Tr. 255). The resulting damage could range from minimal brain damage, hyperactivity, attention deficits or learning deficits, to more severe damage, including Fetal Alcohol Syndrome (H.Tr. 255-56). Glass had fetal alcohol effects due to his mother's drinking during her pregnancy (H.Tr. 293-94). Glass' childhood photos are consistent, showing the facial effects of the fetal alcohol effects (H.Tr. 294-97, Exs. 68, 69, 70). The photos show the characteristic wide bridge across the nose, the eyes which seem farther apart, and the nose, which is very wide at the top (H.Tr. 295).

In addition to alcohol dependence, Dr. Smith found that Glass suffers from Borderline Personality Disorder and fetishism (H.Tr. 263, Ex. 27 at 10). Smith directly addressed Glass' mental state at the time of the crime, and concluded that the combination of Glass' intoxication and mental disorders substantially impaired Glass' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, and that he acted under the influence of an extreme mental or emotional disturbance (H.Tr. 274-76, Ex. 27 at 11).

Pharmacology/Toxicology

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 pharmacokinetic extrapolation, based on Glass'

weight, the type of alcohol imbibed, and the time he imbibed (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).

The motion court considered counsel's reasons for failing to investigate and call experts to testify and concluded that counsel was ineffective (L.F. 796-801). Counsel did not investigate or consult a learning disability expert and a toxicologist. This was an unreasonable failure to investigate (L.F. 797-98, 800-01). Counsel's reasons for not calling Dr. Gelbort were likewise unreasonable (L.F. 796-97). Counsel feared Gelbort's testimony would open the door to child pornography seized from Glass' grandparents' home before trial (L.F. 796). Counsel's reasons were unreasonable since the pornography was never linked to Glass as several adults had access to the home computer (L.F. 796). Additionally, Dr. Gelbort's examination never covered topics such as pornography or sexual issues and he never considered those matters (L.F. 797). The court also concluded that counsel's concerns about calling Dr. Smith because of the pornography issue were unreasonable (L.F. 799). The court found that Dr. Smith's evaluation would not have opened the door to that evidence (L.F. 799-800).

The motion court considered counsel's failure to present each expert's testimony individually and found counsel ineffective (L.F. 802). The motion court

concluded that, whether the experts' testimony was considered individually or together, counsel was ineffective and Glass was prejudiced, requiring a new penalty phase (L.F. 802).

Aggravating Circumstances Instruction

The motion court also granted a new penalty phase based on its finding that trial and appellate counsel were ineffective for failing to make meritorious objections to the statutory aggravating circumstance instruction (L.F. 804-09). The instruction failed to specify what underlying felony must be found to establish the kidnapping aggravator (L.F. 806-09).

Skipper Evidence

The motion court denied relief on other mitigation issues, including Glass' *Skipper*⁶ claim (L.F. 804). While Glass was in the Callaway County Jail awaiting trial, Deputy Fred Cave, a Callaway County Sheriff's Deputy, took Glass to visit his grandfather at the Veterans' Hospital in Columbia, Missouri (H.Tr. 114-15). Judge Conley had signed an order authorizing the visit (H.Tr. 115). Glass was well-behaved and caused no problems (H.Tr. 116-17). Cave noted that, in his 16 years as a deputy, Glass was the only person charged with first degree murder who was ever given permission to leave the jail for such a visit (H.Tr. 119).

Robert Harrison, a sergeant at the Callaway County Jail for nine years, saw Glass in the jail three to four times per night for about one year (H.Tr. 122-23). Glass was a respectful inmate who caused no problems (H.Tr. 123, 124). Glass

⁶ *Skipper v. South Carolina*, 476 U.S. 1 (1986).

was polite and listened to everything the officers had to say (H.Tr. 124). From Harrison's observations, he considered Glass to be "one of the best inmates we've ever had in there" (H.Tr. 124). Trial counsel never interviewed Harrison (H.Tr. 124-25).

Counsel's investigator met with Cave (Ex. 14), and during voir dire, counsel told jurors he was a potential defense witness (Ex. 22, at 83-86). Counsel testified that he intended to call Cave to testify, but he didn't (Ex. 22, at 85). Counsel could not recall why he didn't call Cave (Ex. 22, at 85). He was at a "loss" to explain his failure (Ex. 22 at 85). He thought Cave would have been a very good witness, and said he couldn't for "the life of [him]" remember why he didn't call him (Ex. 22 at 85). Counsel speculated that one jailer indicated that Glass had complained about not getting pizza once and maybe he was worried about this information coming before the jury (Ex. 22 at 88-89).

As for Harrison, counsel acknowledged that the defense had not contacted him before trial (Ex. 22 at 89-90). Counsel would have wanted to present Harrison's testimony that he considered Glass to be among the best inmates Callaway County Jail had ever had (Ex. 22 at 90).

Medical and School Records

The motion court also rejected Glass' claim that appellate counsel was ineffective for failing to raise that the trial court improperly excluded medical and school records as irrelevant and immaterial (LF. 773). Counsel offered Exhibits 29-31. Exhibit 29, Hannibal Ambulatory Care Center Medical Records, showed

that in 1994-95, Glass weighed between 297-307 pounds as a teenager. (Tr. 1353). Exhibit 31, hospital records,⁷ documented that Glass had meningitis when he was a baby. Glass was “semicomatose” and had a prognosis of “permanent brain damage” (Ex. 1, at 5-6). Counsel offered these records to corroborate family members’ testimony (Tr. 1354).

Trial counsel also offered Glass’ school records (Tr. 1353; Ex. 30).⁸ The trial court excluded these exhibits as “irrelevant and immaterial” (Tr. 1352-54). Trial counsel included the trial court’s error in refusing to admit Trial Exhibits 29, 30 and 31 in the New Trial Motion (D.L.F.470-72).

On appeal, Glass’ counsel did not raise the error in excluding this evidence (Ex. 35). Appellate counsel wanted a more specific explanation by trial counsel about how the records were mitigating (H.Tr. 530-33). The court concluded that counsel’s reasoning that she wanted a better offer of proof was reasonable and Glass was not prejudiced by the exclusion of the records (L.F. 773).

Penalty Phase Objections

Glass challenged counsel’s failure to argue that Glass’ alcohol addiction, meningitis and possible brain damage, and his memory book, showing his good character and loving relationships with his family and friends, should have been considered by the jury, even if this mitigation was not directly related to the crime

⁷ Trial Ex. 31 was introduced as Movant’s Ex. 1 at the 29.15 hearing.

⁸ Trial Ex. 30 was introduced as Movant’s Ex. 5 at the 29.15 hearing.

and was proven through hearsay testimony (L.F. 73-89). The motion court found this claim not cognizable and found Glass suffered no prejudice as this mitigating evidence was cumulative (L.F. 771-72).

Age as a Mitigator

The motion court found counsel was not ineffective for failing to submit age as a mitigating circumstance (L.F. 773). Counsel's explained that he did not like to submit specific mitigators for fear that the jury might count the number of mitigators and compare them to the statutory aggravators (Ex. 158-59, 160-61). The court found counsel's reasons were reasonable trial strategy (L.F. 773).

Voir Dire

The court found counsel effective in voir dire (L.F. 763). Counsel did not ask any questions about specific mitigators, and failed to object to the prosecutor's questions about not considering age when applying the law (Tr. 426-27) and suggestion that jurors had to be unanimous when considering mitigating circumstances (Tr. 422, 553-54, 620-21). The court found counsel's failure to ask about mitigation was reasonable since they did not know what mitigating evidence they were going to present (L.F. 763). The court found no prejudice from the failure to object to the prosecutor's questions about age and unanimity because jurors said they were willing to follow the court's instructions (L.F. 763).

Closing Arguments

The motion court rejected Glass' claim that the prosecutor's closing arguments in guilt and penalty phase were improper and that counsel was

ineffective for failing to object (L.F. 775-76). The prosecutor argued in the guilt phase that defense attorneys are never satisfied with police tactics; to find Glass not guilty, jury must believe all the state witnesses lied; he believed Glass had lied to police; and had jurors watch the clock for 30-60 seconds, the time for the victim to become unconscious (Tr. 1127-28, 1129, 1132). In penalty phase the prosecutor argued that juror should give Glass death to protect society and other children; compared Glass' life to the victim's and concluded hers was worth more; claimed that alcohol addiction and remorse were not proper mitigating factors; speculated on Glass' might have done to other potential teenage victims; displayed gruesome photos; and told jurors it was their duty to give death (Tr. 1369-70, 1386-87, 1389, 1390). The motion court found that all of these guilt phase arguments were proper, so counsel could not be ineffective for failing to object (L.F. 775-76).

Inconsistent Defenses

The motion court denied (L.F. 765-66) Glass's claim that counsel was ineffective for presenting inconsistent defenses (L.F. 51-55). Counsel had argued that Glass was innocent in guilt phase and then in penalty phase told the jury he was sorry he did the crime (Tr. 1113-26, 1379). The court recognized the defenses were "somewhat inconsistent" but found counsel had legitimate strategic reasons since Glass wanted an outright acquittal (L.F. 765-66).

Autopsy Report – Crawford Violation

The court found no *Crawford*⁹ violation in the admission of an autopsy report, testimony about that report by a witness other than the medical examiner who had prepared the report, and a curriculum vita of the medical examiner who performed the autopsy (L.F. 767). The court ruled that the testimony and related exhibits were not testimonial. *Id.*

The motion court affirmed Glass' conviction, but granted penalty phase relief (L.F. 759-810). Glass and the State have appealed the motion court's judgment (L.F. 815-18).

Issues for Review

Travis Glass, the cross appellant, raises three claims of error from the denial of guilty-phase relief (Points I-III).

Glass also raises eight penalty phase issues (Points IV-XI). If this Court affirms the motion court's judgment granting penalty phase relief, all of these issues, except Point IX, will become moot. Glass raises them as alternative grounds for penalty phase relief should this Court reverse the motion court's judgment granting relief in the State's appeal.

⁹ *Crawford v. Washington*, 541 U.S. 36 (2004).

POINTS RELIED ON

I. Autopsy Report – Crawford Violation

The motion court clearly erred in denying the claim that counsel was ineffective for failing to object to the admission of an autopsy report, Dr. Dix's vita, and Dr. Adelstein's testimony about Dix's autopsy report as violating Glass' rights to confrontation because this denied Glass his right to confrontation, a fair trial and effective assistance of counsel, U.S. Const., Amends. VI and XIV; Mo. Const., Art. I, §§10, and 18(a), in that Dix conducted the autopsy and his report was prepared to establish or prove past events potentially relevant to later criminal prosecution. Dix died shortly before trial and was unavailable to testify, but counsel had no opportunity to cross-examine him. Trial counsel wanted to exclude these exhibits and related testimony, but did not object based on Glass' right to confrontation, but instead agreed that Adelstein could testify from Dix's report if a proper foundation were laid. Glass was prejudiced as the State argued Adelstein's testimony and the report to show deliberation.

Alternatively, if trial counsel's stipulation that all objections be constitutionalized sufficiently raised the confrontation claim, appellate counsel was ineffective for failing to raise this error to this Court on direct appeal because the claim had substantial merit and counsel raised weaker, unpreserved claims. Had counsel raised this issue, this Court likely would have found a confrontation violation and ordered a new trial.

Crawford v. Washington, 541 U.S. 36 (2004);

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

Deck v. State, 68 S.W.3d 418 (Mo. banc 2002);

State v. Storey, 901 S.W.2d 886 (Mo. banc 1995); and

Section 58.720.

II. Inconsistent Theories

The motion court clearly erred in denying the claim that counsel were ineffective for presenting inconsistent defense theories in guilt and penalty phases, because this denied Glass due process, effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel unreasonably argued in guilt phase that Glass “didn’t do it,” and he is “sorry he did it” mitigation; counsel unreasonably told jurors in guilt phase that Glass didn’t do it, but if he did, he didn’t deliberate and failed to argue specifics facts showing a lack of deliberation as she had promised. Glass was prejudiced as his guilt phase defense was unbelievable and inconsistent with his later claim that he was remorseful for the killing.

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

Goodwin v. State, 191 S.W.3d 20 (Mo. banc 2006); and

State v. Harris, 870 S.W.2d 798 (Mo. banc 1994).

III. Prosecutor's Improper Closing Argument

The motion court clearly erred in denying Glass' claim that he was denied effective assistance of counsel, due process and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21 in that trial counsel failed to properly object to the prosecutor's improper closing argument in:

Guilt Phase

- a. defense attorneys are never satisfied with police tactics;
- b. to find Glass not guilty, jury must believe all the state witnesses lied;
- c. prosecutor believed Glass had lied to police;
- d. had jurors watch the clock and place themselves in the victim's position for 30 to 60 seconds, the time for her to become unconscious;

Penalty Phase

- e. give Glass death to protect society and other children;
- f. compared Glass' life to the victim's and concluded hers was worth more;
- g. claimed that alcohol addiction and remorse were not proper mitigating factors;
- h. speculated on what Glass' might have done to other potential teenage victims;

- i. displayed gruesome photos in an effort to inflame the jury; and**
- j. told jurors it was their duty to give death.**

These errors prejudiced Glass, denying him a fair trial and a reliable sentencing, and a reasonable probability exists that, had counsel properly objected, the jury would not have convicted him of first degree murder and given him death.

State v. Storey, 901 S.W.2d 886 (Mo. banc 1995);

State v. Taylor, 944 S.W.2d 925 (Mo. banc 1997); and

Gardner v. Florida, 430 U.S. 349 (1977).

**IV. Appellate Counsel Failed to Appeal the Trial Court's Exclusion
of Relevant Mitigating Evidence**

The motion court clearly erred in denying Glass' claim that he was denied effective assistance of appellate counsel, due process, and freedom from cruel and unusual punishments, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, because appellate counsel unreasonably failed to raise the trial court's error in excluding Exhibits 29-31, medical and school records in that:

- 1) the claims had significant merit since any evidence reflecting on Glass' background and character was relevant mitigation;
- 2) the law, particularly *Lockett v. Ohio*, *Tennard v. Dretke and Williams v. Taylor*, supported the claims;
- 3) the claims were preserved; and
- 4) appellate counsel pursued weaker issues, including five plain error claims and claims repeatedly rejected by this Court.

Glass was prejudiced because, had the claims been raised, a reasonable probability exists that this Court would have granted a new penalty phase, and, with the additional mitigation, a reasonable likelihood exists that the jury would have sentenced Glass to life.

Evitts v. Lucey, 469 U.S. 387 (1985);

Lockett v. Ohio, 438 U.S. 586 (1978);

Tennard v. Dretke, 542 U.S. 274 (2004); and
Williams v. Taylor, 529 U.S. 362 (2000).

V. Jury Never Heard About Glass' Good Conduct in Jail

The motion court clearly erred in denying Glass' claim that counsel was ineffective in failing to present evidence of his good conduct in jail because Glass was denied his rights to effective assistance of counsel and to present mitigation, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel failed to adequately investigate and 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 - that never called any problems and was allowed to leave jail before trial to visit his ailing grandfather. Glass was prejudiced as this good behavior evidence was mitigating and established that Glass would be a good prisoner and should be sentenced to life rather than death.

Skipper v. South Carolina, 476 U.S. 1 (1986); and
Williams v. Taylor, 529 U.S. 362 (2000).

VI. Voir Dire: Counsel Not Prepared to Ask About Specific Mitigation, Age, and Unanimity

The motion court clearly erred in denying Glass' claim that the prosecutor misled jurors about mitigation and defense counsel was ineffective for conducting an inadequate voir dire because their actions violated Glass' rights to due process, effective assistance of counsel, a fair and impartial jury and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel didn't ask veniremembers whether they could consider specific mitigating circumstances, failed to object when the prosecutor suggested that age was not mitigating and could not be considered, and failed to object when the prosecutor told jurors they had to be unanimous in order to consider mitigation. Glass was prejudiced because without an adequate voir dire his jury likely contained members who could not be fair and impartial.

Knese v. State, 85 S.W.3d 628 (Mo. banc 2002);

Morgan v. Illinois, 529 U.S. 719 (1992);

Johnson v. Texas, 509 U.S. 350, 367 (1993); and

Section 565.032.3(7).

VII. Jury Not Instructed That Age is Mitigating Circumstance

The motion court clearly erred in denying the claim of counsel's ineffectiveness for failing to submit a mitigation instruction that included the statutory mitigator of age, because this denied Glass' rights to effective assistance of counsel, due process, a fair trial and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel unreasonably thought that by specifically listing age it would minimize other nonstatutory mitigation. Glass was prejudiced as the jurors had been misled that age was not an appropriate consideration under the law and thus, they likely did not consider it as mitigation. Contrary to counsel's rationale, the jury did not have a long list of statutory aggravators (two were submitted and one was found) to compare to the statutory and nonstatutory mitigators. Glass has a constitutional right to have the jury consider and give effect to his mitigation and without proper instructions, the jury was unable to consider his youth as mitigation.

Deck v. State, 68 S.W.3d 418 (Mo. banc 2002);

Johnson v. Texas, 509 U.S. 350 (1993);

Roper v. Simmons, 543 U.S. 551 (2005); and

Section 565.032.3(7).

**VIII. Counsel's Ineffectiveness Led to the Exclusion of Relevant
Mitigating Evidence**

The motion court clearly erred in denying the claim that counsel was ineffective for failing to provide legal support for the admission of mitigating evidence; object to the prosecutor's improper statements that mitigation must have a nexus to the crime; make offers of proof when offering a memory book as mitigation; and include claims of error in the relevant mitigation's exclusion in the new trial motion, because this denied Glass due process, effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel unreasonably did not know the United States Supreme Court has ruled hearsay can be admitted as mitigation, and that mitigating circumstances need not be connected to the crime, and counsel meant to adequately preserve the claims of error by making offers of proof and including the claims in the new trial motion but unreasonably failed to do so.

Glass was prejudiced because the jury was deprived of relevant mitigating evidence about his alcohol addiction, his bout with meningitis and resulting deficits, including the prognosis of brain damage, and his memory book showing his good character and loving relationships with friends and family. The jury was misled to believe they could not consider mitigation

unless it was connected to the crime. But for counsel's ineffectiveness, the jury likely would have considered this mitigation and sentenced Glass to life.

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

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

Strickland v. Washington, 466 U.S. 668 (1984); and

Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991).

IX. Lethal Injection Is Cruel and Unusual Punishment

The motion court clearly erred in denying a hearing on the claim that Missouri's method of lethal injection is unconstitutional, and related discovery on this claim, because these rulings denied Glass due process and freedom from cruel and unusual punishment, U.S. Const., Amends. VIII, and XIV; Mo. Const., Art. I, §§10 and 21, and Rule 29.15(h), in that the motion alleged facts, not conclusions, entitling him to relief; specifically, that Missouri's method of execution, combining sodium pentothal, pancuronium, and potassium chloride, causes unnecessary pain and suffering since they are not given in adequate doses with protocols that minimize the risk of suffering; the allegations were not refuted by the record; and Glass was prejudiced since these problems will likely reoccur.

Taylor v. Crawford, et al., W.D. Mo. No. 05-4173-CV-C-FJG;

Hill v. McDonough, 126 S.Ct. 2096 (2006);

Morrow v. State, 21 S.W.3d 819 (Mo. banc 2000); and

Worthington v. State, 166 S.W.3d 566 (Mo. banc 2005).

X. Penalty Phase Instructions Are Confusing

The motion court clearly erred in denying Glass' claim that jurors do not understand penalty phase instructions and counsel failed to object to them denying Glass due process, effective assistance of counsel and individualized, non-arbitrary or capricious sentencing, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel knew the instructions were objectionable, but unreasonably failed to offer evidence to challenge them since this Court had ruled against this claim, and Glass was prejudiced because the less jurors understand the instructions, the more likely they are to impose death.

Deck v. State, 68 S.W.3d 418 (Mo. banc 2002); and

Furman v. Georgia, 408 U.S. 238 (1972).

XI. Glass' Death Sentence is Disproportionate

The motion court clearly erred in rejecting Glass' claim that this Court's proportionality review denies due process and freedom from cruel and unusual punishment, U.S. Const., Amends. VIII, and XIV; Mo. Const., Art. I, §§10 and 21, because *de novo* review should apply on appellate review of death sentences; this Court's database does not comply with §565.035.6 and omits numerous cases; and this Court fails to consider all similar cases required by §565.035.3(3). Should this conduct an adequate *de novo* review of the record, it will find four statutory mitigators and other circumstances warrant a life sentence.

Cooper Industries v. Leatherman Tool Group, Inc., 532 U.S. 424

(2001);

State v. Black, 50 S.W.3d 778 (Mo. banc 2001)(Wolff, J.,

dissenting);

State v. Crenshaw, 59 S.W.3d 45 (Mo. App. E.D. 2001);

State v. Brown, 966 S.W.2d 332 (Mo. App., W.D. 1998); and

Section 565.035.

ARGUMENT

I. Autopsy Report – Crawford Violation

The motion court clearly erred in denying the claim that counsel was ineffective for failing to object to the admission of an autopsy report, Dr. Dix's vita, and Dr. Adelstein's testimony about Dix's autopsy report as violating Glass' rights to confrontation because this denied Glass his right to confrontation, a fair trial and effective assistance of counsel, U.S. Const., Amends. VI and XIV; Mo. Const., Art. I, §§10, and 18(a), in that Dix conducted the autopsy and his report was prepared to establish or prove past events potentially relevant to later criminal prosecution. Dix died shortly before trial and was unavailable to testify, but counsel had no opportunity to cross-examine him. Trial counsel wanted to exclude these exhibits and related testimony, but did not object based on Glass' right to confrontation, but instead agreed that Adelstein could testify from Dix's report if a proper foundation were laid. Glass was prejudiced as the State argued Adelstein's testimony and the report to show deliberation.

Alternatively, if trial counsel's stipulation that all objections be constitutionalized sufficiently raised the confrontation claim, appellate counsel was ineffective for failing to raise this error to this Court on direct appeal because the claim had substantial merit and counsel raised weaker, unpreserved claims. Had counsel raised this issue, this Court likely would have found a confrontation violation and ordered a new trial.

Although Dr. Adelstein did not perform the autopsy in this case, he testified about it from Dr. Dix's report (Tr.743). Dr. Dix, the Medical Examiner, had died shortly before trial (Tr. 743). The State introduced Dix's autopsy report (Trial Ex. 9, PCR Ex. 59) and Dix's curriculum vita (Trial Ex. 8-A, PCR Ex. 58) as exhibits at trial (Tr. 743-44, 748, 750-51). Trial counsel objected to the vita because it had not been disclosed and to the report because it lacked an adequate foundation and Adelstein's lack of personal knowledge (Tr. 743, 748, 749). The prosecutor said that the law was clear; one expert could testify about another's report (Tr. 749). Defense counsel agreed, saying "[h]e can testify to the report if it's properly admitted into evidence but it hasn't been so." (Tr. 748). Counsel did not believe the State laid the proper foundation and objected to the report's admission, asking that her objection be constitutionalized and continuing pursuant to a pre-trial stipulation (Tr. 749). The court overruled the objection (Tr. 750-51). Appellate counsel did not raise the confrontation claim on direct appeal (Ex. 35).

Glass claimed that trial counsel was ineffective for failing to object to Adelstein's testimony, Dix's vita and report because the testimony and documents denied Glass his constitutional right to confrontation and were hearsay, since Glass was never able to confront and cross-examine Dix during the case (L.F. 63-65). Alternatively, appellate counsel was ineffective for failing to raise the claim on direct appeal (L.F. 65).

Because trial counsel wanted to exclude Dix's vita, report and findings, and Adelstein's testimony about the report, she objected at trial (H.Tr. 435-36).

Counsel had no opportunity to cross-examine Dix (H.Tr. 431-33). He did not testify at the preliminary hearing (Ex. 34); neither party deposed him, and he died shortly before trial (H.Tr. 431-33). Counsel did not think to object to the autopsy report, vita, and Adelstein's testimony as denying her client's right to confrontation under the Sixth and Fourteenth Amendments (H.Tr. 435-38). She believed that, under Missouri law, one expert could testify about another's report (H.Tr. 436). But, she wanted this evidence excluded and she wanted the claim preserved for review (H.Tr. 438-39). She admitted she failed to raise a hearsay/confrontation claim about Adelstein's testimony in the new trial motion (H.Tr. 438).

Appellate counsel originally thought that state law allowed the admission of Adelstein's testimony, the autopsy report and CV as a business record (H.Tr. 500). Counsel acknowledged that her analysis of this issue changed once *Crawford*¹⁰ was decided (H.Tr. 500-03). The Court decided *Crawford* on March 8, 2004, the same day counsel filed her reply brief in Glass' case (H.Tr. 500-01). Fairly soon after filing her brief, counsel thought *Crawford* could impact the issue in Glass' case (H.Tr. 502). Counsel had filed motions asking the appellate court to consider new law in other cases (H.Tr. 502). She could have sought leave to file a supplemental brief, in light of *Crawford* (H.Tr. 503). She also could have raised the issue in her rehearing motion (H.Tr. 503). But, counsel did nothing to present the issue to this Court (H.Tr. 503). Counsel believed the autopsy report was

¹⁰ *Crawford v. Washington*, 541 U.S. 36 (2004).

testimonial, and if she had Glass' case today, she would have raised this issue (H.Tr. 503). Counsel thought it was "a great issue" (H.Tr. 503).

The motion court denied this claim, ruling that autopsy reports and findings are not testimonial under *Crawford* and are not subject to *Crawford's* restraints (L.F. 767). The court acknowledged the issue was undecided in Missouri, but cited other jurisdictions that had ruled they were admissible (L.F. 767), citing *People v. Durio*, 7 Misc.3d 729 (N.Y. Supp.2005); *Smith v. State*, 898 So.2d 797 (Ala. Crim. App. 2004); *Moreno Denoso v. State*, 156 S.W.3d 166 (Tex. App. 2005). The court also found the reports are admissible under the business records exception, citing *State v. Weaver*, 912 S.W.2d 499 (Mo. banc 1995); and *State v. Jackson*, 925 S.W.2d 856 (Mo. App. W.D. 1996).

The court further ruled that the failure to object properly to this evidence was not cognizable, citing *State v. Beckerman*, 914 S.W.2d 861 (Mo. App. W.D. 1996) (L.F. 767). Since the claim had no merit, appellate counsel could not be ineffective for failing to raise it on appeal (L.F. 767).

These findings are clearly erroneous.

Standard of Review

This Court reviews the motion court's judgment denying relief for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15(k). Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996).

To establish ineffective assistance, Glass must show counsel's performance was deficient and that performance affected his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390 (2000). To prove prejudice, Glass must show "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.*; *State v. Butler*, 951 S.W.2d 600, 608 (Mo. banc 1997).

Appellate courts review confrontation violations *de novo*. *Lilly v. Virginia*, 527 U.S. 116, 136 (1999). Admission of hearsay is reviewed for an abuse of discretion. *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006).

Confrontation Violation

In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the Court held that, for testimonial evidence to be admissible, the Sixth Amendment demands that the witness be unavailable and the defendant have had a prior opportunity for cross-examination, regardless of whether a court deems the statements reliable. The *Crawford* Court did not define "testimonial" because the statements taken by police officers in the course of interrogations qualified as testimonial under any definition. *Id.* at 52-53. The Court stated that it used "interrogation" in its "colloquial, rather than any technical, legal sense." *Id.* at 53, n. 4.

In *Davis v. Washington*, 126 S.Ct. 2266 (2006), the Court clarified the meaning of "testimonial." The Court decided two companion cases involving 911 calls and the statements made by victims. *Id.* The Court held that statements are testimonial when the circumstances objectively indicate that there is no ongoing

emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id.* at 2273-74. Courts should look to see if the primary, not necessarily the sole, purpose is to investigate a possible crime. *Id.* at 2278.

As in *Crawford*, the *Davis* court emphasized that it was not limiting its analysis to statements resulting from interrogations. *Davis*, 126 S.Ct. at 2274, n. 1. The Court's holding referred to interrogations, because the statements in *Davis* and *Hammon* were the products of interrogations, but the Court made clear that volunteered statements could also be testimonial. *Id.* "The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation." *Id.*

A Medical Examiner's primary purpose in performing an autopsy and generating a report is to investigate the medical causes of death and provide evidence for a future criminal prosecution. Section 58.720, RSMo, 2005¹¹ (App. A-53 to A-54). The Legislature has decided that when a homicide or suspicious death occurs, a medical examiner's duties include the following:

When any person dies within a county having a medical examiner as a result of:

(1) Violence by homicide, suicide, or accident;

¹¹ The full text of the statute is included in the Appendix.

(4) . . . or when any person dies:

(d) In any unusual or suspicious manner;

the police, sheriff, law enforcement officer or official, or any person having knowledge of such a death shall immediately notify the office of the medical examiner of the known facts concerning the time, place, manner and circumstances of the death.

Immediately upon receipt of notification, the medical examiner or his designated assistant shall take charge of the dead body and *fully investigate the essential facts concerning the medical causes of death*. He may take the names and addresses of witnesses to the death and shall file this information in his office. The medical examiner or his designated assistant shall take possession of all property of value found on the body, making exact inventory thereof on his report and shall direct the return of such property to the person entitled to its custody or possession. The medical examiner or his designated assistant examiner *shall take possession of any object or article which, in his opinion, may be useful in establishing the cause of death, and deliver it to the prosecuting attorney of the county*.

58.720. 1., RSMo 2005 Cum. Supp. (emphasis added).

A Medical Examiner's primary responsibilities are to investigate past events, to determine the medical causes of death, and to develop evidence for prosecution. The Medical Examiner works with law enforcement officials to investigate the death. Indeed, here, officers from the Missouri Highway Patrol attended the autopsy as part of their investigation (Tr. 753, 784).

The Medical Examiner must identify articles or objects that are "useful" in establishing the cause of death and deliver them to the prosecuting attorney. Section 58.720. 1. Here, Dix seized samples for comparison with a sexual assault kit (Tr. 786). These facts establish that, under *Davis*, the medical examiner's report and testimony about the autopsy are testimonial since the primary purpose of the autopsy is to establish or prove past events potentially relevant to later criminal prosecution. *Davis*, 126 S.Ct. at 2273-74.

The motion court correctly noted that, when it issued its findings, Missouri courts had not decided this issue. Since then, at least one appellate court has ruled that a forensic lab report finding a substance was crack cocaine was not testimonial under *Crawford*. *State v. March*, S.D. 27102 (Mo. App., S.D. June 30, 2006).¹² The Court of Appeals initially decided *March* without any reference to *Davis*, *supra*. All the cases the motion court cited also fail to take *Davis* into

¹² This Court has transferred that case, so the issue, as it relates to lab reports, is currently pending before this Court. Oral argument is scheduled for December 12, 2006.

account. Since *Davis* controls, however, this Court should decide that an autopsy report is testimonial, as Medical Examiners prepare such reports with the primary purpose of investigating a crime and recording past events for potential criminal prosecution. *Davis, supra*.

Business Records Exception Does Not Apply to Testimonial Statements

The motion court found that the autopsy report was admissible under the business record exception to the hearsay rule, citing *State v. Weaver*, 912 S.W.2d 499, 517 (Mo. banc 1995)(L.F. 767). *Weaver*, however, simply applied Section 490.680 to allow an autopsy report to be admitted when a custodian identifies the report, its mode of preparation and establishes that it was made in the regular course of business. *Weaver, supra* at 517. Here, since it did not call a custodian, or obtain an affidavit from the custodian, it is doubtful that the State met the statutory requirements (Tr.742-51). The business records statute, Section 490.680 (App. A-55), provides:

A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

While this statute may provide an exception to the hearsay rule, it does not allow testimonial evidence to be introduced in violation of the Sixth Amendment under *Crawford* and *Davis, supra*. The *Crawford* Court recognized, after all, that there have always been hearsay exceptions, such as dying declarations. *Crawford*, 541 U.S. at 56, n. 6. But the Court made clear that hearsay exceptions would not allow the admission of testimonial statements, saying:

But there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case.

Id. at 56.

Most hearsay exceptions apply to statements that are, by their nature, not testimonial. Examples include business records or statements in furtherance of a conspiracy. *Id.* The *Crawford* Court recognized that most business records will, by their very nature, be nontestimonial. When a teacher records a grade in a school record, that teacher is simply marking the grade in “the regular course of business, at or near the time of the act, condition or event.” Such a record is not testimonial and its admission does not run afoul of the Sixth Amendment right to confrontation, under *Crawford* and *Davis*’ analysis.

Counsel’s Ineffectiveness is Cognizable

Contrary to the motion court’s findings (L.F. 767), this claim of ineffectiveness is cognizable in 29.15 proceedings. Claims of ineffective assistance must be raised on postconviction, not on direct appeal. *State v. Wheat*, 775 S.W.2d 155, 157 (Mo. banc 1989). Rule 29.15 provides the “*exclusive*

procedure” for raising these claims. *Id.* Courts have found counsel ineffective for not objecting to prejudicial evidence, *Kenner v. State*, 709 S.W.2d 536, 539 (Mo. App. E.D. 1986); argument, *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 for offering faulty instructions, *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002).

In *Deck*, this Court found that a claim of ineffective assistance of counsel is distinct from a related claim, like the trial court’s submission of an improper jury instruction on direct appeal. *Id.* at 428-29. The error on direct appeal may not rise to the level of plain error, but counsel can be ineffective for failing to litigate the claim. *Id.*

The motion court’s reliance on *State v. Beckerman*, 914 S.W.2d 861, 864 (Mo. App. E.D. 1996) was clear error, in light of *Storey*, *Deck* and *Wheat*. *Beckerman* states that “it is well settled that ‘claims for post-conviction relief based on trial counsel’s failure to adequately preserve issues for appeal are not cognizable under Rule 29.15.’” *Beckerman, supra* at 864. *See also, State v. Broseman*, 947 S.W.2d 520, 528 (Mo. App. W.D. 1997). In *Broseman*, the Court qualified that statement, saying “[r]elief predicated upon ineffective assistance of counsel is limited to those errors prejudicing a movant’s right to a fair trial.” *Id.* *Broseman* had not met that standard since he had argued his attorney was ineffective for failing to preserve a sufficiency claim, even though the rules did not require preservation, and the appellate court had ruled the claim on the merits. *Id.*

In *Beckerman*, his allegation also was that he was denied effective assistance of counsel because his counsel failed to file a motion for judgment of acquittal or new trial. *State v. Beckerman, supra* at 864. While the Court did not explain its ruling, the context of the claim shows that the failure to file a motion for judgment of acquittal could not have affected his sufficiency claim or his right to a fair trial. He could not prove any prejudice as required by *Strickland*. Thus, while these cases state, in dicta, that such claims are not cognizable, the courts actually rejected the claims because of the appellants inability to prove prejudice.

This is consistent with *Deck* and *Storey*. A movant claiming counsel was ineffective for failing to object must show he did not receive a fair trial and a reasonable probability that the outcome of the proceeding would have been different. Glass has proven that his counsel was unreasonable in not properly raising the confrontation violation resulting in Dix's report, vita, and opinions being admitted without any opportunity for Glass to confront the witness against him.

Adelstein described the autopsy Dix performed on May 26, 2001 at which Sergeant Mike Platte, Corporal David Hall from the Missouri Highway Patrol, and Woody St. Clair, the Ralls County Coroner, were present (Tr. 752-53). From Dix's report, Adelstein described the victim's injuries (Tr. 752, 753-54, 758-59). Adelstein recounted that Dix had described six ligature abrasions on the right side of her neck that correlated with a ligature tied on the left side of her neck (Tr. 756). Dix had noted in his report a hemorrhage around the kidney and a laceration

in the interior labia minora, the skin surrounding the vagina (Tr. 762). The report did not describe the size of the laceration (Tr. 762). Dix had concluded that the cause of death was asphyxia due to the compression of the neck by ligature (Tr. 763, Ex. 59).

The trial court refused a lesser-included offense instruction based on Dix's finding that the cause of death was strangulation (Tr. 1077-78). According to the trial court, this finding precluded a finding that Glass acted recklessly. *Id.*

The prosecutor relied on Dix's findings to make his case for deliberation. The State proffered Dix's vita to show his credibility, knowing that Glass could not confront him (Tr. 743-44, 748, Ex. 58). In closing, the prosecutor said the victim died of asphyxiation and emphasized Adelstein's testimony showed deliberation (Tr. 1110-11). He emphasized the injuries as revealed by the report and Adelstein's testimony (Tr. 1133-34) and asked for a conviction.

The prosecutor also relied on Adelstein's testimony in penalty phase to prove that the victim had been sexually assaulted (Tr. 1365, 1388). The court gave the jury Exhibit 9, the autopsy report, during its penalty phase deliberations (Tr. 1391). The jury found only one statutory aggravator – kidnapping - but returned a verdict of death after deliberating for more than six hours (Tr. 1391-92). They were specifically instructed that they must consider all evidence in determining the sentence (Ex. 3C, at 419).

Adelstein's testimony from Dix's report was critical in both guilt and penalty phases. The prosecutor said it established an element of the case,

deliberation. Counsel's failure to object to this evidence, as violating Glass' right to confrontation, prejudiced him and denied him a fair trial. This Court should reverse.

Appellate Counsel's Ineffectiveness

If this Court finds that trial counsel acted reasonably and properly objected to the autopsy report and related testimony, then it must decide whether appellate counsel was ineffective. Glass is entitled to effective assistance appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985); *State v. Sumlin*, 820 S.W.2d 487, 490 (Mo. banc 1991). The standard for effectiveness of appellate counsel is the same as that for evaluating trial counsel's performance: Glass must show that counsel's performance was deficient and the performance prejudiced his case. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Williams v. State*, 168 S.W.3d 433, 444 (Mo. banc 2005). The Court must determine whether counsel ignored issues clearly stronger than those presented. *Robbins, supra* at 288, citing *Gray v. Greer*, 800 F.2d. 644, 646 (7th Cir. 1986). *Strickland* does not require the issue be a "dead-bang winner," since that standard would be more onerous than *Strickland's* reasonable probability standard. *Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir. 2001).

The "failure to raise a claim that has significant merit raises an inference that counsel performed beneath professional standards." *Sumlin*, 820 S.W.2d at 490. The presumption of reasonableness afforded an appellate attorney can be overcome if she neglected to raise a significant and obvious issue while pursuing

substantially weaker ones. *Bloomer v. United States*, 162 F.3d.187, 193 (2nd. Cir. 1998).

Death penalty appeals are different than non-capital appeals. “Although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence *mandates careful scrutiny in the review of every colorable claim of error.*” *Zant v. Stephens*, 462 U.S. 862, 885 (1983)(emphasis added). “Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.” *Burger v. Kemp*, 483 U.S. 776, 785 (1987). The American Bar Association requires that counsel raise “all arguably meritorious issues.” American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, §11.9.2D 1989). These Guidelines form the standard of practice in death penalty cases and are constitutionally-required. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). See also ABA Guidelines, February 2003, Guideline 10.15.1.C.

Appellate counsel was ineffective. She recognized the confrontation issue was meritorious while the case was being litigated on appeal, but did nothing to raise the issue before this Court. *Crawford* was decided the very day counsel filed her reply brief. She should have been aware of cases pending in the United States Supreme Court, but, in any event, the case was decided in time for her to bring the issue to this Court’s attention. Counsel had a duty to know and to investigate the law. *Strickland*, 466 U.S. at 690. Counsel acknowledged that the confrontation issue was meritorious. She simply neglected to raise it.

Glass was prejudiced because the prosecutor relied on the report and related testimony to prove deliberation and argue for death. This Court should reverse and remand for a new trial.

II. Inconsistent Theories

The motion court clearly erred in denying the claim that counsel were ineffective for presenting inconsistent defense theories in guilt and penalty phases, because this denied Glass due process, effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel unreasonably argued in guilt phase that Glass “didn’t do it,” and he is “sorry he did it” mitigation; counsel unreasonably told jurors in guilt phase that Glass didn’t do it, but if he did, he didn’t deliberate and failed to argue specifics facts showing a lack of deliberation as she had promised. Glass was prejudiced as his guilt phase defense was unbelievable and inconsistent with his later claim that he was remorseful for the killing.

Glass’ counsel failed to present a reasonable, consistent defense in guilt phase.¹³ Counsel gave no opening statement and presented no defense in Glass’ case-in-chief (Tr. 713, 1102). In closing, counsel argued that Glass didn’t commit the crime (Tr. 1113-26), but, if he did, he was only guilty of second degree murder (Tr. 1112). Although counsel promised jurors she would return to the lack of deliberation in her argument, she never did (Tr. 1112). Then, in penalty phase, counsel switched course and told the jury Glass was sorry for the crime he had

¹³ This was guilt phase counsel’s first capital trial (H.Tr. 402).

committed (Tr. 1379). This claim of remorse rang hollow, given counsel's earlier argument that Glass was innocent.

Counsel admitted that she had talked out of both sides of her mouth. Her "bifurcated" defense was that Glass was innocent, but maybe the State did not prove deliberation (H.Tr. 424). She promised the jurors she would argue how the State had failed to prove deliberation, but failed to make good on her promise in her argument (H.Tr. 424-25). Counsel admitted she had no reason not to make that argument after telling jurors she would (H.Tr. 425). Counsel felt she should have made the argument showing a lack of deliberation and she had "no good reason" for not returning to it (H.Tr. 425).

Counsel tried to rationalize her failure, saying maybe she ran out of time, but she could not recall (H.Tr. 426). She said that Glass would have been upset with any argument other than innocence, but her closing argument shows she did not adhere to any such alleged wishes, since she argued two inconsistent defenses - second degree murder and actual innocence (H.Tr. 425, Tr. 1112). She acknowledged that her "he didn't do it" defense was inconsistent with counsel's "he is sorry he did it" mitigation (H.Tr. 427).

David Kenyon, penalty phase counsel, admitted that the guilt and penalty phase defenses were inconsistent (Ex. 22, at 236-38). He thought the evidence supported a defense of second degree murder (Ex. 22, at 238). The State had a strong case for guilt since Glass had made statements to police admitting he had killed Steffini. *Id.* But Kenyon blamed Glass for the inconsistent theories, saying

Glass wanted an outright acquittal and the attorneys felt it was their duty to do what he wanted in guilt phase. *Id.*

The motion court denied (L.F. 765-66) Glass' claim that counsel was ineffective for presenting inconsistent defenses (L.F. 51-55). The court recognized the defenses were "somewhat inconsistent," but found counsel had legitimate strategic reasons since Glass wanted an outright acquittal (L.F. 765-66). The court relied on *Middleton v. State*, 103 S.W.3d 726, 736 (Mo. banc 2003) to justify the inconsistent theories (L.F. 766). The court found that counsel's failure to develop her argument for second degree murder was "reasonable" because she ran out of time (L.F. 766). The court found no prejudice, ruling the outcome would not have been affected by consistent theories (L.F. 766). These findings should be reversed.

Standard of Review

As discussed *supra*, the motion court's findings and conclusions are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, Glass must show that his counsel's performance was deficient and that the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390 (2000); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

The motion court clearly erred. The Supreme Court recently discussed the importance of presenting consistent theories in guilt and penalty phase. *Florida v. Nixon*, 125 S.Ct. 551, 563 (2004), quoting ABA Guidelines for the Appointment

and Performance of Defense Counsel in Death Penalty Cases, Section 10.9.1, Commentary (rev. ed. 2003). Reasonable counsel should not present a guilt phase defense that is inconsistent with what will be argued in penalty phase. *Id.* at 563. “It is not good to put on ‘he didn’t do it’ defense and a ‘he is sorry he did it’ mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney.” *Id.* quoting Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 Mercer L. Rev. 695, 708 (1991).

This Court has analyzed *Florida v. Nixon*, *supra*, and concluded that counsel arguing a “‘he didn’t do it’ defense and a ‘he is sorry he did it’ mitigation” was impermissible. *Goodwin v. State*, 191 S.W.3d 20, 39 (Mo. banc 2006). There, this Court did not find Goodwin’s counsel ineffective because he did not present inconsistent defenses.

Here, by contrast, counsel made the precise argument this Court ruled impermissible in *Goodwin*. She argued a “he didn’t do it” defense in guilt phase and a “he is sorry he did it” mitigation. These arguments were patently inconsistent. Further, contrary to the motion court’s finding that such inconsistencies are not prejudicial, the Supreme Court has found that the jury “will give the death penalty to the client” when the attorney makes such arguments. *Florida v. Nixon*, *supra* at 563. *See also*, *State v. Harris*, 870 S.W.2d 798, 815-16 (Mo. banc 1994) (counsel should to present consistent guilt and penalty phase defenses to have credibility with the jury); and *Ross v. Kemp*, 393 S.E.2d 244, 245-46 (Ga. 1990) (counsel was ineffective in capital case where his two attorneys

presented inconsistent defense theories: 1) not guilty because the state failed to satisfy its burden; and 2) a mental illness defense).

The motion court's reliance on *Morrow* was misplaced. *Morrow* predated *Florida v. Nixon*. Both this Court and the United States Supreme Court have since ruled that inconsistent defenses are impermissible.

Glass had made statements to the police, and once the trial court ruled they were admissible, it was unreasonable for counsel to present inconsistent defenses – he's innocent, but maybe he's guilty of second degree murder. Arguing innocence in guilt phase destroyed any credibility counsel had in mitigation when he argued Glass was sorry for the murder.

The motion court clearly erred in denying this claim. This Court should reverse and remand for a new trial.

III. Prosecutor's Improper Closing Argument

The motion court clearly erred in denying Glass' claim that he was denied effective assistance of counsel, due process and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21 in that trial counsel failed to properly object to the prosecutor's improper closing argument in:

Guilt Phase

- a. defense attorneys are never satisfied with police tactics;
- b. to find Glass not guilty, jury must believe all the state witnesses lied;
- c. prosecutor believed Glass had lied to police;
- d. had jurors watch the clock and place themselves in the victim's position for 30 to 60 seconds, the time for her to become unconscious;

Penalty Phase

- e. give Glass death to protect society and other children;
- f. compared Glass' life to the victim's and concluded hers was worth more;
- g. claimed that alcohol addiction and remorse were not proper mitigating factors;
- h. speculated on what Glass' might have done to other potential teenage victims;

- i. **displayed gruesome photos in an effort to inflame the jury; and**
- j. **told jurors it was their duty to give death.**

These errors prejudiced Glass, denying him a fair trial and a reliable sentencing, and a reasonable probability exists that, had counsel properly objected, the jury would not have convicted him of first degree murder and given him death.

This Court has repeatedly condemned improper closing arguments. *State v. Storey*, 901 S.W.2d 886, 900-03 (Mo. banc 1995); *State v. Taylor*, 944 S.W.2d 925, 937-38 (Mo. banc 1997); and *State v. Rhodes*, 988 S.W.2d 521, 528-29 (Mo. banc 1999). Yet, the experienced prosecutor¹⁴ made repeated inflammatory arguments in an effort to persuade the jury to decide the case on emotion, not the evidence and the law. He argued outside the evidence, disparaged defense

¹⁴ The Assistant Attorney General, Bob Ahsens, has tried numerous death penalty cases. See e.g., *State v. Driscoll*, 55 S.W.3d 350 (Mo. banc 2001) (admission of bad character evidence that defendant was a member of a racist prison gang required reversal for a new trial); *Tisius v. State*, 183 S.W.3d 207, 211 (Mo. banc 2006) (motion court granted a new penalty phase because of prosecutor's failure to disclose exculpatory material); *Barton v. State*, 76 S.W.3d 280 (Mo. banc 2002) (remanded for findings on failure to disclose exculpatory evidence. On remand, motion court granted relief based on prosecutor's failure to disclose).

counsel, misstated the law, gave his personal opinion, and personalized to the jury. Defense counsel failed to object to the improper argument or objected on the wrong grounds. Counsel had no reasonable strategic reasons for their failure. They were ineffective. This Court should reverse for a new, fair trial.

Standard of Review

This Court reviews for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, Glass must show that his counsel's performance was deficient and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Counsel can be ineffective for not objecting to prejudicial argument, *Copeland v. Washington*, 232 F.3d 969, 974-75 (8th Cir.2000); *State v. Storey*, 901 S.W.2d at 901-03.

Improper arguments can also deny a defendant due process, a fair trial, and violate the Eighth Amendment when they encourage the jury to decide the case on emotion, not the evidence. Prosecutorial argument is unconstitutional if it “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); and *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Penalty arguments must receive greater scrutiny. *See, Caldwell v. Mississippi*, 472 U.S. 320, 340 n. 7 (1985) (death sentence vacated because prosecutor’s improper penalty closing made it appear that responsibility for the death penalty would be borne by appellate court rather

than the jury). Courts conduct a more searching review of the penalty phase since the Eighth Amendment is implicated. *Copeland v. Washington*, 232 F.3d 969, 974, n.2 (8th Cir. 2000), quoting *California v. Ramos*, 463 U.S. 992, 998-999 (1983).

Whether viewed individually or together, the arguments injected unfairness into the proceedings and encouraged jurors to convict and sentence Glass to death based on improper considerations.

Guilt Phase

Defense Attorneys Never Satisfied With Police Tactics

During the guilt phase argument, the prosecutor disparaged defense counsel for confronting police officers and critiquing their interrogation. He told jurors:

It always amazes me how when I have proof of a statement they say why didn't you write it out for them, even if they couldn't write or even if they asked you to or if you wrote it out they will say well, that can't be right because you didn't let them write it. If they did write it out themselves, you didn't audiotape. And if you do audiotape they say why in the world didn't you videotape. Can't believe unless you see a videotape. Well, I've given up trying to satisfy them. I don't have to. I've proved the defendant's guilt beyond a reasonable doubt.

(Tr. 1127-28).

Counsel tried to object to the prosecutor's criticism of defense attorney because counsel believed the argument improper (H.Tr. 457-58). She admitted that she had misstated her objection at trial and did not provide the trial court with the proper legal grounds to rule in her client's favor (H.Tr. 458). She obviously wanted to state the appropriate legal grounds, but failed (H.Tr. 459).

The motion court found the prosecutor's criticism of defense counsel for always challenging police about how they interrogate defendants was proper argument (L.F. 775-76). This is contrary to the law since personal attacks on defense counsel are improper and prejudicial. *State v. Greene*, 820 S.W.2d 345, 347 (Mo. App. S.D. 1991); *State v. Hornbeck*, 702 S.W.2d 90 (Mo. App. E.D. 1985); *State v. Harris*, 662 S.W.2d 276 (Mo. App. E.D. 1983).

In *Greene*, the unsupported suggestion that defense counsel was lying to the jury was so serious and potentially prejudicial it likely affected the jury's deliberations. *Greene*, 820 S.W.2d at 347. In *Hornbeck*, the prosecutor accused defense counsel of conspiring to commit a crime, although no evidence supported that allegation. *Hornbeck*, *supra* at 93. The trial court committed reversible error in failing *sua sponte* to admonish the prosecutor for the improper argument. *Id.* "The argument degraded defense counsel and destroyed the basic precept that both the state and the defendant are entitled to a fair trial." *Id.* Similarly, in *Harris*, 662 S.W.2d at 277, the prosecutor argued that defense counsel created the homosexual defense thus implying that defense counsel had fabricated the defense. This allegation was patently improper. *Id.*

As in *Green*, *Hornbeck* and *Harris*, this prosecutor attacked defense attorneys, suggesting they always nit-pick police tactics and he has given up trying to satisfy them. Adding insult to injury, he referred to “other defense lawyer” tactics and attempted to lay the blame for their actions at these lawyers’ feet. He thus compounded the error by raising facts outside the evidence. *Storey, supra*. Nothing in the defense argument justified his argument. This argument was prejudicial because it encouraged the jurors not to scrutinize the police and their tactics, but to discount the deficiencies since defense attorneys would attack their procedures no matter what.

To Find Glass Not Guilty, Must Believe All Witnesses Lied

The prosecutor suggested, that to find Glass not guilty, jurors would have to believe all the state’s witnesses lied (Tr. 1128, 1129). He emphasized and repeated the argument:

Let me emphasize for you what the defense would have you do in order to find this defendant not guilty, you must disbelieve, you must believe that everyone who came in here and testified lied to you.

(Tr. 1128). He continued:

But these suggestions that all of these men and women would come in here and lie to you frankly is insulting to them. They are professional and they presented themselves to you as such.

(Tr. 1129).

Counsel had no reason for failing to object to the prosecutor's suggestion that jurors would have to find the witnesses all lied to find Glass not guilty (H.Tr. 459-60). Nevertheless, the motion court found this argument a proper comment on the defense (L.F. 775). The motion court clearly erred.

This argument improperly distorted the State's burden of proof. As in *Morris v. State*, 795 A.2d 653, 660-61 (Del. 2002), argument that the jury must find state witnesses are lying to find a defendant not guilty is patently improper argument warranting reversal for plain error. "The jury is not required to choose between the State's and the defendant's version of the facts." *Id.* at 660 (citation omitted). A defendant has "no affirmative burden to disprove the testimony of the [State witnesses]." *Id.* Yet, that is exactly what the prosecutor did here, suggesting that Glass had to prove all the state witnesses were lying to be found not guilty. This Court, like Delaware's Supreme Court, should condemn the improper argument and counsel's failure to object.

Prosecutor's Belief That Glass Lied to Police

The prosecutor gave jurors his personal opinion that Glass was lying, arguing: "Now, let's talk about this idea that Sergeant Platte lied to his [sic] man. Why not? He was lying to Sergeant Platte." (Tr. 1129). Counsel admitted having no reason for not objecting to the prosecutor's opinion (H.Tr. 460-61). The motion court found the prosecutor's statement was not the prosecutor's personal opinion, but a comment on the evidence (L.F. 775-76).

The court's findings are clearly erroneous. They are contrary to this Court's decision in *Storey*, 901 S.W.2d at 900-01, ruling that a prosecutor may not argue facts outside the record. "Assertions of fact not proven amount to unsworn testimony by the prosecutor." *Id.* at 901. A prosecutor's assertions of personal knowledge-here, that Glass lied to the police-are "apt to carry much weight against the accused when they should carry none" because the jury is aware of the prosecutor's duty to serve justice, not just win the case. *Id.*, quoting, *Berger v. United States*, 295 U.S. 78, 88 (1935).

Watch the Clock – How Long it Took for Victim to Become Unconscious

The prosecutor personalized to the jury, asking them to place themselves in the victim's position. He told them to look at a clock and imagine how long it would take for the victim to become unconscious (Tr. 1132). He paused and put the jurors in the victim's position for 30 seconds, and then one minute (Tr. 1132).

He said:

there's a clock right behind you. I want you to turn around and look at it for me. I'm going to start right now. Watch that clock. (Pause.) Do you remember Dr. Adelstein said 30 seconds that's the earliest time she would have been rendered unconscious? Talk about whether she was in a minute. That's one minute. That's a long time, isn't it? A long time to be applying pressure.

(T.1132).

Counsel was familiar with *Storey*, but failed to object to the prosecutor's asking the jurors to look at the clock and pause, imagining how long it took the victim to become unconscious (H.Tr. 461-62). Counsel said she thought this argument went to deliberation, and did not think the prosecutor was asking jurors to place themselves in the victim's position (H.Tr. 462).

The motion court found that the prosecutor's argument telling jurors to look at the clock and to time how long it took the victim to become unconscious was not improper personalization (L.F. 776). This finding is contrary to the facts and the law. The prosecutor specifically asked jurors to think about the victim and how long it took her to become unconscious (Tr.1132).

This argument is like that condemned in *Storey*. There, the prosecutor argued for jurors to put themselves in the victim's place and imagine what it would be like to have their heads yanked back by their hair and to feel the knife blade on their necks. *Id.* at 901. Personalizing argument to the jury is improper and prejudicial, especially in a death penalty case. *Id.* "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be based on reason rather than caprice or emotion." *Id.*, quoting, *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

Penalty Phase

The improper argument did not end in the guilt phase, but escalated in penalty phase.

Protect Society and Children

The prosecutor asked the jurors to give death to protect children and others in society (Tr. 1369, 1370).

I'm going to suggest to you in the strongest possible terms that the right thing to do is the penalty of death. Why? Well, there are people, much of what we do in our law and in our culture is designed to protect those among us who cannot protect themselves. Children, those who have infirmities, who for one reason or another cannot care for themselves....One of the things we as society do, try to care for those people who are unable to protect themselves. And the first and foremost in that group are mothers and young children.

(T.1369); and,

I think, therefore, that to ensure as a society that we do what is necessary as much as we are humanly capable of doing to protecting those among us who cannot care for themselves, protect themselves is that we mete out upon those who would abuse those people, who would beat and murder those people, the ultimate punishment. I know of no other way for us to say in no uncertain terms that we will not tolerate that kind of abuse of those people which we as a society most wish to protect.

(T.1370).

Counsel was unfamiliar with cases ruling that appeals to convict a defendant to solve society's crime problem are improper (Ex. 22 at 207-08). Nevertheless, the motion court found the arguments proper and counsel's failure to object reasonable (L.F. 776-78).

The prosecutor's arguments that jurors should sentence Glass to death to protect society, especially vulnerable children, were improper because they pressured the jury to sentence Glass to death, not based on the evidence, but to protect society in general. Such arguments consistently have been condemned. *United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991); (improper and inflammatory appeal that jurors be the conscience of community was reversible error); *United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992) (same); *United States v. Monaghan*, 741 F.2d. 1434, 1441 (D.C. Cir. 1984) (same).

The broader problems of crime in society should not be the focus of a jury charged with considering an individual defendant's guilt or innocence, let alone whether he deserves to die. *People v. Johnson*, 803 N.E.2d 405, 418-421 (Ill. 2003). The remediation of society's problems should not distract jurors from the awesome responsibility with which they are charged. *Id.* "Any conviction ought to be summarily overturned if it turned out the jurors thought their verdict was supposed to be a referendum on whether their state ought to surrender to some heinous crime, or whether they should convict in order to 'send a message' that the crimes charged 'will not be tolerated in this state.'" *Id.* at 420-21., *quoting*, J.

Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to "Send a Message" With Their Verdict?*, 22 Am. J. Crim. L. 565, 569 (1995).

Counsel was ineffective for failing to know this established law and the motion court should have found the argument improper and granted relief.

Relative Worth of Lives

Not only did the prosecutor ask for death to deal with society's problems, he then encouraged the jury to weigh Glass' life against the victim's:

You know, this part about the defendant's life still has some value.

Well, I'm not sure we can afford that. And I'll tell you why. Because

Steffini Wilkins' life had value. You heard something about her,

didn't you. She apparently was a very outgoing, caring girl who was

a cheerleader, apparently, you know, well-loved and liked. Was

well on her way to becoming a good and contributing citizen. And

that man took her from us and we are all diminished for it....He has

taken a person of considerable value from us. And for that he should

bear the consequences.

(T.1386-87) (Emphasis added).

Counsel did not recognize the comparison of Glass and the victim's lives as objectionable (Ex. 22 at 208-09). He did acknowledge this Court's decision in *Storey* had held such arguments improper, but the legal basis for the objection did not occur to him during the trial. *Id.* at 209.

The motion court concluded that the prosecutor properly argued the victim's life had value and Glass deserved to die for killing her (L.F. 776-77). The court ruled that the prosecutor had not compared Glass's life to the victim's (L.F. 776), a finding contrary to the record. The prosecutor asked jurors to weigh the value of Glass' life against that of the victim (Tr. 1386-87). This is the precise argument this Court condemned in *Storey*, 901 S.W.2d at 902. Nonetheless, the Attorney General's Office continues to compare the value of defendants' lives with that of the victims.'

Alcohol Use and Remorse Not Mitigating

The prosecutor misled the jurors about mitigation, suggesting Glass' alcohol problems should not be considered (Tr. 1387), and that his remorse meant nothing (Tr. 1389). Counsel said it did not occur to him to object to the prosecutor's misstatements of the law on mitigation (Ex. 22 at 209-10, 212-13).

The motion court found that the prosecutor's arguments were not telling the jury not to consider mitigation but telling them not to give them much weight, in the comparison of mitigation to aggravation (L.F. 777). The motion court ignored the record in so finding.

The prosecutor flatly argued these factors were not mitigating (Tr. 1387, 1389). He said remorse meant nothing (Tr. 1389). These arguments were improper because, under the Eighth Amendment and Fourteenth Amendments, jurors must be allowed to consider, as a mitigating factor, any aspect of the defendant's character proffered as a basis for a sentence less than death, *Lockett v.*

Ohio, 438 U.S. 586 (1978). Allowing mitigation evidence is meaningless if jurors are told not to give effect to it. *Hitchcock v. Dugger*, 481 U.S. 393 (1987). The prosecutor's argument led the jury to believe they could not consider Glass' alcohol use and his remorse.

What Might Glass Might Have Done to Other Teenage Victims

The prosecutor tried to scare jurors, having them speculate about what Glass might have done to other potential teenage victims:

in the month or two prior to this murder we know that he walked uninvited and unannounced into somebody else's home, didn't he? You heard that from Samantha Bramlett and you heard that from Nicole Withrow. Why that didn't turn into something ugly, I can't say. I don't know. But when someone comes up in a sliding glass door in the back of your house and into a bedroom, those are not the actions of a person who has come by just, who has come by with a lawful purpose.... It is the home of a person who has what? Two teenage girls living there.

(Tr. 1389).

Counsel admitted he failed to renew his objection to the prosecutor's argument about what might have happened to other victims (Ex. 22 at 210-12). This was an "oversight." *Id.* at 212. It did not occur to counsel that the prosecutor's speculative argument might undermine the reliability of the proceedings. *Id.* at 212.

The motion court found that the prosecutor's speculation about what Glass might have done to other teenage victims was proper and counsel had no basis to object (L.F. 777). These findings are contrary to *Storey*, 901 S.W.2d at 900-01, since the argument referred to matters outside the record. The argument asked the jury to punish Glass, not for what he did, but what he *might have done* to other teenagers. Contrary to the court's findings, this argument did not focus solely on Glass having walked into other houses, but put fear in jurors about him stalking other teenagers. Contrary to the law, it encouraged the jurors to sentence Glass based on fear and emotion. *Gardner v. Florida*, 430 U.S. at 358; *Storey*, 901 S.W.2d at 900-03; and *Taylor*, 944 S.W.2d at 937-38.

Gruesome Photos – Canvas Argument

The prosecutor further inflamed the jury when he showed gruesome pictures to the jurors and said, “[h]ere is the canvas he worked on that night. And here was his artistry” (T.1390).

Counsel realized he should have objected to the prosecutor's display of gruesome photos (Ex. at 214-15). He had made such objections in the past. *Id.* at 215. Counsel was unaware that the Supreme Court had granted review of whether photographs that were properly admitted in guilt phase could be unduly prejudicial in penalty phase. *Id.* at 215-16. It never occurred to counsel that he should argue that using these photos made the penalty proceedings unreliable. *Id.* at 216. Counsel said he also should have objected when the court sent the photos to the jurors during their deliberations. *Id.* at 217.

The motion court seems to rule that, once an item is admitted into evidence, the prosecutor can display it however he wishes, no matter how inflammatory (L.F. 777-78). This Court has ruled, however, that arguments appealing to jurors' passions and prejudices are improper. *Storey*, 901 S.W.2d at 902. Decisions to impose death should not be based on emotion. *Id.*; *Gardner, supra*.

In *Thompson v. Oklahoma*, 487 U.S. 815, 820-21 (1988), the Court granted certiorari on whether gruesome photos properly admissible in guilt phase can render a defendant's death sentence unreliable when considered in penalty phase. *Thompson* did not decide the issue, reversing on other grounds. *Id.* Suggesting that the photos showed Glass' canvas and that he was an artist of death was an improper attempt to inflame the passions of the jury. Like the arguments in *Storey*, they should be condemned.

Duty to Give Death

The prosecutor told jurors it was their "duty" to give Glass death:

I don't ask you for a death penalty because I get any joy out of it. I ask you for it because it's justice. And I ask you to do that because it's the right thing to do. *Do your duty*.

(T.1390) (emphasis added).

Counsel did not recognize that the prosecutor's argument was an objectionable argument and it never occurred to him to object (Ex. 22 at 218-19). The motion court ruled the "duty" argument was a proper appeal to the need for strong law enforcement (L.F. 778).

This finding is contrary to the law. *United States v. Young*, 470 U.S. 1, 18 (1985); *Evans v. State*, 28 P.3d 498, 515 (Nev. 2001).

In *Evans*, the prosecutor asked, “do you as a jury have the resolve, the determination, the courage, the intestinal fortitude, the sense of commitment to do your legal duty?” *Id.* Asking the jury if it had the intestinal fortitude to do its legal duty was highly improper because it pressured the jury for a particular verdict. *Id.* “To exhort the jury to ‘do its job,’ has no place in the administration of criminal justice.” *Evans, supra, quoting, Young*, 470 U.S. at 18. “There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality.” *Evans, supra, quoting United States v. Mandelbaum*, 803 F.2d 42, 44 (1st Cir. 1986).

Despite repeated warnings from this Court, the State persists in crossing the line and engaging in prosecutorial misconduct in argument. Inexplicably, here, defense counsel did nothing to stop the onslaught. This Court should reverse for new guilt and penalty phases.

**IV. Appellate Counsel Failed to Appeal the Trial Court's Exclusion
of Relevant Mitigating Evidence**

The motion court clearly erred in denying Glass' claim that he was denied effective assistance of appellate counsel, due process, and freedom from cruel and unusual punishments, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, because appellate counsel unreasonably failed to raise the trial court's error in excluding Exhibits 29-31, medical and school records in that:

- 1) the claims had significant merit since any evidence reflecting on Glass' background and character was relevant mitigation;
- 2) the law, particularly *Lockett v. Ohio*, *Tennard v. Dretke and Williams v. Taylor*, supported the claims;
- 3) the claims were preserved; and
- 4) appellate counsel pursued weaker issues, including five plain error claims and claims repeatedly rejected by this Court.

Glass was prejudiced because, had the claims been raised, a reasonable probability exists that this Court would have granted a new penalty phase, and, with the additional mitigation, a reasonable likelihood exists that the jury would have sentenced Glass to life.

The motion court found that trial counsel was ineffective for failing to investigate mitigating evidence (L.F. 781-89). Counsel had obtained Glass'

medical and school records (Tr. 1352-54). Yet they unreasonably failed to follow up on the information in these records and interview the doctor who had treated Glass for meningitis. *Id.* Counsel failed to interview and call teachers to testify about Glass' struggles in school, his limited intellectual functioning, and the impact it had on him. *Id.* Trial counsel simply tried to offer the records into evidence without calling any mitigating witnesses revealed by the records. *Id.*

Counsel offered their client's background records. Exhibit 29, Hannibal Ambulatory Care Center Medical Records, showed that from 1994 to 1995, Glass, a teenager, weighed between 297-307 pounds. The records verified the defense theory that Glass was overweight as a child (Tr. 1353). Exhibit 31, hospital records, documented the meningitis. The records established that Glass was "semi-comatose," with and had a prognosis of "permanent brain damage" (Ex. 1, at 5-6). Counsel offered these records as mitigating evidence and to corroborate family members' testimony (Tr. 1354). The corroboration was necessary because the State questioned the family's account of Glass' hospitalization and his deficits due to the meningitis (Tr. 1308).

Trial counsel also offered Glass' school records (Tr. 1353; Ex. 30). These records showed that Glass struggled in school, especially in math (Ex. 5 at 1). In ninth grade, standardized testing showed Glass had "low" reading, language arts, and geometry abilities (Ex. 5 at 7). In third grade his educational performance did not warrant promotion to fourth grade, but he was passed on because he had not made all F's (Ex. 5 at 40-41). Even though Glass struggled academically, he had

no disciplinary problems. *Id.* Rather, he had received the “Student of the Month” award. *Id.* at 1.

The trial court excluded these exhibits, sustaining the State’s objection to them as “irrelevant and immaterial” (Tr. 1352-54). Trial counsel included the trial court's error in refusing to admit Exhibits 29-31 in the new trial motion (D.L.F.470-72).

On appeal, Glass’ counsel did not challenge the exclusion of this evidence (Ex. 35). Counsel’s brief instead claimed that Glass excelled at Palmyra High School, based on Glass’ uncle’s testimony (Ex. 35, at 12). Appellate counsel raised five plain error points,¹⁵ and two claims this Court has repeatedly rejected: 1) *Ring* requires aggravator be pled in information; and 2) the trial court should not have admitted unadjudicated bad acts under *Debler* (Ex. 35, at 90-100, 111-126).

Glass claimed appellate counsel was ineffective for failing to challenge the exclusion of medical and school records, relevant mitigating evidence (L.F. 96-98). Significantly, since counsel failed to call any teachers or school officials in penalty phase, the school records were the only source of information for jurors about Glass' history and background in school. The medical records would have

¹⁵ This Court noted that “all or parts of Glass’s points 2, 4, 6, 7, and 9 were not preserved on appeal.” *State v. Glass*, 136 S.W.3d 496, 508 (Mo. banc 2004).

Thus, review was for plain error. *Id.*

met the State's suggestion that the family was exaggerating the meningitis episode and its effects on Glass.

Appellate counsel admitted that maybe she may have been wrong for failing to raise the issue and she may have wanted too much from trial counsel (H.Tr. 529, 530, 533). Even though the medical records warned that Glass might suffer permanent brain damage and the school records showed some low grades, appellate counsel wanted a more specific explanation by trial counsel about how those records were mitigating (H.Tr. 530-33).

The motion court found that appellate counsel's actions reasonable and found no prejudice (L.F. 773). Evidence of Glass' obesity, meningitis, potential for brain damage and poor school performance was presented at trial, so the records would have been "merely cumulative." *Id.* These findings are clearly erroneous.

Standard of Review

As discussed in Point I, review is for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); 29.15. Glass is entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985); *State v. Sumlin*, 820 S.W.2d 487, 490 (Mo. banc 1991). The standard for effectiveness of appellate counsel is the same as that for evaluating trial counsel's performance: Glass must show that counsel's performance was deficient and the performance prejudiced his case. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Williams v. State*, 168 S.W.3d 433, 444 (Mo. banc 2005).

Appellate counsel was ineffective. The exclusion of relevant mitigating evidence is constitutional error requiring reversal and a new penalty phase. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (death penalty schemes must allow consideration “as a mitigating factor, any aspect of the defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”); *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, and the Eighth Amendment required the jury be capable of giving effect to that evidence). Accordingly, courts have found counsel’s failure to investigate and present background records unreasonable.

In *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000), counsel was found ineffective for failing to present records that graphically described Williams’ “nightmarish childhood,” prison records recording his good conduct in prison, and evidence that Williams was “borderline mentally retarded” and did not advance beyond the sixth grade. *Id.*

In *Rompilla v. Beard*, 125 S.Ct. 2456, 2463 (2005), counsel failed to examine a court file of the petitioner’s prior conviction. The records “pictured Rompilla’s childhood and mental health very differently from anything defense

counsel had seen or heard.” *Id.* at 2468. They showed that Rompilla grew up in a “slum environment,” quit school as a teen, and had “test scores showing a third grade level of cognition after nine years of schooling.” *Id.*

In *Hutchison v. State*, 150 S.W.3d 292, 305 (Mo. banc 2004), counsel were found ineffective for failing “to obtain readily available records showing mental illness, sexual abuse and impaired intellectual functioning.” “The 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 Hutchison’s difficulty in school and placement in special education. *Id.* at 305-06.

Contrary to the motion court’s findings, counsel’s explanation for not raising the claim was unreasonable. Appellate counsel wanted trial counsel to specifically outline how the records were mitigating. But, trial counsel *did* explain the records’ significance. The medical records were marked as exhibits and verified Glass’ meningitis, semi-comatose state and prognosis of brain damage (Ex. 31, Tr. 1354). The medical records showed that Glass weighed between 297 and 307 pounds as a teen (Ex. 29, Tr. 1353) verifying the family’s testimony of his weight problem and how he was teased. The school records were offered so that jurors could review Glass’ grades and learn what kind of student he was (Tr. 1354). Counsel wanted this background information before the jury (Tr. 1354).

An offer of proof must show three things: 1) what the evidence will be; 2) the purpose and object of the evidence; and 3) each fact essential to establishing the admissibility of the evidence. *State v. Tisius*, 92 S.W.3d 751, 768 (Mo. banc 2002). Trial counsel's offer of proof did all three. He offered the actual records; explained what they would show; and explained that the records were offered as mitigating evidence of Glass' background (T.1352-55). They were admissible as mitigating evidence.

These records were not "merely cumulative" to witnesses' testimony as the motion court found. "Evidence is said to be cumulative when it relates to a matter so fully and properly proved by other testimony as to take it out of the area of serious dispute." *Black v. State*, 151 S.W.3d 49, 56 (Mo. banc 2004), quoting *State v. Kidd*, 990 S.W.2d 175, 180 (Mo. App., W.D. 1999).

Discussing *State v. Perry*, 879 S.W.2d 609 (Mo. App., E.D. 1994), this Court has noted the stark difference between records and family's testimony. *Black*, 151 S.W.3d at 56. In *Perry*, the trial court excluded internal police department records that impeached the credibility of some of the State's key witnesses to defendant's alleged confession, because the defendant's sister testified to the events that the records would have shown. *Id.* The appellate court rejected the argument that the records were cumulative to the family member's account:

It borders on the frivolous to contend that the testimony of defendant's sister, refuted on the stand by Briscoe, is equivalent to

the transcript of Briscoe's statement to the police which stated the very things she denied stating on the stand.

Perry, supra at 613. Here too, it borders on the frivolous to suggest the information in background records was equivalent to the family's testimony.

The school records showed Glass struggled in school. By contrast, his uncle said he "excelled" (Tr. 1289). The prosecutor tried to minimize the impact of the meningitis Glass suffered, cross-examining Glass' Aunt Connie about the incident, and saying she had no reason to know if it impacted him as an adult (Tr. 1308). When she tried to tell the jurors that the doctor told the family it could cause brain damage (Tr. 1308-09), the prosecutor objected to the hearsay and the court sustained his objection (Tr. 1309). The records were relevant and critical to establish this mitigating information, especially since the prosecutor minimized Glass' deficits.

The records were also important because they were written documents prepared by school teachers and medical personnel who simply recorded the events as they happened. Jurors would likely find that evidence much more reliable than testimony from family members who might exaggerate to help a loved one on trial for his life. *See State v. Hayes*, 785 S.W.2d 661, 663 (Mo. App. W.D. 1990) (disinterested witnesses may be more credible to juries because they have no stake in case's outcome).

Here, the information in the records would have shown Glass' gross childhood obesity (Ex. 29 at 2-3); the seriousness of his meningitis episode,

including being “semi-comatose” and having a prognosis that he risked “permanent brain damage” (Ex. 1 at 5-6); and school information showing his history of difficulty in school and low academic performance. This is the type of information that has been found expressly mitigating in *Hutchison*, *Williams* and *Rompilla*, *supra*.

Since the mitigation claim was preserved, counsel’s failure to raise it on direct appeal was unreasonable, especially since counsel pursued much weaker, unpreserved claims. Counsel raised five plain error points, rather than this preserved claim. She also raised two claims this Court has repeatedly rejected.

Counsel’s failure prejudiced Glass. Jurors had to decide whether, considering all the evidence, anything in Glass’ character or background prevented them from believing that the death penalty was the appropriate punishment. When mitigating evidence is excluded, rarely can a court say that it could not have affected the jury’s determination of whether a defendant should have received a life or death sentence. The evaluation of the aggravating and the mitigating evidence “is more complicated than a determination of which side proves the most statutory factors beyond a reasonable doubt.” *State v. Storey*, 986 S.W.2d 462, 464 (Mo. banc 1999). The jury is never required to give death, but has discretion to assess life imprisonment even if mitigating factors do not outweigh aggravating factors. *Id.*, citing *State v. Brooks*, 960 S.W.2d 479, 497 (Mo. banc 1997); §565.030.4(4).

Here, the jury found only one aggravator (Tr. 1391). Glass was young, only twenty-one, and had only one prior conviction, a non-violent stealing (Tr. 1187). The jury deliberated more than five hours deciding punishment (Tr. 1391). The medical and school records could have tipped the scales to life. Jurors may have found the meningitis caused brain damage and contributed to Glass' struggles in school. They would have realized how obese Glass was as a teen, giving credence to family accounts of the teasing and ridicule to which he was subjected.

Appellate counsel was unreasonable in failing to brief this meritorious issue. This Court should reverse and remand for a new penalty phase.

V. Jury Never Heard About Glass' Good Conduct in Jail

The motion court clearly erred in denying Glass' claim that counsel was ineffective in failing to present evidence of his good conduct in jail because Glass was denied his rights to effective assistance of counsel and to present mitigation, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel failed to adequately investigate and 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 - that never called any problems and was allowed to leave jail before trial to visit his ailing grandfather. Glass was prejudiced as this good behavior evidence was mitigating and established that Glass would be a good prisoner and should be sentenced to life rather than death.

Seargent Robert Harrison had dealt with a lot of inmates in the nine years he worked at Callaway County Jail (H.Tr. 120-21). He was in charge of staffing duties and the inmate complaints at the jail (H.Tr. 121-22).

Glass spent about a year in the Callaway County Jail and Harrison saw him three to four times each night, five nights per week (H.Tr. 122-23). Glass was polite and respectful (H.Tr. 123). He cooperated with the correctional staff, listened to them and never caused problems (H.Tr. 123-24). Harrison said Glass was “probably one of the best inmates we’ve ever had in there.” (H.Tr. 124).

Deputy Fred Cave also recognized Glass was a good inmate (H.Tr. 115-17). While Glass was jailed on the murder charges, under order from Judge Conley, Cave transported him to the Veteran's Hospital in Columbia to see his grandfather (H.Tr. 114-15). This was the first time an inmate charged with first degree murder was allowed to visit someone outside the jail (H.Tr. 119). Glass behaved himself and gave the deputy no problems (H.Tr. 116-17).

Trial counsel did not know of Harrison's glowing description of Glass and his behavior, because counsel never talked to him about Glass (H.Tr. 124-25, Ex. 22 at 89-90). Counsel admitted that he would have wanted Harrison as a penalty phase witness (Ex. 22 at 90). Counsel believed that jurors view testimony of law enforcement officers more favorably than other witnesses. *Id.* at 87.

Counsel thought Deputy Cave would be a very good witness and endorsed him the first day of trial, November 18, 2002. *Id.* at 87; Ex. 15. Counsel first spoke to Cave the first day of the trial. Ex. 22, at 85. Cave, who was serving as a bailiff, heard his name being mentioned as a witness during voir dire. *Id.* at 86. Cave approached defense counsel and asked him why he was listed as a witness. *Id.* Counsel told him that he wanted the jury to hear the information about how Cave transported Glass to see his grandfather. *Id.* The deputies had no problems with Glass and he never tried to escape. *Id.* at 87.

Counsel could not say why he didn't call Cave. *Id.* at 85. He knew Fred Cave would have been an excellent witness. *Id.* Counsel remembered that one of the jailers had said that Glass had complained about inmates not being allowed to

have pizza and counsel did not think this reflected well on Glass' character. *Id.* at 88-89. But, counsel had no idea if Deputy Cave was even aware of this incident. *Id.* at 89.

The motion court denied the claim of ineffectiveness, ruling that counsel “decided not to present evidence from the jail because there was information that Movant had been ‘whining’ in the jail and some officers considered him a problem” and counsel’s desire not to open the door to this evidence was a reasonable trial strategy (L.F. 804). The court found that Cave and Harrison’s time with Glass was short, so their testimony was relatively minor and Glass was not prejudiced by counsel’s failure to call them. *Id.*

Standard of Review

As outlined in Point I, review is for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); 29.15. A review of entire record should leave this Court with the definite and firm impression that a mistake has been made. *Id.*

Glass must show that his counsel’s performance was deficient and it prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390 (2000); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Counsel has a duty to thoroughly investigate mitigating evidence. *Williams v. Taylor, supra*. In *Williams*, counsel was found constitutionally ineffective for not investigating and introducing mitigating evidence, including Williams’ good jail behavior. *Id.*

Good prison behavior is relevant mitigation that serves “as a basis for a sentence less than death.” *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986), quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). This kind of evidence is critical to the jury’s decision about whether to sentence someone to death or life imprisonment. Good prison behavior is the flip side of past misconduct, and helps the jury decide whether a life sentence is appropriate. *Skipper, supra* at 5.¹⁶ Evidence suggesting a defendant has adjusted well to life in prison “unquestionably goes to a feature of defendant’s character that is highly relevant to a jury’s sentencing determination.” *Id.*, at 7, n. 2.

The motion court’s finding that counsel had a strategy for not calling these witnesses does not square with the record. Counsel had no idea what Harrison would say since he never interviewed him. Counsel admitted he had no strategic reason for not calling Cave and Harrison. He knew law enforcement witnesses were persuasive witnesses and wanted to present evidence of Glass’ good jail behavior. He thought Cave would be a very good witness and could not “for the life of me” remember why he didn’t call him. Ex. 22, at 85. Counsel recalled that someone at the jail knew about Glass complaining about not getting pizza at the

¹⁶ The Court found that excluding evidence of good jail conduct violates due process, especially when the State presents evidence of prior criminal behavior and argues future dangerousness. *Id.* The State made such an argument here, See Point III.

jail. *Id.* at 88. But counsel admitted that he did not know if that could have been the reason for not calling Cave. *Id.* And since counsel never interviewed Harrison, he could not know what harmful information, if any, he had about Glass. Significantly, because he never contacted Harrison, he never knew that Harrison would have testified that Glass was the best inmate he had seen in nine years. The motion court's suggestion that it was reasonable to forgo evidence that Glass was the best inmate Harrison had ever seen and the only inmate charged with first degree murder who had been allowed to leave the jail to visit a sick relative because of one minor complaint about pizza does not withstand scrutiny.

Forgoing mitigation, because it contains something harmful is unreasonable. *Williams v. Taylor*, 529 U.S. at 396. Williams had a juvenile record for larceny, pulling a false fire alarm, and breaking and entering. *Id.* But failing to introduce the comparatively voluminous mitigating evidence that contained some harmful information was unjustified by counsel's strategy. *Id.*

Glass' purported complaint about not getting a pizza was minor compared to Williams' crimes and acting out in the jail. His purported complaint did not justify forgoing the favorable mitigation that he was the best inmate the jailers had ever seen.

Finally, the motion court's finding that Harrison's time with Glass was short is contrary to the record. Harrison saw Glass five days a week for almost a year. Every night that he worked, he saw Glass three or four times. Harrison was responsible for dealing with inmate complaints and staffing decisions, so he had

lots of contacts with inmates, including Glass. Far from “short” contact, it was extensive and continuous.

Harrison and Cave would have been excellent witnesses. They would have shown the jury that Glass was a good prisoner. This good jail behavior would have provided compelling reasons for a life sentence. This Court should reverse the denial of relief on this ground and remand for a new penalty phase.

VI. Voir Dire: Counsel Not Prepared to Ask About Specific Mitigation, Age, and Unanimity

The motion court clearly erred in denying Glass' claim that the prosecutor misled jurors about mitigation and defense counsel was ineffective for conducting an inadequate voir dire because their actions violated Glass' rights to due process, effective assistance of counsel, a fair and impartial jury and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel didn't ask veniremembers whether they could consider specific mitigating circumstances, failed to object when the prosecutor suggested that age was not mitigating and could not be considered, and failed to object when the prosecutor told jurors they had to be unanimous in order to consider mitigation. Glass was prejudiced because without an adequate voir dire his jury likely contained members who could not be fair and impartial.

Counsel were unprepared for voir dire. Because they did not know what mitigating evidence they were going to present, they didn't ask jurors whether they could consider specific mitigation. Although Glass was young, counsel failed to object and correct the prosecutor's suggestion that jurors should not consider his age as mitigation. Counsel also failed to object to the suggestion that the jurors must be unanimous in all their findings. The prosecutor's improper voir dire and

defense counsel's failure to object, rendered Glass unable to select a fair and impartial jury to try his case.

Voir Dire on Specific Mitigating Circumstances

Glass alleged that counsel was ineffective for failing to question veniremembers about the specific kinds of mitigating evidence the defense intended to present (L.F. 44-45, 192). Even though voir dire on critical facts must be allowed to uncover venirepersons' bias and prejudice, counsel failed to ask whether venirepersons could consider any of 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.

Neither trial attorney had reasonable explanations for their failure to voir dire on specific mitigation. Penalty phase counsel admitted he had "no reason" for failing to voir dire jurors on whether they could consider mitigating circumstances (Ex. 22, at 196-97). Co-counsel said that they did not voir dire on expert witnesses because they were unsure what penalty phase experts they were calling (H.Tr. 419-20). But, she admitted they had "no reason" for failing to ask about specific mitigation (H.Tr. 420). She acknowledged they wanted jurors who could fairly consider mitigating evidence (H.Tr. 420). Since they failed to question veniremembers, counsel had no basis to know whether they could be fair and impartial and consider mitigating evidence, as required by law.

Jurors Misled That Age Not a Proper Consideration

During voir dire, the prosecutor improperly suggested jurors could not consider Glass' age (L.F. 34). He said:

The defendant in this case as I understand it, correct me if I'm wrong, was 21 years old at the time this crime occurred. That's a relatively young man. Are there any of you who feel that the laws of the State of Missouri should apply with any greater or lesser weight because the defendant was a relatively young man at the time of the offense?

(Tr. 426-27). Counsel sat silent, never objecting to this suggestion that jurors should not consider Glass' age in deciding his punishment (LF. 34).

Counsel knew age is a mitigating circumstance and admitted he should have made a speaking objection so that the jury would know age is an appropriate factor to consider on punishment (Ex. 22, at 173-74). It simply did not occur to counsel to object to the prosecutor's misleading and improper statement of law. *Id.* at 174, 175. Counsel's error was particularly damning because he never requested a specific instruction informing the jurors they could consider age in mitigation. *See*, Point VII.

**Jurors Misled Into Believing That They Had to Be Unanimous in Their
Consideration of Mitigation**

The prosecutor also improperly questioned jurors and suggested that all of their findings had to be unanimous. While this was true as to findings of guilt and aggravating circumstances, it was contrary to the law on mitigation. He said:

Do you all understand that the decisions on various matters in the jury must be unanimous one way or the other, for guilty or not guilty *or for any other proposition that may be put to you?* Do you all understand that?

(Tr. 422, L.F. 31) (emphasis added). He further confused the issue when discussing the steps for considering aggravators and mitigators in penalty phase (Tr. 553-54, 620-21, L.F. 32-33). He specifically misled one panel, saying:

Remember, I told you aggravating circumstances must be proven beyond a reasonable doubt by the State, any you must unanimously find one or more exists. That's not so with mitigating circumstances. You as jurors either believe them or you do not. And if you believe them, you may assign whatever weight to them that you see fit . . . But if you find in the third step the aggravating circumstances outweigh those mitigating circumstances, you then reach phase four . . . *But which ever way you go, assuming you get there, you must be unanimous.*

(Tr. 620-21, L.F. 32-33) (emphasis added).

Counsel failed to object to all of these misleading statements and, then, failed to clarify that jurors need not be unanimous in order to consider mitigating circumstances (Tr. 588, 652-53, L.F. 33-34). Counsel said his failure to object to was an “oversight” (Ex. 22, at 170-71). Co-counsel also could provide no reason for not objecting (H.Tr. 409-10). She had no excuse for not telling jurors that they need not be unanimous to find and consider mitigation (H.Tr. 410-11). She wanted the jury to know the law (H.Tr. 411).

Findings

The motion court acknowledged that counsel admitted they should have questioned jurors about their ability to consider specific mitigation, but found that, since they were unsure about what mitigation they were going to present, they did not want to question jurors about evidence they might not present (L.F. 763). The court found this a reasonable strategy (L.F. 763). Since jurors indicated their willingness to follow the court’s instructions, Glass did not establish prejudice (L.F. 763).

The motion court found counsel did not believe the prosecutor’s statement that jurors could not consider age was objectionable since the statement was made in general voir dire, and the statement was not misleading (L.F. 761). Glass was not prejudiced because the statement was made early, and the jury was properly instructed on mitigation. *Id.*

The court also found that trial counsel did not believe the statements about unanimity were improper and it did not occur to him that they were incomplete

(L.F. 760-61). The court ruled the prosecutor's statements proper and, even if "incomplete," Glass made no showing that the jury was misled or misunderstood the law (L.F. 761). These findings are contrary to the record.

Standard of Review

This Court must review the motion court's findings and conclusions for clear error. *See*, Point I, *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); 29.15. To establish ineffective assistance, Glass must show counsel's performance was deficient and that performance affected his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). To prove prejudice, Glass must show "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.*; *State v. Butler*, 951 S.W.2d 600, 608 (Mo. banc 1997).

Counsel can be ineffective during jury selection. For example, counsel's failure to read jury questionnaires suggesting two jurors would automatically vote to impose death was ineffective assistance and counsel's failure was structural error requiring death penalty reversal. *Knese v. State*, 85 S.W.3d 628, 631-33 (Mo. banc 2002). Similarly, the failure to strike automatic death penalty juror upon counsel's note-taking error was ineffective assistance, requiring death penalty reversal. *Anderson v. State*, 196 S.W.3d 28, 39-42 (Mo. banc 2006). Counsel was also ineffective for failing to strike for cause two jurors who stated it would bother them if the defendant did not testify. *State v. McKee*, 826 S.W.2d 26, 27-29 (Mo. App. W.D. 1992). Counsel's failure to challenge for cause a juror who admitted

bias against the defendant has constituted ineffective assistance. *Presley v. State*, 750 S.W.2d 602, 604-08 (Mo. App. S.D. 1988). Finally, counsel was ineffective for conducting inadequate voir dire, asking most venirepersons only a few questions and asking most, “any reason you could not be fair?” *Winn v. State*, 871 S.W.2d 756, 763 (Tx. App. 1993). The cursory questioning resulted from a lack of preparation. *Id.*

A defendant must have an impartial jury. Part of that constitutional guarantee is an adequate voir dire to identify unqualified jurors. *Morgan v. Illinois*, 529 U.S. 719, 729 (1992). Without that adequate voir dire, “the trial judge’s responsibility to remove prospective jurors who will not be able impartially to follow the court’s instructions and evaluate the evidence cannot be fulfilled.” *Id.* at 729-30, citing *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). Counsel must be permitted to voir dire on the case’s critical facts to uncover bias and prejudice among venirepersons. *State v. Clark*, 981 S.W.2d 143, 147 (Mo. banc 1998). General questions asking if jurors can be fair and impartial, without specifics, are inadequate. *Id.* See also, *Morgan v. Illinois*, *supra* at 734-75 (All empaneled jurors were asked general “fairness” and “follow-the-law” questions is insufficient to detect those who automatically would vote for death).

Here, counsel failed to ask specific questions about mitigation that were necessary to determine whether the jurors could be fair and impartial, follow the law and consider mitigation, and not automatically impose death. The court’s

finding that counsel had a reasonable strategy for their failure was clearly erroneous (L.F. 763).

Counsel admitted they had “no reason” for their failure (Ex. 22, at 196-97, H.Tr. 420). They were unsure which, if any, experts they were calling (H.Tr. 419-20). While this might explain counsel’s failure to voir dire about expert witnesses, it didn’t explain their failure to voir dire about specific mitigation they knew they would present, like Glass’ age, family background, alcoholism, drinking on the night of the offense, lack of a significant criminal history, good character and good relationships with family and friends. Without having voir dired on these critical facts, counsel had no idea whether veniremembers would fairly consider mitigating evidence. Thus, counsel and the trial court could not fulfill their duty to strike unfair and biased jurors. *Morgan, supra*. Counsel admitted they had no reason for their failure. The motion court clearly erred in ruling otherwise.

The motion court’s finding, that counsel acted reasonably in failing to object to the prosecutor’s misstatements regarding age, is also clearly erroneous. The court held counsel did not believe the prosecutor’s statement about age was objectionable since it occurred in general voir dire (L.F. 761). Counsel testified otherwise (Ex. 22, at 173-75). Counsel admitted he should have made a speaking objection so that the jury would know that age was an appropriate factor to consider (Ex. 22, at 173-74). It simply did not occur to counsel to object to the prosecutor’s misleading and improper statement of law. *Id.* at 174, 175.

The court's finding that Glass was not prejudiced because the statement was made early in the trial process makes no sense. If the State tells jurors that age is irrelevant, and neither defense counsel nor the trial court correct that misstatement, jurors are guided by the State's misstatement of the law. The motion court's finding that any error was cured by the proper instructions on mitigation ignores that counsel failed to submit age as a mitigator. Under these circumstances, the jury was never told that age is mitigating and only heard that it was irrelevant to punishment.

The prosecutor's questions were improper and counsel unreasonably failed to object. The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death. *Penry v. Lynaugh*, 492 U.S. 302, 317 (1989); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). "There is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of *Lockett* and *Eddings*." *Johnson v. Texas*, 509 U.S. 350, 367 (1993), citing *Sumner v. Sherman*, 483 U.S. 66, 81-82 (1987); *Eddings*, 455 U.S. 104, 115 (1982); *Lockett*, 438 U.S. at 608 (plurality opinion). Had Glass been just three years younger, he could not have been subjected to death. *Roper v. Simmons*, 543 U.S. 551 (2005).

Youth is not just a chronological fact. Youth is a time and condition of life when a person may be most susceptible to influence and psychological damage.

Eddings, supra, 455 U.S. at 115. “A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.” *Johnson v. Texas*, 509 U.S. at 367. Such qualities often result in impetuous, ill-considered actions and decisions. *Id.* Sentencers in capital cases must be allowed to consider the mitigating qualities of youth in deciding a sentence. *Id.*; Section 565.032.3(7). Glass’ age was a mitigating factor the jury should have considered. Yet, the State’s misstatement and counsel’s inaction placed that factor outside the jury’s consideration.

Adding insult to injury, Glass’ jury was inaccurately told they had to be unanimous in finding mitigating circumstances. *Mills v. Maryland*, 486 U.S. 367 (1988). While the motion court sought to justify counsel’s failures, finding counsel believed the statements about unanimity were not improper and it did not occur to him that they were incomplete (L.F. 760-61), the record shows otherwise.

Counsel conceded their failure was unreasonable, labeling it an “oversight” (Ex. 22, at 170-71). Co-counsel could provide no reason for not objecting (H.Tr. 409-10). Post-trial, she recognized the prosecutor had misstated the law, but did not recognize it during this, her first death penalty trial (H.Tr. 402, 410). Counsel could not explain why she failed to tell jurors that their findings about mitigation need not be unanimous (H.Tr. 410-11). She wanted the jury to know unanimity was not required (H.Tr. 411).

Glass’ voir dire was fundamentally unfair. Counsel failed to ask if jurors could consider specific mitigation. They were misled into believing age was not a

mitigating factor and they had to be unanimous in finding mitigating evidence.

Counsel was ineffective. A new penalty phase must result.

VII. Jury Not Instructed That Age is Mitigating Circumstance

The motion court clearly erred in denying the claim of counsel's ineffectiveness for failing to submit a mitigation instruction that included the statutory mitigator of age, because this denied Glass' rights to effective assistance of counsel, due process, a fair trial and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel unreasonably thought that by specifically listing age it would minimize other nonstatutory mitigation. Glass was prejudiced as the jurors had been misled that age was not an appropriate consideration under the law and thus, they likely did not consider it as mitigation. Contrary to counsel's rationale, the jury did not have a long list of statutory aggravators (two were submitted and one was found) to compare to the statutory and nonstatutory mitigators. Glass has a constitutional right to have the jury consider and give effect to his mitigation and without proper instructions, the jury was unable to consider his youth as mitigation.

Counsel failed to submit an instruction telling jurors that age is a mitigating circumstance they should consider (L.F. 95, 418). Counsel claimed that submitting statutory mitigators causes the jury to compare statutory aggravators to statutory mitigators (Ex. 22, at 158-59). Counsel acknowledged he is more apt to submit statutory mitigators of substantial impairment or emotional disturbance.

Id. at 160. Had he had other statutory mitigators, he would have considered submitting age. *Id.* at 160-61.

The motion court found counsel's explanation reasonable trial strategy (L.F. 773). Since counsel presented and argued mitigating circumstances, "[t]here is no reasonable probability that had 'age' been written on a piece of paper in front of the jury, that the jury's decision would have been any different." (L.F. 773). Those findings are clearly erroneous and must be reversed.

This Court must review the motion court's findings for clear error. *See* Point I, *supra*. To establish ineffective assistance of counsel, Glass must show his counsel's performance was deficient and that performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). To prove prejudice, he must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Butler*, 951 S.W.2d 600, 608 (Mo. banc 1997); *Williams, supra*.

Counsel can be ineffective for failing to submit proper mitigating circumstances instruction. *Deck v. State*, 68 S.W.3d 418, 429-31 (Mo. banc 2002). Proper instructions are critical in a death penalty case, since they channel the jury's discretion in deciding whether to impose death. *Deck, supra* at 430. The instructions are not mere words "written on a piece of paper in front of the jury" as the motion court found (L.F. 773).

Death and lesser punishments are constitutionally different. *Id.*; citing, *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, supra, quoting Beck, supra* at 638, n. 13, *Woodson v. North Carolina*, 428 U.S. 280, 305 (opinion of Stewart, Powell and Stevens, JJ.).

Here, the jury was never instructed it could consider age as a mitigator. Rather, the State affirmatively misled the jury into thinking age was not properly to be considered. Given the prosecutor’s improper voir dire about age, it was incumbent upon counsel to submit proper instructions with all statutory mitigators supported by the evidence to guide the jury’s discretion.

Counsel’s excuses for not submitting age are unreasonable. Age is one of the most powerful circumstances supporting a life verdict. *Johnson v. Texas*, 509 U.S. 350, 367 (1993); *Eddings, supra*, 455 U.S. at 115. Since the Missouri Legislature and society at large believe that persons under 18 years of age should not be executed, *Roper v. Simmons*, 543 U.S. 551 (2005); Section 565.032.3(7), reasonable attorneys would want their jury specifically instructed to consider the mitigating factor of age.

Counsel’s fear that the jury might compare statutory aggravators to mitigators was also unreasonable. The State only submitted two statutory aggravators and the jury only found one (Ex. 3C at 415-16, 424). Had counsel submitted age, the jury would have found one of each side. In this case, counsel’s “fear” was contrary to the facts. Counsel could have submitted that Glass had no significant history of prior criminal activity as he had only one stealing offense.

Section 565.032.3(1). Additionally, had counsel been constitutionally effective, he would have investigated and presented evidence in support of statutory mitigating evidence, such as substantial impairment, and extreme emotional distress, Sections 565.032.3 (2), (6). See, motion court's findings concluding that counsel was ineffective for failing to investigate and present expert testimony to support these statutory mitigators (L.F. 794-802). At least four statutory mitigators were available in Glass' case.

This Court has rejected counsel's rationale of simply counting the number of circumstances submitted. *State v. Storey*, 986 S.W.2d 462, 464 (Mo. banc 1999). The evaluation of the aggravating and mitigating evidence in penalty phase is more complicated than determining which side proves the most statutory factors beyond a reasonable doubt. *Id.* The jury is never required to impose a death sentence, but has discretion to assess life imprisonment, even if mitigators do not outweigh aggravators. *Storey, supra*; *State v. Brooks*, 960 S.W.2d 479, 497 (Mo. banc 1997); Section 565.030.4(4).

Because the jury can always choose life, complete instructions telling the jurors that age is a proper mitigating circumstance could have changed the balance of aggravation and mitigation as they weighed the evidence. Given the length of their deliberations, had jurors been properly instructed, they could well have imposed a life sentence. This Court should find counsel was ineffective and reverse and remand for a new penalty phase.

**VIII. Counsel's Ineffectiveness Led to the Exclusion of Relevant
Mitigating Evidence**

The motion court clearly erred in denying the claim that counsel was ineffective for failing to provide legal support for the admission of mitigating evidence; object to the prosecutor's improper statements that mitigation must have a nexus to the crime; make offers of proof when offering a memory book as mitigation; and include claims of error in the relevant mitigation's exclusion in the new trial motion, because this denied Glass due process, effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel unreasonably did not know the United States Supreme Court has ruled hearsay can be admitted as mitigation, and that mitigating circumstances need not be connected to the crime, and counsel meant to adequately preserve the claims of error by making offers of proof and including the claims in the new trial motion but unreasonably failed to do so.

Glass was prejudiced because the jury was deprived of relevant mitigating evidence about his alcohol addiction, his bout with meningitis and resulting deficits, including the prognosis of brain damage, and his memory book showing his good character and loving relationships with friends and family. The jury was misled to believe they could not consider mitigation

unless it was connected to the crime. But for counsel's ineffectiveness, the jury likely would have considered this mitigation and sentenced Glass to life.

Travis Glass' jury was denied the opportunity to consider relevant mitigating evidence. When Glass' sister, Tina, tried to tell them about Glass' drinking problem, the court sustained the prosecutor's hearsay objection (Tr. 1265). When Tina was questioned about her brother's upbringing, the prosecutor asked what about that upbringing led to the murder (Tr.1268). The prosecutor asked Glass' Aunt Connie Patre if she had any reason to believe his meningitis impacted his behavior (Tr. 1308). But, the prosecutor objected to her telling jurors the treating physician had told family he could be brain damaged, labeling it "hearsay" (Tr. 1309). Based on the prosecutor's hearsay objections, the trial court excluded Glass' memory book, which Glass compiled in high school (Tr. 1310).

Counsel failed to advocate for Glass and the admission of this evidence. Counsel did not think to argue that, under *Green v. Georgia*,¹⁷ hearsay is admissible in penalty phase (Ex. 22, at 137, 146, 148). Counsel was unfamiliar with *Tennard v. Dretke*, 542 U.S. 274 (2004). He did not realize that mitigating evidence need not be connected to the crime to be admissible (Ex. 22, at 141-42, 144-45). Counsel wanted to preserve his objections to the exclusion of this mitigating evidence. His failure to include these claims in the motion for new trial, failure to state all legal grounds, and failure to make offers of proof were

¹⁷ 442 U.S. 95, 97 (1979).

“oversights” (Ex. 22, at 137-38, 139, 142, 143-44, 147-48, 149). He made a mistake in not providing Ex. 40, the memory book, as an offer of proof (Ex. 22, at 149-50).

The motion court denied (L.F. 771-72) this claim of ineffectiveness (L.F. 73-89). The court found counsel’s failure to properly object, make offers of proof, and preserve claims for review not cognizable in the 29.15 proceeding (L.F. 771). The court also found no prejudice, concluding the excluded mitigation was cumulative to evidence already presented (L.F. 771-72). These findings are clearly erroneous.

Standard of Review

This Court must review the motion court’s findings and conclusions for clear error. *See*, Point I, *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, Glass must show his counsel’s performance was deficient and that the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000).

To prove prejudice, Glass must show a “reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). When deciding if Glass established prejudice, this Court must “evaluate the totality of the evidence - - ‘both that adduced at trial, *and the evidence adduced in the habeas*

proceeding[s].’” Wiggins, supra at 536, quoting Williams v. Taylor, 529 U.S. at 397-398 (emphasis in opinion).

Contrary to the motion court’s findings, this claim of ineffectiveness is cognizable in 29.15 proceedings. See Point I, *supra.*, discussing this Court’s decisions in *State v. Wheat*, 775 S.W.2d 155, 157 (Mo. banc 1989); *State v. Storey*, 901 S.W.2d 886, 901 (Mo. banc 1995); and *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002). The motion court’s reliance (L.F. 770-71) on *State v. Beckerman*, 914 S.W.2d 861, 864 (Mo. App. E.D. 1996) and *State v. Broseman*, 947 S.W.2d 520, 528 (Mo. App. W.D. 1997) was clear error, in light of *Storey*, *Deck* and *Wheat*.

A movant claiming counsel was ineffective for failing to object must show he did not receive a fair trial and a reasonable probability that the outcome of the proceeding would have been different. Glass has proven that his counsel was unreasonable for not knowing the law that authorized admitting mitigating evidence. As a result, he received an unfair trial.

Counsel has a duty to investigate and know the law. *Strickland*, 466 U.S. at 690. “Reasonable performance of counsel includes an adequate investigation of facts, consideration of *viable theories*, and development of evidence to support those theories.” *Hill v. Lockhart*, 28 F.3d 832, 837 (8th Cir. 1994), *quoting Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993) (emphasis added). Courts will not defer to counsel when their so-called “strategic” decisions are based on mistaken understandings of the law, *see Young v. Zant*, 677 F.2d 792 (11th Cir. 1982);

Horton v. Zant, 941 F.2d 1449, 1461-62 (11th Cir. 1991); *Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003).

In *Horton*, the trial attorneys misunderstood the purpose, under Georgia law, of presenting mitigating evidence. *Horton, supra*. “Mitigating evidence, when available, is appropriate in every case where the defendant is placed in jeopardy of receiving the death penalty.” *Id.* at 1462. Failure to investigate, because of their mistaken belief about the law, fell below reasonable professional standards. *Id.*

Here, counsel did not understand the law regarding mitigating evidence. He failed to rely on Supreme Court precedent to argue that hearsay is admissible in penalty phase (Ex. 22, at 137, 146, 148). And, he did not realize that mitigating evidence need not be connected to the crime to be admissible (Ex. 22, at 141-42, 144-45). *Tennard v. Dretke*, 542 U.S. 274, 288 (2004).

Although *Tennard* was decided after Glass’ trial, the legal principle underpinning it was not new. In 1990, the Supreme Court defined mitigation as “evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.” *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990). The “Eighth Amendment requires that the jury be able to consider and give effect to” a capital defendant’s mitigating evidence.” *Boyde v. California*, 494 U.S. 370, 377-378 (1990) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Penry I*, 492 U.S. 302 (1989)). “A State cannot preclude the sentencer from considering

‘any relevant mitigating evidence’ that the defendant proffers in support of a sentence less than death … [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.” *Tennard*, 542 U.S. at 285, quoting *Eddings, supra*, at 114.

The Supreme Court rejected the proposition that mitigation must be connected to the crime. *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986). The Court clarified that good-character evidence includes evidence that does “not relate specifically to petitioner's culpability for the crime he committed.” *Id.* at 4-5. It is “mitigating” if it “might serve ‘as a basis for a sentence less than death.’” *Id.*

Counsel unreasonably failed to object when the prosecutor tried to limit the jury’s consideration of mitigation to that which was connected to the crime or Glass’ behavior as an adult. The jury should have been able to consider any mitigation Glass offered that might have served “as a basis for a sentence less than death.” *Lockett*, 438 U.S. at 604.

Counsel wanted the jury to hear this evidence and he wanted the court’s exclusion of it to be reviewed so that a reversal and remand for a new trial would occur. But, counsel failed to include claims in the new trial motion, failed to state all legal grounds and failed to make offers of proof (Ex. 22, at 137-38, 139, 142, 143-44, 147-48, 149). His only explanation was his errors were “oversights.” *Id.*

Counsel admitted his mistake in not offering Ex. 40, the memory book, as an offer of proof (Ex. 22, at 149-50). The book was admitted at the 29.15 hearing

(Ex. 19). The book would have provided the jury with much mitigating evidence. While in high school, Glass dedicated the book to his grandparents. *Id.* It showed his love of music, how much he cared about others and his desire for a better life. *Id.* It showed that Glass struggled academically, since many words are misspelled. *Id.* Glass recognized he was not good at English, yet he dreamt of making good grades and going to college. *Id.* The book showed Glass wasn't popular and had little money, but he tried to do better, working hard in Pep Band, on his musical solo, "Eye of the Tiger," and with his quartet. *Id.* His quartet received second place at District Music Competition and Glass once was the band's Student of the Month. *Id.* The memory book showed Glass tried to improve his character by going to church and choosing friends that had a positive influence. *Id.*

The memory book would have given jurors a window into Glass' character shortly before the crime. It showed he was a good person who cared about others. Glass had struggled, but tried to do better. The jury should have considered this mitigating evidence in deciding Glass' fate.

The motion court's suggestion that this evidence was "cumulative" is contrary to the record. Nothing comparable to it was introduced at trial. Glass' aunt tried to tell jurors about his meningitis and his brain damage prognosis, but the State's hearsay objections were always sustained. Glass' treating doctor did not testify. The court excluded Glass' medical records. The jury was left with the impression that they could not consider this evidence. They were further misled that mitigating evidence must explain for why Glass committed the crime. As a

result, the jury did not consider substantial relevant mitigating evidence that would have provided a basis for a life sentence.

Glass should receive a new penalty phase.

IX. Lethal Injection Is Cruel and Unusual Punishment

The motion court clearly erred in denying a hearing on the claim that Missouri's method of lethal injection is unconstitutional, and related discovery on this claim, because these rulings denied Glass due process and freedom from cruel and unusual punishment, U.S. Const., Amends. VIII, and XIV; Mo. Const., Art. I, §§10 and 21, and Rule 29.15(h), in that the motion alleged facts, not conclusions, entitling him to relief; specifically, that Missouri's method of execution, combining sodium pentothal, pancuronium, and potassium chloride, causes unnecessary pain and suffering since they are not given in adequate doses with protocols that minimize the risk of suffering; the allegations were not refuted by the record; and Glass was prejudiced since these problems will likely reoccur.

Glass alleged that Missouri's use of lethal injection is unconstitutional, violating the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution (L.F. 161-62, 244-45). The motion challenged the lethal injection process, specifically, the three drugs used in the procedure, the problems with them and how they are administered. *Id.*

This is a distinct claim from the one this Court rejected as insufficiently pled. *Morrow v. State*, 21 S.W.3d 819, 828 (Mo. banc 2000); *Williams v. State*, 168 S.W.3d 433, 446 (Mo. banc 2005); *Worthington v. State*, 166 S.W.3d

566, 582-583 (Mo. banc 2005). There, the pleadings focused on newspaper accounts of past flawed executions. Here, in contrast, the motion challenged the process, offering the testimony of Dr. Mark Heath, M.D., Assistant Professor of Clinical Anesthesiology at Columbia University (L.F.161-62,244-45). This claim is meritorious and deserves a hearing. *See*, Judge Gaitan’s Order dated June 26, 2006, in *Taylor v. Crawford, et al.*, W.D. Mo. No. 05-4173-CV-C-FJG.¹⁸

Glass requested discovery on this claim (L.F. 263-77, H.Tr. 10-25). The motion court denied the discovery (L.F. 4-6, H.Tr. 400). The court refused Glass’ offer of proof (L.F. 352-477, H.Tr. 37-40, 400).

The motion court denied the claim without an evidentiary hearing, ruling that the claim did not plead sufficient facts and the claim is not cognizable in a 29.15 proceeding (L.F.802). These findings do not withstand scrutiny.

Standard of Review

This Court reviews for clear error. *See*, Point I, *supra*. This Court has ruled that challenges to the method of execution can be raised in post-conviction proceedings if the issue is properly pled. *Morrow*, 21 S.W.3d at 828. To be entitled to an evidentiary hearing, he must allege facts that tend to show a problem in the administration of the death penalty by lethal injection that is likely to recur. *Id.*

Glass’ pled such facts. He alleged that “Missouri’s method and protocol for lethal injection subjects persons condemned to death to extreme pain,

¹⁸ Glass has included the order in the appendix (App. A-63 to A-78).

prolonged suffering and torture during the execution process and these problems are likely to recur.” (L.F. 161). Glass pled that Missouri poisons prisoners with a lethal combination of three chemical substances: sodium pentothal, pancuronium bromide (Pavulon), and potassium chloride (KCl) (L.F. 161, 244-45).

Sodium pentothal is an ultra-short-acting barbituate that induces unconsciousness and is usually used with surgical patients (L.F. 218). Because of its brief duration, it may not provide a sedative effect and the prisoner can suffer excruciating pain (L.F. 218-19).

The second chemical, Pavulon, paralyzes the skeletal muscles, but has no effect on consciousness or pain and suffering (L.F. 218). It can neutralize sodium pentothal and actually mask pain and suffering (L.F. 244-45). The American Veterinary Medicine Association (AVMA) condemns the use of neuro-muscular blocking agents such as pavulon in the euthanasia of animals. Since 1981, many states, including Missouri, have made using pancuronium bromide on domestic animals illegal.¹⁹

¹⁹ Tex. Health & Safety Code, §821.052(a); Fla.Stat. §§828.058 and 828.065 (1984); Ga.CodeAnn. §4-11-5.1 (1990); Me.Rev.Stat.Ann., Tit.17 §1044 (1987); Md.Code.Ann., Criminal Law, §10-611(2002); Mass.Gen.Laws §140:151A(1985); N.J.S.A. 4:22- 1.3(1987); N.Y. Agric. & Mkts §374(1987); Okla.Stat., Tit.4, §501 (1981); Tenn.CodeAnn. §44-17-303(2001). Other states have simply banned such practices. *See* 510 Ill.Comp.Stat., ch.70, §2.09; Kan.Stat.Ann. §47-1718(a); La.Rev.

The third chemical, potassium chloride, stops the heart. This drug is extremely painful when administered intravenously, since it causes a severe burning sensation as it travels from the injection site through the body to the heart (L.F. 219).

Glass' pleading offered the testimony of Dr. Heath, an anesthesiologist (L.F. 244-45). Dr. Heath was one of the witnesses who testified in *Taylor v. Crawford, supra* at 4. In *Taylor*, Judge Gaitan allowed discovery, including an inspection and videotaped tour of Missouri's execution chamber; a deposition of Larry Crawford, Director of the Department of Corrections; and documents pertaining to the last six executions in Missouri. *Id.* at 3-4. The State provided information regarding the training of physicians and nurses who mix and administer the drugs. *Id.* at 4. Taylor submitted interrogatories to four individuals involved in the process and anonymously deposed the doctor involved. *Id.* Judge Gaitan found, once Taylor had discovery, and Missouri's execution procedure was taken out of the shadows of a dark execution chamber and exposed to the light of day, that Missouri's punishment methodology creates an unnecessary risk of pain and suffering. *Id.* at 13.

Stat. Ann. §3:2465; Missouri, 2CSR 30- 9.020(F)(5); R.I. Gen. Laws, §4-1-34; Conn. Gen. Stat. § 22-344a; Del. Code Ann., Tit. 3, §8001; Ky. Rev. Stat. Ann. §321.181(17) and 201KAR16:090, §5(1); S.C. Code Ann. §47-3-420.

Unlike *Taylor*, the motion court denied discovery and a hearing (L.F. 4-6, 802, H.Tr. 400). Had the court granted reasonable discovery and a hearing, Glass could have established the flaws in Missouri's execution procedures. *Taylor*, *supra* at 6-13. Execution logs show that 2.5 grams of sodium pentothal were used in one execution, not the 5 grams the State had represented. *Id.* at 6. No written protocol describes how drugs are to be administered. *Id.* at 7, 11. The doctor mixing the drugs has unlimited discretion to change or modify the formula. *Id.* at 11. The doctor deposed has reduced the amount of thiopental and changed where he administers the drugs. *Id.* The *Taylor* court found no checks, balances or oversight, before, during or after the lethal injection. *Id.* Judge Gaitan was gravely concerned that the doctor administering the drugs often made mistakes and confused numbers. *Id.* at 12. Since a videotape of the execution chamber revealed that the area is dark, with partially closed window blinds that obstructed the doctor's view, and that the prisoner, who is on a gurney, faces away from the doctor, the doctor cannot observe the prisoner's facial expression. *Id.* at 12-13. He thus cannot monitor anesthetic depth. *Id.* These problems led Judge Gaitan to conclude that Missouri's lethal injection procedure subjects inmates to an unnecessary risk of unconstitutional pain and suffering during the lethal injection process. *Id.* at 13. These facts show Glass' claim has merit.

The motion court denied a hearing of this claim, finding that Glass' motion did not "allege any facts that any of these 'possibilities' have ever occurred in Missouri, that the protocol and process which Missouri uses to execute individuals

has ever resulted in any pain whatsoever, that the protocols used in prior executions are the same protocol that will be used at the time of his execution, that persons that have participated in prior executions would be involved in Movant's execution, or any facts that 'tend to show that there is a problem of administration of the death penalty by lethal injection that is likely to occur again in Missouri.'" (L.F. 802).

The motion court clearly erred. Glass adequately alleged problems in the lethal injection process that are likely to recur (L.F. 161-62, 244-45). The motion offered the testimony of Dr. Heath, who is familiar with Missouri's execution procedures and its problems. *See, Taylor, supra*.

While, the court correctly noted that protocols may change, the real issue is not one of pleading, but cognizability and ripeness (L.F. 802-03). The question is whether state courts should review Missouri's lethal injection process or leave this review to the federal courts. Federal courts can hear such claims in Section 1983 actions, litigation closer in time to a prisoner's actual execution. *Hill v. McDonough*, 126 S.Ct. 2096 (2006); *Nelson v. Campbell*, 541 U.S. 637 (2004). Yet Section 1983 actions may not provide a meaningful remedy if stays of execution are not granted and prisoners are executed before their claims can be litigated. *See, Hill v. McDonough*, 2006 WL 2641659 (11th Cir. 2006).

The challenge to Missouri's lethal injection procedure is a constitutional challenge to the sentence imposed. Thus, it should be raised in 29.15 proceedings. Rule 29.15(a). The Eighth Amendment requires that punishment "not involve the

unnecessary and wanton infliction of pain.” *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, J.J.); *Louisiana v. Resweber*, 329 U.S. 459, 463 (1947). It cannot cause torture or lingering death. *In re Kemmler*, 136 U.S. 436, 447 (1890). Methods of execution must minimize the risk of unnecessary pain, violence, and mutilation. *Glass v. Louisiana*, 471 U.S. 1080, 1086 (1985) (Brennan, J. dissenting from certiorari denied).

This Court has given mixed signals on whether this claim is cognizable or ripe in a 29.15 proceeding. *See, Morrow and Williams, supra* (Court focuses on inadequate pleadings to deny relief). But in *Worthington*, 166 S.W.3d at 583, n.3, this Court recognized that methods of execution may change and “it is *premature* for this Court to consider whether a particular method of lethal injection violates the Eighth Amendment.” (emphasis added).

Glass is in a classic catch-22. Ruled 29.15(b) requires that he raise all meritorious constitutional claims known to him or risk waiving them. But, because the motion court denied discovery and a hearing, he is denied the opportunity to litigate this meritorious claim in state court.

This Court should conclude that Missouri courts can examine this constitutional issue and scrutinize Missouri’s lethal injection process. It should open the death chamber to the light of day. Glass requests a remand for a hearing and discovery on this claim. Alternatively, this Court should impose a sentence of life without probation or parole.

X. Penalty Phase Instructions Are Confusing

The motion court clearly erred in denying Glass' claim that jurors do not understand penalty phase instructions and counsel failed to object to them denying Glass due process, effective assistance of counsel and individualized, non-arbitrary or capricious sentencing, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that counsel knew the instructions were objectionable, but unreasonably failed to offer evidence to challenge them since this Court had ruled against this claim, and Glass was prejudiced because the less jurors understand the instructions, the more likely they are to impose death.

Glass' motion alleged counsel was ineffective for not challenging the penalty phase instructions (L.F. 163-64). Dr. Richard Wiener²⁰ tested jurors' comprehension of these instructions and found that their comprehension level was low, the mean accuracy rate not reaching 60% (Ex. 23, at attached Pet. Ex. 66). Jurors did not understand individualized consideration of mitigation; proof beyond a reasonable doubt; burdens of proof; guided discretion; and their responsibility for sentencing (Ex. 23, at attached Pet. Ex. 66-68). *See*, "Comprehensibility of Approved Jury Instructions in Capital Murder Cases," *Journal of Applied Psychology*, Vol.No.80, No.4, 455-67. The study contained a control group and

²⁰ The motion court considered Dr. Wiener's affidavit and related exhibits (Ex.23).

model instructions, which established a baseline level of comprehension and showed that comprehension levels could be improved (Ex. 23, at attached Pet. Ex. 68). Wiener's study addressed the problems discussed in *Free v. Peters*, 12 F.3d 700, 705-06 (7th Cir. 1993). It found that the less jurors understand instructions, the more likely they are to give death (Ex. 23, at attached Pet. Ex. 68).

The motion court denied this claim, ruling that counsel's decision not to object to the instructions were reasonable (L.F. 803), citing *Smulls v. State*, 71 S.W.3d 138 (Mo. banc 2002); *Lyons v. State*, 39 S.W.3d 32 (Mo. banc 2001); and *State v. Deck*, 994 S.W.2d 527, 542-43 (Mo. banc 1999). The court also found Weiner's opinions and conclusions were not credible and he was biased. (L.F. 803).

These findings are reviewed for clear error. *See*, Point I, *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffectiveness, Glass must demonstrate deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel can be ineffective for failing to object to an improper instruction or submit proper instructions. *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002); *Gray v. Lynn*, 6 F.3d 265, 269-71(5th Cir. 1993). Claims of ineffectiveness must be raised on 29.15 and are prohibited on direct appeal. *State v. Wheat*, 775 S.W.2d 155 (Mo. banc 1989). 29.15(a)'s plain language supports raising all constitutional claims.

Counsel was aware of Dr. Weiner's research and his findings (Ex. 22, at 248). Yet counsel failed to object or present evidence to challenge the

instructions, because this Court has rejected the claim. *Id.* at 249. Counsel acknowledged that this Court is not the sole arbiter of federal constitutional questions and federal courts can grant relief even if this Court denies a claim. *See e.g. Deck v. Missouri*, 544 U.S. 622 (2005) (shackling violates due process); *Simmons v. Luebbers*, 929 F.3d 529 (8th Cir. 2002) (counsel ineffective for failing to investigate and present mitigation); *Parker v. Bowersox*, 188 F.3d 923 (8th Cir. 1999) (counsel ineffective for failing to rebut aggravator); *Miller v. Dormire*, 310 F.3d 600 (8th Cir. 2002) (state appellate court’s determination that waiver of jury trial by attorney for habeas petitioner constituted harmless error was unreasonable and contrary to clearly established federal law).

State v. Deck is not dispositive of this claim. There, this Court reviewed whether given the jury’s questions, the trial court abused its discretion in not defining “mitigation.” *Deck*, 994 S.W.2d at 542-43. *Deck*’s counsel should have focused on *Deck*'s jurors, and not relied on Wiener's general study. *Id.* In contrast, here, the question is whether counsel ineffectively failed to present evidence *before* trial to demonstrate the error in giving the penalty phase instructions.

Glass was prejudiced. The instructions were constitutionally defective and a reasonable likelihood exists that they misled jurors into sentencing Glass to death. *Boyde v. California*, 494 U.S.370, 380 (1990). Jurors who receive the Missouri Approved Instructions don’t understand the basic legal principles necessary to decide punishment, that: aggravators must be proven beyond a

reasonable doubt, *In re Winship*, 397 U.S. 358 (1970); each juror individually must consider any potential mitigators, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); unanimity on mitigation is not required, *Mills v. Maryland*, 486 U.S. 367(1988); and the jury has the ultimate decision for imposing death, *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (L.F. 613, 474). Jurors' confusion creates the risk that death may be imposed arbitrarily and capriciously. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

The risk is significant here since in voir dire, the jurors were misled about mitigators and the instructions failed to tell them they could consider Glass' age. See Points VI and VII, *supra*. Additionally, this was a close case. In the penalty phase, the jury deliberated many hours and only found one aggravator. Glass was young and only had one prior offense, a nonviolent stealing offense in which he received probation. Jurors confusion about mitigators and how to balance them against aggravators likely tipped the scales toward death (Ex.23).

The court clearly erred in denying this claim. A new penalty phase should result.

XI. Glass' Death Sentence is Disproportionate

The motion court clearly erred in rejecting Glass' claim that this Court's proportionality review denies due process and freedom from cruel and unusual punishment, U.S. Const., Amends. VIII, and XIV; Mo. Const., Art. I, §§10 and 21, because *de novo* review should apply on appellate review of death sentences; this Court's database does not comply with §565.035.6 and omits numerous cases; and this Court fails to consider all similar cases required by §565.035.3(3). Should this conduct an adequate *de novo* review of the record, it will find four statutory mitigators and other circumstances warrant a life sentence.

Glass alleged that this Court's inadequate proportionality review is unconstitutional (L.F.172-75). The motion court denied relief, ruling this Court had rejected this claim (L.F.804) *citing State v. Edwards*, 116 S.W.3d 511 (Mo. banc 2003); *Lyons v. State*, 39 S.W.3d 32, 44 (Mo. banc 2001); and *State v. Clay*, 975 S.W.2d 121, 146 (Mo. banc 1998). Glass recognizes these decisions are contrary to his claim, but asks for reconsideration in light of *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) and Judge Wolff's dissenting opinion discussing *Cooper* in *State v. Black*, 50 S.W.3d 778, 793-96 (Mo. banc 2001)(Wolff, J., dissenting).

On appeal, this Court reviews the motion court for clear error. *See*, Point I, *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15.

While appellate comparative *proportionality* review is not constitutionally-required, *Pulley v. Harris*, 465 U.S. 37, 44-51 (1984); *State v. Ramsey*, 864 S.W.2d 320, 238 (Mo. banc 1993), some form of meaningful *appellate* review is. *Pulley*, 465 U.S. at 54 (Stevens, J. concurring). *See also, Cooper Industries*, 532 U.S. at 434, 440 (the Eighth and Fourteenth Amendments require appellate courts to apply *de novo* review to the constitutionality of punitive damages, and presumably applies to death penalty cases). *Cooper* cited *Furman v. Georgia*, 408 U.S. 239 (1972)(per curiam); *Enmund v. Florida*, 458 U.S. 782, 787 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977)(opinion of White, J.).

Once a State mandates appellate review, that review must comply with the Constitution. *McCleskey v. Kemp*, 481 U.S. 279, 313-14, n.37 (1987). Section 565.035.3(3) requires a determination as to “whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant.” By requiring independent proportionality review, the Legislature created a protected liberty interest. *Ford v. Wainwright*, 477 U.S. 399, 428 (1986) (O'Connor, J., concurring and dissenting); and *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

Section 565.035.6 requires this Court to “accumulate the records of all cases in which the sentence of death or *life imprisonment without probation or parole* was imposed after May 26, 1977. . .” (emphasis added). Glass’ evidence showed this Court did not have 189 life cases as § 565.035.6 requires (Ex.25). Since the record was deficient, the statutory proportionality review is impossible.

This Court fails to consider all similar cases as § 565.035.3(3) requires. This Court has limited the relevant pool of cases, contrary to the statute (Ex.26). It compares only those cases in which the death penalty has been imposed. *Ramsey, supra* at 328. This Court finds other cases with the same statutory aggravator, regardless of how dissimilar the cases might be (Ex. 26). Limiting proportionality review to death-sentenced cases is irrational, contravenes §565.035, and violates due process.

This Court should have considered similar cases in which the defendant received a life sentence. In *State v. Crenshaw*, 59 S.W.3d 45, 47 (Mo. App. E.D. 2001), for example, the defendant convicted of first degree murder and sentenced to life where he strangled a young girl, and moved her body to an abandoned house where it deteriorated before it was discovered. In *State v. Brown*, 966 S.W.2d 332 (Mo. App., W.D. 1998), the defendant received a life sentence for killing a woman and suffocating her four year old daughter.

Glass' sentence is disproportionate when conducting a *de novo* review. He is young, has no significant prior criminal history, suffered from an extreme emotional disturbance and was substantially impaired when he committed the offense. He has limited intellectual functioning and struggled in school. Others ridiculed him throughout his life because of his weight. Glass has been a model inmate and caused no problems to jailers, showing he is a great candidate for a life sentence. This Court should consider the entire record, decide his death sentence is disproportionate and grant him a life sentence.

Alternatively, this Court should find its proportionality review is unconstitutional and Glass should receive a life sentence.

CONCLUSION

Glass was denied a fair trial. His counsel was ineffective. While the motion court properly granted a new penalty phase, it should have granted guilt phase relief as well. Glass requests a new trial based on Points I – III. Glass submits this Court should deny the State’s appeal, but should this Court reverse the motion court’s grant of penalty phase relief, Glass requests 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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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 30,078 words, which does not exceed the 31,000 words allowed for an appellant's 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 November, 2006. 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 2nd day of November, 2006, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Melinda K. Pendergraph