IN THE
MISSOURI SUPREME COURT

EARL FORREST,	)	
Appellant,	)	
vs.	)	No. SC 89343
STATE OF MISSOURI,	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF PLATTE COUNTY, MISSOURI
6TH JUDICIAL CIRCUIT, DIVISION
THE HONORABLE OWENS LEE HULL JR, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Earl Forrest, was jury-tried and convicted of three counts of first degree murder, § 565.020 RSMo 2000,[1] in the Circuit Court of Platte County. The jury assessed punishment at death. This Court affirmed in *State v. Forrest,* 183 S.W.3d 218 (Mo. banc 2006).

Mr. Forrest filed a *pro se* Rule 29.15[2] motion, which appointed counsel amended. The motion court granted the State's Motion to Dismiss several claims without an evidentiary hearing (L.F. 337-39).[3] The motion court held an evidentiary hearing, on the remaining claims and then entered findings of fact and conclusions of law denying relief (L.F. 369-99).

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

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[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.). Mr. Forrest requests that this Court take judicial notice of its files in *State v. Forrest,* S.Ct. No. 86518. Judge Hull took judicial notice of the trial transcript, legal file, and this Court's opinion (H.Tr. 72).

STATEMENT OF FACTS

Trial Facts: Guilt Phase

Earl Forrest was convicted of three counts of first degree murder (D.L.F. 590-92, Tr. 1274).[4] Forrest was upset with Harriett Smith, an acquaintance and methamphetamine dealer who had reneged on her promise to buy him a lawnmower in exchange for Forrest introducing her to a drug supplier (Tr. 841, 851-52, 853-54, 930, 1060). As a result, the two had a falling out and Forrest quit going to Smith's for nearly a year (Tr. 841, 857).

At 5:45 a.m. on December 9, 2002, Forrest woke up and started drinking (Tr. 1062-65, 1086-87). By 10:00 a.m., he had drunk a fifth of 80-proof whiskey (Tr. 1065, 1087). Forrest decided to go to Smith's and confront her about the lawnmower, so Forrest and his girlfriend, Angelina Gamblin Neff,[5] went to Smith's (Tr. 1065-68). Forrest went inside and argued with Smith about the lawnmower (Tr. 874-75, 883-84). During the fight, Forrest shot Smith and Michael Wells, who was at Smith's at the time (Tr. 827-30, 843, 845-47, 864, 876, 877, 879-80, 937, 940, 957, 963). Forrest stole a locked box filled with

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[4] For a more complete set of the crime facts, *see State v. Forrest*, 183 S.W.3d 218, 222-23 (Mo. banc 2006).

[5] Angelina married after the incident (Tr. 1082). Forrest uses Gamblin, her name at the time of the incident.

methamphetamine, and estimated its worth at twenty-five thousand dollars (Tr. 1073, 1076, 1091).

Forrest and Gamblin returned home, and he injected one-half gram of methamphetamine into his arm (Tr. 1075, 1091-92). When police arrived, Forrest shot and injured the sheriff and killed a deputy, Joanne Barnes (Tr. 905, 908-09, 983, 1009-1010, 1079, 1176-78). After a shoot-out, Forrest crawled to the front porch and surrendered (Tr. 907-08, 921, 924, 1081, 1094). Officers shot Forrest in the face and injured Gamblin too (Tr. 925, 1024-25, 1080, 1094).

Officers testified that when they arrested Forrest, he had two large knives, one on his person and one by the front door (Tr. 908, 1013, 1036, 1041, Ex. 45). The State introduced a picture of one of the knives, propped up against a wall near the front door and passed it to the jury (Ex. 45, Tr. 1036, 1041).

Forrest's defense at trial was lack of deliberation (Tr. 1255-59). The evidence in support of this defense came through state witnesses and a defense expert, psychologist, Dr. Robert Smith (Tr. 1199-1221). Smith diagnosed Forrest with: 1) Dysthymic Disorder; 2) cognitive disorder (brain damage) and 3) substance dependence or addiction (Tr. 1207-08). Smith concluded that the three defects combined to impair Forrest's ability to process information and make decisions (Tr. 1213).

On cross-examination, Assistant Attorney General Robert Ahsens questioned Smith's conclusions (Tr. 1214-19). Ahsens highlighted that Smith had relied on Forrest's version of the facts and Smith had interviewed no one else (Tr.

1214-15). Ahsens asked Smith if he saw the brain damage on an x-ray, MRI, or objective test (Tr. 1215). Smith acknowledged he did not (Tr. 1215). Ahsens questioned if Smith could point to any test so that a layman could look at it, and say, "See, here it is" (Tr. 1216). The defense paid Smith for his opinion and he received an hourly fee (Tr. 1218-19).

The trial court submitted a voluntary intoxication instruction, stating: "in determining the defendant's guilt or innocence, you are instructed that an intoxicated or drugged condition whether from alcohol or drugs will not relieve a person of responsibility for his conduct" (Tr. 1224, D.L.F. 576). The jury deliberated 1 ½ hours and convicted Forrest on all three counts of murder (Tr. 1267, 1273, 1274, D.L.F. 590-92).

Penalty Phase

The state called two California police officers to discuss their arrests of Forrest, one in 1994 and one in 1996 (Tr. 1307-1319, 1320-1329). The State introduced Ex. 60, records from the California Department of Corrections and told the jury they established a 1968 conviction for possession of dangerous drugs and marijuana, and a 1979 conviction for transportation, sale or manufacture of a controlled substance (Tr. 1351). The State also introduced Ex. 61, a record of a 1987 conviction for possession of a concealable firearm (Tr. 1351). That exhibit was not certified by a judge (Ex. 61). Exhibit 62 was a record of conviction for possession of a firearm from 1975 (Tr. 1351). Defense counsel asked to see the records as they were being offered and then stated she had no objection (Tr. 1351).

The State also called two victim impact witnesses, one for Wells and one for Barnes (Tr. 1330-37, 1339-1350).

The defense called three experts, Dr. Smith, Dr. Gelbort, and Dr. Evans. Smith reiterated his diagnosis elicited in guilt phase and provided more detail about Forrest's drug use (Tr. 1417-24). Smith found two statutory mitigators – extreme emotional disturbance and substantial impairment (Tr. 1429-30). On cross-examination, Ahsens emphasized that Dr. Smith was not a medical doctor (Tr. 1430). Smith's conclusions were based on tests of Forrest, who had provided all the information (Tr. 1431). Ahsens noted that Forrest could function and was goal-oriented during the offense; he took the drugs, drove to Smith's house (Tr. 1433-34). Ahsens asked:

> Is there a single objective feature which you can show us, an MRI, an x-ray, anything where you can point to something and say, "Here's this brain damage," or "Here's this problem with his brain."

(Tr. 1439). Smith acknowledged that he did not read MRIs and Gelbort's testing was what showed brain damage (Tr. 1439). Ahsens again asked:

> Is there a single objective thing that you can show this jury that points out this kind of brain damage or brain dysfunction that you're talking about?

(Tr. 1440). Smith repeated that Gelbort's testing was objective (Tr. 1440). Ahsens emphasized that Gelbort was "not a medical doctor either" (Tr. 1440).

Dr. Gelbort, a clinical neuropsychologist, testified about his education and experience (Tr. 1525-30). Ahsens announced in open court, in front of the jury, that he would not concede that Gelbort was an expert (H.Tr. 1530). Gelbort's testing showed Forrest's impairment in visual spatial processing (Tr. 1542-43). Forrest had impairment with inhibition and impulse control, functioning based in the front part of the brain (Tr. 1543). Defense counsel asked Gelbort about Forrest's history of brain injury (Tr. 1545). Gelbort responded:

> I took a history from Mr. Forrest and, again, he reported to me – *he could have been misreporting* – but he told me about having been hit in the head with a baseball bat almost 15 years ago and having an alteration in consciousness or a brief loss of consciousness, which is synonymous with, in a part, brain injury. He also talked about an incident where he had a significant blood loss and had a change in consciousness. Again, that can be consistent with the brain being injured.

(Tr. 1545). Thirty years of substance abuse would also damage Forrest's brain (Tr. 1545-49).

Defense counsel asked Gelbort whether he did "any kind of brain scans or MRI testing, anything of that nature?" (Tr. 1553). Gelbort said that that brain impairment would rarely show up in a scan, such as CT or MRI, which are designed to look at the brain's structure (Tr. 1553). Gelbort could not give such a test because he was not trained and qualified to give neurological or medical tests

(Tr. 1554). Gelbort said that a PET or SPECT scan could show the problems with Forrest's type of condition, but those tests were not given (Tr. 1555). PET and SPECT scans evaluate whether the brain is using normal amounts of energy (Tr. 1555).

On cross-examination, Ahsens emphasized that neither a PET scan nor an EEG were administered (Tr. 1556). Gelbort did not think an EEG was warranted, given Forrest's lack of history of a seizure disorder (Tr. 1556). Gelbort's information came from Forrest and "historical information" (Tr. 1557-58). Ahsens noted Forrest's IQ of 108, within the average range (Tr. 1558). But, Forrest had a 13 point difference between his verbal and performance IQ scores (Tr. 1559-60). Ahsens elicited that Gelbort was a paid expert who routinely testifies for defendants instead of the State (Tr. 1560-61, 1562-66).

Dr. Evans, a psychiatric pharmacist, testified for the defense (Tr. 1568-70). Ahsens voir dired Evans about his credentials (Tr. 1571-72). Evans is neither a medical doctor nor a psychologist (Tr. 1571). He is a clinical pharmacist, specializing in psychiatry and he estimates the effect of drugs on the brain and behavior (Tr. 1572). He cannot diagnose medical diseases or defects (Tr. 1572).

Based on Evans' interview of Forrest, he found that his history of alcohol use extensive, starting in adolescence and continuing through December, 2002 (Tr. 1574, 1578). Forrest's methamphetamine use also started in adolescence and continued until the crime (Tr. 1574). Alcohol affects all parts of the brain, including higher cortical areas that control inhibitions, behavior, thoughts and

judgment (Tr. 1575). Long-term alcohol abuse changes the brain's cellular functioning, damaging memory and judgment (Tr. 1575, 1580). Alcohol abuse can lead to poor decision-making and an inability to control impulses (Tr. 1576). Methamphetamine abuse also has a long-term impact on the brain's cellular functioning and can lead to long-term effects, including drug induced paranoia (Tr. 1580). Based on Evan's interview with Forrest and history provided by Forrest and his girlfriend, he found Forrest was suffering from paranoia (Tr. 1581).

Ahsens asked the trial court to strike Evans' opinion and instruct the jury not to consider it, because he was not a qualified expert (Tr. 1589). Evans was not a medical doctor (Tr. 1588). He was not a psychologist or a physician (Tr. 1589). The defense paid Evans $250 per hour, or $2500 for his evaluation of Forrest and his testimony (Tr. 1585).

The defense also called several lay witnesses, including Forrest's younger brother, his stepchildren, several friends, two former girlfriends, acquaintances, and Clayton Forrest, a child Earl helped raise and always treated as his son (Tr. 1356-1392, 1394-96, 1398-1412, 1449-52, 1453-60, 1461-66, 1467-98, 1502-19, 1520-22, 1591-99, 1600-1613, 1614-56). Forrest had a tough childhood; his father, an alcoholic, abused him (Tr. 1365-66, 1369-73). The defense witnesses described Forrest as loving and caring (Tr. 1400-1410, 1446-47, 1451-52, 1463-66, 1473-74, 1496-97, 1503-04, 1508, 1510, 1517, 1520, 1592, 1597, 1607-08, 1610, 1634, 1650, 1652). He had a drug problem, but still was good to others (Tr.

1366-67, 1380-86, 1392, 1473, 1489, 1515, 1596, 1598-99, 1601, 1654). Forrest took care of the children, made them breakfast, was involved in school activities, helped with homework, had them nap, took them on outings like camping and fishing (Tr. 1400-1410, 1456-1460, 1463-66, 1475-1493, 1592-95, 1596, 1617-1630, 1632-1647). The kids all turned out to be productive (Tr. 1718-19).

The jury returned three death verdicts, finding the following statutory aggravators: Harriett Smith was killed in the course of another homicide and for something of monetary value; Michael Wells was killed for something of monetary value; and Joanne Barnes was a peace officer, killed in her official duty (Tr. 1744-46, D.L.F. 630-32). The trial court sentenced Forrest to death on all three counts (Tr. 1784, D.L.F. 742).

On direct appeal, this Court affirmed. *Forrest*, 183 S.W.3d at 218.

Postconviction

Mr. Forrest's amended 29.15 motion alleged that counsel was ineffective for failing to investigate and present readily-available mitigating, including a PET scan of Forrest's brain (132-41, 231-34); medical records that documented Forrest's brain injuries (L.F. 126-31, 229-30); testimony of an employer, neighbor and friend (L.F. 170-79, 240-44); and testimony of Dr. Cunningham, an expert on future dangerousness and childhood factors creating a risk of violence (L.F. 94-125, 202-28).

PET Scan

Mr. Forrest trial began on October 4, 2004 (Tr. 123). Nearly 1 ½ years earlier, on May 21, 2003, defense counsel, Dave Kenyon, prepared a memorandum to the case file indicating he would contact Dr. Preston about any brain scans they would get (Ex. 7, H.Tr. 550). Kenyon listed as potential scans: CT, PET, SPECT and MRI (Ex. 7). In June, 2004, defense expert Dr. Evans recommended to counsel that they obtain a PET scan (Ex. 59). Once Dr. Gelbort completed neuropsychological testing, he too, recommended a PET scan (Ex. 15). Shortly before trial, on September 15, 2004, counsel requested funding for a PET or SPECT scan, to confirm brain damage based on the experts' recommendations (Ex. 15). The Public Defender System was willing to approve funds for a PET scan administered and evaluated by a medical doctor with a specialty in nuclear medicine (Ex. 1).

Despite his May, 2003 memorandum, Kenyon indicated he was not responsible for following up on the brain scan (Ex. 57, at 37-38). This was co-counsel, Sharon Turlington's part of case. *Id*. Kenyon said the decision regarding scans rested strongly on the recommendation of the neuropsychologist. *Id*. at 36. Counsel relied on the expert to tell them if they need a scan. *Id*. Dr. Gelbort recommended that a brain scan be done. *Id*. at 36, 37. Kenyon would have deferred to co-counsel's decision since she was working with Dr. Gelbort. *Id*. at 38.

Turlington was familiar with PET scans, had obtained them in other cases, and was familiar with Dr. Preston (H.Tr. 534, 535, 537, 543). Initially, Turlington testified that she had consulted with Dr. Preston about Forrest's case, but, when confronted with memos, case files, and Dr. Preston's testimony, she acknowledged that she did not talk to him about Forrest (H.Tr. 536-37).

Turlington did not recall that Dr. Evans recommended a PET scan, but when shown her file, acknowledged he made that recommendation in June, 2004 (H.Tr. 538, Ex. 59). Evans believed Forrest had chronic long-term brain damage and a PET scan may show the damage (H.Tr. 538-39, Ex. 59 at 2).

Turlington also did not remember that Dr. Gelbort recommended a PET scan, but she did not dispute his testimony that he did (H.Tr. 540, 549). Her file showed that she requested funding for such a scan, saying: "after the neuropsychological testing by Dr. Gelbort a PET or SPECT scan is required to confirm brain damage." (H.Tr. 541, 549 Ex. 15). She hired Dr. Gelbort in May, 2004 and could provide no reason for waiting that long to hire him (H.Tr. 549-50, 551). Her request for funds was dated September 15, 2004, so, as of that day, counsel still wanted to pursue a brain scan (H.Tr. 541).

In addition to Drs. Gelbort and Evans' recommendations for a scan, counsel knew that Forrest had head injuries (H.Tr. 542). She knew he had a history of long-term, chronic alcohol and methamphetamine use (H.Tr. 542).

Counsel asked another attorney in her office to contact Dr. Ken Smith at SLU to see if he would order the PET scan (H.Tr. 544, 547, 632-34). Turlington

had talked to Dr. Smith about another case (H.Tr. 547). Dr. Smith would not order a PET scan, but would only order an MRI (H.Tr. 544-55, 547, 634). Smith did not believe a PET scan was "medically necessary" (H.Tr. 545). Only if an MRI showed something would Smith agree to perform a PET scan (H.Tr. 545, 634). If Dr. Smith had agreed to do the PET scan, Turlington would have had him perform it (H.Tr. 547).

Turlington acknowledged that she abandoned pursuing the scan, in part, because it was only two weeks before trial (H.Tr. 547, 551). She said the idea for a scan did not come up early on, but developed over time (H.Tr. 547). Turlington did not remember talking about the tests "super early on." (H.Tr. 548). She might have been able to obtain the scan had she worked on it earlier (H.Tr. 553). Turlington recognized that a PET scan could be done in a few hours and did not require a lengthy hospital stay (H.Tr. 554).

Turlington acknowledged that PET scans can confirm brain damage and it can be helpful for a medical doctor to talk about brain injuries (H.Tr. 556). But, PET scans are a bit more subject to interpretation than MRIs (H.Tr. 555). In Turlington's experience, juries are not particularly receptive to this type of evidence (H.Tr. 556-58). Counsel believed the scan could produce mitigating evidence, but not the "best mitigation" (H.Tr. 559). A scan can be helpful, but if it did not show anything, it would be harmful (H.Tr. 547-48, 551-52). Turlington did not want the State to know about the scan and was concerned that she could

not obtain an *ex parte* order to transport Forrest to the hospital (H.Tr. 631-32, 635).

Counsel acknowledged that the foreman in this case indicated that the jury did not buy the defense evidence that Forrest had brain damage or depression, or that his mental problems got worse when he was drinking and doing drugs (H.Tr. 560). Counsel also acknowledged that the State repeatedly criticized the defense's failure to have any medical scans or tests done to show Forrest had brain damage (H.Tr. 561-563, referencing Tr. 1215-16, 1555-56).

Dr. David Preston, a medical doctor in Nuclear Medicine, administered and evaluated Forrest's PET scan in 2006 (H.Tr. 78, 90, Exs. 16, 17, 21, 22, 22A, 23-33, 35, 38-50). A PET scan is a Positron Emission Tomography scan (H.Tr. 82). The scan uses a glucose-like material tagged with radioactive material (H.Tr. 84). The positron emitter goes to organs metabolically active like the brain and heart (H.Tr. 84). When the brain is injured, it is less able to use glucose (H.Tr. 84). A PET scan provides pictures of the locations where the material is localized (H.Tr. 84). These scans are useful in diagnosing cancers, depression, Alzheimer's diseases, infections, lymph nodes, strokes, as well as brain injuries (H.Tr. 85-86, 87).

Forrest's PET scan revealed brain damage (H.Tr. 97-99, 126, Ex. 16, at 3). He had damage in the frontal lobe, an area responsible for planning and executive decisions (H.Tr. 98-99, Ex. 16 at 3, Ex. 17 at 3). He has decreased functioning in the left and right sensory motor areas, the left and right superior parietal lobes, the

left association of the visual cortex and his thalamus (H.Tr. 103-05, Ex. 23-33, Ex. 16 at 4). The brain damage would cause loss of control and impairment of judgment (Ex. 17 at 4). Prior closed-head injuries would cause this type of damage, as would prior cocaine and amphetamine use (Ex. 17 at 3). Forrest's injury from a baseball bat was a possible cause of the damage (H.Tr. 120).

Dr. Preston explained that the Neuro Q quantitative data base allows a numerical and objective interpretation of a patient's brain functioning (H.Tr. 107-117, Ex. 16 at 1, Exs. 38-50). Eighteen regions of Forrest's brain were significantly underactive (Ex. 16, at 2-3).[6] Based on this data, Dr. Preston concluded "there is no doubt that Mr. Forrest has a damaged brain." (Ex. 16 at 3).

PET scan technology was available in 2004 (H.Tr. 118-19). The scan of Forrest's brain in 2006 provided the same information that a 2004 scan would have provided, except Forrest's brain functioning may have improved slightly over time, since he has been jailed without access to drugs and alcohol (H.Tr. 119).

Medical Records

Forrest alleged that counsel was ineffective for failing to provide experts with and failing to introduce at trial available medical records that documented

[6] Dr. Preston's report included a chart detailing all of the brain damaged areas (Ex. 16 at 2-3). It is reproduced in the argument section of the brief. Exhibit 16 and all other movant's exhibits introduced at the hearing have been filed with this Court.

Forrest's brain injuries (L.F. 126-31, 229-30). Those records established that, on March 2, 1990, Forrest was hit in the head with a baseball bat and received medical treatment (Ex. 11, at 34-35). He sustained closed head trauma, which produced a significant hematoma and headaches (Ex. 11 at 36). The wound was significant, 7-9 centimeters long (Ex. 11, at 36).

The records also revealed two separate suicide attempts (Ex. 11, at 13-23). The treating physician found Forrest at risk for impulsive, acting-out behavior (Ex. 11 at 17-20). The doctor referred Forrest for psychiatric treatment to John George Pavillion (Ex. 11 at 13). The treating doctors there found that Forrest suffered from depression, alcohol and amphetamine dependence (Ex. 11 at 13).

Counsel Turlington and Kenyon testified that they had obtained these records prior to trial (H.Tr. 531, 532, Ex. 57, at 25-26, Ex. 11). They provided these records to Dr. Smith, as he referenced them in his report (Ex. 13, at 3). They also provided the records to Dr. Evans, according to Kenyon's memorandum dated August 11, 2004 (Ex. 59). But, Dr. Gelbort was unsure if he reviewed the Valley Care records before trial (H.Tr. 503).

Turlington acknowledged Gelbort testified that the only information he had on head injuries came from Forrest himself, and that Forrest may have misreported his injuries to Gelbort (H.Tr. 530-41, Tr. 1545). Turlington believed Gelbort's trial testimony was incorrect (H.Tr. 531). Two weeks before trial, Turlington sent all of the experts all of the background records, including the Valley Care records (H.Tr. 531, 532, Ex. 11). Turlington acknowledged that she was at fault for not

correcting Gelbort and showing him the records at trial (H.Tr. 532). This was an error, an oversight (H.Tr. 532, 533). Turlington did not introduce the records, because she did not think they were crucial to Forrest's case (H.Tr. 532-33). But, counsel realized the records showed head injuries and suicide attempts; that evidence was significant, and it supported a finding of brain damage (H.Tr. 533).

Kenyon was unsure whether they provided the records to Dr. Gelbort, and deferred to their recollection (Ex. 57, at 28-29, 33). He, too, said that head injuries were not a big focus in the case (Ex. 57, at 31). Kenyon failed to introduce the medical records at trial because Forrest had described the baseball bat incident to Kenyon, who did not feel it was a "mitigation friendly" story (Ex. 57, at 34). The injury had occurred when Forrest had failed to pay for some drugs and Kenyon did not want evidence of drug sales and stealing in the record (Ex. 57 at 69-71).

Neighbor, Employer and Friend

Counsel also failed to investigate penalty phase witnesses, Dennis Smock, a former employer, Mr. Fuller, Forrest's neighbor, and Anthony Jacobs, a long-time friend (L.F. 170-179, 24044). Smock remembered Earl as a good employee, but one unable to handle complex or supervisory roles (H.Tr. 171-72). Smock recalled Forrest's struggles with alcohol (H.Tr. 175, 177, 181). Smock really liked and cared about Forrest (H.Tr. 175, 178).

Curt Fuller saw Forrest's father drunk every day and knew he physically abused Forrest (Ex. 53, at 6-8, 16-17, 26-27). Once Forrest's father punched him

in the head and knocked him flat on the ground (Ex. 53, at 18-20). Forrrest's mother always screamed at him. *Id*. at 9.

Jacobs, Forrest's friend, recounted Forrest's alcohol and drug problems (H.Tr. 189-92, 197). Forrest was fun, intelligent and nice (H.Tr. 187). Jacobs never saw him angry (H.Tr. 187). Forrest was a good and loyal friend (H.Tr. 187). He was good with children (H.Tr. 189). Forrest moved to Missouri, in part to get away from drugs and turn his life around (H.Tr. 192-93, 196).

Counsel had no strategic reason for not interviewing these witnesses (H.Tr. 565, 566, 570, Ex. 57 at 41, 42, 43, 48).

Dr. Cunningham

The motion alleged that counsel should have called an expert, such as Dr. Mark Cunningham, to establish that Forrest would not be dangerous in prison and to elicit mitigating evidence of his childhood development, factors that placed him at risk for violence (L.F. 94-125, 202-228). Counsel requested funding to retain Dr. Cunningham and contacted him by phone (Exs. 9, 10, 57 at 17-18). Counsel did not hire him because he was not that impressed with Cunningham's initial assessment on future dangerousness and was concerned that the State could question the expert about Forrest's alleged criminal conduct (Ex. 57 at 19-20, 22, 23, 68-69).

Dr. Cunningham, a clinical forensic psychologist had researched the factors associated with violence in prison (H.Tr. 258-62). He also had researched developmental factors associated with violence (H.Tr. 262). Cunningham

interviewed Forrest and reviewed his background materials (H.Tr. 279-80). Cunningham found that Forrest was at a low risk for violence in prison, primarily because of his age, Forrest was 55 years old, and his education, he had graduated from high school and had one year of college (H.Tr. 368, 370, 371). Forrest had adjusted well to jail and had been a good inmate when he was in prison before (H.Tr. 370-71). Inmates sentenced to death or life without probation or parole were less likely to be involved in assaultive conduct than parole eligible inmates (H.Tr. 385-86).

Cunningham also assessed Forrest's childhood development and the factors that put him at risk to commit violence (H.Tr. 282-368). Among the factors that put Forrest at risk were his childhood maltreatment (physical and mental), his father's alcoholism, poor family management, poor family bonding and conflict resolution, parental attitudes favorable to substance abuse, early drug and alcohol use (H.Tr. 299-302, 322-351). Forrest's head injuries and resulting brain damage put him at risk for violence (H.Tr. 310-322). Forrest's alcohol and drug dependence were significant factors contributing to violence (H.Tr. 355-65). The research is clear that one's childhood matters (H.Tr. 282). Forrest did not have a choice about most of these factors (H.Tr. 306-07). He had many risk factors and few protective factors (H.Tr. 307).

Failure to Object

The amended motion alleged counsel was ineffective for failing to object to the State's prior convictions and records (L.F. 79-83, 200), unrelated weapons

(L.F. 67-74, 145), voir dire (L.F. 57-66), opening statements and closing arguments (L.F. 75-77, 85-93, 200, 201).

Claims Denied Without Hearing

The motion court granted the State's motion to dismiss several claims without a hearing, including the claims that Missouri's lethal injection process, clemency procedure is arbitrary, and this Court's proportionality review are unconstitutional (L.F. 337-38). The court also denied a hearing on the claims that the prosecutor gave his personal beliefs in his opening statement and made improper closing arguments (L.F. 337-38).

State's Evidence

The State called one witness, Highway Patrolman Roark, at the evidentiary hearing (H.Tr. 603-27). He admitted that his pretrial deposition and trial testimony that he found two knives when he arrested Forrest was incorrect (H.Tr. 611-617). Forrest had a knife on his person when he surrendered, Roark tossed it aside, then moved it to the wall to photograph it (H.Tr. 607-08). The jury was mistakenly left with the impression that Forrest had two large knives with him on the day of the offense (H.Tr. 611, 617, 619). Roark denied trying to make Forrest look more dangerous or worse than he really was (H.Tr. 619-620).

Court's Ruling

After considering evidence on the remaining issues, the motion court issued findings of fact and conclusions of law denying relief (L.F. 369-399).[7]

[7] The findings are outlined in detail in the argument portion of the brief and included in the appendix.

POINTS RELIED ON

I. Brain Scan

The motion court clearly erred in denying Forrest's claim that counsel was ineffective for failing to obtain a PET scan of Forrest's brain because this denied Forrest effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S. Const., Amend.VI, VIII, XIV, Mo. Const., Art. I, §§ 10, 18(a), 21, in that trial counsel knew a scan was warranted, based on Forrest's head injuries, and alcohol and methamphetamine use, and two experts, Gelbort and Evans,' recommendations for such a scan after their testing suggested frontal lobe brain damage. Counsel's failure to investigate and present this evidence was unreasonable as they wanted to obtain a scan, but ran out of time, waiting until two weeks before trial to request the testing.

Forrest was prejudiced because, had counsel obtained a PET scan, it would have shown Forrest's brain damage, especially in the frontal lobes responsible for judgment, planning and executive decisions. Eighteen regions of Forrest's brain were significantly damaged. Had the jury heard this mitigating evidence, a reasonable probability exists that they would have imposed a life sentence, especially since the State criticized all the trial defense experts for not being medical doctors and not performing objective medical tests, like a PET scan, to actually prove the brain damage.

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

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

Black v. State, 151 S.W.3d 49 (Mo. banc 2004); and

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

II.

Medical Records Documenting Head Injuries

The motion court clearly erred in denying Forrest's claim that counsel was ineffective for failing to investigate and present available mitigating evidence of medical records that showed his head injuries, suicide attempts, and in-patient mental health treatment, because this denied Forrest due process, effective assistance of counsel, 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 even if counsel provided the records to Dr. Gelbort, when Gelbort testified that his only evidence of head injuries was Forrest's self-reporting, counsel failed to present the available records.

Forrest was prejudiced because the records showed that he had received medical treatment for head injuries inflicted by a baseball bat, suffered other brain trauma from two suicide attempts and received mental health treatment for depression, alcohol and amphetamine dependence years before the crime. This available mitigating evidence would have supported the defense theory that Forrest had brain damage and resulting mental deficits. The medical records were objective evidence, not merely Forrest's self-report. Had jurors heard this evidence, a reasonable probability exists that they would have imposed a life sentence, especially since the State repeatedly criticized the trial defense experts for not relying on objective data in reaching their conclusions.

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

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

Taylor v. State, 262 S.W.3d 231 (Mo. banc 2000); and

Commonwealth v. Zook, 887 A.2d 1218 (Pa. 2005).

III. Mitigating Evidence: Employer, Neighbor and Friend

The motion court clearly erred in denying Forrest's claim that counsel was ineffective for failing to investigate and present available mitigating evidence from Dennis Smock, a former employer, Curt Fuller, a next-door neighbor, and Anthony Jacobs, a close friend, because this denied Forrest due process, effective assistance of counsel, 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 had no strategic reason for failing to investigate the witnesses and Forrest was prejudiced.

Smock remembered Forrest as a good worker, who everyone liked, but who could not handle complex tasks. Fuller saw Forrest's father hit him, knocking him down, and knew the father had a drinking problem. Jacobs recounted Forrest's kindness and his alcohol and substance abuse. This evidence was not cumulative, as no other employer or neighbor testified and Jacobs knew about Forrest's efforts to turn his life around and to quit using drugs and alcohol. Had jurors heard this mitigating evidence, they may have opted for a life sentence.

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

Black v. State, 151 S.W.3d 49 (Mo. banc 2004).

IV. Proportionality Review

The motion court clearly erred in denying an evidentiary hearing on this Court's failure to engage in meaningful proportionality review because that ruling denied Forrest due process, freedom from cruel and unusual punishment, and a full and fair determination of his claims, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that this Court fails to comply with § 565.035.6, which requires it to accumulate records of all cases where death or life without parole sentences were imposed and fails to consider all similar cases in its review, including those in which the defendant received a life sentence or the State did not seek death.

When reviewing Forrest's death sentence, this Court did a perfunctory review and only compared his case to four death penalty cases involving multiple murders. A thorough review would have included similar cases in which the brain-damaged defendant killed multiple people or a law enforcement officer, but still received a life sentence.

Walker v. Georgia, 555 U.S. ____ , 2008 WL 2847268 (2008);

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

Gregg v. Georgia, 428 U.S. 153 (1976); and

Zant v. Stephens, 462 U.S. 862 (1983).

V. State Introduced Unrelated Weapons and Misled Jury About Weapons

The motion court clearly erred in denying Forrest's claim that counsel was ineffective for failing to object to the State's improper and misleading testimony and evidence of unrelated lethal weapons, two hunting knives with 9 and ½ inch blades, because this denied Forrest due process, effective assistance of counsel, 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 the State misled the jury into believing that Forrest had two knives instead of one; the weapon(s) were unrelated to and unconnected with the charged offense; and Ahsens emphasized this evidence-eliciting testimony about the knives through two witnesses, introducing a picture of a knife and passing it to the jury, and then arguing the jurors should sentence Forrest to death because Forrest would be dangerous to fellow prisoners, staff and guards. Counsel acknowledged they had no strategic reason for not objecting to the unrelated weapons.

State v. Charles, 572 S.W.2d 193 (Mo. App. K.C. 1978);

State v. Jones, 583 S.W.2d 212 (Mo. App. W.D. 1979);

State v. Griffin, 848 S.W.2d 464 (Mo. banc 1993); and

Adams v. State, 677 S.W.2d 408 (Mo. App. W.D. 1984).

VI. Failure to Object to Prior Convictions

The motion court clearly erred in denying Forrest's claim that counsel was ineffective for failing to object to the admission of State's Exhibit 60, California Department of Corrections records, and Exhibit 61, a record of a prior conviction, because that denied Forrest effective assistance of counsel, due process, a fair trial, confrontation 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 Exhibit 61 did not comply with Section 490.130 as it had no judge's certification and Exhibit 60 contained improper hearsay and referenced charges not resulting in convictions. Counsel had no strategy for failing to object, did not know the law for admitting out-of-state convictions and "spaced out" during the trial. Forrest was prejudiced since the State argued his prior criminal history as a basis for a sentence of death.

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

Johnson v. Mississippi, 486 U.S. 578 (1988);

Ervin v. State, 80 S.W.3d 817 (Mo. banc 2002); and

State v. Griffin, 848 S.W.2d 464 (Mo. banc 1993).

VII. Voir Dire: Community Reaction to Verdict

The motion court clearly erred in denying Forrest's claim that the prosecutor improperly warned jurors that members of the community would be watching them when they returned their verdict and defense counsel was ineffective for failing to object because these actions denied Forrest 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 appeals to consider how the community will react to a verdict are improper and counsel had no strategic reason for failing to object.

Forrest was prejudiced because the prosecutor's appeal to consider the community's beliefs was an appeal outside the evidence, the appeal was repeated and he punctuated it in closing argument, telling the jurors that "society is depending on you. Do your duty."

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940);

Viereck v. United States, 318 U.S. 236 (1943);

United States v. Young, 470 U.S. 1 (1985); and

State v. Delaney, 973 S.W.2d 152 (Mo. App., W.D. 1998).

VIII. Improper Closing Arguments: "Do Your Duty"

The motion court clearly erred in denying Forrest's claims based on the prosecutor's closing argument and defense counsel's failure to object to the argument that it was the jurors' duty to convict and sentence Forrest to death, because this denied Forrest due process, a fair trial, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. V, VI, VIII and XIV and Mo. Const., Art. I, §§10, 18(a), and 21, in that Ahsens' "duty" argument pressured the jury and was contrary to Supreme Court precedent, and denying a hearing created an irrebuttable presumption that counsel strategically chose not to object to improper arguments outside the evidence and denied Forrest the opportunity to prove his claim of ineffective assistance.

Viereck v. United States, 318 U.S. 236 (1943);

United States v. Young, 470 U.S. 1 (1985);

Copeland v. Washington, 232 F.3d 969 (8th Cir. 2000); and

State v. Storey, 901 S.W.2d 866 (Mo. banc 1995).

IX. Improper Personalization

The motion court clearly erred in denying a hearing on the claim that Forrest's counsel was ineffective for failing to object to the prosecutor's improper personalization during the penalty phase opening statement, because this denied Forrest due process, a fair trial, 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, and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled Forrest to relief, that counsel unreasonably failed to object to Ahsens' statements of his personal belief that the statutory aggravators were proven and prejudiced Forrest, making it likely that the death sentence would be based on Ahsen's personal opinion and authority.

Weaver v. Bowersox, 438 F.3d 832 (8th Cir. 2006);

Berger v. United States, 295 U.S. 78 (1935);

United States v. Young, 470 U.S. 1 (1985); and

State v. Storey, 901 S.W.2d 866 (Mo. banc 1995).

X. Dr. Cunningham: Future Dangerousness and Childhood Risk Factors

The motion court clearly erred in denying Forrest's claim that counsel was ineffective for failing to introduce available mitigation evidence through an expert such as Dr. Cunningham, because this denied Forrest due process, effective assistance of counsel, 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 failed to present evidence that Forrest was a low risk for future dangerousness and his childhood development was filled with factors, such as genetic predisposition to substance dependence, parental alcoholism, brain dysfunction, physical and emotional abuse, emotional and supervisory neglect, observing domestic violence, adolescent onset of alcohol and drug dependence, that put him at risk for violence and delinquency.

Forrest was prejudiced because Ahsens argued that Forrest would be dangerous in prison and the jury never heard about how Forrest's childhood development put him at risk as he grew up. Had jurors heard this information, there is a reasonable probability of a life sentence.

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

Kyles v. Whitley, 514 U.S. 419 (1995); and

Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995).

XI. Lethal Injection Is Cruel and Unusual Punishment

The motion court clearly erred in denying without a hearing the claim that Missouri's method of lethal injection is unconstitutional, because it denied Mr. Forrest due process and freedom from cruel and unusual punishment, U.S. Const., Amends. 8 and 14, and Article I, Sections 10 and 21 of the Missouri Constitution, in that a sentence that creates an unnecessary risk of pain and suffering is unconstitutional. Further, all constitutional claims known to Forrest should be raised in his postconviction action making the claim cognizable.

Baze v. Rees, 128 S.Ct.1520 (2008);

Gregg v. Georgia, 428 U.S. 153 (1976);

In re Kemmler, 136 U.S. 436 (1890);

Glass v. Louisiana, 471 U.S. 1080 (1985); and

Rule 29.15 (a) and (b).

XII. CLEMENCY

The motion court clearly erred in denying a hearing on Mr. Forrest's claim that the Missouri's clemency process violates his rights to due process, freedom from cruel and unusual punishment, and equal protection, U.S. Constitution, Amendments VIII and XIV, and Mo. Constitution, Article I, Sections 2, 10, 18(a) and 21, in that the motion alleged facts, not conclusions, that entitle Forrest to relief. The process is wholly arbitrary and capricious as, Mease's clemency proceedings evidence. Mease was granted clemency, not on the merits of his case, but because of the Pope's appeal on religious grounds.

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998);

Duvall v. Keating, 162 F.3d 1058 (10th Cir. 1998);

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

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

ARGUMENT

I. Brain Scan

The motion court clearly erred in denying Forrest's claim that counsel was ineffective for failing to obtain a PET scan of Forrest's brain because this denied Forrest effective assistance of counsel, due process and non-arbitrary or capricious sentencing, U.S. Const., Amend. VI, VIII, XIV, Mo. Const., Art. I, §§ 10, 18(a), 21, in that trial counsel knew a scan was warranted, based on Forrest's head injuries, and alcohol and methamphetamine use, and two experts, Gelbort and Evans,' recommendations for such a scan after their testing suggested frontal lobe brain damage. Counsel's failure to investigate and present this evidence was unreasonable as they wanted to obtain a scan, but ran out of time, waiting until two weeks before trial to request the testing.

Forrest was prejudiced because, had counsel obtained a PET scan, it would have shown Forrest's brain damage, especially in the frontal lobes responsible for judgment, planning and executive decisions. Eighteen regions of Forrest's brain were significantly damaged. Had the jury heard this mitigating evidence, a reasonable probability exists that they would have imposed a life sentence, especially since the State criticized all the trial defense experts for not being medical doctors and not performing objective medical tests, like a PET scan, to actually prove the brain damage.

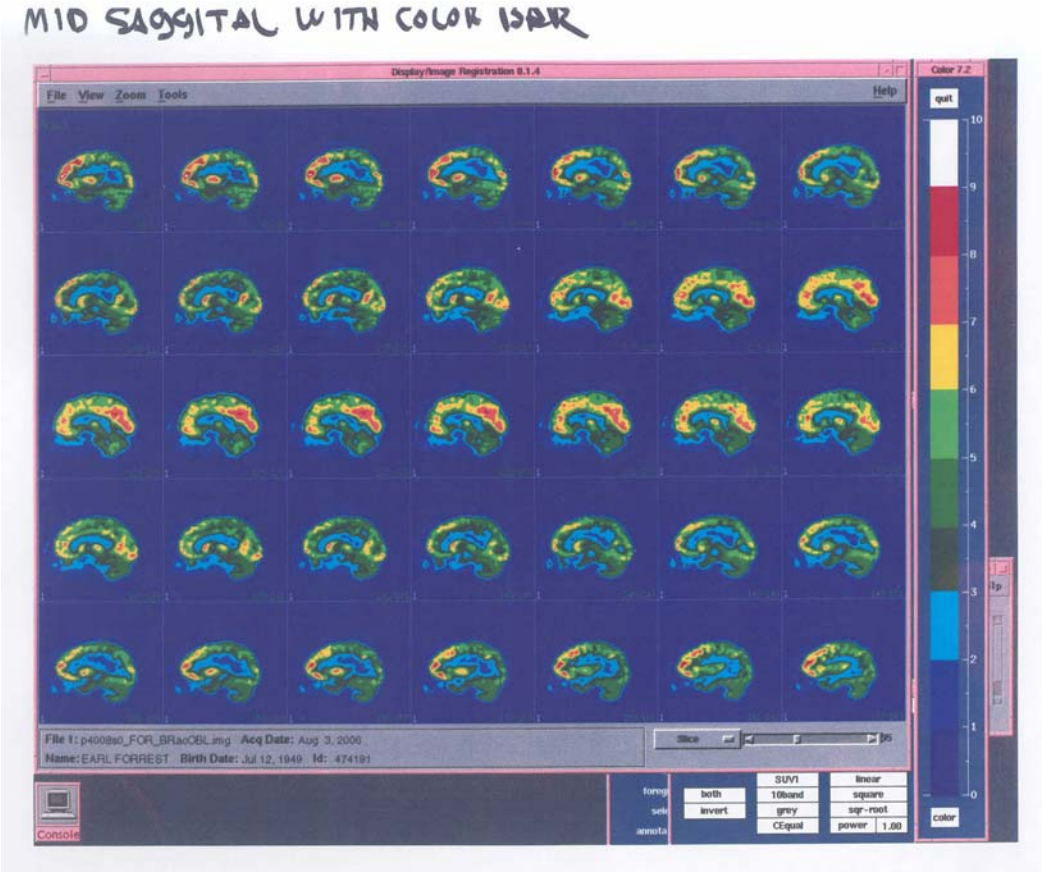
Counsel was on notice that Earl Forrest had brain damage. They knew he had head injuries, and medical records established those injuries (Ex. 11). He had a long history of alcohol and substance abuse (Ex. 13). In May, 2003, counsel discussed potential brain scans, such as CT, MRI, PET and SPECT scans (Ex. 7). But, counsel waited to act. Nearly a year later, in May, 2004, counsel hired Dr. Gelbort to conduct neuropsychological testing (H.Tr. 549-50, 551). Counsel also hired Dr. Evans (Tr. 1572). In June, 2004, Evans recommended that counsel obtain a PET scan (Ex. 59, H.Tr. 538). But, counsel failed to act. Then, in September, 2004, only two weeks before trial, their neuropsychologist recommended a PET scan because he thought it would reveal brain damage (H.Tr. 541, 549, Ex. 15).

Counsel delegated the task of obtaining it to another attorney, one not assigned to Forrest's case (H.Tr. 544, 547). When the first and only doctor that attorney called said a scan was not "medically necessary," counsel abandoned the investigation, despite Evans and Gelbort's recommendations (H.Tr. 547). Counsel down-played the usefulness of a PET scan and its effectiveness with juries (H.Tr. 555-59). But, counsel admitted that, had the doctor agreed to do the testing in St. Louis, she would have pursued obtaining the scan (H.Tr. 547). Had she requested the scan earlier and the doctor said no, she would have consulted someone else (H.Tr. 547, 551, 553).

Turlington did not want the State to know about the scan and was concerned that she could not obtain an *ex parte* order to transport Forrest to the

hospital under *State v. Anderson*, 79 S.W.3d 420 (Mo. banc 2002) (H.Tr. 631-32, 635).

Dr. Preston administered and evaluated Forrest's PET scan in 2006 (H.Tr. 78, 90, Exs. 16, 17, 21, 22, 22A, 23-33, 35, 38-50). That PET scan revealed frontal lobe damage, the area responsible for planning and executive decisions (H.Tr. 97-99, 126, Ex. 16 at 3, Ex. 17 at 3). The scans showed the damage in red and yellow (H.Tr. 106, 113, Exs. 23-34). Exhibit 33 for example, shows:



Pictures of the brain draw attention, but the real information is in the numerical data (H.Tr. 117). The Neuro Q quantitative data base showed that 18

regions of Forrest's brain were significantly underactive and damaged (Ex. 16, at 2-3). Exhibit 16, including a chart of all the damaged areas, shows:

BRAIN REGION	AXIAL SLICE	STANDARD DEVIATION BELOW NORMAL	APPROXIMATE CHANCE OF COMING FROM A NORMAL POPULATION
right superior frontal cortex	p9	-3.12	less than 9 in 10,000
right medial frontal cortex	p9	-3.87	less than 1 in 10,000
left superior frontal cortex	p9	-2.93	less than 17 in 10,000
left medial frontal cortex	p9	-3.08	less than 11 in 10,000
left sensory motor cortex	p9	-3.85	less than 1 in 10,000
right sensory motor cortex	p9	-4.06	less than 5 in 1000,000
left superior parietal cortex	p10	-3.50	less than 5 in 10,000
right superior parietal cortex	p10	-3.41	less than 7 in 10,000
left superior frontal cortex	p11	-2.02	less than 22 in 1000
right sensory motor cortex	p11	-3.03	less than 12 in 10,000
left superior parietal cortex	p12	-2.22	less than 14 in 1,000
right sensory motor cortex	p14	-2.69	less than 35 in 10,000
left sensory motor cortex	p14	-2.35	less than 95 in 10,000
left inferior parietal cortex	p16	-2.65	less than 40 in 10,000
left inferior parietal cortex	p18	-3.07	less than 11 in 10,000
left associative visual cortex	p20	-2.92	less than 19 in 10,000
left thalamus	~p42	-2.70	less than 36 in 10,000
right thalamus	~p42	-2.30	less than 14 in 1,000

(Ex. 16 at 2-3). His testing and this data left Dr. Preston "no doubt that Mr. Forrest has a damaged brain." (Ex. 16 at 3).

Motion Court's Findings

The motion court found Dr. Preston's testimony and findings credible (L.F. 392). It found, however, that, while the scan results were consistent with experts' trial testimony, the scan was not "definitively related to" Forrest's diagnosed mental disorders[8] (L.F. 392).

The motion court found counsel's rationale for not obtaining a PET scan a reasonable strategic decision (L.F. 393-94). She was concerned the State would find out the results of the PET scan if she were not allowed to proceed *ex parte* (L.F. 393). Counsel worried that, if the results were "normal," the state could argue that Forrest had no mental health problems, undermining the mental health mitigation (L.F. 393). Under *State v. Anderson*, 79 S.W.3d 420, 434 (Mo. banc 2002), counsel did not believe she could file an *ex parte* motion to transport Forrest (L.F. 393-94). Counsel did not want an MRI, because she thought it would not show damage and the State would use that to undercut the PET scan results (L.F. 393-94). The court concluded counsel's failure "to pursue this avenue of investigation" was reasonable (L.F. 394).

The court also found Dr. Preston's testimony cumulative to other expert trial testimony; it "merely corroborates, and is therefore cumulative to Dr. Smith's

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[8] Oddly enough, this statement, unsupported by the facts elicited, is identical to the motion court's statement in *Zink v. State*, S.Ct. 88279. Both statements are verbatim quotes from the State's proposed findings. *Id*.

testimony and Dr. Gelbort's testimony" (L.F. 394). The court ruled the scan's results, showing brain damage, was inadmissible in guilt phase, *citing United States v. Purkey,* 428 F.3d 738 (8th Cir. 2005) (L.F. 395). The court found no prejudice in penalty phase because Forrest killed three people and the jury had significant evidence of Forrest's mental defects, "much of which was not challenged by the State." (L.F. 396).

Standard of Review

This Court reviews the findings for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, Forrest must show 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). The Sixth Amendment requires counsel to "discover *all reasonably available* mitigating evidence . . ." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis in original).

To prove prejudice, Forrest 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." *Id*., at 534. When deciding if Forrest 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 397-98 (emphasis in opinion).

Contrary to the motion court's findings, counsel's failure to obtain a PET scan was not a reasonable strategic decision. It was a failure to investigate reasonably available mitigating evidence. Counsel simply waited too long to pursue the brain damage evidence. Counsel wanted to obtain a PET scan and dropped it because she ran out of time two weeks before trial. Once she had no time, she made post-hoc rationalizations why it would not have been that helpful.

Strickland requires that counsel's strategy be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo. App. S.D. 1994). Failing to conduct investigation relates to preparation, not strategy. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). Lack of diligence in investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. *Id*. at 1304.

Counsel's further suggestion that she did not want the PET scan because it might come back "normal" also was unreasonable. First, her actions in trying to pursue the PET scan belie her rationalization. Second, her suggestion that she was afraid to investigate because she might find out her client's brain was normal is nonsensical and contrary to *Wiggins*, this rationale would justify a failure to investigate any client's background.

Foregoing readily-available mitigation because it contains something harmful is unreasonable. *Williams*, 529 U.S. at 395-96. Williams had an extensive juvenile record. He had committed larceny, had been convicted of breaking and entering, and caused problems in the jail. *Id*. Although his records contained this

harmful information, that did not justify counsel's failure to introduce other mitigating evidence from the records. *Id*.

The record refutes the motion court's finding that Dr. Preston's testimony and the PET scan results would have been cumulative to the evidence presented at trial. Whether Forrest suffered from mental defects, including organic brain damage which should lessen his responsibility, was the central issue in the case. The record flatly refutes the motion court's finding that the trial expert's testimony regarding Forrest's mental defects was "not challenged by the State." Ahsens challenged this evidence at every opportunity. In guilt phase, Ahsens asked Dr. Smith if he saw Forrest's brain damage on an x-ray, MRI, or objective test (Tr. 1215). Smith acknowledged he did not (Tr. 1215). Ahsens questioned if Smith could point to any test so that a layman could look at it, and say, "See, here it is" (Tr. 1216).

In penalty phase, Ashens again attacked every expert and criticized their lack of objective testing. Ahsens emphasized that Dr. Smith was not a medical doctor (Tr. 1430). Smith's conclusions were based only on information Forrest provided (Tr. 1431). Ahsens disputed that Forrest had deficits since could function and was goal-oriented during the offense (Tr. 1433-34). Ahsens asked Smith:

> Is there a single objective feature which you can show us, an MRI, an x-ray, anything where you can point to something and say, "Here's this brain damage," or "Here's this problem with his brain."

(Tr. 1439). Ahsens repeated:

> Is there a single objective thing that you can show this jury that points out this kind of brain damage or brain dysfunction that you're talking about?

(Tr. 1440).

Ahsens would not concede the Gelbort was an expert (H.Tr. 1530). He emphasized that a PET scan was not administered and Gelbort obtained all his information from interviewing Forrest (Tr. 1556, 1557-58). Ahsens established that Gelbort was a paid expert who routinely testifies for defendants instead of the State (Tr. 1560-61, 1562-66).

Finally, Ahsens challenged Dr. Evans and his credentials (Tr. 1571-72). Like Smith and Gelbort, he was not a medical doctor (Tr. 1571). Ahsens told the jury he did not think Evans was a qualified expert (Tr. 1589).

The record proves that the State challenged the experts' testimony that Forrest had mental health defects, including organic brain damage. The jury did not buy the defense evidence (H.Tr. 560). As Ahsens had pointed out, lacking "objective" testing, the jury only heard paid experts who routinely testified for the defense, hired guns, unqualified to make a medical diagnosis.

By contrast, the motion court found Dr. Preston credible (L.F. 392). His credentials were impressive (Ex. 21, H.Tr. 79-84). He had two years each of radiology internal medicine, pediatrics, and pathology training (H.Tr. 79). He also had passed his Nuclear Medicine Boards (H.Tr. 80). He was a long-time member

of the Society of Nuclear Medicine and had practiced in nuclear medicine since 1964 (H.Tr. 80). He had conducted extensive research in his field as a professor and as Chief of the Division of Nuclear Medicine at the University of Kansas Medical Center (Ex. 21). He had received numerous honors and awards. *Id*.

Dr. Preston's testimony was not cumulative to the other experts' testimony. He was a medical doctor who conducted an objective brain scan. Whether Forrest had brain damage was a central issue in dispute. "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) (internal quotations omitted). A trial court does not have discretion to reject evidence as cumulative when it goes to the very root of the matter in controversy or relates to the main issue, like the defendant's mental state. *Black, supra, citing, State v. Perry*, 879 S.W.2d 609 (Mo. App. E.D.1994).

Since the State challenged defense counsel's evidence, asserting it was not objective, the PET scan was not merely cumulative. This was an entirely different type of evidence from that presented at trial. *See, Hoskins v. State*, 735 So.2d 1281 (Fla. 1999) (court vacated death sentence and ordered a new penalty phase, because a PET-scan showed an abnormality in Hoskins' brain); *Crook v. State*, 813 So.2d 68, 80 (Fla. 2002) (Wells, C.J., concurring in part and dissenting in part) (discussing the difference between "objective" evidence like a brain scan and

experts' subjective conclusions which rest largely on what the defendant told them and the experts' personal evaluations).

Contrary to the motion court's finding, Preston's testimony was admissible in guilt phase. In *United States v. Purkey*, 428 F.3d at 752, the court had "no doubt" that Preston was qualified to testify regarding the results of the tests he conducted on Mr. Purkey. But, Preston could not testify about Purkey's state of mind, and the defense offer of proof did not even attempt to tie the test results to the state of mind. *Id*. at 752-53.

By contrast, Dr. Smith, a psychologist testified in guilt phase that Forrest had a cognitive disorder, brain damage, and this defect combined with his Dysthymic Disorder and substance dependence, impaired Forrest's ability to process information and make decisions (Tr. 1207-08, 1213). Smith said Forrest had frontal lobe damage affecting his concentration, problem solving and reasoning abilities (Tr. 1207). This put Forrest's state of mind and his brain damage into issue in the guilt phase.

Dr. Preston's testimony and test results would have provided objective data to support Dr. Smith's findings. *See e.g., State v. Raine*, 829 S.W.2d 506, 510 (Mo. App. W.D. 1992); *State v. Windmiller*, 579 S.W.2d 730 (Mo. App. E.D. 1979). In *Raine*, the defense proffered evidence of medical records of Raine's accident when he was six years old and testimony from Raine's brothers, father, and brother's girlfriend about his abnormal behavior such as stealing women's underwear and self-mutilation. *Id*. This evidence was relevant, because it tended

to confirm or refute a fact in issue, whether he suffered from a mental disease or defect. *Id*. at 511. Testimony is admissible to support the factual basis for a mental disease or defect, but cannot provide the ultimate conclusion that the defendant suffers a mental disease or defect. *Id*. at 510-11.

In *State v. Windmiller*, 579 S.W.2d 730 (Mo. App. E.D. 1979), the court reversed a murder case because of the trial court's exclusion of witnesses' testimony about the defendant's character and behavior prior to the crime which supported the defense that he suffered from a mental disease or defect. Unlike *Raine*, Windmiller presented psychiatric testimony to support his defense of mental disease or defect. *Id*. at 731-33. The lay witnesses' testimony about Windmiller's behavior and character was proffered to support this testimony. *Id*. at 733. The behavior showed a marked change in Windmiller's attitude, demeanor, and personality in the last few months before the charged offense. *Id*. The jury might have considered the defense of mental disease or defect more favorably, had the jurors heard from witnesses familiar with Windmiller's life and behavior. *Id*. To exclude such evidence to support his sole defense was fundamentally unfair. *Id*.

Dr. Smith recognized that Dr. Preston's testing would have supported his mental diagnosis (H.Tr. 156-57). Objective data measuring brain function is helpful, especially when a prosecutor asks for this data (H.Tr. 157).

The motion court's conclusion that, because Forrest had killed three people, Forrest was not prejudiced by counsel's failure to obtain a PET scan is also clearly

erroneous. As this Court recently commented, "[t]here is no crime that, by virtue of its aggravated nature standing alone, automatically warrants a punishment of death." *Taylor v. State*, 262 S.W.3d 231, 252 (Mo. banc 2008), *citing Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). "The Eighth Amendment requires 'the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.'" *Id.*

Dr. Preston's testimony and the PET scan results would have provided compelling mitigation. "[E]vidence of impaired intellectual functioning is inherently mitigating…." *Hutchison v. State*, 150 S.W.3d 292, 308 (Mo. banc 2004) (relying on *Tennard v. Dretke*, 542 U.S. 274, 288 (2004)). In *Hutchison*, counsel was ineffective in failing to present mitigation because they limited the scope of their investigation into potential mitigation. *Hutchison*,150 S.W.3d at 307. Like Forrest's counsel, Hutchison's counsel failed to leave sufficient time to prepare adequately. *Id.* at 302.

Counsel's failure to investigate was particularly harmful. The State emphasized that none of Forrest's trial experts were medical doctors. Ahsens portrayed the experts as hired guns, paid for their opinions. Ahsens pointed out that all the information the experts relied on came from Forrest, who had an obvious reason to exaggerate his deficits. Ahsens repeatedly emphasized the lack of objective testing, like a brain scan. The jury bought Ahsens' argument that the defense had not proven brain damage. Forrest was prejudiced. A new penalty phase should result.

II. Medical Records Documenting Head Injuries

The motion court clearly erred in denying Forrest's claim that counsel was ineffective for failing to investigate and present available mitigating evidence of medical records that showed his head injuries, suicide attempts, and in-patient treatment, because this denied Forrest due process, effective assistance of counsel, 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 even if counsel provided the records to Dr. Gelbort, when Gelbort testified that his only evidence of head injuries was Forrest's self-reporting, counsel failed to present the available records.

Forrest was prejudiced because the records showed that he had received medical treatment for head injuries inflicted by a baseball bat, suffered other brain trauma from two suicide attempts and received mental health treatment for depression, alcohol and amphetamine dependence years before the crime. This available mitigating evidence would have supported the defense theory that Forrest had brain damage and resulting mental deficits. The medical records were objective evidence, not merely Forrest's self-report. Had jurors heard this evidence, a reasonable probability exists that they would have imposed a life sentence, especially since the State repeatedly criticized the trial defense experts for not relying on objective data in reaching their conclusions.

Counsel recognized the need to investigate background records and provide those records to their experts. Counsel unquestionably provided the medical records to Drs. Smith and Evans (Ex. 13, at 3, Ex. 59). Turlington felt sure she provided them to Dr. Gelbort too, as she remembered making a copy of all the records two weeks before trial and sending them to all the experts ((H.Tr. 531, 532, Ex. 11). She wanted them to have all relevant background information.

So, when Dr. Gelbort testified at trial that he took a history from Forrest, who reported being hit in the head with a baseball bat, but "he could have been misreporting" the incident (Tr. 1545), counsel acted unreasonably by doing nothing. Counsel failed to show Dr. Gelbort the records to refresh his recollection. She failed to ask him about the records. She failed to introduce the records into evidence.

Counsel could provide no strategic reason for failing to correct Dr. Gelbort. She admitted she was at fault for not correcting Gelbort and showing him the records at trial (H.Tr. 532). This was not strategic, but was an error, an oversight (H.Tr. 532, 533).

Counsel's failure to introduce the records themselves was also unreasonable. Counsel failed to present readily available mitigation, simply because it was not "crucial" (H.Tr. 532-33). But, counsel realized that the records showed head injuries, suicide attempts, and in-patient treatment for depression and alcohol and amphetamine dependence (H.Tr. 533). Counsel realized that

evidence, supporting a finding of brain damage (H.Tr. 533). This was objective data, supporting all of the defense experts' findings.

Kenyon's suggested that head injuries were not a big focus in the case (Ex. 57, at 31). Yet, all three experts testified about brain damage and the prosecutor continually criticized their testimony as unsupported by objective data. Kenyon suggested that they did not introduce the medical records because the baseball bat incident was not a "mitigation friendly" story (Ex. 57, at 34). But, counsel never explained why they provided the records to the experts if they did not want to use them. Dr. Gelbort brought up the baseball bat incident in his trial testimony on direct examination. The records would have merely confirmed the head injury and contained no information about what led to the injury.

Motion Court's Findings

The motion court found that all three experts received the medical records before trial (L.F. 390). The court found counsel exercised reasonable strategy in not introducing the records into evidence, because the baseball bat incident was not a "mitigation friendly" story (LF. 390-91). The motion court also found that, since Drs. Smith and Gelbort testified about Forrest's depression, alcoholism and methamphetamine addiction, more evidence about Forrest's past drug use and depression would have been cumulative (L.F. 391). Finally, the court found no prejudice, because "[t]he jury rejected Forrest's mental health defense." (L.F. 391). The court did not find this evidence strong enough to create a reasonable

probability of a different result in light of the nature of the murders and the strength of the State's case (L.F. 391).

Standard of Review

This Court reviews the findings for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, Forrest must show 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). The Sixth Amendment requires counsel to "discover *all reasonably available* mitigating evidence . . ." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis in original).

The failure to investigate and present background records is unreasonable. *See*, *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (counsel 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); *Rompilla v. Beard*, 545 U.S. 374, 383-85 (2005) (counsel ineffective for failing to investigate court records of prior convictions that showed his troubled childhood); *Hutchison v. State*, 150 S.W.3d 292, 305 (Mo. banc 2004) (counsel were ineffective for failing "to obtain readily available records showing mental illness, sexual abuse and impaired intellectual functioning" and school records, which would have shown Hutchison's difficulty in school and placement in special education).

In *Commonwealth v. Zook*, 887 A.2d 1218, 1230 (Pa. 2005), the court found counsel ineffective for failing to present medical and psychological records documenting Zook's brain injury. Counsel had the records, but never presented them in penalty phase. *Id*. "[C]ounsel's duty encompasses more that the mere recognition or collection of relevant documents; rather, counsel is charged with the duty to pursue all mitigating evidence of which he should reasonably be aware." *Id*. at 1234 (citation omitted).

Contrary to the motion court's finding that counsel's decision not to introduce the records was reasonable, Kenyon's explanation does not make sense. Counsel gave the records to Drs. Evans and Smith, thereby opening the door to the State's questions about them. Furthermore, on direct examination, Dr. Gelbort testified about Forrest's self-reported baseball incident. Thus, the incident was already before the jury.

The only question was whether Forrest had lied or exaggerated the head injury to help himself. Gelbort opined that he may have "misreported" the incident (Tr. 1545). The jury never heard the truth, that Forrest was treated at an emergency room for his head injury. The records would have shown Forrest was truthful; he had been injured. The records would have provided objective data of Forrest's head injuries, substance and alcohol treatment, and mental health treatment for depression and substance abuse. The records would have provided objective data to support the experts' conclusions of brain damage and other mental defects.

The records were not cumulative to the evidence presented at trial. Whether Forrest had brain damage and suffered from mental defects was a central issue. The jurors did not buy the defense evidence that Forrest had brain damage or depression, or that his mental problems worsened when he was drinking and doing drugs (H.Tr. 560). The State repeatedly criticized the defense failure to present any objective evidence showing brain damage (Tr. 1215-16, 1555-56). This evidence was in serious dispute. It was not cumulative. *See, Black v. State*, 151 S.W.3d 49, 56 (Mo. banc 2004), discussed *supra*.

Forrest was prejudiced, contrary to the court's findings. The medical records established that, on March 2, 1990, Forrest sustained a head injury and received medical treatment (Ex. 11, at 34-35). He suffered from closed head trauma, sustained a significant hematoma and had headaches (Ex. 11 at 36). His wound was significant, 7-9 centimeters long (Ex. 11, at 36). This was relevant mitigating evidence. It was objective evidence of the head injury that produced Forrest's brain damage.

The records also revealed two separate suicide attempts also relevant to his brain damage (Ex. 11, at 13-23). One treating physician found Forrest at risk for impulsive, acting out behavior (Ex. 11 at 17-20). These incidents occurred in 1993, more than seven years before the charged offense and shortly after his brain trauma (Ex. 11, at 13). The events were so significant that the E.R. doctor referred Forrest for in-patient psychiatric treatment at John George Pavillion (Ex. 11 at 13). The treating doctors there found that Forrest suffered from depression and alcohol

and amphetamine dependence (Ex. 11 at 13). This was objective evidence from treating physicians, not the subjective opinion of a paid defense expert. The records showed Forrest's history of mental illness and supported the trial defense with objective evidence.

As this Court recently found, failing to introduce psychological records to support an expert's opinion is unreasonable. *Taylor v. State*, 262 S.W.3d 231, 251 (Mo. banc 2000). Taylor's counsel called multiple experts in guilt phase, but did not recall them in penalty phase. *Id*. The jury had asked to see any psychological records during their guilt phase deliberations. *Id*. Since they had not been introduced into evidence, they were not sent back. *Id*. Counsel's failure to present the records in penalty phase was unreasonable since they "were replete with statements showing Mr. Taylor had suffered from mental illness since long before the murder." *Id*.

Here, too, the medical records would have provided support for the defense experts' testimony. They would have shown that Forrest suffered from mental illness long before the charged offenses. He had sustained brain trauma – objective support for the diagnosis of brain damage. Given Ahsens' repeated challenges to the defense experts' credentials and conclusions, counsel was obliged to provide objective support for them.

Forrest was prejudiced. This country does not have an automatic death penalty. *Taylor supra* at 252, *citing Woodson v. North Carolina,* 428 U.S. 280, 303 (1976). The jury should have been allowed to consider Forrest's character and record in

deciding what sentence to impose. The medical records would have provided valuable mitigating evidence and would have supported the mental health experts' opinions. They would have shown that Forrest actually suffered from brain damage, depression and substance addictions. He did not deserve to die. This Court should reverse and remand for a new penalty phase.

III. Mitigating Evidence: Employer, Neighbor and Friend

The motion court clearly erred in denying Forrest's claim that counsel was ineffective for failing to investigate and present available mitigating evidence from Dennis Smock, a former employer, Curt Fuller, a next-door neighbor, and Anthony Jacobs, a close friend, because this denied Forrest due process, effective assistance of counsel, 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 had no strategic reason for failing to investigate the witnesses and Forrest was prejudiced.

Smock remembered Forrest as a good worker, who everyone liked, but who could not handle complex tasks. Fuller saw Forrest's father hit him, knocking him down, and knew the father had a drinking problem. Jacobs recounted Forrest's kindness and his alcohol and substance abuse. This evidence was not cumulative, as no other employer or neighbor testified and Jacobs knew about Forrest's efforts to turn his life around and to quit using drugs and alcohol. Had jurors heard this mitigating evidence, they may have opted for a life sentence.

Counsel had a duty to "discover *all reasonably available* mitigating evidence . . ." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis in original). Counsel abdicated that duty, failing to investigate readily available mitigating witnesses. Counsel knew about Dennis Smock and Anthony Jacobs and could have easily located

Forrest's neighbor, Curt Fuller. But counsel failed to investigate any of these witnesses, even though they had their names, addresses and phone numbers. Counsel had no strategic reason for their failures.

Dennis Smock – Employer

Forrest gave trial counsel a list of potential witnesses, which included Dennis Smock, a former employer (H.Tr. 210, 568, Ex. 51). Turlington asked Kunce, her investigator, to find contact information for Smock (H.Tr. 210, Ex. 52). Kunce located Smock's address and phone number, but no one followed-up and contacted Smock (H.Tr. 212-14, Ex. 52, H.Tr. 560-70, Ex. 57, at 47-48). Both Turlington and Kenyon acknowledged they had no reason not to interview Smock (H.Tr. 570, Ex. 57 at 48).

Had counsel contacted Dennis Smock, they would have discovered that he owned a roofing company for 30 years (H.Tr. 168). Forrest worked for him for two to four years in the late 1980's or early 1990's (H.Tr. 168). Forrest was a helper who tried hard, but did not quite get the job done properly (H.Tr. 171). He would drop things and trip (H.Tr. 171). Smock did not feel Forrest could do a foreman's job (H.Tr. 171). Smock emphasized that Forrest worked really hard and tried his best, but needed supervision (H.Tr. 171-72). Everyone liked Forrest (H.Tr. 172). He tried hard, never caused trouble, and never slacked off on the job (H.Tr. 172).

Forrest had struggles, and alcohol seemed to be the problem he fought most (H.Tr. 175). Forrest missed a couple of days of work due to his problems with alcohol (H.Tr. 177, 181). He and Smock discussed work and religion (H.Tr. 173). Smock referred Forrest to a missionary program (H.Tr. 174, 181). Smock also invited Forrest

into his home (H.Tr. 176). Smock really liked and cared about Forrest and remembered him as a nice and friendly person (H.Tr. 175, 178). He was willing to testify (H.Tr. 179). He had been at the same location with a listed phone number for the past 12 to 14 years (H.Tr. 180).

Curt Fuller- Neighbor[9]

Counsel also failed to investigate any of Forrest's neighbors, even though Kenyon went to California (Ex. 57 at 42-43,H.Tr. 566). They did not ask Forrest who were his neighbors (H.Tr. 566). Both attorneys acknowledged they had no trial strategy for failing to investigate the neighbors (H.Tr. 566, Ex. 57 at 43). Kenyon said his failure was due to time constraints (Ex. 57 at 42-43).

Curt Fuller, Forrest's next door neighbor, knew Forrest throughout grade school and high school (Ex. 53, at 6-8). Forrest's mother always screamed at Forrest, much more than his brother, Billy. *Id*. at 9. Fuller went rabbit hunting with Forrest. *Id*. at 12-13. Fuller liked Forrest; he was good to talk to and never

[9] In the amended motion, counsel listed the neighbor as "Duane" Fuller, rather than "Curt" Fuller (L.F. 173, 241). Fuller's address was the same (L.F. 241). The State objected to Forrest calling Curt to testify and correcting the motion by interlineation (H.Tr. 66-67). The motion court found that the nature of Curt's testimony was fully pled, the State was not surprised, and allowed the substitution (H.Tr. 68). The State has not appealed that ruling.

picked fights, unlike Forrest's younger brother, Billy. *Id*. at 13-15. Fuller did not have much to do with Billy, because Billy lied and caused trouble. *Id*. at 15.

Fuller recalled seeing Forrest's father drink and could smell the alcohol on his breath. *Id*. at 16-17. Forrest's father was "ripped" or drunk every day. *Id*. at 26. He could not talk plainly and tripped and fell on the sidewalk. *Id*. at 26-27. Fuller thought he was intoxicated. *Id*.

Fuller also remembered Forrest's father's nasty temper. Id. at 17. One time, the kids took a "tote-goat," a scooter with a rack that Forrest's father kept in his garage. *Id*. The kids broke it, and when Forrest's father saw what happened, he hit Forrest with his fist on his temple and forehead. *Id*. at 18-19. The blow knocked Forrest flat. *Id*. Forrest ran away as his father screamed and cursed at him. *Id.* at 20.

Anthony Jacobs

Counsel knew about Jacobs before trial, because counsel's investigator spoke to Jacobs when he attempted to locate another witness, Doug Del Mastro, on August 31, 2004 (H.Tr. 194, 565 204-05, Ex. 18). Kunce spoke to Jacobs by phone, and Jacobs told Kunce that he knew Del Mastro and Forrest (H.Tr. 195, 207). Kunce provided this information to counsel, but they did no follow-up and never interviewed Jacobs (H.Tr. 208-10, 565, Ex. 457, at 40-41). Neither attorney had a strategic reason for failing to interview Jacobs (H.Tr. 565, Ex. 57 at 41).

Jacobs was Forrest's friend since the early 1980s (H.Tr. 186-7). Forrest was fun, intelligent and nice (H.Tr. 187). Jacobs never saw him angry (H.Tr.

187). Forrest was a good and loyal friend, who was good with children (H.Tr. 187, 189).

Jacobs remembered Forrest had problems with alcohol and drugs (H.Tr. 189-92). Jacobs never saw him without alcohol (H.Tr. 189, 197). Forrest drank a lot, hard liquor, often straight from the bottle (H.Tr. 190). Forrest also used drugs, like methamphetamine and speed (H.Tr. 191, 198). Forrest moved to Missouri, in part to get away from drugs and to turn his life around (H.Tr. 192-93, 196). When Jacobs talked to Forrest by phone in 2000, after his move to Missouri, Jacobs thought Forrest was doing better (H.Tr. 198).

Motion Court's Findings

Perhaps, because both attorneys admitted their failure to investigate and their lack of strategy in limiting their investigation, the motion court never addressed the unreasonableness of their conduct, but decided the claim on the prejudice prong. The motion court found Smock's testimony about religion cumulative to Clayton Forrest's testimony (L.F. 398). The court found Fuller's testimony about Forrest's father's abuse and about Forrest's drug use cumulative to Forrest's brother, William's, testimony (L.F. 397). Jacobs' testimony about Forrest's drug and alcohol use and kindness was cumulative to the testimony of Doug Del Mastro, Susan Del Mastro, Clayton Forrest, and Forrest's other stepchildren (L.F. 397). The court also found no prejudice in failing to call these three witnesses, given the strength of the State's case (L.F. 398).

Standard of Review

This Court reviews the findings for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, Forrest must show 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). The Sixth Amendment does not require counsel do some investigation. Rather, it requires counsel to "discover *all reasonably available* mitigating evidence . . ." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis in original).

Counsel failed to interview Smock and Jacobs, even though they had their names, addresses and phone numbers. They admitted they had no reason for failing to do this basic investigation. They also failed to talk to any neighbors about Forrest. Again, they could provide no reason for their failure. Counsel acted unreasonably. The only issue was whether Forrest was prejudiced.

The motion court found these witnesses' testimony cumulative to other mitigating evidence presented at trial. This finding is clearly erroneous.

"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) (internal quotations omitted). Since no other employer testified, Smock's testimony about Forrest's work history cannot be considered cumulative. Furthermore, that Forrest was a hard worker, but could

not complete complex and difficult tasks, was consistent with his brain damage. He could only be a helper, doing simple tasks. Smock's testimony about Forrest's kindness and goodness was compelling. He had owned a roofing business for thirty years, and Forrest stood out among all his employees. This was a testament to Forrest's goodness and his character. Surely, one juror may have found this mitigation worthwhile – a reason for a life sentence.

Fuller's testimony was not cumulative. No neighbor testified about Forrest's childhood abuse at trial. Forrest's brother, Bill, testified, but the jury knew a family member might be biased and have every reason to exaggerate the abuse. Forrest's father punched his son in the head with his fist, in front of other neighborhood children. This established the severity of the abuse and may well have contributed to Forrest's documented brain damage. Fuller's testimony also established the Forrests' generational alcoholism. This supported the experts' testimony, critical since Ahsens argued they were "bought and paid for" and could not be believed (Tr. 1728).

Jacobs' testimony was similar to that of Doug Del Mastro, Susan Del Mastro, Clayton Forrest and Forrest's other stepchildren. But, none of those witnesses talked about Forrest's efforts to leave California and drugs and alcohol behind when he moved to Missouri. Jacobs knew that Forrest was trying to turn his life around. He tried to overcome his addiction, but could not do it without medical intervention. Again, a juror may have found this mitigating evidence supported a life sentence.

Because counsel unreasonably failed to investigate readily available mitigation, this Court should reverse and remand for a new penalty phase.

IV. Proportionality Review

The motion court clearly erred in denying an evidentiary hearing on this Court's failure to engage in meaningful proportionality review because that ruling denied Forrest due process, freedom from cruel and unusual punishment, and a full and fair determination of his claims, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, in that this Court fails to comply with § 565.035.6, which requires it to accumulate records of all cases where death or life without parole sentences were imposed and fails to consider all similar cases in its review, including those in which the defendant received a life sentence or the State did not seek death.

When reviewing Forrest's death sentence, this Court did a perfunctory review and only compared his case to four death penalty cases involving multiple murders. A thorough review would have included similar cases in which the brain-damaged defendant killed multiple people or a law enforcement officer, but still received a life sentence.

The motion court denied a hearing on the claim that this Court fails to provide the meaningful proportionality review guaranteed under § 565.035 (L.F. 338). That ruling denied Forrest his federal and state constitutional rights to due process, freedom from cruel and unusual punishment, and a full and fair determination of his claims.

Forrest's amended motion alleged that this Court' proportionality review is unconstitutional (L.F. 195-97, 271-72). This Court lacks the complete database, § 565.035.6 required to conduct meaningful proportionality review (L.F. 195). Section 565.035.6 requires that this Court accumulate the records of all cases in which sentences of death or life without parole were imposed after May 26, 1977 (LF. 195). As of May, 1994, this Court did not have one hundred and eighty-nine life cases, as the statute requires (L.F. 195, 271). This Court cannot conduct the proportionality review the Legislature has mandated if it neither has nor uses the data the statute requires (L.F. 195).

The motion also alleged that this Court fails to consider all similar cases, including those resulting in a life sentence, as § 565.035 requires (L.F. 195). Instead, this Court considers only those cases in which a similar aggravator was found and death was imposed (L.F. 195). *See, State v. Forrest*, 183 S.W.3d 218, 232, n. 52 (Mo. banc 2006) (Court lists four cases where the multiple homicide victim aggravator was found). This Court did not consider the many cases similar to Forrest in which a life sentence resulted (L.F. 195-96).

Motion Court's Ruling

The motion court denied this claim without a hearing, ruling it meritless, contrary to Missouri law, unsupported by correct factual allegations, and not cognizable (L.F. 338). The State requested such a denial, citing this Court's opinion in *State v. Edwards*, 116 S.W.3d 511, 548, n. 6 (Mo. banc 2003); *Lyons v.*

State, 39 S.W.3d 32, 44-45 (Mo. banc 2001); *State v. Clay*, 975 S.W.2d 121, 146 (Mo. banc 1998).

Standard of Review

This Court reviews the motion court's findings and conclusions 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).

A motion court must hold an evidentiary hearing if (1) the movant cites facts, not conclusions that, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record; and (3) the matters complained of prejudiced the movant. *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo. banc 2002); Rule 29.15(h). "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Id*. at 928 (emphasis in original).

Due process requires a fair hearing in 29.15 proceedings. *Thomas v. State*, 808 S.W.2d 364, 367 (Mo.banc1991); *In re Murchison*, 349 U.S. 133, 136 (1955). Rule 29.15(h) creates a presumption that courts hold hearings. Its language creates an expectation, protected by the Due Process Clause, *Ford v. Wainwright*, 477 U.S. 399, 428 (1986) (O'Connor, J., concurring and dissenting) that cannot be arbitrarily abrogated. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). Denying a hearing a postconviction rule requires can violate a defendant's right to due

process. *See, e.g., People v. Kitchen*, 727 N.E.2d 189 (Ill. 2000) (Post-Conviction Hearing Act should not be so strictly construed that a fair hearing is denied and the Act's purpose, of vindicating constitutional rights, is defeated).

The amended motion alleged factual allegations, that, if proven, would entitle Forrest to relief. It alleged that this Court fails to comply with the statute on proportionality review because, contrary to the statute, it does not compile similar cases and does not compare all similar cases, including life sentences. The motion court denied the claim, ruling it meritless and contrary to Missouri law.

Forrest requests this Court reconsider Missouri decisions, such as *Edwards*, *Lyons* and *Clay*, *supra*, especially in light of Justice Stevens' recent statement in *Walker v. Georgia*, 555 U.S. ____ , 2008 WL 2847268 (2008), respecting the denial of certiorari. Sentencing someone to death is cruel and unusual punishment under the federal and state constitutions if the punishment is meted out arbitrarily and capriciously. *Furman v. Georgia*, 408 U.S. 238 (1972). Georgia sought to comply with *Furman*, by enacting a new death penalty statute. *Walker*, *supra* at 1. Among the new procedures was the requirement of proportionality review. *Id.* This important procedural safeguard was intended to avoid arbitrariness and assure proportionality. *Id*., at 1, *citing Gregg v. Georgia*, 428 U.S. 153 (1976); *Zant v. Stephens*, 462 U.S. 862, 890 (1983). Georgia's Supreme Court expressly stated that its proportionality review "uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not

imposed." *Walker, supra* at 1, quoting the Georgia Supreme Court's answer to the certified question in *Zant*, 462 U.S. at 880, n. 19.

But, in Mr. Walker's case, the Georgia Supreme Court conducted an "utterly perfunctory review." *Walker, supra* at 2. Its review contained a single sentence saying it "considered whether imposition of the death penalty in this case was proportionate as compared to sentences imposed for similar offenses." *Id*. The Court referenced the cases cited in the Appendix to support its conclusion that Walker's punishment was not "disproportionate in that each involved a deliberate plan to kill and killing for the purpose of receiving something of monetary value." *Id*., *quoting*, *Walker v. State*, 653 S.E.2d 439, 447-448 (2007). The Court merely referenced the Appendix, which contained a string citation of 21 cases in which juries imposed death sentences. *Walker, supra* at 2. The Court never referenced the cases' facts or the aggravating circumstances. *Id*.

Justice Stevens was concerned because numerous cases involved offenses like Walker's in which the juries imposed life. *Id*. at 3. In other, similar cases, the State did not even seek death. *Id*. Similar cases, where juries imposed life or the State did not seek death, are "relevant to the question of whether a death sentence is proportionate to the offense." *Id.*

Georgia's proportionality review, limited to other cases in which death was imposed, began to change around the time of *Pulley v. Harris*, 465 U.S. 37 (1984). In *Pulley*, the Court held that the "Eighth Amendment does not require comparative proportionality review of every capital case." *Walker, supra* at 3,

citing Pulley. Justice Stevens noted that the *Pulley* decision should not be read to undermine that proportionality review is an important component of the Georgia scheme. *Walker, supra*. The likely result of the *Walker* Court's limited review is the "arbitrary or discriminatory imposition of death sentences in the contravention of the Eighth Amendment." *Id*. at 4.

A second problem with the Georgia Supreme Court's review is its failure to comply with the statute's directive to maintain detailed trial judge reports in murder cases. *Id*. at 4. "When a defendant's life is at stake, th[is] Court has been particularly sensitive to insure that every safeguard is observed." *Id., quoting, Gregg*, 428 U.S. at 187 (joint opinion of Stewart, Powell, and Stevens, JJ.). Justice Stevens warned:

> The Georgia Supreme Court owes its capital litigants the same duty of care and must take seriously its obligation to safeguard against the imposition of death sentences that are arbitrary . . .

Walker, supra at 4.

Missouri's death penalty statute is nearly identical to Georgia's. *See*, § 565.035. Our statute requires this Court consider "similar cases, considering both the crime, the strength of the evidence, and the defendant." § 565.035.3 (3). Like Georgia, our statute requires this Court to "accumulate records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed . . ." § 565.035.3 (6).

Like Georgia, this Court does not review all similar cases as the statute requires. This Court routinely affirms death sentences by only comparing cases in which death was imposed, using "aggravating circumstances as the sole criteria for comparing one death penalty case to another." *State v. Davis*, 814 S.W.2d 593, 607 (Mo. banc 1991) (Blackmar, J., concurring in part and dissenting in part). This Court has refused to compare cases "in which the state chose not to charge a defendant with capital murder, the state agreed to a plea bargain whereby a defendant pled guilty to a lesser charge, the conviction was for an offense less than capital murder, or the state waived the death penalty." *State v. Bolder*, 635 S.W.2d 673, 685 (Mo. banc 1982). *See, also*, *State v. Black*, 50 S.W.3d 778, 793-96 (Mo. banc 2001) (Wolff, J. dissenting) ("This Court has eschewed the statutory invitation to treat like cases alike by refusing to consider similar cases (or even the same case) where lesser sentences are given to other defendants," relying on *Cooper Industries Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424 (2001)).

This Court fails to comply with the Eighth Amendment's guarantee against the arbitrary and capricious imposition of a death sentence. *Walker, Gregg, and Zant, supra*. It also denies due process. When a state statute includes "language of an unmistakable mandatory character," the statute creates an expectation protected by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 428 (1986) (O'Connor, J., concurring and dissenting). Under the Due Process Clause, a state-created right cannot be arbitrarily abrogated. *See Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

Since Missouri provides a statutory right of proportionality review and has created a protected liberty interest, in implementing that review, the State and this Court must ensure it meets due process. But, this Court does not maintain all similar cases as the statute requires (L.F. 194). In May, 1994, this Court did not have 189 life cases as required under § 565.035.6 (L.F. 195, 271).[10]

Forrest did not obtain meaningful proportionality review. As in *Walker*, this Court's review was perfunctory. *State v. Forrest*, 183 S.W.3d 218, 232 (Mo. banc 2006). It listed the aggravating circumstances and then, in a footnote listed a string citation of four death cases in which the defendants committed multiple murders. *Id*., n. 52. The Court never referenced the facts of those cases or the aggravating circumstances found by their juries. *Id.* at 232.

Had the Court conducted an adequate proportionality review, it would have compared Forrest's case to other similar cases, like Christopher Creed,[11] from

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[10]Forrest requests that this Court take judicial notice of Professor Galliher's report submitted in *State v. Parker*, Mo.S.Ct. No. 74794, reported at 886 S.W.2d 908 (Mo. banc 1994). *See In re Estate of Danforth*, 705 S.W.2d 609, 610 (Mo. App., S.D.1986) (providing for judicial notice of the record resulting in an opinion to determine grounds on which opinion is based).

[11] Forrest references these murder cases that resulted in life without probation or parole sentences since, pursuant to Section 565.035.6, this Court should have the trial judges' reports in these cases.

Camden County. The State initially sought death, but allowed Creed to plead guilty for a sentence of life without probation or parole. Creed had killed two people, including a reserve deputy and a fireman. Brain scans revealed Creed's brain damage.

Toby Viles, from Laclede County, committed multiple murders, killing all siblings. He, too, was brain-damaged and was allowed to plead to life without probation or parole.

Pam Burns, in Howell County, also pled to life without probation or parole. She had killed her son-in-law and two grandchildren. She, too, had brain damage.

Levi King pled to life without probation or parole in McDonald County. He had killed two people in Missouri and five more in Texas. His mental illness mitigation made a life sentence possible.

Richard DeLong suffocated a mother, her unborn baby, and three children. Nevertheless, he received life without probation or parole. The jury heard substantial mitigation, including his addiction to drugs.

James Schnick also received a life sentence without probation, even though he killed seven people, including several young children. *See, State v. Schnick*, 819 S.W.2d 330, 331 -332 (Mo. banc 1991) (reversing death penalty case for a new trial). Schnick was allowed to plead to life on remand.

Other cases, in which defendants committing multiple homicides received life sentences include: *State v. Beishline*, 926 S.W.2d 501, 505 (Mo. App. W.D. 1996) (convicted of one murder, but the State introduced evidence of other victims

including Theodore Pisarek, Emilie Mersey, and Della Crane. Jury rejected cocaine psychosis defense in finding Beishline guilty, but sentenced him to life without probation or parole.); *State v. Blankenship*, 830 S.W.2d 1 (Mo. banc 1992) (defendant convicted of five counts of first degree murder, robbery, receiving stolen property and unlawful use of a weapon. The defendant robbed a National Supermarket, forced the victims to lie on the floor on their stomachs, and then shot them); *State v. Gilyard*, 257 S.W.3d 654, 655 (Mo. App. W.D. 2008) (defendant convicted of six counts of first degree murder and sentenced to life without probation or parole in serial murder case involving women found with defendant's DNA).

This Court's review of Forrest's death sentence, listing four cases involving multiple homicides, never explains why Forrest's case is more like other death-sentenced defendants than defendants with life sentences. Forrest was brain damaged and addicted to drugs and alcohol. When his case is compared to other similar cases, the death sentence is shown to be disproportionate. This Court should reverse for a hearing or, alternatively, impose life without probation or parole.

V. State Introduced Unrelated Weapons and Misled Jury About Weapons

The motion court clearly erred in denying Forrest's claim that counsel was ineffective for failing to object to the State's improper and misleading testimony and evidence of unrelated lethal weapons, two hunting knives[12] with 9 and ½ inch blades, because this denied Forrest due process, effective assistance of counsel, 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 the State misled the jury into believing that Forrest had two knives instead of one; the weapon(s) were unrelated to and unconnected with the charged offense; and Ahsens emphasized this evidence-eliciting testimony about the knives through two witnesses, introducing a picture of a knife and passing it to the jury, and then arguing the jurors should sentence Forrest to death because Forrest would be dangerous to fellow prisoners, staff and guards. Counsel acknowledged they had no strategic reason for not objecting to the unrelated weapons.

The State misled the jury, telling them that Forrest had two large hunting knives, one concealed on him when he was arrested and one in the living room propped up against a wall near the front door (Tr. 908, 1023, 1036, 1041).

[12] Although there was only one knife, Forrest refers to "knives" in this point because the State gave the impression that there were two knives.

Highway Patrolman Roark admitted this was false, that Forrest had only one knife (H.Tr. 611, 617). Further, despite that the knives had no connection to the charged offense, Prosecutor Ahsens emphasized the specter of unrelated weapons, eliciting testimony about them through two witnesses (Tr. 908, 1023). He introduced a picture of the knife as an exhibit and passed it to the jury (Tr. 1036, Ex. 45). And, he argued that Forrest should be sentenced to death because he posed a danger in prison –to fellow prisoners, guards and staff (Tr. 1725).

Defense counsel inexplicably failed to object. They acknowledged their mistake – they had no strategic reason for allowing this prejudicial evidence to be introduced (Ex. 57, at 58, H.Tr. 593-94). They did nothing to correct the false testimony that Forrest had two knives, instead of the one he normally carried for legitimate purposes in that rural, farming area. The unrelated weapons were extremely prejudicial. This Court should reverse and remand for a new trial.

Jury Hears False Testimony About Weapons

During the State's case-in-chief, Missouri State Highway Patrol Corporal Henry James Folsom testified that, when he arrested Forrest, he "had a large knife on his side. I took the knife from his side, and I noticed that he was bleeding…" (Tr. 908). But, Ahsens was not content with that. Instead, he elicited more details about this knife and another knife that never even existed. Missouri State Highway Patrol Sergeant Ralph Roark repeated Corporal Folsom's testimony that Folsom removed a knife from Forrest during his arrest (Tr. 1023). Not satisfied with these two references, Ahsen asked Roark what kind of knife Forrest had (Tr.

1023). Sergeant Roark described the knife as a "hunting knife, fixed blade. I think it had a nine and a half inch blade on it; a rather large knife" (Tr. 1023).

Then, Ahsens used a crime scene diagram and had Roark discuss all the other evidence he supposedly found inside the house (Tr. 1027-40). Roark described another weapon, a large hunting or survival type knife found in the house, propped up against the living room wall near the front door (Tr. 1036). Ahsens used a picture of this knife as Exhibit 45, offering it into evidence and passing it to the jury (Tr. 1036, 1041).

The State then argued to the jury that Forrest should be sentenced to death because he posed a danger to fellow prisoners, staff and guards (Tr. 1725). Society was still at risk, according to Ahsens (Tr. 1725). Ahsens warned jurors that society was depending on them to sentence Forrest to death (Tr. 1733).

Counsel Failed to Object

Both defense attorneys acknowledged they had no trial strategy for failing to object to the knives (Ex. 57, at 58, H.Tr. 593-94). Turlington was under the impression that the police had found two separate knives (Tr. 594). Sgt. Roark had created this impression, testifying under oath at his deposition that the knife he photographed in the living room was distinct from the knife found on Forrest when he was arrested (H.Tr. 615). He repeated that falsehood at trial, again suggesting Forrest had two knives, one on his person and one in the living room by the front door (Tr. 1036, H.Tr. 611). Counsel recognized that the knife in the living room was irrelevant to the shooting and she had no reason for not objecting

(H.Tr. 593). Co-counsel, Kenyon, agreed; they should have objected (Ex. 57, at 58). Kenyon thought a weapon found on the defendant might be minimally relevant, but could not explain why he failed to object to the prejudicial evidence (Ex. 57, at 58). Turlington could recall no trial strategy for her failure to object (H.Tr. 594).

Motion Court's Findings

The motion court found that the knife in State's Exhibit 45 was taken from Forrest upon arrest (L.F. 381-82). The court ruled that this knife was admissible, because it showed Forrest's condition and state of mind immediately after Forrest's shootout with the police (L.F. 382). Any objection to the knife or the picture of it would have been meritless (L.F. 382). Even if the testimony and evidence of the knife were objectionable, Forrest was not prejudiced in the guilt phase, given the evidence of the shootings of Wells, Smith, Barnes and Wofford (L.F. 382). The court also found no prejudice in penalty phase, because the State produced evidence of Forrest's illegal possession of multiple weapons, including guns and another knife (L.F. 383).

Standard of Review

This Court reviews for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15.

The motion court's findings were clearly erroneous. The weapons were unrelated to the charged offense and thus, irrelevant. Weapons are properly admitted only when they "tend to connect the defendant with the crime, prove the

identity of the deceased, shows the nature of any wounds or throw any relevant light upon any material fact in issue." *State v. Larette*, 648 S.W.2d 96, 103-04 (Mo. banc 1983). Here, the knives lacked any connection to the shootings, they did not prove the identity of the deceased, they did not show the nature of any wounds, and they shed no light on any issue. That Forrest had a knife on his person when he was arrested proved nothing. *See, State v. Jones*, 583 S.W.2d 212 (Mo. App. W.D. 1979) (evidence that the defendant carried a concealed weapon found on him at the time of his arrest was inadmissible where the gun was unrelated to the charged offense).

The motion court fails to explain how the two knives were relevant to any issue in the case. Forrest surrendered after the shootout with the police and never attempted to use a knife. The knife on his person was irrelevant and should have been excluded. The knife supposedly found by the front door also had no relevance as it was unconnected to the charged offense or any issue in the case.

The motion court also clearly erred in finding no prejudice. "Lethal weapons completely unrelated to and unconnected with the criminal offense for which an accused is standing trial have a ring of prejudice seldom attached to other demonstrative evidence." *State v. Charles*, 572 S.W.2d 193, 198 (Mo. App. K.C. 1978). Even though the evidence of guilt in *Charles* was substantial, the court reversed because of the improper admission and reference to the unrelated weapon during closing argument. *Id. See also, State v. Reyes*, 740 S.W.2d 257

(Mo. App., W.D. 1987); *Walker v. United States*, 490 F.2d 683 (8th Cir. 1974) (admission of unrelated weapon was reversible error).

Here, the evidence that Forrest shot the victims was uncontested. The State's false suggestion that Forrest had a large hunting knife at the front door portrayed him as armed and ready to stab anyone who entered. The prejudice was even greater in penalty phase when Ahsens argued that Forrest was dangerous and fellow inmates, guards and staff would be in danger if he were sentenced to life. Jurors were left was the image of Forrest in prison with a shiv, ready to attack all those around him. The State used this false evidence to obtain a death sentence. The prosecutor's presentation of false and misleading evidence as a basis for a death sentence violated due process and the right to reliable determination of the punishment, as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Due Process and Reliability

When the State uses false information to obtain a death sentence it violated the Eighth Amendment. This Court has ruled that a death sentence cannot be based on such false evidence and is not subject to harmless error review. *State v. Griffin*, 848 S.W.2d 464, 471 (Mo. banc 1993). In *Griffin*, the State introduced numerous prior convictions, but one of those convictions was actually a conviction of another Reginald Griffin. *Id*. This Court reversed, ruling that it would not condone using false information to obtain a death sentence. *Id*.

A prosecutor's knowing presentation of false testimony is "inconsistent with the rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). When a prosecutor fails to correct false testimony, he violates due process. *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959). The heightened need for reliability in capital cases, *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985), requires that the State not present false testimony to obtain a death sentence.

Counsel was ineffective for failing to object to the evidence of knives Forrest supposedly had. *See*, *Adams v. State*, 677 S.W.2d 408 (Mo. App. W.D. 1984) (counsel's failure to object to admission of weapon was ineffective). Here, as in *Adams*, trial counsel had no reasonable strategy for failing to object. The knives were irrelevant and prejudicial. This Court should reverse.

VI. Failure to Object to Prior Convictions

The motion court clearly erred in denying Forrest's claim that counsel was ineffective for failing to object to the admission of State's Exhibit 60, California Department of Corrections records, and Exhibit 61, a record of a prior conviction, because that denied Forrest effective assistance of counsel, due process, a fair trial, confrontation 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 Exhibit 61 did not comply with Section 490.130 as it had no judge's certification and Exhibit 60 contained improper hearsay and referenced charges not resulting in convictions. Counsel had no strategy for failing to object, did not know the law for admitting out-of-state convictions, and "spaced out" during the trial. Forrest was prejudiced since the State argued his prior criminal history as a basis for a sentence of death.

Trial –Prior Criminal History

During penalty phase, the State offered into evidence Exhibit 61,[13] a purported record of Forrest's conviction for possession of a concealed firearm (Tr. 1351). The exhibit had a seal and stamp of Kiri Torres, Chief Executive Officer

[13] State's Exhibit 61 was marked as Movant's Exhibit 5 and State's Exhibit 60 was marked as Movant's Exhibit 6 and introduced at the evidentiary hearing (H.Tr. 75). Forrest will reference the State Exhibit numbers to avoid confusion.

and Clerk of Santa Clara County Clerk, but lacked the judge's certification as Section 490.130 requires (Ex. 61). The State also introduced Exhibit 60, a twenty-two page document purporting to be California Department of Justice records (Tr. 1351). The State announced in open court that the records showed a 1968 conviction for possession of marijuana, a 1979 conviction for transportation, sale, or manufacture of a controlled substance and a 1987 conviction for possession of a concealed firearm by a convicted felon (Tr. 1351). The majority of the records were a criminal history transcript detailing arrests or charges that had not resulted in convictions (Ex. 60).

Defense counsel did not object to either exhibit (Tr. 1351).

In closing argument, Ahsens argued Forrest's criminal history was a reason to give him death (Tr. 1725-26).

Post-conviction–Counsel's Failure to Object

Forrest claimed that counsel was ineffective for failing to object to this aggravating evidence (L.F. 79-83, 200). Counsel Turlington admitted that she "forgot" about the statutory requirements for out-of-state convictions under Section 490.130 (H.Tr. 598-99). She did not think about it and failed to consider the statute's requirements during trial (H.Tr. 599-600). She did not know whether she considered making a hearsay objection to Exhibit 60 (H.Tr. 600-01). She just completely "spaced out" and did not object (H.Tr. 601). She had no trial strategy for her failures (H.Tr. 601).

Similarly, counsel Kenyon acknowledged having no trial strategy for failing to object to these exhibits (Ex. 57, at 44-46, 62-65). He was unaware of Section 490.130's requirement that a judge must certify out-of-state documents (Ex. 57, at 44-46). He acknowledged that Exhibit 60 contained several pages of a criminal history transcript and was objectionable (Ex. 57 at 64). The charges were not evidence of guilt. *Id*. He had no strategic reason for not objecting (Ex. 57, at 64).

Motion Court's Findings

The motion court agreed with Forrest that because a California judge did not certify it, Exhibit 61 lacked proper authentication under Section 490.130 (L.F. 385). But, the court concluded no prejudice resulted, because Exhibit 60 referenced the conviction for a concealed firearm (L.F. 60). According to the court, Exhibit 60 was properly certified and admitted and thus Exhibit 61 was merely cumulative (L.F. 384-85). Since Exhibit 60 was not passed to the jury, the court found no prejudice from the other hearsay evidence of criminal history the exhibit included (L.F. 385). The court concluded that, had counsel properly objected to the admission of either exhibit, the State could have obtained properly-certified copies of the convictions (L.F. 386). The court also found that the criminal convictions themselves were largely collateral to the details of the crimes that were before the jury (L.F. 386, citing Tr. 1313-14, 1324-26 in support).

Standard of Review

This Court must review the motion court's findings and conclusions for

clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15.

Ineffective Assistance of Counsel

To establish ineffective assistance, Forrest 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, 390-91 (2000); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). When prior convictions are improperly admitted in a death penalty case, prejudice is presumed and the claim is not subject to harmless error review. *State v. Griffin*, 848 S.W.2d 464, 471 (Mo. banc 1993).

***Wiggins v. Smith:* Counsel's Duty to Rebut Aggravator**

The Sixth Amendment guarantee of effective assistance requires counsel to "discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 539 U.S. at 524 (emphasis in original). Part of that basic investigation is a thorough review of a client's prior adult and juvenile correctional experience. *Id*.

This Court, too, has recognized that "[o]ne of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state." *Ervin v. State*, 80 S.W.3d 817, 827 (Mo. banc 2002), citing *Bell v. Cone*, 535, U.S. 685 (2002). Defense counsel's failure to investigate and rebut aggravating evidence constitutes ineffective assistance of counsel. *Ervin, supra, citing Parker v. Bowersox*, 188 F.3d 923, 929 (8th Cir. 1999). *See also, Wright-El v. State*, 890 S.W.2d 664 (Mo. App. E.D. 1995) (remanded for a

hearing on counsel's ineffectiveness in failing to object to prior convictions not properly certified).

In *Ervin*, counsel failed to investigate a jail assault and refute the State's contention that Ervin had threatened to kill his cellmate. *Ervin*, at 826. The potential for prejudice was strong because the State argued this non-statutory aggravating evidence was a reason to give death. *Id*., at 827. The State maintained this evidence showed that Ervin would pose a danger to others while incarcerated. *Id*.

Similarly, in *Parker*, counsel failed to rebut the State's aggravating evidence. The State suggested that Parker murdered the victim because she was a potential witness in other pending cases. *Id*. Counsel was ineffective for failing to rebut the aggravator with available evidence. *Id*. at 931.

Similarly, here, counsel failed to rebut the State's non-statutory aggravators. Counsel did not object to Forrest's prior conviction for possession of a concealed firearm even though it was not properly certified. Counsel admitted they had no strategic reason for failing to object; they simply were unaware of the statutory requirements for out-of-state convictions, "spaced out" or failed to properly object (H.Tr. 597-601, Ex. 57, at 44 and 64-65).

The motion court implicitly recognized that counsel acted unreasonably since it only addressed prejudice in its findings (L.F. 384-86). As the motion court properly found, Exhibit 61 lacked any judge's certification (L.F. 385). It did not comply with Section 490.130 which states:

> The records of judicial proceedings of any court of the United States, or of any state, attested by the clerk thereof, with the seal of the court annexed, if there be a seal, ***and certified by the judge, chief justice or presiding associate circuit judge of the court to be attested in due form***, shall have such faith and credit given to them in this state as they would have at the place whence the said records come.
>
> ***

Section 490.130 (emphasis added). The statute requires the judge's certification for the records to be admitted. *See, State v. Dismang*, 151 S.W.3d 155, 161 (Mo. App. S.D. 2004). This Court has found noncompliance with the statute is reversible error. *State v. Young*, 366 S.W.2d 386 (Mo. 1963). *See also, State v. Monroe,* 18 S.W.3d 455 (Mo. App. S.D. 2000) (failure to comply with statute governing admissibility of out-of-state records resulted in new sentencing hearing). The statute's requirements are not some unimportant, technical requirement. The requirements enhance reliability, which is especially critical in a death penalty case. *Caldwell v. Mississippi*, 472 U.S. 320 (1998). The Eighth Amendment requires that any death sentence for which one aggravating factor is a subsequently invalidated conviction be re-examined. *Johnson v. Mississippi*, 486 U.S. 578 (1988).

Here, the motion court ignored the heightened need for reliability, ruling that the State could ignore the requirements of Section 490.130 by merely

obtaining certified copies of DOC records, which contained hearsay references to supposed arrests and convictions. Since they lacked proper authentication, the prior criminal convictions should have been excluded.

The motion court ruled that Forrest was not prejudiced by the admission of the hearsay testimony in Exhibit 60 because the exhibit was never passed to the jury. This ignores that the prosecutor read from the exhibit in open court (Tr. 1351) and then argued it in closing (Tr. 1725-26). Hearsay in records is not admissible. *See, State v. Kreutzer*, 928 S.W.2d 854, 867-68 (Mo. banc 1996) (DFS records rife with hearsay inadmissible in penalty phase); *State v. Nicklasson*, 967 S.W.2d 596, 616 (Mo. banc 1998) (exclusion of records containing hearsay proper). Here, DOC records contained 22 pages, which were rife with hearsay about Forrest's criminal history. Arrests and charges did not prove that Forrest had committed the crimes in question. *State v. Fassero*, 256 S.W.3d 109, 118-19 (Mo. banc 2008) (defendant's prior indictment in another state for criminal sexual abuse against a child was inadmissible at penalty phase).

The State improperly introduced exhibits not properly certified and containing admissible hearsay. Counsel unreasonably failed to object. The State relied on those exhibits to prove Forrest's criminal history and argued them as a reason to sentence him to death. This Court should reverse and remand for a new penalty phase.

VII. Voir Dire: Community Reaction to Verdict

The motion court clearly erred in denying Forrest's claim that the prosecutor improperly warned jurors that members of the community would be watching them when they returned their verdict and defense counsel was ineffective for failing to object because these actions denied Forrest 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 appeals to consider how the community will react to a verdict are improper and counsel had no strategic reason for failing to object.

Forrest was prejudiced because the prosecutor's appeal to consider the community's beliefs was an appeal outside the evidence, the appeal was repeated and he punctuated it in closing argument, telling the jurors that "society is depending on you. Do your duty."

During voir dire, Assistant Attorney General Robert Ahsens repeatedly told jurors that they would be returning a verdict in an open courtroom where members of the community would be watching them (Tr. 370-371, 523-524, 530, 599). Ahsens warned:

> you come back into the courtroom, sit in the jury box just as you are now, the defendant would be present, all the lawyers would be present, *anybody who wandered in off the street, after all, this is an*

> *open courtroom, anyone can attend*, and your verdict would be announced to the defendant, and it would therefore be announced that you and your fellow jurors had voted that he should die, could you do that?

(Tr. 370-371) (emphasis added). Ahsens again warned :

> the jury will come into the courtroom, sit right in the jury box where you're now, all the lawyers will be present, court personnel will be present, *anybody who wanders in off the streets will be here because this is an open courtroom and anybody can attend, and it would be announced … that it was your decision along with your fellow jurors*, that the defendant should die.

(Tr. 523-524) (emphasis added).

Later, Ahsens warned that the jurors' names would be kept on the verdict as a public record (Tr. 530).

Ahsens again emphasized their verdict would be read in open court to the community and "*it would be known that that was all of your fellow jurors' – your verdict*" (Tr. 599) (emphasis added). Ahsens repeated his warning that the community would be in the courtroom when the verdict was announced (Tr. 622).

Counsel failed to object to any of Ahsens' statements warning jurors that the community would be watching and listening as they returned their verdict ((Tr. 370-371, 523-524, 530, 599). Counsel Turlington acknowledged that she could have objected to the questions and had no strategic reason for her failure (H.Tr.

573, 574-75, 576, 578). While the questions were somewhat similar to the question about whether a juror could sign a death verdict, Turlington realized Ahsens' appeal to community pressure was designed to intimidate jurors (H.Tr. 573, 576). Co-counsel Kenyon saw nothing objectionable about Ahsens' questions (Ex. 57, at 48-49).

The motion court found that Ahsens' questions were proper, analogizing them to the question of whether jurors could sign a death verdict (L.F. 378). It held any objection would have been meritless and overruled (L.F. 378).

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.

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); *Darden v. Wainwright,* 477 U.S. 168, 181 (1986). Appeals not to let citizens and society down are highly improper. *United States v. Socony-Vacuum Oil Co*., 310 U.S. 150, 242 (1940). Prosecutors may not admonish jurors that supporting the State's position is "their duty" to the community. *United States v. Young*, 470 U.S. 1, 18 (1985); *Viereck v. United States*, 318 U.S. 236, 247-48, and n. 3 (1943).

To establish ineffective assistance, Forrest 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, Forrest 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, failing to strike automatic death penalty jurors 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 not striking 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). Failing to challenge for cause a juror who admitted bias against the defendant also has constituted ineffective assistance. *Presley v. State*, 750 S.W.2d 602, 604-08 (Mo. App. S.D. 1988).

Counsel was ineffective. Turlington admitted she had no strategic reason for failing to object (H.Tr. 573-78). Kenyon did not even recognize that appeals to community sentiment and warnings that the community would be watching the jurors were improper (Ex. 57, at 48-49), despite at least three United States Supreme Court cases ruling such appeals improper. *Socony-Vacuum Oil Co.*, *Viereck*, and *Young*, *supra*.

Missouri has condemned similar arguments. In *State v. Delaney*, 973 S.W.2d 152 (Mo. App. W.D. 1998), the prosecutor told jurors that the verdict form was a public and permanent record of the jury's decision and, thus, the jury should do its duty to convict the defendant. *Id.* at 156. The Court found the remarks improper:

> . . . The prosecutor was implying, by his statement that the verdict would be "a public and permanent record" that the community was watching the jury, and if the jurors did not convict the defendant, it will be unhappy with them. Although counsel are afforded great latitude in closing argument, counsel does not have unfettered license to say whatever they desire. To attempt to intimidate the jury by arguing in some form, that the citizens of a community will have a record of the jury's verdict and that the evidence is such that consequences could result to the jury members if they do not convict the defendant is improper. The jury should not be encouraged to decide the guilt of a defendant on whether the citizenry of a community will approve of the verdict.

Id. at 157.

As in *Delaney*, Ahsens emphasized that the verdict would be public and that the public would hear it and know who returned that verdict. He encouraged the jury to consider, in determining the appropriate verdicts and penalties, whether the citizenry of their community would approve of their verdict. This appeal to

decide the case on passion and prejudice, not on the evidence and the law, has no place in our criminal justice system, and especially not in a death penalty case. *See, Gardner v. Florida*, 430 U.S. 349, 358 (1977) (death sentence must be based on reason, rather than caprice or emotion).

Unlike in *Dulaney*, Ahsens' remarks were not isolated, but permeated voir dire (Tr. 370-371, 523-524, 530, 599). Then, he returned to his theme in closing argument:

> *Society is depending on you*. Do your duty. It doesn't have to be easy. It shouldn't be. But it needs doing.

(Tr. 1733) (emphasis added). Ahsens improperly warned the jurors during voir dire that the community would be watching. Counsel failed to take any corrective action to prevent the improper argument. This Court should reverse and remand for a new trial.

VIII. Improper Closing Arguments: "Do Your Duty"

The motion court clearly erred in denying Forrest's claims based on the prosecutor's closing argument and defense counsel's failure to object to the argument that it was the jurors' duty to convict and sentence Forrest to death, because this denied Forrest due process, a fair trial, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. V, VI, VIII and XIV and Mo. Const., Art. I, §§10, 18(a), and 21, in that Ahsens' "duty" argument pressured the jury and was contrary to Supreme Court precedent, and denying a hearing created an irrebuttable presumption that counsel strategically chose not to object to improper arguments outside the evidence and denied Forrest the opportunity to prove his claim of ineffective assistance.

Jurors' "Duty" Arguments

Ahsens argued in both phases that it was the jurors' duty to convict Forrest and sentence him to death. In the guilt phase, he stated, "You know this murder in the first degree in all three instances. I simply ask that you ***do your duty***." (T1265) (emphasis added). In penalty phase, he reiterated: "Society is depending on you. ***Do your duty***. It doesn't have to be easy. It shouldn't be. But it needs doing." (T.1733) (emphasis added).

Remarkably, the motion court found these arguments proper and any objection to them would have lacked merit (L.F. 338). This ruling directly

conflicts with *Viereck v. United States*, 318 U.S. 236 (1943) and *United States v. Young*, 470 U.S. 1, 18 (1985), which held this type of argument improper. The motion court's ruling must be reversed.

Standard of Review

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Rule 29.15(k)*. A motion court must hold an evidentiary hearing if (1) the movant cites facts, not conclusions that, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record; and (3) the matters complained of prejudiced the movant. *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo. banc 2002); Rule 29.15(h). *See*, Point IV, *supra*.

Closing Arguments Unconstitutional

Arguments can deny 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); *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 the appellate court, not the jury would bear responsibility for the death penalty). 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).

Duty Argument Has Been Condemned by Supreme Court

The Supreme Court has repeatedly condemned "duty" arguments. *Viereck v. United States*, 318 U.S. 239-247; *United States v. Young*, 470 U.S. at 18.

In *Viereck*, the defendant was charged with failing to register as an agent of foreign principals. 318 U.S. at 239. The prosecutor analogized the jurors' duties to the duties of soldiers in combat and exhorted the jurors to "do your duty." *Id*. at 247, n.3. He said: "you have a duty to perform here. As a representative of your Government I am calling upon every one of you to do your duty." *Id*. The Court condemned these remarks as an emotional appeal to passion and prejudice. *Id*. at 247-48. The trial judge had a duty to stop the remarks *sua sponte*. *Id*.

Forty years later, the Supreme Court again condemned the "duty" argument. *Young*, 470 U.S. at 18-19. There, the prosecutor gave his personal opinion, *Id*. at 9, and exhorted the jury to "do its job." *Id*. at 18-19. The Court held that "that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of justice." *Id*. at 18.

Ahsens also encouraged the jury to do its "duty" – to convict Forrest of first degree murder and to sentence him to death (Tr. 1265, 1733). The motion court ruling conflicted with *Viereck* and *Young* in finding these arguments "proper" (L.F. 338). Accordingly, this Court should reverse and remand for a new trial.

Evidentiary Hearing

This Court should reverse based on the record. Alternatively, it should remand for an evidentiary hearing on the ineffective assistance of counsel claim based on trial counsel's failure to object to these improper arguments. The motion court denied a hearing on the claims, because it found any objection at trial would have been meritless (L.F. 338). *Viereck* and *Young* show otherwise.

To establish ineffective assistance, Forrest must show counsel's performance was deficient and resulting 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 866, 901-03 (Mo. banc 1995). This Court requires postconviction counsel to question trial counsel about his failure to object to improper arguments. *State v. Tokar*, 918 S.W. 2d 753, 768 (Mo. banc 1996) (failure to ask counsel why he did not object to closing argument); and *Taylor v. State*, 126 S.W.3d 755, 758 (Mo. banc 2004) (trial counsel not called to testify at post-conviction evidentiary hearing is presumed effective). Counsel was at the hearing and could easily have been questioned had the court allowed it.

By denying a hearing, the motion court precluded Forrest from establishing his post-conviction claim of ineffective assistance of counsel. This Court should reverse and remand for an evidentiary hearing.

IX. Improper Personalization

The motion court clearly erred in denying a hearing on the claim that Forrest's counsel was ineffective for failing to object to the prosecutor's improper personalization during the penalty phase opening statement, because this denied Forrest due process, a fair trial, 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, and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled Forrest to relief, that counsel unreasonably failed to object to Ahsens' statements of his personal belief that the statutory aggravators were proven and prejudiced Forrest, making it likely that the death sentence would be based on Ahsen's personal opinion and authority.

Forrest's amended motion alleged that Ahsens improperly injected his personal opinion during his penalty phase opening statement (L.F. 75-77). The motion alleged that counsel unreasonably failed to object and Forrest was prejudiced as a result (L.F. 76-77). The State moved to dismiss the claim without a hearing, arguing Ahsens' personalization was proper (L.F. 281). The State relied on *State v. Weaver*, 912 S.W.2d 499, 512 (Mo. banc 1995) to support its claim. The State ignored that *Weaver* was reversed by *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006), which held that the prosecutor's improper closing arguments

warranted habeas relief. The motion court granted the State's motion and denied this claim without a hearing (L.F. 338).

Standard of Review

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Rule 29.15(k)*. Point IV, *supra*.

The amended motion alleged factual allegations, that, if proven, would entitle Forrest to relief. The motion claimed that counsel was ineffective in failing to object to Ahsens' improper personalization during the penalty phase opening argument. Ahsens told jurors:

> "I believe that we—that--that the following statutory aggravating circumstances you will find proven beyond a reasonable doubt."

(T1298);

> "I think the evidence has and will show is that the murder of Michael Wells was committed while the defendant was engaged in the commission of another unlawful homicide, that of Harriet Smith."

(T1299); and

> "I think you will find—it will be my position and that the evidence will show that the aggravating circumstances are proven."

(T1300).

These remarks were objectionable because they constituted improper expressions of personal opinion and assertions of personal knowledge by the

prosecutor about Forrest's intentions. They were not based on any facts and evidence the jury heard at trial (L.F. 77). The motion also alleged prejudice, because the remarks made it more likely jurors would impose the death penalty based on the prosecutor's personal opinion (L.F. 77).

The motion court denied the claim without a hearing, granting the State's motion to dismiss based on *State v. Weaver, supra*. The court clearly erred. In *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006),[14] the Eighth Circuit affirmed the district court's grant of habeas relief based on the prosecutor's improper closing arguments. Among the improper arguments[15] was the prosecutor injecting his personal belief in the death penalty's appropriateness. *Id.* at 840. Statements about a prosecutor's personal belief are inappropriate and contrary to a reasoned opinion by the jury. *Id*. at 840-41.

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[14] The Supreme Court granted certiorari, but later dismissed the writ as improvidently granted. *Roper v. Weaver*, 550 U.S. 598, 127 S.Ct. 2022 (2007). The Court found it appropriate to exercise its discretion to prevent three "virtually identically situated litigants from being treated in a needlessly disparate manner." *Id*. at 2024. The three defendants, Weaver, Shurn, and Newlon all were entitled to relief, because of the prosecutor's improper argument. *Id*.

[15] The Court also condemned "duty" comments like Ahsens made here. *Id*. at 840-41. *See*, Point VIII, *supra*.

Prosecutor's assertions of personal knowledge are especially prejudicial, because they are "apt to carry much weight against the accused when they should properly carry none." *Berger v. United States*, 295 U.S. 78, 89 (1935). *See also*, *United States v. Young*, 470 U.S. 1, 9 (1985) (prosecutor's personal opinion and resulting implication that his position gave him an authoritative and trustworthy perspective has no place in a trial and must not be permitted or rewarded); and *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995) (prosecutor's penalty closing argument was improper and counsel was ineffective in failing to object).

In *Young*, the prosecutor told the jury that his "personal impression" was that the defendant was guilty of fraud. *Id*. at 5. The Court found the statements posed two dangers: the jury would think the prosecutor knew about evidence the jury never heard and the jury would trust the government's judgment rather than its own perception of the evidence. *Id*. at 18-19.

Like *Young*, Ahsens told jurors he believed the statutory aggravators were proven and thus, death was warranted (Tr. 1298, 1299, 1300). His beliefs were irrelevant and highly prejudicial. The motion court clearly erred in ruling the arguments were proper. This Court should reverse or alternatively, remand for an evidentiary hearing as in Point VIII, so counsel can explain why they failed to object to the improper arguments.

X. Dr. Cunningham: Future Dangerousness and Childhood Risk Factors

The motion court clearly erred in denying Forrest's claim that counsel was ineffective for failing to introduce available mitigation evidence through an expert such as Dr. Cunningham, because this denied Forrest due process, effective assistance of counsel, 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 failed to present evidence that Forrest was a low risk for future dangerousness and his childhood development was filled with factors, such as genetic predisposition to substance dependence, parental alcoholism, brain dysfunction, physical and emotional abuse, emotional and supervisory neglect, observing domestic violence, adolescent onset of alcohol and drug dependence, that put him at risk for violence and delinquency.

Forrest was prejudiced because Ahsens argued that Forrest would be dangerous in prison and the jury never heard about how Forrest's childhood development put him at risk as he grew up. Had jurors heard this information, there is a reasonable probability of a life sentence.

Ahsens argued that Forrest should be put to death to protect society, to protect prison guards, fellow inmates and staff. According to the State, they would be at risk if Forrest was kept alive. He was a future danger. Had counsel fully investigated, fully consulted with an expert on future dangerousness, and

presented evidence, the jury would have known the truth. Forrest was actually a low risk for future dangerousness, primarily because of factors not in dispute – his age, his educational background, and the length of the sentence he would receive – life without probation or parole or death. He had never caused problems in prison or in jail, the best predictor of his future behavior. But, because counsel failed to pursue this information, the jury was left only with the State's argument that Forrest would be dangerousness in prison.

The jury also heard no expert testimony about Forrest's childhood risk factors for delinquency and violence. Counsel said they planned to present this evidence through Dr. Smith, but they did not. Counsel's failure to present this readily available mitigation was unreasonable. Forrest was prejudiced. A new penalty phase should result.

Pre-trial Investigation

Counsel requested funding to retain Dr. Cunningham, an expert on future dangerousness, and childhood developmental risk factors for violence (Ex. 10). According to trial counsel Kenyon, he has seen Cunningham testify and "he is extremely good" (Ex. 10). When requesting the funds, Kenyon remarked, "He just might give Earl a fighting chance at avoiding the death penalty." (Ex. 10). Kenyon contacted Cunningham by phone on May 21, 2004 (Exs. 9, 57 at 17-18). Counsel did not retain him because he was not that impressed with his initial assessment on future dangerousness and was concerned that the State could

question the expert about Forrest's alleged criminal conduct, a California homicide (Ex. 57 at 19-20, 22, 23, 68-69).

But, the record shows that the State had not disclosed the alleged homicide until June 14, 2004, after counsel had already decided not to retain Dr. Cunningham (Tr. 91-109, D.L.F. 440, 441). The prosecutor first mentioned the California allegations on May 28, 2004, more than five months after Ahsens' investigator, Dresselhaus, contacted a California officer about the matter on December 18, 2003 (D.L.F. 441). The State formally endorsed a witness regarding the California investigation on July 8, 2004 (D.L.F. 450).

Post-Conviction Evaluation

Dr. Cunningham, found that Forrest was at a low risk for violence in prison, primarily because of his age, Forrest was 55 years old, and his education, he had graduated from high school and had one year of college (H.Tr. 368, 370, 371). Forrest had adjusted well to jail and had been a good inmate when he was in prison before (H.Tr. 370-71). Past behavior is the best predictor of future behavior (H.Tr. 373). Inmates sentenced to death or life without probation or parole are less likely to be involved in assaultive conduct than parole eligible inmates (H.Tr. 385-86).

Studies establish that the severity of one's offense is not a good predictor of whether one will commit violence in prison (H.Tr. 390-91, 403-04). Parole eligible inmates commit assaults at 4-5 times the rate of life without probation and parole or death sentenced inmates (H.Tr. 391-403). When offenders do not have

access to drugs, alcohol, and guns associated with the violent offense, they are unlikely to reoffend (H.Tr. 404-05). The security, structure, staff, confinement and consequences for bad conduct in prison, all combine to reduce rates of violence in prison (H.Tr. 405-08).

Cunningham concluded that Forrest had a low risk for violence, especially given his age and his prior prison behavior (H.Tr. 412-15). The robbery in the capital offense and the multiple victim aggravators slightly increased his risk for violence, but the projections were still low, given all relevant factors (H.Tr. 415-17).

Child Development, Risk Factors for Delinquency and Violence

Cunningham also assessed Forrest's childhood development and the factors that put him at risk to commit violence (H.Tr. 282-368).

- Genetic predisposition to substance dependence
- Parental alcoholism
- Brain dysfunction.
- Physical and emotional abuse
- Emotional and supervisory neglect
- Observed domestic violence

(H.Tr. 299-302, 310-365). The factors have a cumulative impact and should be added together (H.Tr. 299, 366).

Department of Justice studies show that protective factors reduce the likelihood of delinquency and violence (H.Tr. 303). These factors include gender,

intelligence, positive social orientation, social bonding to positive role models, healthy beliefs and clear standards for behavior and effective early intervention (H.Tr. 303-07). Forrest was likable and related well to others so he had a positive social orientation (H.Tr. 305). But, most of the other protective factors were absent (H.Tr. 307). His mother married when she was 14 years old and had a child when she was 15 (H.Tr. 306). She was a child herself, incapable of providing healthy bonding and parental guidance (H.Tr. 305-06). Forrest's father, an alcoholic, beat his wife in front of Forrest (H.Tr. 306). These were not positive role models providing clear standards for appropriate behavior. *Id.*

Motion Court's Findings

The court found Cunningham not credible (L.F. 386, 388). Cunningham underestimated the circumstances of the murder and its effects on Forrest's prison adjustment and his childhood (L.F. 386). The court found the circumstances of the offense were relevant to both the guilt and penalty phase (L.F. 386). The court criticized Cunningham's failure to consider that Forrest killed a sheriff's deputy, which showed his disrespect for law enforcement (L.F. 387). The court found that Forrest's disrespect for law enforcement established his potential to assault prison guards (L.F. 387). Jurors could analyze mitigation without expert assistance, and Cunningham's statements suggesting otherwise were condescending (L.F. 387). Because Cunningham earned 85-90 percent of his income from capital defense work, the court found a financial incentive for his testimony (L.F. 388).

The motion court also concluded that counsel's decision not to call Cunningham was strategic, because it may have opened the door to a previous homicide Forrest allegedly committed in California (L.F. 388). In any event, the jury had already heard the vast majority of facts of Forrest's life through other witnesses, such as William Forrest and Dr. Smith (L.F. 389). Accordingly, the testimony would have been cumulative (L.F. 389).

Standard of Review

This Court reviews the findings for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. To establish ineffective assistance, Forrest must show 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). The Sixth Amendment requires counsel to "discover *all reasonably available* mitigating evidence . . ." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis in original).

Contrary to the motion court's finding, counsel's decision not to hire Cunningham was unreasonable. Counsel dropped the expert in mid-May, 2004, before he had even heard about the California allegations. This could not have factored into his decision. At the evidentiary hearing, counsel down-played Cunningham's persuasiveness, but his statements before trial show that he thought Cunningham would be an "extremely good" witness, and "he might just give Earl a fighting chance at avoiding the death penalty" (Ex. 10).

The motion court found no prejudice, ruling Cunningham was incredible (LF. 386-88). But, credibility is a matter for the jury, not the post-conviction judge. *Kyles v. Whitley*, 514 U.S. 419, 449, n. 19 (1995). A state postconviction's judge's finding that a witness is not credible will not defeat a claim of prejudice in a postconviction action. *Id*. The judge's observation could not substitute for the jury's appraisal at trial. *Id*. Credibility of a witness is for the jury, not the postconviction court. *Antwine v. Delo*, 54 F.3d 1357, 1365 (8th Cir. 1995).

The motion court's ruling that the evidence was cumulative to William Forrest and Dr. Smith (L.F. 389) is clearly erroneous. William did provide some of the factual support for Cunningham's analysis. But, neither William nor Smith testified about the significant body of research outlining childhood developmental factors that place one at risk for delinquency and violence. Neither discussed the protective factors that would guard against violence. No one testified about future dangerousness, let alone discussed the factors such as age, education, length of sentence, and prior prison behavior that suggested Forrest would be a low risk to reoffend in prison.

The only statement the jury heard about future dangerousness came from Ahsens when he argued that jurors should sentence Forrest to death to protect the guards, staff and other inmates in the prison. Cunningham's testimony would have shown this argument was unsupported and contrary to the evidence. *Cf. Simmons v. South Carolina*, 512 U.S. 154 (1994) (if state rests its argument at

sentencing in part on future dangerousness, due process requires that the defendant be allowed to rebut with evidence that he will not be eligible for parole).

Counsel was ineffective for failing to present this mitigating evidence. A new penalty phase should result.

XI. Lethal Injection Is Cruel and Unusual Punishment

The motion court clearly erred in denying without a hearing the claim that Missouri's method of lethal injection is unconstitutional, because it denied Mr. Forrest due process and freedom from cruel and unusual punishment, U.S. Const., Amends. 8 and 14, and Article I, Sections 10 and 21 of the Missouri Constitution, in that a sentence that creates an unnecessary risk of pain and suffering is unconstitutional. Further, all constitutional claims known to Forrest should be raised in his postconviction action making the claim cognizable.

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 and Article I, Sections 10 and 21 of the Missouri Constitution (L.F. 186-88, 246-65). Forrest's motion challenged the lethal injection process, specifically, the three drugs used, the problems with them and how they are administered. *Id*.

The motion court denied the claim without a hearing, ruling that the claim was not cognizable in a Rule 29.15 action (L.F. 376-77).

Standard of Review

This Court reviews for clear error. *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo. banc 2002); Rule 29.15(h). *See*, Point IV, *supra*.

Challenge to Lethal Injection Is Cognizable Claim

The motion court's ruling that the claim is not cognizable is clearly erroneous. The court cited this Court's decisions in *Johnson v. State*, 244 S.W.3d 144, 165 (Mo. banc 2008); *Worthington v. State*, 166 S.W. 3d 566, 582-83 (Mo. banc 2005); and *Morrow v. State*, 21 S.W.3d 819, 828 (Mo. banc 2000) (L.F. 377).

Since protocols may change, an issue of ripeness may exist. 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 occurring 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*, 464 F.3d 1256 (11th Cir. 2006).

The challenge to Missouri's lethal injection procedure is a constitutional challenge to the sentence imposed. Thus, it should and may be raised in Rule 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). Forrest's state-sanctioned punishment may not 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 Rule 29.15 proceeding. *See, Morrow, supra, and Williams v. State*, 168 S.W.3d 433, 446 (Mo. banc 2005) (Court focuses on inadequate pleadings to deny relief). But, in *Worthington*, 166 S.W.3d at 583, n.3, this Court recognized that, since methods of execution may change, "it is *premature* for this Court to consider whether a particular method of lethal injection violates the Eighth Amendment." (emphasis added).

Mr. Forrest is in a classic Catch-22. Rule 29.15(b) requires that he raise all meritorious constitutional claims known to him or risk waiving them. But, because the motion court ruled the claim is not cognizable, he lacks a meaningful opportunity to litigate this meritorious claim in state court.

Should this Court reconsider its previous rulings, Forrest should be granted an evidentiary hearing to prove his claims. He alleged facts, not conclusions, warranting relief. The amended motion pled that Missouri's method and protocol for lethal injection subjects persons condemned to death to extreme pain, prolonged suffering and torture during the execution process. (L.F. 186). A primary factor leading to the unnecessary pain and suffering, is the State's use of pancuronium bromide or Pavulon, a neuromuscular blocking agent (L.F. 186). "While Pavulon paralyzes skeletal muscles, including the diaphragm, it has no effect on consciousness or the perception of pain and suffering" (L.F. 186). "The

American Veterinary Medicine Association (AVMA) condemns the use of neuromuscular blocking agents such as pavulon in the euthanasia of animals" (L.F. 186). Since 1981, many states, including Missouri, have prohibited the use of pancuronium bromide on domestic animals (L.F. 186, citing Missouri, 2 CSR 30-9.020(14)(F)(5), other citations omitted). *See, also*, Exhibit 36, Stipulation regarding Dr. Heath's proposed testimony.

To execute human beings utilizing methods that have been banned in killing animals violates contemporary standards of decency. See, *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) (executing those with mental retardation violates contemporary standards reflected in state statutes barring same).

The amended motion also outlined problems with Missouri's protocols and the State's failure to follow them consistently (L.F. 187-88). Forrest recognizes that the Supreme Court has found Kentucky's lethal injection protocol satisfies the Eighth Amendment. *Baze v. Rees*, 128 S.Ct.1520 (2008). But, Missouri's protocol is fact-specific and appears to be applied at the whim of those participating in the execution process. A former doctor who participated in the execution process had criticized the new protocol as "overly complicated and potentially problematic." "Dyslexic Doctor Has Overseen 40 Executions, CNN.com/crime found at http://www.cnn.com/2008/CRIME/08/15/execution.doctor.ap/index.html

The doctor "said that administering the drugs over a longer period of time in various syringes could jeopardize their effectiveness." *Id*. "It will have the same effect: The guy will die," he said. *Id*. "But it may not be pretty." *Id*.

This Court should either conclude that Missouri courts can examine this constitutional issue and scrutinize Missouri's lethal injection process fully, or clearly state the claim is not ripe, and should be raised in federal court. If this Court concludes the claim is ripe, it should remand the case to the motion court with directions to hear the evidence.

XII. CLEMENCY

The motion court clearly erred in denying a hearing on Mr. Forrest's claim that the Missouri's clemency process violates his rights to due process, freedom from cruel and unusual punishment, and equal protection, U.S. Constitution, Amendments VIII and XIV, and Mo. Constitution, Article I, Sections 2, 10, 18(a) and 21, in that the motion alleged facts, not conclusions, that entitle Forrest to relief. The process is wholly arbitrary and capricious as, Mease's clemency proceedings evidence. Mease was granted clemency, not on the merits of his case, but because of the Pope's appeal on religious grounds.

The motion court denied a hearing on Forrest's claim that Missouri's clemency process is arbitrary and capricious (L.F. 337-38). It denied the claim without a hearing, ruling it meritless, contrary to Missouri law, unsupported by adequate factual allegations, not cognizable and totally lacking in merit (L.F. 337-38). That ruling should be reversed because the motion pled facts, not conclusions, that, if proven, would entitle Forrest to relief (L.F. 192-94, 269-70).

Standard of Review

This Court reviews the motion court's findings and conclusions for clear error. *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo. banc 2002); Rule 29.15(h). *See*, Point IV, *supra*.

The amended motion alleged factual allegations, that, if proven, would entitle Forrest to relief. The motion claimed that Forrest's rights to due process, freedom from cruel and unusual punishment, and equal protection were violated because of the arbitrariness in Missouri's clemency proceedings (L.F. 192-94, 269-70). In particular, it claimed, Governor Carnahan commuted Mease's death sentence because the Pope personally appealed to the Governor on religious grounds. *Id*.

Forrest recognizes that this Court has ruled that claims about clemency are not ripe in state post-conviction proceedings. *Middleton v. State*, 80 S.W.3d 799, 817 (Mo. banc 2002). This Court should reconsider its opinion and find clear error in denying this claim without a hearing.

The Eighth and Fourteenth Amendments require heightened reliability in assessing death. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). A death sentence must be, and appear to be, based on reason rather than caprice or emotion. *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). Discretion given to sentencers in death penalty cases must be suitably directed, limited and channeled to minimize the risk of wholly arbitrary and capricious action. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

While clemency procedures are largely committed to the discretion of the Executive Branch, the Due Process Clause provides some constitutional safeguards to wholly arbitrary and capricious action. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-90 (1998) (O'Connor, J., concurring). Due

Process requires that the procedures followed in rendering a clemency decision "will not be wholly arbitrary, capricious or based upon whim, for example, flipping a coin." *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998), *citing Woodard*, 523 U.S. at 289 (O'Connor, J., concurring). Using religion in deciding whether to grant or deny clemency violates the commands of the Equal Protection Clause. *Woodard,* 523 U.S. at 292 (Stevens, J., concurring and dissenting).

Granting clemency to Mease raises factual issues about the arbitrary and capricious nature of Missouri's clemency process. This Court should reverse the denial of post-conviction relief and remand for a hearing on the clemency process. Alternatively, this Court should impose a life sentence.

CONCLUSION

Based on the foregoing arguments, Mr. Forrest requests the following relief:

Points I, V, VII, and VIII – new trial for both guilt and penalty phases;

Points II, III, VI, IX, X – new penalty phase;

Points IV, VIII, IX, XI and XII, an evidentiary hearing or alternatively, a new penalty phase or life without probation or parole.

Respectfully submitted,

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Certificate of Compliance and Service

I, Melinda K. Pendergraph, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 26,853 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, 2008. 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 20th day of November, 2008, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Melinda K. Pendergraph