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 2
THE HONORABLE OWENS LEE HULL JR, JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL AND FACT STATEMENTS

Appellant, Earl Forrest, adopts the Jurisdictional and Fact Statements from his original brief.

POINTS RELIED ON

I. Brain Scan

Counsel unreasonably failed to obtain a PET scan of Forrest's brain because counsel ran out of time, waiting until two weeks before trial to request the testing. The PET scan was not cumulative, because whether Forrest's was brain damaged was a hotly contested issue at trial. The PET scan was admissible in guilt phase to support the factual basis for a mental disease or defect. Forrest was prejudiced, because the PET scan showed Forrest's damaged brain, mitigating evidence that supported a life sentence, especially since the State criticized all the trial defense experts' credentials and opinions and emphasized the lack of objective medical tests, like a PET scan.

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

United States v. Purkey, 428 F.3d 738 (8th Cir. 2005);

State v. Raine, 829 S.W.2d 506 (Mo. App. W.D. 1992); and

Taylor v. State, 262 S.W.3d 231 (Mo. banc 2008).

II.

Medical Records Documenting Head Injuries

Counsel was ineffective for failing to present medical records that showed Forrest's head injuries, suicide attempts, and in-patient mental health treatment. Forrest was prejudiced because the records were mitigating and not cumulative, because the State argued Forrest was not brain damaged, did not suffer from depression, and repeatedly criticized the trial defense experts for not relying on objective data in reaching their conclusions.

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

IV. Proportionality Review

Meaningful proportionality review is constitutionally required by the Eighth and Fourteenth Amendments. This Court's review of Forrest's death sentence on direct appeal was inadequate because it only compared his case to four death penalty cases involving multiple murders. A constitutional and meaningful review required it to compare similar cases in which the defendants received life sentences.

Pulley v. Harris, 465 U.S. 37 (1984);

Walker v. Georgia, 555 U.S. ____ , 129 S.Ct. 453 (2008);

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

Parker v. Dugger, 498 U.S. 308 (1991).

ARGUMENT

I. Brain Scan

Counsel unreasonably failed to obtain a PET scan of Forrest's brain because counsel ran out of time, waiting until two weeks before trial to request the testing. The PET scan was not cumulative, because whether Forrest's was brain damaged was a hotly contested issue at trial. The PET scan was admissible in guilt phase to support the factual basis for a mental disease or defect. Forrest was prejudiced, because the PET scan showed Forrest's damaged brain, mitigating evidence that supported a life sentence, especially since the State criticized all the trial defense experts' credentials and opinions and emphasized the lack of objective medical tests, like a PET scan.

When this Court reviews the entire record, it will find counsel unreasonably failed to obtain a PET scan and that failure prejudiced Mr. Forrest. The State fails to consider the entire record, but instead, selectively cites to only those portions that support its position. The State's arguments cannot withstand scrutiny and should be rejected.

Last-minute Investigation Let Scan Fall Through the Cracks

The State argues that counsel made a reasonable strategic decision not to obtain a PET scan because she could not obtain an *ex parte* order for transportation and did not want the State to discover the testing in case it turned out negatively (Resp. Br. at 25-26). The State ignores counsel's testimony

establishing that the real problem was that she waited too long to request a scan and lacked time to arrange it.

Counsel entered their appearance on January 7, 2003 (D.L.F. 3). Five months later, in May, 2003, they discussed getting a PET scan (Ex. 7). A year passed, yet counsel took no action. Then, in May, 2004, counsel hired Dr. Gelbort to conduct neuropsychological testing (H.Tr. 549-51). In June, 2004, defense expert- Dr. Evans recommended a PET scan because he was convinced Forrest has long term chronic brain damage and thought a PET scan would show it (Ex. 59, H.Tr. 538). Still, counsel failed to act. Four months later, in September, 2004, Dr. Gelbort also requested a PET scan because he thought it would show brain damage (H.Tr. 541, 549, Ex. 15).

On September 15, 2004, approximately two weeks before trial, counsel finally acted, requesting money for the testing (H.Tr. 541). Counsel had no time to deal with the issue herself. So, she asked another attorney in her office, one with no knowledge of the case, to contact a local doctor, Dr. Smith, to see if he would perform the scan (H.Tr. 547). When Dr. Smith said he would only perform a PET scan after an MRI, counsel abandoned the brain scan altogether (H.Tr. 547).

Counsel acknowledged that she abandoned the scan because she only had two weeks before the trial (H.Tr. 547, 551, 552). She admitted that had Dr. Smith agreed to do the scan, she would have had him perform it (H.Tr. 546). Had she investigated earlier, she would have consulted with experts who would have ordered the scan (H.Tr. 551). Had counsel given herself more time to follow-up,

she would have had more control and could have obtained the scan (H.Tr. 553). Counsel could provide no reason for waiting over a year, until May 4, 2004, to hire Dr. Gelbort (H.Tr. 551). Counsel could provide no strategy for failing to follow-up on Dr. Evans' June, 2004 recommendation for a scan (H.Tr. 538-39).

Counsel said that she wanted a PET scan, but was afraid of letting the State know she was getting it done, because of the transportation order. But counsel never explained, nor does the State, why she would have done the scan had Dr. Smith ordered it, but would not have done the scan with a different doctor, like Dr. Preston. Forrest would have been transported to St. Louis University Hospital for Dr. Smith's test, and counsel needed a transportation order for Dr. Smith's testing or any other doctor's testing. A PET scan cannot be performed in a jail.

When this Court reviews the entire record, not selective portions taken out of context, it will find counsel's neglect and failure to pursue the PET scan was not a reasonable strategic decision. Instead, it was a failure, due to counsel's lack of diligence in pursuing reasonably available mitigating evidence in a timely fashion.

Whether Forrest Was Brain Damaged Was Hotly Contested at Trial

The State argues that a PET scan was cumulative to expert testimony presented at trial that Forrest was brain damaged (Resp. Br. at 27- 29). The State says since the jury already knew about the damage, the PET scan was unnecessary to the experts' diagnosis, and would have made no difference (Resp. Br. at 27). Again, the State ignores the record, which refutes this claim.

At trial, Mr. Ahsens argued that Forrest had not proven brain damage because the defense had failed to hire a medical doctor to scan Forrest's brain and show the damage. In guilt phase, Ahsens challenged Dr. Smith's findings that Forrest suffered from a cognitive disorder and had brain damage. Ahsens asked whether Smith saw the brain damage on an x-ray, MRI, or any objective test (Tr. 1215). Smith acknowledged he did not (Tr. 1215). Ahsens questioned if Smith could point to any test that a layman could look at and say, "See, here it is" (Tr. 1216).

In penalty phase, Ahsens challenged the defense experts, calling them untrustworthy. He faulted their failure to obtain objective evidence of brain damage through tests, like a PET scan. Ahsens asked Dr. 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). Smith acknowledged no brain scans had been done (Tr. 1439). Ahsens emphasized no objective testing proved the defense claim of brain damage or brain dysfunction (Tr. 1440).

Ahsens also challenged Dr. Gelbort and his findings. On cross-examination, Ahsens emphasized that a PET scan was not administered (Tr. 1556). All of Gelbort's information came from Forrest, not a reliable test (Tr. 1557-58).

Finally, Ahsens attacked Dr. Evans' opinion and credentials. Ahsens asked the trial court to strike Evans' opinion and instruct the jury not to consider it,

because Evans was not a qualified expert, not a medical doctor, not a psychologist, not a physician (Tr. 1588-89).

At trial, Ahsens never conceded Forrest had brain damage. Instead, Ahsens argued that the defense experts were bought and paid for and therefore, not believable (Tr. 1728). He called "absurd" counsel's obtaining a psychiatric or psychological opinion from a pharmacist (Tr. 1729). The jury foreman agreed, saying the jury did not believe that Forrest had brain damage (D.L.F. 734, H.Tr. 559-60). The State's argument that the jury knew Forrest had brain damage and the PET scan results thus would have been cumulative is refuted by the record.

The State's citation to *Black v. State*, 151 S.W.3d 49, 56 (Mo. banc 2004) is perplexing. There, this Court found counsel ineffective for failing to impeach eyewitnesses. This Court rejected the State's argument that the impeaching evidence was cumulative, since counsel had already impeached the witnesses on some issues. This Court ruled:

> 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. . . . 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, the decision of which turns on the weight of the evidence.

Black, 151 S.W.3d at 56, *quoting State v. Kidd*, 990 S.W.2d 175, 180 (Mo.App. W.D.1999) (internal quotations omitted).

Here, the issue of whether Forrest had brain damage was not so fully and properly proved by the defense experts' testimony as to remove it from serious dispute. PET scans differed from any other evidence presented at trial. Ahsens characterized the scans as objective evidence necessary to prove the issue. Ahsens criticized defense experts' opinions as bought and paid for and unworthy of belief. Jurors did not believe the defense experts without objective data to support their opinions.

The State's reliance on two Florida cases is also misplaced (Resp. Br. at 28). The State relies on *Walls v. State*, 926 So.2d 1156, 1171 (Fla. 2006) to argue that the PET scan would have been cumulative to evidence the jury heard (Resp. Br. at 28). In *Walls*, the Court rejected the claim that counsel was ineffective for failing to obtain a PET scan. *Id*. at 1170-71. Counsel testified that while he was aware of PET scans, his experts did not want one since they believed it would not show anything helpful. *Id*. at 1170. One defense doctor had conducted other scans, including a Computerized Axial Tomography scan and two electorencephalograms on Walls. Further, the trial court specifically found that Walls suffered from brain dysfunction and brain damage. *Id*. at 1163, 1171. Under these circumstances, the Florida Supreme Court found that Walls failed to show either deficient performance or prejudice on this claim. *Id*. at 1171.

By contrast, here, even though two defense experts recommended a PET scan, no scans were done. And, unlike *Walls*, the jury did not accept defense expert testimony that Forrest had brain damage. Instead, it accepted the State's

argument that without objective testing like a PET scan, the opinions were "absurd."

The State's reliance on *Ferrell v. State*, 918 So.2d 163 (Fla. 2005) is also unconvincing (Resp. Br. at 28). In *Ferrell*, the Court rejected the claim that counsel was ineffective for failing to obtain a PET scan to support the expert's finding of organic brain damage. *Id*. at 174-176. PET scans were not widely used at the time of Ferrell's trial in 1992 and were not recommended in capital training manuals. *Id*. at 175. Counsel's expert did not recommend a PET scan. *Id*. Accordingly, counsel's performance was not deficient. *Id*. at 174-76. Further, since the sentencing judge had found brain impairment was a mitigating factor, the issue was properly considered. *Id*. at 175.

Distinct from *Ferrell*, at the time of Forrest's trial in October, 2004, PET scans were widely used to establish brain damage, counsel was aware of their use, and had obtained them in other cases (H.Tr. 118-119, 534-535). Unlike Ferrell's expert, who did not recommend a PET scan, here, two defense experts, Drs. Gelbort and Evans, recommended one (H.Tr. 538, 541, 549, Exs. 15 and 59). And, whether Forrest suffered brain damage was seriously disputed, and was rejected because no brain scan was conducted.

The State argues that this Court should reject Forrest's claim of ineffectiveness, because "there is no end to possible supporting evidence." (Resp. Br. at 28). Next, a defendant might want an x-ray, an MRI, a SPECT scan, or a CT scan (Resp. Br. at 28-29). This argument ignores that the Sixth Amendment

requires counsel to "discover *all reasonably available* mitigating evidence . . ." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis in original). This does not mean counsel has to subject a defendant to every possible test that may support a diagnosis (Resp. Br. at 29). Instead, counsel must follow-up on leads and obtain the appropriate testing, given the circumstances of that case. Here, for example, Dr. Gelbort indicated that an EEG was inappropriate, because Forrest had no history of seizure disorder (Tr. 1556). Counsel reasonably concluded an MRI was not warranted, based on her investigation and her experts' recommendations (H.Tr. 545). But, given her investigation and her experts' recommendations, counsel knew a PET scan was warranted and would likely lead to evidence of brain damage. She did not make a reasonable strategic decision not to pursue the PET scan, she simply waited too late to get it done.

PET Scan Is Admissible in Guilt Phase

The State argues that the PET scan was inadmissible in guilt, because it does not meet the *Frye*[1] test, as it cannot predict behavior and lacks a causal relationship to criminal behavior (Resp. Br. at 30-31). The State relies on *United States v. Purkey*, 428 F.3d 738, 753 (8th Cir. 2005). *Purkey* does not support this argument (App. Br. at 52). Nothing in *Purkey* suggests that PET scans are not generally accepted in the scientific community. Indeed, *Purkey* found Dr. Preston qualified to testify regarding the PET scan he conducted. *Id*. at 752. The problem

[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

was that Purkey's defense counsel did not attempt to tie the test results to Purkey's state of mind. *Id*. at 752-53.

The State never responds to Forrest's showing that Dr. Smith, a psychologist qualified to give his opinion on mental disease or defects, testified at trial and would have tied the test results to Forrest's state of mind (App. Br. at 52-53). The State ignores *State v. Raine*, 829 S.W.2d 506, 510 (Mo. App. W.D. 1992) and *State v. Windmiller*, 579 S.W.2d 730 (Mo. App. E.D. 1979), which hold that evidence is admissible in guilt phase to support the factual basis for a mental disease or defect, even if it does not provide the ultimate conclusion that the defendant suffers from a mental disease or defect. Thus, medical records and lay testimony can be introduced to support an expert's conclusions that a defendant suffers from a mental disease or defect. *Raine*, 829 S.W.2d at 510-11. Lay testimony about a defendant's behavior is admissible, even if those witnesses testify to events occurring two months before the crime. *Windmiller*, 579 S.W.2d at 731-33.

Like medical records and lay testimony, a PET scan would have provided a factual basis for Dr. Smith's guilt phase testimony. As in *Raine* and *Windmiller*, the expert could make a diagnosis without it, but a jury might consider the testimony more favorably if it had been supported by objective data. Missouri courts have rejected the State's suggestion that supporting evidence is inadmissible. *Windmiller*, 579 S.W.2d at 733. Excluding such evidence is fundamentally unfair and is reversible error. *Id.*

Prejudice

The State argues Forrest was not prejudiced by counsel's failure to obtain a PET scan, because there was "overwhelming" evidence of guilt and thus, there is no reasonable probability that the PET scan and Dr. Preston's testimony would have changed the result (Resp. Br. at 33-34). Again, the State ignores all of the contrary controlling authority cited in Forrest's brief (App. Br. at 54). This Court recently said that no crime, "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). A jury must be allowed to consider mitigating circumstances before death can be imposed.

Missouri juries are instructed that they are never required to give death. Juries have given life to defendants who committed horrific murders and killed many people. For example, Richard DeLong[2] suffocated a mother, her unborn baby, and three children, but received a life sentence. A PET scan established DeLong's brain damage. See also, *State v. Beishline*, 926 S.W.2d 501, 505 (Mo. App. W.D. 1996) (jury imposed life without probation or parole for defendant who had killed four people and presented a cocaine psychosis defense); *State v. Blankenship*, 830 S.W.2d 1 (Mo. banc 1992) (defendant received life sentences for

[2] Forrest asks this Court take judicial notice of the trial judge report in *DeLong*, required to be filed pursuant to Section 565.035.6, RSMo 2000.

killing five people when he 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 sentenced to life without probation or parole in serial murder case involving six women found with defendant's DNA).

Here, the evidence that Forrest shot and killed three people was substantial and uncontested. But, his state of mind was contested. Had counsel presented objective, factual support of his brain damage, the jury likely would have considered this mitigating evidence. Given the State's emphasis on the lack of objective data like brain scans, this Court cannot have confidence that the PET scan evidence would have made no difference. The PET scan was readily available. Counsel's failure to investigate and present this evidence should undermine this Court's confidence in the outcome. This Court should reverse and remand for a new trial.

II. Medical Records Documenting Head Injuries

Counsel was ineffective for failing to present medical records that showed Forrest's head injuries, suicide attempts, and in-patient mental health treatment. Forrest was prejudiced because the records were mitigating and not cumulative, because the State argued Forrest was not brain damaged, did not suffer from depression, and repeatedly criticized the trial defense experts for not relying on objective data in reaching their conclusions.

The State argues that counsel was not ineffective in failing to introduce medical records that showed Forrest's brain injury, history of depression, in-patient psychiatric treatment, and suicide attempts, because counsel thought the details about the brain injury were not mitigation-friendly and the records were not crucial to the case (Resp. Br. at 36). Again, the State selectively cites counsel's testimony and ignores all facts in the record that refute its argument.

Counsel provided the medical records to its experts, thereby opening this area up to cross-examination (Ex. 13, at 3, Ex. 59). Counsel also elicited from Dr. Gelbort Forrest's self-report of brain injury caused by a baseball bat (Tr. 1545). The records confirmed that Forrest's report was truthful; that he had been treated for a substantial head injury (Ex. 11). The records provided no details about how the injury occurred (Ex. 11). Thus, there was no down-side to introducing them to show that Forrest's report to Dr. Gelbort was true. The medical records showed brain trauma, and provided objective evidence of his brain injury, ten years before the charged offense (Ex. 11).

Counsel admitted that she made a mistake in not correcting Dr. Gelbort's suggestion that Forrest may have misreported his head injury (H.Tr. 532-33). But, her admission does not appear in the State's brief, because it demonstrates counsel's ineffectiveness.

As in Point I, the State argues that, since the jury already knew about Forrest's drug abuse and depression, the medical records would have been cumulative (Resp. Br. at 38). The State ignores that Ahsens attacked the defense experts as paid hacks who could not be believed. The State ignores that the jury rejected the testimony of brain damage and depression. The State ignores that the medical records, were the only documented, third-person account of Forrest's head injuries. They differed from all evidence presented at trial. They showed in-patient psychiatric treatment seven years before the charged offense. They showed suicide attempts.

The State ignores that background records are compelling mitigating evidence. See, App. Br. at 58, discussing *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *Rompilla v. Beard*, 545 U.S. 374, 383-85 (2005); *Hutchison v. State*, 150 S.W.3d 292, 305 (Mo. banc 2004); and *Commonwealth v. Zook*, 887 A.2d 1218, 1230 (Pa. 2005). The State' failure to address *Hutchison* is particularly revealing, because there, this Court explained the importance of such records.

Readily available records that Hutchison's trial counsel did not introduce at trial would have documented Hutchison's troubled childhood, mental health problems, drug and alcohol addiction, history of sex abuse, attention deficit

hyperactivity disorder, learning disabilities, memory problems and social and emotional problems. *Hutchison*, 150 S.W.3d at 304 -305. The motion court found that the absence of these documents did not prejudice Hutchison. *Id*. at 304. That court ruled that "the information in these background documents was cumulative or too remote in time to be relevant and in some cases it was actually detrimental to Hutchison." *Id*. The motion court found counsel was not ineffective for failing to offer the records into evidence. *Id*.

This Court reversed, ruling that the records were relevant mitigating evidence. *Id.*, *Tennard v. Dretke*, 542 U.S. 274, 284-85 (2004) (virtually no limits are place on relevant mitigating evidence). The facts in the records, like drug use and gun possession, were introduced during the trial. *Hutchison, supra* at 304. "The documents would not have added anything new that was unfavorable, but could have demonstrated to the jury the problems Hutchison had growing up and his intellectual and emotional deficits far more effectively than the rudimentary information actually presented during the penalty phase." *Id., citing Wiggins*, 539 U.S. at 524-525. Records showing mental illness, sexual abuse and impaired intellectual functioning were important. *Id*. at 305. They were also useful because they showed Hutchison's claim of impaired intellectual functioning "is not a recent discovery for the purpose of the defense." *Id*.

Medical records showing treatment for Forrest's head injury, his mental illness, and his suicide attempts were relevant mitigating evidence that should have been presented. They showed that defense claims of brain damage and

depression were not "a recent discovery for the purpose of the defense." They were important because the State disputed the defense that Forrest was brain damaged and suffered from depression. Counsel knew she should have corrected Dr. Gelbort when he suggested that no evidence, independent of Forrest's self-report, supported his finding of brain trauma.

Like *Hutchison*, there was little down-side to introducing the records. The jury knew about Forrest's drug use. Counsel had provided the records to all the defense experts and had elicited evidence about the baseball bat incident from Dr. Gelbort during his direct examination. Accordingly, the subject had been opened up for cross-examination, and the non-"mitigation friendly story" was already wide open for the State. The records provided no details of how the injury occurred, but documented the severity of the injury and the medical treatment. Counsel should have introduced them at trial.

IV. Proportionality Review

Meaningful proportionality review is constitutionally required by the Eighth and Fourteenth Amendments. This Court's review of Forrest's death sentence on direct appeal was inadequate because it only compared his case to four death penalty cases involving multiple murders. A constitutional and meaningful review required it to compare similar cases in which the defendants received life sentences.

The State acknowledges that Justice Stevens recently criticized the Georgia Supreme Court's "perfunctory" proportionality review because it did not consider similar cases in which a defendant was sentenced to life imprisonment (Resp. Br. at 44). The State gives short shrift to Justice Stevens analysis saying his statement is not governing law and is contrary to *Pulley v. Harris*, 465 U.S. 37 (1984) (Resp. Br. at 44). According to the State, Stevens' statement in *Walker v. Georgia*, 129 S.Ct. 453 (2008) is "merely a reaffirmation of his concurrence" in *Pulley*, an opinion that did not carry the day (Resp. at 44). Thus, the State urges this Court not concern itself with Justice Stevens' concerns about proportionality or meaningful appellate review and the role it plays in prohibiting the arbitrary imposition of death (Resp. Br. at 44-45).

Forrest disagrees with the State and believes Stevens' analysis both in *Walker v. Georgia* and in *Pulley v. Harris* provides compelling arguments why meaningful appellate review is essential to eliminate the systemic arbitrariness and

capriciousness infecting the death penalty scheme invalidated by *Furman v. Georgia*, 408 U.S. 238 (1972).

In *Furman*, the statutory scheme was ruled unconstitutional because of two basic defects: death was permitted for broad classes of offenses for which the offense always constituted cruel and unusual punishment; and secondly, the statute vested unfettered discretion in juries and trial judges to impose death. *Pulley*, 465 U.S. at 55 (Stevens, J., concurring). States drafted new statutes designed to eliminate the unfettered discretion. *Id*. The statutes narrowed the classes of offenses for which death could be imposed and provided special procedural safeguards including appellate review of the sentencing authority's decision to impose death. *Id*.

In reviewing the newly drafted Georgia statute, three justices specifically indicated that some form of meaningful appellate review is required. *Id., citing Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Justice White's opinion focused on the proportionality review of the Georgia statute. *Pulley*, 465 U.S. at 55. Justice White noted that comparative proportionality review was specifically designed to combat the systemic problems in capital sentencing invalidated in the prior Georgia capital sentencing scheme. *Id*. That it was an effective safeguard did not make it the only acceptable form of appellate review however. *Id*.

Florida's statute, unlike Georgia, does not require the state Supreme Court to conduct any specific form of review. *Id.* at 55-56, discussing *Proffitt v. Florida*,

428 U.S. 242, 250-52 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). But, Florida required the trial judge to justify the imposition of death with written findings and the Florida Supreme Court indicated death sentences would be reviewed to ensure that they are consistent with the sentences imposed in similar cases. *Pulley*, 465 U.S. at 56. Thus, the state court engaged in some form of "meaningful appellate review" even though not mandated by statute. *Id*.

Texas' statute, like Florida's, did not require comparative review. *Id.* at 57, discussing *Jurek v. Texas*, 428 U.S. 262, 276 (1976). The Texas capital sentencing procedures passed constitutional muster because they assured that sentences of death will not be wantonly or freakishly imposed. *Pulley*, 465 U.S. at 57. That assurance was based in part on the statutory guarantee of meaningful appellate review. *Id*. The judicial review provides a means to "promote the evenhanded, rational, and consistent imposition of death sentences under the law." *Id.*

Justice Stevens also noted that in *Zant v. Stephens*, 462 U.S. 862 (1983), the Court found that appellate review of death sentences was essential to upholding the Georgia capital sentencing scheme in *Gregg*. *Pulley*, 465 U.S. at 57.

These precedents show that meaningful appellate review is an indispensible component of any capital sentencing scheme. *Id.* Comparative proportionality review is not the only method required. *Id.* But, some "meaningful" review is required by the Eighth Amendment. *Id*.

Justice Stevens' analysis is not contrary to *Pulley*, but is fully supported by Supreme Court precedents. In *Parker v. Dugger*, 498 U.S. 308, 321-322 (1991), the Court reversed because of the Florida Supreme Court's failure to conduct meaningful appellate review required by the Eighth Amendment. That decision was a 6:3 decision, authored by Justice O'Connor and the State cannot easily brush it aside as "merely" a concurring opinion.

In *Parker*, the Court ruled that "[i]f a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Id*. at 321, *quoting*, *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). The Court had "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. at 321, *citing Clemons v. Mississippi*, 494 U.S. 738, 749 (1990) (citing cases); *Gregg v. Georgia*, 428 U.S. 153 (1976). The Court specifically held that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error. *Parker v. Dugger, supra, citing*, *Dobbert v. Florida*, 432 U.S. 282, 295 (1977); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *Spaziano v. Florida*, 468 U.S. 447, 465 (1984). Since the Florida Supreme Court failed to conduct a meaningful independent review, the Court reversed. *Parker v. Dugger*, 498 U.S. at 321-322.

The Missouri Legislature, like Georgia, chose to enact a death penalty statute that requires comparative proportionality review. This is the meaningful appellate review necessary under the Eighth Amendment to safeguard against the arbitrary and capricious imposition of death. Meaningful appellate review requires more than finding four death penalty cases where a similar aggravator was found – the review conducted on Forrest's direct appeal. Meaningful review requires a real comparison among all similar cases to determine whether a death sentence is disproportionate. Section 565.035.3(3), RSMo 2000. This Court's review must be meaningful under the Eighth Amendment. It should consider all similar cases, including those in which a life sentence was imposed, as provided by statute. To the extent this Court fails in its mandated review, our capital punishment scheme is unconstitutional.

CONCLUSION

Based on the foregoing arguments and the arguments in his original brief, 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, 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 5,485 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in February, 2009. 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 mailed this 5th day of February, 2009, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Melinda K. Pendergraph