Sup. Ct. # 93882

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

JESSE DRISKILL,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of Laclede County, Missouri
26th Judicial Circuit, Division 2
The Honorable Kenneth M. Hayden, Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Jesse Driskill was convicted of two counts of first-degree murder, §565.020[1], one count of first-degree burglary, §569.160, one count of forcible rape, §566.030, one count of forcible sodomy, §566.060, and five counts of armed criminal action, §571.015. He received two death sentences, a consecutive fifteen-year term on the burglary count, and seven consecutive life sentences on the remaining counts. Notice of appeal was timely filed. This Court has exclusive jurisdiction of the appeal. Mo.Const.,Art.V,§3.

[1] All statutory references are to the Missouri Revised Statutes, 2000 edition, unless otherwise noted.

STATEMENT OF FACTS[2]

Three months before trial, Dr. Linda Gruenberg reported: "It is my opinion to a reasonable degree of medical and psychiatric certainty, that Mr. Driskill is **UNABLE TO STAND TRIAL**." (D.Ex.A,p.1)(emphasis in original). Although Driskill understood basic courtroom procedures, the roles of the participants, and the components of the court, he was "unlikely to appropriately conform his conduct in the courtroom rendering him unable to cooperate with his attorneys and assist in his defense during trial, in addition to possibly becoming explosive and disruptive during the trial proceedings." (D.Ex.A,p.1). Driskill required "immediate psychiatric treatment with medication to help him regulate his moods and decrease his difficulty in maintaining control of his behavior." (D.Ex.A,p.2). If he received psychiatric treatment and medication, Driskill could be stabilized and probably would become fit to stand trial. (D.Ex.A,p.2).

Dr. Gruenberg noted that Driskill had suffered from mental illness since his teenage years. (D.Ex.A,p.2). Over the years, he had been diagnosed with bipolar disorder, generalized anxiety disorder, intermittent explosive disorder, polysubstance dependence, neurocognitive defects, multiple head traumas, and chronic migraine headaches. (D.Ex.A,p.2,8). He had been treated by five psychiatric hospitals. (D.Ex.A,p.8). Driskill had been prescribed a laundry list of medications over the years. (D.Ex.A,p.8). He experienced mistrust rising to the level of paranoia and had tried to commit suicide repeatedly. (D.Ex.A,p.2,9).

[2] The Record on Appeal consists of a trial transcript (Tr.) and legal file (L.F.).

On June 18, 2013, defense counsel alerted the court that at past court appearances, Driskill had suffered from extreme anxiety and panic attacks which resulted in outbursts over which Driskill had no control. (L.F.531). Counsel feared that Driskill would experience similar panic attacks at his trial. (L.F.531). Counsel requested that Driskill be allowed to participate in portions of his trial by closed-circuit television and that someone from defense counsel's office sit with him so that he could communicate by cell phone with defense counsel. (L.F.531,533). The court sustained the motion. (Tr.39-43,46-50).

Dr. Robert Fucetola examined Driskill on July 13, 2013 and found Driskill competent to stand trial. (D.Ex.B,p.8). But he noted that he had not observed Driskill during a panic attack and could not say how Driskill would be at trial. (L.F.736;Tr.62). He believed that allowing Driskill to be excused if he had a panic attack and given time to recover should suffice to enable Driskill to aid in his defense and remain competent to stand trial. (L.F.736).

Day One: Voir Dire

On August 14, 2013, the first day of jury selection, the parties revisited the topic of allowing Driskill to appear by polycom, a video-conferencing system, during portions of the trial if he had panic attacks. (Tr.60-64). The court advised the parties that polycom was available in Franklin County, where the jury was being selected, but not in Laclede County, where the trial would be held. (Tr.63-64). Defense counsel reminded the court that Driskill had a long history of anxiety disorders, panic attacks, and intermittent explosive disorder. (Tr.61). In the past, he had panic attacks in court and

had to be removed. (Tr.61). These incidents were part of his anxiety disorder, and he had no control of them. (Tr.61).

Counsel advised the court that Dr. Gruenberg had evaluated Driskill's competency to stand trial and recommended that Driskill be prescribed Neurontin for his anxiety, as he had received in the past; without it, Driskill would not be competent to stand trial. (Tr.61). The Department of Corrections, where Driskill was housed, refused to give Driskill anti-anxiety medication. (Tr.62). Counsel had "gone round and round" with the D.O.C. in trying to have Driskill placed on Neurontin, but the D.O.C. refused. (Tr.62). It would not accept an outside doctor's recommendation or prescription. (Tr.62-63). Yet the Department of Corrections had not had a psychiatrist see Driskill. (Tr.62-63). Thus, Driskill was not taking any medication for his anxiety disorder. (Tr.63).

Counsel noted that both Dr. Gruenberg and Dr. Fucetola thought that using the polycom system would be a good way to address Driskill's anxiety. (Tr.62). Driskill would not be prejudiced because he could participate by watching the trial by polycom and communicating with his attorneys. (Tr.62). Counsel alerted the court that they might need to ask for a competency hearing in the middle of trial. (Tr.65).

During the first day of voir dire, counsel suddenly stated that Driskill "needs to get out of the courtroom now." (Tr.231). Driskill left the courtroom, and the court took a recess. (Tr.231). Defense counsel advised the court that Driskill suffered a panic attack and could not control his actions. (Tr.233-34). Driskill could not meet with counsel or participate meaningfully in his trial at that time, whether in person or by polycom. (Tr.233-34).

Counsel asked for a competency evaluation to determine if Driskill could continue with the trial without anti-anxiety medication. (Tr.234). The State objected, arguing that any defendant could act up and get removed from the courtroom and that Driskill was competent because he understood the nature of the proceedings. (Tr.235-36). Stressing Driskill's long, documented history of anxiety, panic attacks, and intermittent explosive disorder, defense counsel countered that Driskill's actions were not volitional and that Driskill had been on anti-anxiety medications throughout his life. (Tr.236). Counsel argued that the issue of competency can arise at any point in trial and must be evaluated at the present time. (Tr.236-37). Counsel noted that Dr. Gruenberg stated that Driskill would be competent if he was given medication to control his panic attacks. (Tr.237). Counsel proposed that a doctor from the state hospital be on standby to evaluate Driskill during a panic attack, but the court overruled the request. (Tr.237-38). It also denied Driskill's request for a competency exam. (Tr.243). It noted that Driskill had already had two competency exams, and the court knew those results. (Tr.243).[3]

[3] A few days later, the court asked defense counsel whether Driskill had problems on the first day of voir dire before his panic attack. (Tr.978). Ms. Turlington stated she did not know of a problem, but she was not sitting next to Driskill. (Tr.978). Ms. Dryden stated she was not sure Driskill was able to fully assist, based on his attitude and demeanor. (Tr.978). His anxiety increased during the first panel; although she kept trying to calm him down, she was not sure as to what level he was able to participate. (Tr.978).

A bailiff, recounting the panic attack, vouched that he saw Driskill getting pretty agitated. (Tr.239). Driskill was getting ready to stand up, saying, "I got to leave." (Tr.239). The bailiff approached Driskill, put his hands on him, and told him to sit down. (Tr.239). Driskill repeated, "I've got to get out of here." (Tr.239). The bailiff repeated, "You need to sit down right now. When the judge clears you to go, we'll go." (Tr.239). The bailiff kept telling Driskill, "Calm down, I'm going to work with you a second, get you out of here." (Tr.239-40). As soon as the judge indicated they could leave, the bailiff led Driskill into a cell. (Tr.240).

Driskill immediately walked to the back of the cell and punched the wall. (Tr.240). He was "almost hyperventilating, red in the face, crying, rubbing his head, kneeling over like his stomach was hurting." (Tr.240). When the bailiff told Driskill that his attorneys wanted to speak with him, Driskill did not respond. (Tr.240). He "was still pretty worked up, crying, red in the face." (Tr.240). The bailiff repeated that counsel wanted to speak with Driskill, but still Driskill was nonresponsive. (Tr.240-41). A third time, the bailiff repeated that counsel wanted to speak with Driskill. (Tr.241). Driskill, red in the face, looked at the bailiff, gritted his teeth, and told the bailiff he wanted to be left alone. (Tr.241). Driskill vomited. (Tr.241). He took his shirts off and washed his face. (Tr.241). He then paced the cell and eventually started to calm down. (Tr.241).

A recess was taken for 15-20 minutes. (Tr.241). Afterwards, counsel advised the court that Driskill was still crying and unable to communicate effectively with counsel or actively participate in the trial. (Tr. 242). Counsel requested they recess for the day. (Tr.242). She added that Driskill would participate by polycom the next day to give him

a chance to calm down further and avoid the stressors that caused his panic attacks. (Tr.242). The State objected, arguing that Driskill should either be present or not present at all. (Tr.243). The court recessed for the afternoon. (Tr.243). It ordered that Driskill would be allowed to appear by polycom the next day. (Tr.243-44). Defense counsel noted that they were only asking for the polycom because the court refused to grant a competency exam. (Tr.244-45).

Day Two:

The next morning, the court admitted into evidence the reports by Dr. Gruenberg and Dr. Fucetola. (Tr.249). The court recognized that Dr. Gruenberg's report found that Driskill was not competent to stand trial, but "based upon the most recent report which basically is 30 days old," *i.e.*, Dr. Fucetola's report, it found Driskill competent to stand trial. (Tr.250).

The court questioned Driskill about his willingness to appear by polycom instead of appearing in person. (Tr.255). Driskill asked that he be allowed to participate that day via polycom. (Tr.253). He understood he had the right to be present, and the polycom procedure had been explained to him. (Tr.252). He was feeling better and was calmer than he had been when he left the courtroom the day before. (Tr.255). He could think clearly, and there was nothing interfering with his ability to communicate with his attorneys or assist in his defense. (Tr.255-56). His attorneys had phones, so he could communicate and text with them. (Tr.256). Driskill hoped to be able to be present in court the following day. (Tr.254).

Counsel objected that regardless of how Driskill was before trial, he was not competent currently. (Tr.254-55). The trial setting was too stressful for Driskill, and he could not control his anxiety disorder without medication. (Tr.255). Driskill agreed to appear by polycom only because the court rejected his request for a competency exam. (Tr.255). The court found that Driskill voluntarily waived his right to be personally present in the courtroom for the day. (Tr.257).

Counsel requested that the jurors be told why Driskill left, so the jurors would not think that Driskill was too dangerous to be in the courtroom. (Tr.260). The court suggested that counsel question the venirepanel as to whether they would draw inferences from Driskill's absence; but the court refused to tell the panel that Driskill had a panic attack. (Tr.259-62).

Counsel asked that Driskill receive a medical evaluation so that they could tell the jury that he left the courtroom for a medical reason, but the court refused. (Tr.264-66). Counsel argued that the court was subjecting Driskill to trial by fire by waiting for Driskill to have another panic attack or physical breakdown before he could get medical attention. (Tr.266-67).

Counsel also advised the court that at 6:00 the night before, Driskill had still been recovering from the panic attack, "still red in the face, sweating, somewhat crying." (Tr261). Counsel had not been able to effectively communicate with him. (Tr.261). Counsel reiterated that Driskill was only agreeing to appear by polycom because the court overruled his request for competency and medical evaluations. (Tr.267).

Driskill appeared by polycom for the day. (Tr.978). Counsel could communicate with Driskill, but they had problems. (Tr.306,978). Driskill could text counsel, but the texts took a long time to arrive, and phone service cut in and out. (Tr.306,978). They were unable to see the entire jury panel on the television, especially for the questioning of the large group of 42 jurors. (Tr.979). Driskill reported he did well that day and wanted to be in the courtroom the next day. (Tr.307,548).

Day Three: End of Voir Dire

Driskill appeared in court without incident. (Tr.694). He seemed able to assist counsel. (Tr.979).

Day Four: Guilt Phase

As guilt phase started, defense counsel again moved for a competency exam. (Tr.692). They presented the supplemental report Dr. Fucetola gave after Driskill's panic attack during voir dire. (Tr.692;D.Ex.B-1). Dr. Fucetola emphasized:

> During the panic attacks, and in the moments before and after attacks, I am concerned that Mr. Driskill does not have the capacity to assist [counsel] in his own defense due to his transient state of mind. Clear thinking is compromised during acute panic attacks because of irrational thoughts and fears about escape, losing control, or going crazy/dying.

(D.Ex.B-1). Dr. Fucetola stated that behavioral treatment and/or anxiolytic medication would likely decondition Driskill's panic response to being in the courtroom. (D.Ex.B-1).

The court noted that the polycom was available if needed and denied counsel's motion for a competency evaluation. (Tr.694-95). Defense counsel objected to Driskill being un-medicated and forced to suffer through panic attacks in front of the jury. (Tr.695).

At the end of the day's proceedings, the court noted that Driskill had been in the courtroom all day. (Tr.973). Driskill was able to ask questions and assist counsel. (Tr.973-74). Counsel stated they had no reason to think that Driskill was under any mental disability that day. (Tr.974).

Day Five: Guilt Phase

The court questioned defense counsel about Driskill's competency. (Tr.977-80). Defense counsel noted that it was impossible to fully answer the court's questions. (Tr.979-80). Whether or not Driskill appeared to be able to assist, he had an underlying disorder and was not medicated. (Tr.979). Counsel could not definitively evaluate what Driskill would have been like had his disorder been controlled by medication. (Tr.979).

After the State rested, defense counsel informed the court that Driskill would not testify in his defense. (Tr.1247-48). His decision was based partly on his belief that he could not testify without having a panic attack. (Tr.1247-48). Driskill stated he understood his constitutional rights and had enough time to talk to counsel about his decision not to testify. (Tr.1248-49). Driskill stated, "I want to testify, but I just know I can't. I mean I'm not good with people." (Tr.1249-50). The court told Driskill that his testimony would have to be in front of the jury, who would have to hear the testimony

and observe his testimony like any other witness. (Tr.1250). Driskill told the court he could not take the stand and do that. (Tr.1250).

Although Driskill was able to assist counsel during the proceedings that day, he had to take a break because of anxiety after he was asked about testifying. (Tr.1266). Driskill became anxious, asked to leave the courtroom, and needed time to collect himself. (Tr.1264).

Day Six: End of Guilt Phase

The next morning, Driskill again stated he would not testify. (Tr.1623). Driskill felt he had no choice but to forego testifying because he would have a panic attack. (Tr.1264). Counsel argued that Driskill was in court without the benefit of medication and without medical treatment and was being forced not to testify. (Tr.1264). Counsel did not know whether medication would help, but it had the potential to do so and had helped in the past. (Tr.1264-65). Driskill's doctors recommended it. (Tr.1265-66).

The defense rested its case, instructions were read, and the parties made their closing arguments. Driskill was able to assist during these proceedings and seemed to understand the proceedings. (Tr.1400-01). Driskill waived his appearance in court for discussion of the jury questions during deliberations. (Tr.1369). During the reading of the verdicts, as count 8 was being read, defense counsel interrupted to ask that Driskill be allowed to leave the courtroom. (Tr.1379-80). The court agreed and took a recess. (Tr.1380-81). The jury saw Driskill leave the courtroom. (Tr.1401). The court approved counsel's request that Driskill be excused for the remainder of the verdicts. (Tr.1381).

Day Seven: Penalty Phase

As penalty phase started, Driskill was in a heightened state of anxiety. (Tr.1402). Counsel was not sure how long he would be able to stay in the courtroom, although he wanted to be there. (Tr.1402,1415). During the State's opening statement, Driskill told counsel he could not take it anymore and worried he would "snap out." (Tr.1415). At about 9:45 a.m., counsel asked the court to excuse Driskill. (Tr.1415). Counsel believed that had she not asked that Driskill be excused, he would have had another panic attack. (Tr.1415). Driskill left the courtroom, and the court declared a recess. (Tr.1410).

After an hour and fifteen minutes, Driskill was a little calmer but still shaking and very anxious. (Tr.1416). Questioned by the court, Driskill stated he would "snap out" if he stayed in the courtroom. (Tr.1411). Driskill advised the court that he wanted to be in the courtroom, but he felt very uneasy and, based on his past experiences, worried his anxiety would escalate and he would have another panic attack. (Tr.1412-13,1416). Driskill declined appearing by polycom, stating that it aggravated his anxiety and that he preferred to be in the courtroom. (Tr.1413).

The prosecutor argued that Driskill was sitting calmly, but defense counsel countered that Driskill was shaking, he was wringing his hands, and he was perspiring. (Tr.1418,1420). Counsel moved for a continuance and a competency exam. (Tr.1416-17). Alternatively, she requested a mistrial. (Tr.1416-17). If the court denied those requests, counsel asked that the court allow Driskill the time he needed until he could be in the courtroom without suffering a panic attack. (Tr.1416-17). The court denied each request. (Tr.1418-19).

Driskill told the court he did not want to stay in the courtroom and did not want to appear by polycom. (Tr.1419). He asked the court to excuse him. (Tr.1419).

Driskill did not appear in person or by polycom for any of the State's evidence in penalty phase. After the State rested, the court questioned Driskill again. (Tr.1477). Driskill did not want to be in the courtroom and asked the court to excuse him. (Tr.1477). He understood he had the right to be present, but believed if he were in the courtroom, he would have another panic attack. (Tr.1477-78). He was jittery and wringing his hands. (Tr.1478). Counsel again asked for a competency exam; if not a competency exam, a mistrial; if not a mistrial, a recess until Driskill was capable of being present. (Tr.1478-79).

The court denied each request. (Tr.1479). It noted that the polycom was available for Driskill. (Tr.1479). Driskill again rejected appearing by polycom, noting that it made his anxiety worse. (Tr.1479). The court noted that Driskill did not appear to be under duress, but his leg was bounced up and down a little bit. (Tr.1480). He was able to answer questions and understood those questions. (Tr.1480). The court did not notice any difference in his behavior. (Tr.1481).

Driskill was absent for the first four defense witnesses but returned to the courtroom for the last two witnesses of the day. (Tr.1542). The court noted that when Driskill was in the courtroom, he was able to speak with counsel, seemed to understand the proceedings, and assisted counsel. (Tr.1643).

Day Eight: Final Day of Trial

Driskill appeared in court for the testimony of one witness, but then had to leave for the remainder of the evidence, when counsel read to the jury a letter from Driskill's brother Clark. (Tr.1645,1659).

After the defense rested, the court wanted to question Driskill about his right to testify in penalty phase. (Tr.1663). The court acknowledged that, "I understand that right now he's not available to do that." (Tr.1663). The court took a recess until Driskill was ready. (Tr.1663). Driskill told the court that he would not testify in penalty phase. (Tr.1664).

After the closing arguments, Driskill asked to be excused. (Tr.1743). He waived his presence for the swearing of the bailiffs and excusing the alternates. (Tr.1743). But Driskill returned before the alternates were excused. (Tr.1744). After the jurors were polled but before they left, Driskill again left the courtroom. (Tr.1755).

Evidence Presented at Trial

Jessica Cummins, Jessica Wallace, Codi Vause, Calvin Perry, and Jesse Driskill were friends. (Tr.906-907,1033). Vause lived at 713 Parkhurst in Lebanon, Missouri. (Tr.1031).

On Sunday afternoon, July 25th, 2010, Driskill and Wallace hung out and took drugs at the Niangua River. (Tr.1078,1093). In the evening, they were having sex by the river when they were interrupted by a police officer. (Tr.1078-79). Driskill, carrying his clothes and a small silver gun, ran off into the woods. (Tr.1078-79).

That day, Johnnie and Coleen Wilson were at their home in Lebanon, in Laclede County, Missouri. (Tr.717-18).[4] The house was a "travel type trailer" in a remote area near the Niangua River. (Tr.727,741,802). Johnnie was 82 years old, and Coleen was 76. (Tr.726).

The Wilsons' son John expected Johnnie and Coleen to arrive at his home by noon on Monday, July 26th. (Tr. 718-19,729). When they did not, John phoned them repeatedly, but got no answer. (Tr. 719,729). He was concerned because Johnnie and Coleen were typically very punctual. (Tr.730).

Shortly before 7:00 p.m., John and other family members arrived at Johnnie and Coleen's house. (Tr.718-19,723,730). The doors were locked, and no one answered. (Tr.720,731). The Wilsons' Trailblazer was gone. (Tr. 731). Inside, the house was smoky. (Tr.721,724,731). Coleen was on the floor with her feet sticking out from under a big pile of smoldering blankets. (Tr.721,724). Johnnie was under another pile of blankets that had a few chairs set on top. (Tr.722). Both were dead. (Tr.761).

Police officers found no sign of forced entry. (Tr.748,804). A can containing gasoline was in the hallway. (Tr.824). A gasoline odor intensified by Coleen, and gasoline had soaked into the carpet under her body. (Tr.761,820). Coleen still wore her wedding ring, a ring with red stones, and her earrings, and a watch was under her body. (Tr.797,853-54). Coleen's purse was dumped out on the basement floor. (Tr.825). The

[4] For ease of reference, members of the Wilson family will be referred to by their first names. No disrespect is intended.

police seized a pack of Decade menthol 100 cigarettes from the basement. (Tr.826,855). A daily calendar was found on the dining room table. (Tr.832-33).

Meanwhile, shortly after 7:00 p.m., Driskill called Wallace and told her that he would need a ride later. (Tr.1080). He called her again shortly past 8:00 p.m. and asked her to pick him up on N Highway in Conway. (Tr.1081). Wallace drove to Conway but could not find Driskill. (Tr.1081). She saw smoke in the distance. (Tr.1082). Police and emergency vehicles headed down N Highway in the direction of the smoke. (Tr.1082). Wallace drove home. (Tr.1082).

At about 9:45 p.m., the police located the Wilsons' Trailblazer 3.4 miles northwest of Conway. (Tr.864-65,868-69). It had been set on fire. (Tr.868;St.Ex.48).

Between 10:49 and 11:00 p.m., Driskill entered Hannah's General Store in Conway. (Tr.875,903). He asked the clerk to charge his cell phone, but the clerk was unable. (Tr.875). Driskill then walked a half block to the Budget Inn, where a clerk let Driskill use a phone. (Tr.882-84). Driskill got no answer, so the clerk tried another number. (Tr.884). She heard Driskill mention the name Jessica and ask for a ride. (Tr. 884).

Driskill called Cummins to ask for a ride. (Tr.907-08). She agreed and picked Driskill up from the Budget Inn. (Tr.907-908). On the ride back, Driskill spoke nonsensically, mumbled and was hard to understand. (Tr.909-10). He said he had shot someone and messed up really bad, but at the time, Cummins thought Driskill must have meant that he had shot up some drugs. (Tr.909-10). At 12:30 a.m., she dropped him off at 913 Parkhurst. (Tr.911,1052).

Sometime in this time frame, Driskill also called Wallace. (Tr.1083). He said he had committed a home invasion, robbery, and double homicide. (Tr.1083). Wallace also went to 913 Parkhurst. (Tr.1084).

At 913 Parkhurst, Driskill told Wallace, Perry, and Vause what he had done. (Tr.1084-85).[5] He stated that an elderly couple had caught him going through their garage or shed. (Tr.943-44,1035,1085). Driskill held up his gun and ordered the couple into their house. (Tr.943-44,1085). Inside, they gave Driskill money. (Tr.945,1085). Driskill told the man it was not enough and shot him. (Tr.944,1085). The woman turned, and he shot her in the face. (Tr.944). She fell down, and he believed she was "playing possum." (Tr.944). He put a bag over the woman's head and raped her vaginally and anally. (Tr.946-47,1086). He shot the woman again. (Tr.1086). He put a plastic bag down the woman's throat and a pillow over her face. (Tr.1086-87).

Driskill stated he stayed at the house for several hours trying to clean up evidence. (Tr.1087). He poured bleach on the woman, and then put newspaper in her vaginal area, poured gasoline on her, and lit it. (Tr.950,1037-38,1087). He set the house on fire and

[5] The testimony given by Perry, Wallace, and Vause varied as to the order of the events inside the house and the injuries, so this is a compiled summary of the three versions of what Driskill allegedly stated.

left in the couple's vehicle, which he later burned. (Tr.955,1087-88). Driskill threw away the gun.[6] (Tr.954,1039). His shoes were covered with blood. (Tr.1089).

Driskill was not stable (Tr.948-49). He seemed to be enjoying how upset and shocked the others got as he told what he had done. (Tr.949,1088). Perry was in shock because he had never seen Driskill act this way; before this, he could not say a bad thing about Driskill. (Tr.948-49).

Afterwards, Cummins arrived at 913 Parkhurst. (Tr.911). Driskill was in the kitchen washing out his shoes. (Tr.911,927-28). He asked Vause for a change of clothes, and she complied. (Tr.912,1039-40). Driskill told Vause to dispose of his clothing, so she put it in a trash bag in the bathroom. (Tr.912, 1039-40). Driskill immediately fell asleep on the couch. (Tr.912,955,1041). Vause, Perry, and Cummins left the apartment and called the police. (Tr.1041). Meanwhile, Wallace had already left the apartment and contacted the police. (Tr.767,1090).

At 1:40 a.m., four officers responded to 913 Parkhurst and arrested Driskill. (Tr.1123-24,1132). Driskill, startled out of sleep, struggled with the officers and was injured when his head hit a coffee table. (Tr.1124-25,1131-32). The officers ordered Driskill to stop resisting, but he refused, so he was tasered. (Tr.1125-27). Driskill was taken to the hospital for treatment for his head wound and the tasering. (Tr.1128,1134). The police collected hair and DNA samples, took swabs of blood stains on Driskill's

[6] Perry did not see Driskill with a gun that night, but had seen him with a .380 semiautomatic about three weeks earlier. (Tr.951-52).

hands, and collected a sexual assault kit. (Tr.843-44,1109-10). A pack of Decades cigarettes was collected from Driskill's jeans. (Tr.841,1111).[7] From 913 Parkhurst, the police collected the bag of Driskill's clothing. (Tr.1071-72).

The Autopsies

Coleen died from a gunshot wound to the head. (Tr.1009). This injury was instantly incapacitating and possibly instantly fatal. (Tr.993). The gun was less than an inch away when fired. (Tr.1007). Coleen also had a bullet wound to her right cheek. (Tr.990). The bullet traveled downward along her jawline, exited her neck, re-entered her shoulder, and exited the back of her shoulder. (Tr.990). This was not a life-threatening injury, but probably was very painful. (Tr.991). Shock from the pain could have caused unconsciousness. (Tr.991).

Coleen had extensive burns, with more severe burns to the back side of her legs and buttocks, with more pronounced burns between her legs. (Tr.774-76,988). Burnt paper towels and pages from a daily calendar were between her legs. (Tr.812,814,819). When those were removed, a clear liquid containing apparent blood drained from Coleen's vaginal and rectal area. (Tr.821). She had abrasions, tearing, and bruising to her vaginal and rectal areas that were consistent with a sexual assault. (Tr.781-82,996-97).

[7] The "run numbers" from this pack of cigarettes and the pack at the crime scene came from a very small run that had been distributed to a store in Lebanon. (Tr.841-42).

Coleen had a laceration over her right eyebrow, swelling and bruising around her right eye, and her skull was fractured. (Tr.821,994-95). This was a blunt force injury and could have been caused if Coleen fell and hit her head. (Tr.995,1021).

Johnnie's body was not burned. (Tr.1010). He was naked except for a pair of untied shoes. (Tr.786,817). He had a plastic shopping bag over his head and another in his throat. (Tr.788,817,829). Johnnie died from asphyxiation by choking from the plastic bag in his throat. (Tr.1013). He would have been incapacitated and dead within minutes. (Tr.1014). Johnnie also had a bullet entry wound to his right cheek. (Tr.786).

Physical Evidence

Three bullets collected as evidence – two from the crime scene and one from Coleen's autopsy – were determined to be .380 caliber and could have been fired from the same gun. (Tr.1144-46). A .380 caliber weapon is typically a smaller firearm. (Tr.1150). The police extensively searched for a weapon, but found none. (Tr.900-903).

DNA profiles were developed for Driskill, Johnnie, and Coleen. (Tr.1206). A vaginal swab taken during Coleen's autopsy contained sperm cells. (Tr.1201-02). Two cuttings were taken from the swab. (Tr.1210). DNA testing revealed that each cutting contained a major component consistent with Coleen's DNA profile and a minor profile consistent with Driskill's. (Tr.1203,1207-08). As to the first cutting, the frequency of that DNA profile in the population was one in 1,190 in the population. (Tr.1210). As to the second cutting, the mixture profile was 94.97 billion times more likely to have occurred as a mixture of DNA from Coleen and Driskill, as opposed to a mixture from Coleen and another unrelated person. (Tr.1215).

The jury found Driskill guilty of all counts. (Tr.1379,1382).

The State's Penalty Phase Evidence

The State presented evidence of Driskill's prior convictions: four convictions for the class C felony of second-degree burglary; two for the class C felony of second-degree assault; and one for the class A misdemeanor of third-degree domestic assault. (Tr.1432-38). In addition, in April 2008, Driskill pled guilty to the class D felony of tampering with evidence. (Tr.1456-57). In that case, Driskill's friends abducted and robbed an elderly woman in Dunklin County and drove to Dallas County with the woman in the trunk. (Tr.1440). They arrived at Driskill's house after midnight and asked him to help dispose of the woman. (Tr.1447). Driskill did not accompany the others but his girlfriend did. (Tr.1449). The others slashed the woman's throat and left her in a ditch (Tr.1450). They returned to Driskill's house and gave him their bloody clothing and the woman's jewelry. (Tr.1450). The woman survived, and Driskill received a two-year sentence. (Tr.1441, 1457). The court admitted into evidence a certified copy of conviction for each of Driskill's convictions. (Tr.1433-36,1456).

Over defense objection, the State also presented the victim impact testimony of the Wilson's son John, their granddaughter Sarah, and Sarah's husband Caleb. (Tr.1458-76; see *infra*, p.125-26). Through a PowerPoint presentation, the State showed the jury seventeen photographs of the victims from their wedding day onward, as Sarah explained what was depicted in each photograph. (Tr.1473-74).

The Case for Life

Driskill presented the evidence of a longtime friend, Amanda Weaver; his seventh grade teacher; the warden at Crossroads Correctional Center; a drug counselor supervisor at Ozark Correctional Center; his longtime family physician; two expert witnesses; and his brother Clark.

Driskill's father was an alcoholic who beat his mother, Gloria (Tr.1484). After he died, Gloria became abusive to Driskill and his brothers, Carl and Clark. (Tr.1484). She beat them and chased them with vehicles. (Tr.1484). Later, when Clark was living with Amanda Warner, Gloria was violent towards her too; she cut Amanda's telephone wires, chased her down with her car, and several times, tried to choke her. (Tr.1484-85).

Crystal Fortune taught Driskill in the seventh grade. (Tr.1501-02). She was concerned about Driskill, a quiet boy with "big eyes that would look up at you" who always sat at the back of the classroom and did not participate. (Tr.1502). Ms. Fortune suspected that Driskill was being abused. (Tr.1502-03). On more than one occasion, she saw bruises on Driskill and reported it to the principal. (Tr.1502-03).

Driskill suffered from bipolar disorder and anxiety. (Tr.1485). His anxiety could be so great that once when he had an anxiety attack, he blacked out and hit the floor; when he awoke, he was not "in the time frame that we were" and not mentally quite there. (Tr.1485). Driskill dealt with his anxiety problem by avoiding people or anything that could trigger his anxiety. (Tr.1486). Driskill also got terrible migraine headaches. (Tr.1487).

Over the years, Amanda allowed Driskill to live in her home. (Tr.1486,1488). When there, Driskill abided by the rules. (Tr.1488). Driskill did not cope well when he was not on his medication. (Tr.1489). He had abused drugs in the past. (Tr.1489).

Driskill was 33 years old. (Tr.1568). He had been married and had five children. (Tr.1493-94). He was very good with Amanda's children. (Tr.1495). He played with them and did outdoor activities. (Tr.1495). Amanda's daughter loved Driskill and called him "Uncle Jesse." (Tr.1495). Amanda kept in touch with Driskill when he was in prison and planned to do so in the future. (Tr.1495,1497). She loved him very much. (Tr.1497).

Driskill attended a long-term drug treatment program at Ozark Correctional Center. (Tr.1535). He was soft-spoken, followed the rules and guidelines, and went to groups and class on time. (Tr.1536-37). He adapted to the program very quickly and completed the program. (Tr.1537-38).

Driskill was housed in general population at the Crossroads Correctional Center. (Tr.1510). Since his first incarceration in 2000, Driskill has had many minor violations, but nothing major. (Tr.1517). As he has gotten older, the number of minor violations has dropped. (Tr.1517).

Dr. Reed Wouters, a small-town family physician, had been treating Driskill since 2003. (Tr.1645-47). Driskill's family life was tumultuous, with a lot of abuse and issues that caused anxiety, paranoia, and distrust. (Tr.1648). When Driskill first came to Dr. Wouters, Driskill was very anxious, quiet, and paranoid, and it took a long time for them

to form a stable relationship. (Tr.1648). Right from start, Dr. Wouters knew Driskill had a drug or alcohol addiction. (Tr.1651).

Dr. Wouters also treated Driskill's brothers Carl and Clark. (Tr.1649). Driskill and Clark described the abuse they had suffered as children. (Tr.1650). Although Dr. Wouters did not recall the specifics of the abuse, he recalled the general feeling of "just the horror I think the kids lived through." (Tr.1650). Clark once told him, "You don't know what it's like to have your mom beating on your head and then four or five minutes later, not understanding what was wrong." (Tr.1650-51).

Dr. Wouters diagnosed Driskill with anxiety disorder, panic attacks, depression, explosive behavior disorder, anger issues, and severe migraines. (Tr.1651-52). He had seen Driskill when he was anxious, sweating, pacing, fists clenched, extremely agitated, and unsettled. (Tr.1654). Frequently, when Driskill got anxious or upset, he would hit things, like a wall, because it was better than hitting a person. (Tr.1652-53). During the trial, Driskill became anxious in the courtroom. (Tr.1653). He was claustrophobic and felt he had to leave. (Tr.1653). He was taken out and punched a wall. (Tr.1653). He was perspiring, vomited, lay on floor, and took off all clothes as if stomach was hurting. (Tr.1653-54). It took a while for him to calm down. (Tr.1653). These were frequently the symptoms of Driskill's panic attacks. (Tr.1654).

Dr. Wouters last saw Driskill on July 12, 2010, several weeks before the crimes. (Tr.1649). Driskill was a little more unsettled than in past, but overall was in a pretty good place. (Tr.1649). He had worked extremely hard to live in society the way he could do it. (Tr.1650). He tried to stay away from people and to earn money where he

did not have to be around people all the time. (Tr.1650). Driskill's brother Carl died about a week before the crimes occurred. (Tr.1095,1649,1655). His brother Clark has extreme anxiety and agoraphobia. (Tr.1655-56).

Dr. Robert Hanlon, a clinical neuropsychologist, evaluated Driskill. (Tr.1542, 1544). He met with Driskill for eight hours and spoke with Driskill's family members and friends. (Tr.1549-50). He reviewed records from various hospitals and clinics, the Social Security Administration, the Division of Youth Services, and the Department of Corrections. (Tr.1545-49).

Driskill suffered from bipolar disorder not otherwise specified. (Tr.1554). His symptoms did not meet the typical criteria for bipolar disorder but he clearly suffered from a mood disorder with manic or hypomanic aspects, with extreme impulsivity and high levels of energy and extreme irritability with phases of depression. (Tr.1554).

Driskill also had a generalized anxiety disorder and experienced panic attacks. (Tr.1554-55). With the panic attacks, he experienced the sudden onset of extreme fear, heart palpitations, sweating and restlessness, agitation, inability to concentrate, and the impression of impending doom. (Tr.1554-55).

In addition, Driskill suffered from intermittent explosive disorder, *i.e.*, periodic episodes of very rapid impulse aggression that far exceeded provocation. (Tr.1555-56). He had polysubstance dependence because he had abused at least three drugs over an extended period of time. (Tr.1553-54). Driskill also suffered from very painful migraines, sometimes accompanied by smells and tastes that were not actually present. (Tr.1556).

Driskill had a cognitive disorder, not otherwise specified. (Tr.1556). He functioned in the low average range of intelligence, with a full scale IQ falling in the 23rd percentile. (Tr.1557). Driskill had executive dysfunction, *i.e.*, his ability to control and organize his thoughts and make decisions in a rational, effective way was impaired. (Tr.1557-59). Driskill was certainly subnormal. (Tr.1559). Because of his impairments, Driskill tended to make bad choices. (Tr.1587).

Dr. Hanlon concluded within a reasonable degree of neuropsychological and scientific certainty that Driskill manifested circumscribed neurocognitive deficits, especially executive dysfunction, some memory disturbance, and abnormal visual reaction time. (Tr.1565). Driskill could exercise free will, and knew right from wrong, but was less able to control his behavior. (Tr.1565-66,1585). Nothing suggested that he was malingering. (Tr.1553).

Dr. William Bernet was a psychiatrist with expertise in forensic psychiatry. (Tr.1589-90). Although he never met Driskill, he reviewed his records, statements of various people who knew Driskill, and he had a genetics test of Driskill conducted. (Tr.1592-94,1610-11).

Dr. Bernet testified about the role of genetics in criminal behavior. (Tr.1592). A person's moods, behaviors, and tendency to violence are the product of genetics and his environment. (Tr.1598). Serotonin, which helps neurons communicate, is metabolized by an enzyme called monoamine oxidase (MAOA). (Tr.1597). When a person has both a low activity MAOA gene and a history of childhood abuse, he has more difficulty controlling emotion, processing information, and thinking things through. (Tr.1610). He

is 4.6 times more likely to commit violent acts than someone who has no history of abuse or the low activity MAOA gene. (Tr.1599). The research and findings on this study are generally accepted in the scientific community. (Tr.1608-09).

Driskill had both a history of childhood abuse and a low activity MAOA gene. (Tr.1611). These were risk factors that made it significantly more likely that Driskill would act in violent manner and made it harder for him to control his behavior. (Tr.1613). Driskill's history of abuse and the genetic factor did not directly cause him to commit crimes (Tr.1613-14,1622). But, because of his genetic makeup, it was significantly harder for Driskill to conform his behavior to what was expected. (Tr.1613-14,1623).

Clark Driskill could not come to court, so counsel read a letter from him to the jury. (Tr.1660). Clark described Driskill as a great older brother, the type of brother "everybody wished they would have." (Tr.1660). He stuck up for Clark and protected him. (Tr.1660). Driskill was patient and generous. (Tr.1660-61). He helped Clark with schoolwork and taught him to ride a bike, tie his shoes, and hunt and fish. (Tr.1660-61). If the boys got in trouble together, Driskill shouldered the blame. (Tr.1661). When their father died, the boys took it hard, especially Driskill, but Driskill was too concerned about Clark to cry or deal with his own emotions. (Tr.1661). If ever Clark needed help, day or night, he would call Driskill, and Driskill would help him. (Tr.1661).

Driskill had a hard childhood and a hard life. (Tr.1662). But a few years back, he was doing well and on a good path. (Tr.1661-62). Driskill talked to Clark about staying off drugs, and urged him to pull himself together so he did not make the same mistakes

Driskill had. (Tr.1661-62). Clark loved Driskill, who would always be his best friend. (Tr.1662).

Death Verdicts

During deliberations, the jury asked for all the penalty phase exhibits, which would have included Defense Exhibits AAAA-IIII (documents that Dr. Hanlon and Dr. Wouters reviewed in reaching their conclusions). (Tr.1746). The court ruled that unless the parties could agree on what exhibits would go to the jurors, none of the exhibits would go. (Tr.1746-47). The parties were unable to agree, so the jurors were not allowed to view any of the penalty phase exhibits. (Tr.1747).

The jury recommended death sentences for the murder counts. (Tr.1749-50). As to Johnnie, the jury found eight aggravators, as follows: (1) serious assaultive conviction, for second-degree assault (Laclede County); (2) serious assaultive conviction, for second-degree assault (Hickory County); (3) murder in the perpetration of another murder; (4) murder for the purpose of receiving money; (5) murder during course of burglary; (6) murder during course of robbery; (7) murder during course of rape; (8) murder during course of sodomy. (Tr.1749-50;L.F.841). As to Coleen, the jurors found the same aggravators, plus one for depravity of mind, sexual intercourse during or immediately after the murder. (Tr.1749;L.F.837).

The court denied the motion for new trial and imposed two death sentences on the murder counts. (Tr.1760,1765). On the burglary count, the court imposed a fifteen year sentence. (Tr.1765). The court imposed life sentences on all the other counts and ran all sentences consecutively. (Tr.1765-66). Notice of appeal was timely filed. (L.F.955-61).

POINT I

The trial court erred in trying, accepting the guilty verdicts, and sentencing Driskill, a man who was not mentally competent to stand trial, and in denying defense counsel's repeated motions for a competency evaluation, hearing, or a continuance. These rulings violated Driskill's right to procedural and substantive due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution and his rights under §552.020, RSMo. Driskill suffered from anxiety and panic attacks during trial that rendered him unable to consult with counsel and assist in his defense. Driskill's lack of competency was demonstrated by Dr. Linda Gruenberg's finding that he was not competent to stand trial, Dr. Robert Fucetola's supplemental report stating that Driskill's panic attacks could render him unable to assist in his defense, counsels' statements to the court that Driskill was not competent, Driskill's repeated panic attacks and forced absences from the courtroom, and Driskill's lengthy and documented history of mental illness. Given the evidence that Driskill was not competent to stand trial, the court had a duty to stop the trial and order a competency evaluation or conduct a hearing.

Drope v. Missouri, 420 U.S. 162 (1975);

People v. Moore, 946 N.E.2d 442 (Ill. App. 2011);

State v. Coco, 371 So.2d 803 (La. 1979);

State v. Tilden, 988 S.W.2d 568 (Mo.App.W.D.1999);

U.S. Const., Amends. V and XIV;

Mo. Const., Art. I, Sec. 10; and

§552.020, RSMo.

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POINT II

The trial court erred in allowing crucial phases of the trial to proceed without Driskill present in the courtroom and in finding that Driskill voluntarily waived his right to be present, in violation of Driskill's rights to due process of law, to a fair trial, to confrontation, to present a defense, and to a fair and reliable sentencing trial, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, §546.030, RSMo, and Missouri Supreme Court Rules 31.02 and 31.03. Driskill could not waive his right to be present at his capital trial and even if he could, any waiver was not voluntary, in that Driskill appeared by polycom or was altogether absent only because the court denied his repeated motions for a competency evaluation and hearing, Driskill was not receiving necessary medication, and Driskill could not stay in the courtroom without suffering panic attacks in front of the jury.

Berghuis v. Thompkins, 560 U.S. 370 (2010);

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

Riggins v. Nevada, 504 U.S. 127 (1992);

United States v. Salim, 690 F.3d 115 (2d Cir. 2012);

U.S. Const., Amends. V, VI, VIII, and XIV;

Mo. Const., Art. I, Sec. 10, 18(a), and 21;

§546.030, RSMo; and

Supreme Court Rules 31.02 and 31.03.

POINT III

The trial court erred in denying Driskill his right to testify in both the guilt and penalty phases and in finding that Driskill voluntarily waived his right to testify. The court's actions violated Driskill's right to testify, to due process, to equal access to the courts, and to present a defense in guilt and penalty phases, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, §§ 2, 10, 18(a), and 21 of the Missouri Constitution; and the Americans with Disabilities Act (ADA), 42 U.S.C.A. §12101-12213. Any waiver was involuntary, in that Driskill told the court he wanted to testify, yet Driskill was forced not to testify because he could not testify without suffering panic attacks due to his untreated mental illness.

Berghuis v. Thompkins, 560 U.S. 370 (2010);

Florida v. Nixon, 543 U.S. 175 (2004);

Rock v. Arkansas, 483 U.S. 44 (1987);

Ward v. Sternes, 334 F.3d 696 (7th Cir. 2003);

U.S. Const., Amends. V, VI, VIII, and XIV;

Mo. Const., Art. I, Sec. 2, 10, 18(a), and 21;

42 U.S.C.A. §12101-12213; and

Supreme Court Rules 25.12, 25.13, and 30.20.

POINT IV

The trial court erred and abused its discretion in denying counsel's motions for a continuance, in failing to order that Driskill receive the medication he needed, and in proceeding through trial while Driskill was in need of psychiatric treatment and medication or at least, medical treatment. The court's failure to continue the trial and/or ensure that Driskill was properly medicated at trial violated Driskill's rights to be present, to confront and cross-examine the witnesses, to testify, to due process, the effective assistance of counsel, a fair trial, and to a fair and reliable sentencing determination, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10, 18(a) and 21 of the Missouri Constitution. The court knew that Driskill had a long history of mental illness, including extreme anxiety, panic attacks, and intermittent explosive disorder; that doctors recommended that he receive medication to function at trial; and that Driskill was not receiving that medication. The denial of medication caused Driskill to experience such extreme anxiety at trial that he became physically and mentally ill and prevented Driskill from being present at trial, testifying, and otherwise participating in his trial and assisting counsel.

Deck v. Missouri, 544 U.S. 622 (2005);

Riggins v. Nevada, 504 U.S. 127 (1992);

State v. Karno, 342 So.2d 219 (La. 1977);

United States v. Brown, 821 F.2d 986 (4th Cir. 1987);

U.S. Const., Amends. V, VI, VIII, and XIV;

Mo. Const., Art. I, Sec. 10, 18(a), and 21; and

ABA Standards Relating to the Administration of Criminal Justice.

POINT V

The trial court abused its discretion in denying the jurors' request to view all exhibits admitted into evidence during the penalty phase and, in particular, in barring the jury from viewing and considering defense exhibits AAAA-IIII. The trial court's error violated Driskill's rights to due process, confrontation, presentation of a defense and rebuttal of the State's evidence, and a fair and reliable sentencing trial, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. Defense exhibits AAAA-IIII had been admitted into evidence and were crucial both to support Driskill's case for life without parole and to rebut the State's inferences and arguments, in that (1) the documents contained in the exhibits came from impartial sources and hence provided unbiased corroboration for the expert witnesses' opinions; and (2) that impartial corroboration was essential to rebut the State's inferences and closing arguments that (a) portrayed the defense experts as paid hacks whose opinions could not be trusted and (b) suggested that Driskill's evidence of childhood abuse and mental illness was recently fabricated and/or exaggerated.

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

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

Simmons v. United States, 390 U.S. 377 (1968);

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

U.S. Const., Amends. V, VI, VIII, and XIV; and

Mo. Const., Art. I, Sec. 10, 18(a), and 21.

POINT VI

The trial court abused its discretion in overruling Driskill's objections and allowing excessive victim impact testimony and evidence, in violation of Driskill's rights to due process, a fair and reliable sentencing trial, and freedom from cruel/unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),21, because the State's victim impact evidence and testimony was excessive, in that it far exceeded what is authorized, overwhelmed the jury with emotion, and encouraged the jury to weigh the value of Driskill's life against the victims'.

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

Kelly v. California, 555 U.S. 1020 (2008);

Payne v. Tennessee, 501 U.S. 808 (1991);

U.S. Const., Amends. V, VI, VIII, and XIV; and

Mo. Const., Art. I,, Sec. 10, 18(a), and 21.

ARGUMENT I

The trial court erred in trying, accepting the guilty verdicts, and sentencing Driskill, a man who was not mentally competent to stand trial, and in denying defense counsel's repeated motions for a competency evaluation, hearing, or a continuance. These rulings violated Driskill's right to procedural and substantive due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution and his rights under §552.020, RSMo. Driskill suffered from anxiety and panic attacks during trial that rendered him unable to consult with counsel and assist in his defense. Driskill's lack of competency was demonstrated by Dr. Linda Gruenberg's finding that he was not competent to stand trial, Dr. Robert Fucetola's supplemental report stating that Driskill's panic attacks could render him unable to assist in his defense, counsels' statements to the court that Driskill was not competent, Driskill's repeated panic attacks and forced absences from the courtroom, and Driskill's lengthy and documented history of mental illness. Given the evidence that Driskill was not competent to stand trial, the court had a duty to stop the trial and order a competency evaluation or conduct a hearing.

Three months before trial, Dr. Linda Gruenberg reported: "It is my opinion to a reasonable degree of medical and psychiatric certainty, that Mr. Driskill is **UNABLE TO STAND TRIAL**." (D.Ex.A,p.1)(emphasis in original). She noted that unless Driskill received medication and treatment, he would not be competent to stand trial.

(D.Ex.A,p.2). Although Driskill received neither treatment nor medication, (Tr.63), Dr. Robert Fucetola found him competent two months later. (D.Ex.B,p.8). He stressed, however, that he had not observed Driskill during a panic attack and could not say how Driskill would be at trial. (Tr.62;L.F.736). Without holding a hearing, the trial court accepted Dr. Fucetola's finding of competence, since it was more recent than Dr. Gruenberg's finding, and proceeded to trial. (Tr.250). Throughout the trial, Driskill suffered panic attacks and intense anxiety such that he could not be present in the courtroom. (Tr.233-34,1379-80,1410,1478,1659,1743,1755). Defense counsel advised the court that Driskill was not competent due to his anxiety and panic attacks and repeatedly moved for a competency evaluation, but the court refused. (Tr.234-37,244-45,254-55,267,692,1416,1478). The trial court's refusal to order a competency evaluation or hearing and proceeding to trial and sentencing despite Driskill's lack of mental competency violated Driskill's rights to procedural and substantive due process, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 10 of the Missouri Constitution, and §552.020, RSMo.

Standard of Review and Preservation

The trial court's ruling on competency is a factual determination that must be upheld unless no substantial evidence supports it. *State v. Anderson,* 79 S.W.3d 420, 433 (Mo. banc 2002). The reviewing court does not re-weigh the evidence but accepts as true all the evidence and reasonable inferences that tend to support the trial court's findings. *Id*. When there is enough evidence for the court to have reasonable cause to believe the defendant lacks competency to stand trial, "there is a non-relenting duty to order an exam

and failure to do so will be reviewed carefully due to the constitutional implications." *State v. Tilden*, 988 S.W.2d 568, 576 (Mo.App.W.D.1999).

Defense counsel repeatedly asked the court to order that Driskill be evaluated for competency pursuant to Section 552.020 and argued that Driskill was not competent to proceed. (Tr.234-37,244-45,254-55,267,692,1416,1478). Counsel included this issue in the motion for new trial. (L.F.829-69,875-77,889-92).

The Court Had a Duty to Act

The Fourteenth Amendment's due process clause bars the criminal prosecution of a defendant who lacks competence to stand trial. *Medina v. California*, 505 U.S. 437, 440 (1992), citing *Drope v. Missouri*, 420 U.S. 162, 171 (1975); see also U.S. Const., Amend V; Mo. Const., Art. I, Section 10; Section 552.020.1, RSMo. "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential for a fair trial, including the right to the effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). Every defendant must be capable of understanding the nature and object of the proceedings, consulting with his attorney, and assisting in the preparation of his defense. *Drope*, 420 U.S. at 171; *Pate v. Robinson*, 383 U.S. 375 (1966). A defendant is competent to proceed only if he has (1) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and (2) a rational as well as factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402, 402 (1960).

A defendant may prevail on a competency claim by showing (a) a substantive due process violation; or (b) a procedural due process violation. A court violates the defendant's right to substantive due process when the defendant can show that he was, in fact, incompetent. *Vogt v. United States*, 88 F.3d 587, 591 (8th Cir. 1996). The defendant is presumed competent and bears the burden of showing his incompetence by a preponderance of the evidence. *State v. Anderson*, 79 S.W.3d 420, 432-33 (Mo. banc 2002).

A court violates the defendant's right to procedural due process when it fails "to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent." *Drope*, 420 U.S. at 172; see also Section 552.020.2, RSMo. Reversible error occurs when the evidence presents "a bona fide doubt" as to the defendant's competency to stand trial, yet the trial court fails to order an evaluation. *Pate*, 383 U.S. at 385. The reviewing court should consider whether a reasonable judge in the same situation as the trial judge would have doubted the defendant's competency. *State v. Tokar*, 918 S.W.2d 753, 762-64 (Mo. banc 1996); *Tilden*, 988 S.W.2d at 576. The defendant must show that the trial judge, "failed to see the need for a competency hearing when, based on the facts and circumstances known to [the judge] at the time, [he or she] should have seen such a need." *United States v. Day*, 949 F.2d 973, 982 (8th Cir. 1991), citing *Drope*, 420 U.S. at 174-75. "Failure to provide an adequate hearing on competency ... deprives a defendant of his due process right to a fair trial." *Griffin v. Lockhart*, 935 F.2d 926, 930 (8th Cir. 1991).

The right to stand trial only when mentally competent is so important that the trial court has a duty – independent of any request by counsel – to order a competency exam when the judge has reasonable cause to believe the defendant lacks mental fitness to proceed. *Pate*, 383 U.S. at 385; *Tilden*, 988 S.W.2d at 575. When confronted with a bona fide doubt on competency, the court should "suspend the trial until such an evaluation could be made." *Drope*, 420 U.S. at 181. The duty to act *sua sponte* is also mandated by statute:

> Whenever any judge has reasonable cause to believe that the accused lacks mental fitness to proceed, he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, … appoint one or more private psychiatrists or psychologists … to examine the accused.

Section 552.020.2, RSMo. Even if a defendant was competent at the start of trial, the court "must always be alert to circumstances suggesting a change that would render the [defendant] unable to meet the standards of competence to stand trial." *Drope*, 420 U.S. at 181; *Tilden*, 988 S.W.2d at 577 ("court must confront and determine the issue at whatever stage of the trial it may arise").

Factors that may be relevant in determining competence are the defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence. *Drope*, 420 U.S. at 180. No single factor is necessarily determinative of whether the defendant lacks competency, but one factor may be enough. *Id*. The court should not rely on the demeanor of the defendant to the exclusion of all other factors. *Pate*, 383 U.S. at 385-86. Other factors to consider are statements by defense counsel, suicide attempts,

previous stays in mental hospitals, and any bizarre circumstances of the criminal activity. *Tilden*, 988 S.W.2d at 578.

An expert's finding of incompetency is usually enough to warrant ordering an exam or a hearing. *Id*. at 578, fn.2. This Court has noted, "When a psychiatrist's report shows a diagnosis of some mental defect, it would certainly be prudent for the trial court to set an evidentiary hearing at which the report and any other evidence pertinent to the issue could be placed in evidence…." *State v. Bryant*, 563 S.W.2d 37, 46 (Mo. banc 1978). Another factor to be considered is whether the defendant's mental condition might deteriorate under the stress of trial. *State v. Coco*, 371 So.2d 803, 805 (La. 1979).

Evidence of Driskill's Incompetence Far Exceeded a Bona Fide Doubt

Multiple factors existed to trigger the court's duty under Section 552.020 to order a competency evaluation and/or conduct a hearing and that showed that Driskill was not competent to stand trial. These factors included the findings of two doctors, Driskill's multiple panic attacks during trial, his lengthy and well-documented mental health history, his mental health hospitalizations, his suicide attempts, and his family history of abuse, addiction, and mental illness.

A. Psychiatric Reports

Dr. Gruenberg, a forensic psychiatrist, examined Driskill three months before trial and reported that, "It is my opinion to a reasonable degree of medical and psychiatric certainty, that Mr. Driskill is **UNABLE TO STAND TRIAL**." (D.Ex.A,p.1)(emphasis in original). Although Driskill understood basic courtroom procedures, the roles of the participants, and the components of the court, he was "unlikely to appropriately conform

his conduct in the courtroom rendering him unable to cooperate with his attorneys and assist in his defense during trial, in addition to possibly becoming explosive and disruptive during the trial proceedings." (D.Ex.A,p.1). Driskill required "immediate psychiatric treatment with medication to help him regulate his moods and decrease his difficulty in maintaining control of his behavior." (D.Ex.A,p.2). If he received psychiatric treatment and medication, Driskill could be stabilized and probably would become fit to stand trial. (D.Ex.A,p.2).

Dr. Fucetola, a neuropsychologist, examined Driskill a month before trial and found Driskill competent to stand trial. (D.Ex.B,p.8). He stressed, however, that he had not observed Driskill during a panic attack and could not say how Driskill would be at trial. (Tr.62;L.F.736). After Driskill suffered a panic attack at trial, Dr. Fucetola cautioned:

> During the panic attacks, and in the moments before and after attacks, I am concerned that Mr. Driskill does not have the capacity to assist [counsel] in his own defense due to his transient state of mind. Clear thinking is compromised during acute panic attacks because of irrational thoughts and fears about escape, losing control, or going crazy/dying.

(D.Ex.B-1).

Both doctors believed that Driskill needed medication in order to be competent to stand trial. Dr. Gruenberg recommended that Driskill be prescribed Neurontin for his anxiety, as he had received in the past; without it, Driskill would not be competent to stand trial. (Tr.61). Dr. Fucetola believed that behavioral treatment and/or anxiolytic

medication would likely decondition Driskill's panic response to being in the courtroom. (D.Ex.B-1).

But Driskill received neither treatment nor medication. (Tr.63,234,237,979). Although defense counsel repeatedly tried to get the Department of Corrections (D.O.C.) to medicate Driskill or even have a psychiatrist see him, the D.O.C. refused to place Driskill on medication that would alleviate his anxiety. (Tr.62).

The fact that Driskill was not receiving medication necessary to his competence triggered the court's duty to order a hearing. In *People v. Moore*, 946 N.E.2d 442, 447-48 (Ill. App. 2011), the defendant needed medication to be competent to stand trial, yet did not receive that medication during trial. The appellate court held that, "The fact that defendant had not been given his medication raised a *bona fide* doubt as to defendant's fitness." *Id*. at 448. The trial court erred in not *sua sponte* ordering a hearing where the State would have to prove the defendant was competent to stand trial. *Id*.

C. Panic Attacks During Trial

Counsel advised the court that, at past court appearances, Driskill had suffered from extreme anxiety and panic attacks which resulted in outbursts over which Driskill had no control. (L.F.531;D.Ex.A, p.2). Counsel warned the court that Driskill was not medicated and that he could experience similar outbursts at trial. (L.F.531).

During the first day of voir dire, counsel suddenly urged that Driskill "needs to get out of the courtroom now." (Tr.231). Driskill left the courtroom, and the court took a recess. (Tr.231). Defense counsel advised the court that Driskill suffered a panic attack and could not control his actions. (Tr.233-34). Driskill could not meet with counsel or

participate meaningfully in his trial at that time, whether in person or by polycom. (Tr.233-34).

Driskill had gotten increasingly agitated and repeatedly tried to stand up and leave the courtroom. (Tr.239). The bailiff had to approach Driskill, put his hands on him, and tell him to sit down. (Tr.239). Driskill repeatedly stated, "I've got to get out of here." (Tr.239). A bailiff repeatedly told Driskill to sit down and calm down, before the court allowed Driskill to leave. (Tr.239-40). As the jury watched, Driskill rushed from the courtroom escorted by a bailiff. (Tr.258).

When Driskill was placed in a holding cell, he immediately walked to the back of the cell and punched the wall. (Tr.240). He was "almost hyperventilating, red in the face, crying, rubbing his head, kneeling over like his stomach was hurting." (Tr.240). When the bailiff told Driskill that his attorneys wanted to speak with him, Driskill did not respond. (Tr.240). He "was still pretty worked up, crying, red in the face." (Tr.240). The bailiff repeated that counsel wanted to speak with Driskill, but still Driskill was unresponsive. (Tr.240-41). A third time, the bailiff repeated that counsel wanted to speak with Driskill. (Tr.241). Driskill, red in the face, looked at the bailiff, gritted his teeth, and told the bailiff he wanted to be left alone. (Tr.241). Driskill then vomited. (Tr.241). He paced the cell and eventually started to calm down. (Tr.241). Even after an hour-long recess, Driskill still had not calmed down enough to speak with counsel. (Tr.242). The court recessed for the day. (Tr.243).

Counsel asked for a competency evaluation to determine if Driskill could continue with the trial without anti-anxiety medication. (Tr.234). The State objected,

arguing that any defendant could act up and get removed from the courtroom and that Driskill was competent because he understood the nature of the proceedings. (Tr.235-36). Counsel proposed that a doctor from the state hospital be on standby to evaluate Driskill during a panic attack. (Tr.237). The court overruled the request. (Tr.238). It also denied Driskill's request for a competency exam. (Tr.243). It noted that Driskill had already had two competency exams, and the court knew those results. (Tr.243).

Counsel questioned whether Driskill had been fully able to assist in his defense leading up to the panic attack. (Tr.978). Driskill's anxiety had been increasing throughout the questioning of the first venire panel. (Tr.978). Although counsel repeatedly tried to calm Driskill, she was not sure how much he had been able to participate. (Tr.978).

Throughout the rest of the trial, counsel repeatedly requested a competency evaluation, but the court denied the requests. (Tr.254-55,267,692,1416,1478). Counsel argued that regardless of whether Driskill had been competent before trial, he was not competent now. (Tr.254-55). Driskill could not be present in the courtroom because of his anxiety disorder. (Tr.255,1266,1416). The trial setting was too stressful for him, and he could not control his anxiety disorder without medication. (Tr.255). Defense counsel objected to Driskill being un-medicated and forced to suffer through panic attacks in front of the jury. (Tr.695). The court denied counsel's requests, noting that the polycom was available if Driskill was too anxious to be in court or had a panic attack. (Tr.694-95,1479). Driskill appeared by polycom for the second day of voir dire, but only because the court rejected his requests for a competency exam. (Tr.244-45,255, 267,695).

Driskill could not testify because he feared it would cause him to have a panic attack in front of the jury. (Tr.1247-48). Driskill wanted to testify but knew he was unable. (Tr.1249-50). After the court questioned him about whether he would testify, Driskill became anxious and needed to leave the courtroom. (Tr.1264,1266).

Driskill interrupted the court's reading of the guilt phase verdicts and left the courtroom, as the jury watched. (Tr.1379-80,1401). During the recess, the court asked whether Driskill wanted to waive his presence for the rest of the verdicts. (Tr.1380-81). Counsel told the court that she did not know how long it would be before she could talk to Driskill because she did not know how upset he was. (Tr.1380). Counsel spoke with Driskill, and he waived his appearance. (Tr.1381).

Going into penalty phase, Driskill was especially anxious, but he wanted to be in the courtroom. (Tr.1402,1415). Counsel warned the court, however, that Driskill would probably need to leave because of his anxiety. (Tr.1402).

At 9:45 a.m., during the State's opening statement, Driskill again had to leave the courtroom. (Tr.1410). Driskill turned to defense counsel and stated that he could not take it anymore, and if he stayed, he would "snap out." (Tr.1415). Counsel believed that had she not gotten Driskill out of the courtroom right then, he would have had another panic attack as he had the first day of trial. (Tr.1415). The court took a recess. (Tr.1410-11). An hour or hour and fifteen minutes later, counsel advised that Driskill was a bit calmer but was still shaking and was incredibly anxious. (Tr.1416). The prosecutor argued that Driskill was sitting calmly, but defense counsel countered that Driskill was shaking, he was wringing his hands, and he was perspiring. (Tr.1418,1420). Driskill

advised the court that he wanted to be in the courtroom, but he felt very uneasy and worried his anxiety would escalate and he would have another panic attack. (Tr.1413,1416).

Counsel again asked for a competency exam. (Tr.1416). Counsel also asked for a mistrial or, alternatively, a continuance until Driskill could appear without having panic attacks. (Tr.1416-17). The court denied each request. (Tr.1418-19). The court offered to let Driskill appear by polycom, but Driskill stated that the polycom made his anxiety worse and he preferred to be in the courtroom. (Tr.1413).

Because of his anxiety, Driskill was absent for all of the State's evidence in penalty phase. After the State rested, the court questioned Driskill again. (Tr.1477). Driskill requested to be excused because he believed if he were in the courtroom, he would have another panic attack. (Tr.1478). He was jittery and wringing his hands. (Tr.1478). Counsel again asked for a competency exam; if not a competency exam, a mistrial; if not a mistrial, a recess until Driskill was capable of being present. (Tr.1478-79). The court denied each request. (Tr.1479). It noted that Driskill did not appear to be under duress, but that Driskill bounced his leg up and down a little bit. (Tr.1480). He was able to answer questions and understood those questions. (Tr.1480). The court did not notice any difference in his behavior. (Tr.1481).

Driskill was absent from the courtroom for the first four defense witnesses, but returned for the last two of the day. (Tr.1477,1542). The court noted that when Driskill was in the courtroom, he was able to speak with counsel, seemed to understand the

proceedings, and assisted counsel. (Tr.1643). Dr. Hanlon, Dr. Bernet, and Dr. Wouters testified about Driskill's lengthy and documented mental health history. (Tr.1541-1658).

On the final day of trial, Driskill appeared in person. (Tr.1645). But he had to leave the courtroom before a letter from his brother was read to the jury. (Tr.1659). After the defense rested, the court wanted to question Driskill about his right to testify in penalty phase, but acknowledged that, "I understand that right now [Driskill's] not available to do that." (Tr.1663). The court took a recess until Driskill was ready. (Tr.1663). Driskill told the court that he would not testify in penalty phase. (Tr.1664).

After the closing arguments, Driskill asked to be excused. (Tr.1743). He waived his presence for the swearing of the bailiffs and excusing the alternates. (Tr.1743). But Driskill returned before the alternates were excused. (Tr.1744). After the jurors were polled but before they left, Driskill again left the courtroom. (Tr.1755).

C. Driskill's Mental Health History

Driskill suffered from mental illness since his teenage years. (D.Ex.A,p.2,8; D.Ex.B,p.3-6). Over the years, he had been diagnosed with bipolar disorder, generalized anxiety disorder, intermittent explosive disorder, polysubstance dependence, neurocognitive defects, multiple head traumas, and chronic migraine headaches. (D.Ex.A,p.2,8;D.Ex.B,p.3-6). He had been placed in five different psychiatric hospitals. (D.Ex.A,p.8;D.Ex.B,p.3-6). He had been prescribed a laundry list of medications over the years. (D.Ex.A,p.8;D.Ex.B,p.4). Driskill experienced mistrust rising to the level of paranoia. (D.Ex.A,p.2). Driskill received disability benefits. (D.Ex.B-1,p.4).

Driskill had tried to commit suicide repeatedly. (D.Ex.A,p.9). Hospital records showed that when Driskill was seventeen, he twice put a gun in his mouth, and at age twenty, he reported that he had been depressed for as long as he could remember. (D.Ex.B-1,p.3-4). At age 21, he took a bottle of Xanax in an attempt to "go to sleep and 'be done'." (D.Ex.B-1,p.3,6).

D. History of Abuse

As a child, Driskill watched his alcoholic father beat his mother. (D.Ex.A,p.4-5;D.Ex.B-1,p1). Driskill's mother, in turn, beat Driskill daily. (D.Ex.A,p.4). She had constant, unexplained explosive behavior. (D.Ex.A,p.5). The rare happy moment could explode into violence where his mother would get angry and break dishes or walk into the room and break the television. (D.Ex.A,p.4). She would swear at him, swing a pan at him, throw things, or flip the table. (D.Ex.A,p.4). Driskill had bruises but would make up stories about it at school. (D.Ex.A,p.5). Once, when he told a teacher about the abuse, the teacher called his mother. (D.Ex.A,p.5). All that happened was that his mother beat him again for telling. (D.Ex.A,p.5). The teacher confirmed that Driskill often came to school with bruises and was "a very abused child." (D.Ex.A,p.10). Driskill's mother had history of depression, and his brothers were drug addicts. (D.Ex.B-1,p.4).

The Trial Court's Reasoning Was Erroneous

The court stated that it was denying Driskill's requests for a competency evaluation because there had already been two competency evaluations, and the court knew what they said. (Tr.243). The court accepted Dr. Fucetola's July finding of

competence, because it was more recent than Dr. Gruenberg's May finding that Driskill was not competent. (Tr.250). The court apparently agreed with the prosecution's argument that the court could deal with Driskill's mental health problems by either recessing briefly until Driskill seemed okay to proceed or by having Driskill absent himself from the courtroom and appear via polycom. (Tr.693-94). Both of these notions were wrong.

A. Conflicting Expert Reports Should Have Prompted a Hearing

The court accepted Dr. Fucetola's finding of competency solely because Dr. Fucetola had evaluated Driskill on July 13, whereas Dr. Gruenberg had evaluated Driskill on May 13. (Tr.250). This was not a valid reason to accept one report over the other. Just because a second opinion is rendered does not make the second opinion correct and the first, incorrect.

Nothing had changed from Dr. Gruenberg's evaluation to Dr. Fucetola's. Driskill had received neither medication nor treatment in those two months. (Tr.62-63). The anxiety disorder Driskill had suffered from since his teenage years had not suddenly disappeared. In addition, Dr. Fucetola issued a supplemental report stating that during the panic attacks, and in the moments before and after the attacks, Driskill may not have the capacity to assist counsel. (D.Ex.B-1). Thus, before the State gave its guilt phase opening statement, the court knew that both doctors who had evaluated Driskill stated that either he was incompetent to stand trial, or in the least, that Driskill was incompetent leading up to, during, and after his panic attacks.

B. The Court's Efforts to Deal with the Situation Were Not Enough

The court's manner of dealing with Driskill's mental illness was to let Driskill choose between (a) remaining in the courtroom but facing the prospect of the jury seeing him lose control or, at a minimum, his agitated behavior; or (b) participating by polycom; or (c) absenting himself altogether. None of these options was appropriate.

It is true that initially, defense counsel suggested that Driskill appear by polycom if he felt a panic attack impending. (Tr.39-43,47-50,60-64;L.F.531-34). But the situation did not pan out as expected. Once counsel experienced first-hand Driskill's panic attack in voir dire, they realized that he was not competent to stand trial at all. (Tr.234,244-45,249,254-55,267,1416-17,1478-79).

The problem was not solved by having Driskill, un-medicated, suffer through the trial until his mental illness reached a boiling point. Driskill had the right to be competent throughout his entire trial. Because the court forced Driskill to proceed through trial un-medicated, there is simply too great a chance that during the times that Driskill's anxiety was building, but not yet in full panic-attack mode, he was not aware of the proceedings or able to assist his counsel. The court had the absolute, independent duty to ensure that Driskill was competent for every moment of his trial, but the court failed to do so.

As addressed in Point II, the polycom was not a valid substitute for Driskill's physical presence in the courtroom. The polycom presented its own problems. A defendant must be free to communicate effectively with counsel at every critical stage of the proceedings. *Geders v. United States*, 425 U.S. 80, 89 (1976), citing *Powell v.*

Alabama, 287 U.S. 45, 68-69 (1932). But Driskill sat in the jail with a member of the defense team – not counsel – and had to communicate with counsel by cell phone or text. Any communication with counsel was delayed, at best. Repeatedly, the phone line cut out, as did the polycom itself. (Tr.510,978). Driskill had a limited view of the courtroom, especially during general voir dire, when he could not see the entire panel of 42 jurors. (Tr.979). Also, while Driskill appeared by polycom, the lawyers and the court could not fully assess Driskill's awareness of the proceedings or his ability to consult with counsel.

In addition, the polycom made Driskill's anxiety worse. (Tr.1413). Driskill explained that the polycom "messes with my head," because it felt both real and unreal at the same time, "almost like it's a real world and a dream world." (Tr.1413). He wanted to be in the courtroom. (Tr.1413).

The court's remedy of recessing or forcing Driskill from the courtroom every time his mental illness reached a boiling point was no solution. In a similar scenario, the Louisiana Supreme Court found reversible error even where the trial court took far more precautionary actions than the trial court here. In *State v. Coco*, 371 So.2d 803, 805 (La. 1979), the defendant had an IQ placing him in the low normal or mildly retarded range of intelligence. Coco also suffered from temporal lobe epilepsy. *Id*. at 805-806. His seizures lasted just a few minutes but would leave him confused for hours. *Id*. at 806. The seizures were difficult for a lay person to detect. *Id*. By close observation, a psychiatrist could discern if Coco had a seizure during trial. *Id*. The trial court found

that Coco was competent to stand trial but ordered that he be given medication to control his epilepsy and be attended during trial by a psychiatrist. *Id.* at 804.

The Louisiana Supreme Court held that the trial court's finding was incorrect because it was formed on incomplete information. *Id*. at 806. Coco's condition had not been fully diagnosed. *Id*. Further testing was needed to determine if Coco's condition could be controlled by medication. *Id*. The medication initially would need to be administered under clinical conditions to ensure that it would not cause Coco to have even worse seizures. *Id*. The Louisiana Supreme Court held that the trial court also needed to determine how often Coco would likely suffer a seizure during trial, how long his awareness and memory would be affected during each seizure, and how long Coco would need to recuperate after each seizure. *Id*. These questions were crucial to determining whether Coco would be able to understand the proceedings and effectively assist counsel. *Id*.

Here, the court took no precautions. Cf. *McManus v. State*, 814 N.E.2d 253, 255 (Ind. 2004)(trial court granted continuance to allow psychiatrist to see defendant after defendant suffered several panic attacks during trial). Although the court knew that Driskill's anxiety could be controlled by medication, the court failed to ensure that Driskill received that medication. See Arg. IV, *infra*. The court did not determine how far in advance of the panic attacks Driskill became incompetent or how long Driskill needed to recuperate. The court haphazardly left it to an incompetent defendant to determine when the proceedings should stop.

The court violated Driskill's right to procedural due process by failing to order a competency evaluation or hearing despite being faced with what was, in the least, a *bona fide* doubt as to Driskill's competency. It violated Driskill's right to substantive due process because Driskill was, in fact, not competent to stand trial. The resulting convictions and death sentences cannot stand.

The Court must reverse.

ARGUMENT II

The trial court erred in allowing crucial phases of the trial to proceed without Driskill present in the courtroom and in finding that Driskill voluntarily waived his right to be present, in violation of Driskill's rights to due process of law, to a fair trial, to confrontation, to present a defense, and to a fair and reliable sentencing trial, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, §546.030, RSMo, and Missouri Supreme Court Rules 31.02 and 31.03. Driskill could not waive his right to be present at his capital trial and even if he could, any waiver was not voluntary, in that Driskill appeared by polycom or was altogether absent only because the court denied his repeated motions for a competency evaluation and hearing, Driskill was not receiving necessary medication, and Driskill could not stay in the courtroom without suffering panic attacks in front of the jury.

A criminal defendant has both the right to proceed to trial only when competent and the right to be present for every crucial stage of the proceedings. Driskill was denied both these rights. Because the court refused to stop the proceedings to order a competency evaluation – despite the findings of two doctors that Driskill's panic attacks rendered him incompetent – Driskill was forced to participate in his trial while incompetent. To ameliorate the effects of proceeding to trial incompetent, Driskill had to choose between risking losing control before the jury, or appearing by polycom, or not

being present at all. Driskill was forced from the courtroom, not by choice or because he was dangerous or disruptive, but because he was mentally ill.

The court's error violated Driskill's rights to due process of law, to a fair trial, to confront the witnesses against him, to present a defense, and to a fair and reliable sentencing trial, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, §546.030, RSMo, and Missouri Supreme Court Rules 31.02 and 31.03.

Standard of Review and Preservation

Whether a defendant's right to be present at trial has been violated is a question of law that is reviewed *de novo*. See, e.g., *State v. Burns*, 287 P.3d 261, 267 (Kan. 2012) (reversed on other grounds); *State v. Irby*, 246 P.3d 796, 799 (Wash. 2011); *Woyak v. State*, 226 P.3d 841, 849 (Wyo. 2010).

Driskill repeatedly objected that he was only agreeing to appear by polycom because the court denied his motion for a competency hearing. (Tr.244,254-55,260,267). He included this issue in the motion for new trial. (L.F.864-69).

Driskill was Denied his Right to Be Present at all Crucial Stages of His Trial

The right to be present at trial is "scarcely less important" than the right to trial itself. *Diaz v. United States*, 223 U.S. 442, 455 (1912). To aid confrontation and the truth-finding function of the trial, the defendant has a right to be present at all stages of the trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970). The right to be present flows from the Sixth Amendment's Confrontation Clause and, when the defendant is not actually confronting witnesses or evidence against him, the Due Process Clause of the Fourteenth

Amendment. *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934); *United States v. Gagnon*, 470 U.S. 522, 526 (1985); see also Mo. Const., Art. I, Sec.10. The defendant's presence is essential to his opportunity to defend against the charges. *Snyder*, 291 U.S. at 106. It enables the defendant to assist his lawyer, *id*., and to testify in his defense. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). It also furthers the "fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table." *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring).

The right to be present is also protected by the Missouri Constitution, by statute, and by the Supreme Court rules. Section 18(a) of the Missouri Constitution provides: "That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel." Section 546.030, RSMo provides that, "[n]o person indicted for a felony can be tried unless he be personally present, during the trial." Rule 31.02(a) guarantees that "[i]n all criminal cases the defendant shall have the right to appear and defend in person and by counsel." Rule 31.03(a) also provides that, "No trial shall be conducted or a plea of guilty entered unless the defendant is present."

"A defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). The focus is whether, on the whole record, the defendant could have done or gained anything by attending. *Gagnon*, 470 U.S. at 527; *State v. Smulls*, 935 S.W.2d 9, 17 (Mo. banc 1996). Voir dire, at which no evidence is presented, is a critical stage of the prosecution. *Gomez v. United*

States, 490 U.S. 858, 873 (1989). So, too, is the penalty phase of a capital trial. *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

Driskill Did Not Validly Waive His Right to Be Present in the Courtroom

Driskill acknowledges that he initially requested that he be allowed to appear by polycom. (Tr.39-42,47-50,60-64;L.F.531-34). But once counsel experienced first-hand Driskill's panic attack in voir dire, they realized that he was not competent to stand trial at all. (Tr.234,244-45,249,254-55,267,1416-17,1478-79). When the court refused counsel's requests to have Driskill evaluated, Driskill had no choice but to appear by polycom, or not at all. (Tr.244,254-55,260,267).

Given that he was between a rock and a hard place – a position he never should have been in – Driskill told the court he would appear by polycom. (Tr.253). He stated he understood he had the right to be present in the courtroom. (Tr.252). The polycom procedure had been explained to him. (Tr.252). His attorneys had phones, so he could communicate and text with them. (Tr.256). However, Driskill repeatedly made clear that he was only agreeing to appear by polycom because the court had denied Driskill's motions for a competency hearing. (Tr.244,249,254-55,260,267).

The court found that Driskill understood he had the right to be present. (Tr.256-57). He noted that Driskill was calmer than the day before, believed he could assist his attorneys, and currently understood the proceedings. (Tr.257). The court held that for that day, Driskill voluntarily waived his right to be present in the courtroom. The court noted that Driskill appeared to understand what was happening, was competent, and able to assist counsel. (Tr.257).

Driskill appeared by polycom for the entire second day of voir dire. (Tr.253). He appeared in court for the remainder of voir dire and most of the guilt phase. But problems arose again at the end of guilt phase. When the court questioned Driskill about whether he would testify, Driskill became so anxious that he asked to leave the courtroom and needed time to collect himself. (Tr.1264,1266). As the court was reading the verdicts, counsel interrupted and asked that Driskill be escorted from the courtroom. (Tr.1379-80,1401). Driskill left, and the court declared a recess. (Tr.1380). Counsel spoke with Driskill and then advised the court that Driskill was waiving his right to be present for the remainder of the verdicts. (Tr.1381). Driskill was also absent when counsel argued several penalty phase motions. (Tr.1386-89).

At the start of the penalty phase, defense counsel advised the court that Driskill was in a heightened state of anxiety, and they did not know how long he would be able to stay in the courtroom. (Tr.1402). Driskill left during the State's opening statement, at about 9:45 a.m., and the court called a recess. (Tr.1410). By about 11:00 a.m., Driskill was a little calmer, but still shaking and incredibly anxious. (Tr.1416). Counsel told the court that Driskill had turned to her and stated, "I can't take this anymore, I'm going to snap out." (Tr.1415). Counsel believed that had she not interrupted the proceedings, Driskill could have had another anxiety attack like the one he had during voir dire. (Tr.1415). Driskill told the court that he wanted to be in the courtroom for his trial but thought, based on his past experiences, he would have an attack. (Tr.1416). The court again denied counsel's motions for a competency evaluation and a continuance. (Tr.1418-19).

The court asked whether Driskill wanted to appear by polycom. (Tr.1419). Driskill declined. (Tr.1413). He explained that the polycom made him even more anxious and made the proceedings seem unreal. (Tr.1413). The court excused Driskill. (Tr.1419).

Driskill was not present for any of the State's evidence in penalty phase. After the State rested, the court questioned Driskill again. (Tr.1477). Driskill stated he did not want to be in the courtroom and was asking the court to excuse him. (Tr.1477). He did not want to be present, because he believed that if he were in the courtroom, he would have another panic attack. (Tr.1478). He was jittery and wringing his hand and was very concerned about having a panic attack. (Tr.1478). Driskill was absent during the testimony of the first four defense witnesses but returned for the last two of the day. (Tr.1542).

On the final day of trial, Driskill started out in the courtroom, but had to leave before a letter from his brother was read. (Tr.1645,1659). After the defense rested, the court asked to question Driskill about whether he would testify in penalty phase. (Tr.1663). The court noted that, "I understand that right now he's not available to do that." (Tr.1663). The court took a recess until Driskill was ready. (Tr.1663).

After the closing arguments, Driskill asked that he be allowed to leave the courtroom. (Tr.1743). He waived his presence for the swearing of the bailiffs and excusing the alternates. (Tr.1743). He returned before the alternates were excused. (Tr.1744). After the jurors were polled but before they left, Driskill again left the courtroom. (Tr.1755).

No Waiver of Right to Be Present in Capital Trial

This Court has held that a capital defendant may waive his right to be present at trial. *State v. Johns*, 34 S.W.3d 93, 116 (Mo. banc 2000). This holding is in conflict with Supreme Court precedent and must be reconsidered.

The Supreme Court has held that a capital defendant cannot waive his right to be present at trial. In *Diaz v. United States*, 223 U.S. 442 (1912), the defendant was present at the start of his non-capital homicide trial, but he was voluntarily absent for two later portions of the trial. *Id*. at 453. He claimed he was wrongfully convicted since part of the trial was conducted in his absence. *Id*. The Court held that, "with like accord [our courts] have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right" to be present. *Id*. at 455. The Court held that where the charged crime is not a capital offense and the defendant is not in custody, the defendant, having been present at the start of the trial, may waive his right to be present later on. *Id*. The Court stated that the reason courts have not allowed capital defendants to waive the right to be present is that, "in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction." *Id*.

The Supreme Court has not expressly overruled this line of cases. The Court had the opportunity to do so in *Drope v. Missouri*, 420 U.S. 162, 182 (1975), but opted not to. By deciding the case on the issue of whether Drope was competent to stand trial, it was "unnecessary to decide whether, … it was constitutionally impermissible to conduct the remainder of his trial on a capital offense in his … absence…").

More recently, the Court has cited *Diaz* with approval in *Crosby v. United States*, 506 U.S. 255, 259-60 (1993). It noted that Federal Rule of Criminal Procedure 43 was "restatement of existing law that, except in capital cases, the defendant may not defeat the proceedings by voluntarily absenting himself after the trial has been commenced in his presence." See also *Taylor v. United States*, 414 U.S. 17, 18 (1973)(discussing the "long-standing rule" set forth in *Diaz*). And Justice Sotomayor, in her dissent from the denial of certiorari in *Fairey v. Tucker*, 132 S. Ct. 2218 (2012), noted that, "at least in noncapital trials, a defendant may waive his right to be present…" Citing *Crosby*, 506 U.S. at 260; *Diaz*, 223 U.S. at 455 (quotations omitted)(emphasis added). But see *Snyder*, 291 U.S. at 106 (capital case, stating, in dictum, that right to presence may be waived).

Even if Driskill Could Waive his Presence at his Capital Trial,

He Did Not Do So Voluntarily

Waiver of fundamental rights like the right to be present must be made knowingly, voluntarily, and intelligently. *Christy v. State*, 780 S.W.2d 704, 707 (Mo. App. W.D. 1989). The determination of whether there has been a knowing, voluntary, and intelligent waiver must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Waiver of the right must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010), quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

When a defendant purports to waive a fundamental constitutional right, the burden is on the State to prove that the waiver was valid. *Brewer v. Williams*, 430 U.S. 387, 404 (1977). The Supreme Court has instructed that courts must "indulge every reasonable presumption against waiver" and that "we do not presume acquiescence in the loss of fundamental rights." *Johnson*, 304 U.S. at 464. The Court has further stressed:

> A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided.

Schneckloth v. Bustamonte, 412 U.S. 218, 241 (1973).

Driskill's waiver was not voluntary, because it was not "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Thompkins*, 560 U.S. at 382; *Burbine*, 475 U.S. at 421. Driskill only waived his presence at the trial because if he remained in the courtroom, he would suffer from panic attacks. (Tr.244,249,254-55,260,267). Given that this was a capital trial, Driskill did not want the jury to see him lose control. The court's refusal to order a competency evaluation forced Driskill to absent himself from the courtroom.

In *United States v. Salim*, 690 F.3d 115, 123 (2d Cir. 2012), the defendant waived his presence at his re-sentencing, but stated he was doing so because correctional officers

had spit on him and beat him the last time he had been moved. He did not want to be subjected to the same abuse by coming to his resentencing. *Id*.

The Federal Court of Appeals for the Second Circuit held that the government failed to meet its burden of proving the waiver was voluntary. *Id*. Salim's waiver purportedly was the product of "fears of intimidation and physical abuse." *Id*. The government did not show that Salim was lying about the abuse, that his fears were unreasonable, or that Salim would not have been present even if he could do so safely. *Id*. Nor did the court assess whether Salim's fears were reasonable or determine if the defendant's fears could have been assuaged. *Id*. The court made no findings that Salim's fears were not credible. *Id*. at 124. The Court of Appeals rejected the waiver. *Id*.

Polycom Was Not Good Enough

"[E]very federal appellate court to have considered the question has held that a defendant's right to be present requires physical presence and is not satisfied by participation through videoconference." *Salim*, 690 F.3d at 122 (citations omitted). Having the defendant appear by polycom places a barrier between the court, the lawyers, and the jury. The defendant cannot choose where to look in the courtroom but instead is fixed on a single spot. In voir dire, the defendant must either view one juror close up (and miss the reactions of other jurors), or must view all the jurors but from so far away that he cannot discern individual jurors' reactions. "One insurmountable limitation of videoconferencing is its inability fully to capture nonverbal cues." Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 Tul. L. Rev. 1089, 1110 (2004). Given the delay in communicating privately with counsel, the

defendant may miss out on the chance to ask counsel to inquire more of certain jurors given the quick pace of voir dire. During voir dire, the defendant would have to choose between viewing and making eye contact with the jurors or not seeing what counsel was doing. Finally, the first impression the jurors would have of Driskill would be the unexplained presence of the defendant on screen instead of, as expected, sitting beside counsel in the courtroom.

Here, Driskill sat in the jail with a member of the defense team – not counsel – and had to communicate with counsel by cell phone or text. Any communication with counsel was delayed, at best. Driskill could send texts, but they took a while to get through to counsel, and phone service cut in and out, as did the polycom itself. (Tr.306,510,978). Driskill had a limited view of the courtroom, especially during general voir dire, when he could not see the entire panel of 42 jurors. (Tr.979). Also, while Driskill appeared by polycom, the lawyers and the court could not fully assess Driskill's awareness of the proceedings or his ability to consult with counsel. Finally, instead of alleviating Driskill's anxiety, the polycom actually made it worse. (Tr.1413).

The Error Was Not Harmless

The erroneous denial of Driskill's right to be present is subject to harmless-error review. *Rushen v. Spain*, 464 U.S. 114, 117-18 (1983). To avoid retrial, the State must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). The State cannot meet this burden.

The defendant's presence is especially critical to a capital trial. For the defense, the goal in the penalty phase of a capital trial is to humanize the defendant. *Lawhorn v. Allen*, 519 F.3d 1272, 1296 (11th Cir. 2008); *Marshall v. Hendricks,* 307 F.3d 36, 99, 103 (3rd Cir.2002); *Stanley v. Zant*, 697 F.2d 955, 969 (11th Cir. 1983). "To ensure a meaningful penalty hearing in capital cases, it is essential that the [defendant] be presented to the sentencer as a human being." *State v. Morton*, 715 A.2d 228, 276 (N.J. 1998). As the Federal Court of Appeals for the Eleventh District has recognized, "It may be more difficult for a jury to condemn to death a man who has sat on the stand a few feet from them [and] looked them in the eyes…" *Waters v. Thomas*, 46 F.3d 1506, 1519 (11th Cir. 1995). Conversely, the prosecution's goal is to dehumanize the defendant. "Dehumanizing the capital defendant is as old as law itself." Ghoshray, *Capital Jury Decision Making: Looking Through the Prism of Social Conformity and Seduction to Symmetry*, 67 U. Miami. L. Rev. 477, 493 (Winter 2013).

Watching Driskill on the polycom made him seem less human, and as Driskill himself noted, made the proceedings themselves seem less real (Tr.1413), and hence, less weighty. In the penalty phase, Driskill left during the State's opening statement, and the jurors would not see him again until the testimony of the last two defense witnesses.

With Driskill appearing merely on a television screen, or not at all, the jurors would not fully appreciate the gravity of their role in sentencing another human being to die. They would not feel as responsible and would disengage morally from the difficult decision before them. *Caldwell v. Mississippi*, 472 U.S. 320, 336 (1985)(indispensability of having sentencers who "appreciat[e] ... the gravity of their choice and ... the moral

responsibility reposed in them as sentencers"). The legitimacy of the capital sentencing process is founded on the presumption that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision." *Id*. at 329-30.

Driskill's forced absence fits into the same category of State-imposed conditions – like shackling a defendant before the jury, forcing the defendant to wear jail clothing, or using heightened security measures – that are inherently prejudicial. *Deck v. Missouri*, 544 U.S. 622, 635 (2005); *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986); *Illinois v. Allen*, 397 U.S. 337, 344 (1970). Like shackling a defendant before the jury, Driskill's absence suggested "to the jury that the justice system itself sees a "need to separate a defendant from the community at large." *Deck*, 544 U.S. at 630, citing *Holbrook*, 475 U.S. at 569. His absence affected his communication with his attorneys, interfered with his ability to participate in his defense, and his ability to testify. *Deck*, 544 U.S. at 631. Lastly, to have a man on trial for his life, yet forcibly absent, affronted the ""dignity and decorum of judicial proceedings" which "includes the respectful treatment of defendants." *Id.*, citing *Allen*, 397 U.S. at 344.

By trying an incompetent defendant and thereby forcing his absence, the court adversely affected how the jury would view Driskill. In *Riggins v. Nevada*, 504 U.S. 127 (1992), a mentally ill individual was medicated over his objection throughout both phases of his capital trial. The Supreme Court recognized that a defendant has the right to be free from a State-imposed condition that diminishes his ability to participate fully in the proceedings and that may prejudice the jury against him. *Id*. at 134-38. Balancing

Riggins' rights against the State's interests, the Court reiterated that a defendant could not be forcibly medicated at his trial unless the State established that the medication was medically appropriate; that it was essential for the defendant's safety or the safety of others; and that less intrusive alternatives had been considered. *Id*. at 135.

Because Riggins was forcibly medicated without such a showing and the error could have impaired his constitutionally-protected trial rights, the Court reversed his conviction. *Id*. at 136-38. "It is clearly possible that . . . [the] side effects [of the medication] had an impact upon not just Riggins' outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." *Id*. at 137.

Justice Kennedy's concurring opinion emphasized that forced medication can make a defendant appear before the jury in such a way as to cast a negative light on his character. A key component of the right to be present at trial is the opportunity to present oneself to the observation of the jury. *Id*. at 142 (Kennedy, J., concurring). "At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial." *Id*. Through control of the defendant's appearance, the State can create a prejudicial negative demeanor that, although subtle, "does not make [it] any less real or potentially influential." *Id*. at 143. "Serious due process concerns are implicated when the State manipulates the evidence in this way." *Id*. at 142.

The State can create a prejudicial negative demeanor, making the defendant appear dangerous and volatile, even though he is not. As Justice Kennedy recognized:

> The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.

Riggins, 504 U.S. at 144 (concurring opinion).

Driskill's situation was the inverse of *Riggins*, but bore the same prejudice. In both cases, the trial court adversely affected how the defendant would appear to the jury or, here, whether the defendant would appear at all. In *Riggins*, the State controlled the defendant's behavior by medicating him against his will. Here, it was by forcing Driskill to proceed to trial without medication and treatment.

Because Driskill was forced to stand trial while not competent, he appeared before the jury in the worst possible light. Toward the end of the penalty phase evidence, the jurors learned that Driskill suffered a panic attack during voir dire and had to leave the courtroom. (Tr.1653-54). The jurors were not told that Driskill was suffering from extreme anxiety and panic attacks throughout the trial and that was the reason he was absent from the courtroom.

The jurors were left to speculate as to why Driskill would suddenly leave the courtroom, why he was appearing by polycom instead of in person, or why he was not appearing at all. The jurors must have speculated that Driskill had done something

particularly dangerous, violent, or untrustworthy, or else he would be appearing in court. The jurors may have believed Driskill had threatened physical violence to people in the courtroom, including, perhaps, to the jurors themselves. The jurors might have concluded that, after the guilty verdicts, Driskill was too angry or volatile for the courtroom. Alternatively, the jurors might have concluded that Driskill was disdainful of the proceedings, or that he did not care what happened during the penalty phase, leaving the jurors freer to vote for death.

The jurors' speculation that Driskill could not even be trusted to act properly in the courtroom would be especially damaging regarding the punishment to be imposed, because Driskill's un-medicated demeanor would work against his own evidence in mitigation that he was a good prisoner. Driskill's absences thereby directly touched upon a key issue for the jury in deciding his sentence, the issue of future dangerousness. Future dangerousness is often a subject that worries jurors in capital sentencing deliberations, and it was specifically in issue here. "[P]robably the *bulk* of what most sentencing is all about" is a determination of the defendant's "acceptance of responsibility, repentance, character, and future dangerousness." *Mitchell v. United States*, 526 U.S. 314, 340 (1999) (Scalia, J., dissenting). Justice Stevens recognized that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Jurek v. Texas*, 428 U.S. 262, 275 (1976); see also Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1560 (1998) (analyzing South Carolina Capital Jury Project data and concluding "[f]uture dangerousness appears to be

one of the primary determinants of capital-sentencing outcomes"). "Other than facts about the crime, questions related to the defendant's dangerousness if ever back in society are the issues jurors discuss most." Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L.Rev. 1, 6 (1993). The jurors would consider Driskill's absence from the courtroom as evidence that he remained dangerous, even in the confines of the courtroom, and thus, would also be dangerous in prison.

The purpose of the penalty phase is to provide the jury with accurate information that permits it to make an individualized sentencing determination based on the defendant's character and record and the circumstances of the particular offense. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The "acute need for reliable decisionmaking" is defeated when the jurors rely on inferences and speculation. *Deck*, 544 U.S. at 632-33. Driskill's absence raised the specter that he was too volatile, uncontrollable, or dangerous, to be present for his trial, or that he was disdainful of the proceedings, the jurors, and their decision. It adversely affected the jurors' views on Driskill's future dangerousness and his character. Driskill's absence undermined "the jury's ability to weigh accurately all relevant considerations—considerations that are often unquantifiable and elusive—when it determines whether a defendant deserves death." *Id*. at 633. By interjecting into the jury's deliberations negative impressions that, although potentially untrue, Driskill was unable to refute effectively, Driskill's absence interfered with his right to a fair and reliable sentencing determination. *See, e.g.*, *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (due process violated when a defendant sentenced based on untrue assumptions).

No justification can exist for trying the mentally ill in absentia, yet that is what occurred here. The Court must reverse.

ARGUMENT III

The trial court erred in denying Driskill his right to testify in both the guilt and penalty phases and in finding that Driskill voluntarily waived his right to testify. The court's actions violated Driskill's right to testify, to due process, to equal access to the courts, and to present a defense in guilt and penalty phases, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, §§ 2, 10, 18(a), and 21 of the Missouri Constitution; and the Americans with Disabilities Act (ADA), 42 U.S.C.A. §12101-12213. Any waiver was involuntary, in that Driskill told the court he wanted to testify, yet Driskill was forced not to testify because he could not testify without suffering panic attacks due to his untreated mental illness.

"[T]he most important witness for the defense in many criminal cases is the defendant himself." *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). Even the most eloquent defense lawyer "may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green v. United States*, 365 U.S. 301, 304 (1961). In a capital case, where the prosecution has striven to dehumanize the defendant, the defendant's testimony can be crucial, as the jurors may finder it harder "to condemn to death a man who has sat on the stand a few feet from them, looked them in the eyes, and talked to them." *Waters v. Thomas*, 46 F.3d 1506, 1519 (11th Cir. 1995). Here, Driskill wanted to testify, and he told the court as such. (Tr.1249). His waiver of this fundamental right was not made voluntarily, because it was compelled by the court's

refusal to order a competency evaluation or hearing and the likelihood that, if he testified, he would have a panic attack in front of the jury. Driskill was denied his right to testify, to due process, to equal access to the courts, and to present a defense in guilt and penalty phases, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, §§ 2, 10, 18(a), and 21 of the Missouri Constitution; and the Americans with Disabilities Act (ADA), 42 U.S.C.A. §12101–12213.

Preservation and Standard of Review

Defense counsel objected that Driskill was without medication or medical treatment, was not competent to stand trial, and was being forced not to testify because he feared he would have panic attacks if he testified. (Tr.1247,1263-64). This issue is included in the motion for new trial (L.F.868-69) and thus is preserved for review. Driskill did not object under the Americans with Disabilities Act (ADA), and thus for that portion of the argument, he requests review for plain error. Rule 30.20.

Whether Driskill waived his right to testify voluntarily is a question of law subject to *de novo* review. *Moore v. People*, 318 P.3d 511, 518 (Colo.2014); *State v. Weed*, 666 N.W.2d 485, 491 (Wisc.2003).

The Right to Testify is a Fundamental Constitutional Right

A criminal defendant's right to testify on his own behalf is "essential to due process of law in a fair adversary process." *Rock*, 483 U.S. at 51; U.S. Const.XIV; Mo.Const., Art.I, Sec.10. Under the Compulsory Process Clause of the Sixth Amendment, the defendant has the right to call "witnesses in his favor," including himself. *Rock*, 483 U.S. at 52, citing *Washington v. Texas*, 388 U.S. 14, 17-19 (1967).

The Sixth Amendment also grants "to the accused *personally* the right to make his defense." *Rock*, 483 U.S. at 52 (emphasis in original), quoting *Faretta v. California*, 422 U.S. 806, 819 (1975). Finally, the Fifth Amendment protects both the right to remain silent and the right to speak if the defendant so chooses. *Rock*, 483 U.S. at 52-53, quoting *Harris v. New York*, 401 U.S. 222, 230 (1971). A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness. *Id.*

The defendant's right to testify on his own behalf is one of a handful of "basic trial rights [that] are of such moment that they cannot be made for the defendant by [counsel]." *Florida v. Nixon*, 543 U.S. 175, 187 (2004); see also *State v. Edwards*, 173 S.W.3d 384, 385-86 (Mo.App.E.D.2005). The defendant has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The right to testify is "so inherently personal and basic that the fundamental fairness of a criminal trial is called into question if [it is] surrendered by anyone other than the accused." *People v. Curtis*, 681 P.2d 504, 511-12 (Colo. banc 1984). It is "[e]ven more fundamental to a personal defense than the right of self-representation...." *Rock*, 483 U.S. at 52.

As with other fundamental rights, waiver of the right to testify must be made knowingly, voluntarily, and intelligently. *Smith v. State*, 276 S.W.3d 314, 317 (Mo. App. E.D. 2008); *State v. Fanning*, 939 S.W.2d 941, 949 (Mo.App.W.D.1997). Waiver of the right must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Berghuis v. Thompkins*, 560

U.S. 370, 382 (2010). The determination of whether there has been a knowing, voluntary, and intelligent waiver must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

When a defendant purports to waive a fundamental constitutional right, the burden is on the State to prove that the waiver was valid. *Brewer v. Williams*, 430 U.S. 387, 404 (1977). The Supreme Court has instructed that courts must "indulge every reasonable presumption against waiver" and that "we do not presume acquiescence in the loss of fundamental rights." *Johnson*, 304 U.S. at 464. Courts must apply a "strict standard of waiver … to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial." *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973).

Driskill Wanted to Testify

Counsel advised the court that Driskill would not testify, partially because he believed he could not testify without having a panic attack. (Tr.1247). Driskill stated, "I want to testify, but I just know I can't. I mean I'm not good with people." (Tr.1249-50). Driskill confirmed that he understood he had the right to testify. (Tr.1248-49). He understood that he had the right to remain silent and that no inference could be drawn from his silence. (Tr.1248). No one had coerced or threatened him to get him to waive his right to testify, and he did not need more time to speak with counsel. (Tr.1249).

The court told Driskill that if he testified, he would have to be in court in front of the jury:

The Court: And if you were to testify, your testimony would have to be in front of the jury. You understand that?

Driskill: Yes.

The Court: Because they're the trier of fact, so they would have to be able to hear your testimony and have the opportunity to observe your testimony just as they've done with every other witness. You understand that?

Driskill: Yes.

The Court: And are you telling me you don't think you can take the stand and do that?

Driskill: No.

The Court: Is that your decision?

Driskill: Yeah, it's my decision.

(Tr.1250). Counsel stated she did not know whether Driskill's decision would be different if he were medicated. (Tr.1248).

The next morning, the court questioned Driskill again about whether he would testify. (Tr.1263). Driskill reiterated that he had decided, after speaking with counsel, not to testify. (Tr.1263). Counsel advised the court that Driskill had decided not to testify for the reasons stated the day before, *i.e.*, that he could not do so without having a panic attack in front of the jury. (Tr.1263-64). Counsel noted that although Driskill stated that his decision was not coerced, Driskill was in court without the benefit of medication or appropriate medical treatment. (Tr.1264). He was coerced because he could not testify without having a panic attack. (Tr.1264). Counsel could not

definitively state that Driskill would have a panic attack if he testified, but that fear contributed to his decision not to testify. (Tr.1265). Counsel could not vouch that medication would make a difference, but it had the potential to do so. (Tr.1266). Driskill had taken it in the past, and the doctors had recommended he take it. (Tr.1266). Counsel reminded the court that after it questioned Driskill the day before, Driskill became anxious and needed to leave the courtroom. (Tr.1264,1266).

At the penalty phase, Driskill again stated that he would not testify. (Tr.1663-64). He knew he had the right to testify, and he had had enough time to talk to counsel about it. (Tr.1663-64). It was his decision not to testify. (Tr.1663-64).

The State Has Not Proven that Driskill Waived his Right to Testify Voluntarily

By refusing Driskill's request for a competency evaluation and forcing him to proceed through the trial un-medicated, untreated, and incompetent, the court also forced Driskill's hand on whether to testify. The court told Driskill that he would have to testify in the courtroom, in front of the jury. (Tr.1250). Driskill knew that he could not testify before the jury due to his anxiety and the likelihood that he would suffer a panic attack, which in turn would make the jury believe he was dangerous and uncontrollable. Because Driskill's waiver was coerced by the conditions the court placed upon his right to testify, it was not voluntary. See e.g., *Curtis*, 681 P.2d at 514 ("If criminal trials are to be perceived as fair by the community, it is important that the public know that persons accused of crimes have not been silenced at trial by undue influence, mistaken impressions, or ignorance.").

Driskill was forced to choose between abandoning his right to testify or risking losing control before the jury due to his mental illness. But the State may not use such mental compulsion against the defendant to secure waiver of a fundamental right. *Flemming v. State*, 949 S.W.2d 876, 879 (Tex.App.1997). Mental compulsion "includes the more subtle force associated with offering a defendant two choices, *i.e.*, to [waive the right] or face an improper and unwarranted penalty, punishment, or detriment." *Id.* The use of mental compulsion may render the waiver involuntary. *Id.* A waiver "must be free from intimidation, coercion or deception." *Id*., citing *Moran v. Burbine*, 475 U.S. 412, 421 (1986); see also *Henderson v. State*, 13 S.W.3d 107, 110 (Tex.App.2000) ("Waiver is not voluntary if the defendant is physically or mentally compelled").

Driskill told the court that he wanted to testify, so the court should have enabled him to do so. Reversal is warranted even when the waiver is ambiguous. In *Ward v. Sternes*, 334 F.3d 696, 699 (7th Cir. 2003), defense counsel told the court that he, not Ward, had decided that Ward would not testify. Ward suffered from aphasia from a head injury which manifested itself in a disconnect between questions asked of him and the answers he gave. *Id*. at 698. In questioning by the court, Ward stated that he had spoken with counsel about whether he should testify. *Id*. at 700. When the court asked Ward if he agreed with counsel's assessment that Ward should not testify, Ward gave a rambling non-response. *Id*. When the court asked again if Ward agreed he should not testify, Ward replied, "I guess. I don't know." *Id*. The court allowed the defense to rest without Ward's testimony. *Id*.

The Court of Appeals for the Seventh Circuit held that the trial court's acceptance of Ward's equivocal response was unreasonable and vacated the conviction. *Id*. at 705,708. The record showed that "Ward was prevented by his own mental deficiencies from exercising his fundamental right to testify…" *Id*. at 706. More inquiry was required before the court could conclude that a defendant with severe brain damage had knowingly, intelligently, and voluntarily waived a fundamental right. *Id*.

The Court Should Have Made Accommodations to Allow Driskill to Testify

As discussed in *Argument* I, *supra*, the court erred in refusing to stop the trial and order a competency evaluation under Section 552.020, RSMo. "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including … the right to testify on one's own behalf…." *Drope v. Missouri*, 420 U.S. 162, 171-172 (1975). Driskill was not competent to stand trial, and his lack of competence affected his decision not to testify.

But even if Driskill had been competent to stand trial, the court knew that Driskill suffered from extreme anxiety and panic attacks. The court should have made accommodations for Driskill to testify given what was, at the least, a physical disability, *i.e.*, his inability to take the stand without a strong likelihood that he would have a panic attack. Driskill's panic attacks caused a strong physical reaction that rendered him unable to testify as a mentally competent and physically able person would. During his panic attack in voir dire, Driskill was "almost hyperventilating, red in the face, crying, rubbing his head, kneeling over like his stomach was hurting." (Tr.240). He even vomited (Tr.241).

Under the Americans With Disabilities Act (ADA), 42 U.S.C.A. § 12101–12213, the court was required to ensure equal access to disabled individuals. Thus, under the ADA, the court should have taken measures to enable Driskill to testify. See, e.g., *In re McDonough*, 930 N.E.2d 1279, 1290 (Mass. 2010). Several measures were available that would have enabled Driskill to testify while not threatening any State interest.

One option was for Driskill to testify by polycom. Although the court was happy to have Driskill appear by polycom for voir dire and the testimony of other witnesses, that option was not given when Driskill wanted to testify. Instead, the court told Driskill that if he were to testify, it would have to be in court in front of the jury. (Tr.1250). Driskill acknowledges that he stated that the polycom made him feel even more anxious than appearing in court. (Tr.1413). But had he been given the choice of testifying in live court – that is, not testifying at all, given Driskill's panic attacks – or testifying by polycom, he may well have chosen to testify by polycom.

Another option was for Driskill's testimony to be taken by videotaped deposition. Under Rule 25.13, the defendant may depose any person and offer that deposition at trial if that person is "unable to attend or testify because of sickness or infirmity." Mo.Sup.Ct. Rule 25.12, 25.13(c). Because of his panic attacks, Driskill was unable to testify. The parties could have videotaped his testimony out of the presence of the jurors, and shown the videotaped testimony in court. Although this would have caused a delay in the trial, such a delay was appropriate given the importance of the defendant's right to testify.

Denial of the Right to Testify is a Structural Error

The improper denial of a criminal defendant's right to testify is a structural error. See, e.g., *State v. Rivera*, 402 S.C. 225 (S.Car.2013); *State v. Hampton*, 818 So.2d 720 (La.2002). The Supreme Court has held that the harmless error doctrine is not applicable to rights, like the right of self-representation, designed to serve individual dignity interests. *McKaskle v. Wiggins*, 465 U.S. 168, 176, 177-78 & n.8 (1984). "According every defendant the right to his say in court" affirms the "dignity and autonomy of the accused." *Indiana v. Edwards*, 554 U.S. 164, 186-87 (2008)(Scalia, J., dissenting). Like the right of self-representation, the right to testify "is personal to the criminal defendant and fundamental to the dignity and fairness of the judicial process." *LaVigne v. State*, 812 P.2d 217, 219 (Alaska 1991). The right to testify is "[e]ven more fundamental to a personal defense than the right of self-representation...." *Rock*, 483 U.S. at 52. Because the denial of the right to self-representation is "not amenable to harmless error analysis," *Wiggins*, 465 U.S. at 177, n.8, neither is the denial of the right to testify.

Harmless error also fails to apply to these two rights, because the effect of the denial cannot be measured, and exercise of these rights may possibly increase the chance of conviction:

> Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis. The right is either respected or denied; its deprivation cannot be harmless.

Id. at 178, n.8; see also *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986)(when the harm stemming from the deprivation of a constitutional right cannot be assessed, mandatory reversal results); *Luce v. United States*, 469 U.S. 38, 41-42 (1984)("an appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying").

This Court must reverse.

ARGUMENT IV

The trial court erred and abused its discretion in denying counsel's motions for a continuance, in failing to order that Driskill receive the medication he needed, and in proceeding through trial while Driskill was in need of psychiatric treatment and medication or at least, medical treatment. The court's failure to continue the trial and/or ensure that Driskill was properly medicated at trial violated Driskill's rights to be present, to confront and cross-examine the witnesses, to testify, to due process, the effective assistance of counsel, a fair trial, and to a fair and reliable sentencing determination, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10, 18(a) and 21 of the Missouri Constitution. The court knew that Driskill had a long history of mental illness, including extreme anxiety, panic attacks, and intermittent explosive disorder; that doctors recommended that he receive medication to function at trial; and that Driskill was not receiving that medication. The denial of medication caused Driskill to experience such extreme anxiety at trial that he became physically and mentally ill and prevented Driskill from being present at trial, testifying, and otherwise participating in his trial and assisting counsel.

It is a fundamental concept of criminal law that an accused is entitled to a fair trial, and it is the duty of the trial court to see that he gets one. *State v. Tiedt*, 206 S.W.2d 524, 526 (Mo. banc 1947). Here, the court knew that Driskill had serious mental health issues. One doctor found Driskill not competent to stand trial, while another believed that

Driskill's panic attacks could render him incompetent. (D.Ex.A,p.1;D.Ex.B-1). Both doctors believed that medication was needed to alleviate Driskill's anxiety, yet Driskill was forced to proceed to trial without it. (D.Ex.A,p.1;D.Ex.B-1;Tr.61,63). Even if the court did not believe that medication was essential to secure Driskill's competency, it still should have ensured that Driskill was properly medicated so Driskill could fully participate in his capital trial. The court's failure to grant a continuance or otherwise ensure that Driskill was properly medicated at trial violated Driskill's rights to be present, to confront and cross-examine the witnesses, to testify, to due process, the effective assistance of counsel, a fair trial, and to a fair and reliable sentencing determination, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10, 18(a) and 21 of the Missouri Constitution.

Standard of Review and Preservation

"Continuances are within the sound discretion of the trial court, and a very strong showing is required to prove abuse." *State v. Black*, 50 S.W.3d 778, 784 (Mo. banc 2001)(internal quotations omitted). Counsel repeatedly objected that Driskill was not receiving necessary medication, that Driskill should receive medical and psychiatric treatment, and that a continuance was mandated. (Tr.234,238,243,255,264-67,695,1264-66,1416-19,1478-79). The court overruled counsel's requests. (Tr.238,243,264-66,695,1418-19,1479). The issue was included in the motion for new trial and is preserved for review. (L.F.875-77).

Driskill Had a Due Process Right to be Mentally and Physically Fit for His Trial

A criminal defendant has the right to a full and fair trial, but that right is jeopardized when the defendant lacks the ability to comprehend or participate in the proceedings. *Riggins v. Nevada*, 504 U.S. 127, 149 (1992). The defendant, personally, must be involved in the proceedings which determine whether his liberty, or even his life, will be taken by the State. "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975). It is the defendant, not counsel, who must be confronted with the witnesses against him, and who must receive compulsory process for obtaining witnesses in his favor. *Id*. It is he, after all, who will bear the consequences of conviction. *Id*. at 819, 834.

To participate personally in his trial, the defendant must be present both physically and mentally. *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *Drope v. Missouri*, 420 U.S. 162, 171 (1975); U.S. Const., Amends. VI, XIV; see also Mo. Const., Art. I, Sec.10,18(a). The defendant's presence is essential to his opportunity to defend against the charges. *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934). It enables the defendant to assist his lawyer, *id*., and to testify in his defense. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). It allows for the face-to-face confrontation of witnesses and cross-examination of witnesses that the Confrontation Clause guarantees. *Coy v. Iowa*, 487 U.S. 1012, 1016-17 (1988).

Driskill was denied due process, because, although physically present for portions of his trial, he was never fully present mentally, and he was absent both mentally and

physically for large portions of the trial. Three months before trial, Dr. Gruenberg reported that Driskill was not competent to stand trial. (D.Ex.A,p.1). Driskill needed "immediate psychiatric treatment with medication to help him regulate his moods and decrease his difficulty in maintaining control of his behavior." (D.Ex.A,p.2). Dr. Gruenberg recommended that Driskill be prescribed Neurontin for his anxiety, as he had received in the past; without it, Driskill would not be competent to stand trial. (Tr.61).

Pretrial, defense counsel advised the court that they had "gone round and round" with the Department of Corrections (D.O.C.) in trying to have Driskill placed on Neurontin, but the D.O.C. refused. (Tr.62). It would not accept an outside doctor's recommendation or prescription. (Tr.62-63). Yet the Department of Corrections had not had a psychiatrist see Driskill. (Tr.62-63). Thus, at trial, Driskill was not taking any medication for his anxiety disorder. (Tr.63).

On the first day of trial, Driskill suffered his first panic attack. Driskill was "almost hyperventilating, red in the face, crying, rubbing his head, kneeling over like his stomach was hurting." (Tr.240). He was unresponsive when questioned, and he vomited. (Tr.240-41). Hours later, Driskill was still recovering, still red in the face, sweating, and crying. (Tr.261).

Counsel asked for a competency evaluation to determine if Driskill could continue with the trial without medication. (Tr.234). Counsel stressed that Driskill had a long, documented history of anxiety, panic attacks, and intermittent explosive disorder and had been on anti-anxiety medications throughout his life, but was currently un-medicated. (Tr.236). Counsel proposed that a doctor from the state hospital be on standby to

evaluate Driskill during a panic attack. (Tr.237). The court overruled that request and Driskill's request for a competency exam. (Tr.238,243).

The next day, counsel reiterated that Driskill could not control his anxiety disorder without medication. (Tr.255). Counsel requested a medical evaluation, but the court refused. (Tr.264-66). Counsel argued that the court was subjecting Driskill to trial by fire by waiting for Driskill to have another panic attack or physical breakdown before he could get medical attention. (Tr.266-67).

On the first day of guilt phase evidence, counsel submitted Dr. Fucetola's supplemental report. (Tr.692;D.Ex.B-1). Dr. Fucetola believed that before, during, and after panic attacks, Driskill might not be able to assist counsel. (D.Ex.B-1). Like Dr. Gruenberg, Dr. Fucetola believed that behavioral treatment and/or anxiolytic medication would alleviate Driskill's anxiety. (D.Ex.B-1). Defense counsel again objected to Driskill being un-medicated and forced to suffer through panic attacks in front of the jury. (Tr.695).

During his trial, Driskill had severe bouts of anxiety and panic attacks that caused him to leave the courtroom or not be able to appear at all. (Tr.1369,1379-81,1410,1415-16,1659,1743,1755). In penalty phase, Driskill was not present for any of the State's evidence, and he missed the testimony of the first four defense witnesses. (Tr.1542).

Driskill believed he could not testify without having a panic attack, so he did not testify. (Tr.1247-48,1264). He could not even talk to the court about whether he would testify, without having a bout of anxiety so severe he had to leave the courtroom. (Tr.1264,1266). Counsel again objected that Driskill was in court without the benefit of

medication and without medical treatment and was being forced not to testify. (Tr.1264). Counsel did not know whether medication would help, but it had the potential to do so, it had helped in the past, and Driskill's doctors recommended it. (Tr.1264-66).

Counsel repeatedly moved for a continuance and a competency exam or a mistrial. (Tr.1416-17,1478-79). Counsel asked that the court allow Driskill the time he needed until he could be in the courtroom without suffering a panic attack. (Tr.1416-17; 1478-79). The court denied each request. (Tr.1418-19,1479).

Since Driskill's competence to stand trial hinged on him receiving medication, the court had a duty, even *sua sponte* if necessary, to order that Driskill receive that medication.

> The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his own initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.

ABA Standards Relating to the Administration of Criminal Justice, at 167. Pretrial, Driskill was being housed at the D.O.C. (Tr.62). Knowing that the D.O.C. was refusing to cooperate with defense counsel's requests that Driskill receive the medication he needed to ensure his competency to stand trial, (Tr.63), the trial court should have ordered the D.O.C. to comply. Alternatively, the court should have committed Driskill to the Department of Mental Health, pursuant to Section 552.020 and 552.050, so that

Driskill could receive the necessary medication. As a final alternative, once Driskill arrived at the county jail to stand trial, the court could have ordered the county jail to give Driskill the medication he needed to ensure competency to stand trial.

Even if the court correctly found that Driskill did not require medication to ensure competency to stand trial, the court should have ensured that Driskill receive his medication to ensure that he was healthy enough to stand trial. Driskill was on trial for his life. Fundamental fairness mandated that he be well enough mentally and physically to participate fully in the trial that would determine whether he lived or died. "[J]udges must seek to maintain a judicial process that is a dignified process." *Deck v. Missouri*, 544 U.S. 622 (2005). The courtroom's dignity "includes the respectful treatment of defendants." *Id*. Holding a trial when the defendant is so ill that he must repeatedly rush out of the courtroom or cannot be present at all "affront[s] the dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id.*, citing *Illinois v. Allen*, 397 U.S. 337, 344 (1970)(internal quotations omitted). It smacks of unfairness.

In *United States v. Brown*, 821 F.2d 986 (4th Cir. 1987), the defendant was an overweight man in his sixties who had a number of physical ailments. Brown entered a hospital shortly before his trial date, and his trial was continued. *Id*. at 987. Eventually, the court held a hearing on Brown's ability to stand trial. *Id*. After hearing testimony from five doctors and reviewing medical records, the court found that Brown had high blood pressure and had suffered several minor strokes, but was healthy enough to stand trial. *Id*. The court offered to make accommodations for Brown's illness, like having shorter court days, taking frequent breaks, and having Brown's doctor available. *Id*.

After several additional continuances, Brown entered a conditional guilty plea, and alleged on appeal that the court should have granted him another continuance based on his health problems. *Id*.

The Court of Appeals for the Fourth Circuit held that the trial court had not abused its discretion in denying the motion for continuance. *Id*. at 988. But it stressed the trial court's duty to "assess the degree to which a defendant's health might impair his participation in his defense, especially his right to be present at trial, to testify on his own behalf, and to confront adverse witnesses." *Id*. The judge should consider whether the trial is likely to worsen the defendant's condition and whether there are steps the court can take to reduce the medical risks. *Id*. The appellate court noted the large amount of evidence and testimony the trial court considered; the trial court's personal observation of Brown's actions and mental acuity; and the accommodations the court was willing to make. *Id*. at 988-89. The appellate court noted, "The availability of such measures is an important consideration in determining whether a trial would impair defendant's health or impair his ability to participate in his defense." *Id*. at 989.

"[I]t is well established that if an accused is in fact suffering from a physical condition such that standing trial would seriously endanger his health, or if his illness or disability substantially impairs effective participation in his defense, he is entitled to a continuance." *State v. Karno*, 342 So.2d 219 (La. 1977). In *Karno*, the Louisiana Supreme Court noted several factors courts should consider in determining whether a continuance should be granted based on the defendant's emotional or physical illness:

(1) Do medical reports support the defendant's claim that he is ill and that forcing him to stand trial would "seriously endanger his health and/or prevent him from effectively participating in his defense";

(2) Has the judge seen the defendant participate effectively at pretrial hearings, etc., despite the claimed illness;

(3) Are there measures available, other than a continuance, that could be employed at trial to reduce the risk to the defendant's health;

(4) Would the defendant be better able to stand trial at a later date;

(5) Will any State interest be hindered by a delay; and

(6) Will the defendant's illness affect the exercise of his constitutional rights.

Id. at 222-23. As a final factor, the appellate court stressed that, in deciding whether to endanger the defendant's health by proceeding to trial, trial courts remember that the defendant is presumed innocent. *Id*. at 223. The court also urged that "[p]ostponement of trial is often the appropriate, obvious and fair decision for both the defendant and the public when the disability is temporary and/or curable." *Id*. at 222. As to the sixth factor, the court noted that the trial court "should carefully consider whether the accused's present physical condition is such that it may substantially impair his constitutional right to effective assistance of counsel, his right to be present in the courtroom at every stage of his trial, and his right to confront witnesses and testify on his own behalf." *Id*. at 223 (internal citations omitted).

Application of these factors demonstrates that the trial court should have granted Driskill a continuance. As to the first factor, the evidence presented to the court showed

that Driskill had a long, well-documented history of mental illness; that two doctors had recommended that he receive medication; that medication had helped Driskill with his anxiety in the past; and that Driskill was not on medication. (D.Ex.A,B,B-1;Tr.61-63). Without the medication, Driskill was not even competent to stand trial. (D.Ex.A,p.1-2). Second, the court saw how Driskill had to repeatedly leave the courtroom, and it heard first-hand from the bailiffs about how Driskill was red in the face, almost hyperventilating, and vomited due to his panic attack during voir dire. (Tr.231-43). Third, it is possible that had Driskill received medication right away, a continuance could have been avoided. But at any rate, as both doctors urged, Driskill likely would have been able to proceed once he was properly medicated. (D.Ex.A,p.2;D.Ex.B-1;Tr.237). Fourth, there were no measures that the court could take in proceeding to trial that could have alleviated Driskill's illness without sacrificing his right to be present or otherwise participate in the trial. Fifth, no State interest would have been damaged by delaying the trial so that Driskill could be properly medicated. In fact, the societal interest in the integrity of the convictions and death sentences weighed in favor of a continuance. Finally, as to the fifth factor, by forcing Driskill to proceed to trial un-medicated and ill, the court forced Driskill to relinquish valuable constitutional rights, i.e., his right to be present, to testify, to confront and cross-examine, to the effective assistance of counsel, and to otherwise participate in his trial.

Driskill was prejudiced, because he was not able to exercise his constitutional rights. He could not testify. For much of his trial, he could not be present. Even when Driskill was not having a full-out panic attack, he exhibited symptoms of his heightened

anxiety, such as shaking, perspiring, wringing his hands, and bouncing his legs. (Tr.1416, 1420). Throughout the trial, when Driskill had panic attacks or had to be excused due to his anxiety, the jurors would have been keenly aware of his unusual behavior and his absences from the courtroom. "While a defendant sits in court, … he is at center stage and on display for the jury. Jurors scrutinize his every move, attaching deep importance to a quick glance or a passing remark – details a nonjuror might consider insignificant." Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 Minn. L. Rev. 573, 575-76 (2008)(internal references omitted). Driskill's agitated behavior, his sudden departures from the courtroom, and his unexplained absences would have made the jurors believe he had acted improperly or was disruptive or dangerous. See *Riggins*, 504 U.S. at 142 (Kennedy, J., concurring).

In the capital context, the need for reliable sentencing is paramount. Given that the jury is making the most significant decision any jury can make – whether another human being should live or die – there is an acute need for reliability. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Monge v. California*, 524 U.S. 721, 732 (1998). Here, the constitutional protections that typically promote the reliability and legitimacy of death sentences were absent. Because of his illness, Driskill was absent for large chunks of his trial, and he could not testify. Driskill's illness caused the jury to draw negative inferences about Driskill's character and consider those inferences in deciding that Driskill deserved the death penalty. By forcing Driskill to stand trial for his life while mentally and physically ill, un-treated, and un-medicated, the court created an unacceptable risk that the death sentences were imposed arbitrarily or capriciously, or by

whim or mistake. *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring). The Court must reverse.

ARGUMENT V

The trial court abused its discretion in denying the jurors' request to view all exhibits admitted into evidence during the penalty phase and, in particular, in barring the jury from viewing and considering defense exhibits AAAA-IIII. The trial court's error violated Driskill's rights to due process, confrontation, presentation of a defense and rebuttal of the State's evidence, and a fair and reliable sentencing trial, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. Defense exhibits AAAA-IIII had been admitted into evidence and were crucial both to support Driskill's case for life without parole and to rebut the State's inferences and arguments, in that (1) the documents contained in the exhibits came from impartial sources and hence provided unbiased corroboration for the expert witnesses' opinions; and (2) that impartial corroboration was essential to rebut the State's inferences and closing arguments that (a) portrayed the defense experts as paid hacks whose opinions could not be trusted and (b) suggested that Driskill's evidence of childhood abuse and mental illness was recently fabricated and/or exaggerated.

The jury must be able to give a "reasoned moral response" to a defendant's mitigating evidence when deciding whether the defendant should live or die. *Brewer v. Quarterman*, 550 U.S. 286, 287 (2007). It is not enough to allow the defendant to present mitigating evidence to the jury; the jury must also be able to consider and give effect to

that evidence in imposing sentence. *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987) (jury may not be precluded from considering any mitigating evidence); *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982). Here, however, the jury was barred from considering and giving a reasoned moral response to Driskill's primary evidence in mitigation. During the penalty phase deliberations, the jury was barred from viewing documents admitted into evidence that showed Driskill's lengthy history of mental illness, childhood abuse, and intellectual limitations and that rebutted the State's contentions that Driskill's mitigating evidence was recently fabricated and the defense experts were paid hacks who would say anything defense counsel wanted. By barring the jury from considering this crucial defense evidence, the trial court violated Driskill's rights to due process, confrontation, presentation of a defense and rebuttal of the State's evidence, and a fair and reliable sentencing trial. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I, Secs.10,18(a),21.

Standard of Review and Preservation

The decision not to send exhibits to the jury during deliberations is reviewed for an abuse of discretion. *State v. Barnett*, 980 S.W.2d 297, 308 (Mo. banc 1998) An abuse of discretion occurs "when the trial court's decision to exclude an exhibit from the jury room was clearly against reason and resulted in an injustice to the defendant." *Id.*, quoting *State v. Roberts*, 948 S.W.2d 577, 596-97 (Mo. banc 1997).

Defense counsel preserved this issue by timely objecting and including the issue in the motion for new trial. (Tr.1747;L.F.869-73).

The Court Barred the Jury from Seeing Defense Exhibits AAAA-IIII

Before penalty phase started, defense counsel noted her understanding that although the State would introduce certified copies of Driskill's prior convictions, the jury would not be given those exhibits; instead, the prosecutor would read to the jurors the charge and the sentence. (Tr.1398). During penalty phase, the court admitted the "certified copies of conviction" and allowed the prosecutor to read to the jury each conviction, the county in which the charge arose, the date Driskill pled guilty, a description of the crime, and the sentence. (Tr.1432-36,1456). The State also presented testimony on Driskill's conviction for tampering with evidence and offered "certified copies of conviction" for that crime as well. (Tr.1440-41,1456-57).

As a primary thrust of the case in mitigation, Driskill presented the testimony of Dr. Robert Hanlon and Dr. William Bernet and introduced the records that the doctors relied on in reaching their opinions. (D.Ex.AAAA-IIII).[8] Dr. Hanlon, a clinical neuropsychologist, evaluated Driskill to assess his cognitive functioning. (Tr.1544). He

[8] Dr. Hanlon reviewed the records of the Social Security Administration (D.Ex.AAAA), Hermitage Family Medical (D.Ex.BBBB), Citizens Memorial Health (D.Ex.CCCC), the Division of Youth Services (D.Ex.DDDD), Lake Regional Health Services (D.Ex.EEEE), Royal Oaks Hospital (D.Ex.FFFF), St. John's Medical Center (D.Ex.GGGG), the Department of Corrections (D.Ex.HHHH), and St. John's Medical Clinic (D.Ex.IIII). The court admitted each of the exhibits into evidence. (Tr.1545-49). Dr. Bernet reviewed defense exhibits BBBB-FFFF, HHHH, and IIII. (1592-93).

met with Driskill, ran a battery of tests, interviewed Driskill's relatives and friends, and reviewed medical, prison, and other records. (Tr.1544-51). Dr. Hanlon discussed the various mental illnesses that Driskill had suffered from over the years and his childhood abuse. (Tr.1553-61). He discussed Driskill's executive dysfunction, *i.e.*, his inability to control and organize his thoughts and make decisions in a rational, insightful, effective way. (Tr.1557-59,1561-65).

Dr. Bernet, a forensic psychiatrist, testified about the role of genetics in criminal behavior. (Tr.1592). He reviewed Driskill's records and conducted genetics testing. (Tr.1592). He discussed recent research that showed that when a person genetically produces less of an enzyme called monoamine oxidase (MAOA) and has a history of being abused, he was more likely to commit a violent crime. (Tr.1599-1607). Dr. Bernet concluded that the combination of low MAOA and childhood abuse made it harder for Driskill to control his emotions, process information, think things through, and modulate strong feelings. (Tr.1610,1613-14).

On cross, the State challenged the defense experts' impartiality, the bases of their opinions, whether Driskill was malingering, and whether psychological findings and theories could ever be trusted. (Tr.1566-67,1576-78,1615-16,1622-23,1625,1628-32). The State elicited that Dr. Hanlon earned $300 an hour and would earn $9,000 on Driskill's case. (Tr.1566-67). Dr. Bernet earned $360 an hour and would earn $5,000 or $6,000. (Tr.1615-16). The State elicited that Dr. Hanlon had never testified for the State in a capital case, and that Dr. Bernet never met, tested, or evaluated Driskill. (Tr.1567,1622-23). The State noted that Dr. Bernet had changed his findings – from

Driskill being impaired to substantially impaired – from his draft report to his final report. (Tr.1625,1628-32). It also elicited that psychology is a subjective field, that mental illness could not be gauged by a bright line test, and that a study had shown how easy it was for patients to lie and be falsely diagnosed with mental illness. (Tr.1576-78).

In closing argument, the prosecutors repeatedly criticized the defense experts. Attorney General Koster argued, "I thought those two doctors … were absolutely nonsensical. And watching their testimony was like watching two clown cars crashing together." (Tr.1713). He compared the experts' testimony to the "frothy eloquence" of "some east coast congressman going on and on and on and yammering about whatever." (Tr.1713). He argued, "I cannot really express how radical, how through the looking glass this defense theory is." (Tr.1714). Koster argued that, as someone who has practiced law for 20 years, he was looking forward to the "sheer spectacle of" Driskill's closing argument discussing Dr. Bernet's testimony. (Tr.1714-15). Koster called Dr. Bernet's testimony "some Harvard baked theory that [Driskill's] genes made him do it." (Tr.1716).

Later, in rebuttal argument, prosecutor Morris repeatedly criticized Dr. Bernet for never examining Driskill. (Tr.1735-36). He argued, "They have their doctors, they have their studies, they have their statistics, and they have their theories. We have the facts." (Tr.1739).

During deliberations, the jury asked for "all evidence/submissions during the penalty phase." (Tr.1746). Previously, in the guilt phase deliberations, when the jurors had asked for some of the exhibits, the court told the parties that either all the exhibits

would be given to the jurors, or none. (Tr.1369-70). It then ordered that the jurors receive all the exhibits. (Tr.1372).

But now, in penalty phase, the court ruled that the jurors would receive none of the exhibits. (Tr.1747). The court ruled that unless the parties could agree on what exhibits would go to the jurors, none of the exhibits would go.[9] (Tr.1746-47). This placed Driskill in an untenable position. On one hand, Driskill wanted his evidence presented to the jury. But, if he wanted the jury to view his evidence, he would have to agree to the jury viewing the certified copies of conviction. Even if redacted, the certified copies of conviction would contain blacked-out sections that logically would lead the jurors to believe that Driskill was involved in other criminal acts. (St.Ex.104-108,112). Before the penalty phase began, the parties had agreed that the prior convictions would only be read into the record, not physically given to the jurors. (Tr.1398). But now, after the evidence was closed and Driskill had no opportunity to confront or explain those other

[9] In the motion for new trial, Driskill explained that prior to the start of penalty phase, defense counsel and Assistant Attorney General Kevin Zoellner agreed that Zoellner would read from the certified copies of conviction because the actual exhibits contained inadmissible information that the jury should not view, and that State exhibits 104-108 and 112 would not be published to the jury. (L.F.869-70). When the jury asked for all the exhibits, Zoellner said he did not think State exhibits 104-108 and 112 should go to the jury, in compliance with the parties' agreement. (L.F.870). But other members of the prosecution team disagreed. (L.F.870).

criminal acts, the jury would be speculating about those acts when deciding whether Driskill would live or die. Driskill objected to giving the jury blacked-out versions of the certified copies of conviction. (Tr.1747).

Driskill suggested that, instead of the redacted State exhibits, the jury receive a list of the convictions and accompanying information that the prosecutor had read to the jury. (Tr.1746-47). That way, the jurors would have all the information that the parties initially anticipated the jury would receive, without any redactions suggesting other criminal acts. The State initially agreed to the list, but then changed its mind. (Tr.1746-47).

Because the parties could not agree on a resolution, the court gave no exhibits to the jury. (Tr.1747). It ruled that it was not appropriate to send back just some of the exhibits. (Tr.1746-47). Over defense objection, the court simply told the jurors, "You must be guided by the instructions given and the evidence as you remember it." (Tr.1747).

The Jury Should Have Been Allowed to View the Exhibits

"A defendant in a criminal case has a constitutional right to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984); *State v. Walkup*, 220 S.W.3d 748, 757 (Mo. banc 2007); U.S. Const. XIV. This is especially true in the context of a capital sentencing trial. In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the Supreme Court held that, to satisfy the Eighth and Fourteenth Amendments, "the sentencer, in all but the rarest kind of capital case, [should] not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any

of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." See also *State v. Deck*, 994 S.W.2d 527, 540 (Mo. banc 1999). The sentencer should have "possession of the fullest information possible concerning the defendant's life and characteristics" since it is "[h]ighly relevant – *if not essential* – [to the] selection of an appropriate sentence." *Lockett*, 438 U.S. at 603, quoting *Williams v. New York*, 337 U.S. 241, 247 (1949) (emphasis added).

This Court too has acknowledged that, in capital sentencing, "the defendant is allowed to introduce *any* evidence that may mitigate the penalty imposed." *State v. Whitfield*, 837 S.W.2d 503, 512 (Mo. banc 1992), citing *Penry v. Lynaugh*, 492 U.S. 302, 317-19 (1989). After all, "the decision to impose the death penalty, whether by a jury or a judge, is the most serious decision society makes about an individual, and the decision-maker is entitled to any evidence that assists in that determination." *State v. Debler*, 856 S.W.2d 641, 656 (Mo. banc 1993); *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) ("exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender").

A capital defendant also has a due process right to rebut any information that the jury considers and upon which it may rely in its penalty phase deliberations. In *Gardner v. Florida*, 430 U.S. 349, 359 (1997), the trial court sentenced the defendant to death based on the contents of a presentence investigation report, portions of which were not disclosed to defense counsel. In a plurality opinion, Justice Stevens warned of the danger that erroneous or misinterpreted information could form the basis for a death sentence.

Id. at 359. He concluded – and a majority of the Court agreed – that the defendant was denied due process because "the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id*. at 362.

So, too, in *Simmons v. South Carolina*, 512 U.S. 154, 165 (1994), the Court held that the defendant had been denied due process when the trial court refused to advise the jury that he would never be eligible for parole, after the State had argued his future dangerousness as the basis for a death sentence. The *Simmons* plurality opinion stressed that the defendant was prevented from rebutting information that the jury "considered, and upon which it may have relied, in imposing the sentence of death." *Id*. at 165. The concurring Justices observed that by refusing the defendant the "ability to meet the State's case against him," the State had denied Simmons "one of the hallmarks of due process in our adversary system." *Id*. at 175 (O'Connor, J., concurring, joined by Rehnquist, C.J., and Kennedy, J.); *see also Kelly v. South Carolina*, 534 U.S. 246 (2002); *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Ramdass v. Angelone*, 530 U.S. 156, 179 (2000) (O'Connor, J., concurring).

Here, the court denied Driskill due process by not allowing the jury during deliberation to consider mitigating evidence. (Tr.1746-47). The defense exhibits were essential to support the testimony of Driskill's expert witnesses and to rebut the State's inferences and arguments that the defense experts were paid hacks whose opinions could not be trusted, that the defense had theories but no facts to support its case for life, and that Driskill's mental illness, childhood abuse, and intellectual limitations were recent

fabrications or exaggerated. (Tr.1566-67,1576-78,1615-16,1622-23,1625,1628-32,1713-16,1735-36,1739).

In *Taylor v. State*, 262 S.W.3d 231, 253 (Mo. banc 2008), this Court found defense counsel ineffective for failing to offer into evidence Taylor's school and medical records. The Court stressed that the records would have independently validated the testimony of Taylor's guilt phase experts as to the intensity and duration of Taylor's mental illness. *Id*. at 252-53. The Court stressed that "[w]here the only basis of defense is that one's client has long had a mental illness that reduces his responsibility," it was especially important that the jury be able to consider "records that present not only support for his history of mental health evaluations and treatment beginning at the extremely young age of 7, but also a treasure trove of mitigation regarding Mr. Taylor's abusive childhood." *Id*. at 251.

In *Hutchison v. State*, 150 S.W.3d 292, 305 (Mo. banc 2004), this Court reversed for a new trial based on counsel's errors in failing to present documentation of the defendant's troubled background and intellectual deficits. The Court held that the information in the records would have "provided significant evidence for mitigation not heard by the jury." *Id*. The records would have shown that the defendant's intellectual deficits were not a recent fabrication. *Id*. ("[R]ecords from remote time are useful to show that a claim of impaired intellectual functioning is not a recent discovery for the purpose of the defense."); see also, by analogy, *State v. Ousley*, 419 S.W.3d 65, 72 (Mo. banc 2013)(reversible error to bar defense from presenting evidence in surrebuttal to support defense case and rehabilitate testimony of defense witness).

This Case is Distinguishable from Roberts and Barnett

This case is distinguishable from *State v. Roberts*, 948 S.W.2d 577, 596-97 (Mo. banc 1997) and *State v. Barnett*, 980 S.W.2d 297 (Mo. banc 1998). In *Roberts*, the trial court in guilt phase refused to allow the jurors to view documents that the defense experts relied on in concluding that Roberts was not capable of deliberation on the night of the charged crime. *Id*. at 596. The records, which had been admitted without redaction, contained evidence of uncharged crimes that Roberts had fought to keep out of evidence. *Id*. The court reasoned that the records were voluminous and contained matters that may have been inadmissible. *Id*.

This Court held that the trial court did not abuse its discretion, because the records were over 1,000 pages in length and contained many matters not discussed at trial, as well as hearsay, irrelevant information, and information that could easily be misconstrued. *Id*. at 597. Redaction would not have been a practical solution. *Id*. The defense experts had testified about much of the relevant matter contained in the records, so it was before the jury. *Id*. No injustice resulted. *Id*.

Driskill concedes that his exhibits amounted to over 1,100 pages. (D.Ex.AAAA-IIII). But otherwise, this case is fully distinguishable from *Roberts*. First, it is distinguishable, in that this case involves a capital penalty phase, whereas *Roberts* involved the guilt phase. Death is different. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Because this is a capital case and the evidence at issue was mitigating, the jury should not have been barred from considering and giving effect to it. *Hitchcock*, 481 U.S. at 394. The jurors should have been allowed to consider the full range of mitigation,

especially evidence relating to mental illness, intellectual limitations, and childhood abuse, as these exhibits contained. *Eddings*, 455 U.S. at 114-15.

Second, the court in *Roberts* found that the defense exhibits were too long and contained inadmissible material. 948 S.W.2d at 596. Here, the court found no fault with the defense exhibits. It merely stated that unless the parties agreed on what the jurors could see, no exhibits would go to the jurors. (Tr.1746-47). This ruling, which neither pointed to any problem with the defense exhibits nor addressed any valid interest, arbitrarily denied Driskill his right to have the jury consider his evidence in mitigation and to rebut the State's allegations.

Roberts is also distinguishable because here, the State attacked Driskill's experts as hacks who, for a price, would say anything defense counsel asked. (Tr.1566-67,1615-16,1622-23,1625,1628-32,1713-16,1735-36,1739). The State also argued that Driskill was faking his mental illness and exaggerating the childhood abuse he suffered. (Tr.1576-78,1713). Thus, here, the records were crucial not only to corroborate the experts' bases for their opinions but also to refute the State's attacks.

Another distinguishing factor is that while redaction was not a practical solution in *Roberts*, a practical solution was available here. As defense counsel suggested, the court could have submitted a list of Driskill's prior convictions with the information that had been read to the jury. (Tr.1646-47). In that way, the jury would have been able to consider the relevant information from the State's exhibits without the blacked-out portions that would have caused the jury to believe that Driskill had committed other crimes. The list could have been typed quickly and would have solved the problem. The

jury would have had the information from the State's exhibits that the parties anticipated. But, because the State would not agree, no exhibits went to the jury. The State's refusal was especially egregious because it initially had agreed that State Exhibits 104-108 and 112 should not be published to the jury; yet now, unless the impermissible State exhibits went to the jury, the defense exhibits would not go either. (Tr.1398). The State, through its own obstreperousness, blocked the jury from ever viewing Defense exhibits AAAA-IIII.

This case is also distinguishable from *Barnett*. In *Barnett*, the trial court refused the jury's request in penalty phase deliberations to view a defense exhibit and Barnett's convictions. 980 S.W.2d at 308. The requested defense exhibit was a poster board that summarized certain aspects of a defense expert's testimony and gave a chronological summary of important mitigating events in Barnett's life. *Id*. The exhibit had been admitted into evidence and mentioned repeatedly in closing argument. *Id*.

This Court held that the trial court correctly concluded that the exhibit unduly highlighted certain portions of the expert's testimony and thus was very one-sided. *Id*. Denial of the exhibit did not work an injustice because the jury had viewed the exhibit twice during the penalty phase and the court refused to send any exhibits to the jury, including those unfavorable to the defendant. *Id*.

Barnett is distinguishable, because there, the jury was barred from seeing just one defense exhibit, and the jury had already viewed that exhibit several times. Here, Defense exhibits AAAA-IIII had never been published to the jury. Those exhibits were the basis and support for the entire case in mitigation. The defense exhibits also were

essential to rebut the State's inferences and arguments that the defense experts were paid hacks whose opinions could not be trusted and that the defense had theories but no facts to support its case for life. It was vital for the jurors to view the content of these exhibits so they could see for themselves that, despite the State's arguments, Driskill had not recently fabricated his mental illnesses and that he had, in fact, truly suffered childhood abuse. Yet the jurors never got even a glimpse at what these exhibits contained.

Unlike the poster board in *Barnett*, the exhibits here were not one-sided. Exhibits AAAA-IIII contained Driskill's records from medical facilities, the Department of Corrections, the Social Security Administration and others. They did not contain just those facts that helped Driskill. Unlike the poster board, defense exhibits AAAA-IIII originated from disinterested sources.

Driskill Should Not Have Been Forced to Choose between his Constitutional Rights

Driskill was placed in the intolerable position of having to choose between two constitutional rights. He wanted to present his defense, *i.e.*, he wanted the jury to consider his evidence in mitigation and rebut the State's attacks on his expert witnesses. But to do so, he would have to agree to let the jury consider documents that would lead the jury to believe that Driskill had been involved in numerous other illegal acts that were not the subject of testimony or evidence at trial.

Thus, Driskill was forced to choose between his Fifth and Fourteenth Amendment due process right to present his defense and rebut the State's evidence, on the one hand, and, on the other hand, his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to have

his sentence determined based solely on the evidence presented in court and not surmise or supposition.

A defendant may not be forced to choose between constitutional rights. *Simmons v. United States*, 390 U.S. 377, 392-94 (1968). In *Simmons*, the defendant was forced to choose between testifying at a suppression hearing in support of a valid Fourth Amendment claim or waiving his Fifth Amendment privilege against self-incrimination at trial. *Id*. The Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id*. at 394; see also *State v. Samuels*, 965 S.W.2d 913, 920 (Mo.App.W.D.1998). Driskill should not have been forced to make such an intolerable choice, especially where the jury was deciding whether he should live or die.

Driskill Was Prejudiced

The court's error in refusing to allow the jury to consider Driskill's evidence created a rebuttable presumption of prejudice. *Walkup*, 220 S.W.3d at 757. To rebut the presumption, the State must show that the error was harmless beyond a reasonable doubt. *Id*.

The State cannot meet this burden. Driskill was prejudiced, because the jury was not allowed to consider Driskill's evidence against the death penalty or to rebut the State's arguments. The major thrust of the case for mitigation was presented through Dr. Hanlon and Dr. Bernet. The State raged against these experts, calling them "absolutely nonsensical" and their testimony "like watching two clown cars crashing together." (Tr.1713). The State compared the experts' testimony to the "frothy eloquence" of "some east coast congressman going on and on and on and yammering about whatever."

(Tr.1713). The State labelled Dr. Bernet's theory as "radical," "through the looking glass," and "some Harvard baked theory." (Tr.1714-15). The State also argued, "They have their doctors, they have their studies, they have their statistics, and they have their theories. We have the facts." (Tr.1739).

But the defense had facts too. The jurors just were not allowed to consider, weigh, and assess them. While the State was allowed to insult the defense experts and disparage their impartiality and opinions, the defense was not allowed to show that in actuality, the experts had valid bases for their opinions, backed by well-documented facts. The exhibits showed that Driskill truly did have a long history of mental illness, as well as intellectual limitations and an abusive childhood.

For example, the records provided evidence of Driskill's prior suicide attempts, (D.Ex.AAAA,p.7; D.Ex.IIII,p.40), and contained a first-hand observation of marks on his arms from self-mutilation and at least eight scabs from self-inflicted cigarette burns on his skin. (D.Ex.AAAA,p.7,9). The records substantiated his diagnosis of bipolar disorder, anxiety, and panic attacks, (D.Ex.AAAA,p.8,14; D.Ex.BBBB, p.4,7,35,41,59; D.Ex.CCCC,p.3,5; HHHH,p.6,17,19,28,49; IIII,p.38), his confusion and headaches, (HHHH,p.56), and the 2001 gunshot injury to his head. (D.Ex.BBBB,p.4,24; D.Ex.HHHH,p.56). The records noted his physical and emotional abuse as a child. (D.Ex.AAAA,p.10; D.Ex.BBBB,p.4; D.Ex.FFFF,p.16,21). The records noted Driskill's low intellectual functioning due to a gunshot wound to his head. (D.Ex.AAAA,p.7). The defense exhibits would have bolstered the case for mitigation and corroborated the testimony and opinions of Dr. Hanlon and Dr. Bernet, rehabilitating their credibility.

As in *Taylor*, 262 S.W.3d at 253, reversal is warranted. In *Taylor*, this Court noted the crucial nature of school and medical records as "independent validation of the testimony of Mr. Taylor's guilt phase experts: that he had been suffering from intense mental health problems for many years before he killed Mr. Thomas." 262 S.W.3d at 253. Contemporaneous records such as these, "more than any testimony the defense offered at the guilt phase, could have persuaded the jury that the mental health evidence had value as mitigation of punishment, and that, perhaps, Mr. Taylor deserved a punishment other than death for his crime." *Id.* Had the jury received these records, "there is a reasonable probability that at least one juror would have struck a different balance." *Id.* Here, too, there is a reasonable likelihood that, had the jurors been allowed to consider the requested exhibits, at least one juror would have opted for life without parole.

"Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." *Mills v. Maryland*, 486 U.S. 367, 375 (1988), quoting *Eddings*, 455 U.S. at 117, n. (O'Connor, J., concurring). So too, this Court must reverse so the jury may consider all of Driskill's evidence in mitigation.

ARGUMENT VI

The trial court abused its discretion in overruling Driskill's objections and allowing excessive victim impact testimony and evidence, in violation of Driskill's rights to due process, a fair and reliable sentencing trial, and freedom from cruel/unusual punishment, U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I, §§10,18(a),21, because the State's victim impact evidence and testimony was excessive, in that it far exceeded what is authorized, overwhelmed the jury with emotion, and encouraged the jury to weigh the value of Driskill's life against the victims'.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Supreme Court held that the Eighth Amendment does not erect a *per se* bar against admission of victim impact evidence and prosecutorial argument on that subject. But while *Payne* permits the admission of evidence and argument regarding the victim's personal characteristics and the crime's impact on the victim's family, it does not permit the unconditional admission of evidence and argument on this topic. *Id*. at 823, 825. The Supreme Court recognized that this evidence can become "so unduly prejudicial that it renders the trial fundamentally unfair" in violation of due process. *Id*. at 825; see also *Kelly v. California*, 555 U.S. 1020 (2008)(Stevens, J., dissenting from denial of cert.).

Defense counsel objected to the victim impact evidence and included the issue in the motion for new trial. (Tr.1457,1462,1467,1473;L.F.884-86). Although the trial court has broad discretion to admit evidence at trial, it abuses its discretion when its ruling

clearly offends the logic of the circumstances or when it becomes arbitrary and unreasonable. *State v. Hall*, 982 S.W.2d 675, 680 (Mo. banc 1998).

The State witnesses gave more than the "quick glimpse of the [victim's] life" anticipated by *Payne*. The State presented seventeen photographs of the victims. (Tr.1473-74). It also presented the testimony of Caleb and Sarah Kessinger and John Wilson. John testified about how the victims cared for his older sister, who had cerebral palsy and died in 1972. (Tr.1462-63). As an adult, Johnnie still looked to his father for advice. (Tr.1464-65). His parents' deaths affected him immensely, and the last three years had been very depressing. (Tr.1465). It was terrible to discover the bodies, and he thought about it every night. (Tr.1466). His parents were good people who never said a cross word to each other and were still very much in love. (Tr.1466).

Caleb testified that at the time of their deaths, Johnnie and Coleen were in the middle of moving in with their extended family so that the family could look after them. (Tr.1459). Coleen was a little old lady who gave everyone candy and was always smiling and wanting to help people. (Tr.1459). Johnnie was "a neat old man" who liked to garden and sit outside and watch the animals. (Tr.1460). Johnnie and Coleen were always there for the grandchildren. (Tr.1461). Now, "we don't know what to do or where we're going now." (Tr.1461).

Sarah testified that Coleen was kind and gentle, loving, and would do absolutely anything for anybody. (Tr.1468-69). She volunteered at church, with her favorite club, and as a medical volunteer. (Tr.1469-70). She loved flowers, reading, collecting dolls, playing with her grandchildren, and fishing with Johnnie. (Tr.1470). Johnnie was very

intelligent and an outdoorsman. (Tr.1470-71). The week before he died, he had gotten an electric wheelchair to help him get around easier. (Tr.1471).

Sarah was expecting her first child when the crimes occurred. (Tr.1471-72). Stress from the deaths caused complications in her pregnancy. (Tr.1474-75). When her son was born, she was so depressed that she could not be happy. (Tr.1475). The crimes strained every relationship she had, and she fought to keep herself together. (Tr.1475). She could not sleep at night and was terrified of every noise she heard; even now, if she went outside by herself, she carried a gun. (Tr.1475). Through a PowerPoint presentation, the State showed the jury seventeen photographs of the victims from their wedding day onward, as Sarah explained what was depicted in each photograph. (Tr.1473-74).

The State's victim impact evidence was calculated to overwhelm the jury with emotion and impermissibly encouraged the jury to weigh the value of the defendant's life against that of the victims. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). The excessive, emotionally-charged victim impact testimony rendered the sentencing fundamentally unfair. *State v. Knese,* 985 S.W.2d 759,772 (Mo. banc 1999). Allowing the State to abuse the use of victim impact evidence violated Driskill's rights to due process, a fair and reliable sentencing, and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I,§§10,18(a),21. The Court must vacate the death sentences and grant Driskill a new sentencing trial.

CONCLUSION

Based on Arguments I, II, III, and IV, Driskill respectfully requests that the Court remand for a new trial. Based on arguments V and VI, Driskill requests that the Court vacate his sentences and remand for a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on June 12, 2014, this Brief and the Appellant's Appendix were served on counsel for the State, Shaun Mackelprang, through the e-filing system of the Missouri Office of the State Courts Administrator.

I certify that the foregoing brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Office Word 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 30,609 words, which does not exceed the 31,000 words allowed for an appellant's brief.

/s/ Rosemary E. Percival
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