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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 REPLY BRIEF

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[1] Driskill maintains each of the arguments presented in his Opening Brief. Only those arguments to which he finds it necessary to reply are contained herein.

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TABLE OF AUTHORITIES

CASELAW:

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CONSTITUTIONAL PROVISIONS:

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REVISED MISSOURI STATUTES:

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JURISDICTIONAL STATEMENT

Driskill incorporates the Jurisdictional Statement from page 10 of his Opening Brief.

STATEMENT OF FACTS

Driskill incorporates the Statement of Facts from pages 11-37 of his Opening Brief.

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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.

The State argues that the trial court was entitled to credit Dr. Fucetola's conclusion over Dr. Gruenberg's. (Resp. Br. 31). It cites *State v. Baumruk*, 280 S.W.3d 600, 608 (Mo. banc 2009), for the proposition that the trial court does not necessarily err when it accepts the finding of one expert over a conflicting finding by another, because "it is the

duty of the trial court to determine which evidence is more credible and persuasive." (Resp. Br. 32, citing *Baumruk*, 280 S.W.3d at 609).

The problem with the State's reasoning is that the court in *Baumruk* held a competency hearing. *Id*., 280 S.W.3d at 609. The *Baumruk* trial court considered not just written reports but also listened to the testimony of the expert witnesses. *Id*. It evaluated the evidence before it, including evidence from a prior competency hearing. *Id*. Through the hearings, the parties tested the bases for the experts' opinions, and the court was able to assess the experts' credentials and credibility.

No such hearing occurred here. The deference that is typically afforded to the trial court's findings on competency should not apply here, since those findings were based on written reports, not assessment of credibility after a hearing. See, e.g., *Fay v. Director of Revenue*, 759 S.W.2d 879, 880 (Mo. App. E.D. 1988) ("[i]n cases submitted solely upon a written record, no such deference is warranted"). The court merely found that because Dr. Fucetola's opinion was a few months more recent than Dr. Gruenberg's, Dr. Fucetola's opinion trumped Dr. Gruenberg's. (Tr. 250). The fact that one report was more recent was immaterial, however, since nothing had changed within those few months regarding Driskill's mental health. Driskill did not start receiving medication. (Tr.62-63, 234, 237, 979). His life-long problems with anxiety and panic attacks had not suddenly been cured. Driskill should not have been forced to proceed to trial – especially a trial of such consequence – while incompetent.

Given Driskill's lengthy history of mental health problems, the conflicting expert opinions, and the panic attack Driskill suffered in voir dire, it was not reasonable for the

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court to continue with the trial without a hearing on competency. Inconvenient as it may be, the issue of competency may arise at any time. *Drope v. Missouri*, 420 U.S. 162, 181 (1975). Defense counsel warned the court at the start that they may need to ask for a competency hearing as the trial progressed. (Tr. 65).

The State argues that Driskill was competent to stand trial because, when not having a panic attack, Driskill was able to answer the court's questions and communicate with counsel. (Resp. Br. 31-32). While the judge's observation of the defendant may be one factor in determining whether a competency hearing is warranted, by no means should it have been a determinative factor. *Drope*, 420 U.S. at 180; *Pate v. Robinson*, 383 U.S. 375, 385-86 (1966). The judge was not a psychologist or psychiatrist. His attention was largely directed elsewhere in the courtroom during voir dire and the presentation of evidence and not at Driskill. The judge would not know when Driskill's anxiety was building up and at what point Driskill would lose competency leading up to a panic attack. The judge would not know the point when Driskill was so consumed with anxiety that he could not aid and assist counsel and meaningfully participate in his trial.

Furthermore, the problem was never Driskill's ability to understand or communicate. Dr. Gruenberg found that Driskill lacked competency because, due to his anxiety, he could not control his behavior in the courtroom so as to assist in his defense. (D.Ex.A,p.3). As per Dr. Fucetola's supplemental report, Driskill was competent except when he was having a panic attack and in the moments leading up to and following the panic attacks. (D.Ex.B-1). The fact that, at times, Driskill could answer questions and behave appropriately did not mean that Driskill was cured of his anxiety and was fully

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competent. Driskill continued to suffer from debilitating anxiety, especially as his anxiety level increased in the penalty phase. (Tr. 1402).

In a case of such consequence, the court did not exercise reasonable diligence to ensure that Driskill was competent to stand trial. Instead, the onus was on Driskill to have the wherewithal as panic overtook him to advise the court he would need a recess. This mentally ill defendant was put in charge of telling the court when he was losing his competency.

The State argues that the court's efforts were adequate because it accommodated every reasonable request. (Resp. Br. 46). This assertion is faulty because (a) the "accommodation" offered was inadequate; and (b) the only true remedy did not fit into what the State deemed "reasonable." After Driskill's first panic attack, the court recessed and gave Driskill the opportunity to recuperate overnight. (Tr. 243).

But when the penalty phase came around, the court was not willing to give the same accommodation. Counsel did what the court instructed – when Driskill was about to have another panic attack, she alerted the court. (Tr. 1410, 1415). The court took a break. (Tr. 1410). But after that break, Driskill was still extremely anxious and believed he would have a panic attack in court. (Tr. 1416). Driskill's anxiety had escalated to a level where a brief recess was no longer enough to quell his anxiety. (Tr. 1416-17).

The court denied counsel's request for a further recess. (Tr. 1418-19). It would not give Driskill the time to calm down, nor would it allow a competency evaluation to determine if Driskill could proceed. (Tr. 1418-19). Instead, the court gave Driskill an ultimatum – either be present in the courtroom and risk snapping in front of the jury, or

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leave and appear through a television screen. (Tr. 1418-19). The court's "accommodation" forced Driskill out of the courtroom for the bulk of his capital penalty phase trial. This was not a reasonable solution for dealing with the competency problems of a mentally ill man, especially in a capital case. The reasonable "accommodation" would have been to halt the proceedings and order a competency evaluation. Instead, testimony from all four of the State's penalty phase witnesses was received in Driskill's absence. (Tr. 1439-76).

Afterwards, Driskill again asked for a recess until he was able to be present. (Tr. 1478-79). The court again denied the request. (Tr. 1479). It told Driskill that the polycom was available for him to participate in the trial. (Tr. 1479). Counsel advised the court that the polycom actually made Driskill's anxiety worse, but the court did not change its ruling. (Tr. 1478-79). Driskill missed the testimony of the first four defense witnesses. (Tr. 1542).

The next day, Driskill appeared in court for the testimony of one witness, but then had to leave again. (Tr. 1645,1659). No recess was held. The evidence was presented in his absence. (Tr. 1659-62). Driskill left the courtroom several more times before the trial was concluded. (Tr. 1743, 1744, 1755).

The State argues that Driskill may have had "more discomfort" if he had stayed in the courtroom and might have had another attack but that the risk of panic attacks occurs in every case. (Resp. Br. 47). Indeed, being on trial for first-degree murder and facing the death penalty would be very stressful for anyone. But imagine the anxiety level for

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someone like Driskill, for whom everyday life triggered extreme anxiety. For him, the stress of a capital trial would push him over the edge, and it did.

Driskill had a legitimate concern that he would not be able to control himself in the courtroom due to his mental illness. Dr. Gruenberg noted that Driskill was "likely unable 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 had prior convictions, but every time he had pled guilty. (L.F. 561-62). He had never been through a trial before, and his anxiety had been increasing as trial approached. (D.Ex.B, p.3). Since childhood, Driskill had avoided people. (D.Ex.A,p.12). He was "not good with people." (Tr. 1249-50). At his arraignment, cameramen, reporters, and other people were present. (D.Ex.A, p.3). It was too much for Driskill to handle. He lost control, cursed at the judge, and had to leave the courtroom. (D.Ex.A, p.3).

The State refuses to acknowledge the importance of the defendant's appearance and behavior to the jury in a capital case. As Justice Kennedy noted, "[a]t 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." *Riggins v. Nevada*, 504 U.S. 127, 142 (1992)(Kennedy, J., concurring). The jurors are striving to learn the defendant's character and whether he would be dangerous in the future. Forcing the defendant to proceed through trial while constantly at risk for a loss of control is blatantly unfair. The jurors would view Driskill's unsettled, agitated, nervous behavior

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as signs of guilt or as disrespectful or shifty. If Driskill were to have a panic attack, the jurors could conclude that Driskill was unpredictable, wild, and unwilling or unable to abide by normal rules of society. The State would stand to gain if Driskill lost control in the courtroom, as it would feed directly into the State's case for the death penalty, especially if, as at arraignment, Driskill lost control and started cursing at court personnel or even the jurors.

The State argues that "at no point after the first day did Mr. Driskill suffer the sort of attack that rendered him temporarily incompetent to proceed." (Resp. Br. 45). It is true that Driskill did not get physically ill except during voir dire. (Tr. 243). But Driskill needed to leave the courtroom six more times: on the last day of guilt phase after speaking with the court about testifying; during reading of the guilt phase verdicts; during opening statements in penalty phase; after the testimony of Dr. Wouters; after the closing arguments; and after the jurors were polled but before they left. (Tr.1253, 1264, 1266, 1379-80, 1415, 1478, 1659, 1663, 1743, 1744, 1755). These other incidents cannot be ruled out as panic attacks merely because they were not identical to the incident during voir dire. Because the court denied Driskill's repeated requests for a competency evaluation, there is no way of concluding that these incidents did not reach a level where Driskill's competency was compromised.

The State also argues that the record showed that counsel consistently reported that they were able to communicate with Driskill and that he understood the proceedings. (Resp. Br. 45). But that is not fully accurate. Counsel reported that on the first day of voir dire, she was not sure if Driskill was able to aid and assist. (Tr. 978). "What I base

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that on is his attitude and demeanor and his increasing anxiety that occurred during voir dire during the first panel. We kept trying to calm him down, calm him down, and I am not sure to what level he was able to participate at that time, Your Honor." (Tr. 978). On the third day of voir dire, the court again asked counsel about Driskill's understanding and awareness. Counsel couched her response as follows:

> [W]hether or not Mr. Driskill appears to be able to assist us, because he has this underlying disorder and because he's not medicated, we aren't in a position to 100 percent evaluate what he would be like, were this disorder being controlled with medication; so it's really impossible for us to fully answer these questions at this time. We're just answering it based on the way the situation appears with him not being medicated.

(Tr. 979-80). On another occasion, counsel stated that Driskill was able to answer counsel's questions "up until the point in time we discussed this issue about him testifying," when he had to leave the courtroom because of his anxiety. (Tr. 1266). The fact that defense counsel repeatedly requested a competency hearing, a continuance, or recesses so that Driskill could participate in his trial refutes the State's allegation that defense counsel thought Driskill was fully competent.

The Court must reverse.

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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.

The State argues that defense counsel did not object that Driskill was being denied his right to be present. (Resp. Br. 50). But 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). Thus, defense counsel was bringing to the court's

attention the fact that Driskill's waiver was equivocal and not voluntary. Defense counsel properly objected and preserved this issue for review.[2]

Driskill did not validly waive his right to be present. When the court asked if Driskill was waiving his right, counsel reiterated that he was waiving the right solely because the court had denied Driskill a competency hearing. (Tr.244, 249, 254-55, 260, 267). On the second day of voir dire, when Driskill appeared by polycom, he repeatedly stated that "for today," he would appear by polycom, but he wanted to be back in court the next day. (Tr. 154). In penalty phase, when asked whether he wanted to be present in the courtroom, or whether he even could be present, Driskill responded, "I just know it ain't a good idea for me to be in here right now." (Tr. 1412). He stated that he would rather be in the courtroom than watch the proceedings by polycom. (Tr. 1413). When asked again whether he wanted to be in the courtroom, Driskill replied:

> I mean I do, I just – I don't want to disrespect the Court or anybody in here, and I just feel it would be best if I'm not in here. I mean I feel uneasy right now, so I can only imagine what's going to happen in a matter of minutes.

(Tr. 1413). Driskill repeated that he wanted to be in the courtroom for his trial, but felt he could not do so without having a panic attack. (Tr. 1416). Driskill's equivocation and his belief that he was unable to be in the courtroom without having a panic attack show that any "waiver" was not truly voluntary.

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[2] If, however, the Court finds that the issue is not preserved for review, Driskill requests that the Court review the issue for plain error. Rule 30.20.

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The State summarily claims that Driskill's case is nothing like *United States v. Salim*, 690 F.3d 115, 123 (2d Cir. 2012)(Resp. Br. 55). Salim 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. *Id*. He did not want to be subjected to the same abuse by coming to his resentencing. *Id*. Salim's waiver of his right to be present was forced by external factors beyond his control.

So too, Driskill's waiver was forced. He knew that if he appeared in court, un-medicated and incompetent, he would likely suffer a panic attack and lose control. (Tr. 1413, 1416). In a capital case, where the jury would be deciding whether Driskill lived or died, losing control would be devastating. That is the last thing a capital defendant would want to do.

The State incorrectly compares this case to *State v. Morrison*, 174 S.W.3d 646, 651-52 (Mo. App. W.D. 2005) (Resp. Br. 55). In *Morrison*, the defendant waived his right to jury trial because the court ruled that a very prejudicial comment Morrison made after the crime would be admissible. *Id*. at 651. Toward the end of trial, however, the court changed its mind and excluded the comment. *Id*. Morrison argued on appeal that because the comment should have been excluded from the start, the waiver of his right to a jury trial was coerced. *Id*.

The Court of Appeals held that Morrison had "no reasonable grounds to rely upon [the trial court's interlocutory ruling] as a firm decision in determining whether to waive his right to a jury trial." *Id*. at 652. The court did not mislead or compel Morrison to take

any action. *Id*. The record did not indicate that the non-binding evidentiary ruling had any effect on the voluntariness of Morrison's waiver. *Id*.

Here, in contrast, Driskill had reasonable grounds to rely on the court's ruling denying a competency evaluation. Driskill knew that he either had to appear in court with the likelihood of having another panic attack in front of the jury, or appear by polycom. (Tr. 1412-13). Driskill was a mentally ill man appearing at trial without any medication, despite the recommendations of two doctors that medication was necessary. (Tr. 62-63; D.Ex.A,p.2; D.Ex.B-1). The court's competency ruling forced Driskill's hand. And, unlike *Morrison*, the record is very clear that Driskill was only agreeing to appear by polycom (or later, absenting himself altogether), because of the court's competency rulings and Driskill's inability to appear in court without suffering panic attacks. (Tr.244, 254-55, 260, 267; 1416, 1478-79).

The State argues that even after the court denied Driskill's requests for a competency hearing, Driskill still had free choice to remain in the courtroom. (Resp. Br. 55-56). It alleges that the court would have willingly made accommodations for any panic attacks had Driskill chosen to remain in the courtroom. (Resp.Br. 55-56). After Driskill's first panic attack, the court recessed and gave Driskill the opportunity to recuperate overnight. (Tr. 243). But as trial wore on, Driskill's anxiety reached an intensity where it would not abate after a short recess. Driskill's anxiety had increased to the point where neither Driskill nor counsel could advise the court when he would be back to "normal." (Tr. 1417, 1479). The court denied counsel's request for another recess. (Tr. 1418-19). It would not give Driskill the time to calm down, nor would it

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allow a competency evaluation to determine if Driskill could proceed. (Tr. 1418-19). The only "accommodation" was leaving the courtroom and appearing by polycom, or not appearing at all. Forcing a capital defendant out of the courtroom during his trial is not an accommodation.

The State argues that the potential prejudice of Driskill having a panic attack was immaterial because "no such prejudice came to fruition." (Resp. Br. 60). But the only reason it did not come to fruition was because when Driskill's anxiety reached a boiling point, Driskill had no choice but to absent himself. He could not risk "snapping out" in front of the jury who was to decide whether he lived or died. And just as Riggins had the right to refuse medication so that he might feel more able to participate in his trial, so too Driskill had the right to be medicated at trial, so that he could be fully present and maintain control over his behavior. *Riggins v. Nevada*, 504 U.S. 127 (1992)(Kennedy, J., concurring). Driskill should have been afforded that minimal amount of dignity. The Court must reverse.

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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.

Driskill's conversation with the court shows that Driskill believed that he could not testify, rather than he preferred not to, as the State suggests. (Tr. 65-66). Counsel informed the court that Driskill would not be testifying, partially because he did not think he could do so 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) (emphasis added). The court told him that if he were to testify, "your testimony would have to be in front of the jury…. 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." (Tr.1250). The court asked, "Are you telling me you don't think you can take the stand and do that?" (Tr.1250) (emphasis added).

Driskill indicated he could not. (Tr.1250). Even this short conversation made Driskill so anxious that he had to leave the courtroom and take time to collect himself. (Tr.1264, 1266).

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 State argues that Driskill decided not to testify because he knew he would make a bad witness. (Tr. 65-66). Yes, Driskill would have made a bad witness, because he was mentally ill yet un-medicated at trial. (Tr. 62-63). Testifying in court is nerve-wracking for anyone but it would have been tortuous for someone who had an anxiety disorder and was un-medicated at trial. Driskill's mental illness was the reason he was "not good with people." (Tr. 1249-50). He could not be around a lot of people. (D.Ex.A, p.12). Hence, at arraignment, with the cameras, reporters, and other people, he could not take it; he acted out, cursed at the judge, and had to leave the courtroom. (D.Ex.A, p.3). He and his brother had extreme anxiety. (D.Ex.A, p.11). His brother had so much anxiety that he could not come to court and defense counsel had to read his testimony to the jurors in the form of a letter. (Tr. 1658-59).

The State argues that Driskill knew that the trial court would take breaks if necessary, so Driskill would not have felt coerced out of testifying. (Resp.Br.65). But

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breaks would not have helped. This was a man who could not answer questions from the judge for a few minutes without needing to leave the courtroom. (Tr. 1264, 1266). He would not have functioned on the stand. He was mentally ill, needing medication, and never should have been put in the position where he was forced to testify without medication or not testify at all.

The State asserts that counsel could not say whether Driskill, if properly medicated and competent, would have chosen to testify. (Resp.Br.65). But counsel's comments must be placed in context. When the court asked counsel whether they could predict whether medication would make a difference in Driskill's behavior and thought processes, counsel responded, "We can't, but it certainly has potential to do so, and he has taken that medication in the past and doctors have recommended he take it." (Tr. 1265-66).

Despite the State's suggestion, Driskill is not alleging that the court would have forced him to remain on the stand if he had a panic attack. (Resp. Br. 66). The compulsion Driskill faced was the Hobson's choice thrust upon him – either testify while un-medicated, with the certainty that he would lose control in front of the jury, or refrain from testifying even though he wanted to testify. On the stand, Driskill would be under much more pressure than when he was sitting at counsel table. All eyes would be upon him. He could reasonably believe that he would have more frequent panic attacks, and those panic attacks would be more severe. He did not want the jury to see him lose control even if it was for a few seconds. Driskill did not voluntarily waive his right to

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testify. It was coerced by the fact that he was un-medicated at trial and knew that he would have panic attacks if he tried to testify. A new trial is warranted.

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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.

The State argues that Dr. Fucetola's evaluation did not predicate competency on Driskill being medicated. (Resp. Br. 69). It is true that Dr. Fucetola's first written report stated that Driskill was competent. (D.Ex.B,p.8). But Dr. Fucetola's evaluation of Driskill was done with just the two of them present, in a quiet room, not the crowded,

stressful courtroom environment. (D.Ex.B,p.6). Dr. Fucetola 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). After Driskill's panic attack on the first day of voir dire, Dr. Fucetola consulted with defense counsel. (D.Ex.B-1). He advised counsel that "[b]ehavioral treatment and/or anxiolytic medication could be reasonably expected to decondition [Driskill's] panic response" to being in the courtroom. (D.Ex.B-1). Dr. Fucetola opined that before, during, and after the panic attacks, Driskill did not have the capacity to assist in his defense. (D.Ex.B-1).

The State argues that there was no evidence that Driskill suffered a panic attack after the one during voir dire. (Resp. Br. 70). It argues that any distress Driskill suffered after the first attack was much less, and Driskill was able to continue after short recesses. (Resp. Br. 70).

The State's characterization is only partially correct. It is true that Driskill did not get physically ill except during voir dire. (Tr. 241). But, as discussed in Argument I, Driskill needed to leave the courtroom six more times. (Tr.1253, 1264, 1266, 1379-80, 1415, 1478, 1659, 1663, 1743, 1744, 1755).

The worst of these subsequent incidents occurred during the prosecutor's opening statement in penalty phase. Defense counsel suddenly interrupted to inform the court that Driskill needed to leave the courtroom. (Tr.1410). During the ensuing recess, Driskill told the court that he was certain that if he returned to the courtroom he would have another panic attack. (Tr.1411,1416). Counsel told the court that if she had not acted

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when she had, Driskill would have had a panic attack like he had during voir dire. (Tr.1415).

This time, Driskill was not able to return after a short recess. (Tr. 1416-17). The court recessed for an hour and fifteen minutes, but Driskill, while a bit calmer, was still shaking. (Tr.1416). Even after that recess, he believed that he would have a panic attack if he returned to the courtroom. (Tr.1416). Counsel asked for a continuance, or at least for enough time so that Driskill could appear in court without suffering a panic attack. (Tr. 1416-17). The court denied both requests. (Tr. 1418-19). Instead of a further recess, the court told Driskill he could either appear in court or attend by polycom. (Tr. 1419).

The State argues that a continuance was not needed because the court accommodated Driskill's reasonable requests for recesses. (Resp. Br. 70). But, as noted above, after the first panic attack in penalty phase, the court did not "accommodate" Driskill by granting recesses to allow him to recuperate. Driskill's anxiety had increased to the point where neither Driskill nor counsel could advise the court when he would be back to "normal." (Tr. 1417, 1479). As a result, the court "accommodated" Driskill by telling him that if he was too anxious to be in court, he could appear through a television screen. (Tr. 1418-19, 1479). This was not a valid accommodation.

The State argues that the court could not have arranged for Driskill to receive medication before trial. (Resp. Br. 70). Certainly, the court could have issued an order allowing Dr. Wouters to see Driskill in the jail. Dr. Wouters was a local physician who had had treated Driskill in the past. (D.Ex.A,p.3). The medication that Dr. Wouters had

previously prescribed Driskill had helped him. (D.Ex.A,p.3). Trial courts routinely issue such orders and work with jail personnel to ensure that defendants receive necessary medication to maintain competency for trial. No valid reason existed for why Driskill proceeded through his capital trial without being properly medicated.

The Court must reverse.

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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 State argues that sending back only the defense exhibits would have been one-sided and unfair to the State. (Resp. Br. 74). But Driskill was not asking that only the defense exhibits be sent back. He was asking that the State live up to its agreement with the defense. The State had agreed that although it would introduce certified copies of

Driskill's prior convictions, the jury would not be given those exhibits. (Tr.1398). Thus, although the State exhibits were admitted into evidence, the jury only was to hear about 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). And that information is precisely what Driskill agreed should be given to the jury when they asked for the exhibits. (Tr. 1746-47).

Instead, the State was placed in a win-win situation. By reneging on its earlier agreement, it would either (a) have the jurors see the redacted documents, leading the jurors to speculate about what other crimes lay beneath; or (b) keep the jurors from seeing evidence that supported the defense case for life without parole. The defense, in contrast, was put in a no-win situation – either agree to have the redacted documents sent to the jury, allowing the jurors to speculate about what other crimes Driskill had committed, or not have the jury consider the defense exhibits at all.

Why would the State want the jurors to see the actual redacted judgments, when the jurors could consider a document including all the information that the prosecutor agreed the jury should receive? It's simple. The State wanted the jury to believe that Driskill had committed other crimes which had been dismissed as part of plea agreements.

The State argues that not sending back any exhibits worked no unfairness to the defense. (Resp. Br. 74). But it did. 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-

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16,1622-23,1625,1628-32). In closing argument, the prosecutors repeatedly criticized the defense experts, calling their testimony nonsensical and clownish (Tr.1713); the "frothy eloquence" and "yammering" of "some east coast congressman" (Tr.1713); "radical, .. through the looking glass" (Tr.1714); and "some Harvard baked theory" (Tr.1716). The prosecution criticized the defense for having doctors, studies, statistics, and theories, but no facts. (Tr.1739).

Especially in light of the State's arguments, Driskill was entitled to have the jurors see that Dr. Bernet and Dr. Hanlon had ample facts supporting their conclusions. The State was allowed to argue that the defense experts were paid hacks. The very facts that would refute the State's allegations were kept from the jurors, at the State's behest. Those facts were contained in Exhibits AAAA-IIII. Without the jury's assessment of those facts, the jury could not accurately assess the credibility of these experts. "It is a well settled rule ... that, where either party introduces part of an act, occurrence, or transaction, … the opposing party is entitled to introduce or to inquire into other parts of the whole thereof, in order to explain or rebut adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary, or prove his version with reference thereto." *State v. Odom*, 353 S.W.2d 708,710-11 (Mo.1962). Fundamental fairness mandated that after the State lambasted the defense experts and insisted that they had no facts to support their conclusions, the jury should have been allowed to view the evidence that would have showed that the defense experts were credible and did have facts supporting their conclusions.

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The State argues that it is common practice to submit redacted exhibits to the jury, so there was nothing wrong about the State's insistence that the redacted exhibits be sent to the jury. (Resp. Br. 75). But, although redactions may be routine, they also routinely carry the danger that jurors will speculate about the information that is being kept from them. See, e.g., *Gray v. Maryland*, 523 U.S. 185, 195 (1998)(redactions encourage jurors to speculate); *People v. Stewart*, 93 P.3d 271, 313 (Cal. 2004) (redaction perhaps would lead the jury to speculate that information especially harmful to defendant had been excised); *People v. Frazier*, 521 N.W.2d 291, 297 (Mich. 1994)("we do acknowledge that telling the jury of the fact of redaction necessarily invokes curiosity and speculation despite a cautionary instruction"); *People v. Ames*, 186 A.D.2d 747, 589 N.Y.S.2d 60 (2d Dept. 1992)(redaction communicated to jurors that potentially harmful information had been kept from them). Because of the danger of speculation adverse to the defendant, courts take the added precaution of instructing jurors not to speculate. See, e.g., *Richardson v. Marsh*, 481 U.S. 200 (1987)(limiting instruction given to jury that they not speculate about possible meaning of redactions); *Commonwealth v. Johnson*, 7 N.E.3d 424, 439 (Mass. 2014)("The limiting instruction also had the salutary effect of eliminating jury speculation that might have arisen from redactions in the records.").

Speculation by jurors is especially troubling in the context of a capital case. The Eighth Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The Eighth Amendment requires that the jury receive "accurate sentencing information [as] an indispensable prerequisite to a reasoned

determination of whether a defendant shall live or die." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976)(joint opinion by Stewart, Powell and Stevens, JJ.). It does not tolerate procedural rules tending to "diminish the reliability of the sentencing determination." *Beck v. Alabama*, 447 U.S. 625, 638 (1980). Counsel reasonably did not want jurors' speculation about the redactions to form any part of the sentencing assessment.

The Supreme Court has recently reiterated, "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014). Driskill was denied his right to have the jury consider his properly admitted exhibits in determining whether he should live or die. These exhibits were crucial to the defense. This Court must remand for a new trial.

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CONCLUSION

Driskill incorporates the Conclusion from Page 127 of his opening Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that on October 8, 2014, the foregoing was 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 6,889 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

/s/ Rosemary E. Percival

Rosemary E. Percival, #45292