IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. 83459**
	)	
RUFUS J. ERVIN,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF PHELPS COUNTY, MISSOURI
25th JUDICIAL CIRCUIT, DIVISION 2
THE HONORABLE JOHN WIGGINS, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

Melinda K. Pendergraph, MOBar #34015
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855
FAX (573) 875-2594

INDEX

Page

TABLE OF AUTHORITIES

CASES: **Page**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

***RULES*:**

***OTHER*:**

JURISDICTIONAL STATEMENT

After a change of venue from Reynolds County to Phelps County, appellant, Rufus James Ervin, was convicted of first degree murder but the jury could not agree upon punishment (Ex. 56 at 139).[1] The trial court sentenced him to death (S.Tr.58). This Court affirmed the conviction and sentence on appeal. *See State v. Ervin*, 979 S.W.2d 149 (Mo. banc 1998), with two judges dissenting as to punishment. *Id*. at 166-69 (Wolff, J., concurring and dissenting).

After his direct appeal, Mr. Ervin filed a Rule 29.15 motion that was amended by appointed counsel (L.F.69-245). The motion court denied the motion after an evidentiary hearing (L.F.1072-1181). Because a death sentence was imposed in the underlying case, this Court has jurisdiction of this Rule 29.15 appeal. Art. V., Sect. 3 and 10 (as amended 1982); Standing Order, June 16, 1988.

[1] References to the record are as follows: 29.15 Exhibits (Ex.), evidentiary hearing (H.Tr.), 29.15 legal file (L.F.), trial transcript (Tr.) and supplemental trial transcript (S.Tr.).

STATEMENT OF FACTS

Mr. Ervin was charged with killing his close friend, Leland White (Ex.56 at 12-13;H.Tr.85,112,155,711,749,752). This Court's opinion recounted the evidence in the light most favorable to the verdict. *State v. Ervin*, 979 S.W.2d 149, 152-53 (Mo. banc 1998). On August 31, 1984, Mr. White and three other men, Lucious House, Keith McAllister, and Henry Cook, went to Semco Factory in Arnold, Missouri. *Id*. at 152. They left at 1:00 a.m., bought liquor and drove to Leland White's. *Id*. Mr. White and Mr. Ervin had lived together at times. *Id*.

Mr. White went inside the trailer. *Id*. House heard Ervin yelling, "This is mine. This is mine." *Id*. White called for help. Something hit against a trailer wall, a Kerosene lamp fell over and the trailer caught fire. *Id*. Mr. Ervin pulled White out of the burning trailer. *Id*. White was naked. *Id*. White said, "Just go ahead and kill me, James. Just kill me, James." *Id*. at 152-53. Ervin picked up a brick and hit White multiple times. *Id*. at 153. Later, McAllister and Ervin threw White's body onto the fire. *Id*.

Based on this evidence, the jury found Mr. Ervin guilty of first degree murder. *Id*.

In penalty phase, the State introduced evidence of Mr. Ervin's prior convictions of a law enforcement officer and two weapon counts. *Id*. The State also presented bad character evidence that had not resulted in a conviction. *Id*. A former[2] Phelps County

[2] Deputy Schoengert testified that after the assault he returned to work at the County Jail, but later he went to work for the University of Missouri Police Department (Tr.946-47). The jury was left with the impression that he left because of his injuries and the danger to

Jailer testified about Mr. Ervin's assault on him which resulted in a broken jaw and a bruised brain with swelling. *Id*. at 153-54. Schoengert also claimed that Ervin had threatened to kill his cellmate, Dietrich, and had hit Dietrich in the face (Tr.939-40,942).

The defense called two clinical psychologists. *Ervin*, *supra* at 154.

The jury could not agree upon punishment (Ex.56 at 139). The trial court sentenced Mr. Ervin to death (Ex.58 at 327-28). This Court affirmed the conviction and sentence of death on direct appeal. *State v. Ervin*, 979 S.W.2d 149, 152-53 (Mo.banc 1998), with two judges dissenting as to proportionality relief. *Ervin, supra* (Wolff, J., concurring and dissenting).

Initially, Mr. Ervin was represented by Doug Koski, but he was disbarred (H.Tr.1157). So, another lawyer in his building, Martin Hadican, agreed to take the file (H.Tr.1157-58). He visited with Mr. Ervin and was retained (H.Tr.1013,1158). Ervin's mother, Mrs. Ossie McNeal made the arrangements to pay counsel (H.Tr.788,795-96).

Both Mr. Ervin and his mother gave counsel the names and addresses of Mr. Ervin's brother and four sisters (H.Tr.790,799-801,1020-22). Counsel did not interview any of them (H.Tr.88,94,113,138,161-63,750,1024-25). One sister called Hadican asking how she could help her brother; counsel told her to come to the trial (H.Tr.1023-

---

him. However, Schoengert had stolen money from an inmate's property box (State's Ex. H at 3-5). An investigation showed that Schoengert initially denied the stealing, but later admitted it before taking a polygraph examination. *Id*.

24,1026,1060-61,1182-82). Hadican did not talk to any other relatives (H.Tr.102,694-95,712,716-17,737,740,1180-82).

Mr. Ervin was the fourth of six children; he had one brother and four sisters: Essie Delores Nelson, Mamie Ervin, Carolyn Rayford, Carlos Flynnolyn Ervin, and Danita Hodge (H.Tr.72,123,151,742). All of his siblings were on good terms with Mr. Ervin, remained close to him, and loved him (H.Tr.88,113,132,155,750).

Mr. Ervin's mother was both mentally and physically ill while the children were young (H.Tr.73,124,152,727,743-44,764-66). She was hospitalized a lot of the time, including placements in mental institutions (H.Tr.73,124-25,743-44,765). Delores cared for her younger siblings (H.Tr.73-74,108-09,125,152-53,745,766). Other times, they would stay with their grandparents or aunt (H.Tr.124, 744,766).

The Ervins were very poor and did not always have food to eat (H.Tr.76,125,154, 159,725,728,744,775). Their mother was violent (H.Tr.107-08,721-22,745,777,780). The children did not have a father figure to rely on (H.Tr.82,721). The children had three different fathers (H.Tr.769-70). Mr. Ervin's father, Lynn Collins, had little contact with him (H.Tr.83,720).

In 1968, Mr. Ervin's family moved from Winona, Mississippi to St. Louis (H.Tr.73,76,705,719-20,725). They moved frequently in St. Louis, to avoid drugs and bad neighborhoods (H.Tr.776,778-9).

During his childhood, Mr. Ervin had high fevers, asthma, and suffered from seizures and migraines (H.Tr.84,109-10,126,154,706,732,746,779). He was hospitalized for his medical problems (H.Tr.84). He also had several head injuries (H.Tr.707-

08,732,780-81,782). Mr. Ervin began to drink alcohol (H.Tr.84-85,111,120,147,155,708-09).

Mr. Ervin's family knew and liked Leland White (H.Tr.85-86,112,155,710,734-35,747-48,784). They considered him part of their family (H.Tr.86,734,748). He stayed at their house (H.Tr.86,786). White and Ervin were close friends; White treated Ervin like his son (H.Tr.85,112,155,711,749,752,1093).

Other potential witnesses knew Mr. White too. Dr. Auner, Mr. Ervin's family practitioner, believed that Mr. White was mentally ill (Ex.5 at 49). His former colleagues at Arkansas State University remembered Mr. White's history of odd and bizarre behavior (Ex.2 at 10; Ex.3 at 12-13; Ex.4 at 10). Mr. White ate wild onions from the college yard, lived in his office, and shaved on the 4th Floor of the business building (Ex. 3 at 7-9, Ex.4 at 6-8). He was reclusive (Ex.3, at 8-9). Mr. White became slovenly, unwashed and neglected in his appearance (Ex.4, at 7-8). White was forced to resign from ASU (Ex.3 at 10-12; Ex.4 at 9).

Mr. Ervin asked his attorney to obtain letters written by Mr. White to Ronn Foss and the Division of Family Services (H.Tr.1083,1084,1093, Ex.54; Ex.55). Mr. White suffered from paranoid and persecutory thoughts; he thought women conspired to prevent him from having gainful employment (Ex.55 at 4). Mr. White talked about suicide and tried to obtain the book, *Final Exit* (H.Tr.1096).

Counsel also interviewed no witnesses regarding the alleged assault on Dietrich or the alleged threats to kill him (H.Tr.1076,1079). Again, Mr. Ervin had written to counsel before trial and urged counsel to interview witnesses to this incident

(H.Tr.1079,1171,1233-34,1256-57) (State's Ex. B at 3). Mr. Ervin told counsel that he woke up during the assault and tried to help Dietrich (State's Ex. C; H.Tr.1172,1256-7). Mr. Ervin's counsel for the charged assault, David Mills, contacted Hadican before trial and offered to share his investigation into the assault (H.Tr.979,983-84). He had discovered helpful witnesses (Tr.984). But Hadican believed that it was best to just let the State put on the aggravating evidence and let it drop (Tr.1076,1227). So he did no investigation. *Id*. Witnesses revealed that Mr. Ervin never assaulted Dietrich, but, rather, he rescued him from an assault by others. (H.Tr.1001-03,1007;Ex.1).

Deputy Dennis Green, a jailer at Phelps County Jail for two years, had daily contact with Mr. Ervin while he awaited trial (H.Tr.924-26). Green had no problems with Mr. Ervin who was cooperative (H.Tr.928-29). However, counsel never talked to Green or any other jailers about Mr. Ervin's behavior (H.Tr. 1030-34,1044-46,1059,1213).

Counsel also did not get Mr. Ervin's medication records from the jail and did not review what drugs he was taking (H.Tr. 1030-34,1044-46,1059). Mr. Ervin was prescribed and given many medications, including psychotropic drugs (Exs. 26,27,28,29, H.Tr. 178-80,243). In January, 1996 (the time of the Schoengert assault), he was taking Dilantin, Tegretol, Valium, Dalmane, Elavil, Paxil, Mellaril, Relafen, Soma, Fluvastatin, Procardia, Desyrel, Tenorim, Inderal, and Ativan (Ex.28). During trial in March, 1997, he was taking these same drugs, with the addition of Nitrostat, and the absence of Mellaril (Ex.29). Dilantin and Tegretol were anti-seizure medications, but Mr. Ervin's

blood levels showed that he was not receiving sufficient amounts to control his seizures (H.Tr.244-63,472).

The side effects of all these drugs were significant. Paxil, an antidepressant can cause hostility, paranoid reactions, and bizarre behavior (H.Tr.271,478-79). It can also cause sleepiness, dizziness, insomnia, tremors, nervousness, amnesia, impaired concentration, depression, emotional lability, abnormal thinking, staggering and convulsions (H.Tr.270-71). At the time of the jail assault, Mr. Ervin was receiving 60 mgs. of Paxil, the highest dosage recommended (H.Tr.271,273,478). His aggressiveness was consistent with the side effects for such a high dosage. *Id.*

Jailers continued to give Mr. Ervin Elavil during his trial, even though his physician had discontinued it; it was contraindicated (H.Tr. 283-84). The side effects of Elavil include seizures, hallucinations, delusions, confusion, disorientation, incoordination, ataxia (stumbling and fumbling), tremors, anxiety, insomnia, restlessness and nightmares (H.Tr.285-86). Doctors do not recommend that Elavil be prescribed for a patient with a seizure disorder (H.Tr.477, 485).

Both Valium and Mellaril also had significant side effects (H.Tr.285-87). The drugs cause sedation and lack of coordination. *Id*. The patient appears dull, tired, not alert and inattentive (H.Tr.287). Mr. Ervin's dosage of 30 mg. of Valium was very high, the highest clinical dose allowed (H.Tr.287,474-75).

Together, these medications would have a significant sedative effect on Mr. Ervin (H.Tr.489). They would severely depress his central nervous system, cloud his sensorium, lessen his awareness of his surroundings and decrease his ability to think

clearly (H.Tr.489-90). The end result was a depressed ability of Mr. Ervin's brain to function (H.Tr.491). Mr. Ervin would appear confused. *Id.* The medication would severely impair his ability to participate and follow the proceedings at trial (H.Tr.491).

Trial counsel observed Mr. Ervin going off on tangents and focusing on minor, irrelevant issues, both before and during trial (H.Tr.288-89,1014). He recognized that Mr. Ervin had trouble expressing himself (H.Tr.1015-18). Counsel suspected something was wrong with him (H.Tr.1019). However, counsel said he had no trouble communicating with Mr. Ervin (H.Tr.1015). He relied on Mr. Ervin to inform him of his problems with medication (H.Tr.1031).

Mr. Ervin's demeanor was highlighted by the prosecutor's closing argument, asking for death. He noted that while Mr. Ervin's attorney made an impassioned plea and almost came to tears, Mr. Ervin showed no emotion while testifying (Tr.1003). He described Mr. Ervin as arrogant and mean (Tr.1003).

Counsel did obtain some records documenting Mr. Ervin's head injuries and seizure disorder (Ex.J). He gave these records to two psychologists that he hired (Tr.954-55,987). Counsel did not call any of the doctors, who had treated Mr. Ervin before the offense, or any witnesses who had witnessed his seizures (Tr.953-95). Rather, he relied on the two defense experts to give opinions about Mr. Ervin. *Id*.

The motion court denied all of Mr. Ervin's 29.15 claims.[3] This appeal follows.

[3] Additional evidence is detailed in the argument portion of the brief as necessary to fully discuss the claims.

POINTS RELIED ON

I. Mr. Ervin's Family

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective for failing to investigate and present mitigating evidence from his family: Ossie McNeal, Essie Delores Nelson, Danita Hodge, Carolyn Rayford, Mamie Ervin, Carlos Flynnolyn Ervin, Phoebe Townsend, Essie Dorris, Abram Karr, and Xavier Nelson, because counsel's failure violated Mr. Ervin's rights to effective assistance of counsel and to present mitigation, 6th, 8th and 14th Amendments of the United States Constitution, in that counsel did not interview any of Mr. Ervin's siblings, even though both Mr. Ervin and his mother gave him their names, and counsel talked to no other relatives, except Mr. Ervin's mother. Mr. Ervin was prejudiced as these witnesses would have established that Mr. Ervin was good, they loved him, he had a good relationship with Mr. White and cared deeply about him, Mr. Ervin had a difficult childhood, and suffered from head injuries and a seizure disorder, and this mitigation would have likely resulted in a life sentence, especially since the jury could not agree upon punishment.

Williams v. Taylor, 120 S.Ct. 1495 (2000);

Eddings v. Oklahoma, 455 U.S. 104 (1982);

Battenfield v. Gibson, 236 F.3d 1215 (10th Cir. 2001);

Carter v. Bell, 218 F.3d 581 (6th Cir. 2000); and

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

II. No Investigation of Alleged Assault in Jail

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective for failing to investigate and rebut Mr. Ervin's alleged assault and alleged threats to kill his cellmate, Dietrich, because counsel's failure violated Mr. Ervin's rights to effective assistance of counsel, to rebut aggravating circumstances under the due process clause, and to present mitigation, under the 6th, 8th, and 14th Amendments of the United States Constitution, in that counsel did not interview any of the witnesses to the alleged incident, all of whom agreed that Mr. Ervin never threatened, let alone assaulted Dietrich, and counsel did not even review the helpful investigation offered by Mr. Ervin's attorney on the assault. Mr. Ervin was prejudiced as the State presented the alleged assault and alleged threats of Dietrich as a reason to give Mr. Ervin death and had this inaccurate charge been rebutted, there is a reasonable probability of a life sentence, especially since the jury could not agree upon punishment.

Parker v. Bowersox, 188 F.3d 923 (8th Cir. 1999),

cert. denied, 529 U.S.1038 (2000);

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991);

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

State v. Thompson, 985 S.W.2d 779 (Mo. banc 1999); and

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

III. Good Conduct in Jail

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective in failing to present evidence of Mr. Ervin's good conduct in jail because Mr. Ervin was denied his rights to effective assistance of counsel, and to present mitigation under the 6th, 8th, and 14th Amendments of the United States Constitution, in that counsel failed to conduct any investigation into Mr. Ervin's behavior in prison and therefore, could not make any reasoned decision about what evidence to present and Mr. Ervin was prejudiced as Deputy Dennis Green would have told the jury that Mr. Ervin was a cooperative inmate who did not cause trouble. This evidence of good behavior in prison was mitigating and would have rebutted the State's portrayal of Mr. Ervin as a violent, dangerous inmate.

Williams v. Taylor, 120 S.Ct. 1495 (2000);

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

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991);

State v. Ervin, 979 S.W.2d 149 (Mo. banc 1998); and

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

IV. Records and Witnesses Verifying Head Injuries and Seizure Disorder, Resulting Deficits

The motion court clearly erred in overruling Mr. Ervin's claim that counsel was ineffective in failing to investigate and present testimony of Dr. Auner and Counselor Pope and numerous records (Exs. 5-15,17-20) that verified Mr. Ervin's head injuries, seizure disorder and resulting deficits because the failure violated his rights to effective assistance of counsel and to present mitigating evidence, under the 6th, 8th, and 14th Amendments to the United States Constitution, in that counsel failed to investigate prior treating doctors and counselors, and while providing hired experts with records, failed to present the records to the jury. Mr. Ervin was prejudiced because had the jury considered the objective medical evidence, the jury would have likely imposed a life sentence.

Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995);

Parkus v. Delo, 33 F.3d 933 (8th Cir. 1994)

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991);

Eddings v. Oklahoma, 455 U.S. 104 (1982); and

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

V. Mr. Ervin's Seizure Disorder

The motion court clearly erred in overruling Mr. Ervin's claim that counsel was ineffective in failing to investigate and present testimony of a qualified psychiatrist, such as Dr. Bruce Harry, M.D., because the failure violated his rights to due process, to effective assistance of counsel and to present mitigating evidence, under the 6th, 8th, and 14th Amendments to the United States Constitution, in that Mr. Ervin had a history of head injuries, suffered from a seizure disorder, a cognitive disorder, alcohol addiction, was highly suggestible, and was affected by his childhood without a father and a mentally ill mother who was often absent, and as a result, Mr. Ervin was not competent to stand trial, was not able to give a knowing, voluntary and intelligent statement to the police, was unable to deliberate, and was under the influence of extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct and to conform it to the requirements of law was substantially impaired.

Williams v. Taylor, 120 S.Ct. 1495 (2000);

Eddings v. Oklahoma, 455 U.S. 104 (1982);

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991);

Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995); and

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

VI. Mr. Ervin's Medication While Jailed

The motion court clearly erred in overruling Mr. Ervin's claim that counsel was ineffective in failing to investigate and to object to his improper medication before and during trial because the failure violated his rights to due process, a fair trial, effective assistance of counsel and to reliable sentencing, under the 6th, 8th, and 14th Amendments to the United States Constitution, in that counsel failed to conduct any investigation into the medication Mr. Ervin was taking before and during trial and the psychotropic drugs had significant sedative effects, aggravated Mr. Ervin's seizure disorder, and caused aggression, hostility and paranoid behavior. Mr. Ervin was prejudiced, as he could not follow the proceedings, communicate with counsel, testify rationally on his own behalf, and appeared bizarre, disruptive, unremorseful and uncompassionate – all of which led to his conviction and sentence of death.

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

Pate v. Robinson, 383 U.S. 375 (1966);

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

Hull v. Kyler, 190 F.3d 88 (3rd Cir.1999);

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

Rule 29.07.

VII. Mr. Ervin's Drinking Was Mitigating Evidence

The motion court clearly erred in overruling Mr. Ervin's claim that counsel was ineffective in failing to investigate and present evidence of Mr. Ervin's intoxication on the night of the offense because the failure violated his rights to effective assistance of counsel and to present mitigating evidence, under the 6th, 8th, and 14th Amendments to the United States Constitution, in that counsel failed to investigate a coparticipant's statement that Mr. Ervin had been drinking and police officers saw all the beer cans in Mr. Ervin's car. Mr. Ervin was prejudiced, as the evidence of intoxication would have provided mitigating evidence that would have supported a life sentence.

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

Norris v. State, 429 So.2d 688 (1983);

Williams v. Taylor, 120 S.Ct. 1495 (2000);

People v. Perez, 592 N.E.2d 984 (Ill. 1992); and

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

VIII. Mr. Ervin's Learning Disabilities Were Mitigating

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective for failing to investigate and present evidence of Mr. Ervin's learning disabilities, because the failure denied Mr. Ervin his rights to effective assistance of counsel and to present mitigating evidence under the 6th, 8th, and 14th Amendments to the United States Constitution in that counsel unreasonably failed to investigate Mr. Ervin's head injuries, seizure disorder and the impact on his ability to learn, to concentrate, solve problems, and understand the consequences of his actions. Mr. Ervin was prejudiced, as this evidence would have provided a basis for a life sentence.

Williams v. Taylor, 120 S.Ct. 1495 (2000);

In re Brett, 16 P.3d 601 (Wash. banc 2001);

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

Penry v. Lynaugh, 492 U.S. 302 (1989); and

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

IX. Mr. Ervin's Childhood Development Was Mitigating

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective for failing to investigate and present evidence of Mr. Ervin's childhood development, because the failure denied Mr. Ervin his rights to effective assistance of counsel and to present mitigating evidence under the 6th, 8th, and 14th Amendments to the United States Constitution in that counsel unreasonably failed to investigate Mr. Ervin's childhood, including his poverty, frequent illnesses, frequent moves, lack of a supportive parent due to mental illness and abandonment, and lack of community support. Mr. Ervin was prejudiced, as this evidence would have provided a basis for a life sentence.

Williams v. Taylor, 120 S.Ct. 1495 (2000);

In re Brett, 16 P.3d 601 (Wash. banc 2001);

Eddings v. Oklahoma, 455 U.S. 104 (1982); and

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

X. Mr. White's Mental Problems

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective for failing to investigate Mr. White's mental problems and relationship with Mr. Ervin, because the failure denied Mr. Ervin his rights to effective assistance of counsel and to present mitigating evidence under the 6th, 8th, and 14th Amendments to the United States Constitution in that counsel unreasonably failed to investigate Mr. White's background, mental problems and bizarre behavior showing he was paranoid, reclusive and suicidal, and Mr. Ervin was prejudiced as such evidence was admissible to explain the circumstances of the offense and providing a basis for a sentence less than death. Alternatively, the motion court abused its discretion in excluding Exhibit 54, Mr. White's letters to Ronn Foss, because they revealed his mental problems and bizarre behavior, and the drastic remedy of exclusion for postconviction counsel's failure to disclose them was not appropriate since the State had access to trial counsel's file, which included the Foss letters.

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

Williams v. Taylor, 120 S.Ct. 1495 (2000);

State v. Hall, 982 S.W.2d 675 (Mo.banc1998);

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); and

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

XI. Jury Did Not Find Aggravator

The motion court clearly erred in denying Mr. Ervin's claim that the jury's failure to agree upon punishment and find a statutory aggravator beyond a reasonable doubt, and counsel's failure to object to the trial court finding the aggravator, denied Mr. Ervin his rights to a jury trial, due process and effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution in that the statutory aggravator increased the maximum penalty, making Mr. Ervin eligible for the death penalty, and thus, should have been found by the jury, not a judge, and proven beyond a reasonable doubt, and counsel intended to object and include the claim in the motion for new trial, but neglected to do so.

Apprendi v. New Jersey, 120 S.Ct. 2348 (2000);

Jones v. United States, 119 S.Ct. 1215 (1999);

Walton v. Arizona, 497 U.S. 639 (1990)

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

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

Sections 565.030 and 565.032.2, RSMo 2000.

XII. Counsel's Failure To Object To Prejudicial Arguments

The motion court clearly erred in denying the Rule 29.15 motion because Mr. Ervin was denied his rights to due process, effective assistance of counsel, and to be free from cruel and unusual punishment, 6th, 8th, and 14th Amendments, U.S. Constitution, and his rights under Section 565.030.4, RSMo 2000, in that trial counsel failed to object to the improper argument, asking jurors to:

1. **imagine how painful it was to have their throats cut like Mr. White, as this was improper personalization;**
2. **punish Mr. Ervin for exercising his constitutional rights to a jury, counsel and a fair and impartial trial; and**
3. **consider the victim impact of unrelated offenses committed against law enforcement officers, rather than confining victim impact to the murder;**

and to improper voir dire:

4. **that killing a law enforcement officer was a statutory aggravator warranting death, when the State knew it would introduce nonstatutory aggravation of assaults of law enforcement officers, thereby misleading and confusing the jury;**

because the right to effective assistance of counsel should be decided under the *Strickland* standard for prejudice -- whether a reasonable probability exists that the outcome would have been different, sufficient to undermine confidence in the outcome -- rather than the standard for plain error, a manifest injustice which requires that the error have a decisive effect on the jury's verdict. Applying,

***Strickland*, Mr. Ervin was prejudiced because these errors denied him a fair trial and a reliable sentencing proceeding, introduced emotion and arbitrariness into the proceedings, and given that the evidence of deliberation was weak and the jury could not agree upon punishment, there is a reasonable probability that without the improper arguments, the jury would have sentenced Mr. Ervin to life.**

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

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

Sidebottom v. State, 781 S.W.2d 791 (Mo. banc 1989);

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

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

Section 565.030, RSMo 2000;

Rule 29.11; and

Rule 29.15.

XIII. Clemency

The motion court clearly erred in denying Mr. Ervin's claim that Missouri clemency proceedings violate his rights to due process, under the 14th Amendment to the United States Constitution, in that the proceedings are wholly arbitrary and capricious as the clemency of triple-murder, Mease, indicates. Clemency for Mease was granted, not on the merits of the case, but because the Pope happened to visit at the time of Mease's scheduled execution and asked for clemency for religious reasons.

Ohio Adult Parole Authority v. Woodard, 118 S.Ct. 1244 (1998);

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

Roll v. Carnahan, 225 F.3d 1016 (8th Cir. 2000);

Whitaker v. State, 451 S.W.2d 11 (Mo. 1970);

U.S. Const., Amend. XIV;

Mo. Const., Art. IV, Sec. 7; and

Section 217.800, RSMo 2000

XIV. Mr. Ervin's Death Sentence Is Disproportionate

The motion court clearly erred in rejecting Mr. Ervin's claim that this Court's proportionality review violates his rights to due process, Fourteenth Amendment, U.S. Constitution, in that: 1) this Court does not apply a *de novo* standard of review, 2) this Court's database does not comply with Section 565.035.6 and is missing numerous cases; and 3) this Court fails to consider all similar cases required by Section 565.035.3(3).

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 121 S.Ct. 1678 (2001);

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

State v. Ervin, 979 S.W.2d 149 (Mo. banc 1998);

State v. Chaney, 967 S.W.2d 47 (Mo. banc 1998);

U.S. Const., Amend. XIV; and

Section 565.035, RSMo 2000.

XV. Penalty Phase Instructions

The motion court clearly erred in denying Mr. Ervin's claim that jurors do not understand the penalty instructions and counsel failed to object to the instructions in violation of his rights to due process, effective assistance of counsel and to individualized sentencing not imposed arbitrarily or capriciously, 6th, 8th, and 14th Amendments, U.S. Constitution, in that Mr. Ervin proved that jurors' comprehension is low, around 50%, and the instructions can easily be improved by rewriting, and counsel unreasonably failed to offer evidence to support his objection, first made in the motion for new trial, and Mr. Ervin was prejudiced because the less jurors understand the instructions, the more likely they are to impose death.

Boyde v. California, 494 U.S.370 (1990);

In re Winship, 397 U.S. 358 (1970);

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

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

U.S. Const., Amend. VI, VIII and XIV;

Rule 29.15; and

"Comprehensibility of Approved Jury Instructions in Capital Murder Cases," *Journal of Applied Psychology*, Vol.No.80, No.4.

ARGUMENTS

I. Mr. Ervin's Family

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective for failing to investigate and present mitigating evidence from his family: Ossie McNeal, Essie Delores Nelson, Danita Hodge, Carolyn Rayford, Mamie Ervin, Carlos Flynnolyn Ervin, Phoebe Townsend, Essie Dorris, Abram Karr, and Xavier Nelson, because counsel's failure violated Mr. Ervin's rights to effective assistance of counsel and to present mitigation, 6th, 8th, and 14th Amendments of the United States Constitution, in that counsel did not interview any of Mr. Ervin's siblings, even though both Mr. Ervin and his mother gave him their names, and counsel talked to no other relatives, except Mr. Ervin's mother. Mr. Ervin was prejudiced as these witnesses would have established that Mr. Ervin was good, they loved him, he had a good relationship with Mr. White and cared deeply about him, Mr. Ervin had a difficult childhood, and suffered from head injuries and a seizure disorder, and this mitigation would have likely resulted in a life sentence, especially since the jury could not agree upon punishment.

Trial counsel only interviewed one member of Mr. Ervin's family, his mother—Ms. Ossie McNeal (H.Tr.1022-23,1184-85). She was the one who made the arrangements to pay counsel (H.Tr.788,795-96). Both Mr. Ervin and his mother gave counsel the names and addresses of Mr. Ervin's brother and four sisters (H.Tr.790,799-801,1020-22). Yet counsel did not attempt to interview any of them (H.Tr.88,94,113,

138,161-63,750,1024-25). Counsel said he spoke briefly to one sister when she called his office, asking how she could help her brother. Counsel told her to come to the trial (H.Tr.1023-24,1026,1060-61,1182-82). Not surprisingly, since he did not talk to the witnesses given to him, counsel also failed to talk to any other relatives who were close to Mr. Ervin, such as his aunts, cousin and nephew (H.Tr.102,694-95,712,716-17,737,740,1180-82). Because of counsel's failure to conduct the most basic investigation into Mr. Ervin's background, the jury never heard the mitigating evidence of his childhood and his relationship with his family members who loved Mr. Ervin dearly. Counsel was ineffective.

Mr. Ervin was the fourth of six children; he had one brother and four sisters (H.Tr.72). Essie Delores Nelson was the oldest (H.Tr.72). Next was Mamie, then Carolyn (H.Tr.72,123,742). Carlos was the second brother (H.Tr.72,151). Danita Hodge was the youngest (H.Tr.72). All of his siblings were on good terms with Mr. Ervin and remained close to him (H.Tr.88,113,132,155,750).

Had counsel talked to any of the family, he would have discovered that their mother was both mentally and physically ill while the children were young (H.Tr.73,124,152,727,743-44,764-66). Indeed, she was hospitalized a lot of the time, including placements in mental institutions (H.Tr.73,124-25,743-44,765). She was gone for long periods of time (H.Tr.152,756-66). When she was gone, Delores had to care for her younger siblings (H.Tr.73-74,108-09,125,152-53,745,766). This was difficult for everyone, as Delores was only five years old when she began this caretaker role

(H.Tr.74). Other times, they would stay with their grandparents or aunt (H.Tr.124, 744,766).

During their childhood, they were very poor and did not know where the next meal was coming from (H.Tr.76,125,154,159,725,728,744,775). Some days they did not have enough to eat (H.Tr.744,775). Their mother felt bad and had trouble coping (H.Tr.76). She could not show affection to the children (H.Tr.76,106). Since she was in and out of the hospital, she could not hold a steady job (H.Tr.77,152-53,728,744). The longest period that she worked was three weeks (H.Tr.728). Sometimes the children would wake up and she would be missing (H.Tr.77). They were told that she had a nervous break-down (H.Tr.77,729). Delores prayed that her mother would live (H.Tr.79). She worried about what would happen to her brothers and sisters (H.Tr.79).

When their mother was there, she was often violent and encouraged her children to be violent too (H.Tr.107-08,721-22,745,777,780). She hit Mr. Ervin over the head with a guitar, breaking it (H.Tr.107,153,745,780). She told Carlos to "fight like a man" when he was playing with other children in the front lawn (H.Tr.108,153). She made him feel like a coward (H.Tr.153). Mrs. McNeal was arrested and jailed for hitting one of the neighborhood children (H.Tr.777).

The family lived on welfare and depended on other relatives, their grandmother and aunt, to feed them and take care of them (H.Tr.80,141). However, in Mississippi, everyone was poor and tried to help each other (H.Tr.81). A doctor's wife and friend gave them food (H.Tr.775).

The children did not have a father figure (H.Tr.82,721). The children had three different biological fathers (H.Tr.769-70). Mr. Ervin's father, Lynn Collins, had little contact with him (H.Tr.83,720).

Their grandfather, Willie Clarence English, was also not an appropriate role model. He had shot and killed his son, their Uncle Ray (H.Tr.82,690,729,738,763). English was very abusive (H.Tr.726,763). So was his wife; she was a paranoid schizophrenic (H.Tr.726).[4] The family was hard working, but also had alcohol problems (H.Tr.762-63).

In 1968, Mr. Ervin's family moved from Winona, Mississippi to St. Louis (H.Tr.73,76,705,719-20,725). The move to St. Louis was difficult, they did not have the same support (H.Tr.81). People were cruel, unfriendly, and cold (H.Tr.81). They moved frequently in St. Louis, from 5-12 times (H.Tr.78,776). They were running from drugs and lived in bad neighborhoods (H.Tr.776-79,778-9). Their house was bombed (H.Tr.778). The children encountered racism (H.Tr.81).

During his childhood, Mr. Ervin had high fevers, asthma, and suffered from seizures and migraines (H.Tr.84,109-10,126,154,706,732,746,779). He was hospitalized for his medical problems (H.Tr.84). At age 13, he walked in his sleep (H.Tr.130,135). He talked to people who were not there (H.Tr.130-31,136).

---

[4] Mental illness ran in the family; Lynetta Dorris, Mr. Ervin's first cousin, also suffered from paranoid schizophrenia and mental retardation (H.Tr.730).

However, his most significant problem was his seizure disorder. He had grand mal seizures where he jerked around on the floor, foamed at the mouth, and his eyes rolled into the back of his head (H.Tr.110,119-20,127,139-41,142-45,746-47,783). When he had a seizure, his family put a spoon in his mouth to keep him from biting his tongue; they tried to keep him from hitting his head (H.Tr.127-29,783). At other times, the family noticed Ervin staring off into space (H.Tr.112,708,714). The seizures seemed to worsen after an automobile accident (H.Tr.707-08,732). He became more quiet, and slept a lot (H.Tr.732-33). Sometimes he became withdrawn and went off into the woods by himself (H.Tr.85).

The automobile accident was not his only head injury; he had others when he was little (H.Tr.780-81). Then, as an adult, he fell down a flight of stairs (H.Tr.782). After these accidents, Ervin changed -- he did not know who or where he was (H.Tr.782-83). When he felt stressed, he could not stay on task and got defensive and paranoid (H.Tr.131,783). His voice deepened, he became loud and frightened (H.Tr.131,783). He did not remember these incidents afterwards (H.Tr.784).

Mr. Ervin began to drink alcohol (H.Tr.84-85,111,120,147,155,708-09). After he drank, he usually went to sleep (H.Tr.111).

Mr. Ervin's family knew and liked Leland White (H.Tr.85-86,112,155,710,734-35,747-48,784). They considered Mr. White as part of their family (H.Tr.86,734,748). He slept, ate and bathed at their house (H.Tr.86). He had his own bedroom at their house (H.Tr.786). White and Ervin were close friends; White treated Ervin like his son (H.Tr.85,112,155,711,749,752).

All of his family revealed how much they loved Mr. Ervin (H.Tr.88,100,113, 132,155,693,750,791). Delores appreciated his comical personality (H.Tr.87). She thought of him as a son and was close to him (H.Tr.89-90,92). Danita recalled how he had taken care of her when she was little (H.Tr.109). He combed her hair for her so that she could go to church (H.Tr.109). He made sure she was fed, went to school, did her homework and had clean clothes (H.Tr.109). Carolyn was very close to her brother, who was only one year younger (H.Tr.123,132). Carlos considered his brother to be his best friend (H.Tr.155). He took him to football games, fishing, and to movies when he was younger (H.Tr.154). He loved him very much (H.Tr.155,159).

Delores' son, Robert Xavier Nelson, was close to his uncle, Mr. Ervin, and saw him frequently, usually every month (H.Tr.99). He spent the night with his uncle who took him shopping (H.Tr.99). He enjoyed this time together, Mr. Ervin was his favorite uncle (H.Tr.100). But no one contacted Nelson before trial (H.Tr.102).

Abram Karr was also close to his cousin, Mr. Ervin (H.Tr.711). They were the same age, so they played together, went to school together, and saw each other every weekend (H.Tr.702-06). Karr thought Mr. Ervin was a normal kid who played well with others (H.Tr.704). He loved his cousin and would have testified at his trial, but no one contacted him (H.Tr.711-12,716-17).

Counsel admitted that he did not interview anyone, but Mr. Ervin's mother, only speaking to one sister briefly on the phone about coming to trial (H.Tr.1024-25). He acknowledged that he never asked Mrs. McNeal about many problems, including her mental illness, violence, poverty or Mr. Ervin's difficult childhood (H.Tr.1185-88,1238-

41). He would have given this important background information to the experts he hired (H.Tr.1188-90).

Counsel recognized that Ossie McNeal loved her son dearly; she displayed that throughout (H.Tr.1244). Mr. Ervin loved her too. *Id*. However, counsel thought it best to have her just sit in the courtroom, but not testify (H.Tr.1061,1248-49). He claimed that both she and Mr. Ervin did not want her to testify because of health problems (H.Tr.1023). However, Mrs. McNeal said she was never asked to testify and, while she was nervous and scared,[5] she would have helped her son in any way possible (H.Tr.791-92,804).

Even though counsel did no investigation into Mr. Ervin's background, the motion court found counsel was effective (L.F.1075-98). Since counsel was on notice of the siblings, the court did not address the unreasonableness in failing to investigate, but simply found no prejudice (L.F.1080-83,1086-88,1088-90,1094-96,1097-98). The court found the siblings' descriptions of their childhood contrary to that given by Mr. Ervin to Dr. Leonberger: "pretty decent, I had my ups and downs but I had a pretty decent childhood. There was no abuse in the home or starving or nothing like that" (L.F.1088,1090,1096, 1097-98;D.L.F.295). And the court concluded that since the siblings had left home and did not see their brother all the time, their testimony about

[5] Mrs. McNeal said that the other side was very mean at trial, telling stories about how they shoot "niggers" in the back and hang them (H.Tr.792). She heard them say that they should "hang the nigger and make sure he died." (H.Tr.793).

their childhood and their close relationship with him would not have changed the outcome (L.F.1083,1088, 1091,1096,1098).

As for counsel's failure to adequately interview Mrs. McNeal and call her to testify, the court found that she should have volunteered the family background information to counsel and her testimony about her family struggles with poverty, alcohol and physical and mental illness was irrelevant in Mr. Ervin's penalty phase (L.F.1079-80).

Finally, the motion court found counsel not ineffective for failing to interview Phoebe Townsend, Essie Dorrus, Abram Karr and Xavier Nelson, because he was not given the names of these potential witnesses (L.F.1084,1086,1093,1094).

These findings and conclusions are unsupportable and must be reversed.

Standard of Review

This Court must review the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Hall v. State*, 16 S.W.3d 582, 585 (Mo. banc 2000); Rule 29.15. Findings and conclusions are "clearly erroneous" if after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996). To establish ineffective assistance, Mr. Ervin must show that his counsel's performance was deficient and that such performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); and *Williams v. Taylor*, 120 S.Ct. 1495, 1511-12 (2000). To prove prejudice, Mr. Ervin must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*. and *State v. Butler*, 951 S.W.2d 600, 608

(Mo. banc 1997).

In *Williams v. Taylor, supra* at 1515, the Supreme Court found Williams' counsel constitutionally ineffective, because he failed to conduct a *thorough* investigation of Williams' background. Counsel failed to investigate before trial and did not present extensive records of Williams' nightmarish childhood, his borderline mental retardation, that he only finished Sixth grade, and his good behavior in prison. *Id*. at 1514. In finding prejudice, the Court looked not only at the omitted evidence, but also the evidence adduced at trial. *Id*. at 1515. A court should not look at each piece of evidence in isolation. *Id*. Since counsel had failed to thoroughly investigate, and the jury might have voted for life with such evidence, the Court found counsel ineffective under the Sixth and Fourteenth Amendments. *Id*. at 1515-16.

Like *Williams v. Taylor*, here counsel was ineffective. He did virtually no investigation into Mr. Ervin's background. He only talked to Mr. Ervin's mother, the person who was paying his fee. He did not bother to talk to any of Ervin's brothers or sisters. He had their names, they were cooperative and wanted to help.

Contrary to the motion court's findings, the Sixth and Fourteenth Amendments require a *thorough* investigation. Counsel has a duty to ask questions, not passively sit in his office and wait for mitigation to appear without taking any action. His client and client's mother gave him the names of the five siblings he never contacted -- yet the court faults Mr. Ervin for not giving him the names of his aunts, cousin and nephew. Surely, if counsel did not bother to talk to Mr. Ervin's brothers and sisters, nothing suggests he would have spoken to other relatives.

Unquestionably, counsel failed in his most basic duty, to thoroughly investigate Mr. Ervin's background. The only real issue before the Court is whether he was prejudiced by counsel's failure.

Mr. Ervin's family loved him dearly (H.Tr.88,100,113,132,155,693,750,791). He was a good brother, nephew, cousin and uncle. *Id*. They all had good memories to share with the jury. Capital jurors identify with such family witnesses. Sundby, "The Jury As Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony," 83 *Va. L. Rev*. 1109, 1152 (1997). Indeed, the absence of such testimony is held against a defendant. *Id*. Jurors wonder "couldn't you find in this man's life one person as a character witness?" *Id*. Such witnesses are important, because the jury will have heard overwhelming negative evidence: the brutal details of the murder and the defendant's past history of crime. *Id*. Thus, it is extremely important to the jury to understand that the defendant has people who care enough about him to be there and to testify on his behalf. *Id*. at 1153. "Such testimony may present the first sliver of insight that there is good in the defendant, as well as evil." *Id*.

Mr. Ervin had much good in him. He was kind and loving to all his family. They cared about him deeply. Delores thought of him as her own son. Carlos said he was his best friend. Danita recalled how he took care of her, combing her hair so she could go to church, making sure she was fed, and did her homework. Surely, this mitigating evidence would have made a difference to Mr. Ervin's jurors, who could not agree upon punishment.

The motion court disregards any background information that was inconsistent with Mr. Ervin's description of his childhood as "pretty decent" with its ups and downs (L.F.1088,1090,1096,1097-98). Mr. Ervin's subjective view of what was decent was not the only source of information to be considered. Counsel has a duty to investigate independent of the client. *Carter v. Bell*, 218 F.3d 581,589 (6th Cir. 2000) (counsel cannot rely solely on his client to lead to mitigation, especially where he is unable to recognize and identify such evidence); *People v. Per*ez, 592 N.E.2d 984 (Ill. 1992) (counsel has a duty to investigate mitigation even when client is uncooperative and refuses to provide information).

Here, Mr. Ervin was cooperative and gave his attorney the names of his brothers and sisters. Without even talking to these witnesses, counsel could not decide what mitigation to present. Even counsel recognized the importance of the family's information regarding Mrs. McNeal's mental illness, her absence from the home, their poverty, the violence and the abuse the children suffered (H.Tr.1185-89). Had counsel known this information he would have provided it to his experts (H.Tr.1188-89). It would have been important mitigation for the jury to consider. *Williams*, *supra*; *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (defendant's unhappy upbringing and emotional disturbance was relevant mitigating evidence).

The court's suggestion that Mr. Ervin's mother's family history is irrelevant (L.F.1079-80) is also erroneous. In *Battenfield v. Gibson*, 236 F.3d 1215 (10th Cir. 2001) the Court found counsel ineffective for failing to investigate and present such mitigation. The Court specifically found the family history of alcoholism and drug addiction

mitigating. *Id*. at 1226. So, too, was the defendant's father and grandfather's moonshining which played a role in the defendant's alcohol and drug addiction. *Id*. A parent's family history can play a significant role in the development of a child.

Here, Ervin's mother's mental illness was not some irrelevant factor that had no bearing upon him. Rather, it directly impacted him -- it determined who took care of him and whether he had food to eat. It also impacted on his own mental problems. *See* Point IV, V, VII, and VIII, *infra*. Mrs. McNeal's experience in a violent, alcoholic environment directly impacted how she parented. She was violent and encouraged the children to be violent, too.

Counsel had a duty to thoroughly investigate mitigation -- he totally abdicated that duty in Mr. Ervin's case. "We hope, of course, that the defendant whose life is at risk will be represented by competent counsel - someone who is inspired by the awareness that a less than vigorous defense truly could have fatal consequences for the defendant." *Callins v. Collins*, 510 U.S. 1141 (1994) (J. Blackmun, dissenting from denial of certiorari). Talking to one family member is hardly the vigorous defense Justice Blackmun envisioned.

A lawyer should walk a mile in the shoes of the client, see who he is, get to know his family and the people who care about him, and then present that information to the jury in a way that can be taken into account in deciding whether the client is so beyond redemption that he should be eliminated from the human community. *Battenfield v. Gibson*, *supra* at 1229.

Counsel did not put himself in Mr. Ervin's shoes; he did not even see his shoes. Counsel failed to talk to any of the siblings, let alone get to know them. He had no idea that so many people cared about Mr. Ervin. Thus, the jury did not know it either and could not consider it in deciding whether he should live or die. Even without this information, the jury could not agree upon punishment and two members of this Court thought a life sentence was appropriate. *State v. Ervin*, 979 S.W.2d 149, 166-69 (Mo. banc 1998) (Wolff, J., concurring and dissenting). With this mitigating information, surely the jury would have likely imposed a life sentence. This Court should reverse and grant a new penalty phase, or alternatively, impose a sentence of life without probation or parole.

II. No Investigation of Alleged Assault in Jail

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective for failing to investigate and rebut Mr. Ervin's alleged assault and alleged threats to kill his cellmate, Dietrich, because counsel's failure violated Mr. Ervin's rights to effective assistance of counsel, to rebut aggravating circumstances under the due process clause, and to present mitigation, under the 6th, 8th, and 14th Amendments of the United States Constitution, in that counsel did not interview any of the witnesses to the alleged incident, all of whom agreed that Mr. Ervin never threatened, let alone assaulted Dietrich, and counsel did not even review the helpful investigation offered by Mr. Ervin's attorney on the assault. Mr. Ervin was prejudiced as the State presented the alleged assault and alleged threats of Dietrich as a reason to give Mr. Ervin death and had this inaccurate charge been rebutted, there is a reasonable probability of a life sentence, especially since the jury could not agree upon punishment.

Mr. Ervin rescued Christian Dietrich from an assault by other inmates. Yet the jury and the trial court was told that Mr. Ervin tried to kill Dietrich. Since counsel failed to investigate the jail incident, no one told the jury or the court the truth.

In penalty phase, jailer David Schoengert, testified that on January 20, 1996, Mr. Ervin had assaulted fellow-inmate Christian Dietrich and threatened to kill him (Tr.939-40). Schoengert maintained that Ervin "was standing in the window hollering for me to get that individual [Dietrich] out" of the cell (Tr.939). "He told me that I needed to hurry

up or else he was going to kill him" (Tr.940). According to Scheongert, Ervin had Dietrich back in the corner of the cell and told the officer he better get him out (Tr.941). Schoengert said that Mr. Ervin had injured Dietrich, describing the injuries to his face (Tr.942).

Trial counsel presented no evidence to rebut the alleged assault on Dietrich and threat to kill him. In fact, counsel did not even investigate the matter. Counsel admitted that he did not interview the alleged victim, Christian Dietrich (H.Tr.1076,1079). He did not interview inmate Terry Pearson, even though Mr. Ervin had written to counsel before trial and urged him to interview Pearson about this incident (H.Tr.1079,1171,1233-34,1256-57) (State's Ex. B at 3). Mr. Ervin told counsel that he woke up during the assault and tried to help Dietrich (State's Ex. C; H.Tr.1172,1256-7). Counsel rationalized his failure to investigate, saying he believed it was best to just let the State put on the aggravating evidence and not rebut it (Tr.1076,1227).

Counsel admitted that, in addition to the information provided by Mr. Ervin, he also had a police report of the incident prepared by jailer Schoengert (State's Ex. F) (H.Tr.1072-78,1225-26,1229). That document recounted jailer Schoengert's version of events, but also contained the names of potential witnesses, Chris Dietrich, Terry Pearson and another inmate, Carlos Mitchell (State's Ex. F at 4). Counsel did not interview any of these witnesses (H.Tr.1079). Counsel's failure to investigate was particularly egregious as Mr. Ervin's counsel for the charged assault, David Mills, contacted him before trial and offered to share his investigation into the assault (H.Tr.979,983-84). Mills told counsel that he had helpful witnesses on the assault charge (Tr.984). Yet counsel did

nothing; he did not even review Mills' investigator's interview and statement of Terry Pearson, in which Pearson acknowledged that he and Mitchell, not Ervin, had committed the assault on Dietrich (Ex. 1 Depo. Ex. 1,H.Tr.1078).

If counsel had investigated, he would have discovered that Mr. Ervin never assaulted Dietrich, but, rather, was rescuing Dietrich from an assault by others. Dietrich revealed that he was assaulted by Pearson and Mitchell, not Ervin (H.Tr.1002-03,1007). Dietrich was in the jail for a child sexual offense (H.Tr.1001-02). Pearson and Mitchell obtained his legal papers, read about his case, and beat him (H.Tr.1001-02). Ervin was asleep when the assault began (H.Tr.1002). He woke up and tried to protect Dietrich from Pearson and Mitchell (H.Tr.1002-03). Ervin told the guys to stop and to leave Dietrich alone, and yelled for help, asking the deputy to remove Dietrich from the cellblock (H.Tr.1003). Schoengert eventually came and removed Dietrich (H.Tr.1003,1005-06). Ervin never struck Dietrich nor harmed him in any way (H.Tr.1007).

Pearson verified Dietrich's account, both before trial and at the 29.15 proceedings (Ex. 1). In his statement to the Rolla Public Defender, made before Ervin's trial, Pearson admitted that he and Mitchell, not Ervin, assaulted Dietrich because they discovered that he had molested two boys (Ex. 1 at 32-33 Depo. Ex. 1). Mitchell hit Dietrich on the face (Ex. 1 at 9). Mr. Ervin was asleep when this assault began, and Dietrich began yelling for Ervin to help him (Ex. 1 at 9-10). When Ervin woke up, he asked Pearson and Mitchell what they were doing (Ex. 1 at 11). Ervin tried to protect Dietrich, banging on the main door of the cellblock and calling for help (Ex. 1 at 11). Schoengert came and

removed Dietrich from the cell (Ex. 1 at 12). Ervin never assaulted Dietrich during this incident (Ex. 1 at 14).

Despite this evidence, the motion court found that counsel made a "reasoned investigation into the incident and as a matter of strategy determined not to address the issue" (L.F. 1137). The court also found no prejudice from counsel's failure, because the State presented evidence of an assault of Deputy Schoengert. *Id*.

This Court reviews these findings for clear error. *See* Point I, *supra*, outlining the standard of review in more detail. A review of the entire record leaves the definite and firm impression that a mistake has been made. Counsel acted unreasonably in failing to investigate and Mr. Ervin was prejudiced. *Strickland v. Washington*, 466 U.S. 668 (1984) and *Williams v. Taylor*, 120 S.Ct. 1495, 1511-12 (2000).

Counsel talked to his client and read the police report. Despite both providing the names of witnesses who could rebut the alleged assault of Dietrich, counsel did nothing to rebut the inaccurate allegations.

The failure to investigate and rebut the State's aggravating evidence in penalty phase can render counsel ineffective. *Parker v. Bowersox*, 188 F.3d 923, 929 (8th Cir. 1999), *cert. denied*, 529 U.S.1038 (2000). "The primary duties of counsel at such a proceeding are to neutralize the aggravating circumstances advanced by the state and to present mitigating evidence." *Id*.

Parker's trial counsel failed to rebut the State's aggravating evidence that he murdered the victim, because she was a potential witness in other pending cases. *Id*. The State presented testimony by a prosecutor that other cases involving the murder victim

had been pending against Parker before the murder. *Id*. But Parker's former attorney would have testified that those cases had been resolved before the murder, and that Parker knew this before the murder. *Id*. at 930. The attorney had notified trial counsel about this information, but counsel failed to call her to rebut the State's aggravating evidence. *Id*. The court held that counsel was ineffective, and ordered that Parker receive a new penalty phase. *Id*. at 931.

Similarly, here, as in *Parker*, counsel failed to rebut the State's aggravating evidence that Ervin assaulted Dietrich and threatened to kill him. Counsel did not even investigate the matter by interviewing Dietrich, Pearson or Mitchell. Without any investigation, counsel decided to just let the State put on its evidence, and let the matter "drop." Counsel's performance here is even more deficient than that in Parker, because he did no investigation. "Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy." *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). "[C]ounsel must exercise reasonable diligence to produce exculpatory evidence and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." *Id*.

Mr. Ervin repeatedly wrote to counsel before trial about the jail incident, told counsel that he tried to help Dietrich, and urged counsel to investigate (State's Ex. B at 3; State's Ex. C). Mr. Ervin did all he could. Yet counsel did nothing. He completely failed to act. He could not have made any valid strategic decision, because he failed to investigate. Evidence to rebut the State's claim that Ervin had assaulted Dietrich was readily available through testimony by Dietrich and Pearson. Counsel completely

breached his duty "to neutralize the aggravating circumstances advanced by the state." *Parker v. Bowersox*, 188 F.3d at 929. Counsel was ineffective.

This Court recognizes the importance of counsel rebutting aggravating circumstances. The State must disclose non-statutory aggravating evidence. *State v. Thompson*, 985 S.W.2d 779, 791-93 (Mo. banc 1999). Defendants must be given notice so that they can have an opportunity to rebut the State's claims. *Id*. *See also Gardner v. Florida*, 430 U.S. 349 (1977) (due process requires that the State provide notice of aggravation used in sentencing defendant to death). Mr. Ervin's counsel had notice of the State's aggravating evidence; he simply dropped the ball and did not discover his client's innocence of the assault on Dietrich.

Contrary to the motion court's findings, Mr. Ervin was prejudiced. The jury could not agree on punishment during penalty phase (Ex.56 at 139). If the jury had heard testimony that Mr. Ervin did not assault and threaten to kill Dietrich, but had actually rescued him, the outcome of penalty phase could have been different. Some jurors may very well have erroneously believed that Mr. Ervin should not be sentenced to life in prison, because he would assault or kill other inmates.

This Court should reverse and grant a new penalty phase, or alternatively, impose a sentence of life without probation or parole.

III. Good Conduct in Jail

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective in failing to present evidence of Mr. Ervin's good conduct in jail because Mr. Ervin was denied his rights to effective assistance of counsel, and to present mitigation under the 6th, 8th, and 14th Amendments of the United States Constitution, in that counsel failed to conduct any investigation into Mr. Ervin's behavior in prison and therefore, could not make any reasoned decision about what evidence to present and Mr. Ervin was prejudiced as Deputy Dennis Green would have told the jury that Mr. Ervin was a cooperative inmate who did not cause trouble. This evidence of good behavior in prison was mitigating and would have rebutted the State's portrayal of Mr. Ervin as a violent, dangerous inmate.

Before trial, counsel knew that the State intended to portray Mr. Ervin as a violent, dangerous prisoner (H.Tr.1072-78). Yet counsel did not investigate any of the specific allegations (Pt. II, *supra*) or Mr. Ervin's conduct generally. Had counsel investigated, he would have discovered that Mr. Ervin was cooperative and did not cause problems while in jail -- mitigating evidence under *Skipper v. South Carolina*, 476 U.S. 1(1986).

Deputy Dennis Green, a jailer at Phelps County Jail for two years, had daily contact with Mr. Ervin while he awaited trial (H.Tr.924-26). Green never had a problem with Mr. Ervin (H.Tr.928). He was cooperative and never refused to do anything asked (H.Tr.928-29). However, counsel never talked to Green or any other jailers about Mr. Ervin's behavior (H.Tr.1213).

Despite counsel's total failure to investigate, even when the State revealed its to present bad jail conduct, the motion court found counsel effective (L.F.1123-26). The court found that counsel "did not believe evidence of movant's conduct in jail would have been helpful" (L.F.1125). The court also found no prejudice, since evidence of Mr. Ervin's good conduct while in jail did not disprove the State's evidence of the alleged assault on Schoengert. *Id*. The court's findings are clearly erroneous. *See* Standard of Review under Point I, *supra*.

Counsel has a duty to "thoroughly" investigate mitigating evidence. *Williams v. Taylor*, 120 S.Ct. 1495,1515 (2000). Good conduct while in jail is mitigating. *Skipper v. South Carolina*, *supra*. Indeed, in *Williams*, the Supreme Court criticized counsel for not investigating and presenting such evidence. *Williams*, *supra* at 1514.

Just as in *Williams*, here counsel abdicated his duty to thoroughly investigate all mitigation. Counsel knew that Mr. Ervin's conduct while in jail was going to be an issue. It was incumbent on counsel to present the available evidence that would have portrayed Mr. Ervin in a positive light. Yet, counsel failed to prepare; he interviewed no one. Thus, his decision not to present good conduct behavior "is not protected by the presumption in favor of counsel." *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991).

Further, the motion court's conclusion that Mr. Ervin was not prejudiced, since this mitigation would not have rebutted the State's aggravation is clearly erroneous. The Supreme Court rejected such analysis in *Williams v. Taylor, supra*.

In *Williams*, the State presented much aggravation, showing Williams to be violent. In 1976, Williams was convicted of armed robbery, and six years later, he was convicted of grand larceny. *Id*. at 1500. When he confessed to the murder, he revealed that he also had assaulted two elderly victims after the murder. *Id*. In December 1985, he set a fire outside a house and then attacked and robbed the victim. *Id*. Three months later, Williams brutally assaulted an elderly woman, leaving her in a vegetative state; she was not expected to recover. *Id*. Williams also stole two cars. *Id*. Finally, he set fire in jail, while awaiting trial for the murder. *Id*. Two experts found that Williams would pose a continuing threat to society. *Id*.

Despite all this aggravation, the Court found counsel's failure to present mitigation, including good conduct while in jail, ineffective. The Court rejected the notion that mitigation had to rebut specific aggravators. Indeed, none of the mitigation in Williams' case rebutted the state's evidence that he set a fire in jail. None of the evidence rebutted his prior violent offenses. Nevertheless, the jury might have voted for life had the heard mitigating evidence, independent of the State's case. *Id*. at 1515-16.

Here too, Mr. Ervin was prejudiced by counsel's failure to investigate and present evidence of his good conduct while in jail. The State's evidence of Mr. Ervin's deliberation was not strong. *State v. Ervin*, 979 S.W.2d 149, 167-68 (Mo. banc 1998) (Wolff, J., concurring and dissenting). The jury could not agree upon punishment (Ex. 56 at 139). Had the jury heard that Mr. Ervin was cooperative and had not caused any problems for anyone, there is a reasonable probability that the jury would have sentenced Mr. Ervin to life.

Thus, Mr. Ervin has established counsel's ineffectiveness. This Court should reverse the denial of relief and grant a new penalty phase, or alternatively, impose a sentence of life without probation or parole.

IV. Records and Witnesses Verifying Head Injuries and Seizure Disorder, Resulting Deficits

The motion court clearly erred in overruling Mr. Ervin's claim that counsel was ineffective in failing to investigate and present testimony of Dr. Auner and Counselor Pope and numerous records (Exs. 5-15,17-20) that verified Mr. Ervin's head injuries, seizure disorder and resulting deficits because the failure violated his rights to effective assistance of counsel and to present mitigating evidence, under the 6th, 8th, and 14th Amendments to the United States Constitution, in that counsel failed to investigate prior treating doctors and counselors, and while providing hired experts with records, failed to present the records to the jury. Mr. Ervin was prejudiced because had the jury considered the objective medical evidence, the jury would have likely imposed a life sentence.

Counsel was ineffective in failing to present testimony and records of doctors and counselors who had treated Mr. Ervin prior to the charged offense. Mr. Ervin had an extensive, documented history of prior medical and psychological problems -- particularly, head injuries and a seizure disorder. Although counsel called two post-offense psychologists (Tr.953,986) to testify in penalty phase, counsel called no before-the-offense examiners of Mr. Ervin and presented no records at trial. The prior doctors, counselors and numerous records were readily-available. Such evidence would have corroborated the hired experts, and because the evidence was pre-offense, it would have been particularly compelling and persuasive.

The charged offense occurred on September 1, 1994. Years earlier, Dr. J. David Auner, a board-certified medical doctor practicing in family medicine, treated Mr. Ervin (Ex.5 at 51-52). As a family practitioner, he was trained to deal with mental disorders; he had extensive education in psychology and psychiatry, required for board certification. *Id*. at 51-52. Dr. Auner had practiced since 1982. *Id*. at 5.

Dr. Auner treated Mr. Ervin from 1985 to 1990 for blackouts, seizures, headaches and head trauma. *Id*. at 6-7,10. When he first saw Mr. Ervin, he was taking Dilantin, an anti-seizure medication, and Librium, a tranquilizer for anxiety. *Id*. at 12. During 1986, Mr. Ervin "lost consciousness without warning, and suffered from headaches, and seizures." *Id*. at 15-16. As a result, Dr. Auner increased Mr. Ervin's Dilantin, and eventually prescribed Tegretol for temporal lobe-type seizures. *Id*. at 16-17,19. During an examination in 1986 following a seizure, Mr. Ervin was tangential and unable to answer questions as well as usual. *Id*. at 17.

By 1989, Mr. Ervin had sustained four serious head injuries, two from motor vehicle accidents, one from hitting his head on a rock, and one from falling down stairs. *Id*. at 30. Mr. Ervin's blackouts and memory lapses worsened. *Id*. at 23. He suffered additional seizures, with one episode of incontinence in the bowel and bladder. *Id*. at 25,31. Dr. Auner continued to raise the Dilantin level, because Mr. Ervin continued to have blackouts and seizures. *Id*. at 27-28. He suffered from memory loss and confusion, and was disoriented on a mental status examination. *Id*. at 29,32. Not surprisingly, Mr. Ervin suffered from chronic anxiety, for which Dr. Auner prescribed Buspar. *Id*. at 26-27.

In 1990, Dr. Auner recognized Mr. Ervin had a problem with drinking; this made his seizures more likely and worse. *Id*. at 35. Dr. Auner continued Mr. Ervin on Dilantin and Tegretol. *Id*. at 36. In March 1990, Mr. Ervin suffered from an altered mental state and amnesia for several hours after a seizure episode. *Id*. at 41-42. In April 1990, Mr. Ervin suffered from absence seizures, a form of temporal lobe seizures during which he experienced blackouts. *Id*. at 43. Mr. Ervin's blackouts continued, in July 1990 and in October 1990. *Id*. at 45. As a result of his seizure disorder, Mr. Ervin was out of touch with reality a lot of the time. *Id*. at 48. The seizures caused memory lapses. *Id*. at 48.

Similarly, Mr. Ervin's pre-offense counselor, Douglas Pope, treated Mr. Ervin during 1989 and 1990 (H.Tr.951-53). Mr. Ervin knew that he was having problems and wanted help. *Id*. During counseling sessions, Pope observed Mr. Ervin would lose his train of thought and go off on other thoughts in mid-sentence (H.Tr.963,966-67). Pope observed him staring off into space as if he had trouble concentrating. *Id*. These symptoms were consistent with the absence seizures Mr. Ervin suffered (H.Tr.965).

Cardinal Glennon Children's Hospital Records showed that Mr. Ervin suffered dizzy spells, headaches and hallucinations as an 11 and 12 year old (Ex.9 at 1, 3, 8). Psychological testing done at age 12 suggested a neurological learning disorder. *Id*. at 15.

Vocational Rehabilitation records showed that Dr. Gomez of St. Louis University Hospital treated Mr. Ervin for seizures in 1990; Ervin blacked out and could not remember what he had been doing for periods of time (Ex.8 at 25,31). In 1991, psychologist Peggy Goldfader conducted neuropsychological testing. *Id*. at 36-44. The

testing revealed Ervin's cerebral dysfunction. *Id*. at 38. Mr. Ervin had difficulty in tasks requiring discrimination of verbal auditory stimuli, maintaining attention, and visual memory. *Id*. at 38-39. He had particular difficulty with complex psychomotor speed and visual-spatial analysis. *Id*. at 42. In May 1994, Mr. Ervin's memory loss and seizures continued. *Id*. at 1, 8.

St. Louis County Health and St. Anthony's Medical Center records verified Mr. Ervin's seizure disorder (Ex.10 at 1;Ex. 11,13 at 1 and 3). So too did Arcadia Valley Hospital records. These records confirmed Mr. Ervin's head injury from a car accident in 1985 (Ex.12 at 6-7). He was treated for seizures in 1990. *Id*. Most significantly, hospital personnel witnessed Mr. Ervin having a grand mal seizure in the lobby of the hospital. *Id*. at 12.

Finally, 1985 records from Dr. Steven Mellies, D.O., documented Mr. Ervin's problems (Ex.14). He had headaches, suffered black out spells and seizures (Ex. 15 at 2-3).

Counsel obtained most of Mr. Ervin's records, but did not present them in penalty phase because he thought that the two psychologists retained for the case covered the same information (H.Tr.1062-65,1195-1201).

Trial counsel contacted Dr. Auner and obtained Mr. Ervin's medical records, but did not interview Dr. Auner about the records or Mr. Ervin's medical problems (H.Tr.1028,1068,Ex.5 at 49-50). Counsel did not consider calling Dr. Auner as a witness because he did not believe the doctor had the necessary expertise to testify (H.Tr.1069).

Counsel thought he interviewed Counselor Pope, but felt that Pope was not qualified to be a witness (H.Tr.1070-71). Pope disputed counsel's assertion, saying he was never interviewed before trial (H.Tr.970).

The motion court found that counsel did obtain the records documenting Mr. Ervin's medical problems and provided them to the experts who evaluated Mr. Ervin before trial (L.F.1130-32). The court concluded that Pope was not qualified as an expert, so counsel was not ineffective for failing to call him (L.F.1132). Nor would his report have been admissible (L.F.1132-33). The Court found that evidence of Mr. Ervin's medical history was presented through Dr. Leonberger's testimony during penalty phase (L.F.1133, citing Tr.957-62).

This Court reviews these findings and conclusions for clear error. *See* standard of review outlined in Point I, *supra*. Counsel had a duty to thoroughly investigate and present mitigating evidence. *Williams v. Taylor*, 120 S.Ct. 1495, 1515 (2000). A thorough investigation is critical, because the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). In *Eddings*, the trial court refused to consider testimony by a juvenile officer about the defendant's background. *Eddings, supra* at 107,109 and 113-15. The refusal was reversible error. *Id*. at 113-15. Background evidence must be considered by the sentencer. *Id*. at 114-15.

In *Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991), counsel was ineffective for failing to present in penalty phase prior social, medical and psychological records of the defendant, a prior doctor of the defendant, and a prior social worker. Evidence of mental conditions, disorders and disturbances not rising to the level of legal insanity are precisely the kinds of facts which may be considered by a jury as mitigating evidence. *Id*. at 1307. Defense counsel is obligated to discover and present all substantial, available mitigating evidence. *Id*. at 1304.

Similarly, in *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), trial counsel was ineffective for failing to adequately prepare and present mitigation evidence. There, the defendant killed a police officer, while helping his older brother escape from jail. *Id*. at 1205. Counsel had requested a court-appointed examination, but requested no testing for organic brain damage. *Id*. at 1209-10. Available evidence, that was not presented at trial, included school records, evidence of physical abuse, evidence of the defendant's hyperactivity as a child, and a neurological examination that showed global brain damage probably caused by general anesthesia given mother early in pregnancy. *Id*. at 1208-10. The Court recognized the importance of well-documented, objective medical records and testimony. "While juries tend to distrust claims of insanity, they are more likely to react sympathetically when their attention is drawn to organic brain problems . . ." *Id*. at 1211. *See, also, Parkus v. Delo*, 33 F.3d 933, 936 (8th Cir. 1994) (organic personality disorder is a mental disease or defect under Missouri law).

Counsel failed to interview Dr. Auner. Without such an interview, he could not make a reasonable decision about whether he should call him. Indeed, Dr. Auner was a

board certified medical doctor with almost twenty years experience in family medicine (Ex. 5 at 5 and 51-52). He had training in mental disorders. *Id*. Dr. Auner treated Mr. Ervin for five years for his seizure disorder, a medical condition that causes severe deficits. Dr. Auner would have been particularly persuasive to the jury for his medical expertise; medical doctors carry greater status and authority than do psychologists in the eyes of many jurors, especially on medical topics. *See Tate*, *supra*.

Furthermore, since Dr. Auner treated Mr. Ervin long before the charged offense, Dr. Auner's diagnosis of Mr. Ervin would be more persuasive and compelling to jurors than experts hired for the criminal case, who examined him only after the offense and who were being paid for their testimony. *See*, Sunby, "The Jury As Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony," 83 *Va. L. Rev*. 1109, 1122-39, 1145-46 (1997) (jurors negatively view defense experts as "hired guns who are being paid for their opinion," as opposed to experts who have treated the defendant before the crime, as they are not paid and their testimony derives from their own experience with the defendant).

The motion court's conclusion that Pope could not have been a witness is clearly erroneous. At a minimum, Pope could have testified to his observations of Mr. Ervin, such as his staring off into space, and losing thought in mid-sentence. In this sense, Pope is no different than any other lay witness. Pope's expertise was not the important factor in Mr. Ervin's case, rather Pope's observations of Mr. Ervin before the offense was critical. The jury could not have been precluded from hearing Pope's testimony, especially in penalty phase. *See Eddings v. Oklahoma*, 455 U.S. at 110 and 113-15.

Pope's testimony would have provided corroboration that Mr. Ervin suffered from a serious mental disorder. The testimony also would have established that Mr. Ervin was trying to get help for his problems.

Counsel did obtain many records documenting Mr. Ervin's head injuries, seizure disorder and resulting deficits (Ex.J). Counsel's decision not to use the records, however, was unreasonable and unsound. Even when counsel makes decisions on trial strategy after preparation and investigation, counsel's choice of strategy must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo. App., S.D. 1994). The psychologists called at trial were retained solely for the criminal case and, thus, evaluated Mr. Ervin only after the offense. As experts retained by the defense, they undoubtedly were viewed with suspicion by jurors. In contrast, Mr. Ervin's pre-offense records would have provided vital corroboration and credibility to the psychologists' testimony. *Glenn v. Tate, supra*.

Mr. Ervin was prejudiced. This was a close case on the issue of deliberation. *See State v. Ervin*, 979 S.W.2d 149, 167-68 (Mo. banc 1998) (Wolff, J., concurring and dissenting). If the jury had considered the testimony and records showing that Mr. Ervin had head injuries and a history of seizures, the jury likely would have given life. Without this evidence, the jury could not agree on punishment (Ex.56 at 139). With the evidence, the jury would have had evidentiary support for the submitted statutory mitigating circumstance that his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (Ex.56 at 131). The evidence also would have supported submission of the additional statutory mitigating

circumstance that Mr. Ervin acted under the influence of extreme mental or emotional disturbance and most importantly would have provided substantial non-statutory mitigation.

Therefore, this Court should reverse the denial of relief and grant a new penalty phase. Alternatively, this Court should impose a sentence of life without probation or parole.

V. Mr. Ervin's Seizure Disorder

The motion court clearly erred in overruling Mr. Ervin's claim that counsel was ineffective in failing to investigate and present testimony of a qualified psychiatrist, such as Dr. Bruce Harry, M.D., because the failure violated his rights to due process, to effective assistance of counsel and to present mitigating evidence, under the 6th, 8th, and 14th Amendments to the United States Constitution, in that Mr. Ervin had a history of head injuries, suffered from a seizure disorder, a cognitive disorder, alcohol addiction, was highly suggestible, and was affected by his childhood without a father and a mentally ill mother who was often absent, and as a result, Mr. Ervin was not competent to stand trial, was not able to give a knowing, voluntary and intelligent statement to the police, was unable to deliberate, and was under the influence of extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct and to conform it to the requirements of law was substantially impaired.

During the penalty phase of trial, the defense called two psychologists (Tr.953-85,986-95). Dr. Leonberger testified that Mr. Ervin suffered from seizures, but did not explain what impact the seizures had on Mr. Ervin (Tr.959-61,978-82). He diagnosed Mr. Ervin with a cognitive disorder, n.o.s. (not otherwise specified), depressive disorder and anxiety disorder (Tr.966). Dr. Armour opined that Mr. Ervin was competent to stand trial, even though he acknowledged Mr. Ervin's brain impairment and seizure disorder

(Tr.989,993-94). Like Dr. Leonberger, Dr. Armour never explained Mr. Ervin's seizure disorder or what effect it had on him. *Id*.

A qualified medical doctor, such as Dr. Bruce Harry, could have explained seizures and what effect they had on Mr. Ervin. However, counsel never consulted or called such an expert and never elicited the helpful information from the experts who did testify.

Dr. Harry's examination of Mr. Ervin was extensive, he saw Mr. Ervin on six different occasions to obtain an adequate cross-section and representative sample of his behavior and demeanor (H.Tr.181). During his evaluation, Dr. Harry witnessed Mr. Ervin having petit mal or complex partial seizures (H.Tr.215-16,219-20). He had a total of six seizures in a 1 1/2 hour period (H.Tr.219-20).

Dr. Harry explained that one suffering from complex partial seizures suddenly loses awareness of what is going on around them and are unable to do anything at that moment (H.Tr.217). The patient cannot process what is going on around him and is in a fog or haze (H.Tr.217-18). Dr. Harry's observations were consistent with Mr. Ervin's medical history that documented the seizures (H.Tr.185-196,199-206;Exs.5,7,8,9,10-15,17-20). At age six, Mr. Ervin had dizzy spells (H.Tr.200,Ex.9). By age eleven years, he suffered from hallucinations, spells, motor incoordination, and migraines (H.Tr.199-200). Voices told him they would kill him. *Id*. Mr. Ervin had several head injuries, including two auto accidents and a blow in the St. Louis County Jail that resulted in a loss of consciousness (H.Tr.202-03). In 1990, hospital personnel witnessed Mr. Ervin having grand mal seizures in the lobby while he was waiting for lab work (H.Tr.203-05,Ex.12).

Dr. Harry conducted a mental status exam and numerous tests to examine Mr. Ervin's memory function, attention and concentration skills, verbal intelligence, ability to learn new information, and acquiescence to authority (H.Tr.206-214). Because of Mr. Ervin's neurological deficits, his brain synthesizes information not provided (H.Tr.230-31). He was often confused and could not discriminate between logical opposites (H.Tr.233-35). Dr. Harry concluded that Mr. Ervin suffered from a seizure disorder and a cognitive disorder, n.o.s. (H.Tr.184,237-40). As a consequence, his ability to think, reason, decide, and make cognitive decisions involving learning and memory were impaired (H.Tr.241). Mr. Ervin gets confused with new information (H.Tr.241-42). Learning is difficult. *Id.*

Mr. Ervin was not competent to stand trial (H.Tr.323-24,325-27). He was unable to follow what was going on at trial and aid and assist his attorney (H.Tr.242-43). Mr. Ervin could not intelligently waive his *Miranda* rights (H.Tr.330-34). He had a mental defect under Section 552 that showed brain injury and impairment (H.Tr.350-53). Thus, he could not deliberate. Drinking alcohol would further exacerbate his problems (H.Tr.334-40). Finally, he suffered from an extreme mental or emotional disturbance, and his capacity to appreciate the criminality of his conduct and conform to the requirements of the law was substantially impaired (H.Tr.340).

The motion court rejected Mr. Ervin's claim that counsel was ineffective for not consulting and calling a qualified medical doctor, such as Dr. Harry, to evaluate Mr. Ervin and to explain his brain dysfunction and the effects on him (L.F.1099-1109). The court found Dr. Harry unpersuasive because he gave no weight to Mr. Ervin's testimony

that he was not drinking (L.F.1107). Since voluntary intoxication is not a defense, the court found it made no difference if he was under the influence of alcohol. *Id*. The court discounted Dr. Harry's observations of seizures, because no evidence established what medications Mr. Ervin was taking when Dr. Harry evaluated him (L.F.1108). Since the court did not witness seizures, it disregarded the conclusion that Mr. Ervin suffered from them. *Id*. Finally, the court found that counsel need not shop for a move favorable expert, and nothing requires counsel to hire a medical doctor. *Id*.

These findings are clearly erroneous. *See* Point I, *supra*. First, the motion court's conclusion that alcohol intoxication makes no difference is plain wrong, it is contrary to *Parker v. Dugger*, 498 U.S. 308, 314-16 (1991) finding such evidence compelling mitigation. Dr. Harry recognized that Mr. Ervin downplayed his drinking, but looked at evidence, independent of the patient (H.Tr.339-43). *See* Point VII., *infra*.

The court's suggestion that Mr. Ervin did not suffer from a seizure disorder is unsupported by the extensive record in this case. Mr. Ervin's seizures were treated since childhood. Trained medical personnel at a hospital observed the seizures. His family saw the seizures and had to carry a spoon in their pockets to prevent him from choking (*See* Point I, *supra*). Trained neurologists treated Mr. Ervin. He took anti-seizure medication for years before the offense. Mr. Ervin need not have a grand mal seizure in the courtroom in order to suffer from this disorder.

Mr. Ervin's seizure disorder and cognitive disorder were severe impairments that impacted his ability to stand trial. Counsel had a duty to investigate Mr. Ervin's competency and bring his deficits to the court's attention. *State v. Tilden*, 988 S.W.2d

568, 578-9 (Mo. App., W.D. 1999). *See also Hull v. Kyler*, 190 F.3d 88 (3rd Cir. 1999) (counsel ineffective in murder case for failing to challenge competence to stand trial where client had history of mental retardation and schizophrenia). To try, convict and sentence an incompetent defendant violates due process. *Pate v. Robinson*, 383 U.S. 375 (1966). That Mr. Ervin was oriented to time and place and had some recollection of events was insufficient. *Tilden, supra* at 574. Rather, he must be able to consult with his lawyer with a reasonable degree of rational understanding and factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402, 403 (1960).

Due to his deficits, Mr. Ervin was not competent. His seizures caused him to miss critical parts of the trial (H.Tr.323-24). He could not communicate with and assist counsel, since he was confused and unable to discriminate between logically inconsistent statements in a reliable way (H.Tr. 323-25). Mr. Ervin reacted to his deficits with anger (Tr. 638-39,929,930-34). He was frustrated that he could not understand the proceedings and became loud and disruptive. *Id*. Finally, he just gave up and left the courtroom (Tr.950).

Counsel also was ineffective in his handling of a motion to suppress. *Kimmelman v. Morrison*, 477 U.S. 365, 374-75 (1986) (where defense counsel's failure to litigate a Fourth Amendment claim competently, defendant must prove that the claim is meritorious and that there is a reasonable probability that the outcome would have been different absent the excludable evidence).

Mr. Ervin could not intelligently waive his Miranda rights (H.Tr. 330). His mental problems affected his memory, he could not keep information separate and information

bled together (H.Tr.330-31). He could not distinguish between logically opposite questions (H.Tr.333). Yet counsel presented none of the mental impairments in support of his motion to suppress (S.Tr.3-45).

Mr. Ervin was prejudiced as his statement was critical to the State's case. Without the statement, the only incriminating evidence against Mr. Ervin was House's testimony implicating him (Tr.562-615). However, House was severely impeached, having drank up to 2 and ½ pints of vodka just before the offense occurred (Tr.588-612).

Counsel also had a duty to investigate and present Mr. Ervin's mental disorders and their impact on him in both guilt and penalty phases. *See Bean v. Calderon*, 163 F.3d 1073 (9th Cir. 1988), *cert. denied* 120 S.Ct. 285 (1999) (finding counsel ineffective in sentencing phase of double murder trial for failing to prepare and present mitigation evidence, including the presentation of neuropsychological impairment, a diagnosis of Post Traumatic Stress Disorder, and the influence of drugs on petitioner's mental functioning); and *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999) (finding counsel ineffective in murder and armed robbery case in trial and sentencing phases but prejudiced only in sentencing because of counsel's failure to investigate and present compelling evidence regarding petitioner's mental state at the time of the crime and abusive parents and traumatic upbringing).

While counsel did elicit some evidence of Mr. Ervin's mental problems in penalty phase (Tr.953-95), neither expert explained what a seizure or cognitive disorder was, let alone how it impacted Mr. Ervin. This was critical, both in guilt and penalty phases. Mr.

Ervin's deficits would have explained his irrational behavior on the night of the offense, shown he could not deliberate, and would have mitigated his culpability.

Finally, the court's conclusion that Mr. Ervin need not shop for a more favorable expert misses the point of Mr. Ervin's claim of ineffectiveness. Mr. Ervin's claim was not that counsel should have shopped for a more favorable expert than Drs. Leonberger and Armour; rather it was that counsel should have hired the appropriate expert to elicit relevant mitigating evidence. *See*, *In re Brett*, 16 P.3d 601(Wash. banc 2001) (where counsel hired a psychologist, but failed to consult and present expert testimony regarding fetal alcohol syndrome and diabetes and its impact on Brett, counsel was ineffective and death sentence vacated). As in *Brett*, here, counsel failed to consult with an expert that could talk about all of Mr. Ervin's impairments and explain why they mitigated his culpability. Simply hiring some expert does not make counsel effective. *Id*

Mr. Ervin had severe impairments. He was not competent to stand trial. Counsel was ineffective in failing to contest the finding of competence, in failing to present evidence to support his motion to suppress, and in failing to present this evidence in both guilt and penalty phases. A new trial should result.

VI. Mr. Ervin's Medication While In Jail

The motion court clearly erred in overruling Mr. Ervin's claim that counsel was ineffective in failing to investigate and to object to his improper medication before and during trial because the failure violated his rights to due process, a fair trial, effective assistance of counsel and to reliable sentencing, under the 6th, 8th, and 14th Amendments to the United States Constitution, in that counsel failed to conduct any investigation into the medication Mr. Ervin was taking before and during trial and the psychotropic drugs had significant sedative effects, aggravated Mr. Ervin's seizure disorder, and caused aggression, hostility and paranoid behavior. Mr. Ervin was prejudiced as he could not follow the proceedings, communicate with counsel, testify rationally on his own behalf, and appeared bizarre, disruptive, unremorseful and uncompassionate – all of which led to his conviction and sentence of death.

Before trial, Mr. Ervin was prescribed and given many medications, including psychotropic drugs (Exs. 26,27,28,29, H.Tr. 178-80,243). In January, 1996, he was taking Dilantin, Tegretol, Valium, Dalmane, Elavil, Paxil, Mellaril, Relafen, Soma, Fluvastatin, Procardia, Desyrel, Tenorim, Inderal, and Ativan (Ex.28). During trial in March, 1997, he was taking these same drugs, with the addition of Nitrostat, and the absence of Mellaril (Ex.29). Dilantin and Tegretol were anti-seizure medications, but Mr. Ervin's blood levels showed that he was not receiving sufficient amounts to control

his seizures (H.Tr. 244-63,472). Other psychotropic medications included Mellaril, Valium, Dalmane, Elavil and Paxil (H.Tr. 272).

The side effects of all these drugs were significant. Paxil, an antidepressant can cause hostility, paranoid reactions, and bizarre behavior (H.Tr. 271,478-79). It can also cause sleepiness, dizziness, insomnia, tremors, nervousness, amnesia, impaired concentration, depression, emotional lability, abnormal thinking, staggering and convulsions (H.Tr. 270-71). Significantly, at the time of the jail assault, Mr. Ervin was receiving 60 mgs. of Paxil, the highest dosage recommended (H.Tr. 271,273,478). His aggressiveness was consistent with the side effects for such a high dosage. *Id.*

Jailers continued to give Mr. Ervin Elavil during his trial, even though his physician had discontinued it; it was contraindicated (H.Tr. 283-84). The side effects of Elavil include seizures, hallucinations, delusions, confusion, disorientation, incoordination, ataxia (stumbling and fumbling), tremors, anxiety, insomnia, restlessness and nightmares (H.Tr. 285-86). Doctors do not recommend that Elavil be taken by a patient with a seizure disorder (H.Tr. 477, 485). Nevertheless, jailers continued to give this drug to Mr. Ervin, contrary to his doctor's orders (H.Tr. 283-84).

Both Valium and Mellaril also had signficiant side effects (H.Tr. 285-87). The drugs cause sedation and lack of coordination. *Id*. The patient will appear dull, tired, not alert and inattentive (H.Tr. 287). Mr. Ervin's dosage of 30 mg. of Valium was very high, the highest clinical dose allowed (H.Tr. 287,474-75).

Procardia is a calcium channel blocker, that can make a patient dizzy and weak (H.Tr. 480,487-88). Physicians rarely prescribe Dalmane, given to Mr. Ervin as a

sleeping pill (H.Tr. 484). It had a half-life and continued to work in the day, causing drowsiness and wobbling, making the patient appear drunk (H.Tr. 484). Similarly, Soma, a muscle relaxant and tranquilizer, would help the patient sleep, but if taken at bedtime most of the effects would be gone by the morning (H.Tr. 486-87).

Together, these medications would have a significant sedative effect on Mr. Ervin (H.Tr. 489). They would cloud his sensorium, lessen his awareness of his surroundings and decrease his ability to think clearly (H.Tr. 489-90). They would severely depress his central nervous system (H.Tr. 490). With such substantial dosages of Valium and the impairing potential of Elavil for one suffering from seizures, the drugs would cause serious impairment and sedation (H.Tr. 490). The end result was a depressed ability of Mr. Ervin's brain to function (H.Tr. 491). Mr. Ervin would appear confused. *Id.* The medication would severely impair his ability to participate and follow the proceedings at trial (H.Tr. 491).

During trial, Mr. Ervin was confused and frustrated (H.Tr. 291). He could not think or concentrate (H.Tr. 291). He missed parts of the testimony (H.Tr. 291-92). This made him agitated and he became loud (H.Tr. 289, 291; Tr.638-39). The court admonished him to talk to his attorney in an appropriate manner; he was intruding on the jury's ability to listen. *Id*. The court instructed him not to continue to lean over and speak aloud to his attorney. *Id*. Later, when Mr. Ervin testified he rambled, was unresponsive and went off on tangents (Tr.797-98,810,819-20,865-66). Mr. Ervin's own attorney showed his frustration, cutting Mr. Ervin off and saying "all right . . . all right . . ." (Tr.798). The court too expressed its displeasure, finally instructing Mr. Ervin to just

answer the questions and to quit giving speeches (Tr.867-68). Exasperated, the trial judge said, "let's just get through this." *Id*. The prosecutor characterized Mr. Ervin's testimony as "bizarre" (Tr.875).

During penalty phase, problems with Mr. Ervin's behavior continued (Tr.929-35). The court again admonished Mr. Ervin for talking loud and being disruptive (Tr.929). Both the trial judge and counsel recognized Mr. Ervin's agitation (Tr.930-31,933-34). The more he vented, the more agitated he became (Tr.933-34). Mr. Ervin left the courtroom and was not present for the majority of the penalty phase (Tr.935). The court told the jury that leaving the courtroom was Mr. Ervin's choice (Tr.950).

The prosecutor used Mr. Ervin's demeanor against him, arguing that while his attorney made an impassioned plea and almost came to tears, Mr. Ervin showed no emotion while testifying (Tr.1003). He described Mr. Ervin as arrogant and mean (Tr.1003). The jury could not agree upon punishment (Ex.56,at 139).

At sentencing, Mr. Ervin's behavioral problems continued (S.Tr.54-58). Again, he rambled (S.Tr.55-58). Then the court sentenced him to death (S.Tr.58). The court did not examine Mr. Ervin under Rule 29.07 due to his outburst (S.Tr.59).

Defense counsel admitted that he did not get Mr. Ervin's jail records, did not review the drugs that he was taking, and did not talk to any jailers regarding Mr. Ervin's behavior while in jail (H.Tr. 1030-34,1044-46,1059). He observed Mr. Ervin going off on tangents and focusing on minor, irrelevant issues (H.Tr. 288-89,1014). However, counsel said he had no trouble communicating with Mr. Ervin (H.Tr. 1015). Yet counsel recognized Mr. Ervin had trouble expressing himself and went off on tangents (H.Tr.

1015-18). Counsel suspected something was wrong with him (H.Tr. 1019). He relied on Mr. Ervin to inform him of his problems with medication (H.Tr. 1031).

The motion court rejected Mr. Ervin's claim that counsel was ineffective in failing to object to Mr. Ervin's improper medication and that the drugging violated his rights to due process, a fair trial, and to be properly sentenced under the 6th, 8th and 14th Amendments (L.F. 1120-21). The motion court concluded that this claim was a competency issue and should have been raised on direct appeal (L.F. 1120). Secondly, no evidence put counsel on notice that Mr. Ervin was incompetent (L.F. 1121). Finally, no evidence showed that Mr. Ervin was forcibly medicated. *Id*. This Court reviews these findings and conclusions for clear error. *See* standard of review outlined in Point I, *supra*.

To try, convict and sentence an incompetent defendant violates due process. *Pate v. Robinson*, 383 U.S. 375 (1966). The claim can be raised after trial, in a postconviction action, and on the postconviction appeal. *See, e.g., State v. Tilden,* 988 S.W.2d 568 (Mo.App,W.D.1999). Indeed, counsel can be ineffective for failing to challenge the client's competence to stand trial. *Hull v. Kyler*, 190 F.3d 88 (3rd Cir.1999). In Missouri, claims of ineffective assistance of counsel cannot be raised on direct appeal, but must be raised in a postconviction action. *State v. Wheat*, 795 S.W.2d 155, 157-58 (Mo. banc 1988).

Contrary to the Court's finding, counsel was on notice of Mr. Ervin's medication (H.Tr. 1031). He simply failed to investigate what medications Mr. Ervin was taking and what effects the drugs had on him (H.Tr. 1030-34, 1044-46, 1059). Without the jail

records, counsel did not know that jailers were giving Mr. Ervin Elavil, even though his doctor had discontinued the prescription. Without any investigation, counsel did not know that Elavil was contraindicated with a patient such as Mr. Ervin, who suffered from a seizure disorder. Without any investigation, counsel had no idea that Mr. Ervin was receiving the highest clinical dosage of Valium or its sedative effects. Without investigating, counsel could not review (or have an expert review) Mr. Ervin's blood levels, showing his anti-seizure medication was below therapeutic levels – making it likely that he would have a seizure. Without any investigation, counsel could not know that at the time of the jail assault, Mr. Ervin was receiving the highest dosage of Paxil allowed, which would likely account for his paranoid and hostile reaction to being sprayed with mace.

Because of counsel's failure to investigate, he did not object to the State's improper medication of Mr. Ervin. Had he objected, Mr. Ervin's protected liberty interest under the 14th Amendment in avoiding involuntary administration of antipsychotic drugs would have been protected. *Riggins v. Nevada*, 504 U.S. 127, 134 (1992). To justify medication, the State must establish: 1) no less intrusive alternatives are available; 2) the medication is medically appropriate; and 3) the drugs are essential for the defendant's safety and the safety of others. *Id*. at 128. The side effects of antipsychotic drugs can be substantial, affecting the defendant's outside appearance, 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 discussed the constitutional implications of the State's medicating a defendant during pretrial proceedings and the trial itself. *Id*. at 139-45 (J.Kennedy, concurring). In essence, medicating a defendant interferes with the trial itself. *Id*. To convict an incompetent defendant violates due process. *Id*. Medication affects not only competency, but the right to effective assistance of counsel, the right to summon and confront witnesses, the right to testify and the right to remain silent. *Riggins*, *supra* at 139-40. Thus, the State must show that there is no significant risk that medication will impair, or alter in any material way, a defendant's ability to react to testimony or assist counsel. *Id*. at 141.

The side effects of antipsychotic drugs can compromise the right to a fair trial by altering a defendant's demeanor in a way that will prejudice his reactions and presentation in the courtroom. The effects can render him unable or unwilling to assist counsel. *Id*. at 142. It impacts his right to be present and testify. *Id*. Demeanor has a great bearing on credibility, persuasiveness and degree upon which he evokes sympathy. *Id*. It impacts the defendant's right to confrontation. *Id*. Demeanor may prejudice all aspects of the defense, thus medication raises serious due process concerns. *Id*.

For example, Mellaril can create a prejudicial negative demeanor, making a defendant appear nervous and restless or so calm or sedated as to appear bored, unfeeling and unresponsive. *Id* at 143. It can impact a defendant's capacity to react and respond to the proceeding and to demonstrate remorse or compassion. *Id*. at 143-44. Significantly, "in capital sentencing proceedings, the assessment of character and remorse may carry

great weight and perhaps, be determinative of whether the offender lives or dies." *Id*. at 144 (citation omitted).

All of Justice Kennedy's concerns applied to Mr. Ervin. He could not react to testimony or assist his attorney. He was frustrated because he could not follow along, and became loud and disruptive. When he testified, he rambled and went off on tangents. His rambling was so bad that the court finally intervened and admonished him. The prosecutor made fun of him, calling his testimony bizarre and urged jurors to sentence him to death based on his demeanor – his failure to show remorse or compassion when testifying.

Had counsel objected to the improper medication, the State could not have met the requirements in *Riggins*. Mr. Ervin's medication was not medically appropriate, indeed it was contrary to his own doctor's prescription and to what is clinically recognized as appropriate. Nothing suggested, all this medication, especially all the sedatives, were essential to Mr. Ervin's safety or the safety to others. Indeed, some of the medication, Paxil, was counterproductive, as it caused aggressiveness.

Counsel failed to investigate and object to the improper medication of Mr. Ervin before and during trial. His failure prejudiced Mr. Ervin. It denied him his rights to due process and a fair trial. He was improperly sentenced to death as a result. Therefore, this Court should reverse and remand for a new trial.

VII. Mr. Ervin's Drinking Was Mitigating Evidence

The motion court clearly erred in overruling Mr. Ervin's claim that counsel was ineffective in failing to investigate and present evidence of Mr. Ervin's intoxication on the night of the offense because the failure violated his rights to effective assistance of counsel and to present mitigating evidence, under the 6th, 8th, and 14th Amendments to the United States Constitution, in that counsel failed to investigate a coparticipant's statement that Mr. Ervin had been drinking and police officers saw all the beer cans in Mr. Ervin's car. Mr. Ervin was prejudiced as the evidence of intoxication would have provided mitigating evidence that would have supported a life sentence.

On the evening before Mr. White's death, Mr. Ervin and his three friends (House, McAllister and Cook) bought a lot of liquor, beer, vodka, and Mogan David to drink (Tr.804-08). McAllister admitted to the police that Mr. Ervin and the others were all drinking prior to the incident (Ex.33,at 2). They all were drinking and McAllister was drunk, he was "pretty toasted." *Id*. at 39. When pressed for amounts, McAllister acknowledged that Mr. Ervin had been drinking quite a bit that night. *Id*. He reiterated Mr. Ervin's drinking at the preliminary hearing (Ex.57,at 139).

Despite having McAllister's report and his testimony, counsel did not investigate Mr. Ervin's drinking. He did not elicit evidence of Mr. Ervin's intoxication from the officer on the scene, Deputy Umphleet (Tr.409-43). He did not talk to other officers, such as Sheriff Barton, who verified that there were empty beer cans inside Mr. Ervin's

car (H.Tr. 894,896). However, no one told the jury that Mr. Ervin was drinking prior to the offense.

The motion court rejected the claim that counsel was ineffective for failing to investigate and present evidence of Mr. Ervin's intoxication (L.F.107-08,1122-23). The court found that the record refuted the claim, since Mr. Ervin told both Drs. Courtois and Leonberger that he was not drinking (L.F.1122). He made a similar report to counsel. *Id*. The court concluded that voluntary intoxication was not admissible to prove that Mr. Ervin did not have the requisite mental state. *Id*. Additionally, since Mr. Ervin failed to call Deputy Umphleet who died before the hearing, he did not prove his claim. *Id*. at 1123.

This Court reviews these findings and conclusions for clear error. *See* standard of review outlined in Point I, *supra*. Counsel has a duty to thoroughly investigate all mitigating evidence. *Williams v. Taylor*, 120 S.Ct. 1495 (2000). Evidence that a defendant is intoxicated at the time of the offense is relevant, mitigating evidence. *Parker v. Dugger*, 498 U.S. 308, 314, 315, 316 (1991).

In *Parker*, *supra*, the Court found that evidence that a defendant was under the influence of large amounts of alcohol and drugs during the murders of three victims was nonstatutory mitigation that the sentencer must consider in deciding whether to impose life or death. *Id*. at 314. Indeed, it is the type of evidence sufficient to preclude a judge from overriding the jury's recommendation of life. *Id*. at 315, citing *Norris v. State*, 429 So.2d 688, 690 (1983) (19 year old who suffered from drug abuse problem and who

claimed to be intoxicated at the time of crime, had sufficient mitigation to preclude death sentence by trial judge).

Here, too, evidence suggested that Mr. Ervin was intoxicated when he argued with and then killed Mr. White. He had bought a 12-pack of beer and Sheriff Barton saw the empty cans in his car when he investigated the scene (H.Tr.894-896). His friend, McAllister, revealed that he had drank quite a bit that evening (Ex.33 at 2, 39; Ex.57 at 139). McAllister's statement made on the morning of the offense, as well as his preliminary hearing testimony, put counsel on notice of this mitigating evidence. Yet counsel did nothing to investigate this claim, other than talk to Mr. Ervin himself, who suffered from head injuries and a seizure disorder that caused memory problems. Alcoholics typically underreport their drinking (H.Tr.335). Ervin was not a reliable source of information. His medical records showed a history of alcohol abuse. Point V, *supra*. Family members knew Ervin drank alcohol. Point. I, *supra*..

Counsel had a duty to fully investigate, independent of his client. *People v. Perez*, 592 N.E.2d 984 (Ill. 1992). In *Perez*, counsel was ineffective in failing to investigate and provide evidence in mitigation. His client was difficult and uncooperative. *Id*. at 986-87. This did not excuse counsel's failure to discover mitigating circumstances. *Id*. at 993-94. The failure to interview witnesses or discover helpful evidence relates to trial preparation, not trial strategy, and is not justified. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991).

Thus, even though Mr. Ervin downplayed his drinking, both to counsel and to experts, counsel had a duty to look at the objective evidence from officers at the scene

and eyewitnesses, to discover the truth. He had been drinking quite a bit and like *Norris*, the evidence that Mr. Ervin intended to kill Mr. White was weak. Ervin pulled his friend from the burning trailer, only to later hit him with a brick. *State v. Ervin*, 979 S.W.2d 149, 152-53 (Mo. banc 1998).

The motion court's conclusion that Mr. Ervin failed to prove this claim since Deputy Umphleet had died in October, 1999, before the evidentiary hearing is clearly erroneous. While Mr. Ervin listed the Deputy as a supporting witness of this claim, he had no control over the deputy's untimely death. He did what he could, introducing the testimony of Sheriff Barton, who supervised Deputy Umphleet and the crime scene investigation (H.Tr.882-94) and the statements taken by the officers immediately after the offense (Ex.33).

Mr. Ervin was prejudiced by counsel's failure to present evidence of his intoxication. Evidence that he deliberated was weak. The jury could not agree upon punishment. Had the jury heard that he had been drinking when he argued with Mr. White and pulled him out of the burning trailer, the jury may well have sentenced him to life. A new penalty phase should result. Alternatively, this Court should impose a sentence of life without probation or parole.

VIII. Mr. Ervin's Learning Disabilities Were Mitigating

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective for failing to investigate and present evidence of Mr. Ervin's learning disabilities, because the failure denied Mr. Ervin his rights to effective assistance of counsel and to present mitigating evidence under the 6th, 8th, and 14th Amendments to the United States Constitution in that counsel unreasonably failed to investigate Mr. Ervin's head injuries, seizure disorder and the impact on his ability to learn, to concentrate, solve problems, and understand the consequences of his actions. Mr. Ervin was prejudiced as this evidence would have provided a basis for a life sentence.

Mr. Ervin had a history of head injuries, a seizure disorder and suffered from headaches throughout his life (H.Tr.518). His educational records showed that he did not do well in school; he was in special education in the 6th-8th grade; he had an attention disorder and suffered migraines; and in the 10th grade, he made Cs and Ds the first semester, and Fs in the second semester (H.Tr.519-20). He dropped out of school. *Id*. Vocational Rehabilitation Program records also illustrated his problems with learning. *Id*. at 520.

Yet counsel never had Mr. Ervin tested to determine his disabilities and the impact they had on him. A psychological-educational evaluation showed that Mr. Ervin has extreme deficits (H.Tr.516,521-96). Mr. Ervin has learning difficulties across the board (H.Tr.597). The most significant difficulties are in auditory processing, visual

processing, and fluid reasoning. *Id*. In these areas, he functioned as a 5 to 10 year old (H.Tr. 540-45). The auditory processing difficulties influenced attention, concentration, and problem solving strategies (H.Tr. 541,542). With such difficulties, Mr. Ervin often misses pieces of information. *Id*. at 542. Problems with fluid reasoning made it difficult for Mr. Ervin to solve problems, draw inferences and anticipate consequences. *Id*. at 545-46. Mr. Ervin's memory problems are striking, placing him at the level of a 5 year old (H.Tr.566).

The motion court rejected the claim that counsel was ineffective for failing to present mitigating evidence of Mr. Ervin's learning disabilities (L.F.1109-1111). The court found that: 1) counsel need not shop for a more favorable expert; 2) Ms. Burns, who tested Mr. Ervin, was not able to relate her testimony to the facts of the case; and 3) Burns offered no explanation for Mr. Ervin being able to enter Junior College, the military, or gain employment as a mechanic or machine worker. *Id*.

This Court reviews these findings and conclusions for clear error. *See* standard of review outlined in Point I, *supra*. Counsel has a duty to thoroughly investigate all mitigating evidence. *Williams v. Taylor*, 120 S.Ct. 1495 (2000). Applying these standards, the motion court's findings and conclusions are clearly erroneous.

Shopping for an Expert

Mr. Ervin's claim was not that counsel should have shopped for a more favorable expert than Drs. Leonberger and Armour; rather it was that counsel should have hired the appropriate expert to elicit relevant mitigating evidence. *See*, *In re Brett*, 16 P.3d 601 (Wash. banc 2001) (where counsel hired a psychologist, but failed to consult and present

expert testimony regarding fetal alcohol syndrome and diabetes and its impact on Brett, counsel was ineffective and death sentence vacated). As in *Brett*, here, counsel failed to consult with an expert that could talk about all of Mr. Ervin's impairments and explain why they mitigated his culpability.

Testimony Must Relate to Facts of Murder

The motion court suggests that an expert's testimony outlining a defendant's deficits has no relevance, unless it relates to the facts of the offense. This conclusion has been rejected by the United States Supreme Court. *Williams v. Taylor, supra* at 1516. There, the Court found counsel ineffective in failing to introduce evidence of Williams' nightmarish childhood, borderline mental retardation and good prison behavior. None of this evidence related to the facts of the murder. Yet, the Supreme Court found it compelling mitigation. Indeed, mitigation can make a defendant less morally culpable and less worthy of death, even if the mitigation does not rebut the State's aggravation.

Mr. Ervin's deficits were significant mitigating circumstances, independent of the State's case. That he functioned as a 5-10 year old was something the jury should have heard. Children and those with mental impairments are less culpable than those without such impairments. *Johnson v. Texas,* 509 U.S. 350 (1993) (a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury); and *Penry v. Lynaugh*, 492 U.S. 302 (1989) (defendant's mental retardation is a mitigating factor that the jury must be allowed to consider).

Mr. Ervin's Attempts to Function Normally

Mr. Ervin has tried to obtain an education and has tried to work; he has tried to be a productive member of society. Thus, he tried to go to a Junior College, but dropped out (H.Tr. 609). He entered the National Guard and was honorably discharged (H.Tr. 610-11,618). He worked as a mechanic and machine worker (Tr.790).

The motion court discounted Ms. Burns' testimony because she could not account for any of these activities. The court ignored that the only basis for the suggestion that Mr. Ervin did all these things was Mr. Ervin himself. No evidence suggested that Mr. Ervin did any of these activities well. Indeed, he did not complete a single semester of college. Independent evidence suggested that his employment history was sporadic, he worked odd jobs and at times, needed public assistance. Thus, that he was struggling, trying to be a productive member of society, but not succeeding, was entirely consistent with his learning disabilities. That he continued to try to go to school and work, in spite of his problems, was even more mitigating than if he would have simply threw in the towel. The jury should have heard this mitigation. Counsel was ineffective. A new penalty phase should result. Alternatively, this Court should impose a sentence of life without probation or parole.

IX. Mr. Ervin's Childhood Development Was Mitigating

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective for failing to investigate and present evidence of Mr. Ervin's childhood development, because the failure denied Mr. Ervin his rights to effective assistance of counsel and to present mitigating evidence under the 6th, 8th, and 14th Amendments to the United States Constitution in that counsel unreasonably failed to investigate Mr. Ervin's childhood, including his poverty, frequent illnesses, frequent moves, lack of a supportive parent due to mental illness and abandonment, and lack of community support. Mr. Ervin was prejudiced as this evidence would have provided a basis for a life sentence.

Dr. Vlietstra, a psychologist specializing in childhood development, evaluated Mr. Ervin (H.Tr. 806-09). She conducted extensive interviews of Mr. Ervin and his family, including his mother, aunts, sisters and a cousin (H.Tr. 809-10). She reviewed school records, medical records, police reports, and the transcript from Mr. Ervin's penalty phase (H.Tr.810).

Mr. Ervin was born in Winona, Mississippi (H.Tr. 811). He only weighted 4 lbs, 10 ounces (H.Tr. 813-14). Children with low birth weights often have mental problems later in life, because they often suffered from a nutritional deficiency during the prenatal period. *Id*. Indeed, Mr. Ervin was a sickly child and suffered from a fever for two days after his birth (H.Tr. 824). When he was 3 years old he had a fever and migraines (H.Tr.

824). His migraines continued throughout his life (H.Tr. 824, 836). Prolonged high fevers can produce brain injuries (H.Tr. 824).

His parents were Ossie McNeal and Lynn Collins; they were never married (H.Tr.811-12). He had four sisters and one brother, and was the fourth child (H.Tr. 812). Mr. Ervin and his siblings had different fathers (H.Tr. 822-23). Mr. Ervin's father was out of the picture, rarely seeing his son, or showing him any love or affection (H.Tr. 823). As a result, Mrs. McNeal was bitter and took it out on the children (H.Tr. 836).

Mrs. McNeal's problems as a mother were understandable. She was born to parents who had a conflicted relationship and mental problems, thus, she never learned effective parenting skills (H.Tr. 814-22). Ms. McNeal's father and two uncles abused alcohol and were violent (H.Tr. 815-16). Her father killed his own son, her brother, an event that was kept as a family secret (H.Tr. 817).

Mrs. McNeal was mentally ill. She took antipsychotic medications and antidepressants (H.Tr. 820). She was repeatedly hospitalized, sometimes for months at a time (H.Tr. 820-21). She could not parent her children at these times (H.Tr. 820). So her daughter, Delores, would take care of the younger children (H.Tr. 820-21). She did the best she could, but as a 6-7 year old, she did not have the maturity to provide the love and structure that the children needed. *Id*. Thus, Mr. Ervin's childhood was very chaotic; his sister could not provide authority and discipline, making it impossible for him to feel secure. *Id*. He was depressed with a sense of hopelessness (H.Tr. 821-22).

The family's move to St. Louis, was a shock; St. Louis was so different from Winona, Mississippi (H.Tr. 830-32). Mr. Ervin liked the country better (H.Tr. 832). The

city was more complex, and not as safe (H.Tr. 831). He encountered gangs and teasing, which negatively impacted his sense of self-worth and control (H.Tr.831). He had difficulty in learning and his attention span was low (H.Tr. 831-32,837).

From 1968-74, the family moved six times (H.Tr. 832). With all these moves, Mr. Ervin developed attention patterns where he was constantly exploring and became impulsive, with less goal oriented behavior. *Id*. He had to adapt to different neighborhoods and schools. *Id*. He had little continuity in his life. *Id*.

Poverty was another significant factor in Mr. Ervin's childhood. His mother was sick and could not provide for the family; often they did not have food, proper health care and lived in unsafe physical environment and dangerous neighborhoods (H.Tr. 833-35).

Mr. Ervin dropped out of school and went to work at an early age (H.Tr. 837-38). His first job was at Gunther Salt Company, bagging and stacking salt (H.Tr. 838). He married Pam Ervin, but the marriage lasted less than a year (H.Tr. 840-41). Eventually, Mr. Ervin worked on 640 acres in the country, for Mr. Mueller (H.Tr. 842). This is where he met Mr. White, who became a positive father figure in his life. *Id*.

Dr. Vlietstra found numerous significant factors in Mr. Ervin's child development: poverty, frequent illnesses, frequent moves, lack of a supportive parent and lack of community support (H.Tr. 834). As a result of his developmental adversity, Mr. Ervin's capacity to reflect was impaired, it was difficult for him to think through complex situations (H.Tr.843).

The motion court rejected Mr. Ervin's claim that counsel should have investigated and presented evidence of his childhood development, ruling: 1) counsel need not shop

for a more favorable expert; 2) Dr. Vlietstra failed to consider the specific facts of the case which showed that Mr. Ervin was capable of functioning, understood the consequences of his actions, and could look out for his own interests; and 3) Dr. Vlietstra's opinions were incredible, because Mr. Ervin's siblings grew up in the same environment and they had gone on with their lives (L.F.1114-15).

As discussed in Point VIII., *supra*, the first two findings are clearly erroneous. *See* standard of review outlined in Point I, *supra*. Mr. Ervin's claim was not that counsel should have shopped for a more favorable expert than Dr. Leonberger or Armour; rather it was that counsel should have hired the appropriate expert to elicit relevant mitigating evidence. *See*, *In re Brett*, 16 P.3d 601(Wash. banc 2001), discussed *supra*. As in *Brett*, here, counsel failed to consult with an expert that could discuss Mr. Ervin's troubled childhood and the impact his development had on his behavior.

Similarly, the motion court's suggestion that an expert's testimony must relate to the circumstances of the offense is contrary to *Williams v. Taylor*, 120 S.Ct. 1495, 1516 (2000) (counsel ineffective in failing to introduce evidence of Williams' nightmarish childhood, borderline mental retardation and good prison behavior, none of which related to the facts of the murder).

Finally, the motion court's finding that Dr. Vlietstra was incredible because Mr. Ervin's siblings grew up in the same environment, but had gone on with their lives does not withstand scrutiny. First, the finding ignores that Mr. Ervin had many problems that his siblings did not share. He had a low birth weight, suffered high fevers, had head injuries, brain damage, and a seizure disorder. Secondly, a nightmarish childhood is

compelling mitigation and should be introduced whether one is an only child or has siblings suffering the same fate. *Williams*, *supra*; and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (defendant's turbulent family history is a mitigating factor to be considered in deciding punishment).

Counsel failed to talk to any of Mr. Ervin's siblings. He did not know enough about Mr. Ervin's childhood to make an informed decision about whether to hire a childhood development expert. Dr. Vlietstra's testimony establishes that such an expert would have provided mitigating evidence. Mr. Ervin was prejudiced, because the jury likely would have imposed a life sentence had it known all this mitigation. A new penalty phase should result. Alternatively, this Court should impose a sentence of life without probation or parole.

X. Mr. White's Mental Problems

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective for failing to investigate Mr. White's mental problems and relationship with Mr. Ervin, because the failure denied Mr. Ervin his rights to effective assistance of counsel and to present mitigating evidence under the 6th, 8th, and 14th Amendments to the United States Constitution in that counsel unreasonably failed to investigate Mr. White's background, mental problems and bizarre behavior showing he was paranoid, reclusive and suicidal, and Mr. Ervin was prejudiced as such evidence was admissible to explain the circumstances of the offense and providing a basis for a sentence less than death. Alternatively, the motion court abused its discretion in excluding Exhibit 54, Mr. White's letters to Ronn Foss, because they revealed his mental problems and bizarre behavior, and the drastic remedy of exclusion for postconviction counsel's failure to disclose them was not appropriate since the State had access to trial counsel's file, which included the Foss letters.

Mr. Ervin was charged with the murder of his friend, Leland White. The State's evidence at trial was that Mr. Ervin stabbed Mr. White, then saved him by pulling him from a burning trailer, only to kill him with a brick. *State v. Ervin*, 979 S.W.2d 149,152-53 (1998). Counsel did not investigate Mr. White's background and his mental health. This evidence was essential for the jury to understand the relationship between Mr. Ervin

and Mr. White, and to understand their chaotic conduct and statements on the night of the offense.

Counsel did not interview anyone from Mr. White's former employer, Arkansas State University (Ex.2 at 10; Ex.3 at 12-13; Ex.4 at 10). Had he investigated, counsel would have discovered Mr. White's history of odd and bizarre behavior. Faculty member Charles McFarland recalled that Mr. White lived in his office -- an atypical behavior that embarrassed his colleagues and his department (Ex. 3 at 7-9). White ate wild onions from the college yard. *Id*. at 9. He shaved on the 4th Floor of the business building. *Id*. at 8. McFarland pitied his colleague who was reclusive. *Id*. 8-9. Similarly, faculty member, Timothy Ross, recalled that Mr. White acted normally early in his employment in the mid-1960s, but became increasingly strange by the early 1970s (Ex.4 at 6-7). Mr. White became slovenly, unwashed and neglected in his appearance. *Id*. at 7-8. Mr. White lived in his office, did his laundry there, ate onions from the college yard, and also lived out of his car for a time, despite receiving a college professor's salary. *Id*. at 6-7. He considered White's behavior abnormal. *Id*. at 7. Another professor, Donald Konold, remembered Mr. White getting angry and talking to himself (Ex.2 at 9-10). White was ultimately forced to resign from ASU (Ex.3 at 10-12; Ex.4 at 9).

The professors' view of their colleague was consistent with others' observations shortly before trial. Dr. J. David Auner, M.D., knew both Mr. Ervin and Mr. White prior to Mr. White's death (Ex.5 at 49). Dr. Auner believed that Mr. White was mentally ill. *Id*.

Mr. Ervin asked his attorney to obtain letters written by Mr. White to Ronn Foss and the Division of Family Services (H.Tr.1083,1084,1093, Ex.54[6]; Ex.55). Counsel failed to use the letters -- or call Foss -- at Mr. Ervin's trial. The letters showed that Mr. White had a close relationship with Mr. Ervin and regarded Ervin as his god son (Tr.1093). Mr. White suffered from paranoid and persecutory thoughts; he thought women conspired to prevent him from having gainful employment (Ex.55 at 4). Mr. White talked about suicide and tried to obtain the book, *Final Exit* (H.Tr.1096).

The motion court found that evidence of the victim's character was inadmissible, citing, *State v. Hall*, 982 S.W.2d 675, 681(Mo. banc 1998) (L.F.1148). This Court must review the conclusions for clear error. *See* standard of review outlined in Point I, *supra*.

State v. Hall, *supra* is simply not applicable. There, the issue was whether the victim's reputation for "ripping people off" was admissible to support a claim of self-defense. *Id*. The evidence was not relevant to whether the defendant might fear the victim, and thus, was inadmissible in guilt phase. *Id*. In contrast, here the victim's background and mental problems were relevant in penalty phase. Any circumstance of the offense that provides a basis for a sentences less than death is mitigating evidence. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Thus, Mr. White's mental problems and his relationship with Mr. Ervin were relevant to explain why, under the State's theory, Mr. Ervin stabbed Mr. White, then saved him, only to kill him with a brick.

[6] The motion court excluded Exhibit 54, because postconviction counsel had not disclosed the exhibit, but allowed trial counsel to be questioned about it.

According to the State's evidence at trial, after Mr. Ervin pulled Mr. White from the burning trailer, Mr. White stated, "Just go ahead and kill me, James. Just kill me" (Tr.578). Testimony by the Arkansas faculty members and Mr. White's letters would have helped to explain Mr. White's seemingly inexplicable and bizarre statements, and -- combined with evidence of Mr. Ervin's own mental illness -- mitigated the offense by suggesting that Mr. Ervin's and Mr. White's interactions that night were the interactions of two irrational, mentally ill men.

Counsel has a duty to thoroughly investigate all mitigating evidence. *Williams v. Taylor*, 120 S.Ct. 1495 (2000). Failure to interview witnesses or discover helpful evidence relates to trial preparation, not trial strategy, and is not justified. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991).

Counsel failed to investigate McFarland, Ross and Konold. Although counsel obtained Mr. White's letters, counsel's failure to use them to help explain and mitigate the events on the night in question was unreasonable and unsound. *See State v. McCarter*, 883 S.W.2d 75, 78 (Mo. App., S.D. 1994) (holding counsel's choice of strategy must be objectively reasonable and sound). Without evidence of Mr. White's background and mental illness, the jury did not fully understand the context of Mr. Ervin's actions on the night of the offense, and Mr. Ervin's relationship with Mr. White. This was a close case on the issue of deliberation in guilt phase. *See State v. Ervin*, *supra* at 167-68 (Wolff, J., concurring and dissenting). It was also a close case in penalty phase because the jury could not agree on punishment (Ex.56 at 139). If the jury had heard such evidence, the outcome may reasonably have been different. A new penalty phase should result.

Alternatively, the motion court abused its discretion in excluding Exhibit 54, Mr. White's bizarre letters to Ronn Foss - where he talked about committing suicide, the recipes for Final Exit, and revealed his paranoid and reclusive state of mind. Even though the letters were in trial counsel's trial file, the motion court sustained the State's motion to exclude the letters, because postconviction counsel failed to disclose them (H.Tr.1084-91,1097-98).

Defense counsel has a duty to disclose information it intends to present in support of its defense. *State v. Simonton*, 49 S.W.3d 766, 779 (Mo. App. W.D. 2001). Discovery rules prevent surprise and facilitate effective cross-examination. *Id*.; and *State v. Whitfield*, 837 S.W.2d 503, 508 (Mo. banc 1992). A trial court has discretion to impose sanctions for a discovery violation. *Simonton, supra* at 780. However, exclusion of evidence is a "drastic remedy." *Id*. at 781(quoting *State v. Mansfield*, 637 S.W.2d 699, 703 (Mo. banc 1982). Remedies for discovery violation should focus on the removal of any prejudice the State suffered due to the violation. *Simonton, supra* at 781.

Applying these standards, the Western District found that the trial court abused its discretion. *Id*. The State was aware of Simonton's defense of not guilty by reason of mental disease or defect. *Id*. at 781-82. The defense expert was disclosed as a possible witness weeks before trial. *Id*. at 782. The State failed to argue how late disclosure of the expert's opinion would have impacted the State's case. *Id*.

In contrast, the harm to the defense is excluding the expert testimony was great. Simonton was charged with first degree murder. *Id*. at 783. His defense was mental disease or defect -- thus, the expert testimony went to the key issue at trial. *Id.* The State

had discredited another psychiatrist's opinion that Simonton suffered from a mental disease, saying he was the sole doctor to render such an opinion, and the defendant was malingering or feigning his illness. *Id*. at 783-84. The excluding expert's testimony would likely have been persuasive, since he interviewed Simonton eleven times for a total of 9 1/2 hours. *Id*. at 784.

Like *Simonton*, the motion court abused its discretion in excluding the Foss letters that showed Mr. White's mental state, his suicidal thoughts, his paranoid state of mind and bizarre behavior. The State did not argue how it would be prejudiced by the admission of the letters. Indeed, the amended motion included as a claim Mr. White's mental problems, suicidal ideations, and bizarre behavior (L.F.132-40). The motion specifically pled counsel's ineffectiveness for failing to interview and call Foss and failing to introduce the Foss letters (L.F.139-40). Thus, the State had notice of the letters. Additionally, the State had access to trial counsel's trial file that contained the letters. The State introduced selective letters from the file (Tr.1084,1159,1171-78,1234,1253,1256-57).

However, unlike the State, Mr. Ervin was prejudiced by the letters' exclusion. They were critical to prove his claim that counsel was ineffective in failing to present evidence of Mr. White's paranoid, suicidal ideation and bizarre behavior. The letters would have helped explain the Mr. Ervin and Mr. White's relationship and the circumstances of the offense, mitigating factors under *Lockett*. This information was not available through any other source and indeed, trial counsel could not remember that Mr. White was contemplating suicide, inquired about books on euthanasia, and did not want

to suffer when dying (H.Tr.1093-96). In light of Mr. White's statement to Mr. Ervin, "Just go ahead and kill me, James. Just kill me James" (Tr.578), Mr. White's mental state was critical to Mr. Ervin's defense. The motion court should have admitted Exhibit 54. When considering this exhibit, this Court should grant Mr. Ervin a new penalty phase, or alternatively, impose a sentence of life without probation or parole.

XI. Jury Did Not Find Aggravator

The motion court clearly erred in denying Mr. Ervin's claim that the jury's failure to agree upon punishment and find a statutory aggravator beyond a reasonable doubt, and counsel's failure to object to the trial court finding the aggravator, denied Mr. Ervin his rights to a jury trial, due process and effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution in that the statutory aggravator increased the maximum penalty, making Mr. Ervin eligible for the death penalty, and thus, should have been found by the jury, not a judge, and proven beyond a reasonable doubt, and counsel intended to object and include the claim in the motion for new trial, but neglected to do so.

Mr. Ervin had a right to have the jury find any fact that increased his punishment, and to make that finding beyond a reasonable doubt (L.F.142-45). Counsel unreasonably failed to raise this meritorious issue at trial, admitting that he intended to object, but he "wasn't all there" when the jury returned its verdict (H.Tr.1104). He also intended to put the claim in the motion for new trial (H.Tr.1106), but did not (Ex.56 at 140-50). Mr. Ervin was prejudiced, he was denied his fundamental right to a jury trial on facts that increased punishment and to have those facts found beyond a reasonable doubt.

The motion court denied this claim (L.F.1149-51). The court cited to Professor Wiener's study and cases rejecting the claim that penalty phase instructions are unconstitutional (L.F.1150-51). This evidence and law has no applicability to this claim.

Thus, the findings are clearly erroneous, the standard of review, outlined in Point I, *supra*.

In Missouri, statutory aggravators are a prerequisite to a defendant receiving death. Sections 565.030 and 565.032.2, RSMo 2000. Finding such an aggravator increases the maximum punishment from life without parole to death. *Id*. Thus, the aggravator must be found by the jury under the Sixth and Fourteenth Amendment right to a jury trial and must be proven beyond a reasonable doubt under the due process clause of the Fourteenth Amendment. *Jones v. United States*, 119 S.Ct. 1215 (1999); and *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2362-63 (2000). *See also In re Winship*, 397 U.S. 358 (1970).

Mr. Ervin recognizes that this Court has found that *Apprendi* and *Jones* do not apply to the aggravator, serious assaultive criminal conviction. *State v. Johns*, 34 S.W.3d 93, 114, n.2 (Mo. banc 2000); and *State v. Black*, 50 S.W.3d 778, 792 (Mo. banc 2001). However, here, the aggravator was not based on a prior conviction. *Cf*. *Almendarez-Torres v. United States*, 523 U.S.224 (1998) (federal law allowing a judge to impose an enhanced sentence based on prior convictions does not violate the Sixth Amendment right to jury trial and due process). The Court made clear, however, that *Almendarez-Torres* was, at best, an exceptional departure from the requirement of a jury trial and *Winship* requirements. *Apprendi*, *supra* at 2361. Indeed, the Court conceded that *Almendarez-Torres* may have been wrongly decided, but concluded it did not need to revisit the issue. *Id*. at 2362.

Jones v. United States, supra, held that the Sixth and Fourteenth Amendments mandate that any fact increasing the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. *Id*. *See also Apprendi, supra*. The jury in Mr. Ervin's case did not find a single aggravator justifying a sentence of death (Ex.56 at 139).

The application of *Jones* and *Apprendi* to death penalty schemes has not been squarely addressed by the Supreme Court. However, the *Jones* majority distinguished *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989) and refused to decide whether *Walton v. Arizona*, 497 U.S. 639 (1990) could be reconciled with the Court's *Jones* decision. *Jones, supra,* at 1228. However, Justice Stevens suggested that the extent *Walton v. Arizona, supra,* departed from the principle requiring a jury find facts increasing punishment beyond a reasonable doubt, it should be reconsidered. *Jones*, 119 S.Ct. at 1229 (Stevens, J. concurring). Similarly, the four dissenters believed that the *Jones* ruling could not be consistently applied to a capital scheme allowing a judge, rather than a jury, to find the aggravators that increased the punishment from imprisonment to death. *Jones*, 119 S.Ct. 1238 (Kennedy, J., dissenting).

Similarly, in *Apprendi*, several justices noted the implications for fact finding in capital sentencing schemes. Justice Thomas concluded that the question was for another day. 120 S.Ct. at 2380 (Thomas, J., dissenting). Justice O'Connor, on the other hand, detailed the conflict between *Walton v. Arizona* and the Court's opinion in *Apprendi:*

> A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.
>
> * * *
>
> [In *Walton*] [w]e upheld the Arizona scheme specifically on the ground that the Constitution does not require the jury to make the factual findings that serve as the "'prerequisite to imposition of [a death] sentence,'" *id*., at 647, 110 S.Ct. 3047 (citation omitted), or "'the specific findings authorizing the imposition of the sentence of death,'" *Walton*, *supra*, at 648, 110 S.Ct. 3047 (quoting *Hildwin*, *supra*, at 640-641, 109 S.Ct. 2055). If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today.

120 S.Ct. at 2387-88 (O'Connor, J., dissenting). *See*, *also*, *State v. Hoskins*, 14 P.3d 997, 1016, n. 5 (Ariz. 2000); *People v. Kaczmarek*, 741 N.E.2d 1131 (Ill. App. 2000); and *Hoffman v. Arave*, 236 F.3d 523, 542 (9th Cir. 2001), *cert. denied*, 2001 WL 576233 (2001) (recognizing the conflict between *Walton* and *Apprendi*).

Under *Strickland v. Washington*, 466 U.S. 668 (1984), counsel must act reasonably. Here counsel failed to object to the failure of the jury to find an aggravator beyond a reasonable doubt. Counsel admitted he though he had objected, but was "not all there" when the jury returned the verdict (H.Tr.1104-05). He did intend to include the

claim in the motion for new trial (H.Tr.1106), but did not. Thus, Mr. Ervin was denied his fundamental right to have the jury make all the factual findings and to have the State prove this aggravator beyond a reasonable doubt as required by Sixth and Fourteenth Amendments.

Because the motion court clearly erred in overruling this claim, this Court should vacate Mr. Ervin's death sentence and impose a sentence of life without probation or parole.

XII. Counsel's Failure To Object To Prejudicial Argument

The motion court clearly erred in denying the Rule 29.15 motion because Mr. Ervin was denied his rights to due process, effective assistance of counsel, and to be free from cruel and unusual punishment, 6th, 8th, and 14th Amendments, U.S. Constitution, and his rights under Section 565.030.4, RSMo 2000, in that trial counsel failed to object to the improper argument, asking jurors to:

1. **imagine how painful it was to have their throats cut like Mr. White, as this was improper personalization;**
2. **punish Mr. Ervin for exercising his constitutional rights to a jury, counsel and a fair and impartial trial; and**
3. **consider the victim impact of unrelated offenses committed against law enforcement officers, rather than confining victim impact to the murder;**

and to improper voir dire:

4. **that killing a law enforcement officer was a statutory aggravator warranting death, when the State knew it would introduce nonstatutory aggravation of assaults of law enforcement officers, thereby misleading and confusing the jury;**

because the right to effective assistance of counsel should be decided under the *Strickland* standard for prejudice -- whether a reasonable probability exists that the outcome would have been different, sufficient to undermine confidence in the outcome -- rather than the standard for plain error, a manifest injustice which

requires that the error have a decisive effect on the jury's verdict. Applying, *Strickland*, Mr. Ervin was prejudiced because these errors denied him a fair trial and a reliable sentencing proceeding, introduced emotion and arbitrariness into the proceedings, and given that the evidence of deliberation was weak and the jury could not agree upon punishment, there is a reasonable probability that without the improper arguments, the jury would have sentenced Mr. Ervin to life.

Mr. Ervin's 29.15 motion alleged that counsel was ineffective for failing to object to improper argument, both in closing and during voir dire. The State's improper guilt phase closing argument was as follows:

> You can imagine how - - certainly, it's got to be very painful to have your throat cut, the way his throat was cut (Tr.883).

Then in rebuttal, the State argued:

> [Mr. Ervin] has a jury here. That he has a defense attorney. That he has a judge. And he's had his trial. But Lee White was also entitled to a trial before the punishment of death was imposed upon him, by him. But he didn't get one. Because on September 1, 1994 there was no jury to listen to the facts. Mr. White had no lawyer to stand up and argue for him. There was no judge to oversee the proceedings that were taking place in that trailer and then out in the yard in front of it. Mr. White was afforded none of that. And that was the injustice" (Tr.914).

In penalty phase closing, the prosecutor told jurors they should consider the "harm" that Mr. Ervin had caused when he assaulted law enforcement officers, and the impact on their families (Tr.997). During voir dire, the prosecutor told jurors that a statutory aggravator, making a defendant death eligible, is the killing of a law enforcement officer (Tr.261,307).

Counsel did not object to any of these arguments or the improper voir dire. As for the arguments, counsel said that he seldom objected to closing argument, because "I sincerely believe that I can out-inflame any prosecutor" (H.Tr. 1130). He did not believe the arguments in question were egregious enough to object, even if they were improper (H.Tr.1135,1137). As for the voir dire, counsel admitted that "maybe we should have objected here," but he failed to do it (H.Tr.1140).

The motion court denied all four claims, ruling that the claims were denied on direct appeal under plain error review, citing *Sidebottom v. State*, 781 S.W.2d 791, 796 (Mo. banc 1989) (L.F.1170-72,1174-75). This Court must review the motion court's findings for clear error, as outlined in Point I, *supra*.

To establish ineffective assistance, Mr. Ervin must show that his counsel's performance was deficient and that such performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); and *Williams v. Taylor*, 120 S.Ct. 1495, 1511-12 (2000). To prove prejudice, Mr. Ervin must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*. and *State v. Butler*, 951 S.W.2d 600, 608(Mo. banc 1997). Counsel can be ineffective for failing to object to prejudicial argument. *State v. Storey*, 901 S.W.2d 886, 901 (Mo. banc 1995).

Applying these standards, the motion court's findings and conclusions are clearly erroneous. A careful examination of Supreme Court cases and this Court's opinion in *Sidebottom,* shows the standard is not the same.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court decided the standard for reviewing claims of ineffective assistance of counsel. The standard has performance and prejudice prongs. *Id*. "We believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Id*. at 693. Rather, the Court adopted a test for prejudice with roots in the test for materiality of exculpatory information not disclosed to the defense. *Id*. at 694, citing *United States v. Agurs*, 427 U.S. 97, at 104,112-13 (1976). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, *supra* at 694.

Only five years after *Strickland*, this Court decided *Sidebottom*, *supra*, and appropriately applied the *Strickland* standard of prejudice. *Id*. at 796. At issue was defense counsel's failure to object to Exhibit 3, a prisoner data sheet that referred to a rape and burglary on one small box. *Id*. This reference came in the midst of 15 other pages. *Id*. The jury asked if the defendant had been convicted of rape and burglary or just charged with the offenses, which could not be considered in guilt. *Id*. The trial court instructed the jury not to consider the entries in arriving at a verdict. *Id*.

Given, these facts, and the law, the Court found that "the *bases* for finding no manifest injustice on direct appeal serve to establish no prejudice under the *Strickland*

test." *Id*. (emphasis added). The Court emphasized that the trial court directed the jury to disregard the references, the prosecutor made no attempt to utilized the unrelated crimes, through argument or otherwise, and the prosecutor had not consciously tried to inject the improper evidence. *Id*. at 796-97. Applying, the standard of a "reasonable probability that the result would have been different," this Court found no prejudice. *Id*. at 797.

Rather than review the claim under the *Strickland* standard, the motion court concluded that a finding of no plain error forecloses any review under *Strickland*, under all circumstances. The conclusion is contrary to the plain language of the *Strickland* standard, and the plain error standard, requiring a showing that the error affected the outcome. The argument is also contrary to *Kyles v. Whitley*, 514 U.S. 419 (1995).

In *Kyles*, *supra* at 433-35, the Court discussed the standard for prejudice adopted in both *Strickland* and *United States v. Bagley*, 473 U.S. 667 (1985), a reasonable probability that the outcome would be different. Citing *Strickland*, *supra* at 693, the Court said "[w]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Kyles*, *supra* at 434. The "touchstone" in the analysis is a "reasonable probability" of a different result, and "the adjective is important." *Id*.

In contrast, when reviewing for plain error, this Court requires a showing that the error altered the outcome; the error must have a "decisive effect" on the jury's verdict to warrant relief. *Sidebottom*, *supra* at 920. In *State v. Storey*, *supra* at 900-903, this Court found counsel was ineffective for failing to object to improper argument.

Similarly, here, counsel failed to object to the very argument condemned in *Storey*, *supra*. Asking jurors to imagine themselves being killed as the victim died is improper personalization. *Id*. *See*, *also*, *State v. Rhodes*, 988 S.W.2d 521, 528-29 (Mo. banc 1999). Counsel had no legitimate reason for not objecting, he just thought he could out-inflame any prosecutor.

The argument suggesting that the jury should hold it against Mr. Ervin that he had a jury, defense counsel and a fair and impartial trial, was inappropriate. A defendant's exercise of his constitutional rights cannot be used against him. *Griffin v. California*, 380 U.S. 609 (1965); and *State v. Dexter*, 954 S.W.2d 332 (Mo. banc 1997) (defendant's exercise of his right to remain silent cannot be used against him). But that is exactly what happened here. The prosecutor asked the jury to punish Mr. Ervin, because he exercised his constitutional rights, while the victim did not get those same rights. Counsel recognized this argument was objectionable (H.Tr.1135). Again, he seemed to think he could cure the prejudice with additional inflammatory arguments.

The prosecutor's argument that the jury should consider the impact Mr. Ervin's unrelated assaults had on those victims and their families was contrary to Section 565.030.4, RSMo 2000, that provides that victim impact evidence relating to the murder is admissible. *People v. Hope*, 702 N.E. 2d 1282,1288 (Ill. 1998) (*Payne*[7] clearly contemplates that victim impact evidence will come only from a survivor of the murder for which the defendant is presently on trial, not from survivors of offenses collateral to

[7] *Payne v. Tennessee*, 501 U.S. 808,825 (1991).

the crime for which the defendant is being tried). Again, counsel recognized this argument was objectionable (H.Tr.1137), but let it slide.

Finally, counsel failed to object to the improper voir dire where the prosecutor outlined an aggravator, killing a law enforcement officer, that was not applicable to Mr. Ervin's case. This was inappropriate and prejudicial because the State introduced nonstatutory aggravators of assaulting law enforcement officers. The voir dire misled the jury that they should give more weight to the assaults than the law required. Such inaccurate statements, calculated to create prejudice, are impermissible. *State v. Lacy*, 851 S.W.2d 623, 629 (Mo.App.E.D.1993). Even counsel conceded that he should have objected here (H.Tr.1140).

Mr. Ervin was prejudiced by all these improper arguments. This was a weak case on the issue of deliberation. The jury could not agree upon punishment. Thus, the injection of prejudicial, inflammatory arguments could have caused the jury to hang, where they otherwise may have imposed a sentence of life. *State v. Taylor*, 944 S.W.2d 925, 937 (Mo. banc 1997) (reversing for new penalty phase where the prosecutor improperly told jury to base their decision on emotion). This Court should reverse and remand for a new trial.

XIII. Clemency

The motion court clearly erred in denying Mr. Ervin's claim that Missouri clemency proceedings violate his rights to due process, under the 14th Amendment to the United States Constitution, in that the proceedings are wholly arbitrary and capricious as the clemency of triple-murder, Mease, indicates. Clemency for Mease was granted, not on the merits of the case, but because the Pope happened to visit at the time of Mease's scheduled execution and asked for clemency for religious reasons.

At issue in Mr. Ervin's 29.15 proceedings was the arbitrary and capricious nature of Missouri's clemency proceedings (L.F.140-42). Darrell J. Mease, a triple-murderer, *State v. Mease*, 842 S.W.2d 98 (Mo. banc 1992), received clemency solely because Pope John Paul II visited Missouri near the time of Mr. Mease's scheduled execution date and requested that the Governor commute Mr. Mease's death sentence to life in prison without parole (Ex.22). Mr. Ervin maintained the arbitrariness of clemency proceedings violated his right to due process under the Fourteenth Amendment to the United States Constitution (L.F.140-42).

The motion court denied this claim ruling that Mr. Ervin had no standing to challenge the clemency proceedings, since he had not sought clemency or been denied clemency (L.F.1149). The Court concluded that the Governor has uncontrolled discretion that cannot be challenged. *Id*. This Court must review these findings and conclusions for clear error. *See* standard of review outlined in Point I, *supra*.

Contrary to the motion court's findings and *Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1970), clemency procedures cannot be left to the Governor's unbridled discretion. Such procedures, while committed to the discretion of the executive branch, cannot be wholly arbitrary and capricious under the Due Process Clause. *Ohio Adult Parole Authority v. Woodard*, 118 S.Ct. 1244, 1253 (1998) (O'Connor, J., concurring). The procedures cannot be "based upon whim, for example, flipping a coin." *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir.1998), *citing Woodard, supra* at 1254. Nor should arbitrary criteria, such as religion, be used in deciding whether to grant or deny clemency. *Woodard*, 118 S.Ct. at 1255 (Stevens, J., concurring and dissenting). *See, also, Roll v. Carnahan*, 225 F.3d 1016, 1018 (8th Cir. 2000) (some minimal due process protections apply to clemency proceedings in Missouri).

Yet Mr. Mease's clemency proves the wholly arbitrary and capricious nature of Missouri's clemency proceedings under Section 217.800.2, RSMo 2000 and Article IV, Section 7 of the Missouri Constitution. The governor granted Mr. Mease relief solely because the execution date in his case happened to coincide with a date on which the Pope happened to be in Missouri, and he happened to request that the governor commute the sentence (Ex.22). Mr. Mease, a triple-murderer, received relief, not based on his relative culpability, but solely on the timing of his case. *Id*.

While Mr. Ervin has not completed all available court appeals, so that the governor has not been asked to grant clemency, constitutional claims should be raised at the earliest opportunity. *State v. Chambers*, 891 S.W.2d 93 (Mo. banc 1994). Since Mr. Ervin included the claim in his amended motion and presented evidence to support the

arbitrariness of the clemency proceedings. Mr. Ervin raises the claim at the earliest opportunity, so as to not waive the issue for purposes of future review.

Because the clemency proceedings are wholly arbitrary, capricious, and can be based upon a whim, this Court should order that Mr. Ervin be sentenced to life in prison without parole.

XIV. Mr. Ervin's Death Sentence Is Disproportionate

The motion court clearly erred in rejecting Mr. Ervin's claim that this Court's proportionality review violates his rights to due process, Fourteenth Amendment, U.S. Constitution, in that: 1) this Court does not apply a *de novo* standard of review, 2) this Court's database does not comply with Section 565.035.6 and is missing numerous cases; and 3) this Court fails to consider all similar cases required by Section 565.035.3(3).

Mr. Ervin alleged that this Court's inadequate proportionality review violated his rights to due process under the Fourteenth Amendment to the U.S. Constitution (L.F.147-50). The motion court denied relief ruling that this Court had rejected this claim (L.F.1153), citing *State v. Clay*, 975 S.W.2d 121, 146 (Mo. banc 1998). On appeal, this Court reviews the motion court for clear error. See standard of review outlined in Point I, *supra*.

Initially, Mr. Ervin recognizes that *Clay*, cited by the trial court, did find this Court's proportionality review adequate. *Clay*, 975 at 146. However, this Court should reconsider *Clay* in light of the United States Supreme Court's recent decision, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S.Ct. 1678 (2001) which requires *de novo* review in punitive cases. As outlined by Judge Wolff, *Cooper Industries* should apply with equal force to the imposition of the death penalty. *State v. Black*, 50 S.W.3d 778, 793-99 (Mo. banc 2001) (Wolff, J., dissenting).

Applying a *de novo* standard of review, this Court would find that Mr. Ervin's sentence is disproportionate. Here, the evidence of Mr. Ervin's deliberation was weak. *State v. Ervin*, 979 S.W.2d 149, 167-68 (Mo. banc 1998) (Wolff., J., concurring and dissenting). He supposedly stabbed Mr. White, then saved him pulling him out of the burning trailer. *Id*. at 167. Then, when Mr. White said, "Go ahead and kill me James," Mr. Ervin responded by hitting him in the head with a brick. *Id*. Under Section 565.035.3(3), this Court must analyze the strength of the evidence. Since the evidence of deliberation is so weak, this Court should impose a life sentence. *State v. Chaney*, 967 S.W.2d 47, 61 (Mo. banc 1998) (granting life sentence because the evidence, while sufficient on guilt, was too weak to impose death sentence).

Mr. Ervin recognizes that appellate comparative *proportionality* review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37, 44-51 (1984); *State v. Ramsey*, 864S.W.2d 320, 238 (Mo. banc 1993). However, some form of meaningful *appellate* review may well be constitutionally required. *Pulley*, 465 U.S. at 54 (Stevens, J., concurring; and *McCleskey v. Kemp*, 481 U.S. 279, 313-14, n.37 (1987)). *Cooper Industries* suggests that review must be de novo. *State v. Black, supra*.

Section 565.035.3(3) mandates independent proportionality review, thus, the Legislature has created a protected liberty interest. *Ford v. Wainwright*, 477 U.S. 399, 428 (1986) (O'Connor, J.,concurring and dissenting); and *Wolff v. McDonnell*, 418 U.S.539, 557-58 (1974). Included in this mandate is the requirement that this Court "accumulate the records of all cases in which the sentence of death or *life imprisonment without probation or parole* was imposed after May 26, 1977. . ." Section 565.035.6,

RSMo 2000 (emphasis added). Evidence established noncompliance with the statute. In May, 1994, this Court did not have 189 life cases as required by statute (L.F.659). This Court cannot conduct the proportionality review mandated by statute without the relevant data that the Legislature explicitly requires.

This Court fails to consider all similar cases as required by § 565.035.3(3). This Court has limited the pool of cases contrary to the statute (L.F.682-83). It compares only those cases in which the death penalty has been imposed. *State v. Ramsey, supra* at 328. This Court simply finds other cases that had the same statutory aggravator, regardless of how dissimilar the cases might be (L.F.683). "That mechanistic counting of factors, on appellate review, avoids confronting directly the important question of whether this particular defendant can be said to a moral certainty to have committed a crime that justifies what should be a rare use of the death penalty." *Black, supra* at 795.

This Court's proportionality review is unconstitutional. This Court should find clear error and impose a sentence of life without probation and parole.

XV. Penalty Phase Instructions

The motion court clearly erred in denying Mr. Ervin's claim that jurors do not understand the penalty instructions and counsel failed to object to the instructions in violation of his rights to due process, effective assistance of counsel and to individualized sentencing not imposed arbitrarily or capriciously, 6th, 8th, and 14th Amendments, U.S. Constitution in that Mr. Ervin proved that jurors' comprehension is low, around 50%, and the instructions can easily be improved by rewriting to reduce redundancy, legal jargon, ambiguity and complex language, and counsel unreasonably failed to offer evidence to support his objection, first made in the motion for new trial, and Mr. Ervin was prejudiced because the less jurors understand, the more likely they are to impose death.

The penalty phase instructions are confusing and unconstitutional. Counsel was ineffective; he failed to present any evidence to prove the claim that the instructions are unconstitutional. Mr. Ervin was prejudiced because the less jurors understand the instructions, the more likely they are to impose death.

The 29.15 motion alleged counsel's ineffectiveness with regard to the penalty phase instructions and the constitutional infirmities they pose (L.F.145-47). Mr. Ervin proved his claim. Dr. Richard Wiener[8] tested jurors' comprehension (L.F.356-575). Juror comprehension of the penalty phase instructions was low (L.F.357). Jurors did not

[8] The motion court considered Dr. Wiener's affidavit and related exhibits (H.Tr.43-45).

understand the concepts of individualized consideration of mitigation, proof beyond a reasonable doubt, burdens of proof, guided discretion and that the responsibility for sentencing rested with the jurors (L.F.432-33). *See,* "Comprehensibility of Approved Jury Instructions in Capital Murder Cases," *Journal of Applied Psychology*, Vol. No. 80, No.4, 455-67. The study contained a control group and model instructions which gave a baseline level of comprehension and showed that comprehension could be improved (L.F.357-58), addressing the problems discussed in *Free v. Peters*, 12 F.3d 700, 705-06 (7th Cir. 1993). The less jurors understand the instructions, the more likely they are to impose death (L.F.357).

The court denied this claim, ruling that Dr. Wiener's study was unpersuasive, citing *State v. Deck*, 994 S.W.2d 527, 542-43 (Mo. banc 1999) (L.F.1152). Additionally, counsel was not ineffective for failing to raise a meritless objection. *Id*. This Court reviews these findings and conclusions for clear error. *See* standard of review outlined in Point I, *supra*.

The court's conclusions are clearly erroneous. In *Deck*, this Court was reviewing a completely different issue -- whether the trial court abused its discretion in failing to define "mitigation" based on questions the jury had asked. Trial counsel should have focused on Deck's particular jurors, rather than relying on Dr. Wiener's more generalized study. *Id*. In contrast, here, the issue is whether trial counsel was ineffective in failing to present evidence *before* trial in support a challenge to the instructions or at the time the instructions were submitted.

To establish counsel was ineffective, Mr. Ervin must demonstrate that counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances and he was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Here, trial counsel challenged the penalty phase instructions for the first time in his motion for new trial. He provided no evidentiary support for his objection (Ex.56 at 149-50). Counsel was aware of Wiener's study, but did not make it part of the record (Tr.1107).

Mr. Ervin was prejudiced by counsel's failures. The instructions were constitutionally defective because a reasonable likelihood exists that they misled jurors into sentencing Mr. Ervin to death. *Boyde v. California*, 494 U.S.370, 380 (1990). Jurors do not understand the basic legal principles necessary to decide punishment. Aggravators must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). A juror must be free to consider any potentially mitigating factors. *Lockett v. Ohio*, 438 U.S. 586,604 (1978). Requiring the jury to agree unanimously on a mitigating factor violates the Eighth Amendment. *Mills v. Maryland*, 486 U.S. 367 (1988). The ultimate decision for imposing a sentence of death rests with the jury. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The confusion Wiener identified creates the risk that the death sentence may be imposed arbitrarily and capriciously, in violation of *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S.153 (1976). The risk is great since the greater the jurors' confusion, the more likely they are to impose death (L.F.357).

The motion court clearly erred in denying Mr. Ervin's motion to vacate his sentence. A new penalty phase should result. Alternatively, this Court should impose a sentence of life without probation or parole.

CONCLUSION

Based on the arguments in Point V, VI, and XII, Mr. Ervin requests a new trial; Points I-V, VII-X, and XV, a new penalty phase or a life sentence; and Points XI, XIII and XIV, vacate his death sentence and impose life without probation or parole.

Respectfully submitted,

Melinda K. Pendergraph, MOBar #34015
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
(573) 882-9855

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2001, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, Missouri 65102.

Melinda K. Pendergraph

Certificate of Compliance

I, Melinda K. Pendergraph, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Special Rule 1(b). The brief was completed using Microsoft Word, Office 2000, 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 _____ words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk(s) filed with this brief contain(s) a copy of this brief. The disk(s) has/have been scanned for viruses using a McAfee VirusScan program. According to that program, the disk(s) is/are virus-free.

_____

Melinda K. Pendergraph