IN THE
MISSOURI SUPREME COURT

MICHAEL S. WORTHINGTON,	)	
Appellant,	)	
vs.	)	No. SC 85783
STATE OF MISSOURI,	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
11TH JUDICIAL CIRCUIT, DIVISION II
THE HONORABLE NANCY SCHNEIDER, JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

Both original Statements are incorporated here.

COUNSELS' PENALTY INEFFECTIVENESS - INTRODUCTION

Green knew from his prior capital case experience and training that having a complete social history was critical for deciding how to present a mitigation case. Thus, Rosenblum delegated all social history responsibility to Green. Green did not do a complete social history because of time and money.

Despite knowing what needed to be done, Green limited the social history investigation to what respondent's aggravation expert, Dr. Givon, had done and two fifteen minute phone conversations with Michael's mother. Relying on the State's expert was unreasonable because Givon had nothing positive to say. Green's own experience taught him not to rely on a court ordered examiner. Green knew he had a duty to conduct his own independent investigation. If Green had reasonably investigated, then he could have rebutted Givon's testimony that Michael had intentionally set on fire a friend. The friend's parents would have refuted Givon's testimony.

A complete social history would have uncovered mitigating evidence supporting life that could have been furnished to mental health experts that would have allowed those experts to conclude Michael suffers from Tourette's Syndrome, Attention Deficit Hyperactivity Disorder, Obsessive Compulsive Disorder, Bipolar Disorder, Frontal Lobe Cerebral Brain Dysfunction, and Post-Traumatic Stress Disorder. If Dr. Evans had been furnished these diagnoses, Evans could have explained Michael's jail conduct was caused by improper psychiatric care.

Michael's counsel's conduct is the same conduct this Court found was ineffective in *Hutchison* v. *State*, SC 85548 (Mo. banc Dec. 17, 2004). Michael's counsel, like

Hutchison's counsel, failed to provide complete information to experts who could have presented findings that were highly mitigating. Counsel's actions here are even more unreasonable than Hutchison's counsel because they relied on the State's aggravation expert, Dr. Givon, as their source of social history investigation.

The victim's family's and Prosecutor Braun's coordinated efforts succeeded in forcing Judge Cundiff from the case. They attacked Cundiff's integrity and accused him of having already decided on life. Thus, Green had a heightened duty to fully investigate Michael's background because he knew he needed even more mitigation to persuade Judge Nichols. Despite that responsibility, Green did not even conduct the most fundamental of investigation, obtaining basic history in Peoria.

This Court should find counsel was ineffective in failing to present a competent mitigation case and in failing to rebut false aggravation.

POINTS RELIED ON

I. FAILURE TO PRESENT EVIDENCE MICHAEL DID NOT SET RICHY MACKEY ON FIRE

The motion court clearly erred rejecting counsel was ineffective for failing to call Elex and Beverly Mackey to testify Michael did not intentionally set their son on fire which the motion court admitted for its truth to rebut Givon's testimony he had because Michael having committed such a heinous highly aggravated act was factually false and Givon's report shows Givon considered this occurrence as one of a series of intentional acts to support his anti-social diagnosis because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that Judge Nichols considered this factually false criminal history information in imposing death.

State v. Black, SC 85535 (Mo. banc Nov. 23, 2004);

State v. Foust, 920 S.W.2d 949 (Mo. App., E.D. 1996);

State v. McMillin, 783 S.W.2d 82 (Mo. banc 1990);

Wiggins v. Smith, 123 S.Ct. 2527 (2003);

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

DSM IV.

V. FAILURE TO INVESTIGATE SOCIAL HISTORY

The motion court clearly erred rejecting counsel was ineffective for failing to properly investigate Michael's social history and to furnish it to experts, such as Drs. Pincus, Cowan, and Smith, who would have concluded he suffers from Tourette's Syndrome, Attention Deficit Hyperactivity Disorder, Obsessive Compulsive Disorder, Bipolar Disorder, Frontal Lobe Cerebral Brain Dysfunction, and Post-Traumatic Stress Disorder because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that counsel failed to conduct a thorough social history investigation and supply it to their expert, Dr. Miller, due to lack of money which would have mitigated punishment and rebutted aggravation.

Estelle v. Smith, 451 U.S. 454 (1981);

Hutchison v. *State*, SC 85548 (Mo. banc Dec. 7, 2004);

Taylor v. State, 126 S.W.3d 755 (Mo. banc 2004);

Tennard v. Dretke, 124 S.Ct. 2562 (2004);

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

§552.020(14);

DSM IV.

VI. FAILURE TO SUPPLY DR. EVANS SOCIAL HISTORY

The motion court clearly erred denying the claim and accompanying offer of proof counsel was ineffective for failing to adequately investigate Michael's personal social history and to furnish it to Dr. Evans who could have utilized it to testify Michael was not being properly medicated for his mental disabilities in the St. Charles County Jail which would have explained the cause of his jail incidents, mitigated punishment, and rebutted respondent's jail behavior aggravation because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that the claims raised on appeal are the same claims that appeared in the amended motion.

State v. Clay, 975 S.W.2d 121 (Mo. banc 1998);

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

I. FAILURE TO PRESENT EVIDENCE MICHAEL DID NOT SET RICHY MACKEY ON FIRE

The motion court clearly erred rejecting counsel was ineffective for failing to call Elex and Beverly Mackey to testify Michael did not intentionally set their son on fire which the motion court admitted for its truth to rebut Givon's testimony he had because Michael having committed such a heinous highly aggravated act was factually false and Givon's report shows Givon considered this occurrence as one of a series of intentional acts to support his anti-social diagnosis because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that Judge Nichols considered this factually false criminal history information in imposing death.

Givon found Michael was anti-social and based that finding, in part, on Michael having intentionally set Butch Mackey on fire. Now, respondent tries to minimize such a heinous act that never happened, characterizing Givon's reporting of it as accidental(Resp.Br.18-19). The record establishes Givon's false testimony and counsel's failure to correct this aggravation denied Michael his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel. U.S. Const. Amends. VI, VIII, and XIV. [1]

[1] Although this reply brief focuses exclusively on penalty, Michael is not abandoning any guilt phase claims as set forth in all Points of his original brief.

Respondent makes its argument quoting from Givon's report a statement Givon attributed to Michael(Resp.Br.14-15). That purported quoted statement was as follows: "I was always doing something **destructive**; we burned our friend Butch Mackey over 90% of his body, I was 11 then, we were throwing gas on each other." (24.035Ex.10 at 2586) (emphasis added). Givon's linking of always doing something "destructive" in the same sentence with setting Mackey on fire indicates Givon did not treat the setting on fire as a mere "accident" (Resp.Br.18-19), but instead as an example of behavior he relied on in rendering his anti-social opinion.

Respondent asserts setting Mackey on fire was not included in Givon's diagnosis because Givon based his opinion on DSM IV for incidents after Michael was fifteen(Resp.Br.19). In fact, Givon's report states he relied on events that were both pre and post fifteen years old. Givon's report states his diagnosis under DSM IV is anti-social based on seven listed items(Ex.10 at 2597-98). In the same paragraph, next sentence, Givon stated: "Further, there is evidence of severe conduct disorder with onset **before 15 years**." (Ex.10 at 2597-98) (emphasis added). The DSM IV at 646, 650 states that in order to assign an anti-social diagnosis "Criterion C" requires evidence of a conduct disorder before age fifteen years. Givon's finding of evidence of a conduct disorder before fifteen, as required under the DSM, shows that he considered the intentional setting on fire of Mackey when Michael was eleven.

Contrary to respondent's argument Givon did not need to say his diagnosis would have changed absent the inaccurate information(Resp.Br.19). The inaccurate reporting Michael setting someone on fire was prejudicial. Nichols found Michael's criminal

history, including this burning, as an aggravator(24.035Ex.15 at 3893). Intentionally setting another on fire would be a juvenile crime if Michael had committed such an act. The Mackeys established that this never happened because Michael was not even present when Richy Mackey was burned. Moreover, the act of "throwing gas on each other," standing alone, is an anti-social act.

Respondent asserts Elex and Beverly Mackey's testimony was hearsay that "does not refute appellant's involvement but merely establishes that Richy named other people who were involved and has never named appellant"(Resp.Br.20).[2] Judge Schneider relied on the excited utterance exception to the hearsay rule to allow Elex and Beverly to testify, over respondent's hearsay objection, that Richy told them his brother Butch and a friend Kevin were responsible for accidentally setting him on fire(R.Tr.29-30,55-56). Elex's testimony included:

[2] Respondent has argued this Court should not consider 24.035Ex.51, Richy Mackey's affidavit, because Judge Schneider refused to admit it as hearsay(Resp.Br.17-18 n.3). Richy's affidavit states he was unavailable to testify at the 29.15 and Michael had nothing to do with setting him on fire(24.035Ex.51) That affidavit is properly before this Court, however, as Dr. Cowan testified it was something he relied on (App.Br.92) and Schneider allowed Cowan, over objection, to testify he considered it(R.Tr.246-47). *State v. Boyd*, 143 S.W.3d 36, 46 (Mo. App.,W.D. 2004) (expert can rely on hearsay to support his opinion).

Q. (By [Movant's Counsel]) At any time during Richy's life has he said that Michael Worthington had anything to do with his burning?

[Respondent's Counsel]: Objection, calls for hearsay.

THE COURT: Overruled. You may answer that question.

A. Yes, he said, **no, he had nothing to do with it**.

[Respondent's Counsel]: I ask the answer be stricken. It is a hearsay answer.

THE COURT: Overruled.

(R.Tr.35-36) (emphasis added). This testimony shows Elex testified Richy had expressly told Elex that Michael was not involved.

"Exceptions to the hearsay rule are relevant only when the statement *is* offered for the truth of the matter asserted--*e.g.*, dying declarations, excited utterances, business records, etc." *State v. Foust*, 920 S.W.2d 949, 954 (Mo. App., E.D. 1996) (emphasis in original). Because Schneider allowed the Mackeys' testimony under the excited utterance exception their evidence was admitted for its truth and not barred under the hearsay rule. *See Foust.*

Respondent contends the Mackeys' evidence would have only impeached Givon on a collateral matter because it was only one matter Givon relied on(Resp.Br.21). In *State v. Black*, SC 85535 slip op. at 1, 8-15 (Mo. banc Nov. 23, 2004) counsel was ineffective for failing to impeach witnesses with their prior inconsistent statements. That failure was prejudicial because the prior inconsistent statements went to a central, controverted issue, whether Black acted with deliberation. *Id.*11,15. A trial court is

required to allow impeachment on matters "related to a paramount issue or that affected [the witnesses'] accuracy, veracity, or credibility…."*Id.*10. Such issues are not collateral. *Id.*10. A matter is not collateral "if the alleged discrepancy involves a crucial issue directly in controversy…."*Id*.9-10.

The crucial issue in controversy here was whether Michael's criminal history was sufficiently aggravated to warrant death. Nichols found it was(24.035Ex.15 at 3893). Calling the Mackeys was not only important to establish Givon's antisocial finding was based in part on a serious untrue act, but also because that act standing allow, separate from Givon's opinion, was a highly aggravated criminal act. The evidence that could have been presented was not collateral impeachment. *See Black*.

In *Ervin v. State*, 80 S.W.3d 817, 825-27 (Mo. banc 2002) this Court remanded for the motion court to enter findings on whether counsel was ineffective for failing to rebut evidence Ervin had assaulted another inmate and threatened to kill him. While ordering that remand this Court noted: "Rebuttal of aggravating evidence, where rebuttal evidence is available and efficacious, is one of the duties of trial counsel." *Id.*827. *See also*, *Wiggins v. Smith*,123 S.Ct. 2527, 2537 (2003) (A.B.A Standards require counsel discover all reasonably available mitigation and evidence to rebut aggravation). Green could have proven Michael had nothing to do with an act of intentionally setting someone on fire. The only reason he did not was the cost to him of conducting investigation in Peoria(1st.Supp.R.L.F.457-58). Refuting Michael having intentionally set someone on fire was crucial because that is behavior that is highly aggravated. *State v. McMillin*, 783 S.W.2d 82, 88-89 (Mo. banc 1990) (death imposed where victim was set on fire with

gasoline while alive). Moreover, the Mackeys' testimony would have refuted that anyone was "throwing gas on each other"(App.Br.40-41).

Braun's rebuttal closing argument urged death based on Michael's statements to Givon(Clos.Arg.42-43). Braun argued Michael's statements to Givon showed he was not remorseful(Clos.Arg.Tr.42-43). Braun suggested Givon was highly credible in his reporting(Clos.Arg.Tr.42-43). Respondent contends Michael was not prejudiced because this incident was not mentioned in closing argument(Resp.Br.21). The truth demonstrates Givon cannot be trusted. Counsel should have established the falsity of the Mackey incident.

According to respondent, other exhibits establish a sufficient criminal history (Resp.Br.19,22 relying on Exs.33(b),35,39,83) so that Michael was not prejudiced. All of the acts referenced in those exhibits, except one, involve property crime burglaries and thefts, without personal harm to others. The only claim that Michael committed an act of violence involved his mother's father. Michael's mother would have testified that Michael never assaulted her father(App.Br.143). Michael's mother improperly blamed Michael for many burglaries she committed and often called the police to say Michael committed those crimes to facilitate her sexual encounters with police officers(App.Br.143).[3] The act of intentionally setting another person on fire is a highly

[3] Even the nonviolent criminal history Nichols heard was unreliable and based on false information.

aggravated act *McMillin*, *supra*, and qualitatively different from burglaries and thefts not involving bodily harm to anyone.

Michael's sentence should be vacated.

V. FAILURE TO INVESTIGATE SOCIAL HISTORY

The motion court clearly erred rejecting counsel was ineffective for failing to properly investigate Michael's social history and to furnish it to experts, such as Drs. Pincus, Cowan, and Smith, who would have concluded he suffers from Tourette's Syndrome, Attention Deficit Hyperactivity Disorder, Obsessive Compulsive Disorder, Bipolar Disorder, Frontal Lobe Cerebral Brain Dysfunction, and Post-Traumatic Stress Disorder because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that counsel failed to conduct a thorough social history investigation and supply it to their expert, Dr. Miller, due to lack of money which would have mitigated punishment and rebutted aggravation.

Counsel failed to conduct a thorough social history investigation and supply it to Dr. Miller or other similarly qualified experts who could have provided compelling opinions that mitigated punishment and rebutted aggravation. That failure denied Michael his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel. U.S. Const. Amends. VI, VIII, and XIV.

A. Ineffective Mitigation - Counsel Acted Like Hutchison's Counsel

Counsel called two mitigation witnesses. Michael's mother's sister recounted the abusive, drug infested environment in which Michael was raised(App.Br.13). Dr. Evans opined Michael's intoxication caused him to be incapable of decision making(App.Br.14).

In *Hutchison* v. *State*, SC 85548 (Mo. banc Dec. 7, 2004) slip op. at 18, trial counsel employed a psychiatric expert, Dr. Bland, but failed to provide him with treatment history documents from Hutchison's prior treating psychiatrist. Counsel failed to provide Bland with other readily available records. *Id.*21-25. When Bland testified in penalty he gave no interpretations and provided no testimony to assist the jurors to mitigate punishment. *Id.*22. Hutchison did not argue that counsel was ineffective for failing to shop for a more favorable expert, only that the expert hired should have conducted a more thorough investigation and evaluation by counsel having provided necessary background. *Id.*23. Counsel was ineffective for failing to provide Bland with sufficient background history to provide readily available mitigating testimony. *Id.*21-25. That is true here as well.

Respondent argues counsel was effective because they hired Dr. Miller, but decided against calling Miller based on some unfavorable findings he made(Resp.Br.73-74). Rosenblum testified he hired Dr. Miller to evaluate Michael for a diminished capacity defense(1stSupp.R.L.F.630). Miller reviewed the same materials Givon reviewed and Givon's report(*See* App.Br.84 listing limited materials Givon reviewed and App.Br.95 what Miller reviewed). Givon's diagnoses were malingering, cocaine dependence, alcohol abuse, and anti-social personality(Pen.Hrg.Tr.313-14). Miller's diagnoses, like Givon's diagnoses, included cocaine and alcohol abuse and anti-social so Rosenblum decided not to call Miller(App.Br.95;1stSupp.R.L.F.634-36). Miller acknowledged other problems might exist finding it was necessary to rule out bipolar disorder and complex partial seizures(24.035Ex.10 at 2613).

In contrast to Givon and Miller, Drs. Pincus, Cowan, and Smith reviewed vast volumes of documents neither Givon nor Miller reviewed(*See* App.Br.90-92 listing what these experts reviewed). Having a complete social history background to consider, Pincus, Cowan, and Smith were able to identify the highly mitigating evidence(App.Br.85-90). Like Hutchison's counsel, here counsel failed to provide a substantial social history to its retained mental health expert, Miller, that would have allowed Miller or like experts to provide highly mitigating testimony, rather than aggravating. All Nichols heard from Evans was how Michael's substance abuse had limited his decision making.

"Impaired intellectual functioning has mitigating dimension beyond the impact it has on the individual's ability to act deliberately." *Tennard v. Dretke*, 124 S.Ct. 2562, 2572 (2004). Impaired intellectual functioning evidence is "inherently mitigating" and obvious evidence to support a life sentence. *Hutchison*, slip op. at 25. Cowan's testing found Michael has severe frontal lobe dysfunction(R.Tr.240,287-88,294-96,325). Pincus found Michael has Tourette's(R.Tr.98,101,107-08). Cowan noted the Tourette's caused Michael to be impaired as to abstract reasoning, executive functions, and aggressive behavior control(R.Tr.240,244-45,268-70,279-83,322-23,325-27). Despite the availability of this mitigating information, Judge Nichols never heard it. Nichols never heard the available mitigation because counsel did not provide Miller or like experts with the information necessary to make a reliable diagnosis. *See Hutchison*.

In *Hutchison*, Dr. Bland at least identified some problems Hutchison displayed, but failed to address the effects those deficits had on Hutchison. Hutchison, slip op. at

21. Hutchison's counsel was ineffective because they failed to follow-up with additional preparation based on Bland's work. *Id*.25. Michael's case is even more egregious because the only mental health problems Givon identified were negative ones and that was all Judge Nichols heard. Counsel unreasonably limited what they provided their expert Miller to what Givon had reviewed and Givon's report. Moreover, once Miller included a diagnosis of needing to rule out complex partial seizures (Resp.Br.73), Michael's counsel were on notice that additional preparation needed to be done. Had counsel followed-up, experts like Pincus and Cowan would have identified Michael's brain dysfunction. *See Hutchison*.

Green testified Rosenblum hired him for $10,000 to handle D.N.A. and penalty mitigation and Rosenblum was responsible for guilt issues(1stSupp.R.L.F.449,523,527). Rosenblum testified Green was to handle D.N.A. and mitigation(1stSupp.R.L.F.620). Yet Green only learned about mental health expert Dr. Miller from Rosenblum after the 24.035 motion was filed(1stSupp.R.L.F.466-67). Green's total unfamiliarity with Miller underscores why he could not develop helpful mitigation through Miller. Respondent asserts "because counsel had already shopped for an expert, there was no duty to continue to shop for a more favorable expert"(Resp.Br.78). Like *Hutchison*, Michael's case is not about "expert shopping," but rather being aware Miller was retained and then supplying him or other like experts with complete information.

Respondent asserts Green made a strategic decision to stipulate "to a great deal of evidence that documented his 'social history'"(Resp.Br.85). In support, respondent cites to the cross-examination of Peoria police officer McKean and Peoria probation officer

Frey(Resp.Br.85-86). Counsel elicited from them details of Michael's dysfunctional home, he had received treatment for drug abuse, was diagnosed with "social maladjustment with a conduct disorder," attempted suicide multiple times, and diagnosed with substance abuse disorder, dysthymia, and borderline personality disorder(Resp.Br.85-86). None of these diagnoses or their details presented Michael's mitigation case in a favorable light. Moreover, Givon testified he did not agree with any depressive type diagnoses like dysthymia(Pen.Hrg.Tr.351-53,391,401-02,405-06,414-17,419,456-58). Further, as discussed in Point I, Givon relied on evidence of a conduct disorder to find anti-social as required under DSM IV. Thus, highlighting an earlier conduct disorder assessment was not helpful, reasonable, or effective.

When Givon was called to testify, Rosenblum sought to exclude his testimony as a Chapter 552 competency to proceed evaluation, but withdrew that objection when Green apologized, apprising Rosenblum and Nichols he had stipulated to Givon's testimony(Pen.Hrg.Tr.295). Rosenblum's unfamiliarity with Green's stipulation underscores counsel's ineffectiveness through their failure to communicate about Green's stipulation and rebuts respondent's assertion counsel's stipulation was reasonable strategy(Resp.Br.85).

In *Estelle v. Smith*, 451 U.S. 454, 463, 465, 471 (1981) the Court concluded it violated the defendant's Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel for the State to offer in aggravation a psychiatrist's findings obtained from a court ordered examination done to determine competency to proceed. Similarly, §552.020(14) provides that statements and information obtained during

competency to proceed evaluations cannot be admitted into evidence on the issue of guilt. Green stipulated to Givon's findings for purposes of guilt on the punishment of death. The unreasonableness of that conduct is apparent from *Estelle* and §552.020(14).

Respondent asserts Rosenblum adequately cross-examined Givon for 112 pages about other mental health professionals' diagnoses, and thereby, excuses counsel's failure to adequately investigate mitigation(Resp.Br.87). Rather, Rosenblum's theme was Givon was a pro-State witness employed and paid by the State and had been investigated in Illinois for his pro-State bias, all developed in Rosenblum's past dealings with Givon(Pen.Hrg.Tr.337-47,360-62,366,375-77,409-10,433-34,459-62,469-70). That pro-State bias was attempted to be highlighted because records Givon reviewed from treatment settings had included diagnoses of forms of depression, but Givon testified he disagreed with those diagnoses(Pen.Hrg.Tr.351-53,391,401-02,405-06,414-17,419,456-58). Also, Rosenblum focused on Givon's evaluation was done to determine Michael's competency to proceed and not the role of substance abuse in this offense or to evaluate Michael for diminished capacity(Pen.Hrg.Tr.346,358-60,364-73,421-22,466-68). Counsel, however, never elicited evidence that portrayed Michael favorably and the number of pages the cross covered simply does not address or excuse that deficiency.

Respondent asserts that Judge Nichols heard "a great deal of appellant's social history"(Resp.Br.88). She only heard, however, that Michael had depressive type diagnoses that Givon refuted, testifying he did not agree with them(Pen.Hrg.Tr.351-53,391,401-02,405-06,414-17,419,456-58). Michael's aunt's limited testimony about the

abuse he experienced, like Bland's testimony in Hutchison, *supra*, did not address the effect that abuse had on Michael.

Respondent also states: "Givon also conceded that it would be important to establish a genetic basis for appellant's behavior and that such a basis would include that both his parents were drug addicts and his grandparents were alcoholics"(Resp.Br.87). Such a concession has no force without expert testimony establishing that Michael's mental impairments had a genetic basis. Pincus, in fact, could have testified Michael had Tourette's, which was genetically based(R.Tr.98,101,107-08). *See* DSM IV-TR at 113.

Respondent claims that the 24.035 experts' findings "were significantly dependent on appellant's self-reporting" is contrary to the record(Resp.Br.82). Pincus and Smith testified their diagnoses were not primarily based on Michael's self-reporting and what Michael did report had independent confirmation(R.Tr.129-30,184-85,533-34,640-41). Moreover, Cowan testified his examination involves objective testing which also assessed for malingering(R.Tr.219-20).

Hutchison did not claim the specific experts who testified at the 29.15 should have been called at trial, but rather witnesses with their expertise should have been called. *Hutchison* slip op. at 23. That is the same claim presented here and requires the same sentencing relief.

B. <u>Financial Limitations</u>

Except for Michael's case, Green always relied on a paralegal or mitigation specialist to do capital clients' social history for mitigation(1stSupp.R.L.F.434-36,570). Green testified that he did talk to paralegal/mitigation specialist Kim Gray about retaining

her "but for whatever reasons, I don't know if there wasn't monies available, but I didn't control the money in this case."(1stSupp.R.L.F.436 L.20-22). That was immediately followed by:

Q. What difference does that make that you didn't control the money in this case?

A. Well, because I can't contract somebody that I don't have funds for.

(1stSupp.R.L.F.436 L.23 - 437 L.1).

When Green was asked why he never went to Peoria, his complete response was:

For a boatload of reasons. Because of the sequence of events that were happening with his case, starting all the way back with Cundiff, the -- the, for lack of a better word, I guess the strategies changed over from like May to August when the plea was done. And a lot of that had to do with the changes of the judge.

Another reason was is because quite frankly, you know, time and expense was not a luxury I had, keeping up my own private practice and what I was getting paid on -- paid for on this case. And I didn't have control over the finances or how things were done, so -- with respect to logistics of hiring experts and knowing what money was available and what money wasn't available.

(1stSupp.R.L.F.458).

Green's testimony included:

Q. Okay. Did you consider asking [Rosenblum] for more money so you could go to Peoria or wherever?

A. Not in that limited sense of what you're talking about. I asked [Rosenblum] for money on other issues and got some and didn't -- **for a mitigation specialist, obviously no money was put forward for that.**

(1stSupp.R.L.F.459) (emphasis added). Green later testified that he did not know why mitigation specialist/paralegal Kim Gray was not hired(1stSupp.R.L.F.460).

Respondent asserts Green's testimony that he was unable to remember why a mitigation specialist was not hired does not overcome a strategy presumption (citing *Fretwell v. Norris*, 133 F.3d 621, 623-24 (8th Cir. 1998) (Resp.Br.91)). Green did not remember the details of why a specific mitigation expert, Kim Gray, was not hired, but conceded that he sought a mitigation expert and that was refused because of money(1stSupp.R.L.F.459, see, *supra*, quoted emphasized material). This is unlike *Fretwell* where counsel was unable to recall the reasons for his actions. *Fretwell*, 133 F.3d at 623-24.

Respondent asserts money was not an issue because Green testified there was a "boatload" of reasons why he did not go to Peoria which included "strategies" associated with Cundiff's removal(Resp.Br.92). Green's "boatload" strategies testimony, *supra*, as it related to Cundiff's removal, only highlights the unreasonableness in his mitigation preparation. When the victim's family's and Prosecutor Braun's coordinated efforts succeeded in forcing Judge Cundiff from the case through attacking his integrity, accusing him of having already decided on life (App.Br.8-9), Green had a heightened duty to fully investigate Michael's background. Counsel knew that persuading Judge Nichols to impose life had become that much more difficult. Green should have realized

an even more compelling case to persuade Nichols to impose life was required. Despite that responsibility, Green did not even conduct the most fundamental of investigation, obtaining basic history in Peoria. Green's testimony, *supra*, shows that the lack of money limited investigation.

Respondent argues that under *Taylor v. State*, 126 S.W.3d 755, 758 (Mo. banc 2004), 24.035 counsel was required to ask Rosenblum if Green had requested money or if there was anything that did not get done because of monetary limitations(Resp.Br.92). In *Taylor*, only one of the two attorneys from the penalty retrial were called to testify at the 29.15. *Id*.758. As to those claims made against the non-testifying attorney this Court found Taylor failed to satisfy his burden. *Id.*758. Both attorneys acknowledged Rosenblum was responsible for guilt issues whereas Green, was responsible for mitigation(1stSupp.R.L.F.449,523,527,620). Because the lack of money claims go to issues involving Green's ineffectiveness on mitigation, not Rosenblum's ineffectivness, counsel had no reason to question Rosenblum as respondent asserts.

Respondent points to money paid to Evans and Miller(Resp.Br.92). This does not help respondent. Rather, Evans' efforts to collect payment highlight how limited money plagued investigating mitigation and rebutting aggravation. In November, 1998, Green sent Rosenblum a letter saying he thought that if Evans received a "partial payment" for his services then Evans would be "pacified"(24.035Ex.18 at 4709). In June, 1999, Evans sent a statement that threatened legal action if he was not paid(24.035Ex.18 at 4713).

Respondent argues Michael was not prejudiced because its evidence showed "a long criminal history"(Resp.Br.88-89 relying on Exs.33(b),35,83). As discussed in Point

I of this reply brief and the original brief's Points V and X, Michael's criminal history was for non-violent crimes and not violent crimes as respondent claims.

Hutchison's private counsel "were overwhelmed, under-prepared and under-funded by the time they arrived at the penalty phase." *Hutchison*, slip op. at 12,15. This Court recognized in *Hutchison* that "[p]revailing professional standards for capital defense work require counsel to 'discover *all reasonably available* mitigating evidence ….'" *Id.*13 (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis in *Wiggins*)). Even though Hutchison's family could not afford the experts, failure to do reasonable follow-up was contrary to *Wiggins*. *Hutchison*, slip op. at 23. Michael's counsel, likewise, were overwhelmed, under-prepared, and under-funded.

This Court should find counsel was ineffective.

VI. FAILURE TO SUPPLY DR. EVANS SOCIAL HISTORY

The motion court clearly erred denying the claim and accompanying offer of proof counsel was ineffective for failing to adequately investigate Michael's personal social history and to furnish it to Dr. Evans who could have utilized it to testify Michael was not being properly medicated for his mental disabilities in the St. Charles County Jail which would have explained the cause of his jail incidents, mitigated punishment, and rebutted respondent's jail behavior aggravation because Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that the claims raised on appeal are the same claims that appeared in the amended motion.

The motion court denied claims counsel was ineffective for failing to investigate Michael's social history and provide it to Dr. Evans who could have explained Michael's St. Charles jail incidents resulted from him not being properly medicated. Evans' testimony would have mitigated punishment and rebutted respondent's jail conduct aggravation. These claims are the same claims that appeared in the amended motion. Michael was denied his rights to due process, to be free from cruel and unusual punishment, and effective assistance of counsel. U.S. Const. Amends. VI, VIII, and XIV.

Respondent argues that the claims briefed are not the same ones pled. A review of claims 8(d) and 8(e), however, show otherwise. The claims presented to this Court are the same found in the pleadings. This Court should consider these claims because they are found in the pleadings. *State v. Clay*, 975 S.W.2d 121, 141-42 (Mo. banc 1998).

A. Claim 8(d) Pleadings

Claim 8(d) alleged counsel was ineffective when Green retained Evans, but provided him no psychosocial history and no documentation about Michael's life (24.035Depo.Ex.42 at 279,282). Counsel supplied Evans minimal records, that included Givon's evaluation and police reports(24.035Depo.Ex.42 at 280,282). In previous cases Green supplied Evans with many more records and Evans believed he would receive more records from Green in this case too(24.035Depo.Ex.42 at 280,282). 24.035 counsel furnished Evans the social history data they compiled(24.035Depo.Ex.42 at 281,283). Michael was prejudiced because Evans could have provided support for mitigating circumstances that would have resulted in a life sentence(24.035Depo.Ex.42 at 281-82,284-85,292-93).

The motion detailed Evans' expected testimony(24.035Depo.Ex.42 at 285). Evans would testify about the significance of Michael's Attention Deficit Disorder, Tourette's, and Bipolar Disorder(24.035Depo.Ex.42 at 285-86). In particular: "Dr Evans will testify that it is his belief that much of the behavior exhibited in the St. Charles County Jail had its origins in [Michael's] disability from ADHD and Tourette Syndrome" (24.035Depo.Ex.42 at 286). Evans would testify that medicating Michael in the Jail with antidepressants exacerbated his bipolar symptoms(24.035Depo.Ex.42 at 288).

B. Claim 8(e) Pleadings

The 8(e) pleadings alleged Green was ineffective for failing to present testimony from Evans to explain Michael's behavior in the St. Charles Jail(24.035Depo.Ex.42 at 299,303). Green only sent Evans a few records and failed to furnish records relating to

Michael's childhood, school years, psychiatric and drug treatment, and St. Charles Jail incident reports(24.035Depo.Ex.42 at 301,305). No psychosocial history evidence was furnished to Evans(24.035Depo.Ex.42 at 305). Green should have called Evans, after furnishing him the St. Charles Jail records, to explain Michael's behavior was the product of not being properly medicated for bipolar disorder(24.035Depo.Ex.42 at 299,301,303,306,320). Michael was prejudiced because Judge Nichols found Michael's jail behavior was an aggravator (24.035Depo.Ex.42 at 302).

Evans would testify he reviewed the extensive social history documents 24.035 counsel generated(24.035Depo.Ex.42 at 305). Had Michael been properly medicated he would have been able to control his behavior(24.035Depo.Ex.42 at 306). Evans would testify antidepressants adversely effect people who suffer from bipolar disorder and Michael's jail behavior was adversely impacted when he was given antidepressants(24.035Depo.Ex.42 at 306). Much of Michael's jail behavior had its origin in his ADHD and Tourette's(24.035Depo.Ex.42 at 307).

C. The Claims Briefed Were Pled

Respondent asserts that what was briefed combines portions of Claims 8(d) and 8(e), and therefore, constitutes something different from what was pled(Resp.Br.93). Claims 8(d) and 8(e) actually allege the same matters. What was briefed to this Court actually appears in both claims. The evidence that was presented and argued tracks substantially the pleadings in both claims(*See* App.Br.110-11).

D. The Claim Did Not Require Evans Make Diagnoses

Respondent argues that claim 8(e) was not proven because Evans was not qualified to give diagnoses(Resp.Br.95). Counsel's ineffectiveness was not in failing to obtain diagnoses from Evans, but in failing to call him to explain Michael was not being properly medicated for the diagnoses assigned to him by experts qualified to make those diagnoses(App.Br.112).

Counsel was ineffective for failing to prepare and utilize Evans to mitigate and rebut respondent's St. Charles Jail aggravation and Michael's sentence should be vacated.

CONCLUSION

For the reasons discussed in the original brief and this reply brief Michael Worthington requests: Points II, III, IV, V, VIII, vacate his convictions and sentences; Points I, VI, VII, X, XI vacate his sentences; Point XII impose life without parole; and Point IX a new 24.035 hearing before a judge other than Judge Schneider.

Respectfully submitted,

_____

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Certificate of Compliance and Service

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the reply brief contains _____ words, which does not exceed twenty-five percent of the 31,000 words allowed (7,750) for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan Enterprise 7.1.0 program. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were _____ this ____ day of _____, 2005, to the Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65102.

_____
William J. Swift