Sup. Ct. # 87837

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

JUSTIN J. WALKUP,

Appellant.

Appeal from the Judgment of Conviction and Sentence
Circuit Court of Jackson County, Missouri
16th Judicial Circuit, Division 28
The Honorable Vernon E. Scoville, III, Presiding Judge

APPELLANT'S SUBSTITUTE BRIEF

JEANNIE WILLIBEY, #40997
ASSISTANT APPELLATE DEFENDER
Office of the State Public Defender
Western Appellate Division
818 Grand, Second Floor
Kansas City, MO 64106
Tel: (816) 889-7699
Fax: (816) 889-2001
Counsel for Appellant

I N D E X

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JURISDICTIONAL STATEMENT

On January 15, 2004, after a jury trial in the Circuit Court of Jackson County, Appellant, Justin J. Walkup, was convicted of first degree murder, Section 565.020, RSMo 2000, and armed criminal action, Section 571.015, RSMo 2000. On March 1, 2004, the Honorable Vernon E. Scoville, III, Judge of Division 28, sentenced Appellant to concurrent sentences of life imprisonment without parole for first degree murder and life imprisonment for armed criminal action.

Appellant appealed his convictions and sentences to the Missouri Court of Appeals, Western District. State v. Walkup, WD# 63949. On May 23, 2006, the Court of Appeals issued an opinion reversing Appellant's convictions and sentences and remanding the case for a new trial. On June 27, 2006, the Court of Appeals denied the State's motion for rehearing. On September 26, 2006, this Court sustained the State's application for transfer. Therefore, the Missouri Supreme Court has jurisdiction to hear this case. Missouri Supreme Court Rule 83.04.

STATEMENT OF FACTS

The State charged Appellant, Justin Walkup, by an information in lieu of indictment filed in Jackson County, Missouri with the class A felony of first degree murder, Section 565.020, RSMo 2000, and the unclassified felony of armed criminal action, Section 571.015, RSMo 2000 (L.F. 5-6).[1] Specifically, the State charged that on January 21, 2003, Mr. Walkup, after deliberation, knowingly caused the death of his girlfriend, Deborah Lilly, by stabbing her (L.F. 5-6).

On September 15, 2003, the State filed a Request for Discovery (S.L.F. 1). On November 19, 2003, the State filed a Motion for Mental Examination, which stated that "Defendant … is being evaluated by a private psychiatrist on request of his attorney" (S.L.F. 2-4). The Court granted the State's request and ordered a mental evaluation of Mr. Walkup (S.L.F. 5-6). During the week before trial, defense counsel provided the prosecutor with the written report of the defense's retained psychologist, Dr. Gregory Sisk (Tr. 624). But defense counsel had made the prosecutor aware, months before, that Dr. Sisk was in the process of evaluating Mr. Walkup and that the defense intended to

[1] The Record on Appeal consists of the legal file (referenced "L.F."), a supplemental legal file (referenced "S.L.F."), the trial transcript (referenced "Tr."), the sentencing transcript (referenced "Sent. Tr."), and State's Exhibit 64A, the redacted videotaped statement of Mr. Walkup.

call Dr. Sisk as a witness (Tr. 625, 629-630, 729, L.F. 83-84). On January 12, 2004, defense counsel formally endorsed Dr. Sisk as a defense witness (S.L.F. 7-8).

Mr. Walkup's jury trial began on January 13, 2004, and the State adduced the following evidence (Tr. 2, 40, 63).

At approximately 9:45 p.m. on January 21, 2003, Justin Walkup called his friend and former employer, Matt Magnuss (Tr. 350-351, 352). Mr. Walkup was "very emotional," was sobbing, was "all crazy," and "sounded drunk" (Tr. 374-375, 386, 395-396, 495). Mr. Walkup said that he had killed his girlfriend, Deborah Lilly, that he needed to talk to Mr. Magnuss, that he was in Ms. Lilly's car, and that he was going to leave town (Tr. 353, 356, 371-372, 377). The phone call obviously disturbed and shocked Mr. Magnuss, who told Mr. Walkup that he was not at home (Tr. 354).

Initially, Mr. Magnuss had his doubts that Ms. Lilly was dead (Tr. 355). After the phone call, Mr. Magnuss called a friend, called Ms. Lilly's house to see if she was all right, and then called the police (Tr. 357-358, 359, 384).

Mr. Magnuss had several conversations with Mr. Walkup that evening (Tr. 354, 357, 358). During one of the conversations, he told Mr. Walkup to go back to Ms. Lilly's house to check on her, but Mr. Walkup said that he knew she was dead (Tr. 356). Mr. Walkup told Mr. Magnuss that he and Ms. Lilly had argued and she scratched his face (Tr. 379-380). He said that he choked Ms. Lilly and that after she was on the floor, he stabbed her four times in the chest (Tr. 360-361).

In order to get Mr. Walkup to return to the house and "get the police to get him over there," Mr. Magnuss told him again to go back to the house (Tr. 356-357). Mr.

Walkup turned around and headed back in the direction of Ms. Lilly's home (Tr. 358, 362). But he drove off the highway and crashed into a fence at the residence of Leslie Slover and Greg Smith in Kansas City, Missouri (Tr. 307-308, 318, 362, 415-416). Mr. Walkup got out of the car and asked Ms. Slover and Mr. Smith not to call the police because he had been drinking (Tr. 309, 317, 417). He picked up two cell phones and a bottle of vodka from the car and threw something behind the shed (Tr. 309-310, 312, 317). Mr. Walkup was "very drunk" and went into Ms. Slover and Mr. Smith's house, where he called Mr. Magnuss to pick him up (Tr. 310, 312-314, 317, 363, 425, 430).

Mr. Walkup called Mr. Magnuss several more times; Mr. Walkup finally told Ms. Slover and Mr. Smith that Mr. Magnuss had been pulled over by the police and would be unable to pick him up (Tr. 314, 319, 364-365, 421).

While Mr. Walkup was at their home, he "started talking a lot of crazy stuff," said "I killed her, I think I killed her," and stated several times that he killed his girlfriend (Tr. 313-314, 320-321, 419-420, 423, 430, 431). Although Mr. Smith and Ms. Slover did not know Mr. Walkup, they were not certain whether to believe him; Mr. Smith thought that he had hit his head and did not know what he was saying (Tr. 321, 420). Mr. Walkup was "unstable;" he "bounc[ed] back and forth" from calm to anxious (Tr. 420, 430).

Mr. Smith decided to take Mr. Walkup home (Tr. 315, 422, 431). Mr. Walkup directed Mr. Smith to Ms. Lilly's home (Tr. 431). As Mr. Smith drove by the home, he saw the police there; Mr. Walkup began to get out of the car, but Mr. Smith feared that he would be implicated in a crime and drove Mr. Walkup back to his residence (Tr. 315, 320, 322, 422-423, 432).

Ms. Slover and Mr. Smith then called for a cab, but the cab did not show (Tr. 314-315, 320, 423). Mr. Walkup passed out on the couch (Tr. 315, 322, 425). Mr. Smith saw the police nearby, woke up Mr. Walkup, and told him to leave through the back door (Tr. 315, 322-323, 426). Mr. Walkup went out the back door, walked around to the front of the house and to the police, and screamed that he had just killed his girlfriend (Tr. 316, 323-324, 427-428, 433).

The police found Ms. Lilly lying on the kitchen floor at her home at 12515 Askew in Grandview, Jackson County, Missouri (Tr. 385, 390, 399, 403, 410, 412, 440). She died from multiple sharp force and blunt force injuries, including three stab wounds that were more than an inch deep, a blunt force injury to the head, and a fractured thyroid cartilage, which would have been caused in the process of strangulation (Tr. 579-597, 607). Ms. Lilly also had defensive wounds, which indicated that she was alive when she was stabbed (Tr. 608).

The police questioned Mr. Walkup at approximately 12:45 a.m. on January 22, 2003; after informing Mr. Walkup of his Miranda[2] rights and that he was a suspect in Ms. Lilly's homicide, Mr. Walkup acted surprised that she was dead (Tr. 469, 471-472, 478, 480, 486, 489). Mr. Walkup's eyes were watery and bloodshot, and he had scratches on his face (Tr. 478-479, 486, 487). Mr. Walkup was initially belligerent and verbally combative but later was "kind of aloof" and "passive" (Tr. 476, 479, 490). Mr. Walkup "drift[ed] from one subject to another and wouldn't stick with what he was talking about"

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

(Tr. 475). Mr. Walkup initially denied being in the car accident, but later, he admitted being in the accident (Tr. 473, 475, 481-482).

The police also questioned Mr. Walkup at approximately 3:26 a.m. on January 22, 2003 (Tr. 502). Although he was initially "irritated and angry," he became calm at times during the questioning (Tr. 501, 506). "[H]e would be calm and then he would get his voice raised up and then he would go back down calm. And he was … on a roller coaster ride" (Tr. 508). Mr. Walkup said that he and Ms. Lilly got into an argument because he wanted to go back to work and she did not want him to return to work until his hand was healed (Tr. 505-506, 507). Mr. Walkup said that he then left the house (Tr. 505-506). This interview lasted approximately thirty minutes but was ended "[b]ecause of his roller coaster emotions" (Tr. 509).

The police questioned Mr. Walkup again at 11:07 a.m. on January 22, 2003 (Tr. 559, 560-561). Mr. Walkup gave a videotaped statement and a written statement (Tr. 561, 568-569).

In the videotaped statement, Mr. Walkup initially stated that he and Ms. Lilly were drinking, got into an argument after he told her that he intended to go back to work, and he left the house (St. Ex. 64A).

A short time later, however, Mr. Walkup confessed to killing Ms. Lilly (Tr. 564, St. Ex. 64A). He stated that he and Ms. Lilly argued and he was going to leave (Tr. 564-565, St. Ex. 64A). When he got into the kitchen area, she started pushing and scratching him (Tr. 565, St. Ex. 64A). He grabbed her by the throat and choked her (Tr. 565, St. Ex. 64A). After she died, he stabbed her approximately two times (Tr. 565, St. Ex. 64A). He

also hit her in the eye (Tr. 565, St. Ex. 64A). He grabbed some jewelry, his coat, and the car keys then left the house (Tr. 567, St. Ex. 64A).

In his written statement, Mr. Walkup wrote the following.

> We were fighting about me going back to work and other stupid stuff. It started in the office area and then we sat down on the couch and were still fighting. I went upstairs, got dressed to leave and then went into the kitchen. Then it got physical. She scratched me and then I don't know why or what I started choking her until she was dead. Then I got a knife and stabbed her like twice. I got the keys and left. Then I crashed the car and then I was arrested. …

(Tr. 568-569).

On January 25, 2003, Ms. Slover found two knives, one of which did not have a handle, behind the shed in her yard (Tr. 325, 429, 462-463). The police recovered the knives; both had Ms. Lilly's blood on them (Tr. 326, 429, 466-468, 521, 542-545).

The State rested, and the trial court overruled defense counsel's motion for judgment of acquittal at the close of the State's case (Tr. 613-616, 666, L.F. 30-31).

Defense counsel attempted to call Dr. Gregory Sisk as a defense witness (Tr. 616). When questioned by the court regarding the content of Dr. Sisk's testimony, defense counsel asserted the following:

> … Dr. Sisk is going to testify that he's examined defendant. That he's examined records relating to this case. That he has talked to the defendant's family members and his ex-wife. He's reached a conclusion in

his thorough work that defendant suffers from three disorders, one of which is bipolar disorder, one of which is intermittent explosive disorder, one of … which is a polysubstance abuse problem…

The anticipated testimony is that Mr. Walkup, since he's been a child has demonstrated different incidents that give rise to these diagnoses. These diagnoses have significant symptoms that are relevant to our case. Ultimately going to the fact that when you have bipolar, you have a heightened sense of emotions. … I believe that to be extremely relevant when the jury is looking into his state of mind.

… We are drawing the line that the doctor should not say … in any context that Mr. Walkup was in any way *incapable* of deliberating on this night. He's simply here to talk about Mr. Walkup's history, to talk about his diagnosis …

And then I plan on arguing … take a look at these symptoms. Let's take a look at the fact that somebody that has bipolar has these heightened senses of emotion at times. … I'm going to argue that … the jury should use this in determining on this night whether it's likely or not Mr. Walkup acted in a cool frame of mind. Experts are called to discuss things that are not within the ordinary knowledge of the jury.

… [I]t's not something that you know just because you're a juror necessarily. He's going to help them understand what bipolar is, what this explosive disorder is. And so that they can decide for themselves whether

or not Mr. Walkup acted in a cool frame of mind in this particular evening.

So I think the testimony is relevant for those reasons.

(Tr. 617-620, italics added).

The State objected to Dr. Sisk's testimony on the basis that "such evidence is not admissible unless there has been a defense raised under Chapter 552, either excluding responsibility altogether or diminished capacity" (Tr. 621-622). The State argued that since the defense was not "asking the doctor to render an opinion as to whether or not, based on these disorders, Mr. Walkup deliberated on the night in question," Chapter 552 did not permit the admission of the evidence (Tr. 621-622).

After hearing arguments by both parties, the Court asked the prosecutor when she was made aware that Dr. Sisk would be a defense witness (Tr. 624). The prosecutor indicated that the State had received Dr. Sisk's report "the end of last week" (Tr. 624). Defense counsel indicated that he had "told for a long time to the State that the defendant was being evaluated" and "told the prosecutor that my expectation was, that we were not going for an affirmative defense of diminished capacity or NGRI and that they were welcome to go ahead and have him evaluated and they did so and he has been evaluated by … Dr. Jackson from Western Missouri" (Tr. 625). Defense counsel asserted that "there has been … good communication" between both parties (Tr. 625, 629-630). The prosecutor did not dispute this (Tr. 625, 630).

Even though the State did not allege any discovery violation or object to Dr. Sisk's testimony based on lack of notice, the Court prohibited the defense from calling Dr. Sisk because "the State … didn't get the report until late" and "out of fairness" (Tr. 624-630).

Defense counsel then made an offer of proof by calling Dr. Sisk, who testified as follows:

As part of his employment, Dr. Sisk provides psychological counseling, treats patients, and conducts psychological evaluations, including forensic evaluations to determine whether the patient is not guilty by reason of a mental disease or defect (Tr. 634, 636). He has performed evaluations in criminal cases and has testified both as a State's witness and as a defense witness in several cases (Tr. 636-638). Dr. Sisk's education includes a Bachelor's degree from the University of Missouri and a Master's Degree and Ph.D. in clinical psychology from Louisiana State University (Tr. 635). He has been licensed and has practiced as a psychologist in Missouri since 1980 and has been a member of the American College of Forensic Examiners since 1995 (Tr. 635-636).

At the request of defense counsel, he conducted a psychological evaluation of Mr. Walkup (Tr. 638-639). As part of his evaluation, he reviewed Mr. Walkup's mental health records, reviewed the police reports, reviewed Mr. Walkup's videotaped statement, interviewed Mr. Walkup for approximately five hours, administered standardized psychological tests to Mr. Walkup, interpreted Mr. Walkup's test scores, and conducted interviews of Mr. Walkup's parents and ex-wife (Tr. 639).

When Mr. Walkup was eighteen years old, he was treated by a psychiatrist due to mood swings, problems at home, and concerns with his drinking (Tr. 641). The psychiatrist prescribed medication to help "calm him down" and "to even him out" (Tr.

641-642). He was also treated by other psychiatrists and was diagnosed with bipolar disorder and attention deficit disorder (Tr. 642).

Approximately one year later, in 1996, after Mr. Walkup moved to Kansas City, he sought a psychiatrist in the area (Tr. 642). Again, he was experiencing mood swings, and he was also having difficulty in his marriage (Tr. 642). The doctor prescribed medication for bipolar disorder (Tr. 643).

During that same year, Mr. Walkup had an argument with his wife, which led him to destroy property in their apartment (Tr. 643). Mr. Walkup then called the police "on himself" because he felt out of control (Tr. 643). The police arrived and transported him to Western Missouri Mental Health Center, where he was admitted in-patient and treated for a few days (Tr. 643). Mr. Walkup was "moody" and suicidal and was again diagnosed with bipolar disorder (Tr. 643-644). He was also prescribed medication for bipolar disorder (Tr. 644).

After Mr. Walkup's hospitalization in 1996 at Western Missouri Mental Health Center, he remained on the prescribed medication for approximately two years (Tr. 644). He also continued to see a mental health professional in North Kansas City (Tr. 645).

He and his wife returned back to Nebraska, and he continued to see a psychiatrist there for approximately eight months (Tr. 645). The diagnosis of bipolar disorder was continued, and he continued to be treated by medication prescribed for bipolar disorder (Tr. 645).

Mr. Walkup's history demonstrated that Mr. Walkup suffered from bipolar disorder for at least eight years (Tr. 646). Dr. Sisk confirmed the diagnosis of bipolar

disorder, not only from Mr. Walkup's history but also based upon the results of the aforementioned psychological inventories including the MMPI and the Beck Depression Inventory, which are "both recognized in [the psychological] profession as being reliable instruments to assess that kind of condition" (Tr. 645). Mr. Walkup's scores on those inventories were "consistent with the bipolar disorder, complaints of depression, feeling sad, gloomy, alternating with periods of agitation and anxiety that are typical of the mood swings that go with bipolar disorder" (Tr. 646).

Dr. Sisk diagnosed Mr. Walkup with bipolar disorder, "mixed type," because he displayed symptoms of bipolar manic and bipolar depressed (Tr. 646). The symptoms for bipolar manic include periods of increased energy, agitation, and excessive involvement in pleasurable activities, such as substance abuse (Tr. 647). During these episodes, a person suffering from bipolar disorder has increased energy, plans big projects, has a decreased need for sleep, often has fast-paced speech, and his thoughts switch from one topic to another (Tr. 648). Mr. Walkup's ex-wife described certain periods where Mr. Walkup had "massive amounts of energy," would not be fatigued after working all day, and would stay up late and do the same thing the next day (Tr. 648).

The symptoms for bipolar depressed include periods of sadness, feelings of worthlessness, suicidal ideation, and behavior consistent with those feelings (Tr. 647).

With bipolar disorder, mixed type, a mood of irritability pervades both episodes, and there is an exaggerated expression of emotions to relatively minor events (Tr. 647). Between the bipolar manic and bipolar depressed episodes, there is relative stability but residual symptoms, including moodiness, will continue to persist (Tr. 647).

A person with this condition, is "more easily affected by [his] feelings than the normal person" (Tr. 649). An event that causes a normal person to feel excitement sends a person with bipolar disorder into a very excited state of agitation and anxiety (Tr. 649). Likewise, an event that causes a normal person to feel sad sends a person with bipolar disorder into a severe state of depression (Tr. 649).

The prosecutor cross-examined Dr. Sisk during the offer of proof, and Dr. Sisk testified that his conclusion was that at the time of the charged offenses, Mr. Walkup's mental condition, including bipolar disorder, intermittent explosive disorder, and alcohol and drug intoxication, "disrupted his past behavior, his decision making, and how he conducted himself" (Tr. 652-653).

After making the offer of proof, defense counsel requested that the court reconsider its ruling and permit the defense to call Dr. Sisk as a witness (Tr. 654). Defense counsel reiterated that he wanted to argue to the jury that Mr. Walkup's "mental state, in general, is one factor that they can consider to determine if on January 22, 2003, it was likely he acted with deliberation" (Tr. 655). The court denied the motion (Tr. 655).

The defense rested, and the trial court overruled defense counsel's motion for judgment of acquittal at the close of all the evidence (Tr. 633, 655-656, 666, L.F. 32-33).

The jury deliberated for over eight hours and returned a guilty verdict for first degree murder and armed criminal action (Tr. 707, 715, 716, L.F. 73, 76).

On March 1, 2004, the trial court overruled defense counsel's Motion for Judgment of Acquittal or, in the Alternative, for a New Trial (Tr. 731, L.F. 81-91).[3] Included within the claims of Mr. Walkup's timely motion for new trial was that "the trial court erred to the unfair prejudice of Defendant by excluding the testimony of Dr. Sisk," that the exclusion violated Mr. Walkup's rights to due process and an impartial jury, as guaranteed by the United States and Missouri Constitutions, and that Dr. Sisk's testimony would have assisted the jury in making a determination of whether Mr. Walkup deliberated (L.F. 81, 83-86, Tr. 720).

The Court sentenced Mr. Walkup to concurrent terms of life imprisonment without parole for first degree murder and life imprisonment for armed criminal action (Tr. 735-736, L.F. 92-93). Mr. Walkup timely filed a notice of appeal on March 10, 2004 (L.F. 97-98).

[3] Prior to the court's ruling on defense counsel's motion for new trial, the prosecutor specifically stated, "As regards the issue of Dr. Sisk's testimony, the State's argument was not and is not that Dr. Sisk's testimony should have been excluded because the State wasn't given proper notice of what he was going to testify to or what his report said" (Tr. 729).

POINT

The trial court abused its discretion, in violation of Appellant's rights to present a defense, due process, and a fair trial, as guaranteed by the 5th, 6th, and 14th Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, when, as a sanction for an alleged discovery violation, it excluded the testimony of Dr. Gregory Sisk, who would have testified that:

he conducted a psychological evaluation of Appellant that included a review of Appellant's history, a review of the discovery and interviews of Appellant's parents and ex-wife; Appellant had suffered from bipolar disorder for eight years; he confirmed that diagnosis; the symptoms of bipolar disorder include an exaggerated expression of emotions, mood swings, and periods of increased energy and agitation; and at the time of the charged offenses, Appellant suffered from bipolar disorder, intermittent explosive disorder, and intoxication, which "disrupted his past behavior, his decision making, and how he conducted himself,"

in that: 1) no discovery violation occurred because Appellant complied with the requirements of Rule 25.05, and the notice provisions of Section 552.030 only apply to a defense of not guilty by reason of mental disease or defect; and 2) Dr. Sisk's testimony was otherwise admissible and relevant to Appellant's defense that he did not deliberate, even though Dr. Sisk did not testify that Appellant was incapable of deliberating. Even if a violation had occurred, the remedy of exclusion was too harsh and resulted in fundamental unfairness, since Dr. Sisk's testimony was material and relevant to Appellant's defense.

State v. Anderson, 515 S.W.2d 534 (Mo. banc 1974);

State v. Simonton, 49 S.W.3d 766 (Mo.App., W.D. 2001);

State v. Taylor, 929 S.W.2d 925 (Mo.App., S.D. 1996);

State v. Balderama, 88 P.3d 845 (N.M.S.Ct. 2004);

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

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

Sections 552.010, 552.015, 552.030, 552.040, RSMo 2000;

Missouri Supreme Court Rules 25.05, 25.18.

ARGUMENT

The trial court abused its discretion, in violation of Appellant's rights to present a defense, due process, and a fair trial, as guaranteed by the 5th, 6th, and 14th Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, when, as a sanction for an alleged discovery violation, it excluded the testimony of Dr. Gregory Sisk, who would have testified that:

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> The anticipated testimony is that Mr. Walkup, since he's been a child has demonstrated different incidents that give rise to these diagnoses. These diagnoses have significant symptoms that are relevant to our case. Ultimately going to the fact that when you have bipolar, you have a heightened sense of emotions. … I believe that to be extremely relevant when the jury is looking into his state of mind.
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> … We are drawing the line that the doctor should not say … in any context that Mr. Walkup was in any way *incapable* of deliberating on this night. He's simply here to talk about Mr. Walkup's history, to talk about his diagnosis that is clear to the doctor.
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> And then I plan on arguing … take a look at these symptoms. Let's take a look at the fact that somebody has bipolar has these heightened senses of emotion at times. … I'm going to argue that … the jury should

use this in determining on this night whether it's likely or not Mr. Walkup acted in a cool frame of mind. Experts are called to discuss things that are not within the ordinary knowledge of the jury.

… [I]t's not something that you know just because you're a juror necessarily. He's going to help them understand what bipolar is, what this explosive disorder is. And so that they can decide for themselves whether or not Mr. Walkup acted in a cool frame of mind in this particular evening. So I think the testimony is relevant for those reasons.

(Tr. 617-620, italics added).

The State objected to Dr. Sisk's testimony on the basis that "such evidence is not admissible unless there has been a defense raised under Chapter 552, either excluding responsibility altogether or diminished capacity" (Tr. 621-622). The State argued that since the defense was not "asking the doctor to render an opinion as to whether or not, based on these disorders, Mr. Walkup deliberated on the night in question," Chapter 552 did not permit the admission of the evidence (Tr. 621-622).

After hearing arguments by both parties, the Court asked the prosecutor when she was made aware that Dr. Sisk would be a defense witness (Tr. 624). The prosecutor indicated that the State had received Dr. Sisk's report "the end of last week" (Tr. 624). Defense counsel stated that he had "told for a long time to the State that the defendant was being evaluated" and "told the prosecutor that my expectation was, that we were not going for an affirmative defense of diminished capacity or NGRI and that they were welcome to go ahead and have him evaluated and they did so and he has been evaluated

by … Dr. Jackson from Western Missouri" (Tr. 625). Defense counsel asserted that "there has been … good communication" between both parties (Tr. 625, 629-630). The prosecutor did not dispute this (Tr. 625, 630).

Even though the State did not allege any discovery violation or object to Dr. Sisk's testimony based on lack of notice, the Court prohibited the defense from calling Dr. Sisk because "the State … didn't get the report until late" and "out of fairness" (Tr. 624-630).

Defense counsel then made an offer of proof by calling Dr. Sisk, who testified as follows:

As part of his employment, Dr. Sisk provides psychological counseling, treats patients, and conducts psychological evaluations, including forensic evaluations to determine whether the patient is not guilty by reason of a mental disease (Tr. 634, 636). He has performed evaluations in criminal cases and has testified as a State's witness and a defense witness in several cases (Tr. 636-638). Dr. Sisk's education includes a Bachelor's degree from the University of Missouri and a Master's Degree and Ph.D. in clinical psychology from Louisiana State University (Tr. 635). He has been licensed and has practiced as a psychologist in Missouri since 1980 and has been a member of the American College of Forensic Examiners since 1995 (Tr. 635-636).

At the request of defense counsel, he conducted a psychological evaluation of Mr. Walkup (Tr. 638-639). As part of his evaluation, he reviewed Mr. Walkup's mental health records, reviewed the police reports, reviewed Mr. Walkup's videotaped statement, interviewed Mr. Walkup for approximately five hours, administered standardized

psychological tests to Mr. Walkup, interpreted Mr. Walkup's test scores, and conducted interviews of Mr. Walkup's parents and ex-wife (Tr. 639).

When Mr. Walkup was eighteen years old, he was referred to a psychiatrist due to mood swings, problems at home, and concerns with his drinking (Tr. 641). The psychiatrist prescribed medication to help "calm him down" and "to even him out" (Tr. 641-642). He saw other psychiatrists also and was diagnosed with bipolar disorder and attention deficit disorder (Tr. 642).

Approximately one year later, in 1996, after Mr. Walkup moved to Kansas City, he sought a psychiatrist in the area (Tr. 642). Again, he was experiencing mood swings, and he was also having difficulty in his marriage (Tr. 642). The doctor prescribed medication for bipolar disorder (Tr. 643).

During that same year, Mr. Walkup had an argument with his wife, which led him to destroy property in their apartment (Tr. 643). Mr. Walkup then called the police "on himself" because he felt out of control (Tr. 643). The police arrived and transported him to Western Missouri Mental Health Center, where he was admitted in-patient and treated for a few days (Tr. 643). Mr. Walkup was "moody" and suicidal and was again diagnosed with bipolar disorder (Tr. 643-644). He was also prescribed medication for bipolar disorder (Tr. 644).

After Mr. Walkup's hospitalization in 1996 at Western Missouri Mental Health Center, he remained on prescribed medication for approximately two years (Tr. 644). He also continued to see a mental health professional in North Kansas City (Tr. 645).

He and his wife returned back to Nebraska, and he continued to see a psychiatrist there for approximately eight months (Tr. 645). The diagnosis of bipolar disorder was continued, and he continued to be treated by medication for bipolar disorder (Tr. 645).

Mr. Walkup's history demonstrated that Mr. Walkup suffered from bipolar disorder for at least eight years (Tr. 646). Dr. Sisk confirmed the diagnosis of bipolar disorder, not only from Mr. Walkup's history but also based upon the results of the aforementioned psychological inventories including the MMPI and the Beck Depression Inventory, which are "both recognized in [the psychological] profession as being reliable instruments to assess that kind of condition" (Tr. 645). His scores on those inventories were "consistent with the bipolar disorder, complaints of depression, feeling sad, gloomy, alternating with periods of agitation and anxiety that are typical of the mood swings that go with bipolar disorder" (Tr. 646).

Dr. Sisk diagnosed Mr. Walkup with bipolar disorder, "mixed type," because he displayed symptoms of bipolar manic and bipolar depressed (Tr. 646). The symptoms for bipolar manic include periods of increased energy, agitation, and excessive involvement in pleasurable activities, such as substance abuse (Tr. 647). During these episodes, a person suffering from bipolar has a lot of energy, plans big projects, has a decreased need for sleep, often has fast-paced speech, and his or her thoughts switch from one topic to another (Tr. 648). Mr. Walkup's ex-wife described certain periods where Mr. Walkup had "massive amounts of energy," would not be fatigued after working all day, and would stay up late and do the same thing the next day (Tr. 648).

The symptoms for bipolar depressed include periods of sadness, feelings of worthlessness, suicidal ideation, and behavior consistent with those feelings (Tr. 647).

With the bipolar disorder, mixed type, a mood of irritability pervades both episodes, and there is an exaggerated expression of emotions to relatively minor events (Tr. 647). Between the bipolar manic and bipolar depressed episodes, there is relative stability but residual symptoms, including moodiness, persist (Tr. 647).

A person with this condition is "more easily affected by [his] feelings than the normal person" (Tr. 649). An event that causes a normal person to feel excitement sends a person with bipolar disorder into a very excited state of agitation and anxiety (Tr. 649). Likewise, an event that causes a normal person to feel sad sends a person with bipolar disorder into a severe state of depression (Tr. 649).

The prosecutor cross-examined Dr. Sisk during the offer of proof, and Dr. Sisk testified that his conclusion was that at the time of the charged offenses, Mr. Walkup's mental condition, including bipolar disorder, intermittent explosive disorder, and alcohol and drug intoxication, "disrupted his past behavior, his decision making, and how he conducted himself" (Tr. 652-653).

After making the offer of proof, defense counsel requested that the court reconsider its ruling and permit the defense to call Dr. Sisk as a witness (Tr. 654). Defense counsel reiterated that he wanted to argue to the jury that Mr. Walkup's "mental state, in general, is one factor that they can consider to determine if on January 22, 2003, it was likely he acted with deliberation" (Tr. 655). The court denied the motion (Tr. 655).

Mr. Walkup included this issue in his timely motion for new trial; as such, the issue is properly preserved for appellate review (L.F. 81, 83-86, Tr. 720).

Defense counsel complied with Rule 25.05.

Rule 25.05(A) requires the defendant, upon written request by the State, to disclose the names of any witnesses he intends to call and any reports of experts made in connection with the case. Rule 25.05; State v. Watson, 755 S.W.2d 644, 645 (Mo.App., E.D. 1988). Rule 25.18 provides for sanctions for failure to comply with the discovery rules. Rule 25.18; Watson, 755 S.W.2d at 645. In fashioning sanctions for a discovery violation, the focus is generally on the removal or amelioration of any prejudice that the State suffers due to the violation. State v. Simonton, 49 S.W.3d 766, 781 (Mo.App., W.D. 2001). Among the sanctions authorized by Rule 25.18 is the exclusion of the testimony of a witness whose identity has not been properly disclosed. Rule 25.18; Simonton, 49 S.W.3d at 780.

The remedy of disallowing the relevant and material testimony of a defense witness, however, essentially deprives the defendant of his right to call witnesses in his defense. Simonton, 49 S.W.3d at 781. Thus, a trial court's refusal to allow testimony in a criminal case is a drastic remedy that should be used with the utmost caution. Simonton, 49 S.W.3d at 781. Nevertheless, the decision to impose sanctions under Rule 25.18 is within the discretion of the trial court. Simonton, 49 S.W.3d at 780.

In reviewing this issue, this Court must first determine whether a discovery violation occurred. See Simonton, 49 S.W.3d at 775-776.

In prohibiting the defense from calling Dr. Sisk, the trial court did not state the particular rule or statute that the defense had violated; rather the court stated generally that it would not allow Dr. Sisk's testimony because "the State … didn't get the report until late" and "out of fairness" (Tr. 624-630). However, an examination of the facts of this case and the relevant rule and statute does not support the trial court's conclusion that a discovery violation occurred or that the defense had not given notice as required by Chapter 552.

Missouri Supreme Court Rule 25.05 governs disclosure by a defendant to the State upon written request. Simonton, 49 S.W.3d at 776; Rule 25.05. Rule 25.05 states, in pertinent part, that:

> (A) Except as otherwise provided in these Rules as to protective orders, and subject to constitutional limitations, on written request by the state, the defendant shall disclose to counsel for the state such part of all of the following material or information within his possession or control designated in such request:
>
> (1) Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons, which the defense intends to introduce into evidence at a hearing or trial, except that those portions of any of the above containing statements by the defendant shall not be disclosed;

(2) The names and last known addresses of persons, other than defendant, whom defendant intends to call as witnesses at any hearing or at the trial, together with their written or recorded statements, and existing memoranda reporting or summarizing part or all of their oral statements[.]

Missouri Supreme Court Rule 25.05.

In the case at bar, defense counsel informed the prosecutor, months before trial, that he retained Dr. Sisk to evaluate Mr. Walkup and that he would call Dr. Sisk as a witness (Tr. 625, 629-630, 729, L.F. 83-84). On November 19, 2003, the prosecutor, having been given such notice, moved for a mental examination on the basis that the defense attorney retained a private doctor to evaluate Mr. Walkup (S.L.F. 2-4). The trial court granted the State's request for a mental examination, and that evaluation was completed before trial (L.F. 5-6, Tr. 625). Defense counsel also endorsed Dr. Sisk as a witness and disclosed Dr. Sisk's written report during the week prior to trial (Tr. 624-625, 629, S.L.F. 7-8).

The essential purpose of the rules of discovery "is a quest for truth which promotes informed pleas, expedited trials, a minimum of surprise and opportunity for effective cross-examination." State v. Simonton, 49 S.W.3d at 779, quoting State v. Bradley, 882 S.W.2d 302, 306 (Mo.App., S.D. 1994). Discovery rules are "intended to allow both sides to know the witnesses and evidence to be introduced at trial" and to eliminate surprise. State v. Whitfield, 837 S.W.2d 503, 508 (Mo. banc 1992).

In this case, the prosecutor did not allege that she would have taken further or other action had she received the report or endorsement of Dr. Sisk at an earlier date, and

the prosecutor did not object to Dr. Sisk's testimony on the basis of a violation of Rule 25.05 (Tr. 620-622, 624-625, 729). And prior to the court's ruling on defense counsel's motion for new trial, the prosecutor specifically stated, "As regards the issue of Dr. Sisk's testimony, the State's argument was not and is not that Dr. Sisk's testimony should have been excluded because the State wasn't given proper notice of what he was going to testify to or what his report said" (Tr. 729).

As such, the facts and circumstances of this particular case do not establish that defense counsel failed to comply with Rule 25.05. The trial court abused its discretion in prohibiting defense counsel from calling Dr. Sisk on this basis.

The notice provisions of Section 552.030 did not apply in this case.

In addition to the applicable discovery rule set forth above, Section 552.030, RSMo, states as follows:

> 1. A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect such person was incapable of knowing and appreciating the nature, quality, or wrongfulness of such person's conduct.
>
> 2. Evidence of mental disease or defect excluding responsibility shall not be admissible at trial of the accused unless the accused, at the time of entering such accused's plea to the charge, *pleads not guilty by reason of mental disease or defect excluding responsibility*, or unless within ten days after a plea of not guilty, or at such later date as the court may for good cause permit, the accused files a written notice of such accused's purpose to

rely on *such defense*. Such a plea or notice shall not deprive the accused of other defenses. The state may accept a defense of mental disease or defect excluding responsibility, whether raised by plea or written notice, if the accused has no other defense and files a written notice to that effect. The state shall not accept a defense of mental disease or defect excluding responsibility in the absence of any pretrial evaluation as described in this section or section 552.020. *Upon the state's acceptance of the defense of mental disease or defect excluding responsibility, the court shall proceed to order the commitment of the accused as provided in section 552.040 in cases of persons acquitted on the ground of mental disease or defect excluding responsibility, and further proceedings shall be had regarding the confinement and release of the accused as provided in section 552.040.*[4]

…

6. … The issue of whether any person had a mental disease or defect excluding responsibility for such person's conduct is one for the trier of fact to decide upon the introduction of substantial evidence of lack of such responsibility. But, in the absence of such evidence, the presumption

[4] Section 552.040, RSMo 2000, provides, "When an accused is tried and acquitted on the ground of mental disease or defect excluding responsibility, the court shall order such person committed to the director of the department of mental health for custody." Section 552.040.2, RSMo 2000.

shall be conclusive. Upon the introduction of substantial evidence of lack of such responsibility, the presumption shall not disappear and shall alone be sufficient to take that issue to the trier of fact. The jury shall be instructed as to the existence and nature of such presumption when requested by the state and, where the issue of such responsibility is one for the jury to decide, the jury shall be told that the burden rests upon the accused to show by a preponderance or greater weight of the credible evidence that the defendant was suffering from a mental disease or defect excluding responsibility at the time of the conduct charged against the defendant. At the request of the defense the jury shall be instructed by the court as to the contents of subsection 2 of section 552.040.

7. When the accused is acquitted on the ground of mental disease or defect excluding responsibility, the verdict and the judgment shall so state as well as state the offense for which the accused was acquitted. The clerk of the court shall furnish a copy of any judgment or order of commitment to the department of mental health pursuant to this section to the criminal records central repository pursuant to section 45.503, RSMo.

Section 552.030.1, .2, .6, .7, RSMo 2000 (italics added).

Clearly, the reference to a "mental disease or defect excluding responsibility" in Section 552.030 refers to an accused who is asserting that he committed the charged offense but, due to a mental disease or defect, was incapable of knowing and appreciating the nature, quality, or wrongfulness of his conduct. In other words, Section 552.030

deals solely with what is commonly referred to as a "NGRI"[5] defense or a defense of not guilty by reason of mental disease or defect.

This is clear from a reading of Section 552.030.

First, subsection 1 sets forth the statutory requirements for the defense of not guilty by reason of mental disease or defect. Section 552.030.1, RSMo; MAI-CR3d 306.02A. Such defense is very different, in terms of the ultimate outcome and the burden of proof, from a defense of diminished capacity or a defense that, due to a mental disease or defect, the defendant *is criminally responsible* for a lesser-included offense (but is not guilty of the greater offense). In the first instance, if the defense is successful, the court will order the accused to be delivered to the custody of the department of mental health; in the latter instance, the accused, if successful, will be convicted of a lesser offense and will then be delivered to the custody of the Missouri Department of Corrections or otherwise be sentenced under the criminal penal statutes. Sections 552.015, 552.030, 552.040, 558.011, RSMo. The burden of proof is also different – a defense of not guilty by mental disease or defect is an affirmative defense; the defense of diminished capacity or a defense that the defendant, due to a mental disease or defect, did not possess the requisite mental state of the charged offense is a special negative defense. Sections 552.015, 552.030.6, RSMo; MAI-CR3d 306.02A, 308.03.

Second, subsection 2 of Section 552.030 states that evidence of a mental disease or defect excluding responsibility shall not be admissible at trial unless the accused at the time of entering a plea to the charge, "pleads not guilty by reason of mental disease or

[5] Not Guilty by Reason of Insanity.

defect excluding responsibility, or unless within ten days after a plea of not guilty, or at such later date … the accused files a written notice of [his] purpose to rely on such defense." Section 552.030.2, RSMo. The statute is again referring to cases where the defendant is asserting a defense of not guilty by reason of mental disease or defect. An accused does not offer any different plea, other than a standard "not guilty" plea, when pursuing a defense of diminished capacity or a defense that he is criminally responsible for a lesser-included offense due to a mental disease or defect.

Subsection 2 goes on to say that the "state may accept a defense of mental disease or defect excluding responsibility." This is true in cases where a defendant is asserting that he is not guilty by reason of mental disease or defect. This is not true where a defendant is asserting a defense of diminished capacity or that he is criminally responsible for a lesser-included offense due to a mental disease or defect. In the case of diminished capacity or a defense that asserts the defendant is guilty of a lesser-included offense based, at least in part, upon a mental disease or defect, the prosecutor, if in agreement with such defense, would negotiate with the defense counsel and then file an amended information reducing the charge, to which the defendant (if a plea bargain agreement were reached) would then enter a guilty plea and be held criminally responsible.

Subsection 2 states further that "[u]pon the state's acceptance of the defense of mental disease or defect excluding responsibility, the court shall proceed to order the commitment of the accused as provided in section 552.040," which provides for commitment to the department of mental health. Sections 552.030.2, 552.040, RSMo.

Again, Section 552.030 is referring to the defense of not guilty by reason of mental disease or defect, because those defendants can go to a mental facility. The defendants, like Mr. Walkup, that assert a defense that they are not guilty of a higher offense based, at least in part, on a mental disease or defect, do not go to a mental facility—they go to prison or are otherwise subject to the criminal penal law.

Last, the defense of diminished capacity or a defense that otherwise asserts that the defendant, due to a mental disease or defect, did not possess the requisite mental state of a greater offense, is *not* a defense "*excluding responsibility*." Rather, it is a defense that asserts the defendant *is responsible* for an offense, just not the one charged by the State.

This is precisely the way that this Court read the provisions of Section 552.030 in State v. Anderson, 515 S.W.2d 534 (Mo. banc 1974). Although the Anderson Court did not consider an issue regarding notice, the Court reviewed Section 552.030 and wrote as follows:

> In 1963 Missouri adopted an entirely new act dealing with criminal proceedings involving mental illnesses (Chapter 552). In Section 552.030(1) thereof, the statute provided that 'A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he did not know or appreciate the nature, quality or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of the law.' Other subsections specified how and when the defense should be asserted, the notice to be given, the procedure to be followed and what would occur if the jury by its verdict should acquit

defendant on the ground of mental disease or defect excluding responsibility.

After having provided in the above section for the defense of not guilty by reason of mental disease or defect excluding responsibility, the statute then provided in Section 552.030(3) as follows:

'*Evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible (1) to prove that the defendant did or did not have a state of mind which is an element of the offense…*'[6]

Id. at 538 (italics added).

As such, the notice provisions Section 552.030 clearly apply only to those cases where the defense is not guilty by reason of mental disease or defect. Section 552.030, RSMo 2000. Section 552.030 does **not** provide for any notice requirement for a defense of diminished capacity or where the defendant otherwise seeks to adduce evidence of a mental disease or defect under Section 552.015.2(8), which permits a defendant to adduce evidence of a mental disease or defect to "prove that the defendant did or did not have a state of mind which is an element of the offense." Sections 552.015, 552.030, RSMo 2000.[7]

[6] This language is now contained in Section 552.015.2(8), RSMo.

[7] As set forth above, though, disclosure of any expert, along with the results of any mental examination or such expert's report, would be required under Missouri Supreme Court Rule 25.05.

Because Mr. Walkup did not intend to rely on a defense of not guilty by reason of mental disease or defect, the notice provisions of Section 552.030 did not apply to him (S.L.F. 8). Further, defense counsel provided the prosecutor with actual notice of Dr. Sisk's testimony, and the prosecutor never objected based on any discovery violation. As such, there was no violation of any rule or statute respecting notice to the opposing party, and the trial court clearly abused its discretion in excluding Dr. Sisk's testimony because "the State … didn't get the report until late" and "out of fairness" (Tr. 624-630).

Undersigned counsel acknowledges that this Court's decisions in State v. Copeland and State v. Erwin suggest that the notice provisions of Section 552.030 apply when a defendant is asserting a defense of diminished capacity or a defense that the defendant, due to a mental disease or defect, did not form the requisite mental state, pursuant to Section 552.015.2(8), RSMo. Nevertheless, undersigned counsel asserts: 1) the facts in Copeland and Erwin are distinguishable from the case at bar; and 2) if this Court's decisions in Copeland and Erwin do require a defense counsel to provide the notice required under 552.030 to defenses asserted under 552.015.2(8), **the decisions are in conflict with a literal reading of Section 552.030**; as such, trial attorneys, who typically look at the relevant statutes and rules in providing discovery, are going to be easily misled by Section 552.030, which clearly states that its notice provisions apply to the defense of not guilty by reason of mental disease or defect. (In other words, unless the busy trial attorney sees an ambiguity from Section 552.030 (when there is none) and then does research and examines Copeland and Erwin, he or she is going to believe, without questioning, that the disclosure of an expert supporting a defense under Section

552.015.2(8) is met by fulfilling the requirements of Missouri Supreme Court Rule 25.05.)

First, the underlying facts of Copeland and Erwin are distinguishable. In State v. Erwin, 848 S.W.2d 476 (Mo. banc 1993), Erwin asserted that the trial court erred in excluding expert testimony from Dr. Eric Jolly that, when the murder was committed, Erwin was suffering from an alcoholic blackout because such evidence negated "the knowing element of second degree murder." Id. at 479. This Court found that the trial court did not err, in part, because:

> Even assuming Dr. Jolly's opinions were based upon widely accepted scientific evidence, the essence of Dr. Jolly's testimony was not that defendant would have *difficulty* knowing and appreciating the consequences of his conduct. Dr. Jolly's testimony was that defendant was *incapable* of knowing the nature and consequences of his conduct. A defense of diminished capacity because the accused is incapable of forming the mental element necessary to commit a crime is necessarily based on evidence of a mental disease or defect as defined in Section 552.010. [citations omitted] Evidence of a mental disease or defect is not admissible at trial unless the accused pleads the defense or notifies the court in writing of intent to rely on the defense within ten days after the plea or at such later date as the court may for good cause permit. Section 552.030.2. In this case, not only was the defense not properly raised, but defense counsel took pains to disclaim such defense.

> … The trial judge did not abuse discretion in rejecting Dr. Jolly's testimony because it did not "aid the jury in determining issues." Because the opinion was not shown to be admissible expert testimony and the defense of mental disease or defect was not properly raised, the due process issue need not be reached.

Id. at 480-481.

In State v. Copeland, 928 S.W.2d 828 (Mo. banc 1996), Copeland asserted that the trial court erred in rejecting an offer of proof during the guilt phase of the testimony of psychologist Marilyn Hutchinson that Copeland was suffering from battered spouse syndrome at the time of the murders. Id. at 837. Defense counsel claimed Dr. Hutchinson's testimony was proposed to be offered on issues "such as Faye Copeland's knowledge of the situation surrounding her, and Faye Copeland's intent, or lack thereof, to commit criminal conduct." Id. In upholding the trial court's action, this Court wrote as follows:

> … [E]vidence of a mental disease or defect excluding responsibility is not admissible in a criminal trial unless the accused, at the time of entering the plea of guilty or later, with the permission of the court, gives notice of the intent to rely on such defense. Section 552.030.2. The purpose of requiring notice is to give the state the opportunity to conduct its own examination of the accused and to avoid unfair surprise by allowing the defendant to raise the issue at the last minute.
>
> …

If the evidence was being offered as expert testimony of a diagnosis of a mental disease or defect *that excluded defendant's criminal responsibility*, the defendant must comply with the notice requirements of Section 552.030. As previously noted, defense counsel made clear that defendant was not intending to rely on the defense of mental disease or defect or on the defense of diminished responsibility due to a mental disease or defect. For that reason, the trial court did not abuse its discretion in excluding the testimony.

… [Further,] Dr. Hutchinson stated that defendant could tell right from wrong, that she presented no psychosis, that she possessed no mental disease or defect as defined by Chapter 552, that she was capable of conforming her conduct to the requirements of the law, and that defendant was competent to stand trial.

…

From the above, it appears that the only issue to which Dr. Hutchinson's testimony would be relevant was whether defendant was responsible for her conduct or had a diminished responsibility for her conduct as a result of a mental disease or defect. Because no notice had been given of an intent to rely on those defenses and the evidence failed to support such conclusion, no violation of due process resulted from the trial court's rejection of the evidence.

Id. at 837-838 (italics added).

Erwin and Copeland are distinguishable from Mr. Walkup's case. It does not appear from either Erwin or Copeland that the State had *actual* notice of the defendant's intention to call the expert *and* the content of the expert's testimony. Nor does it appear from those cases that the State, due to notice, obtained its own mental examination of the defendant. In the case at bar, defense counsel provided notice that he would call Dr. Sisk and the content of Dr. Sisk's testimony—the prosecutor knew what defense would be presented (i.e., that due in part to a mental disease, Mr. Walkup did not deliberate but rather was guilty of second degree murder) and this is the reason that the State requested and obtained a mental evaluation of Mr. Walkup (S.L.F. 2-4, 5-6). As such, an important distinguishing fact is the actual notice provided by counsel in Mr. Walkup's case.

Copeland is also distinguishable, because, unlike the case at bar, the expert did not testify that the defendant suffered from a mental disease or defect as defined by Chapter 552. Id. at 838. Likewise, the expert in Erwin testified that Erwin suffered from an alcoholic blackout. Id. at 480. Alcoholism, without psychosis, is not a mental disease or defect under Section 552. Section 552.010, RSMo 2000.

Second, if this Court's decisions in Copeland and Erwin do require a defense counsel to provide the notice required under 552.030 to defenses asserted under 552.015.2(8), the decisions are in conflict with a literal reading of Section 552.030. As such, trial attorneys, who typically look at the relevant statutes and rules in providing discovery, will be easily misled by Section 552.030, which clearly states that its notice provisions apply to the defense of not guilty by reason of mental disease or defect.

For the foregoing reasons, this Court should not employ Copeland and Erwin to deny Mr. Walkup's attempt to fully present his defense that he did not deliberate prior to causing the death of Ms. Lilly.

Even assuming, arguendo, that a violation occurred, the exclusion of Dr. Sisk's testimony was too harsh a remedy.

Even assuming, *arguendo*, that defense counsel failed to timely comply with a discovery rule or the requirements of Chapter 552, the remedy of exclusion was an abuse of discretion in that it was too harsh a remedy. The exclusion resulted in fundamental unfairness to Mr. Walkup since Dr. Sisk's testimony was material and relevant to Mr. Walkup's defense that he did not deliberate prior to causing the death of Ms. Lilly.

In reviewing the propriety of the remedy imposed by the trial court, this Court must examine the effect of Dr. Sisk's testimony on both the State and Mr. Walkup. Simonton, supra, 49 S.W.3d at 775. While this Court considers the effect on both the State and Mr. Walkup, the ultimate determination of whether the exclusion of Dr. Sisk's testimony was an abuse of discretion will depend on whether the trial court's decision resulted in fundamental unfairness to Mr. Walkup. Id.

First, as previously asserted herein, the State was aware, months before trial, that defense counsel hired Dr. Sisk to evaluate Mr. Walkup and intended to call Dr. Sisk as a witness (Tr. 625, 629-630, 729, L.F. 83-84, S.L.F. 4). By virtue of this notice, the State was able, prior to trial, to request and obtain a mental evaluation of Mr. Walkup (Tr. 625, S.L.F. 5-6). Most importantly, the prosecutor did not allege that she would have taken other or further action had she received the written report or endorsement of Dr. Sisk at

an earlier date (Tr. 620-622, 624-625, 729). Considering these facts, this Court must conclude that Dr. Sisk's testimony would have had little to no effect on the State's presentation of its case.

Second, the exclusion of Dr. Sisk's testimony greatly affected the defense in the case and resulted in fundamental unfairness to Mr. Walkup. Mr. Walkup, from the very beginning of the trial, admitted causing the death of Ms. Lilly but asserted that he was guilty of second degree murder as opposed to first degree murder (Tr. 171-175, 291-305). A review of defense counsel's closing argument demonstrates that his only contention was that Mr. Walkup did not deliberate before causing Ms. Lilly's death (Tr. 682-700). The defense asked the jury to return a guilty verdict of the lesser-included offense of second degree murder (and the companion armed criminal action) (Tr. 305, 700, L.F. 59, 63).

Dr. Sisk's testimony went to the heart of the defense, since Dr. Sisk would have provided material and relevant testimony on the issue of deliberation. Specifically, Dr. Sisk would have testified that Mr. Walkup suffered from bipolar disorder since the age of eighteen, had been diagnosed with bipolar disorder and prescribed medication for bipolar disorder by several different doctors, and suffered from bipolar disorder, as well as intermittent explosive disorder and polysubstance abuse, on the night of the charged offenses (Tr. 639, 641-646, 652-653). Dr. Sisk would have further provided testimony: that the symptoms of bipolar disorder include mood swings and "an exaggerated expression of emotions to relatively minor events;" that a person suffering from bipolar disorder is "more easily affected by [his] feelings than the normal person;" and that an

event that causes a normal person to feel excitement sends a person with bipolar disorder into a very excited state of agitation and anxiety (Tr. 647, 649). Clearly, this testimony would have assisted Mr. Walkup's defense that he did not deliberate before causing Ms. Lilly's death.

The jury deliberated for over eight hours before returning a guilty verdict for first degree murder and armed criminal action (Tr. 707, 715, 716, L.F. 73, 76). After over three hours of deliberations, the jury asked the court whether it was "supposed to consider 'cool reflection' on just the stabbing that killed her, or from the beginning of the fight to the end?" (L.F. 71, Tr. 707, 710). Thus, the jury spent a considerable amount of time deliberating on the sole issue in the case, i.e., whether Mr. Walkup deliberated. As such, there is a reasonable probability that Dr. Sisk's testimony could have affected the jury's verdict and resulted in the jury returning a guilty verdict for second degree murder (and the companion armed criminal action).

For the reasons stated above, even if the defense failed to comply with a discovery rule or the requirements of Chapter 552, the trial court abused its discretion in excluding Dr. Sisk's testimony. The trial court's remedy of exclusion resulted in fundamental unfairness to Mr. Walkup. "The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 688, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) (citing Strickland v. Washington, 466 U.S. 668, 684-685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984)). The denial of an opportunity to present relevant and competent evidence negating an essential element of the State's case may constitute a denial of due process. State v. Ray, 945 S.W.2d 462,

469 (Mo.App., W.D. 1997). Further, a defendant has a constitutional right to a fair and impartial trial. State v. Hill, 817 S.W.2d 584, 587 (Mo.App., E.D. 1991). If the defendant is deprived of the testimony of a defense witness, it may violate the defendant's rights under the 6th and 14th Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. Id.

Dr. Sisk's testimony was admissible and should not have been excluded for any other reason.

Further, Dr. Sisk's testimony was otherwise admissible and should not have been excluded for any other reason. As noted previously, the State objected to Dr. Sisk's testimony on the basis that "such evidence is not admissible unless there has been a defense raised under Chapter 552, either excluding responsibility altogether or diminished capacity" (Tr. 621-622). The State argued that since Dr. Sisk was not rendering an opinion that on the night of the charged offenses, Mr. Walkup was incapable of deliberating due to a mental disease or defect, Chapter 552 did not permit the admission of the evidence regarding Mr. Walkup's mental disease (Tr. 621-622, 729-731).

Section 552.015, RSMo 2000, states as follows:

> 1. Evidence that the defendant did or did not suffer [from a] mental disease or defect shall not be admissible in a criminal prosecution except as provided in this section.
>
> 2. Evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible in a criminal proceeding:

….

(8) To prove that the defendant did or did not have a state of mind which is an element of the offense[.]

Section 552.015.2(8), RSMo 2000.

Mr. Walkup asserts that pursuant to this provision, he was entitled to adduce Dr. Sisk's testimony, regarding the mental diseases he suffered from on the night of the charged offenses, and that Dr. Sisk's testimony constituted beneficial evidence or proof that he did not deliberate. Evidence need only be relevant, *not conclusive*, to be admissible, and it is relevant if it logically tends to prove a fact in issue or corroborates relevant evidence which bears on the principal issues. State v. Richardson, 838 S.W.2d 122, 124 (Mo.App., E.D. 1992). Competent evidence which negates a culpable mental state is admissible. State v. Horst, 729 S.W.2d 30, 31 (Mo.App., E.D. 1987).

In State v. Anderson, supra, Anderson adduced expert testimony that he suffered from severe depression at the time of the murders and that as a result of such mental disease or defect, he was unable to premeditate. Id. at 536. Anderson maintained that the evidence supported the giving of a manslaughter instruction, as it demonstrated that he did not have a state of mind which was then an element of second degree murder, namely premeditation. Id. at 536-537. In determining that the trial court committed reversible error by failing to instruct on manslaughter, this Court examined the "partial responsibility" doctrine, which "permits introduction of evidence of a mental disease or defect to prove the absence of particular mental elements of a crime as a basis for convicting defendant of a lesser degree of the crime (instead of being acquitted on the

basis of mental disease or defect)" and the now Section 552.015.2(8), which permitted the defendant to adduce evidence of a mental disease or defect to "prove that the defendant did or did not have a state of mind which is an element of the offense." Id. at 537. In construing that section, this Court considered Section 4.02(1) of the Model Penal Code (1962), which was the source of the section. Id. at 538. The Court set forth the relevant commentary of the drafters of Section 4.02(1) as follows:

> 1. Paragraph (1) resolves an issue as to which there is a sharp division of authority throughout the country. Some jurisdictions decline for reasons of policy to accord to evidence of mental disease or defect an admissibility co-extensive with its relevancy to prove or disprove a material state of mind. [citation omitted] We see no justification for a limitation of this kind. If states of mind such as deliberation or premeditation are accorded legal significance, psychiatric evidence should be admissible when relevant to prove or disprove their existence to the same extent as any other relevant evidence.

Id. at 538-539.

The Anderson Court then wrote that when the legislature enacted Section 552.030(3)(1)[8], it adopted the interpretation placed thereon in the commentary by the drafters of the model act. Id. at 539. The Court concluded that the section was intended to make admissible "evidence to prove the absence (due to mental disease or defect) of some element or elements of the offense charged and to accord to that evidence the same

[8] Again, this is now Section 552.015.2(8), RSMo.

effect as other evidence (not based on mental disease or defect) which might be offered for that purpose." Id.

Based upon the foregoing, Dr. Sisk's testimony (that Mr. Walkup suffered from bipolar disorder and intermittent explosive disorder on the night of the charged offenses and the symptoms of those disorders) was admissible and relevant to "prove that [Mr. Walkup] did or did not have a state of mind which is an element of the offense." Section 552.015.2(8), RSMo 2000.

In addition to the above, "[a]s a general rule, evidence explaining evidence previously introduced or showing that the inference arising or sought to be drawn therefrom is not warranted, is admissible." State v. Taylor, 929 S.W.2d 925, 928 (Mo.App., S.D. 1996). In State v. Taylor, the defendant on appeal asserted that the trial court abused its discretion in excluding evidence of his intoxication on the night the victim was killed. Id. at 926. The defendant offered the evidence of his intoxication to explain his conduct before and after the victim was killed, including why he did not leave when sexual advances were first made by the victim, why he delayed in calling an ambulance or the police, why he was unable to prevent the victim from falling on the knife, why he could not explain the knife wound to the victim's dog, and to explain the language used in some of his statements to the police. Id. The Court of Appeals, Southern District, held that the evidence of the defendant's intoxication "was not relevant for, and was not used in establishing his mental state, *but to rebut inferences regarding that mental state*." Id. at 928 (italics added). The Court of Appeals added:

> Evidence of Appellant's intoxication does, in that respect, relate to his mental state, not to show a lack of the necessary mental state, but to explain conduct that might otherwise be significant regarding his mental state. We also conclude that in order to evaluate the credibility of the Appellant, the jury should have been allowed to be fully informed as to the circumstances of the evening and Appellant's condition.

Id.

Likewise, in the case at bar, the evidence that Mr. Walkup suffered from bipolar disorder on the night of the charged offenses and the symptoms of that disorder, was necessary to explain his conduct that would otherwise be significant regarding his mental state.

In Mr. Walkup's case, the State argued that Mr. Walkup's conduct before, during, and after the offense proved that he deliberated (Tr. 672-679, 681). Specifically, the State's argument included that the following conduct was proof that Mr. Walkup deliberated: the number and nature of the wounds to Ms. Lilly; that Mr. Walkup later showed no remorse; and that he later minimized his conduct in his statements to the police (Tr. 670-679, 681, 702-706).

Dr. Sisk's testimony regarding Mr. Walkup's condition on the night of the charged was necessary for the defense to rebut the inferences the State drew from Mr. Walkup's conduct before, during, and after the charged offenses.

For example, the State argued that evidence that Mr. Walkup stabbed Ms. Lilly several times was evidence that he deliberated. Evidence of Mr. Walkup's mental

disorders was necessary to rebut that inference and to explain his conduct in light of a person suffering from bipolar disorder, who experiences "an exaggerated expression of emotions" (Tr. 647).

There was also testimony by the police that when they initially interviewed Mr. Walkup, he "drift[ed] from one subject to another and wouldn't stick with what he was talking about" (Tr. 475). A legitimate inference from that testimony would be that Mr. Walkup was evading questions by police; however, evidence of Mr. Walkup's mental disorders was necessary to rebut that inference and to explain his conduct in light of a person suffering from bipolar, whose thoughts switch from one topic to another during a bipolar manic episode (Tr. 648).

There was other testimony presented regarding Mr. Walkup's behavior shortly after the offenses while in police custody, including that: during the first questioning by police, he was belligerent and combative and then aloof and passive (Tr. 476, 479, 490); and during the second interrogation, he was initially irritated and angry and then became calm but the interrogation ended due to his "roller coaster emotions" (Tr. 501, 506, 509). While one may draw an inference from that testimony that Mr. Walkup was dangerous and uncooperative with police, evidence of his bipolar condition may rebut such inference, given that those suffering from bipolar disorder often experience mood swings (Tr. 642, 643-644, 646, 647).

Based on the above, Dr. Sisk's testimony was relevant, even though not conclusive, to the issue of whether Mr. Walkup deliberated and to explain conduct from which deliberation might otherwise be inferred.

Last, undersigned counsel acknowledges that Dr. Sisk's testimony fell short of proof that Mr. Walkup was *incapable* of deliberating on the night of the charged offenses.[9] Nevertheless, that did not affect the relevance and admissibility of the testimony. Likewise, whether or not Dr. Sisk's testimony is appropriately labeled a "diminished capacity" defense, the proffered testimony by Dr. Sisk was relevant and admissible.

In State v. Balderama, 88 P.3d 845 (N.M.S.Ct. 2004), the Supreme Court of New Mexico considered the admissibility and relevance of expert testimony similar to the testimony proffered by Mr. Walkup. Id. at 849. At trial, Balderama proffered the testimony of an expert, who testified that he diagnosed Balderama with impulse-control disorder, polysubstance abuse, and antisocial personality disorder and that Balderama had neurological dysfunction, which resulted in problems with impulse control and difficulty in planning. Id. at 852. Although the expert testified that "there is some evidence for diminished capacity," the expert could not testify that Balderama was *incapable* of forming specific intent. Id. at 852-853. The trial court rejected the testimony of Balderama's expert after determining that it would mislead the jury to present psychological testimony when that testimony would not support an instruction on

[9] In fact, an expert's testimony that a homicide was "deliberated" has been held to be inadmissible as invading the province of the jury. State v. Clements, 789 S.W.2d 101, 110-111 (Mo.App., S.D. 1990).

diminished capacity.[10] Id. at 850. The majority of the Supreme Court of New Mexico wrote as follows:

> Defendant's theory at trial … was not that Defendant was incapable of forming deliberate intent, and Defendant therefore did not raise the diminished-capacity defense. Defendant's strategy was to show that he did not, at the time of the killing, form the deliberate intent to kill. He sought to raise a reasonable doubt about whether the State carried its burden of proving the mental state required for first-degree murder. …
>
> Proof of incapacity to form the requisite deliberate intent, however, is not the only means of defending against the State's allegation that the defendant acted with the deliberate intent to take away the life of the victim. "An abnormal mental condition may influence the probability that the defendant premeditated and deliberated – and so be taken into account

[10] In a footnote, the Supreme Court of New Mexico wrote that: the term "diminished capacity" is somewhat misleading and has resulted in considerable confusion; the terms "diminished responsibility" and "partial responsibility" were misnomers, because the theory in fact "contemplates full responsibility, not partial, but only for the crime actually committed;" the same is true with respect to "diminished capacity," which contemplates not a partial ability but an inability to form specific intent; and the term "diminished capacity" should be carefully construed to mean an inability to form specific intent. Balderama, 88 P.3d 845 (FN2).

> by a jury in determining whether those states of mind existed in fact (beyond a reasonable doubt) – even though it did not eliminate the capacity for premeditation." *United States v. Peterson*, 509 F.2d 408, 416-17 (D.C.Cir.1974). "[E]xpert testimony is admissible if it merely 'support[s] an inference or conclusion that the defendant did or did not have the requisite mens rea.'" *United States v. Bennett*, 161 F.3d 171, 183 (3rd Cir. 1990) (quoting *United States v. Morales*, 108 F.3d 1031, 1037 (9th Cir. 1997)). Thus, we conclude that evidence of the condition of the mind of the accused at the time of the crime may be introduced, not only for the purpose of proving the *inability* to deliberate, but also to prove that the conditions were such that Defendant *did not in fact*, at the time of the killing, form a deliberate intent to kill. …

Id. at 853.

As the Supreme Court of New Mexico did in Balderama, this Court should hold that Dr. Sisk's testimony was admissible and relevant to prove that conditions were such that Mr. Walkup did not in fact deliberate prior to killing Ms. Lilly.

The exclusion of Dr. Sisk's testimony deprived Mr. Walkup of his fundamental rights to present a defense, to due process, and to a fair trial, as guaranteed by the 5th, 6th, and 14th Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution. Mr. Walkup respectfully requests that this Court reverse his convictions and sentences and remand the case for a new trial.

CONCLUSION

Based on the Argument set forth herein, Appellant respectfully requests that this Court reverse his convictions and sentences and remand the case for a new trial.

Respectfully Submitted,

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Jeannie Willibey, Mo Bar No. 40997
Asst. Appellate Defender
818 Grand, Suite 200
Kansas City, MO 64106
Tel: 816-889-7699
Fax: 816-889-2001

Certificate of Compliance and Service

I, Jeannie M. Willibey, hereby certify as follows:

1. The attached brief complies with the limitations contained in this Court's Special Rule 84.06(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page and the appendix, the brief contains 13,712 words, which does not exceed the 31,000 words allowed for an appellant's brief.
2. The floppy disk filed with this brief contains a complete copy of the brief. It has been scanned for viruses using a McAfee VirusScan Enterprise 7.1.0 program, which the Public Defender System updated on October 12, 2006. According to that program, this disk and the disk provided to the Attorney General are virus-free.
3. Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid, to Mr. Evan Buchheim, Asst. Attorney General, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri, 65102, on this 13th day of October, 2006.

_____

Jeannie Willibey

APPENDIX