

IN THE
MISSOURI SUPREME COURT

SCOTT A. MCLAUGHLIN,)	
)	
)	
Appellant,)	
)	
vs.)	No. SC 91255
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 12
THE HONORABLE STEVEN GOLDMAN, JUDGE

APPELLANT’S REPLY BRIEF

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JURISDICTIONAL AND FACT STATEMENTS

Appellant, Scott McLaughlin, adopts the Jurisdictional Statement and the Statement of Facts in his original brief.

POINTS RELIED ON

I. Judge Goldman Not Fair and Impartial

When Scott's jury could not agree upon punishment, Judge Goldman determined that death was the appropriate sentence. Judge Goldman erred in denying Scott's motion to disqualify him from hearing the postconviction action because he could not fairly review claims relating to the death penalty, as he was not wholly disinterested in Scott's conviction and sentence. Not all claims of judicial bias emanate from an extrajudicial source, but can result from the judge's role in the prior criminal proceedings, and when a judge has prejudged the issues in the case and is unwilling to consider all the evidence presented.

Caperton v. Massey Coal, 129 S.Ct. 2252 (2009);

In re Murchison, 349 U.S. 133 (1955);

Haynes v. State, 937 S.W.2d 199 (Mo. banc 1999); and

Burgess v. State, 342 S.W.3d 325 (Mo. banc 2011).

II. Counsel Failed to Hire Qualified Psychiatrist to Testify

About Scott's Mental Health

Scott's amended motion claimed that counsel was ineffective for failing to hire a qualified psychiatrist to evaluate him and testify about his mental health, the same claim raised on appeal. Trial counsel was ineffective because they knew of Scott's history of serious mental health issues and wanted a psychiatrist to evaluate him and provide mitigating evidence, but failed to ensure the doctor hired was competent and qualified.

Scott was prejudiced because, without a qualified, competent psychiatrist, the jury heard no evidence that Scott was mentally ill and, at the time of the crime, suffered from an extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct was substantially impaired. Had jurors heard this mitigating evidence, a reasonable probability exists that they would have imposed a life sentence, especially since they rejected three statutory aggravators and could not agree upon punishment.

Hoskins v. State, 329 S.W.3d 695 (Mo. banc 2010).

IV. and V. Background Records Are Admissible at a Penalty Phase

The motion court clearly erred in denying an evidentiary hearing on Scott's claim that counsel was ineffective for failing to present school records, hospital records and jail records documenting medical treatment, and for failing to object to the trial court's improper instruction that the records could not be considered for their truth, because such records are admissible at a penalty phase, jurors should receive as much information as possible in determining the appropriate punishment, and records are rarely cumulative to witnesses who testify, because they are not prepared in preparation for litigation, but at the time of the childhood events, and thus provide corroboration for potentially biased witnesses.

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

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

Williams v. Taylor, 529 U.S. 362 (2000); and

Wiggins v. Smith, 539 U.S. 510 (2003).

ARGUMENT

STANDARD OF REVIEW

The State correctly notes that in *Cullen v. Pinholster*, 131 S.Ct. 1388, 1408 (2011), the Supreme Court ruled that the *Strickland* standard must be applied with “scrupulous care.” (Resp. Br. at 28). The State neglects to mention, however, that in *Pinholster*, the Court reviewed a federal habeas decision governed by AEDPA¹, 28 U.S.C., Section 2254. *Pinholster*, 131 S.Ct. at 1398. That statutory provision limits the power of a federal court to grant a writ of habeas corpus. *Id.* The federal court’s review is limited to the record before the state court adjudicated on the merits. *Id.* This deferential review leaves “primary responsibility with the state courts.” *Id.* at 1399.

This Court must adjudicate federal constitutional claims in the first instance. This Court carefully exercises its review in death penalty cases. *Deck v. State*, 68 S.W.3d 418, 430 (Mo. banc 2002). “There is a significant constitutional difference between the death penalty and lesser punishments.” *Deck, supra*, quoting *Beck v. Alabama*, 447 U.S. 625, 637 (1980). “Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” *Id.*, quoting *Beck, supra* at 638, n. 13, and *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell and Stevens, JJ.).

¹ Antiterrorism and Effective Death Penalty Act.

Here, like *Deck*, Scott McLaughlin is presenting his postconviction claims for the first time. His jury could not agree upon punishment at trial. Scott's case was a close one on the issue of punishment. Death is different and this Court should carefully review his constitutional claims in this first instance, rather than provide an overly deferential review advocated by the State. That review is appropriate for federal courts, not the Supreme Court of Missouri.

I. Judge Goldman Not Fair and Impartial

When Scott's jury could not agree upon punishment, Judge Goldman determined that death was the appropriate sentence. Judge Goldman erred in denying Scott's motion to disqualify him from hearing the postconviction action because he could not fairly review claims relating to the death penalty, as he was not wholly disinterested in Scott's conviction and sentence. Not all claims of judicial bias emanate from an extrajudicial source, but can result from the judge's role in the prior criminal proceedings, and when a judge has prejudged the issues in the case and is unwilling to consider all the evidence presented.

When the jury could not agree upon punishment, Judge Goldman became the fact-finder at trial, found an aggravating circumstance, weighed that aggravator against mitigating evidence, and sentenced Scott to death (Tr. 2000, 2004-2005). Having made that factual determination that death was appropriate, the question arose whether Judge Goldman could properly judge his own decision and preside over the postconviction action challenging the death penalty (L.F. 149-150). Scott's postconviction counsel did not believe Judge Goldman could and asked him to recuse himself. *Id.*

The State suggests that Scott's motion for recusal had no merit, because Judge Goldman's bias and prejudice must come from an extrajudicial source (Resp. Br. at 31, citing *Haynes v. State*, 937 S.W.2d 199, 200 (Mo. banc 1999)).

The State ignores that the Supreme Court has found other sources of potential bias and prejudice that require recusal. *See, Caperton v. Massey Coal*, 129 S.Ct. 2252 (2009). In *Caperton*, the Court found one such instance in the criminal contempt context, where the judge participated in the earlier proceeding. *Id.* at 2261, discussing *In re Murchison*, 349 U.S. 133 (1955). Due process requires disqualification in the subsequent contempt proceeding, because the judge was part of the earlier process and as a result, cannot be, in the very nature of things, wholly disinterested in the conviction of the accused. *Caperton, supra* at 2261. As a practical matter, the judge could not free himself from the influence of the earlier in-court proceedings. *Id.*

Here, too, Judge Goldman could not free himself from his earlier fact-finding role, in which he determined that death was the appropriate punishment. In the very nature of things, he could not be wholly disinterested in the conviction and appropriate sentence for Scott. And, unlike *Haynes, supra*, Judge Goldman did not merely preside over the first trial, but instead, he became a fact finder, determining that an aggravator existed and death was appropriate. He had an interest in having that determination vindicated in the subsequent proceedings. Indeed, in *Haynes*, this Court recognized that a single judge grand jury could not also preside at a contempt trial involving one who allegedly committed perjury in the grand jury proceeding. *Id., citing In re Murchison*, 349 U.S. at 136.

The courts distinguish the type of court proceedings where recusal is required. *Haynes, supra* at 202. *See also, Burgess v. State*, 342 S.W.3d 325 (Mo.

banc 2011). Simply presiding over a trial is not sufficient to require recusal, absent bias or prejudice emanating from an extrajudicial source. *Haynes, supra* at 202. But, when the judge participates in a prior court proceeding where the judge steps out of the role of neutral observer and obtains an adversarial interest, the probability of actual bias is too great. *Id., quoting Withrow v. Larking*, 421 U.S. 35, 47 (1975).

Here, Judge Goldman took off his judicial robe of presiding over the trial and became the fact-finder, determining that death was appropriate. His participation was more like the one-man grand jury that found contempt charges appropriate. Once making that factual determination, he was not in a position to rule on Scott's claims to vacate that very sentence.

The State's argument that the only disqualifying bias can come from an extrajudicial source also ignores those decisions that require recusal where the judge has prejudged the issues and is unwilling to consider all the evidence presented before deciding a case. (See cases cited in App. Br. at 49-50).

Here, the probability of bias was too great. Due process required recusal. This Court should reverse and remand for a new postconviction proceeding.

II. Counsel Failed to Hire Qualified Psychiatrist to Testify

About Scott's Mental Health

Scott's amended motion claimed that counsel was ineffective for failing to hire a qualified psychiatrist to evaluate him and testify about his mental health, the same claim raised on appeal. Trial counsel was ineffective because they knew of Scott's history of serious mental health issues and wanted a psychiatrist to evaluate him and provide mitigating evidence, but failed to ensure the doctor hired was competent and qualified.

Scott was prejudiced because, without a qualified, competent psychiatrist, the jury heard no evidence that Scott was mentally ill and, at the time of the crime, suffered from an extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct was substantially impaired. Had jurors heard this mitigating evidence, a reasonable probability exists that they would have imposed a life sentence, especially since they rejected three statutory aggravators and could not agree upon punishment.

Scott's amended motion alleged that counsel was ineffective for failing to investigate, hire and present the testimony of a qualified psychiatrist who evaluated Scott and determined that Scott was mentally ill and, at the time of the crime, suffered from an extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct was substantially impaired (L.F. 58-66, 126-132). At the evidentiary hearing, the State disputed this claim and introduced

evidence that counsel's investigation was sufficient because they hired Dr. Caruso (H.Tr. 594). The State offered Dr. Caruso's reports into evidence and filed those reports with this Court (Tr. 594-596, State's Ex. 2 and 3).

The State also drafted the findings for Judge Goldman as he requested at the conclusion of the hearing (H.Tr. 720, L.F. 190-191). Judge Goldman signed those findings without making any changes (L.F. 190-191). The findings found that counsel acted reasonably in hiring Dr. Caruso and their decision not to call Caruso was reasonable trial strategy (L.F. 184-185).

Thus, in appealing the court's decision denying this claim, Scott had to address counsel's investigation into Dr. Caruso and their decision not to call him. This was the basis for the court's decision in denying relief. This Court reviews the motion court's findings and conclusions for clear error. Rule 29.15 (k). Appellant has not changed the theory on appeal. The claim pled – the failure to hire a qualified psychiatrist to testify to Scott's mental illness and the statutory mitigators that resulted – is the claim that appellant raised on appeal. The State's suggestion to the contrary should be rejected, especially since the State offered Caruso's reports into evidence and drafted findings that found the investigation and hiring of Caruso was effective (Tr. 594-596, Exs. 2 and 3, L.F. 190-191).

The State argues that the claim raised on appeal is like *Hoskins v. State*, 329 S.W.3d 695 (Mo. banc 2010) (Resp. Br. at 45). But, in *Hoskins*, the appellant raised for the first time on appeal – that the trial court did not have statutory authority to run Hoskins' seven-year sentences consecutively to each other or his

prior 15-year sentence. *Id.* at 698. This Court found that since this claim was never presented to the motion court, it could not be raised on appeal. *Id.* at 698-699. Scott, in contrast, did raise trial counsel's failure to hire a qualified psychiatrist in his amended motion. The motion court not only heard evidence on this claim, but based his findings on trial counsel's actions in hiring and then dismissing Dr. Caruso. This claim was properly before the motion court and is properly raised on appeal, unlike the sentencing issue in *Hoskins*.

When this Court addresses the merits of Scott's claim, it should find counsel was ineffective. Counsel wanted a psychiatrist to evaluate Scott and determine whether he suffered from mental illness and whether any statutory mitigators existed (H.Tr. 582-84). Counsel hired Dr. Keith Caruso, but never investigated Caruso's credentials or background (H.Tr. 584-585). The State excerpts an isolated quote from counsel Robert Steele's testimony, but takes it out of context (Resp. Br. at 49). Steele did testify that he had no reason to think anything was wrong with Dr. Caruso, but he prefaced those remarks with the following testimony:

Q. How did you come to choose Dr. Caruso as your psychiatrist?

A. I did not choose Caruso.

Q. So this was not your decision, then?

A. The decision to choose Caruso was not mine.

Q. Did you personally do any investigation about Dr. Caruso's background, his education, his training, anything of that nature?

Even though you may not have made the ultimate decision, did you do any investigation or background check or anything like that on Dr. Caruso?

A. Yes.

Q. When did you do that?

A. After we received information from Dr. Caruso that there may be a potential problem with his testimony.

Q. Prior to trial, did you do that same investigation?

A. No.

Q. Why did you not?

A. When I entered on the case, he had already been retained. He had already started working on the case. *I assumed that whoever retained him had done some investigation into Caruso or was familiar with his work.*

(H.Tr. 552-553) (emphasis added). Steele's assumption was wrong. Co-counsel never talked to anyone who had worked with Caruso or had hired him to conduct an evaluation. *Id.* And, contrary to the State's argument that counsel had "limited resources" (Resp. Br. 49), conducting a Google search that required a few seconds of counsel's time would not have required any resources (Tr. 1952-1953).

Counsel hired a psychiatrist without conducting any investigation into his background or consulting with a single attorney who had worked with him. Counsel knew they made a horrible mistake and honestly told the court about it at

the time of trial (Tr. 1951-1954). Counsel had promised jurors they would hear Dr. Caruso's testimony in their opening statement, and promised jurors they would hear evidence of Scott's mental illness and statutory mitigation (Tr. 1487-1488). They could not deliver on that promise because they learned for the first time during trial that Caruso had lied, committed fraud and altered data (Tr. 1951-1954). This Court should reject the State's argument that counsel chose not to present this mitigating evidence for strategic reasons (Resp. Br. at 53-54).

The State attempts to minimize the damage from counsel's ineffectiveness, saying a psychiatrist's testimony would have "barely altered the sentencing profile" (Resp. Br. at 52) and was "largely identical" to the mental health evidence the jury already heard (Resp. Br. at 53). The State's position is 180 degrees from the position it took at trial. The State criticized counsel's failure to have Scott evaluated and tested to determine his mental state at the time of the crime (Tr. 1989). The State told jurors that no evidence of mental illness existed, records could not be considered because the judge instructed jurors they were not evidence, and the defense presented no doctor who had diagnosed Scott as mentally ill (Tr. 1993-1994).

Trial counsel also recognized their weakened case. Without a qualified mental health expert, they had no one to support the statutory mitigating circumstances that Scott suffered from an extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct was

substantially impaired (H.Tr. 590-591). Having promised this evidence in their opening, counsel could not meet that promise at trial (Tr. 1487-1488).

This was a close case in which jurors could not agree upon punishment. When this Court considers all the evidence presented at trial, plus a qualified psychiatrist's testimony about Scott's mental state at the time of the crime presented in the state postconviction case, this Court should find that a reasonable probability exists that the jury would have sentenced Scott to life. This Court should reverse and remand for a new penalty phase.

IV. and V. Background Records Are Admissible at a Penalty Phase²

The motion court clearly erred in denying an evidentiary hearing on Scott's claim that counsel was ineffective for failing to present school records, hospital records and jail records documenting medical treatment, and for failing to object to the trial court's improper instruction that the records could not be considered for their truth, because such records are admissible at a penalty phase, jurors should receive as much information as possible in determining the appropriate punishment, and records are rarely cumulative to witnesses who testify, because they are not prepared in preparation for litigation, but at the time of the childhood events, and thus provide corroboration for potentially biased witnesses.

The State suggests that a defendant's background records are not admissible at a penalty phase because they contain hearsay statements (Resp. Br. at 71). According to the State, the trial judge properly cautioned jurors that they could not consider such records for their truth, but only whether they supported an expert opinion (Resp. Br. at 73). The State's argument should be rejected.

Background Records are Admissible

This Court found counsel ineffective for failing to investigate and present background records at the penalty phase of two death penalty trials. *Hutchison v.*

² Since the State responded to Points IV and V in a single point, this reply also combines those two points.

State, 150 S.W.3d 292, 305 (Mo. banc 2004); *Taylor v. State*, 262 S.W.3d 231, 251 (Mo. banc 2008). Surely, this Court would not have ruled counsel ineffective for failing to present inadmissible evidence. The State fails to reconcile its argument with *Hutchison* and *Taylor*, which ruled background records are admissible mitigating evidence jurors should consider.

In both *Hutchison* and *Taylor*, this Court discussed the importance of the records themselves. In *Hutchison*, “[t]he documents would not have added anything new that was unfavorable, but could have demonstrated to the jury the problems Hutchison had growing up and his intellectual and emotional deficits far more effectively than the rudimentary information actually presented during the penalty phase.” *Hutchison v. State*, 150 S.W.3d at 304. “Records from remote time are useful to show that a claim of impaired intellectual functioning is not a recent discovery for the purpose of the defense.” *Id.* at 305. Jurors should hear the mitigating information contained in the records. *Id.*

In *Taylor*, trial counsel failed to introduce into evidence any of the records on which their expert relied in reaching his conclusions regarding Mr. Taylor's abusive background, history of mental illness, and eventual diagnosis. *Taylor v. State*, 262 S.W.3d at 251. “This failure at the penalty phase is particularly profound since the jury had asked to review these records during the guilt phase of the trial. Despite the jury's specific desire to see these available records, which were replete with statements showing Mr. Taylor had suffered from mental illness

since long before the murder, counsel made no attempt to fill this evidentiary void by introducing them in the penalty phase.” *Id.*

The State acknowledges *Hutchison* and *Taylor*, but tries to limit those holdings because those juries heard little mitigating evidence. (Resp. Br. at 77-78). The State’s argument is unconvincing. Records themselves provide compelling information, especially when they are background records, not prepared in preparation of litigation. Accordingly, the motion court clearly erred in denying a hearing on the claims of ineffective assistance of counsel relating to the records.

Jurors Should Have As Much Information Possible for Sentencing

In *Taylor, supra*, this Court ruled that “[b]ecause of the unique nature of capital sentencing—both the stakes and the character of the evidence to be presented—capital defense counsel have a heightened duty to present mitigation evidence to the jury.” *Id.* at 249, citing *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (because the focus of capital penalty phase proceedings is on the defendant’s personal culpability, the sentencing jury must have the opportunity to evaluate the “character and record of the individual offender,” as well as the “circumstances of the particular offense.”); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (“evidence about the defendant’s background and character is relevant because of the belief ... that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse”).

Accordingly, the Supreme Court has repeatedly found attorneys ineffective for failing to present mitigating evidence. *Williams v. Taylor*, 529 U.S. 362, 398-399 (2000) (counsel failed to present mitigation evidence regarding his life history); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (counsel has an affirmative obligation to investigate and present mitigation evidence to the jury at the penalty phase relating to the defendant's background); *Rompilla v. Beard*, 545 U.S. 374, 392-393 (2005) (counsel failed to present evidence relating to the defendant's background and mental health); *Porter v. McCollum*, 130 S.Ct. 447 (2009) (counsel's failure to uncover and present evidence of defendant's mental health, family background and military service was deficient); *Sears v. Upton*, 130 S.Ct. 3259 (2010) (evidence of brain damage is relevant mitigating evidence the jury should consider).

Like *Taylor* and *Hutchison*, all of these cases involved record evidence along with other mitigating evidence such as experts and lay witnesses. The State never explains how counsel could be ineffective for failing to present records which it argues is inadmissible hearsay. All these decisions show that background records are admissible at a penalty phase.

The State would never argue that records of prior criminal convictions should not be admitted at a penalty phase because they are "hearsay." Such records are routinely admitted in death penalty cases. *See, e.g. State v. Johns*, 34 S.W.3d 93, 112 (Mo. banc 2000) (rejecting appellant's challenge to prior convictions and unadjudicated bad acts). "As a general rule, the trial court 'has

discretion during the punishment phase of trial to admit whatever evidence it deems helpful to the jury in assessing punishment.’ ” *Id.*, quoting *State v. Winfield*, 5 S.W.3d 505, 515 (Mo. banc 1999).

Motion Court Clearly Erred in Denying A Hearing

The State criticizes Scott for failing to lay a foundation to show that background records were admissible (Resp. Br. at 73). But, the State ignores that the motion court denied a hearing on the claims regarding the records (L.F. 159). Further, postconviction counsel did offer the records into evidence and they were admitted, showing that had counsel offered them at trial, they should have been admitted as well (Exs. Q, R, S, T, U, V, W, X, Z, CC, DD, FF, II, H.Tr. 320, 336, 345, 347, 348, 350, 351, 352, 354, 360, 361, 366, 368, 371). The failure to lay a foundation was never the basis for the court’s refusal to consider the records as mitigation. Instead, the court ruled they were “cumulative” to the evidence presented at trial (L.F. 186-187).

Scott Prejudiced

The State’s argument that the school, jail and medical records were cumulative to the evidence presented at trial (Resp. Br. at 74-76) is contrary to the record. Not a single teacher or counselor testified at trial, so the school records would not have been cumulative.

The State ignores that since Dr. Caruso lied and altered data, counsel did not call him to testify about Scott’s mental illness. Dr. Cunningham could not testify about it because he had not tested Scott or evaluated his mental state at the

time of the crime. But, independent records would have shown that Dr. Rehmani, a psychiatrist, determined Scott suffers from Bipolar Affective Disorder, and prescribed Tegretol, Risperdal, Seroquel and Lexapro for Depression (Ex. R at 44, 48, 51). Had these records been introduced, the State could not have argued there was no evidence of Bipolar disorder (Tr. 1993).

The records would have established that Scott had delusions, anxiety, hallucinations, compulsive behaviors, mood changes, and racing thoughts (Ex. R at 48). Medical records confirmed that Scott was prescribed medication for his mental illness in 2003, months before the charged offense (Ex. R, at 6, 12, 23). Given the problems with Caruso, introducing the records would have at least provided some evidence to support counsel's argument that Scott was mentally ill.

Moreover, Scott's history of depression and suicidal thoughts dated years before the crime (Ex. HH, at 5 and 8, Ex. W, at 41). Like *Hutchison*, they would have been useful to show that this evidence was not prepared for litigation. They would have countered the State's argument that the defense expert was simply offering excuses because he was paid to do so (Tr. 1989-1990, 1993).

When this Court reviews the entire record, it should be left with one conclusion – the motion court clearly erred in denying the claims regarding background records. This Court should reverse and remand for a new evidentiary hearing or alternatively, a new penalty phase.

CONCLUSION

Based on the foregoing arguments in his original brief and in this reply,
Scott requests the following relief:

Point I – a new evidentiary hearing before a fair and impartial judge;

Points II, III, – new penalty phase;

Points VIII and IX - new trial for both guilt and penalty phases;

Points IV, V, VI, VII, and X, an evidentiary hearing or alternatively, a new
penalty phase or life without probation or parole.

Respectfully submitted,

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Certificate of Compliance and Service

I, Melinda K. Pendergraph, hereby certify to the following. The attached reply brief complies with the limitations contained in Rule 84.06(b). The reply brief was completed using Microsoft Word, 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 4,585 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The reply brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in September, 2011. According to that program the reply brief is virus-free.

A true and correct copy of the attached reply brief has been served electronically using the Missouri Supreme Court's electronic filing system this 27th day of September, 2011, to jim.farnsworth@ago.mo.gov, Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/Melinda K. Pendergraph
Melinda K. Pendergraph