

IN THE
MISSOURI SUPREME COURT

LEON TAYLOR,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC 85119
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION 10
THE HONORABLE CHARLES ATWELL, JUDGE

APPELLANT’S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant's original Jurisdictional Statement is incorporated by reference.

STATEMENT OF FACTS

Appellant's Statement of Facts is incorporated by reference.

POINTS RELIED ON

I. Failure to Investigate Aggravating Circumstance

The motion court clearly erred in denying Mr. Taylor's claim that counsel was ineffective for failing to investigate, rebut and object to the prosecutor's suggestion that Mr. Taylor had stabbed a man to death, when he had not, because counsel's failure and the prosecutor's misstatements violated Mr. Taylor's rights to effective assistance of counsel, to due process, and to present mitigation, under the 6th, 8th, and 14th Amendments of the United States Constitution, in that counsel did not investigate Mr. Taylor's prior conviction and discover that the State had maintained that a co-defendant, Carl Hardin, had stabbed the victim to death. Mr. Taylor was prejudiced, since the State argued that the jury should give death because Mr. Taylor had stabbed another man to death. Had this inaccuracy been corrected, a reasonable probability of a life sentence exists, especially since the first jury, hearing similar information, could not agree upon punishment.

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

State v. Tokar, 918 S.W.2d 753, 768 (Mo. banc 1996).

II. Failure to Present Psychiatric Testimony of Mr. Taylor's
Mental State at the Time of the Crime

The motion court clearly erred in denying the Rule 29.15 motion because Mr. Taylor was denied his rights to effective assistance of counsel and due process and he was arbitrarily and capriciously sentenced to death, in violation of the 6th, 8th and 14th Amendments, U.S. Constitution, and Section 565.032.3 (2) and (6), in that trial counsel failed to investigate and present evidence of Mr. Taylor's mental state through a psychiatrist, such as Dr. Logan, who found that Mr. Taylor's brain did not function normally due to the alcohol and drugs he received while *in utero*, as an infant, and during childhood, and the trauma he suffered as a child, and the results were mental diseases and defects, including Dysthymia, Chronic Depression, Post-Traumatic Stress Disorder, Substance Abuse problems, and a Personality Disorder, which established the statutory mitigators of extreme mental or emotional disturbance and substantial impairment of capacity to appreciate the criminality of his conduct, thus reducing Mr. Taylor's culpability and providing a basis for a life sentence.

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

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

Borchardt v. Maryland, 786 A.2d 631 (2001);

State v. Johnson, 968 S.W.2d 686 (Mo. banc 1998);

Section 565.032.3 (2) and (6); and

MAI CR3d 313.44A.

III. Mental Retardation

The motion court clearly erred in denying Mr. Taylor's postconviction motion, because counsel was ineffective in failing to present evidence of Mr. Taylor's mental retardation and this evidence prohibits his execution under his rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, as guaranteed by the 6th, 8th, and 14th Amendments of the United States Constitution and Sections 565.030.4 and 565.030.6, RSMo Cum. Supp. 2001, in that the jury never heard available evidence of mental retardation through Dr. Logan who revealed that inhalants decreased his IQ 10 points and placed him in the borderline mentally retarded range.

Alternatively, this Court should find, pursuant to Section 565.035.3 (3), that the death penalty is excessive given the evidence of Mr. Taylor's mental retardation.

Rogers v. State, 575 S.E.2d 879 (Ga. 2003);

Atkins v. Virginia, 536 U.S. 304 (2002); and

Johnson v. State, 102 S.W.3d 535 (Mo. banc 2003).

IV. Inadequate Mental Evaluation

The motion court clearly erred in denying the Rule 29.15 motion because Mr. Taylor was denied his rights to effective assistance of counsel and due process and was arbitrarily and capriciously sentenced to death, 6th, 8th and 14th Amendments, U.S. Constitution, and Section 565.032.3 (2) and (6), in that trial counsel failed to investigate and present evidence through their expert Dr. Smith that Mr. Taylor suffered from Depression, Post-Traumatic Stress Disorder, and Alcohol and Drug Dependence, which established the statutory mitigators, extreme mental or emotional disturbance and substantial impairment of capacity to appreciate the criminality of his conduct. This mitigation would have reduced Mr. Taylor's culpability and likely resulted in a life sentence.

Hildwin v. Dugger, 654 So.2d 107 (Fla.1995);

Sections 565.032.3 (2) and (6);

Sections 921.141 (2) and (6) (b) and (f), Fla.Stat. (1985); and

MAI-CR 3d 313.44, Notes on Use 5.

ARGUMENT

I. Failure to Investigate Aggravating Circumstance

The motion court clearly erred in denying Mr. Taylor's claim that counsel was ineffective for failing to investigate, rebut and object to the prosecutor's suggestion that Mr. Taylor had stabbed a man to death, when he had not, because counsel's failure and the prosecutor's misstatements violated Mr. Taylor's rights to effective assistance of counsel, to due process, and to present mitigation, under the 6th, 8th, and 14th Amendments of the United States Constitution, in that counsel did not investigate Mr. Taylor's prior conviction and discover that the State had maintained that a co-defendant, Carl Hardin, had stabbed the victim to death. Mr. Taylor was prejudiced, since the State argued that the jury should give death because Mr. Taylor had stabbed another man to death. Had this inaccuracy been corrected, a reasonable probability of a life sentence exists, especially since the first jury, hearing similar information, could not agree upon punishment.

At the 29.15 hearing, Mr. Taylor elicited evidence of trial counsel's inadequate investigation and failure to rebut aggravating circumstances through the testimony of Robert Wolfrum, one of his two trial attorneys. (H.Tr. 347-406). However, because Mr. Taylor did not call co-counsel, Teoffice Cooper, at the

hearing, the State suggests that he has failed to meet his burden of proof, citing, *State v. Tokar*, 918 S.W.2d 753, 768 (Mo. banc 1996) (Resp. Br. at 20).¹

Tokar does not require that a movant call multiple witnesses to prove his claim. Rather, in *Tokar*, the issue was counsel's alleged ineffectiveness for failing to object to the prosecutor's closing argument. *Tokar*, supra at 768. Despite his allegations, Tokar presented **no** evidence regarding why counsel failed to object to the closing argument in question, despite questioning counsel regarding other issues at the postconviction hearing. *Id.* This Court held that, without any evidence as to counsel's reasons for not objecting, Tokar had "not overcome the presumption that the failure to object was a strategic choice by competent counsel." *Id.*

In contrast, here, Mr. Taylor's postconviction counsel called one of his trial attorneys and questioned him at length regarding his investigation into aggravating circumstances, mitigating circumstances and his failure to rebut aggravators and present mental health evidence (H. Tr. 347-83, 400-06). At no time during the testimony, did the State object to Mr. Wolfrum's testimony about his and co-counsel's strategic decisions. Had the State believed Mr. Wolfrum did not have sufficient knowledge of this issue, it could have timely objected. Had the State believed that Mr. Cooper would have rebutted anything Mr. Wolfrum said, it

¹ The State makes the same argument throughout other arguments of the brief (Resp. Br., at 41-42, 56). Mr. Taylor's response here applies to all the issues.

could have called him as a state witness. The State did not complain at the hearing, and should not be heard to complain now.

Furthermore, the motion court made findings regarding counsel's actions based on Wolfrum's testimony regarding their strategic decisions (A-20-21). The only issue properly before the Court is whether the motion court clearly erred in its findings, since Mr. Taylor presented evidence to prove his claims as required under 29.15(i) and *Tokar*.

The State argues that under *Wiggins*, the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." (Resp. Br. at 17, citing *Wiggins v. Smith*, ____ U.S. ____, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003)). The State neglects to mention that in *Wiggins*, the Court explained what is minimally required in a death penalty case: counsel must "discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 123 S.Ct. at 2537 (emphasis in original). Included in such a basic investigation is a thorough review of a client's prior adult and juvenile correctional experience. *Id.*

Thus, under *Wiggins*, the question is whether counsel was ineffective for failing to investigate and rebut aggravating evidence that Mr. Taylor had stabbed a man to death. The State argues that simply reading police reports provided by the State is sufficient (Resp. Br. at 21). *Wiggins* shows otherwise. Counsel failed to obtain any of the codefendant's records, including a trial transcript that was readily available (H.Tr. 354-59). Counsel could have easily discovered evidence

that while Mr. Taylor acted as an accomplice in the prior murder, the State prosecuted his codefendant, Hardin, as the primary actor (Ex. 2, at 356-98, Ex. 3, at 437-440, 457). The State relied on Mr. Taylor's testimony that Hardin stabbed the victim to death, and was responsible for the 16 stab wounds that actually killed the victim (Ex. 2, at 356-98, Ex. 3, at 437-440, 457). The State wants to change course from its earlier position in the Hardin prosecution, and suggest that Mr. Taylor's testimony is "self-serving." (Resp. Br. at 19). Yet the State was more than happy to rely on Mr. Taylor's testimony to garner a conviction against Hardin (Ex. 2, at 356-98).

Counsel's failure to discover readily available evidence to rebut the aggravator was unreasonable, especially since counsel knew that the prior murder was important to the State's case and argument for death (H.Tr. 353-54, 381; Ex.31-32 at 194, 508, 1776; Ex. 8 at 194, 1681, 1776). Under *Wiggins*, counsel had a duty to discover evidence to rebut this aggravator, since it was reasonably available. The only issue is whether Mr. Taylor was prejudiced.

The State argues that Mr. Taylor was not prejudiced because the evidence from Hardin's trial showed that he was involved in the murder and the jury may have seen this evidence as an attempt to trivialize the murder (Resp. Br. at 21-22). The State's argument ignores that at trial, the prosecutor led the jury to believe that Mr. Taylor, acting alone, stabbed a man to death and as a result, was evil, and should be put to death (2Tr. 1664, 1927-28, 2039-40, 2046-47, 2047, 2048, 2163, 2164, 2172, 2173, 2174, 2176, 2195, 2196). The State argued:

I can see some of this mitigation evidence maybe, being seriously considered in 1975 *when he stabbed a man to death . . .*

(2Tr. 2173) (emphasis added). Surely, had counsel rebutted this misleading evidence and told the jury that the State had prosecuted Hardin and presented evidence that Hardin stabbed and killed the victim, Mr. Taylor's role and culpability in the prior murder would have been mitigated. Contrary to the State's suggestion (Resp. Br. at 16), Mr. Taylor has always taken responsibility for his role in the murder. He pled guilty and assisted the State in prosecuting his older codefendant. However, his role as an accomplice is much different than the State's portrayal of him at trial, as an evil killer who, acting alone, stabbed a man to death.

The State relied on the prior conviction as a basis for death, and more importantly, inaccurately portrayed Mr. Taylor's role in that crime. Counsel had a duty to investigate this aggravating evidence, discover readily available evidence to rebut it, and to object to the prosecutor's inaccurate portrayal. His failure to do so was ineffective. Mr. Taylor was prejudiced and a new sentencing hearing should result.

II. Failure to Present Psychiatric Testimony of Mr. Taylor's
Mental State at the Time of the Crime

The motion court clearly erred in denying the Rule 29.15 motion because Mr. Taylor was denied his rights to effective assistance of counsel and due process and he was arbitrarily and capriciously sentenced to death, in violation of the 6th, 8th and 14th Amendments, U.S. Constitution, and Section 565.032.3 (2) and (6), in that trial counsel failed to investigate and present evidence of Mr. Taylor's mental state through a psychiatrist, such as Dr. Logan, who found that Mr. Taylor's brain did not function normally due to the alcohol and drugs he received while *in utero*, as an infant, and during childhood, and the trauma he suffered as a child, and the results were mental diseases and defects, including Dysthymia, Chronic Depression, Post-Traumatic Stress Disorder, Substance Abuse problems, and a Personality Disorder, which established the statutory mitigators of extreme mental or emotional disturbance and substantial impairment of capacity to appreciate the criminality of his conduct, thus reducing Mr. Taylor's culpability and providing a basis for a life sentence.

At the 29.15 hearing, psychiatric testimony of Dr. Logan established that Mr. Taylor suffered from mental diseases or defects: Dysthymia, Chronic Depression, Post-Traumatic Stress Disorder, Substance Abuse Problems, and Personality Disorder (H.Tr. 157-58). He concluded that Mr. Taylor's mental

problems were mitigating factors that lessened his responsibility (H.Tr. 178, 181). The motion court acknowledged that Dr. Logan's testimony would have supported the statutory mitigators, extreme emotional disturbance or substantial impairment of capacity to appreciate the criminality of his conduct, Sections 565.032.3 (2) and (6), and would have supported a jury instruction to that effect, MAI CR3d 313.44A, paragraphs 2 and 6 (L.F. 936, 951-52). However, both the motion court and the State minimize the importance of these statutory mitigators and suggest that one must show that the mental disease or defect "caused" the crime (Resp. Br. at 26) or the mental disease be so severe, such as a "delusional" disorder or "psychosis," in order to be sufficiently mitigating to be prejudicial (Resp. Br., at 28, quoting the motion court's findings).

Nothing in Sections 565.032.3 (2) and (6) limit the consideration of mental illness to delusional disorders or psychosis that cause someone to commit the crime in question. *See, State v. Richardson*, 923 S.W.2d 301, 325-26 (Mo. banc 1996), *citing* MAI-CR 3d 313.44, Notes on Use 5 (evidence of a mental disease or defect at the time of the murder supports giving the mitigating circumstance instruction); and *State v. Johnson*, 968 S.W.2d 686, 697 (Mo. banc 1998) (defects like cocaine intoxication are mitigating even though they would not provide a defense to the murder). The State's attempt to raise the bar for submitting such mitigators is contrary to the plain language of the statute and this Court's opinions.

The State also suggests that Mr. Taylor is arguing that his attorneys were ineffective for failing to "shop for a more favorable expert." (Resp. Br. at 31).

The State misconstrues Mr. Taylor's claim. His attorneys never investigated his mental state at the time of the crime with any expert. They chose to limit their investigation. Mr. Taylor's claim is that the failure to investigate was unreasonable, and Dr. Logan's testimony establishes that such an investigation would have shown that he was mentally ill and would have supported statutory mitigators, extreme emotional disturbance or substantial impairment of capacity to appreciate the criminality of his conduct.

The State argues that Mr. Taylor was not prejudiced because evidence of his mental problems was presented at trial (Resp. Br. at 32-33). The jury did hear about horrific abuse that Mr. Taylor suffered, and the impact it had on him. However, the jury never heard psychiatric testimony that Mr. Taylor suffered from major psychiatric disorders (H.Tr. 157-58, Ex. 9, at 18). The jury never learned that alcohol and drugs had altered Mr. Taylor's brain, damaged his frontal lobes and prefrontal cortex. They never knew that inhalants had reduced his intelligence, making him borderline retarded. They heard nothing about the trauma's impact on his hippocampus and the physiological changes in his nervous system. They knew nothing of his psychiatric problems and their effects on his behavior.

Without evidence from counsel, the court did not instruct jurors on statutory mitigators, extreme emotional disturbance or the impairment of his capacity to appreciate the criminality of his conduct. The jury never learned that

these factors were mitigating and should be considered in deciding whether he should be sentenced to death.

The State argues that Mr. Taylor was not prejudiced, focusing solely on the evidence presented at trial, rather than reviewing both the trial evidence and the evidence the jury did not hear (Resp. Br. at 31-32). The State's approach is contrary to *Wiggins v. Smith*, 123 S.Ct. 2527 (2003). A reviewing court must "evaluate the totality of the evidence - - 'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*.'" *Wiggins, supra* at 2543, quoting *Williams v. Taylor*, 529 U.S. 362, at 397-98 (2000) (emphasis in opinion). The question is whether, had the omitted evidence been presented "on the mitigating side of the scale, there is a reasonable probability *that at least one juror* would have struck a different balance. 123 S.Ct. at 2543, citing *Borchardt v. Maryland*, 786 A.2d 631, 660 (2001) (as long as a single juror concludes that mitigating evidence outweighs aggravating evidence, the death penalty cannot be imposed).

Contrary to the State's argument, the jury did not hear evidence of Mr. Taylor's mental illness and brain dysfunction. As the motion court found, Dr. Logan's testimony would have provided a basis for statutory mitigators, (L.F. 936, 951-52, 955), whereas no evidence presented at trial supported their submission.

Once this Court considers all the evidence presented at trial, along with all the evidence presented at the 29.15 hearing, it should find a reasonable probability

that at least one juror would have struck a different balance in weighing the aggravators and mitigators. A new penalty phase should result.

III. Mental Retardation

The motion court clearly erred in denying Mr. Taylor's postconviction motion, because counsel was ineffective in failing to present evidence of Mr. Taylor's mental retardation and this evidence prohibits his execution under his rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, as guaranteed by the 6th, 8th, and 14th Amendments of the United States Constitution and Sections 565.030.4 and 565.030.6, RSMo Cum. Supp. 2001, in that the jury never heard available evidence of mental retardation through Dr. Logan who revealed that inhalants decreased his IQ 10 points and placed him in the borderline mentally retarded range.

Alternatively, this Court should find, pursuant to Section 565.035.3 (3), that the death penalty is excessive given the evidence of Mr. Taylor's mental retardation.

Initially, the State argues that Mr. Taylor waived the issue regarding mental retardation because he did not plead it sufficiently in his amended motion (Resp. Br. at 35-36). Mr. Taylor's amended motion did put his mental state in issue and did plead counsel's failure to call Dr. Logan (L.F. 248-98), who testified that Mr. Taylor is borderline mentally retarded (H.Tr. 135-36). However, to the extent the pleadings do not specifically make a claim regarding mental retardation, this Court should still review this issue and find that the claim is not waivable.

In *Rogers v. State*, 575 S.E.2d 879 (Ga. 2003), the Georgia Supreme Court found that a claim regarding mental retardation could not be waived by the petitioner. Rogers had filed a state habeas and presented evidence of mental retardation. *Id.* at 880-81. The court found that a “genuine issue of fact” existed regarding Rogers’ mental retardation and granted the writ, remanding for a jury trial on the issue. *Id.* at 881. Rogers wrote a letter to the judge asking for a dismissal of the mental retardation trial. The trial court found that Rogers “knowingly and voluntarily waived his right to a jury trial on the issue of mental retardation.” *Id.*

The Georgia Supreme Court reversed, finding that “under both the Georgia and United States Constitutions, a criminal defendant may not be put to death if he is found to be mentally retarded.” *Id.*, citing *Atkins v. Virginia*, 536 U.S. 304 (2002). As a result, if a defendant’s mental capacity is challenged, both the state and federal constitution require adjudication of the issue. A defendant cannot waive this eligibility determination. *Id.*

Here, Dr. Logan’s testimony created a “genuine issue of fact” regarding Mr. Taylor’s mental retardation:

By adolescence, Mr. Taylor had gone on to abusing a number of different substances, but one of the things that was fairly prominent was his abuse of inhalants. And inhalants that in my experience, if they’re used chronically, usually drop an IQ by at least 10 points. I have seen a number of inhalant abusers, people who

regularly sniff various substances, and they usually end up with a IQ in the borderline retarded range, which is where Mr. Taylor's IQ had been measured at times in the past.

(H.Tr. 135-36). Since, Mr. Taylor has presented credible evidence of retardation, a jury should decide this issue. *Johnson v. State*, 102 S.W.3d 535 (Mo. banc 2003). It cannot be waived. *Rogers, supra*.

The State suggests that Dr. Logan's testimony is insufficient to create this issue, citing records that the State interprets as showing that Mr. Taylor is of normal intelligence (Resp. Br. at 37). The State seizes on a single IQ score of 101 reported when Mr. Taylor was in the 11th Grade at the Training School at Booneville (Ex. 8, at 1681). The State neglects to mention that this score was based on a Revised Beta test, which is a group test, not an individualized test of intelligence. L.M. Hsu & M. Reckase, Test Review of Revised Beta Examination, J. Mitchell (Ed.), *The Ninth Mental Measurement Year Book*, 1276-79 (Buros Institute of Mental Measurement – Univ. of Neb. Press 1985). *See, also*, A. Anastasi, *Psychological Testing* (7th Ed. 1988). The group test was designed to test illiterates, non-English speakers, and others with language difficulties. Hsu, *supra* at 1276-79. Reviewers criticized the test based on its lack of validity, its unreliability, and its bias. *Id.* The total testing time on this group test is 15 minutes. *Id.* at 1277. None of the tests given in the Beta are proper measures of intelligence. *Id.* The group test cannot be used to diagnose or rule out mental retardation.

Dr. Logan testified that Mr. Taylor's use of inhalants caused his IQ to drop into the borderline retarded age (H.Tr. 135-36). The doctor never specified Mr. Taylor's IQ and Missouri's death penalty statute does not set a cut-off for IQ. §565.030.6, RSMo Cum. Supp. 2001. Its defines "mental retardation" as "a condition involving substantial limitations in general functioning characterized by significantly *subaverage intellectual functioning* with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age." §565.030.6, RSMo Cum. Supp. 2001 (emphasis added). Thus, contrary to the State's suggestion (Resp. Br. at 38), Dr. Logan's testimony of subaverage intellectual functioning was sufficient to meet Missouri's definition. As for the adaptive behaviors, Dr. Logan did not specifically address the behaviors listed in the statute. Should this Court find the record insufficient, Mr. Taylor asks that this Court to remand for further evidence and findings about whether a genuine issue of retardation exists. *Ervin v. State*, 80 S.W.3d 817, 827 (Mo. banc 2002).

The Eighth Amendment precludes executing the mentally retarded. *Atkins supra*, at 2249. The State should not want to risk executing a mentally retarded individual. Given Dr. Logan's testimony of retardation (H.Tr. 135-36), this Court should find a genuine issue regarding whether Mr. Taylor is mentally retarded and should reverse and remand for a jury trial on this issue. Alternatively, this Court

should remand for to the motion court to determine whether a genuine issue regarding mental retardation exists, sufficient for a jury trial on the issue.

IV. Inadequate Mental Evaluation

The motion court clearly erred in denying the Rule 29.15 motion because Mr. Taylor was denied his rights to effective assistance of counsel and due process and was arbitrarily and capriciously sentenced to death, 6th, 8th and 14th Amendments, U.S. Constitution, and Section 565.032.3 (2) and (6), in that trial counsel failed to investigate and present evidence through their expert Dr. Smith that Mr. Taylor suffered from Depression, Post-Traumatic Stress Disorder, and Alcohol and Drug Dependence, which established the statutory mitigators, extreme mental or emotional disturbance and substantial impairment of capacity to appreciate the criminality of his conduct. This mitigation would have reduced Mr. Taylor's culpability and likely resulted in a life sentence.

The State is in a bit of a pickle. The motion court found that Dr. Smith's testimony at the 29.15 hearing, like Dr. Logan, supported the statutory mitigators, extreme emotional disturbance and substantial impairment of his capacity to appreciate the criminality of his conduct (L.F. 936, 951-52, 955). Thus, the State needs to diminish the importance of these statutory mitigators in order to argue that Mr. Taylor was not prejudiced by counsel's failure to adduce evidence to support these mitigators. The State tells this Court that Missouri is different from Florida and jurors "do not weigh statutory aggravating circumstances against

statutory mitigating circumstances. Rather, they weigh aggravating evidence, regardless of whether that evidence is specifically described in an instruction.” (Resp. Br. at 51). However, a review of both Florida and Missouri statutes show that they are more similar than the State wants to admit.

The Florida statute provides:

(2) ADVISORY SENTENCE BY THE JURY.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
- (b) *Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and*
- (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Section 921.141 (2), Fla.Stat. (2003) (emphasis added).

Similarly in Missouri, Section 565.030.4, the jury is required to be instructed to follow a four-step process:

The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

- (1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of

section 565.032; or

(2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or

(3) If the trier concludes that there is evidence in mitigation of punishment, *including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032*, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or

(4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.

Section 565.030.4 (emphasis added). Under both schemes, the jury is required to *weigh* mitigating circumstances against aggravators. However, in Missouri, the jury is told that in addition to the statutory mitigators, it can consider other mitigating evidence. The statutory mitigators in Florida are like those in Missouri:

(6) MITIGATING CIRCUMSTANCES.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of *extreme mental or emotional disturbance*.

- (c) The victim was a participant in the defendant's conduct or consented to the act.
- (d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.
- (e) The defendant acted under extreme duress or under the substantial domination of another person.
- (f) *The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.*
- (g) The age of the defendant at the time of the crime.
- (h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

Section 921.141(6), Fla.Stat. (1985) (emphasis added). Missouri provides circumstances identical to Florida's (b) and (f):

Statutory mitigating circumstances shall include the following:

- (2) The murder in the first degree was committed while the defendant was under the influence of *extreme mental or emotional disturbance*;

(6) *The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;*

Section 565.032.3 (2) and (6). Given the similarity of the Florida and Missouri statutes, Mr. Taylor believes that *Hildwin v. Dugger*, 654 So.2d 107 (Fla.1995) is helpful, contrary to the State's argument (Resp. Br. at 51-52). In both states, jurors are told to weigh statutory mitigating circumstances against aggravators. The State argument that jurors will differentiate between the terms "circumstances" and "evidence" is hyper-technical legal-ease. The truth is that in both *Hildwin* and in Mr. Taylor's case, counsel failed to adduce readily available mitigation that would have supported identical statutory mitigators, extreme emotional disturbance and capacity to appreciate the criminality of one's conduct. And like *Hildwin*, here, the result should be a new penalty phase.

CONCLUSION

Based on the arguments in Point I – V of his original brief and the points in his reply brief, Mr. Taylor requests a new penalty phase; or alternatively, under Point III, a remand for further proceedings on the mental retardation issue.

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, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the reply brief contains 5,195 words, which does not exceed the 7750 words allowed for an appellant's reply brief.

The floppy disk filed with this reply brief contains a complete copy of this reply brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in October, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this reply brief were postage pre-paid this 20th day of October, 2003, to Breck Burgess, Assistant Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65109.

Melinda K. Pendergraph