

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC 91787
)	
JOHNNY JOHNSON,)	
)	
Appellant.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE MARK SEIGEL, JUDGE**

APPELLANT’S REPLY BRIEF

**Robert W. Lundt, MOBar #39687
Assistant Public Defender
Attorney for Appellant
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
(314) 340-7662
FAX: (314) 340-7685
robert.lundt@mspd.mo.gov**

CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	2
JURISDICTIONAL STATEMENT	3
STATEMENT OF FACTS	3
ARGUMENT	5
CONCLUSION	10
CERTIFICATE OF COMPLIANCE AND SERVICE	12

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES:</u>	
<i>Hutchison v State</i> , 150 S.W.3d 292 (Mo. banc 2004)	7, 8, 10
<i>Padilla v. Kentucky</i> , __U.S. __, 130 S.Ct 1437 (2010)	8
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005).....	10
<i>Shelby County R—IV School Dist. v. Herman, Mo.</i> , 392 S.W.2d 609 (Mo. 1965)	6
<i>State v. Stevens</i> , 467 S.W.2d 10 (Mo. 1971)	6
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	9, 10

STATUTES:

Section 552.010 RSMo. 2000	7, 8
----------------------------------	------

JURISDICTIONAL STATEMENT

Appellant, Johnny Johnson, incorporates herein by reference the Jurisdictional Statement from his opening brief as though set out in full.

STATEMENT OF FACTS

Johnny incorporates herein by reference the Statement of Facts from his opening brief as though set out in full.

POINT RELIED ON

If an expert witness finds evidence indicating a capital client suffers brain damage and requests the defense team hire a doctor within that specialty, failure to conduct further investigation constitutes ineffective assistance of counsel. Failure of counsel to investigate this reasonably available mitigating evidence prejudiced Johnny because the jury would not have sentenced him to death had they known the severity of his mental impairments.

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

Padilla v. Kentucky, __U.S. __, 130 S.Ct 1437 (2010)

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

ARGUMENT¹

If an expert witness finds evidence indicating a capital client suffers brain damage and requests the defense team hire a doctor within that specialty, failure to conduct further investigation constitutes ineffective assistance of counsel. Failure of counsel to investigate this reasonably available mitigating evidence prejudiced Johnny because the jury would not have sentenced him to death had they known the severity of his mental impairments.

From the beginning of representing Johnny, both trial counsel were aware Johnny suffered from significant mental health issues (L.F. 367-669, 488-489). Not one, but two experts hired by the trial attorneys, requested they hire an additional expert. Both attorneys admitted that Dr. Dean and Dr. Draper suggested a neuropsychologist examine and evaluate Johnny for possible brain damage (L.F. 372-373,491-492).

Dr. Dean administered the Stroop test and found Johnny's scores significantly below the average score for individuals his age (L.F. 374-375). She also administered the Shipley I.Q. test and determined he was in the low average range (L.F. 375) Dr. Dean reported the evidence doesn't point to significant brain damage or gross brain damage (L.F. 375). But the trial attorneys knew she was not qualified as a neuropsychologist and she employed only one instrument which might detect gross

¹ The Points and Arguments from the opening brief are incorporated by this reference. Failure to respond to any is not intended a waiver.

brain damage (L.F. 375-376). Both Counsel opined that a full neuropsychological battery of tests is a better way to determine if a client suffers from brain damage and did not consider Dr. Dean's report as a finding of no brain damage (L.F. 375-376, 455, 519, 530-531).

Trial Counsel knew that Johnny suffered head trauma. Both trial lawyers admitted to knowing about multiple head injuries including one instance where Johnny was dropped on his head (L.F. 371). One attorney recalled Johnny's mother reporting that she dropped Johnny as a baby and he hit his head on an iron stove (L.F. 489). Neither trial counsel could remember a strategic reason for failing to employ a neuropsychologist but remembered getting names to contact (L.F. 373-374, 491). They failed to follow up on the suggestions of their two experts (L.F. 374). Counsel did not opt not to hire an additional expert but rather failed to conduct reasonable investigation into an area they knew should have been investigated.

The motion court clearly erred in determining that all mental health experts have identical credentials. "In order for a witness to be qualified as an expert, 'it must appear that by reason of education or specialized experience he possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion or drawing correct conclusions.'" *State v. Stevens*, 467 S.W.2d 10, 23 (Mo. 1971), quoting *Shelby County R—IV School Dist. v. Herman, Mo.*, 392 S.W.2d 609, 616 (Mo. 1965).

Dr. Beaver testified neuropsychologists receive specific training to evaluate and diagnose organic brain disorders (H.Tr. 599). This additional training and

subsequent on-the-job experience in diagnosing brain damage makes a neuropsychologist uniquely qualified in this area of expertise (H.Tr. 598-599). Dr. Beaver opined that no single test can give a doctor the information needed to diagnose organic brain syndrome, rather a “constellation” of tests must be administered (H.Tr. 627). Dr. Beaver found that Dr. Dean could not have made a determination of no brain damage from administering the Stroop and Shipley tests (H.Tr. 690-691). Specifically the Shipley test is not used in neuropsychological testing to evaluate brain damage, but only to get a general sense of the individual’s IQ (H.Tr. 718). Dr. Beaver determined that Dr. Dean could not have ruled out brain damage based upon the Stroop test (H.Tr. 691). This Court held in *Hutchison v State*, 150 S.W.3d 292, 307 (Mo. banc 2004), that due process requires a capital defendant have access to an expert who will conduct an “appropriate examination” to assist in his defense. Here a neuropsychologist was the only expert witness qualified to administer the appropriate testing to assist in defending Johnny.

Obtaining the properly qualified expert is not expert shopping. The State points to the numerous social workers, psychologists and psychiatrists who evaluated and treated Johnny for his schizophrenia-based mental disorder, his depression and his suicidal tendencies (Resp. Br. 37-48). Every medical professional Johnny has seen in his entire life has agreed he suffers from severe mental illness (L.F. 457). Mental illness however, is not the same condition as mental defect. Section 552.010 RSMo. specifically states, “The terms “mental disease or defect” include congenital and traumatic mental conditions as well as disease.” No expert examined Johnny

specifically for the mental defect of brain damage prior to the examination by Dr. Beaver. No expert prior to Dr. Beaver was qualified with the particular skill set of a trained Neuropsychologist.

The State's theory that mental health professionals are interchangeable does not hold up in today's capital litigation. The high court in *Padilla v. Kentucky*, __U.S. __, 130 S.Ct 1437, 1482 (2010) held "constitutional deficiency [of defense counsel] is necessarily linked to the legal community's practice and expectations." Modern capital defense practice does not lump all mental health professionals into the same category. *Huthchison*, *supra*, 307. An expert with the unique education and experience in the field of Neuropsychology is necessary to evaluate a client for mental defects under § 552.010 RSMo.

The motion court clearly erred in finding that Dr. Beaver's testimony would not have assisted the defense because he came to no conclusions (L.F.629). Dr. Beaver testified,

Johnny Johnson does have an organic brain syndrome combined with significant psychiatric disorders and those are permanent conditions for him. So they're present now, or as of the last time I saw him in '07 and I believe that they were also present in July of '02 when these events took place....It would affect his ability to think, to problem solve, to act rationally, to deal with stress, to make appropriate decisions.

(H.Tr. 641). Dr. Beaver came to these opinions within a reasonable degree of neuropsychological certainty (H.Tr. 640-641).

Failure of counsel to hire a neuropsychologist did prejudice Johnny's defense of diminished capacity and in mitigation of the sentence. Despite all evidence to the contrary, the prosecution was able to convince the jury the evidence of mental illness was "nonsense" and that Johnny was thinking clearly and deliberated on the crime (Tr. 1920-1921). The state elicited from Dr. Byron English's opinion that Johnny's hallucinations at the time of the crime were caused by drugs and not a result of his mental illnesses (TR. 1825, 1838-1839). The doctor claimed that Johnny liked hallucinating and sought out drugs to achieve this symptom (Tr. 1839). Through this witness, the state convinced the jury that Johnny was responsible for his hallucinations and was using his mental illness to cover a sinister premeditated plan.

The mental defect of brain damage would not have been so easily turned to become Johnny's fault. Dr. Beaver opined Johnny suffers from permanent, longstanding brain damage that affected him on the day of the crime (H.Tr. 640-641). Additionally, any drug use could only further exacerbate mental difficulties in a mind that already suffered from trauma and multiple illnesses (H.Tr. 637-638). With this evidence before the jury, the prosecution could not argue that Johnny intentionally damaged his brain in an attempt to establish a defense for premeditated murder at some future date.

The high court in *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) requires trial counsel to investigate and "discover all reasonably available mitigating evidence."

Both trial counsels were aware that two experts suspected Johnny suffered from brain damage. They began a search for a neuropsychologist and did not follow through. Failing to investigate brain damage cannot come under the heading of “scouring the globe on the off chance something will turn up” *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). When brain damage is suspected and not investigated counsel cannot have “good reason to think further investigation would be a waste.” *Id.* To the contrary, further investigation was demanded in Johnny’s case and counsel had every reason to believe the investigation would be fruitful. Neuropsychological testing was a reasonable avenue of inquiry and counsel had no reason to forgo the investigation.

This Court reversed Brandon Hutchison’s sentence and remanded for a new penalty phase, in part, because trial counsel should have known to hire an expert in Neuropsychology. *Huthchison*, *supra*, 307. Even though trial counsel “‘did not observe’ any manifestations of brain damage” this Court determined that the psychologist’s report and injuries Brandon suffered to his head “should have raised a red flag to evaluate potential brain damage.” *Id.* Johnny’s case contains the same red flags as Brandon’s and this Court must reverse the convictions. Trial counsels “failure to do *any* follow-up cannot, under these circumstances, satisfy *Wiggin’s* mandate to discover all ‘reasonably available mitigating evidence.’” *Id.*, citing *Wiggins*, *supra*.

CONCLUSION

For the reasons set forth herein and in his opening brief, appellant Johnny Johnson respectfully requests that this Court reverse his convictions and sentence and

remand for a new trial. In the alternative appellant Johnny Johnson respectfully requests that this Court remand for a new penalty phase trial.

Respectfully submitted,

/s/ Robert W. Lundt

Robert W. Lundt, MOBar #39687

Attorney for Appellant

1010 Market Street, Suite 1100

St. Louis, Missouri 63101

Telephone (314) 340-7662

FAX (314) 340-7685

e-mail: robert.lundt@mspd.mo.gov

Certificate of Compliance and Service

I, Robert W. Lundt, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in Times New Roman size 13 point font. The brief contains 2,019 words, which does not exceed twenty-five percent of 31,000 words allowed for an appellant's reply brief.

The PDF files containing this brief and appendix and served on opposing counsel have been scanned for viruses using Symantec Endpoint Protection, updated in March, 2012. According to that program, these files are virus-free.

A true and correct copy of the appellant's brief was filed via the Missouri eFiling System on this 15th day of August, 2012, to Shaun Mackelprang at the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

/s/ Robert W. Lundt
Robert W. Lundt