IN THE
MISSOURI SUPREME COURT

RUFUS JAMES ERVIN,	)	
	)	
Appellant.	)	
	)	
vs.	)	**No. 83459**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent,	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF PHELPS COUNTY, MISSOURI
25th JUDICIAL CIRCUIT, DIVISION 2
THE HONORABLE DAVID G. WARREN, JUDGE

APPELLANT'S REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES

CASES: **Page**

***CONSTITUTIONAL PROVISIONS*:**

OTHER:

JURISDICTIONAL STATEMENT

Appellant, Rufus James Ervin, incorporates the jurisdictional statement from his original brief.

STATEMENT OF FACTS

Mr. Ervin incorporates the statement of facts from his original brief.

POINTS RELIED ON

I. Mr. Ervin's Family

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective for failing to investigate and present mitigating evidence from his family: Ossie McNeal, Essie Delores Nelson, Danita Hodge, Carolyn Rayford, Mamie Ervin, Carlos Flynnolyn Ervin, Phoebe Townsend, Essie Dorris, Abram Karr, and Xavier Nelson, because counsel's failure violated Mr. Ervin's rights to effective assistance of counsel and to present mitigation, 6th, 8th and 14th Amendments of the United States Constitution, in that counsel did not interview any of Mr. Ervin's siblings, even though both Mr. Ervin and his mother gave him their names, and counsel talked to no other relatives, except Mr. Ervin's mother. Mr. Ervin was prejudiced as these witnesses would have established that Mr. Ervin was good, they loved him, he had a good relationship with Mr. White and cared deeply about him, Mr. Ervin had a difficult childhood, and suffered from head injuries and a seizure disorder, and this mitigation would have likely resulted in a life sentence, especially since the jury could not agree upon punishment.

Williams v. Taylor, 120 S.Ct. 1495 (2000);

Eddings v. Oklahoma, 455 U.S. 104 (1982);

State v. Hall, 982 S.W.2d 675 (Mo. banc 1998);

State v. Harris, 64 S.W.2d 256 (Mo. 1933); and

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

II. No Investigation of Alleged Assault in Jail

The motion court clearly erred in denying Mr. Ervin's claim (specifically pled) that counsel was ineffective for failing to investigate and rebut Mr. Ervin's alleged assault and alleged threats to kill his cellmate, Dietrich, because counsel's failure violated Mr. Ervin's rights to effective assistance of counsel, to rebut aggravating circumstances under the due process clause, and to present mitigation, under the 6th, 8th, and 14th Amendments of the United States Constitution, in that counsel did not interview any of the witnesses to the alleged incident, all of whom agreed that Mr. Ervin never threatened, let alone assaulted Dietrich, and counsel did not even review the helpful investigation offered by Mr. Ervin's attorney on the assault. Mr. Ervin was prejudiced as the State presented the alleged assault and alleged threats of Dietrich as a reason to give Mr. Ervin death and had this inaccurate charge been rebutted, there is a reasonable probability of a life sentence, especially since the jury could not agree upon punishment.

Parker v. Bowersox, 188 F.3d 923 (8th Cir. 1999),

cert. denied, 529 U.S.1038 (2000); and

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

III. Good Conduct in Jail

and

IV. Witnesses Verifying Head Injuries, Seizure Disorder, and Resulting Deficits

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective in failing investigate and to present evidence of Mr. Ervin's good conduct in jail and in failing to investigate and present testimony of Dr. Auner, Mr. Ervin's family physician that had treated him for his seizure disorder, because counsel failed to conduct any investigation into Mr. Ervin's behavior in prison and did not even interview Dr. Auner; therefore, he could not make any reasoned, strategic decision about what evidence to present.

Williams v. Taylor, 120 S.Ct. 1495 (2000);

Strickland v. Washington, 466 U.S. 668 (1984);

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991);

Chambers v. Armontrout, 907 F.2d 825 (8th Cir.) (en banc 1990).

VI. Mr. Ervin's Medication While Jailed

The motion court clearly erred in overruling Mr. Ervin's claim that counsel was ineffective in failing to investigate and to object to his improper medication before and during trial because the failure violated his rights to due process, a fair trial, effective assistance of counsel and to reliable sentencing, under the 6th, 8th, and 14th Amendments to the United States Constitution, in that counsel failed to conduct any investigation into the medication Mr. Ervin was taking before and during trial and the psychotropic drugs had significant sedative effects, aggravated Mr. Ervin's seizure disorder, and caused aggression, hostility and paranoid behavior. Mr. Ervin was prejudiced, as he could not follow the proceedings, communicate with counsel, testify rationally on his own behalf, and appeared bizarre, disruptive, unremorseful and uncompassionate – all of which led to his conviction and sentence of death.

Riggins v. Nevada, 504 U.S. 127 (1992); and

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

XI. Jury Did Not Find Aggravator

The motion court clearly erred in denying Mr. Ervin's claim that the jury's failure to agree upon punishment and find a statutory aggravator beyond a reasonable doubt, and counsel's failure to object to the trial court finding the aggravator, denied Mr. Ervin his rights to a jury trial, due process and effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution in that the statutory aggravator increased the maximum penalty, making Mr. Ervin eligible for the death penalty, and thus, should have been found by the jury, not a judge, and proven beyond a reasonable doubt, and counsel intended to object and include the claim in the motion for new trial, but neglected to do so.

Apprendi v. New Jersey, 120 S.Ct. 2348 (2000);

In re Winship, 397 U.S. 358 (1970);

Walton v. Arizona, 497 U.S. 639 (1990);

Shafer v. Bowersox, 168 F.Supp.2d 1055 (E.D. Mo. 2001); and

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

I. Mr. Ervin's Family

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective for failing to investigate and present mitigating evidence from his family: Ossie McNeal, Essie Delores Nelson, Danita Hodge, Carolyn Rayford, Mamie Ervin, Carlos Flynnolyn Ervin, Phoebe Townsend, Essie Dorris, Abram Karr, and Xavier Nelson, because counsel's failure violated Mr. Ervin's rights to effective assistance of counsel and to present mitigation, 6th, 8th and 14th Amendments of the United States Constitution, in that counsel did not interview any of Mr. Ervin's siblings, even though both Mr. Ervin and his mother gave him their names, and counsel talked to no other relatives, except Mr. Ervin's mother. Mr. Ervin was prejudiced as these witnesses would have established that Mr. Ervin was good, they loved him, he had a good relationship with Mr. White and cared deeply about him, Mr. Ervin had a difficult childhood, and suffered from head injuries and a seizure disorder, and this mitigation would have likely resulted in a life sentence, especially since the jury could not agree upon punishment.

What is the role of a defendant's trial counsel in a case where the State is seeking the death penalty? The State advocates a passive role -- an attorney who waits for his client and witnesses to provide counsel with all helpful information available. Under this view, counsel has no duty to actively investigate, to seek out helpful information. Throughout its brief, the State makes the case for such a role: counsel was only provided the names of siblings (Resp. Br. at 33); Mr. Ervin's mother did not tell counsel about her

troubled childhood, her mental or physical problems when Mr. Ervin was a child or her family problems (Resp. Br. at 34); "[a]ppellant apparently believes that counsel has a constitutional duty to discover his other family members by talking to those people that appellant did provide counsel with the names of" (Resp. Br. at 34); much of the information [by Mrs. McNeal] was not provided to trial counsel (Resp. Br. at 35), "because trial counsel was not aware of the facts of appellant's upbringing. . ." (Resp. Br. at 36).

Thus, under the State's view, a defense attorney need not talk to available and potentially helpful witnesses, even when provided their names, addresses, and phone numbers. And as for those lay witnesses counsel does talk to, the State would require that witness volunteer any helpful mitigating evidence. Counsel would have no duty to ask questions, discover helpful information and follow up on leads provided.

Mr. Ervin's view of defense counsel is very different. The Constitution assures the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Surely, "effective," "assistance," and "counsel" have some meaning. In the death penalty context, the Sixth Amendment requires an attorney to *thoroughly* investigate his or her client's life for mitigation. *Williams v. Taylor*, 120 S.Ct. 1495, 1515 (2000). Merriam-Webster's Collegiate Dictionary defines "thorough" as:

> **1 :** carried through to completion **:** **EXHAUSTIVE** <a *thorough* search>
>
> **2 a :** marked by full detail <a *thorough* description> **b :** careful about detail **:** **PAINSTAKING** <a *thorough* scholar> **c :** complete in all respects <*thorough*

pleasure> **d :** having full mastery (as of an art) <a *thorough* musician>

3 : passing through

http://www.m-w.com/cgi-bin/dictionary

The State never mentions *Williams v. Taylor*, nor the constitutional requirement to *thoroughly* investigate mitigation. The State cannot justify counsel's conduct under *Williams*. Counsel failed to do even the most basic investigation, let alone a thorough investigation required by the Sixth Amendment.

Counsel interviewed Mr. Ervin and a single family member, his mother -- the person paying his fee. Can the State really suggest this was a thorough investigation? It certainly was not exhaustive, painstaking, complete, or detailed. Counsel did not even bother interviewing Mr. Ervin's brother or four sisters, even though he had their names, addresses and phone numbers provided to him. Hardly the thorough investigation required by the Supreme Court. Yet the State suggests counsel's investigation was effective. Counsel did not do any investigation his client asked for, let alone any independent of Mr. Ervin - - the only real question is whether he was prejudiced by counsel's unreasonable performance.

In reviewing for prejudice, this Court looks at all the omitted evidence and the evidence actually adduced at trial. *Williams*, at 1515-16. The jury never heard from any of Mr. Ervin's family. Thus, jurors never knew that he was a good son, brother, uncle, cousin and nephew. His family loved him very much. The State suggests they were not that close and had little contact with Mr. Ervin (Resp. Br. at 36), citing *State v. Hall*, 982 S.W.2d 675, 688 (Mo. banc 1998). The record proves otherwise.

All of his family revealed how much they loved James[1] and how close they felt to him (H. Tr. 88, 99, 100, 113, 132, 155, 693, 711, 750, 791). Delores thought of James as her own son and was very close to him (H. Tr. 89-90, 92). Carlos considered James his best friend and loved him very much (H. Tr. 155). Likewise, Carolyn was very close to James, probably since they were only one year apart (H. Tr. 123, 132). Danita shared touching memories from their childhood that showed how caring and loving James was to her. He had combed her hair so she could go to church. He made sure that she was fed, that she went to school, that she did her homework and that she had clean clothes to wear (H. Tr. 109).

James had remained close to all his family, even though he did not see some of his out-of-state relatives as often as they would have preferred. *Id*. Those that were near had frequent contact. For example, Robert Nelson, James' nephew, saw him every month (H. Tr. 99). His cousin, Abram Karr, saw him every weekend (H. Tr. 702-06). Yet, the State suggests this contact was too little and these witnesses were not close enough to be helpful (H. Tr. 36). Under the State's view, families that disperse across the country could not be considered close, unless they had frequent contact. Unfortunately, Mr. Ervin did not have the means to make long distance phone calls or send e-mails, like many families.

Mr. Ervin's case is very different from *Hall*, *supra*, relied on by the State. There, counsel contacted the defendant's father and his wife but the witnesses said they would be of no help, because Hall had been away from the family for a long time. *Hall*, *supra*

[1] Mr. Ervin's family refers to him as James, his middle name.

at 688. After interviewing these witnesses, counsel made a reasoned, informed decision not to call them. In contrast, Mr. Ervin's counsel did not even interview his client's siblings, aunts, cousin or nephew before making the decision not to call them. Secondly, Hall's two brothers were not close to Hall, *Id*., in contrast to all of Mr. Ervin's siblings, who testified at the hearing about their close and loving relationships. Finally, the biggest difference between *Hall* and Mr. Ervin's case is that Hall's counsel did call a close friend who had an eleven-year relationship with Hall and Hall's son who revealed their close relationship and pleaded for the jury to spare his life. *Id*. Hall's counsel investigated possible mitigating circumstances and presented that evidence she thought most beneficial. In contrast, here, counsel did no investigation into all the familial witnesses, so he could not make an informed and reasoned decision about what witnesses to call.

The State makes a brief, conclusory statement that some of this information -- especially information about Mr. Ervin's medical condition was cumulative to the mitigation presented at trial (Resp. Br. at 36). "Cumulative evidence is additional evidence of the *same* kind tending to prove the same point as other evidence already given." *State v. Harris*, 64 S.W.2d 256 (Mo. 1933) (emphasis added). "Evidence of other and different circumstances tending to establish or disprove the same fact is not cumulative, nor is evidence of facts tending to prove circumstantially the existence of a fact cumulative to evidence which tends to establish the same fact directly." *Id*.

Mr. Ervin's family's testimony was not the same kind of evidence as the paid defense experts. Even on the issue of Mr. Ervin's seizure disorder, the family would

have direct, eyewitness accounts, different from the expert's opinions based on a review of records and self reports from Mr. Ervin. All of his siblings and his mother had witnessed James having seizures, as he jerked around on the floor, foamed at the mouth and his eyes rolled into the back of his head (H. Tr. 110, 119-20, 127, 139-41, 145-45, 746-47, 783). These eyewitness accounts would have provided essential facts to establish his seizure disorder.

At trial, the State cross-examined the paid defense experts and criticized their opinions, because the experts had not seen Mr. Ervin have a seizure and had relied on Mr. Ervin's self report (Tr. 978, 970-71). The State even suggested that Mr. Ervin exaggerated his symptoms and was a hypochondriac (Tr. 971, 983). After challenging the experts' opinions and suggesting his seizure disorder was not verified, the State is now suggesting that Mr. Ervin's family's experiences with him and his seizure disorder were simply cumulative. But as the State's own cross-examination shows, these witnesses were vital, to present mitigation, and to support the defense experts' opinions.

Apart from the medical problems, much of the information provided by Mr. Ervin's family was never before the jury and thus, cannot be considered cumulative. James' childhood problems: his mother's mental illness, violence, and poverty were never mentioned at trial. This information would have been important to counsel's defense (H. Tr. 1188-90). *See also Eddings v. Oklahoma*, 455 U.S. 104, 107-15 (1982) (discussing the importance of a troubled childhood).

The family also would have testified about Mr. Ervin and Mr. White's close relationship and how much all the family loved and cared for Mr. White (H.Tr.85-

86,112,155,710,734-35,747-48,784). They considered him part of their family (H.Tr.86,734,748). This close relationship made this offense so perplexing. Mr. Ervin had no reason to kill Mr. White, rather they were close friends who cherished their time together. This additional evidence would have shed light on the circumstances of the offense and further weakened the State's suggestion that Mr. Ervin deliberated.

Certainly, evidence of the family's love for Mr. Ervin and their continuing relationships with him were never before the jury in any way, shape, or form. Rather, the jury was left to wonder, "couldn't you find in this man's life one person as a character witness?" Sundby, "The Jury As Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony," 83 *Va. L. Rev*. 1109, 1152 (1997). Mr. Ervin had many available character witnesses; defense counsel did nothing to discover them.

When this Court considers all the omitted mitigating evidence, together with the evidence presented at trial, only one conclusion is possible: Mr. Ervin was prejudiced. The State's case for death was not overwhelming. The jury could not even agree upon punishment (Ex. 56 at 139). The evidence supporting Mr. Ervin's guilt on deliberation was not strong. *State v. Ervin*, 979 S.W.2d 149, 152-53 (Mo. banc 1998) (Wolff, J. concurring and dissenting). Even viewing the evidence in the light most favorable to the State, Mr. White was killed after a heated argument. Mr. Ervin pulled him from a burning trailer, only to pick up a brick and hit him moments later. Under these facts, there is a reasonable probability that had counsel conducted even the most basic investigation and presented this readily, available mitigation, the outcome would have

been different. A new penalty phase should result. Alternatively, this Court should grant proportionality relief and impose a life sentence.

II. No Investigation of Alleged Assault in Jail

The motion court clearly erred in denying Mr. Ervin's claim (specifically pled) that counsel was ineffective for failing to investigate and rebut Mr. Ervin's alleged assault and alleged threats to kill his cellmate, Dietrich, because counsel's failure violated Mr. Ervin's rights to effective assistance of counsel, to rebut aggravating circumstances under the due process clause, and to present mitigation, under the 6th, 8th, and 14th Amendments of the United States Constitution, in that counsel did not interview any of the witnesses to the alleged incident, all of whom agreed that Mr. Ervin never threatened, let alone assaulted Dietrich, and counsel did not even review the helpful investigation offered by Mr. Ervin's attorney on the assault. Mr. Ervin was prejudiced as the State presented the alleged assault and alleged threats of Dietrich as a reason to give Mr. Ervin death and had this inaccurate charge been rebutted, there is a reasonable probability of a life sentence, especially since the jury could not agree upon punishment.

Defense counsel did no investigation at all into Mr. Ervin's alleged assault on Deputy Schoengert and another inmate, Chris Dietrich, while he was in jail, awaiting trial (App. Br. at 47). The State does not address the merits of this issue, arguing instead, that Mr. Ervin has changed the theory on appeal -- since the assault against Dietrich was not pled (Resp. Br. at 38-40). In support of this argument, the State cites to only an isolated portion of Mr. Ervin's Claim 8(J) (L.F. 118, A66) and ignores the specific facts pled regarding Dietrich. However, a review of the entire Claim 8(J), rather than isolated

portions, taken out of context, shows that the issue presented to this Court was indeed specifically pled and presented to the motion court (L.F. 118-21,215-19).

First, Mr. Ervin's motion alleged that he was denied his constitutional rights to effective assistance of counsel, due process of law, equal protection of law, and to confront the witnesses against him, because of trial counsel's failure to investigate and effectively prepare for the penalty phase of the trial (L.F. 118). The motion alleged that "[o]nce counsel is on notice that the State intends to submit an aggravating circumstance, either statutory or non-statutory, counsel has a duty to investigate the aggravating circumstance and present any evidence about the aggravating circumstance that would refute the State's evidence" (L.F. 118). Then the motion outlined the portion referenced by the State in its brief: "[t]rial counsel was on notice that the State intended to introduce evidence of an alleged assault on a sheriff's deputy, David Schoengert, while Mr. Ervin was incarcerated in the Phelps County Jail." (L.F. 118, Resp. Br. at 38).

The State neglects to mention, however, that the motion goes on to discuss the details of this alleged assault, including the supposed threats on Dietrich:

> Prior to Mr. Ervin's trial on the instant offense, Mr. Ervin was being represented on the alleged assault charge by David Mills, District Defender of the Rolla Public Defender's Office, and Michelle Monahan, Assistant Public Defender, also of the Public Defender's Office in Rolla. Prior to Mr. Ervin's trial, Mills and Monahan investigated the alleged assault and talked to two of the inmates incarcerated in the same cell block area as Mr. Ervin at the time of the alleged assault, Terry Pearson and Chris Dietrich.

> In the penalty phase of Mr. Ervin's trial, Schoengert *testified that Mr. Ervin threatened to kill a fellow inmate and interfered with the safe transfer of the inmate to another cell by refusing to go to his cell and by refusing to obey orders that were necessary for the safe transfer of the other inmate. However both Terry Pearson and Chris Dietrich would have testified at trial that Chris Dietrich was the prisoner who was being transferred; that he was already safely in another cell; and that Schoengert, while performing his duties as a jailer, deliberately provoked Mr. Ervin.*

(L.F. 119) (emphasis added). Thus, counsel's failure to investigate the circumstances of the alleged assault, including threats against Dietrich, was specifically pled in the amended motion.

Additionally, Dietrich was repeatedly emphasized: "[t]he information about *Dietrich* . . . was readily-available to Mr. Ervin's trial counsel, Mr. Hadican, because Public Defenders Mills and Monahan told Hadican that they had investigated the alleged assault and would be happy to share the information they had collected about *Dietrich* . . . Mr. Ervin was denied effective assistance of counsel by Mr. Hadican's failure to investigate and present in penalty phase, *Chris Dietrich* . . ." (L.F. 120-21) (emphasis added).

Claim 8(J) made clear that counsel should have investigated the alleged assault on Schoengert and his claims that Mr. Ervin had assaulted and threatened to kill his cell-mate, Dietrich. Additionally, 9(J) provided the specific facts to support this claim

(L.F.215-19). The motion alleged that Pearson would testify, among other things, to the following:

> Pearson was incarcerated in the Phelps County Jail in Rolla, Missouri, along with James Ervin, Carlos Mitchell and Christian Dietrich. Mitchell and Pearson managed to get into Dietrich's legal file and they found out that Dietrich was convicted of child molesting and proceeded to get him on the floor and beat him (Dietrich) up. When the initial fight broke out in the cell block, Mr. Ervin was in his cell, asleep on his bunk. Mr. Ervin was awakened by Dietrich screaming for Mr. Ervin to come help him. Mitchell and Pearson were on top of Dietrich beating the heck out of him. Pearson would testify that Mr. Ervin came out of his cell and went to another inmate, who was out sweeping the hallway, and asked the other inmate to get Schoengert to come back and remove Dietrich. Schoengert, at first, was not going to pull Dietrich out of the cell block; however, Mr. Ervin insisted, stating it was for Dietrich's own good. When Schoengert returned to the cell block, with two other Rolla police officers, to remove Dietrich, Mr. Ervin was standing in his cell door, and as Dietrich walked by, Mr. Ervin told Dietrich not to talk about his (Dietrich's) molestation case and to keep his (Dietrich's) mouth shut. Schoengert told Mr. Ervin to shut up, and that it was his jail and he didn't want to hear him talking. Pearson would have testified that at no time did Mr. Ervin step between Dietrich and Schoengert. Mr. Ervin told Schoengert that he did not like to be talked to

like a child, to which Schoengert replied, "I'll talk to you any way I want. This is my fucking jail." Dietrich removed all his belongings and was placed across the hall in an isolation cell.

(L.F.115).

Similarly, the motion outlined Dietrich's testimony about the incident, including Schoengert's unfounded allegations that Mr. Ervin had threatened and beat Dietrich (L.F.217-18):

> Dietrich was incarcerated in the Phelps County Jail and was a cellmate with Mr. Ervin for about one year prior to *the assault on Dietrich* that occurred in the jail. On the day of the assault on him, two inmates in that cell block, Terry Pearson and Carlos Mitchell, had gotten into his court files and had discovered that Dietrich was charged with child molestation. When Mitchell and Pearson found that out, they confronted him and started to physically hit him and knocked him to the floor. Dietrich screamed for a deputy to come and help him. This brought Mr. Ervin out of his cell to see what was going on. Dietrich would have testified that Mitchell and Pearson told Mr. Ervin what Dietrich was charged with and Mr. Ervin started yelling for the deputies to get Dietrich out of that cell block.
>
> Dietrich would have testified that Mr. Ervin did not step in front of him and [sic] not allow him to leave. No one tried to prevent him from leaving.
>
> ***

(L.F.217) (emphasis added).

Mr. Ervin's motion alleged that counsel was ineffective in failing to investigate the alleged assault on Schoengert and the circumstances surrounding the assault, including Mr. Ervin's supposed threats to kill and his alleged assault of Dietrich. On appeal, counsel has raised this claim regarding Dietrich. The jury heard these untrue allegations in penalty phase, because counsel did not investigate the incident and failed to even read the investigation done by other attorneys and their investigators. Defense counsel completely failed in his duty to rebut aggravating circumstances.

Understandably, the State wants to avoid addressing this issue on the merits, because it has no answer for defense counsel's failure to investigate and rebut the aggravating circumstances. *See, Parker v. Bowersox*, 188 F.3d 923, 929 (8th Cir. 1999), *cert. denied*, 529 U.S.1038 (2000). The simple truth is this: that Mr. Ervin ***saved*** a cellmate, intervening and getting help when Dietrich was assaulted by other inmates. Yet the jury heard that Mr. Ervin had threatened to kill Dietrich and had beat him about the face. Had the jury been told the truth at trial, they likely would have imposed a life sentence. A new penalty phase should result. Alternatively, this Court should grant proportionality relief and impose a life sentence.

III. Good Conduct in Jail

and

IV. Witnesses Verifying Head Injuries, Seizure Disorder, and Resulting Deficits

The motion court clearly erred in denying Mr. Ervin's claim that counsel was ineffective in failing investigate and to present evidence of Mr. Ervin's good conduct in jail and in failing to investigate and present testimony of Dr. Auner, Mr. Ervin's family physician that had treated him for his seizure disorder, because counsel failed to conduct any investigation into Mr. Ervin's behavior in prison and did not even interview Dr. Auner; therefore, he could not make any reasoned, strategic decision about what evidence to present.

Counsel admitted that he did not investigate Mr. Ervin's conduct at the jail. He did not talk to any jailers about his behavior and he did not request any jail records, even after the alleged assault against Schoengert (H.Tr.1213). Similarly, counsel failed to interview Dr. Auner, the board-certified medical doctor practicing in family medicine, who treated Mr. Ervin from 1985 to 1990 for blackouts, seizures, headaches and head trauma (Ex.5 at 6-7,10, 49-52; H.Tr.1028,1068). Yet, despite the lack of any investigation, the State argues that counsel's decision not to present good jail conduct and Dr. Auner was strategic (Resp. Br. at 45, and 51). According to the State, this Court should defer to trial counsel's decision that good conduct evidence would not be helpful (Resp.Br.at 45) and that the selection of witnesses is trial strategy (Resp. Br. at 51).

The State ignores that "[f]ailing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy." *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991), citing *Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir.) (en banc 1990). The Eighth Circuit's holding was based on the directive from the Supreme Court that counsel's "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable profession judgments support the limitations on investigation." *Kenley, supra*., *quoting*, *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). The Supreme Court clarified that in a death case, counsel must thoroughly investigate mitigating evidence, including good jail behavior. *Williams v. Taylor*, 120 S.Ct. 1495, 1515 (2000). Here, counsel did not do any investigation into Mr. Ervin's jail behavior and thus could not make reasonable strategic decisions about whether to present such evidence. The State's failure to acknowledge *Williams* is troubling to say the least.

Similarly, the failure to interview Dr. Auner was unreasonable. Counsel said that he did not consider calling Dr. Auner as a witness, because he did not believe the doctor had the "necessary expertise" to testify (H.Tr.1069). The most basic investigation would have shown otherwise. Dr. Auner was a board certified medical doctor with almost twenty years experience in family medicine (Ex. 5 at 5 and 51-52). He had training in mental disorders. *Id*. Dr. Auner treated Mr. Ervin for five years for blackouts, seizures, headaches and head trauma (Ex.5 at 6-7,10, 49-52; H.Tr.1028,1068).

This case is much like *Kenley, supra*., where counsel was ineffective for failing to investigate and *Thomas v. Lockhart*, 738 F.2d 304, 308 (8th Cir. 1983), where counsel's

reliance on medical report and interview with defendant only was inadequate investigation. This Court should condemn counsel's total failure to investigate Mr. Ervin's jail behavior and failure to interview the doctor who had treated him for five years. Had the jurors considered this mitigation, they likely would have imposed a life sentence. A new penalty phase should result. Alternatively, this Court should grant proportionality relief and impose a life sentence.

VI. Mr. Ervin's Medication While Jailed

The motion court clearly erred in overruling Mr. Ervin's claim that counsel was ineffective in failing to investigate and to object to his improper medication before and during trial because the failure violated his rights to due process, a fair trial, effective assistance of counsel and to reliable sentencing, under the 6th, 8th, and 14th Amendments to the United States Constitution, in that counsel failed to conduct any investigation into the medication Mr. Ervin was taking before and during trial and the psychotropic drugs had significant sedative effects, aggravated Mr. Ervin's seizure disorder, and caused aggression, hostility and paranoid behavior. Mr. Ervin was prejudiced, as he could not follow the proceedings, communicate with counsel, testify rationally on his own behalf, and appeared bizarre, disruptive, unremorseful and uncompassionate – all of which led to his conviction and sentence of death.

The State suggests that Mr. Ervin did not renew his claim that he was involuntarily medicated at trial and thus, he abandoned the claim on appeal (Resp. Br. at 64). The State overlooks Mr. Ervin's explicit argument that jailers gave Mr. Ervin Elavil, a psychotropic drug, during his trial, even though his physician had ordered that it *not* be given and Elavil should not be prescribed to patients with seizure disorders (H.Tr. 283-84, 477, 485) (App. Br. at 73). Surely, jailers giving inmates psychotropic drugs, not prescribed by the physician is involuntary medication.

Secondly, contrary to the State's assertion, this claim was presented in Mr. Ervin's brief:

> Because of counsel's failure to investigate, he did not object to the State's improper medication of Mr. Ervin. Had he objected, Mr. Ervin's protected liberty interest under the 14th Amendment in avoiding *involuntary administration of antipsychotic drugs* would have been protected. *Riggins v. Nevada*, 504 U.S. 127, 134 (1992).

(App. Br. at 77) (emphasis added). Mr. Ervin's claim has always been that counsel was ineffective in failing to investigate and object to the medication before and during trial, denying him his right to effective assistance of counsel, to due process, to a fair trial ,and to reliable sentencing, under the 6th, 8th, and 14th Amendments to the United States Constitution.

The State's claim that Mr. Ervin presented no evidence that he actually suffered from the side effects caused by the drugs (Resp. Br. at 65) is also not supported. Appellant's brief detailed Mr. Ervin's actual behavior at length (App. Br. at 74-75). Evidence showed that Mr. Ervin was confused and frustrated, he could not think or concentrate, he missed parts of the testimony, was agitated and loud (H.Tr. 289, 291-92; Tr.638-39). Evidence established that he rambled, was unresponsive and went off on tangents, focusing on minor, irrelevant issues (H.Tr. 288-89,1014,1015-18; Tr.797-98,810,819-20,865-66;S.Tr.55-58). The prosecutor characterized Mr. Ervin as "bizarre" (Tr.875). Defense counsel suspected something was wrong with him (H.Tr. 1019).

Yet, despite his suspicions, counsel did not get Mr. Ervin's jail records, did not review the drugs that he was taking, and did not talk to any jailers regarding Mr. Ervin's behavior while in jail (H.Tr. 1030-34,1044-46,1059). Had counsel investigated, and

objected to the involuntary medication, the State could not have met the requirements in *Riggins*. Mr. Ervin's medication was not medically appropriate, it was contrary to his own doctor's prescription and to what is clinically appropriate. All this medication, especially all the sedatives, were not essential to Mr. Ervin's safety or the safety of others. Rather, some of the medication, Paxil, was counterproductive, as it caused aggressiveness.

Counsel's failure to investigate and object to the improper medication of Mr. Ervin before and during trial should cause this Court to reverse and remand for a new trial.

XI. Jury Did Not Find Aggravator

The motion court clearly erred in denying Mr. Ervin's claim that the jury's failure to agree upon punishment and find a statutory aggravator beyond a reasonable doubt, and counsel's failure to object to the trial court finding the aggravator, denied Mr. Ervin his rights to a jury trial, due process and effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution in that the statutory aggravator increased the maximum penalty, making Mr. Ervin eligible for the death penalty, and thus, should have been found by the jury, not a judge, and proven beyond a reasonable doubt, and counsel intended to object and include the claim in the motion for new trial, but neglected to do so.

The State's suggestion that Mr. Ervin has changed his claim on appeal (Resp. Br. at 85) should be rejected. As the State concedes (Resp. Br. 34), Mr. Ervin's amended motion alleged that the jury failed to unanimously find a statutory aggravating circumstance and this failure violated his constitutional rights to due process and Sixth Amendment right to a jury trial (L.F. 142). The motion alleged that due process requires the State prove statutory aggravating circumstances beyond a reasonable doubt, and cited *In re Winship*, 397 U.S. 358, 364 (1970) (L.F. 143). The amended motion also alleged that counsel was ineffective for failing to object to the trial judge sentencing Mr. Ervin to death, after the jury could not agree upon punishment (L.F. 142-43). This is precisely the claim Mr. Ervin raised on appeal.

The State's suggestion that Mr. Ervin should have cited *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2362-63 (2000) in his amended motion (Resp. Br. at 85) is silly. The case was decided in 2000, Mr. Ervin's amended motion was filed in March of 1999. The State cites no authority for the suggestion that specific case citations must be included in an amended motion, in order to cite those cases on appeal. Mr. Ervin's amended motion specifically raised the constitutional claims at issue - the Sixth Amendment right to jury trial, the due process right to have statutory aggravating found beyond a reasonable doubt and the Sixth and Fourteenth Amendment right to effective assistance of counsel. His motion did more than was required, citing *In re Winship, supra*. Thus, this claim is properly before the court.

This Court should squarely face the question of whether judge sentencing, when the jury cannot agree upon punishment, violates the Sixth Amendment right to a jury trial and the due process rights under the Fourteenth Amendment. *See Shafer v. Bowersox*, 168 F.Supp.2d 1055, 1087, n.7 (E.D. Mo. 2001):

> The Missouri courts may need to examine what, if any, affect the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) has on Missouri's law permitting the sentencing court, rather than a jury, to determine whether aggravating circumstances exist in a capital case. *See Hoffman v. Arave*, 236 F.3d 523, 542-43 (9th Cir. 2001) (recognizing that, in light of *Apprendi*, some doubt may exist as to the validity of the Supreme Court's decision in *Walton v. Arizona*, 497 U.S. 639, 647-48, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)

that an aggravating circumstance in a capital case may constitutionally be determined by a judge rather than a jury.

* * *

Unquestionably, a statutory aggravating circumstance must be proven in order to sentence someone to death in Missouri. Only a game of semantics would suggest that such a finding does not increase the punishment from life without probation or parole to death. This Court should address this issue, vacate Mr. Ervin's death sentence and impose a sentence of life without parole.

CONCLUSION

Based on the arguments of this and Mr. Ervin's original brief in Point V, VI, and XII, Mr. Ervin requests a new trial; Points I-V, VII-X, and XV, a new penalty phase or a life sentence; and Points XI, XIII and XIV, vacate his death sentence and impose life without probation or parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2002, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, Missouri 65102.

_____
Melinda K. Pendergraph

CERTIFICATE OF COMPLIANCE

I, Melinda K. Pendergraph, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 6,566 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk(s) filed with this brief contain(s) a copy of this brief. The disk(s) has/have been scanned for viruses using a McAfee VirusScan program. According to that program, the disk(s) is/are virus-free.

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Melinda K. Pendergraph