

IN THE MISSOURI SUPREME COURT

ERNEST LEE JOHNSON,)
)
 Appellant,)
)
 vs.) **No. 84502**
)
STATE OF MISSOURI,)
)
 Respondent.)

Appeal to the Missouri Supreme Court
From the Circuit Court of Boone County, Missouri
Thirteenth Judicial Circuit
The Honorable Gene Hamilton, Judge

APPELLANT’S STATEMENT, BRIEF, AND ARGUMENT

Rosemary E. Percival, MOBar #45292
Attorney for Appellant
Office of the Public Defender
818 Grand Ave., Suite 200
Kansas City, Missouri 64106
Tel.: 816/889-7699
Fax: 816/889-2001

INDEX

	<u>Page</u>
<u>Index</u>	1
<u>Table of Authorities</u>	5
<u>Jurisdictional Statement</u>	9
<u>Statement of Facts</u>	10
I. Penalty Phase Retrial.....	10
II. The Case for Life Without Parole.....	13
III. The Postconviction Case.....	18
A. Failure to Investigate and Present the Testimony of Dr. Parwatikar....	19
1. The Amended Motion.....	19
2. The Evidentiary Hearing.....	20
a. Dr. Parwatikar.....	20
b. Other Testimony from the Postconviction Hearing.....	20
3. The Motion Court’s Ruling.....	25
B.. Failure to Investigate and Present the Testimony of Michael Maise...	26
1.The Amended Motion.....	26
2. The Evidentiary Hearing.....	27
3. The Motion Court’s Ruling.....	27
C. Failure to Ensure that the Jurors Did Not Consider Ernest’s Failure to Testify as an Aggravating Circumstance.....	27
1. The Amended Motion.....	27

2. The Evidentiary Hearing.....	28
3. The Motion Court’s Ruling.....	28
D. Failure to Call Dr. Bernard.....	29
1. The Amended Motion.....	29
2. The Evidentiary Hearing.....	30
3. The Motion Court’s Ruling.....	32
E. Ernest Is Mentally Retarded.....	33
1. The Amended Motion.....	33
2. The Motion Court’s Ruling.....	33
F. Failure to Call Witnesses Regarding Ernest’s Background.....	34
1. Phillip McDuffy.....	34
2. Deborah Turner.....	35
3. Evidence That Mental Illness and Mental Retardation Were Rampant in Ernest’s Family.....	36
<u>Points Relied On</u>	38-50
<u>Argument I: Failure to Investigate/Call Dr. Parwatikar</u>	51
I. Ernest Proved This Claim Through the Testimony Presented at the Evidentiary Hearing.....	55
A. Dr. Sam Parwatikar.....	55
B. Other Testimony from the Postconviction Hearing.....	59
C. The Motion Court’s Ruling.....	61
II. The Motion Court’s Holding Was Clearly Erroneous.....	63

A. Parwatikar’s Testimony Would Not Have Been Cumulative.....	63
B. Counsel Did Not Exercise Reasonable Trial Strategy.....	67
C. Ernest Suffered Prejudice by the Failure to Present Parwatikar’s Testimony.....	70
<u>Argument II: Failure to Investigate/Call Michael Maise.....</u>	72
I. Failure to Call Maise Was Not the Product of Reasonable Trial Strategy.....	77
II. Maise’s Testimony Was Not Merely Cumulative.....	79
<u>Argument III: Failure to Conduct Adequate Voir Dire.....</u>	84
I. Standard of Review.....	86
II. Proceedings in the Motion Court.....	87
III. The Motion Court Clearly Erred.....	88
IV. Ernest Suffered Prejudice.....	92
<u>Argument IV: Failure to Investigate/Call Dr. Bernard.....</u>	95
I. Testimony of Dr. Carole Bernard.....	97
II. Standard of Review.....	100
III. The Motion Court Clearly Erred in Denying Relief.....	101
<u>Argument V: Ernest is Mentally Retarded.....</u>	105
I. Substantial Evidence Has Been Presented that Ernest is Mentally Retarded.....	109
A. Trial Testimony.....	110
B. Dr. Carole Bernard.....	113
II. The Mental Retardation Exclusion to the Death Penalty Should Be Applied Retroactively.....	115

Argument VI: Failure to Investigate/Call Witnesses to Ernest’s Background and Behavior in Days Preceding Crimes.....117

I. Phillip McDuffy.....119

II. Deborah Turner.....122

III. Evidence That Mental Illness and Mental Retardation Were Rampant in Ernest’s Family.....124

IV. Ernest Must Receive an Evidentiary Hearing.....126

Argument VII: §565.040.2 Mandates a Sentence of Life Without Parole.....128

Conclusion.....131

Certificate of Compliance.....133

Appendix.....A1-A42

TABLE OF AUTHORITIES

Page

CASES:

Atkins v. Virginia, 122 S.Ct. 2242 (2002)...44,47,96-97,103-104,106-109,111-12,115-16

Bell v. Cone, 122 S.Ct.1843 (2002).....78

Bucklew v. State, 38 S.W.3d 395 (Mo.2001).....55,75,100,118-19

Carter v. Kentucky, 101 S.Ct.1112 (1981).....42,85,89,92

Deck v. State, 68 S.W.3d 418 (Mo.2002).....75,119

Eddings v. Oklahoma, 102 S.Ct.869 (1982).....71

Ervin v. State, 80 S.W.3d 817 (Mo.2002).....40,44,78,95,117-18

Fleming v. Zant, 386 S.E.2d 339 (Ga.1989).....116

Griffin v. California, 85 S.Ct.1229 (1965).....42,85,90,92

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir.1991).....39,67,71,95-96

Lockett v. Ohio, 98 S.Ct. 2954 (1978).....71

Moore v. State, 827 S.W.2d 213 (Mo.1992).....93

Morgan v. Illinois, 112 S.Ct. 2222 (1992).....42,85,91,93

Murphy v. State, 54 P.3d 556 (Okla.Crim.App.2002).....47,111-12

Penry v. Lynaugh, 109 S.Ct. 2934 (1989).....39,44,47,96,104,115

Perkey v. State, 68 S.W.3d 547 (Mo.App.2001).....68-69

Smulls v. State, 71 S.W.3d 138 (Mo.2002).....90

State v. Clark, 981 S.W.2d 143 (Mo.1998).....91-93

State v. Clay, 954 S.W.2d 344 (Mo.App.1997).....67,96

<u>State v. Clay</u> , 975 S.W.2d 121 (Mo.1998).....	75
<u>State v. Clement</u> , 2 S.W.3d 156 (Mo. App. 1999).....	85
<u>State v. Cokes</u> , 682 S.W.2d 59 (Mo.App.1984).....	85
<u>State v. Cole</u> , 71 S.W.3d 163 (Mo.2002).....	129
<u>State v. Driver</u> , 912 S.W.2d 52 (Mo.1995).....	66
<u>State v. Ferguson</u> , 20 S.W.3d 485 (Mo.2000).....	108-109,119
<u>State v. Johnson</u> , 968 S.W.2d 686 (Mo.1998).....	10,50,52,55,70,128-29
<u>State v. Johnson</u> , 22 S.W.3d 183 (Mo.2000).....	18,107
<u>State v. Leisure</u> , 749 S.W.2d 366 (Mo.1988).....	84
<u>State v. Mayes</u> , 63 S.W.2d 615 (Mo.2001).....	85
<u>State v. McCarter</u> , 883 S.W.2d 75 (Mo.App.1994).....	67
<u>State v. McCauley</u> , 831 S.W.2d 741 (Mo.App.1992).....	48,63,119,121,125
<u>State v. Merrill</u> , 990 S.W.2d 166 (Mo.App.1999).....	129
<u>State v. Nunley</u> , 923 S.W.2d 911 (Mo.1996).....	118
<u>State v. Oates</u> , 12 S.W.3d 307 (Mo.2000).....	85
<u>State v. Perry</u> , 879 S.W.2d 609 (Mo.App.1994).....	40,63,79,101
<u>State v. Schaal</u> , 806 S.W.2d 659 (Mo.1991).....	63,75,86,100,108,118
<u>State v. Storey</u> , 986 S.W.2d 462 (Mo.1999).....	43,85-86,89-90,92-93
<u>State v. Wells</u> , 804 S.W.2d 746 (Mo.1991).....	68
<u>State v. White</u> , 873 S.W.2d 874 (Mo.App.1994).....	49,63,101,119,121,123,125
<u>Strickland v. Washington</u> , 104 S.Ct. 2052 (1984).....	54-55,75,82,86-87,100,118
<u>Teague v. Lane</u> , 109 S.Ct. 1060 (1989).....	115

<u>Wilkes v. State</u> , 82 S.W.3d 925, 930 (Mo.2002).....	39,67,75-76,119,126
<u>Woodson v. North Carolina</u> , 96 S.Ct. 2978 (1976).....	126

UNITED STATES CONSTITUTION:

Amendment V.....	38-44,46-51,71-72,82,84-85,88,95,97,105,116-17,127-28,130
Amendment VI.....	38-44,48-49,51,71-72,82,84,88,95,97,117,127,129
Amendment VIII...33,38-44,46-51,70-72,82,84,88,95-97,105-106,108,115-17,127-28,130	
Amendment XIV.....	33,38-44,46-51,70-72,82,84,88,95,97,105-106,116-17,127-30

MISSOURI CONSTITUTION:

Article I:

Section 2.....	33,42-43,46-47,84,88,105-106,116
Section 10.....	38-44,46-51,71-72,82,84,88,95,97,105,116-17,127-28,130
Section 18(a).....	38-44,48-51,71-72,82,84,88,95,97,117,127,129
Section 19.....	42-43,84-85,88
Section 21.....	33,38-44,46-51,71-72,82,84,88,95,97,105-106,116-17,127-28,130
Section 22.....	42-43,84,88
Article V, Section 3.....	9

STATUTES:

§565.020, RSMo 2000.....	9,116
§565.030, RSMo 2000.....	79

§565.030, RSMo Cum.Supp.2001.....	106,109-10,115,116
§565.040, RSMo 2000.....	39,41,43,45,50,71,83,94,104,128-29,130-31

MISSOURI SUPREME COURT RULES:

Rule 29.15.....	3,9,41,43,45,47,49-50,63,75,86,100,108,118,126
Rule 30.20.....	129

MISSOURI APPROVED INSTRUCTIONS:

MAI-Cr3d 308.14.....	43,86
MAI-Cr3d 313.30A.....	43,86

OTHER:

<u>Mental Retardation: Definition, Classification, and Systems of Supports 5</u> (9th ed.1992).....	109
--	-----

JURISDICTIONAL STATEMENT

Ernest Johnson was convicted after a jury trial in the Boone County Circuit Court of three counts of first-degree-murder, Section 565.020.1, RSMo, and was sentenced to death.¹ This Court affirmed the judgment but remanded for a new penalty phase. In April, 1999, Ernest was again sentenced to death. This Court affirmed the death sentence and issued its mandate on August 1, 2000. Ernest timely filed a *pro se* postconviction motion on October 30, 2000. Counsel timely filed an amended motion on March 19, 2001. The motion court denied relief, after a hearing on some of the issues, on March 22, 2002. Notice of appeal was timely filed on May 1, 2002.

The punishment imposed in this case was death, therefore this Court has exclusive appellate jurisdiction. Mo. Const., Art.V, §3.

¹ All statutory references are to the 2000 edition of the Revised Missouri Statutes, unless otherwise noted.

STATEMENT OF FACTS

In 1995, Ernest Johnson was found guilty of three counts of first-degree murder and was sentenced to death (1st Tr.2704).² This Court affirmed the convictions but reversed the death sentences, holding that trial counsel had been ineffective for failing to present the testimony of any medical expert, specifically Dr. Sam Parwatikar, who had personally examined Ernest.³ State v. Johnson, 968 S.W.2d 686, 697 (Mo.1998).

I. Penalty Phase Retrial

The following evidence was presented at the penalty phase retrial. Ernest was a frequent customer at a Columbia Casey's convenience store (Tr.II.898-99). On February 12, 1994, he went there several times (Tr.II.898-905). During those trips, he asked who

² References to the record as are follows: trial transcript of 1995 trial (1st Tr.__); trial transcript of 1998 trial (Tr.II.__); legal file from 1999 trial (L.F.__) ; legal file from first postconviction case (1stPCR L.F.__); transcript of evidentiary hearing from first postconviction case (1stPCR Tr.__); legal file from second postconviction case (PCR L.F.__); transcript of evidentiary hearing from second postconviction case (PCR Tr.__); deposition of Dr. Parwatikar (Par.Depo.__); and deposition of Dr. Bernard (Bernard Depo.__).

³ Because various members of the Johnson and Grant families will be discussed throughout the brief, for clarity sake, this brief shall refer to them by their first names. No disrespect is intended.

would be closing and stared at a cashier when she deposited money from her shift into the store's safe (Tr.II.902).

Shortly after midnight, the police were called to check the store (Tr.II.455). Three store employees, Mary Bratcher, Fred Jones, and Mabel Scruggs, were found dead (Tr.II.471,473). All died from head injuries that were consistent with a bloody hammer found at the store (Tr.II.949-50,954,962). Bratcher sustained multiple stab wounds that were consistent with a bloody screwdriver found in a field near the store (Tr.II.954). Jones sustained a non-fatal gunshot wound (Tr.II.942).

When the police initially spoke with Ernest, he was not a suspect (Tr.II.713-14). After a few hours, though, the police began to suspect Ernest, and they advised him of his rights (Tr.II.722). Although Ernest denied knowing about the crimes, at one point he stated that he knew that his girlfriend's sons, Rodriguez and Antwane Grant, did not have anything to do with the crimes (Tr.II.744).⁴

⁴At the first trial, the jury heard the testimony of Michael Maise, regarding an admission made by Rodriguez (1stTr.2332-33). Maise testified that within a week after the homicides, Rodriguez told him that he was at the store during the homicides but did not do anything (1stTr.2332). Rodriguez revealed that he went to make sure that Ernest did what he was supposed to do (1stTr.2333). He admitted that although he gave Ernest a gun, he didn't trust him; he feared that Ernest would pawn the gun to get money to buy crack (1stTr.2333). This testimony was not presented at the penalty phase retrial.

Antwane testified in exchange for the dismissal of all charges against him (Tr.II.810). Rodriguez had been selling crack cocaine to Ernest, and Ernest owed him money (Tr.II.808). On February 12th, Ernest asked Antwane to ask Rodriguez for crack cocaine for Ernest (Tr.II.808). Antwane did, but Rodriguez refused and told Antwane that if Ernest wanted cocaine he should come see him in the basement and get it himself (Tr.II.808). Ernest was upset that his girlfriend wanted to end their relationship, so he had been taking crack cocaine continuously for most of the day (Tr.II.808,1256). He went to talk with Rodriguez (Tr.II.809).

Afterwards, Ernest told Antwane to get a gun from Rodriguez (Tr.II.810). Rodriguez told Antwane where to find the gun and Antwane got it for Ernest (Tr.II.810). The gun belonged to Rodriguez and Antwane (Tr.II.805).

Ernest left several times during the night, and when he returned the second time, he had specks of blood on his clothing (Tr.II.778,781). A few minutes later, Antwane went down to the basement, where Ernest had taken off the clothing (Tr.II.782). Ernest told Antwane to get rid of the clothing, so Antwane put it in a trash bag and hid the bag in a nearby park (Tr.II.781-82). When Antwane returned, Ernest and Rodriguez were counting money (Tr.II.784,819). The next morning, Ernest instructed Antwane to get rid of his gun, and Antwane complied (Tr.II.786).

Later, Antwane led the police to the park where he had hidden the clothing and the gun (Tr.II.791). From the basement, the police collected evidence linking Ernest to the crimes (Tr.II.747-68).

Bloody shoe prints at the crime scene were made by Ernest's sneakers (Tr.II.560,570,855-56). A shoe print found at the crime scene, behind the counter, did not match the victims, police officers, or Ernest (Tr.II.702-703). The police did not compare the shoe prints found at the crime scene to Rodriguez's shoes (Tr.II.701-702).

II. The Case for Life Without Parole

Ernest was born in a shack in Charleston, Missouri (Tr.II.998,1011). He had an older brother, Bobby Jr., and an older sister, Beverly (Tr.II.998-99,1005). His parents were Bobby Sr. and Jean Ann (Tr.II.998,1011).

Ernest's parents loved to drink, and his mother drank even when pregnant with Ernest (Tr.II.1000,1002-1003). When Ernest was a newborn or one year old, Jean Ann would often go out in Charleston and shoplift and drink (Tr.II.1034-35).

Ernest's parents had a very rocky relationship (Tr.II.1000,1011). They cheated on each other and were abusive towards each other (Tr.II.1000). Twice, Jean Ann burned their shack down in a fit of anger (Tr.II.1011). On one occasion, Bobby Sr. chased Jean Ann through a field firing a gun at her (Tr.II.1036).

When Ernest was one or two years old, Jean Ann left (Tr.II.1003-1004,1006,1048). For about three years, the children lived with Jean Ann's father and his handicapped friend, Mr. Isaac, in Steele, Missouri (Tr.II.1000,1003-1004). Mr. Isaac would watch over the kids while the grandfather was away all day working the fields (Tr.II.1003-1004). If one of the children misbehaved, Mr. Isaac would have all three lay on the floor and he would whip them with a belt buckle or a switch (Tr.II.1007-1008).

When Ernest's grandfather became sick, he unsuccessfully tried to contact Jean Ann (Tr.II.1049). He contacted Bobby Sr., who came and returned the children to Charleston (Tr.II.1008,1049-1050). Since Bobby Sr. worked on a farm as a sharecropper, he arranged for his boss to give him a house on the farm, and he moved his mother in to take care of the children (Tr.II.999,1006,1008-1009).

The "house" was a tin-roofed shack that had no plumbing, electricity, or refrigeration (Tr.II.1013-15,1219). The shack was set up on blocks, and they could see the ground through cracks in the floor (Tr.II.1013). One of the most significant problems they faced was the lack of food on a consistent basis (Tr.II.1219). When there was any food, it had to be eaten quickly because they did not have a refrigerator (Tr.II.1219-20).

Because Bobby Sr. was dating a woman in town, he would only come by to check on the children and occasionally spend the night (Tr.II.1010). Sometimes, the children did not see their father for a week (Tr.II.1010).

When Bobby Sr. drank, he would get extremely abusive and would beat the children with extension cords, switches, or whatever he could grab (Tr.II.1225). On several occasions, he threatened the children with a gun (Tr.II.1225). During one incident, he chased the children through a field firing his gun at them (Tr.II.1225). He even punched Ernest in the face and knocked him out (Tr.II.1225).

As a child, Ernest was sick most of the time (Tr.II.1012,1039). Once, Ernest had worms crawling out of his diaper (Tr.II.1004). Ernest had pneumonia a lot and was small for his age (Tr.II.1012). Growing up, he never saw a doctor, and instead, his

grandmother would do home remedies (Tr.II.1013-14). One “remedy” was to have the sick child urinate in a cup and apply the urine to the child’s face with a rag (Tr.II.1014). As a child, he fell off a cotton truck, banged his head, and lost consciousness (Tr.II.1030,1032,1036-37). He was taken home and did not see a doctor for this injury (Tr.II.1032).

Ernest was always slow in school, and other children would call him a “dummy” and a lot of other names (Tr.II.1017,1033,1054,1057). He was very easily influenced (Tr.II.1057). Growing up, Beverly had to look after Ernest, and in some ways, she considered Ernest more like her baby than her brother (Tr.II.1054). Ernest never got over the fact that his mother had abandoned him (Tr.II.1060).

When Bobby Jr. was thirteen years old, he spent the summer with his mother, who was then living in a housing project in Columbia (Tr.II.1019-21). The housing project did not bother Bobby because it was better than where he was living (Tr.II.1021-22). He enjoyed going to Columbia because his mother let him do anything that he wanted to do (Tr.II.1022). Jean Ann was an alcoholic, drug addict, and prostitute (Tr.II.1025). She spent her time abusing drugs and drinking with her boyfriend, who dealt drugs and gambled (Tr.II.1023,1051-52). Jean Ann sold marijuana out of the house for her boyfriend (Tr.II.1023). She provided marijuana and alcohol to Bobby Jr. (Tr.II.1023-25,1027).

When Ernest was fourteen or fifteen, his father let him and Beverly spend the summer in Columbia with their mother (Tr.II.1051). Jean Ann encouraged Bobby Jr., Ernest, Beverly, and her children from other relationships to prostitute themselves, for

which she was then compensated for their sex acts (Tr.II.1025-26). She rewarded the children by giving them drugs and alcohol (Tr.II.1221-22). Albert Patton, the children's stepfather, physically and sexually abused all three children (Tr.II.1223-24). Ernest's mother told Bobby Jr. that she had wished that he had gone into the military and been killed because then she would have been entitled to compensation for his death (Tr.II.1026-27). Bobby Jr., Ernest, and Beverly have all had serious substance abuse problems (Tr.II.1027-28).

Reverend Dawson testified two weeks before the crimes, Ernest came before the congregation and stated that his life was out of control and that he had a serious addiction (Tr.II.1071). He asked the church to provide a community of support for him, because he couldn't do it for himself (Tr.II.1071). During the following week, Ernest met with Reverend Dawson twice (Tr.II.1071). He stated that he wanted to get into an inpatient program and asked for help (Tr.II.1071).

Dennis Booth was Ernest's parole officer on Ernest's conviction for second-degree burglary (Tr.II.1075-76,1086). Ernest was cooperative and regularly met with him, but could not hold a job (Tr.II.1078,1088). Ernest admitted to an alcohol problem, but denied having a drug problem (Tr.II.1080-81,1088-89). A counselor recommended treatment and instructed Ernest to go to a local facility for an evaluation (Tr.II.1083-84). Ernest went to the facility, but found the customary waiting list (Tr.II.1084-85). Officer Booth was shocked to hear that Ernest was arrested for the crimes (Tr.II.1085-86).

In 1990, Ernest successfully completed a halfway house program (Tr.II.1099). He needed to get a job, so he got a job and kept it (Tr.II.1100). He got along well with

everyone and had few rules problems (Tr.II.1099-1100). Ernest was back at the halfway house in 1993 (Tr.II.1100-1101). He was still easy to get along with, but keeping a job now was a problem (Tr.II.1100-1102). Ernest's criminal history was a problem for employers, and Ernest may have come across as depressed (Tr.II.1102-1103). Ernest was upset and frustrated that as a grown man he could not hold a permanent position (Tr.II.1102-1103). As a result of his employment problems, Ernest was continued in the program beyond 90 days, but later successfully completed the program (Tr.II.1103-1104).

The defense presented the testimony of two psychologists: Dr. Dennis Cowan and Dr. Robert Smith. Dr. Cowan administered a battery of tests to Ernest and determined that he had impairment within the brain-damaged range, at a mild degree of impairment (Tr.II.1133,1135-36). Dr. Cowan also testified that Ernest's current full scale IQ was 84, which is within the low average range; that when Ernest was in the third grade, his IQ was 77; and that when he was in the sixth grade, it had dropped to 63 (Tr.II.1161,1163-64).

Dr. Smith also examined Ernest (Tr.1205-1206). He relayed Ernest's family history of drug abuse, alcoholism, physical abuse, sexual abuse, and poverty (Tr.1215-1225). Dr. Smith testified that Ernest was borderline mentally retarded (Tr.1227) and that he suffered from fetal alcohol effect (Tr.1232-38). He diagnosed Ernest as having long term depression and alcohol, cocaine, and marijuana dependence (Tr.1260-61). He concluded that the crimes were committed while Ernest was under the influence of extreme mental disturbance and that his ability to appreciate the criminality of his

conduct and to conform his conduct to the requirements of the law was impaired (Tr.1263-66).

Although Ernest did not testify, defense counsel did not request the “no adverse inference” instruction, nor had defense counsel questioned the venire panel as to whether any of them would hold it against Ernest if he did not testify.

The jury was instructed to consider the following statutory mitigators: (1) whether the crimes were committed while Ernest was under the influence of extreme mental or emotional disturbance; (2) whether Ernest acted under extreme duress or under the substantial domination of another person; and (3) whether Ernest’s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (L.F.195,202,209).

The jury recommended that Ernest receive the death penalty, and the trial court imposed three death sentences (L.F.235-37,258-60). On direct appeal, this Court affirmed the death sentences and issued its mandate on August 1, 2000. State v. Johnson, 22 S.W.3d 183 (Mo.2000).

III. The Postconviction Case

On October 30, 2000, Ernest filed a timely motion for postconviction relief pursuant to Rule 29.15 (PCR L.F.6-11). Appointed counsel filed a timely amended motion for postconviction relief on March 19, 2001 (PCR L.F.38-285). The court granted an evidentiary hearing as to some of the issues (PCR L.F.315). Postconviction counsel filed a motion to reconsider the denial of a hearing on the other claims, but the court overruled the motion (PCR L.F.324-417).

In the amended motion, Ernest alleged that trial counsel was ineffective for failing to investigate and present the testimony of (1) Dr. Sam Parwatikar; (2) Michael Maise; (3) Dr. Carole Bernard; and (4) various witnesses who could have relayed essential facts regarding Ernest's background and behavior in the days before the crimes (PCR L.F.49-62;223-25;229-32). He alleged that trial counsel was ineffective for failing to question the venire panel as to whether any of them would hold it against Ernest if he did not testify and to request the "no adverse-inference" instruction (PCR L.F.215-19). He also alleged that his death sentences cannot be executed because he is mentally retarded or borderline mentally retarded (PCR L.F.63-67). The facts relating to the relevant claims in the amended motion are set forth as follows:

A. Failure to Investigate and Present the Testimony of Dr. Parwatikar

1. The Amended Motion

Ernest alleged that trial counsel were ineffective for failing to present the testimony of Dr. Sam Parwatikar (PCR L.F.49). He summarized what Dr. Parwatikar would have testified to and cited Dr. Parwatikar's conclusion that at the time of the crime Ernest suffered from "cocaine intoxication delirium," a mental disorder precipitated by excessive cocaine intake (PCR L.F.49-54). He alleged that had Dr. Parwatikar's testimony been presented to the jury, a reasonable probability exists that they would have unanimously recommended life imprisonment without eligibility of probation or parole (PCR L.F.49,54-58). He alleged that Dr. Parwatikar would have been willing, ready, and available to testify (PCR L.F.50).

2. The Evidentiary Hearing

a. Dr. Parwatikar

Postconviction counsel presented Dr. Parwatikar's testimony through a previously taken deposition (PCRTr.4-5). He testified that he is a psychiatrist, certified in the fields of psychiatry, neurology, and forensics (Par.Depo.7-8). He has testified for both the State and the defense in over 250 cases (Par.Depo.10-11).

In 1994, Dr. Parwatikar was contacted by Ernest's first set of trial attorneys – not those at the penalty phase retrial – and asked to determine if Ernest was competent to stand trial and whether he had any sort of mental disease or defect which would make him eligible for an insanity defense (Par.Depo.13). On February 1, 1995, Dr. Parwatikar examined Ernest in prison for about two and a half hours (Par.Depo.14-15).

Dr. Parwatikar concluded that at the time of the crimes, Ernest was suffering from cocaine intoxication delirium, which impaired his mental condition (Par.Depo.25-26). When a person is totally intoxicated with cocaine, he may become delirious (Par.Depo.29). He is hypervigilant and everything becomes extremely bombarding to his senses (Par.Depo.34). His judgement is impaired and he may perceive information incorrectly and react violently (Par.Depo.33). He may get so depressed that he gets panicky and anxious about any situation (Par.Depo.33). Cocaine intoxication delirium is a mental disorder which affects a person's ability to perceive, implement information logically, and use good judgement (Par.Depo.25-26). Dr. Parwatikar based his diagnosis on (1) the amount of cocaine Ernest had ingested prior to the crimes; (2) the type of wounds inflicted upon the victims; and (3) the disarray of the crime scene, indicating a

frenzy or complete lack of control over the situation, which is a typical manifestation of a delirious condition (Par.Depo.25-26).

Dr. Parwatikar concluded that Ernest's cocaine intoxication placed him under the influence of extreme mental or emotional disturbance and substantially impaired his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law (Par.Depo.37). He cited as mitigating factors that Ernest had never before been involved in violent offenses; he had no indication of problems before age 29-30, whereas a person with antisocial personality generally starts having problems at a very young age; Ernest tried to keep Rodriguez and Antwane out of trouble, showing that he did not have an antisocial personality; and Ernest's cocaine intoxication (Par.Depo.37-39).

As a medical doctor, Dr. Parwatikar was able to testify specifically about the effects of cocaine upon Ernest's brain. Cocaine is an extremely powerful agent which passes through the blood-brain barrier very quickly and powerfully (Par.Depo.28). In small doses, cocaine stimulation feels good, but in large doses, it makes the brain extremely vulnerable to outside forces (Par.Depo.28). People using cocaine become paranoid, active, and act in bizarre ways (Par.Depo.28). In the brain, a condition called "kindling" occurs where any little spark may ignite an explosion (Par.Depo.28). As the brain tries to cure the problem, the user fluctuates between depression and stimulation (Par.Depo.29). A drug dependent person may start panicking when the effects of the cocaine wane (Par.Depo.32-33). He becomes depressed and seeks more cocaine (Par.Depo.29).

Dr. Parwatikar explained that Ernest was not merely drug dependent at the time of the crimes. There are three steps in drug use: from casual use, to abuse, to dependence (Par.Depo.18-19). When someone is dependent, he undergoes physiological changes when he can't get the drug; his craving causes him to seek the drug by any means possible (Par.Depo.19).

Dr. Parwatikar differentiated between cocaine dependence and cocaine intoxication delirium, which are two separate diagnoses (Par.Depo.39-40). Anyone can get cocaine intoxication delirium if he or she takes too much cocaine (Par.Depo.39-40). A drug dependent person will use any means possible to get the drug, but will have control over his actions (Par.Depo.19); a person with cocaine intoxication delirium has no control over his actions, his brain becomes dysfunctional, and he becomes delirious (Par.Depo.40).

Dr. Parwatikar explained that on the day of the crimes, Ernest had started smoking cocaine at about 1:00 in the afternoon (Par.Depo.15,52). Ernest learned that the cocaine was no good, so he sold it to get money to buy more cocaine (Par.Depo.15). He bought three 8-balls of crack cocaine, the equivalent of about twenty-four "hits" of cocaine (Par.Depo.15,51). Ernest went home and smoked all the cocaine from about 1:30 to 6:00, sharing some with his girlfriend's sons, Rodriguez and Antwane (Par.Depo.15-16). Ernest alone had smoked at least one and a half 8-balls, or 12 "hits" by 6:00 (Par.Depo.16). After that, Ernest obtained more crack cocaine from Rodriguez (Par.Depo.16-17). His highest ingestion of cocaine took place between 5:00 and 11:00

p.m. (Par.Depo.54). He used cocaine until about ½ hour before the crimes, and then he needed more (Par.Depo.54).

Ernest thought he could get money by robbing Casey's (Par.Depo.55). He borrowed a gun from Rodriguez, and they test-fired it (Par.Depo.35). He dressed in anticipation of robbing the store (Par.Depo.55). Although he intended to rob the convenience store, he did not want to harm anyone (Par.Depo.35).

When the crimes were over, Ernest saw the blood on his clothing and realized he had done something wrong (Par.Depo.36). He did not recall hitting the victims with a hammer (Par.Depo.36). Ernest recalled that he had shot some of the people in the store, but the gun was supposed to be empty, since it was to be used just to threaten the store clerks (Par.Depo.35). He recalled stabbing someone's hand when he was trying to get the people back behind a door (Par.Depo.36).

Dr. Parwatikar concluded that Ernest must have been in a panic due to the sequence of events and the force with which he conducted the crimes (Par.Depo.36). His frenzy was consistent with the amount of cocaine he had ingested (Par.Depo.36).

Ernest's history indicated a diagnosis of cocaine and alcohol dependence (Par.Depo.18). Dr. Parwatikar discussed elements of Ernest's background and upbringing that were relevant to his diagnoses (Par.Depo.18,20-23,48).

Dr. Parwatikar was never contacted by the attorneys representing Ernest in his penalty phase retrial, despite the fact that their office is only about three blocks away from his (Par.Depo.6,40-41,43-44). If he testified, he would have testified consistently with the testimony he gave in his deposition (Par.Depo.43). He was not incapacitated or

otherwise unable to attend trial (Par.Depo.45). He would have been willing, ready, and available to testify (Par.Depo.44-45).

b. Other Testimony from the Postconviction Hearing

Lead counsel for the defense, Teoffice Cooper, admitted that he never spoke with Dr. Parwatikar (PCR Tr. 15,18,37-38). He believed he had read the transcript of Dr. Parwatikar's testimony from the first postconviction case (PCR Tr.15). Cooper generally recalled that he spoke with Loyce Hamilton, who was Ernest's attorney during the first postconviction proceedings, and that she stated that Dr. Parwatikar may have changed his diagnosis and had both negative and positive information to share (PCR Tr.18).

Cooper was disappointed with the testimony of Dr. Cowan and Dr. Smith, believing that they did not offer as much as he thought they would (PCR Tr.19,37,39-40). The defense plan was to let the jury know about Ernest's mental deficiencies, his upbringing, and his cocaine abuse and attempts to find help for that problem (PCR Tr.19,31). Cooper testified that he believes that jurors may perceive experts as explaining away the defendant's behavior and be offended by that testimony (PCR Tr.32).

Cooper testified that he would not have wanted to call Dr. Parwatikar in addition to Drs. Cowan and Smith (PCR Tr.32). He stated that he made a trial strategy decision not to call Dr. Parwatikar, primarily as a result of his conversation with Loyce Hamilton (PCR Tr.33,37).

Co-counsel Delores Berman also admitted that she did not speak with Dr. Parwatikar, even though she had read the Missouri Supreme Court's first opinion (PCR

Tr.46-47). She thought she may have read Dr. Parwatikar's prior testimony (PCR Tr.47-48,60). Although she spoke with Loyce Hamilton regarding Ernest's case, she could not recall discussing Dr. Parwatikar with her (PCR Tr.48). She did not recall why Parwatikar was not called as a witness (PCR Tr.60). She thought that Drs. Cowan and Smith incorporated information they received from other doctors into their trial testimony, but could not explain how (PCR Tr.61).

Loyce Hamilton consulted with Dr. Parwatikar and determined that his testimony would be "critical" to Ernest's mitigation, since he had examined Ernest close in time to the crimes and concluded that Ernest had cocaine intoxication delirium at the time of the crimes (PCR Tr.65,68). Hamilton testified that although she would see Cooper in passing in the office hallways, she never had a formal meeting with him regarding Ernest's case (PCR Tr.66-67). She denied ever telling either Cooper or Berman not to call Parwatikar, and in fact never even spoke with Berman about him (PCR Tr.68-69).

3. The Motion Court's Ruling

The motion court rejected Ernest's claim that trial counsel were ineffective for failing to present Dr. Parwatikar's testimony (L.F.424-39). It held that Dr. Parwatikar's testimony was unnecessary in light of testimony by Drs. Cowan and Smith (PCR L.F.424-34,439). In particular, it cited Dr. Cowan's testimony that Ernest's history of head injuries and polysubstance abuse may have contributed to his brain damage and impacted upon his brain functioning (PCR L.F.424; Tr.II.1138-39).

The motion court relied heavily on testimony provided by Dr. Smith (PCR L.F.425-34). It cited Smith's testimony relating factors leading to his diagnosis of

substance abuse; and how the physical abuse Ernest suffered as a child impacted upon his development as an adult (PCR L.F.426-30). The motion court cited Smith's testimony relating the facts that led up to the crimes, and the factors that played a role, such as Ernest's fetal alcohol effect, his borderline mental retardation and long-term depression, and his addiction to drugs and alcohol (PCR L.F.430-34). The motion court cited Smith's testimony explaining his diagnosis of alcohol, cocaine and marijuana dependence (PCR L.F.433).

The motion court emphasized that the jury heard about Ernest's cocaine addiction through the testimony of his sister, his minister, and State witness Dr. Jerome Peters (PCR L.F.434).

The motion court held that trial counsel followed a reasonable trial strategy in not calling Dr. Parwatikar (PCR L.F. 436-438). The motion court concluded that Ernest had not refuted the presumption that the trial strategy was reasonable, and held that Dr. Parwatikar's testimony also would have been cumulative (PCR L.F.438-39).

B. Failure to Investigate and Present the Testimony of Michael Maise

1. The Amended Motion

In his amended motion, Ernest alleged that trial counsel was ineffective for failing to call Michael Maise, who testified at the first trial that within a week after the homicides, Rodriguez told him that he was at the store during the homicides but did not do anything (1stTr.2332). Rodriguez revealed that he went to make sure that Ernest did what he was supposed to do, and he admitted that although he gave Ernest a gun, he

didn't trust him; he feared that Ernest would pawn the gun to get money to buy crack (1stTr.2333). The motion court granted an evidentiary hearing on this claim.

2. The Evidentiary Hearing

Trial counsel Cooper testified that the defense had purchased a bus ticket for Maise to be at the trial, but decided not to present his testimony (PCRTr.28). Berman testified that she reviewed Maise's prior testimony but did not recall any specific discussions on whether he should testify at the penalty phase retrial (PCR.Tr.55). Neither Cooper nor Berman could recall why Maise was not called to testify (PCR.Tr.28,55).

3. The Motion Court's Ruling

The motion court held that Ernest failed to overcome the presumption that counsel was effective (PCR.L.F.458). It stressed that even without Maise's testimony, the jury heard about how Rodriguez motivated Ernest to commit the robbery and helped count money afterwards (PCR.L.F.458). The court held that trial counsel investigated their options on how best to present Rodriguez's participation and chose a reasonable strategy (PCR.L.F.459). The motion court also held that Maise's testimony would have been cumulative to the testimony about Rodriguez elicited from Antwane (PCR.L.F.459).

C. Failure to Ensure that the Jurors Did Not Consider Ernest's Failure to Testify as an Aggravating Circumstance

1. The Amended Motion

Ernest alleged in his amended motion that trial counsel was ineffective for failing to voir dire the venire panel on whether they would hold it against Ernest if he did not

testify, and further failed to request that the jury receive the “no adverse-inference” instruction (PCR L.F.215-19).

2. The Evidentiary Hearing

Cooper testified that he could not recall whether he asked the venire whether any of them would hold it against Ernest if he did not testify (PCR Tr.22). He admitted, “that is an area of inquiry that a defense attorney generally addresses, especially if they are convinced that the defendant will not testify” (PCR Tr.22). He testified that the court did not prevent him from “functioning” in his capacity to select the jurors (PCR Tr.35). Cooper guessed that the decision not to call Ernest to testify was made “early on” since “Ernest is a reticent sort of guy” and was reluctant to even enter the courtroom (PCR Tr.35-36).

3. The Motion Court’s Ruling

The motion court found that Ernest did not prove that trial counsel was convinced at the time of voir dire that he would not testify (PCR L.F.453). It stressed that during voir dire, the court, the prosecutor, and defense counsel told the jury that the burden of proof was on the State (PCR L.F.453), and that the jurors were told that the defense was not required to put on any evidence (PCR L.F.454). The motion court stressed that defense counsel asked whether any venire members would hold Ernest’s prior convictions against him (PCR L.F.453).

The motion court held that Ernest was attempting to “bootstrap” an argument that defense counsel should have requested the no-adverse inference instruction (PCR L.F.454). The motion court commented that the instruction would have to be modified,

since it mentions the presumption of innocence, which was not applicable to this proceeding (PCR L.F.454).

The motion court held that counsel was not ineffective for failing to question the jurors about whether they would hold it against Ernest if he did not testify (PCR L.F.454). The motion court justified its holding on the fact that defense counsel objected a number of times during the State's questioning (PCR L.F.454), and that at one point the court commented on how thorough counsel had been (PCR L.F.454). The motion court held that Ernest did not show that the result of the trial would have been otherwise had counsel questioned the jurors or requested the instruction (PCR L.F.455).

D. Failure to Call Dr. Bernard

1. The Amended Motion

Ernest alleged in the amended motion that his trial attorneys were ineffective for failing to present the testimony of Dr. Carol Bernard as a mitigation witness (PCR L.F.59-62). He summarized what Dr. Bernard would have testified to if called at trial, including her conclusion that Ernest has always functioned in the mildly mentally retarded range (PCR Tr.59-61). Ernest alleged that Dr. Bernard was ready, willing, and available to testify at the penalty phase retrial (PCR L.F.61). He alleged that had Dr. Bernard's testimony been presented to the jury, the jurors could have considered Dr. Bernard's testimony as mitigating evidence and a reasonable probability exists that they would have unanimously recommended life imprisonment without eligibility of probation or parole (PCR L.F.59-62).

2. The Evidentiary Hearing

Postconviction counsel presented Dr. Bernard's testimony through a previously taken deposition (PCRTr.4-5). Dr. Carole Bernard is a psychologist, who conducts mental retardation assessments (Bernard Depo.8-9). She saw Ernest in 1995 on two days and spent eight hours testing him (Bernard Depo.15-16).

To assess whether Ernest was mentally retarded, Dr. Bernard had to assess his IQ and his adaptive skills (Bernard Depo.9-10,12,14-15). She confirmed that the American Association on Mental Retardation defines mental retardation as impaired intellectual functioning (IQ) and limitations on at least two adaptive skills (Bernard Depo.14-15).

Dr. Bernard determined that Ernest's full scale IQ was in the low 70s (Bernard Depo.24). In the IQ prong of the mental retardation assessment, mental retardation is defined by an IQ of 80 or below (Bernard Depo.12). An IQ of 70-80 is considered borderline mentally retarded (Bernard Depo.12). An IQ of 55-70 reflects mild mental retardation (Bernard Depo.12). An IQ score is reliable within a 10-point spread; for example, an IQ of 71 might reflect a true IQ of anything from 66 to 76 (Bernard Depo.12,54).

Ernest's adaptive skills were deficient also. Adaptive skills must manifest before age eighteen and are skills in communication; self-care; social life; social and interpersonal development; self direction; being able to use community resources; and being able to do certain kind of job or performance (Bernard Depo.13-14). Dr. Bernard noted that Ernest has limited ability to utilize community resources and seemed unable to

live by himself, since for his whole adult life he lived with someone else (Bernard Depo.40-41).

Ernest's vocabulary was very sparse, and he had trouble putting basic sentences together (Bernard Depo.28). In the sentences he was asked to complete, Ernest showed a theme of regret for what he had done, but he did not understand basic social mores (Bernard Depo.26,30). Ernest could not complete a test meant to be taken by a person with a sixth grade reading level (Bernard Depo.62).

Dr. Bernard noted that as a young child, Ernest was very slow to walk and talk (Bernard Depo.25). At school age, he was extremely shy and kept to himself; he didn't seem to know how to make friends (Bernard Depo.25). As he got older, Ernest seemed not to be able to make up his own mind (Bernard Depo.25). He was very sweet but very easily led (Bernard Depo.26).

Dr. Bernard reviewed Ernest's school records, which showed very poor marks (Bernard Depo.30-31). In third grade, Ernest was given an individual IQ test, which showed that the school must have suspected problems (Bernard Depo.31). Ernest was nine years old, and his IQ was 77 (Bernard Depo.32-33). When Ernest was in the sixth grade, he was again given an IQ test (Bernard Depo.33,54). His IQ had dropped from 77 to 63 (Bernard Depo.33-34,54).

In ninth grade, Ernest received all failing grades or grades just slightly above failing (Bernard Depo.34,36). By the end of the year, the only significant improvement was in physical education, which went up to an S (83-86%) (Bernard Depo.37). His grades were consistent with "how mild mental retardation goes" (Bernard Depo.38). For

a mildly mentally retarded person, the retardation becomes more consistent as he approaches the middle adolescent years (Bernard Depo.38).

Dr. Bernard reviewed Ernest's prison records and noted that when he went to prison at age eighteen, he was assessed as developmentally delayed in verbal skills like communication and reading (Bernard Depo.38-39). For all of the adaptive skills on which he was evaluated by the prison, Ernest fell below normal (Bernard Depo.39).

Dr. Bernard concluded that Ernest's mental abilities are enough below average that, coupled with his poor adaptive skills, he was unable even as a grown man to function normally in society (Bernard Depo.43). After the first several years of Ernest's life, he probably always has functioned in the mildly mentally retarded range (Bernard Depo.47-48).

Dr. Bernard was never contacted by the attorneys who represented Ernest in his penalty phase retrial (Bernard Depo.45). Dr. Bernard would have been willing, ready, and available to testify (Bernard Depo.47). She would have testified consistently with her current testimony (Bernard Depo.46).

3. The Motion Court's Ruling

The motion court denied the claim, holding that Ernest had not overcome the presumption that counsel was effective and that their strategic decisions were reasonable (PCR L.F.439-43). It further held that Dr. Bernard's testimony would have been cumulative to the testimony of Drs. Cowan and Smith (PCR L.F.440,443). The motion court found that Dr. Bernard's testimony was consistent with the testimony of Dr. Peters, the State's expert who testified in rebuttal (PCR L.F.441).

E. Ernest Is Mentally Retarded

1. The Amended Motion

Ernest alleged in his amended motion that Missouri's death penalty scheme as applied to mentally retarded persons and/or borderline mentally retarded persons is unconstitutional because it (1) violates the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution and Article I, §21 of the Missouri Constitution and (2) violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article I, §2 of the Missouri Constitution (PCR L.F.63-67). Postconviction counsel alleged that evidence presented at trial was that he was borderline mentally retarded; that in the past, he has received much lower IQ test scores; and that other evidence not presented at trial would show that he has always functioned in the range of mild retardation (PCR L.F.63-66). He also argued that §565.030.4(1), RSMo Cum.Supp.2001, should apply to *all* mentally retarded persons and/or borderline mentally retarded persons and not just to persons in this class who committed their offenses on or after to August 28, 2001 (PCR L.F.66-67).

2. The Motion Court's Ruling

The motion court denied this claim without an evidentiary hearing (PCR L.F.444-47;A24-27). It based its denial on this Court's rejection of Ernest's argument on direct appeal that his borderline mental retardation was grounds for vacating the death sentences under the Court's proportionality review (PCR L.F.445-47;A25-27).

F. Failure to Call Witnesses Regarding Ernest's Background

In the amended motion, counsel raised three separate issues: (1) failure to present Ernest's complete life history; (2) failure to present the aspect of Ernest's childhood environment that included racial discrimination; and (3) failure to call Ernest's father and Ernest's friends (PCR L.F.68-214,226-34).

1. Phillip McDuffy

Ernest alleged in the amended motion that trial counsel should have called Phillip McDuffy, who was one of Ernest's friends and could have been located through reasonable investigation (PCR L.F.229-32). He was never contacted by trial counsel but would have been ready, willing, and available to testify (PCR L.F.231-32) to the following:

Two days before the crimes, McDuffy was in the probation office since he was on probation for carrying a concealed weapon (PCR L.F.229-30). Ernest was there, speaking with a female officer and begging her to lock him up because he took too much drugs (PCR L.F.230). The officer instructed Ernest to come back in two weeks, because his probation officer then would be back from vacation (PCR L.F.230).

McDuffy spoke with Ernest that day, and Ernest told him he needed help (PCR L.F.230). Ernest told him "it's telling me to do things that I should not be doing" (PCR L.F. 230). Ernest told him that he wanted to go to Phoenix House, a rehabilitation center in Boone County, but that he first needed the approval of his probation officer (PCR L.F.230). Ernest admitted that he needed to be locked up before he did "something stupid" (PCR L.F.230).

McDuffy saw Ernest sitting dejected in the parking lot for twenty minutes with his head down (PCR L.F.230). McDuffy knew that Ernest was high on drugs all the time, that Ernest was in his own world, and Ernest had admitted to him in the past that he was having thoughts he should not have (PCR L.F. 230-31). McDuffy also knew, though, that when Ernest was not on drugs, he was a different person and was very calm (PCR L.F. 231).

The motion court denied this claim without a hearing (PCR L.F.447-52). It found that the claim may be procedurally defaulted on the ground that postconviction counsel did not list McDuffy's address in the amended motion (PCR L.F.448). It stressed that McDuffy was located three years after the trial (PCR L.F.450). It held that McDuffy's testimony that Ernest wanted drug treatment also would have been cumulative to the evidence presented at trial (PCR L.F.449-50).

2. Deborah Turner

Ernest alleged in the amended motion that counsel was ineffective for failing to investigate and call Deborah Turner to testify (PCR L.F.199-204). He alleged that if called, Turner would testify as follows:

Turner was a teacher's aide at Washington Elementary School when Ernest attended that school (PCR L.F.200). She had vivid memories of Ernest and recalled that he was a very quiet and shy child (PCR L.F.200). The schools in Charleston, Missouri were racially segregated at the time, and Washington Elementary was the school for black children (PCR L.F.200). The school was overcrowded, and the students received textbooks that were "hand-me-downs" from the white children's school (PCR L.F.200).

After a year or two at Washington, Ernest transferred to Lincoln Elementary School, which also was segregated (PCR L.F.200). Turner knew of the stark difference in teaching materials between those used with the white children and those for the black children and the overcrowding that occurred at the black school, but not the white (PCR L.F.201). Turner would testify that Ernest did not get the attention he needed as a special needs child, due to the overcrowding within his school (PCR L.F.201).

In denying this claim without a hearing, the motion court held that either Ernest procedurally defaulted on the claim by omitting the witness' address from the amended motion for postconviction relief; or the witness' testimony would have been cumulative to the testimony presented at trial (PCR L.F.448-52). The motion court held that trial counsel sufficiently portrayed Ernest's life through the witnesses called at trial and the timeline presented of the important events in his life (PCR L.F.448-49).

3. Evidence That Mental Illness and Mental Retardation Were

Rampant in Ernest's Family

Ernest alleged in the amended motion that the jury should have been made aware of the mental illness of his mother (PCR L.F.88). He alleged that this evidence could have been elicited through the testimony of Ernest's brother, Bobby Johnson, Jr., who testified at trial but was not questioned about this topic; and through his mother's medical records from the Mid-Missouri Health Center (PCR L.F.88).

Those records showed that Jean Ann suffered the symptoms of mental illness for many years, being diagnosed with Depressive Neurosis in March 1974; Inadequate Personality in November 1974; and threatening homicide and attempting suicide in 1974

and 1990 (PCR L.F.88). They show that Jean Ann was admitted into Mid-Missouri Mental Health Center March 1, 1974 complaining of feeling depressed (PCR L.F.88). During that visit, Jean Ann indicated that she had experienced a ‘nervous breakdown’ five years previous (1969, when Ernest was eight years old), and that she was hospitalized in Cook County Hospital in Chicago, Illinois for four weeks (PCR L.F.88). Ernest was thirteen years old when his mother was hospitalized in March, 1974 for having attempted suicide; he was visiting his mother each summer during his teen years, and lived with her the summer of 1974, shortly after her suicide attempt (PCR L.F.88). Jean Ann had a lengthy history of multiple hospitalizations related to depression and alcohol intoxication (PCR L.F.88).

Ernest also alleged that the jury should have been shown the family genogram, or family tree (PCR L.F.79,264). Ernest acknowledged that the jury heard Dr. Smith’s testimony regarding the widespread history of alcohol abuse on both sides of Ernest’s family tree (PCR L.F.78). But the genogram also would have shown the jury that at least five members of the family had suffered from either mental illness or mental retardation (PCR L.F.79).

The motion court denied this claim without a hearing (PCR L.F.448-52). It did not specifically deal with this claim, but considered it within its general holding that the evidence cited in the amended motion would have been cumulative to testimony elicited at trial (PCR L.F.448-52).

The motion court denied relief on all claims (PCR L.F.421-62). Notice of Appeal was timely filed (PCR L.F.466).

POINT I

The motion court clearly erred in denying Ernest's postconviction motion, because counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, and counsel's error resulted in prejudice to Ernest, in violation of Ernest's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21, in that counsel failed to present the available testimony of Dr. Sam Parwatikar that at the time of the crimes, Ernest was suffering from the mental disorder of cocaine intoxication delirium, which would have explained some of the most troubling aspects of the case – both the type and number of wounds inflicted upon the victims and the disarray and bizarreness of the crime scene. Counsel's error resulted in prejudice to Ernest, because the omitted testimony was crucial to show that Ernest's actions were not truly voluntary and to support the mitigating circumstances that (1) Ernest's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired and (2) that Ernest was under the influence of extreme mental or emotional disturbance. Although another expert witness testified in support of these mitigators, he did not mention the mental disorder with which Ernest suffered at the time of the crimes nor show that the disorder explained how the crimes were committed. If the defense had presented Dr. Parwatikar's testimony, a reasonable probability exists that the jury

would have unanimously recommended life imprisonment without eligibility of probation or parole.

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

Penry v. Lynaugh, 109 S.Ct. 2934 (1989);

Wilkes v. State, 82 S.W.3d 925, 930 (Mo.2002);

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

Mo.Const., Art.I, §§10,18(a),21;

§565.040.2, RSMo; and

Rule 29.15.

POINT II

The motion court clearly erred in denying Ernest's postconviction motion, because counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, and counsel's error resulted in prejudice to Ernest, in violation of Ernest's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21, in that counsel failed to present the available testimony of Michael Maise that Rodriguez Grant admitted to him that he was at the store with Ernest when the crimes took place so that he could make sure Ernest did "what he was supposed to do" and that Rodriguez feared that, otherwise, Ernest would pawn the gun for crack money. Counsel's error resulted in prejudice to Ernest, because Maise's testimony was crucial to prove the mitigating circumstance that Ernest acted under extreme duress or Rodriguez's substantial domination. If the jury had heard this testimony, it would have known that the crimes would not have taken place but for Rodriguez being present to make sure that Ernest followed through, since Ernest by himself would have sold the gun and not committed the crimes. These factors, relating so deeply to both the facts of the crimes and Ernest's character, would have swayed the jury to impose sentences of life imprisonment without parole.

Ervin v. State, 80 S.W.3d 817 (Mo.2002);

State v. Perry, 879 S.W.2d 609 (Mo.App.1994);

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

Mo.Const., Art.I, §§10,18(a),21;

§565.040.2, RSMo; and

Rule 29.15.

POINT III

The motion court clearly erred in denying Ernest's postconviction motion, because counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, and counsel's error resulted in prejudice to Ernest, in violation of Ernest's rights to due process, equal protection of the law, effective assistance of counsel, freedom from cruel and unusual punishment, and his privilege against self-incrimination, U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const., Art.I, §§2,10,18(a),19,21,22, in that counsel failed to conduct adequate voir dire to ensure that the jurors did not hold it against Ernest that he did not testify and failed to request that the court submit the "no adverse-inference" instruction to the jury. Ernest was prejudiced by trial counsel's failure, because (1) laypeople naturally consider the defendant's silence as an aggravating circumstance; and (2) even one partial juror constitutes a real probability of injury. A reasonable probability exists that the jury would have unanimously recommended sentencing Ernest to life imprisonment without probation or parole had counsel ensured that the jury not treat Ernest's silence as an aggravating circumstance against him.

Carter v. Kentucky, 101 S.Ct.1112 (1981);

Griffin v. California, 85 S.Ct.1229 (1965);

Morgan v. Illinois, 112 S.Ct. 2222 (1992);

State v. Storey, 986 S.W.2d 462 (Mo.1999);

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

Mo.Const., Art.I, §§2,10,18(a),19,21,22;

§565.040.2, RSMo;

Rule 29.15; and

MAI-CR3d 308.14, 313.30A.

POINT IV

The motion court clearly erred in denying Ernest's postconviction motion, because counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, and counsel's error resulted in prejudice to Ernest, in violation of Ernest's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S.Const., Amends.V,VI,VIII, XIV; Mo.Const., Art.I, §§10,18(a),21, in that counsel failed to present the available testimony of Dr. Carole Bernard that Ernest's full scale IQ was in the low 70s, which, in conjunction with his deficient adaptive skills, placed him in the mildly mentally retarded range, in contrast to the testimony presented at trial that Ernest was not mentally retarded. Counsel's error resulted in prejudice to Ernest, because the full extent of Ernest's limited mental ability was a key item of mitigation which the defense wanted to demonstrate to the jury, and if the jury had known that Ernest truly was mentally retarded, it would not have assessed death sentences, and, even if it had, the death sentences could not be executed.

Atkins v. Virginia, 122 S.Ct. 2242 (2002);

Ervin v. State, 80 S.W.3d 817 (Mo.2002);

Penry v. Lynaugh, 109 S.Ct. 2934 (1989);

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

Mo.Const., Art.I, §§10,18(a),21;

§565.040.2, RSMo; and

Rule 29.15.

POINT V

The motion court clearly erred in denying without a hearing and denying the motion to reconsider Ernest's claim that he cannot be executed due to his mental retardation or borderline mental retardation, because Ernest's motion states facts, not conclusions that, if true, warrant relief; the facts are not refuted by the record; and Ernest was prejudiced, in that Ernest has presented substantial evidence that he was mentally retarded and thus his execution would violate his rights to due process and to be free from cruel and unusual punishment, U.S.Const., Amends.V,VIII, XIV; Mo.Const., Art.I, §§10,21, in that (1) Dr. Robert Smith's finding that Ernest was not mentally retarded (but only borderline mentally retarded) was inconclusive since he failed to assess Ernest's adaptive skills as is required in a mental retardation assessment; and (2) Dr. Carole Bernard found that Ernest has a full scale IQ in the low 70s, poor adaptive skills in at least two areas, and onset before the age of eighteen, and that Ernest has probably always functioned in the mildly mentally retarded range. Alternatively, the motion court clearly erred, in violation of Ernest's rights to equal protection of the law and to be free from cruel and unusual punishment, U.S.Const., Amends.VIII,XIV; Mo.Const., Art.I, §§2,21, in failing to recognize (1) that people who are borderline mentally retarded should receive the same protection as those who are mentally retarded, and (2) that those who committed their crimes before August 28, 2001 should be treated the same as those who commit their crimes after that date.

Atkins v. Virginia, 122 S.Ct. 2242 (2002);

Murphy v. State, 54 P.3d 556 (Okla.Crim.App.2002)

Penry v. Lynaugh, 109 S.Ct. 2934 (1989);

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

Mo.Const., Art.I, §§2,10,21;

Rule 29.15.

POINT VI

The motion court clearly erred in denying without a hearing and denying the motion to reconsider Ernest's claim that defense counsel were ineffective for not investigating and presenting sufficient mitigating evidence regarding Ernest's background and behavior in the days immediately prior to the crimes, because Ernest's motion states facts, not conclusions that, if true, warrant relief; the facts are not refuted by the record; and Ernest was prejudiced by counsel's inaction, in violation of Ernest's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S. Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21, in that counsel should have investigated and presented available mitigating evidence, such as: 1) Phillip McDuffy's testimony regarding Ernest's pleas for help at the probation office just days before the crimes and his dejection at receiving no help; 2) Deborah Turner's testimony regarding Ernest's inability to receive the help he needed as a special needs child in an overcrowded, racially segregated school; and 3) the medical records of Ernest's mother, Jean Ann Patton, regarding her mental illness, and the family genogram showing the rampant occurrence of mental retardation and mental illness within Ernest's family. Counsel's error resulted in prejudice to Ernest, because had these witnesses testified and these items of evidence been presented, there is a reasonable probability that Ernest would have been sentenced to life without parole.

State v. McCauley, 831 S.W.2d 741 (Mo.App.1992);

State v. White, 873 S.W.2d 874 (Mo.App.1994);

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

Mo.Const., Art.I, §§10,18(a),21; and

Rule 29.15.

POINT VII

The trial court/motion court plainly erred in proceeding with a new penalty phase, or alternatively, in not granting relief in the postconviction case, in violation of §565.040.2 and Ernest's rights to due process and freedom from cruel and unusual punishment, U.S.Const., Amends.V,VIII, XIV; Mo.Const., Art.I, §§10,21, because under §565.040.2, Ernest was entitled to be sentenced to life imprisonment without parole, in that the statute provides this remedy if the death sentence is held to be unconstitutional, as Ernest's death sentences were.

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

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

Mo.Const., Art.I, §§10,21;

§565.040.2, RSMo.; and

Sup.Ct.Rule 29.15.

ARGUMENT I

The motion court clearly erred in denying Ernest's postconviction motion, because counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, and counsel's error resulted in prejudice to Ernest, in violation of Ernest's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21, in that counsel failed to present the available testimony of Dr. Sam Parwatikar that at the time of the crimes, Ernest was suffering from the mental disorder of cocaine intoxication delirium, which would have explained some of the most troubling aspects of the case – both the type and number of wounds inflicted upon the victims and the disarray and bizarreness of the crime scene. Counsel's error resulted in prejudice to Ernest, because the omitted testimony was crucial to show that Ernest's actions were not truly voluntary and to support the mitigating circumstances that (1) Ernest's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired and (2) that Ernest was under the influence of extreme mental or emotional disturbance. Although another expert witness testified in support of these mitigators, he did not mention the mental disorder with which Ernest suffered at the time of the crimes nor show that the disorder explained how the crimes were committed. If the defense had presented Dr. Parwatikar's testimony, a reasonable probability exists that the jury

would have unanimously recommended life imprisonment without eligibility of probation or parole.

In 1998, this Court granted Ernest a new penalty phase, because his first set of trial attorneys were ineffective for failing to present the testimony of any medical expert, specifically Dr. Sam Parwatikar, who had personally examined Ernest near the time of the crimes. State v. Johnson, 968 S.W.2d 686,697 (Mo.1998). After examining Ernest for two and a half hours, Parwatikar concluded that Ernest did not have a mental disease or defect at the time of the crime but had suffered from the mental disorder of cocaine intoxication delirium. *Id.* No other witness was able to testify to Ernest's psychological state at the time of the homicides or to explain the mental disorder of cocaine intoxication delirium. *Id.*,698-700. This Court found that "Dr. Parwatikar's testimony would have altered the jurors' deliberations to the extent that a reasonable probability exists that they would have unanimously recommended life imprisonment without eligibility of probation or parole." *Id.*,702.

Despite this Court's holding, Ernest's second set of trial attorneys again failed to present testimony of Ernest's psychological state at the time of the homicides or to explain the mental disorder of cocaine intoxication delirium. Instead, these attorneys, Teoffice Cooper and Delores Berman, presented the testimony of two psychologists, Dennis Cowan and Robert Smith.

Dr. Cowan conducted a neuropsychological examination on Ernest and concluded that he suffered from brain damage, in the range of mild impairment (Tr.1136).

Dr. Smith examined Ernest, read police reports and hospital records, and spoke with family members (Tr.1205-1206). He relayed Ernest's family history of drug abuse, alcoholism, physical abuse, sexual abuse, and poverty (Tr.1215-1225). Dr. Smith testified that Ernest was borderline mentally retarded (Tr.1227) and that he suffered from fetal alcohol effect (Tr.1232-38). He diagnosed Ernest as having long term depression and alcohol, cocaine, and marijuana dependence (Tr.1260-61). He summarily concluded that the crimes were committed while Ernest was under the influence of extreme mental disturbance and that his ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was impaired (Tr.1263-66). He did not testify that it was substantially impaired, as the mitigating circumstance requires (Tr.II.1266).

Although Dr. Cowan and Dr. Smith could testify regarding the problems Ernest faced in general, neither could provide specific testimony as to why Ernest acted as he did on the specific night of the crimes. Dr. Smith provided much background on Ernest's varied problems, such as drug dependence, fetal alcohol effect, depression, low IQ and a miserable upbringing (Tr.II.1247-62). He testified that Ernest took a lot of cocaine on the day of the crimes (Tr.II.1256-57). Dr. Smith concluded that the crimes were committed while Ernest was under the influence of extreme mental disturbance and that his ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was impaired (Tr.II.1265-66). But Dr. Smith provided no explanation for this conclusion, other than the facts that Ernest had these other, longstanding problems.

Nothing within Dr. Smith's testimony explained why Ernest snapped that day or why the crimes were so frenzied and bizarre.

While Dr. Smith provided a lot of background for Ernest's problems, he could not explain Ernest's actions on the day of the charged crimes. The jury desperately needed to hear Dr. Parwatikar's testimony, which would have picked up precisely where Dr. Smith's testimony left off. Dr. Parwatikar would have testified that at the time of the crimes, Ernest was suffering from the mental disorder of cocaine intoxication delirium. He would have explained that Ernest was not just some drug addict in search of drug money, but rather was actually delirious from the excessive amounts of cocaine he took that day. Ernest's mental disorder explained some of the most troubling aspects of the case – both the type and number of wounds inflicted upon the victims and the disarray and bizarreness of the crime scene. Unlike Drs. Cowan and Smith, who are both psychologists, Dr. Parwatikar is a psychiatrist (Tr.II.1117,1199; Par.Depo.7-8).

As a medical doctor, Dr. Parwatikar could have explained how Ernest's brain was affected by the large amounts of cocaine he ingested that day. He could distinguish cocaine intoxication delirium from the actions of a drug dependent person. He would have testified in detail regarding the amounts of cocaine Ernest ingested in relation to the crimes.

To establish that counsel was ineffective, Ernest must demonstrate that counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that he was prejudiced thereby. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). To show prejudice, Ernest must

demonstrate that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Id.*, 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* To prove that counsel was ineffective for failing to call a witness, Ernest must establish that (1) the witness could have been located through reasonable investigation; (2) that the witness would have testified if called; and (3) that his testimony would have provided a viable defense. Bucklew v. State, 38 S.W.3d 395, 398 (Mo.2001).

I. Ernest Proved This Claim Through the Testimony Presented
at the Evidentiary Hearing

A. Dr. Sam Parwatikar

Postconviction counsel presented Dr. Parwatikar's testimony through a previously taken deposition (PCRTr.4-5). Dr. Parwatikar testified that he is a psychiatrist, certified in the fields of psychiatry, neurology, and forensics (Par.Depo.7). His specialty is forensic psychiatry (Par.Depo.8). He has testified for both the State and the defense in over 250 cases (Par.Depo.10-11).

In 1994, Dr. Parwatikar was contacted by Ernest's first set of trial attorneys⁵ and asked to determine if Ernest was competent to stand trial and whether he had any sort of mental disease or defect which would make him eligible for an insanity defense

⁵ Ernest's first set of trial attorneys were Janice Zembles and Nancy McKerrow. State v. Johnson, 968 S.W.2d 686,695 (Mo.1998). His attorneys for the penalty phase retrial were Teoffice Cooper and Delores Berman (PCR Tr.13-15,43).

(Par.Depo.13). On February 1, 1995, Dr. Parwatikar examined Ernest in prison for about two and a half hours (Par.Depo.14-15).

Dr. Parwatikar concluded that at the time of the crimes, Ernest was suffering from cocaine intoxication delirium, which impaired his mental condition (Par.Depo.25-26). When a person is totally intoxicated with cocaine, he may become delirious (Par.Depo.29). He is hypervigilant and everything becomes extremely bombarding to his senses (Par.Depo.34). His judgement is impaired and he may perceive information incorrectly and react violently (Par.Depo.33). He may get so depressed that he gets panicky and anxious about any situation (Par.Depo.33). Cocaine intoxication delirium is a mental disorder which affects a person's ability to perceive, implement information logically, and use good judgement (Par.Depo.25-26). Dr. Parwatikar based his diagnosis on (1) the amount of cocaine Ernest had ingested prior to the crimes; (2) the type of wounds inflicted upon the victims; and (3) the disarray of the crime scene, indicating a frenzy or complete lack of control over the situation, which is a typical manifestation of a delirious condition (Par.Depo.25-26).

Dr. Parwatikar concluded that Ernest's cocaine intoxication placed him under the influence of extreme mental or emotional disturbance and substantially impaired his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law (Par.Depo.37). He cited as mitigating factors that Ernest had never before been involved in violent offenses; he had no indication of problems before age 29-30, whereas a person with antisocial personality generally starts having problems at a very young age; Ernest tried to keep Rodriguez and Antwane out of trouble, showing

that he did not have an antisocial personality; and Ernest's cocaine intoxication (Par.Depo.37-39).

As a medical doctor, Dr. Parwatikar was able to testify specifically about the effects of cocaine upon Ernest's brain. Cocaine is an extremely powerful agent which passes through the blood-brain barrier very quickly and powerfully (Par.Depo.28). In small doses, cocaine stimulation feels good, but in large doses, it makes the brain extremely vulnerable to outside forces (Par.Depo.28). People using cocaine become paranoid, active, and act in bizarre ways (Par.Depo.28). In the brain, a condition called "kindling" occurs where any little spark may ignite an explosion (Par.Depo.28). As the brain tries to cure the problem, the user fluctuates between depression and stimulation (Par.Depo.29). A drug dependent person may start panicking when the effects of the cocaine wane (Par.Depo.32-33). He becomes depressed and seeks more cocaine (Par.Depo.29).

Dr. Parwatikar explained that Ernest was not merely drug dependent at the time of the crimes. There are three steps in drug use: from casual use, to abuse, to dependence (Par.Depo.18-19). When someone is dependent, he undergoes physiological changes when he can't get the drug; his craving causes him to seek the drug by any means possible (Par.Depo.19).

Dr. Parwatikar differentiated between cocaine substance dependence and cocaine intoxication delirium, which are two separate diagnoses (Par.Depo.39-40). Anyone can get cocaine intoxication delirium if he or she takes too much cocaine (Par.Depo.39-40). A drug dependent person will use any means possible to get the drug, but will have

control over his actions (Par.Depo.19); a person with cocaine intoxication delirium has no control over his actions, his brain becomes dysfunctional, and he becomes delirious (Par.Depo.40).

Dr. Parwatar explained that on the day of the crimes, Ernest had started smoking cocaine at about 1:00 in the afternoon (Par.Depo.15,52). Ernest learned that the cocaine was no good, so he sold it to get money to buy more cocaine (Par.Depo.15). He bought three 8-balls of crack cocaine, the equivalent of about twenty-four “hits” of cocaine (Par.Depo.15,51). Ernest went home and smoked all the cocaine from about 1:30 to 6:00, sharing some with his girlfriend’s sons, Rodriguez and Antwane (Par.Depo.15-16). Ernest alone had smoked at least one and a half 8-balls, or 12 “hits” by 6:00 (Par.Depo.16). After that, Ernest obtained more crack cocaine from Rodriguez (Par.Depo.16-17). His highest ingestion of cocaine took place between 5:00 and 11:00 p.m. (Par.Depo.54). He used cocaine until about ½ hour before the crimes, and then he needed more (Par.Depo.54).

Ernest thought he could get money by robbing Casey’s (Par.Depo.55). He borrowed a gun from Rodriguez, and they test-fired it (Par.Depo.35). He dressed in anticipation of robbing the store (Par.Depo.55). Although he intended to rob the convenience store, he did not want to harm anyone (Par.Depo.35).

When the crimes were over, Ernest saw the blood on his clothing and realized he had done something wrong (Par.Depo.36). He did not recall hitting the victims with a hammer (Par.Depo.36). Ernest recalled that he had shot some of the people in the store, but the gun was supposed to be empty, since it was to be used just to threaten the store

clerks (Par.Depo.35). He recalled stabbing someone's hand when he was trying to get the people back behind a door (Par.Depo.36).

Dr. Parwatikar concluded that Ernest must have been in a panic due to the sequence of events and the force with which he conducted the crimes (Par.Depo.36). His frenzy was consistent with the amount of cocaine he had ingested (Par.Depo.36).

Ernest's history indicated a diagnosis of cocaine and alcohol dependence (Par.Depo.18). His mother and father had arguments and violent behavior precipitated by his father's drinking (Par.Depo.20). His mother abandoned him at the age of seven (Par.Depo.20). Ernest was abused and had a head injury at age eight (Par.Depo.21).

Dr. Parwatikar was never contacted by the attorneys representing Ernest in his penalty phase retrial, despite the fact that their office is only about three blocks away from his (Par.Depo.6,40-41,43-44). If he testified, he would have testified consistently with the testimony he gave in his deposition (Par.Depo.43). He was not incapacitated or otherwise unable to attend trial (Par.Depo.45). He would have been willing, ready, and available to testify (Par.Depo.44-45).

B. Other Testimony from the Postconviction Hearing

Lead counsel for the defense, Teoffice Cooper, admitted that he never spoke with Dr. Parwatikar (PCR Tr. 15,18,37-38). He believed he had read the transcript of Dr. Parwatikar's testimony from the first postconviction case (PCR Tr.15). Cooper generally recalled that he spoke with Loyce Hamilton, who was Ernest's attorney during the first postconviction proceedings, and that she stated that Dr. Parwatikar may have changed his diagnosis and had both negative and positive information to share (PCR Tr.18).

Cooper was disappointed with the testimony of Dr. Cowan and Dr. Smith, believing that they did not offer as much as he thought they would (PCR Tr.19,37,39-40). The defense plan was to let the jury know about Ernest's mental deficiencies, his upbringing, and his cocaine abuse and attempts to find help for that problem (PCR Tr.19,31). Cooper testified that he believes that jurors may perceive experts as explaining away the defendant's behavior and be offended by that testimony (PCR Tr.32).

Cooper testified that he would not have wanted to call Dr. Parwatikar in addition to Drs. Cowan and Smith (PCR Tr.32). He vouched that Dr. Smith conducted his own evaluation of Ernest and also reviewed Dr. Parwatikar's findings (PCR Tr.33). He stated that he made a trial strategy decision not to call Dr. Parwatikar, primarily as a result of his conversation with Loyce Hamilton (PCR Tr.33,37).

Co-counsel Delores Berman also admitted that she did not speak with Dr. Parwatikar, even though she had read the Missouri Supreme Court's first opinion (PCR Tr.46-47). She thought she may have read Dr. Parwatikar's prior testimony (PCR Tr.47-48,60). Although she spoke with Hamilton regarding Ernest's case, she could not recall discussing Dr. Parwatikar with her (PCR Tr.48). She did not recall why Parwatikar was not called as a witness (PCR Tr.60). She thought that Drs. Cowan and Smith incorporated information they received from other doctors into their trial testimony, but could not explain how (PCR Tr.61).

Loyce Hamilton was Ernest's attorney in his initial postconviction proceedings (PCR Tr.64). She consulted with Dr. Parwatikar and determined that his testimony

would be “critical” to Ernest’s mitigation (PCR Tr.65,68). Parwatikar had examined Ernest close in time to the crimes and had concluded that Ernest had cocaine intoxication delirium at the time of the crimes (PCR Tr.65). Hamilton testified that although she would see Cooper in passing in the office hallways, she never had a formal meeting with him regarding Ernest’s case (PCR Tr.66-67). She denied ever telling either Cooper or Berman not to call Parwatikar, and in fact never even spoke with Berman about him (PCR Tr.68-69).

C. The Motion Court’s Ruling

The motion court rejected Ernest’s claim that trial counsel were ineffective for failing to present Dr. Parwatikar’s testimony (PCR L.F.424-39). It held that Dr. Parwatikar’s testimony was unnecessary in light of testimony by Dr. Cowan and Dr. Smith (PCR L.F.424-34,439). In particular, it cited Dr. Cowan’s testimony that Ernest’s history of head injuries and polysubstance abuse may have contributed to his brain damage and impacted upon his brain functioning (PCR L.F.424; Tr.II.1138-39).

The motion court relied heavily on testimony provided by Dr. Smith (PCR L.F.425-34). It cited Smith’s testimony relating factors leading to his diagnosis of substance abuse; and how the physical abuse Ernest suffered as a child impacted upon his development as an adult (PCR L.F.426-30). It cited Smith’s testimony that Ernest did not have an antisocial personality (PCR L.F.430). The motion court cited Smith’s testimony relating the facts that led up to the crimes, and the factors that played a role, such as Ernest’s Fetal Alcohol Effect, his borderline mental retardation and long-term depression, and his addiction to drugs and alcohol (PCR L.F.430-34). The motion court cited

Smith's testimony explaining his diagnosis of alcohol, cocaine and marijuana dependence (PCR L.F.433).

The motion court emphasized that the jury heard about Ernest's cocaine addiction through the testimony of his sister and his minister (PCR L.F.434). The motion court found that the jury further heard about the effects of cocaine upon Ernest through the rebuttal testimony of State witness Dr. Jerome Peters (PCR L.F.434).

The motion court stressed that Dr. Parwatikar would provide testimony that Ernest planned to commit the robbery (PCR L.F.435). Dr. Parwatikar clearly stated that he did not conclude that Ernest suffered from a mental disease or defect (PCR L.F.435).

The motion court held that trial counsel followed a reasonable trial strategy in not calling Dr. Parwatikar (PCR L.F. 436-438). It stressed Cooper's testimony that the defense strategy was to show Ernest's abhorrent upbringing and his mental deficits; his cocaine dependence and efforts to free himself from cocaine; and that otherwise he was a generous, kind and gregarious person who was loved by family members (PCR L.F.436). It stressed Cooper's testimony that he did not want to offend the jury by calling another expert witness and that he decided not to call Dr. Parwatikar after speaking with Loyce Hamilton (PCR L.F.436-37).

The motion court cited co-counsel Berman's testimony that she believed they had addressed the issue of cocaine intoxication delirium before the jury (PCR Tr.437). It cited her testimony that the expert witnesses they called relied on Dr. Parwatikar's findings and that information was passed along to the jury (PCR L.F.437).

The motion court concluded that Ernest had not refuted the presumption that the trial strategy was reasonable, and held that Dr. Parwatikar's testimony also would have been cumulative (PCR L.F.438-39). It held that Ernest's allegations of prejudice were merely conclusory (PCR L.F.438).

II. The Motion Court's Holding Was Clearly Erroneous

Appellate review is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous. Rule 29.15(k). A motion court's actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. State v. Schaal, 806 S.W.2d 659, 667 (Mo.1991). A movant has the burden of proving his claims by a preponderance of the evidence. Rule 29.15(i).

A. Parwatikar's Testimony Would Not Have Been Cumulative

"Evidence is said to be cumulative when it relates to a matter so 'fully and properly proved by other testimony' as to take it out of the area of serious dispute." State v. McCauley, 831 S.W.2d 741, 743 (Mo.App.1992). Evidence is not cumulative if it possesses probative value apart from other evidence. State v. White, 873 S.W.2d 874, 877 (Mo.App.1994). Evidence is not to be rejected as cumulative when it goes to the very root of the matter in controversy or relates to the main issue, the decision of which turns on the weight of the evidence. State v. Perry, 879 S.W.2d 609, 613-14 (Mo.App.1994).

No evidence was adduced that Ernest suffered from a mental disorder (cocaine intoxication delirium) *at the time of the incident*. Instead, through Dr. Smith, the jury learned that Ernest had various problems – depression, drug dependence, fetal alcohol effect, a low IQ and a horrible upbringing. But Dr. Smith was unable to show how those factors coalesced on this particular day. The jury was left to believe that Ernest was simply a drug-addict hell-bent to get drugs by any means possible, the same as on any other day, even if he needed to kill three people to do so. The jury was given no explanation for the number of wounds or method of killing or the bizarreness of the crime scene.

Dr. Smith's testimony should have served as a precursor to Dr. Parwatikar's testimony. Through Dr. Smith, the jury learned a lot about Ernest's background, but the background was not tied into the events of the day, or Ernest's mental state at the time of the crimes. Cocaine intoxication delirium explains why Ernest was crazed that night and explains the frenzy of the crimes, nature of the wounds, and bizarreness of the crime scene. It shows that Ernest was not a drug addict who was so mean he was willing to commit these horrid crimes. Rather, it shows that Ernest was not in his right mind and did not know what he was doing or understand the consequences of his actions.

Dr. Parwatikar's testimony would have shown the jury that Ernest was not mean to the core, as the State alleged. Instead, he was a person who had a lot of problems and due to the unique circumstances of this one day of his life, became literally crazed with drugs. In prison, he would not be a danger, because he would never again be delirious from drug ingestion. Without Dr. Parwatikar's explanation of Ernest's state of mind at the time of

the crimes, the jury was left to believe that Ernest was a cruel, heartless person, who on any given day was capable of immense violence, who also had a lot of problems. The jury was left to believe that Ernest would be a danger in prison if he were sentenced to life without parole.

Dr. Parwatikar is a psychiatrist, whereas Dr. Smith is a psychologist (Tr.II.1199; Par.Depo.8). As a medical doctor, Dr. Parwatikar would have been able to show the jury how cocaine affects the brain (Par.Depo.28-29,32-33). Dr. Parwatikar explained:

[Cocaine] makes the [brain] cells so primed to the sensations of the outside world that anything that comes from the outside stimulates it into a frenzy. And that's what is the dangerous part of cocaine usage.... [I]n the very large doses, it – it is extremely vulnerable to outside forces.

(Par.Depo.28). Furthermore, the jury would have learned that because crack cocaine is inhaled, it goes immediately to the brain, making a high from crack cocaine – as opposed to powder cocaine – “very short lived at times and can become extremely powerful”

(Par.Depo.30). The jury would have learned how Ernest's excessive use of cocaine on the day of the crimes was like “kindling” where any little spark might ignite an explosion

(Par.Depo.28). “Kindling” is an image that a jury could relate to in order to understand what occurred in Ernest's brain.

The motion court stressed that Dr. Cowan and Dr. Smith reviewed Dr. Parwatikar's findings and relayed them to the jury (PCR L.F.437). This simply is not true. No mention was made of cocaine intoxication delirium, or that the mental disorder substantially impaired Ernest's capacity to appreciate the criminality of his conduct or to

conform his conduct to the requirements of law. Neither Dr. Cowan nor Dr. Smith referred to Dr. Parwatikar's findings in their testimony before the jury. Although Dr. Smith read off a list of materials he considered, he did not include Dr. Parwatikar's findings or prior testimony (Tr.1205-1206).

The motion court stressed that the jury heard about Ernest's drug use through the testimony of his sister and minister (PCR L.F.434). In State v. Driver, 912 S.W.2d 52, 56 (Mo.1995), this Court rebuffed the State's argument that an expert's testimony as to the defendant's medical condition would have been cumulative, since the defendant's friend testified about the condition. "A lay person is not qualified to make medical diagnoses or testify to the effect of a concussion or Meniere's disease on Driver's condition after the accident." *Id.* So, too, Ernest's sister and minister could not possibly testify in the same detail nor formulate the same conclusions as Dr. Parwatikar regarding Ernest's mental state at the time of the crimes.

The motion court also stressed that the jury heard about Ernest's drug use through the testimony of the State's rebuttal witness, Dr. Jerome Peters (PCR L.F.434). The State's goal in calling Dr. Peters was not to help the defense present mitigating evidence. Dr. Peters challenged whether Ernest was borderline mentally retarded and argued that he actually was just of low average intelligence, capable of being inducted into the United States Army or Navy (Tr.II.1318-19). Dr. Peters diagnosed Ernest as having an antisocial personality (Tr.II.1319). He refuted Dr. Smith's conclusion that Ernest had long-term depression, claiming that Ernest may just have been depressed as a side-affect of his cocaine dependence (Tr.II.1320). Dr. Peters refuted that Ernest suffered from fetal

alcohol effect (Tr.II.1321-22). Finally, he concluded that Ernest was capable of conforming his conduct to the requirements of the law (Tr.II.1327).

Dr. Parwatikar's testimony certainly would not have been cumulative to the testimony of Dr. Peters. Indeed, in light of Dr. Peters' testimony, the jury desperately needed to hear Dr. Parwatikar's testimony. Dr. Peters challenged each of Dr. Smith's findings and refuted the "substantial impairment" mitigator. In contrast, Dr. Parwatikar's testimony would have provided essential support for the mitigator and explained Ernest's actions.

B. Counsel Did Not Exercise Reasonable Trial Strategy

Defense counsel in a death penalty case is obligated to discover and present *all* substantial, available mitigating evidence. Kenley v. Armontrout, 937 F.2d 1298, 1307 (8th Cir.1991). "Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy." *Id.*, 1304. Hence, lack of diligence in preparation and investigation of mitigating circumstances is not protected by a presumption of competence in favor of counsel and cannot be justified as trial strategy. *Id.* "An argument based on trial strategy or tactics is appropriate only if counsel is fully informed of facts which should have been discovered by investigation." State v. Clay, 954 S.W.2d 344, 349 (Mo.App.1997).

Even when counsel make decisions on trial strategy after preparation and investigation, his or her choice of strategy must be objectively reasonable and sound. Wilkes v. State, 82 S.W.3d 925, 930 (Mo.2002); State v. McCarter, 883 S.W.2d 75, 78 (Mo.App.1994). The failure to pursue even one single important item of evidence may

constitute ineffective assistance of counsel. State v. Wells, 804 S.W.2d 746, 748 (Mo.1991).

Trial counsel failed to conduct a reasonable investigation into Dr. Parwatikar. Neither of the trial attorneys bothered to meet with or even speak with Dr. Parwatikar, even though Dr. Parwatikar was just three blocks – an easy stroll – from trial counsel’s office (Par.Depo.6,40-41,43-44). Lead counsel, Cooper, allegedly decided not to call Parwatikar based upon a fleeting conversation with Hamilton, Ernest’s first postconviction attorney, at an office copying machine (PCR Tr.33,37). Hamilton admitted to a brief chat by the copier, but denied ever suggesting to Cooper that he not call Dr. Parwatikar (PCR Tr.66-67). To the contrary, Hamilton insisted that she always thought Dr. Parwatikar was a crucial witness for Ernest and could provide information not provided by the other witnesses (PCR Tr.65,68).

Trial counsel’s failure to investigate is the same type of conduct found to be ineffective in Perkey v. State, 68 S.W.3d 547, 548-49 (Mo.App.2001). There, the defendant was convicted of involuntary manslaughter after the car he was driving struck another car, and the driver of the other car died. In a postconviction motion, the defendant alleged that his trial attorney was ineffective for failing to investigate and call the victim’s family doctor. *Id.*, 549. He alleged that the doctor would have testified that the victim might have died from complications related to her numerous health problems and not the car accident. *Id.* Trial counsel had made no effort to speak with the victim’s doctor, believing that the family doctor would be emotionally attached to the victim and not testify favorably for the defense. *Id.* The Court of Appeals for the Western District

held that counsel was indeed ineffective for failing to call the doctor, who would have raised doubts as to the cause of the victim's death and hence very well could have changed the outcome of the trial. *Id.*, 552.

The motion court implies that Parwatikar's testimony had drawbacks since he would have testified that Ernest intended to rob Casey's (PCR L.F.435). But Dr. Smith, too, testified that Ernest went to Casey's with the intent to rob it (Tr.II.1256). Furthermore, this was no longer at issue in penalty phase, since Ernest had already been found guilty of first degree murder.

Dr. Parwatikar was better qualified to testify than Dr. Smith. The State impeached Dr. Smith based on his lack of experience (Tr.II.1269-70). The State elicited that Smith had only testified fifteen times previously, and all those times were for the defense (Tr.II.1269-70). Dr. Parwatikar, in contrast, has testified over 250 times, for both the defense and the State (Par.Depo.10-11).

Counsel made an arbitrary "decision" that the jury would tolerate two expert witnesses but not three (PCR Tr.32). As a result, the jury was provided with background information about Ernest but left to wonder what drove him to his actions on the night of the crimes. Dr. Parwatikar's testimony would have filled this void. Trial counsel would not have needed to elicit from Dr. Parwatikar a lot of the background information already elicited from Dr. Smith, but should have followed through to present the jury with a complete picture of why Ernest committed the crimes.

Trial counsel's decision that the testimony of another expert would have been intolerable to the jury had no basis and was completely arbitrary. The defense committed

to relying on the testimony of expert witnesses; with such a strategy, counsel could not go halfway. Once committed to this strategy, defense counsel needed to complete the picture by presenting Dr. Parwatikar's testimony. As it was, defense counsel admitted that he was "disappointed that we'd not gotten as much from Dr. Cowan and Dr. Smith ... as we could have.... I don't think that we got as much from the experts in front of the jury as would have been optimal" (PCR Tr.18-19). He admitted that, "I just remember feeling deflated after our psych experts.... [M]y whole feeling about the psych stuff was disappointing" (PCR Tr.40).

C. Ernest Suffered Prejudice by the Failure to Present Parwatikar's Testimony

The motion court clearly erred in concluding that it was reasonable trial strategy for trial counsel to fail to fully investigate Dr. Parwatikar, based on one fleeting chat by a copying machine, and disregard the clear direction given by this Court in their client's case:

While this Court does not presume to know the precise effect Dr. Parwatikar's testimony would have had on the jurors who served on [Ernest's] trial, this Court is left with the definite and firm impression that the record before us demonstrates that Dr. Parwatikar's testimony would have altered the jurors' deliberations to the extent that a reasonable probability exists that they would have unanimously recommended life imprisonment without eligibility of probation or parole.

State v. Johnson, 968 S.W.2d 686, 701 (Mo.1998).

The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating circumstance, any aspect of a defendant's

character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Lockett v. Ohio, 98 S.Ct.2954, 2964-65 (1978). Mitigating circumstances may include a difficult childhood or abusive background; a history of drug and/or alcohol abuse or intoxication; and a defendant's mental or emotional development -- including mental conditions, disorders and disturbances not rising to the level of mental diseases, defects or incompetency. Eddings v. Oklahoma, 102 S.Ct.869, 876-77 (1982); Kenley, 937 F.2d at 1307.

Due to counsels' failure to investigate and present the testimony of Dr. Parwatarikar, the jury never heard of Ernest's mental disorder of cocaine intoxication delirium. The jury could not weigh that mitigating evidence or consider that, at the time of the crimes, Ernest could not appreciate the criminality of his conduct or to conform his conduct to the requirements of law, due to his cocaine intoxication delirium. It had no explanation for the most troubling aspects of the case – the type and number of wounds inflicted upon the victims and the disarray and bizarreness of the crime scene. If the jury had heard Dr. Parwatarikar's testimony, a reasonable probability exists that it would have spared Ernest's life. Because of counsel's failures, Ernest was denied his rights to effective assistance of counsel, due process, and to be free from cruel and unusual punishment. U.S.Const., Amends.V,VI, VIII,XIV; Mo.Const., Art.I, §§10,18(a),21. This Court must remand to the trial court to sentence Ernest to life imprisonment without parole, pursuant to §565.040.2. Alternatively, if this Court finds that §565.040.2 is inapplicable, Ernest requests that the Court remand for new penalty phase proceedings.

ARGUMENT II

The motion court clearly erred in denying Ernest's postconviction motion, because counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, and counsel's error resulted in prejudice to Ernest, in violation of Ernest's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21, in that counsel failed to present the available testimony of Michael Maise that Rodriguez Grant admitted to him that he was at the store with Ernest when the crimes took place so that he could make sure Ernest did "what he was supposed to do" and that Rodriguez feared that, otherwise, Ernest would pawn the gun for crack money. Counsel's error resulted in prejudice to Ernest, because Maise's testimony was crucial to prove the mitigating circumstance that Ernest acted under extreme duress or Rodriguez's substantial domination. If the jury had heard this testimony, it would have known that the crimes would not have taken place but for Rodriguez being present to make sure that Ernest followed through, since Ernest by himself would have sold the gun and not committed the crimes. These factors, relating so deeply to both the facts of the crimes and Ernest's character, would have swayed the jury to impose sentences of life imprisonment without parole.

The jury heard that Ernest was a drug addict who saturated himself with drugs on the evening of February 12 yet needed more (Tr.II.1256). He sought drugs from his

supplier – his girlfriend’s son Rodriguez – but Rodriguez refused (Tr.II.808-809). Instead, Rodriguez gave Ernest a gun, which he and Ernest test-fired together (Tr.II.777,787,810). Ernest owed Rodriguez money for crack cocaine (Tr.II.808).

The jury heard that Rodriguez helped Ernest count the money taken during the robbery (Tr.II.784,819) and that Antwane, Rodriguez’s younger brother, helped Ernest dispose of the gun and bloody clothing (Tr.II.782,786-87). Antwane told the jury that he and Rodriguez were at home during the crimes (Tr.II.816,818). Upon seeing Rodriguez in jail, Ernest told the police that “those boys” had nothing to do with the crimes (Tr.II.743).⁶

The jury did not hear that Rodriguez actually admitted to being present during the crimes so that he could make sure that Ernest followed through with what he was supposed to do. This testimony would have fit in with other testimony elicited by the defense that there was a footprint found at the scene behind the sales counter that did not match the victims, the police officers, or Ernest (Tr.II.702-703). It would have shown that Antwane was trying to diminish his and his brother’s responsibility for the crimes, and that Ernest was protecting the brothers. The testimony would have supported the

⁶ The jury did not hear that Ernest also told the police that “it took more than one man to do that job” (1stTr.1831) and that “[o]ne man wasn’t strong enough to do what had been done at Casey’s” (1stTr.1837-38). The jury did not hear that a witness saw a second man, with hood and gloves on, running toward the Casey’s store at the time that Ernest was in front of the store, at about 10:30 (1stTr.2362-64).

mitigating circumstance that Ernest acted under duress or the substantial domination of someone else.

Maise had testified at the first trial, so defense counsel knew the content of his testimony:

In February, 1994, Maise and Rodriguez were inmates of the Boone County Jail in the same housing “pod” (1stTr.2332,2340). Of the twelve inmates in the pod, they were the only black men (1stTr.2340). When news of the homicides was broadcast on television, the other inmates wanted to jump Rodriguez, but Maise stood up for him (1stTr.2340). After that, Rodriguez confided in Maise (1stTr.2340).

Within a week after the homicides, Rodriguez told Maise that he was at the store during the homicides but did not do anything (1stTr.2332). Rodriguez revealed that he went to make sure that Ernest did what he was supposed to do (1stTr.2333). He admitted that although he gave Ernest a gun, he didn’t trust him; he feared that Ernest would pawn the gun to get money to buy crack (1stTr.2333). Ernest needed \$250 (1stTr.2333).

Maise told the police about Rodriguez’s admission that month, and he wrote a letter to the prosecutor, informing him about the conversation (1stTr.2333-34). Maise had never met Ernest (1stTr.2335). Initially, he may have been hoping for a deal on his pending charges in exchange for the information, since he was concerned that he would have trouble in prison if he testified against Rodriguez (1stTr.2336-37). Maise has a conviction for felony resisting arrest and three convictions for second degree robbery (1stTr.2332,2336). At the time of the first trial, he was incarcerated at the Central Missouri Correctional Center (1stTr.2332).

Appellate review is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous. Rule 29.15(k). A motion court's actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. State v. Schaal, 806 S.W.2d 659, 667 (Mo.1991). A movant has the burden of proving his claims by a preponderance of the evidence. Rule 29.15(i).

To establish that counsel was ineffective, Ernest must demonstrate that counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that he was prejudiced thereby. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). To show prejudice, Ernest must demonstrate that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Id.*, 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

To prove that counsel was ineffective for failing to call a witness, Ernest must establish that (1) the witness could have been located through reasonable investigation; (2) that the witness would have testified if called; and (3) that his testimony would have provided a viable defense. Bucklew v. State, 38 S.W.3d 395, 398 (Mo.2001). Counsel is presumed to have acted competently and the decision not to call a witness is presumed to be trial strategy. Deck v. State, 68 S.W.3d 418, 425 (Mo.2002); State v. Clay, 975 S.W.2d 121, 143 (Mo.1998). But for trial strategy to be the basis for denying post-conviction relief, the strategy must be reasonable. Wilkes v. State, 82 S.W.3d 925, 930

(Mo.2002). A mere assertion that trial counsel's omission was "trial strategy" is not enough to defeat a claim of ineffective assistance of counsel. *Id.*

In his amended motion, Ernest alleged that trial counsel was ineffective for failing to call Maise, who would have provided testimony to support the mitigating circumstance that due to Rodriguez's substantial domination, Ernest operated under extreme duress (PCR L.F.223-25). The motion court granted an evidentiary hearing on this claim (PCR L.F.315).

At the hearing, trial counsel Teoffice Cooper testified that the defense had purchased a bus ticket for Maise to be at the trial, but decided not to present his testimony (PCRTr.28). Co-counsel Delores Berman testified that she reviewed Maise's prior testimony but did not recall any specific discussions on whether he should testify at the penalty phase retrial (PCR.Tr.55). Neither Cooper nor Berman could recall why Maise was not called to testify (PCR.Tr.28,55).

The motion court held that Ernest failed to overcome the presumption that counsel was effective (PCR.L.F.458). It stressed that even without Maise's testimony, the jury heard that (1) Rodriguez gave the gun to Ernest; (2) Rodriguez was selling crack cocaine to Ernest and Ernest owed him money; (3) Rodriguez refused to give any more crack cocaine to Ernest; (4) Rodriguez and Ernest were counting the robbery proceeds; and (5) Rodriguez was charged with and found guilty of robbery (PCR.L.F.458). The court held that:

there is no question based on the testimony of trial counsel and the trial transcripts that the attorneys representing [Ernest] made an investigation of the law and the facts

relevant to ‘plausible options’ of presenting the impact of [Rodriguez’s] actions in motivating [Ernest] to rob Casey’s for the purpose of obtaining more cocaine. The options that trial counsel chose were reasonable and no plausible claim of ineffective assistance of counsel has been presented.

(PCR.L.F.459). The motion court also held that Maise’s testimony would have been cumulative to the testimony about Rodriguez elicited from Antwane (PCR.L.F.459).

I. Failure to Call Maise Was Not the Product of Reasonable Trial Strategy

The motion court clearly erred in concluding that trial counsels’ failure to call Maise was the result of reasonable trial strategy. Calling Maise would have fit squarely within the defense theory, as demonstrated by other testimony elicited by defense counsel. Defense counsel elicited that a shoe print found at the crime scene, behind the counter, did not match the victims, police officers or Ernest (Tr.II.702-703). Defense counsel also elicited that the police did not compare the shoe prints found at the crime scene to Rodriguez’s shoes (Tr.II.701-702). Defense counsel cross-examined Antwane, asking, “[n]ow, your brother, Rod, left that house after Ernest did that night, didn’t he? ... He went up to the store to see if Ernest was doing what he was supposed to do, wasn’t he?” (Tr.II.818). Antwane denied it each time and thus opened the door to Maise’s testimony. Obviously, defense counsel was attempting to show the jury that Rodriguez was at the crime scene with Ernest. Maise could have definitively showed that Rodriguez was in the store, yet counsel inexplicably failed to call him.

The trial attorneys did not testify that their failure to call Maise was the result of trial strategy. Instead, neither attorney could recall why they did not call him (PCR

Tr.28,55). Maise was in court (PCR Tr.28), and the attorneys knew of his potential testimony, since they had reviewed the prior trial transcript (PCR Tr.13,28,46).

Furthermore, nothing within Maise's prior testimony would have hurt Ernest – Maise did not know Ernest (1stTr.2335) and was expecting no favorable treatment by the time he provided his testimony at the first trial (1stTr.2335-37).

One of the mitigating circumstances submitted to the jury was “whether the defendant acted under extreme duress or under substantial domination of another person” (L.F.195,202,209). Logically, counsel would want to present as much testimony to support this mitigator as possible. After all, as this Court has held, “One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence.” Ervin v. State, 80 S.W.3d 817, 827 (Mo.2002), *citing* Bell v. Cone, 122 S.Ct.1843 (2002).

In Ervin, this Court found counsel ineffective for failing to present the testimony of available witnesses to rebut the State's aggravating evidence. 80 S.W.3d at 827. This Court held that the “characterization of Ervin as an inmate who would rescue a cellmate from harm versus an inmate who would kill his cellmate is highly material in a sentencing proceeding.” *Id.*

The jury was left with a characterization of Ernest as a man who would willingly plan and orchestrate a robbery in which three people are killed, just to get money to buy crack cocaine. In marked contrast is the view of Ernest that the jury would have seen had counsel presented Maise's testimony -- Ernest as a man who would rather pawn the gun to get money but instead was forced to commit the robbery by his drug dealer, who

accompanied Ernest into the store to make sure he followed through with the crime. A vast difference looms between a lone gunman with the gumption to commit these crimes by himself and a mentally retarded, or borderline mentally retarded man, who is egged on to commit the crimes and then forced to follow through, not allowed to back down.

II. Maise's Testimony Was Not Merely Cumulative

The motion court also clearly erred in holding that the failure to call Maise was harmless since his testimony was cumulative to what the jury already heard. "Evidence is not to be rejected as cumulative when it goes to the very root of the matter in controversy or relates to the main issue, the decision of which turns on the weight of the evidence." State v. Perry, 879 S.W.2d 609, 613-14 (Mo.App.1994). The main issue here was whether the evidence in mitigation outweighed the evidence in aggravation. §565.030.4(3). After considering all the evidence, the jury could decide not to assess a death sentence. §565.030.4(4).

Maise's testimony would not have been cumulative to the testimony presented to the jury – it would have far exceeded what the jury already heard. The jury heard that Rodriguez motivated Ernest to commit the robbery; but the jury should have heard that Rodriguez actually compelled Ernest to do the robbery. It is true that the jury heard that Rodriguez had some involvement in the robbery – providing a gun and an incentive to get more crack cocaine, and helping to count the proceeds (Tr.II.784,787,810,819). But the jury was left to believe that Rodriguez stayed at home during the crimes (Tr.II.818,822). Maise, in contrast, would have testified that Rodriguez was with Ernest inside Casey's, and that Rodriguez:

said that he had went with Ernest to make sure that Ernest was going to do what Ernest said he was going to do because [Rodriguez] didn't trust Ernest. And he gave Ernest a gun, and Ernest would probably pawn it to get some crack with.

(1stTr.2333). The clear inference is that, without Rodriguez egging him on, Ernest would not have committed the crimes and instead would have pawned the gun for crack money. With Maise's testimony, the jury could have concluded that it was not Ernest's wish to commit the robbery and that Rodriguez played a substantial role in bringing about the robbery and the violence that ensued.

<u>What the Jury Heard</u>	<u>What the Jury Would Have Heard</u>
Ernest got a gun from Rodriguez and test-fired it to make sure it worked (Tr.II.777).	But for Rodriguez, Ernest would have pawned the gun instead of using the gun to rob (1 st Tr.2333).
Rodriguez stayed at home during the crimes (Tr.II.816,818).	Rodriguez was at the store and the extent of his involvement in the crimes thereafter is unknown (1 st Tr.2333).
Rodriguez may have been charged with robbery (Tr.II.823).	Grounds existed to charge and convict Rodriguez of robbery and three counts of murder (1 st Tr.2139).
Rodriguez motivated Ernest to commit the robbery by giving him a gun and	Rodriguez compelled Ernest to commit the robbery by giving him a gun and

refusing to give him any more drugs (Tr.II.787,808-10).	accompanying him to make sure Ernest followed through with it (1 st Tr.2333).
--	---

Additionally, the motion court was factually incorrect when it found that the jury heard that Rodriguez was charged with and convicted of robbery (PCR L.F.458). Antwane testified that he was not sure, but thought that Rodriguez was charged with robbery (Tr.II.823). He did not testify, nor did any other witness testify, that Rodriguez was convicted of robbery in connection with these crimes. The jury did not hear that Rodriguez was charged with three counts of felony murder, armed criminal action, and robbery but was convicted only of robbery (1stTr.2139-40).

The State repeatedly argued in closing that the crimes were the result of Ernest's individual decisions. It argued, "The defendant chose to do this crime, and he didn't have to decide to do it.... The defendant wanted to rob and kill, and that's what he did" (Tr.II.1371). "The case is about personal individual decisions of Ernest Johnson" (Tr.II.1364). "He is the creator of his current circumstances" (Tr.II.1365). The State pondered, "Was this guy a dope-crazed maniac because of his upbringing, or was he somebody that that made decisions, personal decisions of accountability?" (Tr.II.1367).

The jury should have known that Ernest had not acted alone inside Casey's and that his "personal decisions" were not necessarily his own, but rather the decisions made by Rodriguez, his controlling, everpresent drug-dealer. The jury was told to consider whether Ernest acted under someone else's domination (L.F.195,202,209), but was never told the most vital facts about how Ernest came to commit these crimes. The jury did not

consider what role Rodriguez really played in the actual commission of the robbery and murders – standing as mute spectator, or issuing commands, or actively participating? The jury never had the chance to ponder these issues in determining whether Ernest’s conduct warranted the death penalty.

Counsel’s failure to call Maise violated Ernest’s rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment. U.S. Const., Amends V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21. To succeed in this motion, Ernest must show a probability sufficient to undermine confidence in the jury’s death recommendation. Strickland, 104 S.Ct. at 2068.

Ernest Johnson was a follower (Tr.II.1057). He was a man whose intellectual capacity, at best, was mildly mentally retarded (Tr.II.1228-29). His prior convictions were for non-violent crimes – burglary and stealing – with one conviction for second degree robbery (Tr.II.937-38). People who knew him were shocked at his involvement in these crimes (Tr.II.1085-86).

Defense counsel argued in closing that Ernest’s commission of these crimes was inexcusable and inexplicable (Tr.II.1362). If the jury had heard Maise’s testimony, however, it would not have been inexplicable, or inexcusable as to Ernest’s role. The jury would have known that Ernest was forced to commit the crimes, not allowed to back down, by his everpresent drug-dealer. If the jury had known this, and that Ernest would rather have pawned the gun than commit the crimes, the jury may well have spared Ernest’s life. The probability is substantial and completely undermines confidence in the death sentence. This Court should reverse the judgment of the motion court and remand

to the trial court to sentence Ernest to life imprisonment without parole, pursuant to §565.040.2. Alternatively, if this Court finds that §565.040.2 is inapplicable, Ernest requests that the Court remand for new penalty phase proceedings.

ARGUMENT III

The motion court clearly erred in denying Ernest’s postconviction motion, because counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, and counsel’s error resulted in prejudice to Ernest, in violation of Ernest’s rights to due process, equal protection of the law, effective assistance of counsel, freedom from cruel and unusual punishment, and his privilege against self-incrimination, U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const., Art.I, §§2,10,18(a),19,21,22, in that counsel failed to conduct adequate voir dire to ensure that the jurors did not hold it against Ernest that he did not testify and failed to request that the court submit the “no adverse-inference” instruction to the jury. Ernest was prejudiced by trial counsel’s failure, because (1) laypeople naturally consider the defendant’s silence as an aggravating circumstance; and (2) even one partial juror constitutes a real probability of injury. A reasonable probability exists that the jury would have unanimously recommended sentencing Ernest to life imprisonment without probation or parole had counsel ensured that the jury not treat Ernest’s silence as an aggravating circumstance against him.

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, §18(a) of the Missouri Constitution guarantee every defendant the right to a fair and impartial jury. *See State v. Leisure*, 749 S.W.2d 366, 373 (Mo.1988). A necessary

component of that right is “an adequate voir dire that identifies unqualified jurors.” State v. Oates, 12 S.W.3d 307, 310 (Mo.2000), *citing* Morgan v. Illinois, 112 S.Ct. 2222, 2230 (1992). Without an adequate voir dire, the judge cannot fulfill his responsibility to remove prospective jurors who will not be able to follow instructions and evaluate evidence impartially. Morgan, 112 S.Ct. at 2230.

In State v. Clement, 2 S.W.3d 156, 157 (Mo. App. 1999), the Court of Appeals for the Western District reversed because the defendant had not been allowed to ask whether potential jurors would draw a negative inference if he did not testify. Judge Stith, writing for the court, reasoned that, “if a criminal defendant is to be able to effectively exercise his or her right not to be compelled to testify at trial, then he or she must be able to inquire of the panel members whether they will draw an adverse inference if defendant fails to testify. *Id.*, 159-60, *citing* U.S. Const., Amend. V; Mo. Const., Art.I, §19; State v. Cokes, 682 S.W.2d 59, 61-62 (Mo.App.1984).

The Fifth Amendment privilege against compelled self-incrimination guarantees a defendant the right not to have the jury draw an adverse inference from his silence. Griffin v. California, 85 S.Ct.1229,1233 (1965). It requires that a judge in a criminal case give the “no-adverse” inference instruction to the jury if requested by the defendant. Carter v. Kentucky, 101 S.Ct.1112,1119 (1981); State v. Storey, 986 S.W.2d 462,464 (Mo.1999). In a capital case, the court must give the instruction, upon defense counsel’s request, if the defendant did not testify in penalty phase. *Id.*, State v. Mayes, 63 S.W.2d 615,636 (Mo.2001). The instruction is necessary to ensure that jurors do not transform the failure to testify into an aggravating circumstance. Storey, 986 S.W.2d at 464-65.

In Missouri, the “no-adverse inference” instruction provides:

Under the law, a defendant has the right not to testify. No presumption of guilt may be raised and no inference of any kind may be drawn from the fact that the defendant did not testify.

MAI-CR3d 308.14. In a capital case, the instruction may be modified for penalty phase, as follows:

Under the law, a defendant has the right not to testify. No presumption may be raised and no inference of any kind may be drawn from the fact defendant did not testify.

MAI-CR3d 308.14, 313.30A (Note on Use 4); Storey, 986 S.W.2d at 463-64..

I. Standard of Review

Appellate review is limited to a determination of whether the motion court’s findings and conclusions are clearly erroneous. Rule 29.15(k). A motion court’s actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. State v. Schaal, 806 S.W.2d 659, 667 (Mo.1991). A movant has the burden of proving his claims by a preponderance of the evidence. Rule 29.15(i).

To establish that counsel was ineffective, Ernest must demonstrate that counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that he was prejudiced thereby. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). To show prejudice, Ernest must demonstrate that there is a reasonable probability that, but for counsel’s error, the outcome of the proceeding would have been different. *Id.*, 2052. A reasonable

probability is a probability sufficient to undermine confidence in the outcome. *Id.*, 2052,2068.

II. Proceedings in the Motion Court

Ernest alleged in his amended motion that trial counsel was ineffective for failing to question potential jurors on whether they would hold it against Ernest if he did not testify, and further failed to request that the jury receive the “no adverse-inference” instruction (PCR L.F.215-18). At the evidentiary hearing, trial counsel Cooper testified that he could not recall whether he asked the venire whether any of them would hold it against Ernest if he did not testify (PCR Tr.22). He admitted, “that is an area of inquiry that a defense attorney generally addresses, especially if they are convinced that the defendant will not testify” (PCR Tr.22). Cooper testified that the court did not prevent him from “functioning” in his capacity to select the jurors (PCR Tr.35). He did not think that Ernest would testify, since he was so reluctant to even enter the courtroom (PCR Tr.35-36). Cooper guessed that the decision not to call Ernest to testify was made “early on” since “Ernest is a reticent sort of guy” (PCR Tr.36).

The motion court held that counsel was not ineffective for failing to question the jurors about whether they would hold it against Ernest if he did not testify (PCR L.F.454). The motion court found that Ernest did not prove that trial counsel was convinced at the time of voir dire that he would not testify (PCR L.F.453). It stressed that during voir dire, the court, the prosecutor, and defense counsel told the jury that the burden of proof was on the State (PCR L.F.453), and that the jurors were told that the defense was not required to put on any evidence (PCR L.F.454). The motion court

stressed that defense counsel asked whether any venire members would hold Ernest's prior convictions against him (PCR L.F.453).

The motion court held that Ernest was attempting to "bootstrap" an argument that defense counsel should have requested the no-adverse inference instruction (PCR L.F.454). The motion court commented that the instruction would have to be modified, since it mentions the presumption of innocence, which was not applicable to this proceeding (PCR L.F.454).

The motion court justified its holding on the fact that defense counsel objected a number of times during the State's questioning (PCR L.F.454), and that at one point the court commented on how thorough counsel had been (PCR L.F.454). The motion court held that Ernest did not show that the result of the trial would have been otherwise had counsel questioned the jurors or requested the "no adverse-inference" instruction (PCR L.F.455).

III. The Motion Court Clearly Erred

The motion court clearly erred in failing to vacate Ernest's death sentences because such ruling violated Ernest's rights to due process, equal protection of the law, a fair trial, effective counsel, freedom from cruel and unusual punishment and his privilege against self-incrimination. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const., Art.I, §§2,10,18(a),19,21,22.

The motion court found that Ernest did not prove that trial counsel was convinced at the time of voir dire that he would not testify (PCR L.F.453). But trial counsel did not think that Ernest would testify, since he was so reluctant to even enter the courtroom

(PCR Tr.35-36). Counsel guessed that the decision not to call Ernest to testify was made “early on” since “Ernest is a reticent sort of guy” (PCR Tr.36). Ernest had not testified in either the guilt or penalty phases of his first trial.

Even if counsel was not sure that Ernest would not testify, he should have protected Ernest’s rights in the event that Ernest decided not to testify. The trial court did not restrict counsel from pursuing this inquiry (PCR Tr.35). Trial counsel should have asked the jurors whether they would hold it against Ernest if he chose not to testify. That way, defense counsel would know which venirepersons held that view and could exercise strikes against them. If Ernest chose to testify, he would not be harmed. But by failing to question the jurors, a reasonable probability exists that at least one of the jurors held it against Ernest that he did not testify.

The motion court stressed that the jury was told several times that the burden of proof was on the State and that the defense was not required to put on any evidence (PCR L.F.453-54). The fact that the jury is told that the burden of proof rests with the State is of no avail. Regardless of whether the jury is told that the burden of proof is on the State, the jury may believe that the State can meet that burden through the silence of the defendant, an implicit admission that the evidence in aggravation is weightier than the evidence in mitigation. Both this Court and the United States Supreme Court have recognized the danger in the omission of a no adverse-inference instruction, that “the jury will give evidentiary weight to a defendant’s failure to testify.” Carter, 101 S.Ct.1112; Storey, 986 S.W.2d at 464.

The motion court stressed that defense counsel asked whether any venire members would hold Ernest's prior convictions against him (PCR L.F.453). This is comparing apples with oranges. In penalty phase, the jury may consider evidence of prior convictions against Ernest. Smulls v. State, 71 S.W.3d 138, 156 (Mo.2002). In contrast, it may not consider Ernest's silence as evidence against him. Griffin, 85 S.Ct. at 1233. If anything, defense counsel's questioning regarding prior convictions may have misled some jurors to believe that, like prior convictions, Ernest's silence could be considered as evidence in aggravation.

The motion court appears to imply that postconviction counsel did not properly raise the claim that defense counsel was ineffective for failing to request the "no adverse-inference" instruction (PCR L.F.454). Postconviction counsel did not "bootstrap" this issue. Postconviction counsel alleged that if counsel has requested the instruction, it would have been given (PCR L.F.217), and that Ernest was prejudiced by the lack of instruction, since jurors naturally infer guilt/aggravation from the defendant's silence (PCR L.F.217).

The motion court commented that the instruction would have to be modified, since it mentions the presumption of innocence, which was not applicable to this proceeding (PCR L.F.454). The Storey opinion came down several weeks before this case went to trial and specifically states how the instruction may be modified. 986 S.W.2d at 463-64. This certainly is no excuse for leaving the jury with no guidance.

The motion court also justified its holding on the fact that defense counsel objected a number of times during the State's questioning (PCR L.F.454). It cited an

exchange during death qualification (PCR L.F.454; Tr.II.198). Trial counsel's duty in voir dire is two-fold: (1) counsel must attempt to prevent the State from asking objectionable questions; and (2) counsel himself must ferret out biases of the potential jurors. Morgan, 112 S.Ct. at 2230; State v. Clark, 981 S.W.2d 143, 147 (Mo.1998). It makes no difference that counsel objected several times to objectionable comments or questions by the State. Defense counsel must establish through probing questions, which of the venire members would not be good jurors for the defense.

The motion court also stressed that at one point the court commented on how thorough counsel had been (PCR L.F.454, citing Tr.II.267). Ironically, the comment on how "thorough" counsel had been was actually a complaint that he was taking too long:

THE COURT: You took about an hour and a half, and I hope the next one is shorter.

PROSECUTOR: Same here.

THE COURT: You took probably about the right period of time. You were much better than he was.

(Tr.II.267). Note, too, that this was death qualification, not general voir dire.

The entire general voir dire was 103 pages, including the court's instructions to the jury, and was completed well within a morning, including strikes for cause and hardship (Tr.II.48-151). Defense counsel's voir dire was thirty pages (Tr.II.121-151). Defense counsel questioned the venire panel on fourteen topics: (1) race; (2) whether people on the jury knew each other; (3) venirepersons who had psychology or sociology backgrounds; (4) venirepersons who had friends or relatives addicted to cocaine; (5) venirepersons with teaching or daycare backgrounds; (6) venirepersons who had friends

or relatives who were police officers; (7) venirepersons who had worked in convenience stores; (8) venirepersons who had been victims of violent crime; (9) whether a child's background could influence his or her adult life; (10) that the State has the burden of proof; (11) venirepersons who had friends or relatives who were attorneys; (12) venirepersons who had served on a jury previously; (13) whether everyone could stand by their convictions; and (14) whether there was any other reason a venireperson should not serve (Tr.II.121-51).

Surely, reasonably competent counsel would have known that Ernest would not testify, and would have sought to protect Ernest's rights by ensuring that no juror would hold that against Ernest. Instead, trial counsel completely omitted any questions to the jury on this topic.

IV. Ernest Suffered Prejudice

The United States Supreme Court has recognized that:

It has been almost universally thought that juries notice a defendant's failure to testify. "[T]he jury will, of course, realize this quite evident fact, even though the choice goes unmentioned.... [It is] a fact inescapably impressed on the jury's consciousness."

Carter, 101 S.Ct.1120, fn18, *citing* Griffin, 85 S.Ct, at 1237 (dissenting). The Court warned of the danger that an uninstructed jury "is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt." Carter, 101 S.Ct at 1119; Storey, 986 S.W.2d at 465.

Furthermore, even one partial juror constitutes a real probability of injury. Morgan, 112 S.Ct. at 2230; State v. Clark, 981 S.W.2d 143, 148 (Mo.1998). If even one juror considered Ernest's silence as an aggravating circumstance, his sentences should be overturned. To prove prejudice, Ernest need only demonstrate that counsel's error undermines confidence in the outcome. Moore v. State, 827 S.W.2d 213, 215 (Mo.1992). If the jurors had known that they could not hold Ernest's failure to testify against him, a reasonable probability exists that they would have opted for life imprisonment without probation or parole.

Jurors have discretion to impose life. "In light of this discretion, the prejudice against a defendant who invokes the privilege—prejudice which is 'inescapably impressed on the jury's consciousness'—is not purely speculative." Storey, 986 S.W.2d at 464-465 (citation omitted).

Counsel had no reason not to question the jurors about Ernest's right not to testify. So, too, counsel had no reason for failing to request the no adverse inference instruction.

The effect on the jury is exactly the same as if counsel had requested the instruction but it had been denied by the court – the jury was left without instruction on how it could consider Ernest's silence. With only its "untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt," the jury considered Ernest's silence as evidence in aggravation. This prejudice is "not purely speculative." Rather, Ernest's silence was 'inescapably impressed on the jury's consciousness.' This Court must remand to the trial court to sentence Ernest to life imprisonment without parole,

pursuant to §565.040.2. Alternatively, if this Court finds that §565.040.2 is inapplicable, Ernest requests that the Court remand for new penalty phase proceedings.

ARGUMENT IV

The motion court clearly erred in denying Ernest's postconviction motion, because counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, and counsel's error resulted in prejudice to Ernest, in violation of Ernest's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S.Const., Amends.V,VI,VIII, XIV; Mo.Const., Art.I, §§10,18(a),21, in that counsel failed to present the available testimony of Dr. Carole Bernard that Ernest's full scale IQ was in the low 70s, which, in conjunction with his deficient adaptive skills, placed him in the mildly mentally retarded range, in contrast to the testimony presented at trial that Ernest was not mentally retarded. Counsel's error resulted in prejudice to Ernest, because the full extent of Ernest's limited mental ability was a key item of mitigation which the defense wanted to demonstrate to the jury, and if the jury had known that Ernest truly was mentally retarded, it would not have assessed death sentences, and, even if it had, the death sentences could not be executed.

“One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence.” Ervin v. State, 80 S.W.3d 817, 827 (Mo.2002). Defense counsel in a death penalty case is obligated to discover and present *all* substantial, available mitigating evidence. Kenley v. Armontrout, 937 F.2d 1298, 1307 (8th Cir.1991). “Failing to

interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy.” *Id.*, 1304. Hence, lack of diligence in preparation and investigation of mitigating circumstances is not protected by a presumption of competence in favor of counsel and cannot be justified as trial strategy. *Id.* “An argument based on trial strategy or tactics is appropriate only if counsel is fully informed of facts which should have been discovered by investigation.” State v. Clay, 954 S.W.2d 344, 349 (Mo.App.1997).

In Penry v. Lynaugh, 109 S.Ct. 2934, 2952 (1989), the Supreme Court held that without the jurors knowing that they could consider the defendant’s mental retardation and abused background as mitigating evidence, the jury had no means for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision, and the death sentence was invalid. More recently, the Supreme Court has recognized that “our society views mentally retarded offenders as categorically less culpable than the average criminal.” Atkins v. Virginia, 122 S.Ct. 2242, 2249 (2002). It has concluded that “death is not a suitable punishment for a mentally retarded criminal” and would violate the cruel and unusual punishment clause of the Eighth Amendment. *Id.*,2252.

Ernest’s trial attorneys were ineffective for failing to investigate and present the testimony of Dr. Carole Bernard, who was willing, ready, and available to testify (Bernard Depo.47). Dr. Bernard would have testified that Ernest’s full scale IQ was in the low 70s, which, in conjunction with his deficient adaptive skills, placed him in the mildly mentally retarded range (Bernard Depo.24,38-41). This testimony sharply contrasts with the testimony presented at trial that Ernest was not mentally retarded (Tr.II.1161-62,1228-29,1233). Dr. Bernard would have testified that Ernest has always

functioned in the mildly mentally retarded range (Bernard Depo.47-48). The full extent of Ernest's limited mental ability was a key item of mitigation which the defense wanted to demonstrate to the jury (PCR Tr.19,31), and if the jury had known that Ernest truly was mentally retarded, it would not have assessed death sentences. Even if it had, the death sentences could not be executed. Atkins, 122 S.Ct.at 2252. Because of trial counsel's failure, Ernest was denied his rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII, XIV; Mo.Const., Art.I, §§10,18(a),21.

I. Testimony of Dr. Carole Bernard

Dr. Carole Bernard is a psychologist (Bernard Depo.5). She has practiced for many years at the VA Hospital in Columbia, Missouri and since 1986 has also conducted private practice (Bernard Depo.6). She has conducted intelligence, personality and neuropsychological testing (Bernard Depo.6). She has conducted many mental retardation assessments (Bernard Depo.8-9).

Dr. Bernard saw Ernest in 1995 on two days and spent eight hours testing him (Bernard Depo.15-16). To assess whether Ernest was mentally retarded, Dr. Bernard had to assess his IQ and his adaptive skills (Bernard Depo.9-10,12,14-15). She confirmed that the American Association on Mental Retardation defines mental retardation as impaired intellectual functioning (IQ) and limitations on at least two adaptive skills (Bernard Depo.14-15).

Dr. Bernard determined that Ernest's full scale IQ was in the low 70s (Bernard Depo.24). In the IQ prong of the mental retardation assessment, mental retardation is

defined by an IQ of 80 or below (Bernard Depo.12). An IQ of 70-80 is considered borderline mentally retarded (Bernard Depo.12). An IQ of 55-70 reflects mild mental retardation (Bernard Depo.12). An IQ score is reliable within a 10-point spread; for example, an IQ of 71 might reflect a true IQ of anything from 66 to 76 (Bernard Depo.12,54).

Ernest's adaptive skills were deficient also. Adaptive skills must manifest before age 18 and are skills in communication; self-care; social life; social and interpersonal development; self direction; being able to use community resources; and being able to do certain kind of job or performance (Bernard Depo.13-14). Dr. Bernard noted that Ernest has limited ability to utilize community resources and seemed unable to live by himself, since for his whole adult life he lived with someone else (Bernard Depo.40-41).

Ernest's vocabulary was very sparse, and he had trouble putting basic sentences together (Bernard Depo.28). In the sentences he was asked to complete, Ernest showed a theme of regret for what he had done, but he did not understand basic social mores (Bernard Depo.26,30).

Dr. Bernard noted that as a young child, Ernest was very slow to walk and talk (Bernard Depo.25). At school age, he was extremely shy and kept to himself; he didn't seem to know how to make friends (Bernard Depo.25). As he got older, Ernest seemed not to be able to make up his own mind (Bernard Depo.25). He was very sweet but very easily led (Bernard Depo.26).

Dr. Bernard reviewed Ernest's school records, which showed very poor marks (Bernard Depo.30-31). In third grade, Ernest was given an individual IQ test, which

showed that the school must have suspected problems (Bernard Depo.31). Ernest was nine years old, and his IQ was 77 (Bernard Depo.32-33). When Ernest was in the sixth grade, he was again given an IQ test (Bernard Depo.33,54). His IQ had dropped from 77 to 63 (Bernard Depo.33-34,54).

In ninth grade, Ernest received all failing grades or grades just slightly above failing (Bernard Depo.34,36). By the end of the year, the only significant improvement was in physical education, which went up to an S (83-86%) (Bernard Depo.37). His grades were consistent with “how mild mental retardation goes” (Bernard Depo.38). For a mildly mentally retarded person, the retardation becomes more consistent as he approaches the middle adolescent years (Bernard Depo.38). Ernest could not complete a test designed to be taken by a person with a sixth grade reading level (Bernard Depo.62).

Dr. Bernard reviewed Ernest’s prison records and noted that when he went to prison at age eighteen, he was assessed as developmentally delayed in verbal skills like communication and reading (Bernard Depo.38-39). For all of the adaptive skills on which he was evaluated by the prison, Ernest fell below normal (Bernard Depo.39).

Dr. Bernard concluded that Ernest’s mental abilities are enough below average that, coupled with his poor adaptive skills, he was unable even as a grown man to function normally in society (Bernard Depo.43). After the first several years of Ernest’s life, he probably always has functioned in the mildly mentally retarded range (Bernard Depo.47-48).

Dr. Bernard was never contacted by the attorneys who represented Ernest in his penalty phase retrial (Bernard Depo.45). Dr. Bernard would have been willing, ready,

and available to testify (Bernard Depo.47). She would have testified consistently with her current testimony (Bernard Depo.46).

II. Standard of Review

To establish that counsel was ineffective, Ernest must demonstrate that counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that he was prejudiced thereby. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). To show prejudice, Ernest must demonstrate that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Id.*, 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* To prove that counsel was ineffective for failing to call a witness, Ernest must establish that (1) the witness could have been located through reasonable investigation; (2) that the witness would have testified if called; and (3) that his testimony would have provided a viable defense. Bucklew v. State, 38 S.W.3d 395, 398 (Mo.2001).

Appellate review is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous. Rule 29.15(k). A motion court's actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. State v. Schaal, 806 S.W.2d 659, 667 (Mo.1991). A movant has the burden of proving his claims by a preponderance of the evidence. Rule 29.15(i).

III. The Motion Court Clearly Erred in Denying Relief

The motion court denied the claim, holding that Ernest had not overcome the presumption that counsel was effective and that their strategic decisions were reasonable (PCR L.F.439-43). It further held that Dr. Bernard's testimony would have been cumulative to the testimony of Drs. Cowan and Smith (PCR L.F.443). It stressed that Dr. Bernard gave her test results to Dr. Smith so that he could use them in conjunction with other test data that had been gathered on Ernest and that Dr. Smith testified to the same conclusions as Dr. Bernard (PCR L.F.440; PCR Tr.61; Tr.II.1227). The motion court found that Dr. Bernard's testimony was consistent with the testimony of Dr. Peters, the State's expert who testified in rebuttal (PCR L.F.441).

The motion court clearly erred, because Dr. Bernard's testimony would not have been cumulative to the testimony of Drs. Cowan and Smith. Evidence is not to be rejected as cumulative when it goes to the very root of the matter in controversy or relates to the main issue, the decision of which turns on the weight of the evidence. State v. Perry, 879 S.W.2d 609, 613-14 (Mo.App.1994). Evidence is not cumulative if it possesses probative value apart from other evidence. State v. White, 873 S.W.2d 874, 877 (Mo.App.1994). Dr. Bernard's testimony focused on the key issue of Ernest's mental retardation, and she could provide information not provided by the other witnesses. Her testimony cannot be rejected as cumulative.

Bernard would have testified that Ernest's full scale IQ was in the low 70s (Bernard Depo.24); Cowan testified that Ernest's full scale IQ was 84 (Tr.II.1161-62). Bernard would have testified that an individual may be mentally retarded with an IQ of

80 or below (Bernard Depo.12), and that an IQ of 70-80 is considered borderline mental retardation (Bernard Depo.12). Bernard would have testified that borderline mental retardation is a category within mental retardation (Bernard Depo.12); whereas Smith testified that borderline mental retardation is a step above mental retardation but is not mental retardation (Tr.II.1228-29,1233). Bernard would have testified that Ernest had significant limitations on his adaptive skills, which is the second part of the assessment for mental retardation, and that those limitations manifested before Ernest reached the age of eighteen (Bernard depo.13-14,38-41). Smith failed to discuss Ernest's adaptive skills; although he discussed that Ernest had limitations (Tr.II.1228,1238), he failed to place them in context of his assessment of whether Ernest was mentally retarded. Finally, Bernard would have testified that after the first several years of Ernest's life, he has probably always functioned in the mildly mentally retarded range (Bernard Depo.47-48).

So, too, Dr. Bernard's testimony was in no way consistent with that of Dr. Peters. Dr. Peters testified that Ernest's IQ was 84 (Tr.II.1318). He testified that Ernest's true IQ could be three to six points higher than 84 (Tr.II.1318). He stressed that Ernest was probably smarter than his full-scale IQ showed, because the IQ tests were culturally biased against African-Americans (Tr.II.1318). Dr. Peters testified that Ernest's IQ was in the low average range, and he should have been able to perform jobs and perform in society, and be inducted into the United States Navy or Army (Tr.II.1318-19).

In contrast, Dr. Bernard concluded that Ernest's mental abilities are enough below average that, coupled with his poor adaptive skills, that he was unable even as a grown

man to function normally in society (Bernard Depo.43). She testified that Ernest's inability to follow through with expectations that he find work could have been a symptom of his mental retardation (Bernard Depo.41). She also explained that the IQ test's cultural bias against African-Americans would not affect Ernest so much as it would inner city blacks, and that Ernest would be more comparable "with a white kid in a similar poor environment" (Bernard Depo.61).

The motion court stressed the following excerpt from Dr. Bernard's deposition testimony:

Q: Does Ernest have subaverage intelligence with an IQ under seventy-five or around seventy?

A: If Ernest had none of the adaptation skills—if those were all perfect, then I don't think you would judge him as mentally retarded. In terms of IQ, that's subaverage IQ, but he would be considered more higher functioning.

(PCR L.F.441; Bernard Depo.24-25). From this excerpt, the motion court seems to imply that Ernest was not mentally retarded. But a mental retardation assessment is comprised of an evaluation of both the individual's IQ and his adaptive skills (Bernard Depo.12-14; *see also Atkins*, 122 S.Ct. at 2245, fn.3). Dr. Bernard was merely explaining that if Ernest had perfect adaptive skills, he would not be considered mentally retarded (Bernard Depo.24-25). This, however, was not the case. Ernest was so lacking in his adaptive skills, that Dr. Bernard concluded that he has always functioned in the mildly retarded range (Bernard Depo.47-48).

Although the Atkins decision had not been issued at the time of the penalty phase retrial, the Supreme Court had already instructed that mental retardation is a factor that may well lessen a defendant's culpability for a capital offense. Penry v. Lynaugh, 109 S.Ct. 2934 (1989). Counsel should have known that Dr. Bernard's testimony would have provided a viable mitigation defense in penalty phase. Since a major part of the defense strategy was to inform the jury about Ernest's mental deficiencies (PCR Tr.19,31), counsel was ineffective for bypassing a witness who would have demonstrated Ernest's mental retardation and instead offering testimony that Ernest was not mentally retarded.

The jury should have learned that Ernest was mentally retarded. If it had this information, the jury would have perceived Ernest as less culpable than the average criminal. Atkins, 122 S.Ct. at 2249. Even if the jury had imposed death sentences, this Court would have been required to vacate the sentences and impose sentences of life imprisonment without parole. *Id.*, at 2252. This Court must remand to the trial court to sentence Ernest to life imprisonment without parole, pursuant to §565.040.2.

Alternatively, if this Court finds that §565.040.2 is inapplicable, Ernest requests that the Court remand for new penalty phase proceedings.

ARGUMENT V

The motion court clearly erred in denying without a hearing and denying the motion to reconsider Ernest's claim that he cannot be executed due to his mental retardation or borderline mental retardation, because Ernest's motion states facts, not conclusions that, if true, warrant relief; the facts are not refuted by the record; and Ernest was prejudiced, in that Ernest has presented substantial evidence that he was mentally retarded and thus his execution would violate his rights to due process and to be free from cruel and unusual punishment, U.S.Const., Amends.V,VIII, XIV; Mo.Const., Art.I, §§10,21, in that (1) Dr. Robert Smith's finding that Ernest was not mentally retarded (but only borderline mentally retarded) was inconclusive since he failed to assess Ernest's adaptive skills as is required in a mental retardation assessment; and (2) Dr. Carole Bernard found that Ernest has a full scale IQ in the low 70s, poor adaptive skills in at least two areas, and onset before the age of eighteen, and that Ernest has probably always functioned in the mildly mentally retarded range. Alternatively, the motion court clearly erred, in violation of Ernest's rights to equal protection of the law and to be free from cruel and unusual punishment, U.S.Const., Amends.VIII,XIV; Mo.Const., Art.I, §§2,21, in failing to recognize (1) that people who are borderline mentally retarded should receive the same protection as those who are mentally retarded, and (2) that those who committed their crimes before August 28, 2001 should be treated the same as those who commit their crimes after that date.

“Death is not a suitable punishment for a mentally retarded criminal.” Atkins v. Virginia, 122 S.Ct. 2242, 2252 (2002). Ernest should not be subject to the death penalty, because substantial evidence has been presented that he is in fact mentally retarded. Even if this Court finds that Ernest is not mentally retarded, it must find that he is, at best, borderline mentally retarded. As such, Ernest is so close to being mentally retarded, that the protections set forth in Atkins should apply to him as well.

Ernest alleged in his amended motion that Missouri’s death penalty scheme as applied to mentally retarded persons and/or borderline mentally retarded persons is unconstitutional, because it (1) violates the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution and Article I, §21 of the Missouri Constitution and (2) violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, §2 of the Missouri Constitution (PCR L.F.63-67). Postconviction counsel alleged that evidence presented at trial was that he was borderline mentally retarded; that in the past, he has received much lower IQ test scores; and that other evidence not presented at trial would show that he has always functioned in the range of mild mental retardation (PCR L.F.63-66). He also argued that §565.030.4(1), RSMo Cum.Supp.2001, should apply to *all* mentally retarded persons and/or borderline mentally retarded persons and not just to persons in this class who committed the offense on or after to August 28, 2001 (PCR L.F.66-67).

The motion court denied this claim without an evidentiary hearing (PCR L.F.444-47). It stressed that this Court on direct appeal rejected Ernest’s argument that his borderline mental retardation was grounds for vacating the death sentences under the

Court's proportionality review (PCR L.F.445). The motion court cited this Court's proportionality discussion, wherein the Court recognized that the jury considered testimony from the defense experts that Ernest was not mentally retarded (PCR L.F.446). Discussing whether the death sentences were proportionate, this Court held that in the past it had upheld death sentences "where the defendant presented evidence of a low I.Q. and mental retardation" (PCR L.F.446). The motion court held that nothing Ernest presented to it "in the pleadings of post-conviction proceeding would change the ruling by the Missouri Supreme Court in 2000... Moreover, no evidence was presented at the evidentiary hearing that would have changed the conclusion of the Missouri Supreme Court that [Ernest] was not mentally retarded" (PCR L.F.446). It concluded that the "basis for denying the claim on direct appeal forms the basis for denying these claims in the post-conviction proceeding" (PCR L.F.447).

The motion court clearly erred in reaching this conclusion, because it based its holding on this Court's proportionality review, which is the wrong analysis. The motion court should have considered both the evidence presented at trial and the postconviction pleading to determine whether a preponderance of the evidence showed that Ernest was mentally retarded. After all, this Court did not decide on direct appeal, by a preponderance of the evidence, that Ernest was not mentally retarded. Instead, this Court held that (1) the jury considered evidence of whether Ernest was mentally retarded but still imposed death; and (2) the Court had upheld death sentences for mentally retarded defendants in the past. State v. Johnson, 22 S.W.3d 183, 193 (Mo.2000). But Atkins changed this, heralding in a new era of death penalty jurisprudence, by holding that

execution of mentally retarded defendants violates the Eighth Amendment's protection against cruel and unusual punishment.

Ernest has not had the opportunity to prove by a preponderance of the evidence that he is mentally retarded, and no court has considered that issue. The motion court refused to consider it, because it denied the claim based solely on this Court's proportionality finding (PCR L.F.447). At trial, Atkins had not yet been issued, and defense counsel apparently did not comprehend the full necessity of showing that Ernest was mentally retarded. *See supra*, Argument IV. At the evidentiary hearing, Ernest was allowed to present Dr. Bernard's testimony, since it related to a claim of ineffective assistance of counsel, but was denied the opportunity to present her testimony regarding this claim or to expose how the testimony of the experts at trial was lacking in this regard. This Court must remand for an evidentiary hearing to allow Ernest to present evidence on this issue and allow a court to consider, for the first time, whether Ernest can show by a preponderance of the evidence, that he is mentally retarded.

Appellate review is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous. Rule 29.15(k). A motion court's actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. State v. Schaal, 806 S.W.2d 659, 667 (Mo.1991). A movant has the burden of proving his claims by a preponderance of the evidence. Rule 29.15(i).

A motion court need not hold an evidentiary hearing unless (1) the movant cites facts, not conclusions, which, if true, would entitle him to relief; (2) the factual

allegations are not refuted by the record; and (3) the matters complained of prejudiced the movant. State v. Ferguson, 20 S.W.3d 485,503 (Mo.2000).

I. Substantial Evidence Has Been Presented that Ernest is Mentally Retarded

Although the motion court held that Ernest had not made a showing that he is mentally retarded, that holding is clearly refuted by the record. The American Association of Mental Retardation (AAMR) defines mental retardation as follows:

Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed.1992); Atkins, 122 S.Ct.at 2245, fn.3.

Like the AAMR's definition of mental retardation, Missouri's death penalty statute does not set a cut-off for IQ. §565.030.6, RSMo Cum.Supp.2001. Its definition provides:

The terms "mental retardation" or "mentally retarded" refer to 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.

A. Trial Testimony

At trial, Dr. Smith testified that Ernest is not mentally retarded, but is just one step above it, borderline mentally retarded (Tr.II.1228-29,1233). He testified that Ernest's intelligence is "clearly far below average" (Tr.II.1228-29). Although he testified that Ernest has always had trouble in school and suffers from fetal alcohol effect, he did not discuss Ernest's adaptive skills, as required in any mental retardation assessment. He furthermore did not explain the significance of Ernest's lower IQ scores as a child, notably his IQ score of 63 in the sixth grade. Given the omissions in Dr. Smith's trial testimony, his conclusion that Ernest was not mentally retarded – but "only" borderline mentally retarded – is inconclusive.

Dr. Dennis Cowan confirmed that when Ernest was in the third grade, his IQ was 77; and when he was in the sixth grade, his IQ was 63 (Tr.II.1163-64). Thus, Ernest's IQ scores were well within the range of mental retardation well before Ernest turned eighteen. Dr. Cowan believed that Ernest's current full scale IQ was 84 (Tr.II.1161,1164). He did not testify, however, regarding the second prong of the mental retardation assessment, whether Ernest had limitations in his adaptive skills.

The State's expert, Dr. Peters, testified that Ernest's IQ was 84 (Tr.II.1318). He testified that Ernest's true IQ could be three to six points higher than 84 (Tr.II.1318). He stressed that Ernest was probably smarter than his full-scale IQ showed, because the IQ

tests were culturally biased against African-Americans (Tr.II.1318). Dr. Peters testified that Ernest's IQ was in the low average range, and he should have been able to perform jobs and perform in society, and be inducted into the United States Navy or Army (Tr.II.1318-19).

Even if Ernest is "only" borderline mentally retarded, the protections of Atkins should still apply to him. In holding that the execution of mentally retarded criminals violates the Eighth Amendment's protection against cruel and unusual punishment, the Supreme Court recognized that (1) "our society views mentally retarded offenders as categorically less culpable than the average criminal"; (2) the deterrent effect of capital punishment does not apply to mentally retarded criminals, since they have less ability to understand and process information, learn from experience, engage in logical reasoning, or control their impulses; and (3) mentally retarded criminals may be less able to assist defense counsel, are typically poor witnesses, and their demeanor may create an unwarranted impression that they lack remorse for their crimes. Atkins, 122 S.Ct. at 2249, 2251-52.

The rationales for creating a mental retardation exclusion to the death penalty apply equally as well to defendants who are borderline mentally retarded. Such a small distinction exists between mental retardation and borderline mental retardation that it would be arbitrary and capricious to apply the exclusion to one group but not the other.

In Murphy v. State, 54 P.3d 556, 562 (Okla.Crim.App.2002), the defendant alleged that he was borderline mentally retarded and did not get past the sixth grade. He alleged that due to his mild mental retardation, his execution would violate the state and

federal constitutions against cruel and unusual punishment. *Id.*, 566. The appellate court acknowledged that:

Atkins notes ... that there is serious disagreement (and thus no “national consensus”) among the States in determining which offenders are in fact retarded: “Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about who there is a national consensus.” It is therefore important to understand that Atkins does not attempt to define who is or who is not mentally retarded for purposes of eligibility for a death sentence, but “leave[s] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.”

Id., 567, *citing* Atkins, 122 S.Ct. at 2250. The appellate court remanded for an evidentiary hearing on the issue of whether the defendant was mentally retarded.

Murphy, 54 P.3d at 570. Interestingly, the court noted that the defense expert who testified regarding Murphy’s mental retardation actually downplayed it, excusing it by cultural factors, testing conditions and the like. *Id.*, 567, fn.17.

Like the Oklahoma Court of Appeals in Murphy, this Court should remand for an evidentiary hearing to allow a court to consider his evidence that he is mentally retarded. The motion court refused to consider the evidence. It erroneously believed that this Court, by holding that the jury was free to consider whether Ernest was mentally retarded, had concluded that Ernest was not mentally retarded (PCR L.F.445-47). In actuality, no fact-finder has ever considered whether the preponderance of the evidence shows that Ernest is mentally retarded. This Court must give Ernest that opportunity.

B. Dr. Carole Bernard

Dr. Bernard's testimony at the evidentiary hearing shows that Ernest is mentally retarded – she assessed both Ernest's IQ and his adaptive skills and concluded that Ernest has probably always functioned in the range of mild mental retardation (Bernard Depo.15-16,47-48).

Dr. Bernard determined that Ernest's full scale IQ was in the low 70s (Bernard Depo.24). In the IQ prong of the mental retardation assessment, mental retardation is defined by an IQ of 80 or below (Bernard Depo.12). An IQ of 70-80 is considered borderline mentally retarded (Bernard Depo.12). An IQ of 55-70 reflects mild mental retardation (Bernard Depo.12). An IQ score is reliable within a 10-point spread; for example, an IQ of 71 might reflect a true IQ of anything from 66 to 76 (Bernard Depo.12,54).

Ernest's adaptive skills were deficient also. Dr. Bernard noted that Ernest has limited ability to utilize community resources and seemed unable to live by himself, since for his whole adult life he lived with someone else (Bernard Depo.40-41).

Ernest's vocabulary was very sparse, and he had trouble putting basic sentences together (Bernard Depo.28). In the sentences he was asked to complete, Ernest showed a theme of regret for what he had done, but he did not understand basic social mores (Bernard Depo.26,30). Ernest could not complete a test that is meant to be taken by a person with a sixth grade reading level (Bernard Depo.62).

Dr. Bernard noted that as a young child, Ernest was very slow to walk and talk (Bernard Depo.25). At school age, he was extremely shy and kept to himself; he didn't

seem to know how to make friends (Bernard Depo.25). As he got older, Ernest seemed not to be able to make up his own mind (Bernard Depo.25). He was very sweet but very easily led (Bernard Depo.26).

Dr. Bernard reviewed Ernest's school records, which showed very poor marks (Bernard Depo.30-31). In third grade, Ernest was given an individual IQ test, which showed that the school must have suspected problems (Bernard Depo.31). Ernest was nine years old, and his IQ was 77 (Bernard Depo.32-33). When Ernest was in the sixth grade, he was again given an IQ test (Bernard Depo.33,54). His IQ had dropped from 77 to 63 (Bernard Depo.33-34,54).

In ninth grade, Ernest received all failing grades or grades just slightly above failing (Bernard Depo.34,36). By the end of the year, the only significant improvement was in physical education, which went up to an S (83-86%) (Bernard Depo.37). His grades were consistent with "how mild mental retardation goes" (Bernard Depo.38). For a mildly mentally retarded person, the retardation becomes more consistent as he approaches the middle adolescent years (Bernard Depo.38).

Dr. Bernard reviewed Ernest's prison records and noted that when he went to prison at age eighteen, he was assessed as developmentally delayed in verbal skills like communication and reading (Bernard Depo.38-39). For all of the adaptive skills on which he was evaluated by the prison, Ernest fell below normal (Bernard Depo.39).

Dr. Bernard concluded that Ernest's mental abilities are enough below average that, coupled with his poor adaptive skills, he was unable even as a grown man to function normally in society (Bernard Depo.43). After the first several years of Ernest's

life, he probably always has functioned in the mildly mentally retarded range (Bernard Depo.47-48).

The motion court refused to consider any of Dr. Bernard's testimony with regard to Ernest's claim that the Eighth Amendment protects him, as a mentally retarded defendant, from being executed (PCR L.F.444-47).

II. The Mental Retardation Exclusion to the Death Penalty Should Be Applied Retroactively

Atkins constitutes an exception to the non-retroactivity rule of Teague v. Lane, 109 S.Ct. 1060 (1989), and therefore applies retroactively in this case. *See* Penry v. Lynaugh, 109 S.Ct. 2934, 2953 (1989) (“[I]f we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons ... such a rule would fall under the first exception to [Teague's] general rule of non-retroactivity and would be applicable to defendants on collateral review.”).

§565.030.4(1), RSMo Cum.Supp.2001, provides that the trier must assess a sentence of life imprisonment without parole if it finds by a preponderance of the evidence that the defendant is mentally retarded. It also provides, however, that this exclusion only governs offenses committed on or after August 28, 2001. §565.030.7.

Missouri's exclusion of mentally retarded defendants from the death penalty should apply to *all* mentally retarded persons and/or borderline mentally retarded persons and not just to persons in this class who committed their offenses on or after to August 28, 2001. Whether a defendant committed his crimes before August 28, 2001 does not make him any more culpable, does not increase the deterrent effect, and does not make

the defendant any more able to assist in his defense, than the mentally retarded offender who committed his crime after that date. The arbitrary inclusion of a “starting date” for the mental retardation exclusion flies in the face of Atkins, 122 S.Ct. at 2249, 2251-52, and violates Ernest’s rights to equal protection. U.S.Const., Amend.XIV; Mo. Const., Art.I,§2.

Just like §565.020.2 excludes juvenile defendants – those who are fifteen years old or younger – from eligibility for the death penalty, mentally retarded persons have now been excluded from eligibility for the death penalty. The exclusion of mentally retarded defendants from the death penalty should apply to *all* mentally retarded persons and/or borderline mentally retarded persons and not just to persons in this class who committed their offenses on or after to August 28, 2001.

Furthermore, the portion of §565.030.4(1), RSMo Cum.Supp.2001, that restricts its application to those offenses committed after August 28, 2001, is unconstitutional, because it violates the cruel and unusual provision of the Missouri Constitution. Mo.Const.Art.I,§21. *See Fleming v. Zant*, 386 S.E.2d 339 (Ga.1989).

Upholding Ernest’s death sentences would violate Ernest’s rights to due process, equal protection of the law, and freedom from cruel and unusual punishment, U.S.Const., Amends.V,VIII,XIV; Mo.Const., Art.I, §§2,10,21. This Court must vacate Ernest’s death sentences and order that he be resentenced to life imprisonment without the possibility of parole, or alternatively, must remand for an evidentiary hearing.

ARGUMENT VI

The motion court clearly erred in denying without a hearing and denying the motion to reconsider Ernest's claim that defense counsel were ineffective for not investigating and presenting sufficient mitigating evidence regarding Ernest's background and behavior in the days immediately prior to the crimes, because Ernest's motion states facts, not conclusions that, if true, warrant relief; the facts are not refuted by the record; and Ernest was prejudiced by counsel's inaction, in violation of Ernest's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S. Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21, in that counsel should have investigated and presented available mitigating evidence, such as: 1) Phillip McDuffy's testimony regarding Ernest's pleas for help at the probation office just days before the crimes and his dejection at receiving no help; 2) Deborah Turner's testimony regarding Ernest's inability to receive the help he needed as a special needs child in an overcrowded, racially segregated school; and 3) the medical records of Ernest's mother, Jean Ann Patton, regarding her mental illness, and the family genogram showing the rampant occurrence of mental retardation and mental illness within Ernest's family. Counsel's error resulted in prejudice to Ernest, because had these witnesses testified and these items of evidence been presented, there is a reasonable probability that Ernest would have been sentenced to life without parole.

“One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating

evidence.” Ervin v. State, 80 S.W.3d 817, 827 (Mo.2002). “Counsel has a duty to make a reasonable investigation of mitigating evidence or to make a reasonable decision such an investigation is unnecessary.” State v. Nunley, 923 S.W.2d 911,924 (Mo.1996). Despite counsel’s duties, trial counsel failed to investigate and present relevant and available mitigating testimony and evidence, to Ernest’s prejudice. The motion court clearly erred in denying an evidentiary hearing on this issue.

Appellate review is limited to a determination of whether the motion court’s findings and conclusions are clearly erroneous. Rule 29.15(k). A motion court’s actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. State v. Schaal, 806 S.W.2d 659, 667 (Mo.1991). A movant has the burden of proving his claims by a preponderance of the evidence. Rule 29.15(i).

To establish that counsel was ineffective, Ernest must demonstrate that counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances, and that he was prejudiced thereby. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). To show prejudice, Ernest must demonstrate that there is a reasonable probability that, but for counsel’s error, the outcome of the proceeding would have been different. *Id.*, 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

To prove that counsel was ineffective for failing to call a witness, Ernest must establish that (1) the witness could have been located through reasonable investigation; (2) that the witness would have testified if called; and (3) that his testimony would have

provided a viable defense. Bucklew v. State, 38 S.W.3d 395, 398 (Mo.2001). Counsel is presumed to have acted competently and the decision not to call a witness is presumed to be trial strategy. Deck v. State, 68 S.W.3d 418, 425 (Mo.2002). But for trial strategy to be the basis for denying post-conviction relief, the strategy must be reasonable. Wilkes v. State, 82 S.W.3d 925, 930 (Mo.2002). A mere assertion that trial counsel's omission was "trial strategy" is not enough to defeat a claim of ineffective assistance of counsel.

Id.

A motion court need not hold an evidentiary hearing unless (1) the movant cites facts, not conclusions, which, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record; and (3) the matters complained of prejudiced the movant. State v. Ferguson, 20 S.W.3d 485,503 (Mo.2000).

"Evidence is said to be cumulative when it relates to a matter so 'fully and properly proved by other testimony' as to take it out of the area of serious dispute." State v. McCauley, 831 S.W.2d 741, 743 (Mo.App.1992). Evidence is not cumulative if it possesses probative value apart from other evidence. State v. White, 873 S.W.2d 874, 877 (Mo.App.1994).

I. Phillip McDuffy

Ernest alleged in the amended motion that trial counsel should have called Phillip McDuffy (PCR L.F.229-32). McDuffy was one of Ernest's friends and could have been located through reasonable investigation (PCR L.F.229). He was never contacted by trial counsel but would have been ready, willing, and available to testify (PCR L.F.231-32) to the following:

Two days before the crimes, McDuffy was in the probation office, since he was on probation for carrying a concealed weapon (PCR L.F.229-30). Ernest was there, speaking with a female officer and begging her to lock him up because he took too much drugs (PCR L.F.230). The officer instructed Ernest to come back in two weeks, because his probation officer then would be back from vacation (PCR L.F.230).

McDuffy spoke with Ernest that day, and Ernest told him he needed help (PCR L.F.230). Ernest told him “it’s telling me to do things that I should not be doing” (PCR L.F. 230). Ernest told him that he wanted to go to Phoenix House, a rehabilitation center in Boone County, but that he first needed the approval of his probation officer (PCR L.F.230). Ernest admitted that he needed to be locked up before he did “something stupid” (PCR L.F.230).

McDuffy saw Ernest sitting dejected in the parking lot for twenty minutes with his head down (PCR L.F.230). McDuffy knew that Ernest was high on drugs all the time, that Ernest was in his own world, and Ernest had admitted to him in the past that he was having thoughts he should not have (PCR L.F. 230-31). McDuffy also knew, though, that when Ernest was not on drugs, he was a different person and was very calm (PCR L.F. 231).

The motion court denied this claim without a hearing (PCR L.F.447-52). It motion court found that the claim may be procedurally defaulted on the ground that postconviction counsel did not list McDuffy’s address in the amended motion (PCR L.F.448). It stressed that McDuffy was located three years after the trial (PCR L.F.450).

It held that McDuffy's testimony that Ernest wanted drug treatment would have been cumulative to the evidence presented at trial (PCR L.F.449-50).

The motion court clearly erred in ruling that Ernest did not merit an evidentiary hearing on this claim. Although McDuffy's address was not listed under one section of the amended motion, it was listed in another (PCR L.F.214). McDuffy's address was also listed in the motion to reconsider filed by postconviction counsel (PCR L.F.395).

An important factor of the mitigation case was that although Ernest had a horrible drug addiction, he was desperate to get help (PCR Tr.19,31). This was one of the main mitigation themes as set forth by lead counsel at the postconviction hearing (PCR Tr.19,31). Trial counsel presented the testimony of Reverend Dawson to show that several weeks prior to the crimes, Ernest had sought him out and was trying to get treatment for his drug addiction (Tr.II.1071-73). Trial counsel presented the testimony of his parole officer and a worker at a halfway house, that Ernest seemed depressed and had trouble holding jobs (Tr.II.1085,1088,1100-1102). These witnesses also testified, however, that Ernest had not admitted to having a drug problem or did not appear to have a drug problem (Tr.II.1080-81,1088-89,1101,1105,1108).

McDuffy's testimony would not have been cumulative. McCauley, 831 S.W.2d at 743; White, 873 S.W.2d at 877. McDuffy would have been the only defense witness to testify to Ernest's condition just days prior to the crimes (PCR L.F.229-30). The jury would have learned that Ernest not only admitted to having a big drug problem but was desperate to receive help just two days before the crimes (PCR L.F.229-30). Once he did not receive the help, he was completely dejected (PCR L.F.230). Ernest told McDuffy

that day that the drugs were “telling me to do things that I should not be doing” (PCR L.F. 230). McDuffy would have testified that when Ernest was not on drugs, he was a different person and was very calm (PCR L.F. 231).

Ernest alleged that McDuffy could have been located through reasonable investigation and would have been willing, ready, and available to testify at Ernest’s trial (PCR L.F.229,232). Although the motion court alleges that McDuffy was “found” three years after the trial (PCR L.F.450), nothing in the record supports this allegation.

II. Deborah Turner

Ernest alleged in the amended motion that counsel was ineffective for failing to investigate and call Deborah Turner to testify (PCR L.F.199-204). He alleged that if called, Turner would testify as follows:

Turner was a teacher’s aide at Washington Elementary School when Ernest attended that school (PCR L.F.200). She had vivid memories of Ernest and recalled that he was a very quiet and shy child (PCR L.F.200). The schools in Charleston, Missouri were racially segregated at the time, and Washington Elementary was the school for black children (PCR L.F.200). The school was overcrowded, and the students received textbooks that were “hand-me-downs” from the white children’s school (PCR L.F.200). After a year or two at Washington, Ernest transferred to Lincoln Elementary School, which also was segregated (PCR L.F.200). Turner knew of the stark difference in teaching materials between those used with the white children and those for the black children and the overcrowding that occurred at the black school, but not the white (PCR

L.F.201). Turner would testify that Ernest did not get the attention he needed as a special needs child, due to the overcrowding within his school (PCR L.F.201).

In denying this claim without a hearing, the motion court did not specifically address Ernest's claim as to this witness, but lumped her with most of the other witnesses mentioned in the amended motion (PCR L.F.448-52). It held that either Ernest procedurally defaulted on the claim by omitting the witness' address from the amended motion for postconviction relief; or the witness' testimony would have been cumulative to the testimony presented at trial (PCR L.F.448-52). The motion court held that trial counsel sufficiently portrayed Ernest's life through the witnesses called at trial and the timeline presented of the important events in his life (PCR L.F.448-49).

But Ernest did not procedurally default on this claim. He listed Turner's address as 203 Finney, Charleston, Missouri 63834 (PCR L.F.214). He stated that she could have been located through reasonable investigation; that she was willing, ready, and available to testify; and detailed how she would have provided meaningful mitigation for the defense (PCR L.F.199-204). Ernest demonstrated that he was prejudiced as a result of counsel not presenting her testimony (PCR L.F.199-204).

Furthermore, Turner's testimony would not have been cumulative, since it had probative value apart from any other evidence presented at trial. White, 873 S.W.2d at 877. Although the jury heard that Ernest grew up in a shack and that his father was a sharecropper (Tr.II.999,1006,1011-12), poverty does not equate to racial discrimination. Without Turner's testimony, the jury was not aware of the racial prejudice that Ernest faced and how that impacted upon his educational opportunities. The jury should have

known that simply due to the fact that Ernest is African-American, he was forced to attend an all-black, overcrowded school (PCR L.F.200-201). Because of the racial segregation, Ernest did not receive the attention he so badly needed as a special needs student (PCR L.F.200-201).

III. Evidence That Mental Illness and Mental Retardation Were

Rampant in Ernest's Family

Ernest alleged in the amended motion that the jury should have been made aware of the mental illness of his mother (PCR L.F.88). He alleged that this evidence could have been elicited through the testimony of Ernest's brother, Bobby Johnson, Jr., who testified at trial but was not questioned about this topic; and through his mother's records from the Mid-Missouri Health Center (PCR L.F.88).

Those records showed that his mother, Jean Ann, suffered from the symptoms of mental illness for many years, being diagnosed with Depressive Neurosis in March 1974; Inadequate Personality in November 1974; and threatening homicide and attempting suicide in 1974 and 1990 (PCR L.F.88). They show that Jean Ann was admitted into Mid-Missouri Mental Health Center March 1, 1974 complaining of feeling depressed (PCR L.F.88). During that visit, Jean Ann indicated that she had experienced a 'nervous breakdown' five years previous (1969, when Ernest was eight years old), and that she was hospitalized in Cook County Hospital in Chicago, Illinois for four weeks (PCR L.F.88). Ernest was thirteen years old when his mother was hospitalized in March, 1974 for having attempted suicide; he was visiting his mother each summer during his teen years and lived with her the summer of 1974, shortly after her suicide attempt (PCR

L.F.88). Jean Ann had a lengthy history of multiple hospitalizations related to depression and alcohol intoxication (PCR L.F.88).

Ernest also alleged that the jury should have been shown the family genogram, or family tree (PCR L.F.79,264). Ernest acknowledged that the jury heard Dr. Smith's testimony regarding the widespread history of alcohol abuse on both sides of Ernest's family tree (PCR L.F.78). But the genogram also would have shown the jury that at least five members of the family had suffered from either mental illness or mental retardation (PCR L.F.79).

The motion court did not specifically deal with this claim, but considered it within its general holding that the evidence cited in the amended motion would have been cumulative to testimony elicited at trial (PCR L.F.448-52).

The jury did not hear that Ernest's mother was mentally ill, so this testimony cannot possibly be considered cumulative. McCauley, 831 S.W.2d at 743; White, 873 S.W.2d at 877. The jury learned that Jean Ann was an alcoholic and very poor mother (Tr.II.1002-1003,1022-25), but did not know the role that mental illness played. The jury certainly did not know that Ernest, at age thirteen, lived with his mother the summer right after she had attempted to commit suicide (PCR L.F.88). The jury did not know that given Ernest's mother's diagnosis of depression, Ernest was genetically predisposed to depression himself. This evidence would have contradicted Dr. Peters' testimony that Ernest may not have suffered from long-term depression as Dr. Smith had testified (Tr.II.1319-20).

The jury also did not learn of the extent to which mental illness and mental retardation ran in Ernest's family (PCR L.F.264). Since the State alleged that Ernest was not truly mentally retarded, the jury should have learned of the extent to which mental retardation occurred within his family tree. The jury also should have learned of the extent to which mental illness occurred in his family, since it had to consider (1) whether (1) Ernest's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired and (2) whether Ernest was under the influence of extreme mental or emotional disturbance (L.F.209).

IV. Ernest Must Receive an Evidentiary Hearing

The motion court clearly erred in denying this claim without, at the minimum, granting an evidentiary hearing. For each of the witnesses and items of evidence listed, Ernest specifically alleged that (1) the witness or item of evidence could have been located through reasonable investigation; (2) the witness would have testified if called; and (3) that the testimony or evidence would have made a difference in the outcome of the trial (PCR L.F.79,88,199-204,229-32). The address or location of the witness or item of evidence was listed within the amended motion (PCR L.F.88,213-14).

This Court has acknowledged that, "[i]n order to ensure that claims are decided accurately, the rules encourage evidentiary hearings." Wilkes, 82 S.W.3d at 929, *citing* Rule 29.15(h). Since the United States Supreme Court has stalwartly supported the principle that because a death sentence is qualitatively different from any other sentence, there must be a corresponding difference in the need for reliability in the sentencing determination. Woodson v. North Carolina, 96 S.Ct. 2978, 2291 (1976). Ernest's death

sentences cannot be considered reliable when the motion court refused to allow Ernest to present evidence on his valid, properly pled claims for postconviction relief.

Ernest's trial attorneys were ineffective for not investigating and presenting mitigating evidence through readily available witnesses who were willing to testify and records that were easily accessible. The attorneys' failures violated Ernest's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment. U.S. Const., Amends. V, VI, VIII, XIV; Mo. Const., Art. I, §§10, 18(a), 21. This Court must reverse the motion court's holding and remand for an evidentiary hearing.

ARGUMENT VII

The trial court/motion court plainly erred in proceeding with a new penalty phase, or alternatively, in not granting relief in the postconviction case, in violation of §565.040.2 and Ernest's rights to due process and freedom from cruel and unusual punishment, U.S.Const., Amends.V,VIII, XIV; Mo.Const., Art.I, §§10,21, because under §565.040.2, Ernest was entitled to be sentenced to life imprisonment without parole, in that the statute provides this remedy if the death sentence is held to be unconstitutional, as Ernest's death sentences were.

In State v. Johnson, 968 S.W.2d 686, 697-702 (Mo.1998), this Court affirmed Ernest's convictions but found that Ernest had been denied the effective assistance of counsel in sentencing phase. As a result, it vacated Ernest's death sentences and remanded for new penalty phase proceedings. *Id.*

Section 565.040.2, RSMo, provides:

In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be inapplicable, unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for retrial of the punishment.

The death sentences imposed against Ernest in 1995 were unconstitutional, since they were obtained in violation of Ernest's right to the effective assistance of counsel. U.S.Const., Amends.VI,XIV; Mo.Const., Art.I, §18(a); Johnson, 968 S.W.2d at 697-702. The exception set forth within §565.040.2 does not apply to Ernest, since his sentences were not vacated based on an aggravating circumstance. Thus, under the clear language of §565.040.2, the case should have been sent back to the trial court for imposition of sentences of life imprisonment without parole.

The Missouri death penalty statute, §565.030, creates a presumption in favor of life. The jury is never required to assess death. §565.030.4. It may assess a sentence of life without parole even if the aggravating circumstances warrant death and outweigh the mitigating circumstances. §565.030.4(4). So, too, §565.040.2 follows this presumption of life and mandates a sentence of life without parole in the event that this Court finds the defendant's death sentence to be unconstitutional.

Ernest acknowledges that this issue was not raised on direct appeal or in his postconviction motion. He requests that the Court review it for plain error. Rule 30.20. Under this standard of review, Ernest must show "that the trial court's error so substantially violated his rights that manifest injustice or a miscarriage of justice results if the error is not corrected." State v. Cole, 71 S.W.3d 163, 170 (Mo.2002). Sentencing errors rise to the level of manifest injustice. *See, e.g.,* State v. Merrill, 990 S.W.2d 166, 173 (Mo.App.1999) (improperly sentencing defendant as prior and persistent offender was plain error).

Certainly, Ernest has met this burden. If the trial court had abided by the clear language of the statute, it would have vacated Ernest's death sentences and imposed sentences of life without parole.

The trial court/motion court plainly erred in proceeding with a new penalty phase, or alternatively, in not granting relief in the postconviction case, because under §565.040.2, Ernest was entitled to be sentenced to life imprisonment without parole, in that the statute provides this remedy if the death sentence is held to be unconstitutional, as Ernest's death sentences were. This plain error of the trial court/motion court violated §565.040.2 and Ernest's rights to due process and freedom from cruel and unusual punishment, U.S.Const., Amends.V, VIII, XIV; Mo.Const., Art.I, §§10,21.

Ernest Johnson therefore respectfully requests that this Court vacate his death sentences, remand to the trial court, and direct that the trial court impose sentences of life imprisonment without the possibility of probation or parole.

CONCLUSION

Based on Points I, II, III, and IV, Ernest Johnson respectfully requests that this Court remand to the trial court to sentence Ernest to life imprisonment without parole, pursuant to §565.040.2. Alternatively, if this Court finds that §565.040.2 is inapplicable, Ernest requests that the Court remand for new penalty phase proceedings. Based on Point V, Ernest requests that the Court reverse the ruling of the motion court, vacate his death sentences, and order that he be resentenced to life imprisonment without parole, or alternatively, that the Court remand the case for an evidentiary hearing. Based on Point VI, Ernest requests that the Court reverse the ruling of the motion court and remand for an evidentiary hearing. Based on Point VII, Ernest requests that the Court vacate his death sentences and order that he be resentenced to life imprisonment without parole.

Respectfully submitted,

ROSEMARY E. PERCIVAL, #45292
ASSISTANT APPELLATE DEFENDER
Office of the State Public Defender
Western Appellate Division
818 Grand Boulevard, Suite 200
Kansas City, Missouri 64106-1910
Tel: (816) 889-7699
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were delivered to: The Office of the Attorney General, 1530 Rax Court, Second Floor, Jefferson City, MO 65109, on the 1st day of November, 2002.

Rosemary E. Percival

Certificate of Compliance

I, Rosemary E. Percival, hereby certify as follows:

The attached brief complies with the limitations contained in 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 30,175 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

Rosemary E. Percival, #45292
ASSISTANT PUBLIC DEFENDER
Office of the State Public Defender
Western Appellate Division
818 Grand Boulevard, Suite 200
Kansas City, MO 64106-1910
816/889-7699
Counsel for Appellant