

NO. SC87825

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

ERNEST LEE JOHNSON

Appellant.

Appeal from the Circuit Court of Boone County

Honorable Gene Hamilton

REPLY BRIEF FOR APPELLANT

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In this reply brief, appellant addresses only those issues and contentions of the appellee which require response. The failure to re-urge any issue or argument presented in the opening brief is not intended as a waiver of that issue.

REPLY ARGUMENT AND AUTHORITIES

REPLY POINT I

THE TRIAL COURT HAD JURISDICTION TO GRANT MR. TAYLOR'S POST-TRIAL MOTIONS AND FIND THAT HE IS MENTALLY RETARDED, AND THE EVIDENCE OFFERED AT TRIAL REQUIRED THAT IT DO SO.

A. The court's jurisdiction to grant relief.

The state first makes the novel suggestion that the trial court lacked authority to correct the clear error of the jury and to order that Mr. Johnson be sentenced to imprisonment for life rather than to death. This contention relies on the reasoning of *State v. Moss*, 789 S.W.2d 512 (Mo. App. 1990) and its progeny, which hold that in cases involving an insanity defense, the statutory presumption of sanity prevents the trial (or appellate) court from *ever* holding that the conviction must be reversed because the defendant is insane as a matter of law. To the extent that these cases correctly state Missouri law,¹ they are inapposite to the situation here.

¹ This Court has not spoken on the issue.

First, as this Court held in *In Re Competency of Parkus*, 219 S.W.3d 250, 254 n. 6 (Mo. banc 2007), “The state has a clear legal duty not to execute a person who is mentally retarded.” This duty arose in Mr. Johnson’s case as a result of the United State’s Supreme Court decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), holding that the execution of the mentally retarded violates the United States Constitution. There is no corresponding constitutional right to be found not guilty by reason of insanity. *Clark v. Arizona*, 126 S.Ct. 2709, 2722 n. 20 (2006). Moreover, *Atkins* announces no presumption that a defendant is not mentally retarded. Nor does Mo. Rev. Stat. §552.030.6 apply. Mental retardation may be a “mental defect,” but it is not one which “excludes responsibility” as required for the application of the presumption in that statute. If Mr. Johnson is found to be mentally retarded, he will not be exonerated from guilt; he will spend the rest of his life in prison.

Mr. Johnson is entitled to meaningful appellate review by this Court to determine whether his execution would violate the state’s legal duty not to execute the mentally retarded. *Parkus* further noted that “The right to appeal should be liberally construed as appeals are

avored in the law. If doubt exists as to the right of appeal, it should be resolved in favor of that right.” *In Re Competency of Parkus*, 219 S.W.3d 250, 253 (Mo. banc 2007).

Therefore, the trial court was free to direct a verdict in favor of Mr. Johnson on the issue of mental retardation, and this Court must likewise evaluate the evidence to determine whether he has met his burden to prove by a preponderance of the evidence.

B. The evidence requires a finding of mental retardation.

1. Sub-average intellectual functioning.

The first prong of the diagnosis of mental retardation is a finding that the person has significantly sub-average intellectual functioning. This is normally assessed using intelligence tests. In discussing the evidence of sub-average intellectual functioning, the state conveniently de-emphasizes the fact that its expert, Dr. Gerald Heisler², and Mr. Johnson’s expert, Dr. Denis Keyes, obtained IQ test results reflecting

²Dr. Heisler, a psychologist, relied on test results obtained by a “psychometrist” whom he directed to administer the WAIS-III to Mr. Johnson.

identical full-scale scores of 67, which is in the area of presumed sub-average intellectual functioning. The tests were given over six months apart in preparation for the trial in this matter.

The state notes that this Court expressed some reservations about the qualifications and testimony of Dr. Keyes in *Goodwin v. State*, 191 S.W.3d 20 (Mo. banc 2006). *Goodwin* was decided on the eve of Mr. Johnson's trial. Mr. Johnson then filed a motion for continuance to obtain an additional expert in light of this Court's reservations. Denying that motion, the trial court here specifically found that *Goodwin* did not establish that Dr. Keyes was not a qualified expert. Trial Tr. Vol. I, pp. 640-642. Moreover, since *Goodwin*, this Court has accepted the testimony of Dr. Keyes in *In Re Competency of Parkus*, 219 S.W.3d 250 (Mo. banc 2007).

The only trial witness who actually administered an IQ test to Mr. Johnson was Dr. Keyes. The state chose not to present the testimony of any person who had administered intelligence tests to Mr. Johnson. Both Dr. Keyes and Dr. Robert Smith, another psychologist who testified for the defense, testified that "malingered" identical test

results was virtually impossible.³ Dr. Keyes also explained that the pattern of Mr. Johnson's responses on the WAIS, as well as his responses to the Test of Memory Malinger, indicated that he was not malingering. Trial Tr. Vol. II, p. 1538-1539, Vol. III, p. 1574.⁴ While the defense witnesses acknowledged that they were aware of other test results, they indicated that the two most recent tests were more reliable than earlier results. The state presented no evidence concerning the reliability of earlier testing. No reasonable juror could believe that Mr. Johnson does not have significantly sub-average intellectual functioning.

2. Deficiencies in at least two categories of adaptive behavior.

The second prong of the mental retardation diagnosis is a finding of deficits in adaptive behavior in at least two of eight enumerated

³ Dr. Smith did not base his conclusion entirely on the test administered by Dr. Keyes; he also considered other testing, including that of Dr. Heisler.

⁴ Dr. Keyes's doctoral dissertation concerned the topic of malingering on IQ tests. Trial Tr. Vol. III, p. 1574.

areas. Dr. Keyes testified that, based on his administration of two assessment instruments, Mr. Johnson was deficient in all eight areas of adaptive functioning. Trial Tr. Vol. III, pp. 1621-1622. He also testified that standardized assessments of adaptive skills are required by both the American Psychological Association and the AAMR for a valid diagnosis of mental retardation. Trial Tr. Vol. III, p. 1611. Although he did not perform standardized testing, Dr. Robert Smith testified that he had identified characteristics of Mr. Johnson indicating that he is deficient in at least four of the relevant areas: communication, social relationships, home living, and functional academics. Trial Tr. Vol. II, pp. 1489-91.

The state presented no evidence of any standardized assessment of Mr. Johnson's adaptive behavior. Nor did the state present any expert opinion about Mr. Johnson's adaptive skills. In its brief, without articulating any standards for determining whether Mr. Johnson's performance in a particular area constitutes a deficiency in adaptive behavior, the State argues from anecdotal evidence that Mr. Johnson is not deficient in each of the eight areas. The fallacy in this type of analysis is evident from the definition itself, which requires deficits in

only two of eight enumerated categories of adaptive behaviors. Clearly, a person with mental retardation may have adequate skills in some areas. Thus, clinical judgment is needed in order to determine whether a person is mentally retarded:

Although the Supreme Court was well aware of the uncertainties at the margins of any mental disorder diagnosis, including the diagnosis of mental retardation, it also must have assumed that the inevitable “disagreement[s] . . . in determining which offenders are in fact retarded” can be resolved fairly and with reasonable accuracy based on scientific and clinical knowledge. At the very least, the Court must have assumed that expert disagreements would rest on articulable differences in scientific or clinical judgment, rather than on hidden disagreements about whether the offender deserves a death sentence. In this sense, the very soundness of the *Atkins* decision, and the integrity of *Atkins* adjudications, turns on the effort made by the states to implement it in a scientifically satisfactory manner.

Richard J. Bonnie & Katherine Gustafson, *The Challenge Of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications Of Mental Retardation in Death Penalty Cases*, 41 U. Rich. L. Rev. 811, 815-816 (2007), citing *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

The state's brief, which attempts to undermine the expert assessments of Mr. Johnson's adaptive skills by showing that he can perform particular tasks, is insufficient to discredit the clinical assessment of experts who have specialized knowledge concerning the types of limitations which indicate mental retardation. Some of the state's characterizations, however, deserve particular attention because they place undue emphasis on certain evidence to the exclusion of other evidence.

The State first suggests that insufficient evidence was presented of Mr. Johnson's deficiency in the area of *communication*. The State apparently equates this area with Mr. Johnson's ability to talk, which is not disputed. A person can be capable of making his basic needs known and still be deficient in communication, however, and both Dr. Keyes

and Dr. Smith testified that Mr. Johnson had difficulty in communicating and dealing with abstract concepts.

Communication, of course, is a two-way process involving both expression and comprehension. The videotaped interview between Mr. Johnson and Dr. Heisler, cited by the state as evidence that Mr. Johnson could communicate adequately, demonstrated that he was unable to learn a simple magic trick despite repeated coaching from Dr. Heisler. His further deficiencies in understanding were illustrated by his telling Dr. Heisler that he enjoyed watching “The Young and the Restless” on television, and thought that Victor, the villain of the show, was a “good guy.”

The common deficiency in communications skills in persons with mental retardation was cited in *Atkins* as a reason why mentally retarded persons should not be executed:

[S]ome characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards. . . . Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their

demeanor may create an unwarranted impression of lack of remorse for their crimes. . . . Mentally retarded defendants in the aggregate face a special risk of wrongful execution.

Atkins v. Virginia, 536 U.S. 304, 317, 320-321 (2002).

It is these aspects of communication skill, rather than the simple ability to carry on a routine or casual conversation, that are significant for the determination of mental retardation.

The state's analysis of Mr. Johnson's abilities in *home living* ignores much evidence which formed the basis of the diagnosis made by Drs. Smith and Keyes. At the time of his arrest, Mr. Johnson lived with his girlfriend, who paid the rent. At an earlier time, he lived with another woman, Gloria Lisa Johnson, who testified that he was unable to plan or to operate her washing machine. Some evidence was presented that, with help, Mr. Johnson was able to do his laundry at a halfway house, but that is not particularly relevant to independent home living. It is uncontested that Mr. Johnson never learned to drive, a basic living skill. Trial Tr. Vol. II, pp. 1114-1135.

In analyzing Mr. Johnson's abilities in *social skills* and *community use*, the State implicitly suggests that because Mr. Johnson had *some*

social skills and *sometimes* accessed community services, he could not be deficient in this area. Again, the definition of mental retardation does not require that adaptive behavior be *absent*, only that it be deficient. It is also important to remember that while there are many reasons for maladaptive behavior, when such deficiencies are coupled with evidence of sub-average intellectual functioning, they validate a diagnosis of mental retardation.

Rev. C. W. Dawson, one of the persons to whom Mr. Johnson turned for help, recognized his low intellectual functioning. Trial Tr. Vol. III, p. 1724. So did his counselor at the halfway house, Thomas Powell. Mr. Powell recalled that Mr. Johnson needed help with spelling his destination when he signed out of the halfway house, and could not keep a job labeling boxes because of his difficulty in reading. Trial Tr. Vol. II, pp. 1200-1203. Dr. Keyes also testified that he based his assessment of Mr. Johnson's social skills on certain responses made by Mr. Johnson's siblings to the Vineland Adaptive Behavior Scales. The state notes that Mr. Johnson's brother and sister did not testify to those particular facts at trial. However, an expert may base his opinion on information he receives outside of trial if such information is of the type

reasonably relied upon by experts. *State v. Boyd*, 143 S.W.3d 36, 46 (Mo. App. 2006); *State v. Hendrix*, 883 S.W.2d 935, 940 (Mo. App. 1994). Mr. Johnson was not required to have his siblings testify before the jury to each fact obtained in an expert interview. Moreover, the trial testimony of Mr. Johnson's brother concerning Mr. Johnson's clinging to his grandmother, as well as that of his sister that his grandmother treated him as a "special" child, supports Dr. Keyes's findings. Trial Tr. Vol. II, pp. 1008, 1042.

The state points out that Dr. Keyes did not consider Mr. Johnson's adaptation to prison life as a part of his adaptive skills assessment. He testified that the adaptive skills criteria focus on life in normal society, rather than the specialized environment of prison. Trial Tr. Vol. V, pp. 1650, 1658. Other authorities agree that adaptive skills should not be measured by prison adaptation, but rather by obtaining information about the defendant's adaptive skills when he was not incarcerated:

[T]he administration of measures of adaptive behavior to a defendant who is incarcerated poses significant problems.

Many of the skills in the operational definition of adaptive behavior are not relevant in prisons, such as self-direction,

community resources, and leisure skills. A mentally retarded person is also likely to show stronger adaptive behavior in the structured environment of a correctional facility than in society, thus possibly inflating scores that would have been indicative of mental retardation in the community environment. Unfortunately, there will usually be no adaptive behavior test on record prior to the offense. For this reason, it is important for experts conducting Atkins evaluations to obtain information relating to the defendant's adaptive skills before the offense occurred and prior to incarceration to augment whatever recent information is provided by informants.

Richard J. Bonnie & Katherine Gustafson, *The Challenge Of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications Of Mental Retardation in Death Penalty Cases*, 41 U. Rich. L. Rev. 811, 848-849 (2007), citing Melissa Piaseki, handout, Mental Retardation in Capital Cases, Managing the Capital Case in North Carolina Conference, The University of North Carolina, School of Government and the National

Judicial College (Mar.-Apr. 2006) available at [http://www.judges.unc.edu/200603CapitalCases/Bell%20-%20Pretrial%20Issues%20\(Mental%20Retardation\).doc](http://www.judges.unc.edu/200603CapitalCases/Bell%20-%20Pretrial%20Issues%20(Mental%20Retardation).doc); Kay B. Stevens & J. Randall Price, *Adaptive Behavior, Mental Retardation, and the Death Penalty*, 6 J. FORENSIC PSYCHOL. PRAC. 1, 19 (2006); Stanley L. Brodsky & Virginia A. Galloway, *Ethical and Professional Demands for Forensic Mental Health Professionals in the Post-Atkins Era*, 13 J. ETHICS & BEHAVIOR 3, 7 (2003).

It should be noted, moreover, that Mr. Johnson's adaptation to prison life does not reveal a particularly high level of functioning. He has been held in protective custody for extensive periods of time, which limits his need or ability to fend for himself. Trial Tr. Vol. II, p. 1039. He is escorted to and from work each day. His prison jobs, such as stacking trays or picking up trash, are at the lowest level of work available to the prison population. His minor conduct violations reflect a pattern of what Joseph Brandenburg, an expert in prison conditions, described as "stupid" disciplinary violations. Trial Tr. Vol. II, pp. 1143, 1145.

3. Onset before age 18.

The final part of the definition of mental retardation is that the condition have been recognized before the defendant has reached age 18. Although Mr. Johnson was not diagnosed as mentally retarded before he reached age 18, there was ample evidence that he has suffered from the condition of mental retardation for all of his life. Testimony from his brother, sister and a family friend indicated that he was seen by all as a slow child, having difficulty learning. Trial Tr. Vol. II, pp. 1039-1043 (Testimony of Bobby Johnson, Jr.); Trial Tr. Vol. II, p. 1008 (Testimony of Beverly Johnson); Trial Tr. Vol. II, pp. 1263-1265 (Testimony of Ricky Frazier). His school records indicated that he was placed in special education classes in elementary school, and that an IQ test at age 12 showed his IQ to be 66. Defendant's Ex. E; Trial Tr. Vol. II, p. 1237. His teachers all testified that he had difficulty learning subjects normally mastered by other students his age. Trial Tr. Vol. II, pp. 1225-1226 (Testimony of Robin Seabaugh); Trial Tr. Vol. II, pp. 1229-1241 (Testimony of Steven Mason); Defendant's Ex. C (Deposition of Deborah Turner).

A finding of mental retardation does not require a *diagnosis* before age 18. Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them From Execution*, 30 J. LEGIS. 77, 99-101 (2003) As one article notes, “Such a requirement would be unconstitutional because it would amount to discrimination against people whose need for special education was overlooked and who did not have access to adequate clinical or social services as a child.” Richard J. Bonnie & Katherine Gustafson, *The Challenge Of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications Of Mental Retardation in Death Penalty Cases*, 41 U. Rich. L. Rev. 811, 855 (2007).

Finally, the State argues that there is no credible evidence that Mr. Johnson is mentally retarded. The state points first to a previous evaluation by a psychiatrist, Dr. Peters, whose testimony was not offered at trial, but was mentioned in cross-examination by the state. Trial Tr. Vol. II, p. 1310. Not only did the state not offer this expert for cross-examination by the defense, Mr. Johnson offered testimony from another psychiatrist, Dr. Sam Parwatikar, that psychiatrists, including

specifically Dr. Peters, are not qualified to diagnose mental illness.⁵

Trial Tr. Vol. II, p. 1300.

The state next asserts that Dr. Smith's credibility was "severely diminished" because he did not evaluate Mr. Johnson for mental retardation. The state asserts that Dr. Smith relied "solely on the work performed by Dr. Keyes." State's Brief, pp. 41-42. Dr. Smith's testimony reveals that he reviewed and relied on far more than the findings of Dr. Keyes in making his determination that Mr. Johnson was mentally retarded. Specifically, his testimony reveals that he had previously thought that Mr. Johnson was in the borderline range, and that he had changed his view because he believed that the concurrence of the IQ testing results of Dr. Keyes and Dr. Heisler (the state's expert) indicated that their scores were the most accurate measure of Mr. Johnson's intellectual functioning. Trial Tr. Vol. II, pp. 1381, 1427. Dr. Smith testified, *based on his own observation and interviews*, that Mr. Johnson was deficient in at least four of the relevant areas of adaptive functioning. Trial Tr. Vol. II, pp. 1458-1471.

⁵ Dr. Parwatikar further testified that his own findings were not inconsistent with mental retardation. Trial Tr. Vol. II, p. 1310.

Despite the attempts of the state's brief to discredit Dr. Keyes's ability to diagnose mental retardation, he has been found to be qualified to do so both in Missouri and elsewhere. As noted earlier, this Court recently held that the evidence of mental retardation presented in the case of Steven Parkus, which included the testimony of Dr. Keyes, was sufficient to uphold the decision of the trial judge there that Mr. Parkus is mentally retarded. *In Re Competency of Parkus*, 219 S.W.3d 250, 255 (Mo. banc 2007). Dr. Keyes was cited as an authority on mental retardation in *Atkins* itself. *Atkins v. Virginia*, 536 U.S. 304, 316 n. 20 (2002). He has also been cited as an authority on mental retardation in *State v. Rauch*, 118 S.W.3d 263, 270 (Mo. App. 2003); and *Nixon v. Singletary*, 715 So.2d 618, 628 (Fla. 2000), *rev'd on oth. grnds. sub nom. Florida v. Nixon*, 543 U.S. 175 (2004). Dr. Keyes's testimony also supported the unpublished, unappealed decision of the motion court in *Alis Ben Johns v. State* that Mr. Johns is mentally retarded. See *State ex rel. Johns v. Kays*, 181 S.W.3d 565 (Mo. banc 2006).

The state also suggests that Dr. Keyes's findings about the areas of communication and self-direction were largely based on Mr. Johnson's inability to find or hold a job. Of course, a lack of goal-

directed behavior such as motivation to work is itself a maladaptive behavior which is consistent with mental retardation. Moreover, as discussed earlier and in the opening brief, there was evidence concerning his ability to communicate which was unrelated to his ability to work.

The state further suggests that Mr. Johnson's family testified to new material that they had not mentioned in previous testimony, and asserts that this new evidence should be discounted because of the family's incentive to exaggerate maladaptive behavior. Of course, if evidence from people who are related to and know the defendant is disregarded, it is highly unlikely that *anyone* would be diagnosed as mentally retarded. And it is unquestioned that Mr. Johnson had not been evaluated for mental retardation before this trial, so it is not surprising that information specific to that diagnosis was not elicited previously. The state does not suggest that the new evidence presented by Mr. Johnson's family contradicts their earlier testimony. Dr. Smith testified that all of the data he had reviewed indicated that Mr. Johnson had a very low IQ and definite intellectual limits. Trial Tr. Vol. II, p. 1380. The testimony of Mr. Johnson's family and friends is

substantially corroborated by the objective evidence available, as well as by the observations of other people who had more than casual contact with Mr. Johnson. And, as Dr. Keyes explained, mentally retarded persons frequently are able to hide their deficiency from those who do not have regular contact with them. This becomes habitual because they are ashamed of their condition and do not want to admit their limitations. Trial Tr. Vol. V, pp. 1695-1699.

In addition to the testimony of his family, Mr. Johnson presented testimony from an expert on prison conditions and adjustment, school records, and testimony from teachers, a childhood friend, a former girlfriend, a minister and a halfway house counselor. All of this evidence clearly attests to his low intellectual functioning and maladaptive behavior, and corroborates the testimony of his family.⁶

⁶ See, testimony of Deborah Turner (Defendant's Ex. C), Robin Seabaugh (Trial Tr. Vol. II, pp. 1217-1237), Ricky Frazier (Trial Tr. Vol. II, pp.1263-1266), Gloria Lisa Johnson (Trial Tr. Vol. II, pp. 1114-1125), Thomas Powell (Trial Tr. Vol. II, pp. 1195-1214); and Rev. C. W. Dawson (Trial Tr. Vol. III, pp. 1723-1725).

As noted earlier, the state presented no direct evidence that Mr. Johnson was not mentally retarded. Thus, although previous opinions were referred to in direct and cross-examination of defense witnesses, the credibility of those witnesses was not fully tested before the jury. For the purpose of this Point, Mr. Johnson agrees that he has the burden of both production and proof by a preponderance of the evidence. However, when the only evidence, presented in open court from a wide variety of sources, supports the diagnosis of mental retardation, Mr. Johnson has met that burden. This Court should hold that Mr. Johnson has demonstrated that he is mentally retarded, and should vacate his sentence and death and enter a sentence of life imprisonment without eligibility for probation or parole.

REPLY POINT II

MR. JOHNSON WAS ENTITLED TO A DIRECTED VERDICT OF LIFE IMPRISONMENT.

The state first argues that the trial court was without authority to determine the evidence in aggravation did not outweigh the evidence in mitigation. Under Missouri law and the instructions to the jury, Mr.

Johnson could not be sentenced to death if the jury found that the evidence in mitigation outweighed the evidence in aggravation. Mo. Rev. Stat. §565.030.4(3). Mr. Johnson's right to due process of law under the United States Constitution, Amend. XIV and the Missouri Constitution, Art. 1, §10 requires that there be an adequate opportunity for appellate review of the jury's finding on this issue. See, e.g. *Ivory v. State*, 211 S.W.3d 185, 187 (Mo. App. 2007); *Edwards v. State*, 200 S.W.3d 500, 513 (Mo. banc 2006). The right of a criminal defendant to review of factual findings by the jury is guaranteed by *Jackson v. Virginia*, 433 U.S. 307 (1979). Thus, if the trial court—or this Court—agrees that no reasonable juror could find that the evidence presented in aggravation here was not outweighed by the evidence in mitigation, either court has authority to say so.

Mr. Johnson relies on his opening brief for his argument as to why the standard for this Court to vacate his death sentence and impose a sentence of life has been met here.

REPLY POINT III

THE BURDEN OF PROOF SHOULD BE ON THE STATE TO SHOW LACK OF MENTAL RETARDATION.

At the outset, it should be noted that while the state's caption for its response to this Point indicates that the issue should be reviewed for plain error only, no authority is suggested for that proposition. The issue was raised in the trial court at every available opportunity⁷, and plenary, *de novo* review is appropriate.

The state first cites Mo. Rev. Stat. §535.030.4(1) as placing the burden of proof on Mr. Johnson. Of course, since Mr. Johnson's offenses were committed prior to the effective date of that statute, the statute does not apply to him.

The State argues that mental retardation decreases the punishment, and therefore the burden should be on the defense to

⁷In addition to objecting to the instructions, Mr. Johnson also filed a pretrial motion seeking to have the court impose the proper burden of proof. The motion was denied. L.F. Vol. II, p. 211, 237. Mr. Johnson also filed an unsuccessful petition for a writ of mandamus in this Court. Cause No. SC866636.

establish it. However, this argument ignores the constitutional imperative not to execute the mentally retarded which this Court expressly recognized in *In Re Competency of Parkus*, 219 S.W.3d 250, 254 n. 6 (Mo. banc 2007). If the state has a legal duty not to execute the mentally retarded, then the burden should be on the state to show that it is complying with this duty.

Mr. Johnson acknowledges that cases from other jurisdictions have held adversely to him on this issue. There is no controlling authority, however, and this Court must review the issue on its merits. As explained in the opening brief, the conclusion that the state must prove beyond a reasonable doubt that Mr. Johnson is not mentally retarded is required by *Atkins v. Virginia*, 536 U.S. 304 (2002); and *Ring v. Arizona*, 536 U.S. 584 (2002).

REPLY POINT IV

THE TRIAL COURT ERRED IN EXCUSING PROSPECTIVE JURORS WITH SCRUPLES ABOUT THE DEATH PENALTY.

Mr. Johnson relies on his opening brief on this issue, but needs to discuss the application of the recent U.S. Supreme Court case of *Uttecht v. Brown*, 127 S.Ct. 2218 (2007), decided after his opening brief was filed.

Brown reversed a Ninth Circuit decision granting a defendant a new penalty phase because a juror was improperly excused for cause after voicing scruples about the death penalty. In a 5-4 decision, the Court held that in assessing the propriety of such challenges, the reviewing court must give great deference to the decision of the trial court, which has the opportunity to assess the demeanor of the prospective juror. The Court went on to hold that the Ninth Circuit had not afforded the proper deference.

Uttecht v. Brown, 127 S.Ct. 2218 (2007), describes in some detail the process used by the Washington trial court in conducting the jury selection. The Court noted that the jury selection process took two

weeks, of which eleven days were devoted to death qualification. *Id. at* 2225. The defense and prosecution alternated in questioning the prospective jurors first. *Id. at* 2226.

Eighteen prospective jurors were challenged by the defense, and eleven of those challenges were sustained. Twelve challenges were made by the state, but only two were sustained over defense objection. *Uttecht v. Brown*, 127 S.Ct. 2218, 2225 (2007). Clearly, then, the court did not exhibit bias toward the state when ruling on challenges. Further, “When issuing its decisions [on challenges for cause] the court gave careful and measured explanations.” *Id. at* 2225.

In Mr. Johnson’s case, as explained more fully in the opening brief, the prosecutor had a substantial advantage over the Washington prosecutor in that he went first in questioning each prospective juror. The prosecutor challenged 22 prospective jurors, including some who were clearly unqualified because they were biased in favor of the death penalty. The defense objected to five of these challenges, and made none of their own. Of the five challenges to which objections were made, three were sustained, and two were overruled. The entire jury selection process took two days.

Unlike the situation in *Uttecht v. Brown*, 127 S.Ct. 2218 (2007) , very little explanation was given by the trial judge in Mr. Johnson's trial for his decisions, and the questioning of the prospective jurors was clearly much less extensive than that in *Brown*. In addition, the lawyers in *Brown* had the benefit of the prospective jurors' responses to a questionnaire which included questions about their views on the death penalty. *Uttecht v. Brown*, 127 S.Ct. 2218, 2226 (2007). A further distinction is found in the fact that the challenge to the prospective juror in *Brown* was not objected to by the defense. *Id.* at 2230.

Prospective jurors Green, Leiter, and Corcoran, on the other hand, were the subject of defense arguments as to why they were not subject to challenge for cause. Trial Tr. Vol. I, pp. 439-440 (Green); 446 (Leiter); 623 (Corcoran).

Uttecht v. Brown, 127 S.Ct. 2218 (2007), does not permit this Court to abdicate its responsibility to review the trial court's decision concerning these prospective jurors. That review should take into consideration the fact that the defense unsuccessfully moved the trial court, prior to trial, to have the jury selection videotaped to facilitate review of the demeanor of the prospective jurors, L.F. Vol. I, p. 144.

Thus, Mr. Johnson attempted to obtain a better record for this Court. This Court should also consider the advantage of the prosecutor in going first every time, which could have been prevented by granting Mr. Johnson's pretrial motion to allow the defense to go first. L.F. Vol. I, p. 91. Finally, this Court should consider the fact that the trial court did not give extensive explanations as to the reasons for his decisions.

Based on such an analysis, and for the reasons discussed in his opening brief, Mr. Johnson is entitled to a new penalty phase trial.

REPLY POINT X

THE METHOD OF LETHAL INJECTION NOW PROMULGATED BY THE STATE OF MISSOURI CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Since the filing of the opening brief in this matter, the Eighth Circuit Court of Appeals has reversed the decision of the federal district court for the Northern District of Missouri, and has found the protocol produced by the State of Missouri in connection with the case of *Taylor v. Crawford* to comport with the United States Constitution. *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007). The mandate in that case has

not yet issued, but rehearing has been denied. More recently, in *Nooner v. Norris*, 2007 WL 1964649 (8th Cir. July 9, 2007), the Eighth Circuit vacated a stay of execution granted to petitioner Nooner on the ground that he had not litigated the issue of whether the state's execution method as soon as such a challenge was available to him. In light of this decision, Mr. Johnson now makes his particular challenge to the most recent method of execution promulgated by the Missouri Department of Corrections.

Mr. Johnson filed his motion challenging the state's method of execution prior to trial, and it was overruled as premature. Although *Taylor v. Crawford* holds that the state's *current* protocol (which was adopted after Mr. Johnson's motion was filed but prior to his trial) is constitutional, that opinion leaves open the question of how the qualifications of the members of the execution team will be monitored.

Specifically, there is a grave risk that Mr. Johnson will experience severe pain if the lethal injection process is not performed properly. Therefore, the Constitution requires that executions by lethal injection be overseen by personnel with qualifications and training sufficient to

ensure that the condemned inmate is, and remains, fully anesthetized during injection of the second and third drugs in the protocol.

The Missouri Department of Corrections has a well-documented history of employing incompetent and unqualified personnel to oversee this crucial element of executions by lethal injection. Accordingly, under the current lethal injection protocol, there exists a substantial likelihood that the personnel charged with carrying out executions are unqualified or otherwise unfit to do so.

Since Missouri law currently prevents Mr. Johnson or his attorneys from determining the identity of the persons who will carry out the execution, the Cruel and Unusual Punishment Clause of U.S. Const. Amend. VIII requires that this Court remand Mr. Johnson's case to the trial court for a prompt determination as to the qualifications and training of the persons who will execute him. Alternatively, this Court could fix a time at which a condemned inmate must raise any challenge to the method of execution.

CONCLUSION

For the foregoing reasons, appellant prays the court:

a) For the reasons discussed in Points I, II, VII and VIII of the opening brief and the corresponding reply points, to vacate his sentences of death and direct that he be resentenced to life imprisonment in the Missouri Department of Corrections without eligibility for probation or parole; or, in the alternative,

b) For the reasons discussed in Points III-VI of the opening brief and the corresponding reply points, to vacate his sentences of death and remand for a new penalty phase proceeding; or, in the alternative,

c) For the reasons discussed in Point X of the opening brief and the corresponding reply point, either to remand for a hearing on Missouri's execution method or to fix a time when a death-sentenced person must raise the issue of cruel and unusual methods of execution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the limitations contained in Sup. Ct. R. 84.06(b). It contains 6,439 words.

The disk submitted with this brief has been scanned for viruses and is virus-free.

ELIZABETH UNGER CARLYLE

I hereby certify that a copy of the foregoing brief was served upon Evan Buchheim, Asst. Atty. Gen., Attorney for Respondent, at P.O. Box 899, Jefferson City, MO 65102, by U.S. Mail on August 13, 2007.

Elizabeth Unger Carlyle