

Sup. Ct. # 84502

**IN THE
SUPREME COURT OF MISSOURI**

ERNEST LEE JOHNSON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal to the Missouri Supreme Court
from the Circuit Court of Boone County, Missouri,
13th Judicial Circuit, Division I
The Honorable Gene Hamilton, Judge

APPELLANT'S REPLY BRIEF

ROSEMARY E. PERCIVAL, #45292
Assistant Public Defender
Office of the State Public Defender
Capital Litigation Division
818 Grand Boulevard, Suite 200
Kansas City, Missouri 64106
Tel: (816)889-7699
Fax: (816)889-2088

Counsel for Appellant

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JURISDICTIONAL STATEMENT

Appellant incorporates the Jurisdictional Statement from page 9 of his Opening Brief.

STATEMENT OF FACTS

Appellant incorporates the Statement of Facts from pages 10-37 of his Opening Brief.

ARGUMENT I¹

The trial attorneys' failure to present the testimony of Dr. Parwatikar was not a reasonable trial strategy decision made after thorough investigation, since it was made without talking to Dr. Parwatikar or even reading his findings. Instead, it was based solely on reading Dr. Parwatikar's prior testimony at a postconviction hearing and on one conversation with postconviction counsel by one of the trial attorneys. Contrary to the State's assertions, Dr. Parwatikar's testimony was not presented to the jury through the testimony of Dr. Cowan and Dr. Smith. Neither of those experts reviewed Dr. Parwatikar's findings, and neither discussed Ernest's state of mind at the time of the crimes, or his cocaine intoxication delirium. Dr. Parwatikar's testimony would have greatly helped, not hindered, Ernest's penalty stage strategy.

The State urges this Court to believe that defense counsels' failure to present the testimony of Dr. Parwatikar was the result of numerous conversations with postconviction counsel and a thorough investigation (Resp.27-38). This simply is not true. Lead counsel, Teoffice Cooper, had one conversation with

¹ Ernest maintains each of the seven arguments presented in his Opening Brief. Only those arguments to which he finds it necessary to reply are contained herein. All arguments are incorporated by reference.

postconviction counsel, Loyce Hamilton, regarding Dr. Parwatikar (PCR Tr.33,37). This fact is made crystal clear by Cooper’s testimony on cross-examination at the second postconviction evidentiary hearing: “And as I indicated on direct, I had a conversation with [Hamilton] about Dr. Parwatikar and about Dr. Smith. And as a result of **that conversation**, I hired Dr. Smith” (PCR Tr.33; *see also* PCR Tr.37) (emphasis added).²

Neither Cooper nor co-counsel Delores Berman bothered to speak with Dr. Parwatikar or even look at his report (PCR Tr.15,18,33,37-38,46-47). The “decision” not to call Dr. Parwatikar was based solely on what another attorney – postconviction counsel – elicited at the first postconviction hearing and what postconviction counsel supposedly relayed to Cooper in one conversation (PCR Tr.33). Speaking with postconviction counsel and looking at the testimony elicited by postconviction counsel might give defense counsel insight into postconviction counsel’s take on this witness. But reasonably competent attorneys would not have based their case on another attorney’s work without thoroughly

² Postconviction counsel denied that she ever told Cooper not to call Dr. Parwatikar (PCR Tr.68). She testified that she felt Dr. Parwatikar’s testimony was vital to Ernest’s defense (PCR Tr.64-65). Postconviction counsel added that any conversation with Cooper about the case would have been a very casual conversation by the office copying machine (PCR Tr.66-68). She testified that she never spoke with co-counsel Delores Berman about Dr. Parwatikar (PCR Tr.68).

researching that work; reasonably competent trial attorneys would have conducted their own investigation – spoken with Dr. Parwatikar, read his reports, examined his credentials – and formed their own conclusions. By failing to speak with Dr. Parwatikar or read his report, Cooper and Berman did not know if he could offer further information that he did not provide at the initial postconviction hearing.

The State also urges this Court to believe that Dr. Smith incorporated Dr. Parwatikar’s findings into his testimony (Resp.29-30). But while there may be some slight overlap in the testimony of the two witnesses, Dr. Smith fell far short of what Dr. Parwatikar could have testified to. Notably, when Dr. Smith tried to testify regarding Ernest’s state of mind at the time of the crimes, the State objected on the ground that Dr. Smith lacked the expertise to make that finding, and the court sustained the objection (Tr.II.1257). Because Dr. Parwatikar did not testify, no evidence was adduced at trial that Ernest suffered from the mental disorder of cocaine intoxication delirium at the time of the incident. Nothing within Dr. Smith’s testimony explained why Ernest snapped that day or why the crimes were so frenzied and bizarre. Dr. Smith failed to differentiate between cocaine substance dependence and cocaine intoxication delirium, which are two separate diagnoses (Par.Depo.39-40).

Dr. Smith was questioned about the materials that he read and relied on in forming his conclusions (Tr.II.1205-1206). Dr. Smith listed Dr. Cowan and Dr. Bernard, and a number of other sources, but nor Dr. Parwatikar (Tr.II.1208-1209,

1225-27, 1282). If Dr. Smith did not even review Dr. Parwatikar's findings, he could not have incorporated them into his testimony.

Berman acknowledged that Drs. Cowan and Smith covered some of the same testimony as Dr. Parwatikar, but not all of it (PCR Tr.60). Berman testified that, "what I recall is that [Dr. Cowan and Dr. Smith] incorporated [into their testimony] information they had seen from other reports, as well as witnesses that they had personally interviewed" (PCR Tr.61). But since Dr. Smith did not review Dr. Parwatikar's reports, he could not have incorporated that information into his testimony.

Although Berman was the attorney in charge of Dr. Smith's testimony, she did not review Dr. Parwatikar's report or speak with him, or speak with Hamilton about what Dr. Parwatikar could offer (PCR Tr.46-48). Berman would have been an integral part of deciding whether Dr. Parwatikar should be called or what should be elicited from Dr. Smith. Yet without speaking with Dr. Parwatikar or reading his report or speaking with Hamilton about Dr. Parwatikar, her "decision" not to call Dr. Parwatikar cannot be considered reasonable.

The State argues that counsel made a reasonable decision not to call Dr. Parwatikar, because his testimony would have focused the jury's attention on the gory details of the crime (PCR Tr.28-29). But the gruesome injuries were before the jury in minute detail, as the State produced photograph upon photograph of the injuries, elicited the gory details from various witnesses, and discussed them in closing arguments. Dr. Parwatikar's testimony would have helped to explain what

drove Ernest to commit the crimes in the bizarre manner he did. Rather than hiding from the facts, his testimony would have explained them and helped to lessen their sting.

The State argues that the jury would not have believed Dr. Parwatikar's account that the crimes were bizarre or that the crime scene was in disarray (Resp.30-31). The State argues that the crimes were committed methodically and were not bizarre (Resp.31-32). But the victims were not methodically shot execution style. They were killed with weapons – a hammer and screwdriver – that were grabbed at the scene (Tr.II.910-11). Rather than methodical, the crimes were frantic and frenzied. Fred Jones was shot once in the face from not very close (Tr.II.948); he had a broken finger, as if it had been smashed in the beer cooler's door (Tr.II.951); and he had at least eight blows to his head from a hammer, and then another two from the claw end of the hammer (Tr.II.950). Mary Bratcher had ten stab wounds to her left hand from a flat head screwdriver (Tr.II.957-58), and was struck at least fifteen times in the head with a hammer, with some of those injuries being from the claw end of the hammer (Tr.II.955-58). Mable Scruggs was struck at least seven times in the head with a hammer (Tr.II.961-62).

Ernest argued that Dr. Parwatikar's testimony would have helped to show that he would not be a danger in prison, because he would not have access to drugs such as he ingested on the day of the crimes (App.64). The State counters that since drugs are accessible in prison, Ernest could in fact have cocaine intoxication

delirium in prison (Resp.32-33). But, even if some drugs are somehow accessible by some people in prison, it is ludicrous to think that drugs are so readily available in prison that an inmate could acquire and ingest well more than 12 hits of cocaine in any given day, so as to have cocaine intoxication delirium.

This Court must grant Ernest a new trial.

ARGUMENT II

Michael Maise’s testimony would have provided crucial mitigation evidence to show that Ernest would not have committed the crimes but for Rodriguez’s substantial domination. Maise had no motivation to fabricate Rodriguez’s statement and only wanted a deal with the State so that his safety would not be in peril as a “snitch” witness. Meanwhile, the three witnesses the State would use to rebut Maise’s testimony each had strong motivation to fabricate an alibi – Rodriguez and Antwane were protecting each other from murder charges, and Rodriguez’s girlfriend Deborah was protecting the man she cherished and the father of her son. Contrary to the State’s assertions, the physical evidence at the crime scene and the testimony of a bystander corroborate Maise’s testimony.

The State repeatedly argues that the only purpose of Michael Maise’s testimony would be to “excuse” Ernest’s actions in committing the crimes (Resp.46,47,48). The State misunderstands the purpose of mitigation evidence. “The fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” Woodson v. North Carolina, 96 S.Ct. 2978, 2991 (1976). The sentencer must be permitted to consider, as a mitigating factor, the defendant’s lack of specific intent to cause death and the

extent of his role in the crime. Lockett v. Ohio, 98 S.Ct. 2954, 2960 (1978).

Evidence need not provide a “legal excuse” for the defendant’s criminal actions to be considered as mitigation evidence. Eddings v. Oklahoma, 102 S.Ct. 869, 876-77 (1982).

This was a penalty phase retrial. Maise’s testimony was not “worthless, offensive evidence” as the State argues (Resp.48) because it would have supported the statutory mitigating circumstance that Ernest acted under Rodriguez’s substantial domination. The goal of the defense was not to “excuse” Ernest’s conduct but to show the jury that the circumstances of the crimes warrant a sentence less than death.

The State argues that Maise lacked credibility since he initially hoped for a deal in exchange for his testimony (Resp.50), and three State witnesses would have refuted his testimony (Resp.46-47). Maise admitted that he initially hoped to get out of custody of he testified against Rodriguez, but explained that as a snitch, his safety would be in peril as long as he was in custody (1stTr.2336-37).

The witnesses the State would use to rebut Maise – Rodriguez, Antwane, and Rodriguez’s girlfriend – each had very strong motivations to testify falsely and each had changed their statements to the police. Initially, Rodriguez told the police that at the time of the crimes, he was home with Antwane alone (1stTr.2160). It was days later, only when the police advised Rodriguez that he would be charged with the three murders if he could not come up with a better alibi, that Rodriguez told the police that his girlfriend Deborah was with him too

(1stTr.2160-61). Rodriguez and Antwane were very close, and they protected each other (1stTr.2161-62). Each knew that they faced very serious charges as a result of their involvement, and each had charges dropped as a result of providing testimony against Ernest (Tr.II.810; 1stTr.2139-40). Rod admitted that he initially lied to the police to protect Antwane (1stTr.2162). He admitted that he told the police that Ernest confessed to the crimes, when Ernest had not, so he could protect Antwane (1stTr.2132). Rodriguez admitted that, at the time of the crimes, he needed money to get back into the crack dealing business (1stTr.2146).

At the time Deborah gave her statement to the police, she had every motivation to create an alibi for Rodriguez. He was the father of her baby and she did whatever it took, even lying and tricking her mother, to spend time with him (1stTr.2046-47). Deborah was so fixated with Rodriguez that she had gone back to him even after he had beaten and stabbed her numerous times with a screwdriver when she was eight months pregnant (1stTr.2047). By the time of trial, Deborah and Rodriguez no longer spoke with each other (1stTr.2002), but by then, she had already given her sworn statement to the police and was stuck with it.

The State suggests that physical evidence at the house corroborates the story told by Rodriguez and Deborah (Resp.40-41,50). The State suggests that a can of whipped cream on the headboard of Rodriguez's bed is self-proving evidence that Rodriguez and Deborah had sex using the whipped cream from 9:50 to 11:22 on the night of the crimes, as these witnesses suggest (Resp.40-41,50). But the presence of the whipped cream proves nothing as to the time or date they

had sex. They could have had sex much earlier in the evening, or even on another day. The can of whipped cream does not help to “time” or “date” their sexual encounter.

Rodriguez was a slick character. He made his living selling crack cocaine, although he did not use crack cocaine and had only disdain for people who did use it (1stTr.2142, 2145-46). Ernest was one of those people (1stTr.2146). To believe that Rodriguez was not the type of person who would use Ernest’s crippling drug addiction for his own gain, by talking Ernest into robbing the Casey’s and then meeting him at Casey’s to make sure Ernest followed through, is naive.

The State implies that Rodriguez could not have been inside the store, because he would have left bloody footprints (Resp.48). But almost all the blood was back in the bathroom and cooler area of the store, not in the front (State Ex.29,29A-G). If Rodriguez had stayed by the counter, right outside the immediate area where the deaths occurred, he very easily would have avoided stepping in any of the blood, but still could have directed Ernest’s actions. Notably, this is the area where the cash register and the safe – the targets of the robbery – were located (Tr.II.872).

The State argues that the footprint behind the counter could have been there a long time (Resp.48). But this is a store that was mopped at least once a day (Tr.II.546,865-66,893). There is no reason to believe that the entire store would be mopped every day except the area behind the counter. If the footprint belonged

to any of the store employees, the police would have established that. As it was, the person who made that footprint was never identified (Tr.II 702-703).

The State argues that the testimony of David Hopkins does not corroborate Maise's testimony (Resp.48-49). Hopkins testified that he was at Casey's at "about 10:30" and saw a man with his face partially hidden (1stTr.2357-58). He testified that the man could have been Ernest (1stTr.2361). When he drove by about five minutes later, he saw another man running toward the store (1stTr.2358-59). Hopkins knew Rodriguez, but refused to exclude Rodriguez as the man he saw (1stTr.2360). Instead, Hopkins insisted that he was not sure whether Rodriguez was the man or not (1stTr.2360).

The State argues that it would have been crazy for Rodriguez to be running to the store at about 10:35, when the crimes did not take place until 11:00 (Resp.48-49). But Hopkins testified that a man resembling Ernest was already at Casey's before the second man would have arrived (1stTr.2357-58). It would not have been strange or crazy for Rodriguez to meet Ernest at the store, "psych" Ernest up to commit the crimes, and to go with Ernest into the store. This would not have been inconsistent with Rodriguez's statement to Maise:

[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 he didn't trust Ernest. And he gave Ernest a gun, and Ernest would probably pawn it to get some crack with.

(1stTr.2333).

The State argues that even if Rodriguez's involvement mitigates the punishment for the robbery, it does not mitigate the murders (Resp.52-53). But the murders would not have taken place but for the robbery. The robbery cannot be extricated from the murders. It was only when Ernest was trying to commit the robbery, that the murders occurred. By going with Ernest to make sure Ernest did what he said he would do, Rodriguez kept Ernest's "feet to the fire." The robbery would not have been committed but for Rodriguez's substantial domination, and so too, neither would the murders. What mitigates the punishment for the robbery would also mitigate the punishment for the murders.

Counsel's failure to present Maise's testimony warrants a new trial.

ARGUMENT III

Trial counsel's failure to question the venire panel on Ernest's right not to testify and failure to request the no adverse inference instruction cannot possibly be excused as reasonable trial strategy. Trial counsel could not recall whether he questioned the venire panel on this issue, but admitted that it is a line of questioning that defense attorneys usually do pursue in voir dire. Trial counsel admitted he knew "early on" that Ernest would not testify, since Ernest was so reluctant even to enter the courtroom.

The State argues that Ernest has not rebutted the presumption of reasonable trial strategy regarding trial counsel's failure to question the venire on Ernest's right not to testify and failure to request the no adverse inference instruction (Resp.58-61). But trial counsel's testimony at the evidentiary hearing shows that his failure to question the venire panel was not a trial strategy decision (PCR Tr.22). When asked if he questioned the venire panel on this point, trial counsel responded:

I would stand on the transcript. I don't recall, but 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). Defense counsel indicated that "I just don't think that we would have ever relied on [Ernest] testifying. He had to be coaxed into the courtroom on a couple of occasions during the trial" (PCR Tr.35-36). In fact, at the beginning of

the trial, Ernest requested that he not be present for the trial, but after speaking with counsel, agreed to remain in the courtroom (Tr.II.496-500).

Trial counsel's failure to question the venire on Ernest's right not to testify could hardly be termed a "decision" as the State urges (Resp.59-61). Counsel never termed his failure a "decision." Counsel admitted that this is an area that attorneys usually would question on, and he stated no reason for not questioning on this point (PCR Tr.22). He knew that Ernest had not testified at the first trial, guilt or penalty phase, or at the postconviction evidentiary hearing (PCR Tr.13-14). And counsel knew early on that Ernest would not testify in this trial (PCR Tr.36). A reasonably competent attorney, knowing that his client would not be testifying, would question the venire as to whether any of them would hold that against the defendant. Furthermore, there would have been no harm in conducting the questioning if Ernest unexpectedly decided to testify.

ARGUMENT IV

Ernest was prejudiced by counsels' failure to call Dr. Carole Bernard, because the jury did not hear that based on both Ernest's subaverage IQ and the limitations in his adaptive skills, he was mildly mentally retarded. Dr. Bernard's testimony would not have been cumulative, because neither Dr. Smith nor Dr. Cowan informed the jury of Dr. Bernard's conclusion that Ernest's IQ was in the low 70s, with a reliability differential that would place his IQ in the upper 60s, and that Ernest had significant limitations in a number of his adaptive skills, making him mentally retarded. Dr. Smith testified that Ernest's IQ was in the borderline mentally retarded range, but he did not present an analysis of Ernest's adaptive skills, so as to be able to conclude overall whether Ernest was borderline mentally retarded or mildly mentally retarded.

The State argues that Ernest has failed to overcome the presumption that counsel's failure to present Dr. Bernard's testimony was reasonable trial strategy (Resp.68-69). But trial counsel Cooper testified that a key part of the trial strategy was to present Ernest's mental deficits (PCR Tr.31). Cooper testified that, "I don't remember what [Ernest's] IQ was, if it was – if we actually got into mental retardation with Ernest or not, but I would guess that we did" (PCR Tr.31). Even the State admits that it would have been vital to the defense to present evidence of Ernest's mental retardation to the jury (Resp.81).

The State repeatedly fails to recognize that an assessment of mental retardation should contain both an assessment of IQ and an assessment of adaptive skills. *See Atkins v. Virginia*, 122 S.Ct.2242, 2245, n.3 (2002), setting forth the definitions of mental retardation provided by the American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA). The State argues that Dr. Bernard found that Ernest was in the borderline mentally retarded range (Resp.70), when really, she was referring just to the IQ prong of the assessment (Tr.II 1227). So, too, the State argues that “Dr. Smith reported that Dr. Bernard had concluded that appellant was in the ‘borderline mental retardation range’” (Resp.70, citing 2ndTr.1227). Actually, what Dr. Smith testified was that Dr. Bernard had found Ernest’s IQ to be in the borderline mentally retarded range (2ndTr.1227). The IQ assessment, however, does not end the evaluation for mental retardation. An assessment of adaptive skills must accompany it. After completing her assessment, Dr. Bernard concluded that Ernest was indeed mildly mentally retarded (1stPCR 60).³

The State contests whether Dr. Bernard actually concluded that Ernest is mildly mentally retarded (Resp.70-72). It argues that if Dr. Bernard testified at the second postconviction hearing that Ernest was mildly mentally retarded, her testimony was a marked and unexplained change from her testimony at the first

³ Citations to the transcript of the first postconviction hearing are set forth as (1stPCR __).

postconviction hearing (Resp.70). This simply is not true. At the first postconviction hearing, Dr. Bernard testified that Ernest's IQ "was in the 70's, which is in the borderline mentally retarded range, at about one or two percent intellectual functioning, which means that 98 percent of the people who take the test do better on it than he did" (1stPCR 58). But then, Dr. Bernard also assessed Ernest's adaptive skills (1stPCR 57-59). She noted that Ernest could not read at sixth grade reading level and had very poor writing skills (1stPCR 58-59). She concluded that "[Ernest] has probably always functioned in the at least mildly mentally retarded range, that he did very poorly in school because of this" (1stPCR 60) (emphasis added).

The State argues that Dr. Bernard never testified in the second deposition that Ernest was mildly mentally retarded (Resp.71). As stated above, in her first deposition, Dr. Bernard testified that "[Ernest] has probably always functioned in the at least mildly mentally range" (1stPCR 60). In her second deposition, Dr. Bernard was asked whether Ernest "always functioned in a mentally retarded range" (2ndPCR 47). She responded that, "yes, probably" (2ndPCR 48). The following testimony also indicates her conclusion that Ernest is mildly mentally retarded:

Q: Is it fair to say that the grades more reflect that [Ernest is] mentally retarded than any other reason that you can think of?

A: Yes. I mean – and because that is consistent with the way mild mental retardation goes. If a child is profoundly retarded, which is an IQ in the

twenties, twenty to thirty-something, that's noticeable immediately. In the mild retardation stage, as the child approaches the middle adolescent years, that's – that's when the retardation seems to be more consistent all the time. (2ndPCR 38). Dr. Bernard had no reason to mention this “consistency” if she were not relating it to Ernest.

Dr. Bernard indicated that Ernest meets both prongs of the mental retardation assessment. She testified that he had subaverage intelligence, with an IQ in the low 70s (2ndPCR 24-25). In fact, when Ernest was twelve, his IQ was 63 (2ndPCR 34). His IQ could actually be five points higher or lower due to the reliability differential (2ndPCR 54). His adaptive skills were lacking in many areas: vocabulary, social skills, ability to form sentences; and he had fairly significant limitations on his use of community resources and his ability to live by himself (2ndPCR 26-30; 40-41). When he was evaluated at age eighteen, by prison staff, all of his adaptive skills were below normal (2ndPCR 38-39). Dr. Bernard concluded that, “I think Ernest’s mental abilities are enough below average that coupled with his adaptive skills, which are poor in several areas, that he was unable even as a grown male to function normally in society” (2ndPCR 43).

The State completely ignores Dr. Bernard’s assessment that Ernest’s IQ is in the low 70s, yet acknowledges that an IQ in the low 70s falls within the accepted range of mental retardation (Resp.71,n.9). “It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the

mental retardation definition.” Atkins, 122 S.Ct. at 2245, n.5, citing 2 B. Sadock & V. Sadock, *Comprehensive Textbook of Psychiatry* 2952 (7th ed.2000). Ernest’s true IQ may be even lower than the low 70s – with the reliability differential, his IQ could be in the upper 60s; and he has had another IQ score of 63, with a reliability differential as low as 58 (Bernard depo.54).

Neither the APA nor the AAMR sets any specific cutoff for IQ. Atkins, 122 S.Ct. at 2245, n.3. Both define mental retardation as “significantly subaverage intellectual functioning” coupled with limitations in two or more adaptive skills, which manifests before age 18. *Id.* An IQ in the low 70s should not bar further consideration of whether Ernest is mentally retarded.

Contrary to the State’s assertions, Dr. Bernard’s testimony would not have been cumulative to that of Dr. Cowan or Dr. Smith, because the testimony of Drs. Cowan and Smith was radically different from Dr. Bernard’s (Resp.70). The State alleges that Dr. Smith summarized all of Dr. Bernard’s findings when he testified that he reviewed Dr. Bernard’s test results and agreed with her conclusion that Ernest was in the borderline mental retardation range (Resp.70). But Dr. Smith misconstrued Dr. Bernard’s findings. Apparently, Dr. Smith believed that Dr. Bernard’s IQ assessment of Ernest – that he was borderline mentally retarded – was her final conclusion on whether Ernest was, in fact, mentally retarded. He testified that because Ernest’s IQ was borderline mentally retarded, Ernest was only borderline mentally retarded (Tr.II.1227-29). But Dr. Bernard’s finding that Ernest’s IQ was borderline mentally retarded did not end her analysis – rather, she

concluded that because of (1) Ernest's very low IQ and (2) the significant limitations on his adaptive skills, he had probably always been mildly mentally retarded (1stPCR 60). Thus, Dr. Bernard's findings were significantly different, and much more beneficial to Ernest, than Dr. Smith's.

So, too, Dr. Cowan's findings were radically different from Dr. Bernard's, since Dr. Cowan found that Ernest's IQ was 84 (Tr.II 1161). Dr. Cowan explained that as you take the IQ test repeated times, your IQ score will increase even though your actual intelligence did not increase (Tr.II.1189-90). Dr. Bernard evaluated Ernest in November or December, 1994 (1stPCR 54). Dr. Cowan evaluated Ernest just about a year later, in the late fall or early winter of 1995 (1stPCR 201-202). Thus, Dr. Cowan's finding was tainted by the "practice effect." The jury, however, did not learn of Ernest's IQ score in the low 70s or that his score of 84 likely was elevated as a result of the testing done within the prior year.

Dr. Bernard's testimony was crucial to show that Ernest was mentally retarded, which was a key element of mitigation and would bar Ernest's execution. Atkins, 122 S.Ct. at 2246-52. This Court must grant Ernest a new trial.

ARGUMENT V

Through Dr. Bernard's testimony (presented on another issue), Ernest has demonstrated that he is mentally retarded. Because the motion court denied a hearing on this point, Ernest was not given full opportunity to present available evidence regarding his mental retardation. Ernest's death sentences should be vacated and he should be sentenced to life without parole, or at the least, he should receive a full opportunity to present evidence in support of his claim that he is mentally retarded.

Contrary to the State's claim, Ernest's claim of mental retardation is not refuted by the record (Resp.78). Dr. Bernard's testimony, admitted into evidence regarding another claim, clearly shows that Ernest was mildly mentally retarded. And because he was denied a hearing on this claim, Ernest did not have the opportunity to present further evidence in support of this claim.

The State alleges that the claim is refuted by the testimony of Dr. Cowan, Dr. Bernard, and Dr. Peters (Resp.78,80). Dr. Cowan evaluated Ernest in the late fall or early winter of 1995 (1stPCR 201-202), and determined that his functional IQ was 84 (Tr.II.1161). He also testified, however, that IQ levels may be falsely elevated when the person being tested has the chance to "practice" the IQ test by taking it more than once (Tr.II.1189-90). Dr. Cowan's assessment was conducted just about a year after Dr. Bernard had conducted hers (and determined Ernest's

IQ in the low 70's).⁴ Thus, Dr. Cowan's result was tainted by the practice effect – the fact that Ernest had just taken the IQ test about a year earlier.

Dr. Smith testified that Dr. Bernard determined that Ernest's IQ was in the borderline mentally retarded range (1227). He testified that borderline mental retardation is a step above mental retardation (1228). He testified that Ernest's intellectual functioning is "clearly far below average" (1228-29). Dr. Smith never confirmed whether Ernest's IQ was in the low 70s or 84. Since he used the same terminology as Dr. Bernard – borderline mentally retarded – it is reasonable to presume that he agreed with Dr. Bernard's assessment of Ernest's IQ as in the low 70s (Tr.II 1127-28). In fact, Dr. Bernard testified that only minor facts in Dr. Smith's report were inconsistent with her own findings (1stPCR 63).

An IQ in the low 70s, however, would not preclude mental retardation, especially since Dr. Bernard believed that Ernest's IQ was "seventy, seventy-one, seventy-two. Something like that" (Bernard depo.55). Neither the American Psychiatric Association (APA) nor the American Association of Mental Retardation (AAMR) mandate a specific cut-off for the IQ prong of the mental retardation analysis. Atkins v. Virginia, 122 S.Ct. 2242, 2245, n.3 (2002). The closest is the APA, which states that mild mental retardation is "typically used to describe people with an IQ level of 50-55 to approximately 70." *Id.*, quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental

⁴ Dr. Bernard evaluated Ernest in November or December, 1994 (1stPCR 54).

Disorders 41 (4th ed.2000). The terms “typically” and “approximately” indicate that there may be cases of mild mental retardation where the IQ exceeds 70. These more general definitions probably arose from a need to accommodate the 10-point reliability differential described by Dr. Bernard (Bernard depo.54).

And Dr. Smith never completed the mental retardation evaluation. He acknowledged that Ernest has significant limitations in his reading, writing, and his comprehension of complex ideas, abstractions, and theoretical concepts (Tr.II 1229). Although he stated that Ernest is not mentally retarded, he does not ground that opinion in any facts (Tr.II 1228-29,1233).

Dr. Peters reviewed the reports of Dr. Cowan and Dr. Smith (Tr.II 1317). He did not conduct any independent testing (Tr.II 1331). He took issue with the term “borderline mental retardation” because he believed it should be “borderline intellectual functioning” (Tr.II 1330). Dr. Peters agreed that with an IQ of 84, Ernest fell into the category of borderline intellectual functioning (Tr.II 1330). Dr. Peters based his finding of no mental retardation on the IQ finding of 84, rather than the IQ in the low 70s or Ernest’s sixth grade IQ score of 63 (Tr.II 1318).

The only expert to conduct a full mental retardation evaluation was Dr. Bernard. She evaluated Ernest first, and thus her scores would be more accurate than Dr. Cowan’s (Tr.II 1189-90). Based on her evaluation, Dr. Bernard concluded that “[Ernest] has probably always functioned in the at least mildly mentally retarded range, that he did very poorly in school because of this” (1stPCR

60).⁵ She concluded that his adaptive skills were significantly lacking in at least two areas: vocabulary, social skills, ability to form sentences, use of community resources and his ability to live by himself (2ndPCR 26-30; 40-41). His mental retardation was well documented before age 18. Thus, Ernest meets the definitions of mental retardation as set forth by the APA, AAMR, and §565.030.6, RSMo Cum. Supp. 2001.

The State alleges that Ernest has had four opportunities – two trials and two postconviction hearings – to prove that he is mentally retarded but has failed to do so (Resp.80). But at the time of all of those proceedings, the United States Supreme Court had not yet issued Atkins v. Virginia, 122 Sup. Ct. 2242 (2002). It was not until June 2002 that mental retardation served as an absolute bar to execution. *Id.* Prior to that date, a defendant’s mental deficit was merely another factor to consider and perhaps would not even rise to the level of a statutory mitigating circumstance. §565.030.3, RSMo 2000. Prior to June 2002, the trial courts had no obligation to find whether the defendant (1) had significantly subaverage intellectual functioning; (2) existing concurrently with related limitations in two or more adaptive skills; and (3) these limitations manifested

⁵ Notably, “[a]pproximately 89% of retarded persons are ‘mildly’ retarded.” Penry v. Lynaugh, 109 S.Ct. 2934, 2941, n.1 (1989), *citing* Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash.L.Rev. 414, 423 (1985).

before age 18. To this date, no court has examined this question and made its findings.

The State attempts to distinguish this case from Atkins, by arguing that here, no expert witness testified that Ernest was mentally retarded (Resp.81-82). Again, this simply is not true, since Dr. Bernard concluded that “[Ernest] has probably always functioned in the at least mildly mentally retarded range, that he did very poorly in school because of this” (1stPCR 60). She testified in detail, explaining Ernest’s IQ score in the low 70s and his significant limitations in adaptive skills (Bernard depo. 26,28,30,33-34,38-41,43,47-48,54,62).

Ernest was not able to litigate his claim in his postconviction motion. The court denied a hearing on this issue (PCR L.F.444-47). It allowed some evidence on the claim, but Ernest would have provided further evidence if allowed the chance. Ernest must receive an evidentiary hearing on this claim, to allow him to fully litigate it. The State of Missouri must not execute a mentally retarded man.

ARGUMENT VII

The plain language of §565.040.2 mandates that Ernest’s death sentences – held unconstitutional as violative of his Sixth Amendment right to the effective assistance of counsel – be vacated and that he be sentenced to life without parole. If his death sentences are not vacated, Ernest would suffer manifest injustice.

The State argues that Ernest should have raised this issue in his first appeal (Resp.99). But at that time, this was not an issue, since Ernest had not yet had his death sentence declared unconstitutional. True, Ernest should have raised it within his appeal from his penalty phase retrial, but did not. But, as the State admits, “[a]ppellate courts have discretion not to apply the doctrine where there is a mistake, a manifest injustice, or an intervening change of law” (Resp.99). State v. Graham, 13 S.W.3d 290, 293 (Mo.2000). Here, a manifest injustice certainly would result if Ernest were to be sentenced to death when a Missouri statute – §565.040.2 – forbids that sentence.

The State argues that perhaps, as a “tactic,” Ernest has purposefully waited to raise this claim (Resp.99). Under the State’s theory, as a “tactic,” Ernest chose not to raise this claim before his penalty phase retrial, so that he could subject himself to a new penalty phase trial (Resp.99). This is ridiculous. If Ernest had been aware of this claim, he would have raised it before his penalty phase retrial. Ernest gained absolutely no benefit by subjecting himself to a trial (which he

found so painful he had to be talked into even being present) (Tr.II 496-500). Certainly, he would have avoided the trial and agreed to be sentenced to life without parole if he had known of the statute before his penalty phase retrial.

Ernest absolutely agrees with the State that this Court should consider the plain language of §565.040.2 (Resp.100). The plain language of the statute indicates that if a death sentence is found to be unconstitutional, the trial court shall sentence the defendant to life without parole. *Id.* It is only when a specific aggravating circumstance is found to be inapplicable, unconstitutional, or invalid, that the defendant may be retried. *Id.*

Here, the Court vacated Ernest's death sentences, on the ground that he had been denied his constitutionally guaranteed right to the effective assistance of counsel. State v. Johnson, 968 S.W.2d 686, 702 (Mo.1998). The Court cited Strickland v. Washington, 104 S.Ct. 2052, 2063-64 (1984), which is based on the Sixth Amendment to the United States Constitution. Johnson, 968 S.W.2d at 695, fn.32. Ernest had grounded his claim on the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution. *See* SC#78282, Appellant's Brief, p. 26-27.

The State contends that "Section 565.040, RSMo 2000, provides in pertinent part as follows: Death penalty, if held unconstitutional, resentencing procedure ..." (Resp.100). The statute, however, does not have as a title, "Death

penalty, if held unconstitutional, resentencing procedure ...”⁶ This is merely the headnote given to §565.040 by the revisor of statutes. State v. Knapp, 843 S.W.2d 345, 348 (Mo.1992). As such, “it is merely an arbitrary designation inserted for convenience of reference and has no legislative authority to lessen or expand the letter or meaning of law. *Id.*, at 348, n.3, *citing* State v. Maurer, 255 Mo. 152, 164 S.W.2d 551, 552 (1914). The headnote itself applies primarily to the first section of §565.040, rather than the second section which is at issue here.

The State argues that because §565.035.5 authorizes this Court to vacate a death sentence and remand the case for a new penalty phase, §565.040.2 can apply “only if to sentence the defendant to death at all is unconstitutional” (Resp.100-101). It argues that §565.040.2 does not apply to cases where the death sentence is unconstitutional due to trial errors (Resp.101).

The language of the statute does not support the State’s argument. §565.040.2 applies to “any death sentence imposed pursuant to this chapter.” The

⁶ The title of Senate Bill No. 276 is “AN ACT To repeal sections 546.070, 562.076, 565.001, 565.003, 565.004, 565.008, 565.014, 565.016, 565.021, 565.026, 565.031, 565.050, and 565.060, RSMo 1978, and sections 556.061, 565.005, 565.006, 565.012, and 577.005 RSMo Supp. 1982, relating to homicides and assaults and their punishments and the intoxication and drugged condition defense, and to enact in lieu thereof twenty-one new sections relating to the same subject, with penalty provisions and an effective date.” *See* Appendix.

only exception to the statute is when there is a problem with a specific aggravating circumstance; in that event, and that event alone, may this Court remand for retrial pursuant to §565.035.5.

Under the State's theory, §565.040.2 would never be used. But the legislature is presumed not to enact meaningless provisions. Wollard v. City of Kansas City, 831 S.W.2d 200, 203 (Mo.1992). "It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect." Hyde Park Housing Partnership v. Director of Revenue, 850 S.W.2d 82, 83 (Mo.1993).

So, too, §565.040.2 must be given effect. Its plain language provides that when a death sentence has been held to be unconstitutional, the trial court must sentence the defendant to life without parole. Because this is what happened in Ernest's case, he would suffer manifest injustice if he is not sentenced to life without parole rather than death. This Court must vacate the death sentences and remand to the trial court for imposition of sentences of life without parole.

CONCLUSION

For the foregoing reasons, Ernest Johnson affirms the Conclusion he set forth on page 131 of his initial brief.

Respectfully submitted,

ROSEMARY E. PERCIVAL, #45292
ASSISTANT APPELLATE DEFENDER
Office of the State Public Defender
Capital Litigation 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: Ms. Linda Lemke, The Office of the Attorney General, 1530 Rax Court, Second Floor, Jefferson City, MO 65109, on the 15th day of January, 2003.

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 6,936 words, which does not exceed the 7,750 words allowed for an appellant's reply 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