

NO. SC87825

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IN THE SUPREME COURT OF MISSOURI

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STATE OF MISSOURI,

Respondent,

v.

ERNEST LEE JOHNSON

Appellant.

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Appeal from the Circuit Court of Boone County

Honorable Gene Hamilton

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**BRIEF FOR APPELLANT**

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TABLE OF CONTENTS

Table of Authorities ..... 4

Jurisdictional Statement..... 11

Statement of Facts..... 12

Points Relied On ..... 17

Argument and Authorities

    Point I ..... 26

        Mr. Johnson proved by a preponderance of the evidence  
        that he is mentally retarded; therefore he cannot be  
        put to death.

    Point II ..... 49

        The evidence in mitigation outweighs the evidence in  
        aggravation as a matter of law, and Mr. Johnson  
        cannot be put to death.

    Point III..... 60

        The trial court erred in not requiring the state to prove  
        beyond a reasonable doubt that Mr. Johnson is not  
        mentally retarded

Point IV ..... 96  
Prospective jurors were improperly excused for cause  
because of their views on the death penalty.

Point V ..... 106  
Needlessly inflammatory photographs were admitted  
into evidence

Point VI..... 112  
The jury instructions did not permit the jury to give  
full consideration to mitigating evidence

Point VII ..... 137  
Mr. Johnson was denied due process of law because of  
lack of notice of this court’s method of proportionality  
review

Point VIII ..... 144  
Mr. Johnson’s sentences of death are excessive and  
disproportionate

Point IX.....	150
Missouri’s method of execution is unconstitutional cruel and unusual punishment.	
Conclusion.....	153
Certificate of Compliance .....	154
Certificate of Service .....	154

## TABLE OF AUTHORITIES

### Cases

Adams v. Texas, 448 U.S. 38, 45 (1980) .....	96
Apprendi v. New Jersey, 530 U.S. 466 (2000) .....	88, 90, 91, 92, 93, 94
Armstrong v. Manzo, 380 U.S. 545 (1965).....	143
Atkins v. Virginia, 536 U.S. 304 (2002).....	13, 18, 19, 60, 88, 89, 91, 94
Branch v. Turner, 37 F.3d 371, 375 (8th Cir. 1994), rev'd on other grounds sub nom. Goeke v. Branch, 514 U.S. 115 (1995).....	138
Bullington v. Missouri, 451 U.S. 430 (1981). .....	48
California v. Brown, 475 U.S. 1301, 1304 (1986) .....	111
Chapman v. California, 386 U.S. 18 (1967).....	22, 95, 136
Darden v. Wainwright, 477 U.S. 168 (1986) .....	20, 100
Easter v. Endell, 37 F.3d 1343, 1345 (8th Cir. 1994) .....	23, 138
Eddings v. Oklahoma, 455 U.S. 104 (1982).....	130, 131, 135
Evitts v. Lucey, 469 U.S. 387, 400 (1985).....	23, 138
Fuentes v. Shevin, 407 U.S. 67, 80 (1972).....	143

Furman v. Georgia, 408 U. S. 238 (1972) .....	90, 91, 131, 137
Gardner v. Florida, 430 U.S. 349, 358 (1977) .....	111
Greene v. Georgia, 117 S.Ct. 578 (1996).....	100
Harris v. Blodgett, 853 F.Supp. 1239, 1286 (W.D. Wash 1994), affirmed 64 F.3d 1432 (9th Cir. 1995) .....	23, 143
In Re Winship, 397 U.S. 358, 364 (1970).....	19, 92, 93
Jackson v. Virginia, 433 U.S. 307 (1979).....	28, 48, 50
Johnson v. State, 102 S.W.3d 535 (Mo. banc. 2003) ....	12, 24, 26, 88, 142, 147
Johnson v. Texas, 509 U.S. 350, 381(1993).....	132
Lockett v. Ohio, 438 U.S. 586, 604 (1978) .....	22, 130, 131, 135
Maynard v. Cartwright, 486 U. S. 356, 362 (1988).....	90
Mullaney v. Wilbur, 421 U.S. 684 (1975) .....	19, 92, 93, 94
Penry v. Johnson, 532 U.S. 782 (2001).....	22, 131, 132, 133, 135
Penry v. Lynaugh, 492 U.S. 302 (1989).....	22, 130, 131, 132, 135

Ring v. Arizona, 536 U.S. 584 (2002).....	19, 88, 89, 90, 91, 92, 94
Rivera v. Dretke, 2006 WL 870927 (S.D. Tex. March 31, 2006)	18, 30, 42
Rust v. Hopkins, 984 F.2d 1486, 1493 (8th Cir. 1993).....	23, 138
St. Louis S.W.R. Co. v. Arkansas, 235 U.S. 350, 362 (1914) .....	93
State Board of Nursing v. Berry, 32 S.W.3d 638, 642 (Mo. App. 1983) .	45
State ex rel. Johns v. Kays, 181 S.W.3d 565 (Mo. banc 2006).....	148
State of Ohio v. Kevin Yarbrough, No. 96CR000024, (Shelby County Court of Common Pleas, Feb. 28, 2007) .....	30, 43
State of South Carolina v. Johnny Ringo Pearson, Case No. 86-GS-32- 3338, Marlboro County Court of General Sessions, Dec. 14, 2005. ...	41, 42
State v. Bannister, 680 S.W.2d 141 (Mo. banc 1984).....	140
State v. Bolder, 635 S.W.2d 673, 685 (Mo. banc 1982) .....	138
State v. Byrd, 676 S.W.2d 494 (Mo. banc 1984) .....	139
State v. Chaney, 967 S.W.2d 47, 59 (Mo. banc 1998) .....	24, 141, 146, 147

State v. Clements, 849 S.W.2d 640 (Mo. App. 1993) .....	108
State v. Davis, 814 S.W.2d 593, 607 (Mo. banc 1991).....	140
State v. Day, 866 S.W.2d 491 (Mo. App. 1993) .....	109
State v. Floyd, 360 S.W.2d 630 (Mo. 1962).....	21, 108
State v. Gumm, 2006 WL 3524435 (Ohio App. Dec. 8, 2006).....	18, 39, 40
State v. Johns, 34 S.W.3d 93 (Mo. banc 2000) .....	148, 149
State v. Johnson, 22 S.W.3d 183 (Mo. banc 2000) .....	12
State v. Johnson, 968 S.W.2d 686 (Mo. banc 1998) .....	12
State v. Kinder, 942 S.W.2d 313 (Mo. banc 1996).....	100
State v. McIlvoy, 629 S.W.2d 333 (Mo. banc 1982).....	141
State v. Pinkus, 550 S.W.2d 829, 837 (Mo. App. 1977) .....	21, 109
State v. Ramsey, 864 S.W.2d 320 (Mo. banc 1993).....	139, 146
State v. Sempsrott, 587 S.W.2d 630 (Mo. App. 1979).....	109
State v. Simmons, 944 S.W.2d 165 (Mo. banc 1997).....	100
State v. Sloan, 756 S.W.2d 503 (Mo. banc 1988).....	138

State v. Stevenson, 852 S.W.2d 858 (Mo. App. 1993) .....	21, 109
State v. Taylor, 944 S.W.2d 925, 938 (Mo. banc 1997) .....	110
State v. White, 813 S.W.2d 862 (Mo. banc 1991) .....	139
State v. Wood, 596 S.W.2d 394, 403 (Mo. banc 1980).....	21, 108
State v. Zeitvogel, 707 S.W.2d 365 (Mo. banc 1986) .....	139
Taylor v. Crawford, 05-CV-4173-FJG (W.D. Mo.) .....	25, 151, 152
Trejo v. Keller Industries, Inc., 829 S.W.2d 593 (Mo. App. 1992).....	109
United States v. Parker, NMCCA 9501500 (N.M. Ct. Crim. App. Feb. 27, 2007).....	18, 30
Wainwright v. Witt, 469 U.S. 412 (1985) ....	14, 20, 96, 100, 101, 104, 105
Walton v. Arizona, 497 U.S. 639 (1990).....	89
Weems v. United States, 217 U.S. 349, 367 (1910).....	137
Woods v. Cockrell, 307 F.3d 353, 359 (5th Cir. 2002).....	102
Woodson v. North Carolina, 428 U.S. 280, 304, 305 (1976) .....	133
Zant v. Stephens, 462 U.S. 862 (1983) .....	111

**Statutes**

Mo. Const. art. 2, §22 ..... 143

Mo. Const. art. V, §3..... 12

Mo. Const., Art. 1, §10 ..... 108, 143

Mo. Rev. Stat. §546.720..... 151

Mo. Rev. Stat. §565.030..... 27, 49, 50, 88, 91

Mo. Rev. Stat. §565.032..... 18, 24, 49, 50, 91, 144

Mo. Rev. Stat. §565.035..... 13, 23, 24, 110, 137, 138, 144, 147, 149

U. S. Const., Amend. XIV ..... 21, 106, 108, 143

U.S. Const. Amend. VI ..... 14, 60, 88, 140, 143

**Other Authorities**

Acker and Lanier, Statutory Measures for More Effective Appellate

Review of Capital Cases, 8 State Court Journal 211, 238 (1984) .... 141,  
142

MAI-CR3d 313.40-313.48 ..... 13

Wallace and Sorensen, “The Missouri Capital Punishment Process:

Appellate Review of Proportionality and Racial Discrimination”,

unpublished article..... 140, 141

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STATE OF MISSOURI,

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ERNEST LEE JOHNSON

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**JURISDICTIONAL STATEMENT**

A jury imposed a sentence of death on Ernest Johnson, appellant, on May 11, 2006. L.F. Vol. II, p. 314. A motion for new trial or for judgment of acquittal of the death penalty was filed on June 2, 2006, pursuant to the trial court's order allowing 25 days for its filing. L.F. 317. Sentence was entered on June 12, 2006, sentencing appellant to death for each count of murder. L.F. 326. Notice of appeal was filed on June 16, 2006. L.F. 331.

This court has exclusive jurisdiction of the appeal, pursuant to Article V, §3 of the Missouri Constitution as amended, in that appellant was sentenced to death.

## STATEMENT OF FACTS

### Overview and Statement of Issues

This is an appeal from three sentences of death for first degree murder. Mr. Johnson's convictions were affirmed by this Court in *State v. Johnson*, 968 S.W.2d 686 (Mo. banc 1998). However, this Court reversed the death sentences, and remanded for a new sentencing hearing, because of ineffective assistance of counsel. Mr. Johnson was again sentenced to death. The second death sentences were affirmed on direct appeal, *State v. Johnson*, 22 S.W.3d 183 (Mo. banc 2000). On post-conviction review, this Court again reversed the death sentences because of a substantial question as to whether Mr. Johnson was mentally retarded. *Johnson v. State*, 102 S.W.3d 535 (Mo. banc. 2003). After a third sentencing hearing, Mr. Johnson was again sentenced to death. This appeal follows.

The issues on appeal are as follows: 1) Whether the evidence was sufficient as a matter of law to establish by a preponderance of the

evidence that Mr. Johnson is mentally retarded; 2) Whether the evidence in mitigation was sufficient as a matter of law to outweigh the aggravating evidence; 3) Whether the trial court committed constitutional error by requiring Mr. Johnson to prove by a preponderance of the evidence that he was mentally retarded in order to claim the application of *Atkins v. Virginia*, 536 U.S. 304 (2002), and by instructing the jury as to this burden of proof; 4) Whether the trial court erred in excluding jurors for cause based on their reluctance to impose the death penalty; 5) Whether the trial court erred in admitting inflammatory photographs of the injuries of the victims; 6) Whether the trial court erred in denying Mr. Johnson's motion to ask the court to refrain from giving MAI-CR3d 313.40-313.48 or to declare Missouri's death penalty statute unconstitutional; 7) Whether the death sentences are unconstitutional because Mo. Rev. Stat. §565.035.3(3) provides insufficient guidance as to how this Court conducts proportionality review; 8) Whether the death sentences were disproportionate and excessive under Mo. Rev. Stat. §565.035.3; 9) Whether the death sentences are unconstitutional because Missouri's execution method will subject Mr. Johnson to unreasonable pain and suffering.

## **Trial procedures and evidence.**

During the jury selection in this case, the trial court granted the state's challenge for cause to prospective jurors Green (6) (Tr. 443)<sup>1</sup>, Leiter (45) Tr. 447), Alley (599) (Tr. 626), and Corcoran (102) (Tr. 627) on the basis that they could not properly consider the death penalty. Mr. Johnson objected that these jurors were not subject to challenge under the Sixth Amendment to the United States Constitution as construed by the U.S. Supreme Court in *Wainwright v. Witt*, 469 U.S. 412 (1985).<sup>2</sup>

Mr. Johnson had been previously convicted of murdering three store employees during the robbery of a Casey's convenience store in Columbia, Missouri. Pursuant to a stipulation by the parties, the state presented an abbreviated version of the guilt evidence. However, over defense objection, the state admitted into evidence multiple

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<sup>1</sup> The numbers after the name of each prospective juror are the jury panel numbers assigned by the clerk of the court.

<sup>2</sup> Mr. Johnson concedes that he did not object at trial to the exclusion of prospective juror Alley. He did include the objection in his motion for new trial.

photographs of the injuries of the three victims. Tr. 759, 766, 776, 777. The previous testimony of Dr. Jay Dix, the medical examiner who died before this trial was read into evidence. During that testimony, the defense objected to other photographic exhibits. The evidence showed that two of the decedents were white and one was African-American. The state also offered the testimony of relatives of each of the three decedents as to the decedents' character and the effect their death had on their families.

Mr. Johnson offered evidence concerning his early childhood in the racially oppressed town of Charleston, Missouri in the early 1960s. His older brother, Bobby Johnson, explained that when he and Ernest were growing up, African-Americans like the Johnsons were not permitted to eat inside restaurants in Charleston. Trial Tr. Vol. II, p. 1047. They could only get food to go, from the rear of the restaurant. Trial Tr. Vol. II, p. 1048. Public schools were segregated at the time Bobby started school, although they were integrated by the time Ernest began school four years later. Trial Tr. Vol. II, p. 1037.

Testimony was also offered concerning Mr. Johnson's chaotic and deprived early home life. He spent most of his first ten years in homes without running water or electricity. Trial Tr. Vol. II, pp. 1030-1032.

His mother, Jean Ann Patton, abandoned the family when Ernest was in diapers, and left her three children with her father. Trial Tr. Vol. II, p. 1024-1026. Ms. Patton moved to Chicago and then to Columbia, Missouri where she married and started another family. Trial Tr. Vol. II, p. 1024.

Mr. Johnson also presented expert testimony about his conduct in prison and the type of conditions under which he would be confined if he were sentenced to life without parole. Trial Tr. Vol. 1029-1049. Other experts testified that Mr. Johnson's mental state was substantially impaired during the commission of the crime, and that he was mentally retarded. The State presented no expert evidence on the issue of mental retardation.

Other events during the trial will be discussed in connection with the points to which they pertain.

## **POINTS RELIED ON**

### **POINT I**

**THE TRIAL COURT ERRED IN DENYING MR.**

**JOHNSON'S MOTIONS FOR DIRECTED VERDICT OF**

**LIFE IMPRISONMENT BECAUSE THE EVIDENCE WAS**

SUFFICIENT TO PROVE BY PREPONDERANCE OF THE EVIDENCE THAT MR. JOHNSON IS MENTALLY RETARDED. HIS DIMINISHED MENTAL CAPACITY HAD BEEN DOCUMENTED FROM AT LEAST AGE 8, HIS IQ SCORE AT THE TIME OF TRIAL WAS 67, AND HE HAD DEFICIENCIES IN SEVERAL AREAS OF ADAPTIVE FUNCTIONING. THEREFORE, THE JURY'S FAILURE TO FIND THAT MR. JOHNSON IS MENTALLY RETARDED VIOLATES HIS RIGHT TO DUE PROCESS OF LAW AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.

*Atkins v. Virginia*, 536 U.S. 304 (2002)

*United States v. Parker*, NMCCA 9501500 (N.M. Ct. Crim. App. Feb. 27, 2007)

*Rivera v. Dretke*, 2006 WL 870927 (S.D. Tex. March 31, 2006)

*State v. Gumm*, 2006 WL 3524435 (Ohio App. Dec. 8, 2006)

## POINT II

THE TRIAL COURT ERRED IN OVERRULING MR. JOHNSON'S MOTION FOR DIRECTED VERDICT

BECAUSE THE EVIDENCE IN AGGRAVATION DID NOT  
OUTWEIGH THE EVIDENCE IN MITIGATION, AND  
THEREFORE THE EVIDENCE AS A WHOLE DID NOT  
WARRANT THE DEATH PENALTY, IN VIOLATION OF  
MR. JOHNSON'S RIGHTS TO DUE PROCESS OF LAW,  
TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENT,  
AND IN VIOLATION OF MO. REV. STAT. §565.032.

Mo. Rev. Stat. §565.032

### POINT III

THE TRIAL COURT ERRED IN REQUIRING MR.  
JOHNSON TO SHOW MENTAL RETARDATION BY A  
PREPONDERANCE OF THE EVIDENCE, AND IN GIVING  
INSTRUCTIONS 6, 7, 11, 12, 16, 17, 21. THIS VIOLATED  
MR. JOHNSON'S RIGHT UNDER THE U.S. CONST.  
AMEND. VI AND THE MISSOURI CONSTITUTION TO A  
JURY FINDING, BEYOND A REASONABLE DOUBT, AS  
TO ANY FACTOR WHICH INCREASES HIS SENTENCE.  
UNDER *ATKINS V. VIRGINIA*, A DEATH SENTENCE

CAN ONLY BE IMPOSED ON PERSONS WHO ARE NOT  
MENTALLY RETARDED.

*Atkins v. Virginia*, 536 U.S. 304 (2002)

*Ring v. Arizona*, 536 U.S. 584 (2002)

*In Re Winship*, 397 U.S. 358, 364 (1970)

*Mullaney v. Wilbur*, 421 U.S. 684 (1975)

#### POINT IV

THE TRIAL COURT ERRED IN GRANTING THE STATE'S  
CHALLENGE FOR CAUSE TO PROSPECTIVE JURORS  
GREEN, LEITER, ALLEY, AND CORCORAN. THESE  
PROSPECTIVE JURORS' VIEWS ON THE DEATH  
PENALTY WOULD NOT SUBSTANTIALLY IMPAIR  
THEIR ABILITY TO PARTICIPATE IN THE  
DELIBERATIVE PROCESS IN THE PENALTY PHASE  
REQUIRED BY MISSOURI LAW. THEREFORE, THEIR  
EXCLUSION VIOLATED MR. JOHNSON'S RIGHTS TO A  
FAIR AND IMPARTIAL JURY AND TO BE FREE FROM  
CRUEL AND UNUSUAL PUNISHMENT UNDER THE

SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO  
THE UNITED STATES CONSTITUTION.

*Wainwright v. Witt*, 469 U.S. 412, 421 (1985)

*Darden v. Wainwright*, 477 U.S. 168 (1986)

POINT V

THE TRIAL COURT ERRED IN ADMITTING INTO  
EVIDENCE OVER DEFENSE OBJECTION STATE'S  
EXHIBITS 34A-G, 39A-C, 41A-D, 69A-D, 70A-E, AND 71A-  
C. THESE EXHIBITS, WHICH WERE PHOTOGRAPHS  
SHOWING THE INJURIES OF THE DECEASED  
PERSONS, WERE CUMULATIVE AND UNNECESSARY  
AND THEIR PREJUDICIAL IMPACT SUBSTANTIALLY  
OUTWEIGHED THEIR PROBATIVE VALUE.  
THEREFORE, THE ADMISSION OF THESE EXHIBITS  
VIOLATED MR. JOHNSON'S RIGHT TO DUE PROCESS  
OF LAW UNDER THE UNITED STATES CONSTITUTION,  
AMEND. XIV AND THE MISSOURI CONSTITUTION,  
ART. 1, §10.

*State v. Floyd*, 360 S.W.2d 630 (Mo. 1962)

*State v. Stevenson*, 852 S.W.2d 858 (Mo. App. 1993)

*State v. Pinkus*, 550 S.W.2d 829, 837 (Mo. App. 1977)

*State v. Wood*, 596 S.W.2d 394, 403 (Mo. banc 1980)

## POINT VI

THE TRIAL COURT ERRED IN DENYING MR. JOHNSON'S MOTION TO ASK THE COURT TO REFRAIN FROM GIVING MAI-CR3D 313.40-313.48 OR TO DECLARE MISSOURI'S DEATH PENALTY STATUTE UNCONSTITUTIONAL, AND IN GIVING INSTRUCTIONS 7- 9, 12-14, AND 17-19. THESE INSTRUCTIONS IMPROPERLY PREVENT THE JURY FROM GIVING FULL CONSIDERATION TO MITIGATING EVIDENCE, AND THEREFORE VIOLATE THE DUE PROCESS AND CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE UNITED STATES AND MISSOURI CONSTITUTIONS.

*Lockett v. Ohio*, 438 U.S. 586, 604 (1978)

*Penry v. Lynaugh*, 492 U.S. 302 (1989)

*Penry v. Johnson*, 532 U.S. 782 (2001)

*Chapman v. California*, 386 U.S. 18 (1967)

POINT VII

THE DEATH SENTENCE IN THIS CASE IS  
UNCONSTITUTIONAL AND MUST BE VACATED  
BECAUSE THIS COURT'S SCHEME OF  
PROPORTIONALITY REVIEW, DOES NOT COMPLY  
WITH THE REQUIREMENT OF MO. REV. STAT.  
§565.035.3(3) THAT THIS COURT DETERMINE  
WHETHER THE DEATH SENTENCE IN EACH CASE IS  
“EXCESSIVE OR DISPROPORTIONATE TO THE  
PENALTY IMPOSED IN SIMILAR CASES” IN VIOLATION  
OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW.

*Evitts v. Lucey*, 469 U.S. 387, 400 (1985)

*Easter v. Endell*, 37 F.3d 1343, 1345 (8<sup>th</sup> Cir. 1994)

*Rust v. Hopkins*, 984 F.2d 1486, 1493 (8<sup>th</sup> Cir. 1993)

*Harris v. Blodgett*, 853 F.Supp. 1239, 1286 (W.D. Wash 1994), affirmed  
64 F.3d 1432 (9<sup>th</sup> Cir. 1995)

POINT VIII

THE DEATH SENTENCES MUST BE VACATED  
BECAUSE THEY ARE EXCESSIVE AND

DISPROPORTIONATE TO THOSE IMPOSED IN OTHER  
SIMILAR CASES, IN VIOLATION OF MO. REV. STAT.  
§565.035 AND THE UNITED STATES CONSTITUTION, IN  
THAT MR. JOHNSON'S DIMINISHED INTELLECTUAL  
FUNCTIONING REQUIRES A FINDING THAT A  
SENTENCE OF DEATH IS EXCESSIVE.

Mo. Rev. Stat. §565.032.2-3

*State v. Chaney*, 967 S.W.2d 47, 59 (Mo. banc 1998)

*Johnson v. State*, 102 S.W.3d 525 (2003)

#### POINT IX

THE TRIAL COURT ERRED IN DENYING MR.  
JOHNSON'S MOTION TO PRECLUDE THE DEATH  
PENALTY BECAUSE THE METHOD OF EXECUTION  
PRESCRIBED BY MISSOURI LAW CONSTITUTES  
CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION  
OF THE MISSOURI AND UNITED STATES  
CONSTITUTIONS, IN THAT THERE IS A REASONABLE  
PROBABILITY THAT MR. JOHNSON WILL SUFFER  
UNREASONABLY WHILE BEING PUT TO DEATH.

**ARGUMENT AND AUTHORITIES**

**POINT I**

**THE TRIAL COURT ERRED IN DENYING MR. JOHNSON'S MOTIONS FOR DIRECTED VERDICT OF LIFE IMPRISONMENT BECAUSE THE EVIDENCE WAS SUFFICIENT TO PROVE BY PREPONDERANCE OF THE EVIDENCE THAT MR. JOHNSON IS MENTALLY RETARDED. HIS DIMINISHED MENTAL CAPACITY HAD BEEN DOCUMENTED FROM AT LEAST AGE 8, HIS IQ SCORE AT THE TIME OF TRIAL WAS 67, AND HE HAD DEFICIENCIES IN SEVERAL AREAS OF ADAPTIVE FUNCTIONING. THEREFORE, THE JURY'S FAILURE TO FIND THAT MR. JOHNSON IS MENTALLY RETARDED VIOLATES HIS RIGHT TO DUE PROCESS OF LAW AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.**

Pursuant to this Court's order in *Johnson v. State*, 102 S.W.3d 525 (2003), the trial court instructed the jury that they could not impose the death penalty on Mr. Johnson if they found by a preponderance of the

**APPELLANT'S BRIEF - Page 24**

evidence that he was mentally retarded. While Mr. Johnson contends that the burden should not be on him to establish this, as will be discussed in Point III below, he also contends that resolution of the issue is unnecessary in his case because the evidence before the court established, as a matter of law, that he is mentally retarded.

The State of Missouri defines mental retardation for the purposes of death penalty eligibility as:

[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.

Mo. Rev. Stat. §565.030.6.

***Standard of review.*** This court reviews questions of sufficiency of the evidence to determine whether any reasonable juror could have made the finding at issue. The evidence is considered in the light most favorable to the jury's verdict. *Jackson v. Virginia*, 433 U.S. 307 (1979).

*Argument.* The “significantly subaverage intellectual functioning” prong of the definition of mental retardation is generally related to the results of standardized tests of intellectual functioning. Trial Tr. Vol. II, p. 1527. Dr. Denis Keyes<sup>3</sup> testified that the American Psychological Association views an IQ score under 70 as demonstrating the “significantly subaverage intellectual functioning” prong of mental retardation. A score of less than 70 indicates functioning in the lowest 2% of society. Trial Tr. Vol. II, p. 1530.

Mr. Johnson was shown to have received a variety of tests at different times. At approximately 12 years of age, when he was in the sixth grade, he scored 63 on the WISC, a standard intelligence test for children. In connection with this trial, he was tested, at six-month intervals to avoid a practice effect, by psychologists retained by both the

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<sup>3</sup> Dr. Keyes is an educational psychologist who has specialized in diagnosis of mental retardation in adults under or facing a sentence of death. Trial Tr. Vol. II, p. 1506. He has particular expertise in detecting malingering; his doctoral dissertation was entitled ““Deliberate Response Falsification of Corresponding Subtests of Two Tests of Intelligence: Indicators for Simulating Mental Retardation.” Def. Ex. K.

defense and the State of Missouri. On the defense test, the WAIS-III given by Dr. Denis Keyes, Mr. Johnson scored 67. The state offered no direct evidence of the score achieved on the test given by Sonny Bradshaw.<sup>4</sup> However, Drs. Keyes and Smith testified that they had reviewed data from that test, and that the data appeared to be valid and also reflected a full scale IQ of 67. Trial Tr. Vol. II, p. 1382, Vol. III, pp. 1567-1568. Mr. Johnson's score of 67 places him below 99% of the population in intellectual functioning. Trial Tr. Vol. III, p. 1584.

Dr. Keyes and Dr. Robert Smith<sup>5</sup>, another psychologist who had previously examined Mr. Johnson, acknowledged that they had reviewed other testing data indicating higher scores. Trial Tr. Vol. II, pp. 1423-1426, 1566-1570. Dr. Keyes testified that to some extent, these

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<sup>4</sup> Mr. Bradshaw appeared on the videotape presented by the state and identified himself to Mr. Johnson as "the test guy." State's Ex. 78A. Mr. Bradshaw's qualifications to administer the test were not presented to the jury.

<sup>5</sup> Dr. Smith is a clinical psychologist with special expertise in addiction and fetal alcohol syndrome (FAS). Def. Ex. J. Mental retardation is a symptom of FAS. Trial Tr. Vol. II, p. 1409.

scores might be the result of the “Flynn effect”, a pattern which occurs as an IQ test ages. For reasons that are not clear, the average score on a given test rises as the test gets older. To keep test results reliable, most tests are re-normed periodically, but the Flynn effect still affects scores obtained when a test is given near the end of its useful life.<sup>6</sup> Dr. Keyes acknowledged, however, that the score of 84 obtained by Dr. Dennis Cowan, who tested Mr. Johnson in 1995, was inconsistent with the other scores on individualized intelligence tests.<sup>7</sup> While he was unable

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<sup>6</sup> Several courts have approved the use of the Flynn effect to explain inconsistent IQ scores. *United States v. Parker*, NMCCA 9501500 (N.M. Ct. Crim. App. Feb. 27, 2007); *Rivera v. Dretke*, 2006 WL 870927 (S.D. Tex. March 31, 2006); *State of Ohio v. Kevin Yarbrough*, No. 96CR000024, (Shelby County Court of Common Pleas, Feb. 28, 2007). Copies of the order in *Parker*, which has not yet been published, and of the unpublished order in *Yarbrough* are included in the Appendix for the court’s convenience.

<sup>7</sup> Scores on a group written IQ test, the “revised Beta,” given by the Missouri Department of Corrections, were also reviewed by Dr. Keyes. He testified that the revised beta is not recognized as an accurate

to explain this inconsistency, he did not believe it invalidated the lower scores. Trial Tr. Vol. III, pp. 1567-1570, 1587.

Both Dr. Keyes and Dr. Smith testified that it would be extremely difficult for a subject to achieve the same score on two tests given six months apart by malingering. Dr. Keyes further noted that the pattern of the answers on the questions, which he described as “aces and spaces,” was indicative of mental retardation and was extremely difficult to fake. Trial Tr. Vol. II, pp. 1538-1539, Vol. III, p. 1746. The “aces and spaces” pattern occurs because persons with mental retardation have varying amounts of general information and skills. A person who is trying to score lower than his actual IQ tends either to answer almost all of the questions wrong or to answer the first few right and then answer all of them wrong, rather than exhibiting a variable pattern. Dr. Keyes confirmed this in a study which he did for his doctoral dissertation, “Deliberate Response Falsification of Corresponding Subtests of Two Tests of Intelligence: Indicators for Simulating Mental Retardation.” Def. Ex. K, Trial Tr. Vol. III, pp. 1574-1575. To further rule out malingering, Dr. Keyes also administered the

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indicator of intellectual functioning. Trial Tr. Vol. II, pp. 1521, 1537.

Test of Memory Malinger, a test which is designed to detect malingering on intelligence tests. That test revealed no malingering. Trial Tr. Vol. III, p. 1583. Because of this data, both Dr. Smith and Dr. Keyes testified that they believed that the scores of 67 were the most reliable measurement of Mr. Johnson's intellectual functioning. Trial Tr. Vol. II, pp. 1538-1539, Vol. III, p. 1426-1427.

Considerable evidence was presented concerning Mr. Johnson's adaptive functioning. Dr. Keyes administered two evaluation instruments to assess Mr. Johnson's adaptive skills. He testified that standardized instruments are required by both the American Psychological Association and the AAMR for a valid diagnosis of mental retardation. Trial Tr. Vol. III, p. 1611. The first, the Vineland Adaptive Behavior Scales, was administered to Mr. Johnson's brother and sister. Trial Tr. Vol. III, p. 1738. The second, the Scales of Independent Behavior, was administered to Mr. Johnson himself. Trial Tr. Vol. III, p. 1738. Based on these scales, Dr. Keyes testified that Mr. Johnson showed "extensive related deficits and limitations" in the eight areas of communication, home living, social skills, community use, self-direction and motivation, health and safety, functional academics, and leisure and work. Trial Tr. Vol. III, pp. 1621-1622. Dr. Smith similarly testified

that based on the data he reviewed and his evaluation of Mr. Johnson, Mr. Johnson was deficient in the areas of communication, social relationships, home living, and functional academics, Trial Tr. Vol. II, pp. 1489-91. Thus, given Mr. Johnson's low intellectual functioning and deficits in adaptive functioning in more than two of the areas described in the definition, both Dr. Smith and Dr. Keyes made a diagnosis of mental retardation.

In addition to the expert testimony, the jury heard considerable lay evidence concerning Mr. Johnson's functioning both in and out of prison. Deborah Turner, who was a teacher's aide in Mr. Johnson's first or second grade classroom in Wyatt (near Charleston), Missouri, stated that he was "very slow. Slow learning" Def. Ex. D, Deposition of Deborah Turner, p. 5.<sup>8</sup> She said that he was a special education student at that time. Def. Ex. D, Deposition of Deborah Turner, p. 5.

Ms. Turner testified that Mr. Johnson "could not grasp very quickly. . . Even with someone there helping him. We would have to go

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<sup>8</sup> Ms. Turner's deposition was read into evidence. Trial Tr. Vol. II, p. 1188.

over it and over. He could not pick up. . . Ernest was very slow in all subjects.” Def. Ex. D, Deposition of Deborah Turner, p. 18.

Robin Seabaugh, who had taught Mr. Johnson in a ninth grade developmental reading class in Charleston, Missouri, testified that he had been in special education during his elementary and junior high years. Trial Tr. Vol. II, p. 1219. See Def. Ex. E, Mr. Johnson’s school records. The special education classes were held in a trailer behind the school; the other students called it the “tin can” and ridiculed the special education students. Trial Tr. p. 1236.

Ms. Seabaugh indicated that the high school developmental reading class was for students at a low level of functioning, and that Mr. Johnson was in the “basic track” which was also for low level students. Trial Tr. p. 1223. The records did not indicate why Mr. Johnson was not placed in special education classes in high school, as he had been in junior high and elementary school. Ms. Seabaugh explained that because of educational system pressures, an informal quota system existed that sometimes prevented the school from placing students in special education even though they needed it. Trial Tr. Vol. II, p. 1223. She also explained that although Mr. Johnson attained satisfactory grades in his special education classes, those grades

reflected the fact that he was being taught on his own level, rather than at grade level. Trial Tr. Vol. II, p. 1237. She noted that when Mr. Johnson was placed in regular classes in high school, he did not do well. Trial Tr. p. 1224-1225.

Steve Mason, Mr. Johnson's high school art teacher, testified that he seemed unable to comprehend basic art subjects, such as the color wheel, and the use of a ruler and compass. Trial Tr. Vol. II, pp. 1240-1244. He seemed to lack motivation. Mr. Mason asked his supervisors why Mr. Johnson had been placed in the art class when he could not do the work. Trial Tr. Vol. II, p. 1247. Mr. Mason taught Mr. Johnson in what turned out to be Mr. Johnson's last semester of formal education; he was repeating the ninth grade at that time. Trial Tr. Vol. II, p. 1257.

Ricky Frazier, who had known Mr. Johnson during his youth, testified that Mr. Johnson was frequently called "dummy" because of his slowness. Trial Tr. Vol. II, p. 1265. Mr. Frazier testified that other children did not want to play with Mr. Johnson because he could not comprehend the rules of games, and that he seemed to have difficulty with such normal childhood skills as crossing the street and riding a bike. Trial Tr. pp. 1263-1268.

Gloria Lisa Johnson<sup>9</sup>, a former girlfriend of Mr. Johnson, testified that when the two lived together briefly, she noticed that he seemed to have no goals and to be unable to make small talk. She also found him deficient in basic household tasks. He could not drive, and when he tried to do his laundry in her home, he caused the washing machine to overflow. He could not write in full sentences. Trial Tr. Vol. II, pp. 1114-1135. Rev. C.W. Dawson came to know Mr. Johnson shortly before his arrest. He also observed Mr. Johnson's low level of intellectual functioning. Trial Tr. Vol. III, p. 1724.

Mr. Johnson's older brother Bobby testified that Mr. Johnson was always slow at school. Trial Tr. Vol. II, p. 1039. Bobby tried to help Ernest, but it was very difficult. Trial Tr. Vol. II, p. 1039. Mr. Johnson was frequently called "Dummy" by other children. Trial Tr. Vol. II, p. 1041. He had trouble learning. Trial Tr. Vol. II, p. 1075. When they children lived with their grandmother, Ernest clung to her and stayed underfoot. He once was burned when he was too close to his grandmother at the stove and hot grease fell on him. Trial Tr. Vol. II, p. 1042. Similar experiences were described by Mr. Johnson's sister Beverly.

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<sup>9</sup> Ms. Johnson is not related to Ernest Johnson.  
APPELLANT'S BRIEF - Page 34

Thomas Powell, who supervised Mr. Johnson in a halfway house after his release from prison, testified that Mr. Johnson had difficulty keeping a job labeling boxes because of his limited reading ability. Trial Tr. Vol. II, p. 1020. Mr. Powell recalled that Mr. Johnson needed help with spelling his destination when he signed out of the halfway house. Trial Tr. Vol. II, p. 1203.

Finally, Joseph Brandenburg, an expert in prison conditions, testified that Mr. Johnson functions fairly well in prison because it is a highly restrictive environment with few choices. Trial Tr. Vol. II, p. 1039. Even there, Mr. Johnson's job assignments are at the lowest level of prison work, such as stacking trays and picking up trash. He has a pattern of what Mr. Brandenburg described as "stupid" disciplinary violations, such as pushing the button too many times to attract the attention of a guard. Trial Tr. Vol. II, pp. 1143, 1145.

The State played for the jury the videotape of Mr. Johnson's interview with Dr. Gerald Heisler, who had evaluated Mr. Johnson on behalf of the state, and of the testing by Sonny Bradshaw. State's Ex. 78A. The videotape demonstrated that Mr. Johnson was unable to learn a simple magic trick despite repeated coaching from Dr. Heisler. Mr. Johnson told 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.” He explained that he did not have to take responsibility for getting to work on time because someone came and got him to escort him to the work area (a pattern confirmed by Mr. Brandenburg), Trial Tr. Vol. II, p. 1139.) The state presented no expert witnesses on the issue of mental retardation.

A review of decisions concluding that defendants facing the death penalty are mentally retarded is instructive in applying the definition here, and shows that the evidence presented by Mr. Johnson clearly requires a finding of mental retardation by a preponderance of the evidence.<sup>10</sup>

In *State v. Gumm*, 2006 WL 3524435 (Ohio App. Dec. 8, 2006), the appellate court affirmed the trial court’s finding that Mr. Gumm had established by a preponderance of the evidence that he is mentally retarded. Mr. Gumm’s IQ scores were in the range of 70-73, with one score of 79. Under the Ohio’ statute, this means that Mr. Gumm is not

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<sup>10</sup> The Court will note that all of these decisions concerning mental retardation were made by judges. Counsel has been unable to locate comparable cases involving decisions made by juries.

“presumptively” mentally retarded because his IQ is above 70. (Under the Ohio scheme, Mr. Johnson’s scores of 67 would place him in the presumptively mentally retarded range.) Despite these scores, the court found that Mr. Gumm had significantly subaverage intellectual functioning. Mr. Gumm, like Mr. Johnson, presented evidence that he had been in special education classes and that when in the 8<sup>th</sup> grade, he was functioning at between a second and third grade educational level.

The court then considered whether Mr. Gumm had shown significant deficiencies in two or more adaptive skills. The court disbelieved the testimony of two of Mr. Gumm’s sisters that he was totally unable to care for himself, but nonetheless found deficiencies in adaptive skills. Like Mr. Johnson, Mr. Gumm was only able to follow simple directions at school, was a follower, and functioned in a custodial role. It was also established that “Gumm was quite limited in social skills, self-direction and functional academics.” The same can surely be said for Mr. Johnson. As in Mr. Johnson’s case, the state in *Gumm* presented no expert testimony that Mr. Gumm was not mentally retarded. They relied on prison personnel, who acknowledged that Mr. Gumm was a follower and functionally illiterate. Although he maintained personal hygiene and followed the rules, they acknowledged

that failure to do these things would subject Mr. Gumm to punishment. Based on this evidence, the *Gumm* court upheld the lower court's finding of mental retardation.

In an unpublished South Carolina trial court case, the judge also found that the defendant was mentally retarded. *State of South Carolina v. Johnny Ringo Pearson*, Case No. 86-GS-32-3338, Marlboro County Court of General Sessions, Dec. 14, 2005.<sup>11</sup> Mr. Pearson's IQ scores ranged from a low of 62 to a high of 72. In holding that Mr. Pearson was not malingering on tests administered after he was charged, when he had a motive to do so, the court was persuaded in part by the consistency of the scores and in part by the expert testimony that Mr. Pearson showed no signs of malingering. The court also found that Mr. Pearson's school records, which reflected that he failed several grades and was placed in special education classes, provided further evidence of his diminished intellectual functioning.

The court went on to find deficits in adaptive functioning noting that Mr. Pearson had difficulty in school and therefore had deficiencies

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<sup>11</sup> A copy of this unpublished decision is included in an Appendix to the brief.

in functional academics, had only held unskilled jobs and had been unable to keep those for more than a few months, had difficulty communicating, had never lived alone, could not cook or handle money, never had a life plan or goals, had few friends and poor relationships with women, and had never had a driver's license or bank account.

While Mr. Pearson's ability to play games and self-care were adequate in prison (like those of Mr. Johnson), the *Pearson* court noted that "the performance of a skill in an institutional setting, where there is encouragement and support, does not establish *adequate* adaptive functioning." Opinion, p. 18.

The finding of mental retardation in Mr. Pearson's case was made despite expert testimony from the state that Mr. Pearson was not mentally retarded. The court specifically rejected the expert's testimony that "they cannot overscore their potential," and therefore the highest score must be the most accurate. Of course, no such testimony was offered in Mr. Johnson's case.

The U.S. District Court for the Southern District of Texas, in a federal habeas corpus case, *Rivera v. Dretke*, 2006 WL 870927 (S.D.

Tex. March 31, 2006)<sup>12</sup>, held that Mr. Rivera was mentally retarded. Mr. Rivera's WAIS-III score was 68, but, as in Mr. Johnson's case, the court noted that there were other higher scores (including a Beta score of 92), and there was no reliable IQ score prior to age 18. Like Mr. Johnson, Mr. Rivera's score on the TOMM indicated that he was not malingering.

Turning to the adaptive functioning deficits, the court noted that Mr. Rivera, unlike Mr. Johnson, was never placed in special education classes, that his trial attorney found him competent to assist in his defense, and that prison officials reported that he adjusted well in prison. On the other hand, the defense evidence indicated that Mr. Rivera received social promotions and (like Mr. Johnson) dropped out of school in the ninth grade. He relied on his family to find him jobs, but was unable to hold them. The decision in Mr. Rivera's case was also complicated by his long-term inhalant use, which affects intelligence. Nonetheless, the court found that Mr. Rivera met the AAMR criteria

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<sup>12</sup> Mr. Rivera's case is pending before the Fifth Circuit Court of Appeals on the State's appeal.

(which are virtually identical to the Missouri statute) for mental retardation.

In another Ohio case, the court recently found Kevin Yarbrough ineligible for the death penalty because of mental retardation. *State of Ohio v. Kevin Yarbrough*, No. 96CR000024, Shelby County Court of Common Pleas, February 28, 2007. Mr. Yarbrough's IQ was 69 when most recently tested. Earlier tests ranged from 68 to 86. The court discounted the higher scores because they were not accompanied by proper assessments of adaptive skills, the Flynn effect might have caused elevated scores, and the doctors involved were not assessing mental retardation. Based on the score of 69, the court found that Mr. Yarbrough had significantly subaverage intellectual functioning.

Using the Scales of Independent Behavior, the same test used by Dr. Keyes in Mr. Johnson's evaluation, an expert psychologist testified that Mr. Yarbrough was in the mild mentally retarded range. The court noted, "Higher scores in [some] categories simply prove that adaptive strengths co-exist with adaptive weaknesses." The psychologist also administered an academic achievement test, and found scores in the second and third grade range. Finally, the court accepted the opinion of the expert that Mr. Yarbrough's school records (showing special

education classes) and interviews with his family and teachers demonstrated the onset of retardation before age 18. Based on this evidence, the court held that Mr. Yarbrough had met his burden to prove that he was mentally retarded.

Considered against the statutory definition, and in the context of the decisions discussed above, Mr. Johnson clearly established, by a preponderance of the evidence, that he is mentally retarded. The fact that he had IQ scores above the range of mental retardation is not dispositive on the issue of “significantly subaverage intellectual functioning.” As noted by Dr. Keyes, the higher scores can be explained by either errors in administration and scoring or the Flynn effect. The courts in the cases discussed above likewise concluded that some inconsistency in IQ scores is not fatal to a finding of mental retardation. In fact, based on the anecdotal evidence of the above cases, inconsistent IQ scores are not unusual in persons with mental retardation. Since Mr. Johnson was tested below 70 both at age 12 and twice as an adult, and has *always* been recognized as intellectually slow, there is ample

evidence that, more likely than not<sup>13</sup>, he has met the first prong of the mental retardation definition.

“[C]ontinual extensive related deficits and limitations” in adaptive behaviors were also established by a preponderance of the evidence. In addition to the summaries and interpretations of Mr. Johnson’s behavior provided by experts, eight witnesses who had known Mr. Johnson testified to his deficient adaptive skills. These deficiencies were also evident in his school records, Def. Ex. E. The evidence revealed a pattern of inability to perform academically, deficiencies in social relationships, inability to maintain employment, and failure to conform to the law. The statutory definition of mental retardation requires deficits in adaptive functioning in only two areas. Thus, the definition recognizes that mentally retarded people have strengths as well as

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<sup>13</sup> See *State Board of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. 1983): “Preponderance of the evidence’ is defined as that degree of evidence that “is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not.” [citations omitted]

weaknesses, a fact that the prosecutor brought out on cross-examination. But, although he has strengths in some areas, Mr. Johnson has adaptive deficiencies in four to eight of the areas addressed by the definition. Trial Tr. Vol. II, pp. 1489-91, Vol. III, pp. 1621-1622.

Many of these deficiencies were recognized before Mr. Johnson was 18 years old, as required by the definition. In particular, his IQ score at age 12 was 63, well within the range for significantly subaverage intellectual functioning. His teachers, brother, sister and childhood friend all testified to his low intelligence level as a child, and his school records corroborated their testimony.

Other than Mr. Johnson's statements in the interview with Dr. Heisler about how he adapts in prison, the state presented little evidence that Mr. Johnson does not have deficiencies in adaptive skills.<sup>14</sup> The prosecutor referred, in cross-examination of Dr. Smith and Dr. Keyes, to reports prepared by a Mr. Haws of interviews with prison officials, but neither Dr. Smith nor Dr. Keyes accepted them as

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<sup>14</sup> Dr. Keyes testified that mentally retarded people often think or at least state that they are more competent than others observe them to be. Trial Tr. Vol. IV, p. 1739.

probative, and the prosecutor did not present evidence from the officials who had been interviewed or from the investigator. Trial Tr. Vol. IV, p. 1739. The prosecutor did present the testimony of a cab driver and jewelry store clerk who had brief encounters with Mr. Johnson shortly after the offense occurred. Trial Tr. Vol. II, pp. 939-952. But, given the ability and propensity of mentally retarded persons to conceal their limitations,<sup>15</sup> these witnesses are not probative on the issue of adaptive limitations.

The only other evidence presented by the state concerned the offense itself. Mr. Johnson openly cased the business, which was located near his home. He arrived and left on foot, discarding his clothing on the way home or in nearby open fields. He immediately began to spend his loot, again in the near vicinity of his home. This crime, while concededly extremely violent, showed a very low level of sophistication. Thus, the greater weight of the evidence clearly supports a finding that Mr. Johnson is mentally retarded, and no reasonable jury could have

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<sup>15</sup> Dr. Keyes testified concerning the “cloak of competence” which mentally retarded persons use to conceal their limitations. Trial Tr. Vol. IV, pp. 1525-1526.

found otherwise. Therefore, Mr. Johnson's death sentence must be vacated and a sentence of life imprisonment without eligibility for probation or parole must be entered. *Jackson v. Virginia*, 433 U.S. 307 (1979); *Bullington v. Missouri*, 451 U.S. 430 (1981).

## POINT II

**THE TRIAL COURT ERRED IN OVERRULING MR. JOHNSON'S MOTION FOR DIRECTED VERDICT BECAUSE THE EVIDENCE IN AGGRAVATION DID NOT OUTWEIGH THE EVIDENCE IN MITIGATION, AND THEREFORE THE EVIDENCE AS A WHOLE DID NOT WARRANT THE DEATH PENALTY, IN VIOLATION OF MR. JOHNSON'S RIGHTS TO DUE PROCESS OF LAW, TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENT, AND IN VIOLATION OF MO. REV. STAT. §565.032.**

In the alternative, Mr. Johnson is entitled to resentencing because the mitigating evidence in this case clearly outweighs the evidence in aggravation. Under Mo. Rev. Stat. §565.030, after a jury has found beyond a reasonable doubt the existence of an aggravating circumstance, the death sentence may nonetheless not be imposed:

If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier. . .

Mo. Rev. Stat. §565.030.4(3). Because, as a matter of law, the mitigating evidence outweighs the aggravating evidence, Mr. Johnson's death sentence must be vacated.

***Standard of review.*** This court reviews questions of sufficiency of the evidence to determine whether any reasonable juror could have made the required finding. The evidence is considered in the light most favorable to the jury's verdict. *Jackson v. Virginia*, 433 U.S. 307 (1979).

***Argument.***

**A. Aggravating evidence**

Evidence in aggravation in this case included the circumstances of the crime. There were three victims, death was inflicted in a cruel and painful way, and the killing was in the course of a robbery. All of the witnesses to the robbery were killed. Other aggravating evidence

included Mr. Johnson's prior record of convictions for felony property crimes.

### **B. Mitigating evidence**

Even if Mr. Johnson is not found to be mentally retarded, the clear evidence of his diminished intellectual capacity must be considered in mitigation. Virtually everyone who spent any significant amount of time with Mr. Johnson concluded that he was "slow." His sister Beverly testified that their grandmother called him her "special" child as a result. Trial Tr. Vol. II, p. 1008. This assessment was echoed by Mr. Johnson's brother Bobby, his friend Ricky Frazier, his teachers Deborah Turner, Robin Seabaugh and Steve Mason, his pastor Rev. Dawson, and his parole officer Mr. Powell. Mr. Johnson's deficient intellect affected in an obvious way his ability to function in society. He had few close relationships, was unable to hold a job, was unable to finish high school, and lacked the ability to access most community treatment options.

The circumstances of the crime also support the conclusion that Mr. Johnson was of low intelligence. He chose to rob a business at which he was a regular customer, located very close to his residence. He

openly visited the store several times on the day of the robbery. As Dr. Smith put it,

I think that it basically reflected his. . . sort of naïve and simple approach to life, going into a store where people knew him, four times in one day. Obviously, they would notice and recognize him and remember that he had been there that many times; that he really had not really thought this out in a sophisticated way and afterwards was caught very rapidly following the offense.

Trial Tr. Vol. II p. 1354.

In addition to his low intelligence, Mr. Johnson suffers from fetal alcohol syndrome, or FAS. This condition was caused by his mother's pervasive use of alcohol during her pregnancy with Ernest. Trial Tr. Vol. II, p. 1386, 1403. It was evidenced by his developmental delays. Trial Tr. Vol. II, p. 1403-1405, and his physical appearance as a child. Trial Tr. Vol. II, p. 1405, Def. Ex. H. FAS affects not only the intellect but also judgment and impulse control. Trial Tr. Vol. II, p. 1409, Def. Ex. H.

Despite his limitations, Mr. Johnson attempted, shortly before the events at issue here, to get help for his addiction. According to the

testimony of his minister, Rev. C.W. Dawson, shortly before the Casey's events, Mr. Johnson stood up before the congregation at Second Baptist Church in Columbia, confessed that he was addicted to cocaine, and asked for help. He met with Rev. Dawson several times during the next few weeks for counseling. Trial Tr. Vol. IV, p. 1722. Mr. Johnson also asked his parole officer for help in getting into a treatment program but was turned away. Trial Tr. Vol. II, pp. 1089, 1097. Even though he was hampered by his own limitations and drug addiction, Mr. Johnson knew he needed help.

At the time the Casey's events occurred, Mr. Johnson was in acute withdrawal from a cocaine binge. He had been supplied with crack cocaine by his girlfriend's son, but they had run out of cocaine and Mr. Johnson was out of money. His state of mind was described by Dr. Robert Smith, a psychologist with extensive experience with addiction, as akin to that of someone who is starving to death. Trial Tr. Vol. II, p. 1358-59, 1364. Mr. Johnson agreed with Dr. Heisler, the state's psychologist who interviewed him, that at the time of these crimes, he was "fiending" or "Jonesing," both colloquial terms which identify the craving for cocaine as the effect wears off. Trial Tr. Vol. II, p. 1374, State's Ex. 78.

Mr. Johnson used approximately 2 grams of cocaine on the day of the Casey's events. This is a considerable amount. Trial Tr. Vol. II, p. 1378. At that point, Rod Grant, his girlfriend's son who had been supplying him, had run out, and Mr. Johnson was in a position of needing—acutely—to obtain money to buy some more cocaine. Trial Tr. Vol. II, p. 1379.

While using cocaine is a personal choice, Mr. Johnson was predisposed by his environment to addiction. Numerous family members were addicted to alcohol and other drugs. These included his mother and father, his maternal grandmother, maternal uncles, his paternal uncles and aunt. This pattern reflects a genetic predisposition to addiction. Trial Tr. Vol. II, p. 1387. In addition, Mr. Johnson's exposure to the behavior of these relatives also put him at increased risk for addiction. Trial Tr. Vol. II, p. 1388.

Mr. Johnson was also predisposed to addiction by his childhood environment. He had experienced acute psychological trauma as a child, including an incident in which his father threatened to kill all the children and shot a gun over Mr. Johnson's older brother's head. Trial Tr. Vol. II, p. 1052. He was also subjected to family instability, extreme

poverty and uncertainty as to whether basic food and clothing would be provided. Trial Tr. Vol. II, pp. 1389-1390.

Mr. Johnson was abandoned by his mother at an early age. Trial Tr. Vol. II, p. 1024, 1395. He was then shuttled from maternal grandfather's house to his paternal grandfather's house; his father lived in town with another family. Trial Tr. Vol. II, p. 1023, 1029, 1050, 1396. He also endured sexual abuse; his mother gave him to her friends for sexual favors and his stepfather sexually abused him, and he was sexually assaulted in prison. Trial Tr. Vol. II, p. 1383. Mr. Johnson was physically abused by family members and caretakers. Trial Tr. Vol. II, p. 1026, 1383.

Mr. Johnson had been exposed to alcohol and drugs at an early age. He used marijuana with family members at age 11. Trial Tr. Vol. II, p. 1376. His own mother had offered him alcohol and marijuana as a teenager. Trial Tr. Vol. II, p. 1365, 1377. He began to use cocaine at age 25, progressing from the powder form to the more highly addictive "crack" cocaine. Trial Tr. Vol. II, p. 1377.

Once addicted, Mr. Johnson's judgment and ability to reason, already impaired by his low intellect, were further diminished by the effects of cocaine. Trial Tr. Vol. II, p. 1368. His ability to maintain

personal relationships was also impaired by his drug use. Trial Tr. Vol. II, p. 1370. Of course, the need for money for the drug also affected Mr. Johnson's daily life. Trial Tr. Vol. II, p. 1372. All of these factors led to a sense of helplessness and hopelessness. Trial Tr. p. 1373.

This sense of helplessness and hopelessness was increased by Mr. Johnson's depression because of his situation. He was feuding with his girlfriend. He had been unable to find or keep a job since his release from prison, and faced parole revocation. This depression, or dysthymia as it is clinically known, also interfered with Mr. Johnson's ability to make rational and moral choices about his conduct. Trial Tr. Vol. II, p. 1413.

Dr. Smith testified that the combination of Mr. Johnson's cocaine dependence, cocaine intoxication, dysthymia, and impaired intellectual functioning "would constitute a serious mental illness or disease, and that that would diminish his ability to fully appreciate his actions and to consider the consequences of what he was doing." Trial Tr. Vol. II, p. 1413. Similarly, Dr. Sam Parwatikar testified that at the time of the crime, Mr. Johnson "suffered from a cocaine intoxication delirium." Trial Tr. Vol. II, p. 1292. This condition left him hypersensitive, irritable, and with severely impaired judgment. Trial Tr. p. 1293.

Mr. Johnson's early life did not give him a good start. He was raised in rural Charleston, Missouri. In the early 1960s, when Mr. Johnson was a child, Charleston was highly segregated. Not only were the schools segregated, with a significant difference between the quality of the schools for white and black children, but African-Americans like Mr. Johnson and his family could not eat inside the local restaurants; they had to get their food "to go" from behind the establishment, "served out of a window that had a sign on it, said, "For colored only." Def. Ex. C, Deposition of Steve Betts, p. 6.<sup>16</sup> They had to sit in the balcony of the movie theater. Def. Ex. C, Deposition of Steve Betts, p. 5. Deborah Turner recalled that the whites sometimes threw soda and popcorn on the black movie patrons. Def. Ex. D, Deposition of Deborah Turner, p. 6. The bus station and buses were also segregated. Def. Ex. C, Deposition of Steve Betts, p. 6.

Mr. Johnson's family lived in a rural area. For much of his childhood he lived in four-room shacks raised above the ground to avoid flooding from the Mississippi River. There were no screens in the

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<sup>16</sup> Mr. Betts's deposition was read into evidence. Trial Tr. Vol. II, p. 1185.

windows, so insects were a constant problem. Several of the houses had no electricity, and none had running water. Trial Tr. Vol. II, p. 1020-1021. The flimsiness of these structures is illustrated by the fact that when Mr. Johnson's mother burned one of them down, Mr. Johnson's father's "boss man" (the white farmer for whom he worked) simply pulled another shack into its place. Trial Tr. Vol. II, p. 1122.

Mr. Johnson's family was a typical black family of the time in Charleston. As Steve Betts, a minister and high school counselor, put it, "The blacks basically worked on farms or did farm labor, picking cotton, chopping cotton, hauling hay, and domestic works. That is, the ladies basically worked in the homes of the whites as housekeepers or maids." Def. Ex. C, Deposition of Steve Betts, p. 6. Mr. Betts also related that in the early 1960s, when the schools were integrated, "We had to fight our way to school and we had to fight our way from school." Def. Ex. C, Deposition of Steve Betts, p. 9.

Mr. Johnson began his own education at an all black school called Washington School. Def. Ex. D, Deposition of Deborah Turner, p. 4. Ms. Turner worked at the school. She recalled, It was [in] a very poor condition. . . because the black children was handed down all of the books that an all white school by the name of Eugene Field, . . . used. . ."

The other black schools also got hand-me-down books from white schools. Def. Ex. D, Deposition of Deborah Turner, p. 7. Ms. Turner recalled a wide gulf between the economic levels of black and white citizens at that time. Def. Ex. D, Deposition of Deborah Turner, p. 5.

There is no question that the crimes at issue were extremely serious and brutal. But that brutality is clearly outweighed by the brutal circumstances of Mr. Johnson's background, his impaired intellectual functioning, and the stresses to which he was subject at the time of the events. Ample evidence was presented in mitigation, both as relevant to the statutory mitigating circumstances that Mr. Johnson was under the influence of extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. L.F. Vol. II, pp. 260, 267, 274.

Under these circumstances, the jury's failure to find that the evidence in mitigation outweighed the evidence in aggravation is incorrect as a matter of law, and the death sentence cannot stand.

POINT III

THE TRIAL COURT ERRED IN REQUIRING MR. JOHNSON TO SHOW MENTAL RETARDATION BY A PREPONDERANCE OF THE EVIDENCE, AND IN GIVING INSTRUCTIONS 6, 7, 11, 12, 16, 17, AND 21. THIS VIOLATED MR. JOHNSON'S RIGHT UNDER THE U.S. CONST. AMEND. VI AND THE MISSOURI CONSTITUTION TO A JURY FINDING, BEYOND A REASONABLE DOUBT, AS TO ANY FACTOR WHICH INCREASES HIS SENTENCE. UNDER *ATKINS V. VIRGINIA*, A DEATH SENTENCE CAN ONLY BE IMPOSED ON PERSONS WHO ARE NOT MENTALLY RETARDED.

Should this Court find that Mr. Johnson did not meet the burden imposed by the trial court to prove by a preponderance of the evidence that he is mentally retarded, reversal for a new trial is nonetheless required because that burden was not properly imposed. Prior to trial, Mr. Johnson moved the court to require the jury to find, beyond a reasonable doubt, that Mr. Johnson was not mentally retarded, before imposing the death penalty. L.F. Vol. II, p. 211. The trial court denied

this motion, L.F. Vol. II, p. 237, and Mr. Johnson then pursued this relief by a petition for writ of mandamus to this Court, which was assigned Cause No. SC866636. This Court denied the requested relief.

At the end of the trial, Mr. Johnson submitted proposed instructions A-D:

#### INSTRUCTION A

In determining the punishment to be assessed under Counts I, II, and III against the defendant for the murders of Fred Jones, Mary Bratcher, and Mable Scruggs, you must first consider whether the defendant is mentally retarded.

As used in this instruction, a person is mentally retarded if he suffers from 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.

The state has the burden of proving beyond a reasonable doubt that the defendant is not mentally retarded. Unless you find beyond a reasonable doubt that the defendant is not mentally retarded, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

L.F. Vol. II, p. 301.

#### INSTRUCTION B

When you retire to your jury room, you will first select one of your number to act as you[r] foreperson and to preside over your deliberation.

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count I, if you unanimously decide, after considering all of the evidence and instructions of the law

given to you, that the defendant must be put to death for the murder of Fred Jones, your foreperson must complete the verdict form and write into your verdict all of the statutory aggravating circumstance(s) submitted in Instruction No. \_\_\_ that you found beyond a reasonable doubt. The foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Fred Jones by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all the evidence and instructions of law, that the defendant must be punished for the murder of Fred Jones by imprisonment for life by the Department of Corrections without eligibility for

probation or parole, you foreperson will sign the verdict form so fixing the punishment.

If you do not unanimously find beyond a reasonable doubt that the defendant is not mentally retarded, as submitted in Instruction No. \_\_\_\_, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. \_\_\_\_, or if you are unable to unanimously find that there are facts and circumstances in aggravation of punishment that warrant the imposition of a sentence of death, as submitted in Instruction No. \_\_\_\_, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find the matters described in Instructions No. \_\_\_\_ and \_\_\_\_, and you are unable to

unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree on the punishment, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict all of the statutory aggravating circumstance(s) submitted in Instruction No. \_\_\_\_ that you found beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree on punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.

L.F. Vol. II, p. 302.

### INSTRUCTION C

When you retire to your jury room, you will first select one of your number to act as you[r] foreperson and to preside over your deliberation.

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count II, if you unanimously decide, after considering all of the evidence and instructions of the law given to you, that the defendant must be put to death for the murder of Mary Bratcher, your foreperson must complete the verdict form and write into your verdict all of the

statutory aggravating circumstance(s) submitted in Instruction No. \_\_\_\_ that you found beyond a reasonable doubt. The foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Mary Bratcher by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all the evidence and instructions of law, that the defendant must be punished for the murder of Fred Jones by imprisonment for life by the Department of Corrections without eligibility for probation or parole, you foreperson will sign the verdict form so fixing the punishment.

If you do not unanimously find beyond a reasonable doubt that the defendant is not mentally retarded, as

submitted in Instruction No. \_\_\_\_, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. \_\_\_\_, or if you are unable to unanimously find that there are facts and circumstances in aggravation of punishment that warrant the imposition of a sentence of death, as submitted in Instruction No. \_\_\_\_, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find the matters described in Instructions No. \_\_\_\_ and \_\_\_\_, and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree on the punishment, your foreperson will complete

the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict all of the statutory aggravating circumstance(s) submitted in Instruction No. \_\_\_ that you found beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree on punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.

L.F. Vol. II, p. 304

## INSTRUCTION D

When you retire to your jury room, you will first select one of your number to act as you[r] foreperson and to preside over your deliberation.

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count III, if you unanimously decide, after considering all of the evidence and instructions of the law given to you, that the defendant must be put to death for the murder of Mable Scruggs, your foreperson must complete the verdict form and write into your verdict all of the statutory aggravating circumstance(s) submitted in Instruction No. \_\_\_ that you found beyond a reasonable doubt. The foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Mable Scruggs by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all the evidence and instructions of law, that the defendant must be punished for the murder of Mable Scruggs by imprisonment for life by the Department of Corrections without eligibility for probation or parole, you foreperson will sign the verdict form so fixing the punishment.

If you do not unanimously find beyond a reasonable doubt that the defendant is not mentally retarded, as submitted in Instruction No. \_\_\_\_, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. \_\_\_\_, or if you are unable to unanimously find that there are facts and circumstances in aggravation of punishment that warrant the imposition of a sentence of death, as submitted in Instruction No. \_\_\_\_, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find the matters described in Instructions No. \_\_\_\_ and \_\_\_\_, and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree on the punishment, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict all of the statutory aggravating

circumstance(s) submitted in Instruction No. \_\_\_ that you found beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree on punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.

L.F. Vol. II, p. 306.

These instructions were refused by the trial court. Instead, the court gave the following instructions, to which the defense objected:

#### INSTRUCTION 6

In determining the punishment to be assessed under Counts I, II and III against the defendant for the murders of Fred Jones, Mary Bratcher and Mable Scruggs, you must first determine whether the defendant is mentally retarded.

As used in this instruction, a person is mentally retarded if he suffers from 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.

If you unanimously find by a preponderance of the evidence that the defendant is mentally retarded, you must return a verdict fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole. As used in this instruction

“preponderance of the evidence” means that it is more likely true than not true that the defendant is mentally retarded.

L.F. Vol. II, p. 256.

#### INSTRUCTION NO. 11

When you retire to your jury room, you will first select one of your number to act as your foreperson and to preside over your deliberation.

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count I, if you unanimously decide, after considering all of the evidence and instructions of the law given to you, that the defendant must be put to death for the murder of Fred Jones, your foreperson must complete the verdict form and write into your verdict all of the statutory aggravating circumstance(s) submitted in Instruction No. 7

that you found beyond a reasonable doubt. The foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Fred Jones by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all the evidence and instructions of law, that the defendant must be punished for the murder of Fred Jones by imprisonment for life by the Department of Corrections without eligibility for probation or parole, you foreperson will sign the verdict form so fixing the punishment.

If you unanimously find by a preponderance of the evidence that the defendant is mentally retarded, as submitted in Instruction No. 6, then your foreperson must sign the verdict form fixing the punishment at imprisonment

for life by the Department of Corrections without eligibility for probation or parole.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 7, or if you are unable to unanimously find that there are facts and circumstances in aggravation of punishment that warrant the imposition of a sentence of death, as submitted in Instruction No. 8, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find the matters described in Instructions No. 7 and 8, and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree on the punishment, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must

answer the questions on the verdict form and write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 7 that you found beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree on punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.

L.F. Vol. II, p. 262.

## INSTRUCTION NO. 16

When you retire to your jury room, you will first select one of your number to act as your foreperson and to preside over your deliberation.

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count II, if you unanimously decide, after considering all of the evidence and instructions of the law given to you, that the defendant must be put to death for the murder of Mary Bratcher, your foreperson must complete the verdict form and write into your verdict all of the statutory aggravating circumstance(s) submitted in Instruction No. 12 that you found beyond a reasonable doubt. The foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the

facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Mary Bratcher by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all the evidence and instructions of law, that the defendant must be punished for the murder of Mary Bratcher by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the verdict form so fixing the punishment.

If you unanimously find by a preponderance of the evidence that the defendant is mentally retarded, as submitted in Instruction No. 6, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a

reasonable doubt, as submitted in Instruction No. 12, or if you are unable to unanimously find that there are facts and circumstances in aggravation of punishment that warrant the imposition of a sentence of death, as submitted in Instruction No. 13, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find the matters described in Instructions No. 12 and 13, and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree on the punishment, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 12 that you found beyond a reasonable doubt and your foreperson must

sign the verdict form stating that you are unable to decide or agree on punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.

L.F. Vol. II, p. 262.

#### INSTRUCTION NO. 21

When you retire to your jury room, you will first select one of your number to act as your foreperson and to preside over your deliberation.

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count III, if you unanimously decide, after considering all of the evidence and instructions of the law given to you, that the defendant must be put to death for the murder of Mable Scruggs, your foreperson must complete the verdict form and write into your verdict all of the statutory aggravating circumstance(s) submitted in Instruction No. 17 that you found beyond a reasonable doubt. The foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Mable Scruggs by imprisonment for life by the Department of Corrections without eligibility for probation or parole, and

your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all the evidence and instructions of law, that the defendant must be punished for the murder of Mable Scruggs by imprisonment for life by the Department of Corrections without eligibility for probation or parole, you[r] foreperson will sign the verdict form so fixing the punishment.

If you unanimously find by a preponderance of the evidence that the defendant is mentally retarded, as submitted in Instruction No. 6, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 17, or if you are unable to unanimously find that there are facts and circumstances in aggravation of punishment that warrant the imposition of a sentence of death, as submitted in

Instruction No. 18, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find the matters described in Instructions No. 17 and 18, and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree on the punishment, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 17 that you found beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree on punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the

defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.

L.F. Vol. II, p. 277.

***Standard of review.*** The trial court's legal ruling regarding the burden of proof on the issue of mental retardation is reviewed *de novo* by this Court.

***Argument.*** Mr. Johnson acknowledges that this Court's decision in *Johnson v. State*, 102 S.W.3d 535 (Mo. banc 2003), placed the burden on Mr. Johnson to prove by a preponderance of the evidence that he is mentally retarded in order to avoid consideration of the death penalty. In so holding, the Court relied on Mo. Rev. Stat. §565.030.6, which was enacted before the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

An analysis of *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Ring v. Arizona*, 536 U.S. 584 (2002), demonstrates that, in order to impose death, a jury must find beyond a reasonable doubt that Mr. Johnson is not mentally retarded. *Ring* involved a Sixth Amendment challenge to Arizona’s judge-sentencing capital punishment scheme. Relying on the constitutional principles established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Sixth Amendment does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone), *Ring* argued that *Apprendi* was irreconcilable with the Court’s prior decision in *Walton v. Arizona*, 497 U.S. 639 (1990), which upheld Arizona’s judge-sentencing procedure. The Court agreed, overruled *Walton*, and held that the Sixth Amendment requires that any finding of fact that makes a defendant eligible for the death penalty must be unanimously made by the jury beyond a reasonable doubt. *Ring*, 536 U.S. 584, 609 (2002). Justice Scalia’s concurring opinion crystallized the Court’s holding as follows: “All facts essential to the imposition of the level of punishment that the defendant receives –whether the statute calls them elements of the offense, sentencing factors, or *Mary Jane* – must

be made by the jury beyond a reasonable doubt.” *Ring*, 536 U.S. 584 at 610 (Scalia, J. concurring).

While *Ring* dealt specifically with statutory aggravating circumstances, it included “factfinding[s] necessary to . . . put [a defendant] to death.” These factfindings to which the decision applied were described as “the functional equivalent of an element of a greater offense” *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

*Atkins v. Virginia*, 536 U.S. 304 (2002), held that the Eighth Amendment prohibits a mentally retarded defendant from being sentenced to death. In *Apprendi/Ring* parlance, a mentally retarded defendant is now constitutionally ineligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Mental retardation is now a factual issue upon which a defendant’s eligibility for death turns. Just as a defendant cannot be sentenced to death, under Missouri law, unless statutory aggravating circumstances exist, he cannot be sentenced to death, under the United States Constitution, unless he is *not* mentally retarded.

It is true that, under Missouri law, the jury need not find beyond a reasonable doubt that aggravating evidence outweighs mitigating evidence in order to sentence a defendant to death. But such weighing,

unlike statutory aggravators, is not required by the Constitution. In *Furman v. Georgia*, 408 U. S. 238 (1972) the United States Supreme Court held that the death sentence could constitutionally be applied if the discretion of the jury to impose death was narrowed in such a way that the death sentence was reserved for a particularly serious class of cases and defendants. See *Maynard v. Cartwright*, 486 U. S. 356, 362 (1988) (“Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.”) The Court did not prescribe a particular statutory scheme to achieve this end, but the state of Missouri chose to enact a statute which narrowed the class of first degree murders eligible for the death penalty using aggravating circumstances. Mo. Rev. Stat. §565.030, §565.032. This brought Missouri’s death penalty scheme within the requirements of *Furman*.

It is quite clear, under *Ring*, that when a state death penalty statute provides for statutory aggravating circumstances, those circumstances must be found by a jury beyond a reasonable doubt in order for a defendant to be eligible for the death penalty. *Ring* clearly holds the procedural rights guaranteed by *Apprendi v. New Jersey*, 530

U.S. 466 (2000) attach to elements that are added by the Supreme Court as “interpret[at]ions] of the Constitution to require the addition of an . . . element to the definition of a criminal offense in order to narrow its scope.” *Ring v. Arizona*, 536 U.S. 584, 606 (2002).

It is just as clear that *Atkins v. Virginia*, 536 U.S. 304 (2002), adds such an element. The Court in *Atkins* referred specifically to the principles of *Furman* and its progeny to support its decision: “Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.” *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). And, under *Ring*, it is these narrowing elements that require a determination of eligibility beyond a reasonable doubt.

Even apart from the clear dictates of *Ring* and *Apprendi*, prior precedent establishes that the prosecution must bear the burden of proving the absence of mental retardation beyond a reasonable doubt. In *In Re Winship*, 397 U.S. 358, 364 (1970), the Supreme Court held that the U.S. Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. Applying that principle, in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court held unconstitutional a Maine statute that placed upon the

defendant the burden of proving that he acted in the heat of passion in order to reduce a first degree murder charge, which required the mental state of “malice aforethought,” to manslaughter. The court’s instructions in *Mullaney* informed the jury that malice aforethought could be implied from the circumstances of the crime, and that to avoid such a finding, the defendant had the burden to prove the existence of sudden passion.

Maine attempted to defend its statute on the ground that “sudden passion” was not part of the definition of the offense of felonious homicide under Maine law. As the Court would later do in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court in *Mullaney* emphasized the necessity of looking at the *effect* of a state statute rather than its form:

*Winship* is concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the ‘operation and effect of the law as applied and enforced by the state,’ *St. Louis S.W.R. Co. v. Arkansas*, 235 U.S. 350, 362. . . (1914), and to the interests of both the State and the defendant as affected by the allocation of the burden of proof.

Because the Maine law allowed the state to punish a defendant for murder without proving malice aforethought, instead requiring the defendant to *disprove* it by proving sudden passion, the Court found it unconstitutional despite the nomenclature used in the Maine statute. The Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), again emphasized this principle: “[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”

The principle of *Mullaney*, *Apprendi*, and *Ring* applies here. Under *Atkins v. Virginia*, 536 U.S. 304 (2002), a mentally retarded defendant has the constitutionally protected right not to be executed—a right a non-mentally retarded defendant does not have. At a hearing to determine whether the defendant is mentally retarded, the burden of proving this constitutionally dispositive fact cannot fall upon the defendant. Otherwise, as in *Mullaney*, the defendant will bear the burden of proving a fact—mental retardation—that is inconsistent with the fact required to sentence him to death—non-mental retardation. Thus, under controlling federal constitutional law, once the defendant has placed mental retardation in issue, the prosecution must bear the

burden of disproving it beyond a reasonable doubt, and the trial court should have so instructed the jury.

The failure to so instruct the jury was clearly prejudicial to Mr. Johnson. The state presented no expert opinion that contradicted that of the two defense experts who testified that Mr. Johnson was mentally retarded. They presented no evidence that the IQ test score obtained by their own expert, a 67, did not establish Mr. Johnson's significantly subaverage intellectual functioning. While some evidence that Mr. Johnson's adaptive functioning is not inadequate in *all* areas was presented, they did not refute the defense evidence showing lack of adaptive functioning in four to eight areas, and only two are required for a diagnosis of mental retardation. The state's evidence here did not, as a matter of law, prove beyond a reasonable doubt that Mr. Johnson is not mentally retarded.

Because the failure to require the proper burden of proof is of constitutional dimension, the proper standard for prejudice is that of *Chapman v. California*, 386 U.S. 18 (1967). Under *Chapman*, reversal is required unless the error is harmless beyond a reasonable doubt. Because of the weight of the evidence supporting mental retardation,

this Court must conclude that Mr. Johnson was prejudiced by the use of the wrong standard, and must reverse and remand for a new trial.

POINT IV

THE TRIAL COURT ERRED IN GRANTING THE STATE'S CHALLENGE FOR CAUSE TO PROSPECTIVE JURORS GREEN, LEITER, ALLEY, AND CORCORAN. THESE PROSPECTIVE JURORS' VIEWS ON THE DEATH PENALTY WOULD NOT SUBSTANTIALLY IMPAIR THEIR ABILITY TO PARTICIPATE IN THE DELIBERATIVE PROCESS IN THE PENALTY PHASE REQUIRED BY MISSOURI LAW. THEREFORE, THEIR EXCLUSION VIOLATED MR. JOHNSON'S RIGHTS TO A FAIR AND IMPARTIAL JURY AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE MISSOURI CONSTITUTION.

Under *Wainwright v. Witt*, 469 U.S. 412, 421 (1985) and *Adams v. Texas*, 448 U.S. 38, 45 (1980), "A juror may not be challenged for cause based on his views about capital punishment unless those views would

prevent or substantially impair the performance of his duties as a juror in accordance with his oath.”

During the jury selection process, the state’s challenges for cause to four prospective jurors were sustained in violation of Mr. Johnson’s rights. The responses of the jurors are described below.

**Prospective juror Green.**

Asked by the prosecutor if she was among those who could “never envision themselves voting with your fellow jurors for the death penalty,” Ms. Green responded that she would “hesitate.” Trial Tr. Vol. I, p. 351. Later, in response to another question from the prosecutor, Ms. Green said, “I am just—I’d have to say yes. . . you just convinced me when you said ‘Could you stand up and pronounce the death penalty?’ And I couldn’t do it. I know I couldn’t.” Trial Tr. Vol. I, p. 359.

However, after defense counsel explained to Ms. Green that she would not be required to be the jury foreperson, Ms. Green said, “if I had to, I would follow what the laws told me to do. . . I would because I know that’s the right thing to do; not because I want to, but because I know it’s the right thing to do.” Trial Tr. Vol. I, p. 399.

The State challenged Ms. Green for cause, and the challenge was sustained over defense objection. Trial Tr. Vol. I, pp. 439, 443.

### **Prospective juror Leiter**

Ms. Leiter stated repeatedly that she did not believe in the death penalty. However, she coupled that statement with a statement of her ability to serve on the jury nonetheless:

**Q.** If death was one of the considerations, could you serve on that jury?

**Ms. Leiter:** I believe I could.

**Q.** Okay, you could set aside your personal biases and be fair and impartial to Mr. Johnson here in this case?

**Ms. Leiter:** I believe so. . . I do not believe in the death penalty.

Trial Tr. Vol. I, p. 400.

The State challenged Ms. Leiter for cause, and the challenge was sustained over defense objection. Trial Tr. Vol. I, pp. 446-447.

### **Prospective juror Corcoran**

Prospective juror Corcoran indicated that she could vote for the death penalty, but “the evidence would have to be great.” She went on to say that despite the fact that she doesn’t “like the idea of the death penalty,” she could still vote for it. In order to impose the death penalty, Ms. Corcoran would have to be sure, “like beyond all doubt,” in her own

mind, that the death penalty was the right decision. Trial Tr. Vol. I, pp. 573-576. She explained, “Just for myself, I would have to be completely convinced.” Trial Tr. Vol. I, p. 618.

Ms. Corcoran was excused on the state’s challenge for cause over defense objection. Trial Tr. Vol. I, pp. 623, 627.

**Prospective juror Alley**

Ms. Alley began by saying that she believed in the death penalty, but did not know if she could “do it.” She indicated that she would “possibly” be impaired, and said she would not be “comfortable” with the decision. Pressed further by the prosecutor to commit to inability to consider the death penalty, she said, “I think whether it comes down to it, when I really have to choose, that I would have to say that’s correct.” However, she went on, I can’t say somebody wouldn’t talk me out of that. I haven’t had that happen.” Trial Tr. Vol. I, pp. 568-569.

The state challenged Ms. Alley for cause and the defense made no objection, but did raise an objection in the motion for new trial. L.F. Vo. II, p. 317.

***Standard of review.*** This court reviews the trial court’s determination on challenges for cause under an abuse of discretion

standard. *State v. Simmons*, 944 S.W.2d 165 (Mo. banc 1997); *State v. Kinder*, 942 S.W.2d 313 (Mo. banc 1996).

**Argument.** In *Wainwright v. Witt*, 469 U.S. 412, 421 (1985), the U.S. Supreme Court reiterated that a defendant facing the death penalty was entitled to have jurors on the panel who generally opposed the death penalty provided that those jurors' views would not substantially prevent or impair the performance of their legal duties. In federal habeas corpus cases, the reviewing federal court gives great deference to the ruling of the trial court on this issue. Revisiting the issue in *Darden v. Wainwright*, 477 U.S. 168 (1986), the court held that the whole record of jury selection as it relates to the prospective juror in question was to be considered in determining whether the juror met this standard. Finally, the court in *Greene v. Georgia*, 117 S.Ct. 578 (1996) held that the deference accorded the trial court by the *Witt* decision is not constitutionally required but simply stated the standard to be used in federal habeas corpus cases. Therefore, a state court may use a different standard in evaluating the propriety of strikes for cause.

When a challenge for cause based on opposition to the death penalty is made, the trial court has “the difficult task of distinguishing between prospective jurors whose opposition to capital punishment will

not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial.” *Wainwright v. Witt*, 469 U.S. 412, 421 (1985).

A review of the voir dire indicates that the trial court abused its discretion here. Each of the four prospective jurors at issue expressed opposition to or reservations about the death penalty. However, each of them also repeatedly stated that they could apply the law, although none of them relished the prospect of doing so. Ms. Green said she could apply the law and impose the death penalty “because I know that’s the right thing to do. . .” Trial Tr. Vol. I, p. 399. Ms. Leiter said she did not *believe* in the death penalty, but could set aside her personal biases and apply the law. Trial Tr. Vol. I, p. 400. Ms. Corcoran said she could vote for the death penalty but would have to be “completely convinced” that it was the right decision. Trial Tr. Vol. I, p. 618. Because the law does not specify the amount of persuasion which must satisfy each juror that death is the right sentence, this view did not disqualify Ms. Corcoran. Like Texas, Missouri does not specify a burden of proof on mitigation issues. Thus, as the court held in *Woods v. Cockrell*, 307 F.3d 353, 359 (5<sup>th</sup> Cir. 2002), “each juror individually and

**APPELLANT’S BRIEF** - Page 97

subjectively determines what evidence, if any, is sufficient to mitigate against the imposition of the death penalty.” It follows that Ms. Corcoran’s insistence on a high burden of proof on aggravation does not substantially impair her ability to deliberate under Missouri law.

Finally, Ms. Alley was fairly sure she could not impose death, but said that it might be possible that she could be persuaded otherwise. Like Ms. Corcoran, this view does not substantially impair her ability to follow Missouri law.

It should be noted that prior to trial, the defense moved unsuccessfully for the court to allow defense attorneys to question the prospective jurors first on the issue of the death penalty. L.F. Vol. I, p. 91. As a result, the prosecutor was able to frame the issue in a way that hardened the prospective jurors’ views in opposition to the death penalty. For example, Ms. Leiter initially answered the prosecutor’s question about whether her views about the death penalty would impair her ability to serve by saying, “No I don't think it would be impaired. I think I could do it if—if I found the evidence you gave, you know, I think I could think it through.” Trial Tr. Vol. I, p. 369. The prosecutor then went on, “You know, you’re just a very nice person. I can tell that. Do you think that your personality would make it difficult for you to be

the one that was the foreperson, if you were selected by the jury, to sign that verdict form. . .” Trial Tr. Vol. I, pp. 369-370. Ms. Leiter then began to back away from her earlier expressed willingness to follow the law. Ms. Green also responded to the prosecutor’s questioning, she said, “[Y]ou just *convinced* me when you said ‘Could you stand up and pronounce the death penalty?’” Trial Tr. Vol. I, p. 359. (Emphasis added)

The prosecutor’s technique of discouraging prospective jurors who had reservations about the death penalty but were willing to be open to it if necessary was not, in and of itself, improper under Missouri law. But since the prosecutor got to go first throughout the jury selection, the defense was always under the necessity of rehabilitating these prospective jurors, without ever having the opportunity to prosecutor had to “harden up” the view that it is possible to oppose the death penalty and still be a qualified juror.

*Witherspoon* and *Witt* represent the Supreme Court’s response to a difficult problem. On the one hand, it is clearly unfair to the defendant if a death penalty jury is made up only of *advocates* of the death penalty. On the other hand, it is unfair to the state if jurors are completely unable to consider the death penalty.

As those cases suggest, however, distinguishing the qualified from unqualified jurors is extremely difficult. At the jury selection stage of the trial, it is improper to give the prospective jurors much information about the case, so the prospective jurors are speculating about their views. Moreover, particularly under Missouri's jury selection rules which discourage the asking of open-ended jury selection questions, the prospective jurors are placed on the spot and required to channel their views into the terminology used by the questioner. Finally, because the jurors are examined in the courtroom in the presence of others, some may be reticent about expressing themselves freely. These problems could be ameliorated if the defense, which has the more difficult task of qualifying those with reservations about the death penalty as jurors, were permitted to go first. At least, it would equalize the situation somewhat if the court alternated which side began the questioning with each small group.

The prosecutor here used the advantage of going first to encourage Ms. Green, Ms. Leiter, Ms. Corcoran and Ms. Alley to express reservations about their ability to participate. Viewing their statements in a more even-handed way leads to the conclusion that their exclusion for cause was not proper under *Wainwright v. Witt*, 469 U.S. 412, 421

(1985). Because Mr. Johnson was denied the impartial jury to which he was entitled when his life was at stake, reversal for a new trial is required.

#### POINT V

**THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE OVER DEFENSE OBJECTION STATE'S EXHIBITS 34A-G, 39A-C, 41A-D, 69A-D, 70A-E, AND 71A-C. THESE EXHIBITS, WHICH WERE PHOTOGRAPHS SHOWING THE INJURIES OF THE DECEASED PERSONS, WERE CUMULATIVE AND UNNECESSARY AND THEIR PREJUDICIAL IMPACT SUBSTANTIALLY OUTWEIGHED THEIR PROBATIVE VALUE. THEREFORE, THE ADMISSION OF THESE EXHIBITS VIOLATED MR. JOHNSON'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION, AMEND. XIV AND THE MISSOURI CONSTITUTION, ART. 1, §10.**

Over defense objection, photographs of the victims' bodies, both as they were found and after autopsy, were admitted. The photographs at

issue were State's Exhibit 34A-G, photographs of the bathroom of the Casey's store with the bodies of Mable Scruggs and Mary Bratcher, Trial Tr. Vol. I, p. 759; 39A-C, photographs of the body of Mable Scruggs in the bathroom, Trial Tr. Vol. I, p. 766; and 41A-D, photographs of the body of Fred Jones in the walk-in cooler, Trial Tr. Vol. I, p. 776. State's Exhibits 69A-D, 70A-E, AND 71A-C, photographs of various aspects of the deceased persons after autopsy, were referenced in the form testimony of medical examiner Dr. Jay Dix, which was read into evidence by the state and admitted into evidence as State's Ex. 79. Trial Tr. Vol. II, p. 968. These exhibits were objected to at the prior trial under different numbers. Trial Tr. Vol. II, p. 978. The original rulings are found at State's Ex. 79, pp. 945,<sup>17</sup> 953, 960. Prior to the reading of the transcript, Mr. Johnson renewed and amplified his objection to these exhibits, which was again overruled. Trial Tr. Vol. II, pp. 965, 968.

***Standard of review.*** Decisions of the trial court as to the admission of evidence are reviewed for abuse of discretion.

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<sup>17</sup> The page numbers are those from the original trial transcript.

*Argument.* It has been repeatedly held that the gruesomeness of photographic evidence is not an insurmountable obstacle to their admission when the photos are relevant to an issue in the case. However, “Such photographs should not be admitted where their sole purpose is to arouse the emotions of the jury and to prejudice the defendant.” *State v. Wood*, 596 S.W.2d 394, 403 (Mo. banc 1980). The situation here is even more egregious than that in *State v. Floyd*, 360 S.W.2d 630 (Mo. 1962), where the admission of photographs of a decomposed body was held error. As in *Floyd*, the photographs here proved nothing of any consequence. Mr. Johnson’s guilt had been established prior to trial. While the jury was entitled to know how the victims were killed in order to gauge the statutory aggravating circumstance relating to whether Mr. Johnson “committed repeated and excessive acts of physical abuse” upon each victim, the testimony of the medical examine and other witnesses who found the bodies was ample on that issue. The use of the photographs here had no purpose other than to inflame the jury, and violated Mr. Johnson’s right to due process of law under the United States Constitution, Amend. XIV and the Missouri Constitution, Art. 1, §10

In *State v. Clements*, 849 S.W.2d 640 (Mo. App. 1993), the court found similar photographs admissible because the nature of the injuries inflicted by a baseball bat was probative on the issue of deliberation. Here, however, the issue of deliberation had been decided before the trial began. See also *State v. Sempsrott*, 587 S.W.2d 630 (Mo. App. 1979). In *State v. Day*, 866 S.W.2d 491 (Mo. App. 1993), the court approved the admission of photographs of the assault victim taken at the hospital to prove that he had sustained serious physical injury, as opposed to a lesser injury. Here, the degree of injury was not at issue.

The admission of gruesome photographs presents a situation in which the court is required to perform a balancing of the probative value and prejudicial impact of the evidence. In *State v. Pinkus*, 550 S.W.2d 829, 837 (Mo. App. 1977), the court held “We agree that a photograph of the victim in a homicide case may be so gruesome and inflammatory that its probative value is outweighed by the prejudicial effect it has on the jury.” See also *Trejo v. Keller Industries, Inc.*, 829 S.W.2d 593 (Mo. App. 1992). The trial court clearly abused its discretion in making that balancing here, and, in so doing, deprived the Mr. Johnson of due process of law.

In *State v. Stevenson*, 852 S.W.2d 858 (Mo. App. 1993), the court found that autopsy photographs showing the bullet track within the body were unduly prejudicial and should not have been admitted. The court declined to reverse because the judge, not the jury, assessed punishment and the evidence of guilt was overwhelming. This factor requires reversal here. The jury not only assessed punishment, it assessed the ultimate penalty. It is true that reversals for error in the admission of photographic evidence are rare. However, this case clearly crosses the line between gruesome photographs offered for a proper purpose and those offered simply to inflame the jury. The admission of this evidence denied the Mr. Johnson a fair trial, and reversal of the convictions is required.

The prejudicial impact of this evidence contributed to the imposition of the sentence of death. The jury were instructed three time (once for each victim) that they could consider all of the evidence offered at either phase in determining punishment. L.F. Vol. II, pp. 259, 266, 273. This Court must vacate a death sentence if the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. Mo. Rev. Stat. §565.035.3(1). The admission of this inflammatory evidence certainly encouraged the jury to act on the basis

of passion rather than reason, in violation of the mandate of *State v. Taylor*, 944 S.W.2d 925, 938 (Mo. banc 1997); *Gardner v. Florida*, 430 U.S. 349, 358 (1977); *Lankford v. Idaho*, 500 U.S. 110, 124-126 (1991); *Zant v. Stephens*, 462 U.S. 862 (1983); and *California v. Brown*, 475 U.S. 1301, 1304 (1986).

In this case, apart from the facts of the crime, there was little evidence in aggravation. During final argument, the prosecutor repeatedly emphasized the nature of the injuries. He mentioned the photographs specifically: “And you know you won’t forget, you won’t be able to forget the photos of these people. But you have to look at them. You had to look at them to do your duty and understand this case.” Trial Tr. Vol. III, p. 1773. This served to bring the jury’s attention to the needlessly gory photographs, and caused them to base their decision on passion rather than reason, in violation of Mr. Johnson’s rights under the United States Constitution. Prejudice is shown, and reversal is required.

POINT VI

**THE TRIAL COURT ERRED IN DENYING MR. JOHNSON'S MOTION TO ASK THE COURT TO REFRAIN FROM GIVING MAI-CR3D 313.40-313.48 OR TO DECLARE MISSOURI'S DEATH PENALTY STATUTE UNCONSTITUTIONAL, AND IN GIVING INSTRUCTIONS 7- 9, 12-14, AND 17-19. THESE INSTRUCTIONS IMPROPERLY PREVENT THE JURY FROM GIVING FULL CONSIDERATION TO MITIGATING EVIDENCE, AND THEREFORE VIOLATE THE DUE PROCESS AND CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE UNITED STATES AND MISSOURI CONSTITUTIONS.**

Prior to an earlier trial, Mr. Johnson moved the court to refrain from telling the jury that they could only consider mitigating evidence after determining, first, that at least one statutory aggravating circumstance had been proved beyond a reasonable doubt, and second, that the evidence in aggravation warranted the death penalty. L.F. Vol. I, p. 95. The trial court denied this motion, and renewed that ruling

before Mr. Johnson's current trial. Pursuant to that ruling, the trial court gave the following instructions:

#### INSTRUCTION NO. 7

If you did not unanimously find by a preponderance of the evidence that the defendant is mentally retarded, as submitted in Instruction No. 6, under Count I against the defendant for the murder of Fred Jones, you must first consider whether one or more of the following statutory aggravating circumstances exists:

1. Whether the murder of Fred Jones was committed while the defendant was engaged in the commission of another unlawful homicide of Mary Bratcher. A person commits unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Whether the murder of Fred Jones was committed while the defendant was engaged in the commission of another unlawful homicide of Mable Scruggs. A person commits unlawful homicide of murder in the first degree if

he knowingly causes the death of another person after deliberation upon the matter.

3. Whether the defendant murdered Fred Jones, for the purpose of the defendant receiving money or any other thing of monetary value from Fred Jones or another.

4. Whether the murder of Fred Jones involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman. You can make a determination of depravity only if you find:

That the defendant committed repeated and successive acts of physical abuse upon Fred Jones and the killing was therefore unreasonably brutal.

5. Whether the murder of Fred Jones was committed for the purpose of preventing a lawful arrest of the defendant.

6. Whether the murder of Fred Jones was committed while the defendant was engaged in the perpetration of robbery. A person commits the crime of robbery when he forcibly steals property.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

L.F. Vol. II, pp. 257-258.

#### INSTRUCTION NO. 8

As to Count I, if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 7 exists, then you must decide whether there are facts and circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon the defendant.

In deciding this question, you may consider all of the evidence presented, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No. 7. If each juror find facts and circumstances in aggravation of punishment that are sufficient to warrant a sentence of death, then you may consider imposing a sentence of death upon the defendant.

If you do not unanimously find from the evidence that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant's punishment, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

L.F. Vol. II, p. 259.

#### INSTRUCTION NO. 9

As you Count I, if you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts and circumstances in mitigation of punishment which

are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented.

As circumstances in mitigation of punishment, you shall consider:

1. Whether the murder of Fred Jones was committed while the defendant was under the influence of extreme mental or emotional disturbance.

2. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

You shall also consider any other facts or circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing the punishment of the defendant at

imprisonment for life by the Department of Corrections without eligibility for probation or parole.

L.F. Vol. II, p. 260.

#### INSTRUCTION NO. 12

If you did not unanimously find by a preponderance of the evidence that the defendant is mentally retarded, as submitted in Instruction No. 6, under Count II against the defendant for the murder of Mary Bratcher, you must first consider whether one or more of the following statutory aggravating circumstances exists:

1. Whether the murder of Mary Bratcher was committed while the defendant was engaged in the commission of another unlawful homicide of Fred Jones. A person commits unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Whether the murder of Mary Bratcher was committed while the defendant was engaged in the commission of another unlawful homicide of Mable Scruggs.

A person commits unlawful homicide of murder in the first

degree if he knowingly causes the death of another person after deliberation upon the matter.

3. Whether the defendant murdered Mary Bratcher, for the purpose of the defendant receiving money or any other thing of monetary value from Mary Bratcher or another.

4. Whether the murder of Mary Bratcher involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman. You can make a determination of depravity only if you find:

That the defendant committed repeated and successive acts of physical abuse upon Mary Bratcher and the killing was therefore unreasonably brutal.

5. Whether the murder of Mary Bratcher was committed for the purpose of preventing a lawful arrest of the defendant.

6. Whether the murder of Mary Bratcher was committed while the defendant was engaged in the perpetration of robbery. A person commits the crime of robbery when he forcibly steals property.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

L.F. Vol. II, pp. 264-265.

#### INSTRUCTION NO. 13

As to Count II, if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 12 exists, then you must decide whether there are facts and circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon the defendant.

In deciding this question, you may consider all of the evidence presented, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No. 12. If each juror find facts and circumstances in aggravation of punishment that are sufficient to warrant a sentence of death, then you may consider imposing a sentence of death upon the defendant.

If you do not unanimously find from the evidence that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant's punishment, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

L.F. Vol. II, p. 266.

#### INSTRUCTION NO. 14

As you Count II, if you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts and circumstances in mitigation of punishment which

are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented.

As circumstances in mitigation of punishment, you shall consider:

1. Whether the murder of Mary Bratcher was committed while the defendant was under the influence of extreme mental or emotional disturbance.

2. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

You shall also consider any other facts or circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing the punishment of the defendant at

imprisonment for life by the Department of Corrections without eligibility for probation or parole.

L.F. Vol. II, p. 267.

#### INSTRUCTION NO. 17

If you did not unanimously find by a preponderance of the evidence that the defendant is mentally retarded, as submitted in Instruction No. 6, under Count III against the defendant for the murder of Mable Scruggs, you must first consider whether one or more of the following statutory aggravating circumstances exists:

1. Whether the murder of Mable Scruggs was committed while the defendant was engaged in the commission of another unlawful homicide of Fred Jones. A person commits unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Whether the murder of Mable Scruggs was committed while the defendant was engaged in the commission of another unlawful homicide of Mary Bratcher.

A person commits unlawful homicide of murder in the first

degree if he knowingly causes the death of another person after deliberation upon the matter.

3. Whether the defendant murdered Mable Scruggs, for the purpose of the defendant receiving money or any other thing of monetary value from Mable Scruggs or another.

4. Whether the murder of Mable Scruggs involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman. You can make a determination of depravity only if you find:

That the defendant committed repeated and successive acts of physical abuse upon Mable Scruggs and the killing was therefore unreasonably brutal.

5. Whether the murder of Mable Scruggs was committed for the purpose of preventing a lawful arrest of the defendant.

6. Whether the murder of Mable Scruggs was committed while the defendant was engaged in the perpetration of robbery. A person commits the crime of robbery when he forcibly steals property.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

L.F. Vol. II, pp. 271-272.

#### INSTRUCTION NO. 18

As to Count III, if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 17 exists, then you must decide whether there are facts and circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon the defendant.

In deciding this question, you may consider all of the evidence presented, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No. 17. If each juror find facts and circumstances in aggravation of punishment that are sufficient to warrant a sentence of death, then you may consider imposing a sentence of death upon the defendant.

If you do not unanimously find from the evidence that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant's punishment, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

L.F. Vol. II, p. 274.

#### INSTRUCTION NO. 19

As you Count III, if you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts and circumstances in mitigation of punishment which

are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented.

As circumstances in mitigation of punishment, you shall consider:

1. Whether the murder of Mable Scruggs was committed while the defendant was under the influence of extreme mental or emotional disturbance.

2. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

You shall also consider any other facts or circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing the punishment of the defendant at

imprisonment for life by the Department of Corrections without eligibility for probation or parole.

L.F. Vol. II, p. 274.

***Standard of review.*** Insofar as this is a legal error, it will be reviewed by this court *de novo*. As unpreserved instructional error, it will be reviewed for plain error.

***Argument.*** Because Missouri’s capital punishment instruction scheme requires the jury to focus exclusively on evidence in aggravation before turning to mitigating evidence, including a finding that the aggravating evidence “warrants” the death penalty, it creates an impermissible risk that the jury will not consider and give effect to mitigating evidence. This violates Mr. Johnson’s right, under the Eighth Amendment to the United States Constitution, to be free from cruel and unusual punishment.

In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the United States Supreme Court held that in order for the death penalty to be constitutional, the jury must “not be precluded from considering, as a mitigating factor, 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.” In *Eddings v. Oklahoma*, 455 U.S.

104 (1982), the Court clarified that *Lockett* requires more than the mere opportunity to present mitigating evidence. Rather, the jury must be permitted to *consider* that evidence in imposing punishment. Thus, the death sentence in *Eddings* was reversed where the judge ruled that evidence presented at trial concerning Mr. Eddings's background could not be considered in deciding whether the death penalty should be imposed.

The Court has reinforced this holding in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*) and *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). In *Penry I*, the court held that Texas's death penalty scheme, which required findings on "special issues" in order to impose the death penalty, violated *Lockett* and U.S. Const. amend. VIII because it did not give the jury a way to consider Mr. Penry's mental retardation as a mitigating factor. The Court distinguished between the *Furman* principle that in order to be constitutional, a statute must narrow the range of cases in which the death penalty may be *imposed* and the *Lockett-Eddings* principle that in deciding *not* to impose the death penalty, the jury should be given broad discretion. The Court concluded,

In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision.

*Penry v. Lynaugh*, 492 U.S. 302, 328 (1989).

In *Penry II*, the Court examined Texas's response to *Penry I* and determined that it was inadequate. Texas did not change its special issues or verdict forms. Rather, in Mr. Penry's retrial, the jury was given an instruction that it could consider any mitigating evidence. The instruction concluded,

If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

*Penry v. Johnson*, 532 U.S. 782, 790 (2001) (internal quotations omitted). The Court held that the instructions and verdict forms did not comply with *Penry I* because:

[T]he key under *Penry I* is that the jury be able to “consider and *give effect* to [a defendant's mitigating] evidence in imposing sentence.” 492 U.S., at 319. . . (emphasis added). See also *Johnson v. Texas*, 509 U.S. 350, 381. . . (1993) (O’CONNOR, J., dissenting) (“[A] sentencer [must] be allowed to give *full* consideration and *full* effect to mitigating circumstances” (emphasis in original)). For it is only when the jury is given a “vehicle for expressing its ‘reasoned moral response’ to that evidence in rendering its sentencing decision,” *Penry I*, 492 U.S., at 328. . . , that we can be sure that the jury “has treated the defendant as a ‘uniquely individual human bein[g]’ and has made a reliable determination that death is the appropriate sentence. . . *id.*, at 319. . . (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 305 (1976)).

*Penry v. Johnson*, 532 U.S. 782, 797 (2001).

Here, once the jury had made a determination that Mr. Johnson was not mentally retarded, they were instructed to focus exclusively on aggravating evidence during the next two steps of their process. First, they were instructed to determine whether any statutory aggravating circumstances had been found beyond a reasonable doubt. Inst. 7, 12, and 17, L.F. Vol. II, pp. 257, 264, 271. In this case, *all* of the statutory aggravating circumstances pertained to the facts of the offense, rather than to any personal characteristics of Mr. Johnson. At this stage of their deliberations, then, the jury was given no opportunity to consider Mr. Johnson's personal and individual characteristics. The same problem existed in the second step. At this stage, the jury was instructed to consider whether the evidence in aggravation "warranted" the death penalty. Inst. 8, 13, and 18, L.F. Vol. II, pp. 259, 266, 273. While the state did present some individualized aggravating evidence, such as Mr. Johnson's prior convictions for property crimes, given the fact that this sort of evidence was not mentioned in the jury instructions, it is virtually certain that the jury thought only about the offense when they decided that the evidence in aggravation "warranted" the death penalty. Essentially, then, the jury was instructed to focus on the same aggravating evidence twice.

Only after these two determinations had been made was the jury instructed to consider mitigating evidence and to decide whether it outweighed the aggravating evidence. Inst. 9, 14, and 19, L.F. Vol. II, pp. 260, 267, 274. But because of the early emphasis on the characteristics of the offense, that “weighing” likely was made with a thumb on the death penalty side of the scale. Moreover, the jurors were told that the death penalty is prohibited only if they determine unanimously that mitigating circumstances outweigh the aggravating circumstances that the jurors had just held “warranted” the death penalty.

It is clear that the Missouri statutory scheme, as well as the United States Constitution, requires that the jury must consider first whether a statutory aggravator has been proved in order to go further along the road to a death sentence. But the second, or “warrant,” step is not required by the constitution and is in fact harmful to the defendant. As the Court put it in *Penry I*, “Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant.” *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). In this case, the circumstances of the crime were horrific. Yet, the Constitution still requires the jury to consider not only Ernest

Johnson, murderer, but Ernest Johnson, the man driven by early trauma and lack of structure into an uncontrollable drug addiction. The court's instructions so weakened the jury's ability to do this that they do not satisfy the requirements of *Eddings*, *Lockett*, and *Penry I and II*.

The instructional error was highly prejudicial to Mr. Johnson. He presented extensive evidence not only of his mental limitations but of his crippling drug addiction and depression and lack of family structure. This Court cannot say, beyond a reasonable doubt as required by *Chapman v. California*, 386 U.S. 18 (1967), that the outcome would not have changed had Mr. Johnson's jury had a proper vehicle for considering this evidence. Therefore, reversal for a new trial is required.

POINT VII

**THE DEATH SENTENCE IN THIS CASE IS UNCONSTITUTIONAL AND MUST BE VACATED BECAUSE THIS COURT'S SCHEME OF PROPORTIONALITY REVIEW, DOES NOT COMPLY WITH THE REQUIREMENT OF MO. REV. STAT. §565.035.3(3) THAT THIS COURT DETERMINE WHETHER THE DEATH SENTENCE IN EACH CASE IS "EXCESSIVE OR DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES" IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW.**

For nearly a century, the United States Supreme Court has recognized "that punishment for crime should be graduated and proportioned to the offense," *Weems v. United States*, 217 U.S. 349, 367 (1910). To insure against the "wanton" and "freakish" imposition of the death penalty condemned in *Furman v. Georgia*, 408 U.S. 238 (1972), the Missouri legislature required proportionality review in all cases in which the death sentence is imposed, and directed the compiling of a database of cases to facilitate such review. Mo. Rev. Stat. §565.035.3,

requires this Court to consider each death sentence and determine whether it was “excessive or disproportionate to the penalty imposed in similar cases”. This statute created a due process and equal protection right in the Mr. Johnson and other defendants sentenced to death because “in integrating an appellate process into Missouri's criminal justice system, the state’s appellate procedures must comply with the Due Process Clause. . .” *Branch v. Turner*, 37 F.3d 371, 375 (8th Cir. 1994), *rev’d on other grounds sub nom. Goeke v. Branch*, 514 U.S. 115 (1995). See also *Evitts v. Lucey*, 469 U.S. 387, 400 (1985); *Easter v. Endell*, 37 F.3d 1343, 1345 (8th Cir. 1994); *Rust v. Hopkins*, 984 F.2d 1486, 1493 (8th Cir. 1993); *Hewitt v. Helms*, 459 U.S. 460, 471-472 (1982).

This Court’s approach is flawed in three ways. First, the pool of cases which this court reviews to determine proportionality is selected in such a way as to skew the analysis. According to this court's decisions, the pool includes either: 1) Only appealed cases - *State v. Bolder*, 635 S.W.2d 673, 685 (Mo. banc 1982); 2) only cases in which the state sought death - *State v. Sloan*, 756 S.W.2d 503 (Mo. banc 1988); *State v. White*, 813 S.W.2d 862 (Mo. banc 1991); 3) only cases with jury sentencing - *State v. Byrd*, 676 S.W.2d 494 (Mo. banc 1984), *State v.*

*Zeitvogel*, 707 S.W.2d 365 (Mo. banc 1986); or 4) only cases in which death was imposed, *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993).

Apart from the possible confusion caused by this approach, even a superficial analysis of *all* of these criteria for selection shows that many cases in which a defendant was sentenced to life imprisonment are eliminated. For example, a case in which the sentence was life is less likely to be appealed than a death sentence, which is appealed automatically. None of the cases in which the death penalty was waived will appear in the analysis. And, by comparing the case at issue only with those cases in which death was imposed, the court turns the concept of “proportionality” on its head. Such a comparison may allow the court to find similar cases in which death has been imposed, but that is not the same as proportionality. A previous mistake in the imposition of the death sentence should not pave the way for a repetition of the same mistake.

The second flaw in this court’s analysis has to do with the selection of cases for comparison from the pool of cases considered. This court has never articulated its approach to this process. See, e.g., *State v. Bannister*, 680 S.W.2d 141 (Mo. banc 1984). At most, there is a citation to cases with similar statutory aggravating circumstances,

excluding non-statutory aggravators and mitigators. See *State v. Davis*, 814 S.W.2d 593, 607 (Mo. banc 1991), Blackmar, J. dissenting. This denies the defendant any meaningful ability to articulate for the Court an argument that his sentence is disproportionate in comparison with other similar cases, in violation of his rights under the Sixth Amendment to the United States Constitution to present a defense and to the effective assistance of counsel.

Finally, the court fails to use adequate methods to compare the cases. Wallace and Sorensen suggest, in “*The Missouri Capital Punishment Process: Appellate Review of Proportionality and Racial Discrimination*”, unpublished article, at p. 30, the use of a “frequency” approach:

where the reviewing court determines the elements which led to a death sentence in the case and identif[ies] the comparison cases using a case selection method. Using the identified relevant factors, the court estimates the number of death sentences which have been imposed in this identified pool of cases. Then a determination is made as to whether the death penalty is being imposed sufficiently often to justify affirming the sentence under review.

The article states, “This type of review would appear necessary to meet the concerns regarding comparative excessiveness expressed in the plurality opinion in *Gregg v. Georgia*.” *The Missouri Capital Punishment Process: Appellate Review of Proportionality and Racial Discrimination*, unpublished article, at p. 31. Almost ten years earlier, looking more broadly at proportionality review, another team of writers came to the same conclusion.

In Acker and Lanier, *Statutory Measures for More Effective Appellate Review of Capital Cases*, 8 State Court Journal 211, 238 (1984), the authors suggest that the lack of standards in proportionality review statutes “helps explain why, in practice, comparative proportionality review has been an empty promise.” In Missouri, only one case has been so reversed. *State v. McIlvoy*, 629 S.W.2d 333 (Mo. banc 1982). This Court has reversed two other death sentences, but not because their sentences were disproportionate. In *State v. Chaney*, 967 S.W.2d 47, 59 (Mo. banc 1998), this Court reversed because of concerns about the sufficiency of the evidence. And in *Johnson v. State*, 102 S.W.3d 535 (Mo. banc. 2003), this Court remanded Mr. Johnson’s case for a new trial due to concerns about whether the issue of mental retardation was adequately determined.

Acker and Lanier suggest that the best way to clarify proportionality review is to have legislatively enacted standards requiring the frequency method described above. Although this Court does not control the action of the legislature, it does control its own procedures. By adopting a method of proportionality review which considers all cases eligible for the death penalty, extracts relevant factors, and determines the frequency of death sentences in the relevant group, this court could obviate the need for further legislation on the issue while protecting the rights of persons sentenced to death to due process and equal protection of the laws.

In the absence of such a judicially or legislatively adopted standard, Missouri's proportionality review statute is unconstitutional. Among the fundamental prerequisites of due process is the right to notice and an opportunity to be heard in a meaningful manner.

*Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Armstrong v. Manzo*, 380 U.S. 545 (1965). Because neither this court's decisions nor the statute itself provide any guidance as to how proportionality review is to be conducted, persons condemned to death are denied due process of law under the United States Constitution, Amend. XIV and the Missouri Constitution, Art. 1, §10 and the right to effective assistance of counsel

guaranteed by U.S. Const. amend VI and Mo. Const. art. 2, §22. See *Harris v. Blodgett*, 853 F.Supp. 1239, 1286 (W.D. Wash 1994), *affirmed* 64 F.3d 1432 (9<sup>th</sup> Cir. 1995).

The Court has used a variety of proportionality analyses. These include the consideration of various “pools” of cases and various criteria for determining similarity. Some of these approaches are described above. Such a multiplicity of methodology makes it impossible for Mr. Johnson and his counsel to demonstrate to the court that his sentence is disproportionate. To solve this problem, this court should articulate standards for review which comport with due process. Then, to provide for adequate notice to Mr. Johnson prior to this Court’s application of those new procedures, the death sentences must be reversed.

#### POINT VIII

#### **THE DEATH SENTENCE MUST BE VACATED BECAUSE IT IS EXCESSIVE AND DISPROPORTIONATE TO THAT IMPOSED IN OTHER SIMILAR CASES.**

In the previous point of error, Mr. Johnson explained why the Missouri practice of conducting proportionality review denies him the due process protection created by the Missouri statute. Without waiving

his claims that his counsel is unable to discharge her duty to provide effective assistance of appellate counsel in regard to this issue, or that this Court's proportionality review is constitutionally inadequate, Mr. Johnson contends that his sentence was excessive and disproportionate.

*Standard of review.* The standard of review is provided in Mo. Rev. Stat. §565.032.2 and §565.032.3, discussed in greater detail below.

*Argument.* In death penalty cases, Mo. Rev. Stat. §565.035..2 requires this Court, in addition to “any errors enumerated by way of appeal,” to “consider the punishment.” The statute then goes on to set out certain determinations to be made by this Court in reviewing death sentences:

3. With regard to the sentence, the supreme court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

The statute then sets out additional options for this Court in reviewing death sentences:

5. . . . In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and resentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor; or

(3) Set the sentence aside and remand the case for retrial of the punishment hearing. . .

While this court's early decisions under this statute were limited to a review of similar cases where death was assessed to determine proportionality, its more recent jurisprudence reflects an appreciation that the legislature intended to give this Court considerable discretion to do justice in cases in which a death sentence has been imposed. In

*State v. Chaney*, 967 S.W.2d 47, 59 (Mo. banc 1998), reversing a death sentence, this court noted, “This independent statutory review ‘is designed by the legislature as an additional safeguard against arbitrary and capricious sentencing and to promote evenhanded, rational and consistent imposition of death sentences.” (Citing *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993)). In its previous opinion in Mr. Johnson’s case, this Court likewise held Mr. Johnson’s sentence to be “excessive” because of evidence that he was mentally retarded. Because this evidence had not been fully developed, this Court exercised its discretion under Mo. Rev. Stat. §565.035.5(3) to remand the case for a new punishment hearing. *Johnson v. State*, 102 S.W.3d 535 (Mo. banc 2003).

The Court now has the opportunity to consider the strength of the evidence of mental retardation. It is considerable, as fully discussed under Point I above. Yet, as in *Chaney*, this Court may find itself unable to conclude that it is sufficient *as a matter of law* to require entry of a life sentence. Should that be the case, §565.035.5 nonetheless allows—and requires—this Court to do justice by resentencing Mr. Johnson to life imprisonment without eligibility for probation or parole.

Mr. Johnson has indicated his willingness to accept this sentence since before his first trial.

In *Chaney*, this Court found that the combination of the weak evidence that Mr. Chaney committed the crime and Mr. Chaney's background meant that a death sentence was disproportionate. Here, it cannot be argued that the evidence of guilt is weak. However, the evidence of Mr. Johnson's limitations is extremely strong. And the brutality of the crime, coupled with prosecutor's insistence on presenting extensive graphic and inflammatory visual evidence, makes it extremely likely that the imposition of the death penalty here was not rational, but was rather a reaction to the horrific nature of the crime.

On its facts, the case that appears to be most appropriate for comparison by this Court is that of Alis Ben Johns, described in part in *State v. Johns*, 34 S.W.3d 93 (Mo. banc 2000). After his conviction and sentence were affirmed, Mr. Johns presented evidence in a post-conviction hearing (including extensive testimony from Dr. Denis Keyes) that he is mentally retarded. The motion court found him to be ineligible for the death penalty because of his retardation, and the order was not appeals. Subsequently, this Court held that the state was estopped from seeking the death penalty in another murder proceeding

in Camden County. *State ex rel. Johns v. Kays*, 181 S.W.3d 565 (Mo. banc 2006). Mr. Johns was involved in three murders and several robberies, including home invasions. *State v. Johns*, 34 S.W.3d 93, 101 (Mo. banc 2000).

The determination that Mr. Johns is mentally retarded was made by a judge, not a jury. In Mr. Johnson's case, on the other hand, the determination was made by a jury after that jury had heard all of the evidence of the crime. The United States Constitution requires, as this Court has acknowledged repeatedly, that the death penalty not be a product of emotion or passion. For that reason, limitations on victim impact evidence are imposed, including a requirement that families of murder victims not be permitted to argue directly for a death sentence. However, those limitations are not always sufficient to prevent injustice, and for that reason, the legislature has entrusted this Court with authority to resentence based on excessive punishment. In the event that this Court does not find that any of the errors discussed here require resentencing, Mr. Johnson prays the court to exercise its authority under Mo. Rev. Stat. §565.035.

POINT IX

**THE TRIAL COURT ERRED IN DENYING MR. JOHNSON'S MOTION TO PRECLUDE THE DEATH PENALTY BECAUSE THE METHOD OF EXECUTION PRESCRIBED BY MISSOURI LAW CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE MISSOURI AND UNITED STATES CONSTITUTIONS, IN THAT THERE IS A REASONABLE PROBABILITY THAT MR. JOHNSON WILL SUFFER UNREASONABLY WHILE BEING PUT TO DEATH.**

Prior to his second trial, Mr. Johnson filed a motion to preclude the death penalty due to the likelihood that Missouri's execution process is unreasonably painful. L.F. Vol. I, p. 191. The motion was overruled by the trial court. An amended motion was filed before this trial. L.F. Vol. II, p. 223. It was denied as premature. In an abundance of caution to preclude any later contention that Mr. Johnson has waived his right to assert this issue because he did not pursue it soon enough, the ground is included in this appeal

*Standard of review.* The legal conclusion that the motion is premature is reviewed for clear error.

Pursuant to Mo. Rev. Stat. §546.720, “The manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection.” Since 1989, when executions resumed in Missouri, the State of Missouri has exclusively used lethal injection as the method of execution.

The method currently used involves poisoning the victim with a lethal combination of three chemical substances: sodium pentothal, pancuronium bromide (pavulon), and potassium chloride (KCl). As administered in recent executions, there is a reasonable likelihood and an unjustifiable risk that this particular combination of chemicals will cause Mr. Johnson to consciously suffer an excruciating, painful and protracted death.

In *Taylor v. Crawford*, 05-CV-4173-FJG, W.D. Mo., the Hon. Fernando Gaitan entered an order that Missouri’s customary method of execution presents an unreasonable risk of pain and suffering. Doc. 195, June 26, 2006. The court directed the Missouri Department of Corrections to prepare a protocol for future executions addressing the issues discussed in the order, and stayed all executions pending the preparation of a proper protocol. The state presented a protocol, but it was rejected by the district court as not sufficient to comply with the

June 26 order. Doc. 213, Sept. 12, 2006. The state declined to present a revised protocol and appealed Judge Gaitan's decision. The case is now awaiting a decision by the United States Court of Appeals for the Eighth Circuit. *Taylor v. Crawford*, 06-3651, Eighth Circuit Court of Appeals.

Because Judge Gaitan's order is not final, Mr. Johnson may still be subjected to the pain and suffering at issue in *Taylor v. Crawford*. He therefore requests this Court either to remand the case for a hearing in the circuit court concerning Missouri's execution practices, or, in the alternative, fix the event which triggers a duty on the part of a death-sentenced inmate to make any complaint concerning 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 above, 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 above, 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 above, 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 25,401 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 Shaun Mackelprang, Asst. Atty. Gen., Attorney for Respondent, at P.O. Box 899, Jefferson City, MO 65102, by U.S. Mail on March 15, 2007.

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