

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 BOONE COUNTY CIRCUIT COURT  
THIRTEENTH JUDICIAL CIRCUIT  
THE HONORABLE GENE HAMILTON, JUDGE**

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**RESPONDENT'S BRIEF**

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## JURISDICTIONAL STATEMENT

This is an appeal from a Boone County Circuit Court judgment imposing three death sentences on Appellant following the retrial of the penalty-phase proceeding in Appellant's prosecution for capital murder. Although this Court previously affirmed Appellant's 1995 guilty verdicts on three counts of first-degree murder, the three death sentences previously recommended by a jury and imposed by the circuit court were set aside and the case was remanded for a new penalty-phase proceeding. *See State v. Johnson*, 968 S.W.2d 686 (Mo. banc 1998) (*Johnson I*). The three death sentences recommended by the jury and imposed by the circuit court following Appellant's second penalty-phase proceeding were affirmed by this Court. *See State v. Johnson*, 22 S.W.3d 183 (Mo. banc 2000), *cert. denied*, 531 U.S. 935 (2000) (*Johnson II*). Those sentences were later set aside by this Court during Appellant's post-conviction appeal and the case was remanded for a third penalty-phase proceeding. *See Johnson v. State*, 102 S.W.3d 535 (Mo. banc 2003) (*Johnson III*). Because three death sentences were again imposed on Appellant following his third penalty-phase proceeding, this Court has exclusive appellate jurisdiction over this appeal. Mo. Const. art. V, § 3.

## STATEMENT OF FACTS

In May 1994, Appellant was charged in Boone County Circuit Court with three counts of first-degree murder, armed criminal action, and first-degree robbery for a robbery and triple homicide occurring on February 12, 1994, at a Columbia, Missouri, convenience store. (L.F. 1, 5). A jury trial on the three murder charges was held in May 1995 in Boone County Circuit Court before Judge Gene Hamilton. (L.F. 24-26). The jury found Appellant guilty on all three counts and recommended three death sentences, which the circuit court imposed. (L.F. 26-28). As taken from this Court's 1998 opinion in *Johnson I* affirming Appellant's murder convictions, the evidence presented at trial showed that:

At eleven o'clock, the morning of Saturday, February 12, 1994, Ernest Johnson bought a bottle of beer and a package of cigarettes at a Columbia, Missouri, convenience store of which he was a frequent customer. He went to the store a second time later that day, but did not make a purchase. On one of these trips, he questioned the cashier about who would be working the next shift. The cashier told Johnson that she would be relieved at 5:00 p.m. by Mabel Scruggs and that the store would close at 11:00 p.m. Johnson left and returned a short time later, but stayed only a few minutes before leaving again. Just before the shift change at 5:00 p.m., Johnson went to the store a fourth time, this time carrying a book bag over his shoulder. The cashier noticed Johnson staring at her while she deposited the money from her shift into the store safe. He did not buy anything.

Johnson went to his girlfriend's house and purchased a twenty-dollar rock of crack cocaine from his girlfriend's eighteen-year-old son, Rodriguez Grant. Johnson left and then later returned to buy two more rocks. He asked Rodriguez to lend him the .25 caliber pistol Johnson had given to him a couple of weeks earlier in exchange for crack cocaine. Rodriguez agreed, and he and Johnson test-fired the pistol in the back yard. Johnson returned the gun a while later, claiming that it did not work. Still later, Johnson retrieved the gun and left again, wearing layers of clothing, a mask over his face, and black tennis shoes. Since January of 1994, Johnson had confided to Rodriguez his plans to hold up the convenience store, locking all but one employee in the back room and having the remaining employee open the safe.

The next time Johnson returned to the house, from the direction of the convenience store, around 11:45 p.m., his face and clothes were spattered with blood. He came in through the back door and went downstairs to Rodriguez's room. Johnson gave the pistol back to Rodriguez. Johnson then cleaned his tennis shoes, took off his clothes, put the clothes into a trash bag, and told his girlfriend's sixteen-year-old son, Antwane Grant, to get rid of the bag. Johnson had a large amount of money sorted by denomination, and he and Rodriguez counted it. Johnson then hid the money in an air vent. Rodriguez went back upstairs and soon smelled something burning. On returning downstairs, he found Johnson burning paper.

At 1:12 a.m. the following morning, a deputy sheriff responded to a call to

check on the convenience store for the possibility of a disturbance involving weapons. The store lights were still on. Through the windows, the officer saw that the cash register was open and the money vault was out and in the middle of the floor. He observed blood smears on the front door lock. City police officers arrived with keys. Upon entering, they discovered two dead bodies and a .25 caliber shell casing in the bathroom. Another body and another .25 caliber shell casing were found inside the walk-in cooler. The safe was empty.

All three victims were store employees: Mary Bratcher, age 46; Fred Jones, age 58; and Mabel Scruggs, age 57. Each victim died from head injuries that were consistent with a bloody hammer found at the scene. In addition, Mary Bratcher suffered at least ten stab wounds to her left hand consistent with a bloody flat-head screwdriver found in a field near the store, and Fred Jones suffered a nonfatal, facial gunshot wound. Police officers also found a bloody Phillips screwdriver, a pair of gloves, a pair of jeans, and a brown jacket in the field next to the store.

Hair on the gloves was consistent with that of Mabel Scruggs. Blood on the gloves was consistent with that of Mabel Scruggs or Fred Jones. Hair on the jacket was consistent with that of Fred Jones. Blood on the jacket was consistent with a mixture of the blood of all three victims.

Later the same morning that the bodies were discovered, Johnson went to a shopping mall and made over \$200 in cash purchases. After he returned to his girlfriend's house, police officers arrived asking for any information about the murders. Johnson initially refused to speak with the officers, but eventually agreed

to accompany them to the police station. The interviewing officer did not believe Johnson's alibi and read him his *Miranda* rights. Johnson then gave conflicting versions of his alibi and became depressed whenever the convenience store was mentioned. He stated that he did not care if the officers shot him. At one point he said, "It took more than one man to do that job."

A search warrant for his girlfriend's house was obtained. The police found a bag containing \$443; coin wrappers; partially burned checks, coupons, and a cash register receipt—all bearing the convenience store's name; a live .25 caliber bullet; and a black pair of tennis shoes with the same company logo as the bloody shoeprints found inside the store.

Johnson was placed under arrest and taken to the booking room. Upon seeing Rodriguez Grant in a holding cell, Johnson stated, "That boy didn't have anything to do with this. None of those boys did." When asked how he knew this information, he responded, "I know they weren't there."

Antwane Grant led the police to the park where he had hidden, at Johnson's direction, a .25 caliber semi-automatic pistol, 17 live rounds of .25 caliber ammunition, a sweat shirt, a pair of sweat pants, a hooded jacket, two stocking caps, and two pairs of socks. Antwane identified the clothes—and the black tennis shoes found at the house—as those Johnson had been wearing the evening of the murders.

Blood found on the sweat shirt was consistent with that of Fred Jones. Blood on the hooded jacket was consistent with that of Fred Jones or Mabel

Scruggs. Some hair on one of the stocking caps was consistent with Fred Jones's hair and some was consistent with Johnson's hair.

*Johnson I*, 968 S.W.2d at 689-90 (footnote omitted).

In *Johnson I*, this Court affirmed Appellant's murder convictions but remanded the case for a second penalty-phase proceeding because of ineffective assistance of counsel. (L.F. 29). The jury in Appellant's second penalty-phase proceeding also recommended three death sentences, which the circuit court imposed. (L.F. 32-33). Those sentences were affirmed by this Court on direct appeal in *Johnson II*. (L.F. 33). But in 2003, this Court issued an opinion in *Johnson III* reversing those death sentences and remanding the case for a third penalty-phase proceeding, (L.F. 33), on the ground that after Appellant's second penalty-phase proceeding, the United States Supreme Court had declared that it was unconstitutional to execute a mentally retarded criminal and that Appellant had previously articulated specific facts indicating mental deficiency. *Johnson III*, 102 S.W.3d at 541.

Appellant's third penalty-phase proceeding was held in Boone County Circuit Court—with a jury drawn from Pettis County—in May 2006 before Judge Gene Hamilton. (L.F. 40, 42). The State presented evidence from police officers, the medical examiner, and other witnesses regarding the circumstances of the crime. (Tr. 671-72, 682, 694, 706, 844, 854, 874, 895, 939-40, 947, 975; State's Ex. 79). Family members of the three slain store workers also testified. (Tr. 980, 985, 993). A recorded interview between Appellant and a psychiatrist, Dr. Heisler, who evaluated Appellant for mental retardation in 2004, was played for the jury. (Tr. 953; State's Ex. 78A). The State also

presented evidence of Appellant's previous convictions for burglary (1978 and 1981, and 1991), stealing (1978 and 1979), and second-degree robbery (1981). (Tr. 972-73).

Appellant called his brother and sister to testify, as well as former teachers, probation officers, and an ex-girlfriend and ex-cellmate. (Tr. 1015, 1085-86, 1100, 1115-16, 1176, 1195, 1218, 1239). He called a psychiatrist and psychologist to testify about the effects his alleged cocaine use may have had on him at the time of the murders. (Tr. 1281, 1292, 1344, 1413). He also presented testimony from a "school psychologist" (Dr. Denis Keyes) regarding his evaluation of Appellant for mental retardation. (Tr. 1502, 1504, 1514-15).

The parties also entered into a stipulation before the jury that Appellant was the only person, other than the three victims, who was in the store on the night of the murders; that the bloody shoeprints in the store came from Appellant's shoes; that shell casings and bullet found in the store were fired from the Raven handgun; gloves with a raised multi-dot pattern matched the pattern impression near the head of the hammer; and that blood found on the brown coat was consistent with the blood from each of the victims. (L.F. 243; Tr. 828-29). Other evidence showed that a pair of gloves and a brown coat was found in a field near the store and that a Raven .25 caliber handgun was found in a bag in a park where police had been directed to recover evidence from the crime. (Tr. 821-25, 839). During closing argument, Appellant's counsel said Appellant would not deny what happened at the convenience store and that Appellant had admitted that he was responsible for it. (Tr. 1778).

The jury found that Appellant had not proved by a preponderance of the evidence that he was mentally retarded.<sup>1</sup> (L.F. 256). It also found beyond a reasonable doubt the existence of six statutory aggravating circumstances:

(1) each murder was committed while murdering another victim; (2) each murder was committed while murdering yet another victim; (3) each victim was murdered for the purpose of receiving money; (4) each murder involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman; (5) each murder was committed to prevent defendant's arrest; and (6) each murder was committed while defendant was engaged in a robbery.

(L.F. 314-16, Tr. 1815-23). The jury recommended three death sentences, which the trial court later imposed on Appellant. (L.F. 314-16,326-30; Tr. 1828-29 ).

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<sup>1</sup> The jury was instructed to declare a sentence of life imprisonment if it found by a preponderance of the evidence that Appellant was mentally retarded. (L.F. 256).

## ARGUMENT

### **I (directed verdict—mental retardation).**

**The trial court did not err in overruling Appellant’s motion for a directed verdict or for judgment notwithstanding the verdict on the issue of Appellant’s alleged mental retardation because these motions were legally inappropriate in that the law presumes a defendant to be free of mental defect and Appellant had the burden of proving by a preponderance of the evidence that he was not mentally retarded.**

**In any event, the granting of Appellant’s motions would not have been warranted since the record contained conflicting evidence on this issue and the weight of the credible evidence established that Appellant was not, in fact, mentally retarded.**

In *Atkins v. Virginia*, the United States Supreme Court held that it is unconstitutional to execute a mentally retarded criminal. Under Missouri law, a capital defendant has the burden of proving by a preponderance of the evidence that he or she is not mentally retarded. In this case, evidence on both sides was presented on this issue, and the jury concluded that Appellant had failed to carry his burden of proving mental retardation. Because the record easily supports the jury’s finding on this issue, the trial court did not err in overruling Appellant’s motions for a directed verdict or judgment notwithstanding the verdict. In fact, the weight of the credible evidence before the jury proved that Appellant was not, in fact, mentally retarded.

### **A. Standard of review.**

Because Appellant had the burden of proving that he was mentally retarded, the standard of review applicable to the trial court's order overruling Appellant's motions for a directed verdict and for judgment of life imprisonment notwithstanding the verdict is not altogether clear. Appellant suggests that the sufficiency-of-the-evidence standard applies, and he concedes that the evidence should be viewed in the light most favorable to the jury's verdict. App. Br. 28. But this standard generally applies only to a criminal defendant's claim on appeal that the evidence was insufficient as a matter of law to support an element of the offense that the state had the burden of proving. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989). Here, Appellant, not the State, had the burden of proving by a preponderance of the evidence that he was mentally retarded.

In fact, under Rule 27.07(a), motions for directed verdict have been abolished in Missouri and replaced by motions for judgment of acquittal. Rule 27.07(a). But this rule applies only when a defendant (or the court on its own motion) alleges that the State has presented insufficient evidence to sustain a conviction for the offense with which the defendant is charged, or, if made after a guilty verdict, the offense on which the jury found the defendant guilty. *Id.*

This appears to be an issue of first impression—at least on the issue of mental retardation in a capital case. In a similar context, Missouri law requires a criminal defendant seeking to avoid criminal responsibility based on mental disease or defect to prove the existence of such a condition by a preponderance of the evidence. *See*

§ 552.030.6, RSMo Cum. Supp. 2006. The law also states that “[a]ll persons are presumed to be free of mental disease or defect excluding responsibility.” *Id.*

Appellant’s expert witness testified that mental retardation is a “mental defect.” (Tr. 1628). Mental retardation is also listed as a mental disorder in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders. *See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 39* (4th ed. text rev. 2000) (hereinafter DSM-IV).

In *State v. Moss*, 789 S.W.2d 512 (Mo.App.1990), the defendant argued on appeal that since he had proved by a preponderance of the evidence the existence of a mental disease or defect, the trial court erred in not directing a verdict in his favor at the close of all the evidence. *Id.* at 513. In other words, the defendant was arguing “that as a matter of law, he was not guilty by reason of mental disease or defect.” *Id.* The court rejected the premise that a motion for a directed verdict is ever appropriate in such circumstances:

We reject this argument. Even if the experts had testified unanimously that the defendant suffered from a mental disease at the time the crimes charged were committed—and they did not—such evidence would not have authorized removal of the issue of criminal responsibility from the jury. The prosecution has no burden to prove the sanity of the accused. By statute, the defendant is presumed to be free from mental disease or defect and that presumption alone is sufficient to take the issue to the jury even when it is controverted by substantial and uncontradicted evidence to the contrary.

*Id.* at 513-14. *See also State v Bass*, 81 S.W.3d 595, 615-16 (Mo. App. W.D. 2002) (“[E]ven if the State had not introduced substantial evidence of the appellant’s sanity at the time that the offenses occurred, which our review indicates it did, the statutory presumption of sanity was sufficient to take the issue to the jury such that the appellant’s motion for acquittal was properly denied by the trial court.”); *State v. Bannister*, 339 S.W.2d 281, 282 (Mo. 1960).

Although Appellant is not relying on the existence of mental defect to exclude complete responsibility for his crimes, he is relying on his claim of mental retardation to diminish his responsibility so that he can avoid imposition of a sentence of death. *See Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (The deficiencies of mentally retarded criminals “diminish their personal culpability.”). Thus, the statutory presumption that all persons are free of mental disease or defect should equally apply to Appellant.

As a result of this presumption, any motion for a directed verdict or judgment notwithstanding the verdict was properly rejected by the trial court regardless of the volume or strength of the evidence Appellant presented on the mental-retardation issue. Appellant chose to present his mental-retardation evidence to the jury, it heard the evidence, and it decided that Appellant had not proved mental retardation by a preponderance of the evidence. This was an issue for the jury to decide, and Appellant cannot now complain that the trial court erred in overruling his motions for a directed verdict or judgment notwithstanding the verdict simply because the jury disagreed with his evidence.

Finally, the State was not required to adduce any evidence of its own following Appellant's presentation of evidence on the mental-retardation issue to avoid a directed verdict or judgment notwithstanding the verdict. Appellant had the burden of proof. Even in cases of self-defense, in which the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, the state is not "required to come forward with additional evidence after the defendant has produced evidence of self-defense." *See State v. Page*, 580 S.W.2d 315, 318 (Mo. App. E.D. 1979).

Consequently, because Appellant had the burden of proving by a preponderance of the evidence that he suffered from mental retardation, and because he chose to have this issue decided by the jury, Appellant's motions for a directed verdict or judgment notwithstanding the verdict were inappropriate as a matter of law and were properly overruled by the trial court.

Even under the civil rules, Appellant's motions were not warranted. If reasonable minds can differ on questions before the jury, a motion for a directed verdict or judgment notwithstanding the verdict is inappropriate. *See Martens v. White*, 195 S.W.3d 548, 554 (Mo. App. S.D. 2006); *see also Spry v. Director of Revenue*, 144 S.W.3d 362, 366 (Mo. App. S.D. 2004). In reviewing the trial court's rejection of a motion for directed verdict or judgment notwithstanding the verdict under the civil rules, the appellate court "takes the evidence in the light most favorable to the verdict, giving the prevailing party all reasonable inferences from the verdict and disregarding the unfavorable evidence." *Hodges v. City of St. Louis*, 217 S.W.3d 278, 280 (Mo. banc 2007).

**B. The record on the mental-retardation issue.**

Even if Appellant's claim is not summarily rejected on the ground that a motion for directed verdict or judgment notwithstanding the verdict was inappropriate as a matter of law, the record shows not only that these motions were properly overruled, but also that Appellant failed to adduce sufficient, credible evidence proving that he is mentally retarded.

In *Johnson III*, which involved Appellant's post-conviction appeal from the second retrial of the penalty-phase in this case, this Court reversed Appellant's three death sentences and remanded this case to the trial court for a third penalty-phase proceeding because the record showed that Appellant had articulated specific facts relating to possible mental retardation. Under Missouri law, a capital defendant convicted of first-degree murder must be sentenced to life imprisonment if the jury "finds by a preponderance of the evidence that the defendant is mentally retarded." Section 565.030.4(1), RSMo Cum. Supp. 2006. Although this law specifically applied only to crimes committed after August 28, 2001, subsequent to its adoption the United States Supreme Court held that it was unconstitutional to execute a mentally retarded defendant. *See Johnson III*, 102 S.W.3d at 537; *Atkins*, 536 U.S. 304, 321 (2002). Because Appellant had articulated specific facts relating to possible mental retardation during his second penalty-phase proceeding, which occurred before the enactment of the statute and the Court's decision in *Atkins*, this Court decided that a remand for a third penalty-phase proceeding, during which this issue could be addressed, was appropriate. *Johnson III*, 102 S.W.3d at 541.

The General Assembly has defined the terms “mental retardation” or “mentally retarded” 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.

Section 565.030.6. Appellant’s evidence was insufficient for him to carry his burden of proving that he was mentally retarded.

**1. Subaverage Intellectual Functioning.**

In 1968, when Appellant was in the third grade, he was given the Wechsler Intelligence Scale for Children (WISC), an IQ test, and received a full-scale score of 77. (Tr. 1566). Four years later in 1972, when he was in the sixth grade, Appellant received a full-scale IQ score of 63 on the WISC. (Tr. 1566). Both tests were administered by the same school psychologist for the Charleston Public Schools. (Tr. 1567). When Appellant was committed to the Department of Corrections in 1979, he was given an IQ test called the Revised Beta, which showed that he had an IQ of 95. (Tr. 1567, 1678). No other IQ testing was performed on Appellant until after he was charged with the murders in this case.

In 1994, Dr. Bernard, a psychologist, determined that Appellant had an IQ of 78. (Tr. 1668-69). In 1995, Dr. Cowan, who had an educational doctorate in

neuropsychology, tested Appellant by using the Wechsler Adult Intelligence Scale, Revised Edition (WAIS-R) and determined that his IQ was 84.<sup>2</sup> (Tr. 1567).

In a 1996 report on his evaluation of Appellant, Appellant's witness, Dr. Smith, a clinical psychologist and addiction specialist, stated that "past testing has indicated that [Appellant's] IQ is approximately 77." (Tr. 1423). Although he did not specifically assess Appellant for mental retardation, Dr. Smith agreed that he had previously testified that Appellant's IQ was 77 and that he fell within the borderline range of intelligence, which is above the range of mental retardation.<sup>3</sup> (Tr. 1380-81, 1424).

After this case was remanded for a third penalty-phase proceeding on the mental-retardation issue, two additional IQ tests were performed.

The first of these two tests was given in December 2003 by Denis Keyes, who holds a Ph.D. in special education. (Tr. 1502, 1568). Dr. Keyes, who, by his own admission, is not a clinical or forensic psychologist and is not qualified to diagnose mental diseases or defects other than mental retardation, gave Appellant the Wechsler

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<sup>2</sup> This result was reported by Dr. Keyes during his testimony in this trial. (Tr. 1567). Dr. Cowan was deceased when Appellant's third penalty-phase proceeding was held. (Tr. 1567).

<sup>3</sup> Dr. Smith testified that while he believed that Appellant's IQ was 77 back in 1996, he had now changed his opinion based on "recent testing" performed by Dr. Keyes. (Tr. 1426-27). Dr. Smith now believes that Appellant's IQ is not 77, but is closer to 67, and that Appellant is mentally retarded. (Tr. 1426-27, 1471). He relied on the work performed by Dr. Keyes in revising his opinion. (Tr. 1436).

Adult Intelligence Scale, Third Edition (WAIS-III). (Tr. 1511, 1564, 1628-30).

According to Dr. Keyes, Appellant received a full-scale score of 67, which included a verbal score of 69 and a performance score of 70. (Tr. 1564, 1568).

The other test, given in July 2004, was performed by a Mr. Bradshaw, who worked as a “psychometrist” for Dr. Heisler, a licensed psychologist. (Tr. 1568, 1667). Mr. Bradshaw also administered the WAIS-III to Appellant, on which he received a full-scale IQ score of 67, which included a verbal score of 67 and a performance score of 73. (Tr. 1568).

Dr. Heisler concluded, however, that Appellant was malingering. (Tr. 1753). Both Dr. Smith and Dr. Keyes agreed that a person can fake having a lower IQ than he or she actually has, but that a person cannot fake having a higher IQ.<sup>4</sup> (Tr. 1427, 1573, 1683). But Dr. Keyes testified that in his opinion he did not believe Appellant was malingering. (Tr. 1583-84).

Dr. Smith testified that an IQ score of 77 is not indicative of mental retardation. (Tr. 1430). He also said that any score below 70 would be indicative of retardation. (Tr. 1382). Dr. Keyes testified that an IQ score below 75 raises concerns about mental retardation, but that a person can still be considered retarded even with a score over 75.

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<sup>4</sup> Dr. Keyes testified that a person can intentionally score lower on the WAIS than he or she is capable of. (Tr. 1573).

(Tr. 1521, 1537-38). Dr. Keyes went so far to say that the cutoff for mental retardation begins with an IQ score between 75 and 85.<sup>5</sup> (Tr. 1585).

Although he did not formally evaluate Appellant for mental retardation, Dr. Sam Parwatikar, a forensic psychiatrist who evaluated Appellant in 1995 regarding his competency to stand trial and whether he was suffering from a mental disease or defect, determined that Appellant operated in the average range of intelligence. (Tr. 1303-06). Moreover, Dr. Parwatikar made no findings indicating a need to conduct neurological testing on Appellant. (Tr. 1315-16).

Simply because an individual is of below average intelligence does not necessarily mean that he or she is mentally retarded. (Tr. 1334).

## **2. Adaptive Behaviors.**

Two of Appellant's expert witnesses testified that Appellant had deficits or limitations in several categories of adaptive behaviors. Dr. Smith testified that Appellant had deficits in the areas of communication, social skills, home living, and functional academics. (Tr. 1489-91). Dr. Keyes testified that Appellant had deficits in seven of the nine adaptive behaviors identified under Missouri's definition of mental retardation:

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<sup>5</sup> This is inconsistent with the DSM-IV, which states that significantly subaverage intellectual functioning is defined as an IQ of 70 or below and that, taking into account the five point measurement error for IQ tests, it is "possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior." DSM-IV, 41-42.

(1) communication; (2) home living; (3) social skills; (4) community use; (5) self-direction; (6) health and safety; and (7) leisure and work. (Tr. 1621-23).

**a) Communication**

Dr. Smith said that Appellant had a concrete understanding of verbal communication, but had difficulty with written communication. (Tr. 1489-90). Dr. Keyes said that while Appellant's "expressive" communication was better than his "receptive" communication, he still considered Appellant deficient in this area. (Tr. 1621). Dr. Keyes also believed Appellant had difficulty making himself understood and in understanding "abstractions." (Tr. 1607). But Dr. Keyes conceded that Appellant communicated with people in prison and that during his interview with Appellant, he noted that Appellant had good verbal communication and that he was friendly, cooperative, and oriented to time and place. (Tr. 1660-61). Dr. Keyes dismissed the significance of Appellant's prison behaviors that negated a finding of an adaptive behavior deficit by simply saying that Appellant's behavior could be different if he were not in prison. (Tr. 1662, 1666).

When Dr. Parwatarikar evaluated Appellant in 1995, he noted that Appellant was "coherent," that he "was able to answer questions in a goal directed fashion," and that he "was able to impart information appropriately." (State's Exhibit 80). In addition, Dr. Parwatarikar noted that Appellant "was able to answer questions related to his understanding of his legal situation" and that he was able "to provide information pertinent to his defense." (State's Exhibit 80).

Appellant's ex-girlfriend said that Appellant wrote to her from prison "all the time." (Tr. 1122, 1125-26).

Officers who interviewed Appellant during the investigation into the murders stated that Appellant conversed normally and understood what was being asked. (Tr. 849-50, 866). A convenience store employee also said that Appellant could communicate when he came into the store to make purchases. (Tr. 926-27). Appellant's probation officer at the time of the murders testified that he was able to communicate with Appellant. (Tr. 1181-82). Appellant was also able to use the prison grievance procedure to lodge complaints. (Tr. 1171-72).

Evidence of Appellant's ability to communicate is also demonstrated by the recorded interview between Appellant and Dr. Heisler, which was played for the jury. (Tr. 953; State's Ex. 78).

#### **b) Home living**

Even though Dr. Smith said that an assessment for home living cannot be made for someone who is incarcerated, which Appellant frequently was, he still deemed him deficient in this area. (Tr. 1462, 1491). In Dr. Smith's opinion, Appellant relied on the women in his life to perform the functions required for home living. (Tr. 1491). Dr. Keyes based his opinion regarding Appellant's deficiency in this area on the fact that just before he committed the murders, Appellant lived with a girlfriend who paid the rent. (Tr. 1621). Other evidence showed that Appellant was required to do his own laundry when he was assigned to live at a halfway house, and was even allowed to use the laundry facilities there after he was released. (Tr. 1210).

### **c) Social skills**

During direct examination, Dr. Smith testified that Appellant had no deficits on social skills and that he had the ability to form connections with other people. (Tr. 1465). But later during redirect, he said that Appellant was “impaired” in this area based on his inability to “interpret” social situations. (Tr. 1490). Dr. Keyes testified that Appellant was deficient in this area based on the fact that Appellant did not have close friends. (Tr. 1613). In forming this opinion, Dr. Keyes relied on information from Appellant’s brother and sister, who told him that Appellant’s socialization skills were “severely” deficient. (Tr. 1617). Dr. Keyes also said that Appellant’s siblings told him that Appellant threw tantrums when he was young, that he ate with his fingers, that he could not keep a secret, that he would talk incessantly or not at all, that he did not have a best friend, that he did not watch the news, and that he was socially inept. (Tr. 1617-18). But Appellant’s brother and sister did not mention these specific facts during their testimony.

Appellant’s ex-girlfriend testified that she and Appellant lived together for six or eight months. (Tr. 1115-16). She said that Appellant was nice and respectful toward her. (Tr. 1118). When Appellant was younger he liked to hang out with his friends and play basketball. (Tr.1691-92).

### **d) Community use**

Dr. Smith’s opinion that Appellant had a deficit in the community use category was based on Appellant’s inability to arrange access to a drug treatment program. (Tr. 1468). Dr. Keyes believed Appellant was deficient in this area because he did not receive SSI payments, use public transportation, keep a job, or go to a movie. (Tr. 1619-20).

Other evidence showed that Appellant sought help for his alcohol and drug problems from his probation officer and from the pastor and congregation of a church to which he belonged. (Tr. 1177-78, 1722). He also completed a substance abuse program at a halfway house at which he stayed just before the murders. (Tr. 1201-03).

An employee of the store where these murders occurred said that Appellant was a frequent customer at the store and made purchases. (Tr. 926-27). Appellant had even filled out a job application to work there. (Tr. 927-28).

Just before the murders, Appellant told a fellow parolee that he had asked a parole officer for help with a drug problem. (Tr. 1089, 1097).

The day after the murders, Appellant called for a cab, for which he paid cash, went to the mall, and paid cash for some jewelry he had seen in a catalog and about which he had called earlier to inquire about purchasing. (Tr. 939-42, 947-50). Appellant then took another cab ride home, again paying cash. (Tr. 945). Appellant also learned how to use the prison grievance procedure. (Tr. 1171-72).

#### **e) Self-direction**

Dr. Smith believed that Appellant was “significantly impaired” in the category of self-direction, but offered no specifics in support of that opinion. (Tr. 1490). Likewise, Dr. Keyes simply said Appellant’s self-direction skills were “not good at all.” (Tr. 1622). Dr. Keyes agreed that Appellant’s planning, execution, and cover-up of the murders in this case was “goal-oriented,” but discounted this as not being an “adaptive” behavior. (Tr. 1707-08). Appellant also sought help for his alcohol and drug problems from his probation officer and from the pastor and congregation of a church to which he belonged.

(Tr. 1177-78, 1722). He also filled out an employment application at the store he would later rob. (Tr. 927-28).

**f) Health and safety**

Dr. Keyes believed Appellant was deficient in this area based on his drug use. (Tr. 1619). Other evidence showed that Appellant asked to be put in protective custody to avoid retaliation for having stole \$1500 in drugs from a fellow inmate. (Tr. 1146, 1162). Just before committing the murders in this case, Appellant apparently set up an appointment to be evaluated for alcohol and a fellow parolee testified that Appellant had told him that he had asked a probation officer for help with a drug problem. (Tr. 1089, 1097). During his stay at a halfway house in 1993, Appellant successfully completed a substance abuse program. (Tr. 1201, 1203). Appellant never tested positive for drug use during his stay there. (Tr. 1208).

**g) Functional academics**

Dr. Smith said that while Appellant had “general knowledge regarding everyday things,” he was “very limited” in doing things like long division, long subtraction, multiplication, and preparing a budget.” (Tr. 1491). Dr. Keyes said Appellant’s area of deficit in this category was in the “upper range,” and he did not identify this category as one in which Appellant had continual, extensive deficits. (Tr. 1620-22). Dr. Keyes agreed that Appellant was “street smart.” (Tr. 1714).

**h) Leisure and work**

Dr. Smith did not know whether Appellant was deficient in this category. (Tr. 1473). Dr. Keyes said Appellant was deficient in this area because his only leisure

activity was drug use. (Tr. 1622). But Dr. Keyes acknowledged that Appellant's sister told him that when Appellant was younger his hobby was horse riding. (Tr. 1619, 1699-1700). He also acknowledged that Appellant held a job in prison. (Tr. 1659). Appellant had a job in prison stacking trays in the cafeteria and picking up trash, which he performed eight hours a day, five days per week. (Tr. 1145, 1161). Finally, Dr. Keyes admitted that in his report he said that when Appellant was younger he did not want to work as a farmhand, so he spent time with his friends playing basketball, drinking, and smoking marijuana. (Tr. 1691-92).

Two of Appellant's probation officers said that while Appellant was capable of working and had the ability to get jobs, he could not keep them because he was not motivated to work. (Tr. 1182, 1211). Dr. Keyes agreed that Appellant was not motivated to work. (Tr. 1706).

Two probation officers testified that Appellant was a good athlete who excelled in basketball. (Tr. 1180-81). Appellant was described as a "finesse" player who played without "ego" as a team player. (Tr. 1206).

### **3. Mental Retardation.**

A psychiatrist who previously evaluated Appellant (Dr. J.C. Peters) determined that Appellant was not mentally retarded. (Tr. 1310). Two psychologists who evaluated Appellant (Drs. Kline and Heisler) determined that Appellant was not mentally retarded.<sup>6</sup>

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<sup>6</sup> Drs. Peters, Kline and Heisler did not testify during Appellant's third penalty-phase proceeding, though a recorded interview between Dr. Heisler and Appellant was admitted

(Tr. 1310, 1457, 1667). Although he gave opinion testimony on whether Appellant was mentally retarded, Dr. Smith said that he did not evaluate Appellant for mental retardation, but instead relied on Dr. Keyes's work in forming his opinions on the mental retardation issue. (Tr. 1380, 1436). Dr. Smith admitted that in 1994, 1996, and 1999 he did not believe Appellant was mentally retarded, but said he had recently changed his mind based on Dr. Keyes's information. (Tr. 1432-33). Dr. Keyes, who first evaluated Appellant after this case was remanded for a third penalty-phase proceeding, was the first person who determined that Appellant was mentally retarded.<sup>7</sup> (Tr. 1671-72).

Although Appellant was placed in special education during grade school, he was not put in the class for mentally retarded students. (Tr. 1219-22). He was put in a class for "slower ability" children. (Tr. 1223). Appellant's brother described Appellant as a "slow learner," but admitted that he had previously testified that there was no indication that Appellant was retarded. (Tr. 1079). Appellant's sister also said that Appellant was

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into evidence (State's Exhibit 78A). The conclusions they reached based on their evaluations of Appellant were reported by Appellant's expert witness (Dr. Keyes), who considered those findings during his later evaluation of Appellant. (Tr. 1667, 1675). In *Johnson II*, this Court noted that during the second penalty-phase proceeding, Appellant's expert flatly stated that Appellant was not mentally retarded. *Johnson II*, 22 S.W.3d at 193.

<sup>7</sup> Dr. Keyes explained this by saying that he was the only expert in mental retardation to have evaluated Appellant and that he knew more about mental retardation than the psychiatrists and psychologists who had previously evaluated Appellant. (Tr. 1672).

“slow,” but admitted that she had never described him as such during the two previous penalty-phase proceedings. (Tr. 1111).

Appellant’s art teacher said that Appellant was on the verge of flunking his class because he had no “work ethic” and missed numerous days of school. (Tr. 1242, 1244, 1247-49, 1254-55). The teacher said that for someone to flunk his class they would effectively have to try to do so. (Tr. 1247-48). But in both his regular and special education classes, however, Appellant received several good grades in various subjects. (Tr. 1229-30).

**C. The credible evidence showed no mental retardation.**

The record in this case, as described above, reveals that substantial evidence was adduced disputing Appellant’s claim that he was mentally retarded. Evidence existed that Appellant had IQ scores above the mentally-retarded range, that he did not have subaverage intellectual functioning, and that he did not exhibit continual extensive related deficits in two or more of the categories described above. Thus, the jury had sufficient grounds to find that Appellant had failed to prove by a preponderance of the evidence that he was mentally retarded. Consequently, the trial court acted appropriately in overruling Appellant’s motion for a directed verdict or judgment notwithstanding the verdict. That conclusion is reinforced when considering the substantial evidence presented that called into question the credibility of the opinions of Drs. Smith and Keyes, who were the only expert witnesses who testified that Appellant was mentally retarded.

Dr. Smith's credibility was severely diminished by the fact that he never personally evaluated Appellant for mental retardation, but relied solely on the work performed by Dr. Keyes, and that he had previously testified on three different occasions (1994, 1996, and 1999) that Appellant was not mentally retarded. (Tr. 1380, 1432-33, 1436). The simple fact that Dr. Smith had not personally evaluated Appellant for mental retardation was enough for the jury to reject his opinion.

In addition, Dr. Smith admitted that he had testified for the defense—never the prosecution—forty times over eighteen years, and that each time his testimony was given was almost exclusively in death penalty cases. (Tr. 1348-49).

Dr. Keyes had his own credibility problems, beginning with his expertise to render an opinion on whether Appellant was, in fact, retarded. Dr. Keyes was neither a clinical, nor a forensic, psychologist or psychiatrist. (Tr. 1511). He was not qualified to diagnose mental illnesses and he had never worked in the criminal justice system. (Tr. 1630-31). He was simply an educational or school psychologist who assessed students for possible mental retardation. (Tr. 1499, 1627-28).

In fact, Dr. Keyes admitted that his training qualified him to diagnose children twenty-two years old or younger.<sup>8</sup> (Tr. 1648-49). He claimed that he performed what he called a “retro” diagnosis of Appellant to reach his opinion that Appellant was mentally

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<sup>8</sup> Appellant was born in 1960, (L.F. 326; Tr. 1100-01), making him forty-three when Dr. Keyes performed his evaluation, (Tr. 1671).

retarded.<sup>9</sup> (Tr. 1544, 1652). In fact, Dr. Keyes said that assessing someone like Appellant is not typically what he does, but that currently it is part of his professional work. (Tr. 1652). He said that he does not regularly perform IQ tests now, but when he does he primarily tests adults more than children. (Tr. 1734-35).

In *Goodwin v. State*, 191 S.W.3d 20 (Mo. banc 2003), a defendant sentenced to death raised a post-conviction claim of mental retardation based on testimony given by Dr. Keyes. *Id.* at 32-33. This Court affirmed the motion court's judgment rejecting that claim, and in its opinion noted that the motion court had questioned whether Dr. Keyes, an educational psychologist, was qualified to complete the testing to diagnose mental retardation. *Id.* at 33. In upholding the motion court's finding, this Court's opinion specifically noted that Dr. Keyes was "not certified or licensed as a psychologist or psychiatrist." *Id.*

Dr. Keyes admitted that more than half of his income comes from doing mental-retardation evaluations in criminal cases. (Tr. 1639). His primary interest is in capital punishment and in the six or seven Missouri death-penalty cases he has been hired to

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<sup>9</sup> Dr. Keyes said that a determination that someone is retarded does not have to be made before the person turns eighteen years old, and that a "retro-diagnosis" can be performed. (Tr. 1544). But Missouri law requires the conditions evidencing mental retardation to have been manifested and documented before eighteen years of age. Section 565.030.6. Much of the evidence on which Dr. Keyes relied to support his opinion involved occurrences in Appellant's adult life.

perform these evaluations, he has found the defendant mentally retarded five times. (Tr. 1632, 1641). Dr. Keyes, who was retained after this case was remanded for a third penalty-phase proceeding on the issue of mental retardation, was the first person in the long history of this case to claim that Appellant was mentally retarded.<sup>10</sup> (Tr. 1672).

In all the capital cases in which he has testified, at no time did Dr. Keyes testify for the prosecution. (Tr. 1635). Twelve of the nineteen articles he has written have involved mental retardation and capital punishment. (Tr. 1636). He has also given many lectures to public defender groups on this topic. (Tr. 1636).

Dr. Keyes tried to explain away the other experts' opinions stating that Appellant was not mentally retarded by invoking what he described as the "cloak of competence," by which a mentally retarded individual attempts to appear to be more intellectually capable than he actually is. (Tr. 1624). He said that mentally retarded people try to conceal their limitations, and that psychologists simply do not understand that retarded people try to appear more capable than they are. (Tr. 1523, 1525). But he admitted that Appellant readily volunteered to another doctor (Dr. Kline) that he was mentally retarded at a time when Appellant knew such a finding would result in a sentence of life imprisonment. (Tr. 1694-95).

Most of the examples Dr. Keyes cited as being indicative of Appellant's deficiency in adaptive behaviors, involved occurrences during Appellant's adult life. But

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<sup>10</sup> In *Goodwin*, the motion court found that Dr. Keyes intelligence testing of the defendant in that case "contradicted all other IQ tests results previously obtained." *Id.* at 33.

Missouri's definition of mental retardation requires these behaviors to be manifested and documented before eighteen years of age.

Both Dr. Smith and Dr. Keyes said that an evaluation of a person's adaptive functions cannot be based on how a person functions while in prison.<sup>11</sup> (Tr. 1462, 1551-52). But this supposed limitation on the evaluation of adaptive behaviors is at odds with the DSM-IV on diagnosing mental retardation:

[In assessing adaptive functioning], consideration should be given to the suitability of the instrument to the person's socio-cultural background, education, associated handicaps, motivation, and cooperation. . . . [B]ehaviors that would normally be considered maladaptive (e.g., dependency, passivity) may be evidence of good adaptation in the context of a particular individual's life (e.g., in some institutional settings).

DSM-IV, *supra*, 42. Dr. Keyes admitted that he did not interview anybody in the prison where Appellant was incarcerated. (Tr. 1653).

Dr. Keyes tested Appellant's adaptive behaviors by administering "Vineland" to Appellant's brother and sister. (Tr. 1611, 1614, 1616). Vineland uses a question-and-answer format to obtain anecdotes and specific stories that happened to the person in

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<sup>11</sup> Dr. Keyes was not consistent on this issue. On other occasions he said that behavior in prison could be considered. (Tr. 1650-53).

question before he or she was 18.<sup>12</sup> (Tr. 1614-15). The different skill sets or adaptive behaviors identified in Vineland are analyzed through a series of questions to people who knew the individual closely. (Tr. 1615-16). Although Dr. Keyes likes to use teachers for Vineland, he did not use Appellant's teacher because her memory was "fuzzy." (Tr. 1697).

Dr. Keyes relied on the anecdotal evidence gathered from Appellant's siblings in reaching his opinion. But the jury was not required to believe these accounts, especially when some of the events described by Dr. Keyes were not testified to by Appellant's siblings. "In Missouri, an expert is permitted to rely on hearsay evidence to support an opinion, even though the hearsay evidence is not independently admissible, if that evidence is of a type reasonably relied upon by other experts in that field." *State v. Gary*, 913 S.W.2d 822, 830 (Mo. App. E.D. 1995), *overruled on other grounds*, *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997). Such hearsay statements may be considered only on the credibility of the expert's opinion, but they are not substantive evidence of the truth of the statement's assertions. *Id.* See also *Bannister*, 339 S.W.2d at 282 (holding that a criminal jury is not bound by expert evidence even when that evidence is uncontradicted).

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<sup>12</sup> The motion court in *Goodwin* found that "the use of Vineland Scales to utilize hindsight in recalling [the defendant]'s capabilities seventeen years prior was inaccurate even by Dr. Keyes's own testimony." *Goodwin*, 191 S.W.3d at 33.

In placing primary reliance on the information provided by Appellant's brother and sister in forming his opinion on Appellant's adaptive behaviors, Dr. Keyes ignored the DSM-IV's requirement that evidence of these behaviors come from one or more "reliable independent sources." DSM-IV, *supra*, at 42 ("It is useful to gather evidence for deficits in adaptive functioning from one or more reliable sources (e.g., teacher evaluation and educational, developmental, and medical history)."). Concerns about bias will obviously be present when a defendant's siblings provide information or testify in a proceeding to determine whether that defendant will receive a death sentence. Both Appellant's brother and sister admitted that they had provided testimony during the course of this penalty-phase proceeding regarding Appellant's alleged intellectual deficits that they had not previously stated during Appellant's two previous trials.<sup>13</sup> (Tr. 1078-80, 1111).

Many of Dr. Keyes's findings regarding Appellant's deficiencies in the areas of communication and self-direction were based on Appellant's inability to get or hold a

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<sup>13</sup> In *Goodwin*, the motion court based its rejection of Dr. Keyes's testimony on the fact that the defendant's relatives exaggerated the Vineland's, on Dr. Keyes's admission that the family's claims were distorted and exaggerated, and that Goodwin's family had a strong incentive not speak honestly because of Goodwin having been sentenced to death. *Goodwin*, 191 S.W.3d at 32. The court concluded that the "exaggerations by [Goodwin]'s family and friends in completing the Vineland Scales cause them to be of questionable value." *Id.* at 33.

job. (Tr. 1607, 1612, 1619). But other evidence showed that Appellant was quite capable of getting a job; he simply was not motivated to hold one for any length of time. (Tr. 1182, 1211).

In short, the jury could have relied on these matters in assessing Dr. Keyes's credibility and rejecting his opinion that Appellant was mentally retarded. An objective reading of the record raises serious concerns not only about Dr. Keyes's qualifications and expertise to diagnose mental retardation in adults, but also about the methods and information he relies on to do so.

## **II (directed verdict—life imprisonment)**

**The trial court did not err in overruling Appellant’s motions for a directed verdict or judgment notwithstanding the verdict of life imprisonment on the ground that the mitigating evidence outweighed the aggravating evidence as a matter of law because these motions were inappropriate in that it was the jury’s responsibility, not the trial court’s, to fix the punishment. Moreover, the motions were properly overruled because the record contained substantial evidence in aggravation of punishment, which the jury could have easily determined outweighed the mitigating evidence presented by Appellant.**

Although the jury in this case declared that Appellant’s punishment should be three death sentences, he contends that the trial court should have ignored this recommendation and imposed a life sentence on its own accord. The record contains substantial evidence in aggravation of punishment. This alone justified rejection of Appellant’s motions for a directed verdict or judgment notwithstanding the verdict. It was the jury’s responsibility to weigh the evidence on both sides and to determine the issue of punishment. Appellant’s motions were nothing more than a request to the trial court, and to this Court on appeal, to conduct a de novo review of the evidence presented and re-decide the punishment itself.

### **A. The trial court did not abuse its discretion in overruling Appellant’s motions.**

In Missouri, “it is primarily the jury’s function to fix the penalty.” *State v. Laster*, 365 Mo. 1076, 1083, 293 S.W.2d 300, 305 (Mo. banc 1956). An appellate court will exercise the “highly extraordinary power” to interfere with the jury’s discretion only

when “passion and prejudice so clearly appear from the record” that it can be confidently said that the trial court abused its discretion when it declined to reduce the punishment to life imprisonment.” *Id.* This policy is reflected in this Court’s rules, which state that when the law provides “an alternative or discretion as to the kind or extent of punishment to be imposed, the jury may assess and declare the punishment in their verdict except as otherwise provided by law.” Rule 29.02(a). Only when that punishment is above the limit prescribed by law or when the jury fails to agree on a punishment, is the circuit court authorized to assess the punishment itself. Rules 29.03 and 29.04.

Although courts have the authority under Rule 29.05 “to reduce a punishment within the statutory limits prescribed for the offense if it finds that the punishment” imposed by the jury is “excessive,” appellate review of that authority is restrained by the policies discussed above.

While Appellant’s claim is couched in sufficiency-of-evidence terms, what he really seeks is a *de novo* determination of punishment from this Court. This task, however, has been statutorily entrusted to the trier of fact, the jury in this case, and this Court interferes with the trier’s decision only when a sentence of death “was imposed under the influence of passion, prejudice, or any other arbitrary factor.” *See* §§ 565.030.4, RSMo 1994 and 565.035, RSMo 2000. Because nothing in the record shows that the circuit court abused its discretion in overruling Appellant’s motions, Appellant’s challenge to the court’s overruling his motions should be rejected. *See Laster*, 365 Mo. at 1083, 293 S.W.2d at 305; *State v. Agee*, 474 S.W.2d 817, 821 (Mo. 1971).

## **B. Standard of review.**

If the circuit court had the authority to consider Appellant's motions, then much of the discussion contained under Point I would also apply to the standard of review for this Point. If reasonable minds can differ on questions before the jury, a motion for a directed verdict or judgment notwithstanding the verdict is inappropriate. *See Martens v. White*, 195 S.W.3d at 554; *see also Spry v. Director of Revenue*, 144 S.W.3d at 366. In reviewing the trial court's rejection of a motion for directed verdict or judgment notwithstanding the verdict under the civil rules, the appellate court "takes the evidence in the light most favorable to the verdict, giving the prevailing party all reasonable inferences from the verdict and disregarding the unfavorable evidence." *Hodges*, 217 S.W.3d at 280.

## **C. The jury's verdict is support by substantial evidence.**

During the penalty-phase of a capital murder case, the jury must recommend a sentence of life imprisonment if it "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 [jury]." Section 565.030.4(3), RSMo 1994. The jurors in this case were instructed to return a verdict of life imprisonment if they determined there were "facts and circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment." (L.F. 260, 267, 274). They were also told that it was unnecessary for all jurors to agree upon the same mitigating evidence. (L.F. 260, 267, 274). Finally, they were told that they

could fix a sentence of life imprisonment even if the evidence in mitigation was insufficient to outweigh the evidence in aggravation. (L.F. 261, 268, 275).

A jury's determination of whether mitigating circumstances outweigh aggravating circumstances is not one subject to proof of a fact certain, but is determined based on all the facts peculiar to that case. *State v. Smith*, 649 S.W.2d 417, 430 (Mo. banc 1983).

The use of discretionary judgment in making this factual determination is apparent: "In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no 'central issue' from which the jury's attention may be diverted. . . .

In this sense, the jury's choice between life and death must be individualized."

*California v. Ramos*, 463 U.S. 992, 1008 (1983).

Essentially, Appellant is arguing that the evidence in mitigation was so overwhelming that no reasonable jury could have concluded that the aggravating evidence outweighed the mitigating evidence in this case. This claim is unsupported by any reasonable reading of the record.

Notwithstanding the evidence Appellant presented in mitigation of punishment, the circumstances surrounding the triple homicide Appellant committed would alone support the jury's verdict recommending three death sentences for Appellant. In the course of stealing money from a convenience store, Appellant savagely beat three store employees to death with a hammer. (State's Ex. 79, pp. 949-50, 958, 962). Not only did he beat them in the head with the hammer anywhere between 8 and 15 times each, he also hit them with the claw end of the hammer, shot one employee in the face and slammed

his finger in a cooler door, nearly severing it, and, finally, stabbed completely through the back of another employee's hand at least eight times with a flat-headed screwdriver.

(State's Ex. 79, pp. 950-51, 956-58, 962-63; State Exhibits 69A, 69B, 69D, 70D, 70E).

Appellant beat his victims so savagely that he left large openings in their heads exposing bone and brain matter. (State's Ex. 79, pp. 951-52, 955-56, 961; State's Exhibits 69A, 70B, 71C).

In addition, the jurors heard evidence of Appellant's numerous previous convictions and the fact that Appellant averages three conduct violations per year in prison, including violations for fighting and for stealing from the prison cafeteria. (Tr. 1167, 1169).

Appellant's claim that the mitigating evidence in this case so overwhelms the aggravating evidence that he is entitled to a life sentence as a matter of law is belied by the fact that this is the third jury that has recommended that Appellant be given three death sentences for the murders in this case. *See Johnson I*, 968 S.W.2d at 689; *Johnson II*, 22 S.W.3d at 185. In fact, it appears that each jury heard substantially the same mitigating evidence, except that the second and third juries heard the additional evidence that Appellant was suffering from "cocaine intoxication delirium," and the third jury heard the mental-retardation evidence. *Johnson I*, 968 S.W.2d at 699-700; *Johnson II*, 22 S.W.3d at 193.

Appellant suggests that even if he is not mentally retarded, his allegedly diminished intellectual capacity legally entitles him to a life sentence. But, as this Court noted in *Johnson II*, death sentences have been upheld by this Court even when a

“defendant has presented evidence of a low I.Q. and mental retardation.” *See Johnson II*, 22 S.W.3d at 193. His allegedly low intellectual functioning does not warrant a finding that he is entitled to a sentence of life imprisonment as a matter of law.

As evidence of his low intelligence, Appellant stresses that the circumstances under which he committed the crime showed a lack of sophistication. He supports this by saying that he chose to rob a store at which he was a frequent customer and where he would be recognized by the victims. App. Br. 51-52. But this could easily be seen as evidence in aggravation as well. Knowing that he would be recognized by his victims, but realizing the need to rob a place in which he knew the layout, the employees’ schedules, and the location and manner of opening the drop-safe in which cash and other receipts were deposited made it worth the risk. Based on this record, the jury could have reasonably presumed that Appellant knew before going into the store that he was going to kill the employees during the robbery.<sup>14</sup>

Evidence of Appellant’s alleged drug use is also insufficient to require a life sentence as a matter of law. Appellant presented evidence that he was suffering from “cocaine intoxication delirium,” which caused him to be paranoid, irritable, and act in an irrational manner. (Tr. 1292-94). Other testimony he presented suggested that he was suffering from cocaine intoxication and that this condition coupled with Appellant’s depression, impaired intellectual functioning, and his affliction of “extreme emotional

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<sup>14</sup> The jurors found that Appellant murdered each victim in an effort to prevent his arrest for these crimes. (L.F. 314-16).

disturbance” diminished his ability to “fully appreciate” his actions. Appellant’s argument appears to be that his drug use prevented him from being in control of his actions.

But the circumstances of the crime suggest otherwise. Appellant planned to rob the store at least a month before the murders; he obtained a gun to use for the robbery, which he test fired; he cased the store at least four times on the day of the robbery; he waited until just before closing time and after the last customer left before beginning the robbery; he wore layers of clothing, which he then discarded when they became spattered with blood; and he denied any involvement in the crime when questioned by police.

*Johnson I*, 968 S.W.2d at 689-90. These circumstances do not suggest an impulsive and ill-planned crime, but reflect careful planning to achieve his goal of obtaining money and avoiding apprehension.

Appellant’s suggests that the sole motive in committing the crime was to obtain money with which to buy more cocaine to feed his out-of-control drug habit. But instead of using the money for this purpose, Appellant, just hours after committing the murders, called a cab and went to the jewelry store at the mall to buy his girlfriend a diamond-cluster ring for Valentine’s Day. (Tr. 939-42, 947-50).

The record also contained evidence suggesting that Appellant’s cocaine habit was not as severe as he now claims. Appellant’s probation officer in 1994, the year Appellant committed the Casey’s murders, testified that Appellant never said that he had a cocaine problem. (Tr. 1178). Another officer who worked in a halfway house Appellant resided in said that Appellant completed a substance abuse program in 1993 and never tested

positive for drugs during random urine screens. (Tr. 1201, 1208). He said that there was no indication that Appellant was using cocaine at that time. (Tr. 1209). Although Appellant allegedly told an ex-cellmate that he had a cocaine problem, that person had never seen Appellant using cocaine. (Tr. 1091, 1095-96).

Finally, “many jurors find that chemical abuse is an *aggravating* factor engendering no sympathy for the defendant.” *Skillicorn v. State*, 22 S.W.3d 678, 685 (Mo. banc 2000); *see also Taylor v. State*, 126 S.W.3d 755, 763 (Mo. banc 2004) (“Evidence of substance abuse can be seen as an aggravating circumstance, rather than a mitigating circumstance . . .”). It was not unreasonable for the jurors in this case to reject this as mitigating evidence sufficient to warrant a sentence of life imprisonment.

Appellant also presented evidence from a psychologist that he allegedly suffers from Fetal Alcohol Syndrome. (Tr. 1408-09). But when directly asked whether he believed Appellant “had Fetal Alcohol Syndrome,” the psychologist would say only that based on “the data that’s currently available” Appellant’s characteristics “*suggests* Fetal Alcohol Syndrome.” (Tr. 1408-09) (emphasis added). He said that he based this finding solely on reports by family members that Appellant’s mother used alcohol during her pregnancy with Appellant. (Tr. 1478-79). None of the people from whom he received this information testified during trial. (Tr. 1492-93). The psychologist also acknowledged that the “characteristics” he observed in Appellant could be indicative of things other than Fetal Alcohol Syndrome. (Tr. 1478).

Neither of Appellant’s siblings testified that their mother was an alcoholic or otherwise a heavy drinker when she lived with them while they were young. They

testified that their mother introduced them to drugs and alcohol when they were reunited with her as teenagers. (Tr. 1057-58, 1109).

Appellant also relies on the circumstances of his childhood as a basis for arguing that a life sentence was mandated as a matter of law. But even proof an “extremely difficult childhood” is an insufficient basis to find that a sentence of death is disproportionate. *See State v. Brooks*, 960 S.W.2d 479, 502 (Mo. banc 1997). The brutal and extreme circumstances surrounding these crimes provided more than a sufficient basis for the jury to recommend sentences of death in spite of Appellant’s difficult childhood.

### **III (burden of proof—mental retardation).**

**The trial court did not plainly err in instructing the jury that Appellant had the burden of proving mental retardation by a preponderance of the evidence because this instruction did not violate the Sixth Amendment guarantee to a jury determination of any fact that increases the maximum punishment to which a defendant may be subjected in that mental retardation is not an element of the offense of first-degree murder and its existence does not increase the punishment authorized for the crime; it can only serve to decrease it.**

Appellant claims that the MAI-approved instruction the trial court gave the jury instructing it that Appellant had the burden of proving mental retardation by a preponderance of the evidence violated the Constitution. But because the fact of mental retardation is not an element that increases the maximum penalty to which a defendant may be subjected (it only decreases it), it is not required to be found by a jury beyond a reasonable doubt. Every court that has considered this issue has rejected the precise claim Appellant raises before this Court.

#### **A. The court’s mental-retardation instruction.**

Under Missouri law, a capital defendant must be sentenced to life imprisonment if the jury finds by a preponderance of the evidence that he or she is mentally retarded. See § 535.030.4(1). A “defendant that can prove mental retardation by a preponderance of the evidence . . . shall not be subject to the death penalty.” *Johnson III*, 102 S.W.3d at 540. This Court’s approved MAI-CR 3d instruction on this issue instructs jurors that if they “unanimously find by a preponderance of the evidence that the defendant is mentally

retarded,” then they must return a verdict of life imprisonment. MAI-CR 3d 313.38. The instruction further provides that “preponderance of the evidence means that it is more likely true than not that the defendant is mentally retarded.” *Id.* The trial court’s instruction to the jurors in this case exactly complied with this MAI-approved instruction. (L.F. 256).

Appellant objected to this instruction and the verdict-directing instructions on constitutional grounds, and submitted his own instruction (and modified verdict-directing instructions), which instructed the jury that the “state has the burden of proving beyond a reasonable doubt that the defendant is not mentally retarded.” (Tr. 1761-65; L.F. 301). The instruction further provided that the jurors were required to return a verdict of life imprisonment “unless you find beyond a reasonable doubt that the defendant is not mentally retarded.” (L.F. 301). The trial court refused to give Appellant’s proposed instruction. (Tr. 1761-62).

On the issue of mental retardation, the trial court gave an instruction patterned exactly after MAI-CR 3d 313.38 that instructed the jury to fix Appellant’s sentence at life imprisonment if it unanimously found by a preponderance of the evidence that Appellant was mentally retarded.<sup>15</sup> (L.F. 256). Appellant objected to this instruction and offered his own instruction (Instruction A) in which the jury was told that the “state has the burden of proving beyond a reasonable doubt that the defendant is not mentally retarded.”

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<sup>15</sup> The full text of this pattern instruction (313.38) and the instruction (Instruction No. 6) submitted to the jury in this case is contained in the Appendix.

(Tr. 1760-62; L.F. 301). The court refused Appellant's tendered instruction because it was not in compliance with this Court's approved instruction.<sup>16</sup>

**B. Standard of review.**

The decision to submit or refuse a tendered instruction lies within the trial court's discretion. *State v. Edwards*, 60 S.W.3d 602, 610 (Mo. App. W.D. 2001). A trial court errs when it fails to give an MAI-approved instruction. *State v. Gardner*, 8 S.W.3d 66, 73 (Mo. banc 1999). Only when an MAI-CR 3d pattern instruction violates the substantive law, should a court consider not following it. *State v. Carson*, 941 S.W.2d at 520.

**C. The State is not constitutionally required to prove beyond a reasonable doubt that a capital defendant is not mentally retarded to make him eligible for the death penalty.**

Under Missouri law, a defendant convicted of first-degree murder is ineligible for the death penalty if the jury finds by a preponderance of the evidence that the defendant is mentally retarded:

The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

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<sup>16</sup> Appellant also offered instructions partially patterned after MAI-CR 3d 313.48A (Instructions B, C, and D) and revised verdict forms incorporating the reasonable-doubt standard; the court refused to give these instructions to the jury as well. (Tr. 1761-62; L.F. 302-13).

(1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded;

Section 565.030.4(1), RSMo Cum. Supp. 2006.

After Appellant's second penalty-phase proceeding, the United States Supreme Court decided *Atkins v. Virginia*, which held that "death is not a suitable punishment for a mentally retarded criminal." 536 U.S. at 321. *Atkins* did not involve trial court error regarding instructions to the jury on mental retardation issue, but simply held that a mentally retarded criminal cannot be executed. The defendant in *Atkins* argued on direct appeal only that he could not be executed because he was mentally retarded. *Id.* at 310. The Virginia Supreme Court did not decide the case on the issue of whether the defendant was, in fact, mentally retarded, an issue on which conflicting evidence had been adduced. *Id.* at 308-09. Rather, the Virginia court simply rejected the defendant's claim by relying solely on *Penry v. Lynaugh*, 492 U.S. 302 (1989), which held that the Eighth Amendment did not categorically prohibit the execution of mentally retarded persons convicted of capital crimes. *Id.* at 335. The Court in *Atkins* held only that the Eighth Amendment prohibited the execution of the mentally retarded and remanded the case. *Id.* at 321.

Thus, this Court has held that under *Atkins* "a retarded person, as defined by state law, cannot be executed for murder." *Goodwin*, 191 S.W.3d at 26. In June 2003, after the United Supreme Court's decision in both *Atkins* and *Ring*, this Court revised its approved criminal instructions to comply with the amended version of § 565.030 and *Atkins*. See MAI-CR 3d 300.03A, 313.38, 313.40, 313.48A (9-1-2003).

Appellant contends that under the United States Supreme Court's decision in *Atkins v. Virginia* and *Ring v. Arizona*, the State is required to prove beyond a reasonable doubt that a capital defendant is not mentally retarded before it may constitutionally subject that defendant to a sentence of death. In other words, Appellant claims that proof of a lack of mental retardation is required to make a capital defendant eligible for the death penalty. Appellant's argument misapprehends the holdings of each of these cases.

Although the United States Supreme Court held in *Atkins* that a mentally retarded criminal cannot be executed, it has never held that the a jury must find that a capital defendant is not mentally retarded beyond a reasonable doubt before it may impose a sentence of death. In fact, the Court left "the task of developing appropriate ways to enforce the constitutional restriction" to the States. *See Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416-17 (1986); *Johnson III*, 102 S.W.3d at 540. When the United States Court of Appeals, Ninth Circuit, ordered Arizona to hold a jury trial to determine whether a previously convicted murderer was mentally retarded, the Court reversed that decision and reiterated its direction that the development of measures for adjudicating claims of mental retardation should be left to the States. *See Schriro v. Smith*, 546 U.S. 6, 9 (2005).

Appellant, however, does not rely on *Atkins* alone, but instead argues that his argument is meritorious when *Atkins* is read together with *Ring v. Arizona*, 536 U.S. 584 (2002).

In *Ring v. Arizona*, the Court examined Arizona's statutory scheme that allowed a judge sitting without a jury to find the existence of a statutory aggravating circumstance,

which was a statutory prerequisite for making a defendant eligible for a death sentence. *Ring*, 536 U.S. at 588. The Court held that the Sixth Amendment required the finding of an aggravating circumstance to be made by a jury: “If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.” *Ring*, 536 U.S. 602, 609. Because Arizona made an increase in the potential punishment for murder contingent on the finding of an aggravating circumstance, the Sixth Amendment required those aggravating circumstances to be found by a jury. *Id.* at 609. *Ring* was simply an extension of the Court’s decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in which it held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490.

But a finding of mental retardation does not increase a murder defendant’s potential penalty; it serves only to decrease the punishment. *See Walker v. True*, 399 F.3d 315, 326 (4<sup>th</sup> Cir. 2005) (“[T]he finding of mental retardation does not increase the penalty for the crime beyond the statutory maximum—death”); *United States v. Webster*, 421 F.3d 308, 311 (5<sup>th</sup> Cir. 2005); *In re Johnson*, 334 F.3d 403, 405 (5<sup>th</sup> Cir. 2003). In *Walker*, *Webster*, and *Johnson*, the courts rejected arguments identical to the one Appellant raises. *Walker*, 399 F.3d at 326 (“Walker maintains that the factual determination of ‘not-retarded’ is required to impose the death penalty.”); *Webster*, 421 F.3d at 312 (“Webster’s suggestion . . . that the government had to prove his non-retardation beyond a reasonable doubt . . . .”); *Johnson*, 334 F.3d at 403

(Johnson . . . asserts that he was entitled to a judge and/or jury determination of mental retardation pursuant to . . . *Ring*.”). In each case, the court held that the absence of mental retardation is not an element of the offense of capital murder. *Walker*, 399 F.3d at 326 (“The state does not have a corollary duty to prove that a defendant is “not retarded” in order to be entitled to the death penalty.”); *Johnson*, 334 F.3d at 405 (“[N]either *Ring* and *Apprendi* nor *Atkins* render the absence of mental retardation the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt.”).

Appellant cites no case in which a court has found that *Atkins* and *Ring* require the State prove the lack of mental retardation beyond a reasonable doubt. In fact, every state court that has considered this precise issue has specifically rejected it. *State v. Flores*, 93 P.3d 1264, 1266 (N.M. 2004); *Ex parte Briseno*, 135 S.W.3d 1, 10-11 (Tex. Crim. App. 2004); *Head v. Hill*, 587 S.E.2d 613, 619-20 (Ga. 2003); *State v. Laney*, 627 S.E.2d 726, 731-32 (S.C. 2006); *Howell v. State*, 138 P.3d 549, 561-62 (Okla. Crim. App. 2006); *Russell v. State*, 849 So.2d 95, 146-48 (Miss. 2003); *Howell v. State*, 151 S.W.3d 450, 465-67 (Tenn. 2004); *Bowling v. Commonwealth*, 163 S.W.3d 361, 377-80 (Ky. 2005); *Arbelaez v. State*, 898 So.2d 25, 43 (Fla. 2005); *State v. Grell*, 135 P.3d 696, 701-02 (Ariz. 2006).<sup>17</sup>

A finding of mental retardation under Missouri law caps the potential punishment for a capital defendant at life imprisonment. Because a finding of mental retardation is

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<sup>17</sup> See also *State v. Kennedy*, --- So.2d ---, 2007 WL 1471652 (La. May 22, 2007).

not a finding of fact that increases the range of punishment, the issue of mental retardation is not subject to the *Ring* requirement of a jury determination beyond a reasonable doubt. Every court that has considered this issue has so held. Consequently, Appellant's claim that the Constitution requires the State to prove his lack of mental retardation beyond a reasonable is without merit.

#### **IV (removal of veniremembers for cause).**

**The trial court did not abuse its discretion in sustaining the State’s objections and removing veniremembers Green, Leiter, Corcoran, and Alley for cause because an examination of the entire record of these veniremembers’ response shows that their beliefs would have substantially impaired their ability to serve as jurors in that they would have been unwilling or unable to follow the court’s instructions on the issue of punishment or to consider the full range of punishment.**

A trial court does not abuse its discretion in removing a veniremember for cause when the complete record of the veniremember’s responses shows that he or she would be unable or unwilling to follow the court’s instructions on the issue of punishment or to consider the full range of punishment. The trial court properly exercised its discretion here because the record shows it properly determined that these veniremembers’ beliefs would substantially impair their ability to serve as jurors in this case.

#### **A. The law regarding jury selection in capital cases.**

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court held that a State cannot automatically exclude jurors from a death-penalty case simply because they had “conscientious scruples against capital punishment” or were opposed it. *Id.* at 512; *see also Wainwright v. Witt*, 469 U.S. 412, 418 (1985). The Court refined this doctrine in two cases following *Witherspoon*. *See Boulden v. Holman*, 394 U.S. 478, 483-84 (1969) (noting that a person who has a fixed opinion against or does not believe in capital punishment may nevertheless be able to follow the law and fairly consider imposition of the death penalty in a particular case); *Lockett v. Ohio*, 438 U.S. 586, 595-96 (1978)

(holding that prospective jurors were properly disqualified when they were unable to set aside their personal beliefs or convictions regarding capital punishment and take an oath to follow the law).<sup>18</sup>

In *Adams v. Texas*, 448 U.S. 38 (1980), the Court, in considering the holdings of these previous cases, held that the standard for establishing whether a prospective juror in a capital case may be excused for cause is whether that person's views about capital punishment would prevent or substantially impair the performance of that person as a juror:

This line of cases establishes the general proposition that 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 instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

*Id.* at 45; *see also Witt*, 469 U.S. at 424; *Johnson*, 22 S.W.3d at 187 (“The relevant question is whether a venireperson’s beliefs preclude following the court’s instructions so

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<sup>18</sup>In *Lockett*, the excluded jurors were unable to respond affirmatively to the following question: “Do you feel that you could take an oath to well and truly [sic] try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment.” 438 U.S. at 595-96.

as to ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’”).

The *Adams* court also noted that a State “does not violate the *Witherspoon* doctrine when it excludes prospective jurors who are unable or unwilling to address the penalty questions with this degree of impartiality.” *Id.* at 46. The Court read *Witherspoon* as a limitation on the State’s power to exclude prospective jurors on a basis any broader than their inability to follow the law or abide by their oaths. *Id.* at 48; *see also Lockhart v. McCree*, 476 U.S. 162 (1986) (holding that the Sixth Amendment’s fair-cross-section requirement was not violated when prospective jurors were excluded for cause after stating that under no circumstances would they vote for death).

Consequently, no one can seriously argue that a prospective juror who cannot or will not follow the law in a capital case may be excluded for cause. The easy cases are those in which prospective jurors unequivocally state that under no circumstances will they follow the law and consider the death penalty. The more difficult cases are the ones in which jurors adopt no firm position or give no definitive answer about their ability to set aside their personal beliefs and follow the law.

In *Witt*, after reaffirming the *Adams* “standard” for juror exclusion, the Court held that a prospective juror’s bias need not be proved with “unmistakable clarity” and that a trial judge may still lawfully exclude such jurors if the judge believes that the prospective juror would be unable to follow the law:

[T]his standard likewise does not require that a juror’s bias be proved with ‘unmistakable clarity.’ This is because determinations of juror bias cannot be

reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made ‘unmistakably clear’; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

*Witt*, 469 U.S. at 424-26.

This Court has held that a potential juror’s “equivocation about his ability to follow the law in a capital case together with an unequivocal statement that he could not sign a verdict of death can provide a basis for the trial court to exclude the venireperson from the jury.” *Johnson II*, 22 S.W.3d at 186. In addition, a statement indicating that a veniremember would hold the state to a burden of proof higher than the beyond-a-reasonable-doubt standard constitutes a sufficient basis on which to sustain a motion to strike for cause. *Johnson II*, 22 S.W.3d at 188-89; *State v. Clayton*, 995 S.W.2d 468, 476 (Mo. banc 1999).

#### **B. Standard of review.**

“The trial court’s ‘ruling on a challenge for cause will not be disturbed on appeal unless it is clearly against the evidence and constitutes a clear abuse of discretion.’” *State*

*v. Taylor*, 134 S.W.3d 21, 29 (Mo. banc 2004) (quoting *State v. Smith*, 32 S.W.3d 532, 544 (Mo. banc 2000)).

The qualifications of a prospective juror are not determined from a single response, but rather from the entire examination. *Johnson II*, 22 S.W.3d at 188. The trial court can better evaluate a venireperson's commitment to follow the law and has broad discretion to determine the qualifications of prospective jurors. *Id.* "Under *Wainwright*, the trial judge evaluates the venire's responses and determines whether their views would prevent or substantially impair their performance as jurors (including the ability to follow instructions on the burden of proof)." *Id.*

Accordingly, a great deal of deference is owed to the trial court's determination that a prospective juror is substantially impaired. *See Uttecht v. Brown*, 127 S. Ct. 2218, 2224 (2007). This deferential standard applies whether the trial court has engaged in a specific analysis regarding the substantial impairment; even the simple act of granting a motion to excuse for cause "constitutes an implicit finding of bias." *Id.* at 2223. "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of *critical* importance in assessing the attitude and qualifications of potential jurors. *Id.* at 2224. The trial court's "finding may be upheld even in the absence of clear statements from the juror that he or she is impaired." *Id.* at 2223. "Thus, when there is ambiguity in the prospective juror's statements, 'the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State.'" *Id.* (quoting *Witt*, 469 U.S. at 434); *see also State v. Tisius*, 92 S.W.3d 751, 763

(Mo. banc 2002) (quoting *State v. Roberts*, 948 S.W.2d 577, 597 (Mo. banc 1997)) (“Where there is conflicting testimony regarding a prospective juror’s ability to consider the death penalty, the trial court does not abuse its discretion by giving more weight to one response than to another and in finding that the venireperson could not properly consider the death penalty.”). Even a juror’s assurance that he or she can follow the law and consider the death penalty may not overcome the reasonable inferences from other responses that he or she may be unable or unwilling to. *Uttecht*, 127 S. Ct. at 2229.

**C. The trial court did not abuse its discretion in removing the veniremembers in question for cause.**

The trial court did not err in sustaining the State’s motions to strike for cause veniremembers Green, Leiter, Corcoran, and Alley. The record covering the complete examination of these veniremembers does not reveal that the trial court abused its considerable discretion in concluding, based on the entirety of the veniremembers’ responses, that their beliefs would have prevented, or substantially impaired, their ability to serve as jurors in a capital case.

**1. Veniremember Barbara Green.**

Ms. Barbara Green<sup>19</sup> stated that she would “hesitate” to vote for the death penalty and a decision to do so would “weigh” on her because of her relationship with a member of her church whose son had been charged with murder. (Tr. 351-52). Although she could not definitively say she could not vote for death, she believed her hesitation would

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<sup>19</sup> A different veniremember was named Treasure Green. (Tr. 250).

“substantially impair[ ]” her ability to do so. (Tr. 353). When asked if her views on the death penalty would “affect her ability to follow the Court’s instructions,” she said that she would vote for death “if [she] had to do it,” and that she would do whatever the Court told [her] to do.” (Tr. 353). After being told that she was not going to be told that she had to vote for death, she ultimately agreed that her ability to do so would be “substantially impaired” based on her views. (Tr. 354).

Later, the prosecutor asked the panel if anyone “could not, under any circumstances, consider imposing a sentence of death?” (Tr. 358-59). Ms. Green agreed that this statement would apply to her:

[The Prosecutor]: Okay. I’m going to ask you all this again, everybody:

Is there anybody on the panel who, because of your views on the death penalty, whatever they may be, could not, under any circumstances, consider imposing a sentence of death? You’ve already said that, Ms. Scroggins. Both of you guys. Would that be true of you, Ms. Green?

Venireman Barbara Green: I am just—I’d have to say yes.

[The Prosecutor]: You’d say yes.

Venireman Barbara Green: Because of when you—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.

[The Prosecutor]: Oh, could you sign the verdict form?

Venireman Barbara Green: Right. I couldn’t do that.

[The Prosecutor]: You could not act, if you were selected as the foreperson by the other jurors, you could not act as the foreperson and sign that?

Venireman Barbara Green: That's what made me realize I could never do it.

[The Prosecutor]: You couldn't Sign a verdict of death?

Venireman Barbara Green: No.

(Tr. 358-59).

During defense counsel's questioning, Ms. Green repeated that she could consider the death penalty and follow the court's instructions if "she had to do it," but that she would be "biased." (Tr. 399). She also said that she could set aside her biases, but then added that she would do so "with hesitation." (Tr. 399-400). Ms. Green said later that she was not leaning toward one punishment or the other and that she "could not let [her] emotions be involved at all." (Tr. 420-21).

The State moved to strike Ms. Green for cause and Appellant objected. (Tr. 439). While arguing the motion, the court recalled Ms. Green saying, "If I had to do it, I could do it.":

The Court: Well, I guess I have a question in my own mind to what

[Appellant's Counsel]'s question was at the time, because—And I

recall her answer being, "If I had to do it, I could do it." And I

don't know if she was talking about signing the verdict form of—

[Appellant's Counsel]: I think she was.

The Court: —or rendering the death penalty.

[Appellant's Counsel]: I think she was talking about rendering the death penalty, your Honor.

The Court: That's what I thought she was saying. And you never have to.

....

The Court: You never, ever have to under Missouri law.

....

[Appellant's Counsel]: But she could consider it.

The Court: If she had to. And you never have to.

[The Prosecutor]: She never came off of the verdict form issue, even in the defense voir dire. And further, the State would certainly agree that the demeanor of all the jurors, as observed by the Court, should be taken into consideration. And she was clear in her statement that her ability to legitimately consider the death penalty would be substantially impaired.

The Court: Well, I agree. I'm going to sustain that challenge.  
(Tr. 442-43).

Appellant acknowledges that Ms. Green expressed "opposition to or reservations about the death penalty," but claims that she also said she could apply the law and impose the death penalty. App. Br. 101. But Ms. Green's responses went beyond mere expressions about her beliefs on the death penalty; instead, they revealed that she would be unable to follow the law. At one point she stated that she could never impose the

death penalty. Later she said she could, if the court told her that she had to. Because she would never receive such an instruction, her answer shows that her ability to follow the instructions and to consider the death penalty would be substantially impaired. In other words, her responses show that she could never vote to impose the death penalty unless the court told her that she had to do so.

A review of her complete examination shows her equivocation about her ability to follow the law and to consider the death penalty. She also expressly stated that she would never be able to sign the verdict form for a sentence of death. After considering Ms. Green's responses and being in a position to assess her demeanor, the trial court did not abuse its discretion in sustaining the State's motion to strike her for cause.

## **2. Veniremember Leiter.**

When asked if she could consider the death penalty, Ms. Leiter said she could consider both punishments, but that she would "have a little difficulty with the death penalty" based on her personal convictions. (Tr. 369). She "guessed" that she could consider the death penalty. (Tr. 369). When asked if her "serious consideration" of the death penalty "would be impaired," she said she did not "think" it would be. (Tr. 369). But she did expressly say that she could not sign the verdict form for a sentence of death. (Tr. 370).

During defense counsel's questioning, Ms. Leiter confirmed that she would not "like to" sign a verdict form for death. (Tr. 398-99). When asked if she could consider a sentence of death, "as long as [she wasn't] the foreperson and didn't have to sign off on" the verdict, Ms. Leiter said she "believed" she could do so. (Tr. 400). Later, Ms. Leiter

said that while she would listen to the evidence, she would “lean” toward life imprisonment. (Tr. 426-27). She then said that she would “try” to consider both punishments, and that she “believed” that she could do so in Appellant’s case. (Tr. 427).

The trial court sustained the State’s motion to strike for cause because Ms. Leiter expressly stated that she would not sign a verdict form for a sentence of death. (Tr. 447).

The trial court did not abuse its discretion because Ms. Leiter consistently stated that she would not sign a verdict form for a sentence of death. In addition, Ms. Leiter said that her personal convictions against the death penalty would make it difficult for her to consider death and that she would lean toward life imprisonment. When asked if she could consider both punishments, Ms. Leiter’s answers were either that she would “try” to do so or that she “believed” or “guessed” that she could. Instead of firmly stating her ability to consider both punishments, she consistently equivocated in responding to questions asking if she could fairly consider both punishments.

### **3. Veniremember Corcoran.**

Veniremember Corcoran initially stated that while she would not say that she would never vote to impose the death penalty, the evidence would have to be “great” for her to do so. (Tr. 573). Further questioning revealed that she believed her ability to consider the death penalty would be “impaired” by her “strong opinion” and that even after she heard all the facts she did not know whether she could be “swayed.” (Tr. 573-74). She later said that she did not know if she could be impartial:

Veniremember Corcoran: My thoughts are, I don’t like the idea of the death penalty. And I just don’t know if I—if I would be impartial. I don’t know. I

think that I would, you know, after listening to all the evidence, I think that I could be impartial, but I can't say that I definitely would be, no.

[The Prosecutor]: Your ability to be impartial would be impaired?

Veniremember Corcoran: It would be impaired, yes.

(Tr. 574). Ms. Corcoran also said that she would hold the state to a burden of proof higher than the "beyond a reasonable doubt" standard and that she would have to be convinced "beyond all doubt" to vote for death:

[The Prosecutor]: Do you think that you would hold the State to a higher burden of proof?

Veniremember Corcoran: Yes.

[The Prosecutor]: You would hold the State to a higher burden of proof, like a hundred percent, for instance?

Veniremember Corcoran: Yes.

....

[The Prosecutor]: Given your thoughts on the death penalty, would you require the State, for instance, on the aggravating circumstances, to prove those more than the required burden of beyond a reasonable doubt?

Veniremember Corcoran: Yes, because we're talking about someone's life.

[The Prosecutor]: Understood. So you would, as you sit there right now, you would require the State to prove it beyond what's in the instructions, as you sit there right now, beyond a reasonable doubt.

Veniremember Corcoran: Beyond a reasonable doubt.

[The Prosecutor]: You'd want.

Veniremember Corcoran: I would have to know—I would have to know for sure.

[The Prosecutor]: Like beyond all doubt?

Veniremember Corcoran: In my own mind, yes.

(Tr. 575).

During later questioning by defense counsel, Ms. Corcoran stated that while her ability to impose the death penalty would be impaired, she did not mean to suggest that she could never impose it.<sup>20</sup> (Tr. 608). Although Ms. Corcoran also later suggested that she would not hold the State to a burden higher than the reasonable-doubt standard, she qualified that and said that in her mind she would have to be “completely convinced.” (Tr. 618-17).

The trial court sustained the State's motion to strike for cause because Ms. Corcoran indicated that she would hold the State to a higher burden of proof than required and when defense counsel attempted to rehabilitate her, Ms. Corcoran still said that she would have to be “completely convinced.”<sup>21</sup> (Tr. 627).

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<sup>20</sup> The transcript reflects that “Veniremen Alley” made this statement, but the record clearly shows that defense counsel's question was directed toward Veniremember Corcoran and that it was she that gave this response. (Tr. 608).

<sup>21</sup> When the court made this statement in ruling on the motion, defense counsel stated that he “was afraid” that the court had heard this remark by Ms. Corcoran. (Tr. 627).

The trial court did not abuse its discretion in sustaining the motion to strike Ms. Corcoran for cause. In addition to her statements saying that she would hold the State to a burden higher than the reasonable-doubt standard, she also doubted her ability to be impartial in considering the death penalty. She even stated that her ability to consider death would be “impaired” by her personal beliefs. Based on the entire record of Ms. Corcoran’s examination, it cannot be said that the trial court abused its discretion in sustaining the motion to strike.

#### **4. Veniremember Alley.**

Veniremember Alley said that she was not sure she could vote for death and that her ability to do so would be “possibly impaired” by her beliefs. (Tr. 565-67). During later questioning, Ms. Alley agreed with the prosecutor that she would be unable to consider the death penalty, and that if she were forced to make a choice, she could not choose death. (Tr. 568). Although she said that somebody might talk her out of it, she had not yet had that happen and confirmed that she had already made up her mind on the issue. (Tr. 568-69). Later when defense counsel asked Ms. Alley if she really meant that she could never impose the death penalty, Ms. Alley confirmed that that was exactly what she meant. (Tr. 608).

When asked if there was an objection to the State’s motion to strike Ms. Alley for cause, defense counsel stated, “No objection.” (Tr. 622). Curiously, however, Appellant raised this issue in his motion for new trial and in this appeal. (L.F. 321).

The trial court did not abuse its discretion in sustaining the motion to strike for cause, Ms. Alley stated more than once that she could impose the death penalty. The trial

court was not obliged to find that she could be an impartial juror and fairly consider the death penalty simply because she gratuitously said that someone might talk her out of it, even though no one had done so before. Even defense counsel, who, like the trial court, observed Ms. Alley's demeanor, offered no objection when asked if it opposed the State's motion to strike.

## **V (crime scene and autopsy photographs).**

**The trial court did not abuse its discretion in admitting photographic exhibits of the crime scene (State’s Exhibits 34A to 34G, 39A to 39C, and 41A to 41D) or from the victims’ autopsies (State’s Exhibits 69A to 69D, 70A to 70E, and 71A to 71C) because those photographs were relevant and probative to the issue of punishment in that this was a retrial of a penalty-phase proceeding and the jurors’ had never heard the guilt phase evidence; the photographs were the only non-testimonial source of information describing the crime scene and the victims’ injuries and were necessary to the jurors’ understanding of the expert testimony; and the circumstances in which Appellant committed these murders was the primary evidence in aggravation of punishment.**

The trial court did not abuse its discretion in admitting photographic exhibits during the retrial of Appellant’s penalty-phase proceeding before a jury who had never heard the guilt-phase evidence. These exhibits were properly admitted to inform jurors about the circumstances of the offense, which was vital to their ability to determine the appropriate punishment.

### **A. Standard of review.**

“The trial court has broad discretion in the admission of photographs.” *State v. Strong*, 142 S.W.3d 702, 715 (Mo. banc 2004). “Its decision will not be overturned absent an abuse of discretion.” *Id.*

## **B. The photographic evidence at trial.**

The photographs about which Appellant complains fall into two groups. The first group consists of crime scene photographs (State's Exhibits 34A to 34G, 39A to 39C, and 41A to 41D). The second group consists of autopsy photographs (State's Exhibits 69A to 69D, 70A to 70E, and 71A to 71C).

### **1. Crime scene photographs.**

Exhibits 34A to 34G are crime scene photographs of the area in and around the bathroom where the bodies of Mabel Scruggs and Mary Bratcher were found. (Tr. 758). In Exhibit 34A, the door to the bathroom where the bodies were found is closed and a pool of blood along with blood spatter information and a bloody footprint are depicted. (Tr. 760). Exhibit 34B is simply a closer view of the blood flow, blood spatter, and bloody footprint depicted in Exhibit 34A. (Tr. 760). Exhibit 34C shows the bathroom door open and includes blood "information" on the door and above the door handle; it also shows the victims' legs. (Tr. 760-61). Exhibit 34D shows blood "information" on the floor near the victims' bodies and broken glass and pieces of eyeglasses. (Tr. 761). Exhibit 34E shows a .25 caliber shell casing under the lip of the door. (Tr. 761). Exhibit 34F shows the victims on the floor just as police found them. (Tr. 762). Exhibit 34G is a closer view of Ms. Bratcher's body. (Tr. 762). Police initially believed, incorrectly, that the victims had suffered shotgun wounds because of the damage to their heads and the pieces of bone strewn about the floor. (Tr. 762). Later autopsy findings—substantiated in part by the autopsy photographs—showed that the victims were beaten with a blunt

object, probably a claw hammer found in the store. (Tr. 808, 811, 949, 950, 956-57, 962).

Exhibits 39A to 39C depict the body of victim Mabel Scruggs. (Tr. 765-66). Exhibit 39A shows blood spatter above Ms. Scruggs's body. (Tr. 766-67, 800). Exhibit 39B provides a closer view of this blood spatter. (Tr. 800). Exhibit 39C shows a wider view of the blood spatter, particularly the multiple directions that the blood traveled. (Tr. 800).

Exhibits 41A to 41C depict the interior of the walk-in cooler where the body of Fred Jones was found. (Tr. 775). Exhibits 41A and 41B show defined patterns of blood radiating away from the body, as well as blood transference and "hair painting." (Tr. 806). Exhibit 41C, which is a picture of the same area after Mr. Jones's body had been removed, shows the blood painting effect on the wall and on some nearby soda packaging. (Tr. 807).

## **2. Autopsy photographs.**

Exhibits 69A to 69D are photographs taken during Mr. Jones's autopsy. (State's Ex. 79, p. 943).<sup>22</sup> Exhibit 69A<sup>23</sup> shows the left side of the victim's head and reveals

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<sup>22</sup> State's Exhibit 79 is a transcript of the testimony of Dr. Jay Dix, formerly the Boone County Medical Examiner, given on March 11, 1999, during Appellant's second penalty-phase proceeding. Because Dr. Dix passed away between Appellant's second and third penalty-phase proceedings, his testimony was read into the record by the current Boone County Medical Examiner (Dr. Edward Adelstein).

injuries, including tremendous damage to the left eye, caused by a blunt object, as well as puncture wounds probably caused by the claw end of a hammer. (State's Ex. 79, pp. 946-47). Exhibit 69B shows the right side of the victim's face and reveals a non-lethal gunshot wound that entered through the cheek and exited through the ear. (State's Ex. 79, pp. 947-48). Exhibit 69C depicts a piece of skull removed during the autopsy that shows a circular injury and highly compressed fracture to the bone, which is consistent with a blow from a hammer similar to the one police found in the store. (State's Ex. 79, p. 949). Exhibit 69D depicts the victim's left hand showing a tear of the skin and a broken ring finger likely caused by a "mashing-type" injury consistent with the hand being slammed in a door. (State's Ex. 79, pp. 950-51).

Exhibits 70A to 70E are photographs taken during the autopsy of Ms. Bratcher's body. (State's Ex. 79, p. 952). Exhibit 70A depicts the crown of the head and right side of the face showing some tears to the skin and bruising. (State's Ex. 79, p. 955). Exhibit 70B depicts the left side of the head and shows a "very large" open "defect" four inches long and extending from the left ear up to the left side of the forehead that exposed the brain and bone material. (State's Ex. 79, pp. 955-56). Exhibit 70C depicts a piece of skull showing a semicircular defect that could have been caused by a hammer similar to

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<sup>23</sup> The exhibit numbers for the autopsy photographs changed from Appellant's second and third penalty-phase proceedings. Exhibits 69A to 69D were formerly Exhibits 122A to 122D; Exhibits 70A to 70E were formerly Exhibits 123A to 123E; and Exhibits 71A to 71C were formerly Exhibits 124A to 124C. (Tr. 978-79).

the one police found in the store. (State's Ex. 79, pp. 956). State's Exhibits 70D and 70E depict the back of the left hand and show ten stab wounds—eight of which went completely through the hand—caused by a flat-head screwdriver similar to the one police found in a field near the store. (State's Ex. 79, pp. 957-58; Tr. 815).

State's Exhibits 71A to 71C are photographs taken during the autopsy of Ms. Scruggs's body. (State's Ex. 79, p. 959). State's Exhibit 71A depicts the right side of the face and shows tears near the nose, mouth, and right eye. (State's Ex. 79, p. 961). State's Exhibit 71B depicts the left side of the face and shows a large open "defect" in the head revealing a fracture of the bone and brain. (State's Ex. 79, p. 961). State's Exhibit 71C depicts this "open defect" and shows fractures and injuries to the brain. (State's Ex. 79, p. 961).

**C. The trial court did not abuse its discretion in admitting these photographs into evidence during trial.**

Appellant contends that the jury should not have seen any crime scene or autopsy photographs in which the victims were shown. He claims the trial court abused its discretion in admitting these photographs into evidence on the ground that the police officers' testimonies describing the crime scene and the medical examiner's testimony describing the victims' injuries were enough evidence for the jury. App. Br. 108. Appellant's claim misses the mark on several grounds.

First, the law simply does not support Appellant's claim. Just because the photographs are gruesome does not establish that they were inadmissible. "[P]hotographs tend to be shocking or gruesome . . . almost always because the crime is shocking or

gruesome.” *State v. Rousan*, 961 S.W.2d 831, 844 (Mo. banc 1998). *See also State v. Wolfe*, 13 S.W.3d 248, 264 (Mo. banc 2000) (“Gruesome crimes produce gruesome, yet probative, photographs, and a defendant may not escape the brutality of his own actions.”). “If a photograph is relevant, it should not be excluded simply because it may be inflammatory.” *Rousan*, 961 S.W.2d at 844.

This Court has also previously rejected Appellant’s specific contention that the photographs lacked probative value because other evidence described what was depicted in the photograph. “A photograph is not rendered inadmissible simply because other evidence described what is shown in the photograph.” *Id.*; *see also State v. Schneider*, 736 S.W.2d 392, 403 (Mo. banc 1987).

Second, this case involved the retrial of Appellant’s penalty-phase proceeding. Before any evidence had been presented, the jurors were told only that Appellant had already been found guilty on three counts of first-degree murder and that their job was to determine the appropriate punishment. Normally, the jurors would have heard and seen evidence about the circumstances of the crime during the guilt-phase proceeding. But because this was a retrial of only the penalty-phase proceeding, the jurors here had no opportunity to hear the evidence presented during the guilt phase ten years earlier. Appellant’s suggestion that the jurors’ knowledge and understanding of the circumstances surrounding the murders and the manner in which these victims were killed should be restricted to only oral descriptions is patently unreasonable.

Third, before the jury could consider whether to impose a sentence of death, the State had the burden of proving the statutory aggravating circumstances alleged in this

case. One of those aggravators was whether the murders were “outrageously and wantonly vile, horrible, and inhumane,” which required the jury to find that Appellant “committed repeated and excessive acts of physical abuse” that made the killing “unreasonably brutal.” (L.F. 257, 264, 271). The crime-scene and autopsy photographs offered in conjunction with testimony from the police and medical examiner provided jurors with the best evidence from which to make that determination. Second-hand, oral descriptions contained in testimony could not, standing alone, have provided jurors with the information the needed to determine whether the State proved this aggravating circumstance. *Compare State v. Strong*, 142 S.W.3d at 715 (holding that the trial court did not err in allowing the jurors to view a slide show comprised of crime-scene and autopsy photographs during the penalty-phase of capital murder trial offered by the State to prove the statutory aggravating circumstance that the crimes were “outrageously or wantonly vile, horrible or inhuman”).

Fourth, the photographs provided the only visual evidence to assist jurors in understanding the nature of the crime and to determine whether the crime occurred as the State suggested. The blood spatter information shown in the photographs suggests that the victims were struck multiple times by blunt force trauma. (Tr. 801). The photographs also revealed “castoff spattering,” which occurs when blood is cast off an object being repeatedly swung, and they also showed “tailing,” which can be studied to determine the direction in which the blood traveled and the source from where it originated. (Tr. 803-04). The photographs were the only objective evidence by which

the jurors could test the State's blood-evidence expert, who used the photographs as visual aids while explaining the blood evidence to jurors . (Tr. 790-807).

The trial court admitted the autopsy photographs into evidence (Exhibits 69, 70, and 71) on the ground that the crime scene photographs did not clearly show the victims' wounds, while the autopsy photographs, showing the wounds after they had been cleaned, did. (Tr. 764). The autopsy photographs showed not only the fatal blunt force wounds to the victims' skulls, but also showed other wounds, such as the puncture wounds Ms. Bratcher suffered, which were likely caused by the claw end of a hammer, or the non-fatal gunshot wound to Mr. Jones's face, that helped to prove that Appellant administered repeated and excessive acts of violence against the victims. *Compare Rousan*, 961 S.W.2d at 844 (trial court did not err in admitting photographs of murder victims' decomposing bodies which showed the location where the bodies were found and assisted jurors in understanding the medical examiner's testimony).

The nature and visual aspect of the wounds was vital to the jurors' understanding of how the crime was committed and allowed them to assess the witnesses' credibility. Especially important was the medical examiner's testimony suggesting that the victims died from Appellant's use of a hammer to deliver multiple blunt force blows to the victims' skulls. It would have been nearly impossible for the jurors to comprehend this testimony without viewing the photographs, which the medical examiner repeatedly referred to and exhibited to jurors during his testimony. "Generally, even gruesome photographs are admissible if they: (1) show the nature and location of wounds, (2) enable jurors to better understand the testimony at trial, and (3) aid in establishing an

element of the State's case." *State v. Mayes*, 63 S.W.3d 615, 631 (Mo. banc 2001). The admission of the photographs in this case satisfy all three of these elements.

Fifth, the record shows that the jury was not unduly influenced or prejudiced by the photographs. The jurors were made aware of the existence of these photographs during jury selection, and none of them indicated that viewing these photographs would affect their ability to fairly decide Appellant's case. (Tr. 301).

The cases relied on by Appellant are distinguishable. Forty-five years ago, in *State v. Floyd*, 360 S.W.2d 630 (Mo. 1962), the court held that it was error to admit into evidence a photograph of a badly decomposed body during a murder case when, based on the prosecutor's admissions, the photograph was not offered for any "conventional" reason, such as identifying the victim, showing the location or nature of injury, proving the weapon used, or establishing a cause of death. *Id.* at 633. Later cases, however, have virtually distinguished *Floyd* out of existence.

Nearly twenty years after the decision in *Floyd*, the court in *State v. Newberry*, 605 S.W.2d 117 (Mo. 1980), described *Floyd* as involving photographs of a badly decomposed body which could have no probative value, and noted that *Floyd* had "been regularly distinguished in subsequent cases." *Id.* The court also found that no case after *Floyd* had held that the admission of a victim's photograph was error. *Id.* Other Missouri decisions have recognized that the holding in *Floyd* has no contemporary application in the law governing the admissibility of photographs. *See State v. Leisure*, 772 S.W.2d 674 (Mo. App. W.D. 1989) (noting that the "continued vitality" of *Floyd* was brought into question by *Newberry* and that *Floyd* had been "repeatedly distinguished" in

later cases involving photographs of murder victims); *State v. Lay*, 896 S.W.2d 693 (Mo. App. W.D. 1995) (noting that the “continued validity” of *Floyd* was brought into question by *Newberry*).

Appellant’s reliance on *State v. Stevenson*, 852 S.W.2d 858 (Mo. App. S.D. 1993), is also misplaced. In that case, an autopsy photograph of the internal organs inside the victim’s chest cavity was admitted into evidence, but the record contained nothing indicating the purpose for which it was offered. *Id.* at 861-62. Although the appellate court mentioned this circumstance, it did not reverse the defendant’s conviction. *Id.* at 863. Consequently, the court’s discussion of this issue, and its approving recognition of *State v. Floyd*, despite the later cases that had already called it into question, is mere dicta. The record in Appellant’s case, however, demonstrates that numerous reasons existed to warrant the admission of the crime-scene and autopsy photographs. And none of those photographs depicted the inside of a victim’s chest cavity.

Appellant contrasts the holdings in *State v. Clements*, 849 S.W.2d 640 (Mo. App. S.D. 1993), and *State v. Day*, 866 S.W.2d 491 (Mo. App. S.D. 1993), which held that arguably gruesome photographs were admissible to prove deliberation (*Clements*) and the infliction of a serious physical injury (*Day*), to argue that since this case involved only the retrial of a penalty-phase proceeding, those type of guilt-phase issues were not relevant to the jury’s determination; therefore, admission of the photographs was unnecessary. App. Br. 108-09. But, as explained above, the nature and severity of the Appellant’s crimes were relevant both to the jury’s understanding of the offense, upon which it would rely in imposing punishment, and to the State’s burden of proving the

statutory aggravating circumstance of whether the crime was “outrageously and wantonly vile, horrible, and inhumane.”

## **VI (constitutionality of mitigation instructions).**

**The trial court did not plainly err in submitting the various penalty-phase instructions on the ground that they improperly emphasized the evidence in aggravation and prevented the jury from fully considering the mitigating evidence because these instructions actually benefit the defendant by asking jurors to determine if the State has completely proved the case in aggravation before asking them to consider whether to impose a sentence of death; and this identical claim has already been rejected by this Court in previous cases.**

This Court has previously held that the MAI-CR 3d penalty-phase instructions do not unconstitutionally focus the jury's attention on the circumstances in aggravation to the detriment of the mitigating evidence. Appellant's argument to the contrary has already been rejected and is thus without merit.

### **A. The penalty-phase instructions.**

Appellant's complaint centers on three instructions.<sup>24</sup> The first of these instructions (Instruction Nos. 7, 12, and 17) is patterned after MAI-CR 3d 313.40, and instructs the jury to determine which, if any, of the enumerated aggravating circumstances has been proved beyond a reasonable doubt. (L.F. 257-58, 264-65, 271-72). If none are found, the jurors are instructed to return a verdict of life imprisonment.

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<sup>24</sup> He actually challenges nine instructions (Instructions Nos. 7, 8, 9, 12, 13, 14, 17, 18, and 19), which are part of a set of three identical instructions for each count. (L.F. 257-60, 264-67, 271-74).

The next instruction (Instruction Nos. 8, 13, and 18), patterned after MAI-CR 3d 313.41A, tells the jury that if it has determined that one or more aggravating circumstances exist, it is to next consider whether the facts and circumstances in aggravation of punishment taken as a whole are sufficient to warrant imposition of a sentence of death. (L.F. 259, 266, 274). If the jury is unable to unanimously find that they do, it is instructed to return a verdict of life imprisonment. The third instruction (Instruction Nos. 9, 14, and 19), patterned after MAI-CR 3d 313.44A, tells the jury that if it has found that the facts and circumstances in aggravation of punishment taken as a whole warrant the imposition, it must consider whether the facts and circumstances in mitigation of punishment are sufficient to outweigh the facts and circumstances in aggravation of punishment. (L.F. 260, 267, 273). If the jury so finds, it is instructed to return a verdict of life imprisonment.

Appellant's complaint on appeal centers on the fact that the jury is asked to twice consider the facts and circumstances in aggravation of punishment before it is instructed to consider the facts and circumstances in mitigation of punishment.

**B. Standard of review.**

Before Appellant's first trial in 1994, he filed a motion asking that the court not give certain MAI-CR 3d penalty-phase instructions on the ground that the instructions ask the jury to first find the existence of a statutory aggravating circumstance and that the aggravating circumstances taken as a whole warrant the imposition of a death sentence before it is instructed to consider the mitigating circumstances that may be present. (L.F. 95-103). It does not appear that this motion was renewed before Appellant's most recent

penalty-phase proceeding. Appellant made no objection to the instructions on this ground during the instruction conference. (Tr. 1760-67). Appellant's motion for new trial simply states the court erred in giving the MAI-CR 3d penalty-phase instructions "for all the reasons stated in the motion and on the record in this and previous proceedings." (L.F. 320).

Because Appellant failed to preserve this claim by objecting at trial it may only be reviewed, if at all, for plain error. "Plain error is found only where the alleged error establishes substantial grounds for believing a manifest injustice or miscarriage of justice occurred." *State v. Johnson*, 207 S.W.3d 24, 44 (Mo. banc 2006). Before instructional error can rise to the level of plain error, it must be shown that the trial court so misdirected or failed to instruct the jury to cause manifest injustice or miscarriage of justice and that this error. *Id.* Moreover, it must be apparent to the appellate court that the instructional error affected the jury's verdict. *Id.*

**C. The MAI-CR 3d penalty-phase instructions do not unconstitutionally restrict consideration of mitigating evidence.**

These instructions about which Appellant complains were patterned after MAI-CR 3d 313.40, 313.41A, and 313.44A, and as such are presumptively valid under Rule 28.02(c). *See State v. Ervin*, 979 S.W.2d 149, 158 (Mo. banc 1998).

This Court has previously considered a constitutional challenge to the penalty-phase instructions on the ground that they unduly emphasize aggravating circumstances over evidence in mitigation. Those constitutional challenges were rejected. *See State v.*

*Tokar*, 918 S.W.2d 753, 771 (Mo. banc 1996); *State v. Middleton*, 998 S.W.2d 520, 530 (Mo. banc 1999); *State v. Simmons*, 955 S.W.2d 729, 743 (Mo. banc 1997).

The defendant's claim in *Tokar* was virtually indistinguishable from Appellant's claim. There, the defendant took "issue with the order in which the instructions were given because the jurors were forced to find aggravating circumstances before they were asked to consider the mitigating circumstances." *Tokar*, 918 S.W.2d at 771. Just like Appellant, the defendant in *Tokar* relied on *Lockett v. Ohio*, 438 U.S. 586 (1978), to argue that the MAI-CR 3d instruction regarding whether the death penalty is warranted should not be given to the jury before the MAI-CR 3d instruction on the consideration of mitigating circumstances. *Id.*

In rejecting this challenge, this Court noted that "[j]urors do not need to consider mitigating circumstances until they find an aggravating circumstance that sufficiently warrants imposition of the death penalty." *Id.* This Court found that the instruction regarding whether the death penalty is warranted "does not ask the jury to impose the death penalty, but rather it specifically directs the jury to decide whether the aggravating circumstances are sufficient to *warrant* the imposition of death as punishment." *Id.* (emphasis in original) (footnote and internal quotation marks omitted). This instructional scheme is not prejudicial, but actually constitutes a benefit to the defendant:

This instruction actually erects a barrier, in favor of the defendant, which must be surpassed before the jury can even begin to consider whether it should impose the death penalty under the specific facts of the defendant's case they are deciding.

The succeeding two instructions make absolutely clear that: 1) the jury can decide

the mitigating circumstances outweigh aggravating circumstances . . . ; and 2) the jury never has to decide to impose the death penalty, even if they find the mitigating circumstances do not outweigh the aggravating circumstances . . . .

*Id.*

Similarly, in *Simmons*, the defendant argued “that the fact that the jury must first find that the aggravating circumstances are sufficient to warrant the imposition of death before it begins considering balancing the mitigating circumstances against the found aggravating circumstances impermissibly shifts the burden of proof to the defendant.” *Simmons*, 955 S.W.2d at 743. This Court noted, however, that “the jury’s decision that the death penalty is *warranted* is not the same as its deciding that it *shall be imposed*. *Id.* (emphasis in original). Further, it explained that the order of deliberation outlined in the instructions actually benefits the defendant:

In fact, the order of proceedings actually presents an advantage to the defendant by requiring the state to completely prove its aggravating case before allowing the jury to even consider application of the death penalty. Moreover, it would be illogical to have the jury consider mitigators if it had not first found that the death sentence was warranted and if it had not found aggravators against which to balance the mitigators.

*Id.*

Appellant’s argument that this process prevents proper consideration of the mitigating evidence is simply a regurgitation of these rejected claims.

Appellant also complains that instructing jurors to find both an aggravating circumstance beyond a reasonable doubt and that the aggravating circumstances taken as a whole warrant a sentence of death before it is asked to considering mitigating evidence “creates an impermissible risk” that the jury will not properly consider the mitigating evidence. But Appellant’s “conclusory statements and speculation that the alleged error in instruction would have influenced the jury’s verdict” is an insufficient basis on which to base a finding of plain error. *State v. Taylor*, 134 S.W.3d at 30.

Finally, “the Constitution does not require a State to adopt specific standards for instructing the jury in consideration of aggravating and mitigating circumstances.” *Zant v. Stephens*, 462 U.S. 862, 890 (1983). The Supreme Court has also rejected the notion that “a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.” *Harris v. Alabama*, 513 U.S. 504, 512 (1995) (citation omitted). Appellant’s claimed constitutional violation has no basis in law, or in fact. The trial court committed no plain error in giving these penalty-phase instructions.

## VII (constitutionality of proportionality scheme).

**Appellant’s claim that this Court’s system of proportionality review is unconstitutional should be rejected under the law-of-the-case doctrine because he has already raised this claim in an earlier appeal and it was rejected by this Court. Moreover, this Court has repeatedly held that its system of proportionality review and the statute under which it is employed are constitutional.**

In an earlier appeal, Appellant claimed that “this Court fails to engage in meaningful proportionality review because it refuses to consider all similar cases and does not maintain a complete database of cases, resulting in an arbitrary imposition of the death penalty.” *Johnson II*, 22 S.W.3d at 193. In rejecting this claim, this Court cited numerous previous cases in which it had reached rejected similar claims. *Id.* Since its holding in *Johnson II*, this Court has again repeatedly rejected claims similar to the one Appellant raises now. *See Hutchison v. State*, 150 S.W.3d 292, 301 (Mo. banc 2004); *State v. Anderson*, 79 S.W.3d 420, 444 (Mo. banc 2002); *Lyons v. State*, 39 S.W.3d 32, 44-45 (Mo. banc 2001). The Eighth Circuit has also held that Missouri’s proportionality review scheme and the statute under which that review is taken are constitutional. *See LaRette v. Delo*, 44 F.3d 681, 688 (8<sup>th</sup> Cir. 1995). “The statute gave [the defendant] notice that the proportionality of his sentence would be reviewed on direct appeal.” *Id.* *See also Murray v. Delo*, 34 F.3d 1367, 1376 (8<sup>th</sup> Cir. 1994) (“We see no unfairness or deprivation of due process in the Missouri Supreme Court’s procedures for exercising a proportionality review.”).

The law-of-the-case doctrine “governs successive appeals involving substantially the same issues and facts, and applies appellate decisions to later proceedings in that case. *Johnson II*, 22 S.W.3d at 189. Because Appellant has already raised this issue in a previous appeal he is barred from raising it in his current appeal in the same case. In any event, this Court has repeatedly rejected the claim Appellant makes here. *Johnson II*, 22 S.W.3d at 193.

### VIII (proportionality review).

**This Court should, in the exercise of its independent statutory review, affirm Appellant's death sentence because: (1) the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's findings of aggravating circumstances, and; (3) the sentence is not excessive or disproportionate to those in similar cases considering the crime, the strength of the evidence and the defendant.**

Under the independent review procedure contained in § 565.035.3, RSMo 2000, this Court must determine whether:

(1) the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the finding of a statutory aggravating circumstance; and (3) the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering the crime, strength of the evidence, and the defendant.

*Johnson II*, 22 S.W.3d at 192. This Court's proportionality review is designed to prevent freakish and wanton application of the death penalty. *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993).

In Appellant's previous appeal, this Court found that the death sentences in this case were not imposed under the influence of passion, prejudice, or any other arbitrary factor. *Johnson II*, 22 S.W.3d at 192. The jury in his previous penalty-phase proceeding found the same six statutory aggravating circumstances that the jury in this case found:

(1) each murder was committed while murdering another victim, 565.032.2(2); (2) each murder was committed while murdering yet another victim, 565.032.2(2); (3) each victim was murdered for the purpose of receiving money or other things of monetary value, 565.032.2(4); (4) each murder involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman in that excessive and repeated acts of violence occurred, and the killing was unreasonably brutal, 565.032.2(7); (5) each murder was committed to prevent defendant's arrest, 565.032.2(10); and (6) each murder was committed while defendant was engaged in a robbery, 565.032.2(11).

*Id.* at 192; (L.F. 314-16). This Court found that the “evidence supported, beyond a reasonable doubt, each aggravating circumstance.” *Id.*

This Court also found that “the death sentences [were not] excessive or disproportionate to the penalty imposed in similar cases, considering the crime, strength of the evidence, and the defendant.” *Id.* It noted that it had upheld death sentences “where the defendant murdered multiple victims either for pecuniary gain, or to commit a robbery”; “for defendants who murdered more than one person”; and “[w]hen a murder involves acts that show depravity of mind.” *Id.* at 192-93.

The evidence in mitigation considered by this Court in Appellant's previous appeal is nearly identical to that presented in Appellant's most recent penalty-phase proceeding. This Court noted Appellant's claims that “his parents abused him mentally, physically, and sexually; he was raised in extreme poverty; and he suffers from brain damage that makes him borderline mentally retarded.” *Id.* at 192. But a bad or difficult

childhood is not sufficient grounds on which to set aside a death penalty, especially in a case as heinous as this one. *See State v. Brooks*, 960 S.W.2d at 503 (refusing to find death sentence disproportionate on the ground that the defendant had an “extremely difficult childhood”).

This Court also observed that Appellant emphasized “that he suffers from borderline retardation (below average intelligence), reflecting Fetal Alcohol Effect and a head injury.” *Johnson II*, 22 S.W.3d at 193. Just like Appellant’s previous jury, the jury in this case also determined that Appellant should be sentenced to death despite these claims. *Id.*

The only substantive difference between this penalty-phase proceeding and the one considered by this Court in *Johnson II* was the presentation of expert testimony by Dr. Keyes that Appellant was mentally retarded. But the jury rejected Dr. Keyes’s conclusion that Appellant was mentally retarded and the record amply supports its finding questioning the reliability of Dr. Keyes’s opinion and the credibility of his testimony. *See Point I, supra*. Even if there is evidence of Appellant’s below average intelligence, this Court noted that it had upheld sentences of death “where [the] defendant presented evidence of a low I.Q. and mental retardation.” *Johnson II*, 22 S.W.3d at 193; *see also Goodwin*, 43 S.W.3d at 821 (“The death penalty has been upheld in cases where the defendant presented evidence of low intelligence.”).

### **IX (constitutionality of method of execution).**

Appellant admits that his claim regarding the State's method of execution being unconstitutional is being raised simply to avoid a ruling in a potential future appeal that this issue has been waived. During Appellant's direct appeal from his second penalty-phase proceeding, this Court held that Appellant could not raise this issue under the law-of-the-case doctrine because Appellant failed to raise this issue during his first direct appeal. *See Johnson II*, 22 S.W.3d at 189. This doctrine also applies to Appellant's attempt to raise this issue yet again in this appeal.

Moreover, this Court has recently held that it would be premature to consider a claim involving the method of execution since "it is unknown what method, if any, of lethal injection may be utilized by the State of Missouri at such future time." *See Worthington v. State*, 166 S.W.3d 566, 583 n.3 (Mo. banc 2005). Because Appellant's execution date has not been set and his right to seek relief in state and federal courts has not yet concluded, "it is premature for this Court to consider whether a particular method of lethal injection violates the Eighth Amendment because it causes lingering, conscious infliction of unnecessary pain." *Id.*

Finally, the United States Court of Appeals, Eighth Circuit, has recently held that Missouri's lethal injection procedures pass constitutional muster. *See Taylor v. Crawford*, No. 06-3651 --- F.3d ---, 2007 WL 1583874 (8th Cir. June 4, 2007).

## CONCLUSION

The trial court did not commit reversible error in this case. Appellant's sentences should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 21,729 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 29<sup>th</sup> day of July, 2007, to:

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**APPENDIX**

Judgment..... A1-A

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Stipulation.....

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