

No. 87127

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

IN THE MATTER OF THE COMPETENCY OF
STEVEN PARKUS.

Appeal from the Circuit Court of Washington County, Missouri
The Honorable Robert C. Stillwell, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

SEAN D. O'BRIEN, MoBar 30116

Public Interest Litigation Clinic
305 East 63rd Street
Kansas City, MO 64113
816-363-2795 · Fax 816-363-2799

NANCY A. MCKERROW, MoBar
32212

Office of State Public Defender
3402 Buttonwood Drive
Columbia, MO 65201
573-882-9855 · Fax 573-875-2594

Attorneys for Mr. Parkus

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3
 JURISDICTIONAL STATEMENT 7
 STANDARD OF REVIEW 8
 STATEMENT OF FACTS 10
 POINTS RELIED ON 36
 ARGUMENT

POINT I -This Appeal Should Be Dismissed and Steve Parkus' Sentence
Commutated to Life Without Parole Because:

- A. A Final Determination Pursuant to § 565.030 RSMo That a Person
Has Mental Retardation is Not Appealable, and
- B. Requiring Mr. Parkus to Relitigate the Issue of Mental Retardation
Would Violate the Double Jeopardy Clause
of the Fifth Amendment. 38

POINT II -The Circuit Court Did Not Err in Entering its September 28, 2005
"Judgment and Order" Because in Finding That Mr. Parkus Has Mental
Retardation, the Circuit Court Rendered Moot the Issue of Mr. Parkus'
Competence to Be Executed Pursuant to § 552.060 RSMo. (In response to

1

Appellant's Point I) 49

POINT III - The Circuit Court Did Not Exceed Its Jurisdiction When It Found Mr. Parkus to Be Mentally Retarded and Stated the Obvious Legal Consequence of That Finding Because Its Order Was Entered in Compliance With the Alternative Writ of Mandamus Issued by the Missouri Supreme Court. (In response to Appellant's Point II) 57
 POINT IV -The Circuit Court's Finding That Steven Parkus Has Mental Retardation is Not Clearly Erroneous (In response to Appellant's Point III) 63
 CONCLUSION 86
 CERTIFICATE OF COMPLIANCE AND SERVICE..... 87
 ADDENDUM..... A-1

2

TABLE OF AUTHORITIES

FEDERAL CASES

Arizona v. Rumsey, 467 U.S. 203 (1984) 49
 Atkins v. Virginia, 536 U.S. 304 (2002) 8, 14, 42, 45, 48, 52, 57, 58, 60, 63
 Bullington v. Missouri, 451 U.S. 430 (1981) 47, 48
 Green v. United States, 355 U.S. 184 (1957)..... 47
 Parkus v. Bowersox, 157 F.3d 1136 (8th Cir. 1998) 12, 13
 Parkus v. Delo, 33 F.3d 933 (8th Cir. 1994) 11-13
 Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) 8, 48, 49
 Shaw v. Delo, 762 F.Supp. 853 (E.D. Mo. 1991)..... 9, 55
 Shaw v. Delo, 971 F.2d 181 (8th Cir. 1992)..... 55
 United States v. DiFrancesco, 449 U.S. 117 (1980)..... 48

STATE CASES

Alongi v. Alongi, 72 S.W.3d 592 (Mo. App. 2002) 9
 City of Springfield v. Stoviak, 110 S.W.3d 418 (Mo. App. S.D. 2003) 42
 Committee for Educational Equality v. State, 878 S.W.2d 446
 (Mo. banc 1994) 8, 9, 43
 Helmig v. State, 42 S.W.3d 658 (Mo. App. E.D. 2001) 51
 Johnson v. State, 102 S.W.3d 535

3

(Mo. 2003) 8, 9, 14, 42, 45, 46, 48, 52, 54, 58-60, 64
 Parkus v. State, 781 S.W.2d 545 (Mo. 1989) (en banc), cert. denied,
 495 U.S. 940 (1990) 12
 Rockett v. Radar, Inc., 97 S.W.3d 535 (Mo. App., E.D. 2003)..... 56
 McGuire v. Seltsam, 138 S.W.3d 718 (Mo. 2004) (per curiam) 79
 Shady Valley Park and Pool, Inc. v. Fred Weber, Inc., 913 S.W.2d 28
 (Mo. App., E.D. 1995) 51
 State ex rel. Cervantes v. Bloom, 485 S.W.2d 446 (Mo. App., E.D. 1972) 56
 State ex rel. Reed v. Reardon, 41 S.W.3d 470 (Mo. banc 2001)..... 56
 State ex rel. St. Louis County v. Enright, 729 S.W.2d 537
 (Mo. App., E.D. 1987) 57
 State v. Brown, 722 S.W.2d 613 (Mo. Ct. App. W.D. 1986) 43
 State v. Evans, 679 S.W.2d 434 (Mo. App. E.D. 1984) 8, 42
 State v. Griddine, 75 S.W.3d 741 (Mo. App. W.D. 2002) 61
 State v. Haldiman, 106 S.W.3d 529 (Mo. App. W.D. 2003) 65
 State v. Lynch, 679 S.W.2d 858 (Mo. 1994) 42

State v. Millior, 794 S.W.2d 181 (Mo. banc 1990)..... 65, 66, 70, 71
State v. Parkus, 753 S.W.2d 881 (Mo. 1988)(en banc),

cert. denied, 488 U.S. 900 (1988)..... 11, 12, 19, 25, 27, 35

4

State v. Scott, 933 S.W.2d 884 (Mo. App. W.D. 1996) 51
State v. Stout, 960 S.W.2d 535 (Mo. Ct. App. E.D. 1998) 43
State v. Taylor, 134 S.W.3d 21 (Mo. banc 2004)..... 10
State v. Thompson, 659 S.W.2d 766 (Mo. banc 1983)..... 61
State v. Weems, 840 S.W.2d 222 (Mo. banc 1992) 10
State v. Westmoreland, 48 S.W.3d 672 (Mo. App. E.D. 2001)..... 50
State v. Whitfield, 107 S.W.3d 253 (2003) 44, 57, 63
State v. Williams, 871 S.W.2d 450 (Mo. 1994) 42
State v. Winfield, 1075 S.W.3d 253 (Mo. banc 2003) 49
State v. Hoyt, 75 S.W.3d 879 (Mo. App. W.D. 2002). 65, 79, 84
Taylor v. Taylor, 25 S.W.3d 634 (Mo. App. 2000) 9
Whitson v. Busch, 776 S.W.2d 374 (Mo. banc 1989)..... 61
Wilson v. State, 813 S.W.2d 833 (Mo. banc 1991)..... 9, 64

FEDERAL STATUTES

Missouri Supreme Court Rule 66.02 51
Supreme Court Rule 84.06(b)/Local Rule 360 88

STATE STATUTES

Mo. Const. Art. V, § 4.1 (2006) 38, 58, 59
Mo. Const., Art. V, § 3 (2005) 62

5

RSMo 552.030.6 16, 18
RSMo § 547.200 (2006) 43
RSMo § 565.030 44, 60
RSMo § 565.030.6 38
RSMo 565.030 65
RSMo § 552.060 50
RSMo §§ 565.030.4 49

6

JURISDICTIONAL STATEMENT

Pursuant to a directive from the Missouri Supreme Court to "finally determine pursuant to § 565.030, whether Steven Wesley Parkus has mental retardation excluding fitness for execution," Circuit Judge Robert Stillwell found that "Steven Wesley Parkus is mentally retarded and therefore it would be cruel and unusual punishment

to inflict the death penalty as declared in [Atkins v. Virginia, 536 U.S. 304 (2002)] and [Johnson v. State, 102 S.W.3d 535 (Mo. 2003)]." L.F. 277. Appellant's Jurisdictional Statement, App. Br., p. 4, cites no statutory basis for this appeal; there is none. "There is no right to appeal without statutory authority," Committee for Educational Equality v. State, 878 S.W.2d 446, 450 (Mo. banc 1994), especially from a judgment in favor of the accused in a criminal case. "It has long been the law in Missouri that the state cannot appeal a judgment for the accused, whether it is upon a verdict of acquittal or upon the determination of a question of law, unless a right of appeal is unequivocally conferred by statute." State v. Evans, 679 S.W.2d 434, 435 (Mo. App. E.D. 1984). Further, because Judge Stillwell's final determination exempts Mr. Parkus from execution, the State's appeal is barred by the Double Jeopardy Clause of the Fifth Amendment. Sattazahn v. Pennsylvania, 537 U.S. 101, 109 (2003).

7

STANDARD OF REVIEW

A final determination pursuant to Sec. 565.030 that a defendant has mental retardation which bars the imposition of the death penalty cannot be reviewed on appeal. "There is no right to appeal without statutory authority." Committee for Educational Equality v. State, 878 S.W.2d 446, 450 (Mo. banc 1994).

Even if there were a right to appeal a final determination under § 565.030 that a defendant has mental retardation, the existence of mental retardation is a question of fact. Johnson v. State, 102 S.W.3d 535 (Mo. banc 2003) (Granting a new sentencing hearing because "The evidence necessary in light of Atkins was not presented adequately to a finder of fact.") Therefore, this Court must defer to the trial court's credibility determinations and view the evidence in a light most favorable to the judgment, disregarding all contrary evidence and inferences. Alongi v. Alongi, 72 S.W.3d 592, 594 (Mo. App. 2002). The judgment of the trial court is presumed correct, Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991), and its findings of fact are entitled to deference even if the evidence could support a contrary conclusion. Taylor v. Taylor, 25 S.W.3d 634, 638 (Mo. App. 2000).

Appellant's argument for de novo review suffers many flaws. First, appellant claims the standard of review is "uncertain" because "[t]here has never been an appeal in a §552.060 proceeding." App. Br. 5. The reason there has never been such an appeal is that judgments under §552.060 are not appealable. Shaw v. Delo, 762 F.Supp. 853, 857 (E.D. Mo. 1991); In re Competency of Bobby Lewis Shaw, No.

8

CV186-897CC, slip op (Mo. Cir. Ct., Oct. 7, 1987), appeal dismissed, No. 69954 (Mo. Sup. Ct. Nov. 12, 1987). Further, Appellant's reliance on State v. Taylor, 134 S.W.3d 21, 26-27 (Mo. banc 2004), to support a claim that "the Missouri Supreme Court has extended de novo review to questions concerning whether a condemned is mentally retarded" is misplaced. The issue in Taylor was whether the trial court

erred

in failing to instruct a capital sentencing jury on the issue of mental retardation.
Id. at

28. In determining whether it is error not to submit a particular instruction, the appellate court must view the evidence in the light most favorable to giving the instruction. *State v. Weems*, 840 S.W.2d 222 (Mo. banc 1992). The standard used in *Taylor* has no application to findings of fact, which, if reviewable at all, are examined under a standard that gives substantial deference to the trial court, who heard the testimony and observed the witnesses.

9

STATEMENT OF FACTS

The sole issue of fact in this case is whether Steven Parkus has mental retardation which bars his execution under Sec. 565.030 RSMo and the Eighth Amendment to the United States Constitution. The Honorable Robert Stillwell, after allowing the parties ample time to conduct expert assessments of Mr. Parkus, conducted an evidentiary hearing and found that "Steven Wesley Parkus is mentally retarded." L.F. 277. Judge Stillwell's final determination that Mr. Parkus has mental retardation is not appealable, and in any event is not clearly erroneous because it is supported by substantial evidence.

A. PROCEDURAL HISTORY

"Steven Parkus, a mentally disturbed man raised in state institutions since age four, killed Mark Steffenhagen by strangulation while both were incarcerated in a Missouri prison." *Parkus v. Delo*, 33 F.3d 933, 934 (8th Cir. 1994). Because mental retardation was not a bar to execution at the time of his trial and subsequent appeals, Steve was convicted and sentenced to death. *State v. Parkus*, 753 S.W.2d 881 (Mo. 1988) (en banc), cert. denied, 488 U.S. 900 (1988). Judge Charles Blackmar dissented from the affirmance of Steve's death sentence:

The record shows that the defendant has lived his life from a very young age in some form of custody in a Missouri institution. He has been unable to adapt to any environment

10

in which he finds himself. The easiest course of action might be to execute him as a means of extermination or euthanasia, but there should be a limit to the process of burying our mistakes. The state must bear some responsibility for the situation which has developed. I would exercise our statutory authority by mitigating the death sentence to life imprisonment.

753 S.W.2d at 891 (Blackmar, J., dissenting). In his postconviction motion, Steve's public defender alleged that his mental retardation barred his execution; that claim and related issues were rejected under the law as it existed at that time. *Parkus v. State*,

SC88077 Resp.'s brief filed in ED.txt
781 S.W.2d 545 (Mo. 1989) (en banc), cert. denied, 495 U.S. 940 (1990).

In subsequent federal habeas corpus proceedings, Steve's court-appointed lawyers attempted to establish that his trial attorney was ineffective for failing to locate more than a decade of psychiatric treatment records. "These records reflect various diagnoses, including childhood psychosis, schizophrenia and mental retardation." Parkus v. Delo, 33 F.3d at 936. Both the prosecution psychiatrist and the defense psychiatrist from Steve's trial, "each having now had the opportunity to review Parkus's treatment records from St. Louis State Hospital, have changed their opinions regarding Parkus's mental state at the time of the murder." Parkus v. Bowersox, 157 F.3d 1136, 1139 (8th Cir. 1998). Both would have testified that Steve is mentally ill, brain damaged and/or mentally retarded, and therefore incapable of harboring the state

11

of mind for first degree murder. 33 F.3d at 936, 939. The Court of Appeals

concluded:

[W]e determine that a reasonable probability exists that the jury, if given the opportunity to consider Parkus' additional evidence, would not have convicted him of first degree murder at the guilt phase, or, otherwise, would not have imposed the death penalty at sentencing.

Parkus v. Delo, 33 F.3d at 939. The Court of Appeals remanded the case to the district court to determine whether trial counsel was constitutionally ineffective for failing to locate Steve's childhood psychiatric records. 33 F.3d at 942. The court subsequently ruled that even though the outcome of Steve's trial was unreliable, his public defender did just enough to avoid a finding that he was ineffective. 157 F.3d at

1139-1140. All relief was denied.

At the conclusion of state and federal proceedings, Dora Schriro, Ed.D., then the Director of the Department of Corrections, filed a petition in the Circuit Court of

Washington County pursuant to 552.060 RSMo requesting an inquiry into Steve's competence to be executed, alleging that "Dr. Schriro has reasonable cause to believe

that Steven Parkus has a mental disease or defect excluding fitness for execution."

L.F. 8. The Missouri Department of Mental Health appeared as amicus curiae. L.F.

1. During the pendency of those proceedings, the Missouri General Assembly

12

amended § 565.030 RSMo (2006) to exempt persons with mental retardation from execution, and the United States Supreme Court in Atkins v. Virginia, 536 U.S. 304 (2002) found that the Cruel and Unusual Punishment Clause of the Eighth Amendment prohibits the execution of persons with mental retardation. In Johnson v. State, 102

S.W.3d 535 (Mo. banc 2003), the Missouri Supreme Court ruled that the statutory and constitutional prohibition on the execution of persons with mental retardation is retroactive.

Based on these legal developments, Steve's current counsel moved the Missouri Supreme Court to recall the mandate of Steve's original appeal on the grounds that State and Federal law have erected a retroactive constitutional barrier to Steve's execution. L.F. 19. The Missouri Supreme Court on August 28, 2003, entered an alternative writ of mandamus directing the Court below to make factual findings on the issue of Steve's mental retardation:

NOW, THEREFORE, you the said Circuit Court of Washington County are COMMANDED to finally determine pursuant to § 552.060, RSMo, whether Steven Wesley Parkus has a mental disease or defect and finally determine pursuant to § 565.030, whether Steven Wesley Parkus has mental retardation excluding fitness for execution or show cause, if any you have, by written return,

13

before this Court on or before September 25, 2003, why you should not do so.

L.F. 19 (emphasis added).

On the motion of Steve's counsel, joined by the amicus curiae Missouri Department of Mental Health, the court below bifurcated the issues of mental retardation and competence to be executed for reasons relating to clarity and judicial economy, L.F. 95-110, and notified the Missouri Supreme Court of its decision. L.F. 111-112. The Honorable Robert Stillwell conducted an evidentiary hearing in Potosi Correctional Center on July 12th and 13th, 2004, on the issue of whether Steve Parkus has mental retardation. L.F. 5. The evidence presented at the hearing and Judge Stillwell's findings are summarized below.

B. EVIDENCE ON BEHALF OF STEVE PARKUS

Judge Stillwell heard substantial evidence establishing that Steve Parkus is mentally retarded as defined in § 565.030 RSMo (2000). In addition to institutional records dating back to age four and affidavits of family and others describing conditions and events during Steve's very early childhood, counsel presented the testimony of Dr. Denis Keyes, an Associate Professor of Special Education with thirty years experience in the field of mental retardation; Dr. William A. O'Connor, a psychologist with a minor in special education and experience teaching children with mental retardation; and Dr. Jonathan Pincus, a neurologist and Chairman Emeritus of the Department of Neurology at Georgetown University. Based on psychological

14

assessments, neuropsychological testing and a neurological examination which included an EEG and MRI, these experts established that Mr. Parkus has significantly subaverage intellectual functioning and extensive deficits in adaptive behavior. These conditions were manifested and documented well before Steve's eighteenth birthday. Because the diagnosis of mental retardation must be established during the subject's developmental period, RSMo 552.030.6, a review of Steve's social history is important.

Steve's mother, Linda June Parkus, was an alcoholic, and "was apparently psychotic." Supp. L.F. 334. Family and friends report that while she was pregnant with Steve, Linda went on drinking binges. She smoked and drank heavily, hanging out in bars and traveling and singing with different bands. Supp. L.F. 241. She was prone to terrible mood swings and was unable to care for her children. There were rodents, vermin, and cockroaches in the home. Supp. L.F. 241, 242, 338. His father, Jay W. Parkus, abandoned the family when Steve was only two years old, shortly after Linda gave birth to their second son, Chester. Supp. L.F. 241.

Steve was slow to learn to walk and talk. He got lost easily, so Linda often locked him in the bathroom. On one occasion Steve escaped, and as punishment Linda Parkus heated a knife blade over a hot stove and applied it to Steve's bare buttocks, leaving a scar that is still visible. Supp. L.F. 338-39. A juvenile court judge took Steve away from his mother and gave custody to his maternal aunt and uncle, Bernice and Taylor Hampton. Supp. L.F. 244-45, 338.

15

Taylor Hampton "used Steve for his sexual release," and "abused Steven as if he were his 'girl friend,'" Supp. L.F. 242, 333, 338, 342, and was physically abusive:

In [the Hampton home] he was brutalized; his uncle drank and beat him and his brother savagely and subjected them to unremitting sexual abuse. [Steve] was beaten with a belt, with fists, and was hit on the head with a monkey wrench by the uncle who not only beat them but made his brother fight with him for his entertainment. . . . After the uncle became tired beating Steve, the boy was made to stand at the corner of the room with his nose in the corner, on his tip toes. If he moved, the uncle hit him with a belt. He was made to stand there for hours. He was subjected to sodomy by his uncle who forced him to perform oral sex and to submit to anal sex. On one occasion, his brother had lost the uncle's cigarettes, but the uncle thought it was Steve's fault and so told him to put his hand on the kitchen counter. Steve did not know what was coming and complied. The uncle then hit Steve's hand with a meat cleaver, nearly severing the right index finger at the base.

Supp. L.F. 218-219. Also see Supp. L.F. 338-342, 240-254. While raping Steve,

16

Hampton would explain to him that "if his aunt had behaved sexually as she was supposed to, it wouldn't be necessary. This made Steve very angry at his aunt because it seemed as though she were egging on his uncle towards sexual thoughts and then not providing any outlet for them." Supp. L.F. 219.

Medical and institutional records show that Steve was identified as mentally retarded at an early age. Dr. F. Crimi wrote that Steve was expelled from kindergarten because he was not ready to learn, and was unable to complete the first grade after two attempts. Supp. L.F. 272. Dr. Mildred Berland recorded that at age 8, Steve's developmental age was that of a five-year-old, and that learning in a normal

environment was almost impossible for him. Supp. L.F. 272. When he should have been in the third grade, he was unable to read or perform simple, age-appropriate motor skills such as catching a ball. Supp. L.F. 273. He had no friends and did not know how to play. Id.

When Steve was nearly ten, his developmental skills lagged four years behind his chronological age. Supp. L.F. 273. A month shy of his eleventh birthday, Steve had no sense of time or money, was perseverative and concrete in his thinking, could not tell his right from his left, and had the social skills of a three-year-old child. Supp.

L.F. 274.

When Steve was eleven years, eight months old, he did not know words that children of his age usually know, his learning ability continued to be poor, and one examiner noted, "As he gets older, it seems the gap widens between normal children

17

and him ..." Supp. L.F. 275. Every mental health examiner and caretaker who encountered Steve at an early age documented an inability to learn, significant developmental delays, perseveration and concrete patterns of thinking, all of which are hallmarks of mental retardation. Tr. 69-75.

In adulthood, Steve "has been unable to adapt to any environment in which he finds himself." State v. Parkus, 753 S.W.2d 881 (Mo 1988) (en banc) (Blackmar, J., dissenting). Steve is perpetually victimized physically and sexually by other prisoners.

Tr. 402-03, Supp. L.F. 458-477. He has literally been "sold" by one inmate to another

for use as a sex slave. Supp. L.F. 461. Steve has never been able to function in the general population or hold a job inside the prison. Tr. 309-310, 370. He is housed in

the Special Needs Unit, which is reserved for prisoners with mental retardation and other developmental disabilities. Tr. 370. He was repeatedly disciplined for failing to

keep his cell clean, Supp. L.F. 394-95, 512, and for failing to maintain basic personal

hygiene. Supp. L.F. 524.1 Dr. Pincus explained how these things relate to adaptive

1 An August 3, 1999 medical report observes:

Very poor hygiene. Hair extremely long. He refuses a haircut. States no one here knows how to cut hair. His toe nails are extremely long. Custody offered to let him use the nail clippers but he states "I know what you guys want." There is also an extreme amount of crust between

18

functioning:

Other inmates have neat cells. It's perfectly possible to keep a neat cell. There's nothing that the prison imposes on them that makes it necessary for him to live in squalor. But he lives in squalor and doesn't care about it. That's consistent with the idea that he is not able to function normally.

Supp. L.F. 396. (emphasis added). Other examples of poor adaptive behavior skills are documented throughout the prison and institutional files, including clumsy attempts to start relationships with female prison staff. Tr. 74-75, 508-509. Dr. Myers described an incident in which Steve nearly electrocuted himself trying to light a cigarette. Tr. 358, 503-04. He "accidentally" swallowed his toothbrush, requiring medical treatment for injuries to his rectum. Supp. L.F. 518-523.

Steve's records also reflect that his IQ scores over the span of his life have been in the range of mental retardation. Supp. L.F. 269. Because of the convergence of extremely deficient adaptive behavior skills and significantly subaverage intellectual

all his toes. He smells very foul, but as stated above he does not seem to want to improve his hygiene at the present time.

Supp. L.F. 524.
19

functioning, he was diagnosed as having mental retardation by Dr. F. Crimi, Supp. L.F. 273, Dr. Aurora Amin, Supp. L.F. 274, Dr. Jovan Simeon, Supp. L.F. 274, Dr. Jacqueline Wilson, Supp. L.F. 275, Dr. Eugene Kissling, Supp. L.F. 276, and others. Assessments in Mr. Parkus' files fit the "textbook definition of mental retardation."
Tr. 70.

Standardized tests of intellectual functioning approved by the American Psychiatric Association (APA) and the American Association on Mental Retardation (AAMR) were administered by Dr. O'Connor in 1992, and by Dr. Keyes in 2001. Dr. Keyes administered the Wechsler Adult Intelligence Scale - Third Edition (WAIS - III), the Woodcock-Johnson Achievement Test, the Beery Developmental Test of Visual Motor Integration, and the Vineland Adaptive Behavior scales. Tr. 79-80. The Wechsler produced IQ scores of 69 verbal, 67 performance, and 65 full scale, which is two standard deviations below normal and satisfies the statutory criteria of significantly subaverage intellectual functioning. Tr. 84. Dr. Keyes concluded that Steve functions at about the level of a four to eight year old child. L.F. 28, Tr. 83-84.

Dr. O'Connor obtained very consistent scores on his testing nearly fourteen years earlier in 1990. Tr. 165-66. He also administered the WAIS, and obtained scores of 69 verbal, 73 performance, and 69 full scale. Tr. 184. The following day, Dr. O'Connor administered the Shipley, on which Steve achieved a score of 70. Tr.

184. The fact that Steve's score on the Shipley was within one point of his score on the Wechsler excludes the possibility that he is deliberately performing poorly on the
the
20

test; "I could not, on purpose, take these two tests and make them come out within one point. Nobody can. You can't do it. You don't know the statistical conversions." Tr. 187-88. Although Steve scored four points lower on the test administered by Dr. Keyes, "he had the newer version of the test. It's supposed to score three points lower. His was four points. So for all practical purposes we got

identical scores 14 years apart." Tr. 263. Dr. O'Connor and Dr. Keyes agreed that their testing revealed that Steve has significantly subaverage intellectual functioning.

Steve also meets the second statutory criteria for mental retardation in that he has extensive deficits in adaptive functioning. Dr. Keyes and Dr. O'Connor used standardized testing, structured interviews with Mr. Parkus and others, and a review

of his social history to make this assessment. Dr. O'Connor gave Steve the Brief Psychiatric Rating Scale (BPRS) which has norms for Missouri. Tr. 207-08. Steve's score of 58 was equal to that of many psychiatric in-patients at Western Missouri Mental Health Center. Tr. 208. He also used the Global Assessment of Functioning (GAF) scale which assesses a patient's ability to function in a number of areas. Tr.

208, DMS-IV-TR, p. 34. Steve scored a 25 on a 100-point scale, which is deficient. Tr. 209.2

2Scores between 21 and 30 on the GAF indicate a person whose "[b]ehavior is considerably influenced by delusions or hallucinations OR serious impairment in communication or judgment (e.g. sometimes incoherent,

21

Dr. O'Connor concluded that Steve could not function outside the walls of Potosi Correctional Center. Tr. 308-09. While Steve's intellectual functioning is two standard deviations below the norm, his problem solving performance tested at three standard deviations below the norm. Tr. 185. He could not earn his GED, hold a job without external supports (e.g., in a sheltered workshop), maintain normal social relations, take care of his own medical needs or maintain a household. Tr. 309-10. Steve Parkus has deficits in at least two or more areas of adaptive behavior. He would not meet normal adaptive behavior standards in at least two or more domains of adaptive functioning. Tr. 310-11.

Dr. Keyes used the Vineland Adaptive Behavior Scale to determine that Steve's adaptive behavior in the areas of Communication and Daily Living Skills are equivalent to a six-year-old child's, his Socialization skills are those of a three-year-old, and his composite adaptive functioning was on the level of a five-year-old child. L.F. 28.

Steve exhibited many common characteristics of persons with mental retardation. He perseverates, i.e., does not learn from his mistakes, which is a common finding in the mentally retarded. Tr. 68-69. He has a reduced short and long term memory, cannot think abstractly, is distractible, and cannot generalize skills from

acts grossly inappropriately, suicidal preoccupation) OR inability to function in almost all areas (e.g., stays in bed all day; no job, home or friends)." DSM-IVTR 35 (emphasis in original).

22

one situation to another. Tr. 73-74. Steve is impulsive, shows no planning or coping skills and uses poor judgment. Tr. 73-74. People with mental retardation like Steve's need a high level of structure because they do not have the intelligence and adaptive

skills to put order in their own lives. Tr. 76. Often they do well in prison unless they have a dual diagnosis, i.e., a mental disease in addition to mental retardation, which is the case with Steve. Tr. 77.

Dr. Pincus conducted a neurological study of Steve in 1992. Supp. L.F. 216

238. The neurologically significant aspects of his history included his mother's heavy drinking while she was pregnant with Steve, her mental illness which rendered her unable to care for her children, the abuse and neglect that Steve suffered at the hands of his mother, and the subsequent sexual and physical abuse perpetrated by Taylor Hampton. Supp. L.F. 333-342, 239-260. Dr. Pincus explained the significance of these experiences:

You can cover the eye for a few weeks, of a developing animal, and the animal will be forever blind in that eye forever after. You can do that to an adult animal, and he will not be blind, ever, once the nervous system is developed. The developing nervous system is very vulnerable to environmental experiences, and the actual hard wiring of the brain changes in response to those things and is permanently changed. However, most people who are

23

abused are able not to be violent. . . . If you've got a good brain, a person can orient his behavior to the expectations of society, even though he's deeply troubled. There's no such thing as having an experience of the kind that Steve had that would leave a person untouched. Supp. L.F. 343-44.

Mrs. Parkus' alcohol consumption during pregnancy caused neurological and physical deformities in Steve, including mental retardation. There is no safe amount of alcohol that a woman can consume when she is pregnant, particularly in the first trimester. Supp. L.F. 334. Women who drink heavily have a significant risk of having children with Fetal Alcohol Syndrome (FAS). Id. The rate of retardation in the offspring of women who drink during pregnancy is somewhere around 40 per 1,000, which is quite high -- about 10 times the normal rate. Supp. L.F. 335-36. This is why the Surgeon General has required alcohol distributors to print labels warning pregnant women about the dangers of drinking while pregnant. Tr. 58.

Fetal Alcohol Syndrome is often accompanied by certain skeletal and physical manifestations which Dr. Pincus observed in Steve. Supp. L.F. 336. The red part of the upper lip (the vermilion border) is thin. The vertical indentation of the upper lip below the nose, the philtrum, is effaced. Steve's eyes are also slightly deformed and

24

shortened, and he had epicanthal folds, which is a foreshortening of the palpebral fissures. His mandible or the maxilla is malformed and odd looking, and although Steve is small in stature, his head is of normal size. Steve's fifth finger is curved and his chest is deformed. Supp. L.F. 334-37. Pincus found him to have FAS or FAE and mental retardation. Supp. L.F. 337. Mental retardation can occur with Fetal Alcohol Syndrome, or fetal alcohol effect (FAE) without the full manifestations of the syndrome Supp. L.F. 335.

During the neurological examination Steve exhibited "little jerky movements of his fingers and arms, called choreiform movements. That reflects some dysfunction of the basal ganglia, which are gray matter masses in the very center of the brain."

Supp. L.F. 357. Steve could not skip, although Dr. Pincus showed him several times how. He could not stand for ten seconds. His poor coordination and balance are nonspecific indicators that something is wrong with his nervous system. Supp. L.F. 357-358.

Steve's movements and reactions to certain stimuli indicated that he also has damage to the frontal lobes of the brain. Supp. L.F. 359-361. That sort of damage will produce behavioral changes - impulsivity, difficulty planning, difficulty seeing or caring about cause and effect relationships. Supp. L.F. 359. "The frontal lobes control executive function, which is to say what's a good idea, what's a bad idea;

25

what behaviors will lead me to success and what will lead me to failure, what's going to happen as a result of my saying this or doing this; is it worth it; is it the right time for it, is this the proper circumstances for it; do I care about that kind of thing?" Supp. L.F. 369-370. A person with frontal lobe damage would have difficulty controlling impulses and would be unable to appreciate cause and effect. Supp. L.F. 372.

Dr. Pincus' findings on his neurological examination are corroborated by EEG tests and MRI scans. The MRI scan showed little holes in the lower half of his brain, on both sides, in the frontal lobe and the parietal lobe. Supp. L.F. 372. These can be seen on the scan. Supp. L.F. 373. One EEG had been done in 1969 at St. Louis State Hospital and another around the time Dr. Pincus saw Steve. Supp. L.F. 374, 376. Both were abnormal, excessively slow, with more slowing on the right side than the left. Supp. L.F. 374. That is consistent with Dr. Pincus' conclusion that there is something wrong with the right side of Steve's brain. Id.

Dr. Pincus' findings are also consistent with the neuropsychological examination by Dr. O'Connor which established that Steve has damage in the subcortical area of Steve's brain (midbrain: adrenal; pituitary; hypothalamus loop), the area responsible for regulating impulse and arousal. Supp. L.F. 368, Tr. 196, 207. Because it is hard to injure this area of the brain, it is likely that the damage was caused by alcohol consumption by Steve's mother while he was in utero. Tr. 196. The

26

damage is predominantly in Steve's right brain, the area that controls judgment. Tr.

196. Dr. O'Connor, Dr. Keyes and Dr. Pincus agreed that Steve has Fetal Alcohol Syndrome, brain damage and other significant risk factors for mental retardation. Supp. L.F. 369; Tr. 81-83, 199, 200. Dr. Pincus' findings caused Dr. Keyes to conclude that Steve has been mentally retarded since infancy. Tr. 80-83. Dr. Pincus agreed with Dr. O'Connor and Dr. Keyes that Steve has mental retardation. Supp. L.F. 369.

In addition to establishing a diagnosis of FAS, the neurological and neuropsychological testing revealed that Steve also has frontal lobe damage, which is probably the product of additional injury to the brain, consistent with having been stricken in the head or shaken violently as an infant Tr. 196-97, 210. Dr. Pincus' physical examination revealed scars of childhood injuries consistent with that hypothesis, including a scar on Steve's head consistent with his being hit with a wrench, Supp. L.F. 339, and scars at the base of his right index finger consistent with Taylor Hampton nearly severing it. Supp. L.F. 341, 352. Throughout his three-hour interview with Dr. Pincus, Steve rocked, which is a repetitive motor manifestation that's seen commonly in retarded and autistic children and adults. Supp. L.F. 353.

Steve's mental retardation is exacerbated by the fact that he has also been psychotic since childhood, and that has gotten worse over time. Supp. L.F. 347. As

27

a neurologist with a sub-specialty in behavioral disorders, Dr. Pincus felt fully confident in his diagnosis that Steve suffers from schizophrenia. Supp. L.F. 381.3 He is very paranoid about women. Supp. L.F. 349. Steve told Dr. Pincus that he believes the guards, in particular the female guards, are planning to murder him, that

they make fun of him, tease him and blame him for things he doesn't do. Supp. L.F.

349. He blames women for the sexual abuse he has endured. Supp. L.F. 350. This is a psychotic, paranoid, delusional idea which is deeply, deeply felt. Supp. L.F. 351.

Dr. Keyes explained that Steve's dual diagnosis for mental retardation and a major mental illness compounds his problems considerably:

The American Association on Mental Retardation has stated that people with mental retardation and mental illness, that one can interact with the other, and to such a degree that it causes very significant problems in their understanding of their lives. That's not only because their reduced mental intelligence and adaptive skills are at play, but also their reduced understanding of reality and what's going on

3Dr. Pincus' publications in his field include the standard and authoritative text, Pincus & Tucker, BEHAVIORAL NEUROLOGY (Oxford Press 1985, 3rd ed.), which contains a chapter on schizophrenia.

28

around them.

Because of this, they are not able to adapt themselves as they might have been able to adapt themselves if they were just simply mentally retarded. A high level of structure can be a very good thing for people to live under, but if you

SC88077 Resp.'s brief filed in ED.txt
are mentally retarded and not dealing with reality, then that structure might be seen as confining or problematic.

Tr. 77-78. Thus, the complete diagnostic picture of Steve Parkus is that of a severely impaired individual with mental retardation, brain damage and schizophrenia.

C. STATE'S EVIDENCE: DR. WADE MYERS

The State called only one witness, Dr. Wade Myers, a psychiatrist from Gainesville, Florida. Tr. 319. He has evaluated death row inmates in Florida, and was hired by the Missouri Attorney General to evaluate Steve Parkus' competency to be executed. Tr. 323. The court below received Dr. Myers' report over the objection of Steve's counsel that his opinions and conclusions are without foundation because Myers did not comply with either AAMR or DSM-IV-TR protocol for arriving at a conclusion about mental retardation. Tr. 335, 339-40. Further, the words "mental retardation" appear nowhere in Dr. Myers' curriculum vitae of his publications, nor did

4Dr. Myers claimed that he did not feel the need to do intelligence testing because he saw no evidence of mental retardation. (Tr. 341.)
29

he ever claim to have any training in the field of mental retardation. Tr. 318-23; 341-43.

Dr. Myers did not know much about the American Association on Mental Retardation (AAMR)⁵, Tr. 347, and did not know that the American Psychiatric Association (APA) defers to the AAMR on mental retardation treatment and diagnosis. Tr. 347. Dr. Myers had never read the standard and authoritative AAMR text, *Mental Retardation: Definitions, Classifications, and Systems of Support*, 10th ed. (AAMR 2002). Tr. 348. He was unaware of the AAMR standards for diagnosing mental retardation. Tr. 348-49. Judge Stillwell overruled the defense's objection, and Myers was permitted to testify, over counsel's continuing objection, Tr. 353, that he did not find that Steve Parkus has mental retardation. Tr. 339.

Dr. Myers examination consisted of interviews with Department of Corrections employees and with Steve on September 3, 2003, for a little less than two hours. Tr.

325-26. Dr. Myers administered personality testing having nothing to do with assessment of intellectual functioning or adaptive behavior, Tr. 211-23, 215, 217-18, and based the rest of his assessment on subjective observations during unstructured interviews. After being deposed by Steve's counsel, Dr. Myers returned for a second

5Since its founding in 1876, the AAMR has led the field of mental retardation in understanding, defining and classifying the condition of mental retardation. *Mental Retardation: Definition, Classification and Systems of Support*, 10th ed., (AAMR. 2002).

30

session with Steve to obtain additional data. Tr. 540.

Dr. Myers' testing consisted of a personality inventory called "Schedule of Non-adaptive and Adaptive Personality" (SNAP), Tr. 329, the Trait Anger Expression Inventory (STAXI) and the Psychopathy check list. Tr. 329. None of these tests measure IQ or adaptive functioning, Tr. 211-12, 215, 217-18, but Dr. Myers concluded there was no indication of mental retardation because it appeared to him that Steve was able to read and write. Tr. 329-30. Because of that, and because

Myers felt that Steve showed no major deficits in intelligence in the mental status exam, Dr. Myers did not feel the need to do IQ testing. Tr. 330.

Dr. Myers did not use the standardized Mental Status Exam. Tr. 331. Instead, he used a non-standardized interview loosely based on the mental status examination.

Tr. 331. Dr. Pincus used the standard MSE, and explained that it is not very sensitive.

An unimpaired person should be able to perform every task correctly. Any deficient performance is a sign of serious thought disorder. Supp. L.F. 405-411. One of the exercises designed to measure capacity for abstract thought involves proverb interpretation. Tr. 332-33. Steve was only able to interpret one proverb correctly, from which Dr. Myers concluded that he showed a capacity for abstract thought. Tr.

333.6 Dr. Pincus would have described that performance as deficient; a person with 6 Steve knew the meaning of the common proverb, "you can't judge a book by its cover." Dr. Myers failed to document the proverbs and similarities which

31

normal capacity for abstract thought should have been able to interpret all of the simple proverbs correctly. Supp. L.F. 92-93. Dr. Myers concluded from his nonstandard

mental status examination that Steve is not mentally retarded because he had a good memory for past presidents, and he got one of three proverbs correct, Tr. 332-33, because he could use a "Cadillac," which is a syrup container tied to the end of a string, to pass things to other prisoners' cells, Tr. 357, he could apparently read a newspaper "without any major difficulty," Tr. 360, he displayed a sense of humor, Tr. 341, and on the occasion Dr. Myers visited, Steve's cell was neat and clean, Tr.

355. Dr. Myers also noted that Steve could use words such as Kyoto Treaty, global warming, nepotism, Nostradamus, and hypocrite. Tr. 364. Steve knew who the civil war presidents were; he began with Jefferson Davis then switched to Thomas Jefferson. Tr. 334. He knew which direction Canada was, but when asked about California, Steve replied, "I don't give a #@!*" Tr. 334. Without the benefit of standardized testing, Dr. Myers felt that these abilities ruled out mental retardation. Tr.

365. Myers found in an old psychology magazine an obscure non-standardized instrument known as the Rapid Approximate Intelligence Test which purports to measure intelligence solely by a person's ability to serially multiply by two. Steve was

Steve could not correctly interpret, and when pressed, could not recall what they were. Tr. 546.

32

able to multiply 384 x 2 correctly on his second try, "yielding an approximate IQ score

in of 110-120, within the bright normal range (average IQ = 100)." Supp. L.F. 502 (emphasis in original). When Dr. Myers recalculated an error, he revised his estimate

of Steve's IQ to 120 to 130. Tr. 226. In his testimony at the hearing, however, he estimated Steve's IQ "roughly" in the 85 to 100 group. Tr. 507. Dr. Myers testified that Steve Parkus is not mentally retarded; he is of average intelligence, and the

low IQ scores early in his life were probably due to his interrupted educational career. Tr. 543-44.

Based on the evidence adduced at the hearing, the court below on September 28, 2005, entered an order making detailed findings, discussing Steve's diagnostic and social history which included diagnoses of mental retardation supported by standardized IQ testing and documents which established that "Mr. Parkus exhibited limitations (state of being limited) in two or more . . . adaptive behaviors areas." L.F.

275. Judge Stillwell further found "that from the documented and unrefuted evidence presented Mr. Parkus had limitations in the following areas of adaptive behavior that had manifested themselves and were documented prior to his eighteenth birthday: social skills, self-direction, functional academics, health and safety and home living."

L.F. 276. Judge Stillwell also noted: That aside from the above indications of mental retardation there was ample evidence to conclude that Mr. Parkus also experienced several predisposing factors for mental

33

retardation: early alterations of his embryonic development from prenatal damage due to his mother's excessive drinking which may have resulted in fetal alcohol syndrome; additionally he was deprived of the environmental influences of social stimulation because of institutional confinements, abuse during foster care and evidence of brain damage in an EEG report in 1969.

L.F. 276. Judge Stillwell concluded: That the ample and unrefuted documented evidence presented by Mr. Parkus' counsel has superior evidentiary weight and therefore the Court finds that Mr. Parkus' condition of mental retardation and his limitations in two or more adaptive behavior areas were manifested and documented before his eighteenth birthday.

L.F. 277. Thus, Judge Stillwell found "pursuant to Section 565.030.6 that the Defendant Steven Parkus is mentally retarded and therefore it would be cruel and unusual punishment to inflict the death penalty as declared in Atkins and Johnson, supra, and should be re-sentenced to life imprisonment without eligibility for probation, parole, or release except by act of the governor." L.F. 277. Appellant filed his notice of appeal on October 7, 2005, L.F. 7. Respondent on November 14, 2005 moved to dismiss the appeal on the grounds that Judge

34

Stillwell's final determination pursuant to Section 565.030.6 that Steve Parkus has mental retardation is not an appealable order. This Court on December 12, 2005, ordered that motion taken with the case.

35

POINT I

This Appeal Should Be Dismissed and Steve Parkus' Sentence Commuted to Life Without Parole Because:

- A. A Final Determination Pursuant to § 565.030 RSMo That a Person Has Mental Retardation is Not Appealable, and
 - B. Requiring Mr. Parkus to Relitigate the Issue of Mental Retardation Would Violate the Double Jeopardy Clause of the Fifth Amendment.
- State v. Evans, 679 S.W.2d 434 (Mo. App. E.D. 1984)
State v. Winfield, 1075 S.W.3d 253 (Mo. banc 2003)
Bullington v. Missouri, 451 U.S. 430 (1981)

POINT II

The Circuit Court Did Not Err in Entering its September 28, 2005 "Judgment and Order" Because in Finding That Mr. Parkus Has Mental Retardation, the Circuit Court Rendered Moot the Issue of Mr. Parkus' Competence to Be Executed Pursuant to § 552.060 RSMo.

(In response to Appellant's Point I)
Atkins v. Virginia, 536 U.S. 304 (2002)
Johnson v. State, 102 S.W.3d 535 (Mo. 2003)
State ex rel. Reed v. Reardon, 41 S.W.3d 470 (Mo. banc 2001)

36

POINT III

The Circuit Court Did Not Exceed Its Jurisdiction When It Found Mr. Parkus to Be Mentally Retarded and Stated the Obvious Legal Consequence of That Finding Because Its Order Was Entered in Compliance With the Alternative Writ of Mandamus Issued by the Missouri Supreme Court.

(In response to Appellant's Point II)
Johnson v. State, 102 S.W.3d 535 (Mo. 2003)
Atkins v. Virginia, 536 U.S. 304 (2002)
Mo. Const. Art. V, § 4.1 (2006)

POINT IV

Because the Evidence That Steven Parkus Has Mental Retardation Is Substantial, The Circuit Court's Finding That Steven Parkus Has Mental Retardation is Not Clearly Erroneous.

(In response to Appellant's Point III)
Johnson v. State, 102 S.W.3d 535 (Mo. 2003)
Atkins v. Virginia, 536 U.S. 304 (2002)
RSMo § 565.030.6

37

ARGUMENT I

This Appeal Should Be Dismissed and Steve Parkus' Sentence Commuted to Life Without Parole Because:

A. A Final Determination Pursuant to § 565.030 RSMo That a Person Has Mental Retardation is Not Appealable, and
B. Requiring Mr. Parkus to Relitigate the Issue of Mental Retardation Would Violate the Double Jeopardy Clause of the Fifth Amendment.
The Missouri Supreme Court's September 26, 2006, Alternative Writ of

Mandamus defined the scope of the hearing below:
NOW, THEREFORE, you the said Circuit Court of Washington County are COMMANDED to finally determine pursuant to § 552.060, RSMo, whether Steven Wesley Parkus has a mental disease or defect and finally determine pursuant to § 565.030, whether Steven Wesley Parkus has mental retardation excluding fitness for execution or show cause, if any you have, by written return, before this Court on or before September 25, 2003, why you should not do so.

L.F. 19. (Emphasis added). Pursuant to that order, both parties devoted substantial time and resources toward the preparation and presentation of evidence on the
38

question of whether Mr. Parkus has mental retardation. Multiple evaluations of Steve Parkus were conducted by mental health experts of each party's choosing, and Respondent performed a thorough investigation of Steve's life history, including his lengthy history of institutionalization for childhood psychosis and mental retardation. In the interest of judicial economy and clarity, and because the issue of competence for execution was not ripe, Judge Stillwell ordered the hearing bifurcated, proceeding first on the question of whether Mr. Parkus has mental retardation. L.F. 95-114.

Judge Stillwell conducted an evidentiary in the Potosi Correctional Center on July 14 and 15, 2004. On behalf of Mr. Parkus, Denis Keyes, Ed.D., and William A. O'Connor, Ph.D., testified in person, and Jonathan Pincus, M.D., testified by videotaped deposition. Dr. Wade Myers testified for the State. In addition, Respondent presented many volumes of records representing several decades of psychiatric, educational, and social history records, including prison records, dating back to 1975.

On September 28, 2005, Judge Stillwell entered a detailed eight-page Judgment and Order making specific factual findings based on the evidence presented at the hearing. After reviewing Mr. Parkus' lengthy history and documentation, which included tests demonstrating significantly subaverage intellectual functioning, and detailed clinical observations of extensive adaptive behavior deficits, Judge Stillwell noted:

That aside from the above indications of mental retardation there was ample evidence to conclude that Mr. Parkus also

39

experienced several predisposing factors for mental retardation: early alterations of his embryonic development

from prenatal damage due to his mother's excessive drinking which may have resulted in fetal alcohol syndrome; additionally he was deprived of the environmental influences of social stimulation because of his institutional confinements, abuse during foster care and evidence of brain damage in an EEG report in 1969. DSM at 45, 46; Defendant's Exhibit 3 and Deposition of Jonathan H. Pincus, M. D. at 18 - 21, 24 - 25, 58 - 61.

L. F. 276. Judge Stillwell explicitly resolved conflicting opinions of Mr. Parkus' experts and the State's expert, finding Mr. Parkus' experts more credible: That the ample and unrefuted documented evidence presented by Mr. Parkus' counsel has superior evidentiary weight and therefore the Court finds that Mr. Parkus' condition of mental retardation and his limitations in two or more adaptive behavior areas were manifested and documented before his eighteenth birthday.

L. F. 277 (emphasis added).

Based on the evidence, "utilizing the definition as set forth in § 565.030.6 RSMo," and imposing on Mr. Parkus the burden to "prove mental retardation by a

40

preponderance of the evidence, as set out in § 565.030.6," Judge Stillwell found:

Steven Wesley Parkus is mentally retarded and therefore it would be cruel and unusual punishment to inflict the death penalty as declared in [Atkins v. Virginia, 536 U.S. 304 (2002)] and [Johnson v. State, 102 S.W.3d 535 (Mo. 2003)] and should be re-sentenced to life imprisonment without eligibility for probation, parole, or release except by act of the governor;

L. F. 277. Judge Stillwell's Judgment and Order represents a final determination pursuant to § 565.030.6 RSMo that Steve Parkus has mental retardation. As a result of that finding, Steve is exempt from the death penalty under Missouri law and the Eighth Amendment to the United States Constitution.

A. A Final Determination Pursuant to § 565.030 RSMo That a Person Has Mental Retardation is Not Appealable.

Judge Stillwell's order making a "final determination" is not subject to appeal because there is no statutory authority authorizing the State to appeal such a finding.

No right to appeal exists without statutory authority. State v. Williams, 871 S.W.2d 450, 452 (Mo. 1994); State v. Lynch, 679 S.W.2d 858, 859 (Mo. 1994). "It has long been the law in Missouri that the state cannot appeal a judgment for the accused, whether it is upon a verdict of acquittal or upon the determination of a question of law,

unless a right of appeal is unequivocally conferred by statute." State v. Evans, 679

41

S.W.2d 434, 435 (Mo. Ct. App. E.D. 1984), accord, City of Springfield v. Stovick, 110 S.W.3d 418 (Mo. App. S.D. 2003).

Under Missouri statute, the State has specific rights to appeal certain ruling in

criminal cases, though none applies to this situation. For example, the State has the right to appeal rulings quashing arrest warrants or suppressing evidence and confessions. RSMo § 547.200 (2006); State v. Brown, 722 S.W.2d 613, 616 (Mo. Ct. App. W.D. 1986). Nothing in the statute gives the State to the right to appeal decisions of fact that settle the issue of a prisoner's capital sentence. 7

In addition, the State argues that this Court should take jurisdiction over the issue of mental retardation because Judge Stillwell's judgment is not a final judgment because the Circuit Court did not decide whether Steve Parkus is fit for execution. App. Br. 15. The state's logic is unappealing. If the judgment is not a final judgment, the State cannot appeal because an appeal in a criminal case is limited by statute to final judgments. State v. Stout, 960 S.W.2d 535, 536 (Mo. Ct. App. E.D. 1998). "A

7Although Missouri statute authorizes the State to appeal in other criminal cases "except in those cases where the possible outcome of such appeal would result in double jeopardy for the defendant," RSMo § 547.200, an appeal of a final determination that a defendant has mental retardation exempting him from the death penalty would violate double jeopardy principles. See Part B, below.

42

prerequisite to appellate review is that there be a final judgment." Committee For Educational Equality v. State, 878 S.W.2d 446, 450 (Mo. 1994). If the State's position is correct, then this appeal has no statutory basis and should be dismissed.

In any event, the State has failed to cite to this Court any basis for exercising jurisdiction over an appeal attempting to challenge a final determination pursuant to RSMo § 565.030 that a criminal defendant charged with or convicted of first degree murder has mental retardation.

Besides the absence of statutory authority for the State's appeal herein, the statute governing capital appeals forbids it. In an analogous situation, the Missouri

Supreme Court in State v. Whitfield, 107 S.W.3d 253 (2003), commuted a death sentence to life without parole rather than subject the defendant to additional death

penalty proceedings. The Court was concerned that were it to rule otherwise,

the remedy will be to order a new trial and give the State a

second opportunity to convince a different jury to find the

facts necessary for imposition of the death penalty. But,

Missouri's statutes do not provide for this second bite at

the apple.

Id., at 270. Likewise, in this case, allowing an appeal would circumvent the clear legislative intent that a finding of mental retardation by a jury or a judge ends a capital

43

defendant's peril of the death penalty. Because Missouri law clearly provides that

the possibility of a death sentence is terminated by a judicial finding, pursuant to an adversarial hearing, that a defendant is mentally retarded, allowing the state to appeal raises serious double jeopardy concerns as well, as discussed below.

B. Requiring Mr. Parkus to Relitigate the Issue of Mental Retardation Would Violate the Double Jeopardy Clause of the Fifth Amendment. The Missouri Supreme Court has recognized that the decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), creates a retroactive constitutional bar to the execution of a person with mental retardation. Therefore, "under *Atkins*, Missouri cannot execute a person who is mentally deficient." *Johnson v. State*, 102 S.W.3d 535, 537 (Mo. 2003). The mandate of *Atkins* is satisfied by Missouri's statute, which provides

a procedure by which "a defendant that can prove mental retardation by a preponderance of the evidence, as set out in § 565.030.6, shall not be subject to the death penalty." *Id.*, at 540. Indeed, the statute commands the trier of fact to "assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor... [i]f the trier finds by a preponderance of the evidence that the defendant is mentally retarded." § 565.030.4.

The statute specifically allows a judge to make the final determination of whether a defendant has mental retardation, and that finding has the same effect and finality of

44

a jury determination that a mentally retarded defendant must be sentenced to life. §565.030.5. Thus, the Supreme Court's directive to Judge Stillwell to "finally determine pursuant to § 565.030, whether Steven Wesley Parkus has mental retardation excluding fitness for execution" resulted in a factual finding of mental retardation that bars any further proceedings in this case.

Judge Stillwell's Judgment and Order rests on a determination, made after an adversarial hearing in which Steve Parkus' life hung in the balance, that by a preponderance of the evidence, Steve Parkus has mental retardation. The Judgment clearly rests on a factual finding, made in accordance with statutory standards and procedures, that Steve Parkus is mentally retarded. Judge Stillwell found that Respondent presented "ample and unrefuted documented evidence" which "has superior evidentiary weight" over the state's evidence. L.F. 277. Based on the evidence, Judge Stillwell found "that Mr. Parkus' condition of mental retardation and his limitations in two or more adaptive behavior areas were manifested and documented before his eighteenth birthday." *Id.* Judge Stillwell thus concluded that "Steven Parkus is mentally retarded and therefore it would be cruel and unusual punishment to inflict the death penalty." *Id.* Because this finding of fact conclusively exempts Steve Parkus from execution, it cannot be appealed without exposing him to Double Jeopardy.

45

The Double Jeopardy Clause protects defendants from the oppression of

multiple trials for the same offense, and the risks and hardships that necessarily flow

from extended and repetitious litigation of the same issue: The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Bullington v. Missouri, 451 U.S. 430, 445-46 (1981), quoting Green v. United States, 355 U.S. 184, 187-188 (1957). Those concerns are at least as great when the issue is

whether the defendant lives or dies: The "embarrassment, expense and ordeal" and the "anxiety and insecurity" faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a

46

criminal trial. The "unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant," *id.*, at 130, thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment.

Bullington, 451 U.S. at 445, quoting *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980). In an adversarial hearing resulting in findings mandating a life sentence, the state, "[h]aving received 'one fair opportunity to offer whatever proof it could assemble,' . . . is not entitled to another." *Id.* at 446 [internal citations omitted]. Yet that is precisely what the state seeks by this appeal.

The Supreme Court recently explained that the application of the Double Jeopardy Clause to a state's attempt to expose a person to the risk of death a second time depends on "whether there has been an 'acquittal'" of the death penalty. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003). Of course, under § 565.030.4, *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Johnson v. State*, 102 S.W.3d 535 (Mo. 2003), a finding that Mr. Parkus has mental retardation is an "acquittal" of the death penalty. "[U]nder *Atkins*, Missouri cannot execute a person who is mentally deficient." *Johnson v. State*, *supra*, at 537. It is of no consequence that he was

47

acquitted by a judge rather than a jury; "the double jeopardy principle relevant to [Rumsey's] case is the same as that invoked in *Bullington*: an acquittal on the

merits

by the sole decision maker in the proceeding is final and bars retrial on the same charge." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 107-08 (2003), citing *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984). Steven Parkus has met his burden of proving that he has mental retardation and is ineligible for the death penalty; he "was forced to run the gauntlet once," *Bullington v. Missouri*, at 443, and should not be made to do so again.

For the foregoing reasons, this Court has no jurisdiction over an appeal of a final determination pursuant to § 565.030 that a capital defendant has mental retardation. Based on Judge Stillwell's finding, this Court should commute Steve Parkus' sentence of death to life without the possibility of probation or parole. See

RSMo §§ 565.030.4 and 565.040.2; *State v. Winfield*, 1075 S.W.3d 253, 271 (Mo. banc 2003).

48

ARGUMENT II

The Circuit Court Did Not Err in Entering its September 28, 2005 "Judgment and Order" Because in Finding That Mr. Parkus Has Mental Retardation, the Circuit Court Rendered Moot the Issue of Mr. Parkus' Competence to Be Executed Pursuant to § 552.060 RSMo.
(In response to Appellant's Point I).

Appellant argues that the case should be remanded to resolve the issue of whether Steve Parkus has a mental disease or defect rendering him incompetent to be executed pursuant to RSMo § 552.060, virtually ignoring Judge Stillwell's ruling that

Steve Parkus is not eligible to be executed under § 565.030.6 and the Eighth Amendment to the Constitution because he has mental retardation. L.F. 277. Further, Appellant makes no mention of the proceedings below which resulted in Judge Stillwell's decision to bifurcate the proceedings and proceed first on the mental retardation issue, L.F. 95-114, nor does Appellant ever refer to Judge Stillwell's order

or his reasons for bifurcating the hearing. Appellant's Point I fails to identify the trial

court ruling or action being challenged, state concisely the legal reasons for the Appellant's claim of reversible error, or explain why those legal reasons support the

claim of reversible error. Therefore, Appellant's Point I is not in compliance with the

requirement of Rule 84.04(d)(1) and should be dismissed because it makes no

49

reference to the ruling actually in issue, which is Judge Stillwell's decision to bifurcate the proceedings. *State v. Westmoreland*, 48 S.W.3d 672 (Mo. App. E.D. 2001).

Further, Appellant failed to provide this Court with a transcript of the June 9, 2004, telephonic hearing, see L.F. 110, at which the parties appeared to argue the Motion to Bifurcate Hearing filed by counsel for Steven Parkus, L.F. 95, in which amicus curiae Missouri Department of Mental Health joined. L.F. 107. It is Appellant's duty under Rule 81.12 to "file the transcript and to prepare a legal file so

that the record contained all the evidence necessary for [the Court's] making determinations on the issues raised." State v. Scott, 933 S.W.2d 884, 886 (Mo. App.

W.D. 1996); Helmig v. State, 42 S.W.3d 658, 670 (Mo. App. E.D. 2001).

Appellant's failure to provide this Court with the transcript of the hearing at which

each party argued its position on the issue of bifurcation is yet another reason to dismiss Appellant's Point I.

Even if this Court were to ignore Appellant's failure to comply with Rules 84.04 and 81.12, Appellant's argument is without merit because Judge Stillwell had legally

sound reasons for bifurcating the hearing, and his finding that Steve Parkus is mentally

retarded renders moot the issue of whether he is competent to be executed notwithstanding his mental retardation. The Circuit Court's decision to bifurcate the

hearing was a sound exercise of discretion and authorized by Missouri Supreme Court

50

Rule 66.02, which permits a circuit court to separate issues "in furtherance of convenience" or "when separate trials will be conducive to expedition and economy." See, e.g. Shady Valley Park and Pool, Inc. v. Fred Weber, Inc., 913 S.W.2d 28, 36 (Mo. App. E.D. 1995).

A brief recitation of the procedural history of this case reveals the correctness of Judge Stillwell's decision. On August 7, 2000, the Missouri Department of Corrections initiated an inquiry into Mr. Parkus' competence to be executed pursuant

to § 552.060. L.F. 8. While that matter was pending, decisions were handed down in

Atkins v. Virginia, 536 U.S. 304 (2002), and Johnson v. State, 102 S.W.3d 535, 540 (Mo. banc 2003), establishing a retroactive prohibition on the execution of persons with mental retardation. On June 20, 2003, Respondent's counsel filed a Motion to Recall the Mandate or, In the Alternative, Petition for Writ of Habeas Corpus in the

Missouri Supreme Court (Case No. SC 69274), alleging that Steve is mentally retarded and seeking the benefit of those decisions.

The Missouri Supreme Court treated Mr. Parkus' Motion as a petition for writ of mandamus, and on August 26, 2003, ordered Judge Stillwell "to finally determine pursuant to § 552.060 RSMo, whether Steven Wesley Parkus has a mental disease or defect and finally determine pursuant to § 565.030 whether Steven Wesley Parkus has mental retardation excluding fitness for execution." L.F. 19.

51

On June 1, 2004, Respondent moved to bifurcate the case and conduct separate hearings on the issue of mental retardation and competence to be executed. L.F. 95. Respondent explained that the issues are legally and factually different, involve different standards of proof, require different remedies, and are governed by different

rules of appealability. L.F. 95-102. The Attorney General opposed the motion. L.F.

104. The Department of Mental Health joined Mr. Parkus in requesting bifurcation, noting that it was not a party to any hearing or judgment concerning Mr. Parkus' Eighth Amendment rights as identified in Atkins and Johnson. L.F. 107-109. After a telephonic hearing, Judge Stillwell sustained the Motion to Bifurcate Hearing. L.F.

110.

In his Fourth Supplemental Return, Judge Stillwell explained his reasons for sustaining Mr. Parkus' motion to bifurcate the hearing. Judge Stillwell advised the Supreme Court that he considered arguments that bifurcation was appropriate

due to the differences in the substantive evidentiary standards in the two types of cases, differences in the standing of parties to each action, burden of proof as well as the appropriateness of proceeding with a final determination of matters related to 552.060 RSMo pending the final determination and exhaustion of appeals as to

52

issues of Mental Retardation pursuant to this Court's order.

L. F. 111-112.

Important to Judge Stillwell's reasoning was his concern that attempting to resolve both issues in a single proceeding would prevent "a determination of competency of an inmate at or near the time of execution" because of the "potential duration of the hearings process and any associated appeals relating to the issue of

Mental Retardation . . . has left this case in the posture that does not allow for a

determination of competency close in time with the proximity of any pending execution

date." L. F. 112 (emphasis added). Because "a determination of a mental disease or defect may change with time, a determination of that status prior to the exhaustion of

the hearing processes related to the issue of Mental Retardation would not be determinative for purposes of 552.060." Id. In other words, Judge Stillwell reasonably

concluded that bifurcation of the hearing was necessary in order to comply with the Supreme Court's order.

To appreciate the wisdom of Judge Stillwell's ruling, one need only imagine what a complicated mess this appeal would be if he had attempted to hear both issues

in a single hearing and resolve them in a single order. The Alternative Writ of Mandamus required him to determine whether Steve has shown, by a preponderance of the evidence, that he has mental retardation. If he has met that burden of proof, he

53

may not be executed. § 565.030.4(1); Johnson v. State, 102 S.W.3d 535, 540 (Mo. banc 2003) ("[T]his Court holds as a bright line test that defendant that (sic) can prove

mental retardation by a preponderance of the evidence, as set out in § 565.030.6, shall

not be subject to the death penalty.") On the other hand, the determination of Mr.

Parkus' competence to be executed is not subject to appeal. Shaw v. Delo, 762

F.Supp. 853, 857 (E.D. Mo. 1991); In re Competency of Bobby Lewis Shaw, No.

CV186-897CC, slip op (Mo. Cir. Ct., Oct. 7, 1987), appeal dismissed, No. 69954

(Mo. Sup. Ct. Nov. 12, 1987). If a single hearing had been held, this Court would have

to search a single record, identifying the evidence and testimony relevant to its review

of the Circuit Court's findings of fact and conclusions of law finding that Mr. Parkus

has met his burden of proving, by a preponderance of the evidence that he has mental retardation. At the same time, this Court would have to identify and set aside any testimony and evidence on the issue of whether Mr. Parkus has a mental disease or defect excluding fitness for execution. Given the size of record on the single issue of mental retardation, it is obvious that combining the two issues would have been impractical and a waste of this Court's time and resources.

Of equal or greater concern is the fact that even if Judge Stillwell had decided to brave the complexities of litigating two vastly different cases at the same time, he may nevertheless have to repeat the 552.060 hearing because the issue of whether

54

Steve Parkus was competent to be executed in July of 2004 does not resolve the question of whether or not he would be competent at the conclusion of these proceedings more than two years later. See, e.g., *Shaw v. Delo*, 971 F.2d 181, 188 (8th Cir. 1992), finding that Shaw had failed to exhaust state remedies on the question of whether he was competent to be executed in 1992 because that issue was not resolved by a state court determination that Shaw was competent to be executed in 1987. Because mental competence can change over time, a determination by Judge Stillwell of Steve Parkus' competency in 2004 might have to be repeated in 2007. All of these issues are ignored in Appellant's Point I.

Judge Stillwell's decision to bifurcate the hearing has served the interests of judicial economy because his finding that Steve Parkus has mental retardation has rendered any finding pursuant to § 552.060 moot. "A cause of action is moot when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy." *Rockett v. Radar, Inc.*, 97 S.W.3d 535, 536 (Mo.App., E.D. 2003). When an event occurs that makes a decision unnecessary, then the case is rendered moot and generally should be dismissed. *Id.*, citing *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001). By arguing that the Circuit Court erred in failing to make a determination of whether Mr. Parkus is "fit for execution" pursuant to §

55

552.060, notwithstanding his mental retardation, Appellant is arguing that this Court order the Circuit Court to perform a useless act. The law does not demand the doing of a useless act. *State ex rel. Cervantes v. Bloom*, 485 S.W.2d 446, 448 (Mo. App., E.D. 1972); *State ex rel. St. Louis County v. Enright*, 729 S.W.2d 537, 540 (Mo. App., E.D. 1987). Appellant's argument that Mr. Parkus' competence to be executed has not been rendered moot is without merit. App. br. 15. Appellant argues that the Cape Girardeau County Circuit Court's criminal judgment sentencing Parkus to death has not been vacated or set aside, and the Missouri Supreme Court's mandate affirming that judgment has not been recalled or withdrawn. App. br. 15. That may be true, but only because this Court has not yet acted upon Judge Stillwell's finding. Missouri statute dictates that the Court must "assess and declare the punishment at life imprisonment

without eligibility for probation, parole, or release except by act of the governor . . . [i]f the trier finds by a preponderance of the evidence that the defendant is mentally retarded." § 565.030.4. Judge Stillwell's finding also renders Mr. Parkus' death sentence unconstitutional, which triggers the appellate court's power and duty, pursuant to § 565.040.2, to commute his sentence to life. State v. Whitfield, 107 S.W.3d 253, 271 (Mo. banc 2003). Even the dissenters in Whitfield agree that "§ 565.040.2 governs . . . where a death sentence cannot constitutionally be imposed upon a particular

56

offender, such as where the offender is mentally retarded, Atkins, 536 U.S. 304 . . . " 107 S.W.3d at 274 (Price, J., dissenting).

Remanding this case to the Circuit Court with an order that it make a determination of Mr. Parkus' competence to be executed pursuant to § 552.060 would be a waste of judicial resources. All of Appellant's complaints are easily addressed by an order from this Court, pursuant to the power delegated to it by the Missouri Supreme Court, Mo. Const., art. V, § 4.1 (2006), commuting Steve Parkus' sentence to life without eligibility for probation, parole, or release except by act of the governor. 565.040.2; State v. Winfield, 1075 S.W.3d 253 (2003).

ARGUMENT III

The Circuit Court Did Not Exceed Its Jurisdiction When It Found Mr. Parkus to Be Mentally Retarded and Stated the Obvious Legal Consequence of That Finding Because Its Order Was Entered in Compliance With the Alternative Writ of Mandamus Issued by the Missouri Supreme Court.

(In response to Appellant's Point II)

After the decisions in Atkins v. Virginia, 536 U.S. 304 (2002), and Johnson v. State, 102 S.W.3d 535, 540 (Mo. banc 2003), established a retroactive prohibition on the execution of persons with mental retardation, counsel for Steve Parkus filed a Motion to Recall the Mandate in the Missouri Supreme Court asking that his death

57

sentence be set aside. In response, the Missouri Supreme Court issued an Alternative Writ of Mandamus directing the court below to "finally determine pursuant to Section

565.030 whether Steven Wesley Parkus has mental retardation excluding fitness for execution." L.F. 19 (emphasis added). In compliance with that directive, Judge Stillwell allowed the parties to conduct mental evaluations of Mr. Parkus and, after a hearing, entered eight pages of fact findings which concluded:
THEREFORE IT IS ORDERED, DECREED AND
ADJUDGED that the Court finds pursuant to Section

565.030.6 that the Defendant Steven Parkus is mentally

retarded and therefore it would be cruel and unusual punishment to inflict the death penalty as declared in Atkins and Johnson, supra, and should be re-sentenced to life imprisonment without eligibility for probation, parole, or release except by act of the governor.

L.F. 277. Without citing any case law or statutory authority, Appellant contends that

Judge Stillwell's recommendation that the Missouri Supreme Court resentence Respondent justifies reversal of the entire judgment, suggesting that he somehow exceeded his jurisdiction. The argument is meritless. That Judge Stillwell had jurisdiction to determine whether Steve Parkus is

58

mentally retarded is not seriously open to question; he was ordered to do so by the Missouri Supreme Court. "Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power." Mo. Const., Art. V, § 4.1 (2006). Nevertheless, Appellant contends that Judge Stillwell's order should be vacated because the recommendation to commute the sentence is an improper advisory opinion because the circuit court had no jurisdiction to require any other court to act on its finding of mental retardation. App. Br. 21. The order does not

even purport to do so; Judge Stillwell merely made a recommendation and provided appropriate context for his finding, addressing both the constitutional and statutory standards for determining Steve Parkus' eligibility for the death penalty. In other words, he was simply making it clear that Steve's mental retardation is such as to "exclud[e] fitness for execution," as ordered by the Missouri Supreme Court. L.F. 19.

Judge Stillwell was merely stating the obvious: Steve Parkus is mentally retarded and therefore his sentence of death must be commuted to life without parole. Atkins v. Virginia, 536 U.S. 304 (2002); Johnson v. State, 102 S.W.3d 535 (Mo. banc 2003); RSMo § 565.030.

In attacking Judge Stillwell's order, Appellant provides a litany of proceedings in which it would have been improper for Judge Stillwell to resentence Steve Parkus to life, including § 552.060, Rule 29.15, and Rule 91. App. Br. 17-20. Appellant fails to

59

mention the actual posture of the case; the Missouri Supreme Court was confronted with a Motion to Recall the Mandate which had a sound legal basis (the creation of a retroactive right)⁸ and which turned on an issue of fact (whether Steve Parkus is mentally retarded). Because appellate courts are not well-equipped to resolve issues of fact, appellate courts may appoint a special master to hear evidence and render findings of fact and conclusions of law:

When an appellate court appoints a special master pursuant to Rule 68.03, the master's findings, conclusions and recommendations are to be accorded "the weight and deference given to trial courts in court-tried cases, in light of the master's opportunity to view and judge the credibility of

SC88077 Resp.'s brief filed in ED.txt
witnesses." State ex rel. Busch by Whitson v. Busch, 776
S.W.2d 374, 377 (Mo. banc 1989).

State v. Griddine, 75 S.W.3d 741, 742 (Mo. App. W.D. 2002). In this case, Judge Stillwell was in effect acting as a special master for the Missouri Supreme Court—and now this Court—to resolve issues of fact and make appropriate recommendations.

8See State v. Thompson, 659 S.W.2d 766, 768-69 (Mo. banc 1983) ("our courts have properly recognized that a mandate may be recalled in order to remedy a deprivation of the federal constitutional rights of a criminal defendant.")

60

Appellant contends that "[s]uch decisions are not part of Missouri practice," App. Br. 22, but indeed they are.

Of course, Judge Stillwell does not purport to resentence Steve Parkus, nor did he order any other court to do so. Neither was it a "normative statement that some court, somewhere should resentence Parkus," App. Br. 21, as Appellant coyly suggests. There is no mystery as to which court Judge Stillwell's recommendation is directed. At the time, Judge Stillwell clearly understood that he was writing findings of fact and recommendations for the Missouri Supreme Court, which has transferred the case to this Court for appropriate disposition.⁹

As noted in Respondent's Argument II, above, Appellant's concerns are fully addressed by an order from this Court commuting Steve Parkus' sentence. Missouri statute dictates that the Court must "assess and declare the punishment at life

⁹At first blush, the Supreme Court's decision to transfer this case to this Court seemed puzzling. Given the fact that the Supreme Court has "exclusive appellate jurisdiction in all cases . . . where the punishment imposed is death," Mo. Const., Art. V, § 3 (2005), it is logical to assume that the case was transferred to this Court because Judge Stillwell's finding of mental retardation eliminates the possibility of execution.

61

imprisonment without eligibility for probation, parole, or release except by act of the governor . . . [i]f the trier finds by a preponderance of the evidence that the defendant is mentally retarded." § 565.030.4. Because Steve's mental retardation renders his death sentence unconstitutional, § 565.040.2 dictates that his sentence be commuted to life. State v. Whitfield, 107 S.W.3d 253, 271 (Mo. banc 2003). There is no dispute that "§ 565.040.2 governs . . . where a death sentence cannot constitutionally be imposed upon a particular offender, such as where the offender is mentally retarded, Atkins, 536 U.S. 304 . . ." 107 S.W.3d at 274 (Price, J., dissenting).

For the foregoing reasons, the judgment below should be affirmed, and this Court should commute Mr. Parkus' sentence of death to life without the possibility of probation or parole. See § 565.040.2; State v. Whitfield, 107 S.W.3d 253 (2003).

62

ARGUMENT IV

Because the Evidence That Steven Parkus Has Mental Retardation Is Substantial, The Circuit Court's Finding That Steven Parkus Has Mental Retardation is Not Clearly Erroneous.

(In response to Appellant's Point III).

After hearing testimony and considering a massive amount of documentary evidence regarding Steve Parkus' life-long impaired intellectual functioning and adaptive behavior deficits, Judge Stillwell found "pursuant to Section 565.030.6 that the Defendant Steven Parkus is mentally retarded and therefore it would be cruel and unusual punishment to inflict the death penalty." L.F. 277. Respondent challenges Judge Stillwell's ruling, claiming that "the circuit court only concluded that Parkus was "borderline mentally retarded," App. Br. 24-26, that the court erred in limiting his discussion to the documentary evidence generated during Steve's developmental period, App. Br. 26-27, and apparently complaining that Judge Stillwell was not swayed by the testimony of Appellant's "expert", Wade C. Myers. App. Br. 28. Appellant's argument simply seizes upon isolated passages from Judge Stillwell's detailed findings, distorts them, takes them out of context, and ignores mountains of evidence and testimony supporting Judge Stillwell's finding that Steve Parkus is mentally retarded, and has been his entire life.

63

Respondent will review the evidence supporting Judge Stillwell's findings, and then address Appellant's unwarranted criticism of the trial court's order. It should be noted first, however, that Appellant never relates his attacks upon Judge Stillwell's findings to any particular standard of review, although he implies that this Court should review the issue de novo.¹⁰ See App. Br. 5. As noted above at pp. 5-6, the issue of whether Steve Parkus has mental retardation is a question of fact, *Johnson v. State*, 102 S.W.3d 535 (Mo. banc 2003), on which the trial court's findings are presumed correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). In reviewing findings of fact, the appellate court "view[s] the evidence presented and all reasonable inferences drawn therefrom in the light most favorable to the trial court's order and disregard[s] all evidence and inferences to the contrary." *State v. Hoyt*, 75 S.W.3d 879, 882 (Mo. App. W.D. 2002). "If the ruling is plausible, in light of the record viewed in its entirety, an appellate court will not reverse, even if convinced that it would have weighed the evidence differently." *State v. Haldeman*, 106 S.W.3d 529, 533 (Mo. App. W.D. 2003), citing *State v. Milliorn*, 794 S.W.2d 181, 184 (Mo. banc 1990). Appellant falls

far short of meeting this burden.

The evidence before Judge Stillwell establishes that Steve Parkus has been

10Respondent's position is that a finding of mental retardation is not reviewable at all. See Argument I above.

64

mentally retarded all of his life.¹¹ He was slow to learn to walk and talk, L.F. 258, and never played with other children. L.F. 262. He was expelled from kindergarten because he was "not ready for any kind of teaching program." Tr. 64, L.F. 287. He got lost on the way home from school, and never passed the first grade, even after two attempts.

Tr. 64. At age eight, when most children are in the third grade, Steve could not read or

11Respondent's experts diagnosed Steve according to Missouri statutory

criteria as set forth in RSMo 565.030:

As used in this section, the terms "mental retardation" or "mentally retarded" refer to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

The statute is almost word for word the same as the definition of mental retardation

used by the American Association on Mental Retardation in 1992. Tr. 21.

65

write at all, talked like a boy of four or five years-of-age, did not know how to catch a ball, and his insight and judgment was described as "nil." Tr. 65-66, L.F. 288. Learning and achievement in a normal school were "almost impossible." L.F. 287. When he was nearly ten years old, and should have been in the fourth grade, his developmental level was that of a kindergartner. Tr. 66-67, L.F. 288. He had poor peer relations, and was "perseverative and concrete." L.F. 289. At age eleven, Steve was impulsive, had a short attention span, and functioned "immaturely at the level of a three-year-old." L.F. 289. He had "no sense of time or money," Id., Tr. 67, and did not know words that children his age usually know. L.F. 290. At age twelve, he was unable to learn from experience, unable to play, unable to carry on a normal conversation, and he had no friends. He had severe learning difficulties, and was consistently described as perseverative¹² and concrete.¹³ L.F. 290. As he got older,

12Dr. Keyes explained, "A person who perseverates is a person who does not learn from their mistakes. He keeps doing the same thing again and again and again, because it is what he knows. Even though it is not working, he still does it again and again. And that's real common in mental retardation." Tr. 68-69.

13When a person's thinking is concrete, "in practical terms it means that he does not think abstractly - he does not see abstractions. He is bound to the actual information that he knows and that's it." Tr. 69.

66

the gap between him and normal children widened. Tr. 70. Dr. Keyes described the documented, historical observations of Steve's caretakers as "a textbook definition of mental retardation." Tr. 70.

Intelligence testing was consistent with Steve's poor functioning. In Steve's diagnostic history, ten psychologists diagnosed Steve using valid, standardized IQ tests. Eight diagnosed Steve as mentally retarded; two diagnosed him as "borderline mentally retarded." p. 229. His IQ scores over his lifetime span from a low of 64 to

high of 76, which is "not even a standard error of measure or a standard deviation. So

the consistency is really pretty strong." p. 52. See L.F. 284, charting Steve's IQ scores and showing where he stands in relation to the rest of the population in terms

of intellectual functioning. Dr. William A. O'Connor, a psychologist with a minor in

Mental Retardation and several years experience teaching mentally retarded children in special education classes, testified that Steve's IQ scores range from 76 to 65, but tend

to cluster around 72. Tr. 172-73. Even eliminating the highest and lowest scores, "we've got pretty reliable scores running from 69 to 73." Tr. 173. Dr. O'Connor explained that in terms of actual, measurable intellectual capacity, "there is no real world

difference" between an IQ of 68 and 73. Tr. 169. Steve's lifetime history of intelligence testing was compiled in a chart that was prepared for the trial court and

introduced into evidence:

67

Historical IQ Scores

Date Full Scale Score Report

Report Date: 12-23-1968 76 Mildred Berland, Ph.D. (1)

Exam Date: 7-17-1970 72 Marjorie S. Baker, Ph.D. (10)

Report Date: 06-28-1971 69 Aurora Amin, M.D. (15)

Report Date: 03-23-1972 76 Jacqueline M. Wilson, M.S. (21)
(test repeated several times)

Exam Date: 11-21-1973 72 Eugene Kissling, Ph.D. (34)

Report Date: 10-08-1975 73 Byron C. English, Clinical Psychologist (96)

Exam Date: 7-26-1077 64 David Jannick, Clinical Psychologist (138)

Exam Date: 10-03-1988 68 Thomas J. Amolsch, Ph.D.

Exam Dates: 09-04-1990 and
09-05-1990

69 William A. O'Connor, Ph.D.

Report Date: 06-01-2003 65 Denis W. Keyes, Ph.D.

Supp. L.F. 267.

Judge Stillwell addressed the evidence of Steve's impaired intellectual

functioning, finding that the first prong of the statutory definition was satisfied:

That from the documented evidence presented this Court finds that Mr. Parkus met the definition of being mentally retarded albeit borderline. Given what is at stake in capital punishment cases, reliability during mental retardation

68

assessment is essential and requires practice standards. This Court is making this determination in light of the execution of Mr. Parkus and it should be made erring on the side of caution while dealing with a mental disorder diagnosis from within an imprecise science and lacking a more finite "line in the sand" definition for courts to work with while being confronted with a borderline retarded diagnosis that is based on IQ scores with a measurement error of approximately plus or minus five (5) points in assessing IQ and that may vary from test to test. The fact that the label of mental retardation is used as a part of an individual's diagnosis should indicate he is mentally retarded albeit connoted as borderline. Quoting from the DSM, ". . . it must be admitted that no definition adequately specifies precise boundaries for the concept of "mental disorder." The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations." *Id.* at xxx.

L.F. 274-75. Judge Stillwell further found

69

That from the documented and unrefuted evidence presented Mr. Parkus had limitations in the following areas of adaptive behavior that had manifested themselves and were documented prior to his eighteenth birthday: social skills, self-direction, functional academics, health and safety and home living.

L.F. 276. Each of these findings was preceded by a detailed recitation of the documentary evidence, generated prior to Steve's eighteenth birthday, demonstrating his substantially impaired intellectual functioning and almost non-existent adaptive

behavior skills. See L.F. 273-76. Although Appellant contested Respondent's case, Judge Stillwell concluded:

That the ample and unrefuted documented evidence presented by Mr. Parkus' counsel has superior evidentiary weight and therefore the Court finds that Mr. Parkus' condition of mental retardation and his limitations in two or more adaptive behavior areas were manifested and documented before his eighteenth birthday.

L.F. 277. Thus, Judge Stillwell's order finding that Steve Parkus has mental retardation

is well-reasoned and supported by substantial evidence.

70

Appellant's first criticism of Judge Stillwell's order focuses on the court's use

of the term "borderline" in his discussion of the evidence. See App. Br. 24-26. Appellant's argument takes Judge Stillwell's discussion entirely out of context. The term appears not in the court's final determination, L.F. 277, but in his discussion of the historical evidence of Steve's intellectual functioning. L.F. 274-75. Appellant fails to note that Judge Stillwell specifically noted that mental retardation is divided into four categories (mild, moderate, severe and profound), but that "no 'borderline' category exists." *Id.*, citing the American Psychiatric Association's Diagnostic and Statistical Manual, Fourth Edition, Text Revision, (DSM-IV-TR), 42 - 44 (2000). In fact, Judge Stillwell's order reflects that in making his final determination, he assumed that "there may not be a ban to executing a person who is 'borderline mentally retarded' in the State of Missouri. In context, Judge Stillwell used "borderline" not as a diagnostic term, but as an adjective to describe Steve's pattern of IQ scores, which straddle the range of IQ scores in the upper end of persons considered diagnosed with mild mental retardation. 14

14The AAMR dropped the severity levels of classification in 1992, in part because "'mild mental retardation,' a condition that represents considerable disadvantage, was a misnomer..." American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports*, p. 26

71

Judge Stillwell's discussion is consistent with the testimony of Appellant's experts that Steve "has mental retardation, mild, and the upper range of mild mental retardation." Tr. 209. A graphic illustration of the history of Steve's IQ testing provides compelling evidence that his intellectual functioning is two standard deviations below the norm, set out at Supp. L.F. 267 and reproduced in the Addendum to this Brief. Further, Judge Stillwell's discussion is a recognition of the appropriate procedures for diagnosing mental retardation, as explained by Respondent's mental retardation expert:

The issue isn't numbers. The issue is the overall functioning of the individual. Specifically, is this person functioning in the range of mental retardation or isn't he? And if you look at the behaviors, the background, the data, all the data suggests, you know, across the long period of time, as well as specifically at this time, then does mental retardation still exist?

Tr. 39. Thus, a person with an IQ of about 70 might not be diagnosed with mental retardation if he had adequate adaptive behavior skills, while another with an IQ in the 70's with impaired adaptive functions would. Even though Steve Parkus' IQ places him

(10th ed. 2002)

72

in the upper end of those considered to have significantly impaired intellectual functioning, his adaptive behavior deficits unquestionably qualify him for the diagnosis of mental retardation. Judge Stillwell did not find that Steve Parkus is "borderline" mentally retarded; to the contrary, he found "pursuant to Section 565.030.6 that the Defendant Steven Parkus is mentally retarded..." L.F. 277 (emphasis added).

The next phrase from Judge Stillwell's order which Appellant attempts to transmogrify into an issue is the court's decision to "concern itself with the documented evidence during the timeframe before his eighteenth birthday as required by Section 565.030.6." See App. Br. 26-27. Judge Stillwell was clearly referring to the third prong of the statutory definition of mental retardation, which requires that the condition be "manifested and documented before eighteen years of age." During the hearing, Judge Stillwell noted that this prong of the statutory definition of mental retardation effectively screens out cases of malingering, commenting that "I'm sure a ten year old is not thinking, 'Man, if I'm mentally retarded, well, I'll gain - I can use this later in my life.'" Tr. 157-58.

Implicit in Appellant's argument is the suggestion that Judge Stillwell overlooked competent evidence that Steve is not mentally retarded because he focused his analysis on Steve's developmental period. That is not at all the case. Since age 17, Steve has scored between 64 and 69 on every single standardized IQ test administered between 73

1977 and 2003. L.F. 28-41, Supp. L.F. 267, 273-541, 284, 305-313. Dr. Keyes and Dr. O'Connor explained that there is not much difference between scores in the mid-toupper 60's and scores in the low-to-mid 70's. If, on an IQ test, "you get say a 68, you are at the first percentile. If you get a 72, you are at the first percentile. If you get a 74, you would be at the second percentile, and there is not a lot of real world difference there." Tr. 182-83. Appellant's assertion that Judge Stillwell "focused upon the static concept of 'margin of error'" because "the circuit court did not find that Parkus scored under 70" is simply unsubstantiated speculation. Further, the argument overlooks not only every IQ test since Steve turned seventeen, but also testing at age 11 and age 17 that produced IQ scores in the 60's. See Supp. L.F. 267.

Among the IQ scores cited by Respondent and Judge Stillwell is a series of testing which produced scores of 76, 80, 71, 78, 103 and 72 at age 13. App. Br. 27, L.F. 250. Perhaps one reason the trial court included his discussion of the well-recognized margin of error in IQ testing is the testimony about the validity of these scores, which were produced as part of a well-meaning but misguided effort to

determine how well Steve was responding to anti-psychotic medication. Dr. Jacqueline Wilson repeated the Wechsler Intelligence Scale for Children (the WISC) six times in nine months, which yields invalid scores because of the practice effect. Tr. 53.

Also

see Supp. L.F. 66-69. These were the highest IQ scores that Steve obtained in his entire

74

life; however, in spite of getting those scores, Dr. Wilson assessed the diagnosis of mental retardation. Tr. 70, Supp. L.F. 69.

There is also ample evidence that Steve still has substantial deficiencies in his adaptive skills. Dr. O'Connor used the Global Assessment of Functioning to determine Steve's adaptive behavior skills, and that instrument likewise indicated significant deficits; he scored 25 out of a possible 100, which indicates that his

... behavior is considerably influenced by delusions and hallucinations, or serious impairment in communication or judgment, e.g. acts grossly inappropriately, suicidal preoccupation. Or inability to function in almost all the areas, for example, has no job, cannot live independently in a home, cannot get along with friends, et cetera.

Q. And would a person functioning on that level satisfy the diagnostic criteria of substantial deficits in adaptive behavior?

A. Yes. Assuming that it was a reasonably good rating based on a reasonable history input.

Tr. 209. The Vinel and Adaptive Behavior Scales indicate that Steve presently functions

at the bottom one-tenth of the one percentile of the population in adaptive skills such

75

as Communication, Daily Living Skills, and Socialization. His age-equivalent skills in

those areas is 6 years, 3 months, 6 years, one month and 3 years, 0 months, respectively. His composite adaptive functioning skills place him at an age equivalent

of 5 years, 1 month. Ex. 4, Report of Dr. Denis Keyes, p. 1. Steve could not function

outside of the highly structured prison environment. Tr. 308-309. He could not earn a GED. With external supports he might be able to hold down a job in a sheltered workshop environment. He would not be able to maintain normal social relationships, would not be able to maintain a household, or maintain his own health and safety outside of very narrow limits. Tr. 309. "By AAMR and DSM standards, he has enough impairment to qualify as mentally retarded in virtually any setting." Tr. 314-315.

The evidence supporting Steve's diagnosis of mental retardation exists at all stages of his life, from in utero to the present. His mother's binge-drinking during her

pregnancy with Steve is a significant contributing factor. 15 Steve received a

neurological examination, Supp. L.F. 42-57, an MRI scan, Supp. L.F. 216, an EEG, 15Because of the proven link between maternal alcohol use and a form of mental retardation known as Fetal Alcohol Syndrome, the Surgeon General has required alcohol distributors to print labels warning pregnant women about the dangers of drinking while pregnant. Tr. 58.

76

Supp. L.F. 59, and neuropsychological testing, Tr. 190-200 all of which were abnormal, indicative of significant brain damage consistent with Fetal Alcohol Syndrome. Dr. Keyes explained that the multidisciplinary evaluation, Steve's adaptive behavior and social history, and other risk factors provide "convergent validation" for his diagnosis of mental retardation. Tr. 61.16 Judge Stillwell agreed:

That aside from the above indications of mental retardation there was ample evidence to conclude that Mr. Parkus also experienced several predisposing factors for mental retardation: early alterations of his embryonic development from prenatal damage due to his mother's excessive drinking which may have resulted in fetal alcohol syndrome; additionally he was deprived of the environmental influences of social stimulation because of his institutional confinements, abuse during foster care and evidence of brain damage in an EEG report in 1969. DSM at 45, 46; Defendant's Exhibit 3 and Deposition of Jonathan H.

16A chart from the AAMR, 10th ed. showing the risk factors applicable to Steve Parkus is set out at Supp. L.F. 276 and reproduced in the Addendum to this Brief.

77

Pincus, M. D. at 18 - 21, 24 - 25, 58 - 61.

L.F. 276. Indeed, when one looks at Steve's complete social history, it would be hard to imagine anyone emerging from his childhood with normal intellectual and adaptive behavior abilities. Appellant's final argument criticizes Judge Stillwell for failing to credit the testimony of the State's "expert," Dr. Wade C. Myers, a Florida psychiatrist, that Steve "effectively copes with common life demands and meets the standard of personal independence expected of one who is incarcerated." It is of no consequence that Judge Stillwell did not discuss the testimony of each expert; in reviewing findings of fact, the appellate court examines the evidence and inferences therefrom "in a light most favorable to the trial court's order and disregard[s] all evidence and inferences to the contrary." State v. Hoyt, 75 S.W.3d 879, 882 (Mo. App. W.D. 2002).

Regardless of the standard of review, there are substantial reasons for Judge Stillwell to have discredited Dr. Myers' conclusions. 17 Myers did not comply with

17Respondent argued in the court below that Myers' testimony was inadmissible under RSMo. Section 490.065, and McGuire v. Seltsam, 138 S.W.3d 718 (Mo. 2004) (per curiam). See Tr. 341-343, L.F. 196-209. Judge Stillwell's

rejection of Dr. Myers' testimony makes it unnecessary to repeat that argument here.

78

either AAMR or DSM-IV-TR protocol for arriving at a conclusion about mental retardation. Tr. 335, 339-40. He did not administer or rely upon standardized testing of intellectual functioning, nor did he use any objective measure of adaptive functioning. The words "mental retardation" appear nowhere in his curriculum vitae, or in any of his publications, nor did he ever claim to have any training in the field of mental retardation. Tr. 318-23; 341-43. Surprisingly, he was not familiar with the American Association on Mental Retardation (AAMR), admitting, "I don't know much about the AAMR." Tr. 347-48, and did not know that the American Psychiatric Association (APA) defers to the AAMR on mental retardation treatment and diagnosis. Tr. 347. Dr. Myers had never heard of or read the standard and authoritative text on mental retardation, *Mental Retardation: Definitions, Classifications, and Systems of Support*, published by the AAMR. Tr. 348. Dr. Myers admitted, "I'm not aware of their standards," Tr. 349, referring to the AAMR.

Appellant's and Dr. Myers' claims about Steve's adaptive behavior skills are patently absurd. The claim that he "effectively copes with common life demands and meets the standard of personal independence expected of one who is incarcerated," App. Br. 28, is untenable in light of the extensive documentation of Steve's history of

18Dr. Myers claimed that he did not feel the need to do intelligence testing because he saw no signs of mental retardation. Tr. 341.

79

being sexually victimized in prison, repeatedly being raped, See Supp. L.F. 475-495, and even being sold from one inmate to another. Supp. L.F. 478. Steve has been repeatedly disciplined for being unable to maintain sanitary conditions in his cell, Supp.

L.F. 489-490, 19 and failing to maintain personal hygiene, Supp. L.F. 494-495.

Indeed,

he is housed in the Special Needs Unit, which is reserved for inmates with mental retardation and other developmental disabilities. Tr. 349.20

19A disciplinary report by a Colonel Eckhoff described the condition of Steve's cell:

I . . . was conducting a cell search in 4B39, which is occupied by Parkus, Steven, and observed how dirty the cell was. The toilet was a charred color. Trash was scattered all over the floor, and it had a dirty odor to the cell. Inmate Parkus has been warned by myself several times to clean it up.

Supp. L.F. 412. The fact that Steve "lives in squalor and doesn't care about it" is "consistent with the idea that he is not able to function normally." Supp. L.F. 413.

20The fact that Steve is housed with people of comparable disabilities puts Appellant's claims about his chess-playing ability, see App. Br. 28, in context. His

favorite chess piece is "the horse." Supp. L.F. 429. Neurologist Jonathan Pincus

80

Appellant and Dr. Myers claim that Steve is not mentally retarded because he "made a homemade cigarette lighter." App. Br. 28. The incident in question involved Steve's attempt to light a cigarette using a common inmate trick of inserting pencil leads into his electrical outlet. Steve substituted paper clips for the pencil lead, with disastrous results, nearly electrocuting himself and cutting open the back of his head.

Tr. 358, 503-04. Appellant's claim does not withstand close scrutiny.

Appellant and Dr. Myers contend that Steve's reading ability rules out his mental retardation, App. Br. 28, but again the evidence simply fails to support their claim.²¹

Neurologist Jonathan Pincus examined Steve's ability to comprehend written material,

and found it deficient. He asked Steve to read aloud a paragraph written on a sixth grade level, then asked him questions about it. The material dealt with the dangers of

smoke jumpers who parachute into forests to fight fires:

And he read it. He read it pretty well. And I asked him, well,

observed that 'Prison is not a place that you go to find people who . . . are great chess players. . . I didn't consider that to be a very strong endorsement of his normality.' Id.

²¹The ability to read even on a sixth grade level does not rule out mental retardation; "By their late teens, [persons with mild mental retardation] can acquire academic skills up to approximately the sixth-grade level." DSM-IV-TR 43.

81

what did it say. He read it out loud, so I knew he had read it well. And he just could not - he said, well, they're fires and being near fires is dangerous. I said, well, why. He completely couldn't get the idea that there were side drafts that would pull the smoke jumpers in from the sides if they dropped too near the fire. He was not able to understand, in other words, the full meaning of this small paragraph. And that's dyslexia.

What I demonstrated is called dyslexia, inability to read properly. That is to say, he was able, mechanically, to read. He read the words, but he didn't understand them all, didn't understand the paragraph fully.

Supp. L.F. 382. Dr. Pincus' experience is consistent with the testing by Dr. Keyes, who assessed Steve's reading comprehension as that of an eight to ten-year-old child.

See Supp. L.F. 219. It is also consistent with documentary evidence that shows that Steve scored at a fifth grade reading level on the Wide Range Achievement Test, which

is not a test of reading comprehension, only his ability to recognize and sound out words. Tr. 133.

Appellant claims, again based on Dr. Myers' conclusions, that Steve "can think

82

abstractly." App. Br. 28. That claim is based on a portion of the abbreviated Mini-Mental Status Examination administered by Dr. Myers, in which Steve correctly performed only one of three similarities and correctly interpreted one of two proverbs. Dr. Myers concluded that this demonstrated a capacity for abstract thought. Tr. 332

33. Dr. Pincus used a similar instrument during his neurological evaluation, obtaining similar results, but reaching the opposite conclusion. Dr. Pincus explained that an unimpaired person would be able to correctly interpret all three proverbs: He said one out of two proverbs was interpreted abstractly. People that live in glass houses should not throw stones. Perhaps that's a proverb. There's only one correct interpretation of that, is that you don't talk about other people and criticize them for faults that you might have. But you don't say they would break the windows. That's a correct but concrete interpretation of that proverb.

I don't know which proverbs he used, but the fact that [Steve] interpreted one of them incorrectly is more important than the fact that he interpreted one of them correctly.

83

Supp. L.F. 425.22 Steve's failure to correctly interpret all of the proverbs is an abnormal, deficient response. Id.

Dr. Myers' conclusions which form the basis of Appellant's argument reflect poor clinical judgment about the issue of mental retardation. More often than not, he misinterprets data and draws incorrect conclusions from his observations. The AAMR requires that assessments of mental retardation be made by persons with sound clinical judgement, which it describes in very specific terms:

Clinical judgment is a special type of judgment rooted in a high level of clinical expertise and experience; it emerges directly from extensive data. It is based on the clinician's explicit training, direct experience with people who have mental retardation, and familiarity with the person and the person's environments. Thus clinicians who have not gathered extensive relevant assessment data should not claim clinical judgment. Clinical judgment should not be thought of as a justification for abbreviated evaluations, a vehicle for stereotypes or prejudices, a substitute for insufficiently

22Dr. Myers could not recall what proverbs and similarities were used in his "testing." Tr. 546.

84

explored questions, an excuse for incomplete or missing data, or a way to solve political problems. Rather, it should

SC88077 Resp.'s brief filed in ED.txt
be viewed as a tool of clinicians with training and expertise
in mental retardation and ongoing experience with – and
observations of – people with mental retardation and their
families.

AAMR, 10th Ed. 95. Likewise, the American Psychiatric Association states, “[t]he
diagnostic categories, criteria, and textual descriptions are meant to be employed
by
individuals with appropriate clinical training and experience in diagnosis.”
DSM-IV-TR,

p. xxxii.
Dr. Myers lacks sound clinical judgment in the area of mental retardation, as
demonstrated by the inappropriate shortcuts he took the flawed conclusions he drew
from his contacts with Steve. Judge Stillwell was correct to ignore his testimony
and
find “[t]hat the ample and unrefuted documented evidence presented by Mr. Parkus’
counsel has superior evidentiary weight.” L.F. 277. This Court should reject Dr.
Myers’ testimony in its entirety and affirm the judgment of the Circuit Court and
commute Steve Parkus’ sentence to life without probation or parole.

85

CONCLUSION

WHEREFORE, for the reasons herein stated, Respondent prays this Court to
dismiss Appellant’s Point III, affirm the judgment of the court below, formally
commute Respondent’s Sentence to Life imprisonment, and grant such further relief
as the Court deems appropriate.

Respectfully submitted,

Sean D. O’Brien, Mo. Bar 30116
Public Interest Litigation Clinic
305 East 63rd Street
Kansas City, MO 64113
816-363-2795 · Fax 816-363-2799

Nancy A. McKerrow, Mo. Bar 32212
Office of State Public Defender
3402 Buttonwood Drive
Columbia, MO 65201
573-882-9855 · Fax 573-875-2594

Attorneys for Mr. Parkus

86

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme
Court Rule 84.06(b)/Local Rule 360 of this Court and contains 16,928 words,
excluding the cover, this certification and the appendix, as determined by

WordPerfect

9 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, postage prepaid, this 14th day of August,

2006, to:

Mr. Stephen D. Hawke

Assistant Attorney General

P. O. Box 899

Jefferson City, MO 65101

Stephen.Hawke@ago.mo.gov

Counsel for Appellant

Mary Tansey, General Counsel

Missouri Dept. of Mental Health

P. O. Box 687

Jefferson City, MO 65102

Counsel for amicus curiae Missouri Department of Mental Health

Daniel Gibson

Department of Corrections

2729 Plaza Drive

Jefferson City, MO 65101

Counsel for Petitioner Missouri Department of Corrections

87

Sean D. O'Brien

ADDENDUM

A-1