IN THE MISSOURI SUPREME COURT

RONALD JOHNSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	APPEAL NO. SC97330
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
ON TRANSFER FROM THE MISSOURI COURT OF APPEALS,
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
22nd JUDICIAL CIRCUIT,
THE HONORABLE STEVEN OHMER
JUDGE AT PLEA, SENTENCING &
POST-CONVICTION PROCEEDINGS

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT AND TIMING STATEMENT

Ronald Johnson pleaded guilty on August 10, 2010 to murder in the first degree and a sentence of life without the possibility of parole, as well as concurrent 10 year sentences for armed criminal action, robbery in the first degree and armed criminal action in the 22nd Judicial Circuit, before the Honorable Steven Ohmer. The court sentenced Ronald to life without the possibility of probation or parole on December 19, 2012.

Ronald moved for post-conviction relief once he was sentenced to the department of corrections. He filed his *pro se* motion on June 6, 2013, within 180 days of his delivery. Transcripts were filed on December 18, 2013, and after a request for a 30 day extension was granted, Robert Lundt with the public defender filed an amended motion on March 18, 2013, 90 days from the filing date of the transcript. An evidentiary hearing was held, and this appeal follows that denial.

This appeal does not involve any of the categories reserved for the exclusive jurisdiction of the Missouri Supreme Court and the Missouri Court of Appeals of the Eastern District had jurisdiction. Mo. Const. art. V, § 3. However, this Court Granted transfer after opinion, with the transfer order entered on October 30, 2018. Thus this Court has jurisdiction on appeal. Mo. Const. Art V §10.

STATEMENT OF FACTS

Ronald Johnson was diagnosed as having mild mental retardation[1] when he was ten years old. (Pcr Tr [2]at 31). His IQ was 53. (Pcr Tr at 33). He would spend the rest of his time in school in special classes due to this disability, until he dropped out in the tenth grade. (Pcr Tr at 73, Lf 39). He would never score above a 64 on an IQ test for the duration of his life. (Pcr Tr at 54, Exhibit 3).

Ronald's intellectual limitations were not his only disability. He also suffered from a seizure disorder. (Pcr Tr at 60-2). In addition, he developed schizophrenia as a young adult. Without medication he suffered from active hallucinations, and he was repeatedly hospitalized (Pcr Tr at 60-2, Exhibit 3). Ronald was on disability for his cognitive issues, and had been since he was a child. (Lf at 39).

Ronald began dating a man by the name of Cleophus King when Ronald was in his late teens. (Pcr Tr at 50, H. Tr at 46-8). Cleophus was larger than Ronald, and significantly older. Ronald was scared of Cleophus. (Pcr Tr at 50, H. Tr at 46-8). Eventually, Cleophus used Ronald as a lure for a murder and robbery, wherein a local attorney was murdered via strangulation, beating and stabbing.

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[1] The term mental retardation is now viewed as offensive. Counsel apologies for any offense caused by its use in this brief. However, throughout most of the pendency of Ronald's case the official term in Missouri for what is now called intellectual disability was "Mental retardation" and it is also the term used throughout Ronald's medical records.

[2] The Transcript of the Plea and Sentencing will be referenced as TR, the hearing to with the plea as H Tr and the PCR transcript as Pcr Tr. The under lying legal file will be referenced as Lf, the legal file from the Pcr as Pcr Lf.

(Lf at 29, 40-1). Ronald would admit to being a participant in the killing during court proceedings. (Lf at 40-1). Audio of the incident captured the victim shouting for help from Ronald, and then anyone else, and Ronald not responding. (Pcr Tr at 37) Ronald's attorney would note the fact that Ronald did not leave was one of the worst pieces of evidence. (Pcr Tr at 45). Ronald went with Cleophus to hide the body, and used the decedent's credit cards. (Lf at 40-41).

Both Ronald and Cleophus were charged with murder in the first degree. (Lf at 29, 41) The State announced its intent to seek the death penalty against both men. (Exhibit 1, Pcr Tr at 5-6). Ronald retained private counsel, Cleveland Tyson. Mr. Tyson became concerned that Ronald might not be competent after interacting with him. (Pcr Tr at 44). A psychiatric examination performed by the Missouri Department of Mental Health stated that Ronald had an IQ of 53, and diagnosed him "Mild Mental Retardation v. Borderline Intellectual Functioning." (Pcr Tr at 30-1). Mr. Tyson also requested Ronald's school records, showing that Ronald had a diagnosis of mental retardation, and that he had been in special education from the age of 10, until he dropped out early in high school. (Pcr Tr at 34-35). Mr. Tyson noted, during the evidentiary hearing in the matter, that he "… had concerns about his mental ability to understand what's going on or his mental ability." (Pcr Tr at 44). However, it did not occur to Mr. Tyson, despite the mental examination and school records showing a diagnosis of mental retardation

and an IQ of 53, that Ronald might have mental retardation and as such be ineligible for the death penalty. (Pcr Tr at 44).

At the later evidentiary hearing in this case, Cleveland summarized his knowledge of the interaction between Ronald's intellectual disability and the death penalty as follows:

> Q. Are you familiar with *Atkins vs. Virginia*?
>
> A. Vaguely.
>
> Q. Do you know the [holding of][3] *Atkins vs. Virginia*?
>
> A. Not offhand.
>
> Q. Are you familiar with *Hall vs. Florida*?
>
> A. No.
>
> Q. Is someone who suffers from mental retardation eligible for the death penalty?
>
> A. I do not believe so.
>
> Q. Did you discuss this with Mr. Johnson?
>
> A. I did not believe that Mr. Johnson was found to be mentally -- have mental retardation. Close to it, but not mental retardation.
>
> Q. What is the definition of mental retardation?

[3] A scriveners error in the transcript renders this as "whole."

A. I'm not a doctor. I don't know. I just know that in my -- my relationship with Mr. Johnson and in speaking with him, that I did not believe that he suffered from mental retardation.

Q. Are you familiar with the standards that have been used by the U.S. Courts?

A. I don't know what -- I don't understand the question.

Q. What standard of the definition of mental retardation was used?

A. I don't know. If you provide me with it, I could tell you.

Q. Did you know at the time?

A. I did not believe he was mentally retarded.

Q. But you did not know what the definition was?

A. It was -- just never even occurred to me to look.

(PCR Tr 31-3).

Ronald pleaded guilty to murder in the first degree to avoid the possibility of the death penalty. (Pcr Tr at 75, Lf at 38). Avoiding the possibility of the death penalty was the sole reason he pleaded guilty to a sentence of life without parole. (Pcr Tr at 75). As a condition of being spared from the threat of death, Ronald was also to testify against Cleophus King. (H.Tr.4). On March 7, 2012 the court held a hearing upon the state's motion to withdraw Ronald's plea (H.Tr.4). The State moved to withdraw the plea because Ronald would no longer testify. *Id.*

Ronald testified that he was afraid that his co-defendant, Cleophus King, would kill him if he did not do what Cleophus wanted him to do (H.Tr. 46-48). Through a series of letters with Cleophus, Ronald agreed to commit suicide and let Cleophus put the entire case on him (H.Tr. 56). Ronald thought that if he did not do what Cleophus told him to, that Cleophus would murder Ronald. The court determined that Ronald was "intellectually slow and under the influence of Cleophus King." (Order dated June 19, 2012). The court further found that Ronald's lack of cooperation was a result of intimidation by his co-defendant and he did not breach his plea agreement (Order dated June 19, 2012).

Ronald then filed for post conviction relief. His post-conviction raised three points of error: That Ronald's attorney coerced him to plea guilty through the threat of the possibility of the death penalty, since Ronald was never death eligible; that Ronald was not competent to plead guilty, and never would be competent; and that Ronald's attorney was ineffective for not challenging the state mental examination in his case, because it failed to meet professional minimums on its face. (Lf 95-97). Ronald's post-conviction relief attorney had the mental examination performed by the State analyzed by Dr. Patricia Zapf. (Exhibit 1, Pcr Tr 5-6). Dr. Zapf is a professor at the John Jay College of Criminal Justice at the City University of New York. She is licensed in Missouri, Florida, New York and Alabama as a psychologist and has been a Certified Forensic Examiner since

2001. (Exhibit 1). She has been involved in training forensic psychologists since 2002 and has been the Director of Clinical Training and the Deputy Director for the PhD program in forensic psychology at John Jay College of Criminal Justice. (Exhibit 1, Pcr Tr 5-6). Dr. Zapf has completed numerous forensic evaluations. She has also been involved in writing and publishing manuals and books about the proper method to evaluate individuals in the forensic assessment of competence and responsibility. (Exhibit 1, Pcr Tr 5-6). She had conducted training on best practices in conducting mental evaluations in Missouri at the request of the head of the Missouri Department of Health. (Pcr Tr at 6).

Dr. Zapf found the competency examination did not meet basic professional standards. (Pcr Tr 11-12). At the evidentiary hearing, she testified that the examination showed a failure to include any independent testing, failed to gauge rational understanding, failed to control for the dangers of the over acquiescence of people with intellectual disabilities, and included irrelevant material. (Pcr Tr 12-19).

Post-conviction counsel also had Ronald evaluated by Dr. Robert Fucetola, a neuro-psychiatrist. Dr. Fucetola determined that Ronald's present full scale I.Q. is 63 (Pcr Tr at 55). He also suffers from schizophrenia among other impairments. (Pcr Tr at 55-9). According to Dr. Fucetola, the intelligence score alone indicates severe deficits in all areas of understanding and ability in Ronald's daily life. (Pcr

Tr at 55-9). Dr. Fucetola testified Ronald suffers from impairments in his reasoning ability and his understanding of the legal process. (Pcr Tr at 55-60). He also would struggle with any abstract thought or acting in his own interest. (Pcr. Tr at 55-60). He had the receptive vocabulary of an 8 year old. (Pcr Tr 67). Ronald's IQ was in the bottom first percentile of intellectual functioning. (Pcr Tr at 55-9).

Furthermore, Dr. Fucetola concluded that Ronald did not have an ability to assist his attorneys in his own defense. (Pcr. Tr at 55-60). He could not meet the legal standard for competency and suffered from mental retardation. (Exhibit 3). Dr. Fucetola also opined that the mental examination he reviewed in the case did not meet the basic standards of the field of psychiatry. (Pcr Tr at 63).

Ronald's first post-conviction attorney withdrew, and undersigned counsel entered. An evidentiary hearing was granted and held. After an evidentiary hearing where plea counsel and the two psychiatric experts testified, the petition was denied. (Lf at 160-7). The Circuit Court reasoned that a jury could have believed that Ronald was not suffering from mental retardation, and that only a plea of guilty would remove the threat of the death penalty. (Lf at 165). The circuit court further ruled that Ronald was competent, and that there was no reason to challenge the report by the Department of Mental Health. (Lf at 166).

FIRST POINT RELIED ON

The motion court clearly erred when it denied Ronald's motion for post-conviction relief following a hearing because Ronald proved by a preponderance of the evidence that he was denied his rights to effective assistance of counsel, due process of law, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §10 and § 18(a) of the Missouri Constitution, when his attorney coerced him to enter a plea of guilty to life without parole for murder in the first degree by using the threat of the death penalty to induce a plea. This is error in that a reasonably competent attorney would have known that Ronald, who had a diagnosis of mental retardation, and whose IQ was listed as 53 in every record reviewed by plea counsel, was not eligible to be executed, and a reasonably competent attorney would not have informed Ronald he was at risk for the death penalty if he did not plead guilty. But for plea counsel's unreasonable advice and lack of knowledge, Ronald would not have been coerced into pleading guilty to a sentence of life without parole in a manner that was neither knowing, voluntary, nor intelligent.

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

Rule 24.035

Mo. Const. art. I, § 10, 18(a)

U.S. Const. amend. V,VI, XIV

SECOND POINT RELIED ON

The motion court clearly erred when it denied Ronald's motion for post-conviction relief following a hearing because Ronald proved by a preponderance of the evidence that he was denied his rights to effective assistance of counsel, due process of law, and protection from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 18(a) and 19 of the Missouri Constitution when his attorney never challenged the sufficiency of his mental examination. This was error in that the mental examination in this case was deficient on its face and reasonably skilled counsel would have known to exercise his statutory right to a second independent exam meeting at least minimal professional standards.

Van Ralston v. State 824 S.W.2d 75 (Mo.App. E.D. 1991)

Rule 24.035

Mo. Const., Article I, §§10, 18(a)

U.S. Const., Amends. V ,VI, XIV

THIRD POINT RELIED ON

The motion court clearly erred when it denied Ronald's motion for post-conviction relief following a hearing because Ronald proved by a preponderance of the evidence that he was denied his rights to effective assistance of counsel, due process of law, and protection from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 18(a), and 19 of the Missouri Constitution and RSMO § 556.041 when he was found to be competent to plead guilty. Ronald proved by a preponderance of the evidence that he was not and is not competent to proceed because of his mental disabilities.

Van Ralston v. State 824 S.W.2d 75 (Mo.App. E.D. 1991)

Rule 24.035

Mo. Const., Article I, §§10, 18(a)

U.S. Const., Amends. V ,VI, XIV

ARGUMENT FOR FIRST POINT

The motion court clearly erred when it denied Ronald's motion for post-conviction relief following a hearing because Ronald proved by a preponderance of the evidence that he was denied his rights to effective assistance of counsel, due process of law, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §10 and § 18(a) of the Missouri Constitution, when his attorney coerced him to enter a plea of guilty to life without parole for murder in the first degree by using the threat of the death penalty to induce a plea. This is error in that a reasonably competent attorney would have known that Ronald, who had a diagnosis of mental retardation, and whose IQ was listed as 53 in every record reviewed by plea counsel, was not eligible to be executed, and a reasonably competent attorney would not have informed Ronald he was at risk for the death penalty if he did not plead guilty. But for plea counsel's unreasonable advice and lack of knowledge, Ronald would not have been coerced into pleading guilty to a sentence of life without parole in a manner that was neither knowing, voluntary, nor intelligent.

Standard of Review

Appellate review of a motion for post-conviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. *Roberts v. State*, 276 S.W.3d 833, 835 (Mo 2009). Findings of fact and conclusions of law are clearly erroneous if the appellate court, upon review of the record, is left with the definite and firm impression that a mistake has been made. *Id.* Appellant carries the burden of proving this by a preponderance of the evidence. *Id.*

Analysis

Ronald Johnson was denied effective assistance of counsel, due process, and was subjected to cruel and unusual punishment in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution in that his trial counsel, Cleveland Tyson, coerced him into pleading guilty by the threat of the state seeking the death penalty if he were to take the case to trial. Ronald's guilty pleas were not voluntarily, knowingly and intelligently made because they were the result of plea counsel's failure to act in a reasonably competent manner leading Ronald into entering his pleas of guilty under the false, coercive threat of the death penalty. This threat was illusory, because the state could not sentence a man suffering from mental retardation to death. Counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would have

exercised under similar circumstances by failing to advance the defense of mental retardation. But for counsel's ineffectiveness, Ronald would not have entered a plea of guilty, but would have insisted on going to trial.

If Appellant's pleas were the product of "…fraud, mistake, misapprehension, fear, coercion or promises, [he] should be permitted to withdraw his guilty plea." *Tillock v. State*, 711 S.W.2d 203, 205 (Mo. App. S.D. 1986) (citing *Latham v. State*, 439 S.W.2d 737, 739 (Mo. banc 1969)).

In 2002 the Supreme Court of the United States decided *Atkins v. Virginia*, 536 U.S. 304 (2002). The high court barred the states from condemning to death individuals who suffer from mental retardation. 536 U.S. at 306. The court held that the Eighth Amendment prohibition against cruel and unusual punishment prohibits putting to death persons who, "because of their disabilities in areas of reasoning, judgment, and control of their impulses, … do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* "The state has a clear legal duty not to execute a person who is mentally retarded." *In re Competency of Parkus*, 219 S.W.3d 250, 254 (Mo. banc 2007). In *Johnson v. State*, the Missouri Supreme Court noted the "bright-line test that a defendant that can prove mental retardation by a preponderance of the evidence, as set out in section 565.030.6, shall not be subject to the death penalty." 102 S.W.3d 535, 540

(Mo. banc 2003). RSMO 565.030, as in effect at the time of Ronald's plea, for its part read:

> 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.

RSMO §565.030.6 (2000)

Intellectual disability (still termed "mental retardation" in Missouri law at the time of Ronald's amended motion, and referred to as mental retardation throughout the cited case law) is viewed as an intellectual impairment, with commensurate deficits in adaptive behavior, with an onset prior to 18 years of age. In the context of death penalty law, it has been presumed to occur in those with an IQ under 70, or, those with an IQ over 70 who show severe deficits in functioning that would otherwise qualify them as disabled. *See, e.g*., Diagnostic and Statistical Manual of Mental Disorders IV (DSM–IV), *Atkins v. Virginia*, 536 U.S. 304 (2002). It is in the second category that there has been the most

litigation and controversy. *See, e.g., Hall v. Florida*, 572 U.S. 701 (2014). Although an IQ consistently below 70 generally shows intellectual disability, as it is more likely to be accompanied by the second prong of adaptive behavior deficits, it is always more difficult to prove that someone with a higher IQ is so impaired that they would not be able to function. *Id.*

It is undisputed that Ronald Johnson is intellectually disabled, or more archaically, has mental retardation. He was first diagnosed as a ten-year old in elementary school. (Pcr Tr 30-4). He was in special education his entire time in school. He received disability payments for his disability, and could not complete high school. Even the State Psychiatric examination shows a finding of "mild mental retardation v. borderline intellectual functioning" and an IQ of 53. (Armour Report, p 17). He has notable and pervasive deficits in his adaptive behavior, and has never been able to be in a regular class room, has been on disability, and struggles to engage in abstract reasoning or act in his own interest. (Pcr Tr at 55-9, 73, Lf 39). His attorney noticed he had difficulty understanding what was going on in his case. Even the judge who denied the amended motion in this case noted Ronald was "intellectually slow and under the domination of his codefendant." (Order dated June 19, 2012). He has never scored above a 63 on any IQ test. (Pcr Tr at 54, Exhibit 3). A full neuro-psychiatric examination reaffirmed what has been well established since Ronald was first diagnosed with mental retardation as a

10 year old-- Ronald has an intellectual disability, known when his case was litigated as mental retardation. (Pcr Tr at 55, Exhibit 3). He was never, and will never be eligible for the death penalty. (Pcr Tr at 55, Exhibit 3).

But Ronald's plea attorney did not know that. Ronald's plea attorney in fact did not know what mental retardation was. He offered the following at hearing:

> Q. Are you familiar with *Atkins vs. Virginia*?
>
> A. Vaguely.
>
> Q. Do you know the [holding of][4] *Atkins vs. Virginia*?
>
> A. Not offhand.
>
> Q. Are you familiar with *Hall vs. Florida*?
>
> A. No.
>
> Q. Is someone who suffers from mental retardation eligible for the death penalty?
>
> A. I do not believe so.
>
> Q. Did you discuss this with Mr. Johnson?
>
> A. I did not believe that Mr. Johnson was found to be mentally -- have mental retardation. Close to it, but not mental retardation.
>
> Q. What is the definition of mental retardation?

[4] A scriveners error in the transcript renders this as "whole."

A. I'm not a doctor. I don't know. I just know that in my -- my relationship with Mr. Johnson and in speaking with him, that I did not believe that he suffered from mental retardation.

Q. Are you familiar with the standards that have been used by the U.S. Courts?

A. I don't know what -- I don't understand the question.

Q. What standard of the definition of mental retardation was used?

A. I don't know. If you provide me with it, I could tell you.

Q. Did you know at the time?

A. I did not believe he was mentally retarded.

Q. But you did not know what the definition was?

A. It was -- just never even occurred to me to look.

(PCR Tr 31-3).

Ronald's attorney, at the same hearing, admitted he had gone through the Court's psychiatric exam, and seen Ronald's school records which labeled him as having mental retardation. (Pcr Tr 29-30). Despite this it "just never occurred to [him] to look" at what the definition of mental retardation was. (Pcr Tr 31-3). Instead he *sua sponte* decided Ronald was not suffering from an intellectual disability or mental retardation, and should plead guilty to life without the possibility of parole to avoid the death penalty.

Despite this, the Court in its findings ruled that the plea should stand because it was possible that a jury could have found that Ronald was not mentally retarded, and as such his attorney had a reasonable strategy. (Lf 164-6). Admittedly, under Missouri Law, a finder of facts has the ability to believe or disbelieve evidence. *Jackson v. State,* 433 S.W.3d 390 (Mo 2014). Yet this is a case where regardless of what witness one believes, state or defense, which records one credits, state or defense, the same result is reached: every test and every record shows Ronald with an IQ well under 70, with severe functional deficits in his adaptive behavior. (Pcr Tr at 30-3, 54, 55, 73, Lf 39, Exhibit 3). The dictates of *Jackson* do not trump the dictates of *Atkins* and *Hall*, but must be read in harmony with them. The US Supreme Court has been clear-- State procedures have great leeway, but must be crafted to avoid the risk of someone with Mental retardation receiving the death penalty. *See, Moore v. Texas,* 581 U.S. ___, 137 S.Ct. 1039 (2017) (holding that states may not use procedures to determine who has intellectual disability or mental retardation that are so narrow as to risk the execution of a person with an intellectual disability or mental retardation).

Worse, in the case at bar, Mr. Tyson's advice that Ronald could be subject to the death penalty was not based on a hypothetical concern that somehow a jury would disbelieve the state, the defense, the department of mental health and the public school system. Instead Mr. Tyson's decision was based in unmitigated

ignorance of the law. (Pcr Tr 31-33). The threat of lethal injection is inherently coercive, and Ronald's plea was not truly knowing, intelligent and voluntary.

The Court attempted to bolster its finding by relying on *Thurman v. State*, 424 S.W.3d 456 (Mo. App. E.D. 2014). However, the Court ignores the actual holding and standard applied in *Thurman*.

Thurman is a case about a procedural default, containing some discussion regarding mental retardation and the death penalty. *Thurman v. State*, 424 S.W.3d 456 (Mo. App. E.D. 2014). In *Thurman*, an individual alleged that his attorney misadvised him on whether or not he should plead guilty. *Id* at 460-1. However, Mr. Thurman failed to allege that but for this poor advice, he would have gone to trial. Id. Further, even if this procedural default was ignored, the evidence of Mr. Thurman's mental retardation was, at best, dubious. *Id*. Mr. Thurman's IQ was low, but it was above 70 in all tests referenced in the opinion. *Thurman* at 460-1, (placing Mr. Thurman's IQ at 72). There was no presumption of disability in Thurman's case. There was a very real chance that Mr. Thurman would never have been able to put on sufficient evidence that he was intellectually disabled. *Id*. (noting dubious evidence of intellectual disability). Mr. Thurman's attorney, given this dubious evidence, very well could have made a reasonable strategy decision to not attempt to make a difficult, high risk case. Further distinguishing this case, Mr. Thurman's post-conviction appeal attorney procedurally defaulted on several

aspects of his case. *Id.* Despite the lack of an evidentiary hearing, the post-conviction appeal attorney never appealed the denial of the hearing, and asked the court to rule on the record before it-- meaning Mr. Thurman put on no evidence to rebut the presumption of reasonable trial strategy, then did not ask for that opportunity on appeal. This is the opposite of Ronald's case where he has consistently been found to be intellectually disabled or have mental retardation, has an IQ well under 70, has, since he was 10 years old, been treated for said mental retardation or intellectual disability, and presented multiple experts on the degree of his impairment at a hearing.

Finally, there is prejudice in this case. Ronald's sole reason for waiving his trial rights was that he was afraid of the possibility of death. Had he gone to trial, he had multiple options for a defense based on his mental health issues, as well as his ability to have the requisite mental state for murder in the first degree. There was the real chance that at any trial, Ronald may have been found not guilty by reason of insanity or mental defect, or that he would have been found guilty of only a lesser offense. Ronald gave up all of these chances to avoid an illusory threat, levied by an attorney ignorant of the law.

The motion court clearly erred when it upheld this plea of guilty. The death penalty was not a real threat to Ronald. There is overwhelming evidence that

Ronald is mentally retarded and not eligible for the death penalty. The plea of guilty should be set aside.

ARGUMENT FOR SECOND POINT

The motion court clearly erred when it denied Ronald's motion for post-conviction relief following a hearing because Ronald proved by a preponderance of the evidence that he was denied his rights to effective assistance of counsel, due process of law, and protection from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 18(a) and 19 of the Missouri Constitution when his attorney never challenged the sufficiency of his mental examination. This was error in that the mental examination in this case was deficient on its face and reasonably skilled counsel would have known to exercise his statutory right to a second independent exam meeting at least minimal professional standards.

Standard of Review

Appellate review of a motion for post-conviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. *Roberts v. State*, 276 S.W.3d 833, 835 (Mo 2009). Findings of fact and conclusions of law are clearly erroneous if the appellate court, upon review of the record, is left with the definite and firm impression that a mistake has been made. *Id.* Appellant carries the burden of proving this by a preponderance of the evidence. *Id.*

Analysis

Ronald Johnson was denied effective assistance of counsel, due process, and was subjected to cruel and unusual punishment in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a) and 21 of the Missouri Constitution in that his trial counsel, Cleveland Tyson, failed to object to the court ordered psychological evaluation and ask for an independent, properly conducted evaluation. Counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under similar circumstances. Ronald was prejudiced as a result, in that had counsel not been ineffective, there is a reasonable probability that the outcome of the proceedings would have been different. *See Williams v. Taylor*, 529 U.S. 362, 390-91 (2000); *Strickland v. Washington*, 466 U.S. 668, 694 (1984). That is, Ronald would have been found to be not competent to stand trial or plead guilty.

Any attorney versed in mental health law would have recognized that the mental examination in this cause was deficient, and requested a second examination as explicitly permitted by statute in such a situation. *See*, RSMO§§ 552.020 and 552.030. Although an attorney is not a psychiatrist, any attorney who had the requisite knowledge to competently litigate a mental health case would have requested a second examination in this cause.

Ronald Johnson's post-conviction attorney had the mental examination performed by the State analyzed by Dr. Patricia Zapf. (Exhibit 1, Pcr Tr 5-6). Dr. Zapf is a professor at the John Jay College of Criminal Justice at the City University of New York. She is licensed in Missouri, Florida, New York and Alabama as a psychologist and has been a Certified Forensic Examiner since 2001. (Exhibit 1). She has been involved in training forensic psychologists since 2002 and has been the Director of Clinical Training and the Deputy Director for the PhD program in forensic psychology. (Exhibit 1, Pcr Tr 5-6). Dr. Zapf has completed numerous forensic evaluations. She has also been involved in writing and publishing manuals and books about the proper method to evaluate individuals in the forensic assessment of competence and responsibility. (Exhibit 1, Pcr Tr 5-6). She had conducted training on best practices in conducting mental evaluations in Missouri at the request of the head of the Missouri Department of Mental Health. (Pcr Tr at 6).

Dr. Zapf found the competency examination did not meet basic professional standards. (Pcr Tr 11-2). At the evidentiary hearing, she testified that the examination showed a failure to include any independent testing, failed to gauge rational understanding, failed to control for the dangers of the over acquiescence of people with intellectual disabilities, and included irrelevant material. (Pcr Tr 12-9).

Post-conviction counsel also had Ronald evaluated by Dr. Robert Fucetola, a nuero-psychiatrist. Dr. Fucetola determined that Ronald's present full scale I.Q. is 63 (Pcr Tr at 55). He also suffers from schizophrenia among other impairments. (Pcr Tr at 55-9). According to Dr. Fucetola, the intelligence score alone indicates severe deficits in all areas of understanding and ability in Ronald's daily life. (Pcr Tr at 55-9). Dr. Fucetola testified Ronald suffers from impairments in his reasoning ability and his understanding of the legal process. (Pcr Tr at 55-60). He also would struggle with any abstract thought or acting in his own interest. (Pcr Tr at 55-60). He had the receptive vocabulary of an 8 year old. (Pcr Tr at 67). Ronald's IQ was in the bottom first percentile of intellectual functioning. (Pcr Tr at 55-9).

Furthermore, Ronald did not have an ability to assist his attorneys in his own defense. (Pcr. Tr at 55-60). He could not meet the legal standard for competency and suffered from mental retardation. (Pcr Tr at5-60, Exhibit 3). Dr. Fucetola also opined that the mental examination he reviewed in the case did not meet the basic standards of the field of psychiatry. (Pcr Tr at 63).

Effective counsel would have challenged the finding of the Department of Mental Health, and moved for a second independent examination under RSMO §552.020.

It is a *per se* due process violation for an incompetent client to be tried or to be allowed to enter a plea of guilty. *See e.g.*, *Van Ralston v. State* 824 S.W.2d 75, 78 -79 (Mo.App. E.D. 1991). Although post-conviction relief does not usually lie where trial counsel fails to challenge a competency examination, there are exceptions. *See, e.g.*, *Van Ralston v. State* 824 S.W.2d 75, 78 -79 (Mo.App. E.D. 1991). Where the record refutes a finding of competence, the motion court may find that trial was ineffective for failing to address the matter of competency. *See, Gooden v. State*, 846 S.W.2d 214, 218 (Mo.App. S.D. 1993)("Absent a perceived shortcoming in a mental evaluation report or a manifestation of a mental disease or defect not identified by a prior report, an attorney representing a defendant in a criminal case is not compelled to seek further evaluation").

Here the record shows that competency evaluation failed to meet any professional standards. The evaluation did not feature any independent testing. (Pcr Tr 11-9). It had no controls to deal with the client's known disabilities. It gave no opinion on the clients ability to rationally understand the proceedings against him. (Pcr Tr 11-9). It was, on its face, insufficient.

Further, nothing indicates that counsel had a strategic reason for avoiding a second mental evaluation. *Schneider v. State*, 787 S.W.2d 718, 720 (Mo. 1990) (Allowing counsel to forgo a second mental evaluation for stated strategic reasons). Counsel did not seek a second mental examination because he did not

think Ronald had mental retardation. But counsel also testified that he had no idea what the definition of mental retardation was, nor did he make any effort to look it up, despite the school records and court-ordered psychiatric exam indicated that Ronald had mental retardation. (Pcr Tr 30-5). In this case counsel's decision was not based on strategy-- it was based on ignorance and an utter failure to investigate the legal standards at issue.

But for counsel's deficient performance Ronald would not have been found competent to proceed. The motion court's finding that it was reasonable for counsel, who did not know what mental retardation was, to summarily decide to trust in an inadequate report is clearly in error and must be set aside.

ARGUMENT FOR THIRD POINT

The motion court clearly erred when it denied Ronald's motion for post-conviction relief following a hearing because Ronald proved by a preponderance of the evidence that he was denied his rights to effective assistance of counsel, due process of law, and protection from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10, 18(a), and 19 of the Missouri Constitution and RSMO § 556.041 when he was found to be competent to plead guilty. Ronald proved by a preponderance of the evidence that he was not and is not competent to proceed because of his mental disabilities.

Standard of Review

Appellate review of a motion for post-conviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. *Roberts v. State*, 276 S.W.3d 833, 835 (Mo 2009). Findings of fact and conclusions of law are clearly erroneous if the appellate court, upon review of the record, is left with the definite and firm impression that a mistake has been made. *Id.* Appellant carries the burden of proving this by a preponderance of the evidence. *Id.*

Analysis

To avoid needless repetition, Ronald restates the arguments about his competency in Point II- Deficient mental evaluation.

As discussed in Point II, Ronald was found incompetent by Dr. Fucetola, a neuro-psychiatrist. Specifically Dr. Fucetola found that based on Ronald's IQ alone, he would have had severe deficits in functioning that would have lead him to be unable to aid in his own defense. (Pcr Tr at 58.) In addition to that, Dr. Fucetola noted that Ronald would be easy to lead or coerce, and that he could only have the most elementary understanding of the charges against him. (Pcr Tr at 58-9). He had the receptive vocabulary of an eight year old child. (Pcr Tr at 67). Ronald would have had severe deficits in abstract thinking, and would have struggled to deal with unexpected situations or making decisions in his own interest. (Pcr Tr at 55). He would have trouble planning behavior. (Pcr Tr at 55). He could not assist an attorney in any meaningful way. (Pcr Tr at 55-9).

In addition the doctor found that Ronald had HIV, a seizure disorder, and paranoid schizophrenia. (Pcr Tr at 60). Ronald had been hospitalized repeatedly for paranoid delusions. (Pcr Tr at 59-61). This would also have impacted his ability to work with an attorney.

Ronald was not competent to proceed. (Pcr Tr at 55-60, Exhibit 3). He was only found competent, as discussed in Point II, due to an inadequate examination,

and an inadequate lawyer. The motion court clearly erred in upholding a plea of guilty by an incompetent individual.

CONCLUSION

WHEREFORE, based on the arguments as set forth in this brief, appellant Ronald Johnson respectfully requests this Honorable Court to vacate his plea and sentence or such other relief as this Court sees fit.

Respectfully submitted,

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Davis ron**CERTIFICATE OF SERVICE**

Pursuant to Missouri Supreme Court Rule 84.06(h) and Special Rule 363, I hereby certify that on this 19th day of November 2018 a true and complete copy of the foregoing was submitted to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, daniel.mcpherson@ago.mo.gov, via the Missouri e-filing system, care of Mr. Daniel McPherson, Office of the Attorney General.

/s/ Amy E. Lowe_____
Amy E. Lowe

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 14 point font, and does not exceed 15,500 Words. The word-processing software identified that this brief contains 7130 words, and 38 pages including the cover page, signature block, and certificates of service and of compliance. In addition, I hereby certify that this document has been scanned for viruses with Symantec Endpoint Protection Anti-Virus software and found virus-free.

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