

**Summary of SC90582, *Ernest Johnson v. State of Missouri***

Appeal from the Boone County circuit court, Judge Gene Hamilton  
Argued and submitted Dec. 7, 2010; opinion issued March 1, 2011

**Attorneys:** Johnson was represented by William J. Swift of the public defender's office in Columbia, (573) 882-9855; and the state was represented by Evan J. Buchheim and Shaun J. Mackelprang of the attorney general's office in Jefferson City, (573) 751-3321.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A defendant convicted of a triple murder and sentenced to death appeals the circuit court's judgment overruling his motion for post-conviction relief. In a unanimous decision written by Judge Zel M. Fischer, the Supreme Court of Missouri affirms the judgment. It was reasonable trial strategy for the defendant's counsel to present evidence from a special education expert that the defendant is retarded rather than calling a witness whose testimony would have been cumulative to other evidence in the record. It also was reasonable trial strategy for counsel not to present evidence that another person orchestrated the crime and that the defendant was acting under this person's substantial domination. The defendant was not prejudiced by his counsel's failure to admit into evidence an expert's deposition and his mother's mental health records, as both would have been cumulative to evidence already presented. It was reasonable trial strategy for the defendant's counsel not to object to the admission of portions of a videotaped evaluation of the defendant. The circuit court did not clearly err in rejecting the defendant's claim that his counsel should have objected to questions about an expert's evaluation of whether he was competent to proceed to trial. Finally, the defendant failed to show the circuit court clearly erred in finding he did not show the statutory death penalty scheme is unconstitutional, especially given that the study on which he relied was "severely flawed," and he failed to preserve for appellate review his claim that the county in which he was tried has a disproportionate number of death sentences.

**Facts:** Ernest Lee Johnson was convicted of first-degree murder in the 1994 deaths of three employees of a Casey's convenience store in Columbia. This Court affirmed his convictions in *State v. Johnson*, 968 S.W.2d 686 (Mo. banc 1998) (*Johnson I*). Following his third penalty-phase trial, Johnson was sentenced to death. This Court affirmed his death sentence in *State v. Johnson*, 244 S.W.3d 144 (Mo. banc 2008) (*Johnson IV*). Johnson then sought post-conviction relief. After an evidentiary hearing in which the circuit court received testimony from three mental-health professionals, Johnson's third penalty-phase attorneys and several other witnesses relating to guilt-phase testimony, the circuit court overruled Johnson's motion. Johnson appeals.

**AFFIRMED.**

**Court en banc holds:** (1) It was reasonable trial strategy for Johnson's counsel to present evidence from Dr. Denis Keyes, who holds his doctorate in special education and who testified Johnson is mentally retarded, rather than calling a different witness who was an expert in fetal alcohol syndrome. The fact that this Court found in a different case that Keyes' testimony did not

have the evidentiary support or reliability necessary to warrant relief in that case does not make Keyes an incredible or unreliable witness *per se*. The jury here did not hear about the other case, and the circuit court in Johnson's case determined that this Court had based its decision in the other case on the particular facts elicited there, not on the background that Keyes would provide in Johnson's case. Although Keyes misspoke during his testimony in Johnson's case, he corrected these misstatements either on his own or with the assistance of counsel, and these minor misstatements do not show Keyes was unqualified or unprepared. Defense counsel here investigated Keyes and knew about his academic background, and although counsel was frustrated that Keyes wanted more time to prepare, there is no evidence Keyes provided testimony in the past that would have indicated to counsel that calling him would be harmful to Johnson. Keyes' testimony was favorable to Johnson's defense and did not question the science behind diagnosing mental retardation. Because another expert testified about the possibility that Johnson suffered from fetal alcohol syndrome, offering similar testimony from another expert would have been cumulative and only could have served to mitigate – not prevent – the death sentence. Moreover, the focus of Johnson's third penalty-phase trial was his mental retardation, and a jury finding that Johnson was mentally retarded would have precluded imposition of the death penalty. Further, it was not unreasonable to call Keyes as a witness even though he advocates for individuals who are mentally retarded. Johnson cites no cases holding that it is unreasonable to call an expert who advocates for individuals who are similarly situated to the defendant.

(2) Johnson's counsel were not ineffective for failing to present evidence that another person orchestrated the crime and that Johnson was acting under this person's substantial domination. Counsel testified at the post-conviction hearing that the third penalty-phase trial focused on mental retardation and that counsel made a strategic decision to focus on that aspect of the case and not go into the facts presented during the guilt-phase of the trial. This strategy was not unreasonable. In any event, this evidence would not have shown Johnson was acting under the other person's substantial domination. At most, it would have shown only that the other person was at Casey's the night of the murder, which would have contradicted the stipulation that counsel entered at the beginning of the penalty-phase trial that the only persons at Casey's that night were Johnson and the three victims.

(3) Johnson was not prejudiced by his counsel's failure to admit into evidence an expert's deposition and his mother's mental health records. The deposition did not provide any new or mitigating evidence and would have been cumulative of two other experts' testimony refuting the state's argument that Johnson was not mentally retarded. Similarly, the mother's mental health records were cumulative of evidence already admitted. One expert testified that Johnson's mother used alcohol during her pregnancy, and the jury heard evidence presenting a clear picture of Johnson's family history.

(4) The circuit court did not commit clear error in finding Johnson's trial counsel were not ineffective for failing to object to portions of an expert's videotaped evaluation of Johnson. Counsel testified during the post-conviction hearing that she did not object because she believed the videotape showed that Johnson was mentally retarded and because part of the stipulation concerning the interview was that it be videotaped. This was reasonable trial strategy, and any objection counsel may have raised on the ground that Johnson had not waived his right against

self-incrimination before being interviewed would have been meritless because, by claiming he is mentally retarded, Johnson placed his mental condition into issue.

(5) The circuit court did not commit clear error in rejecting Johnson's claim that his counsel failed to object to questions about an expert's evaluation – before Johnson's third penalty-phase trial – of whether Johnson was competent to proceed to trial. This particular expert concluded that Johnson was not mentally retarded, but two other experts who testified during Johnson's penalty phase trial concluded that he was mentally retarded. Questions posed to these witnesses about the evaluating doctor's findings do not violate section 552.020.14, RSMo 2000, because they did not seek to elicit information about any statements made by Johnson or information the evaluator received. Instead, the questions were directed toward the evaluator's opinion about Johnson's mental retardation. Further, the statute only prohibits admission of an examiner's testimony as to the issue of guilt, and here, Johnson's guilt already had been established.

(6) Johnson failed to show the circuit court clearly erred in finding that he did not establish that the death penalty statutes are unconstitutional. To the extent he now claims that the imposition of the death penalty is arbitrary and capricious because Boone County has a disproportionate number of death sentences, he did not present this claim in his motion for post-conviction relief and, therefore, has failed to preserve it for appellate review. This Court has rejected claims that Missouri's statutory death penalty scheme is unconstitutional because it vests too much power in prosecutorial discretion. Further, the circuit court found the study on which Johnson relies for this claim was "severely flawed," with numerous misconceptions in its research and numerous flaws in its data, was incomplete, and was conducted by a professor with no professional or practical experience in criminal law.