IN THE
MISSOURI SUPREME COURT

PAUL GOODWIN,	)	
Appellant,	)	
vs.	)	No. SC 86278
STATE OF MISSOURI,	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 11
THE HONORABLE EMMETT O'BRIEN, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Paul Goodwin, was jury tried and convicted of first degree murder, § 565.020 RSMo 2000,[1] in the Circuit Court of St. Louis County. The jury assessed punishment at death and the trial court sentenced him accordingly. This Court affirmed in *State v. Goodwin*, 43 S.W.3d 805 (Mo. banc 2001).

Paul filed his *pro se* motion for post-conviction relief under Rule 29.15,[2] which appointed counsel amended. The motion court limited evidence to the claim of whether Paul is mentally retarded (L.F. 372-73, L.F. 444).[3] The court denied all other claims without a hearing. *Id*. The postconviction judge made factual findings that Paul is not retarded and refused to allow a jury to hear this evidence (L.F. 433, 444-79). Paul now appeals. Because a death sentence was imposed, this Court has exclusive appellate jurisdiction. Art. V, §3, Mo. Const. (as amended 1982); Standing Order, June 16, 1988.

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[1] All statutory references are to RSMo 2000, unless otherwise indicated.

[2] All references to rules are to VAMR, unless specified otherwise.

[3] Record citations are as follows: evidentiary hearing transcript (H.Tr.); legal file of 29.15 appeal (L.F.); trial transcript (Tr.); direct appeal legal file (D.L.F.); and exhibits (Ex.). Paul requests that this Court take judicial notice of its files in *State v. Goodwin*, S.Ct. No. 82205. Judge O'Brien took judicial notice of the trial transcript, legal file, and this Court's opinion at the evidentiary hearing (H.Tr. 1-2).

STATEMENT OF FACTS

The motion court heard evidence on a single issue, whether appellant, Paul Goodwin, is mentally retarded, denying all other 29.15 claims without a hearing (L.F. 372-73, L.F. 444). At the hearing, Paul's counsel called seven witnesses, including one expert on mental retardation, Dr. Denis Keyes, some of Paul's teachers and family members (H.Tr. 2-533). The State called four witnesses, including an expert, Dr. Richard Scott, who reviewed materials, but did not evaluate Paul (Tr. 574-750). The motion court also considered exhibits, including Special School District Records from Paul's childhood in special education, psychological reports, Paul's writings and drawings, and Paul's employment records (Exs. 1-20, A-V).

Movant's Evidence Of Mental Retardation

Childhood Problems

Paul Goodwin was born on November 12, 1966 (Ex. 7). From the time he was a baby, Paul Goodwin's family knew he was different. Paul was slow and did not interact with others (H.Tr. 287, 289, 290, 293, 302, 417, 538). He had problems communicating (H.Tr. 289, 551). Usually, he was alone, often in a corner by himself, with a great big smile (H.Tr. 290, 538). Paul could not play games like other children (H.Tr. 417, 538). He could not understand the rules (H.Tr. 417). He could not remember what side he was on (H.Tr. 417).

When he was five to twelve years old, he often wandered away from home, climbing on neighbors' roofs (H.Tr. 302, 303, 304, 313). He also wandered into neighbors' homes (H.Tr. 302, 313). Neighbors called, saying that Paul was running around on their roofs and asked the family to come and get him (H.Tr. 303). Once, a neighbor even called the police (H.Tr. 304). Paul's family told him he should not walk into other people's homes or climb their roofs (H.Tr. 303, 313). Paul said okay, but the next day, he did it again (H.Tr. 303, 313). He just could not understand appropriate behavior (H.Tr. 303, 313).

Babysitters got frustrated with Paul and his wanderings (H.Tr. 305). One babysitter made him sit in a corner, facing a wall, for hours at a time (H.Tr. 305, 306). She tried to explain the rules to him, but Paul did not understand (H.Tr. 305).

When Paul was seven or eight, the Goodwins belonged to Glen Echo Country Club (H.Tr. 535). Paul's mom signed all the kids up for the swim team (H.Tr. 535). Paul went to the Club, but he never swam with the team or participated in the practices (H.Tr. 535-36). He was a big joke (H.Tr. 536). The other kids teased him, calling him names like "fat boy" (H.Tr. 536). Paul wandered around during the swim meets and once, went on the roof of the snack bar (H.Tr. 536). He jumped off the high dive and splashed all the people (H.Tr. 536). He defecated on the floor in the bathroom (H.Tr. 536). He often got in trouble (H.Tr. 536).

Even though Paul did not participate on the swim team, he got a trophy, a prized possession that he kept for years (H.Tr. 537). He also treasured a Marlboro box with Marlboro coupons and costume jewelry (H.Tr. 537).

When Paul was eight, he made horrible messes in the bathroom, leaving feces and urine all around the toilet and at times, on the wall (H.Tr. 545). His sister saw him standing on the toilet seat while he was going to the bathroom (H.Tr. 546). He filled the toilet with toilet paper (H.Tr. 545). The inappropriate behavior was a constant problem (H.Tr. 545). This behavior continued during his childhood through his teens (H.Tr. 545).

Once, Paul carried plates with water outside (H.Tr. 307). When his family looked outside to see what he was doing, they discovered that part of the back yard was on fire (H.Tr. 307). Paul tried to put the fire out with plates of water, rather than a large container (H.Tr. 307). His cousin grabbed a nearby garden hose and put the fire out (H.Tr. 307).

When Paul was eleven or twelve, some kids started hanging out with him, because Paul was large and could protect them (H.Tr. 538). As he got older, the kids would take all Paul's money and spend it (H.Tr. 539).

Paul's father, Dan Goodwin, was an alcoholic and drank heavily, rarely leaving the house (H.Tr. 293-94). He had little patience for Paul (H.Tr. 308). He yelled at his son and called him names, like "moron" (H.Tr. 294, 304, 308, 309). He talked badly about Paul in front of him, humiliating him (H.Tr. 294). Paul simply shrugged his shoulders and gave a sad look, liked a whipped puppy dog

(H.Tr. 294, 299). Other times, Mr. Goodwin yelled at Paul and ordered him out of the house (H.Tr. 304). Paul would climb up on the roof and sit there (H.Tr. 304). Mr. Goodwin could not tolerate Paul's inability to follow direction, understand and learn the consequences of his behavior (H.Tr. 308).

Paul's mother tried to make up for how mean Paul's dad was to him (H.Tr. 311). She was loving and affectionate (H.Tr. 311). Paul became very dependent upon her, both for his emotional and physical needs (H.Tr. 311). She cleaned up after him, she took him to school, and she helped him with his home work (H.Tr. 311). She tried to explain the rules to him and teach him appropriate behavior (H.Tr. 312). But Paul could not understand (H.Tr. 312-13). Being impulsive, he did not think about consequences (H.Tr. 313).

When he was twenty, Paul enjoyed spending time with his three year old niece (H.Tr. 539-40). He preferred to be with children, rather than adults (H.Tr. 540, 541, 542). He played in the sandbox, on the swing set, and rolled around on the floor (H.Tr. 540). He could not play board games or read to her (H.Tr. 540). When his niece got older, she outgrew Paul since he could not keep up with her (H.Tr. 540-41). Paul then started playing with his younger nephew, Nick (H.Tr. 541). They played with cars and simple activities (H.Tr. 541). However, when Nick became interested in reading and board games, Paul could not keep up with his nephew (H.Tr. 542). Nick outgrew the games that Paul wanted to play (H.Tr. 542-43).

Whether they called him slow, retarded, or a moron, those around Paul knew he was not normal and was severely impaired. Dr. Paul Meiners, his uncle, talked to Paul's parents in the early seventies, and urged them to put him in a group home for the mentally retarded (H.Tr. 420-21). Dr. Meiners' son had Down's Syndrome and as a result, Meiners helped develop group homes for mentally retarded people (H.Tr. 419, 422-23). Dr. Meiners' son had a positive experience in a group home, worked and had a productive life (H.Tr. 423-25).

Struggles in School

Once Paul entered school, Paul's deficits became a problem. His kindergarten teacher realized his problems were severe and suspected that he was mentally retarded (Ex. 20). She referred him to the Special School District to receive additional help (Ex. 20).

The Special School District found that Paul suffered from a hearing impairment, was learning disabled and language impaired (H.Tr. 504-05). School officials tried to educate Paul in the regular education system and provided him one hour a day in Special Education to deal with his special needs (H.Tr. 443, Ex. 7). However, the mainstreaming did not work. Paul failed the 3rd and 4th grades (H.Tr. 57).

Paul spent more and more time in Special Education. He was 15 years old when he was in the 7th Grade (H.Tr. 430, Ex. 10). His special education teacher, Patricia Higgins, remembered him as a nice, big boy (H.Tr. 430). He was big for his age, 6 foot, 3 inches and weighed 236 pounds (H.Tr. 506). The other children

teased him and made fun of him (H.Tr. 313). Paul responded by wearing clothes that were too small for him (H.Tr. 313). He thought that if he wore a size medium, others would not believe he was so large (H.Tr. 313-14). He did not fit in and often wandered away from school (H.Tr. 432). As a result, his mother brought him to school and sat outside his classroom during the entire day (H.Tr. 431-32). She walked him to his classes (H.Tr. 432).

Ms. Higgins remembered how Paul's hearing impairment impacted him (H.Tr. 481-83). Mr. Hittner, the Seventh Grade Principal, yelled at Paul while they were standing in the hallway (H.Tr. 482). Paul turned around and walked away (H.Tr. 482). Mr. Hittner called to Paul and asked, "what's the matter with you, are you deaf?" (H.Tr. 482). Ms. Higgins told Mr. Hittner that Paul could not hear him (H.Tr. 482).

Ms. Higgins reviewed Paul's Individual Educational Assessments (H.Tr. 439-81, Exs. 7-12, 14). Paul was very concrete, with literal comprehension skills (H.Tr. 444, Ex. 7). At the end of the Sixth Grade, he functioned at a Fourth Grade, sixth month level (H.Tr. 445, Ex. 7). He could not stay on task without cuing and prompting from someone (H.Tr. 446, Ex. 7). Paul could follow two-part directions, but had difficulty with two-part commands with several elements (Ex. 7). School officials had two goals: improve Paul's ability to follow directions and expand his vocabulary (H.Tr. 447-48, Ex. 7).

In 1981- 1982, Paul made progress toward the goal of following directions, like being told to sharpen his pencil and put it back on his desk (H.Tr. 450-52, Ex.

9). However, he was "below expectancy in following directions, word useage [sic], vocabulary, and conceptual language skills." (H.Tr. 454-55, Ex. 9). He read at the fifth grade, first month, level. (H.Tr. 455, Ex. 9). He had problems comprehending. (H.Tr. 455, Ex. 9). His math skills were at the fourth grade level (H.Tr. 456, Ex. 9). He could not maintain tasks and complete them (H.Tr. 456, Ex. 9). When teachers asked Paul to work, he often smiled at them and continued to sit (H.Tr. 456, Ex. 9). Ms. Higgins believed Paul's behavior, typical for the hearing impaired, showed that he did not understand what was going on (H.Tr. 457). Paul seldom completed his homework, except for science, where his mother helped him (H.Tr. 457). He had problems fitting in with the other children (H.Tr. 457). Officials wanted to improve his ability to follow directions (H.Tr. 457-58).

In 1982, Paul attended a meeting to discuss his IEP (H.Tr. 458). He signed his name backwards, illustrating that if not given specific cues on how to do something, he just followed along (H.Tr. 458-59, Ex. 10). Paul made progress toward his goals, but no objectives were met (H.Tr. 460).

In October, 1982, the Special School District increased the amount of service Paul would receive (H.Tr. 463, Ex. 11). He moved into Phase Two, fifty percent or more of his school day would be in the Special School District setting (H.Tr. 463, Ex. 11). Paul needed to move from group work to one-to-one assistance (H.Tr. 464, Ex. 11). Officials focused on life skills, rather than academic skills (H.Tr. 464, Ex. 11). Teachers would use money books, banking books, getting around town books (H.Tr. 464-65, Ex. 11). They intended to teach

Paul survival skills (H.Tr. 465, Ex. 11). Goals for Paul shifted from teaching him to follow directions to teaching him selective vocabulary, expressing likenesses and differences (H.Tr. 465-67, Ex. 11). Their goal was to teach Paul to stay on task for 20 minutes (H.Tr. 468, Ex. 11). However, his teacher acknowledged he made no progress on this goal (H.Tr. 469, Ex. 11).

In 1983, officials decided that Paul needed another placement change (H.Tr. 469-70, Ex. 12). They moved him from Normady Junior High to Wirtz Vocational Skills Center, a Special School District building exclusively for Special Education Students (H.Tr. 470, Ex. 12). This was considered Phase 3, 100 percent of the student's time was spent in Special Education (H.Tr. 470, Ex. 12). Wirtz was not a technical school where students could earn a regular high school diploma, rather it was a vocational skills training school (H.Tr. 470-71). These special education students did not earn credits necessary to graduate (H.Tr. 471).

Paul's functioning worsened. His comprehension decreased to the Fourth Grade level (H.Tr. 472, Ex. 12). He had memory problems (H.Tr. 473, Ex. 12). Paul could not do simple math, like calculations involving fractions, decimals, or division not divide by two or three digits (H.Tr. 473, Ex. 12). Paul struggled to complete tasks (H.Tr. 473, Ex. 12).

At age 16, his teachers tried to teach him how to use a map so he could travel on a bus (H.Tr. 474, Ex. 12). They wanted to teach Paul how to function in the community, covering subjects like housing, banking, checking accounts and real life skills (H.Tr. 474-75, Ex. 12). They sought to teach him grooming and

hygiene skills (H.Tr. 475, Ex. 12). The Special School District wanted to help him develop job skills, including how to measure for simple construction type work (H.Tr. 475, Ex. 12).

In May, 1983, when he was 16 years old, officials amended Paul's IEP (H.Tr. 475-76, Ex. 13). A speech and language pathologist needed to work on Paul's ability to express his ideas (H.Tr. 476, Ex. 13). Paul needed assistance socially and on the job (H.Tr. 476, Ex. 13).

In February, 1984, teachers reported that Paul had met some of his goals like personal hygiene (H.Tr. 477, Ex. 16). He made progress in other areas like community resources (H.Tr. 477, Ex. 16). However, he had not progressed sufficiently to go back to a general education setting where he could graduate (H.Tr. 478, Ex. 16). He could not get his GED (H.Tr. 478). Rather, he had to stay in the Special Education setting, full time (H.Tr. 478-79).

While in Special Education, officials diagnosed Paul as hearing impaired, learning disabled and with a language deficit disorder (Exs. 7-12, 14, 16-17). His IQ scores were low and dropped during his school years, from a high of 83 to a low of 72 (H.Tr. 156-57). Paul consistently did worse on verbal testing than performance (H.Tr. 243). His verbal scores dipped to a low of 69 when Paul was 13 and 16 years old (H.Tr. 59, 79-80, 81-82, 156-57. 167, 168-69).

School teachers realized that a diagnosis of mental retardation carried a stigma (H.Tr. 394-95, 397, 398, 487-88). A diagnosis of learning disabled was more acceptable. *Id.* Being labeled retarded was hard for the students, for their

parents and everyone around them (H.Tr. 487-88). Thus, even though students sometimes tested in the mentally retarded range, school officials continued to label them as learning disabled (H.Tr. 490, 495). Sometimes officials used different tests to avoid a mentally retarded diagnosis (H.Tr. 495). Students with IQs of 60-65 were sometimes diagnosed as learning disabled (H.Tr. 395, 396, 397, 398).

Mary Catherine Welch, a teacher at the Special School District in Normandy, tutored Paul when he was 14-15 years old (H.Tr. 380-81). Paul was a large child, but never threatened her in any way (H.Tr. 382, 386). He had a kind, pleasing nature (H.Tr. 386). Paul was in middle school, but functioning at the 3rd and 4th grade level (H.Tr. 382-83, 384-85). He had trouble with writing, math and especially reading (H.Tr. 382). His vocabulary was limited (H.Tr. 385). Due to his educational limitations, he was dependent (H.Tr. 386).

Ms. Welch tried to teach Paul functional reading that would help him with daily living skills (H.Tr. 383). They worked on basics, like signs that he would see, such as "restroom" or those warning of dangers (H.Tr. 383). Paul had trouble maintaining his attention for an hour (H.Tr. 383). Ms. Welch was unsure whether Paul understood her directions (H.Tr. 384). He struggled with directions beyond one or two steps (H.Tr. 384, 385). Paul's social skills were extremely limited (H.Tr. 385). He could say, "hello," but could not really converse (H.Tr. 385). He did not seem to have any friends (H.Tr. 385). Mrs. Welch told the Goodwins that Paul needed more intensive intervention than she could provide in tutoring sessions (H.Tr. 386).

Problems Functioning At Work

Paul did not function well at work. He started as a janitor at the Goodwin family business, a print shop (H.Tr. 314-15, 401-02). His cousin, Patrick, recalled that he was not sharp (H.Tr. 403). Paul could sweep the floors, empty the trash and get all of the dirty shop rags and put them in a box (H.Tr. 315, 402-03). However, Paul could not handle other positions, like shipping and receiving, because it required paperwork (H.Tr. 315-16, 403). He loaded the wrong circulars on to the wrong truck (H.Tr. 316, 405). The materials were dated, and Paul's mistakes cost the company a lot of money (H.Tr. 316). Thus, if Paul worked in shipping and receiving, others had to be there and double check to make sure Paul was doing it right (H.Tr. 316-17, 405-06). Other workers had to do his paperwork for him (H.Tr. 405-07). Paul could not learn to use a calculator (H.Tr. 407).

Paul needed constant supervision (H.Tr. 317, 406). Supervisors had to explain things two or three times and point Paul in the right direction (H.Tr. 409). Paul received raises, not because he deserved them, but because he had financial difficulties (H.Tr. 408). Paul would not have been hired at Goodwin Brothers had he not been part of the Goodwin family (H.Tr. 408-09). He could not communicate (H.Tr. 409). Quiet, he kept to himself (H.Tr. 409). Paul stayed at Goodwin Brothers ten years because he was a family member (H.Tr. 409).

Sometimes Paul helped his sister, Brenda Thomas, when she worked in the plate room, a pre-press area where workers prepared film and plates for the printing press (H.Tr. 546-47). Brenda asked Paul to bring her heavy copper plates

(H.Tr. 547). Even though Paul did this chore for several weeks, Brenda had to give Paul very simple, detailed instructions about how many plates she needed each and every time he got them (H.Tr. 547-48). He never learned the job over time (H.Tr. 547-49).

Even though Paul worked at the family business, his coworkers made fun of him and called him names (H.Tr. 549). The press men teased Paul, calling him "boing-boing" and "fat boy" (H.Tr. 549). Even his brother Joe joined in and called him names (H.Tr. 549).

After Paul was fired from his job, for tardiness and stealing (H.Tr. 333), his mother helped him obtain other jobs, filling out his applications (H.Tr. 335, 344). He could not answer the questions on the applications by himself (H.Tr. 345). She also had to drive him to work every day (H.Tr. 335, 344). However, she could not do everything for him. *Id*.

When he worked at a chemical company, he could not read the names of the chemicals on the barrels, got nervous and flustered (H.Tr. 336). He dropped a forklift of chemicals onto the ground (H.Tr. 336). The other employees laughed at him (H.Tr. 336). Paul, embarrassed and humiliated, asked the boss if he could work in the back room (H.Tr. 336). There, he washed labels off buckets (H.Tr. 336-37).

When Paul worked at Di-Mac, his coworkers made fun of him and called him names (H.Tr. 551). They called him "Lurch" from "The Adams Family" because Paul was so big and quiet (H.Tr. 551-52). He walked into a room and just

looked around without saying anything (H.Tr. 551). He did not talk to others (H.Tr. 551).

At another place of employment, they switched from a standard time clock to a computer (H.Tr. 566). No matter how many times someone tried to teach Paul, he could not learn how to use the computer to sign in and out (H.Tr. 566). His mother dropped him off, making sure he was on time (H.Tr. 566). Yet Paul did not clock in as required, since he could not figure out how to use the computer (H.Tr. 566). Paul was fired for being tardy, even though he had actually been to work on time (H.Tr. 566-72, Ex. Q).

Paul's mother did everything she could to help him keep his job at Rhodes Furniture where he moved furniture (H.Tr. 379). She took him to and from work (H.Tr. 379-80). She wanted him to stay there long enough to get his health insurance (H.Tr. 379).

Paul could do manual labor (H.Tr. 337-38). He helped his sister, Mary, with projects on her property, like tearing down a shed, tearing down barbed-wire fencing, and digging a ditch (H.Tr. 337). He needed direction (H.Tr. 338). Paul thought that digging a ditch was the perfect job (H.Tr. 338).

If jobs were not extremely simple, Paul became frustrated (H.Tr. 556). Once, he tried to help his sister, Brenda, with laying plywood on the floor (H.Tr. 556). He could not measure the plywood; it was too hard for him (H.Tr. 556-57). He got upset and flustered, and asked to do something he could handle, like carrying the plywood (H.Tr. 557).

Paul Struggles With Daily Functions

When Paul was 21 years old, he and his father argued and Paul had to move in with his sister, Mary and her husband (Tr. 319-20). Mary thought it would take a couple of months to teach Paul how to function on his own (H.Tr. 320). However, Paul struggled with simple daily functions and finances (H.Tr. 323-26). He could not learn how to budget his money to pay for groceries, his truck payment, and other necessities (H.Tr. 321, 323-24, 325-26). He could not take care of himself and his room (H.Tr. 324-25). Mary had to stand over and tell him what to do, like clean up his room or bathroom (H.Tr. 325). He repeatedly forgot to put ice cream back in the freezer regardless of how many times his sister told him (H.Tr. 345-46).

After living with Mary for months, she left Paul alone in the apartment while she went on a short, 3-day vacation (H.Tr. 328). Paul loved her animals and tried to care for them (H.Tr. 328). He over fed her fish and it died (H.Tr. 328). He let her ferret out of her cage and it got lost (H.Tr. 329). Paul later accidentally stepped on the ferret and broke its hip (H.Tr. 329). He felt sorry that he could not care for her pets while she was gone and he had harmed them (H.Tr. 329).

Paul tried hard to do what was right, but he was so impulsive (H.Tr. 327). He tried to please others and did not want to live on his own (H.Tr. 327). He really wanted to be at home with his mom (H.Tr. 327).

After two months with Mary and her husband, Paul was not learning how to take care of himself (H.Tr. 322). Two months turned into four months, four into

six, six into eight (H.Tr. 322). Eventually, Mary found a studio apartment for Paul, but she worried that he could not make it on his own (H.Tr. 329-30). She asked her mother and sisters to help look after him (H.Tr. 330).

Paul's mother tried to help him (H.Tr. 331). She took him groceries and gave him money (H.Tr. 331). She picked him up and took him to work when his truck was broken (H.Tr. 331). Paul was so lonely living by himself that he did not want to go home at night (H.Tr. 332). At times he spent the night at Goodwin Brothers so he did not have to go home alone (H.Tr. 332).

Paul could not make it on his own (H.Tr. 331). His truck was repossessed (H.Tr. 331). He was evicted from his apartment (H.Tr. 331). Finally, he met his girlfriend, Penny, so he had some place to go (H.Tr. 331).

No one really expected a whole lot out of Paul (H.Tr. 318). He was slow and could work if someone gave him simple, specific instructions and constantly supervised him (H.Tr. 316-18). When he did participate in community service events, his family had to help him and assign him a simple job that he could handle (H.Tr. 554). During one Christmas Project, Paul helped his brother-in-law, Gary, load firewood into people's cars (H.Tr. 554). Another time, Paul's mother took him to the store, picked out a gift for a child, and signed a card from Paul (H.Tr. 555).

During his trial, Paul's biggest concern was that his pants were too short (H.Tr. 552). He was afraid that people were going to make fun of him (H.Tr.

552). Even after his conviction, he did not focus on the legal proceedings (H.Tr. 553).

Mental Retardation Evaluation

After trial, Dr. Denis Keyes evaluated Paul for mental retardation. Dr. Keyes has 29 years of experience in mental retardation (H.Tr. 3, L.F. 271-80, Ex. 1). He taught courses on mental retardation (H.Tr. 5-6) and published extensively in this field (H.Tr. 6-8, L.F. 274-279, Ex. 1). The United States Supreme Court relied on his published work in *Atkins v. Virginia*, 536 U.S. 304, 316, n. 20 (2002) (H.Tr. 8). He was made a fellow of the American Association on Mental Retardation (H.Tr. 9).

Dr. Keyes reviewed background materials, including school records, medical records, psychological records, employment records, criminal records, correctional records, family records, letters, and cards from Paul (H.Tr. 51, 53-54, 55). These records are important to verify the accuracy of family opinions' regarding functioning (H.Tr. 55-56). The school records did not include the protocols from earlier testing of Paul, so Dr. Keyes could not review those (H.Tr. 53). Dr. Keyes also reviewed Drs. Rabun, Shultz and Wetzel's trial testimony and reports (H.Tr. 54). He reviewed Dr. Schultz' protocols (H.Tr. 54).

School records showed that Paul had significant disability problems since he was a small child (H.Tr. 56). He had a congenital hearing problem that impaired his understanding of vocal speech (H.Tr. 56-58). He failed both third and fourth grades (H.Tr. 57). School testing showed that Paul's functioning level

went down (H.Tr. 59). His I.Q. levels went down from 82 to a low of 69 on a verbal test (H.Tr. 59, 79-80, 81-82). This is unusual, because normally, students' scores go up as they repeat tests again and again (H.Tr. 79-80). The school evaluations also showed a "halo effect," where evaluators misdiagnose a child they find attractive (H.Tr. 81). In two reports, he was described as "a handsome or very nice-looking child with freckles" (H.Tr. 81). The evaluators should be as objective as possible to avoid this bias (H.Tr. 81).

Dr. Keyes interviewed twenty witnesses, including family and teachers, making more than twenty hours of individual assessments (H.Tr. 60). He gave the Vineland interview format to Paul's mother, all of his sisters, his brother, his sister-in-law, two of his brothers-in-law, two of his aunts and uncles, three or four of his cousins and two of his teachers (H.Tr. 60). The Vineland is an instrument, used to determine adaptive behaviors in areas of daily living skills, socialization, and communication (H.Tr. 60-61). Paul had low adaptive skills (H.Tr. 61). Paul had problems with finances, required assistance at work, and relied on his mother to fill out applications (H.Tr. 62). He would be lost in an unstructured environment (H.Tr. 61).

Dr. Keyes tested Paul for 12-14 hours over three days (H.Tr. 51-52). Dr. Keyes did supplemental testing, because Paul had seen some of the pictures from the Wechsler before and a previous examiner had shown him how to do the test (H.Tr. 52, 62). This invalidated the performance part of the test (H.Tr. 52, 62-63, 64). Paul's score on the verbal portion was 71 (H.Tr. 65).

On the Stanford Binet, Fourth Edition, his scores were all almost universally within the range of mental retardation (H.Tr. 64). On the verbal reasoning, he scored 73 (H.Tr. 64-65). On abstract visual reasoning, he had 83 (H.Tr. 65). His quantitative reasoning tested at 62 (H.Tr. 65). Short term memory was 67 (H.Tr. 65). His composite score was 67, one point below the 68 level considered mentally retarded for that test (H.Tr. 65).

Since the Stanford Binet tends to be verbally loaded, Dr. Keyes also administered the Kaufman Adolescent and Adult Intelligence Indicator (H.Tr. 66). The crystallized score was 75, the fluid score was 77, and the composite score was 74 (H.Tr. 66). The subtests showed that Paul did better on achievement tests than those testing general intelligence (H.Tr. 67). He had problems with perceptional motor skills, consistent with earlier evaluations from his childhood (H.Tr. 67-68). Given the standard error of measurement, his composite score placed Paul within the mentally retarded range (H.Tr. 66).

Dr. Keyes did the convergent validation, looking at all the witnesses he interviewed regarding adaptive behaviors (H.Tr. 68). Based on a median score of 100, Paul scored as follows:

Communication – 20

Socialization - 35

Daily Living Skills - 51

Composite – 32

(H.Tr. 68-69). Dr. Keyes noted that Paul sat back with a smile on his face, but did not interact with others (H.Tr. 68-69). His communication and social skills were adversely impacted by his hearing loss (H.Tr. 69). Daily living skills included activities such as cooking, cleaning and setting the table (H.Tr. 68). Adaptive skills are important in assessing mental retardation (H.Tr. 69-70).

Dr. Keyes concluded that Paul Goodwin functions within a range of mental retardation and has since a young child (H.Tr. 71). His I.Q. scores continued to decline, probably based upon brain injury (H.Tr. 71-72). Paul's judgment skills are very impaired (H.Tr. 73). He is not logical (H.Tr. 73).

Dr. Keyes found that Paul had virtually every characteristic of a mentally retarded individual:

Significantly reduced intelligence;

Deficits in adaptive skills, including communication, socialization, daily living skills;

Reduced short term memory;

Poor ability to use abstract thought;

A lack of retained concentration or focusing (easily distractible);

Poor transference and generalization skills (unable to make logical connections);

Perseverative and impulsive behaviors (unable to control repetitive behaviors);

Poor planning and coping skills (unable to see cause and effect and easily

frustrated;

Poor judgment skills (unable to recognize danger situations); and

Tendency to acquiesce (wants to please and be accepted).

(H.Tr. 74-77, Ex. 4 and 4A).

Dr. Keyes found that Paul fell within the mild range of mental retardation, with an I.Q. of 63-65 (H.Tr. 79).

On cross-examination, Dr. Keyes acknowledged that he relied on the family rather than school records, when assessing Paul's adaptive functioning (H.Tr. 189-90, 196-98, 221-22). He agreed that the family tended to lower the scores, but still believed Paul's skills were in the retarded range (H.Tr. 254-55). Dr. Keyes did not test Paul for depression, nor did he test for validity or malingering (H.Tr. 124, 126, 137, 281). He relied on his experience and clinical judgment to assess these factors. *Id*.

State's Evidence

The State disputed Dr. Keyes' finding that Paul is mentally retarded and presented evidence that he has borderline intelligence. Bobbie Meinershagen, a counselor who works for the Department of Corrections, tested Paul at Potosi Correctional Center after he was convicted (H.Tr. 588-91). Meinershagen administered the Wechsler Adult Intelligence Scale (H.Tr. 589, 594). Paul scored 81 on the verbal IQ, 90 on the performance IQ, and 84 on the full-scale IQ (H.Tr. 594, Ex. F). Meinershagen acknowledged that she did not administer any adaptive

functioning testing (H.Tr. 603). She denied giving or suggesting the correct answers (H.Tr. 595).

Marilyn Lamb, a psychological examiner with the Special School District, reviewed Paul's evaluations conducted when he was a student (H.Tr. 608). In January, 1974, when he was seven years old, Paul was diagnosed as hearing impaired (H.Tr. 608-09). In 1975, Paul had a psychological re-evaluation (H.Tr. 610, Ex. A-3). Paul's scores on the Wechsler were: verbal IQ – 82, performance IQ – 87, full-scale IQ - 84 (H.Tr. 611-12). Lamb gave Paul some supplementary tests to identify his strengths and weaknesses (H.Tr. 611). On a Goodenough figure drawing, she scored him at 94, and on a Beery test, she gave him a perceptual Quotient of 92, which "is kind of like an IQ score" (H.Tr. 611). Based on his IQ scores, Lamb did not find Paul mentally retarded, but thought he had hearing loss and language deficits (H.Tr. 612-13).

In 1976, another evaluation showed 9-year-old Paul functioning in the borderline range (H.Tr. 616, Ex. A-4). Paul was given the WISC-R, and scored a 72 on the verbal, 85 on the performance, and 76 on the full-scale (H.Tr. 644). Paul scored low on the tests that measure general intelligence, including tests on information, similarities, vocabulary, and comprehension (H.Tr. 645).

In 1978, Paul scored 68 on the Receptive Vocabulary Test, the Peabody (H.Tr. 617, Ex. A-5). Lamb attributed the low score to Paul's hearing and language impairments (H.Tr. 617-18). The scores on the Wechsler had dropped: verbal IQ - 77, performance - 80, and full-scale - 76 (H.Tr. 618, 619). The

subtests had a lot of variation and suggested poor memory and attention (H.Tr. 618). Lamb found Paul to be extremely concrete (H.Tr. 646). He seemed "unable to learn spontaneously from his environment" (H.Tr. 646). Lamb concluded that Paul was hearing-impaired and learning-disabled (H.Tr. 621). Lamb would not have hesitated to diagnose Paul or any other student as mentally retarded if she believed that to be the case (H.Tr. 622).[4]

Lamb acknowledged that some students could be classified as mentally retarded even if they had IQ scores above a certain cutoff (H.Tr. 625-28). Mental retardation is determined by both IQ scores and adaptive functioning (H.Tr. 656). The Special School District did not test Paul's adaptive functioning (H.Tr. 657).

Lamb acknowledged that Paul's kindergarten teacher suspected he was mentally retarded and hearing impaired (H.Tr. 629-33, Ex. 20). His social history indicated he hit his head on concrete when he was three years old (H.Tr. 633). Throughout his history, educators found Paul's communication skills were poor (H.Tr. 648).

Vernon Olson, one of Paul's teachers at Wirtz Vocational School for Special Education students, recalled Paul as a big, mild-mannered student (H.Tr. 666). Paul never caused any problems and helped Mr. Olson separate two

[4] The State did not question Lamb about Paul's later Special School District IQ scores that fell within the mentally retarded range, when allowing for a 5 point margin of error.

students who were fighting (H.Tr. 666). Paul made progress in tool identification and shop safety (H.Tr. 667). He learned how to do simple tasks, like screwing a bolt (H.Tr. 668). In 1985, Mr. Olson reported that Paul completed the unit on first aid with eighty percent on the test, and achieved eighty percent on the tool test (H.Tr. 669-70, Ex. A-10). On the tool test,[5] Paul was given a picture of a tool and he had to pick out the name of the tool from a list (H.Tr. 671).

Mr. Olson rated Paul's skills in auto maintenance, on a scale of 0-5 (H.Tr. 672, Ex. A-18). On introduction to auto maintenance, Mr. Olson provided a drawing of a car, divided into four parts (H.Tr. 672). Paul scored pretty good, scoring a 4 (H.Tr. 673). On identification of hand tools, Paul scored 3 (H.Tr. 673). Paul was able to perform tasks with limited supervision; Mr. Olson had to be there with him (H.Tr. 673). Paul scored a 3 on lifting equipment, which included using jacks and jack stands (H.Tr. 674). Paul scored a 3 on oil and lubrication (H.Tr. 674-75). Paul scored a 3 on tires and balancing (H.Tr. 675-77).

The prosecution retained Dr. Richard Scott, a psychologist with the Department of Mental Health, to review records and to consult with the prosecution for the postconviction hearing (H.Tr. 681). He reviewed the two

[5] This test had 40 pictures, not 100 as indicated by the prosecutor when he questioned Dr. Keyes (H.Tr. 278). Mr. Olson also testified that the students were provided a list of answers from which to choose, so they did not have to name the tool on their own (H.Tr. 671).

reports prepared by Dr. Rabun before trial, evaluations by Drs. Schultz and Wetzel, defense experts at trial, records from the Special School District, Meinershagen's evaluation, and testing done by Dr. Keyes (H.Tr. 681, 696, 697, 698-99, 729, 730-3-37, Exs. B, C, D, E, F). Scott relied on the DSM-IV definition of mental retardation, which requires: 1) an IQ of approximately 70 or below on an individually administered IQ test, 2) concurrent deficits in present adaptive functioning in at least two of the following areas: communication, self-care, home-living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety; and 3) the onset must be before age 18 (H.Tr. 687). Scott equated the DSM-IV definition and Section 565.030.6 (H.Tr. 688-89).

Scott found that Drs. Rabun and Schultz's finding of borderline intellectual functioning precluded a finding of mental retardation (H.Tr. 694-95, 697). Paul's school records placed him in the borderline intellectual functioning range and diagnosed him as learning disabled (H.Tr. 699-712). His IQ scores were as follows:

Year	**Test**	**Score (Full Scale)**
1973	WISC[6]	83
1975	WISC-R	84
1976	WISC-R	76
1978	WISC-R	76

1980	WISC-R	72
1983	WISC-R	78

(H.Tr. 700-704).

Dr. Scott concluded that Paul's IQ was between 75-80, placing him in the borderline range (H.Tr. 708, 718-19). He thought the one score of 72, within the margin of error for mental retardation, could have been influenced by Paul not wearing his hearing aid (H.Tr. 704). Paul was also "possibly depressed" according to the examiner (H.Tr. 709-10). Depression could lower the score (H.Tr. 709-10). Schultz and Meinershagen's testing was consistent with the school records: Schultz- full - 80, performance – 92, and verbal – 73; Meinershagen – full – 84, performance – 90, and verbal - 81 (H.Tr. 723, 729).

Dr. Scott did not consider Dr. Keyes' testing for adaptive behavior reliable, since he looked back many years, from Paul's current age of 35 (H.Tr. 733-34). Additionally, those giving information may have remembered his functioning at a lower level in order to help Paul who had been sentenced to death (H.Tr. 734). Based on Paul's letters and writings, Scott determined that Paul could communicate and express his needs (H.Tr. 740-43). He could get a driver's license (H.Tr. 744). He could cash his paycheck and buy groceries (H.Tr. 745). He was able to think into the future and execute a plan, as evidenced by his disassembling aluminum bleachers and recycling them (H.Tr. 745). He could run a forklift and drive to work (H.Tr. 746-48).

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[6] Wechsler Intelligence Scale for Children (H.Tr. 700).

Even though his opinion was limited by not having met Paul, Dr. Scott concluded that he was not mentally retarded (H.Tr. 748). Scott did not talk to any family, teachers or other witnesses in coming to his conclusion (H.Tr. 751). To determine Paul's adaptive skills, Scott relied on material, such as employment history, criminal history, writings and drawings, all done after Paul was 18 (H.Tr. 751).

Postconviction Judge Make Factual Findings That

Paul Is Not Mentally Retarded

Judge O'Brien weighed this evidence and determined that Paul is not mentally retarded (L.F. 454-73). He refused counsel's request (L.F. 412-15) that a jury be allowed to hear this evidence and make the factual determination of mental retardation, under *State v. Johnson*, 102 S.W.3d 535 (Mo. banc 2003) (L.F. 421, 473-77). He also denied all Paul's other claims, without a hearing (L.F. 448-53).[7] This appeal follows.

[7] The claims denied without a hearing are outlined in detail in Arguments II-VII, *infra*.

POINTS RELIED ON

I. Mental Retardation

The motion court clearly erred in denying Paul's postconviction motion based on evidence that he was mentally retarded, because the ruling violated his rights to due process, a jury trial, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21; and Sections 564.040, 565.030.4 and 565.030.6, RSMo 2004, in that Dr. Keyes testified Paul was mentally retarded with IQ scores of 67-74, low adaptive skills, and an onset before age 18; Dr. Keyes was the only expert that assessed Paul's adaptive skills; a 1980 IQ score when Paul was a teenager was 72, within the mentally retarded range and other scores on verbal testing were 69; a kindergarten teacher referred Paul to the Special School District because she believed he was mentally retarded; and Paul failed third and fourth grades. Since ample evidence called Paul's intellectual functioning and adaptive skills into question and reasonable minds could differ on whether he was mentally retarded, the motion court should have granted a new penalty phase so that a jury could determine this factual issue and make credibility determinations. Counsel was ineffective in failing to investigate and present evidence of mental retardation which would have resulted in a life sentence.

Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242(2002);

Johnson v. State, 102 S.W.3d 535(Mo. banc 2003);

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

State v. Lott, 779 N.E.2d 1011(Ohio 2002).

II. State's Evidence of Motive – That Paul Blamed Mrs. Crotts For Being Evicted From Boarding House - Was Not True

The motion court clearly erred in denying a hearing on the claim that Paul's counsel was ineffective for failing to investigate and present evidence to rebut the state's suggestion that Paul blamed Mrs. Crotts for being evicted from the boarding house and killed her as a result, because this denied Paul due process, effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled Paul to relief, that counsel acted unreasonably in failing to investigate and present documentary evidence, cancelled checks, and witnesses, Royal Crase, Mary Elaine Goodwin, Andy Silkwood, and Ray Dickerson, who would have established that Paul was not evicted from the boarding house in August 1996 because of fights with Mrs. Crotts, rather he lived there until November, 1996; Mrs. Crotts never complained about Paul to Mr. Crase, the owner of the boarding house; and when Paul moved from Mr. Crase's residence, he did not threaten Mrs. Crotts. Paul was prejudiced since this evidence would have rebutted the state's evidence of deliberation and motive, that he supposedly killed Mrs. Crotts out of anger for being evicted.

Parker v. Bowersox, 188 F.3d 923 (8th Cir. 1999);

Wilkes v. State, 82 S.W.3d 925 (Mo. banc 2002);

Cotton v. State, 25 S.W.3d 507 (Mo. App. E.D. 2000); and

Fingers v. State, 680 S.W.2d 377 (Mo. App. S.D. 1984).

III. Counsel Did Not Investigate Hall's Allegation that Paul Had Threatened Mrs. Crotts, Smashing a Rock With a Sledgehammer

The motion court clearly erred in denying a hearing on the claim that Paul's counsel was ineffective for failing to investigate and present evidence to rebut the state's suggestion that Paul threatened Mrs. Crotts, while he smashed a rock with a sledgehammer, because this denied Paul due process, effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled Paul to relief, that counsel acted unreasonably in failing to investigate and call Ronald Krabbenhoft who was present during the sledgehammer incident and disputed Hall's contention that Paul smashed a rock or threatened Mrs. Crotts. Paul was prejudiced since Krabbenhoft's testimony would have undermined the State's case for deliberation and death.

Kyles v. Whitley, 514 U.S. 419 (1995);

Wiggins v. Smith, 123 S.Ct. 2527 2003);

Williams v. Taylor, 529 U.S. 362 (2000); and

State ex rel. Amrine v. Roper, 102 S.W.3d 541(Mo. banc 2003).

IV. Counsel Did Not Investigate Medical Evidence

The motion court clearly erred in denying, without a hearing, Paul Goodwin's claim that counsel was ineffective for failing to investigate the medical evidence, consult with and call a forensic pathologist, such as Dr. Thomas Bennett, because this denied Paul due process, effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, and Rule 29.15(h), in that the motion pled facts, not conclusions that entitled Paul to relief: that counsel acted unreasonably in failing to investigate and present evidence concerning the pathology reports and physical evidence to show that Mrs. Crotts' injuries were consistent with a fall down the stairs and that she was not subjected to repeated and excessive physical abuse, a necessary factual finding for the aggravating circumstance of depravity of mind, and to rebut the State's suggestion that Paul beat her over her entire body and therefore, deliberated. These factual allegations are supported by the record, especially by Dr. Case's testimony and the State's closing arguments. Counsel's failure prejudiced Paul since the State relied on the repeated and excessive acts of physical abuse as the reason the jury should give death and emphasized that the State's medical testimony from Dr. Case went unchallenged. During their deliberations, jurors asked to see the autopsy photos, Dr. Case's testimony, and the autopsy report, showing the importance of this evidence in assessing death and finding deliberation.

Cravens v. State, 50 S.W.3d 290 (Mo. App. S.D. 2001);

Blankenship v. State, 23 S.W.3d 848 (Mo. App. E.D. 2000);

Moore v. State, 827 S.W.2d 213 (Mo. banc 1992); and

Wolfe v. State, 96 S.W.3d 90 (Mo. banc 2003).

V. Counsel Did Not Sufficiently Investigate Client's Mental State

The motion court clearly erred in denying a hearing on the claim that Paul's counsel was ineffective for failing to investigate and present evidence to rebut the state's suggestion that Paul planned to kill Mrs. Crotts and deliberated on the killing, because this denied Paul due process, effective assistance of counsel, right to present a defense, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled Paul to relief, that counsel acted unreasonably in failing to investigate and present witnesses, Patty Higgins, Marilyn Lamb, Mary Welch, Mary Elaine Goodwin, Joseph Goodwin, Mary Mifflin, Kathleen Goodwin, Brenda Thomas, Jim Goodwin, Pat Goodwin, Dr. Meiners, Ray Dickerson, and Andy Silkwood, who would have testified: 1) that Paul was not capable of detailed planning due to his intellectual deficits, his inability to foresee consequences and his impulsive nature; 2) Paul was easily confused, got lost and wandered into strangers' houses when he was a child; and 3) Paul had legitimate reasons for walking on Hanley road, since he lived in the neighborhood and did not drive a car. Paul was prejudiced since this evidence would have rebutted the state's evidence of deliberation and supported his sole defense that due to his mental problems he could not deliberate.

State v. Raine, 829 S.W.2d 506 (Mo. App. W.D. 1992);

State v. Windmiller, 579 S.W.2d 730 (Mo. App. E.D. 1979);

State v. Ray, 945 S.W.2d 462 (Mo. App. W.D. 1997); and

Black v. State, 151 S.W.3d 49 (Mo. banc 2004).

VI. Counsel's Inconsistent Theories

The motion court clearly erred in denying a hearing on Paul's claims that counsel was ineffective for failing to adequately investigate his background and in presenting inconsistent theories in guilt and penalty phases, because this denied Paul due process, effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, and Rule 29.15(h), in that the motion pled facts, not conclusions that entitled Paul to relief: that counsel acted unreasonably in failing to investigate and provide their experts with all relevant background material and counsel called a psychologist Dr. Schultz in guilt phase who claimed Paul suffered from a mental disease and defect and could not appreciate the wrongfulness of his actions, and then in penalty phase called Dr. Wetzel who disagreed, saying Paul had no mental disease or defect and could appreciate that his actions were wrong. Paul was prejudiced as his guilt phase defense was unbelievable and jurors would not trust any expert defense counsel called, given such inconsistent defenses.

Florida v. Nixon, 125 S.Ct. 551 (2004);

Wiggins v. Smith, 123 S.Ct. 2527 (2003);

Hutchison v. State, 150 S.W.3d 292 (Mo. banc 2004); and

Jacobs v. Horn, 395 F.3d 92 (2d Cir. 2005).

VII. Lethal Injection Is Cruel and Unusual Punishment

The motion court clearly erred in denying a hearing on the claim that lethal injection is unconstitutional, as applied in Missouri, because that ruling denied Paul Goodwin his rights to due process and to be free from cruel and unusual punishment, U.S.Const.Amends. VIII and XIV; Mo. Const., Art. I, §§10 and 21; and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled him to relief; specifically, that Missouri's method of execution is flawed in that it causes unnecessary pain as evidenced by 11 other executions that encountered problems and resulted in prolonged and unnecessary pain and the problems will likely reoccur since the Missouri statute confers unlimited discretion to the Department of Corrections and the procedures and protocols do not include safeguards regarding the manner in which executions should occur, fail to establish minimum qualifications and expertise for personnel conducting executions, and do not provide criteria and standards for the lethal injection procedures, but use drugs that cause unnecessary pain and suffering; the allegations were not refuted by the record; and Paul was prejudiced since these problems will likely reoccur.

Nelson v. Campbell, 124 S.Ct. 2117 (2004);

Glass v. Louisiana, 471 U.S. 1080 (1985);

In re Kemmler, 136 U.S. 436 (1890); and

Morrow v. State, 21 S.W.3d 819 (Mo. banc 2000).

VIII. Closing Argument

The motion court plainly erred in denying postconviction relief because the record shows that the prosecutor's closing argument violated Paul Goodwin's rights to due process, to be free from self-incrimination, a fair trial and prohibition against cruel and unusual punishment, U.S. Const. Amends. V, VI, VIII and XIV and Mo. Const., Art. I, §§10, 18(a), 19 and 21, in that the prosecutor argued in penalty phase closing that:

A. this was one of the worst cases in St. Louis County, and therefore, the prosecutor had decided Paul deserved death;

B. urged jurors to give death to send a message to the community and to protect the elderly from similar attacks;

C. jurors had a duty to give death;

D. jurors' family, friends and coworkers would disapprove of a verdict less than death;

E. jurors did not hear Paul say he was sorry for what he had done; and

F. defense counsel had fabricated the defense by paying Dr. Schultz for a favorable opinion.

These arguments were manifestly unjust, as they urged jurors to sentence Paul to death, not based on the evidence and his individual character, but by appealing to jurors' fears, passion and prejudice.

Shurn v. Delo, 177 F.3d 662 8th Cir. 1999);

Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989);

United States v. Young, 470 U.S. 1 1985); and

State v. Burnfin, 771 S.W.2d 908 (Mo. App. W.D. 1989).

ARGUMENT

I. Mental Retardation

The motion court clearly erred in denying Paul's postconviction motion based on evidence that he was mentally retarded, because the ruling violated his rights to due process, a jury trial, effective assistance of counsel, and freedom from cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21; and Sections 564.040, 565.030.4 and 565.030.6, RSMo 2004, in that Dr. Keyes testified Paul was mentally retarded with IQ scores of 67-74, low adaptive skills, and an onset before age 18; Dr. Keyes was the only expert that assessed Paul's adaptive skills; a 1980 IQ score when Paul was a teenager was 72, within the mentally retarded range and other scores on verbal testing were 69; a kindergarten teacher referred Paul to the Special School District because she believed he was mentally retarded; and Paul failed third and fourth grades. Since ample evidence called Paul's intellectual functioning and adaptive skills into question and reasonable minds could differ on whether he was mentally retarded, the motion court should have granted a new penalty phase so that a jury could determine this factual issue and make credibility determinations. Counsel was ineffective in failing to investigate and present evidence of mental retardation which would have resulted in a life sentence.

Paul presented substantial evidence of mental retardation. He called a nationally recognized expert on mental retardation, Dr. Keyes, who found that Paul is mentally retarded (H.Tr. 3-9, 71-77, 79). Paul scored 67 on the Stanford Binet (H.Tr. 65), 74 on the Kaufman (H.Tr. 66-67) and 71 on the Wechsler verbal scale (H.Tr. 65). His adaptive skills were very low. On testing that had a median as 100, Paul scored 20 on communication, 35 on socialization, 51 on daily living, for a composite score of 32 (H.Tr. 68-69). Combining intellectual functioning and deficits in adaptive skills, Dr. Keyes placed Paul within the mild range of mental retardation, with an IQ of 63-65 (H.Tr. 79).

Paul's 29.15 counsel also presented testimony from teachers and family members showing Paul's adaptive functioning was low (H.Tr. 285-559). Paul had problems communicating, as a child, in school and at work (H.Tr. 289, 385, 551). He sat back and smiled, not engaging in conversation (H.Tr. 290, 551). His social skills were poor at home when he tried to play with others (H.Tr. 417, 538), at school (H.Tr. 313-14, 385), at his swim meets and practices (H.Tr. 536), and at work (H.Tr. 551).

Paul had problems with self-care, especially when he was young (H.Tr. 545) When Paul was eight, he made horrible messes in the bathroom, leaving feces and urine all around the toilet and at times, on the wall (H.Tr. 545). He stood on the toilet seat while he was going to the bathroom (H.Tr. 546). He filled the toilet with toilet paper (H.Tr. 545). The inappropriate behavior was a constant

problem (H.Tr. 545). This behavior began in childhood and continued through his teens (H.Tr. 545).

Paul could not direct himself. Rather, he needed constant direction by family members and his teachers (H.Tr. 303, 313, 386, 446). His mother had to sit outside his class room and walk him to his classes (H.Tr. 431-32). He constantly wandered off at home, climbing onto the neighbors' roofs (H.Tr. 303, 305, 312, 313).

At work, he needed constant supervision and detailed instructions (H.Tr. 316-17, 405-07, 547-49). He could not complete job applications by himself, could not learn how to use a computer time sheet, and could not learn how to use a calculator or how to measure plywood (H.Tr. 335, 344, 345, 407, 556-57). He made messes at work, putting the wrong circulars on trucks and spilling chemicals (H.Tr. 316, 336, 405). Paul could only do simple tasks and manual labor, and even then he had to have simple instructions and constant supervision (H.Tr. 337-38, 556). His ideal job was digging a ditch (H.Tr. 338).

Paul's academic functioning was poor. Paul was in Special Education (Exs. 7-12, 16-17). A referral from Paul's kindergarten teacher, showed that she suspected Paul was mentally retarded (Ex. 20). Paul failed 3rd and 4th grades (H.Tr. 57, 177). He never graduated from school or obtained a GED (H.Tr. 468, Ex. 16). School records revealed one of Paul's IQ scores placed him in the mentally retarded range (72) and verbal scores were even lower, 69 in 1980 (age 13) and 69 in 1983 (age 16) (H.Tr. 59, 79-80, 81-82, 167, 168-69).

Thus, Dr. Keyes' conclusions about Paul's low functioning were supported by school records, and testimony from teachers, in addition to family members.

On the other hand, the State presented evidence to prove that Paul should be classified with Borderline Intellectual Functioning (H.Tr. 573-751). The State acknowledged major deficits, including a hearing impairment, a learning disorder, and a language disorder (H.Tr. 613, 617-18, 620, 621, 706-07, 712). However, since most of Paul's IQ scores averaged in the 75-80 range, the State maintained that Paul was not mentally retarded (H.Tr. 702-04, 708, 723, 729, 730).

The motion court weighed the evidence presented at the hearing and found that Paul is not retarded (L.F. 454-73). The motion court found that Paul's family members and teachers were not credible, since they had obvious bias in favor of Paul and they were unfamiliar with the facts surrounding the case (L.F. 463, 472).

Dr. Keyes testimony was not worthy of belief, since he based his opinions on interviews with family members and relied on Paul's postconviction counsel to provide background material to him (L.F. 471). Even though the United States Supreme Court relied on his published work in *Atkins*, the motion court rejected Keyes' testimony and his status as an expert witness (L.F. 472). The court found that the Special School District records supported the finding that Paul's intellectual functioning was above the mentally retarded range, consistent with expert testimony at trial and the State's evidence at the 29.15 hearing (L.F. 475).

The issue in this case is simple: who should weigh this evidence, a postconviction judge or a jury? Who should find the facts necessary to make Paul

eligible for death? Who should make the credibility determinations? Once this Court reviews the record and considers its precedents and those of the United States Supreme Court, the conclusion should be clear – Paul is entitled to a jury trial on the issue of mental retardation. A new penalty phase should result.

Standard of Review

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Rule 29.15(k)*. Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996).

The Eighth Amendment precludes executing the mentally retarded. *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 2249 (2002). "Our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* Thus, "death is not a suitable punishment for a mentally retarded criminal" and would violate the cruel and unusual punishment clause of the Eighth Amendment. *Id*., at 2252. The Supreme Court left to "the States the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id*. at 2250, *quoting*, *Ford v. Wainwright*, 477 U.S. 399, 405, 416-17 (1986).

The Missouri Legislature defined mental retardation in §565.030.6, RSMo 2004:

> 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.

This language substantially tracks the definition of the American Association of Mental Retardation (AAMR):

> Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed.1992); *Atkins*, *supra* at 2245, fn.3. Neither the AAMR's definition of mental retardation, nor Missouri's death penalty statute sets a cut-off for IQ in order to find mental retardation.

Paul was tried in 1999, before *Atkins* was decided and before the Missouri Legislature prohibited the execution of mentally retarded. Thus, the issue of Paul's mental retardation was not litigated pretrial, and the jury was not instructed on the issue.

Sixth Amendment Right to Jury Trial

Section 565.030.4(1), RSMo 2004 requires that the trier assess a sentence of life imprisonment without parole if it finds, by a preponderance of the evidence, that the defendant is mentally retarded. Thus, whether a defendant is mentally retarded is a factual issue the jury must find in order for a defendant to be eligible for death. As such, a jury must decide this issue. *See Ring v. Arizona*, 536 U.S. 584, 589 (2002) (Sixth Amendment entitles "[c]apital defendants ... to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"); *State v. Whitfield*, 107 S.W.3d 253, 256 (Mo. banc 2003) (jury must make the factual findings required by Section 565.030.4 in order to render the defendant eligible for the death penalty under the Sixth and Fourteenth Amendments). *See also*, Section 546.040, RSMo 2000, providing that "all issues of fact in any criminal cause *shall be tried by a jury*, to be selected, summoned and returned in a manner prescribed by law" (emphasis added). Under Section 565.030.4(1), RSMo 2004, the trier must find that a defendant is not mentally retarded in order for him to be eligible for death and thus, this factual issue must be made by the jury, not a postconviction judge.

This Court addressed this issue in *Johnson v. State*, 102 S.W.3d 535 (Mo. banc 2003). There, Johnson was denied an evidentiary hearing on the issue of mental retardation at his 29.15 proceedings. *Id*. Johnson had been evaluated before trial by three mental health experts, Drs. Cowan, Bernard and Smith. *Id*. at 541. Dr. Cowan tested Johnson and reported his IQ as Full – 84, performance – 86, and verbal – 83. *Id*. at 541. In contrast, Dr. Bernard indicated that his IQ ranged from 70-75. *Johnson, supra* at 541. Dr. Smith did not do independent testing. *Id*. Johnson's IQ scores in school were 77 in the third grade and 63 in the sixth grade. *Id*. Dr. Bernard maintained that Johnson had poor intelligence indicators and other defective adaptive skills. *Id.*

This Court found the conflicting evidence raised a question of fact regarding Johnson's mental capacity. "Reasonable minds could differ as to Johnson's mental abilities." *Id.* at 540. Since there was ample evidence putting Johnson's mental capacity in question, this Court remanded for a new penalty phase, so a jury could determine the issue. *Id.* at 541. Significantly, this Court did not remand to the motion court to make this determination, but decided that a jury should decide the issue at a new penalty phase.

Like *Johnson*, here, there is ample evidence calling Paul's mental capacity into question. As in *Johnson*, Paul has conflicting IQ scores, most putting him in the borderline intellectual functioning range (H.Tr. 700-04, L.F. 468). However, Paul took the Wechsler so many times, that his elevated scores may have resulted from a practice effect (H.Tr. 245, 250). He had scores in grade school that place

him in the mentally retarded range. In 1980, when he was 13 years old, he had the following scores on the Wechsler: 69 – verbal, 80 – performance, and 72 – full scale (H.Tr. 651). In 1983, his verbal score was 69 once again (H.Tr. 653). The verbal scores are good indicators of general intelligence, since they assess information, similarities, vocabulary, and comprehension, all low scores for Paul (H.Tr. 651). Dr. Keyes found him to be mentally retarded (H.Tr. 59, 79, 79-80, 81-82, 167, 168-69, 243, 651,653).

Significantly, none of the experts who evaluated Paul before trial tested his adaptive functioning (H.Tr. 272-73). Neither did the Special School District (H.Tr. 657). Meinershagen, the employee from the Department of Corrections, admitted that she did no adaptive testing (H.Tr. 603). Dr. Scott did no testing at all (H.Tr. 748, 751). Thus, only Dr. Keyes assessed Paul's adaptive functioning, a necessary component of mental retardation under Section 565.030.6. Thus, "reasonable minds could differ as to Paul's mental abilities" and could conclude that he was mentally retarded. *Johnson*, *supra*.

In *Johnson*, this Court relied on four decisions from other states. *Murphy v. Oklahoma*, 54 P.3d 556, 557, n.17 (Okla. Crim. App. 2002) (evidence of borderline mental retardation downplayed by defendant's own expert warranted remand) and *State v. Lott*, 779 N.E.2d 1011, 1013-15 (Ohio 2002) (contradictory evidence of mental retardation necessitated a remand); *People v. Pulliam*, 794 N.E.2d 214 (Ill. 2002) (contradictory evidence of mental retardation necessitated a

remand); and *State v. Dunn*, 831 So.2d 862, 880-83 (La. 2002) (contradictory evidence of mental retardation necessitated a remand).

Lott is particularly instructive. There, the defendant relied on a single IQ test of 72 and five affidavits from family and friends showing personality problems and behavioral indicators of early-life trauma. *Lott*, 779 N.E.2d 1013. The State pointed to evidence in the mitigation phase of trial that placed Lot's IQ in the low average categories: 77-81, 83-91, 87-97. *Id.* Additionally, the State submitted a sixth grade IQ test showing Lott's IQ was 87-97, and a 1984 test showing a full scale IQ of 86. *Id*. Even though this evidence suggested Lott was of low average intelligence, the court found the conflicting evidence presented a disputed factual issue and necessitated a reversal. *Id*. at 1014.

Since Paul presented ample evidence of mental retardation and reasonable minds could disagree, this Court should reverse the denial of postconviction relief and remand for a new penalty phase in which the jury can decide whether Paul is mentally retarded, so as to preclude his execution under *Atkins* and Section 565.030.

Motion Court's Findings Are Clearly Erroneous

Alternatively, if this Court finds that a judge can make the factual finding of mental retardation, it should conclude that the motion judge clearly erred in denying relief and reverse. Judge O'Brien denied Paul relief because he found that Dr. Keyes and all Paul's witnesses were not credible (L.F. 463, 471-72). Judge O'Brien thought that Paul's family and teachers had an obvious bias in

favor of Paul (L.F. 463). He also found that since family were not familiar with facts surrounding the criminal case, their testimony was not credible (L.F. 472).

The motion judge criticized Dr. Keyes for relying on Paul's family to determine his opinions of adaptive functioning (L.F. 471). Keyes admitted that the family had a strong incentive to try to help Paul since he had been sentenced to death (L.F. 471-72). Keyes also relied on Paul's counsel to provide background material (L.F. 472).

The court weighed movant's evidence against the State's and ruled in favor of the State (L.F. 474-75). He found the three experts prior to trial, the Special School District records, and other records all established that Paul functioned above the mentally retarded range (L.F. 474-75).

Credibility is for the Jury

First, the motion court clearly erred in finding all Paul's witnesses incredible. A state postconviction's judge's finding that a witness is not credible will not defeat a claim of prejudice in a postconviction action. *Kyles v. Whitley*, 514 U.S. 419, 449, n. 19 (1995). The judge's observation could not substitute for the jury's appraisal at trial. *Id*. Credibility of a witness is for the jury, not the postconviction court. *Antwine v. Delo*, 54 F.3d 1357, 1365 (8th Cir. 1995).

Court Focuses on IQ Scores and Ignores Adaptive Deficits

Even though the Missouri Legislature declined to set a cutoff for IQ in order to find a defendant mentally retarded, the motion court focused on IQ numbers and ignored Paul's deficits in adaptive functioning. The motion court

credits the three trial experts finding of no mental retardation, based on IQ testing alone (L.F. 454-59). None of these experts assessed Paul's adaptive functioning (H.Tr. 272-73). Neither did Meinershagen from the Department of Corrections (H.Tr. 603). She admitted as much in her testimony (H.Tr. 603). Dr. Lamb from the Special School District acknowledged that neither she, nor anyone else in the school department, tested Paul's adaptive skills before ruling out mental retardation, even when his IQ scores fell to 72 and his verbal scores were in the 60s (H.Tr. 657).

Perhaps the most troubling finding is the court's total disregard of all Paul's family and teachers' testimony. Under the court's analysis, one could never prove low adaptive functioning, because all those who surrounded the defendant as a child, the very people who could recount his childhood functioning and his problems, would be too biased to testify.

The motion court ignores all the school records that support the family and teachers' testimony, showing Paul had memory problems, failed third and fourth grade, had problems communicating and problems with socialization (Ex. A). The motion court totally ignores Mrs. Higgins, Paul's seventh grade teacher, and Mrs. Welch, a special education teacher and tutor for Paul, since they provide testimony in support of the family. Indeed, much of Mrs. Higgins testimony focused on the school records themselves, the very records the motion court credits in its ruling (L.F. 475). *Lott, supra,* shows that family affidavits can provide support for low adaptive functioning and should be considered.

Counsel's Ineffectiveness

Judge O'Brien rejected the claim that counsel was ineffective, ruling that counsel had made reasonable efforts to investigate Paul's mental status and were not ineffective for failing to shop for another expert (L.F. 470). The court found that much of the evidence of mental retardation would have been "hearsay, speculation or opinion testimony" and cumulative to that presented at trial (LF. 470). Thus, counsel could not be ineffective for failing to present it. *Id*.

To establish ineffective assistance, Paul must show that his counsel's performance was deficient and that the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511-12 (2000). To prove prejudice, Paul must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Wiggins v. Smith*, 123 S.Ct. 2527, 2542 (2003). The Sixth Amendment requires counsel to "discover *all reasonably available* mitigating evidence." *Id.* (emphasis in original). *See also, Hutchison v. State,* 150 S.W.3d 292 (Mo. banc 2004) (counsel ineffective for failing to adequately investigate client's life history and consult with appropriate experts).

In the fall of 1999, the time of Paul's trial, mental retardation was mitigating evidence and the jury could not be precluded from considering it. *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 2952 (1989). Thus, it was unreasonable for counsel not to investigate and present this evidence. None of

counsel's defense experts assessed Paul's adaptive functioning, necessary to rule out mental retardation (H.Tr. 272-73). Given that Paul had so many deficits in his adaptive skills and an IQ score placing him in the mentally retarded range, counsel had a duty to investigate and present this evidence.

Contrary to the motion court's finding, this evidence was not hearsay, speculation or opinion evidence. Rather, it was based on family and teachers' personal observations. A lay person may be allowed to testify to another's mental condition if the testimony is based on adequate observations. *State v. Raine*, 829 S.W.2d 506, 510 (Mo. App. W.D. 1992). Additionally, mitigating evidence can be presented even if it is hearsay. *Green v. Georgia*, 442 U.S. 95 (1979) (exclusion of proffered testimony of witness that second defendant confided to witness that he had killed victim after ordering defendant to run errand was relevant to critical issue in punishment phase of trial, and thus exclusion of such testimony, based on hearsay rule, denied defendant fair trial on issue of punishment).

The court also erred in requiring the mitigating evidence relate to the crime itself. This Court has rejected such analysis:

> The court found that some of the family members who were not contacted were unfamiliar with Hutchison's *recent* activities so their testimony was not relevant. Contrary to that court's ruling, a defendant need not show a nexus between his mental capacity and the crime to admit such mitigating evidence.

Hutchison v. State, 150 S.W.3d 292, 305 (Mo. banc 2004), *citing*, *Tennard v. Dretke*,____ U.S. ____, 124 S.Ct. 2562, 2573 (2004). "Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Hutchison*, *supra* at 304, quoting, *Tennard*, 124 S.Ct. at 2570.

Paul's evidence of mental retardation was not cumulative, since the only evidence presented at trial suggested Paul was not mentally retarded. "Evidence is said to be cumulative when it relates to a matter so fully and properly proved by other testimony as to take it out of the area of serious dispute." *Black v. State*, 151 S.W.3d 49, 56 (Mo. banc 2004), *quoting State v. Kidd,* 990 S.W.2d 175, 180 (Mo. App. W.D. 1999) (internal quotations omitted). A trial court does not have discretion to reject evidence as cumulative when it goes to the very root of the matter in controversy or relates to the main issue, like the defendant's mental state. *Black, supra*, *citing*, *State v. Perry*, 879 S.W.2d 609 (Mo. App. E.D.1994).

The court's finding that the trial attorneys conducted a reasonable investigation is not supported by the record. When counsel agreed to take Paul's case, they thought it would plea and not require a lot of work (L.F. 295). As a result, counsel did very little investigation and did not thoroughly investigate Paul's background (L.F. 295-96). Counsel never talked to Catherine Welch, Paul's tutor, or Patricia Higgins, his seventh grade teacher (H.Tr. 387, 497-98). Counsel did not talk to some family members (H.Tr. 295, 557-58) and spent a limited amount of time with one sister and Paul's mother (H.Tr. 339-40). The

defense experts also spent a limited amount of time with family (H.Tr. 340-444, 557-58) and did not question family about Paul's adaptive functioning (H.Tr. 346-47, 498, 558).

Postconviction counsel did not call trial counsel to testify at the 29.15 hearing. However, Paul has still proven his claim, since there could be no reasonable trial strategy for failing to present evidence of mental retardation. *See*, *Young v. Dretke*, 356 F.3d. 616 (5th Cir. 2004) (counsel ineffective in failing to move to dismiss untimely indictment, which provided an absolute bar to prosecution).

In *State v. Tokar*, 918 S.W.2d 753, 768 (Mo. banc 1996), this Court addressed counsel's alleged ineffectiveness for failing to object to the prosecutor's closing argument. *Tokar*, supra at 768. Despite his allegations, Tokar presented no evidence regarding why counsel failed to object to the closing argument in question, despite questioning counsel regarding other issues at the postconviction hearing. *Id*. This Court held that, without any evidence as to counsel's reasons for not objecting, Tokar had "not overcome the presumption that the failure to object was a strategic choice by competent counsel." *Id*.

Here, Paul has overcome the presumption that counsel made a reasonable strategic choice. It really would not matter what counsel said at a hearing. It could not be reasonable strategy, under any circumstances, not to offer evidence of mental retardation in penalty phase. This is especially true since counsel never claimed that Paul did not commit the offense, but rather, that his mental state was

not sufficient to find deliberation. Evidence of mental retardation would not have conflicted with this defense and counsel unreasonably failed to adduce it. A new penalty phase should result.

II. State's Evidence of Motive – That Paul Blamed Mrs. Crotts For Being Evicted From Boarding House - Was Not True

The motion court clearly erred in denying a hearing on the claim that Paul's counsel was ineffective for failing to investigate and present evidence to rebut the state's suggestion that Paul blamed Mrs. Crotts for being evicted from the boarding house and killed her as a result, because this denied Paul due process, effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled Paul to relief, that counsel acted unreasonably in failing to investigate and present documentary evidence, cancelled checks, and witnesses, Royal Crase, Mary Elaine Goodwin, Andy Silkwood, and Ray Dickerson, who would have established that Paul was not evicted from the boarding house in August 1996 because of fights with Mrs. Crotts, rather he lived there until November, 1996; Mrs. Crotts never complained about Paul to Mr. Crase, the owner of the boarding house; and when Paul moved from Mr. Crase's residence, he did not threaten Mrs. Crotts. Paul was prejudiced since this evidence would have rebutted the state's evidence of deliberation and motive, that he supposedly killed Mrs. Crotts out of anger for being evicted.

The State's theory at trial was that when Mrs. Crotts and Paul Goodwin lived next door to each other during the summer of 1996, they disliked each other and got into arguments. Paul supposedly harassed her, throwing chicken bones over the fence to her dogs and beer cans in her yard. As a result, Paul was evicted. According to the State, Paul was angry and blamed Mrs. Crotts for being evicted. He vowed to get even.

The State outlined this theory in its opening statement (Tr. 774-76, 779-80), and called three witnesses to testify in support: Debra Decker Olive (Mrs. Crotts' daughter) (Tr. 857-866, 936-38), Carol Stanley (Mrs. Crotts' neighbor and friend) (Tr. 1185-89, 1191-92) and James Melvin Hall[8] (Mrs. Crotts' neighbor and her grandson's friend) (Tr. 1251-54). Then in closing, the prosecutor used these purported threats to show Paul's intent to harm and kill her (Tr. 1916).

The amended motion alleged that, despite the importance of this evidence, trial counsel never investigated these alleged threats or the August eviction (L.F. 29-31, 134-56). Had counsel conducted any investigation at all, they would have learned that Paul stayed at the home owned by Mr. Royal Crase until November 1996 (L.F. 149-51). Had counsel talked to Mr. Crase, counsel would have learned that Mr. Crase did not evict Paul in the summer of 1996 (L.F. 153-54). Mr. Crase never saw or heard Paul and Mrs. Crotts argue or fight (L.F. 153-154). Mrs.

[8] Counsel's ineffectiveness in failing to investigate Hall is raised separately in Point III, *infra*.

Crotts never complained to Mr. Crase about Paul (L.F. 153). She never complained to him about any of his tenants in the twenty-seven years that they were neighbors (L.F. 153). Mr. Crase's only problem with Paul and other residents came when he found out they used drugs at the house (L.F. 153). He would not tolerate drug use (L.F. 153). He also made Paul pay for some damage to a wall at the house (L.F. 154).

Mr. Crase's testimony was confirmed by Mrs. Goodwin's cancelled checks, showing she continued paying Paul's rent in October, 1996 while he was looking for another place to live (L.F. 151). Paul was hospitalized for six days in August, but he returned to Mr. Crase's house and recuperated (L.F. 150). Paul and his girlfriend, Penny, eventually moved in with Andy Silkwood for two weeks, until Andy's rental property, rented by Ray Dickerson, was available (L.F. 151). Two weeks later, in November 1996, Paul and Penny rented Andy's apartment on Jane Avenue (L.F. 151-52).

Andy helped Paul move from Mr. Crase's house in late October or early November, 1996 (L.F. 151). When they collected Paul's personal belongings, they did not see Mrs. Crotts and had no arguments or confrontations with anyone (L.F. 151).

Counsel did not interview or call Mr. Crase, Mrs. Goodwin, Andy Silkwood or Ray Dickerson, who could have verified these facts, even though counsel knew that the State intended to call Ms. Olive, Ms. Stanley, and Mr. Hall to testify about Paul's alleged threats against Mrs. Crotts (L.F. 148-55). Paul and

his sister, Mary, told counsel that Paul was not evicted in August, 1996 and did not move until November of 1996 (L.F. 149). They told counsel about the witnesses that could verify what actually happened (L.F. 149). Counsel endorsed Mr. Crase, but never interviewed him or the other witnesses (L.F. 152).

Despite these allegations, the motion court denied this claim without a hearing (L.F. 450). The court ruled that Mrs. Goodwin testified at trial and did not offer any testimony regarding Paul and Mrs. Crotts' relationship (L.F. 450). According to the court, the proposed testimony was based on "hearsay, speculation and opinion" as to Paul's thoughts, and thus was inadmissible (L.F. 450). It also did not provide a defense (L.F. 450).

Standard of Review[9]

This Court reviews the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Rule 29.15(k)*. Findings are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996).

A motion court must hold an evidentiary hearing if (1) the movant cites facts, not conclusions that, if true, would entitle him to relief; (2) the factual

[9] The standard of review is the same for Points II-VII, all claims denied without a hearing. To avoid unnecessary repetition, Mr. Goodwin does not discuss the standard in detail in these subsequent arguments.

allegations are not refuted by the record; and (3) the matters complained of prejudiced the movant. *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo. banc 2002); Rule 29.15(h). "An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief." *Id*. at 928 (emphasis in original).

Due process requires a fair hearing in 29.15 proceedings. *Thomas v. State*, 808 S.W.2d 364, 367 (Mo.banc1991); *In re Murchison*, 349 U.S. 133, 136 (1955). Additionally, Rule 29.15(h) creates a presumption that courts should hold hearings. This language creates an expectation protected by the Due Process Clause, *Ford v. Wainwright*, 477 U.S. 399, 428 (1986) (O'Connor, J., concurring and dissenting) that cannot be arbitrarily abrogated. *Wolff v. McDonnell*, 418 U.S. 539,557-58 (1974). Thus, the denial of a hearing required by a postconviction rule can violate a defendant's right to due process. *See, e.g*., *People v. Kitchen*, 727 N.E.2d 189 (Ill. 2000) (Post-Conviction Hearing Act should not be so strictly construed that a fair hearing is denied and the purpose of the Act, the vindication of constitutional rights is defeated).

The amended motion alleged factual allegations, that if proven, would entitle Paul to relief. The motion claimed that counsel was ineffective in failing to investigate the State's evidence that Paul had threatened the victim and vowed to get even with her for having him evicted (L.F. 29-31, 134-56). Counsel's failure also violated Paul's rights to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments, as it deprived him of mitigating evidence that

would have provided jurors with a basis for a sentence less than death (L.F. 29, 134). *Lockett v. Ohio*, 438 U.S. 586 (1978).

Counsel is constitutionally ineffective if his performance was deficient and it prejudiced the case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). A defendant must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*.; *State v. Butler*, 951 S.W.2d 600, 608 (Mo. banc 1997). A reasonable probability is one sufficient to undermine confidence in the outcome. *Id*.

Counsel can be ineffective for failing to call witnesses to rebut the State's evidence of the defendant's motive for the murder. *Parker v. Bowersox*, 188 F.3d 923 (8th Cir. 1999). In *Parker*, counsel failed to call her client's former attorney to testify that Parker was aware that the victim was no longer a potential witness against him in an assault case and a probation violation case and that she had told Parker as much. *Id*. at 929-31. The State's theory was that Parker wanted to kill the victim because of her status as a witness. *Id*. at 929. Not only did this provide Parker's motive for the killing in guilt phase, it also constituted an aggravating circumstance supporting death. *Id*. Counsel had no reasonable explanation for not calling this witness to rebut the motive evidence. *Id*. at 930. Parker was prejudiced as this evidence would have rebutted the aggravating circumstances. *Id*. at 931.

Here too, counsel failed to investigate and present evidence to rebut the State's evidence of motive, that Paul committed the murder because he was angry with the victim and wanted to get even with her for having him evicted. The State portrayed Paul as mean and vengeful, holding a grudge against Mrs. Crotts for 18 months. According to the State when Paul entered Mrs. Crotts' house, "he was there to make good on his promise he'd get her" (Tr. 780). Not only did this provide a motive, it strengthened the State's case for deliberation, and it portrayed Paul as mean, calculating and deserving of death.

This evidence was prejudicial in both guilt and penalty phases. Counsel had a duty to investigate and present readily available evidence that could have rebutted the State's evidence. Had counsel conducted a minimal investigation, he would have learned from Mr. Crase himself, that he never evicted Paul for harassing Mrs. Crotts. Paul did not even move out of the Crase house until November, 1996, much later than the State witnesses claimed. Paul's mother had copies of cancelled checks verifying that rent was paid through October. Andy Silkwood helped Paul move out of the Crase house and knew that Paul did not fight with Mrs. Crotts or threaten her.

These are substantial allegations, which, if proven, would rebut the State's theory of the case and call into doubt whether Paul deliberated on the killing. *Cf*. *Driscoll v. Delo*, 71 F.3d. 701, 709 (8th Cir. 1995) (finding ineffective assistance where counsel failed to expose a material inconsistency in the state's case). The proposed testimony would have placed the evidentiary picture in an entirely

different light and would have shown the State's argument for death was not warranted.

Furthermore, the Court's finding that Mrs. Goodwin testified, but failed to offer testimony regarding Paul and Mrs. Crotts' relationship (L.F. 450), does not eliminate the need for a hearing. Mrs. Goodwin was called as a penalty phase witness. Without a hearing, this Court is left to speculate as to why counsel did not call her in guilt phase to rebut the State's evidence of motive. Counsel can be ineffective in failing to elicit favorable testimony from a witness he calls at trial. *See*, *Cotton v. State*, 25 S.W.3d 507 (Mo. App. E.D. 2000) (movant alleged sufficient facts to support claim that counsel was ineffective for failing to elicit testimony from movant as to victim's reputation and acts, though he did testify as to one specific act of violence by victim); and *Fingers v. State*, 680 S.W.2d 377 (Mo. App. S.D. 1984) (counsel ineffective for failing to elicit from state's witness that he had been offered a "deal" for his testimony).

Contrary to the motion court's finding, the proposed testimony by Mr. Crase, Mrs. Goodwin, Mr. Silkwood and Mr. Dickerson, was not based on "hearsay, speculation and opinion" (L.F. 450). Rather, it was based on their personal observations and knowledge. Mr. Crase owned the residence on Lyndhurst next door to Mrs. Crotts and rented a room to Paul. Mr. Crase knew whether he evicted Paul and when he moved out. Andy Silkwood helped Paul move, so he would have personally observed Paul as he was leaving and whether Mrs. Crotts was present. Similarly, Ray Dickerson knew when Paul moved

because Paul moved into Ray's apartment when Ray moved out. Finally, Mrs. Goodwin had personal knowledge about the rent she paid and her cancelled checks. She knew Paul was in the hospital and recovered at the Crase household. Thus, the proposed testimony was not hearsay, speculation or opinion.

Given these factual claims, the motion court clearly erred in denying a hearing. A remand should result.

III. Counsel Did Not Investigate Hall's Allegation that Paul Had Threatened Mrs. Crotts, Smashing a Rock With a Sledgehammer

The motion court clearly erred in denying a hearing on the claim that Paul's counsel was ineffective for failing to investigate and present evidence to rebut the state's suggestion that Paul threatened Mrs. Crotts, while he smashed a rock with a sledgehammer, because this denied Paul due process, effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled Paul to relief, that counsel acted unreasonably in failing to investigate and call Ronald Krabbenhoft who was present during the sledgehammer incident and disputed Hall's contention that Paul smashed a rock or threatened Mrs. Crotts. Paul was prejudiced since Krabbenhoft's testimony would have undermined the State's case for deliberation and death.

Perhaps the most prejudicial testimony at trial came from James Melvin Hall, a childhood acquaintance of Paul's who lived at 2626 Lyndhust, down the street from Mrs. Crotts (Tr. 1249-51). Hall claimed that in July or August of 1996, he was in the backyard of Mr. Crase's house where Paul and others were having a barbeque (Tr. 1251-52, 1259). According to Hall, some of the men were throwing chicken bones in Mrs. Crotts' backyard (Tr. 1253). She came out of the house and yelled at them, telling them to stop throwing things in her backyard and

that she was tired of being harassed (Tr. 1253). Paul allegedly picked up a sledgehammer and smashed a rock, saying "this is your head, blank, blank, if you keep messing with me" (Tr. 1254).

Paul's amended motion alleged that counsel was ineffective for failing to investigate this alleged threat (L.F. 33-34, 167-75). Paul denied that he had ever threatened Mrs. Crotts (L.F. 169). Paul asked that counsel talk to Mr. Crase and the tenants who lived at the Crase house at the time (L.F. 169-70). Counsel endorsed Ronald Krabbenhoft, but never interviewed him before trial (L.F. 170, S.Tr. 27-28). Had counsel interviewed Mr. Krabbenhoft, he would have learned that he lived at Mr. Crase's house with Paul (L.F. 171). He was interviewed by the prosecutor's office regarding the sledgehammer incident, but never by defense counsel (L.F. 171, 172, S.Tr. 27-28). Krabbenhoft recalled that the sledgehammer incident, because he thought Mr. Crase would be angry for putting holes in the ground (L.F. 171). However, he disputed Hall's claim that Paul hit a rock with the hammer or that he threatened Mrs. Crotts (L.F. 171-72).

The motion court denied this claim without a hearing, ruling that the court heard Mr. Krabbenhoft testify at the motion for new trial hearing and, based on that testimony, found he was not credible (L.F. 450-51). Krabbenhoft had prior convictions, including child molestation (L.F. 451). Additionally, his testimony at the new trial hearing included harmful information, that Paul was violent when drinking and had harassed Mrs. Crotts in the past (L.F. 451). Finally, the court pointed to this Court's opinion finding that Krabbenhoft's testimony would not

have impeached Hall and was cumulative. *Id*. Counsel could not be ineffective for failing to call a witness who would not have aided the defense. *Id*. These findings are clearly erroneous and must be reversed.

Standard of Review

As discussed *supra*, the motion court's findings and conclusions are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. The motion court must hold an evidentiary hearing if: (1) Paul alleged facts, not conclusions that, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record; and (3) the matters complained of prejudiced him. *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo. banc 2002); Rule 29.15(h). Paul had a due process right to a full and fair hearing. *See*, *Thomas v. State*, 808 S.W.2d 364, 367 (Mo. banc 1991); *In re Murchison*, 349 U.S. 133, 136 (1955); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); and *People v. Kitchen*, 727 N.E.2d 189 (Ill. 2000), discussed *supra*.

Counsel is constitutionally ineffective if his performance was deficient and it prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). Counsel must conduct a reasonable investigation. *Id*. The failure to investigate relates to trial preparation, not strategy. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). A defendant must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*.; *State v. Butler*, 951

S.W.2d 600, 608 (Mo. banc 1997). A reasonable probability is one sufficient to undermine confidence in the outcome. *Id*.

Counsel's failure also violated Paul's rights to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments, as it deprived him of mitigating evidence that would have provided jurors with a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586 (1978).

The amended motion alleged factual allegations, that if proven, would entitle Paul to relief. The motion claimed that counsel was ineffective in failing to investigate the State's damning evidence that Paul had threatened the victim, crushing a rock and saying that would be her head if she kept messing with him. Counsel knew that the State intended to introduce this evidence, but did nothing to investigate it. Counsel was aware of potential witnesses to the events and even endorsed one, Ronald Krabbenhoft (L.F. 170, D.L.F. 101). Yet counsel never even talked to Krabbenhoft to see if he had any helpful information before deciding not to call him at trial (S.Tr. 27-28). Had counsel conducted a reasonable investigation and talked to Krabbenhoft, they would have learned that he disputed Hall's allegations that Paul had crushed a rock with a sledge hammer and threatened the victim saying this would be her head if she kept messing with him.

The motion court improperly denied a hearing, because the court concluded that Krabbenhoft was not credible, based on his testimony at the hearing on Paul's motion for new trial (L.F. 140-51). A state postconviction's judge's finding that a witness is not convincing does not defeat a claim of prejudice. *Kyles v. Whitley*,

514 U.S. 419, 449, n. 19 (1995). Credibility of a witness is for the jury, not the postconviction court. *Antwine v. Delo*, 54 F.3d 1357, 1365 (8th Cir. 1995).

Similarly, the motion court found Krabbenhoft had prior convictions, so it denied the claim of ineffectiveness in failing to investigate and call him as witness. While a prior conviction can be used to impeach a witness, it does not automatically disqualify him from testifying. Rather, witnesses with prior criminal histories can provide truthful information that can exonerate a criminal defendant. *See*, *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003) (three inmate witnesses' recantation of prior testimony constituted clear and convincing evidence of innocence). The State relies on witnesses with prior convictions to garner a conviction. *Driscoll v. Delo*, 71 F.3d 701, 709-11 (8th Cir. 1995). Counsel can be ineffective in failing to call such a witness or in failing to impeach inmate witnesses called by state with prior inconsistent statements. *Id*. A postconviction movant is entitled to present testimony of inmate witnesses to prove his claims of ineffectiveness in failing to call the witness at trial. *Taylor v. State*, 728 S.W.2d 305, 307 (Mo. App. W.D. 1987). All these cases show that witnesses with prior criminal histories may be important and truthful in spite of their criminal histories. It is for the jury, not the state postconviction judge, to decide if they are credible. *Kyles*, and *Antwine, supra*. A prior criminal history should not provide a reason to deny an evidentiary hearing.

The motion court also denied a hearing, because Krabbenhoft knew harmful information about Paul, that he was violent when he drank and had harassed Mrs.

Crotts in the past. The court's analysis is flawed since counsel had not even talked to Krabbenhoft to discover the good and bad information he possessed. Thus, counsel was not in a position to make any reasonable decisions about whether to call the witness or not. Secondly, all the so-called "bad" information had been elicited by the State through other witnesses. Thus, Krabbenhoft would not have added anything harmful to the equation, but he could have provided helpful information, showing that Paul never threatened Mrs. Crotts with a sledgehammer as suggested by the State.

Thus, this claim is like that discussed in *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct.1495, 1511-12 (2000). There, counsel failed to present mitigating evidence, because it contained harmful information. *Id.* at 1514. Records showed that Williams had a prior criminal history, a juvenile record for larceny, pulling a false fire alarm, and breaking and entering. *Id*. The harmful information paled in comparison to the helpful mitigation. *Id*. Nearly every unfavorable fact the court mentioned had already been elicited. *Id*.

Here too, the harmful information mentioned by the motion court had already been elicited at trial through other witnesses. Accordingly, Krabbenhoft's helpful testimony that Paul never smashed a rock with the sledgehammer and never threatened to crush Mrs. Crotts head would have outweighed the bad. At the very least, Paul should be allowed a hearing in which counsel is called to testify about his investigation and whether he would have called this witness, weighing the good and bad.

The motion court also denied a hearing, because this Court denied Paul's claim that the state violated due process under *Brady*[10] by not disclosing Krabbenhoft's statement before trial (L.F. 451), *citing*, *State v. Goodwin*, 43 S.W.3d 805, 813 (Mo. banc 2001). The denial of the Brady claim does not foreclose an ineffective assistance of counsel claim. This Court's decision rested on appellant's failure to establish that Krabbenhoft and Hall were describing the same incident where a sledgehammer was used. *Id*. Without such proof, Krabbenhoft's testimony was not impeaching. *Id*. With an adequate investigation, counsel could have established that the incident was the same and Krabbenhoft's testimony refuted Hall's claims.

Additionally, to establish ineffective assistance, Paul must show that his counsel's performance was deficient and that the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511-12 (2000). These are different evidentiary questions than the *Brady* claim. For example, when deciding if Paul established prejudice, this Court must "evaluate the totality of the evidence - - 'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*.'" *Wiggins v. Smith*, 123 S.Ct. 2527, 2543 (2003), quoting *Williams v. Taylor*, 120 S.Ct. at 1515 (emphasis in opinion). Therefore, the motion court should have granted a hearing, considered all the evidence counsel failed to present at trial, and then combine it with the

[10] *Brady v. Maryland*, 373 U.S. 83 (1963).

evidence adduced at the 29.15 hearing, to determine whether there was a reasonable probability that the outcome would have been different.

Hall's allegations that Paul smashed a rock with a sledge hammer and told Mrs. Crotts it would be her head if she kept messing with him was compelling evidence for the State. It portrayed Paul as mean and violent, intent on harming Mrs. Crotts. It supported the State's theory of deliberation and weakened the defense's claim that Paul accidentally entered her basement. Given the importance of this evidence, it was unreasonable for counsel to not investigate it and rebut it. This claim deserves an evidentiary hearing. A remand is required.

IV. Counsel Did Not Investigate Medical Evidence

The motion court clearly erred in denying, without a hearing, Paul Goodwin's claim that counsel was ineffective for failing to investigate the medical evidence, consult with and call a forensic pathologist, such as Dr. Thomas Bennett, because this denied Paul due process, effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, and Rule 29.15(h), in that the motion pled facts, not conclusions that entitled Paul to relief: that counsel acted unreasonably in failing to investigate and present evidence concerning the pathology reports and physical evidence to show that Mrs. Crotts' injuries were consistent with a fall down the stairs and that she was not subjected to repeated and excessive physical abuse, a necessary factual finding for the aggravating circumstance of depravity of mind, and to rebut the State's suggestion that Paul beat her over her entire body and therefore, deliberated. These factual allegations are supported by the record, especially by Dr. Case's testimony and the State's closing arguments. Counsel's failure prejudiced Paul since the State relied on the repeated and excessive acts of physical abuse as the reason the jury should give death and emphasized that the State's medical testimony from Dr. Case went unchallenged. During their deliberations, jurors asked to see the autopsy photos, Dr. Case's testimony, and the autopsy report, showing the importance of this evidence in assessing death and finding deliberation.

At trial, the State argued that Paul Goodwin deserved the death penalty, because he terrorized Mrs. Crotts, torturing her and beating her all over her body (Tr.2297, 2299, 2300, 2305, 2317-18, 2319). According to the State, the medical evidence, especially Dr. Case's testimony and autopsy photos, supported its argument. The State encouraged the jury to look at the autopsy photos to see the abuse and beating Mrs. Crotts suffered (Tr.1869, 1916, 1917). The State told jurors that Dr. Case's testimony went unchallenged, thereby proving that Paul had beaten and manhandled Mrs. Crotts (Tr.1916). Not surprisingly, the jury focused on this evidence, asking to see the autopsy photos in its guilt phase deliberations (Tr.1922) and for Dr. Case's testimony and her autopsy report during penalty phase deliberations (Tr. 2323, 2332). The jury ultimately found the aggravating circumstance of torture or depravity of mind, specifically finding repeated and excessive acts of physical abuse (Tr. 2284, 2341).

Paul Goodwin's postconviction counsel alleged that counsel was ineffective for failing to investigate and present evidence concerning the pathology reports and physical evidence surrounding Mrs. Crotts' death (L.F. 27-28, 122-34). Had counsel conducted such an investigation and consulted a qualified forensic pathologist, such as Dr. Thomas Bennett, M.D., counsel would have learned that most of Mrs. Crotts injuries were consistent with her fall down the stairs, including the head injuries to the left side of her brain (L.F. 126-31). None of the head injuries penetrated the dura matter (L.F. 126). This testimony would have refuted the suggestion that Paul committed repeated and excessive acts of physical

abuse, supporting a death sentence. The evidence also would have weakened the State's evidence of deliberation (L.F. 131-33).

The motion court denied this claim, without a hearing, ruling that "[a]s it was clear that the victim's injuries were caused by the deliberate acts of Movant, whether by beating her or pushing her down the stairs, Movant could not have been prejudiced by trial counsel's failure to present this evidence" (L.F. 449-50). The motion court clearly erred. Mr. Goodwin should be granted an evidentiary hearing on this claim.

Standard of Review

As discussed *supra*, the motion court's findings and conclusions are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. The motion court must hold an evidentiary hearing if (1) Paul cited facts, not conclusions that, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record; and (3) the matters complained of prejudiced him. *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo. banc 2002); Rule 29.15(h). Paul had a due process right to a full and fair hearing. *See*, *Thomas v. State*, 808 S.W.2d 364, 367 (Mo. banc 1991); *In re Murchison*, 349 U.S. 133, 136 (1955); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); and *People v. Kitchen*, 727 N.E.2d 189 (Ill. 2000), discussed *supra*.

Ineffective Assistance of Counsel

To establish ineffective assistance, Paul must show that counsel's performance was deficient and that it prejudiced his case. *Strickland v.*

Washington, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). He must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*.; *State v. Butler*, 951 S.W.2d 600, 608 (Mo. banc 1997). A reasonable probability is one sufficient to undermine confidence in the outcome. *Id*.

Counsel's failure also violated Paul's rights to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments, as it would have rebutted aggravating evidence and would have provided jurors with a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586 (1978).

Here, the motion court clearly erred. The amended motion alleged factual allegations, that if proven, would entitle Paul to relief. The motion claimed that counsel was ineffective in failing to investigate the pathology reports and physical evidence by consulting with a qualified forensic pathologist, such as Dr. Thomas Bennett. The claim was factual, establishing that an adequate investigation would have shown that nearly all Mrs. Crotts' injuries were consistent with a fall down the stairs and not the result of excessive and repeated acts of physical abuse. This would have rebutted the State's argument for death and also would have weakened its case for deliberation - - prejudicing Paul in both penalty and guilt phases.

Numerous decisions have found counsel ineffective for failing to investigate the physical evidence and consult with necessary experts to rebut the State's case. *Cravens v. State*, 50 S.W.3d 290, 295-98 (Mo. App. S.D. 2001) (forensic pathologist); *Blankenship v. State*, 23 S.W.3d 848 (Mo. App. E.D. 2000)

(expert in accident reconstruction); *Moore v. State*, 827 S.W.2d 213, 215-16 (Mo. banc 1992) (serologist); *Wolfe v. State*, 96 S.W.3d 90, 93-95 (Mo. banc 2003) (forensic hair testing).

In *Cravens*, counsel was ineffective for failing to consult an expert in forensic pathology and forensic sciences to testify about the gunshot wound to the victim. *Id*. The State's theory was that Cravens shot the victim from a distance of six to eight feet from the right. *Id*. at 293. However, independent experts would have testified that the victim was shot at a close distance of less than one foot. *Id*. The shot originated from the victim's left side and was fired at an upward angle, only a few inches from her face. *Id*. The victim had high levels of gunpowder residue on her hands, unlikely transferred by Cravens. *Id*. Finally, the gun had a low trigger pull and no trigger guard making it prone to accidental firing. *Id*.

Craven's counsel had a duty to make reasonable investigation. *Id*. at 295. The defense, an accidental shooting, relied on the gunshot being fired from a close distance. *Id*. Yet counsel made no investigation into the propriety of independent experts and provided no reasonable explanation for his failure to conduct this basic investigation. *Id*.

In finding prejudice, the Court found that the expert testimony may have altered the entire evidentiary picture. *Id*. at 296. Without the expert testimony, the jury was compelled to accept the State's evidence that the shot was fired from 6-8 feet and that Cravens transferred the gunshot residue to the victim. *Id*. at 297-98. Had counsel consulted with and presented expert testimony, there was a

reasonable probability that the outcome would have been different. *Id*. at 298. Not only would the evidence have supported the defense, it would have supported a conviction for a lesser degree of homicide. *Id*.

Similarly, here the jury was compelled to accept the State's evidence that Paul beat and tortured Mrs. Crotts, hitting her all over her body. As the prosecutor put it, Dr. Case's conclusion went unchallenged (Tr. 1916). Had counsel investigated and called an expert such as Dr. Bennett, the entire evidentiary picture would have changed. Jurors would have learned that many of Mrs. Crotts' injuries were consistent with her fall down the stairs, vastly different than the State's suggestion that Paul beat her up and terrorized her before he pushed her down the stairs (L.F. 129, 130). Jurors also would have learned that all of the injuries to the left side of her brain were consistent with falling (L.F. 127-28). Thus, the jury would have realized that while Paul hit her twice in the head, the blows did not penetrate the dura matter of the brain, nor cause swelling in the brain (L.F. 126-27). While this evidence still would have supported a finding that Paul caused her death, it called into question whether he deliberated, and whether he committed repeated and excessive acts of violence.

The motion court found that Paul could not be prejudiced, since he caused Mrs. Crotts' death, either by beating her or pushing her down the stairs (L.F. 449-50). This finding is contrary to the record. The State relied heavily on Dr. Case's testimony to support not only deliberation, but the aggravator – torture or depravity of mind. On direct, Dr. Case detailed Mrs. Crotts injuries and stated that

many of the injuries were inconsistent with a fall down the stairs (Tr. 1108, 1109, 1109-10, 1110, 1110-12, 1112-13, 1113-14, 1114-5, 1115, 1118-19, 1147). On cross-examination, she reiterated that the injuries could not have been sustained from falling (Tr. 1156). Then on redirect, the State again emphasized all the injuries and that they could not be caused by falling down the stairs (Tr. 1160-61, 1161-62, 1162). Dr. Case claimed the injuries resulted from an assault or a beating (Tr. 1163). Finally, on re-cross, Dr. Case again stated that while a single injury to the mouth could have been caused by the fall, all her injuries could not (Tr. 1164).

The impact of this testimony was not lost on the jurors. The State suggested three times that they look at the autopsy photos and reminded the jurors that Dr. Case's testimony -- that the victim was beaten and manhandled -- went unchallenged (Tr. 1869, 1916, 1917). The jurors accepted the invitation, asking for the autopsy pictures during deliberations (Tr.1922).

Dr. Case's testimony was even more important during the penalty phase of trial as it provided the centerpiece of the State's argument for death – to support the aggravator of torture and depravity of mind. The State told jurors that Mrs. Crotts' arms were twisted and she had blunt trauma to her entire body (Tr. 2297). She suffered horrible abuse and was rendered helpless, according to the State (Tr. 2299). The State argued that Paul had grabbed her, twisted her arms, punched her in the mouth (Tr. 2300). He "terrorized" her and beat her (Tr. 2305, 2306). He deserved death, because he was willing to torture her (Tr. 2319).

The jurors zeroed in on this evidence during its penalty phase deliberations, asking for Dr. Case's testimony and her autopsy report (Tr. 2323, 2332). The jury found repeated and excessive acts of physical abuse to support a finding of torture and depravity of mind, in assessing punishment at death (Tr. 2341).

Given this record, the motion court clearly erred in denying Paul a hearing on his claim of ineffective assistance of counsel. This Court should remand for an evidentiary hearing.

V. Counsel Did Not Sufficiently Investigate Client's Mental State

The motion court clearly erred in denying a hearing on the claim that Paul's counsel was ineffective for failing to investigate and present evidence to rebut the state's suggestion that Paul planned to kill Mrs. Crotts and deliberated on the killing, because this denied Paul due process, effective assistance of counsel, right to present a defense, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled Paul to relief, that counsel acted unreasonably in failing to investigate and present witnesses, Patty Higgins, Marilyn Lamb, Mary Welch, Mary Elaine Goodwin, Joseph Goodwin, Mary Mifflin, Kathleen Goodwin, Brenda Thomas, Jim Goodwin, Pat Goodwin, Dr. Meiners, Ray Dickerson, and Andy Silkwood, who would have testified: 1) that Paul was not capable of detailed planning due to his intellectual deficits, his inability to foresee consequences and his impulsive nature; 2) Paul was easily confused, got lost and wandered into strangers' houses when he was a child; and 3) Paul had legitimate reasons for walking on Hanley road, since he lived in the neighborhood and did not drive a car. Paul was prejudiced since this evidence would have rebutted the state's evidence of deliberation and supported his sole defense that due to his mental problems he could not deliberate.

Paul Goodwin's amended motion alleged that counsel was ineffective for failing to investigate and present evidence to rebut the State's suggestion that he planned to kill Mrs. Crotts, concocting a scheme to lure her out of her home, enter the home surreptitiously, and lay in wait with the intent to kill her (L.F. 34-37, 175-97, 197-201, 201-05). Numerous witnesses, Patty Higgins (Paul's special education teacher), Marilyn Lamb (psychologist for Special School District), Mary Welch (Paul's tutor), Mary Elaine Goodwin (Paul's mother), Joseph Goodwin, Mary Mifflin, Kathleen Goodwin, Brenda Thomas (Paul's siblings), Jim Goodwin (Paul's uncle), Pat Goodwin (Paul's cousin), Dr. Meiners (Paul's uncle), Ray Dickerson and Andy Silkwood (Paul's friends) could have testified about Paul's intellectual deficits (L.F. 177-97)

Paul could not follow instructions and was easily confused (L.F.178-79, 191-92, 193, 198-200). Paul had problems communicating, a short attention span, and could not retain information (L.F. 180). He had difficulty formulating a plan, let alone following through with it (L.F. 182, 185, 185-86). Paul was extremely concrete and could not form abstract ideas (L.F. 184, 185, 187). Rather, he acted on impulse (L.F.185). He failed to grasp the consequences of his actions (L.F. 185, 188).

Paul's family, friends and teachers witnessed his problems throughout his life. He often wandered into neighbors' houses by mistake (L.F. 199). Paul was so easily confused that he could not remember how to get from one class to the

next (L.F. 199). His mother had to sit outside the class room and take him to his next class (L.F. 199). Unable to hear, he had problems communicating (L.F.200).

Additionally, Elaine Goodwin and Mary Mifflin, could have testified about why Paul walked on Hanley Road (L.F. 204-04). Paul lived on Jane Avenue, adjacent to Hanley Road (L.F. 203). He did not own a car and walked places. *Id*. Paul often walked to his mother's house, so she could take him to work or to visit her. *Id*. Sometimes Paul met his mother at St. Vincent's Park, near Hanley and St. Charles Rock Road, where she walked her dog (L.F. 204). He walked to the Citgo Station, located at Natural Bridge and Hanley Road. (L.F. 203). Had counsel presented this evidence, the jury would have realized Paul had legitimate reasons for walking on Hanley Road, contrary to the State's suggestion that he was walking up and down the road, stalking the victim and plotting to kill her (L.F. 204).

The motion court denied all these claims, ruling that the proposed testimony was based upon "hearsay, speculation and opinion" and thus was inadmissible (L.F. 451-52). The court also found that since experts testified about Paul's mental capabilities, this evidence would have been cumulative to the evidence adduced at trial (L.F. 451-52). Additionally, the proposed evidence of Paul's walking in the neighborhood for legitimate reasons did not provide a defense, according to the court (L.F. 452).

Standard of Review

As discussed *supra*, the motion court's findings and conclusions are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. The motion court must hold an evidentiary hearing if: (1) Paul alleged facts, not conclusions that, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record; and (3) the matters complained of prejudiced him. *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo. banc 2002); Rule 29.15 (h). Paul had a due process right to a full and fair hearing. *See*, *Thomas v. State*, 808 S.W.2d 364, 367 (Mo. banc 1991); *In re Murchison*, 349 U.S. 133, 136 (1955); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); and *People v. Kitchen*, 727 N.E.2d 189 (Ill. 2000), discussed *supra*.

Here, the motion court clearly erred. The amended motion alleged factual allegations that if proven, would entitle Paul to relief. The motion claimed that counsel was ineffective in failing to investigate Paul's state of mind, his ability to plan and deliberate. Contrary to the motion court's findings, witnesses' testimony, based on their personal observations, are admissible.

A lay person may be allowed to testify to another's mental condition if the testimony is based on adequate observations. *State v. Raine*, 829 S.W.2d 506, 510 (Mo. App. W.D. 1992). In *Raine*, the defense proffered evidence of medical records of Raine's accident when he was six years old and testimony from Raine's brothers, father, and brother's girlfriend about his abnormal behavior such as stealing women's underwear and self-mutilation. *Id*. This evidence was relevant,

because it tended to confirm or refute a fact in issue, whether he suffered from a mental disease or defect. *Id*. at 511. However, the trial court did not err in excluding it, because defense counsel improperly included inadmissible facts in his offer of proof, and failed to present an expert on mental disease or defect. *Id*. Lay testimony is admissible to support the factual basis for a mental disease or defect, but cannot provide the ultimate conclusion that the defendant suffers a mental disease or defect. *Id*. at 510-11.

In *State v. Windmiller*, 579 S.W.2d 730 (Mo. App. E.D. 1979), the court reversed a murder case because of the trial court's exclusion of lay witnesses' testimony about the defendant's character and behavior prior to the crime which supported the defense that he suffered from a mental disease or defect. Unlike *Raine*, Windmiller presented psychiatric testimony to support his defense of mental disease or defect. *Id*. at 731-33. The lay witnesses' testimony about Windmiller's behavior and character was proffered to support this testimony. *Id*. at 733. The behavior showed a marked change in Windmiller's attitude, demeanor, and personality in the last few months before the charged offense. *Id*. The jury might have considered the defense of mental disease or defect more favorably, had the jurors heard from witnesses familiar with Windmiller's life and behavior. *Id*. To exclude such evidence to support his sole defense was fundamentally unfair. *Id*.

Excluding this type of evidence is fundamentally unfair because it denies a defendant a meaningful opportunity to present a complete defense under the Sixth

and Fourteenth Amendments to the United States Constitution. *State v. Ray*, 945 S.W.2d 462, 469 (Mo. App. W.D. 1997), citing *Crane v. Kentucky*, 476 U.S. 683, 688 (1986) and *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). "The denial of the opportunity to present relevant and competent evidence negating an essential element of the State's case may, in some cases, constitute a denial of due process." *Ray, supra, quoting, State v. Copeland*, 928 S.W.2d 828, 837 (Mo. banc 1996). After all, direct evidence of a culpable mental state is rarely available, and it may be demonstrated with evidence of a defendant's conduct before the act. *Ray, supra*, at 468. Additionally, here the failure to present such evidence violated Paul's rights to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments, as it deprived him of mitigating evidence that would have provided jurors with a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586 (1978).

The testimony from Paul's family, teachers, and friends, about his intellectual deficits and his behavior before the trial would have been admissible at trial had counsel conducted a reasonable investigation and presented it. This testimony was based on the witnesses' personal observations. The evidence would have rebutted the State's evidence that he planned to kill Mrs. Crotts, concocting a scheme to lure her out of her home, enter the home surreptitiously, and lay in wait with the intent to kill her. It also would have supported his defense that he had mental problems making him unable to deliberate. Like *Windmiller*, the jury may have favorably considered his defense had jurors heard from those witnesses

familiar with Paul's life and his behavior before the charged offense. Thus, the motion court's denial of this claim, without even hearing any evidence, was clearly erroneous.

The motion court's conclusion that such evidence was cumulative to the expert's testimony is also clearly erroneous. As in *Windmiller*, a jury may disbelieve a paid expert called to testify that a defendant suffers from a mental disease or defect if that is the only evidence the defense presents. However, when that expert testimony is supported by witnesses familiar with the defendant's behavior, the defense can become compelling.

That is especially true here, where the State challenged the defense expert's credibility (Tr. 1519-1662). According to the State, jurors were required to find Dr. Schultz credible in order to find that Paul did not deliberate (Tr. 1859). Dr. Schultz was the sole defense witness. The prosecutor criticized Schultz's experience, saying that in every single forensic evaluation she conducted, she found the defendant crazy (Tr. 1908-09). He told jurors that she "never found a murderer who she didn't think was crazy" (Tr. 1912). The prosecutor portrayed her as a paid hack who made thousands of dollars for her findings of insanity (Tr. 1910-11). According to the State, she was paid $9,000.00 to give Paul a way out (Tr. 1912). Her testimony was an injustice to the victim and the people really suffering from the disease of depression. *Id*. Dr. Schultz "cooked" her report, according to the prosecutor (Tr. 1913-14). He "kept picturing her in a little white

hat, a little chef's outfit cooking up some mental disease to help him out." (Tr. 1914).

Given this record, the motion court's finding that the lay witnesses' testimony would have been cumulative is clearly erroneous. "Evidence is said to be cumulative when it relates to a matter so fully and properly proved by other testimony as to take it out of the area of serious dispute." *Black v. State*, 151 S.W.3d 49, 56 (Mo. banc 2004), *quoting State v. Kidd,* 990 S.W.2d 175, 180 (Mo. App. W.D. 1999) (internal quotations omitted). A trial court does not have discretion to reject evidence as cumulative when it goes to the very root of the matter in controversy or relates to the main issue, like the defendant's mental state. *Black, supra*, *citing*, *State v. Perry*, 879 S.W.2d 609 (Mo. App. E.D.1994).

Here, the evidence defense counsel failed to offer did not relate to "a matter so fully and properly proved by other testimony as to take it out of the areas of serious dispute." *Black*, *supra* at 56, *quoting*, *Kidd*, 990 S.W.2d at 180. To the contrary, the evidence of Paul's intellectual problems, including his inability to formulate abstract ideas, to plan, to foresee consequences, all went to his mental state and whether he could plan and deliberate. The evidence that he was impulsive and easily confused did not fit the State's theory, rather it supported the defense that he acted in the moment without deliberating. Evidence that he had legitimate reasons to be walking on Hanley Road showed that he was not stalking Mrs. Crotts or planning to kill her.

Since the amended motion alleged facts, not conclusions, that if proven entitled Paul to relief, the motion court should have granted a hearing. The court was wrong to find this evidence would have been inadmissible at trial and cumulative to the expert's testimony. The only relevant issue was whether counsel was ineffective in failing to present this evidence.

At a hearing, Paul must show that counsel's performance was deficient and that it prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). He must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*.; *State v. Butler*, 951 S.W.2d 600, 608 (Mo. banc 1997). A reasonable probability is one sufficient to undermine confidence in the outcome. *Id*.

Paul's claims show ineffectiveness. He specifically alleged counsel's unreasonable conduct and prejudice. He must be given an opportunity to prove his allegations. This Court should reverse and remand for an evidentiary hearing.

VI. Counsel's Inconsistent Theories

The motion court clearly erred in denying a hearing on Paul's claims that counsel was ineffective for failing to adequately investigate his background and in presenting inconsistent theories in guilt and penalty phases, because this denied Paul due process, effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends. VI, VIII, and XIV; Mo. Const., Art. I, §§10, 18(a), and 21, and Rule 29.15(h), in that the motion pled facts, not conclusions that entitled Paul to relief: that counsel acted unreasonably in failing to investigate and provide their experts with all relevant background material and counsel called a psychologist Dr. Schultz in guilt phase who claimed Paul suffered from a mental disease and defect and could not appreciate the wrongfulness of his actions, and then in penalty phase called Dr. Wetzel who disagreed, saying Paul had no mental disease or defect and could appreciate that his actions were wrong. Paul was prejudiced as his guilt phase defense was unbelievable and jurors would not trust any expert defense counsel called, given such inconsistent defenses.

Trial counsel called a single witness in guilt phase, Dr. Rosalyn Schultz a psychologist (Tr. 1415-1682). Schultz opined that Paul had a major depression disorder (Tr. 1499-1504). He also suffered from post-traumatic stress disorder, as a result of his girlfriend's drug overdose a few months before the charged offense (Tr. 1505, 1508-11). Schultz concluded that as a result of these mental diseases or

defects, Paul was incapable of knowing and appreciating the nature, quality and wrongfulness of his conduct (Tr. 1501, 1511-12, 1519). He could not coolly reflect upon killing Mrs. Crotts (Tr. 1512).

The State extensively cross-examined Schultz (Tr. 1519-1662). Then, in rebuttal, the State called Dr. John Rabun, who concluded that Paul was not suffering from a mental disease or defect (Tr. 1699, 1733) and he knew the wrongfulness of his behavior (Tr. 1716, 1719, 1725-26, 1727, 1766-67, 1774, 1771).

In closing, the State emphasized that jurors must find Schultz credible to find Paul did not deliberate (Tr. 1859). The prosecutor criticized Schultz's experience, and told jurors she found every single defendant she evaluated crazy (Tr. 1909, 1912). He claimed Schultz gave a favorable opinion to the defense for the money (Tr. 1910, 1912) and that she had cooked her report (Tr. 1912-14, 1917). She had ignored statements and evidence inconsistent with her diagnosis (Tr. 1914, 1979).

The jury rejected the defense and convicted Paul of first degree murder (Tr. 1929).

In penalty phase, the defense changed courses, calling Dr. Richard Wetzel, a different psychologist (Tr. 2136-41). Dr. Wetzel did not even address PTSD (Tr. 2136-65). He found Paul had clinical depression of a moderate degree (Tr. 2155-58). However, on the night of the offense, Paul was not beside himself; he was

upset, but could control his behavior (Tr. 2165). Paul did have substantial impairments (Tr. 2165).

On cross-examination, Wetzel acknowledged that during his first evaluation, he did not make a diagnosis of major depression or PTSD (Tr. 2173, 2176-77). Wetzel conducted a second evaluation for mitigation only two and a half weeks before he testified (Tr. 2186). That was the first time he talked to Paul about the crime (Tr. 2186). Contrary to Schultz, Wetzel thought Paul knew his criminal acts were wrong (Tr. 2190, 2191-92, 2196). Paul was not suffering from an extreme mental or emotional disturbance (Tr. 2200).

The State pounced on the differences in the defense expert's opinions, noting that Dr. Wetzel found no extreme mental or emotional disturbance (Tr. 2304). The defense attorneys "tried to sell you a bill of goods called Rosalyn Schultz" (Tr. 2304).

Paul's amended motion claimed counsel was ineffective for failing to adequately investigate and provide their experts with a complete social history (L.F. 23-24, 40-51). Counsel unreasonably presented inconsistent theories in guilt and penalty phases. *Id.* Dr. Wetzel warned trial counsel that Paul did not suffer from a mental disease or defect under Missouri law and to suggest otherwise, would offend jurors (L.F. 42, 44). He urged the attorneys to focus on penalty phase issues rather than present a mental disease defense not supported by the evidence (L.F. 42).

Dr. Wetzel also warned counsel about Dr. Schultz (L.F. 45). She was not in the mainstream and often found PTSD where other competent psychologists and psychiatrists would not (L.F. 45). Her opinions were not credible and not supported by experts in her field (L.F. 45).

Dr. Wetzel admitted that both he and Schultz lacked basic information about Paul's case before they testified (L.F. 45). As a result, their credibility was weakened (L.F. 45). Dr. Wetzel did not have information from Paul's family, teachers and friends,[11] important to a thorough and accurate evaluation and necessary to provide credible testimony (L.F. 45-46). He had a limited time to prepare, since counsel asked him to evaluate Paul for mitigation only weeks before trial (L.F. 293). He had insufficient time to interview the family and counsel did not provide this information to Dr. Wetzel (L.F. 293-94).

[11] The motion specified the witnesses, Kathleen Klorer, Patricia (Gussie) Klorer, Robert and Mary Meiners, Mary Ann Fleming, Nancy McCabe, Linda Cook, Dianne Stock, Christine Meiners, Joseph Meiners, Dr. David Meiners, Eileen Cervantes, Dr. Paul Meiners, Marie Dennis, Paul Meiners, Dorothy and Roman (Bud) Seiter, Bob and Jean McCarty, Mary Elaine Goodwin, Joe and Kathy Goodwin, Mary Mifflin, Kathleen Goodwin, Brad and Brenda Thomas, Patty Higgins, Marilyn Lamb, Vern Olson, Mary Welch, Jim Goodwin, Pat Goodwin, and Ray Dickerson (L.F. 46).

Despite these specific allegations, the motion court denied this claim without an evidentiary hearing (L.F. 448-49). The Court found that Drs. Schultz and Wetzel's opinions were consistent with only a "slight disagreement between the witnesses as to the severity of the depression" (L.F. 448). The court found the allegations that counsel failed to provide a complete social history refuted by the record (L.F. 449). These findings do not withstand scrutiny, and must be reversed.

Standard of Review

As discussed *supra*, the motion court's findings and conclusions are reviewed for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. The motion court must hold an evidentiary hearing if: (1) Paul alleged facts, not conclusions that, if true, would entitle him to relief; (2) the factual allegations are not refuted by the record; and (3) the matters complained of prejudiced him. *Wilkes v. State*, 82 S.W.3d 925, 929 (Mo. banc 2002); Rule 29.15(h). Paul had a due process right to a full and fair hearing. *See*, *Thomas v. State*, 808 S.W.2d 364, 367 (Mo. banc 1991); *In re Murchison*, 349 U.S. 133, 136 (1955); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); and *People v. Kitchen*, 727 N.E.2d 189 (Ill. 2000), discussed *supra*.

To establish ineffective assistance, Paul must show that his counsel's performance was deficient and that the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511-12 (2000). To prove prejudice, Paul must show a "reasonable probability that, but for counsel's errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Wiggins v. Smith*, 123 S.Ct. 2527, 2542 (2003).

Counsel's failure also violated Paul's rights to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments, as it deprived him of mitigating evidence that would have provided jurors with a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586 (1978).

Applying these standards, the motion court clearly erred in denying a hearing on this claim. Paul's amended motion pled specific facts, not conclusions, that if true, would entitle him to relief. Contrary to the motion court's findings, Schultz and Wetzel disagreed on their diagnosis of Paul's mental problems and its impact on him. Schultz thought Paul suffered from PTSD; Wetzel rejected such a diagnosis. Schultz thought Paul's depression was so severe that he could not appreciate the wrongfulness of his actions. Wetzel disagreed, finding he could control his behavior and knew the wrongfulness of his actions. Schultz concluded Paul had an extreme emotional disturbance; Wetzel said he did not. These were not minor disagreements, but were dramatically opposite conclusions.

The Supreme Court recently discussed the important of presenting consistent theories in guilt and penalty phase. *Florida v. Nixon*, 125 S.Ct. 551, 563 (2004), *quoting* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Section 10.9.1, Commentary (rev. ed. 2003). Reasonable counsel should not conduct a guilt phase defense that is

counterproductive to what will be argued in penalty phase. *Id.* at 563. "It is not good to put on 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney." *Id. quoting* Lyon, *Defending the Death Penalty Case: What Makes Death Different?,* 42 Mercer L. Rev. 695, 708 (1991).

That is precisely what happened here. Defense counsel presented a "Paul was not responsible" defense in guilt phase, and then in penalty phase admitted, yes, he was responsible, but should not be put to death. The State emphasized the experts' inconsistencies (Tr. 2304) and denigrated defense counsel for trying to sell jurors "a bill of goods" (Tr. 2304). The motion court's findings ignore these inconsistencies and the factual allegations that Dr. Wetzel warned counsel of problems with Dr. Schultz and her proposed testimony (L.F. 42-44, 45).

The motion court also rejected the claim that counsel did not provide their experts a complete social history, saying the claim was refuted by the record (L.F. 449). In so ruling, the court ignores that Dr. Wetzel admitted at trial he conducted his evaluation for mitigation only two and a half weeks before he testified (Tr. 2186). The court ignores that Dr. Wetzel claimed that trial counsel did not provide him with important, relevant, vital information for his evaluation (L.F. 294). The motion alleged counsel's failure to interview and provide the experts with information from family, friends, and teachers, including: Kathleen Klorer, Patricia (Gussie) Klorer, Robert and Mary Meiners, Mary Ann Fleming, Nancy McCabe, Linda Cook, Dianne Stock, Christine Meiners, Joseph Meiners, Dr.

David Meiners, Eileen Cervantes, Dr. Paul Meiners, Marie Dennis, Paul Meiners, Dorothy and Roman (Bud) Seiter, Bob and Jean McCarty, Joe and Kathy Goodwin, Brad Thomas, Patty Higgins, Marilyn Lamb, Vern Olson, Mary Welch, Jim Goodwin, Pat Goodwin, and Ray Dickerson (L.F. 46).

Contrary to the motion court's findings, neither defense expert suggested that they or counsel had interviewed any of these witnesses (Tr. 1426, 2144). Rather, Schultz had interviewed Paul's mother, two sisters and a social worker (Tr. 1426). Dr. Wetzel talked to Paul's mother and one sister (Tr. 2144).

Counsel had a constitutional duty to conduct a thorough investigation into their client's background. *Wiggins v. Smith*, 123 S.Ct. at 2537. The Sixth Amendment requires counsel to "discover *all reasonably available* mitigating evidence." *Id.* (emphasis in original). *See also, Hutchison v. State,* 150 S.W.3d 292 (Mo. banc 2004) (counsel ineffective for failing to adequately investigate client's life history and consult with appropriate experts).

Counsel must investigate their client's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. *Wiggins, citing* 1 ABA Standards for Criminal Justice, 4-4.1, commentary, pg. 4-55. Investigation is essential. *Wiggins, supra*. Critical to this investigation is consulting expert and lay witnesses along with supporting documentation. *See*, ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Feb. 2003), Guideline 10.11, F.2. These witnesses and

records provide "insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability. . . ." *Id*.

Counsel has a duty, not to simply hire experts, but must provide them with relevant background material. *Jacobs v. Horn*, 395 F.3d 92 (2d Cir. 2005). Information from family members or friends regarding a defendant's childhood, background, or mental health history is vitally important as the information can demonstrate mental deficiencies. *Id.*, at 103.

In *Wallace v. Stewart*, 184 F.3d 1112 (9th Cir. 1999), counsel was ineffective for not giving an expert relevant background materials for the evaluation. Counsel devoted remarkably little time to exploring Wallace's mental state or other mitigators. *Id*. Had they looked, they would have discovered a great deal about Wallace's family history, including his psychotic, alcoholic and anorexic mother. *Id*. at 1116. This family history was important, because psychosis and alcoholism are genetically passed from parents to children. *Id*. Wallace's home life was chaotic. *Id*. Wallace started sniffing glue and gasoline between the ages of ten and twelve and experienced head traumas. *Id*. This was important, because children raised in profoundly dysfunctional environments are prone to develop severe psychiatric disturbances. *Id*. In reversing, the Court found that in the sentencing phase of a capital case, counsel has a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request. *Id*. at 1117. *See also*, *Wiggins*, *supra*, citing ABA guidelines, *supra*.

Just like *Jacobs* and *Wallace*, here, the amended motion alleged counsel's ineffectiveness for failing to investigate Paul's background and failing to provide Schultz and Wetzel with necessary information, so they could completely and accurately evaluate Paul. Contrary to the motion court's findings, these claims were not refuted by the record. An evidentiary hearing is necessary to determine whether counsel conducted a reasonable investigation and provided their experts with all necessary background materials. This Court should reverse the denial of relief and remand for a hearing on this claim.

VII. Lethal Injection Is Cruel and Unusual Punishment

The motion court clearly erred in denying a hearing on the claim that lethal injection is unconstitutional, as applied in Missouri, because that ruling denied Paul Goodwin his rights to due process and to be free from cruel and unusual punishment, U.S. Const. Amends. VIII and XIV; Mo. Const., Art. I, §§10 and 21; and Rule 29.15(h), in that the motion alleged facts, not conclusions, that entitled him to relief; specifically, that Missouri's method of execution is flawed in that it causes unnecessary pain as evidenced by 11 other executions that encountered problems and resulted in prolonged and unnecessary pain and the problems will likely reoccur since the Missouri statute confers unlimited discretion to the Department of Corrections and the procedures and protocols do not include safeguards regarding the manner in which executions should occur, fail to establish minimum qualifications and expertise for personnel conducting executions, and do not provide criteria and standards for the lethal injection procedures, but use drugs that cause unnecessary pain and suffering; the allegations were not refuted by the record; and Paul was prejudiced since these problems will likely reoccur.

Paul Goodwin alleged that Missouri's use of lethal injection is unconstitutional, violating the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution (L.F. 40, 228-38). The motion alleged specific facts of eleven other executions

where the prisoners encountered problems that resulted in prolonged and unnecessary pain (L.F. 229-33). The motion showed that the problems will likely reoccur since the statute provides unlimited discretion to the Department of Corrections and Missouri's protocol fails to include safeguards regarding the manner in which executions should occur, has no minimum qualifications for personnel conducting executions, contains no criteria or standards for the lethal injection procedures, and employs drugs that cause unnecessary pain and suffering (L.F. 235-38).

The motion court denied the claim without an evidentiary hearing, citing *Morrow v. State*, 21 S.W.3d 819, 828 (Mo. banc 2000) (L.F. 453).

Standard of Review

This Court reviews the denial of the claim without a hearing for clear error. *See*, Point II, *supra*. Due process requires a fair hearing in 29.15 proceedings. *Thomas v. State*, 808 S.W.2d 364, 367 (Mo. banc 1991); *In re Murchison*, 349 U.S. 133, 136 (1955). Additionally, Rule 29.15(h) creates a presumption that courts should hold hearings. This language creates an expectation protected by the Due Process Clause, *Ford v. Wainwright*, 477 U.S. 399, 428 (1986) (O'Connor, J., concurring and dissenting) that cannot be arbitrarily abrogated. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). Thus, the denial of a hearing required by a postconviction rule can violate a defendant's right to due process. *See, e.g*., *People v. Kitchen*, 727 N.E.2d 189 (Ill. 2000) (Post-Conviction Hearing Act

should not be so strictly construed that a fair hearing is denied and the purpose of the Act, the vindication of constitutional rights is defeated).

The court's conclusion that this claim is identical to that presented in *Morrow*, *supra*, is clearly erroneous. Challenges to the method of execution can be raised in post-conviction proceedings if the claim is properly pled. *Morrow*, 21 S.W.3d at 828. To be entitled to an evidentiary hearing, a movant must allege facts that tend to show that there is a problem of administration of the death penalty by lethal injection that is likely to occur again in Missouri. *Id*.

Paul's claim pled such facts. He outlined in great detail the problems with the administration of lethal injection (L.F. 235-38). Moreover, the motion identified why these problems are likely to reoccur. Dr. Brunner from Northwestern University Medical School reviewed Missouri's protocol[12] (L.F. 235-38). Missouri's procedures do not provide adequate safeguards (L.F. 235-38). The protocol provides no guidance or standards for procedures, but allows drugs that cause unnecessary pain and suffering (L.F. 235-38).

Missouri uses the method of lethal injection, poisoning the prisoner with a lethal combination of three chemical substances: sodium pentothal, pancuronium bromide (pavulon), and potassium chloride (KCl). Lethal Injection Manual, *supra*.

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[12] Missouri's lethal injection manual can be found at: http://www.angelfire.com/fl3/starke/injection.html

The American Veterinary Medicine Association (AVMA) condemns the use of neuromuscular blocking agents such as pavulon in the euthanasia of animals. Since 1981, many states, including Missouri, have made the use of pancuronium bromide on domestic animals illegal.[13] Utilizing methods or chemicals to execute human beings which have been banned for use in euthanizing animals violates contemporary standards of decency.

Under the Eighth Amendment, a punishment "must not involve the unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, J.J.) *See*, *also*, *Louisiana v. Resweber*, 329 U.S. 459, 463 (1947) ("The traditional humanity of modern Anglo-

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[13] Missouri, 2 CSR 30-9.020(14)(F)(5); Tex. Health & Safety Code, Sec. 821.052(a); Fla.Stat. Secs. 828.058 and 828.065 (1984); Ga.CodeAnn. Sec. 4-11.5.1 (1990); Me.Rev.Stat.Ann., Tit.17 Sec. 1044 (1987); Md.Code.Ann.,Criminal Law, Sec. 10-611(2002); Mass.Gen.Laws Sec. 140:151A (1985); N.J.S.A. 4:22-1.3 (1987); N.Y. Agric. & Mkts Sec. 374 (1987); Okla.Stat.,Tit.4, Sec. 501 (1981); Tenn.Code.Ann., Sec. 44-17-303 (2001); 410 Ill.Comp.Stat., Ch.70, Sec. 2.09; Kan.Stat.Ann. Sec. 47-1718(a); La.Rev.Stat.Ann., Sec. 3:2465; R.I.Gen.Laws, Sec. 4-1-34; Conn.Gen.Stat., Sec. 22-344a; Del.Code.Ann.,Tit.3, Sec. 8001; Ky.Rev.Stat.Ann., Sec. 321.181(17) and 201KAR16:090, Sec. 5(1); S.C.Code.Ann., Sec. 47-3-420.

American law forbids the infliction of unnecessary pain in the execution of the death sentence"). A chosen method of execution must minimize the risk of unnecessary pain, violence, and mutilation. *Glass v. Louisiana*, 471 U.S. 1080, 1086 (1985) (Brennan, J. dissenting from denial of certiorari). A punishment violates the Eighth Amendment if it causes torture or lingering death. *Id*. at 1086, *citing, In re Kemmler*, 136 U.S. 436, 447 (1890). Lethal injection and related procedures can violate the Eighth Amendment prohibition against cruel and unusual punishment. *Nelson v. Campbell*, 124 S.Ct. 2117 (2004).

The motion court clearly erred in rejecting this claim without an evidentiary hearing. This Court should remand for a hearing or alternatively, impose life without parole.

VIII. Closing Argument

The motion court plainly erred in denying postconviction relief because the record shows that the prosecutor's closing argument violated Paul Goodwin's rights to due process, to be free from self-incrimination, a fair trial and prohibition against cruel and unusual punishment, U.S. Const. Amends. V, VI, VIII and XIV and Mo. Const., Art. I, §§10, 18(a), 19 and 21, in that the prosecutor argued in penalty phase closing that:

G. this was one of the worst cases in St. Louis County, and therefore, the prosecutor had decided Paul deserved death;

H. urged jurors to give death to send a message to the community and to protect the elderly from similar attacks;

I. jurors had a duty to give death;

J. jurors' family, friends and coworkers would disapprove of a verdict less than death;

K. jurors did not hear Paul say he was sorry for what he had done; and

L. defense counsel had fabricated the defense by paying Dr. Schultz for a favorable opinion.

These arguments were manifestly unjust, as they urged jurors to sentence Paul to death, not based on the evidence and his individual character, but by appealing to jurors' fears, passion and prejudice.

The St. Louis County Prosecutor's Office decided that Rayfield Newlon's case was the worst of the worst and deserved death. *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989). It was so bad that the prosecutor made improper arguments, violating due process, to get a death sentence. *Id*. The same office thought William Weaver's case was the worst of the worst and deserved death. Again, the prosecutor made improper arguments to get it.[14] Weaver's codefendant, Daryl Shurn, was also the worst of the worst. *Shurn v. Delo*, 177 F.3d 662 8th Cir. 1999). So the prosecutor, undeterred by the reversal in *Newlon*, made the same improper arguments to get death. *Shurn*, *supra*.

Shurn was decided on May 10, 1999. *Id*. The Eighth Circuit denied a rehearing on June 29, 1999. *Id*. Less than three months later, the St. Louis County Prosecutor's Office tried Paul Goodwin's case. And once again, the prosecutor made the same improper arguments, as in *Shurn*, *Weaver*, and *Newlon*, to get a death sentence.

Worst Case

The prosecutor told jurors that Paul's case was one of the worst cases and he decided it warranted death. The argument was not isolated, but repeated:

[14] The federal district court reversed Weaver's death sentence because of the improper penalty phase argument in an unpublished opinion. *Weaver v. Roper*, 4:96CV2220CAS. That ruling is pending on appeal in the Eighth Circuit.

> . . . In St. Louis County we have a small number of murders every year. Not every one of those murders is a first degree. Very few of those murders are death penalty cases.

(Tr. 2298). He said:

> A death sentence is something very, very difficult, and it is only for special cases. And this is one.

(Tr. 2319). The prosecutor assured jurors that he had done his job in prosecuting Paul and seeking death (Tr. 2321-22). He then reminded the jurors that they had promised that they could vote for death (Tr. 2321-22). He ended his closing, saying, "I've done my job. You do yours." (Tr. 2322). In other words, this case was the worst of the worst and the St. Louis County Prosecutor's Office had decided it warranted death.

Send a Message/Protect Community

Additionally, the prosecutor argued that jurors should sentence Paul to death to protect the community and to send a message (Tr. 2296, 2298, 2299, 2302, 2318). According to the State, "the appropriateness of death in this case is about how he has affected your community by taking a member of your community from you in the most brutal, heinous, inhumane way." (Tr. 2295-95). The prosecutor warned "[a]nd what we must do to protect people in our community like Joan Crotts, the elderly, the immobile, the easy victims of prey in our community, we must raise the stakes for people like Paul Goodwin and tell them that these kinds of crimes are going to be deal with in the most severe way."

(Tr. 2298). Then he told jurors that giving death was not easy, but the thing they had sworn to do:

> . . . [i]t is exactly what you swore to do and exactly the burden that you must shoulder for the benefit of your entire community.

(Tr. 2299). Later, he repeated this theme, saying:

> We must raise the stakes on people who prey upon our elderly, the weak, those people who cannot protect themselves. We must raise the stakes.

(Tr. 2302). The prosecutor told jurors:

> And I do not tell you this is easy, because it's not. But this is your opportunity as members of this community to send a message to Paul Goodwin and those who would prey upon our innocent, easy victims.
>
> You must protect those victims by your verdict, and you will if you sentence him to death.

(Tr. 2318).

Telling Jurors It Was Their Duty to Give Death

The prosecutor also improperly argued that jurors had a sworn duty to give death (Tr. 2299, 2317, 2318, 2321-22). He said giving death was not easy, but "it is exactly what you swore to do" (Tr. 2299). He found the defense remark, don't spill any more blood offensive, because "you are not doing anything other than your duty when you sentence him to death" (Tr. 2317). He told jurors, "he will

receive the justice he deserves when you all do the job you swore to do" (Tr. 2318). He reminded jurors that they promised they could vote for death and then told them, "I've done my job. Do yours." (Tr. 2321-22).

Fear of Public's Disapproval

The prosecutor ended his argument, warning them that they would have to justify their decision to their families. He said:

> You're going to leave here sometime in the near future and go back to your families, to your jobs, to your homes. And you'll be forever changed by this case.
>
> But as you go back to your families and your homes and your jobs, you'll be asked, Where you been? What you been doing? And you will tell them you were on a murder case. And they'll say, What was it about? And you'll tell them: This six foot six, 350-pound man broke in a little old lady's house, and in that house he beat her, he forced her to take his penis in her mouth, he raped her in the very bed she lived in or tried to rape her in the very bed she'd slept in for thirty-five years. What did he do then? He took a drink of soda and he ended her life in the most horrible way.
>
> And you'll be asked, Well, what happened? What did you do? And you'll say, I did the right thing. I gave him what he deserved. I gave him what he earned.

(Tr. 2321). He then followed with the argument that the right punishment was death (Tr. 2322).

Comment on Right Not to Testify

The prosecutor referred to Paul's family's testimony and contrasted it with what jurors had not heard from Paul:

> And no matter how much his family apologizes to you, ask yourself: Was he sorry when he grabbed her? Was he sorry when he twisted her arms so badly that it split her skin and she bled? Was he sorry when he punched her in the mouth? Was he sorry when he put his penis in her mouth? Was he sorry when he tried to pry her legs apart?
>
> Was he sorry as she stood at that back door, wondering how this could have happened and how she could be in her kitchen, the kitchen where she raised her family, the kitchen she had lived in, the place she felt safe?

(Tr. 2300).

Denigrating Defense Counsel

The prosecutor denigrated defense counsel, saying that Dr. Wetzel was called only in the penalty phase, not in guilt phase, "when they tried to sell you a bill of goods called Rosayln Schultz" (Tr. 2304). This was not an isolated attack on defense counsel, but followed a continuous barrage of arguments that counsel

had put on a witness who fabricated her testimony and "cooked a report" (Tr. 1912-14).

Standard of Review

Trial counsel did not object to these improper arguments and appellate counsel did not raise the claims of improper arguments on appeal. They were not included in Paul's amended 29.15 motion. The motion court did take judicial notice of the underlying criminal case file, including the closing arguments (H.Tr. 1-2). Paul recognizes that normally, claims that have not been presented to the motion court cannot be raised for the first time on appeal. *Amrine v. State,* 785 S.W.2d 531, 535 (Mo. banc 1990). Paul requests plain error review under Rules 30.20 and 84.13(c) given the unfairness of the arguments, and because they were made to get a death sentence.

Rule 84.13(c) provides:

> Plain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

Rule 84.13(c) has been invoked for plain error review in appeals in post-conviction proceedings. *McCoo v. State*, 844 S.W.2d 565, 568 (Mo. App. S.D. 1992). Former Rule 27.26(a) provided that the procedure before the trial court and on appeal is governed by the Rules of Civil Procedure insofar as applicable. Similarly, Rules 24.035(a) and 29.15(a) provide that the procedure before the trial

court is governed by the Rules of Civil Procedure insofar as applicable. *McCoo, supra*. The Rules of Criminal Procedure also have a plain error rule. Rule 30.20 reads, in pertinent part:

> ... Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

Thus, the Court can review here for plain error regardless of whether the applicable rule is 30.20 (criminal) or 84.13(c) (civil). *McCoo, supra* at 568.

Applying these rules, appellate courts have found plain error review is available in appeals of postconviction cases under limited circumstances. *Searcy v. State*, 981 S.W.2d 596 (Mo. App. W.D. 1998) (plain error review granted where plea court lacked jurisdiction over the defendant as he had a charge for the same offense pending in another county); *McCoo v. State*, 844 S.W.2d 565, 568 (Mo. App., S.D. 1992) (court finds a manifest injustice and a miscarriage of justice where the circuit court denied relief in a post-conviction proceeding on the ground that the motion was untimely, when the record contained no support for that finding); *Ivy v. State*, 81 S.W.3d 199, 205 (Mo. App. W.D. 2002) (the motion court plainly erred in denying Ivy's motion for post-conviction relief because the sentencing court violated Ivy's rights to be free from double jeopardy when it accepted his guilty pleas and sentenced him for both felony murder based on the predicate felony of unlawful use of weapon and for armed criminal action).

A pattern of intentional prosecutorial misconduct may so seriously undermine the integrity of judicial proceedings as to support reversal under the plain error doctrine. *See*, *United States v. Young*, 470 U.S. 1, 33 n. 16 (1985) (Brennan, J., concurring in part and dissenting in part, joined by Marshall and Blackmun, JJ.). *See, also, State v. Burnfin*, 771 S.W.2d 908, 912 (Mo. App. W.D. 1989) (in some instances, improper arguments inject poison and prejudice into a case to warrant plain error relief).

Furthermore, appellate courts frequently grant plain error review to errors challenging sentences. *State v. Grubb*, 120 S.W.3d 737 (Mo. banc 2003) (plain error review under Rule 30.20 granted on the issue of whether a military conviction can be used to enhance a sentence); *State v. Vaught*, 34 S.W.3d 293, 295-96 (Mo. App. W.D. 2000) (use of two offenses occurring after date of charge offense found to be plain error). An error is plain if, on its face, this Court discerns substantial grounds for believing that the error caused manifest injustice or a miscarriage of justice. *Id*. Here, too, the Court should grant plain error review, since Paul Goodwin has been sentenced to death.

Death penalty appeals are different than non-capital appeals. "Although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence *mandates careful scrutiny in the review of every colorable claim of error*." *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (emphasis added). "Our duty to search for constitutional

error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987).

This Court has recognized that death is different. *Deck v. State*, 68 S.W.3d 418, 430 (Mo. banc 2002). "[T]here is a significant constitutional difference between the death penalty and lesser punishments." *Id.* (*quoting Beck v. Alabama*, 447 U.S. 625, 637 (1980)). "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Deck, supra,* (*quoting Beck, supra* at 638, n. 13, and *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell and Stevens, JJ.)).

Constitutional Violations

Prosecutorial argument is unconstitutional if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974); and *Darden v. Wainwright,* 477 U.S. 168, 181 (1986). Penalty arguments must receive greater scrutiny. *See*, *Caldwell v. Mississippi,* 472 U.S. 320, 340 n. 7 (1985) (death sentence vacated because prosecutor's improper penalty closing made it appear that responsibility for the death penalty would be borne by appellate court rather than the jury). Courts conduct a more searching review of the penalty phase since the Eighth Amendment is implicated. *Copeland v. Washington,* 232 F.3d 969, 974, n.2 (8th Cir. 2000), *quoting California v. Ramos,* 463 U.S. 992, 998-999 (1983) ("The Court ... has recognized the qualitative difference of death from all other

punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination"); and *citing* Welsh S. White, *Prosecutors' Closing Arguments at the Penalty Trial,* 18 N.Y.U. Rev. L. & Soc. Change 297 (1991) (courts have been increasing review of closing arguments at sentencing hearings and categorizing improper arguments requiring reversal into several groups, including those where prosecutor personally vouched for death penalty).

The prosecutor's arguments here violated Paul's rights to due process and his Eighth Amendment right to be sentenced based on the facts of the case and his character, rather than appeals to passion and emotions. Whether viewed individually or together, the arguments injected unfairness into the proceedings and encouraged jurors to sentence Paul to death based on improper considerations.

Prosecutor's Personal Belief in Propriety of Death Sentence –

Implying Special Knowledge Outside the Record

As in *Newlon* and *Shurn*, here, the prosecutor expressed his personal belief in the propriety of the death sentence and implied that he had special knowledge outside the record. He also emphasized his position of authority. He argued that very few cases in St. Louis County warrant a first degree murder charge, let alone death (Tr. 2298). His office reserved the death penalty for "special cases" like Paul's (Tr. 2319). The prosecutor assured jurors that he had done his job in seeking death (Tr. 2321-22). He ended his closing, saying, "I've done my job. You do yours." (Tr. 2322).

These arguments are nearly indistinguishable from those condemned in *Newlon* and *Shurn*. *Shurn*, 177 F.3d at 665. The arguments from those two cases:

Newlon:	**Shurn**:
I've been a prosecutor for ten years and I've never asked a jury for a death penalty, but I can tell you in all candor, I've never seen a man who deserved it more than Rayfield Newlon.	I'm the top law enforcement officer in this county and I'm the one that decides in which cases to ask for the death penalty and which cases we won't. You people have to tell me: Is this an appropriate case or isn't it? You're the community. You represent society. You represent all those potential witnesses out there that have the courage to come forward. You have to tell me: Is this a case where I should ask for the death penalty or am I wasting my time? You're the community.
Today I'm talking to you as Prosecuting Attorney of this County- the top law enforcement officer in St. Louis County.	I'm telling you there's no case that could be more obvious than Daryl Shurn's and William Weaver's was.
Tr. at 1339-42.	Tr. Vol. III,1165-66, 1168, 1171-72.

Shurn v. Delo, 177 F.3d at 665.

The Court condemned these arguments because they emphasized the prosecutor's position of authority and expressed his personal opinion on the propriety of the death sentence. *Id*. at 667. Therefore, they violated due process. Only three months after *Shurn*, the same prosecuting attorney's office made the same improper arguments. The prosecutor told jurors that Paul's case was one of the few murders in St. Louis County that deserved death. The prosecutor assured jurors that he had done his job in selecting this case for death, so they could give it knowing that he took responsibility for the decision.

The St. Louis County Prosecuting Attorney's Office continues to make the same arguments that required reversals in three previous death penalty cases. This Court should reverse in Paul's case, making clear that such disrespect for the rule of law will not be tolerated. *Cf. People v. Johnson*, 803 N.E.2d 405, 412-413 (Ill. 2003) (without a reversal, attorneys will continue to make such improper arguments).

> If prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial. Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court--recalling the bitter tear shed by

the Walrus as he ate the oysters-- breeds a deplorably cynical attitude towards the judiciary.

Id., *quoting, United States v. Antonelli Fireworks Co.,* 155 F.2d 631, 661 (1946); and *Darden v. Wainwright,* 477 U.S. 168, 205-06 (1986) (Blackmun, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.) (citations omitted).

Send a Message/Protect Community

The prosecutor's arguments that jurors should sentence Paul to death to protect the community and to send a message (Tr. 2296, 2298, 2299, 2302, 2318) also were improper because they pressured the jury to sentence Paul to death, not based on the evidence, but to protect society in general. Such arguments have consistently been condemned. *United States v. Solivan,* 937 F.2d 1146 (6th Cir. 1991); *United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992) (improper and inflammatory appeal to jurors to be the conscience of community was reversible error); *United States v. Monaghan*, 741 F.2d. 1434, 1441 (D.C. Cir.1984).

The broader problems of crime in society should not be the focus of a jury considering the guilt or innocence of an individual defendant, let alone whether he deserves to die. *People v. Johnson,* 803 N.E.2d at 418-421. The remediation of society's problems should not distract jurors from the awesome responsibility with which they are charged. *Id*. "Any conviction ought to be summarily overturned if it turned out the jurors thought their verdict was supposed to be a referendum on whether their state ought to surrender to some heinous crime, or whether they should convict in order to 'send a message' that the crimes charged 'will not be

tolerated in this state.'" *Id*. at 420-21., *quoting*, J. Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to "Send a Message" With Their Verdict?*, 22 Am. J. Crim. L. 565, 569 (1995).

While an improper argument to send a message to the community, in and of itself, may not be plain error, *State v. Marsh*, 945 S.W.2d 60, 62, n.4 (Mo. App. S.D. 1997), it should be in a death case, given the Eighth Amendment's requirement of individualized sentencing based only on the facts of the crime and the character of the defendant. Additionally, when it is considered with all the other improper arguments in this case, this Court should find a manifest injustice.

Telling Jurors It Was Their Duty to Give Death

The prosecutor's improper argument that jurors had a sworn duty to give death (Tr. 2299, 2317, 2318, 2321-22) requires a reversal. *United States v. Young*, 470 U.S. 1, 18 (1985); *Evans v. State*, 28 P.3d 498, 515 (Nev. 2001). In *Evans*, the prosecutor asked, "do you as a jury have the resolve, the determination, the courage, the intestinal fortitude, the sense of commitment to do your legal duty?" *Id*. Asking the jury if it had the intestinal fortitude to do its legal duty was highly improper as it pressured the jury for a particular verdict. *Id*. "To exhort the jury to 'do its job,' has no place in the administration of criminal justice." *Evans, supra, quoting, Young*, 470 U.S. at 18. "There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality." *Evans, supra, quoting United States v. Mandelbaum*, 803 F.2d 42, 44 (1st Cir. 1986).

Like the prosecutor in *Evans*, here, the prosecutor told jurors they had a sworn duty to give death, particularly designed to stir the jury's passion and appeal to partiality. The prosecutor told them, giving death was not easy, but "it is exactly *what you swore to do*" (Tr. 2299) (emphasis added). He repeated, "you are not doing anything other than *your duty* when you sentence him to death" (Tr. 2317) (emphasis added). According to the State, Paul "will receive the justice he deserves when you all do *the job you swore to do*" (Tr. 2318) (emphasis added). He reminded jurors that they promised they could vote for death and then told them, "I've done my job. Do yours." (Tr. 2321-22). These repeated arguments told jurors they had a duty to decide one way – to give death. It was an appeal designed to stir jurors' passion and could only distract the jury from its actual duty: impartiality. As such, the argument should be condemned.

Fear of Public's Disapproval

The prosecutor's argument ended with a warning to jurors that they would have to justify their decision to their families, coworkers and friends (Tr.2321). He said that their loved ones would question them about their jury duty and the facts of the case, and would ask them what was the result. (Tr. 2321-22).

Arguments that attempt to coerce the jury by fear of public disapproval are improper. *State v. Smith*, 731 S.W.2d 501, 503 (Mo. App. S.D. 1987). In *Smith*, the improper argument was:

> Was John Marrs worth the price of a beer? That's what this man with his distorted, pickled mind thinks that you're gonna let him off

> because he was drunk. Well, if you do, you've got to look that wife back there in the face and you've got to look your neighbors in the face....

Id. Here, too, the prosecutor coerced the jurors to convict telling them they would have to face their family, friends and coworkers. This improper argument should result in a reversal.

Comment on Right Not to Testify

The prosecutor referred to Paul's family's testimony and contrasted it with what jurors had not heard from Paul (Tr. 2300). He repeatedly emphasized that jurors never heard Paul say that he was sorry (Tr. 2300). Such arguments are improper and should be condemned.

No criminal defendant may be compelled to testify in his own case and no one may comment on the exercise of that right under the Fifth and Fourteenth Amendments and Article I, Section 19 of the Missouri Constitution. *Griffin v. California*, 380 U.S. 609, 61 (1965); *State v. Shields*, 391 S.W.2d 909, 912 (Mo. 1965). Comments that would cause jurors to draw attention to the defendant's failure to testify are prohibited. *State v. Nelson*, 719 S.W.2d 13 (Mo. App. W.D. 1986). The issue is whether the statement "will naturally and necessarily be construed by the jury to be an allusion to the defendant's failure to testify." *United States v. Hasting*, 461 U.S. 499, 515, n. 6 (1983) (Stevens, J., concurring).

Other courts have found similar comments, "is he sorry," to be impermissible comments on the defendant's right not to testify. In *State v.*

Cockerham, 365 S.E.2d 22, 23 (S.C. 1988), the prosecutor argued, "look at [appellant], does he look sorry to you?" Then he asked the jury to look at appellant, saying: "Have you seen any remorse?" *Id*. These comments effectively drew the jury's attention to appellant's exercise of his Fifth Amendment right to remain silent. *Id.*

Texas courts also condemn these kind of arguments. *De Los Santos v. State*, 918 S.W.2d 565, 570-71 (Tx Ct. App. 1996). In *De Los Santos*, the prosecutor argued:

> What about the five people that are left dying: Any remorse for them: Did we ever hear an 'I am sorry. Let me see what I can do. Let me help you'? . . . Did the defendant ever stop and say, 'Oh, my God. I didn't mean to do all of this. I am sorry, Roland. I am sorry Priscilla'?

Id. The argument violated the accused's right against self-incrimination. *Id*. Only the defendant could have said he was sorry, thus leading the jurors to question why he did not testify. *Id*.

Like *Cockerham* and *De Los Santos*, here, the prosecutor improperly commented on Paul's failure to testify and say he was sorry for Mrs. Crotts' death. A new penalty phase should result.

Denigrating Defense Counsel

The prosecutor denigrated defense counsel, saying that Dr. Wetzel was called only in the penalty phase, not in guilt phase, "when they tried to sell you a

bill of goods called Rosayln Schultz" (Tr. 2304). This was not an isolated attack on defense counsel, but followed a continuous barrage of arguments that counsel had put on a witness who fabricated her testimony and "cooked a report" (Tr. 1912-14).

Personal attacks on defense counsel are improper and prejudicial. *State v. Greene*, 820 S.W.2d 345, 347 (Mo. App. S.D. 1991); *State v. Hornbeck*, 702 S.W.2d 90 (Mo. App. E.D. 1985); and *State v. Harris*, 662 S.W.2d 276 (Mo. App. E.D. 1983). In *Greene*, the unsupported suggestion that defense counsel was lying to the jury was so serious and potentially prejudicial, it likely affected the jury's deliberations. *Greene*, 820 S.W.2d at 347.

In *Hornbeck*, the prosecutor accused defense counsel of conspiring to commit a crime, although no evidence supported the allegation. *Hornbeck, supra* at 93. The trial court committed reversible in failing to *sua sponte* admonish the prosecutor for the improper argument. *Id*. "The argument degraded defense counsel and destroyed the basic precept that both the state and the defendant are entitled to a fair trial." *Id*.

Similarly, in *Harris, supra* at 277, the prosecutor argued that defense counsel created the homosexual defense thus implying that defense counsel had subjorned perjury or fabricated the defense. This allegation was patently improper. *Id*.

As in all these cases, the prosecutor here attacked defense counsel, suggesting that he fabricated evidence by paying Dr. Shultz for her opinion. He

claimed that she cooked her report and the defense attorney tried to sell jurors a bill of goods. This was especially prejudicial, since Dr. Schultz provided the only evidence of mental disease or defect.

Given this and all the other improper arguments, this Court should grant plain error review, find a manifest injustice, and reverse Paul's sentence and remand for a new penalty phase.

CONCLUSION

Based on the arguments in Points I, Paul requests a new penalty phase trial where the jury can decide the issue of mental retardation; based on Points II-VII, Paul requests this Court reverse and remand for an evidentiary hearing; and based on Point VIII, a new penalty phase.

Respectfully submitted,

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Certificate of Compliance and Service

I, Melinda K. Pendergraph, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 30,393 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in March, 2005. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 23rd day of March, 2005, Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65102.

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Melinda K. Pendergraph