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 REPLY BRIEF

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Jurisdictional and Fact Statements

Appellant, Paul Goodwin, adopts the Jurisdictional Statement and the Statement of Facts in his original brief.

POINTS RELIED ON

I. Evidence of Mental Retardation

In deciding what is sufficient evidence of mental retardation, Section 565.030.6 mandates consideration of both sub-average intellectual functioning and deficits and limitations in adaptive behaviors; a qualified examiner with training in mental retardation should conduct evaluations; the evaluations should be complete and thorough; courts should consider all the evidence in the record; and post-trial evaluations should be considered, especially where counsel has failed to obtain a thorough and complete evaluation before trial.

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

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

Antwine v. Delo, 54 F.3d. 1357 (8th Cir. 1995); and

Tennard v. Dretke,___ U.S. ____, 124 S.Ct. 2562 (2004).

II. **<u>Counsel Should Have Investigated State's Evidence of Motive</u>**

Counsel had a duty to investigate the State's evidence and was on notice that witnesses could establish that Paul was never evicted from his boarding house. The State's evidence of motive was important as the State emphasized it at trial and argued it showed deliberation and made the murder aggravated, warranting death.

Rompilla v. Beard, 545 U.S.____, 125 S.Ct. 2456 (2005);

Wiggins v. Smith, 539 U.S. 510 (2003);

State v. Butler, 951 S.W.2d 600 (Mo. banc 1997); and

State v. Roe, 6 S.W.3d 411 (Mo. App. E.D. 1999).

III. Counsel Did Not Investigate Alleged Threats with Sledgehammer

Counsel had a duty to investigate and rebut the State's evidence. Here counsel was on notice of Ronald Krabbenhoft and that he could dispute State witness, Hall's, allegations that Paul threatened Mrs. Crotts with a sledgehammer. Counsel's failure to interview Krabbenhoft was unreasonable and prejudicial, since the State argued the sledgehammer incident supported deliberation and a sentence of death.

Rompilla v. Beard, 545 U.S.____, 125 S.Ct. 2456 (2005);

Wiggins v. Smith, 539 U.S. 510 (2003);

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

State v. Butler, 951 S.W.2d 600 (Mo. banc 1997).

IV. Counsel Did Not Investigate Medical Evidence

The State concedes that if counsel had investigated the medical evidence, consulted with and called a forensic pathologist, such as Dr. Thomas Bennett, the defense could have refuted the State's contention that Paul beat Mrs. Crotts before pushing her down the stairs. Paul was prejudiced because the State argued the repeated and excessive physical abuse showed deliberation and proved the aggravating circumstance of depravity of mind. 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 finding deliberation and assessing a death sentence.

Rompilla v. Beard, 545 U.S.____, 125 S.Ct. 2456 (2005);

Wiggins v. Smith, 539 U.S. 510 (2003);

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

Strickland v. Washington, 466 U.S. 668 (1984).

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

Lay witnesses' testimony about Paul's mental state is admissible and would not have been cumulative to the sole defense expert, Dr. Schultz, because the State argued that the expert was a paid hack who "cooked her report" and had no basis for her opinions.

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).

VI. Counsel's Inconsistent Theories

The State's argument that Dr. Schultz was qualified and the defense presented consistent theories in guilt and penalty phases, is inconsistent with the position the State took at trial. Paul was prejudiced by counsel's inconsistent theories, as his guilt phase defense was unbelievable and jurors would not trust any expert defense counsel called, given such inconsistent defenses.

Bradshaw v. Stumpf, 545 U.S. ____, 125 S.Ct. 2398 (2005);

Berger v. United States, 295 U.S. 78 (1935).

ARGUMENT

I. Evidence of Mental Retardation

In deciding what is sufficient evidence of mental retardation, Section 565.030.6 mandates consideration of both sub-average intellectual functioning and deficits and limitations in adaptive behaviors; a qualified examiner with training in mental retardation should conduct evaluations; the evaluations should be complete and thorough; courts should consider all the evidence in the record; and post-trial evaluations should be considered, especially where counsel has failed to obtain a thorough and complete evaluation before trial.

The State suggests that Paul Goodwin has not presented sufficient evidence of mental retardation to warrant a remand for a jury trial (Resp. Br. at 18). The State's argument is based on IQ scores alone (Resp. Br. 20-23, 28-29) and ignores the Missouri Legislature's mandate to assess adaptive behaviors. Section 565.030.6. The Legislature adopted the American Association of Mentally Retarded (AAMR) definition of mental retardation. *Id*. A thorough and competent evaluation for mental retardation must include IQ and adaptive skills testing, by a qualified expert with experience and training in mental retardation. The State ignores these requirements.

The State selectively cites to the record and ignores the substantial evidence of mental retardation, including low IQ scores, school records, and the testimony of school teachers, coworkers, and family members (Resp. Br. 20-29). The State

suggests that if evidence of mental retardation is based on an evaluation conducted post-trial and relies on information provided by the defendant's family, the evidence cannot be reliable and must be rejected (Resp. Br. 34, 35). The State's arguments do not withstand scrutiny and must be rejected.

IQ Scores Alone

Even though the State outlines Section 565.030.6's definition of mental retardation (Resp. Br. at 31), it ignores the Legislature's mandate that adaptive behaviors be assessed. Rather, it focuses only on IQ scores in arguing that Paul Goodwin is not mentally retarded (Resp. Br. at 26-27). IQ scores alone are not determinative of whether one is mentally retarded. Victor R. Scarano and Bryan A. Liang, *Mental Retardation and Criminal Justice: Atkins, the Mentally Retarded and Psychiatric Methods for the Criminal Defense Attorney*, 4 Hous. J. Health L. & Pol'y 285, 299 (2004). A range of 70-75 serves as a guideline only. James W. Ellis and Ruth A. Luckasson, *Mentally Retarded Criminal Defendants, Symposium on the ABA Criminal Justice Mental Health Standards*, 53 Geo. Wash. L. Rev. 414, 422, n. 44 (March/May 1985); Note, *Implementing Atkins*, 116 Harv. L. Rev. 2565, 2571-72 (June, 2003). The upper limit of 75 can be extended, depending on the reliability of the intelligence test used. Ellis & Luckasson, *supra* at 422, n. 44.

IQ scores are problematic in that intelligence tests can be unreliable, IQ scores tend to rise with repeated assessments, and clinicians need flexibility in interpreting tests. Harvard Note, at 2572. IQ tests alone are arbitrary, because

some children with mental retardation will score above a certain number. *Id*. at 2574. IQ scores also appear to be absolute and definite, but they actually are just estimates, due to measurement error and test bias. *Id*. They do not reflect adaptive components of mental retardation. *Id*. AAMR advocates a range to underscore the inherent unreliability of IQ tests. *Id*. at 2571, n. 44.

Paul had repeated IQ assessments during childhood, being tested six times between the ages of 7 and 16 (H.Tr. 700-04). His scores are likely inflated because of the repeated assessments. Even with repeated testing, his verbal scores were consistently low, often in the mentally retarded range:

1976 – 72

1980 – 69

1983 – 69

Id. His full scale IQ scores also provide cause for concern. The 1980 score was 72, within the mentally retarded range and two other scores were only 1 point from the upper range: 1976 - 76; and 1978 – 76. *Id*. Paul's IQ scores should have been a red flag, especially since they declined, even with repeated assessments. At the very least, these scores raise questions of Paul's problems with intellectual functioning and require examination of his adaptive skills.

In addition to IQ scores, an examiner must consider an individual's adaptive behaviors. Scarano & Liang, *supra* at 299; Ellis & Luckasson, *supra* at 422. "[A]daptive behavior is a term of art which is not synonymous with maladaptive behavior." Ellis & Luckasson, *supra* at 422. Adaptive behaviors in

Section 565.030.6 include self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work.

The most frequent and recognized scales for measuring adaptive behavior are the AAMD Adaptive Behavior Scale and the Vineland Social Maturity Scale. Ellis & Luckasson, *supra* at 422, n. 46. Additionally, the Scales of Independent Behavior-Revised (AIB-R) and the Comprehensive Test of Adaptive Behavior-Revised (CTAB-R) are utilized. Scarano & Liang, *supra* at 299. These scales are recognized as reliable in the scientific field, due to their usefulness, accuracy, quality standardization and norming. *Id*.

The Vineland Adaptive Behavior Scales (VABS) consists of 297 items and is administered with those familiar with the defendant, rather than the defendant himself. *Id*. at 300. This instrument tests four domains: communicative (receptive, expressive, and written); daily living skills (personal, domestic, community); socialization (interpersonal, play and leisure time, and coping skills); and motor skills (gross and fine). *Id*. at 301.

The State ignores that only one expert, Dr. Keyes, tested for adaptive skills, as required by Section 565.030.6. Dr. Keyes used the Vineland, recognized as an appropriate and valid test in the scientific field (H.Tr. 60). Dr. Keyes interviewed 20 witnesses, including family and teachers (H.Tr. 60). Paul scored in the mentally retarded range in communication, socialization and daily living skills (H.Tr. 68-69, 74-77, Ex. 4 and 4A).

No other expert has evaluated Paul's adaptive skills (H.Tr. 603, 657, 748, 751). Yet the State asks this Court to rely on incomplete evaluations and IQ scores alone to find that Paul is not mentally retarded (Resp. Br. at 34).

Qualified Expert

AAMR provides that evaluations for mental retardations should be performed by professionals trained in the specific field of mental retardation. Harvard Note, *supra* at 2584; Ellis & Luckasson, *supra* at 487. Evaluators should not be merely psychologists, but professionals trained in diagnosing and working with individuals with mental retardation. Harvard Note, *supra* at 2584. Typical medical school training and an academic degree are insufficient. Ellis & Luckasson, *supra* at 487. Few professionals have expertise in both mental illness and mental retardation. Ellis & Luckasson, *supra* at 487. Psychiatrists have limited expertise in the field of mental retardation. *Id*. at 443, n. 149. Thus, courts have recognized special education teachers, rehabilitation specialists and speech pathologists as experts who are qualified to testify in criminal cases. *Id*. at 490, n. 414 and 416, citing *Cooper v. Griffin*, 455 F.2d 1142, 1143-44 (5th Cir. 1972); *Hines v. State*, 384 So.2d 1171, 1177 (Ala. Crim. App. 1980); *May v. State*, 398 So.2d 1331, 1334 (Miss. 1981).

A qualified expert[1] is essential, because many confuse mental retardation and mental illness. Ellis & Luckasson, *supra* at 423-24. Mentally ill people encounter disturbances in their thought processes and emotion, while mentally retarded people have limited abilities to learn. *Id*. at 424. Mental illness is temporary, cyclical or episodic, while mental retardation is permanent. *Id*.

The State has confused mental illness and mental retardation, relying on *In re Johnson v. State*, 58 S.W.3d 496, 499 (Mo. banc 2001) (Resp. Br. at 34). There, this Court held that a Department of Corrections employee with a degree in engineering, was not qualified to provide a diagnosis of a "mental disorders" since he was not a licensed psychologist. *Id*.

In contrast, Dr. Keyes is an educational psychologist with three decades of experience in the field of mental retardation (H.Tr. 3, L.F. 271-80, Ex. 1). He is a certified psychologist, a Diplomate of the American Board of Forensic Examiners, and a Fellow of the American Association of Mental Retardation (H.Tr. 9). He has published extensively in his field and his work has been recognized by the Supreme Court in *Atkins*, 536 U.S. at 316, n. 20 (H.Tr. 6-8). Courts have

[1] Dr. Keyes is recognized as a leading expert in the field. Harvard Note, 2585, n. 125, citing his work in *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 Mental & Physical Disability L. Rep. 529, 535 (1998). The Supreme Court also relied on Dr. Keyes' published work in *Atkins v. Virginia*, 536 U.S. 304, 316, n. 20 (2002).

recognized Dr. Keyes as an expert and considered his testimony (H.Tr. 12-13). His experience and training make him precisely the type of expert qualified to assess and diagnose mental retardation.

Thorough and Competent Evaluation

A thorough and competent evaluation is critical in determining whether an individual is mentally retarded. A simple test will not resolve the issue. Ellis & Luckasson, *supra* at 488. An individual intelligence test should be administered to formulate an estimate of an individual's general intellectual functioning, even where the individual had IQ tests in the past. *Id*. The examiner must carefully analyze the results, since some subtests of the IQ test provide a better understanding of the individuals' abilities and functioning. *Id*. Some tests have a greater reliability (Information, Vocabulary, and Block Design) than other tests (Object Assembly, Picture Arrangement, Mazes and Symbol Search). Scarano & Liang, *supra* at 298, n. 56. Thus, courts should be weary of experts who only look at the composite IQ score.

The expert must assess the individual's adaptive functioning, using reliable tests. Scarano & Liang, *supra* at 299. The expert should gather information about the defendant from a variety of sources, including interviews with family members, school records and work history. Harvard Note, at 2586; Scarano & Liang, *supra* at 304-05. An informational diary from the mother or other family members is very useful. *Id*. at 305. These often mark a child's milestones and behavior. *Id*. Special Education records are also important information regarding

the child's progress and behavior in school. *Id*. They provide significant insights into the adaptive behavior and provide a historical perspective. *Id*. When reading special education records, one should remember that these curriculums are less informative than regular curriculums and usually focus on basic skills and vocational training. Ellis & Luckasson, *supra* at 431. Question types are also important, since it is much easier to answer yes-no questions and choose among pictures, rather than complete multiple-choice or open ended questions. *Id*. at 428, n. 73. The evaluator must cautiously review school records, because the trend is to diagnose individuals as Learning Disabled, rather than Mentally Retarded. Harvard Note, *supra* at 2576.

Courts should reject testimony from an expert who performed no evaluation. Ellis & Luckasson, *supra* at 488, n. 403, discussing *State v. Bennett*, 345 So.2d 1129, 1138 (La. 1977) (court rejected testimony of psychiatrist who alleged an IQ level for the defendant without performing an evaluation). *See also*, *State v. Rogers*, 419 So.2d 840, 844 (La. 1982) (psychiatrist's intuitive interactions with patient, absent testing, were rejected as insufficient). A psychologist violates ethical standards when testifying "about the psychological characteristics of particular individuals when they have not had an opportunity to conduct an examination of the individual." Alexis Krulish Dowling, *Post-Atkins Problems with Enforcing the Supreme Court's Ban on Executing the Mentally Retarded*, 33 Seton Hall L. Rev. 773, 809 (2003).

The State ignores these requirements, urging this Court to rely on opinions by Dr. Scott who never met Paul and never talked to his family, teachers or other witnesses (H.Tr. 748, 751). He did not administer any scientifically accepted scales to determine adaptive behaviors (H.Tr. 751). Similarly, state witness, Bobbie Meinershagen, a counselor for DOC, relied on IQ testing alone and did not administer any adaptive testing (H.Tr. 589, 594, 603, Ex. F). Neither did Ms. Lamb or any other examiner at the Special School District (H.Tr. 657). Despite these deficiencies in the State's evidence, the State urges this Court to ignore the only evidence of adaptive behavior and rely on incomplete evaluations instead.

The Rest of the Story: the Evidence the State Ignores

The State omits much of the evidence adduced at the 29.15 hearing (Resp. Br. at 28). The State acknowledges that postconviction counsel called family members, a former tutor, a former teacher, but then never discusses their testimony or the documentary testimony supporting a finding of mental retardation (Resp. Br. at 28). Thus, in coming to its conclusion that Paul did not make a "sufficient showing" or present "substantial evidence" of mental retardation (Resp. Br. at 28), the State ignores the following evidence.

Paul's kindergarten teacher suspected Paul was mentally retarded and referred him to the Special School District (H.Tr. 629-33). *See also*, Stipulation filed with this Court. Paul failed the 3rd and 4th grades (H.Tr. 57). Patricia Higgins, his Special Education teacher in the 7th grade, had a wealth of information about how Paul functioned. She remembered how dependent he was

on his mother, who sat outside his classroom and walked him to his classes (H.Tr. 431-32). She reviewed his Individual Assessments, which revealed that he could not complete complicated tasks, but needed much direction (H.Tr. 439-81, Exs. 7-12, 14). He followed along (H.Tr. 458-59, Ex. 10). When he was in a high school vocational program, he functioned at a 4th Grade level (H.Tr. 472, Ex. 12).

Both Higgins and Mary Catherine Welch, another Special Education teacher, recognized that a Learning Disabled diagnosis was more acceptable than a mental retardation diagnosis (H.Tr. 394-95, 397-98, 487-88). Thus, students were misdiagnosed or not properly tested for mental retardation (H.Tr. 395-98, 490, 495). These accounts are consistent with the research showing such misdiagnosis. Harvard Note, *supra* at 2576.

Ms. Welch tutored Paul when he was 14-15 years old and knew he functioned at a 3rd to 4th Grade level and had trouble with reading, writing and math (H.Tr. 382-86). Dependent, he struggled with the simplest tasks (H.Tr. 383-84).

Who better to relate Paul's functioning as a child than his Kindergarten teacher, special education teacher, and tutor? Yet the State never discusses their testimony when arguing no substantial evidence of mental retardation was presented (Resp. Br. 18-46).

The State ignores coworkers and family members too and argues their views should carry no weight at all, since they might be biased (Resp. Br. at 30, 35). The State ignores that these are the very people who have the critical

information about a defendant's functioning. Harvard Note, at 2586; Scarano & Liang, supra at 304-05. They must be considered when deciding if Paul is mentally retarded.

Post-Trial Evaluation

The State also argues that this Court should not consider "belated" postconviction evidence of mental retardation (Resp. Br. at 37). A defense expert's finding of mental retardation is supposedly more reliable if the evaluation is conducted before, rather than after trial (Resp. Br. at 41). Thus, Dr. Bernard's opinion that Ernest Johnson was mentally retarded is substantial evidence, while a postconviction expert's finding is not. *Id*. This distinction makes no sense and has been rejected by the Eighth Circuit.

In *Antwine v. Delo*, 54 F.3d. 1357, 1365 (8th Cir. 1995), Antwine alleged that trial counsel was ineffective for failing to investigate fully and present evidence of his mental condition. "A battery of examinations conducted several years after the offense at the request of post-conviction counsel produced evidence that Antwine suffers from bipolar disorder, a lifetime condition that usually arises in early adulthood." *Id*. The State motion court found "no credible evidence" to support this mental disease or defect. *Id*. In particular, the motion court found that Dr. O'Connor's diagnosis was not credible because it was based on an exam that occurred five years after the offense. *Id*. at 1366. The Eighth Circuit rejected this finding because, had counsel been effective, the examination would have been made earlier. *Id*. The court was concerned "with whether the jury - - not the

motion court - - would have found the evidence of Antwine's mental condition credible." *Id*. at 1365. *See also, Kyles v. Whitley*, 514 U.S. 419, 449, n. 19 (1995) (a state postconviction's judge's finding that a witness is not credible will not defeat a claim in a postconviction action, since the judge's observation could not substitute for the jury's appraisal at trial).

Here too, the issue is whether Paul Goodwin is mentally retarded, a permanent condition that would have developed before he was 18 years old. The jury, rather than the motion court, should decide whether his post-trial evaluation is credible.

Legislature Has Decided Mental Retardation is Jury Issue

The State cites other state court decisions for the proposition that a jury need not decide the issue of mental retardation in Missouri (Resp. Br. at 42-43. n. 13). The State ignores that Section 565.030.4(1) provides that the jury assess punishment at life without probation or parole if it "finds by a preponderance of the evidence that the defendant is mentally retarded." The Legislature provided a jury should try the defendant and decide the issue of life and death, unless a defendant waives his jury right. Section 565.006. Indeed, his right to waive the punishment phase is limited, and must be by agreement with the defense, the state and the court. Section 565.006.3. Thus, in *Johnson v. State*, 102 S.W.3d 535 (Mo. banc 2003), when the motion court denied Johnson's claim that he was mentally retarded, without a hearing, this Court did not remand the case back to the motion court to decide by a preponderance of the evidence whether Johnson

was mentally retarded. *Id*. at 541. Instead, this Court reversed and remanded for a new penalty phase where the jury could decide the issue, consistent with Section 565.030.4 and 565.030.6.

The State suggests that if a defendant does not make a sufficient showing of mental retardation, the issue will never be submitted to the jury (Resp. Br. at 36). The Supreme Court has held otherwise. Evidence of impaired intellectual functioning is inherently mitigating evidence that the jury must hear. *Tennard v. Dretke*, 542 U.S. 274,____, 124 S.Ct. 2562, 2572-2573 (2004). Thus, Tennard's single IQ score of 67, even if not sufficient to establish his mental retardation, was relevant mitigating evidence that the jury must be allowed to consider. *Id.* at 2572. *See also, e.g. Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (Wiggins' IQ of 79 further augmented his mitigation case); *Burger v. Kemp*, 483 U.S. 776, 779, 789, n. 7 (1987) (that petitioner "had an IQ of 82 and functioned at the level of a 12-year-old child," and that his mental and emotional development were at a level several years below his chronological age could not have been excluded by the state court). "Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004), quoting, *Tennard*, 124 S.Ct. at 2570.

Thus, the issue of Paul's impaired intellectual functioning should be submitted to a jury. If the jury finds Paul is mentally retarded, he cannot be executed under the Eighth Amendment and Section 565.030.4(1); *Atkins*, *supra*.

If the jury decides he is not mentally retarded, it still must consider his impaired intellectual functioning in determining whether he should receive a life sentence.

II. Counsel Should Have Investigated State's Evidence of Motive

Counsel had a duty to investigate the State's evidence and was on notice that witnesses could establish that Paul was never evicted from his boarding house. The State's evidence of motive was important as the State emphasized it at trial and argued it showed deliberation and made the murder aggravated, warranting death.

The State admits that counsel was on notice that witnesses would have rebutted the State's evidence of motive (Resp. Br. at 55). The State acknowledges that Paul's mother gave counsel a list of witnesses. *Id*. Paul's sister told counsel that Paul had never been evicted and asked him to contact Mr. Crase, the owner of the rental property. *Id*. The State suggests that this is insufficient, because Paul did not personally inform trial counsel about the witnesses. *Id*. Paul has depended on his family his entire life and continued to do so when communicating with his attorney.

Contrary to the State's argument, a defendant is not responsible for directing counsel's investigation. *Rompilla v. Beard*, 545 U.S.____, 125 S.Ct. 2456 (2005). Counsel has a duty to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation. *Id*. at 2460. Counsel's duty to investigate is independent of his client. *Id*. at 2462. Rompilla contributed little to his defense and was uninterested in helping counsel. *Id*. He told counsel he was "bored being here listening"

during one interview and returned to his cell. *Id*. He told counsel his childhood and schooling had been normal, except for quitting school in the ninth grade, when in reality, it had not been normal. *Id*. Rompilla, actively obstructive, sent counsel off on false leads. *Id.* Regardless of a defendant's actions, counsel must conduct a reasonable investigation, including reviewing the evidence the State intends to present against the defendant. *Id.*

Under *Rompilla*, this Court must reject the State's suggestion that counsel cannot be ineffective unless his client specified personally what witnesses he should interview and call. The State admits that counsel was on notice that Paul had not been evicted and did not have a grudge against Mrs. Crotts (Resp. Br. at 55).

The State alleges that witness, Ray Dickerson's, testimony was insufficiently pled in Paul's amended motion (Resp. Br. at 52, n. 14). A review of the motion shows otherwise. Dickerson's testimony is outlined in Claim 8 (e) in which numerous witnesses would have established that Paul was not evicted from the boarding house, located next door to the victim, Mrs. Crotts. Therefore, he could not have blamed Mrs. Crotts for an eviction that did not happen (L.F.151). Ray Dickerson was important because Paul moved into Dickerson's apartment when he left Mrs. Crotts neighborhood. The amended motion alleged that "Ray would have testified that he and his wife purchased a home and moved out of the rental property in October or November 1996" (L.F. 151). This established that

Paul moved from Mrs. Crotts' neighborhood months later than the time suggested by state witnesses.

The State claims that rebutting the State's motive for killing Mrs. Crotts was unimportant, because it would not have provided a viable defense (Resp. Br. at 55). The State suggests that counsel can only be ineffective in the way they present their defense, but not in how they challenge the State's case. *Id*. *Rompilla* shows otherwise, as counsel has a duty to investigate and try to minimize the negative, aggravating evidence the State presents. *Rompilla, supra* at 2456. *See also*, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (the Sixth Amendment requires counsel to "discover all reasonably available mitigating evidence and *evidence to rebut any aggravating evidence that may be introduced by the prosecutor*") (emphasis added).

Counsel has a duty to properly investigate a case and bring out substantial weaknesses in the prosecution's case. *State v Butler*, 951 S.W.2d 600, 609 (Mo. banc 1997). In *Butler*, a state's witness' testimony that he saw a Ruger .22 caliber pistol in Butler's car could have been challenged had counsel conducted a proper investigation. *Id*. However, counsel had not adequately investigated and did not know enough about the evidence to decide whether to use it. *Id*. This Court found counsel's inadequate performance unreasonable and prejudicial. *Id*.

In *State v. Roe*, 6 S.W.3d 411, 415 (Mo. App. E.D. 1999), the Court found error in the failure to instruct the jury on every element, even where the defendant's defense was that he was not involved in the murder. The Court

recognized that the defense can challenge the weaknesses in the State's case and at the same time pursue a separate, distinct defense. *Id*.

Paul Goodwin's counsel should have conducted a reasonable investigation into the State's evidence of motive. Contrary to the State's argument (Resp. Br. at 57), motive was an important part of the State's case. 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 argued, Paul harassed her, and as a result, Paul was evicted. According to the State, Paul was angry and blamed Mrs. Crotts for being evicted and vowed to get even (Tr. 774-76, 779-80, 857-866, 936-38, 1185-89, 1191-92, 1251-54, 1916). The State used this evidence of motive to argue that Paul deliberated and the killing was aggravated. The State emphasized the evidence in its opening and closing and through its direct examination of three witnesses. The State cannot backtrack now and say the evidence was unimportant.

This Court should remand for a hearing on counsel's failure to adequately investigate the State's evidence of motive and to rebut it.

III. Counsel Did Not Investigate Alleged Threats with Sledgehammer

Counsel had a duty to investigate and rebut the State's evidence. Here counsel was on notice of Ronald Krabbenhoft and that he could dispute State witness, Hall's, allegations that Paul threatened Mrs. Crotts with a sledgehammer. Counsel's failure to interview Krabbenhoft was unreasonable and prejudicial, since the State argued the sledgehammer incident supported deliberation and a sentence of death.

The State asks this Court to deny Paul Goodwin a hearing on his claims of ineffectiveness for failing to investigate and call Krabbenhoft, because Paul's sister, rather than Paul himself, told counsel about Krabbenhoft (Resp. Br. at 66). Counsel has a duty to investigate, independent of his client. *Rompilla v. Beard*, 545 U.S.____, 125 S.Ct. 2456 (2005). Here, Paul gave his sister helpful information to tell his attorney. The record shows that counsel endorsed Krabbenhoft as a witness, but never interviewed him (L.F. 170, S.Tr. 27-28).

The State wants this Court to presume counsel made all decisions in the exercise of professional judgment (Resp. Br. at 66). Courts will not make such a presumption when counsel has failed to conduct a basic investigation. *Rompilla, supra* at 2462; *State v. Butler*, 951 S.W.2d 600, 609 (Mo. banc 1997). Where counsel has never interviewed the witness, he cannot make a reasoned decision about calling him. *Id*. Motion courts cannot speculate that a decision was based on trial strategy without first holding a hearing. *See, e.g. State v. Blue*, 811

S.W.2d 405, 410 (Mo. App. E.D. 1991) (no basis for determining counsel's failure to call a witness, absent a hearing); *State v. Talbert*, 800 S.W.2d 748, 749 (Mo. App. E.D. 1990) (failure to call endorsed witness could not be considered "strategic" absent a hearing): *Fingers v. State*, 680 S.W.2d 377, 378 (Mo. App. S.D. 1984) (finding that failure to impeach witness was strategic improper without a hearing); and *Chambers v. State*, 781 S.W.2d 116, 117 (Mo. App. E.D. 1989) (questioning of witness could not be considered trial strategy without a hearing).

The State alleges that counsel cannot be ineffective for failing to rebut the state's case, since he had a defense of mental disease or defect (Resp. Br. at 67-68). As discussed in Point II, courts have concluded otherwise. *Rompilla*, *Butler*, *supra*.

Apparently recognizing the weakness of its claim that counsel acted reasonably, the State turns to the prejudice prong and makes the remarkable declaration that this Court need not consider all the evidence in determining whether Paul was prejudiced (Resp. Br. at 69). The State ignores the Supreme Court's directive that in determining 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).

This Court should remand for an evidentiary hearing on counsel's ineffectiveness in failing to investigate and present evidence to rebut the State's evidence that Paul had threatened Mrs. Crotts with a sledgehammer.

IV. Counsel Did Not Investigate Medical Evidence

The State concedes that if counsel had investigated the medical evidence, consulted with and called a forensic pathologist, such as Dr. Thomas Bennett, the defense could have refuted the State's contention that Paul beat Mrs. Crotts before pushing her down the stairs. Paul was prejudiced because the State argued the repeated and excessive physical abuse showed deliberation and proved the aggravating circumstance of depravity of mind. 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 finding deliberation and assessing a death sentence.

The State concedes that had counsel consulted and called an expert such as Dr. Bennett, he "would have refuted the State's contention that Appellant beat the victim prior to pushing her down the stairs" (Resp. Br. at 81). Nevertheless, the State urges this court to deny a hearing, saying that the medical evidence would not have refuted "all" the evidence of depravity of mind (Resp. Br. at 81). The State's argument does not withstand scrutiny.

In analyzing Paul's claims of ineffective assistance of counsel, this Court must determine whether there is a reasonable probability that the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511-12 (2000). This is not an acquittal

standard, where a defendant must show that, but for counsel's errors, he would not have been convicted or the aggravator would not have been found. Rather, the question is whether counsel's failure undermines the confidence in the outcome. As the Supreme Court recently put it:

> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and *although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test*. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," *Wiggins,* 539 U.S., at 538, 123 S.Ct. 2527 (quoting *Williams v. Taylor,* 529 U.S., at 398, 120 S.Ct. 1495), and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing, *Strickland,* 466 U.S., at 694, 104 S.Ct. 2052.

Rompilla v. Beard, 125 S.Ct. 2456, 2469 (2005) (emphasis added).

Thus, had counsel adequately investigated the medical evidence and refuted the State's conclusion that Paul repeatedly beat Mrs. Crotts before he pushed her down the stairs, this evidence might well have influenced the jury's appraisal of Paul's culpability. Jurors focused on this evidence, asking to see the autopsy photos in their 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). Under these facts, refuting the medical evidence and showing that Paul did not repeatedly beat Mrs. Crotts would have weakened the State's case for deliberation and its case for death. A remand for a hearing is required.

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

Lay witnesses' testimony about Paul's mental state is admissible and would not have been cumulative to the sole defense expert, Dr. Schultz, because the State argued that the expert was a paid hack who "cooked her report" and had no basis for her opinions.

The State ignores the authorities cited in Paul's original brief,[2] arguing that lay testimony regarding one's mental state is inadmissible and cumulative to the State's expert (Resp. Br. at 86). Counsel had a duty to investigate Paul's mental state, including witnesses' observations of Paul's intellectual deficits, impulsivity, confusion and inability to formulate a plan. Contrary to the State's suggestion, underlying factual support for its hired expert was critical, especially since the State argued that she was a paid hack who was fabricating the defense, and "cooked her report." (Tr. 1519-1662, 1859, 1908-09, 1910-11,1912, 1913-14). The prosecutor "kept picturing [Schultz] in a little white hat, a little chef's outfit cooking up some mental disease to help him out" (Tr. 1914).

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

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[2] *State v. Raine*, 829 S.W.2d 506, 510 (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, 469 (Mo. App. W.D. 1997).

defense presents. However, when that expert testimony is supported by witnesses familiar with the defendant's behavior, the defense can become compelling. Since the State challenged the defense at trial as incredible, it is hardly in a position to argue that counsel performed reasonably in presenting this defense. A remand for a hearing on counsel's ineffectiveness is required.

VI. Counsel's Inconsistent Theories

The State's argument that Dr. Schultz was qualified and the defense presented consistent theories in guilt and penalty phases, is inconsistent with the position the State took at trial. Paul was prejudiced by counsel's inconsistent theories, as his guilt phase defense was unbelievable and jurors would not trust any expert defense counsel called, given such inconsistent defenses.

At trial, the State skewered Dr. Schultz, the sole defense witness during the guilt phase, with a damning cross-examination (Tr. 1519-1662). The State argued Schultz was incredible (Tr. 1900-14, 1917, 1979). The State criticized Schultz's experience, saying she found every single defendant she evaluated crazy (Tr. 1909, 1912). The State claimed Schultz was a paid hack, giving a favorable opinion to the defense for the money (Tr. 1910, 1912). The State accused Schultz of lying, arguing that she had cooked her report (Tr. 1912-14, 1917). The State criticized her for ignoring any statements and evidence inconsistent with her diagnosis (Tr. 1914, 1979).

Now, the State wants to change course and argue that nothing supports a finding that Schultz was not qualified and that the defense was consistent and effective (Resp. Br. at 98). The State cannot argue such inconsistent positions in a death penalty case. See, *Bradshaw v. Stumpf*, 545 U.S. ____, 125 S.Ct. 2398, 2407-08 (2005) (remanding to the Sixth Circuit to determine whether the

prosecutor's inconsistent arguments in two codefendant's case regarding who was the shooter violated his right to due process and impacted his death sentence). Serious questions are raised when the State takes inconsistent positions in order to uphold a death sentence at all costs. *Id*. at 2409 (Souter, J., concurring). "[T]he State's interest in winning some point in a given case is transcended by its interest 'that justice shall be done.'" *Id*., *quoting*, *Berger v. United States*, 295 U.S. 78, 88 (1935).

Here, the State wants to win so badly that it is willing to argue a position opposite to that it argued at trial. If counsel presented such a horrible defense at trial that it was incredible, unworthy of belief, shouldn't the State now agree to a review of counsel's actions, to determine whether counsel acted reasonably and whether Paul was prejudiced? That is what justice requires. It is why this Court should remand for an evidentiary hearing.

CONCLUSION

Based on the arguments in his original brief and his reply, Paul requests:

Points I, a new penalty phase trial where the jury can decide the issue of mental retardation;

Points II-VII, a remand for an evidentiary hearing; and

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 7,075 words, which does not exceed the 7,750 words allowed for an appellant's reply 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 July, 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 11th day of July, 2005, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Melinda K. Pendergraph