IN THE
MISSOURI SUPREME COURT

ERNEST JOHNSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC 90582**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI
THIRTEENTH JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE GENE HAMILTON, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Because death was imposed, this Court has exclusive jurisdiction of this 29.15 appeal. Art. V, Sec.3, Mo. Const.

STATEMENT OF FACTS

Ernest Johnson was convicted of killing three Casey's convenience store employees, Fred Jones, Mary Bratcher, Mable Scruggs, during the late evening of February 12, 1994 and death sentenced on all counts. After a second penalty phase, this Court reversed for a jury to decide whether Ernest is mentally retarded. *Johnson v. State*, 102 S.W.3d 535, 537-41 (Mo. banc 2003). This is an appeal of that related postconviction action.[1]

I. Original Trial

A. Pretrial And State's Guilt Phase

Deputy Police Chief Highbarger gave press statements the police were uncertain whether Ernest acted alone(T.Tr.68,76).

Bloody screwdrivers were recovered near Casey's(T.Tr.1533-40,1720-21,1725-26).

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[1] Record references are: (1) original guilt and penalty trial – (T.Tr.); (2) first postconviction transcript – (1stPCRTr.); (3) second penalty phase transcript – (2ndPenTr.); (4) third penalty phase legal file (3rdPenL.F.); (5) third penalty phase transcript (3rdPen.Tr.); (6) third postconviction legal file – (3rdPCRL.F.); (7) third postconviction first supplemental legal file – (3rdPCR1stSupp.L.F.); (8) third postconviction transcript – (3rdPCRTr.); and (9) third postconviction exhibits – (3rdPCREx.). The transcripts and legal files from all proceedings prior to this third postconviction action were also made exhibits in the third PCR.

Officer McMillen interrogated Ernest and Ernest said: "it took more than one man to do that job" because one was not strong enough(T.Tr.1831,1837-38). Ernest said he did not know what happened(T.Tr.1833). Ernest told Officers McMillen and McDonald that Rod and Antwane Grant were not involved(T.Tr.1833-34,1842-43).

On February 12, 1994, Deborah Watson went to 200 Mohawk to see Rod Grant(T.Tr.2003-06). Rod had just gotten out of jail for assaulting Deborah by stabbing her with a screwdriver(T.Tr.2047). On numerous occasions, Rod beat Deborah badly while pregnant with Rod's child(T.Tr.2047). Rod had pulled guns on Deborah and choked her(T.Tr.2048).

February 12, 1994, was Deborah's and Rod's last time together before Rod's sentencing for assaulting her(T.Tr.2049-50). Throughout the night, Ernest got crack from Rod, but owed Rod money(T.Tr.2014,2086,2089-91). Ernest interrupted Rod's and Deborah's sexual encounter multiple times because he badly needed more crack(T.Tr.2022-28,2062-63). When Rod cut Ernest off, Ernest tried pawning personal items to get more crack(T.Tr.2146,2153-54).

Ernest was the boyfriend of Delores Grant, Rod and Antwane Grant's mother(T.Tr.2079). Ernest was friends with Rod and Antwane and Ernest had a father-son like relationship with Delores' youngest son, Marcus(T.Tr.2078-80).

When Rod testified, he was in prison for assaulting Deborah and he was charged with three counts of second degree murder and armed criminal action based on the Casey's events(T.Tr.2078,2139-40). Rod had already pled guilty to first degree robbery and was to be sentenced after Ernest's trial to ten years concurrent to

his sentences for stabbing Deborah with a screwdriver(T.Tr.2139-40). Rod's deal included he would testify against Ernest and everything but the robbery would be dropped(T.Tr.2141-42). Even though Rod had admitted selling Ernest and others crack, he had no pending drug charges(T.Tr.2142). Rod provided Ernest a .25 automatic Raven(T.Tr.2092-94).

Dr. Dix did the autopsies(T.Tr.2288,2291-92). Mary Bratcher had ten stab wounds to her left hand consistent with being stabbed with a screwdriver(T.Tr.2302,2305-06). Fred sustained a gunshot wound around his mouth(T.Tr.2293). All three died from blunt skull trauma consistent with being struck with a hammer(T.Tr.2311).

B. Defense Guilt Phase

Michael Maise was in jail with Rod(T.Tr.2332). Rod told Maise that he went with Ernest to Casey's to make sure Ernest did what Ernest was supposed to do(T.Tr.2333). Rod needed money(T.Tr.2333). Two witnesses testified they saw someone outside Casey's around the time of the offense who may have been Rod(T.Tr.2357-63,2366-68).

C. Guilt Closing Arguments

The prosecutor argued Ernest hit each employee in the head with a hammer, going from one to the next(T.Tr.2383-84).

Counsel argued Rod was involved because of Maise's testimony and Rod was the other person seen at Casey's(T.Tr.2391-92).

D. Original Trial Penalty Arguments

Counsel argued Ernest was covering for someone and it was Rod who stabbed his pregnant girlfriend with a screwdriver(T.Tr.2647,2649). Rod told Maise that he was with Ernest at Casey's when the killings happened(T.Tr.2650). It was unfair to sentence Ernest to death and for Rod to get a deal(T.Tr.2650).

II. First PCR

Psychiatrist Dr. Parwatikar testified Ernest declined to speak about Rod's and Antwane's involvment(1stPCRTr.22).

Psychologist Dr. Bernard obtained some invalid test results because Ernest has very low reading skills and her testing required sixth grade skills(1stPCRTr.57-58). Ernest's I.Q. was in the 70's(1stPCRTr.58). Bernard concluded Ernest always was mildly mentally retarded(1stPCRTr.60).

Neuropsychologist Dr. Cowan measured Ernest's Full Scale I.Q. at 84(1stPCRTr.197-98,225-26).

III. Second Penalty Phase

Psychologist Dr. Smith found Ernest suffers from Fetal Alcohol Effect caused by his mother's drinking while pregnant with him(2ndPenTr.1215-16,1230-33,1239-40). Ernest had learning disabilities, but not mental retardation(2ndPenTr.1228-29,1233).

In rebuttal, respondent called psychiatrist Peters to testify about reports and records reviewed(2ndPenTr.1314,1317,1319). Peters neither interviewed nor tested Ernest, but testified Ernest was anti-social(2ndPenTr.1319,1331-32).

IV. Second PCR

Psychologist Dr. Bernard measured Ernest's Full Scale I.Q. in the **low 70's** (3rdPCREx.15 at 5-7,24-25,55).[2] Bernard did not have her data, but her notes showed low 70's and that meant under 75 and from 71 to 73(3rdPCREx.15 at 24,55). The Department of Corrections assessed Ernest in his late teens as below normal on all adaptive skills(3rdPCREx.15 at 38-39). Mentally retarded people, like Ernest, mask deficits because they do not want to be perceived dumb(3rdPCREx.15 at 41-42). From watching Ernest play basketball, a person could not assess Ernest's I.Q. and whether Ernest is mentally retarded(3rdPCREx.15 at 42). Ernest's measured I.Q., impaired intellect, and poor adaptive skills establish he is mentally retarded(3rdPCREx.15 at 43,47-48).

In remanding for a penalty retrial on mental retardation, this Court noted "Bernard's testimony best supported Movant's mental retardation theory." *Johnson v. State*, 102 S.W.3d 535, 538 (Mo. banc 2003). Bernard is "a psychologist with considerable experience in mental retardation." *Id*. at 538. Bernard had concluded that Ernest's third grade 77 I.Q. and his sixth grade 63 I.Q. were caused by his inability to process and retain information and deficient adaptive skills. *Id*. at 538. Bernard testified that Ernest's poor grade history was indicative of mental retardation. *Id*. at 538. Bernard found Ernest had deficient adaptive skills and her rationale was recounted. *Id*. at 538-39.

[2] Bernard's deposition, referenced here as 3rdPCREx.15, was filed as Ex.4 in SC84502 – *Johnson v. State*, 102 S.W.3d 535 (Mo. banc 2003).

V. Third Penalty Phase

A. Pretrial

Elizabeth Carlyle and Tim Cisar represented Ernest.

On December 18, 2003, respondent moved for a mental examination by Dr. Hiesler(3rdPenL.F.199-20). A March 11, 2004 order stated a "stipulation" was reached that Heisler was "to evaluate defendant's claim of mental retardation under Section 565.030.6, Supp. 2003, RSMo"(3rdPenL.F.209;3rdPenTr.2-4). The examination was limited to assessing mental retardation under §565.030.6(3rdPenL.F.209-10).

On January 24, 2005, counsel sought to continue a March 10, 2005 trial setting because defense mental retardation expert, Dr. Keyes, needed more time to consider Heisler's report(3rdPen.Tr.36-43). Keyes received Heisler's report on January 18, 2005(3rdPCR1stSupp.L.F.6). Keyes could not review Heisler's report during the seven weeks before trial(3rdPenTr.38). Keyes' affidavit stated there was inadequate time to review Heisler's report because doing so required ten hours of work and because of his other time commitments as a professor and consulting duties on cases other than Ernest's case(3rdPCR1stSupp.L.F.12;3rdPenTr.42-43). Cisar said the jury's decision on mental retardation would be based on whose expert was believed(3rdPenTr.41).

The February 25, 2005, continuance arguments (3rdPenTr.44) included:

MR CISAR: But it's happened since I filed the motion, you know Dr. Keyes is **eccentric**. Let's put it that way. And he told me he will not come – This is the guy **we've paid money to** and got expert opinion from.

He says Mr. Johnson is mentally retarded and **flat refuses to come** any day but Friday. I flat refuse to be dictated to by him, but he tells me, you know, "If you force me to come Thursday, **I'll get off**."

I said, "That's great. **I'm going to get an out-of-state subpoena**." I can't get it in two weeks. He's telling me he will not give up – He's a professor at Charleston, and he will not give up his class time to come here.

And I'm thinking to myself, [t]hat's wonderful.

I don't have an answer for you guys, other than **he tells me he won't come any day but Friday**.

I'm thinking, Okay, If I get it [the case continued] after classes are out, I'll subpoena him. But I don't have that luxury right now. I didn't realize I had this problem until last Friday.

(3rdPenTr.59-60)(emphasis added).

……..

MS. CARYLE: And so then I, you know, notified him specifically, "Well, you know, we're going to need you on Thursday."

And what I got back was an e-mail that said, "No. I really won't do that."

And you know, I – so anyway, that's that.

THE COURT: **Sounds like he's really dedicated**.

MR CISAR: Say that again.

THE COURT: **Sounds like he's really dedicated**.

MR. CISAR I appreciate that. I wish I had an answer for that. **I mean you'd think he would be, in the line of work that he's in**, but I guess he's dedicated more to his students than he is to any case he's working on. I don't have an answer for that.

(3rdPenTr.60-61)(emphasis added).

……..

THE COURT: If I were to continue this till the middle or end of May, what assurance do I have that these witnesses are going to show up then?

MR CISAR: Well, I can only tell you that I am going to personally make certain that Dr. Keyes is, **if I have to drive out there myself and serve him with an out-of-state subpoena** and gets [sic] him here on the day I need him here and not on his class schedule. **That incenses me**. And you don't need to know that, but I'm fairly **mad at Dr. Keyes** right now. I'll take care of **getting him served with an out-of-state subpoena.**

(3rdPenTr.66)(emphasis added).

……

MR. CISAR Keyes is the difficult one I've had. **He is not being reasonable**.

(3rdPenTr.67)(emphasis added).

……..

MR. CISAR: Well, and I mean, I can tell you what they are. I'm at the point where if you give me a date in June, it's clear, Judge. Same with the back half of May.

THE COURT: **Yeah, but I don't want to find out that Dr. Keyes is going to be in Timbuktu**.

(3rdPenTr.70)(emphasis added).

At the same hearing, where counsel disparaged Keyes, Cisar apprised the court that they were having difficulty locating Bernard(3rdPenTr.45-46,57). Carlyle had reviewed this Court's opinion and it was clear Bernard's testimony was "critical"(3rdPenTr.57). It was extremely important to locate Bernard because the postconviction format of her testimony, where all facts were not developed, was a "shorthand" presented to a PCR judge and not how Carlyle wanted Bernard's opinions presented to a jury(3rdPen.Tr.57-58). Bernard's opinions would be unchanged(3rdPenTr.57-58).

On May 12, 2005, counsel moved for a competency to proceed evaluation under §552.020 alleging "it is increasingly clear that Mr. Johnson does not understand the proceedings in this case or their implications"(3rdPenL.F.238-39). Dr. Kline found Ernest was competent to proceed(3rdPCREx.57).

On Tuesday, May 2, 2006, this Court decided *Goodwin v. State*, 191 S.W.3d 20 (Mo. banc 2006).

Before the trial's second day Friday, May 5, 2006, and more than one year after counsel had the case continued because of Keyes' conduct, Carlyle decided a continuance was necessary based on this Court's *Goodwin* opinion(3rdPenTr.449). Carlyle noted this Court had found Keyes unqualified in *Goodwin*(3rdPenTr.449). Cisar noted what this Court said about Keyes was "not a good thing"(3rdPenTr.450). A continuance was denied(3rdPenTr.451).

On Monday, May 8, 2006, counsel moved to continue based on *Goodwin*(3rdPenL.F.245-48;3rdPenTr.640-42). That motion was denied(3rdPenTr.640-42,648). A continuance was needed because this Court had found Keyes incredible on whether Goodwin was mentally retarded and Keyes was unqualified(3rdPenL.F.245). Keyes was the only defense expert who had assessed and found Ernest mentally retarded(3rdPenL.F.246). A continuance would allow retaining a different expert(3rdPenL.F.246-47). The prosecutor stated he had a copy of Keyes' *Goodwin* testimony and planned to cross-examine Keyes about *Goodwin*(3rdPenTr.641-42).

In opening, respondent told the jury the defense would call "a new psychologist" who was "not credible" on mental retardation(3rdPenTr.658) and it was undisputed Ernest acted "alone"(3rdPenTr.665).

B. <u>Third Penalty Evidence</u>

Officer Brown responded to Casey's at 1:20 a.m. on February 13, 1994(3rdPenTr.671-72). There was much blood coming from under the bathroom door and two deceased women inside(3rdPenTr.676-77). There was blood around the

walk-in cooler and a deceased male inside(3rdPenTr.677-78). In a field across from Casey's, a bloodstained screwdriver was found(3rdPenTr.685-89).

Officer Himmel stated blood spatter analysis established all three employees were struck multiple times(3rdPenTr.794-95,799-801,806-07). A .25 caliber automatic Raven without a clip was found nearby(3rdPenTr.825-827). Bloodstains on the recovered clothing were consistent with them having been worn in layers(3rdPenTr.830-36).

A stipulation Ernest was the only person inside Casey's when the killings happened was read(3rdPenTr.828-29).

Initially, Ernest was not a suspect and the police wanted to talk to him because he was a regular Casey's customer(3rdPenTr.846-48,855). Officer Mays believed he and Ernest understood each other and Ernest appeared "normal"(3rdPenTr.849-51). When Ernest spoke with Officer McMillen, Ernest understood him(3rdPenTr.850-51).

Ernest told police he lived at 200 Mohawk with his girlfriend, her three sons, and her sons' babies(3rdPenTr.857). McMillen testified Ernest displayed a "command" of English, his responses showed he understood McMillen, and McMillen understood Ernest(3rdPenTr.866). Ernest never confessed to participating and said he did not shoot anyone(3rdPenTr.866-68).

Casey's Assistant Manager Theresa Barnes testified Ernest had no difficulty communicating about purchases, counting money, or figuring cost(3rdPenTr.926-27). Ernest completed a job application without difficulty and returned it(3rdPenTr.927-

28). On cross-examination, Theresa stated that Ernest completed the application without taking it home for help(3rdPenTr.937).

Cab driver Reynolds took Ernest and a young male to the Columbia Mall on February 13, 1994(3rdPenTr.939-41). Reynolds picked them up later at Walmart and Ernest paid cash twice and had no problems communicating(3rdPenTr.942-45).

Linda White worked at Columbia Mall's Hurst Diamonds(3rdPenTr.947). Ernest had called about a ring and paid cash for it(3rdPenTr.949-51).

The autopsy findings were read(3rdPenTr.967-68,975-78).

C. Heisler's Videotaped Interogation

The state played videotape Exhibit 78, Heisler's interview of Ernest(3rdPenTr.953). Exhibit 78 was the entire videotape meeting with Heisler and Ex.78A is excerpts and both were admitted(3rdPenTr.691-92).[3]

Heisler told Ernest that Boone County hired Heisler to assess him(Heisler Tr.2). Heisler told Ernest they were being recorded and it would be shared with the attorneys and not confidential(Heisler Tr.2-3). Heisler asked Ernest whether he understood and Ernest replied: "Well, do this here for the state"(Heisler Tr.3). Ernest was not given warnings provided for under *Miranda v. Arizona*, 384 U.S. 436 (1966).

[3] On June 28, 2010, this Court granted leave to file transcripts of Ex.78 and Ex.78A. All references herein are to the transcript (Heisler Tr.) of the entire videotape meeting of Ex.78.

Heisler interrogated Ernest asking: **"You good for the crime?** I'm not a judge so, you know, **we're not going to retry the case or anything**"(Heisler Tr.39-40)(emphasis added). Ernest said he was and blamed drugs(Heisler Tr.40). During what followed, Heisler elicited statements that created the impression for the jury that Ernest acted alone, and therefore, was not mentally retarded(Heisler Tr.40-63). In the course of that interrogation (Heisler Tr.39-63), Ernest provided an account that tracked the prosecutor's closing argument in the original trial and second penalty phase that Ernest: (1) wore layered clothes (T.Tr.2385-86;2ndPenTr.1354); (2) attempted to conceal his identity (T.Tr.2386-87;2ndPenTr.1354); (3) focused on Mary because she had the safe's key (T.Tr.2387-88;2ndPenTr.1356-57); (4) disposed of an outer layer of bloody clothes to change his appearance (T.Tr.2389;2ndPenTr.1354); (5) went to each employee hitting them in the head with a hammer (T.Tr.2383-84;2ndPenTr.1356,1366); and (6) fired the .25 Raven during the commission(T.Tr.2402;2ndPenTr,1366).

Heisler's psychometrist, Bradshaw, measured Ernest's I.Q. as: (1) Full Scale 67; (2) Verbal 67; and (3) Performance 73(3rdPenTr.1568).

D. Defense Evidence

Lisa Johnson, Ernest's former girlfriend, described Ernest's overloading the washing machine and using excess detergent(3rdPenTr.1116-17).

Ernest's parole officer, Dennis Booth, testified Ernest was non-violent, compliant, and quiet(3rdPenTr.1176-77). Ernest had below average intelligence and difficulty reading and writing(3rdPenTr.1177). Ernest was only able to keep short

term, menial jobs(3rdPenTr.1177). Ernest was on a substance abuse counseling waiting list when the Casey's events happened(3rdPenTr.1177-78).

Respondent elicited from Booth that Ernest was "smart enough" not to disclose his cocaine problem(3rdPenTr.1179). Ernest was a good athlete who played basketball well(3rdPenTr.1180). Booth and Ernest were able to communicate(3rdPenTr.1181-82). Ernest was not "very motivated" to work(3rdPenTr.1182-83).

Thomas Powell directed a halfway house where Ernest twice lived(3rdPenTr.1195-96,1199). Ernest was quiet(3rdPenTr.1203-04). Part of the programing included basketball and Ernest played well(3rdPenTr.1203-04). Respondent elicited from Powell that Ernest made good basketball strategy decisions(3rdPenTr.1205-06). Ernest had no problems doing laundry(3rdPenTr.1210-11,1213-14).

Counsel elicited from psychiatrist Dr. Parwatikar that he had determined Ernest was competent to proceed, but was not asked to evaluate for mental retardation(3rdPenTr.1280,1290,1295-96). At the time of the offense, Ernest had cocaine intoxication delirium(3rdPenTr.1292).

Respondent elicited Parwatikar had found in 1995 that Ernest "was functioning at an average rate of intelligence" and was able to understand his legal situation and assist counsel(3rdPenTr.1303-06). A person can fake low intelligence and low motivation or having a reason to get a low I.Q. score could indicate malingering(3rdPenTr.1305-06).

Respondent elicited that Pawatikar previously testified he had not diagnosed Ernest as suffering from Fetal Alcohol Effect(3rdPenTr.1313). Parwatikar found Ernest has a good past events' memory(3rdPenTr.1313-14). Respondent presented Ernest through Parwatikar as sound as to adaptive functioning because Ernest was able to communicate with Parwatikar and had appropriate hygiene(3rdPenTr.1318-19).

Dr. Smith did not assess for mental retardation(3rdPenTr.1380-81). In prior proceedings, Smith had testified that Ernest's I.Q. fell within the borderline range for intelligence, higher than for mental retardation(3rdPenTr.1381,1424). Smith concluded Ernest suffers from a form of depression called dysthymia(3rdPenTr.1411-13).

Smith relied on a visual examination of a childhood photograph of Ernest while opining Ernest had certain facial characteristics that are commonly associated with prenatal exposure to alcohol and Fetal Alcohol Effect(3rdPenTr.1407). Those characteristics were: (1) a thin upper lip when compared to the lower; (2) lack of a philtrum, the division below the nose to the lip; (3) a high and low flat forehead; (4) drooping eyelids; (5) low set ears; and (6) a small chin(3rdPenTr.1407). Smith concluded Ernest is mentally retarded and suffers from Fetal Alcohol Syndrome(3rdPenTr.1408-09). The prosecutor told Smith that Smith's ears were "low slung" like Ernest's ears, argued with Smith whether or not Ernest has a philtrum groove, and told Smith that Smith had a thin upper lip(3rdPenTr.1483-85).

Smith agreed with the prosecutor that Heisler believed that Heisler's I.Q. testing did not accurately reflect Ernest's intellectual ability because Heisler believed he was malingering(3rdPenTr.1427-28).

Smith agreed he changed his opinion on mental retardation and that was based on Keyes' finding Ernest is mentally retarded(3rdPenTr.1432,1436). Respondent highlighted that in Smith's 1999 previous testimony at page 1,228 Smith twice said Ernest was not mentally retarded(3rdPenTr.1440-41).

Respondent asked Smith why he would rely on Keyes when Keyes is unqualified to diagnose mental illness(3rdPenTr.1436-38). When counsel objected, the prosecutor expressly stated his questioning was proper under this Court's *Goodwin* decision and that objection was overruled(3rdPenTr.1436-38). The prosecutor drove home this challenge to anyone relying on Keyes asking Smith: "And isn't mental retardation a mental illness?"(3rdPenTr.1438). Respondent questioned Smith about the reasonableness of relying on "[a] psychologist who says the only thing they can diagnose is mental retardation"(3rdPenTr.1439). Respondent continued asking Smith the reasonableness of relying on Keyes "because [he] can't diagnose them, other mental illnesses" and Smith agreed Keyes cannot diagnose clinical disorders(3rdPenTr.1440).

Respondent highlighted the Heisler video to contrast what Ernest told Heisler about the crime's details to what Ernest told Smith(3rdPenTr.1454). When Smith said Ernest was reading impaired, the prosecutor asked Smith if he had watched the Heisler video(3rdPenTr.1458-59). The prosecutor stated Ernest read a job description

on the Heisler video and Smith indicated he was not furnished Heisler's video(3rdPenTr.1421,1459)

Respondent asked Smith about his knowledge of accounts about Ernest having been "an excellent basketball player"(3rdPenTr.1473).

E. Dr. Keyes

Keyes is an Associate Professor of Special Education at the College of Charleston and has a Master of Science in school psychology, a Ph.D. in Special Education, and is a certified school psychologist(3rdPenTr.1502-04,1511-13). Keyes gave as examples of his publishing that he had published in *Capital Defense*(3rdPenTr.1507). The prosecutor interrupted Keyes stating: "What was the name of that one? I'm sorry? Capital Defense?"(3rdPenTr.1507). Keyes repeated: *Capital Defense*(3rdPenTr.1507).

Keyes measured Ernest's I.Q. as: (1) Full Scale Composite 67; (2) Verbal 69; and (c) Performance 70(3rdPenTr.1564). Keyes believed Ernest has significant intellectual deficits based on the similar I.Q. scores Keyes and Heisler's assistant, Bradshaw, obtained(3rdPenTr.1589). Ernest's school records reflected he had been in special education and had many failing grades(3rdPenTr.1552-53). Ernest's low percentile rank on school achievement tests was consistent with mental retardation(3rdPenTr.1555).

Keyes testified Ernest has adaptive behavior skills deficits(3rdPenTr.1605-06). Ernest has difficulty making himself understood and understanding others and those deficits make it hard to hold a job(3rdPenTr.1606-07).

Keyes testified that he had not viewed the Heisler videotape and counsel requested a recess(3rdPenTr.1607-08). During the resulting conference, counsel informed the court that Keyes had seen the video and his testimony was "a big shock"(3rdPenTr.1608-09). A recess was denied(3rdPenTr.1609).

Keyes initially stated Ernest's reading level was between second and third grades(3rdPenTr.1610). When counsel asked Keyes to check his report, Keyes did, and corrected himself stating between third and fourth grades(3rdPenTr.1610).

Keyes assesses adaptive behavior using standardized instruments – the Scales of Independent Behavior and the Vineland(3rdPenTr.1611). Keyes used the Vineland Instrument to assess communication, self-help/daily living skills, and socialization(3rdPenTr.1615). Ernest was severely deficient in socialization skills, occupational skills, following rules, and unable to avoid victimization(3rdPenTr.1617-19). Ernest has deficiencies in his ability to utilize community resources, such as public transportation(3rdPenTr.1619-20).

Keyes opined Ernest is mentally retarded(3rdPenTr.1623-24). Counsel indicated her direct of Keyes was concluded and a break was taken(3rdPenTr.1625-26). After the break, counsel asked to reopen(3rdPenTr.1626). Keyes apologized and stated he had previously seen the Heisler video(3rdPenTr.1627).

Cross-examination began eliciting Keyes is a school psychologist, not a licensed clinical psychologist, and unqualified to give mental disease or defect diagnoses(3rdPenTr.1627-28,1630).

The prosecutor elicited that Keyes evaluated Paul Goodwin and concluded Goodwin was mentally retarded(3rdPenTr.1633-34). Keyes has never testified for the prosecution and his "primary interest" is capital punishment defense(3rdPenTr.1635-36). Keyes had published nineteen items with twelve involving mental retardation in capital punishment and has done many Public Defender capital punishment presentations(3rdPenTr.1635-36). After *Atkins v. Virginia*, 536 U.S. 304 (2002), Keyes has testified more frequently for defendants relying on mental retardation(3rdPenTr.1638). Keyes does fifteen evaluations per year to derive half his income(3rdPenTr.1639). Keyes evaluated eight Missouri defendants and six he found mentally retarded(3rdPenTr.1640-41).

Respondent questioned since Keyes cannot diagnose mental illness and all he can diagnose is mental retardation, then how can he rule out "other mental health problems" and Keyes conceded he cannot(3rdPenTr.1641-42). Keyes conceded depression can lower I.Q. scores and he is unqualified to determine that someone was depressed, which thereby, caused a lower I.Q.(3rdPenTr.1642-43).

Heisler and Kline, unlike Keyes, are licensed psychologists and "are qualified to diagnose the full gamut of mental defects"(3rdPenTr.1667). As an educational psychologist, Keyes is trained to evaluate only children(3rdPenTr.1648-50). Keyes was doing an unqualified "retro diagnosis" and his capital work is "atypical"(3rdPenTr.1652).

Keyes agreed it was appropriate to consider Ernest's prison adaptive behavior, but he failed to(3rdPenTr.1650,1653,1655).

Keyes conceded Ernest's hygiene was acceptable when the prosecutor referenced Ernest's having told Heisler that he takes a shower when he chooses(3rdPenTr.1659). Keyes conceded Ernest was aware of his prison enemies because he told Heisler that he had a $1500 drug debt(3rdPenTr.1659-60).

Respondent elicited from Keyes that in 1996, Smith had concluded Ernest was not mentally retarded and Smith's opinion changed based on Keyes' findings(3rdPenTr.1668,1673).

The prosecutor misrepresented that licensed psychologist Bernard who is "able to diagnose the full gamut of mental illnesses" had measured Ernest's I.Q. at 78 and Keyes endorsed that misrepresentation(3rdPenTr.1668-70,1684).

When the prosecutor highlighted that Cowan had measured Ernest's I.Q. at 84, Keyes stated he thought that was spuriously high and he should have obtained the WAIS-R manual to evaluate Cowan's work's accuracy(3rdPenTr.1671).

Respondent erroneously represented Keyes was the first to identify Ernest as mentally retarded(3rdPenTr.1672). Keyes acknowledged that the other experts were qualified to evaluate and diagnose mental retardation(3rdPenTr.1672). When Keyes offered that he is a recognized mental retardation expert, the prosecutor countered by "the Public Defender System"(3rdPenTr.1672-73).

The prosecutor highlighted that psychiatrist Peters found Ernest was not mentally retarded and found he was antisocial(3rdPenTr.1675-76).

Cross-examination of Keyes included:

Q. All right. You're an **advocate** for the idea that mentally retarded people shouldn't receive the death penalty; right? You are an **advocate** for that issue?

A. **Yes, I am**, for mentally retarded people.

(3rdPenTr.1685)(emphasis added).

Respondent asked Keyes about Ernest's art teacher who had testified the difference between Ernest and another student, Millie, was Millie was motivated to do her best and Ernest was not(3rdPenTr.1691). Respondent read from page 6 of Keyes' report to show that even Keyes had considered Ernest unmotivated to do his best and Keyes conceded that(3rdPenTr.1692;3rdPCREx.60 at 6).

Keyes was questioned about Ernest having told Kline that if he was found mentally retarded, then he would get a life sentence and the prosecutor represented Ernest faked mental retardation because Ernest understood he would get life(3rdPenTr.1694-95).

When Keyes testified Ernest was afraid of the stove because of a childhood accident, respondent commented that Ernest had "a phobia" which Keyes was unqualified to diagnose and Keyes agreed(3rdPenTr.1699). Keyes said Ernest had bed wetting problems until ten and that was not adaptive(3rdPenTr.1700). Respondent countered with there are lots of causes for childhood bed wetting and Keyes was unqualified to make that determination and Keyes agreed(3rdPenTr.1700-01).

The prosecutor disputed Keyes' assertion Ernest was vulnerable to bullying at Potosi based on Ernest being in protective custody because on the Heisler video

Ernest said that he would not let anyone take his cigarettes(3rdPenTr.1703). The prosecutor pointed out, relying on Heisler, Ernest was in protective custody because of drug debts(3rdPenTr.1703). Keyes told the prosecutor he was unaware why Ernest was in protective custody(3rdPenTr.1703-04).

The prosecutor asked Keyes if he had seen on the Heisler video that Ernest had a good memory and pointed to Ernest's listing television stations he watched and Ernest's "keeping track" of The Young & The Restless and Ernest's favorite character, as characterized by the prosecutor, as "some dude named Victor"(3rdPenTr.1710).

Respondent stated Keyes said earlier the apple does not fall far from the tree, but Ernest's brother, Bobby, and sister, Beverly, are not mentally retarded(3rdPenTr. 1716). Respondent asked Keyes whether Ernest's mother and grandmother were mentally retarded and Keyes did not know(3rdPenTr.1716-17). Keyes testified that there was no one in Ernest's family, other than Ernest, who was mentally retarded(3rdPenTr.1717).

On redirect, through leading questions, counsel elicited from Keyes that Ernest's half brother Danny was mentally retarded(3rdPenTr.1747-50).

Keyes' report (3rdPCREx.60 at 2) listed Dr. Smith's report (3rdPCREx.13) as something Keyes reviewed. Smith's report recounted that Ernest's half-brother, Daniel Patton, who shares the same mother as Ernest, was mentally retarded and was institutionalized(3rdPCREx.13 at 8-9). Keyes' own report indicated that he had reviewed Ernest's mother's Mid-Missouri Mental Health records(3rdPCREx.60 at 3).

Ernest's mother's mental health records recounted that she had a son who was "severely mentally retarded" with cerebral palsy and unable to walk who was cared for at the Marshall State School(3rdPCREx.21 at 8,10,12,14). Ernest's mother's records stated she has "mild mental retardation" with a Full Scale 61 I.Q. and also diagnosed there with "moderate severity" mental retardation(3rdPCREx.21 at 12,14-15).

On redirect, Keyes initially said that he thought Heisler believed Ernest's I.Q. was 67, as measured by Bradshaw, but then Keyes said he did not remember(3rdPenTr.1752).

F. Closing Arguments

In initial closing argument, respondent noted Ernest told Heisler that he wore a mask to avoid identification(3rdPenTr.1773). Heisler's testimony supported the aggravator Ernest did the killings to avoid arrest because Ernest's exchange with Heisler showed Ernest did them because he knew the employees(3rdPenTr.1772-73).

The prosecutor told the jury that being "dope crazed" was not beyond Ernest's control and Ernest was the responsible creator of the circumstances and not some external force(3rdPenTr.1775,1777).

In rebuttal the prosecutor argued:

> Dr. Keyes. Let me tell you something about Dr. Keyes. Don't forget this now:
>
> **He's not qualified to diagnose mental illness**. He's not.

(3rdPenTr.1796)(emphasis added).

The prosecutor argued, listing by name, that there were seven doctors, psychiatrists and psychologists, Cowan, Parwatikar, Kline, Peters, Smith, Heisler, and Bernard who all concluded Ernest was not mentally retarded(3rdPenTr.1796-97). Smith's opinion change, that Ernest was mentally retarded, was incredible because it was premised on Keyes(3rdPenTr.1797-98). Keyes was unbelieveable because he was **"an advocate"** for the mentally retarded(3rdPenTr.1797)(emphasis added). No one had said Ernest was mentally retarded "until after business picked up for Dr. Keyes"(3rdPenTr.1799).

Ernest was faking mental retardation because he told Kline that if he was found mentally retarded, then he would get life(3rdPenTr.1799).

That Ernest told Heisler that he has a television in his cell, has cable television, plays basketball, gets to shower whenever he wants to, and is in protective custody because of drug debts proved Ernest is not mentally retarded(3rdPenTr.1798).

Ernest was not mentally retarded because it was not documented before he was 18(3rdPenTr.1800).

VI. Third Current Postconviction Action

A. The Pleadings

The pleadings alleged counsel was ineffective for failing to present credible and qualified expert testimony Ernest suffers from mental retardation and associated Fetal Alchol Syndrome Disorder(FASD)(3rdPCRL.F.57). Counsel should have presented a qualified expert testimony like Drs. Brown, Connor, and Adler(3rdPCRL.F.58-63).

Counsel was ineffective in calling Keyes because he was unqualified, incompetent, and incredible(3rdPCRL.F.93-99). Counsel knew well in advance of retrial Keyes was found unqualified and incompetent to testify about mental retardation in *Goodwin* because Goodwin's trial level postconviction counsel told them about Goodwin's postconviction findings, and despite that still called Keyes(3rdPCRL.F.93-99). Keyes should not have been called because his testimony established he was unprepared and counsel was warned by Goodwin's postconviction counsel Keyes was unprepared there(3rdPCRL.F.93-99).

B. <u>FASD Expert Findings</u>

Drs. Brown and Connor are clinical licensed psychologists specializing in Fetal Alcohol Spectrum Disorders (FASD) practicing at the University of Washington Department of Psychiatry and Behavioral Sciences in its Fetal Alcohol and Drug Unit(3rdPCRTr.10-12,14,199-202;3rdPCRExs.22 and 28). Dr. Adler, M.D., is a board certified adult and child psychiatrist with specialized forensic psychiatry FASD training and experience, who is Brown's and Connor's colleague and who collaborates with them(3rdPCRTr.270;3rdPCREx.31). To properly assess FASD, a multi-disciplinary approach involving psychologists, like Brown, a neuropsychologist, like Connor, and an M.D. physician, like Adler, are required with each relying on the other's work(3rdPCRTr.20-22,273,307-08,348-49). An FASD diagnosis can only be properly rendered by an M.D. because only an M.D. is qualified to evaluate some of the DSM IV's FASD physical criteria(3rdPCRTr.132,273-74).

Ernest's mother's treatment records showed a significant history for alcohol and drug abuse(3rdPCRTr.37-38,41-42). She died from liver cirrhosis, commonly associated with alcohol abuse(3rdPCRTr.44). There was consistent and reliable evidence establishing Ernest's mother drank while pregnant with him(3rdPCRTr.42-44,45).

In 1974, Ernest's mother was admitted to Mid-Missouri Mental Health and described as "infantile and immature"(3rdPCRTr.39-40). Her records showed a mentally retarded 61 I.Q.(3rdPCRTr.38,40-41). She made a suicidal gesture, consistent with mental retardation, taking five birth control bills(3rdPCRTr.41). Ernest's mother's mental retardation is particularly significant because of the causal relationship of genetic inheritance of brain structure and I.Q.(3rdPCRTr.280-81).

Ernest and Daniel Patton have the same mother(3rdPCRTr.46-47). Daniel was profoundly mentally retarded, had cerebral palsy, and was a spastic quadriplegic cared for at the Marshall Habilitation Center and who had no functional speech, engaged in self-injurious behavior, was legally blind, and incontinent(3rdPCRTr.46-47;3rdPCR Ex.24 at 3,9-10,14-15,39-40,44). That condition was caused by his mother's alcohol abuse(3rdPCRTr.46-47). The rates and severity of FASD increases for subsequent children born to a mother who drinks during pregnancy and Ernest was six years older than Daniel(3rdPCRTr.263-64;3rdPCREx.17 at 2;3rdPCREx.24 at 2).

The Flynn Effect explains gradual I.Q. test score increases such that to get an accurate I.Q. measurement for an individual taking an I.Q. test a standardized amount must be deducted from that individual's score based on when the test was last normed

to avoid the individual's score being artificially inflated(3rdPCRTr.54-55). Ernest has taken numerous I.Q. tests since he was eight and all but one placed him in the mentally retarded range(3rdPCRTr.56-65,122;3rdPCREx.25). Ernest's I.Q. score when he was eight was virtually the same as when he was tested at forty-eight in this PCR(3rdPCRTr.56-65,198;3rdPCREx.25). On the one I.Q. test where Ernest did not score in the mentally retarded range, Cowan's testing, Ernest's Flynn adjusted score still placed him at borderline intelligence(3rdPCRTr.121-22).

Ernest repeated second and third grades and dropped out of school, while repeating ninth grade(3rdPCRTr.67,71,69-70,150). Ernest was placed in seventh grade after fifth, solely to keep him with age peers(3rdPCRTr.70-71).

Ernest's Achievement test scores were consistently one to two standard deviations below the mean for reading, math, and language(3rdPCRTr.53-54,72-81;3rdPCREx.27). Ernest lacks the ability to learn because of deficits in attention, memory, executive functioning, and language(3rdPCRTr.66,73,79-80).

Department of Corrections records showed when Ernest was nineteen he read at sixth grade level and was described as childlike, unintelligent, impulsive, and lacking insight(3rdPCRTr.84,88-89).

Connor measured Ernest's I.Q. twice getting scores of 70 and 71, both in the mentally retarded range(3rdPCRTr.203,208,221-22;3rdPCREx.25). On Connor's achievement testing, Ernest's grade equivalent ranged from a low of third grade (3.1) on Academic Knowledge to a high of fifth grade (5.3) on Calculation(3rdPCRTr.80;3rdPCREx.27).

Brown gave Ernest the Brief A test which measures executive functioning and the Gudjonsson Suggestibility and Compliance Scales(3rdPCRTr.106-07). On the Brief A test, Ernest was significantly impaired as to impulse control, ability to shift focus, working memory, problem solving strategies, ability to learn from the past, and planning and organizing(3rdPCRTr.85-88,107-09).

The Gudjonsson Suggestibility and Compliance Scales measure a person's interrogation pressure suggestibility and susceptibility to being coerced and led into making statements(3rdPCRTr.109-11). Ernest's score was elevated to the point of individuals who give false confessions(3rdPCRTr.111). Until Heisler, Ernest had not given any detailed rendition of what happened, but during this postconviction action did tell Dr. Brown that Rod and Antwane were involved in the events at Casey's(3rdPCRTr.130-32;3rdPCREx.23 at 60).

On all testing and examinations, Ernest was cooperative and put forth good effort, and therefore, the measured results are accurate(3rdPCRTr.115-16,219,290-91). Heisler, in contrast, concluded Ernest was malingering(3rdPCRTr.151-52).

Kline's report does not indicate that Ernest said that he wanted to be found mentally retarded, but rather that Ernest would have no problem with such a finding because it is true(3rdPCRTr.194-95).

Connor quantified his data on a color graph that appears in Exhibit 30(3rdPCRTr.230-36;3rdPCREx.30). On Connor's testing, Ernest was consistently one to two standard deviations below the mean and on some more than three and more than six below the mean(3rdPCRTr.230-36;3rdPCREx.30). Ernest actually did

well on some measures because the expectation is not for a person to do poorly on everything(3rdPCRTr.230-36,260;3rdPCREx.30). On Connor's testing, Ernest's scores fell in the third through fifth grade range, which was consistent with past academic testing(3rdPCRTr.224). Ernest's performance on Connor's neuropsychological testing, as well as his childhood I.Q. testing, was consistent with a mild mental retardation diagnosis and FASD(3rdPCRTr.240-41).

Ernest has significant problems with verbal learning and memory and common sense(3rdPCRTr.219,222-23,225,261,290-92). Ernest has significant deficits as to memory, executive functioning, and impulsivity(3rdPCRTr.239). Ernest has problems as to communication and language, daily living adaptive functioning, socialization, and executive functioning(3rdPCRTr.53).

Individuals with mild mental retardation are capable of taking a bus(3rdPCRTr.119-20). Ernest's diagnoses are not inconsistent with his athletic abilities(3rdPCRTr.322).

The DSM-IV TR specifies three criteria for a diagnosis of mental retardation: Criterion A – subaverage intellectual functioning, Criterion B – adaptive functioning deficits, and Criterion C - onset before 18(3rdPCRTr.309-11;3rdPCREx.34). All three are present(3rdPCRTr.311). For Criterion C, it is not required that Ernest have been diagnosed before age 18, only that **onset** have occurred before age 18, which was the case(3rdPCRTr.120-21,311-12).

On the issue of Adaptive Functioning, the DSM requires deficits in two of eleven areas and Ernest has deficits in seven(3rdPCRTr.122). Heisler found Ernest's

adaptive functioning was within the normal range, but Heisler failed to employ any evaluative standardized testing(3rdPCRTr.211). There was consistent evidence Ernest's cognitive deficits were present since birth and manifested before age 18(3rdPCRTr.242,245-46). People with mild mental retardation are commonly not diagnosed before 18 because they can pass as normal(3rdPCRTr.311-13).

Adler did physical and psychological examinations(3rdPCRTr.274-75). Adler measured the palpebral fissures openings for the eyes (the intercanthal distance), head circumference, and other quantifiable facial features critical for assessing FASD(3rdPCRTr.287-88,293). Adler examined the philtrum, which is the space between the bottom of the nose and top of the lip, and Ernest's upper lip(3rdPCRTr.293).

There are norms for what qualifies as constituting standard deviations in measuring the palpebral fissure distance(3rdPCRTr.293-94). Individuals with FASD tend to have small palpebral fissures(3rdPCRTr.294). For the philtrum there are standardized pictorial guidelines for grading between 1 and 5 which are also normed according to race(3rdPCRTr.294). For the philtrum, there is a visual grading guide(3rdPCRTr.294). For the width of the upper lip it is graded on a 1 to 5 scale and normed according to race(3rdPCRTr.294). Adler took digital photographs of Ernest's face to determine whether he has FASD physical attributes(3rdPCRTr.275). The digital pictures are analyzed to provide greater reliability as to the measurements' criteria(3rdPCRTr.294). The Centers For Disease Control has codified the norms followed(3rdPCRTr.295).

Adler reviewed three childhood photos(3rdPCRTr.297;3rdPCREx.35). Diagnosing FASD in adults is complicated because facial characteristics change over time, which is why childhood photos are used(3rdPCRTr.297-98). He analyzed those using computer software programs and generated tables with scores(3rdPCRTr.297-300;3rdPCREx.35). For all three photos, the D scores were greater than .85, which is indicative of FASD(3rdPCRTr.301-05;3rdPCREx.35). Adler also digitally analyzed Ernest's facial features as they exist as an adult and they were consistent with Mild FASD(3rdPCRTr.305-07;3rdPCREx.35). Even though Smith talked about facial features that he observed for purposes of Fetal Alcohol Effect, Smith was unqualified to diagnosis physical damage due to fetal alcohol exposure because Smith is not an M.D.(3rdPCRTr.190).

Ernest's head circumference was in the third to fifth percentile which is notably small and constitutes structural brain damage consistent with FASD(3rdPCRTr.51-52,292).

Ernest has two separate diagnoses - mild mental retardation and Partial FASD which co-exist and each exacerbates the other(3rdPCRTr.116-17,132,224,239,308,315-26,327-28;3rdPCREx.29 at 11;3rdPCREx.32 at 24-27 and 3rdPCREx.36). Ernest's diagnosis of mental retardation is bolstered because Ernest's school records were generated before they became relevant here(3rdPCRTr.122-24). Connor's testing also showed Ernest has ADHD(3rdPCRTr.91-92,226,239).

Ernest suffers from dysthymia, a form of depression(3rdPCRTr.113-14). Mental retardation's diagnostic criteria do not include any exclusion

criteria(3rdPCRTr.313). DSM-IV recognizes a high rate of co-morbidity of other conditions with mental retardation(3rdPCRTr.313-14).

Ernest has Partial FASD, rather than Full FASD, because in Full FASD a score of 4 or 5 on the three elements of facial features, the eyes, the philtrum, and the lips, is required(3rdPCRTr.326). Ernest did not have those scores when Adler evaluated him and Adler could not positively say Ernest previously did(3rdPCRTr.326).

Partial FASD is not a lesser disorder than Full FASD(3rdPCRTr.326). Life-course outcomes for Partial FASD are worse than Full FASD because people with Full FASD tend to be identified, diagnosed, and provided necessary interventions, while those with Partial FASD and mental retardation do not(3rdPCRTr.322,326-27). Thus, individuals like Ernest, with Partial FASD, actually fare worse than those with Full FASD(3rdPCRTr.327).

Peters diagnosed Ernest as anti-social(3rdPCRTr.127-28). Unlike mental retardation, anti-social has the exclusionary criteria of a prior conduct disorder and there was no evidence of that(3rdPCRTr.127-29).

FASD victims are predisposed to substance abuse problems(3rdPCRTr.279).

C. Counsels' Testimony

Carlyle was responsible for experts(3rdPCRTr.594,744,755-56). Mental retardation was the issue(3rdPCRTr.636). Goodwin's postconviction counsel had cautioned Carlyle that Keyes was unprepared to testify there(3rdPCRTr.634). Carlyle discussed Keyes with Goodwin's trial level PCR counsel "a good bit" before Ernest's retrial and that Goodwin's postconviction trial court found Keyes

incredible(3rdPCRTr.633). Carlyle had a copy of *Goodwin's* findings before trial(3rdPCRTr.633-34).

D. Officer McDonald

As part of the investigation Officer McDonald contacted Lafonzo Tucker(3rdPCRTr.583). At Rod's request, Tucker disposed of a shotgun under sticks in a ditch because Rod did not want the police to find it(3rdPCRTr.586-88).

All claims were denied(3rdPCRL.F.336-77). This appeal followed.

POINTS RELIED ON

I.

CALLING HISTORICALLY UNPREPARED UNQUALIFIED INCREDIBLE "ADVOCATE" KEYES

The motion court clearly erred in overruling Ernest's postconviction motion because he received ineffective assistance of counsel in violation of his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would not have called Keyes, but would have called a qualified neutral FASD clinical diagnostic expert, because counsel knew far before retrial that Keyes was historically unprepared and found incredible and unqualified in Goodwin's postconviction action, and counsel had argued desperately and successfully more than one year before retrial for a continuance because Keyes was "eccentric" refusing to be prepared causing counsel to be "incense[d]" and the court to condemn Keyes' behavior as "really dedicated" while stating Keyes better not claim later to need to be in "Timbuktu," and Ernest was prejudiced because Keyes was an unprepared, unqualified mental retardation "advocate" and the jury did not hear qualified credible prepared clinician testimony Ernest is mentally retarded with FASD.

Goodwin v. State, 191 S.W.3d 20 (Mo. banc 2006);

Skaggs v. Parker, 235 F.3d 261 (6th Cir. 2000);

Stevens v. McBride, 489 F.3d 883 (7th Cir. 2007);

Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005);

U.S. Const. Amends.VI, VIII, and XIV;

Keyes, Edwards, Perske, *People with Mental Retardation Are Dying, Legally*, Mental Retardation February, 1997;

Keyes, Edwards, Perske, *People With Mental Retardation Are Dying, Legally: At Least 44 Have Been Executed*, Mental Retardation June, 2002.

II.

EVIDENCE ROD ORCHESTRATED OFFENSE

The motion court clearly erred in overruling Ernest's postconviction motion because he received ineffective assistance of counsel in violation of his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented evidence available from witnesses Officer McDonald, Officer Buel, Officer McMillen, Officer Maloney, Michael Maise, David Hopkins, and Bill Muddiman all of whom supported that Rod Grant orchestrated the offense and Ernest did not act alone which would have refuted the state's having cast him as the sole actor who was so capable in carrying out this offense alone that he could not be mentally retarded and supported the mitigating circumstance that he acted under Rod's substantial domination. Ernest was prejudiced because had the jury heard this evidence there is a reasonable probability the jury would have found he is mentally retarded and not imposed death.

Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995);

State v. McCarter, 883 S.W.2d 75 (Mo. App., S.D. 1994);

§565.032.3(5);

U.S. Const. Amends. VI, VIII, and XIV.

III.

BERNARD'S DEPOSITION AND ERNEST'S MOTHER'S RECORDS

The motion court clearly erred in overruling Ernest's postconviction motion because he received ineffective assistance of counsel in violation of his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have offered into evidence Dr. Bernard's deposition and Ernest's mother's Mid-Missouri Mental Health records because Bernard's deposition would have refuted the prosecutor's misrepresentation that Bernard found Ernest not mentally retarded when she found he is and Ernest's mother's records documented she and her son, Daniel, were mentally retarded and reliably documented the family's mental retardation history which Keyes erroneously denied existed. Ernest was prejudiced because these credible reliable sources would have resulted in rebutting the prosecutor's characterization of Ernest's mental retardation as newly minted by opportunistic, unqualified, and unprepared Keyes and Ernest would have been found mentally retarded and life sentenced.

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

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

Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990);

State v. Chambers,671 S.W.2d 781 (Mo. banc 1984);

U.S. Const. Amends. VI, VIII, and XIV.

IV.

HEISLER'S INTERROGATION TACTICS – ERNEST'S MENTALLY RETARDED SUBMISSIVENESS EXPLOITED

The motion court clearly erred in overruling Ernest's postconviction motion because he received ineffective assistance of counsel in violation of his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have moved to suppress and redact those portions of Heisler's video interrogation asking whether Ernest was "good for the crime" since the case was not going to be "retr[ied]," in violation of the court's order limiting the evaluation to assessing for mental retardation, and all of Ernest's responses because those interrogation inquiries and responses, were conducted without Ernest's having been *Mirandized* and without counsel, in violation of U.S. Const. Amends. V and VI, and Ernest was prejudiced because that was the first time Ernest ever admitted any participation while leaving the impression he acted alone, which made him appear to not be mentally retarded, and therefore, deserving of death.

People v. Cleburn, 782 P.2d 784 (Colo. 1989);

People v. Braggs, 810 N.E.2d 472 (Ill. 2003);

Miller v. State,770 N.E.2d 763 (Ind. 2002);

Estelle v. Smith, 451 U.S. 454 (1981);

U.S. Const. Amends. VI, VIII, and XIV;

§565.030.6.

V.

USE OF COMPETENCY TO PROCEED STATEMENTS AND KLINE'S OPINION ERNEST IS NOT MENTALLY RETARDED VIOLATED §552.020.14

The motion court clearly erred in overruling Ernest's postconviction motion because he received ineffective assistance of counsel in violation of his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that counsel failed to object to evidence of statements Ernest made to Dr. Kline during a competency to proceed evaluation, to Kline's opinion Ernest was not mentally retarded based on Ernest's statements and I.Q. scoring, and to closing argument that Ernest was not mentally retarded based on all these matters because §552.020.14 prohibited admission and use of these matters and Ernest was prejudiced because hearing the competency evaluator opinion that Ernest was not mentally retarded with his basis for that opinion and related argument gave undue weight to it and predisposed the jury to find Ernest was not mentally retarded.

Anderson v. State, 196 S.W.3d 28 (Mo. banc 2006);

State ex rel. Baumruk v. Belt, 964 S.W.2d 443 (Mo. banc 1998);

Drope v. Missouri, 420 U.S. 162 (1975);

U.S. Const. Amends. VI, VIII, and XIV;

§552.020.14.

VI.

GETTING DEATH IN BOONE COUNTY REFLECTS A MISSOURI "GEOGRAPHIC LOTTERY"

The motion court clearly erred in denying the claim that the death penalty in Boone County is arbitrarily and capriciously imposed because the decision whether to seek death or not reflects a "geographic lottery" based on local Boone County community standards such that Ernest Johnson was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that the rate for which death was sought and imposed in Boone County was shown in a study of the Missouri death penalty scheme to be substantially greater than anywhere else in Missouri making Ernest Johnson's punishment arbitrary and capricious.

Gregg v. Georgia, 428 U.S. 153 (1976);

Woodson v. North Carolina, 428 U.S. 280 (1976);

Lankford v. Idaho, 500 U.S. 110 (1991);

Obrey v. Johnson, 400 F.3d 691 (9th Cir. 2005);

Barnes, Sloss, and Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making In Death-Eligible Cases*, 51 Ariz. L.Rev. 305 (2009);

U.S. Const. Amends. VIII, and XIV.

ARGUMENT

I.

CALLING HISTORICALLY UNPREPARED UNQUALIFIED INCREDIBLE "ADVOCATE" KEYES

The motion court clearly erred in overruling Ernest's postconviction motion because he received ineffective assistance of counsel in violation of his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would not have called Keyes, but would have called a qualified neutral FASD clinical diagnostic expert, because counsel knew far before retrial that Keyes was historically unprepared and found incredible and unqualified in Goodwin's postconviction action, and counsel had argued desperately and successfully more than one year before retrial for a continuance because Keyes was "eccentric" refusing to be prepared causing counsel to be "incense[d]" and the court to condemn Keyes' behavior as "really dedicated" while stating Keyes better not claim later to need to be in "Timbuktu," and Ernest was prejudiced because Keyes was an unprepared, unqualified mental retardation "advocate" and the jury did not hear qualified credible prepared clinician testimony Ernest is mentally retarded with FASD.

Counsel called Keyes knowing his track record in *Goodwin* and Ernest's own case was that he was an unprepared witness who was found unqualified and incredible in Goodwin's postconviction action. Keyes is a mental retardation "advocate," not a

neutral qualified clinician for mental retardation and FASD which was what the jury needed to hear.

Review is for clear error. *Barry v. State*, 850 S.W.2d 348, 350 (Mo. banc 1993). To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A movant is prejudiced if there is a reasonable probability that but for counsel's errors the result would have been different. *Deck v. State*, 68 S.W.3d 418, 426 (Mo. banc 2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 426. The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Lankford v. Idaho*, 500 U.S. 110, 125 (1991). [4]

A. <u>Findings</u>

The 29.15 findings stated counsel was not ineffective in failing to call the FASD experts because counsel: (1) called Smith, Parwatikar, and Keyes who all testified about their review of materials and their findings while concluding Ernest is mentally retarded; (2) Smith testified that Ernest suffered from FASD, based upon his examination of facial features, and which was caused by Ernest's mother's drinking;

[4] Hereinafter, the *Strickland* standard and its two prongs, *Woodson*, and *Lankford* will all be referenced in abbreviated forms.

(3) counsel was not required to "shop" for a more favorable expert; and (4) the FASD expert testimony was cumulative to what the jury heard(3rdPCRL.F.338-42).

The 29.15 findings also stated that counsel was not ineffective for calling Keyes because: (1) the U.S. Supreme Court cited Keyes' work in *Atkins* and counsel was able to tell the jury it relied on Keyes; (2) the prosecutor did not mention that Keyes had been found unqualified to diagnose mental retardation; (3) the jury knew Keyes had been admitted to testify as an expert previously; (4) counsel reviewed Keyes' C.V. and was aware of his study and work with mental retardation; (5) counsel requested a continuance and it was denied; and (6) the FASD expert testimony "relied heavily" on Keyes' findings and admitted doing so(3rdPCRL.F.361-63).

B. <u>Counsel Was Ineffective</u>

Counsel was cautioned far before retrial that Keyes was unprepared and found incredible in *Goodwin* and counsel had a copy of Goodwin's postconviction findings(3rdPCRTr.633-34). Counsel succeeded in getting the March, 2005 trial continued based on Keyes' affidavit that he did not have ten hours to review Heisler's work during the seven weeks before that setting and counsel told the court that Keyes was "eccentric" and unreasonable in refusing to be prepared and counsel was "incense[d]" by Keyes' bad behavior(3rdPenTr.36-43,59-60,66-67;3rdPCR1stSupp.L.F.6,12). Those reasons, prompted the trial court to declare Keyes was "really dedicated" and that Keyes better not later claim to need to be in "Timbuktu"(3rdPenTr.60-61,70). Trial did not begin until more than one year later, May, 2006(3rdPenTr.83).

The state filed its *Goodwin* brief in this Court in June, 2005, nearly one year before Ernest's May, 2006 penalty retrial. *See Goodwin* Casenet docket entries SC86278. In arguing to affirm, the state relied on findings Keyes was neither credible nor qualified. *See* state's *Goodwin* Brief at 31, 35-36.[5] Respondent expressly argued that Keyes' testimony was properly rejected because he was not a licensed psychologist, and therefore, unqualified to diagnose mental retardation. *Id.* at 31, 35-36. The state argued the *Goodwin* 29.15 judge was correct because Keyes failed to test for depression and Keyes had admitted depression could have impacted the outcome of Keyes' testing. *Id.* at 28, 36, 39. Respondent also argued the 29.15 judge was correct in finding Keyes was '"unworthy of belief."' *Id.* at 36 (quoting Findings). The state characterized Keyes as a "purported 'expert'" who was "not qualified to offer a diagnosis of mental retardation." *Id.* at 39.

This Court rejected Keyes' *Goodwin* mental retardation testimony on multiple grounds. *Goodwin v. State*, 191 S.W.3d 20, 32 (Mo. banc 2006). Keyes' testimony failed to establish mental retardation because the 29.15 judge found Keyes was "incredible." *Id.* at 32. In particular, this Court quoted from Goodwin's 29.15 judge's findings that '"Dr. Keyes' assertion [is] unworthy of belief."' *Id.* at 32

[5] This Court is requested to take judicial notice of the state's Goodwin brief in SC86278 posted on this Court's web site as docketed for argument September 7, 2005.

(quoting findings). This Court also relied on and quoted from the 29.15 findings the following:

> His [Keyes] conclusions were unsupported by the independent records submitted or any credible evidence adduced.
>
> ……
>
> **His [Keyes] testimony cannot be considered reliable, as it is not based upon any objective evidence**....

Id. at 32 (bold typeface and ellipsis in this Court's opinion).

In addition to Keyes being an incredible witness, this Court rejected Goodwin's mental retardation claim because Keyes "is not a qualified expert" as the 29.15 judge so found. *Goodwin*, 191 S.W.3d at 33. This Court endorsed and quoted the 29.15 judges' finding that Keyes' failure to test for depression was below professional requirements for a thorough evaluation and offered its own criticism of Keyes on this. *Id*. at 33. To support the motion court's rejection of Keyes as a qualified expert this Court stated: "Dr. Keyes is not certified or licensed as a psychologist or psychiatrist." *Id.* at 33.

Keyes showed himself to be as unprepared here as he was *in Goodwin* and as unwilling to be prepared as he was more than one year before trial when he did not have ten hours in seven weeks to review Heisler's work(3rdPenTr.36-43,59-60,66-67;3rdPCR1stSupp.L.F.6,12).

During the state's case, the jury saw the Heisler video Ex.78(3rdPenTr.953). Keyes testified he had not seen the Heisler video(3rdPenTr.1607-09). Counsel

knowing Keyes had seen it was “shock[ed]” and requested a recess, which was denied(3rdPenTr.1607-09).

Next, Keyes incorrectly stated that he had found Ernest read at second and third grade level, rather than third and fourth, and only corrected himself when counsel urged him to check his report(3rdPenTr.1610).

After further testimony from Keyes, counsel indicated direct was finished and a break was taken(3rdPenTr.1625-26). After the break, counsel asked to reopen and Keyes apologized indicating he had seen the Heisler video(3rdPenTr.1626-27).

On cross-examination, Keyes testified that he thought that Cowan’s I.Q. measurement was spuriously high, but confessed he neglected to obtain the WAIS-R manual to evaluate Cowan’s work’s accuracy(3rdPenTr.1671). Keyes also agreed it was appropriate to consider Ernest’s prison adaptive behavior, but failed to do that too(3rdPenTr.1650,1653,1655).

When the prosecutor relied on the Heisler video to state that Ernest was in protective custody because of his prison drug debts, Keyes testified he did not know why Ernest was there(3rdPenTr.1703-04). Further, the prosecutor questioned Keyes about whether he had seen on the Heisler video that Ernest listed the television stations he watched and Ernest said his favorite program was The Young & The Restless with his favorite character, as referenced by the prosecutor, being “some dude named Victor” as evidence of a good memory(3rdPenTr.1710).

Keyes told the prosecutor he did not know whether Ernest’s mother was mentally retarded(3rdPenTr.1716-17). Keyes also testified there was no one other

than Ernest in his family who was mentally retarded(3rdPenTr.1717). On redirect, through leading questions, counsel elicited from Keyes that Ernest had a half brother Danny who was mentally retarded(3rdPenTr.1747-50).

Keyes' report (3rdPCREx.60 at 2) listed Dr. Smith's report (3rdPCREx.13) as something Keyes reviewed. Smith's report recounted that Ernest's half-brother, Daniel Patton, who shares the same mother as Ernest, was mentally retarded and was institutionalized(3rdPCREx.13 at 8-9). Since Keyes had reviewed Smith's report, he was clearly apprised Ernest's brother was mentally retarded.

Keyes' own report indicated that he had reviewed Ernest's mother's Mid-Missouri Mental Health records(3rdPCREx.60 at 3). Ernest's mother's mental health records recounted that she had a son who was "severely mentally retarded" with cerebral palsy and unable to walk who was cared for at the Marshall State School(3rdPCREx.21 at 8,10,12,14). Ernest's mother's records stated she has "mild mental retardation" with a Full Scale 61 I.Q. and also diagnosed there with "moderate severity" mental retardation(3rdPCREx.21 at 12,14-15). Once again, Keyes had information about Ernest's family history of mental retardation. Keyes' flagrantly erroneous statements about Ernest's family's history of mental retardation shows his unpreparedness on the very issue he was called to address.

On redirect, Keyes initially said that he thought Heisler believed Ernest's I.Q. was 67, as it was measured by Heisler's tester Bradshaw, but then Keyes changed his testimony to say he did not remember Heisler's opinion(3rdPenTr.1752). Smith accurately testified earlier that Heisler did not believe that Heisler's I.Q. testing

accurately reflected Ernest's intellectual ability and Heisler believed Ernest was malingering(3rdPen.Tr.1427-28). Heisler had concluded that Ernest was malingering(3rdPCRTr.151-52).

In *Skaggs v. Parker*, 235 F.3d 261, 264, 267(6th Cir. 2000), counsel called a guilt witness who counsel was unaware fraudulently held himself out as a psychologist. Because the witness testified so badly in guilt, counsel did not recall him in a first penalty phase, but recalled him anyway in a penalty retrial. *Id.* at 264. Counsel recalled the witness because they felt it was not worth the effort to try to get someone different. *Id.* at 270. Calling that witness knowing the witness' bad track record and "eccentric" testimony was not reasonable. *Id.* at 269-70.

Ernest's counsel knew Keyes' bad track record in *Goodwin* and called him anyway. They knew Keyes had continued his bad preparation ways in Ernest's case complaining intensely to the court about Keyes' bad behavior. In successfully arguing for a continuance, Ernest's counsel complained vociferously about Keyes and had to have a continuance more than one year before retrial, because Keyes was "eccentric" refusing to be prepared and telling the court they were "incense[d]" by Keyes' behavior that included not having ten hours of time seven weeks before trial to review Heisler's work(3rdPenTr.36-44,59-60,66-67,83;3rdPCR1stSupp.L.F.6,12). Counsel ignored the trial court's unabashed critique that Keyes was "really dedicated" and better not claim later to need to be in "Timbuktu"(3rdPenTr.60-61,70). Counsel made the extraordinary assurance that despite Keyes being their own retained paid expert, they would obtain an out-of-state subpoena and drive to South Carolina to

serve Keyes with it to secure Keyes' attendance(3rdPenTr.59-60,66). Reasonable counsel who knew Keyes was an unprepared witness in *Goodwin* and who already shown himself to be unprepared and unreasonable in Ernest's case while Ernest's trial judge had condemned Keyes bad behavior would not have called Keyes. *See Skaggs*. Further, as in *Skaggs*, counsel called Keyes because it was just easier to do than to hire a different competent witness.

In *Stevens v. McBride*, 489 F.3d 883, 888 (7th Cir. 2007), counsel retained a psychologist who disregarded their express instructions not to prepare a report and did an extremely detrimental one. Counsel also learned that psychologist subscribed to a bizarre "psychological theory." *Id.* at 888. Counsel still called the witness, despite well founded doubts about the expert's fitness. *Id.* at 888-89.

The *Stevens* Court found counsel ineffective noting: "The general qualifications of an expert witness do not guarantee that the witness will provide proficient assistance in any given instance." *Stevens*, 489 F.3d at 891. That Court noted it had upheld a trial court's decision to exclude a Noble prize winning economist's testimony in an anti-trust case. *Id.* at 891. Counsel failed to act as reasonable counsel in simply relying on the expert's credentials as a psychologist. *Id.* at 892. Ernest's counsel complained mightily to the trial court about Keyes behavior, but still called Keyes based on Keyes being cited in *Atkins*, that was not reasonable. *See Stevens*. Knowing that Keyes had testified before as "an expert" (3rdPCRL.F.361-63) did nothing for Ernest because he was unqualified to testify here. *See Stevens*.

That the U.S. Supreme Court cited Keyes's work did not make him a qualified witness or make counsels' decision to utilize Keyes reasonable. In *Penry v. Lynaugh*, 492 U.S. 302, 334-35, 340 (1989), the Court rejected that there was a national consensus against executing the mentally retarded, but someday one might emerge. In *Atkins v. Virginia*, 536 U.S. 304, 312-16 (2002), the Court recognized such a consensus. As authority for that shift the *Atkins* Court cited:

> D. Keyes, W. Edwards, & R. Perske, People with Mental Retardation are Dying Legally, 35 Mental Retardation (Feb.1997) (updated by Death Penalty Information Center, available at http:// www.advocacyone.org/deathpenalty. html (as visited June 18, 2002).

Atkins, 536 U.S. at 316 n.20.

Keyes' article begins: "People with mental retardation should not be subject to the death sentence when convicted of a crime." Keyes, Edwards, Perske, *People with Mental Retardation Are Dying, Legally*, Mental Retardation February, 1997 at 59. Keyes' article is devoted to highlighting legislative responses to *Penry* prohibiting executing the mentally retarded and the circumstances of a select few mentally retarded executed individuals which support why the mentally retarded should not be executed. *Id.* at 60-62. The article concludes urging an effort be made to ban executing the mentally retarded because "[t]he momentum is there, and the need for state action is more important than ever!" *Id.* at 62.

The *Atkins* citation to Keyes indicates that Keyes' article was updated and refers to a web address for the Death Penalty Information Center whose web address

is www.**advocacyone**.org/deathpenalty(emphasis added). Keyes' update contains an updated table which showed that since his original article the number of executed mentally retarded individuals had reached at least forty-four. Keyes, Edwards, Perske, *People With Mental Retardation Are Dying, Legally: At Least 44 Have Been Executed*, Mental Retardation June, 2002 at 243-44. The updated list was due to collaboration with the following advocacy groups opposing the death penalty: ACLU Capital Punishment Project, Amnesty International – USA, Death Penalty Information Center, Human Rights Watch, and the National Coalition To Abolish The Death Penalty. *Id. at* 243-44[6].

What Keyes' cited work reflects is that Keyes is an **ADVOCATE** for the mentally retarded and not a qualified **CLINICIAN** who can speak to whether a particular defendant is mentally retarded. In closing argument, the prosecutor told the jury to disregard Keyes because he is "an advocate" for the mentally retarded and not an unbiased clinician(3rdPenTr.1797). The credentials Keyes has did not make him qualified here and establishes why clinical non-advocate FASD expert testimony was required. *See Stevens*. Moreover, this Court should not condone the state now arguing the reasonableness and lack of prejudice to Ernest in calling Keyes when it successfully relished and reveled in trashing Keyes in *Goodwin* as a "purported expert" who was "unworthy of belief" and "not qualified to offer a diagnosis of mental retardation." *See*, state's *Goodwin* brief *supra*.

[6] Both of Keyes' *Atkins* cited articles are included in this brief's appendix.

The prosecutor highlighted Keyes' status as a mental retardation "advocate," rather than an unbiased diagnostic clinician, when he interrupted Keyes' direct examination asking Keyes to repeat that he had just stated that he had published in a journal called *Capital Defense*(3rdPenTr.1507).[7] On cross-examination, the prosecutor highlighted that Keyes was an "advocate" that the mentally retarded should not be executed, rather than a legitimate unbiased diagnostic clinician(3rdPenTr.1685). On cross-examination, the prosecutor elicited from Keyes that since the *Atkins* decision, he has testified more frequently for defendants relying on a defense of mental retardation and derived half his income from that work(3rdPenTr.1638-41). In closing argument, the prosecutor told the jury Keyes was "an advocate" for the mentally retarded and that no one had asserted Ernest was mentally retarded "until after business picked up for Dr. Keyes" because of the *Atkins* decision(3rdPenTr.1797,1799).

During the continuance hearing, counsel's own statements highlighted the importance of having a qualified, credible, and prepared expert. Counsel told the court that the jury's decision on mental retardation would be based on which side's expert the jury believed(3rdPenTr.41). Respondent's cross-examination of Keyes

[7] During the prosecutor's cross-examination of Keyes, he had difficulty locating matters in Kline's report he wanted to highlight and when he found them stated in the jury's presence: "Here it is. Page 9 of – Whew, I almost thought I had a mental deficit."(3rdPenTr.1694).

focused on Keyes was a school psychologist who was unqualified to make diagnoses as to mental disease or defect, that Keyes' work has focused on capital punishment favorable to defendants for Public Defenders, that Keyes was not as qualified as the state's evaluators who can diagnose "the full gamut of mental defects" and that Keyes was only trained to evaluate children such that his evaluation was "atypical" and a "retro diagnosis"(3rdPenTr.1627-30,1635-36,1648-50,1652,1667,1672-73,1699-1701). In closing argument, the prosecutor emphatically argued: "**He's not qualified to diagnose mental illness**. He's not."(3rdPenTr.1796). While the prosecutor never expressly told the jury that this Court had found Keyes unqualified in *Goodwin* (3rdPCRL.F.361-63), he did not have to because Keyes was repeatedly attacked as and shown to be unqualified and incredible. Moreover, the prosecutor apprised the court he had a copy of Keyes' Goodwin testimony and he was going to cross-examine Keyes about what was in Keyes' Goodwin testimony (3rdPenTr.641-42) and the prosecutor attacked Keyes in the same way he was attacked in *Goodwin* – showing he was unqualified and incredible. That attack on Keyes began in opening statement where the jury was told it would hear from "a new psychologist" who was "not credible" on mental retardation(3rdPenTr.658). The reason Keyes could be attacked as unqualified was because of *Goodwin* and when counsel objected to the prosecutor asking Smith why he would rely on Keyes when Keyes was unqualified, the prosecutor successfully argued the inquiry was proper because of this Court's *Goodwin* decision and that questioning was allowed(3rdPenTr.1436-38).

The prosecutor's questioning repeatedly emphasized that Keyes was both unqualified and incredible. Keyes was forced to admit he was unqualified to diagnose Ernest having "a phobia" about the stove and the cause of his extended childhood bed wetting(3rdPenTr.1699-1701). Keyes showed himself as incredible and unprepared when he testified that Ernest was vulnerable to bullying at Potosi which the prosecutor countered with that Ernest told Heisler he would not tolerate anyone taking his cigarettes(3rdPenTr.1703).

Unlike Keyes, the 29.15 FASD experts were eminently qualified and **prepared** to testify Ernest is mentally retarded and a victim of FASD. All three have extensive clinical training, experience, and licensing in diagnosing mental retardation and FASD(3rdPCRTr.10-12,14,20-22,132,199-202,270,273-74,307-08,348-49;3rdPCRExs.22, 28, and 31). Unlike Keyes, they could not be pegged as opportunistic advocates who had been cited in *Atkins* as "advocates" for the mentally retarded.

The 29.15 experts highlighted that there was reliable and consistent evidence Ernest's mother drank while pregnant with him and she died from liver cirrhosis, associated with alcohol abuse(3rdPCRTr.37-38,41-45). Unlike Keyes, the 29.15 experts accurately identified Ernest's mother was diagnosed as mentally retarded with a 61 I.Q. and a suicide gesture consistent with mental retardation of overdosing on birth control pills(3rdPCREx.21 at 4;3rdPCRTr.38-41). Ernest's mother's mental retardation history was especially significant because of the genetic link between brain structure and I.Q.(3rdPCRTr.280-81). The 29.15 experts, likewise, were

prepared to testify about the severity of Ernest's brother's mental retardation requiring institutionalization at the Marshall Habilitation Center(3rdPCRTr.46-47;3rdPCR Ex.24 at 3,9-10,14-15,39-40,44). Moreover, they were able to establish that Ernest and his brother both were FASD victims with Ernest's brother's condition more severe because the rates and severity of FASD increases for subsequent children and Ernest's brother was younger than him(3rdPCRTr.263-64;3rdPCREx.17 at 2;3rdPCR Ex.24 at 2).

The FASD 29.15 experts, unlike Keyes, were prepared to testify about Ernest's Flynn Effect adjusted I.Q. scores and that Ernest's one I.Q. score that was not in the mental retardation range (Cowan's score) when Flynn adjusted, still placed Ernest in the borderline intelligence range(3rdPCRTr.54-65,121-22,198;3rdPCREx.25). The 29.15 experts noted that a 70 I.Q. score plus or minus five points means a person is mildly mentally retarded(3rdPCRTr.56). The 29.15 experts' measured I.Q. scores were 70 and 71, which are both in the mental retardation range(3rdPCRTr.203,209,221;3rdPCREx.25). They presented that Ernest's Achievement test scores were consistently one to two standard deviations below the mean in the critical areas of reading math and language skills(3rdPCRTr.53-54,72-81;3rdPCREx.27). On Connor's achievement testing, Ernest's grade equivalent ranged from third to fifth grades(3rdPCRTr.80;3rdPCREx.27). On some testing, Ernest was more than three and more than six standard deviations below the mean(3rdPCRTr.230-36;3rdPCREx.30). This evidence would have countered testimony from Ernest's police office interrogators, Casey's employee Barnes, cab

driver Reynolds, and jewelry clerk White that Ernest had no difficulty with oral and written communication and making cash payments(3rdPenTr.849-51,866,926-28,937,939-45,947,949-51). Likewise, this evidence would have rebutted respondent's cross-examination of parole officer Booth that Ernest was "smart enough" not to disclose to Booth his cocaine problem(3rdPenTr.1179).

The FASD 29.15 experts' I.Q. scores were particularly important in light of the prosecutor's, authoritatively made misrepresentations to the jury about Dr. Bernard's I.Q. scoring and her ultimate conclusions on mental retardation. Bernard measured Ernest's I.Q. in the low 70's(3rdPCREx.15 at 5-7,24-25,55). Bernard had concluded Ernest had always functioned as mildly mentally retarded(1stPCRTr.60;3rdPCREx.15 at 43,47-48). On cross-examination of Keyes, the prosecutor misrepresented that licensed psychologist Bernard who is "able to diagnose the full gamut of mental illnesses" had measured Ernest's I.Q. at 78 and Keyes agreed with the prosecutor(3rdPenTr.1668-70,1684). That misrepresentation was only aggravated when the prosecutor in closing argument named Bernard personally, along with naming all the other state and defense evaluators, as having found Ernest was not mentally retarded to show that prior to Keyes there had been unanimity in finding Ernest was not mentally retarded(3rdPenTr.1796-97). Keyes' agreement with the prosecutor's misstatement of Bernard's I.Q. measurement, further demonstrates Keyes lack of preparation and the unreasonableness in calling someone whose reputation was being an unprepared witness.

Brown's testing showed Ernest was significantly impaired as to impulse control, ability to shift focus, working memory, problem solving strategies, ability to learn from the past, and planning and organizing, all of which is consistent with mental retardation(3rdPCRTr.85-88,107-09).

The Gudjonsson testing found that Ernest was susceptible to being coerced and led into making statements and his scores were in the range for individuals who give false confessions(3rdPCRTr.109-11). That testing had special significance because previously Ernest had not given a detailed rendition of what happened and Ernest told Dr. Brown that Rod and Antwane were involved(3rdPCRTr.130-32;3rdPCREx.23 at 60). Moreover, that testing is critical in light of Police Officer McDonald's testimony that Lafonzo Tucker disposed of a shotgun in a ditch at Rod's direction because Rod did not want the police to find it and Officer Buel's testimony linking blood found on shotgun shells to blood found on the hammer recovered at Casey's(3rdPCRTr.583,586-88;3rdPCRL.F.206-07;3rdPCREx.64 at "F7";3rdPCREx.53 at 2,4)). *See* Point II. Further, those results would have countered the contents of the Heisler video regarding details of the offense and the prosecutor highlighting the Heisler video with Smith for what Ernest told Heisler about the circumstances of the offense(3rdPenTr.1454).

The testing showing Ernest was prone to making false confessions had special significance because the police gave press statements they were uncertain Ernest acted alone(T.Tr.68,76). Police Officer McMillen testified in the third penalty phase that Ernest never confessed to the police to having participated in the

killings(3rdPenTr.866-67). Ernest did tell the police that it took more than one man to commit the acts involved(T.Tr.1831,1837-38). Rod was charged with three counts of second degree murder and got a deal for those to be dismissed, even though Rod told Maise he went to Casey's to make sure Ernest did what Ernest was supposed to do and witnesses saw someone outside Casey's at the time of the offense who may have been Rod(T.Tr.2078,2139-42,2333,2357-63,2366-68). Mary had stab wounds consistent with being stabbed with a screwdriver and Rod had stabbed his girlfriend Deborah with a screwdriver and went to prison for that(T.Tr.2047,2302,2305-06).

Brown's and Connor's psychological testing evaluations took on added credibility because they were juxtaposed with both physical and psychological examinations M.D. Adler did(3rdPCRTr.274-75). Adler took physical measurements necessary to an FASD diagnosis and compared those measurements to codified norms established by the Centers for Disease Control, generated comparative D scores, relied on computer software programs in generating his table data, and relied on standard deviations from recognized norms(3rdPCRTr.51-52,275,287-88,292-95,297-307;3rdPCREx.35).

Unlike Heisler, who concluded Ernest was malingering, the 29.15 experts found that Ernest put forth his best effort such that their testing accurately measured his deficits(3rdPCRTr.115-16,151-52,219,290-91).

The 29.15 experts found that Ernest satisfies the DSM criteria for mental retardation and suffers from FASD(3rdPCRTr.132,239-41,315-26,327-

28;3rdPCREx.29 at 11; 3rdPCREx.32 at 24-27 and 3rdPCREx.36). Additionally, Connor's testing found Ernest suffers from ADHD(3rdPCRTr.91-92,226,239).

In questioning Ernest's witnesses, respondent created the erroneous impression that equated Ernest's basketball ability with somehow evidencing he was not mentally retarded(3rdPenTr.1180,1203-06,1473,1712) and it made closing argument Ernest's basketball ability showed he was not mentally retarded(3rdPenTr.1798). The FASD 29.15 experts found there was nothing inconsistent with Ernest's diagnoses and the athletic ability he had displayed(3rdPCRTr.322).[8]

Respondent elicited from Booth and Ernest's school art teacher that Ernest was not motivated to work, but the jury never heard that Connor's testing showed Ernest has ADHD(3rdPenTr.1182-83,1691;3rdPCRTr.91-92,226,239). Keyes also provided objectively harmful testimony on cross-examination when the prosecutor read from Keyes' report and asked Keyes whether his report supported that Ernest was unmotivated and Keyes conceded it did(3rdPenTr.1692;3rdPCREx.60 at 6). In rebuttal closing argument, the prosecutor told the jury that Ernest was a low motivated, but goal directed actor(3rdPenTr.1797-98).

That prejudice was accentuated because Keyes was questioned about Ernest having told Kline that if he was found mentally retarded, then he would get a life

[8] Dr. Bernard's deposition testimony, likewise, reflected that Ernest's basketball ability had no correlation with his I.Q. and whether he is mentally retarded(3rdPCREx.15 at 42).

sentence and the prosecutor asserted Ernest faked mental retardation because Ernest understood that if he was, he would get life(3rdPenTr.1694-95). In closing argument, the prosecutor argued that Ernest was faking mental retardation based on his statements to Kline(3rdPenTr.1799). In contrast, the 29.15 experts explained that what Kline's report in fact said did not reflect that Ernest said that he wanted to be found mentally retarded, but rather that Ernest said he would have no problem with such a finding because it is true(3rdPCRTr.194-95).

Smith did not assess Ernest for mental retardation and was not asked to do that(3rdPenTr.1380-81). Smith had previously testified that Ernest was not mentally retarded(3rdPenTr.1381,1424). Both Smith and Keyes testified that Smith changed his opinion to Ernest is mentally retarded **based on Keyes** having so found(3rdPenTr.1432,1436,1440-41,1668,1673). Smith was attacked on cross-examination for why anyone would rely on Keyes when Keyes was unqualified to diagnose mental illness and mental retardation is a mental illness(3rdPenTr.1436-38-40). Smith having offered the opinion that Ernest was mentally retarded, when Smith had not evaluated Ernest for mental retardation, but based his **changed** opinion on unqualified Keyes did nothing more than **restate Keyes' opinion**. Furthermore, once respondent established that Smith relied on unqualified Keyes for any opinion, Smith was damaged goods who was incredible on everything else he said, including his opinion Ernest had Fetal Alcohol Effect(3rdPenTr.1407). In closing argument, the prosecutor told the jury that Smith based his mental retardation change in opinion on Keyes(3rdPenTr.1797). Moreover, the prosecutor could not have attacked Adler's

opinions on FASD, like he did when he told Smith, that Smith had "low slung" ears like Ernest, argued with Smith whether or not Ernest has a philtrum groove, and told Smith that Smith had a thin upper lip(3rdPenTr.1483-85) because Adler's findings were premised on Adler's physical measurements compared to CDC codified norms, use of D scores and computer software programs in generating his data, and use of standard deviations from recognized norms, and not mere visual inspection of a childhood photograph as Smith had done(3rdPCRTr.51-52,275,287-88,292-95,297-307;3rdPCREx.35;3rdPenTr.1407).

Smith testified Ernest suffers from a form of depression, dysthymia(3rdPenTr.1411-13). Keyes conceded that depression can lower I.Q. scores and that he was not qualified to make the determination that someone was depressed which caused their I.Q. score to be lowered(3rdPenTr.1642-43). One of the grounds that this Court condemned Keyes for in *Goodwin*, and the state argued in *Goodwin*, *supra*, was Keyes' failure to account for depression because of its potential to impact a mental retardation opinion and that condemnation applies here with equal force. *Goodwin*, 191 S.W.3d at 33.

Respondent attacked Keyes, questioning him since he was unqualified to diagnose mental illness, then he could not rule out "other mental health problems" and Keyes conceded he cannot(3rdPenTr.1641-42). In contrast, the FASD 29.15 experts could have testified mental retardation's diagnostic criteria do not include any exclusionary criteria(3rdPCRTr.313). Mental retardation can co-exist and be comorbid with other conditions(3rdPCRTr.313). The FASD 29.15 experts would

have testified DSM-IV actually recognizes a high rate of co-morbidity of other conditions with mental retardation(3rdPCRTr.314).

Contrary to the findings, Parwatikar did not testify Ernest is mentally retarded(3rdPCRL.F.338-42). Parwatikar testified he **was not asked to evaluate for mental retardation**(3rdPenTr.1280,1290,1295-96). Parwatikar testified that at the time of the offense Ernest suffered from cocaine intoxication delirium(3rdPenTr.1292). Parwatikar on cross-examination actually had extremely harmful testimony. Parwatikar testified that in 1995 he had found Ernest "was functioning at an average rate of intelligence" and was able to understand his legal situation and assist counsel(3rdPenTr.1303-06). Parwatikar had not diagnosed Ernest as suffering from Fetal Alchol Effect(3rdPenTr.1313). Parwatikar believed Ernest has a good memory and cast Ernest as having good adaptive functioning skills because Ernest was able to communicate with Parwatikar and had appropriate hygiene(3rdPenTr.1313-14,1318-19).

Parwatikar was called ostensibly to present as mitigation that at the time of the offense Ernest suffered from cocaine intoxication delirium(3rdPenTr.1292). Cocaine intoxication delirium, however, standing alone is not mitigating. The prosecutor told the jury that being "dope crazed" was not beyond Ernest's control because Ernest made the decision to ingest cocaine and Ernest was the responsible creator of the circumstances and not some external force(3rdPenTr.1775,1777,1802-03). The FASD 29.15 experts could have minimized respondent's casting of Ernest's cocaine consumption as an entirely voluntary act making it an aggravating factor, rather than a

mitigating circumstance, because FASD victims, like Ernest, are themselves predisposed to having substance abuse problems and they are not responsible for having FASD(3rdPCRTr.279).

On the Heisler video, that Keyes did not remember having seen, the jury heard Ernest tell Heisler that he got around Columbia using public buses(Heisler Tr.18-20). Keyes testified Ernest has deficiencies in his ability to utilize community resources, such as public transportation(3rdPenTr.1619-20). Aside from providing testimony that expressly contradicted what Ernest told Heisler, the FASD 29.15 experts could have explained that individuals with mild mental retardation, like Ernest, are capable of taking a bus(3rdPCRTr.119-20).

The prosecutor argued to the jury Ernest was not mentally retarded because Ernest's being mentally retarded was not documented before Ernest was 18(3rdPenTr.1800). The FASD 29.15 experts would have told the jury that under the DSM-IV criteria it is not required that someone be diagnosed before 18, only that the **onset** have occurred before age 18, which was the case(3rdPCRTr.120-21,311-12). It is noteworthy that in the state's *Goodwin* brief, the state sought to distinguish Ernest's case from *Goodwin* telling this Court, while citing this Court, that in Ernest's case there was evidence that Ernest was mildly mentally retarded because Ernest being mentally retarded "was documented before the defendant was 18 years of age." *See* state's *Goodwin* Brief at 43. **Thus, the prosecutor's representations to the jury in Ernest's case are contrary to what the state represented to this Court about Ernest's case in Goodwin's appeal!** Moreover, what this Court stated in Ernest's

prior appeal was in keeping with what the FASD 29.15 experts said when this Court stated that Ernest could potentially be in the mentally retarded range because "[t]hese qualities [low I.Q. and deficient adaptive behaviors] **manifested** before the age of 18." *Johnson*, 102 S.W.3d at 541 (emphasis added).

The FASD 29.15 experts' findings were supported by Department of Corrections records which showed at age nineteen Ernest read at a sixth grade level and was described as childlike, unintelligent, impulsive, and lacking insight(3rdPCRTr.84,88-89). Equally important was what the FASD 29.15 experts had to say about adaptive functioning. In diagnosing whether someone is mentally retarded or not, it is required both intellectual functioning and adaptive behavior be assessed. Beail, *Utility of The Vineland Adaptive Behavior Scales In Diagnosis And Research With Adults Who Have Mental Retardation*, 41 Mental Retardation 286, 286 (August 2003). A proper adaptive behavior assessment contemplates use of a standardized adaptive behavior assessment testing tool. *Id*. at 286-88. The DSM requires deficits in two of eleven areas and Ernest has deficits in seven areas(3rdPCRTr.122). Heisler found that Ernest's adaptive functioning was within the normal range, **but Heisler failed to use any standardized testing to arrive at that result**(3rdPCRTr.211). The FASD 29.15 experts found consistent evidence Ernest's cognitive deficits were present since birth and manifested before Ernest was 18(3rdPCRTr.242,245-46). It is not unusual for people with mild mental retardation not to be diagnosed before age 18 because they can pass as normal(3rdPCRTr.311-13). The FASD 29.15 experts could have explained that Ernest had Partial FASD,

rather than Full FASD, which likely caused him to fare worse at life's required skills because people with Full FASD typically are identified and provided appropriate interventions, while people with Partial FASD go unidentified and do not get those interventions(3rdPCRTr.322,326-27).

The FASD 29.15 experts did not rely "heavily" on Keyes(3rdPCRL.F.361-63). What the FASD 29.15 experts' testimony and their reports show is **they did not discard anyone's data or opinion**, but instead they took everything into account in rendering their opinions. They took into account: Ernest's school records, teachers' reports, medical records, prior psychological evaluations done for the state and defense, I.Q. scores, achievement scores, Ernest's family background, prior neuropsychological testing, each one's own evaluation, testing, and reports, the entire compiled social history, **and even Heisler's report, deposition, I.Q. testing, and videotape interview of Ernest**(3rdPCRTr.86-88, 93-94,97-100,195,311-12;3rdPCRExs.23,29,32). They did not discard Keyes' information, but rather considered it with all the other data(3rdPCRTr.81,94,245,251-53,257;3rdPCRExs.23,29,32). Had they ignored Keyes' data, they would have been attacked for that since Keyes provided affirmatively harmful opinions. *See, supra*.

The prosecutor highlighted that psychiatrist Dr. Peters found Ernest was not mentally retarded and found he was antisocial(3rdPenTr.1675-76). The FASD 29.15 experts could have discounted for the jury that opinion because unlike mental retardation, anti-social has the exclusionary criteria of a prior conduct disorder and there was no evidence of that(3rdPCRTr.127-29).

In *Daniels v. Woodford*, 428 F.3d 1181, 1191-92 (9th Cir. 2005), counsel called in penalty phase psychologist Banks who lacked credentials essential to being a competent witness. Banks' evaluation experience was limited to evaluating children for family court custody cases, and therefore, did a narrow evaluation of Daniels. *Id.* at 1192. Banks admitted that he had not fully reviewed the psychological materials he was furnished. *Id.* at 1192. Because Banks' evaluation was so limited, the state was able to effectively discredit Banks on cross-examination through emphasizing Banks' lack of expertise, lack of preparation, and limited evaluation. *Id*. at 1192. What the jury heard, as presented by Daniels' counsel, was "the testimony of an unqualified and incompetent psychologist." *Id.* at 1193. Postconviction evidence presented through competent psychological experts, who did thorough examinations, established prejudice. *Id.* at 1193-95, 1207, 1209-10.

The same is true here. Ernest's counsel knowingly called a witness who the *Goodwin* trial level PCR court had found was unqualified and incredible and who had affirmatively refused to be prepared to testify in Ernest's case such that counsel was "incense[d]" by Keyes' behavior. Like in *Daniels*, Ernest's counsel called a witness who on cross-examination the state emphasized and highlighted his lack of expertise, preparation, and limited evaluation. Moreover, Ernest's counsel action, like Daniels' counsel, was the same because both called experts whose practice was geared to evaluating children. Lastly, Keyes behavior was as bad as the *Daniels* psychologist, who did not review everything, while Keyes testified contrary to materials that were furnished to him.

In *Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003), counsel's performance was deficient and Powell was prejudiced through presenting a psychologist, who was unqualified to do testing that would have uncovered organic brain damage. *Id*. at 398-401. Further, Powell was also prejudiced because the psychologist objectively presented harmful testimony. *Id*. at 398-401. Keyes was unqualified and he presented objectively harmful evidence that Ernest was unmotivated to do his best(3rdPenTr.1692;3rdPCREx.60 at 6).

This is not a case about "shopping" for a more favorable witness (3rdPCRL.F.338-42). In *Hutchison v. State*, 150 S.W.3d 292, 307 (Mo. banc 2004), this Court rejected the state's expert shopping argument because the issue there was that the expert hired should have conducted a more thorough investigation and evaluation. Like *Hutchison*, Ernest's case is not about expert shopping, but instead is a case about calling a **qualified credible** witness who is **prepared** to testify about the facts of this case to testify why Ernest is mentally retarded.

The FASD 29.15 experts' testimony was not cumulative to what the jury heard(3rdPCRL.F.338-42). While the jury may have heard some of the same things a qualified expert like those called at the hearing testified to, the difference was the jury had **no reason to credit Keyes** because he **was unqualified, unprepared, and incredible** and Smith was equally incredible because he relied on unqualified unprepared Keyes for his opinions. Even before the prosecutor's cross-examination, Keyes' credibility self-destructed and imploded when he testified he had not seen the

Heisler video and then only after a recess did he testify that he had seen the Heisler video.

After the retrial began, counsel requested a continuance to get a new expert when counsel became aware this Court had affirmed Goodwin's PCR findings on Keyes(3rdPenTr.449-51,640-42,648;3rdPenL.F.245-48). Counsel was cautioned long before retrial that Keyes was unprepared and found incredible in *Goodwin* and counsel successfully obtained one continuance more than one year before retrial while complaining it was needed because of Keyes' reclacitrant behavior that "incensed" them. When counsel requested a continuance, after trial began, it was to obtain a different expert – something that should have been done long before(3rdPenL.F.246-47). Reasonable counsel would have sought out a new expert after they had learned about Goodwin's findings, and certainly, after they had experienced firsthand Keyes was uncooperative and unwilling to prepare to the point of "incens[ing]" them. Requesting a continuance in the middle of trial does not make counsel any less ineffective(3rdPCRL.F.361-63).

Reasonably competent counsel who was advised far in advance of the retrial about Keyes being unprepared and found unqualified and incredible in *Goodwin* and who had experienced firsthand Keyes' incompetence to the point of "incens[ing]" them more than one year before retrial would have replaced Keyes. *See Strickland*. Ernest was prejudiced because the jury did not hear evidence from a qualified credible expert, not subject to attack for being unqualified and incredible, that Ernest is mentally retarded. Ernest was prejudiced because counsel told the court the jury's

decision on mental retardation would be based on which side's expert the jury believed(3rdPenTr.41) and counsel called an expert who was unqualified and incredible. Further, Ernest was prejudiced because had the jury heard from the qualified, credible, prepared expert testimony that Ernest is mentally retarded there is a reasonable probability he would have been found mentally retarded, and therefore, not subject to the death penalty. *See Strickland*.

A new penalty phase at which qualified, credible, prepared witnesses are called to testify as to why Ernest is mentally retarded is required.

II.

EVIDENCE ROD ORCHESTRATED OFFENSE

The motion court clearly erred in overruling Ernest's postconviction motion because he received ineffective assistance of counsel in violation of his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have presented evidence available from witnesses Officer McDonald, Officer Buel, Officer McMillen, Officer Maloney, Michael Maise, David Hopkins, and Bill Muddiman all of whom supported that Rod Grant orchestrated the offense and Ernest did not act alone which would have refuted the state's having cast him as the sole actor who was so capable in carrying out this offense alone that he could not be mentally retarded and supported the mitigating circumstance that he acted under Rod's substantial domination. Ernest was prejudiced because had the jury heard this evidence there is a reasonable probability the jury would have found he is mentally retarded and not imposed death.

The jury did not hear evidence Rod orchestrated and participated in the acts of killing the Casey's employees. That evidence would have refuted the state's casting Ernest as the sole actor who was so capable of carrying out this offense that he is not mentally retarded and supported the mitigating circumstance Ernest acted under the substantial domination of another, Rod, as provided under §565.032.3(5). The

witnesses could have been located and called through reasonable investigation or through presenting a transcript of their prior recorded testimony(3rdPCRL.F.67).

This Court reviews for clear error. *See* Point I. Ineffectiveness claims are reviewed under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Lankford v. Idaho*, 500 U.S.110, 125 (1991).

Respondent's Portrayal - Ernest As Sole Actor

When the police arrived at Casey's, there was much blood coming from underneath the bathroom door(3rdPenTr.671-77). Two deceased women were in the bathroom(3rdPenTr.676-77). There was blood around the walk-in cooler and a deceased male inside(3rdPenTr.677-78).

Officer Reddin found a bloodstained screwdriver in a field across from Casey's(3rdPenTr.685-89). At nearby Indian Hills Park, Officer Hammond found a large plastic garbage bag with clothes Ernest allegedly wore(3rdPenTr.695-702).

Officer Himmel identified various photographs from Casey's(3rdPenTr.713-96). The photos included pictures of the employees as they were found at Casey's, autopsy photos, the conditions at Casey's when officers arrived, and bloody shoeprints(3rdPenTr.713-96). In initial closing argument, the prosecutor urged the jury to remember the autopsy photos(3rdPenTr.1775). In rebuttal closing argument, the prosecutor urged the jury to look at "these horrible photographs that I know you hate to look at"(3rdPenTr.1801). The bloody shoeprints were consistent with Nikes

recovered at 200 Mohawk and inconsistent with the employees' shoes(3rdPenTr.784-87). Himmel opined that Ernest was walking, rather than running, when the bloody shoeprints were created(3rdPenTr.793-94). Himmel opined that based on his blood spatter analysis and general review of the blood present, all three employees were struck multiple times(3rdPenTr.794-95,799-801,806-07).

In opening statement, the prosecutor told the jury that Ernest wore an outer brown coat with a tan jacket underneath(3rdPenTr.652-53). Himmel testified the patterns of blood stains on the recovered clothing were consistent with that clothing having been worn in layers by one person(3rdPenTr.830-36). In initial closing argument, the jury was told Ernest's behaviors were "logical" and "goal directed"(3rdPenTr.1774). The "logical" behavior included dressing in layers of clothing because "[t]he brown coat easily comes off"(3rdPenTr.1775).

A bank bag containing $443 was found in a bedroom at 200 Mohawk (3rdPenTr.873-75,880-83). Nikes that Ernest was alleged to have worn were found there(3rdPenTr.883-85). There were partially burned Casey's checks, cashier tapes, and food stamps found there(3rdPenTr.885-90).

In opening statement, the prosecutor told the jury it was undisputed that Ernest acted alone(3rdPenTr.665). During Himmel's testimony, the state read a stipulation that Ernest was the only person inside Casey's when the killings happened(3rdPenL.F.243-44;3rdPenTr.828-29).

In opening statement, the prosecutor told the jury that Mary's hand wounds were caused when she was stabbed with a screwdriver(3rdPenTr.661). In closing

argument, the prosecutor told the jury Mary's stab wounds were caused by a screwdriver(3rdPenTr.1774).

Counsels' Testimony

Carlyle testified that they did not present evidence that went to guilt phase responsibility to avoid emphasizing the offense's facts(3rdPCRTr.647).

Cisar was responsible for the lay, non-expert fact witnesses(3rdPCRTr.699). Cisar made a strategy decision to avoid getting into facts that were pertinent to guilt phase(3rdPCRTr.702). That strategy did not work because the disturbing aspects of how the employees died were introduced anyway(3rdPCRTr.761). Cisar did not recall getting anything in exchange for stipulating that Ernest was the only person inside Casey's when the homicides happened(3rdPCRTr.704-06).

Findings

The findings rejected these claims for the following reasons: (a) McMillen - no evidence was presented at the hearing as to counsels' strategy and counsels' strategy was to focus on establishing mental retardation and the jury's decision would not have been impacted(3rdPCRL.F.344-45); (b) Buel – counsels' strategy was to focus on establishing mental retardation and the jury's decision would not have been impacted(3rdPCRL.F.345); (c) Maloney - no evidence was presented at the hearing as to counsels' strategy and counsels' strategy was to stay away from guilt phase evidence and this evidence would have supported that Ernest dressed in layers(3rdPCRL.F.345-46); (d) Maise – counsel testified to being aware of what Maise could have said and it was reasonable strategy not to present Maise's testimony

and part of the strategy was not to focus on guilt phase matters(3rdPCRL.F.347); (e) Hopkins – counsel was not questioned about Hopkins and counsels' strategy to focus on mental retardation was reasonable(3rdPCRL.F.348-49); (f) Muddiman – no supporting evidence was presented and counsel was not questioned about Muddiman(3rdPCRL.F.349); and (g) McDonald – it was not shown how McDonald's testimony would have been beneficial(3rdPCRL.F.350).

Evidence Rod Orchestrated and Participated In Offense

Officer McDonald recounted that as part of the investigation he contacted Lafonzo Tucker(3rdPCRTr.583). Tucker told McDonald that at Rod's direction Tucker disposed of a shotgun because Rod did not want the police to find it(3rdPCRTr.586). Tucker hid the shotgun in a ditch under some sticks(3rdPCRTr.587-88).

Missouri Highway Patrol evidence technician Thomas Buel compared bloody marks left on shotgun shells recovered from nearby Indian Hills Park with bloody marks on the hammer recovered at Casey's(3rdPCRL.F.206-07;3rdPCREx.64 at "F7";3rdPCREx.53 at 2,4). Both the shotgun shells and the hammer had a multi-dot blood pattern that was consistent with bloody gloves found in a field near Casey's(3rdPCRL.F.206-07;3rdPCREx.64 at "F7";3rdPCREx.53 at 2,4). The gloves had a dotted pattern(T.Tr.1916).

In exchange for pleading guilty and testifying against Ernest, three homicide charges against Rod were dismissed(T.Tr.2139-42). *See,* Casenet Docket entries at

pages 12-16 and "Charges, Judgments, & Sentences" for Boone County case No. 13R019441585-01, *State v. Rodriquez Grant*.

On February 18, 1994, and February 19th, Michael Maise was confined in the Boone County jail with Rod(T.Tr.2332). Rod told Maise that he went with Ernest to Casey's to make sure that Ernest did what Ernest was supposed to do(T.Tr.2333). Rod told Maise that he gave Ernest a gun(T.Tr.2333). Rod told Maise he needed money(T.Tr.2333).

Mary had stab wounds consistent with being stabbed with a screwdriver and Rod had stabbed his girlfriend Deborah with a screwdriver(T.Tr.2047,2302,2305-06).

Ernest told interrogating officer McMillen "it took more than one man to do that job" because one was not strong enough(T.Tr.1831,1837-38). Ernest said he did not know what happened(T.Tr.1833).

Missouri Highway Patrol DNA expert Cary Maloney did DNA testing on a tan jacket and found blood that matched Fred(3rdPCREx.64;3rdPCREx.66 at1;3rdPCREx.67;3rdPCRTr.688-92). Maloney also did DNA testing on a brown jacket which contained a mixture of blood that matched Fred, Mable, and Mary(3rdPCREx.64;3rdPCREx.66 at 1;3rdPCREx.67;3rdPCRTr.688-92).

David Hopkins saw someone whose height, build, and clothing resembled Ernest outside Casey's about 10:30 p.m.(T.Tr.2357-58,2360-61). After Hopkins saw that individual, he saw a shorter person running in the direction of Casey's(T.Tr.2358-59,2361-63). Bill Muddiman drove by Casey's at about midnight and saw two people standing outside Casey's(T.Tr.2366-68).

All of these facts could have been presented to support that Ernest did not act alone, but instead Rod was not only a co-participant, but also the person who orchestrated the offense. That Ernest did not act alone was critical to refuting the state as having cast Ernest as not being mentally retarded because he carried out the offense in such a calculated manner and would have mitigated the offense to show he acted under the substantial domination of another, Rod, §565.032.3(5). Rod's statements to Maise that he went to Casey's to be sure Ernest did what he was supposed to do, coupled with Rod having Tucker dispose of a shotgun and the recovery of bloody shotgun shells with a glove dot pattern consistent with a glove dot pattern found on the Casey's bloody hammer underscores Rod's role in the killings **as the main actor and orchestrator**. Additionally, Rod's history of stabbing his girlfriend with a screwdriver was consistent with Rod's having been the one who stabbed Mary with a screwdriver. These facts, involving the shotgun and bloody shotgun shells and Rod's history of using screwdrivers as weapons, make Ernest's statements to McMillen that "it took more than one man to do that job" because one was not strong enough(T.Tr.1831,1837-38) that much more critical for the jury to have heard.

While respondent maintained that Ernest wore two coats layered over one another, Maloney's DNA testimony was just as consistent with two actors because there were two coats and one coat had all three victims' DNA, but the other coat had only one victim's DNA. Likewise, Hopkins' and Muddiman's testimony of having seen two people at Casey's supported that Ernest was not the sole actor.

In *Glenn v. Tate*, 71 F.3d 1204, 1205-06 (6th Cir. 1995), defendant Glenn was sentenced to death for shooting a police officer during the course of assisting his brother to escape from jail. The jury did not hear that Glenn was mentally retarded and had always been a follower easily manipulated by his jailed brother. *Id*. at 1208-09, 1211. Glenn's organic brain deficit coupled with the ease with which his admired older brother manipulated him was mitigating evidence that warranted a new penalty phase. *Id*. at 1211. In a similar manner, Ernest's jury did not hear credible evidence that he is mentally retarded and that Rod orchestrated this offense through manipulating him and he was under Rod's substantial domination as provided for under §565.032.3(5).

Reasonably competent counsel would have wanted to present all this evidence through calling all these witnesses or presenting their prior testimony to establish that Ernest was not the sole participant and that Rod orchestrated this offense. *See Strickland*. Ernest was prejudiced because this evidence would have refuted respondent's casting Ernest as so capable that he carried out this offense alone going from one employee to another and then hitting each in the head with a hammer (T.Tr.2383-84), and therefore, could not be mentally retarded. *Id*. Further, Ernest was prejudiced because this evidence would have supported the mitigating circumstance that Ernest acted under the substantial domination of another, Rod, as provided under §565.032.3(5). *Id*. There is a reasonable probability Ernest would not have been sentenced to death. *Id*.

The findings are simply wrong in stating counsel was not questioned on this matter. Both counsel testified that they avoided guilt phase related evidence in order to avoid highlighting the emotional reaction that would be generated by the manner in which these people died(3rdPCRTr.647,699,702).

Counsel's strategy choices must be objectively reasonable and sound. *State v. McCarter*, 883 S.W.2d 75, 78 (Mo. App., S.D. 1994). The upsetting nature of the details of the employees' deaths was highlighted anyway through the state's witnesses testifying about the employees' conditions when they were discovered(3rdPenTr.671-78), bloodstained items that were recovered(3rdPenTr.685-89,817-18,819-21), photos of the employees' as they were found at Casey's and at their autopsies(3rdPenTr.713-96), bloody shoeprints(3rdPenTr.713-96), the recovery of a bloodstained hammer(3rdPenTr.808-11) and the prosecutor's urging the jury to consider the autopsy photos and look at "these horrible photographs that I know you hate to look at"(3rdPenTr.1775,1801).

In the second penalty phase retrial, respondent's evidence highlighted the same facts and photos that Ernest's counsel stated they desired to avoid here(2ndPenTr.467,469-73,479-81,486-93,501-707,939-64). Likewise, in the second penalty phase, the prosecutor argued that Ernest wore layered clothing to remove it to change his appearance(2ndPenTr.1354), the employees' photos proved the aggravators and it was "not fun showing" the jurors those photos to prove those aggravators(2ndPenTr.1355-56), Mary's stab wounds were inflicted with a screwdriver(2ndPenTr.1356), and Ernest's behavior was "logical and

methodical"(2ndPenTr.1357). Reasonable counsel who knew that in the second retrial penalty phase that respondent had highlighted the upsetting details of the employees' deaths would not have made the strategic decision to fail to present evidence that supported Rod was a co-actor who orchestrated what happened. *See Strickland*. Counsels' strategy decision was not reasonable. *See McCarter*. Ernest was prejudiced because had the jury heard evidence Rod was a co-participant, who orchestrated what happened, that evidence would have refuted respondent's casting Ernest as not mentally retarded because he was so capable in how he carried out this offense alone and would have constituted mitigating evidence Ernest acted under Rod's substantial domination under §565.032.3(5). *See Strickland, McCarter* and *Glenn*. Ernest was prejudiced because there is a reasonable probability the jury would have found he is mentally retarded and sentenced him to life. *See Strickland.*

A new penalty phase is required.

III.

BERNARD'S DEPOSITION AND ERNEST'S MOTHER'S RECORDS

The motion court clearly erred in overruling Ernest's postconviction motion because he received ineffective assistance of counsel in violation of his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have offered into evidence Dr. Bernard's deposition and Ernest's mother's Mid-Missouri Mental Health records because Bernard's deposition would have refuted the prosecutor's misrepresentation that Bernard found Ernest not mentally retarded when she found he is and Ernest's mother's records documented she and her son, Daniel, were mentally retarded and reliably documented the family's mental retardation history which Keyes erroneously denied existed. Ernest was prejudiced because these credible reliable sources would have resulted in rebutting the prosecutor's characterization of Ernest's mental retardation as newly minted by opportunistic, unqualified, and unprepared Keyes and Ernest would have been found mentally retarded and life sentenced.

The prosecutor misrepresented that Dr. Bernard had found Ernest's I.Q. was 78 and that Ernest was not mentally retarded, when in fact Bernard found Ernest is mentally retarded with an I.Q.in the low 70s. Ernest's mother's psychiatric records would have established a family history of mental retardation that included Ernest's

mother and his brother Daniel, while Keyes erroneously testified on cross-examination there was no such family history of mental retardation.

This Court reviews for clear error. *See* Point I. Ineffectiveness claims are reviewed under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Lankford v. Idaho*, 500 U.S. 110, 125 (1991).

Dr. Bernard's Conclusions

In May, **1996**, before *Atkins v. Virginia*, 536 U.S. 304 (2002) was decided, psychologist Dr. Bernard testified at Ernest's first postconviction hearing(1stPCRTr. at i). Bernard obtained some invalid test results because Ernest has very low reading skills and her testing required sixth grade skills(1stPCRTr.57-58). Ernest's I.Q. was in the 70's(1stPCRTr.58). Bernard concluded Ernest probably always functioned as mildly mentally retarded(1stPCRTr.60).

In this Court's opinion remanding Ernest's case for a retrial of the penalty phase in light of *Atkins* because there was evidence to support he is mentally retarded, this Court noted that Drs. Bernard, Cowan, and Smith had testified prior to the second penalty phase, but only Cowan and Smith were called as witnesses at that second penalty phase. *Johnson v. State*, 102 S.W.3d 535, 538-39 (Mo. banc 2003). This Court noted that "Bernard's testimony best supported Movant's mental retardation theory." *Id*. at 538. This Court described Bernard as "a psychologist with considerable experience in mental retardation." *Id*. at 538. Bernard had concluded

that Ernest's third grade I.Q. of 77 and his sixth grade I.Q. of 63 were caused by his inability to process and retain information and deficient adaptive skills. *Id*. at 538. Bernard testified that Ernest's history of poor grades could be indicative of mental retardation. *Id*. at 538. Bernard had found Ernest had deficient adaptive skills and this Court's opinion discussed in detail the grounds for her opinion. *Id*. at 538-39.

At a pretrial hearing, Carlyle informed the court that she had reviewed this Court's opinion and it was clear to Carlyle that Bernard's testimony was "critical" to Ernest's case(3rdPenTr.57). Carlyle told the court that she expected Bernard's opinions to be the same in front of a jury as they were in her prior testimony(3rdPenTr.57-58).

Besides this Court's opinion's reliance on Dr. Bernard, her deposition revealed the following. Dr. Bernard measured Ernest's Full Scale I.Q. in the low 70's, which meant under 75 and from 71 to 73(3rdPCREx.15 at 5-7,24-25,55). The **Department of Corrections** assessed Ernest in his late teens, finding he was below normal on all adaptive skills(3rdPCREx.15 at 38-39). Mentally retarded people, like Ernest, mask their deficits because they do not want to be perceived dumb(3rdPCREx.15 at 41-42). From watching Ernest play basketball, a person could not assess Ernest's I.Q. and whether Ernest is mentally retarded(3rdPCREx.15 at 42). Ernest's measured I.Q., impaired intellect, and poor adaptive skills establish he is mentally retarded(3rdPCREx.15 at 43,47-48).

Ernest's Mother's Psychiatric Records

Ernest's mother's mental health records recounted that she had a son who was "severely mentally retarded" with cerebral palsy, and who was unable to walk and who was cared for at the Marshall State School(3rdPCREx.21 at 8,10,12,14). Ernest's mother's records stated she has "mild mental retardation" with a Full Scale 61 I.Q. and also diagnosed there with "moderate severity" mental retardation(3rdPCREx.21 at 12,14-15). Ernest's mother's psychiatric records showed a suicide gesture consistent with mental retardation of overdosing on birth control pills(3rdPCREx.21 at 4;3rdPCRTr.38-41).

Findings

The 29.15 findings stated that counsel testified they provided Bernard's deposition to their experts and discussed admitting the deposition, but could not remember why the deposition was not offered(3rdPCRL.F.357-58). The findings went on to state that the jury should not be expected to sift through the deposition to find beneficial information(3rdPCRL.F.357-58). The findings stated that the deposition could not have been used to establish Ernest is mentally retarded because it was relied on by the experts who were called(3rdPCRL.F.357-58). The information in Bernard's deposition was found to be cumulative to what the jury heard(3rdPCRL.F.357-58). The experts who were called testified about Bernard's findings and conclusions(3rdPCRL.F.357-58).

Ernest's mother's records were hearsay and cumulative to what the jury heard(3rdPCRL.F.357-58).

Counsels' Testimony

Carlyle had no strategy reason for failing to move to admit Bernard's deposition(3rdPCRTr.619-20). Cisar relied on Carlyle as to this matter(3rdPCRTr.733).

Carlyle would have wanted the jury to know about the family history of mental retardation contained in Ernest's mother's mental health records and had no strategy reason for failing to offer those records(3rdPCRTr.624-26,632). Cisar had no strategy reason for failing to offer Ernest's mother's mental health records(3rdPCRTr.735-36).

Refuting Prosecutor's Misrepresentations And

Keyes' Misinformation

The prosecutor misrepresented that licensed psychologist Bernard who is "able to diagnose the full gamut of mental illnesses" had measured Ernest's I.Q. at 78 and Keyes agreed that was Bernard's measure of Ernest's I.Q.(3rdPenTr.1668-70,1684). The prosecutor argued and identified by name that there were seven doctors, psychiatrists and psychologists, Cowan, Parwatikar, Kline, Peters, Smith, Heisler, and Bernard who all concluded Ernest was not mentally retarded(3rdPenTr.1796-97). Keyes was "an advocate" for the mentally retarded and no one had asserted Ernest was mentally retarded "until after business picked up for Dr. Keyes" because of the *Atkins* decision(3rdPenTr.1797,1799).

Respondent stated on cross-examination of Keyes that Keyes had said earlier "the apple doesn't fall too far from the tree," but Ernest's brother, Bobby, and sister, Beverly, are not mentally retarded(3rdPenTr.1716). Keyes told the prosecutor he did not know whether Ernest's mother was mentally retarded(3rdPenTr.1716-17). Keyes

also testified there was no one other than Ernest in his family who was mentally retarded(3rdPenTr.1717). On redirect, through leading questions, counsel elicited from Keyes that Ernest had a half brother Danny who was mentally retarded(3rdPenTr.1747-50).

Keyes' own report indicated that he had reviewed Dr. Bernard's deposition and Ernest's mother's Mid-Missouri Mental Health records(3rdPCREx.60 at 2-3).

Keyes' report (3rdPCREx.60 at 2) listed Dr. Smith's report (3rdPCREx.13) as something Keyes reviewed. Smith's report recounted that Ernest's half-brother, Daniel Patton, who shares the same mother as Ernest, was mentally retarded and was institutionalized(3rdPCREx.13 at 8-9). Since Keyes had reviewed Smith's report, he was clearly apprised that Ernest's brother was mentally retarded.

In *Hutchison v. State*, 150 S.W.3d 292, 304-05 (Mo. banc 2004), even though counsel called a psychologist and called Hutchison's mother to testify about his learning disability and special education, counsel was ineffective for failing to investigate and present records and additional expert testimony. The records would have shown Hutchison's troubled childhood, mental health problems, history of sexual abuse, and learning disabilities. *Id*.304. Similarly, counsel was ineffective here for failing to offer into evidence Bernard's deposition and Ernest's mother's mental health records.

These documents would have refuted the prosecutor's misrepresentations made in questioning and argument that Bernard had found Ernest's I.Q. was 78 and he was not mentally retarded. The jury knowing that the prosecutor had falsely portrayed

Bernard's I.Q. scoring and conclusion on mental retardation would have had substantial reason to distrust this prosecutor as casting Ernest's mental retardation as simply newly minted by opportunistic, unqualified, and unprepared Keyes. Further, from Bernard's deposition, the jury would have learned that the **Department of Corrections** had concluded, long before the Casey's events, Ernest had deficient adaptive skills(3rdPCREx.15 at 38-39). Additionally, Bernard's own opinion was that Ernest has deficient adaptive skills(3rdPCREx.15 at 43,47-48). Bernard's deposition would have refuted the prosecutor's repeated emphasis that somehow Ernest's basketball skills showed that he is not mentally retarded(3rdPenTr.1180,1203-06,1473,1712, 1798). Bernard's deposition was not cumulative because the jury heard from unprepared, unqualified, incredible Keyes and Smith whose mental retardation opinion was premised on Keyes(*See* Point I). Moreover, the expert who testified about Bernard's findings (Keyes) testified about her findings erroneously(3rdPenTr.1668-70,1684).

Ernest's mother's records' accurately reporting the family history of mental retardation was significant because of the genetic link to I.Q.(3rdPCRTr.280-81). The records were not cumulative because the jury erroneously heard from Keyes that there was no family history of mental retardation which he only partially corrected following suggestion on redirect(3rdPenTr.1717,1747-50). The records were not excludable, but were admissible as recognized in *Hutchison*.

Reviewing the two documents would not have been unwieldy for the jury – Bernard's deposition (3rdPCREx.15) is 66 pages and Ernest's mother's mental health records (3rdPCREx.21) are 20 pages.

This Court reversed defendant Chambers' conviction and death sentence when the trial court refused to give a self-defense instruction which was supported by only one witness' testimony, Jones. *Chambers v. Armontrout*, 907 F.2d 825, 827 (8th Cir. 1990) (discussing *State v. Chambers*, 671 S.W.2d 781 (Mo. banc 1984)). On retrial, counsel failed to recall this only witness who could have supported Chambers' self-defense defense. *Chambers v. Armontrout*, 907 F.2d at 827. Chambers was denied effective assistance because Jones' testimony directly contradicted the state's theory. *Id*. at 831-33. Here, Bernard's deposition and Ernest's mother's mental health records directly contradicted that Ernest's being mentally retarded was newly fabricated by opportunistic, unqualified, and incredible Keyes. When this court ordered a penalty retrial, as when it ordered a new trial in *Chambers*, it recognized that there was a critical defense witness - Bernard. *See Johnson v. State*, 102 S.W.3d at 538-39. As in *Chambers v. Armontrout*, Ernest was denied effective assistance of counsel because the jury did not hear from a witness this Court had identified as critical through her deposition.

Reasonable counsel knowing that this Court had placed great emphasis on Bernard's findings as a reason for a new penalty phase would at a minimum have introduced her deposition because it contradicted the prosecutor's misrepresentations about what she had found as to I.Q. and mental retardation. *See Chambers v.*

Armontrout, *Hutchison*, and *Strickland*. Counsels' unreasonableness is highlighted by Carlyle's statements to the trial court that she considered Bernard's opinions to be "critical" to Ernest's defense(3rdPenTr.57-58). Even though Bernard's testimony was in an abbreviated format, and not Carlyle's preference because it was presented in a PCR (3rdPenTr.57-58), that was better than the jury's not hearing Bernard's findings at all. *Cf. Chambers v. Armontrout*. Ernest was prejudiced because without Bernard's deposition available to the jury the prosecutor's misrepresentations that she had found Ernest has a 78 I.Q. and that there was unanimity among all examiners prior to Keyes that Ernest is not mentally retarded went uncontradicted. *See Chambers v. Armontrout*, *Hutchison*, and *Strickland*.

Reasonable counsel would have offered into evidence Ernest's mother's psychiatric records documenting she and her son Danny were mentally retarded which would have established "the apple" (3rdPenTr.1716-17) in fact did not fall too far from the tree and corrected Keyes' misinformation on the family history of mental retardation(3rdPenTr.1716). *See Hutchison* and *Strickland*. Ernest was prejudiced because the jury was deprived of compelling genetic evidence to support Ernest is mentally retarded and left with Keyes' erroneous testimony on a critical matter.

A new penalty phase is required.

IV.

HEISLER'S INTERROGATION TACTICS – ERNEST'S MENTALLY RETARDED SUBMISSIVENESS EXPLOITED

The motion court clearly erred in overruling Ernest's postconviction motion because he received ineffective assistance of counsel in violation of his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that effective counsel would have moved to suppress and redact those portions of Heisler's video interrogation asking whether Ernest was "good for the crime" since the case was not going to be "retr[ied]," in violation of the court's order limiting the evaluation to assessing for mental retardation, and all of Ernest's responses because those interrogation inquiries and responses were conducted without Ernest's having been *Mirandized* and without counsel, in violation of U.S. Const. Amends. V and VI, and Ernest was prejudiced because that was the first time Ernest ever admitted any participation while leaving the impression he acted alone, which made him appear to not be mentally retarded, and therefore, deserving of death.

Heisler improperly interrogated Ernest about the facts of the Casey's homicides. Counsel failed to move to suppress and redact those selected parts of Heisler's questioning and Ernest's responses about the details of the offense. That interrogation was prejudicial because Ernest had never admitted to any participation

and his responses left the impression he acted alone so as to make him appear to not be mentally retarded, and therefore, deserving of death.

This Court reviews for clear error. *See* Point I. Ineffectiveness claims are reviewed under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Lankford v. Idaho*, 500 U.S. 110, 125 (1991).

Narrow Order On Scope of Heisler's Evaluation

On December 18, 2003, the prosecutor moved for Heisler to evaluate Ernest(3rdPenL.F.199-20). Attached to respondent's motion was an affidavit which recited that: "[t]he State is without means or method to discover the true nature and extent of Movant's alleged mental retardation except by examination by a psychologist" (3rdPCR1stSupp.L.F.4). Counsel objected on multiple grounds, including any such examination violated *Estelle v. Smith*, 451 U.S. 454 (1981) (3rdPenL.F.201-08).

A March 11, 2004, order stated a "stipulation," was reached that provided the state's expert was "to evaluate defendant's claim of mental retardation under Section 565.030.6, Supp. 2003, RSMo"(3rdPenL.F.209;3rdPenTr.2-4). The examination was ordered conducted with only Ernest, Heisler, and "clinical psyometrist [sic]" Bradshaw present(3rdPenL.F.209). The examination was ordered videotaped with audio and without Ernest's awareness(3rdPenL.F.209;3rdPenTr.5). The examination was ordered limited to assessing whether Ernest was mentally retarded under

§565.030.6(3rdPenL.F.209-10). Section 565.030.6 defines mental retardation for purposes of excluding from the death penalty defendants who are mentally retarded.

Counsels' Testimony

Carlyle testified that she had a trial strategy reason for not objecting to the Heisler video in its entirety because she felt portions highlighted Ernest is mentally retarded(3rdPCRTr.610-11). Carlyle also testified that she did not have a strategy reason for failing to have redacted statements Ernest made involving the circumstances of the offense(3rdPCRTr.610-11). Cisar did not recall why he did not object to the Heisler video(3rdPCRTr.723).

Findings

The 29.15 findings ruled that counsel believed the Heisler video supported Ernest is mentally retarded and wanted the jury to view it and that strategy was reasonable(3rdPCRL.F.352). The findings held that counsel stipulated the evaluation could occur and be videotaped(3rdPCRL.F.352). Under the findings, a motion to suppress would have been meritless because the state was entitled under decisions from this Court to have Heisler evaluate Ernest because Ernest put his mental health in issue as to whether he is mentally retarded(3rdPCRL.F.352-54).

Heisler Violated Court's Limited Order And Conducted Interrogation Exploiting Ernest's Mentally Retarded Personality Traits

In *People v. Cleburn*, 782 P.2d 784, 785-86 (Colo. 1989), the police conducted a "'good ol' boy'" interrogation of the defendant in which they told the defendant,

referring to him by his nickname, that they needed to talk to him and did so in his kitchen while obtaining admissions without *Mirandizing* him as provided for under *Miranda v. Arizona*, 384 U.S. 436 (1966). Those statements were properly suppressed for failing to *Mirandize* the defendant. *Cleburn*, 782 P.2d at 787.

Mentally retarded people are more susceptible to police coercion or pressure than people of normal intellectual ability, predisposed to answer questions so as to please their questioners rather than answer accurately, more likely to confess to crimes they did not commit, and tend to be submissive. *People v. Braggs*, 810 N.E.2d 472, 486 (Ill. 2003) (citing multiple law reviews as authority). It is because of those considerations that Courts have allowed expert testimony presented to juries to explain why interrogation admissions by mentally retarded people are unreliable. *See Miller v. State*, 770 N.E.2d 763, 770-74 (Ind. 2002); *Pritchett v. Commonwealth*, 557 S.E.2d 205, 207-08 (Va. 2002).

Heisler's examination proceeded with Heisler's asking Ernest about having played "b-ball" with former MU basketball star Frazier, and telling Ernest he "must have been pretty good to go against Ricky"(Heisler Tr. 5-7). Heisler's comments included: "Dang. So you'll know Ricky if he came up and said, he says, hey, Ernest, what's up?" and "Cool. You still play some b-ball?"(Heisler Tr.5-7).

Heisler asked Ernest if he was a good softball hitter and when Ernest indicated he was fair, Heisler said "get under the ball and give it a good ride. Cool."(Heisler Tr.8).

Heisler thought it was “Cool” that Ernest had a television in his cell(Heisler Tr.9). When Ernest indicated that he got cable, Heisler’s reaction was to ask “Dang. What kind of channels you get?” and complain that even he did not get ESPN2 (Heisler Tr.9-10).

Heisler then proceeded to NBA talk about “Shaquille” and Heisler’s not knowing the “Diesel” had left the Lakers(Heisler Tr.10-11). From the NBA, Heisler directed his focus to Ernest’s being a Cubs fan, rather than a Cardinals fan(Heisler Tr.11-12).

Heisler endorsed Ernest’s choice of Victor as his favorite “Young & the Restless” character because “[h]e the man” because “[h]e don’t mess around”(Heisler Tr.13).

Heisler’s inquiry about Ernest’s Potosi washing dishes job included: “Dang. How many trays you got to take care of?” (Heisler Tr.17). When Ernest explained someone else counted, Heisler told Ernest that was: “Cool.”(Heisler Tr.17-18).

When Ernest told Heisler where he last lived in Columbia, Heisler said “Cool”(Heisler Tr.18). When Ernest explained his past efforts applying for unemployment, Heisler said that was “Cool” (Heisler Tr.20-21). When Ernest explained what clothing Potosi allowed, Heisler said: “Cool.” (Heisler Tr.24).

Heisler asked Ernest about whether he knew what Charmin is and told Ernest that he had “cracked up” when someone told him that her parents named her for toilet paper(Heisler Tr.26-27). After asking Ernest whether he had any children and Ernest’s indicating he had a son Heisler asked: “[h]e play b-ball?”(Heisler Tr.27-29).

After Ernest explained that he had prison enemies because of $1500 marijuana drug debts, Heisler commented: "that's a lot of weed, buddy" and asked: "Was that good weed at least?"(Heisler Tr.33-34). Heisler laughed, asking how long it took to smoke(Heisler Tr.34). When Ernest said he had smoked it over a period of time, Heisler commented: "Dang."(Heisler Tr.34). When Heisler asked Ernest how long, Ernest indicated seven years, Heisler laughed saying: "Dang. Well, how you playing ball if you're in - - in lockup?"(Heisler Tr.34-35).

When Ernest indicated he liked attending church, Heisler said that was "Cool."(Heisler Tr.36-37). Heisler asked Ernest if he liked college basketball and who his favorite team was(Heisler Tr.37). Heisler asked Ernest whether it surprised him that people had positive things to say about Ernest and Ernest indicated it did not, to which Heilser indicated "[t]hat's cool."(Heisler Tr.39).

After all this chatter, designed to engender Ernest's trust, Heisler asked: "**You good for the crime**? I'm not a judge so, you know, **we're not going to retry the case or anything**"(Heisler Tr.39-40)(emphasis added). Ernest said he was and his drug habit caused it(Heisler Tr.40). Heisler asked Ernest what he was using and how much(Heisler Tr.40-41). Ernest said cocaine and he was doing it during the NBA All-Star game(Heisler Tr.40-41). Heisler then commented: "Damn. '93 – '94. I don't even know who - -was Kareem in the league then? I don't even know. I was probably pre- -- pre Shaq, isn't it? Shaq's about 32 now so that make him 22. He might have been a rookie about then, I bet."(Heisler Tr.41).

Ernest recounted that Rod was giving him drugs on credit(Heisler Tr.41-42). Heisler asked Ernest how he always got drugs on credit and Ernest said because he is a nice guy(Heisler Tr.42). Heisler said: "Dang, Ernest, I swear you - - charming dealers out of their own dope. You must get charming when you want to be. I swear."(Heisler Tr.42). Ernest told Heisler on the streets that he stole dealers' drugs, but repaid them(Heisler Tr.42-43). Heisler wanted to know why dealers had not shot Ernest and Ernest said he did not know and Heisler commented: "Dang. You have a charmed life here so far."(Heisler Tr.42-43).

Ernest told Heisler that he got a gun from Rod, waited for the last person to leave Casey's, and wore a mask(Heisler Tr.43-47). Ernest reported that he demanded money and knew the manager who was present had the key to the second safe, but acted like she did not have it(Heisler Tr.48-49). Ernest said he "put them all in the bathroom"(Heisler Tr.49). Ernest said he went back to the bathroom and found the manager trying to flush the key down the toilet and that caused him to lose control(Heisler Tr.49-50). Ernest said that if the manager had only given him the key then things would not have happened(Heisler Tr.50). Heisler asked Ernest if he remembered everything that happened and Heisler answered his own question stating that Ernest must remember because he was telling Heisler(Heisler Tr.50).

Ernest said he started shooting(Heisler Tr.51). Heisler said Ernest was incorrect because reports said he used a hammer(Heisler Tr.51). Ernest said the hammer happened later(Heisler Tr.51).

Heisler commented that Ernest said he had not done well in school, but passed anyway(Heisler Tr.55). Ernest acknowledged that(Heisler Tr.55). Heisler commented: "Shoot I should have gone to school in Charleston"(Heisler Tr.55).

In the midst of having extracted inculpatory statements Ernest acted alone, Heisler told Ernest that he "really appreciate[d], you know, you being as opened [sic] as you are, Ernest. I mean I really appreciate it. I mean you really seem like a nice guy"(Heisler Tr.57). Heisler's appreciation for Ernest being "open" highlights the prejudice of his interrogating a mentally retarded person who is predisposed to making false confessions. *See People v. Braggs*, *Miller v. State*, *Pritchett v. Commonwealth*, *supra*. Heisler's telling Ernest that he was "a nice guy" was used to build on the trust Heisler had already engendered to promote Ernest's making further inculpatory statements, *infra*, suggesting he had acted alone when he had never before had made such statements.

Heisler asked Ernest if after he left Casey's whether his clothing was bloody and Ernest said he took off an outer bloody layer(Heisler Tr.59). Ernest told Heisler that when he came in the house he had blood on his face and Heisler commented: "you got blood on your face so they either think you're a vampire or something went down"(Heisler Tr. 59).

Ernest told Heisler that when he got to the house that Rod counted $1500.00(Heisler Tr.60). Heisler said: "[t]hat's a good haul"(Heisler Tr.60). Heisler asked what happened next and Ernest said he paid Rod what he owed(Heisler Tr.60-61). Ernest told Heisler that Rod tried to burn checks from Casey's(Heisler Tr.61).

Ernest told Heisler that he had money that he planned to use to buy more drugs(Heisler Tr.61). Heisler asked Ernest if he was "feening bad" and "jonesing" and Ernest said he was(Heisler Tr.61).

Heisler told Ernest he was done and concluded: "Well, I appreciate your honesty. I appreciate your assistance. It was nice talking with you."(Heisler Tr.63).

Heisler violated the court's order which expressly limited the evaluation to evaluating whether Ernest was mentally retarded as defined in §565.030.6(3rdPenL.F.209-10). Instead, Heisler proceeded to interrogate Ernest whether he was "good for the crime" because the case was not going to be "retr[ied]"(Heisler Tr.39-40). Before Heisler asked Ernest if he was "good for the crime," Heisler spent his time engendering Ernest's trust. Heisler turned what was supposed to be an evaluation limited to assessing mental retardation into something resembling sports talk radio chatter, with Heisler punctuating that chatter with such trust building commentary as "Cool" and "Dang," followed by interrogating Ernest about the circumstances of the offense. Heisler conducted a "good ol' boy'' interrogation of Ernest without *Miranda* warnings. *Cf. People v. Cleburn.* Heisler's "good ol'boy'' tactics exploited Ernest's susceptibility to answer questions to please an interrogator and his submissive mentally retarded personality. *See People v. Braggs.* Moreover, Heisler affirmatively misrepresented his purposes assuring Ernest he could speak about the offense because it was not going to be "retr[ied]" when in fact this jury heard the guilt evidence replayed in detail for it, see Point II, and supplemented with statements Heisler deceived Ernest into making.

Estelle v. Smith Violation

In *Estelle v. Smith*, 451 U.S. 454, 461, 464-65, 467 (1981), the Court held that admitting an examining psychiatrist's evaluation in penalty phase that included an account of the circumstances of the offense violated his Fifth Amendment rights when he was not advised of his rights guaranteed under *Miranda v. Arizona,* 384 U.S. 436 (1966) before making statements to the psychiatrist. Also, that action violated Smith's Sixth Amendment right to counsel because his counsel were not advised that the evaluation would include issues of Smith's future dangerousness. *Estelle v. Smith*, 451 U.S. at 470-71. Because of the Fifth and Sixth Amendment violations, Smith's death sentence was reversed. *Id*. at 473-74.

In *Buchanan v. Kentucky*,483 U.S. 402, 409-11, 414, 423-24 (1987), the state introduced as rebuttal evidence to the defendant's psychological defense statements he made during an evaluation done to determine whether he should be committed for psychiatric treatment and which evaluation was requested by both sides. The Court found use of that evidence was permissible because **the state did not rely on any statements dealing with the facts of the crime** and distinguished *Estelle v. Smith,* noting that what was problematic there was that the state had used detailed descriptions of Smith's statements about the offense. *Buchanan v. Kentucky*, 483 U.S. at 421,423. The *Buchanan* Court noted in *Estelle,* a Sixth Amendment violation had occurred because counsel had not been informed of the scope and nature of the psychological evaluation done. *Id*. at 424-25.

In *Battie v. Estelle,* 655 F.2d 692, 699 (5th Cir. 1981), the Court reversed the defendant's death sentence because of an *Estelle v. Smith* violation. The *Battie* Court noted that *Estelle v. Smith* requires *Miranda* warnings be given for court ordered psychological evaluations. *Battie,* 655 F.2d at 699. An *Estelle v. Smith* violation occurred because the psychological examiner was appointed by the state court, and therefore, was a state agent. *Id.* at 699-700. The examination was conducted for the penalty purpose of evaluating for future dangerousness. *Id.* at 700. There was an *Estelle v. Smith* violation because the defendant was required '"to speak his guilt."' *Id.* at 700. The commands of *Estelle v. Smith* were violated because the examination was used to "assist the State in establishing the basis for imposition of a criminal punishment." *Id.* at 701. To the extent a defendant relies on a defense that goes to his mental state he only waives his Fifth Amendment right under *Estelle v. Smith* as to matters that go to rebutting his psychiatric defense. *Gibbs v. Frank*, 387 F.3d 268, 274 (3rd Cir. 2004).

This Court has held that when a defendant places his mental condition in issue he waives his privilege against self-incrimination for statements he makes to evaluators. *State v. Thompson*, 985 S.W.2d 779, 786 (Mo. banc 1999) (relying on *State v. Copeland*, 928 S.W.2d 828, 839 (Mo. banc 1996)). The *Thompson* Court, however, noted that under §552.030.5 that statements made to an examiner are only admissible on **the issue of mental condition** and a defendant is entitled a limiting instruction stating such. *Thompson,* 985 S.W.2d at 786. *See also, State v. Taylor*, 134 S.W.3d 21, 24 (Mo. banc 2004) (noting trial court is required to give limiting

instruction under MAI-CR3d 306.04). Thus, even this Court has recognized that any waiver is necessarily a narrow one limited to matters that go the issue of the mental condition at issue, as required under *Estelle v. Smith* and *Buchanan v. Kentucky*. In Ernest's case, the narrow waiver went to whether Ernest is mentally retarded, there was no waiver of an interrogation that went to whether Ernest was "good for the crime" and that interrogation violated Ernest's Fifth Amendment *Miranda* rights and his Sixth Amendment right to counsel. *See Estelle v. Smith* and *Buchanan v. Kentucky.*

Before Heisler could question Ernest about whether he was "good for the crime," Ernest was required to be given *Miranda* warnings. *See Estelle v. Smith* and *Buchanan v. Kentucky*. Questioning Ernest about the details of the crime was not within the scope of the trial court's order to conduct a limited evaluation as to mental retardation under §565.030.6. In fact, the postconviction prosecutor conceded this point, telling the court that Heisler's role was to assess intellectual functioning or mental retardation(3rdPCRTr.726). There was an *Estelle v. Smith* violation because Ernest was required '"to speak his guilt."' *Cf. Battie.*

Besides violating Ernest's Fifth Amendment *Miranda* rights, Heisler also violated Ernest's Sixth Amendment right to counsel. Counsel did stipulate to an evaluation that was as limited under the court's order to assessing for mental retardation under §565.030.6. Counsel, however, did not stipulate, and was not on notice, that Heisler would interrogate Ernest about whether he was "good for the

crime," and therefore, Ernest was entitled to have counsel present. *See Estelle v. Smith* and *Buchanan v. Kentucky.*

Officer McMillen testified Ernest never confessed during interrogation to having participated and said he had not shot anyone(3rdPenTr.866-68). Previously, Ernest had not given a detailed rendition of what happened and told Dr. Brown that Rod and Antwane were involved(3rdPCRTr.130-32;3rdPCREx.23 at 60). Ernest told Officer McMillen "it took more than one man to do that job" because one was not strong enough(T.Tr.1831,1837-38). Ernest told McMillen he did not know what happened(T.Tr.1833). Dr. Parwatikar in the first PCR testified that Ernest had declined to speak about his girlfriend's children's role in what happened at Casey's(1stPCRTr.22). What the jury heard from Ernest on the Heisler video caused it to believe Ernest acted alone and because he acted alone, he must not be mentally retarded. The Heisler statements, obtained in violation of *Miranda and Estelle* regarding the circumstances of the offense, were prejudicial and caused the jury to reject Ernest's mental retardation.

Counsel did not have a strategy reason for failing to suppress and redact the objectionable parts of Heisler's interrogation(3rdPCRTr.610-11). Reasonable counsel would have moved to suppress and redact Heisler's interrogation about the circumstances of the offense. *See Estelle v. Smith, Buchanan v. Kentucky, Battie,* and *Strickland.*

In opening statement, the prosecutor stated that Mary was subjected to the most brutality because she had the safe key and she did not give it up

easily(3rdPenTr.661). In closing argument, the prosecutor returned to this information from the Heisler interrogation (Heisler Tr.48-50), arguing that Mary was the focus because she had the safe key that allowed access to the lower portion of the safe(3rdPenTr.1774,1776).

In closing argument, the prosecutor relied on Heisler's interrogation about the facts of the offense to argue Ernest is not mentally retarded. Respondent argued that Ernest told Heisler he wore a mask to avoid being identified(3rdPenTr.1773). The prosecutor argued Heisler's testimony supported the aggravator that Ernest did the killings to avoid arrest because Ernest's exchanges with Heisler showed Ernest killed because he knew the employees(3rdPenTr.1772-73). The prosecutor argued that Ernest told Heisler that he shot the employees first, but used the hammer later(3rdPenTr.1773). The prejudice of the Heisler video, and how Heisler exploited Ernest's mental retardation submissiveness and willingness to please interrogators, is underscored because Ernest told defense examiner Parwatikar that he did not remember striking the employees with a hammer(3rdPenTr.1326). On cross-examination of Smith, respondent highlighted the Heisler video to contrast what Ernest told Heisler about the crime with what Ernest told Smith(3rdPenTr.1454).

Ernest was prejudiced because the statements the jury heard dealing with the circumstances of the offense created the impression Ernest acted alone when there is every reason to believe Rod orchestrated and participated in this offense. *See Strickland* and Point II. Because the jury was left with that erroneous impression Ernest acted alone, it caused them to conclude he was not mentally retarded. Further,

Ernest was prejudiced because the prosecutor in closing argument, and in questioning witnesses, relied on Heisler's interrogation about the facts of the offense to argue Ernest is not mentally retarded. *See Strickland*.

A new penalty phase is required.

V.

USE OF COMPETENCY TO PROCEED STATEMENTS AND KLINE'S OPINION ERNEST IS NOT MENTALLY RETARDED VIOLATED §552.020.14

The motion court clearly erred in overruling Ernest's postconviction motion because he received ineffective assistance of counsel in violation of his rights to due process, freedom from cruel and unusual punishment, and effective assistance of counsel, U.S. Const. Amends. VI, VIII, and XIV, in that counsel failed to object to evidence of statements Ernest made to Dr. Kline during a competency to proceed evaluation, to Kline's opinion Ernest was not mentally retarded based on Ernest's statements and I.Q. scoring, and to closing argument that Ernest was not mentally retarded based on all these matters because §552.020.14 prohibited admission and use of these matters and Ernest was prejudiced because hearing the competency evaluator opinion that Ernest was not mentally retarded with his basis for that opinion and related argument gave undue weight to it and predisposed the jury to find Ernest was not mentally retarded.

The prosecutor relied on statements Ernest made to the competency to proceed evaluator, Dr. Kline, and Kline's opinion based on those statements, that Ernest was not mentally retarded, in violation of §552.020.14. Counsel failed to object and Ernest was prejudiced because the jury was predisposed to conclude Ernest was not mentally retarded.

This Court reviews for clear error. *See* Point I. Ineffectiveness claims are reviewed under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Lankford v. Idaho*, 500 U.S. 110, 125 (1991).

Competency To Proceed Evaluation

In May, **2005**, counsel moved for and was granted a mental evaluation to determine competency to proceed under §552.020(3rdPenL.F.238-40). Kline evaluated Ernest as to his understanding of the proceedings against him and his ability to assist in his defense and found him competent to proceed(3rdPCREx.57 at 4,11-12). Kline went beyond the court's order and found Ernest was not mentally retarded(3rdPCREx.57 at 11). In so finding, Kline relied on reporting that Ernest stated he would '"get a life sentence,"' if he was found mentally retarded and reporting that Ernest said he had no problem with being found mentally retarded(3rdPCREx.57 at 9).

Respondent's Improper Use And Argument

On direct examination of Parwatikar, Ernest's counsel elicited that Parwatikar evaluated Ernest in **1995** for competency to proceed and the possibility of an insanity defense(3rdPenTr.1285-87). In 1995, Parwatikar found Ernest was competent to proceed(3rdPenTr.1290).

On cross-examination, Parwatikar indicated that he had previously found Ernest was competent to proceed(3rdPenTr.1301,1304). Also on cross, Parwatikar

indicated he had reviewed Kline's report(3rdPenTr.1309). The prosecutor elicited from Parwatikar that Kline had concluded Ernest was not mentally retarded(3rdPenTr.1310).

On direct examination of Smith, counsel did not make any inquiry about competency to proceed or elicit any matters on that subject(3rdPenTr.1343-1414).

On cross-examination of Smith, however, the prosecutor asked Smith if he had read Kline's report and Smith indicated that he had(3rdPenTr.1422). The prosecutor followed that by asking, and Smith agreeing, that Kline had found Ernest was not mentally retarded(3rdPenTr.1422). The prosecutor then asked Smith whether Kline had written in Kline's report that Kline had agreed with Smith that Ernest's "most accurate" I.Q. was 77(3rdPenTr.1424).

Ernest's counsel asked Keyes on direct examination what materials he had reviewed, and among many other items Keyes listed from Keyes' report, Keyes included having reviewed Kline's report without elaboration(3rdPenTr.1545-47).

On cross-examination of Keyes, the prosecutor asked Keyes if he had read Kline's competency evaluation in which Kline concluded Ernest was not mentally retarded and Keyes indicated he had read it(3rdPenTr.1667). The prosecutor represented that Ernest said to Kline that he is mentally retarded and that because of that he could get a life sentence(3rdPenTr.1694-96).

On **redirect** of Keyes, counsel elicited Keyes reviewed Kline's report and Kline did not do any I.Q. testing(3rdPenTr.1740).

In rebuttal closing argument, the prosecutor told the jury, while listing all their names, that Kline was one of seven experts who had found Ernest was not mentally retarded(3rdPenTr.1796-97). The prosecutor also argued that Ernest told Kline that if the jury decided he is mentally retarded, then he would not get the death penalty(3rdPenTr.1799).

Findings

The 29.15 findings stated that Ernest's counsel elicited from Parwatikar that Parwatikar had found him competent to proceed before the prosecutor elicited matters relating to Ernest's competence to proceed(3rdPCRL.F.350). Kline's findings were first raised during Ernest's counsel's questioning of Keyes and Smith(3rdPCRL.F.350). This was a penalty phase only and Ernest had already been found guilty(3rdPCRL.F.350-51). Further, the findings stated that the prosecutor never referred in his questioning of witnesses to whether Ernest was found competent to proceed and never referred to any statements Ernest made to Kline regarding Ernest's guilt(3rdPCRL.F.350). The prosecutor's questioning focused on I.Q. testing done on Ernest and that Ernest had admitted to Kline that if he was found mentally retarded he could get a life sentence creating an inference Ernest was malingering and falsifying his I.Q. tests(3rdPCRL.F.351). The state was entitled to question defense experts on information they relied on in rendering their opinions to test the basis of their opinions(3rdPCRL.F.351-52). Ernest's counsel opened the door through his counsel's reference to competency evaluations(3rdPCRL.F.351-52).

Counsels' Testimony

Carlyle had no strategy reason for failing to object to the following: (1) cross-examination of Parwatikar that Kline had concluded Ernest was not mentally retarded(3rdPCRTr.602-03;3rdPenTr.1310); (2) cross-examination of Smith that in 1996 Smith had concluded Ernest's I.Q. was approximately 77 and that Kline put in Kline's report that he agreed with that assessment(3rdPCRTr.603-04;3rdPenTr.1424); (3) cross-examination of Keyes that Kline had concluded Ernest was not mentally retarded(3rdPCRTr.604-05;3rdPenTr.1667); (4) Keyes being cross-examined that Ernest had said to Kline that he had no problem with being found mentally retarded(3rdPCRTr.605-06;3rdPenTr.1694-95); (5) closing argument that Kline had found Ernest was not mentally retarded(3rdPCRTr.606-07;3rdPenTr.1796-97); and (6) closing argument that Ernest told Kline that if he was found mentally retarded, then he would not be sentenced to death(3rdPCRTr.607-08;3rdPenTr.1799).

As to these matters, Cisar testified that he either had no reason for failing to make proper objections or he relied on Carlyle to make objections because expert matters were Carlyle's responsibility(3rdPCRTr.715-22).

§552.020.14 Violated And Counsel Was Ineffective

Section 552.020.14 (emphasis added) provides:

> 14. **No statement** made by the accused in the course of any examination or treatment pursuant to this section and **no information received** by any examiner or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, **shall be admitted in evidence against the**

accused on the issue of guilt in any criminal proceeding then or thereafter pending in any court, state or federal. A finding by the court that the accused **is mentally fit** to proceed **shall in no way prejudice** the accused in a defense to the crime charged on the ground that at the time thereof he was afflicted with a mental disease or defect excluding responsibility, nor shall such finding by the court be introduced in evidence on that issue **nor otherwise be brought to the notice of the jury**.

In *Anderson v. State*, 196 S.W.3d 28, 34-35 (Mo. banc 2006), this Court found counsels' performance was deficient when counsel failed to object to the prosecutor eliciting statements Anderson made to the competency examiner in violation of §552.020.14, but Anderson was not prejudiced because of other curative actions counsel took. This Court noted that §552.020.14 "prevents testimony about statements made by the accused or information received…." during a §552.020 examination. *Id*. at 35.

The purpose of §552.020 is to insure that a criminal defendant not be tried while incompetent because to do so would violate due process. *State ex rel. Baumruk v. Belt*, 964 S.W.2d 443, 444-45 (Mo. banc 1998) (relying on *Drope v. Missouri*, 420 U.S. 162 (1975)). The legislative intent behind §552.020.14 is to insure the constitutionally mandated purpose recognized in *Baumruk* is carried out through evaluators having access to a defendant's statements and other information received, but at the same time safeguarding a defendant's Fifth Amendment rights against furnishing statements that would be harmful to his defense, whether that be a defense

to guilt or as here, his defense to punishment. Thus, while §552.020.14 employs the language "on the issue of guilt," the larger purpose of §552.020.14 requires that its commands apply with equal force in a penalty phase only retrial. Moreover, §552.020.14 applies to a penalty phase only proceeding because what the jury is asked to decide is a defendant's "guilt" as to imposing the death penalty, and here, that "guilt" turned on whether the jury concluded Ernest was mentally retarded or not.

While decisions the findings cited recognize an expert can be cross-examined about facts not in evidence to test the expert's opinion's validity, §552.020.14 creates a legislative exception to that rule(3rdPCRL.F.350-52 see, e.g., relying on *State v. Taylor*, 134 S.W.3d 21, 25 (Mo. banc 2004)). Thus, those decisions have no application here.

Ernest's counsel did initially inject that Parwatikar had found Ernest competent to proceed in 1995. Because of counsels' inquiry about Parwatikar's competency finding, it was proper for the state to then point out with Parwatikar, Smith, and Keyes, that in 2005 Kline had arrived at the same ultimate conclusion - that Ernest was competent to proceed. But that was the only door that counsel opened. What the state could not do under §552.020.14 was go beyond competency to proceed and ask whether Ernest's witnesses were aware Kline had found Ernest was not mentally retarded, any I.Q. basis for Kline's opinion, and to rely on Kline's reporting that Ernest said that if he was found mentally retarded, then he would not be sentenced to death.

The findings are simply wrong in asserting Kline's findings were first raised during Ernest's counsel's questioning of Keyes and Smith(3rdPCRL.F.350). Kline's findings were first injected by the prosecutor in cross-examining Parwatikar(3rdPenTr.1310). Moreover, on direct of Smith, counsel made no inquiry about competency to proceed (3rdPenTr.1343-1414), but on cross-examination of Smith the prosecutor inquired whether Smith had reviewed Kline's report(3rdPenTr.1422) and the details of Kline's having found Ernest was not mentally retarded(3rdPenTr.1422,1424). Ernest's counsel did ask Keyes on direct examination what materials he had reviewed and, among many other items, Keyes listed having reviewed Kline's report without elaboration(3rdPenTr.1545-47).

The state's actions as to Parwatikar were especially egregious. On direct examination, Parwatikar testified he **was not asked to evaluate for mental retardation**(3rdPenTr.1280,1290,1295-96). Parwatikar was called to present as mitigation that at the time of the offense Ernest suffered from cocaine intoxication delirium(3rdPenTr.1292). Because Parwatikar **never expressed an opinion** on whether Ernest was or was not mentally retarded, the state could not have properly tested Parwatikar's opinion on mental retardation by asking whether Parwatikar was aware that Kline had found Ernest was not mentally retarded, since Parwatikar did not have an opinion on mental retardation!

Use of Ernest's statement, as reported by Kline, that he would not be sentenced to death if found mentally retarded was prohibited under §552.020.14. *See Anderson*. Similarly, it was improper to ask Smith whether Smith and Kline had agreed Ernest's

I.Q. was 77(3rdPenTr.1424). *Id*. Because Kline's conclusion that Ernest was not mentally retarded was premised on "information received" from Ernest, it was improper to question Ernest's experts about Kline having opined Ernest was not mentally retarded. *See Anderson*.

The state's use of the statement Kline attributed to Ernest about being found mentally retarded, Kline's opinion that Ernest was not mentally retarded, and Kline's and Smith's agreement on an I.Q. of 77 were prejudicial because the jury was led to believe through respondent's questioning of Ernest's expert witnesses and argument that Ernest was faking mental retardation and that Heisler's opinion was correct.

Counsel had no strategy reason for failing to object to the matters here(3rdPCRTr.602-08). Reasonably competent counsel would have objected to the prosecutor's use of Kline's reporting of a statement he attributed to Ernest, questioning Ernest's witnesses about Kline's conclusion Ernest was not mentally retarded, questioning about Kline's and Smith's agreement on I.Q. score, and the prosecutor's related closing arguments. *See Anderson* and *Strickland*. Unlike in *Anderson*, Ernest was prejudiced. Ernest was prejudiced because the jury repeatedly heard in evidence and argument, without any curative actions, that Ernest made the statement Kline attributed to him, Kline's opinion that Ernest was not mentally retarded, and that Kline and Smith agreed on I.Q. score.

A new penalty phase is required.

VI.

GETTING DEATH IN BOONE COUNTY REFLECTS A MISSOURI "GEOGRAPHIC LOTTERY"

The motion court clearly erred in denying the claim that the death penalty in Boone County is arbitrarily and capriciously imposed because the decision whether to seek death or not reflects a "geographic lottery" based on local Boone County community standards such that Ernest Johnson was denied his rights to due process and freedom from cruel and unusual punishment, U.S. Const. Amends. VIII, and XIV, in that the rate for which death was sought and imposed in Boone County was shown in a study of the Missouri death penalty scheme to be substantially greater than anywhere else in Missouri making Ernest Johnson's punishment arbitrary and capricious.

The postconviction court rejected Ernest's claim that the decision to seek and impose death as it has been applied under the Missouri statutory scheme is arbitrary and capricious. That arbitrariness was established through a study which demonstrated that whether the state seeks and gets death is a function of a "geographic lottery" in which Boone County substantially exceeds all other counties in both categories.

Published Study's Findings

Third PCR Exhibit 81was a published version of a study of the Missouri death penalty statutory scheme as it has been applied which found that it does not provide sufficient criteria to guide prosecutors in selecting which cases are appropriate to

charge and try as capital cases. Barnes, Sloss, and Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making In Death-Eligible Cases*, 51 Ariz. L.Rev. 305, 355 (2009). The study noted that in Jackson County prosecutors conducted capital trials in less than 1% of the intentional homicide cases that were charged. *Id*. at 355. In contrast, Boone County prosecutors took capital charges to trial in more than 15% of intentional homicide cases. *Id*. at 355. The study found that such disparities expressed endorsement of large differences in prosecution decisions across counties. *Id*. at 355-56. What the Missouri Legislature has sanctioned is a "geographic lottery" as to whether death is sought against a defendant. *Id*. at 360. The article noted that the United States Supreme Court has never suggested that the Eighth Amendment's prohibition against cruel and unusual punishment should be subject to the vagaries of local community standards. *Id*. at 308. Further, the Missouri Legislature has abdicated its responsibility to establish statutory limits on capital punishment through delegating that function to prosecutors. *Id*. at 309.

Professor Sloss' Testimony

Along with having a law degree from Stanford Law School, Professor Sloss obtained a Master's Degree in Public Policy(3rdPCRTr.352). The Public Policy degree required Sloss be proficient in statistical analysis(3rdPCRTr.352). Sloss had taught criminal law at St. Louis University Law School for five years(3rdPCRTr.353). Professor Barnes, a study co-author, has a Ph.D. in Statistics, as well as a law degree(3rdPCRTr.353). The study's third author, Professor Thaman, teaches criminal

law and criminal procedure at St. Louis University and worked as a Public Defender for twelve years (3rdPCRTr.354,437).

The study looked at prosecutorial and jury decision making in Missouri homicide cases(3rdPCRTr.354-55). A "comprehensive database" of 1,046 homicides over a five year period was examined(3rdPCRTr.362-63). That database represented substantially all of the homicide cases that were initially charged as either murder or voluntary manslaughter that resulted in a homicide conviction(3rdPCRTr.363).

The database was based on a caselist that the Office of the State Court Administrator furnished because that office is statutorily mandated to track all cases(3rdPCRTr.363-64). Sloss acknowledged that even the Office of the State Court Administrator's data was imperfect(3rdPCRTr.363-64). In fact, the researchers actually found cases that the Office of State Court Administrator had missed and that office then supplemented its database with the researchers' data(3rdPCRTr.363-64). The researchers concluded that their database included about 98% of the homicide cases that were charged(3rdPCRTr.363-64).

From the comprehensive database it was determined that there was approximately 130 cases that actually resulted in capital charges(3rdPCRTr.365). An additional 130 cases were randomly selected to create a "detailed database" of 260 cases which ultimately end with 247 cases(3rdPCRTr.365,368). For the detailed database, greater data was collected about those cases(3rdPCRTr.365-66). For the detailed database, the sources of information relied on were: (1) court file records; (2)

Casenet; (3) appellate opinions; (4) newspaper articles; (5) police reports; and (6) F.B.I. criminal history records(3rdPCRTr.369-70).

The most important source of information was the police reports because they were best at approximating the information that was available to prosecutors when the decision to seek death or not was made(3rdPCRTr.370,373-74). The researchers did not go beyond the police reports because prosecutors would not release their casefiles to them(3rdPCRTr.503). The researchers only relied on newspaper articles and appellate opinions as supplements to police reports(3rdPCRTr.506,521).

Sloss and Thaman reviewed the detailed database casefiles to determine which cases a prosecutor could make a good faith determination that the case was first degree murder eligible under the charging statute(3rdPCRTr.379-80). That designation of first degree murder eligible was based on what a prosecutor would likely believe could be proven and not what a prosecutor could actually prove(3rdPCRTr.504). There was no consistent pattern as to the timing of when notice of aggravators were filed, some prosecutors filed them early and others filed later in a case(3rdPCRTr.504). In response to the court's questioning that indicated that a prior conviction might not be able to be proven because a certified copy of the prior conviction was somehow unavailable, Sloss noted that the focus of the study was that prosecutors' decisions whether to file aggravators are based on what they believe they will be able to prove and not what they can actually prove(3rdPCRTr.529-30).

The study considered the initial charge as being made in an indictment or information not a complaint(3rdPCRTr.515). From the time of arrest until an indictment or information is filed, Sloss felt was a relatively short time(3rdPCRTr.515-16).

Sloss testified the depravity of mind aggravator had been construed so broadly by this Court so that it could apply to almost all intentional homicides(3rdPCRTR.511-12,524-26).

In analyzing the data, the researchers followed generally accepted social sciences statistical methodolgies(3rdPCRTr.390). Across Missouri counties there was large variations in the rate at which prosecutors sought death and defendants got death sentences(3rdPCRTr.473-74,479). A case was deemed as one where death was sought if notice of aggravating circumstances were filed(3rdPCRTr.480). For cases where defendants pled guilty to first degree murder, it was presumed that notice of aggravators were filed because there would be no reason to plead guilty to first degree murder, if death was not being sought(3rdPCRTr.481,508).

The data showed that death was sought in cases where there existed a basis for doing so as follows: (a) St. Louis City - 6.5%; (b) Jackson County - 1.3%; (c) St. Louis County - 12.5%; (d) Boone County - 34.6%; and (e) remainder of the state - 21.2%(3rdPCRTr.478-80,484-85;3rdPCREx.86). Boone County was substantially higher than any of these other counties(3rdPCRTr.479). Boone County was at least 50% higher than any of the rest of the state in seeking death(3rdPCRTr.485). For the

state as a whole, death was sought in 12.7% of the cases where it was possible(3rdPCRTr.479-80;3rdPCREx.86).

In terms of cases where death was actually imposed the study found as follows: (a) St. Louis City - 0.4%; (b) Jackson County - 0%; (c) St. Louis County - 5.2%; (d) Boone County - 11.5%; and (e) remainder of the state - 3.9% (3rdPCRTr.485-86; 3rdPCREx.86).

29.15 Findings

The 29.15 findings stated that the Missouri study of prosecutorial discretion was flawed(3rdPCRL.F.363-65). Sloss had no experience as a prosecutor or defense attorney(3rdPCRL.F.363-65). The findings stated that Sloss' testimony reflected that he did not understand what evidence must be established to prove certain aggravators (3rdPCRL.F.363-65). Sloss testified that he believed that prosecutors file notices of aggravating circumstances quickly and the court disagreed(3rdPCRL.F.363-65). According to the findings Sloss was inaccurate in believing that the indictment or the information was the initial charging document and that those are filed quickly(3rdPCRL.F.363-65). The study failed to consider dismissed cases(3rdPCRL.F.363-65). Sloss testified there were cases in which police records could not be obtained and newspapers were used to determine case facts(3rdPCRL.F.363-65). The findings asserted that the databases were inaccurate and incomplete(3rdPCRL.F.363-65). The findings faulted the study because it did not include talking to witnesses, police officers or investigators to verify case evidence(3rdPCRL.F.363-65). The findings found the study deficient because the

source of defendants' priors convictions were "MULES" and F.B.I. checks, and not certified convictions(3rdPCRL.F.363-65). The findings asserted that prosecutors would not rely on only the contents of police reports and criminal history in deciding whether to seek death(3rdPCRL.F.363-65). In classifying guilty pleas where defendants pled guilty to first degree murder as cases where death was sought that conclusion was flawed(3rdPCRL.F.363-65).

Ernest's Punishment Is the Product of A

"Geographic Lottery"

This Court reviews for clear error. *See* Point I. The Eighth Amendment and the Fourteenth Amendment's due process clause require heightened reliability in assessing death. *Woodson v. North Carolina*, 428 U.S .280, 305 (1976); *Lankford v. Idaho*, 500 U.S. 110, 125 (1991).

It is generally recognized that objections to a study's completeness and to missing data do not invalidate the study, but detract from the weight of the study's conclusions. *See, e.g., Doan v. Astrue*, 2010 WL 234935 *6 (S.D. Ca. Jan. 12, 2010); *Obrey v. Johnson*, 400 F.3d 691, 695 (9th Cir. 2005); *Mateza v. Polaroid*, 1981 WL 11479 *40 (Superior Ct. Ma. July 30, 1981). This study followed generally accepted social science statistical methodolgies(3rdPCRTr.390). Because the study followed generally accepted statistical analyses, the study was not flawed at all(3rdPCRTr.390). The multiplicity of criticisms leveled at the study at most only detract from the weight of the study's conclusions. Moreover, when scrutinized

closer, those criticisms are devoid of any substance and establish Ernest's punishment was the product of a "geographic lottery."

Sloss' lack of experience as a prosecutor or defense attorney does not call into question the study's validity(3rdPCRL.F.363-65). Sloss had taught criminal law for five years and was assisted by Thaman who teaches criminal law and procedure and Thaman had worked as a Public Defender for twelve years(3rdPCRTr.353-54,437).

Sloss' testimony did not reflect a lack of understanding as to what must be proven to establish aggravators(3rdPCRL.F.363-65). Instead, his testimony reflected that the study's criteria for designating a case as death eligible was not what a prosecutor could actually prove, but what a prosecutor would likely believe could be proven with the information that was available to the prosecutor(3rdPCRTr.504, 529-30). The trial judge just disagreed with this criteria, opining generally that he does not believe an aggravator should be filed unless the prosecutor knows the aggravator will be proved(3rdPCRTr.529).

Sloss did not testify that prosecutors file notices of aggravators quickly (3rdPCRL.F.363-65), but instead testified that there was no consistent pattern as to when aggravators were filed, sometimes they were filed early and other times they were filed late(3rdPCRTr.504).

Sloss did not state that he believed that an indictment or information was the initial charging document(3rdPCRL.F.363-65). Instead, Sloss testified that for purposes of the study, the researchers did not consider the complaint as the initial charging decision(3rdPCRTr.515).

The non-inclusion of dismissed cases simply does not detract from the study's validity(3rdPCRLF363-65). Cases that were dismissed would not have required prosecutors to have to decide whether to file aggravators or not, since they were dismissed. Furthermore, the Office of State Court Administrator was the source of the study's caselist and the researchers were more thorough having found cases that Office missed(3rdPCRTR.363-64). Additionally, faulting the study for not including dismissed cases is illogical because the researchers tried to get that information, but the Office of State Court Administrator declined to make that information available because it was prohibited by statute from disclosing the identity of defendants whose cases were dismissed(3rdPCRTr.388-90). Moreover, as Sloss noted, cases that start out charged as first degree murder are rarely dismissed(3rdPCRTr.388-90). Even if a case is dismissed, it is typically then refiled, so that overwhelmingly the study took into account dismissed cases(3rdPCRTr.388-90).

Sloss did not testify that newspapers were relied on to determine facts in a case(3rdPCRL.F.363-65). Newspaper articles were only relied on as supplements to the police reports which were the most important source of information in the study(3rdPCRTr.370,373-74,506,521).

The databases were not inaccurate and incomplete(3rdPCRLF363-65), they were more complete than the Office of State Court Administrator's records were while that office has a mandate to maintain a database of all cases(3rdPCRTr.363-64). Moreover, the researchers found 98% of the homicide cases that were charged(3rdPCRTr.363-64).

The researchers did not need to talk to witnesses, police officers or investigators(3rdPCRL.F.363-65) because they had the police reports and when they needed to supplement those reports, they looked to other sources that were at least as reliable, like appellate court opinions and newspaper articles(3rdPCRTR.506,521).

Relying on "MULES" and the F.B.I. as sources of prior convictions (3rdPCRL.F.363-65) is entirely appropriate to do since it is the F.B.I. who Missouri officials turn to for this information(3rdPCRTr.506-07).

While police reports and prior convictions are not the only sources of information prosecutors rely on(3rdPCRL.F.363-65), they do best approximate the information available to prosecutors since prosecutors would not release their files to the researchers(3rdPCRTr.370,373-74,503).

The decision to include cases where there were guilty pleas to first degree murder as cases where aggravators were filed is not flawed (3rdPCRL.F.363-65) because there would not be any incentive to plead guilty to life without parole, unless the state had decided to seek death(3rdPCRTr.481,508).

In Boone County, death was sought in 34.6% of the cases which was at least 50% higher than any of the rest of the state(3rdPCRTr.478-80,484-85;3rdPCREx.86). In Boone County, death was actually imposed in 11.5% of the cases which stands in stark contrast to St. Louis City - 0.4%,) Jackson County - 0%, St. Louis County - 5.2%, and the remainder of the state - 3.9%(3rdPCRTr.485-86; 3rdPCREx.86). Both the charging decisions and cases where death was actually imposed in Boone County reflect that seeking death against Ernest was the product of a "geographic lottery."

The Eighth Amendment prohibits the arbitrary and capricious imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). The study's findings as to Boone County establishes that Ernest's punishment was the product of a "geographic lottery" and that his punishment violates the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty. The punishment here reflects local, Boone County community standards and does not satisfy the Eighth Amendment and due process. *See Place Matters (Most)* and *Gregg, Woodson, and Lankford*. The Missouri Legislaure has improperly delegated to prosecutors the role of establishing statutory limits on capital punishment. *See Place Matters (Most).*

This Court should vacate Ernest's sentences and impose life without parole.

CONCLUSION

For the reasons discussed in Points I, II, III, IV, and V this Court should order a new penalty phase. Further for the reasons discussed in Point VI, this Court should impose a sentence of life in prison without parole.

Respectfully submitted,

_____
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CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, 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 2007, 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 26,918 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 Symantec Endpoint Protection program, which was updated in August, 2010. 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 with brief appendix and a floppy disk containing a copy of this brief were mailed postage prepaid this 26th day of August, 2010, to Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

_____

William J. Swift

APPENDIX

IN THE
MISSOURI SUPREME COURT

ERNEST JOHNSON,	**)**	
	)	
Appellant,	**)**	
	)	
vs.	**)**	**No. SC 90582**
	)	
STATE OF MISSOURI,	**)**	
	)	
Respondent.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF COURT OF BOONE COUNTY,
MISSOURI THIRTEENTH JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE GENE HAMILTON, JUDGE

APPELLANT'S APPENDIX TO BRIEF

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APPENDIX TO BRIEF CONTENTS