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 REPLY BRIEF

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JURISDICTION AND STATEMENT OF FACTS

The original brief's Jurisdictional Statement and Statement of Facts are incorporated here.

POINTS RELIED ON

I.

CALLING HISTORICALLY UNPREPARED UNQUALIFIED INCREDIBLE "ADVOCATE" KEYES

The motion court clearly erred in overruling Ernest's postconviction motion as effective counsel would not have called Keyes, but would have called experts like Drs. Brown, Connor, and Adler, because counsel knew more than one year before retrial Keyes was a witness defiant to being prepared for when the court scheduled retrial who did not have ten hours in seven weeks to review Heisler's work, counsel complained mightily to the court Keyes was "eccentric" and "not being reasonable" such that his behavior "incense[d]" them and the trial court responded condemning Keyes' recalcitrant behavior as "really dedicated" and he better not later claim to need to be in "Timbuktu." Ernest was prejudiced because Keyes did not remember having viewed the Heisler video, the reason he was called to testify, Keyes testified no other members of Ernest's family were mentally retarded when his mother and brother were, and Keyes made Smith incredible on everything Smith testified about because Smith relied on Keyes to conclude Ernest was mentally retarded.

Goodwin v. State,191S.W.3d20(Mo.banc2006);

Skaggs v. Parker,235F.3d261(6th Cir.2000).

II.

EVIDENCE ROD ORCHESTRATED OFFENSE

The motion court clearly erred in overruling Ernest's postconviction motion as effective counsel would have presented evidence available from witnesses Michael Maise and Officer McDonald as their testimony was critical because the jury should have been allowed to weigh Rod Grant's sweetheart deal for placing the blame entirely on Ernest and having dismissed the three murder charges against Rod involving Caseys' employees and Maise's testimony that Rod told Maise that Rod went to Casey's to be sure Ernest did what Ernest was supposed to do and Officer McDonald's testimony that as part of investigating this case Lafonzo Tucker led the police to a shotgun Rod asked Tucker to hide, which Tucker did.

State v. Grim,854S.W.2d403(Mo.banc1993).

III.

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

The motion court clearly erred in overruling Ernest's postconviction motion as effective counsel would have offered into evidence Dr. Bernard's deposition and Ernest's mother's mental health records as counsel testified they had no strategy reason for failing to call Bernard and counsel told the court they had problems locating Bernard and both documents were admissible as materials the testifying experts reviewed.

Hutchison v. State,150S.W.3d292(Mo.banc2004).

VI.

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

The motion court clearly erred in denying the claim the death penalty in Boone County is arbitrarily and capriciously imposed because the decision whether to seek death reflects a "geographic lottery" based on local Boone County community standards because the claim briefed is the same claim pled.

Rule 29.15.

ARGUMENT

I.

CALLING HISTORICALLY UNPREPARED UNQUALIFIED INCREDIBLE "ADVOCATE" KEYES

The motion court clearly erred in overruling Ernest's postconviction motion as effective counsel would not have called Keyes, but would have called experts like Drs. Brown, Connor, and Adler, because counsel knew more than one year before retrial Keyes was a witness defiant to being prepared for when the court scheduled retrial who did not have ten hours in seven weeks to review Heisler's work, counsel complained mightily to the court Keyes was "eccentric" and "not being reasonable" such that his behavior "incense[d]" them and the trial court responded condemning Keyes' recalcitrant behavior as "really dedicated" and he better not later claim to need to be in "Timbuktu." Ernest was prejudiced because Keyes did not remember having viewed the Heisler video, the reason he was called to testify, Keyes testified no other members of Ernest's family were mentally retarded when his mother and brother were, and Keyes made Smith incredible on everything Smith testified about because Smith relied on Keyes to conclude Ernest was mentally retarded.

The state wants to have it both ways when it serves its purposes, as it did in *Goodwin*, it argued that Dr. Keyes is a "purported 'expert,'" who is unqualified to make a diagnosis of mental retardation and incredible. In contrast, when it serves

respondent's purposes here, it casts Keyes as an eminently qualified and credible expert to diagnose mental retardation. This Court should not sanction such behavior.

Throughout respondent misrepresents the factual record and the history it wrote in *Goodwin* about Keyes in hopes that this Court will ignore Ernest's counsel unreasonably called Keyes. Counsel knew more than one year before retrial Keyes refused to and defied the trial court and Ernest's counsel to be prepared. As set forth in Keyes' own sworn affidavit, Keyes did not have ten hours in seven weeks before the March, 2005 trial date to evaluate state expert Heisler's work(3rdPenTr.36-43,59-60,66-67;3rdPCR1stSupp.L.F.6,12). Keyes' defiance of the trial court and counsel to be prepared in March, 2005 prompted the court to condemn Keyes' unprofessionalism as "really dedicated" and that Keyes better not later claim to need to be "in Timbuktu"(3rdPenTr.60-61). Goodwin's postconviction counsel cautioned Ernest's counsel far in advance of when Ernest's case was retried in May, 2006 that Keyes was unprepared to testify in *Goodwin*, resulting in catastrophic consequences (3rdPCRTr.633-34). Yet, Ernest's counsel called Keyes. Such behavior epitomizes ineffective assistance. *Strickland v. Washington*,466U.S.668,687(1984).

Counsel Knew More Than One Year Before Retrial

Keyes Needed Replacing

Ernest's claim here is not that counsel should have abandoned Keyes on the eve of or in the middle of trial(Resp.Br.22). Instead, Ernest's claim is counsel should have severed their association with Keyes more than one year before the case was retried, when they were on notice of Keyes' unfitness and substituted experts, like

Drs. Brown, Connor, and Adler, committed to providing qualified, credible, testimony and who would be perceived as truthful. Counsel were on notice of the need to replace Keyes from their first hand experiences with Keyes, coupled with Goodwin's PCR counsel's reporting of Keyes' unprofessionalism far in advance of the retrial(3rdPCRTr.633). Counsel had a copy of Goodwin's findings issued almost two years before Ernest's retrial(3rdPCRTr.633-34;3rdPCREx.61).

Respondent asserts this Court's *Goodwin* opinion was handed down two days before Ernest's retrial, and therefore, came too late to replace Keyes(Resp.49). Ernest's claim that counsel should have acted as reasonable counsel and replaced Keyes **is not premised on this Court's *Goodwin* opinion**, but instead on:

- Goodwin's findings entered in July, 2004 almost two years before Ernest's May, 2006 retrial(3rdPCREx.61) and Ernest's counsel had them(3rdPCRTr.633-34).
- counsel had discussed Keyes' unpreparedness with Goodwin's 29.15 counsel substantially before Ernest's retrial(3rdPCRTr.633).
- Keyes' defiance to be prepared more than one year before retrial because he did not have ten hours in seven weeks to evaluate state expert Heisler's work because of Keyes' work on other cases and teaching duties.
- Counsels' outrage with Keyes more than one year before retrial that he was "eccentric" and "not being reasonable" so as to "incens[e]"(3rdPenTr.59-61,66-67,70).

- The trial court's condemnation of Keyes' unprofessionalism and defiance more than one year before retrial that Keyes was "really dedicated" and counsels' endorsement of that condemnation that **"you'd think he would be, in the line of work that he's in"**(3rdPenTr.60-61)(emphasis added).
- The trial's court's condemnation of Keyes more than one year before retrial that Keyes better not later claim to need to be in "Timbuktu"(3rdPenTr.70).

Reasonable counsel confronted with all this information more than one year before retrial would have discharged Keyes and substituted other qualified experts, like those from the 29.15. *See Strickland*.

Respondent asserts this claim should be rejected because all Keyes did was refuse once not to disrupt his teaching schedule(Resp.Br.22,47). Instead, the issue is that counsel was on notice of Keyes' devastating unprofessional unpreparedness in *Goodwin* far in advance of retrial and had experienced themselves the same thing. Keyes put in his sworn affidavit in support of a continuance that he did not have ten hours in seven weeks to review state expert Heisler's work because of his other commitments as a professor and consulting duties on other cases to be heard in the winter and spring(3rdPenTr.38,42-43;3rdPCR1stSupp.L.F.12). What Keyes did was dictate to the trial court and counsel that his other cases' scheduling took priority over the March, 2005 trial date. Reasonable counsel had an abundance of time to replace Keyes and would have done so. *Cf. Skaggs v. Parker*, 235 F.3d261(6thCir.2000)(counsel who knew expert's past bad performance, but called

expert anyway because it was easier not to expend effort to obtain replacement was ineffective)(discussed in detail App. Orig. Br at 50-51).

Attorney General's Rewriting History It Wrote

About Keyes In *Goodwin*

This Court's *Goodwin* opinion shows this Court should not tolerate the Attorney General's doublespeak. The state won *Goodwin* in this Court arguing:

- Keyes was a "purported 'expert'" who was "not qualified to offer a diagnosis of mental retardation." State's *Goodwin* brief at 39.
- Keyes was '"unworthy of belief"' *Id*. at 36 (quoting Findings).
- Keyes was neither credible nor qualified. *Id.* at 31,35-36.
- Keyes' testimony was properly rejected because he was not a licensed psychologist, and therefore, unqualified to diagnose mental retardation. *Id*. at 31,35-36.

This Court's *Goodwin* opinion rejected Keyes' *Goodwin* mental retardation testimony on multiple grounds. *Goodwin v. State*,191S.W.3d20,32(Mo.banc2006). Keyes' testimony failed to establish mental retardation because the 29.15 judge found Keyes "incredible." *Id.* at 32. This Court quoted from Goodwin's findings: '"Dr. Keyes' assertion [is] unworthy of belief."' *Id.* at 32. This Court relied on and quoted from the findings:

> 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." *Goodwin*, 191 S.W.3d at 33. This Court concluded Keyes was unqualified stating: "Dr. Keyes is not certified or licensed as a psychologist or psychiatrist." *Id.* at 33.

Respondent would like this Court to believe counsel called someone eminently qualified and credible. Respondent seeks to rewrite the history it wrote in its *Goodwin* brief in this Court where it trashed Keyes as '"unworthy of belief,"' a '"purported 'expert,"' and someone "not qualified to offer a diagnosis of mental retardation." *See* state's *Goodwin* Brief at 28,31,35-36,39. A prosecutor's interest in a case is not just to win the case, but to see that justice is done. *Berger v. United States*,295U.S.78,88(1935). This Court should not countenance such a reversal of views on Keyes when it suits the Attorney General's agenda.

Respondent claims this Court's *Goodwin* opinion is not controlling because it noted that Keyes' opinion was based solely on materials PCR counsel supplied in "an effort to bend Keyes's testimony" and for that reason Keyes' credibility was not in question, but instead Goodwin's PCR counsels' credibility was(Resp.Br.50). Respondent adds that Keyes was not shown to be qualified to test a hearing impaired individual like Goodwin(Resp.Br.50). Respondent's Goodwin arguments were that Keyes was unqualified to diagnose mental retardation because he was not a licensed

psychologist and Keyes was an incredible witness. *See supra*. This Court adopted respondent's *Goodwin* arguments and they are just as applicable here.

Respondent asserts the jury did not hear the *Goodwin* motion court's findings and this Court's opinion(Resp.Br.50). Respondent points to an agreement the prosecutor would not use this Court's *Goodwin* opinion to cross-examine Keyes(Resp.Br.28 relying on 3rdPen.Tr.640-42). What the prosecutor agreed not to do was ask questions like: "Isn't it true the Missouri Supreme Court has found you to not be qualified as an expert in *Goodwin*?"(3rdPen.Tr.641-42).

The prosecutor had the transcript of Keyes' *Goodwin* testimony and relied on it in cross-examining Keyes(3rdPenTr.641-42). The prosecutor's questioning of Keyes repeatedly emphasized that Keyes was both unqualified and incredible and that was founded on what happened in *Goodwin*. Respondent's cross-examination of Keyes focused on Keyes was a school psychologist who was unqualified to make diagnoses as to mental disease or defect, that Keyes' work 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)(emphasis added). 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 he repeatedly attacked

Keyes as unqualified and incredible. The prosecutor attacked Keyes in the same way he was attacked in *Goodwin* – showing he was unqualified and incredible. The reason Keyes could be attacked as unqualified was because of *Goodwin*. 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).

Keyes' Devastating Testimony

Keyes testified he never viewed the Heisler videotape, which was the only evidence the jury heard from Heisler **as Heisler was not called as a live witness**(3rdPenTr.1607-08). The jury heard Heisler's opinion Ernest was not mentally retarded through respondent's cross-examination of defense witnesses(3rdPenTr.1427-28,1667). As counsel told the court at the continuance proceedings, this case "come[s] down to, in my opinion, which expert the jury believes"(3rdPenTr.41). Keyes' very reason for being in the case was to be the counter authority to state's expert Heisler, surely Keyes should have known whether he viewed the Heisler video or not. The reason Keyes did not remember seeing the Heisler video was he was too busy teaching and testifying in fifteen cases per year earning half his income from that testimony(3rdPenTr.1639). The prosecutor argued to the jury 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). What the jury took from the prosecutor's cross-examination, that included Keyes had found six of eight Missouri

defendants he evaluated mentally retarded (3rdPenTr.1640-41), and argument was Keyes hit the lottery in *Atkins v. Virginia*,536U.S.304(2002) and parlayed it into a financial bonanza for himself.

Respondent seeks to excuse Keyes' unpreparedness because he corrected himself, while it claims all his miscues involved "trivial or collateral matters" claiming Keyes provided "consistent and coherent" testimony(Resp.Br.47). As trial counsel told the court, this case came down to which side's expert was believed(3rdPenTr.41). On direct, Keyes testified that he observed that Ernest was unable to grasp information as it was presented to him, to express himself in ways others can understand, and to understand abstractions(3rdPen.Tr.1607). What immediately followed was:

> Q. Did you observe that interaction in the interactions of say -- Have you reviewed Dr. Heisler's videotape?
>
> A. Yes. Oh, no, I did not see Dr. Heisler's videotape. I'm sorry.
>
> Q. You didn't see the videotape of Dr. Heisler?
>
> A. No. I'm sorry, I did not see it.
>
> MR. CISAR: Can we take a break, your Honor?
>
> THE COURT: I'm sorry?
>
> MR. CISAR: We need to take a break, your Honor. About five minutes, if that's okay.
>
> THE COURT: Why?
>
> MR. CISAR: May we approach?

THE COURT: You may. Approach the bench, Counsel.

(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING PROCEEDINGS WERE HAD:)

THE COURT: What's the problem?

[THE PROSECUTOR]: Big shock?

MR. CISAR: Well, yeah, it's a big shock, because he watched that.

THE COURT: I don't know. Ask him another question about it. But he says he didn't, so.

MR. CISAR: Well, he needs to watch it again then, but he watched the video, I know.

[THE PROSECUTOR]: Are you going testify for him?

MR. CISAR: No, I am not.

[THE PROSECUTOR]: But he's -- maybe we can --

THE COURT: Either he knows or he doesn't know.

MR. CISAR: That's why I need to take a break so we can review.

THE COURT: You're not going to review his testimony, are you?

MR. CISAR: **I'm not going to review his testimony. I'm going to review the fact that he reviewed this video.**

THE COURT: I'll let you ask other questions about it, but we're not going to take a recess.

[THE PROSECUTOR]: I mean, he may have memory deficits.

MR. CISAR: It's --

THE COURT: I mean, he either remembers or he doesn't.

MR. CISAR: I appreciate that, but he may be --Well --

THE COURT: Okay. Let's proceed.

(THE PROCEEDINGS RETURNED TO OPEN COURT.)

BY MS. CARLYLE:

Q. Let's go on to Mr. Johnson's ability for reading and writing, which you've identified as deficient. Yes.

(3rdPenTr.1607-09)(emphasis added). The jury then heard additional testimony from Keyes, and his finding Ernest is mentally retarded(3rdPenTr.1625). Counsel, in the jury's presence, informed the court direct was finished and a recess was declared(3rdPenTr.1625-26). When the recess concluded, counsel requested leave to reopen Keyes' direct and that was granted(3rdPenTr.1626-27). That entire questioning was:

BY MS. CARLYLE:

Q. Dr. Keyes, during the break, have you had a chance to briefly review portions of the video of Dr. Heisler's testimony which was admitted in this matter as State's Exhibit 78?

A. Yes, I did.

Q. And based on that review, do you now -- have you ever seen it before?

A. Yes, I have.

Q. Thank you.

A. I apologize.

THE COURT: Okay. Cross-examination.

(3rdPen.Tr.1627). Every juror in that courtroom knew that there was huddle involving counsel and Keyes during the recess and what went on was "**review[ing] the fact that he reviewed this video.**"(3rdPenTr.1609)(emphasis added). After seeing and hearing what took place about the Heisler video, no reasonable juror would have believed anything Keyes said about Ernest and certainty would not have believed anything Smith said because Smith relied on Keyes. *See* Smith discussion *infra*.

Keyes' unpreparedness on the Heisler video was especially prejudicial and devastating in light of 29.15 counsel's testimony that their strategy included relying on the Heisler video because they perceived portions as highlighting Ernest is mentally retarded(3rdPCRTr.610-11).[1] When counsel asked Keyes about the Heisler video, *see supra*, and Keyes did not remember it, the context of that questioning shows that counsel was trying to get Keyes to highlight how the deficits Keyes identified were evident in the Heisler video(3rdPenTr.1607-08). Thus, the damage was multifaceted, the jury would not believe anything Keyes said and it did not hear how Heisler's video's contents were consistent with Ernest being mentally retarded.

[1] Point IV alleges that counsel was ineffective only for failing to have redacted portions of the Heisler video relating to Heisler's interrogating Ernest whether he was "good for the crime" and does not challenge counsels' strategy in viewing portions of that video as supporting Ernest is mentally retarded.

Moreover, the prosecutor's use of the Heisler video on cross of Keyes demonstrates this was not a claim about "trivial or collateral matters"(Resp.Br.47). 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, but Keyes did not know why Ernest was there(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).

Keyes,' testimony there was no other family members who were mentally retarded when both Ernest's mother and brother are was not a "triviality"(3rdPenTr.1717;3rdPCREx.21 at 8,10,12,14-15). The redirect corrective actions (Resp.Br.33,47) only elicited Ernest's brother was mentally retarded(3rdPenTr.1747-50). 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's brother's mentally retarded status was especially significant because it supported that Ernest has FASD as Ernest's brother's condition was more severe than Ernest's 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).

In seeking to excuse Keyes having testified there was no one else in Ernest's family who was mentally retarded (3rdPen.Tr.1717), respondent points to Dr. Parwatikar's testimony Ernest's mother had "mental problems"(Resp.Br.33 relying on 3rdPen.Tr.1296-97). The impact of Keyes not knowing Ernest had other mentally retarded family members, his mother and brother, was not lessened since having "mental problems" simply did not convey a mental retardation family history. That misstatement was prejudicial because Ernest's mother's mental retardation history was especially significant because of the genetic link between brain structure and I.Q.(3rdPCRTr.280-81).

Respondent references Keyes having testified in the Ben-Johns' and Parkus' bench tried matters and they were found mentally retarded(Resp.Br.46-47). That Keyes provided testimony that assisted Ben-Johns and Parkus did not make counsels' choice of Keyes reasonable when they were on notice of Keyes' *Goodwin* unpreparedness and Keyes having shown himself to be defiant to being prepared to testify because he did not have ten hours in seven weeks to review Heisler's work.

The Attorney General misrepresents to this Court, like the prosecutor repeatedly prejudicially did to the jury(3rdPenTr.1672,1796-97,1799), that Keyes was "the first expert" to find Ernest was mentally retarded(Resp.Br.22,30,46). In fact, Dr. Bernard provided testimony for both the first and second PCRs that Ernest's I.Q. was under 75 falling between 71 to 73 and that Ernest always was mildly mentally retarded(1stPCRTr.58,60;3rdPCREx.15 at 5-7,24-25,55). When this Court remanded for a retrial on mental retardation, it noted Bernard is "a psychologist with

considerable experience in mental retardation." *Johnson v. State*,102S.W.3d535,538(Mo.banc2003). Bernard had found that Ernest's poor academic performance was indicative of mental retardation and that he had deficient adaptive skills. *Id*. at 538-39.

According to respondent, Drs. Brown's, Connor's, and Adler's testimony would not have mattered because the third penalty phase's focus was mental retardation, not the prenatal impact of Ernest's mother's alcohol abuse(Resp.Br.23). Respondent asserts the remand was about whether Ernest was mentally retarded, not whether he has FASD(Resp.Br.54). The 29.15 experts' testimony linked Ernest's in-utero exposure to alcohol to him being mental retarded, and therefore, credible FASD evidence was critical to how the jury decided whether Ernest is mentally retarded(3rdPCRTr.42-47,51-52,91-92,116-17,132,224,226,239,263-64,287-88,292-95,297-300,308,315-28; 3rdPCREx. 17 at 2; 3rdPCREx.24 at 2-3,9-10,14-15,39-40,44; 3rdPCREx.29 at 11; 3rdPCR Ex.32 at 24-27; 3rdpCREx.35; 3rdPCREx.36).

Respondent asserts Ernest was not prejudiced because of the disturbing facts of how the Casey's employees died and because three juries imposed death(Resp.Br.56-57). Only the last, third jury, heard mental retardation evidence from a witness who the state successfully portrayed as an unqualified incredible money grubbing paid hack because of what happened in *Goodwin*. Ernest's last jury heard testimony from Keyes who the Attorney General argued in *Goodwin* was a "purported 'expert,'" "not qualified to offer a diagnosis of mental retardation," and '"unworthy of belief."' This Court wholeheartedly endorsed those views. *See*, *supra*, State's *Goodwin* brief and

this Court's *Goodwin* opinion. Counsel unreasonably failed to act on Keyes' unfitness to testify.

The disturbing details of how these employees were killed is important because there is substantial reason to believe Rod orchestrated this offense and was the main actor. *See* Point II. It is for that reason that it was so critical the jury have heard credible mental retardation evidence.

Keyes' Incoherent Testimony

While respondent asserts Keyes provided "coherent" testimony (Resp.Br.47) respondent's own brief underscores that Keyes was an unprepared, incredible, incoherent witness on whether it was appropriate to consider Ernest's prison behavior in assessing adaptive skills(*See* Resp.Br. at 31-32,48). On direct examination, Keyes testified it was inappropriate to take into account Ernest's prison behavior for purposes of adaptive functioning, because of how structured prison is(3rdPenTr.1616-17). On cross-examination, Keyes testified:

> Q. With all due respect, Doctor, did you look at and evaluate Mr. Johnson's adaptive behaviors in the penitentiary?
>
> A. No. I did not.
>
> Q. You did not at all?
>
> A. No.

(3rdPenTr.1655). Keyes later testified he took into account Ernest's assigned prison job as to adaptive behavior(3rdPenTr.1657-58 L.8). Next, Keyes testified, still on cross-examination, as follows:

Q. Now, you told the jury, you said, don't consider it, that conduct in the penitentiary.

A. If that was my impression -- if that was the impression I gave you, I apologize. That is not correct. You do have to consider all the behavior. (3rdPenTr.1658 L.24 -1659). Keyes contradicted himself and was incoherent.

Smith Was Incredible On Everything Because Keyes Was His Basis For Opinion Change

Respondent would like this Court to believe Keyes did such stellar work that he "convinced" Smith to change his opinion to Ernest is mentally retarded(Resp.Br.46). In fact, what happened was that Smith was rendered equally incredible as Keyes on everything Smith testified to as to Fetal Alcohol Effect and mental retardation because he relied on incredible Keyes to arrive at his changed opinion. 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). On cross-examination of Smith, the prosecutor elicited that before making a psychological diagnosis that it is "imperative" to rule out other possible problems and their manifestations and you have to be "qualified to diagnose a range of mental diseases"(3rdPenTr.1434-35). 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). In closing argument, the prosecutor, who attacked Keyes throughout as unqualified and

incredible, told the jury Smith based his mental retardation change in opinion on Keyes(3rdPenTr.1797).

According to respondent, Ernest was not prejudiced because the 29.15 experts' testimony was cumulative to Keyes and Smith(Resp.Br.23,50,53-54). But, respondent successfully attacked Keyes as unqualified and incredible and Smith for relying on Keyes(3rdPenTr.1436-40,1797-98). Smith was damaged goods as to everything he testified to because he relied on Keyes(3rdPen.Tr.1436-40,1797). The net effect was the jury did not hear credible mental retardation evidence. Thus, cases like *State v. Ferguson*,20S.W.3d485,509(Mo.banc2000)(Resp.Br.55) are inapplicable.

Respondent states Smith testified that he had changed his opinion based "on the work performed by both Drs. Keyes and Heisler"(Resp.Br.33). What Smith actually said was that **the I.Q. test results** Keyes and Heisler obtained meet the I.Q. criteria for mental retardation(3rdPen.Tr.1381,1426-27,1457). Smith could not have changed his opinion based on Heisler because Heisler found Ernest was not mentally retarded(3rdPen.Tr.1457).

29.15 Experts Integrated All Prior Evaluations

Respondent, like the findings the 29.15 prosecutor wrote(3rdPCRL.F.318-19) and the 29.15 court signed(3rdPCRL.F.362), states the 29.15 experts' opinions were premised on Keyes and Smith(Resp.Br.41,49,51-53).

The FASD experts took into account Keyes' test results were not inconsistent with their own independent conclusions(3rdPCRTr.95). Brown's detailed report discussed the examinations, findings, and conclusions of **everyone** who ever

examined Ernest whether those were done on behalf of the defendant, the state, or pursuant to court order. *See* Brown's report 3rdPCREx.23. Brown interspersed the findings from these other evaluations placing them in context with her independent findings(3rdPCREx.23). Brown's report noted that Keyes, Heisler, and Dr. Connor obtained nearly identical verbal I.Q. scores(3rdPCREx.23 at 40,48). Brown relied on Dr. Kline's findings as to Ernest's substance abuse history(3rdPCREx.23 at 55). Brown explained why Peters' anti-social finding was incorrect(3rdPCREx.23 at 56,60). Brown's report recounted statements Ernest made to Heisler on videotape(3rdPCREx.23 at 60).

The 29.15 experts did take into account Keyes' data and work, but they did not base any findings "primarily" on Keyes or any other examiners, including Smith, who preceded them. 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. They took into account: Ernest's school records, teachers' reports, medical records, prior psychological evaluations done for the state, the defense and court ordered, 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, instead integrated it with all the other data from everyone who ever evaluated Ernest(3rdPCRTr.81,94,245,251-53,257;3rdPCRExs.23,29,32).

Respondent states Connor relied on Keyes' testing(Resp.Br.42). What respondent omits is that Connor, like Brown, also incorporated into his analysis examiners who had opinions unfavorable to Ernest, among them Heisler and Kline, as well as, examiners who had favorable opinions(3rdPCREx.29). Respondent asserts that Connor relied on Keyes' 2003 testing to find mental retardation(Resp.Br.42 relying on 3rdPCRTr.240). What respondent fails to apprise this Court is that in referencing Keyes' test results, Connor stated that the issues Keyes identified were present in Ernest's I.Q. testing done in 1968 and 1972, when he had I.Q. scores of 72 and 63(3rdPCRTr.240). Connor did his own I.Q. testing of Ernest twice(3rdPCREx.29 at Summary Scores attachment;3rdPCRTr.64-65). Connor stated that even when Ernest was eight to twelve years old he had an I.Q. that was within the mildly mentally retarded range(3rdPCRTr.240).

29.15 Experts Were Competent And Prepared

In an effort to minimize Keye's unpreparedness, and to distract this Court from just how devastating Keyes was, respondent asserts the 29.15 experts, were also guilty of "minor misstatements"(Resp.Br.48). According to respondent "Dr. Brown could not remember that Mr. Bradshaw performed I.Q. testing for Dr. Heisler until post-conviction counsel reminded her"(Resp.Br.48 relying 3rdPCRTr.63). Dr. Brown was explaining the Flynn Effect as it applied to Ernest's I.Q. scores and was doing so in conjunction with 3rdPCR Ex.25(3rdPCRTr.55-65). That Exhibit 25, included in the Appendix to Ernest's original Brief, is a chart that lists seven I.Q. tests administered by six individuals starting in 1968 and ending in 2008(3rdPCREx.25). For each test

date an I.Q. was administered there are columns for: (1) test dates; (2) Full Scale I.Q.; (3) **name of the person who administered the I.Q. tests**; (4) year tests were normed; (5) Flynn Effect coefficient; and (6) Flynn Effect adjusted scores(3rdPCREx.25). The relevant questioning was:

Q. And then Ernest was given another WAIS-III in July of 2004 by Wayne Bradshaw?

A. Yes.

Q. Do you recall that?

A. Yes.

Q. And do you recall who Wayne Bradshaw was?

A. He was the psychometrist for -- I can't remember who he worked with, but he --

Q. Would that have been Dr. Heisler, the State's doctor?

A. Yes. And he did all of Dr. Heisler's testing.

(3rdPCRTr.63).

Respondent states Brown "mistook testing performed by Dr. Cowan as having been performed by Dr. Smith"(Resp.Br.48 relying on 3rdPCRTr.121-22). Brown's testimony shows that she was again discussing the data found in the 3rdPCREx.25 chart. Brown's testimony was as follows:

Q. Now, going back to the first criterion, which was the intellectual functioning, in regard to Ernest Johnson, the IQ tests that we have talked about

taken over his -- that he has taken over his lifetime, how many of those scores fall within the mentally retarded range?

A. Six out of the seven scores on the chart reviewed earlier fall within the mild mental retardation range.

Q. And the only one that does not would be which score? If you need to look at it --

A. I believe that was Dr. Smith's test. I can't recall who administered that test.

Q. Would that be the one taken in '95 by Dr. Cowan?

A. Oh, Dr. Cowan, yes. That would be Dr. Cowan's test. And his IQ score was in the borderline range after the Flynn adjustment, but in the low average range, between the low average and the borderline range prior to the Flynn adjustment.

(3rdPCRTr.121-22). That Brown did not have at her memory's fingertips who administered two of seven I.Q. tests in the 3rdPCREx. 25 chart had no bearing on her Flynn Effect analysis. That Keyes did not remember having viewed the Heisler video and denied Ernest had a family history of mental retardation, including Ernest's mother, was devastating.

Respondent states that Brown testified her "memory [was] pretty vague" on the Heisler video(Resp.Br.48 relying on 3rdPCRTr.159). Exhibit 78 was the entire videotape meeting with Heisler, while Ex.78A is abridged excerpts and both were admitted at trial(3rdPenTr.691-92). Brown was asked on cross which version she

viewed and testified that in 2008 she watched the 10 segment abridged version(3rdPCRTr.159;see transcript of Ex.78A). When Brown was asked if she recalled the segment of Ernest making change for Heisler, she indicated she remembered it, but her memory of it was pretty vague(3rdPCRTr.159). When Brown was asked if she recalled the segment of Heisler showing Ernest a magic trick, she testified she did not recall that(3rdPCRTr.159-60). Brown accurately testified she did not recall the magic trick for good reason – it is not included in the abridged version(*See* Transcript of Ex.78A). Unlike Keyes, who had no memory of ever having watched the Heisler video when asked, Brown testified about which version she viewed and testified accurately.

Respondent also faults Brown, asserting she could not remember whether counsel introduced her to Ernest at Potosi and Brown indicating she did not have a specific memory for that(Resp.Br.48 relying on PCR3rdTr.182). The 29.15 prosecutor's questioning was:

> Q. Okay. When you interviewed Mr. Johnson, when you first went to go meet him at Potosi, were you the only one present besides Mr. Johnson?
>
> A. Yes.
>
> Q. And no one met with him, with you and him before you started your interview and testing?
>
> A. I don't recall that anyone was there to introduce us. Although, Cindy Malone [29.15 Mitigation Specialist] may have been there to introduce us, but

I don't recall. I do so many evaluations that I just don't have a specific memory of that.

Q. Okay.

A. If she was there, it was very briefly, just to introduce us.

(3rdPCRTr.182). Unlike Keyes, who could not recall matters that went to the very essence of why he was called, Brown recalled that she met with Ernest alone and may have been introduced to him by 29.15 Mitigation Specialist Malone.

Respondent states Brown testified "she could not recall which testimony of Dr. Smith she had reviewed" because of the volume of casefile documents(Resp.Br.48-49 relying on 3rdPCRTr.189). As it does throughout, respondent seeks to portray the record divorced from context. Brown was asked whether she had reviewed Smith's testimony from the third penalty phase because in her report's listing of Smith's work she reviewed that was not included(3rdPCRTr.142;3rdPCREx23 at 65). Brown indicated that was an inadvertent omission because she had reviewed all the third penalty transcripts(3rdPCRTr.142-43,189). More importantly, to be contrasted with Keyes, Brown indicated that Smith had testified at the third penalty phase regarding Fetal Alcohol Effect, which is now referred to as ARND(3rdPCRTr.189).

Respondent faults Adler because he referred to Ernest's mentally retarded brother Daniel Patton as being an alcoholic and crack addict(Resp.Br.49 relying on 3rdPCRTr.281-82). In the third penalty phase, Ernest's brother Bobby Johnson testified that he was an alcoholic and drug addict(3rdPenTr.1013,1058,1063). During his testimony, Adler merely confused the names of which of Ernest's brother's Daniel

Patton or Bobby Johnson was mentally retarded, unlike Keyes who said there was no other members of Ernest's family who were mentally retarded(3rdPenTr.1717).

Respondent faults Adler for not remembering Ernest's art teacher Mason who was mentioned in Adler's report(Resp.Br.49 relying on 3rdPCRTr.333-34). Adler was asked about having referenced the testimony of Steven Mason in Adler's report(3rdPCRTr.333-34). At first Adler did not recognize Mason's name, but when Adler was told Mason had been Ernest's art teacher, he immediately connected Mason's name and his report(3rdPCRTr.333-34).

Respondent faults Adler for referring to his report(Resp.Br.49 relying on 3rdPCRTr.345). In fact, the 29.15 prosecutor asked Adler whether he had referred in his report to Ernest's mother's mental health records for two psychiatric admissions one in the 1970s and one in the 1990s(3rdPCRTr.344-45;3rdPCREx.32 at 12-13). Before answering, Adler checked his report to confirm that what the prosecutor was representing about it was accurate(3rdPCRTr.345;3rdPCREx.32 at 12-13). The 29.15 prosecutor then continued a line of questions about the report's exact details(3rdPCRTr.344-46; 3rdPCREx.32 at 12-13). In light of the prosecutor's pointed questioning about Adler's report's contents, he certainly ought to be expected to reference it.

29.15 Experts Available Since 1990s

Respondent asserts Ernest's claim should be rejected because Brown testified the collegial team she formed with Connor and Adler happened in 2006 and since this case was tried in May, 2006, the 29.15 experts could not have been

called(Resp.Br.23,52-53). Brown testified she established a multi-disciplinary team in 2006(3rdPCRTr.13). Brown also testified that throughout the 1990s until the time of her 29.15 testimony she "specialized in Fetal Alcohol Spectrum Disorders"(3rdPCRTr.13). During that time Brown treated children with FASD conditions and did many FASD evaluations(3rdPCRTr.13). Respondent misrepresents Brown "predominatly treated sex offenders"(Resp.Br.39). Brown testified that her specialities include both Fetal Alcohol Spectrum Disorders and sexual offender evaluations(3rdPCRTr.11). Brown is an Assistant Clinical Professor at the University of Washington Department of Psychiatry with her work devoted to "predominantly consulting" with the Fetal Alcohol and Drug Unit(3rdPCRTr.14). The University of Washington's Fetal Alcohol Unit has existed for decades, since the 1970s(3rdPCRTr.14).

Dr. Connor testified that his area of expertise is neuropsychological assessments for Fetal Alcohol Spectrum Disorders and his work in that area began in 1995(3rdPCRTr.200). Connor began his affiliation with the University of Washington in 1995(3rdPCREx.28).

Dr. Adler was associated with the University of Washington School of Medicine since 1998 and has specialized training and experience with FASD (Fetal Alcohol Spectrum Disorders) (3rdPCREx.31;3rdPCR).

While there was some formalistic designation as a team by the 29.15 experts in 2006, Brown, Connor, and Adler have all been engaged in the diagnosis and treatment of FASD since the 1990s while affiliated with the University of Washington. Thus,

they, or other similarly situated experts, were readily available and qualified to be called at Ernest's May, 2006 retrial.

The amended motion alleged as to Drs. Brown, Connor, and Adler, that they "or a similarly qualified expert" should have been called(3rdPCRL.F.58,60,62). In *Hutchison v. State*,150S.W.3d292,307(Mo.banc2004), this Court recognized that a 29.15 movant does not have to claim counsel should have called the specific experts who testified at the 29.15 hearing only that the same type of expertise should have been pursued by trial counsel as at the 29.15. It was not necessary that counsel have called Brown, Connor, and Adler, only that they have called a similarly qualified expert or experts. *See Hutchison*.

§565.030.6's Requirements Come From DSM-IV

According to respondent, Keyes and Smith were more persuasive witnesses than the 29.15 experts because their testimony tracked the mental retardation statute, while the 29.15 experts' testimony "tailored" their testimony "to fit the criteria under the DSM-IV"(Resp.Br.53-54). Goodwin's claim failed to meet each of the three statutory prongs required to establish mental retardation under §565.030.6. *Goodwin*,191S.W.3d at 29-33. As to all three prongs this Court began its analysis noting that the statutory requirements **were actually taken directly from the DSM-IV**. *Id*. at 29-33. Thus, the 29.15 experts' testimony, rather than deviating from a persuasive presentation, tracked what this Court recognized as §565.030.6's foundation.

This Court should reverse for a new penalty phase.

II.

EVIDENCE ROD ORCHESTRATED OFFENSE

The motion court clearly erred in overruling Ernest's postconviction motion as effective counsel would have presented evidence available from witnesses Michael Maise and Officer McDonald as their testimony was critical because the jury should have been allowed to weigh Rod Grant's sweetheart deal for placing the blame entirely on Ernest and having dismissed the three murder charges against Rod involving Caseys' employees and Maise's testimony that Rod told Maise that Rod went to Casey's to be sure Ernest did what Ernest was supposed to do and Officer McDonald's testimony that as part of investigating this case Lafonzo Tucker led the police to a shotgun Rod asked Tucker to hide, which Tucker did.

Respondent asserts counsel was not ineffective for failing to call Michael Maise to testify because he was an inmate witness who had sought favorable treatment in exchange for his testimony, and therefore, would not have been a credible witness and before testifying attempted to invoke the Fifth Amendment(Resp.Br.63-64, 68).

This Court has recognized that "[w]eighing credibility and resolving competing versions of the facts are critical tasks that our society entrusts only to juries." *State v. Grim*,854S.W.2d403,418(Mo.banc1993). It is the jury's function to weigh witness credibility. *Id*. at 418.

Maise sought to invoke his Fifth Amendment rights, but testified that there was no way his testimony could implicate him in a crime(3rdPen.Tr.2330). Instead, Maise testified he feared for his safety when he returned to the jail(3rdPen.Tr.2330). Maise's fear viewed in the context of him attempting to invoke the Fifth Amendment did not lessen his credibility.

The jury should have heard Maise's testimony that Rod told Maise that Rod went with Ernest to Casey's to make sure Ernest did what Ernest was supposed to do(T.Tr.2333). While Maise sought unsuccessfully to obtain favorable treatment for his charges having nothing to do with the Casey's employees' deaths (T.Tr.2334-37), Rod's testimony was obtained in exchange for dismissing three counts of second degree murder and armed criminal action for the Casey's employees' deaths and that was contingent on him testifying favorably against Ernest(T.Tr.2078,2139-40). The jury should have been allowed to weigh the sweetheart deal Rod got in which he pled guilty to first degree robbery and would be sentenced to ten years concurrent to the sentences he had for stabbing Deborah with a screwdriver(T.Tr.2139-42).

Rod having assaulted and stabbed Deborah with a screwdriver (T.Tr.2078,2139-40) was especially significant because the prosecutor emphasized to the jury that Mary's hand injuries were caused by her having been stabbed with a screwdriver(3rdPen.Tr.661,1774). The jury could have concluded Rod's modus operandi was to stab women with screwdrivers and that Rod stabbed Mary with a screwdriver. Moreover, even though Rod had admitted selling Ernest and others crack, when Rod testified he had no pending drug charges(T.Tr.2142).

Maise's credibility would have been accentuated by Officer McDonald's testimony that as part of investigating this offense McDonald contacted LaFonzo Tucker(3rdPCRTr.583). Tucker told McDonald that Rod directed Tucker to dispose of a shotgun because Rod did not want the police to find it and Tucker did so(3rdPCRTr.586-88).

That Rod orchestrated this offense and was a co-participant is further supported by Officer Himmel's blood spatter analysis opinion that all three employees were struck multiple times with a hammer(3rdPenTr.794-95,799-801,806-07). Striking three employees multiple times with a hammer is consistent with multiple actors inside Casey's.

Respondent argues Maise's testimony would not have helped Ernest because Ernest made statements Rod was not involved(Resp.Br.68). Ernest also told the police "it took more than one man to do that job," because one was not strong enough(T.Tr.1831,1837-38). The jury should have been allowed to weigh these competing statements. *See Grim, supra.* In particular, the jury should have been allowed to weigh that interrogation statements of mentally retarded people, like Ernest, tend to be inconsistent and unreliable. *See Miller v. State,*770N.E.2d763,770-74(Ind.2002); *Pritchett v. Commonwealth*,557S.E.2d205,207-08(Va.2002).

There was every reason to believe Rod orchestrated and participated in this offense.

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 as effective counsel would have offered into evidence Dr. Bernard's deposition and Ernest's mother's mental health records as counsel testified they had no strategy reason for failing to call Bernard and counsel told the court they had problems locating Bernard and both documents were admissible as materials the testifying experts reviewed.

Without any evidence to support its assertion, respondent claims counsel did not call Bernard for strategy reasons, and therefore, it was strategic not to offer her deposition testimony(Resp.Br.73). In fact, as discussed in Ernest's original brief (App.Br.86) both counsel testified there was no strategic reason for failing to offer both Bernard's deposition and Ernest's mother's mental health records. Moreover, what the record actually supports is that Bernard was unavailable because counsel informed the court they were having problems locating her(3rdPen.Tr.46,57).

Respondent argues Bernard's deposition and Ernest's mother's records were inadmissible hearsay(Resp.Br.72-73). An expert is allowed to rely on hearsay matters so long as they are of the type reasonably relied on by other experts in the field. *State v. Woodworth*,941S.W.2d679,697-98(Mo.App.,W.D.1997). As discussed in the original brief (App.Br.87), these documents were admissible under *Hutchison v. State*,150S.W.3d292,304-05(Mo.banc2004) as documents the expert witnesses reviewed here.

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 the death penalty in Boone County is arbitrarily and capriciously imposed because the decision whether to seek death reflects a "geographic lottery" based on local Boone County community standards because the claim briefed is the same claim pled.

Respondent asserts the claim briefed regarding Missouri's application of the death penalty is different from the Rule 29.15 claim pled(Resp.Br.92).

The amended motion alleged the Missouri death penalty statutes fail to properly narrow the class of individuals eligible for the death penalty and that the Missouri Legislature has improperly delegated to each of the prosecutors in all of Missouri's 117 counties that function(3rdPCRL.F.101-02). To support that claim the amended motion alleged in detail the contents of Professors Sloss,' Thaman's, and Barnes' study would be presented(3rdPCRL.F.101-02).

Since Ernest was charged in Boone County Ernest's brief necessarily focused on how the decision to seek death against him by the Boone County Prosecutor, as evidenced by a comparison to other Missouri counties, established a "geographic lottery" in Missouri. The claim briefed was the same pled.

This Court should impose life without parole.

CONCLUSION

For the reasons discussed in Points I, II, III, IV, and V of the original and reply briefs this Court should order a new penalty phase. Further for the reasons discussed in Point VI of the original and reply briefs, 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 7,630 words, which does not exceed twenty-five percent of the 31,000 words (7,750) allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in November, 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 and a floppy disk containing a copy of this brief were hand delivered this 30th day of November, 2010, to Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

_____
William J. Swift