Capital Case – Execution October 5, 2021 at 6:00 p.m. Central

No. 21-_____

In The Supreme Court Of The United States

ERNEST JOHNSON,

Petitioner,

v.

PAUL BLAIR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – EXECUTION DATE 10/5/2021 at 6:00 p.m. Central

QUESTIONS PRESENTED

The State of Missouri is set to execute an individual whom every evaluating expert following clinical diagnostic requirements has concluded meets the criteria for intellectual disability. The Missouri Supreme Court failed to understand and apply current medical standards in assessing intellectual disability, in direct contradiction of the Eighth Amendment and this Court's precedent as set forth in *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*), and *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*).

1. May a state add a diagnostic criterion to the definition of intellectual disability requiring a causal connection between subaverage intellectual functioning and adaptive deficits thereby ignoring *Atkins* and its progeny?

2. After *Moore I* and *Moore II* rejected the *Briseno* factors for assessing adaptive deficits as relying on unscientific, layperson stereotypes of intellectual disability rather than on clinical criteria, and overemphasizing adaptive *strengths* when the inquiry solely demands evidence of adaptive *deficits*, may a state rely on evidence of perceived adaptive strengths to deny the subaverage intellectual functioning prong?

Since before the Birth of our Nation, juries have held a favored role in cases where death is the possible sentence. It is well-settled that a jury must unanimously find every factor that exposes a defendant to heightened punishment, such as the possibility of a death sentence in a capital case. Contrary to this well-settled principle, Missouri procedures for determining intellectual disability permit a single juror to overrule eleven others to expose the defendant to the death penalty. Nonetheless, in denying Mr. Johnson's most recent petition for habeas corpus, the Missouri Supreme Court recognized for purposes of Missouri law that the *Atkins* determination is an eligibility question. This presents the following question:

1. Under the Sixth and Eighth Amendments, may a single hold-out juror subvert the will of the jury on an eligibility question such as intellectual disability and render someone subject to the death penalty?

2. Is an intellectual disability determination in a capital case where the jury is instructed it must find unanimously that a defendant is *not* eligible for the death penalty, where the jury rendered no verdict and was not polled but simply instructed to move on to the sentencing question, sufficiently reliable under the Eighth Amendment to subject a defendant whom all evaluating and testifying experts agree meets the criteria for intellectual disability to preclude execution?

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

State v. Johnson, Thirteenth Circuit Court of Missouri, Boone County, Div. I, Case No. 13RO19441558-01. Judgment entered June 21, 2006.

State v. Johnson (*Johnson I*), 968 S.W.2d 686 (Mo. banc 1998). Docket No. 78282. Judgment entered May 26, 1998.

State v. Johnson (*Johnson II*), 22 S.W.3d 183 (Mo. banc 2000). Docket No. SC 81596. Judgment entered August 1, 2000.

Johnson v. State (*Johnson III*), 102 S.W.3d 535, 537 (Mo. banc 2003). Docket No. SC 84502. Judgment entered April 22, 2003.

State v. Johnson (*Johnson IV*), 244 S.W.3d 144, 155-56 (Mo. banc 2008). Docket No. SC 87825. Judgment entered February 19, 2008.

Johnson v. Steele, No. 11–08001–CV–W–DGK, 2013 WL 625318 (W.D. Mo. 2013). Docket No. 11-08001-CV-W-DGK. Judgment entered February 20, 2013.

State ex rel. Johnson v. Blair, No. SC 99176, 2021 WL 3887574 (Mo. banc Aug. 31, 2021). Docket No. SC 99176. Judgment entered October 1, 2021.

RULE 29.6 STATEMENT

All parties to the proceedings are named in the caption of the case.

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Petitioner Ernest Johnson respectfully prays that a Writ of Certiorari issue to review the opinion entered by the Missouri Supreme Court.

OPINIONS BELOW

The Missouri Supreme Court's decision denying state habeas corpus relief is reported at *State ex rel. Johnson v. Blair*, --- S.W.3d ---, 2021 WL 3887574 (Mo. banc Aug. 31, 2021). App. A. On October 1, 2021, the Missouri Supreme Court denied Petitioner Johnson's request for rehearing. App. B. Mr. Johnson filed a state petition for habeas corpus in the Missouri Supreme Court, pursuant to Rule 91 of the Missouri Supreme Court Rules. (App. M).

JURISDICTIONAL STATEMENT

The decision of the Missouri Supreme Court became final upon the denial of the rehearing request on October 1, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review this Petition.

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which reads in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State… ."

This case involves the Eighth Amendment to the Constitution of the United States, which reads in pertinent part: "… nor cruel and unusual punishments inflicted."

This case involves the Fourteenth Amendment, Sec. 1, to the Constitution of the United States, which reads in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. INTRODUCTION

Petitioner Ernest Johnson is a 61-year-old man with intellectually disability facing imminent execution. Mr. Johnson petitions this Court to grant certiorari because the Missouri Supreme Court's recent ruling violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. *State ex rel. Johnson v. Blair*, No. SC 99176, 2021 WL 3887574 (Mo. banc Aug. 31, 2021). (App. A-B).

This is not a close case – Mr. Johnson is intellectually disabled. In spite of overwhelming evidence of consistently low IQ scores, consistently poor academic achievement, and a lifetime of evidence illustrating adaptive behavior deficits, the Missouri Supreme Court ignored the intellectual disability rulings of this Court and relied on lay stereotypes about the intellectually disabled that are at odds with the clinical science governing the diagnosis, in direct contradiction to this Court's holdings in *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*), and *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*).

In addition, the jury instructions on intellectual disability, an eligibility determination pursuant to Missouri law (App. H, p. 21), allowed a single hold-out juror to decide Mr. Johnson's death penalty eligibility, thus violating his Sixth Amendment right to a unanimous jury verdict. "This Court has long explained that the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice,'" and this fundamental right has always "*included* a right to a unanimous verdict." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397-1402 (2020). Not only was Mr. Johnson denied a fundamental right, but the jury instructions used in his case are those still in use when a jury needs to render an intellectual disability finding in capital cases in Missouri. Thus, there remains a great risk that numerous intellectually disabled Missouri defendants will be deprived the fundamental right to a unanimous jury verdict when facing this country's most serious and irreparable punishment, death – a single juror makes that determination in Missouri.

II. PROCEDURAL HISTORY

Mr. Johnson was convicted of first-degree murder in Missouri state court in 1995. In 2003, after this Court's ruling in *Atkins v. Virginia*, 536 U.S. 304 (2002), Mr. Johnson was granted a resentencing to provide evidence of his intellectual disability. *Johnson v. State* (*Johnson III*), 102 S.W.3d 535 (Mo. banc 2003). Even though the State presented no expert testimony to contradict the defense experts that opined Mr. Johnson was intellectually disabled, the jury recommended death. However, the jury was provided unconstitutional and misleading instructions that enabled a single holdout juror to prevent them from finding that Mr. Johnson was intellectually disabled. The resentencing was appealed on other grounds, and Mr. Johnson was denied relief. *State v. Johnson* (*Johnson IV*), 244 S.W.3d 144 (Mo. banc 2008).

Mr. Johnson filed a state habeas petition and the Missouri Supreme Court reviewed on the merits his claim of intellectual disability. *State ex rel. Johnson v. Blair*, No. SC 99176, 2021 WL 3887574 (Mo. banc Aug. 31, 2021). (App. B, pp. 8-19). The court also rejected the jury instruction claim – but noted *Atkins* was an eligibility factor. *Id.* 19-20. Mr. Johnson filed a timely rehearing request. (App. N). The Missouri Supreme Court denied that request on October 1, 2021. (App. B).

III. OVERWHELMING EVIDENCE OF INTELLECTUAL DISABILITY.

Mr. Johnson was born intellectually disabled. His disability has consistently been recognized by those close to him, beginning with his teachers at an early age. Mr. Johnson's IQ has been tested on numerous occasions throughout his life, beginning when he was only 8 years old. His IQ scores have been remarkably

consistent throughout his life with eight of the nine full-scale IQ tests within the subaverage intellectual functioning range. Covering five decades and multiple test administrators in a variety of settings, Mr. Johnson's lifetime test scores break down as follows:

Test/Test Date	FSIQ Obtained	Mid-Year Norm Date	Flynn Adjustment	Corrected FSIQ
WISC 1968	77	1948 20 years	-6.0	71.0
WISC 1972	63	1948 24 years	-7.2	55.8
WAIS-R 1994	78	1978 17 years	-5.1	72.9
WAIS-R 1995	84	1978 17 years	-5.1	78.9[1]
WAIS-III 2003	67	1995 8 years	-2.4	64.6
WAIS-III 2004	67	1995 9 years	-2.7	64.3
WAIS-III 2008	70	1995 13 years	-3.9	66.1
WAIS-III 2009	71	1995 14 years	-4.2	66.8
WAIS-IV 2019	70	2007 12 years	-3.6	66.4
Lifetime Average 71.9				67.4

On academic achievement tests administered during his elementary school years, Mr. Johnson scored reliably in the bottom percentiles in every single area:

[1] This sole outlier score was noted by the court-appointed competency expert to "be tainted somewhat by the fact that 5 to 6 months prior to that testing, he was also given the same test." 3rd PCR Exh. 57 at 6; *see also Wiley v. Epps*, 625 F.3d 199, 222 n.1 (5th Cir. 2010) (explaining that the practice effect occurs "when a subject who is tested more than once generally will do better on subsequent tests than on the first test."). Thus, even this score when adjusted for testing effect falls within the standard error of measurement.

Grade	Date	Reading	Math	Language Arts
Grade 2	April 1969	1% (1.0)	*	*
Grade 3	April 1970	2% (1-5)	4% (2-4)	9% (2-4)
Grade 4	April 1971	1% (1-6)	*	2% (2-4)
Grade 3	April 1972	29% (3-1)	*	13% (2-5)
Grade 5	April 1973	2% (2-8)	2% (3-4)	2% (2-9)
Grade 7	April 1974	7%	8%	2%
Grade 9	October 1975	2%	21%	6%

Mr. Johnson attended a segregated school as a young child, and then transitioned to an integrated school for the rest of his education. (App. G, p. 4). He was held back three times, in second and third grade, and in his freshman year in high school. (App. E, p. 39; App. L, p. 3). He dropped out of school in his freshman year, during his second attempt at passing. *Id.* He was placed in special education classes from fourth through eighth grade. (App. L, p. 2). His adult IQ scores were remarkably consistent with his childhood scores, illustrating a case of "convergent validity" over the course of 51 years of IQ testing. (App. E, p. 30).

At resentencing, his teachers testified regarding their observations of Mr. Johnson's intellectual disability during the developmental period. Robin Seabaugh was hired by the Charleston school district as the teacher for the intellectually disabled. (App. L, p. 2). She taught Mr. Johnson at age 15, in a freshman developmental reading class "specifically for students who couldn't read and students who struggled in the regular classroom." *Id.* Because Mr. Johnson was black where he was placed was impacted, school districts at that time were put under pressure due to federal mandates to "only have a certain percentage of the enrollment in the special education classes and a certain percentage of blacks in special education

classes." *Id.* at 3. Mr. Johnson's school district was pressured to "mainstream" special education kids by putting them in regular classes. *Id.* at 5. Mr. Johnson was still placed on the "basic track" for "slower-ability kids." *Id.* at 3. Even in those classes, Mr. Johnson "didn't do well at all." *Id.* When Ms. Seabaugh attempted to characterize Mr. Johnson as a "mentally retarded" child, the prosecutor objected and this objection was sustained. *Id.* Mr. Johnson's reading level at age 15 was at 2.1, between the second and third grade level. *Id.* at 3-4. She characterized his intelligence as "very low." *Id.* at 4.

Steven Mason taught Mr. Johnson in art class when he had to repeat ninth grade. *Id.* at 6. He testified that Mr. Johnson could not "understand the instructions and he pretty much had a hard time doing everything he tried to do in class." *Id.* He had a specific memory of tasking Mr. Johnson with something very simple: taking a ball of clay and rolling it on the table to make a coil. *Id.* He testified that "90 percent of my students, do that the first time." *Id.* Mr. Johnson struggled "with that every time. He never did, couldn't get it. He'd rub it and mash it too hard and it would flop." *Id.* When he would ask Mr. Johnson why he was struggling, he'd have a "I don't know what you're talking about" blank look on his face. (App. L, p. 6). Mr. Johnson could not read the instructions provided for the assignments. *Id.* He could not even accomplish a basic task like using a ruler or compass. *Id.* at 7. The children were tasked with taking notes on art history and Mr. Johnson's folder of notes was always blank. *Id.* When tested, he would have three or four wrong answers and the rest would

be blank. *Id.* He was not a behavioral problem in class, but Mr. Johnson could not complete a single project and received an F in art. *Id.*

Deborah Turner's deposition was admitted at Mr. Johnson's resentencing. (App. L, p. 1). She worked at the segregated school Mr. Johnson attended as a child. (App. G, p. 4). The black children were given hand-me down books from the all-white school and conditions at the school were very poor. *Id.* She recalled that as a child in first or second grade, Mr. Johnson was "very shy, very slow" and a "withdrawn child." *Id.* at 5. She recalled that he could not keep up with the average students and worked below his grade level. *Id.* at 17. He was simply "a child that could not grasp very quickly." *Id.* at 18. Even when given special attention, and going over things over and over, Mr. Johnson "could not pick up." *Id.*

A 1979 report from the Missouri Department of Corrections notes that on their own testing, Mr. Johnson was "barely able" to read the sixth-grade reading level material provided and the report notes the childhood IQ score of 70. (App. O). A corrections case worker described Mr. Johnson as "very childlike and unintelligent." *Id.*

In his state habeas corpus petition, Mr. Johnson submitted a report from Dr. Daniel Martell, another clinician who diagnosed Mr. Johnson with intellectual disability. (App. E, pp. 1-63). After considering objective measures of adaptive behavior, and administering another test of IQ, Dr. Martell opined that Mr. Johnson meets the criteria for the diagnosis of intellectual disability. *Id.* at 62. Also notable is the fact that Mr. Johnson's mother and brother are also intellectually disabled, with

his brother's intellectual disability of severity that he was institutionalized most of his life. *Id.* at 12. Intellectual disability runs in families and having a parent or sibling with the disorder significantly increases its likelihood. *Id.* Mr. Johnson also has Fetal Alcohol Spectrum Disorder (FASD), which is the leading risk factor for intellectual disability. *Id.* at 13.

The state has never called an expert to testify in any proceeding that Mr. Johnson is not intellectually disabled. In denying Mr. Johnson relief in his state habeas petition, the Missouri Supreme Court relied upon the report of a non-testifying expert that was never submitted before the jury at resentencing. (App. A, pp. 11-12, 18).

The opinion of the Missouri Supreme Court violates clinical practice and the holdings of this Court. Dramatically, the court created a new-diagnostic-criteria to find intellectual disability, requiring a causative relationship between the intellectual functioning prong of the diagnosis and the adaptive behavior prong. Further, ignoring this Court's admonition in *Moore I* and *Moore II*, the court relied on the facts of the crime, similar to the unconstitutional *Briseno* factors, to deny Mr. Johnson the protection of *Atkins*. As a result, the court ignored Mr. Johnson's consistent history of IQ scores and achievement tests, as well as teacher testimony, that demonstrate subaverage intellectual functioning. Finally, the court required a diagnosis of intellectual disability during the developmental period rather than simply an on-set of the condition during the developmental period.

IV. FLAWED JURY INSTRUCTIONS.

The instructions conveyed the jury must "unanimously find" that Mr. Johnson had proven he was intellectually disabled by a preponderance of the evidence. (App. H, p. 6). Jury Instructions #7, 11, 12, 16, 17, and 21, reiterated the unanimity requirement: "[i]f you did not unanimously find by a preponderance that the defendant is mentally retarded. . . ." *Id.* at 7, 12, 14, 19, 21, 25. The verdict forms reiterated that the jury must find unanimously Mr. Johnson had proven intellectual disability. *Id.* at 31, 35, 39. Jury instructions submitted by the defense, which would have instructed the jury that the State had the burden of proving Mr. Johnson was not intellectually disabled, beyond a reasonable doubt, were rejected. (App. I, pp. 1-2, 4, 6, 8-9, 10-13). There is no signed verdict form directly addressing the jury's finding on the intellectual disability question. The instructions require an automatic progression to the capital weighing question if a *single juror* did not believe Mr. Johnson was intellectually disabled.

REASONS FOR GRANTING THE WRIT

I. Mr. Johnson Is Ineligible For The Death Penalty Because He Is Intellectually Disabled As Defined By Clinical Standards Relied On By This Court In *Atkins*, And Its Progeny. The Missouri Supreme Court Opinion Is Out-Of-Step With Clinical Standards And The Science Of Intellectual Disability, Recently Emphasized By This Court In *Moore I*, 137 S. Ct. 1039 (2017) And *Moore II*, 139 S. Ct. 666 (2019).

In *Atkins,* this Court prohibited the execution of persons with intellectual disability under the Eighth Amendment's prohibition against cruel and unusual punishment. *Atkins,* 536 U.S. at 321. This Court recognized that doing so serves neither of the recognized purposes of capital punishment: retribution and deterrence.

Unless the death penalty "measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." *Atkins*, 536 U.S. at 318 (internal quotations omitted).

In setting forth the ban, this Court referred to the definitions of intellectual disability from the American Association on Intellectual and Developmental Disabilities (AAIDD) and the American Psychiatric Association (APA). *Id.* at 309, n. 3. This Court noted three diagnostic criteria:

> [C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.

Atkins, 536 U.S. at 318.[2]

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[2] The current definition of intellectual disability from the DSM-5 has three diagnostic criteria and states:

> Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met: (a) Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing. (b) Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community. (c) Onset of intellectual and adaptive deficits during the developmental period.

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, p. 38 (5th ed. 2013) (DSM-5). The AAIDD has three diagnostic criteria and defines intellectual disability as:

Since *Atkins*, this Court has consistently reinforced the necessity of clinical criteria for an accurate determination of whether someone is intellectually disabled. In *Hall v. Florida*, 572 U.S. 701 (2014), this Court presented the question of "how intellectual disability must be defined in order to implement these principles and the holding of *Atkins*." *Id. Hall* further noted it is unsurprising that "this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability." *Id.* In *Hall,* the Supreme Court repeatedly referred to medical journals to guide the Court's analysis of the appropriate way to evaluate the use of IQ scores. *See generally, Hall, supra.*

In *Brumfield v. Cain,* 576 U.S. 305 (2015), this Court considered whether an IQ score of 75 was inconsistent with a finding that the defendant was intellectually disabled. The Court held that a score of 75 was "entirely consistent with intellectual disability." *Id.* at 314. In so concluding, the Court relied on expert opinions and third-party sources such as the AAMR as well as the DSM-IV. The Court in *Brumfield* thus reemphasized the Court's reliance on experts in the field of intellectual disability to guide the Court's jurisprudence on this difficult subject.

This Court recently addressed the scope of *Atkins* in *Moore I,* 137 S.Ct. 1039. In *Moore I,* this Court evaluated Texas's *Briseno* factors for determining intellectual

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> ID is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates during the developmental period, which is defined operationally as before the individual attains age 22.

American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports, p. 13 (12th ed. 2021) (AAIDD-12). The AAIDD was formerly known as the American Association on Mental Retardation (AAMR).

disability. *Id.* at 1048. The Court rejected the *Briseno* factors because the factors were based on outdated medical standards resulting in the "unacceptable risk that persons with intellectual disability will be executed." *Moore I*, 137 S.Ct. at 1044 (quoting *Hall*, 572 U.S. at 704). This Court noted state courts must "consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Id.* While the state court in *Moore I* considered adaptive functioning, it did so in a manner inconsistent with the clinical standards.

The state court improperly relied on Mr. Moore's adaptive strengths to determine he did not meet the requirements for intellectual disability. Instead, the medical community relies on an individual's adaptive deficits. *Id.* at 1050. The state court relied on Mr. Moore's life on the streets, his ability to mow lawns, and his playing pool for money as evidence he was not intellectually disabled. *Id.* The state court also relied on his relative improvement once he was imprisoned. *Id.* This Court rejected that approach relying on the medical and clinical standards. This Court noted that the medical community cautions against "reliance on adaptive strengths developed "'in a controlled setting,'" such as a prison. *Id.* (quoting DSM-5, at 38). This Court ultimately held the state court's reliance on the outdated *Briseno* factors hindered the proper evaluation of Mr. Moore, resulting in a significant risk an intellectually disabled person will be put to death.

The development of intellectual disability jurisprudence since *Atkins* serves only to strengthen the evidence of Mr. Johnson's intellectual disability diagnosis.

Reliance on the clinical evaluations and accepted medical standards demonstrates Mr. Johnson's clinical diagnosis of intellectual disability to be correct and undercuts any argument to the contrary. Indeed, as set forth more fully below, the limited evidence casting doubt on Mr. Johnson's intellectual disability diagnosis represents a rejection of medical and clinical standards essential to this Court's repeated mandates.

The Missouri Supreme Court decision contains several fundamental flaws that put it at odds with both the clinical standards governing diagnosis and this Court's pronouncements in *Moore I*, 137 S. Ct. 1039 and *Moore II*, 139 S. Ct. 666. Mr. Johnson requests that his case be summarily reversed and remanded to the Missouri Supreme Court for the proper application of these precedents so that his intellectually disability can be reliably and fairly determined by reference to the science of intellectually disability, and not by reference to lay stereotypes at odds with clinical practice.

A. The Missouri Supreme Court required Mr. Johnson to demonstrate causation between the first and second prongs of the diagnosis, at odds with well-established clinical practice and imposing an additional element to the definition of intellectual disability inconsistent with either the clinical or state statutory definitions.

Contrary to *Atkins*, the DSM-5, the AAIDD, 12th Edition, and Missouri's Statute, the Missouri Supreme Court created a fourth diagnostic criterion to determine intellectual disability. This Court noted that there are ***three*** **diagnostic criteria** to determine whether someone is intellectually disabled. *Atkins,* 536 U.S. at 318. The Missouri Supreme Court improperly created a ***fourth*** **diagnostic criterion**.

The Missouri Supreme Court purported to rely on the DSM-5 to guide its decision, but in doing so it misinterpreted the text of the DSM-5 in a way that imposed an additional evidentiary burden unsupported by the clinical definitions and even the Missouri statutory definition. The court interpreted the DSM-5 in a way that required Mr. Johnson to prove causation between his intellectual disability and his adaptive deficits: "[i]n essence, adaptive deficits must be caused by intellectual functioning." App. A, p. 13; *see also id.* at 14 ("…suffer from a lack of causal connection to his alleged impaired intellectual functioning."); *Id.* at 16 ("this Court finds Johnson failed to prove a causal connection between his poor academic performance and his alleged intellectual impairment."); *Id.* at 17 ("Johnson again does not demonstrate a causal connection between these facts and his alleged intellectual impairment."); *Id.* at 18-19 ("Criminal behavior, absent a causal connection to intellectual impairment, however, does not support intellectual disability.")

The Missouri Supreme Court relied on a sentence in the DSM-5 stating: "[t]o meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the [person's] intellectual impairments[.]" DSM5 at 37; App. A, p. 13. The court then imposed a burden on Mr. Johnson to "provide enough evidence to prove the alleged deficits are related to his alleged deficits in intellectual functioning." App. A, p. 13 (citing DSM-5 at 38). The court misinterpreted the DSM-5 and the burdens on the intellectually disabled to prove the causal relationship.

Imposing an additional diagnostic criterion makes Missouri an outlier because clinical requirements reject the imposition of a fourth criterion based on such a causal

connection. "Intellectual functioning and adaptive behavior are distinct and separate constructs, which are only moderately correlated. Equal weight and joint consideration are given to intellectual functioning and adaptive behavior diagnosis of ID." AAIDD, 12th Edition, p. 33. The AAIDD describes requiring a causal connection as a "thinking error:"

> This initial positioning has led to two additional thinking errors. The first is that limitations in intellectual functioning cause the limitation in adaptive behavior. This error in thinking is refuted by three facts: (1) the relation between intellectual functioning and adaptive behavior as always been expressed historically and consistently as correlational, not causative; (2) there is only a low to moderate statistical correlation between intelligence and adaptive behavior scores; and (3) there is no empirical evidence to support inserting a causal interpretation between the two.

Id. at 34 (citations omitted from original).

The DSM-5 does not require Mr. Johnson to prove causation. In *United States v. Wilson*, 170 F.Supp.3d 347 (E.D. N.Y. 2016), the court rejected a causation requirement: "the Government's approach would transform the standard for intellectual disability into an impossible test: In order for a defendant to show that he was intellectually disabled, he would need to prove that he satisfied the criteria because he was intellectually disabled." *Id.* at 371.

In *Jackson v. Payne*, --- F.4th ---, 2021 WL 3573012, at *7 (8th Cir. Aug. 13, 2021), the Eighth Circuit examined the language relied upon by the Missouri Supreme Court from the DSM-5, at 38, and expressly rejected the position that this language required the petitioner to show causation between the first and second prongs of the diagnosis:

> **The DSM-5's diagnostic criteria do not require a direct relationship between adaptive deficits and subaverage intellectual functioning**, but the explanatory text states that "[t]o meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in [prong one]." DSM-5, supra note 4, at 38 (emphasis added). However, following *Moore I*, we explained that "Jackson is not required to demonstrate a specific connection between subaverage intellectual functioning and adaptive behavior deficits. Rather, he must show only that deficits related to intellectual functioning exist." *Jackson III*, 898 F.3d at 869. And "Jackson is not required to exclude [other] disorders as causes of his adaptive behavior deficits." *Id.*

Id. at *7 (emphasis added).

The AAIDD identified the language from the DSM-5 as a potential concern and sought to clarify the language of the DSM-5. *See* AAIDD Opposes a Proposed Revision to the DSM-5's Entry for Intellectual Disability, AAIDD, July 29, 2019 (https://www.aaidd.org/news-policy/news/releases/2019/07/29/aaidd-opposes-a-proposed-revision-to-the-dsm-5-s-entry-for-intellectual-disability). The AAIDD proposed the DSM-5 remove the language cited by the Missouri Supreme Court because "the current text appeared to add a new, fourth criterion to the diagnostic criteria, one that required the deficits in adaptive functioning be "directly related to" (commonly understood to mean "caused by") the deficits in intellectual functioning, a criterion which is neither possible for clinicians to ascertain nor empirically supported." *Id.* The AAIDD noted the practical implications for intellectually disabled individuals in "criminal and civil justice systems." *Id.*

On September 16, 2021, the APA updated the language in the DSM-5 with several text updates related to intellectual disability. (App. D). The APA removed the language relied on by the Missouri Supreme Court, but otherwise left the elements

of intellectual disability alone. *Id.* The language was taken out because of a recognition of the "confusion this sentence caused in the diagnostic process, appearing to add a diagnostic criterion beyond the official criteria set. That was not the intent of the sentence and thus, to avoid such confusion, the sentence was removed." (App. C). The change further reflects the concerns that the manual is primarily intended for clinical practice and there is a potential for misuse in a forensic context. DSM-5 at 25 ("When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood.")

The Missouri Supreme Court was made aware of the changes in the DSM-5 in Mr. Johnson's rehearing petition and again in his reply filed with the court. Despite this, the court denied Mr. Johnson's petition for rehearing. The court did this even though the court knew from the Chair of the DSM Steering Committee's Letter filed with the court and the formal publishing of the text revisions to the DSM-5 that the basis for its opinion had been *eliminated*.

The Missouri Supreme Court's decision to graft on a causal/related to requirement also conflicts with *Moore I* and *Moore II*. This Court noted in *Moore I* that the Briseno factors "incorporated" an outdated version of the AAIDD imposing a "related to" requirement. *Moore I*, 137 S. Ct. at 1046. Thereafter, this Court found that the analysis of the "related to" requirement violated "clinical practice," and rather than being used to refute intellectual disability, the facts the Texas court found at odds with the diagnosis should instead have been considered risk factors for

intellectual disability. *Id.* at 1051 (noting the state court violated clinical practice by finding that evidence of childhood abuse and a personality order detracted from a finding of intellectual disability. When the Texas court again applied the "related to" requirement, this Court reiterated the previous error (*see Moore II*, 139 S.Ct. at 669), and again reversed, noting:

> Further, the court of appeals concluded that Moore failed to show that the "cause of [his] deficient social behavior was related to any deficits in general mental abilities" rather than "emotional problems." *Id.*, at 570. But in our last review, we said that the court of appeals had "departed from clinical practice" when it required Moore to prove that his "problems in kindergarten" stemmed from his intellectual disability, rather than "'emotional problems.'" *Moore*, 581 U. S., at ___, 137 S. Ct. 1039, 197 L.Ed. 2d 416, at 429 (quoting *Ex parte Moore I*, 470 S. W. 3d, at 488, 526).

Moore II, 139 S.Ct. at 671.

The Missouri Supreme Court's decision is replete with instances where the court used the relatedness language as a vehicle to backdoor lay stereotypes or evidence of adaptive strengths to undermine an otherwise clinical diagnosis. *See Moore I,* 137 S.Ct. at 1051. For instance, in evaluating Mr. Johnson's academic performance, the court stated, "he does not attempt to connect the alleged deficit with diminished intellectual functioning." (App. A, p. 16). The court then noted "there are multiple factors present in Johnson's life that could, absent intellectual disability, prevent academic achievement." *Id.* All the experts to testify regarding Mr. Johnson's intellectual disability diagnosis, though, agree his intellectual disability impacted his ability to perform well academically. Their reports were supported by testimony from teachers, his grades, and his consistently poor performance on standardized testing

showing him to be at or near the lowest levels of achievement and ability. The Missouri Supreme Court's rejection of this evidence highlights the concerns laid out in *Wilson,* that: "In order for a defendant to show that he was intellectually disabled, he would need to prove that he satisfied the criteria because he was intellectually disabled." *Id.* at 371.

Although the State hired an expert to draft a report addressing Mr. Johnson's intellectual disability, the State chose not to call him to the stand to testify at the resentencing. However, the Missouri Supreme Court relied on his report in denying relief, even though his methods of assessing the diagnosis of intellectual disability are clearly at odds with established clinical practice and he has never been subjected to cross-examination regarding this fact. Instead of utilizing an objective measure of adaptive behavior, Dr. Heisler attributed Mr. Johnson's poor academic record to his "impoverished background" and "substance abuse before age 10." (App. F, p. 4).

Dr. Heisler's statement demonstrates his lack of knowledge about clinical assessments of intellectual disability and undermines his qualification to provide a reliable opinion. There is no requirement that Mr. Johnson prove that his deficits are caused by his intellectual disability and these circumstances in his background are risk factors for intellectual disability – they do not detract from it. *See Moore I*, 137 S. Ct. 1047, 1051 (noting that alternative causes for adaptive deficits cited by the State included drug abuse and "an abuse-filled childhood"; academic failure and traumatic childhood experiences are also risk factors for intellectual disability). If Mr. Johnson had been properly diagnosed and cared for as a child it is more than likely

he would not have formed maladaptive mechanisms, like drug addiction, that fueled this crime.

There are only three criteria, not four. Because the Missouri Supreme Court has decided an important federal question in a way that conflicts with *Atkins* and its progeny, this Court should grant, or in the alternative grant, vacate, and remand pursuant to Sup. Ct. R. 10(c).

B. Overreliance on the facts of the crime to deny Atkins protection, places the Missouri Supreme Court at odds with Moore I and II.

The Missouri Supreme Court relied heavily on the facts of the crime to conclude Mr. Johnson was not a person with intellectual disability. (App. A, p. 12). (noting the facts of the crime "illustrate Johnson's ability to plan, strategize, and problem solve – contrary to a finding of substantial subaverage intelligence."). However, this reliance mirrors the errors committed by the Texas state courts in applying the "*Briseno* factors." *Moore I*, 137 S. Ct. at 1046 n.6 (the final *Briseno* factor posed was "did the commission of the offense require forethought, planning, and complex execution of purpose."). This Court has condemned the *Briseno* factors and described them as "an outlier" because they deviated so substantially from accepted clinical practices. *Moore I*, 137 S. Ct. at 1052.

Texas forced this Court to again take corrective action in *Moore II,* where this Court a second time reversed the state court for its continued reliance on the facts of the crime *Briseno* factor. 139 S. Ct. at 671. This Court noted that "[e]mphasizing the *Briseno* factors over clinical factor "'creat[es] an unacceptable risk that persons with

intellectual disability will be executed.'" *Id.* at 669 (citation omitted). This risk has come to fruition in Mr. Johnson's case.

Criminal behavior is considered maladaptive behavior and because there are no objective norms for its consideration, it should not be considered in the diagnostic process. *See Brumfield v. Cain*, 808 F.3d 1041, 1047 (5th Cir. 2015) (in upholding the lower court's finding of intellectual disability, the court credited expert testimony explaining that the presence or absence of maladaptive behavior "is not relevant to the diagnosis of intellectual disability."). The *Atkins* ban exists because the intellectually disabled commit crimes, including violent crimes. However, overemphasis on the facts of the crime to deny the protection of *Atkins* is at odds with the established clinical science. *See Van Tran v. Colson*, 764 F.3d 594, 608-09 (6th Cir. 2014) ("The sophistication of the crime and Van Tran's role in it are mostly irrelevant to the very narrow, clinically defined question of whether Van Tran suffers a deficit in the area of functional academics."); *Hooks v. State*, 126 P.3d 636, 644 (Okla. Ct. Crim. App. 2005) ("individual acts of violent crime, such as armed robbery or rape, require little or no abstract thought or complex planning."). The diagnostic manuals specifically warn against using "past criminal behavior or verbal behavior to infer [a] level of adaptive behavior." *Brumfield*, 808 F.3d at 1053 (citation omitted).

The facts of the crime in *Moore* closely resemble Mr. Johnson's crime – a "botched robbery" that resulted in the fatal shooting of a store clerk. *Moore I*, 137 S. Ct. at 1044. In *Moore I*, the Texas court relied upon Mr. Moore's ability to commit "the crime in a sophisticated way." *Id.* at 1047. After the remand from this Court, the

Texas courts again relied heavily on the facts of the crime to justify its finding that he was not intellectually disabled. *Moore II*, 139 S. Ct. at 671. This Court again reversed this finding because it was based so heavily on lay stereotypes about what the intellectually disabled can do, in contrast with established science. *Id.* at 672.

In the original district court proceedings in *Brumfield v. Cain*, 854 F.Supp.2d 36 (M.D. La. 2012), in which the district court found Brumfield to be intellectually disabled, the court ably noted why a heavy reliance on the facts of the crime is at odds with the clinical science:

> The reasons for not using maladaptive criminal behavior to assess adaptive skills are several: (1) the defendant may have gullibly acted under the direction or training of a confederate during the crime; (2) there may not be available enough accurate details about the facts of the crime from which to draw adaptive conclusions; and (3) in any event, there is a lack of normative information about actions during and following crimes to be able to meaningfully assess whether and how much a defendant's actions deviated from the mean adaptive behavior during criminal acts.

Id. Although these findings were overturned by the Fifth Circuit Court of Appeals in *Brumfield v. Cain*, 744 F.3d 918 (5th Cir. 2014), that decision was itself overturned by this Court in *Brumfield*, 576 U.S. 305. On remand, the Fifth Circuit upheld the grant of habeas relief based upon intellectual disability. *See Brumfield*, 808 F.3d 1041.

The Missouri Supreme Court relied upon various crime facts to undermine the diagnosis of intellectual disability, App. A, p. 11, but there is nothing in the facts of the crime at odds with a finding of intellectually disability and the state court's overreliance on these facts violates clinical standards. The court, for instance, relied

on Mr. Johnson's acquisition of a firearm to infer he had a premeditated plan for the crime. *Id.* at 2. However, while Mr. Johnson did obtain a firearm prior to robbing the store, the firearm was provided by his drug dealer, and the drug dealer had to show Mr. Johnson how to use the weapon and provided him with only one bullet. (App. L, pp. 9-15). The crime was committed with three different weapons, but only the firearm, used in a non-fatal manner, was brought to the scene in advance. (App. A, p. 2). The other two weapons were grabbed in the frenzy of the moment, undermining the court's characterization of this crime as well-planned. These facts demonstrate Johnson's lack of sophistication and at best demonstrate a plan to rob to support a drug habit.

The state court also described a plan to wear layers of clothing in order to escape detection upon fleeing the scene. *Id.* at 2, 12. However, after the crime, Mr. Johnson walked into his home with the same clothes on in front of witnesses. *Id.* The clothing and evidence were brought home and thus the "plan" of escaping detection did not come to fruition. As the state court noted, Johnson was arrested just one day later and immediately contradicted his own alibi. (App. A, p. 3).

Even if the crime were to be considered in the clinical analysis, it should be contextualized for what it is – a plan to rob that went tragically awry. Most adults with intellectual disabilities can achieve reading, arithmetic, and writing skills equivalent to a 5th or 6th grader. *See* Tasse, Marc J. and Blume, John H., *Intellectual Disability and the Death Penalty, Current Issues and Controversies*, p. 102 (2018). A child of that age "has the ability to lie, hide, plot and deceive to get out of trouble." *Id.*

It is not, therefore, surprising or indicative of special skills that Mr. Johnson would be capable of committing a crime, even with his significant limitations.

This Court recognized the improper overreliance on the facts of the crime in twice reversing the Fifth Circuit in *Moore I* and *II*. Because the Missouri Supreme Court has decided an important federal question in a way that conflicts with relevant decision of this Court, this Court should grant, or in the alternative grant, vacate, and remand pursuant to Sup. Ct. R. 10(c).

C. The Missouri Supreme Court misapprehended the significance and consistency in Mr. Johnson's IQ scores and ignored objective evidence which indicated that Mr. Johnson was not malingering during testing with the State's technician.

In finding that Mr. Johnson did not to meet the intellectual functioning prong, the Missouri Supreme Court proceeded from a flawed premise. It discounted the later testing and noted that on previous IQ testing, "only one (out of four valid scores) . . . would indicate significant subaverage intelligence." (App. A, p. 11). Not accurately knowing the import of the IQ tests is a dramatic substantive error. Only one of these four scores **do not** indicate significant subaverage intelligence. Three out of four tests administered and relied upon by the state court fully fall within the range of intellectual disability:

1. The Missouri Supreme Court references the 77 in 1968. A Flynn Effect adjusted score of 71. With the standard error of measurement (SEM) of 5, the IQ range is 66-76, falling within the range of intellectual disability;

2. The Missouri Supreme Court references the 63 in 1971, this score safely falls within the range of intellectual disability; and,

3. The Court references the 78 in 1994. A Flynn Effect adjusted score of 72.9. With the SEM of 5, the IQ range is 67.9-77.9, and falls within the range of intellectual disability.

Contrary to the state court's findings, Mr. Johnson's IQ scores have been remarkably consistent throughout his life, with eight of the nine full-scale IQ tests within the subaverage intellectual functioning range. *See supra* at 5-6. In focusing on IQ scores (incorrectly noting the significance of the same), the Missouri Supreme Court failed to consider or discuss the remarkable consistency of Mr. Johnson's IQ scores with the results of Achievement Test Scores. To reiterate, they reflect evidence of intellectual disability established long before the crime. The childhood IQ scores and achievement test scores were supported by the testimony of teachers noting Mr. Johnson's significant cognitive shortcomings.

The Missouri Supreme Court also relied upon the subjective assertion of an untrained technician, never called to the stand to testify, that Mr. Johnson was malingering on the IQ test he was given. (App. A, p. 11). Mr. Bradshaw was tasked by Dr. Heisler, the State's expert who the State did not call to testify at resentencing, with giving Mr. Johnson an IQ test. Dr. Heisler adopted Mr. Bradshaw's assertion that Mr. Johnson was malingering. (App. F, p. 3). However, what both Dr. Heisler and Mr. Bradshaw failed to either recognize or mention in their assertion of malingering was that embedded in the version of the IQ test Mr. Johnson was given by Mr. Bradshaw were two tests of validity. (App. E p. 30). **Mr. Johnson passed this validity test,** belying Mr. Bradshaw's subjective observation that he was malingering. *Id.* (emphasis added).

One of the reasons Mr. Johnson requested this case be remanded for additional factual findings by a Special Master, which is allowed under Missouri rules, is that Dr. Heisler's conclusions were never subjected to cross-examination. The objective measures of validity on the IQ test Bradshaw gave, as well as Mr. Johnson's consistency in IQ scores over the years, rebuts any subjective assertion of malingering. *See United States v. Nelson*, 419 F.Supp.2d 891, 903 (E.D. La. 2006) ("It is simply impossible for the Court to conclude that Nelson has been malingering since age 11 and has been able to manufacture the identical testing pattern for all those years."). Further, the objective measures then and now, universally rebut any lack of effort on Mr. Johnson's behalf.

For those practitioners who have little or no clinical experience with the intellectually disabled, "[m]alingering may be suspected because of confusion related to a combination of psychiatric symptoms, neurological symptoms, and cognitive deficits. . ." Edward Polloway, ed., *The Death Penalty and Intellectual Disability*, (AAIDD) (2015), at 270. "[A] defendant cannot readily feign the symptoms of mental retardation." *Newman v. Harrington*, 726 F.3d 921, 929 (7th Cir. 2013); *Smith v. Sharp*, 935 F.3d 1064, 1081 (10th Cir. 2019). Mr. Johnson's consistent IQ scores over the years belie an assertion of malingering and it is significant that he obtained the exact same IQ score on his testing with the defense expert, who did give Mr. Johnson an objective test of effort: "it is extremely unlikely that a person with Mr. Johnson's history of adaptive deficits could 'fake' on two IQ tests a year apart and be able to obtain the exact same score." (App. E, p. 30). Instead, Mr. Johnson's history of IQ

scores, over a 51-year time span, indicates overwhelming proof that he fits the first prong of the diagnosis. *See id.* at 30 (noting that the consistency of scores indicates a case of convergent validity on IQ).

D. Interpreting the Missouri statute to require a diagnosis of intellectual disability prior to the age of 18 violates the Eighth and Fourteenth Amendments.

For various reasons, many of those who suffer from intellectual disability are not diagnosed as such during the developmental period. *See* Polloway, at 222 (noting that many *Atkins* petitioners have a clear history of school failure but were never labeled ID in school and this is especially true of poor minority children). In Mr. Johnson's case, he was born into the poverty of the Missouri bootheel as a child of a sharecropper, at a time where people with his skin color were shipped to separate, but not equal, schools. The reality is that the impoverished school districts Mr. Johnson attended simply did not provide the opportunity for diagnosis, regardless of the apparent need. In addition, at the time Mr. Johnson was in school, the district was under pressure due to federal mandates to "mainstream" special education students and only a certain percentage of Black students could be placed in special education. (App. L, pp. 3, 5).

The Missouri Supreme Court cited the Missouri statute for the proposition of requiring intellectual disability to be "manifested and documented before eighteen years of age." (App. A, p. 15). On this basis, the court concluded that "[b]ecause Johnson is now over 60 years old, reports of Johnson's alleged current mental ability are not given much weight." *Id.* The state court also noted that Johnson did "not

provide any evidence of a formal evaluation or diagnosis of intellectual disability during the developmental period." *Id.* at 16.

Thus, Missouri improperly modified the on-set criterion to require diagnosis of intellectual disability during the developmental period. Contrary to *Atkins*, the DSM-5, the AAIDD, 12th Edition, and Missouri's Statute, the Missouri Supreme Court redefined a diagnostic criterion. This runs contrary to and violates the Eighth Amendment. *See Oats v. State*, 181 So.3d 457, 469 (Fla. 2015) (reversing a lower court's finding, based upon a Florida statute with similar language to that of Missouri, that the defendant was not intellectually disabled based upon a misperception that a lack of diagnosis prior to age 18 was fatal to the claim and ignoring later evidence as a result). In *Oats*, the Florida Supreme Court noted that it would be at odds with the Supreme Court's decision following *Atkins* to require diagnosis prior to age 18 before the protection of *Atkins* is given: "[t]hat inflexible view would not be supported by the United States Supreme Court's recent enunciations in *Hall* and *Brumfield*." *Id.* at 469; *see also Wilson*, 170 F.Supp.3d at 391 (noting that the age of onset requirement does not require diagnosis before the age of 18).

It is error to give Mr. Johnson's later IQ scores little weight in determining his intellectual disability. His IQ scores, from childhood to now, have been consistently within the range of intellectual disability, something even the Missouri Supreme Court acknowledged. *See* App. A, p. 11 (noting that after adjusting for the margin of error and the Flynn effect, Mr. Johnson's test scores "are within the range that could

be indicative of intellectual disability"). The fact that Mr. Johnson may not have been diagnosed as intellectually disabled during the developmental time frame is more a function of the paucity of services available to him during his childhood in rural Missouri and his status as a minority.

Furthermore, IQ scores remain relatively consistent over a person's lifetime, as illustrated by Mr. Johnson's consistency in IQ scores over time. *See Muncy v. Apfel*, 247 F.3d 728, 734 (8th Cir. 2001) ("a person's IQ is presumed to remain stable over time in the absence of any evidence of a change in a claimant's intellectual functioning."). Mr. Johnson should not be exempted from the protection of *Atkins*, and his later consistent IQ scores ignored, simply because of the absence of diagnosis during the developmental period. This is especially true since Mr. Johnson's IQ scores virtually have remained the same over 50 years.

Because the Missouri Supreme Court has decided an important federal question in a way that conflicts with *Atkins* and its progeny, this Court should grant, or in the alternative grant, vacate, and remand pursuant to Sup. Ct. R. 10(c).

II. Missouri's Intellectual Disability Instructions Violated Mr. Johnson's Sixth And Eighth Amendment Rights.

In denying Mr. Johnson's state habeas petition, the Missouri Supreme Court upheld its pattern juror instructions on intellectual disability, which required Mr. Johnson to unanimously prove that question by a preponderance of the evidence. (App. A, p. 19). As to Missouri's treatment of the intellectual disability question, the Missouri Supreme Court held "intellectual disability concerns whether an offender is

eligible for the death penalty. *See Atkins*, 536 U.S. at 320" (App. A, p. 20) (emphasis in the original).

As written, these instructions permit juries to impose the death penalty even if eleven out of twelve jurors believed that Mr. Johnson was intellectually disabled. Even more troublingly, the jury was not polled and there is no verdict sheet documenting what the jury finding on the intellectual disability question actually was. This Court's jurisprudence makes clear that these instructions cannot withstand constitutional scrutiny on an eligibility question.

First, since the question of intellectual disability is an eligibility determination, as the Missouri Supreme Court itself recently noted, the burden should be on the State to prove Mr. Johnson is not intellectually disabled, and therefore is eligible for the death penalty. Second, by not polling the jury as to its finding on the intellectual disability question, the process by which Mr. Johnson was sentenced to death was insufficiently reliable to guard against the execution of a person with intellectual disability. By placing the burden on Mr. Johnson and allowing a lone holdout juror voting against a finding of intellectual disability to eviscerate the substantive protections of *Atkins,* Missouri violated Petitioner's Sixth and Eighth Amendment rights.

In *Ramos v. Louisiana*, this Court held that the Sixth Amendment right to a jury trial, as incorporated against the States by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense, with the burden being placed on the State. 140 S. Ct. 1390 (2020). As this Court explained in

Andres v. United States, "[a] verdict embodies in a *single finding* the conclusions by the jury upon *all the questions submitted to it.*" 333 U.S. 740, 748 (1948) (emphasis added). Thus, the "requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury." *Id.* A unanimous verdict, with the burden being placed on the state, serves the purposes of a jury trial by providing for "the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Williams v. Florida*, 399 U.S. 78, 100 (1970). Further, at the time of the Founding, a unanimous jury verdict of guilt had been required at common law for over 400 years. *See Ramos*, 140 S. Ct. at 1396 ("If the term 'trial by an impartial jury' carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity.")

Ironically in Missouri, the post-*Atkins* jury instructions actually made it *more difficult* for Mr. Johnson to have a jury spare him from execution because of his intellectual disability. This cannot be what the Court intended. Prior to *Atkins*, Mr. Johnson could at least present evidence of his intellectual disability as a mitigating circumstance that any single juror could find supporting a life sentence, without a requirement of unanimity for mitigation. Under those circumstances, a lone juror could rightly find that Mr. Johnson's evidence of intellectual disability warranted sparing him from a death sentence. Under the current instructions, however, where intellectual disability is no longer considered as a part of the mitigation inquiry, the opposite is now true: a lone juror's vote could *expose* Mr. Johnson to a death sentence, even if all other jurors believed him to be ineligible by reason of intellectual disability.

These instructions actually provide him less protection due to his disability, something not contemplated by this Court when it rendered its decision in *Atkins*.

The Missouri Supreme Court recognized that the question of intellectual disability is a question of Mr. Johnson's eligibility for the death sentence. App. A at 21, citing *Atkins*, 536 U.S. at 320. However, the court denied the challenge to the jury instructions allowing a non-unanimous finding by referencing their earlier opinion, *Johnson v. State*, 244 S.W.3d 144 (Mo. 2008). The 2008 opinion did not recognize that the question under *Atkins* concerned an eligibility factor for facing the death penalty.

In *Ring v. Arizona*, 536 U.S. 584 (2002), decided the same year as *Atkins*, this Court held that death penalty eligibility factors must be proven to a jury with the burden on the State and their burden is beyond a reasonable doubt. More recently in *Hurst v. Florida*, 577 U.S. 92 (2016), this Court overruled prior decisions which had held that the Sixth Amendment did not require a jury to find the specific findings underlying the death sentence because those decisions "were irreconcilable with *Apprendi*." *Id.* at 101.

In *Atkins*, this Court held that a capital defendant's right to submit evidence of intellectual disability to a sentencing jury in mitigation was *insufficient* to satisfy the Eighth Amendment's prohibition against excessive punishment, and that the Eighth Amendment required announcement of an additional rule that "the mentally retarded should be categorically excluded from executions." *Atkins*, 536 U.S. at 318. Thus, after *Atkins* and *Ring*, **the absence of intellectual disability is a *constitutional precondition* for the imposition of a capital sentence that "operates as the functional**

equivalent of an element of a greater offense." *Ring*, 536 U.S. at 609 (citation omitted) (emphasis added). Read together, the cases require that the Sixth Amendment right to a jury trial attaches to elements that are required to adjust the scope of consequences for the criminal offense, with the burden being on the State to prove a defendant is eligible to face the ultimate punishment. *Atkins* adds this element: "[t]hus, *pursuant to our narrowing jurisprudence*, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate." *Atkins*, 536 U.S. at 319 (emphasis added).

Atkins left to the States "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." 536 U.S. at 317. In so doing, the Court cited their approach in *Ford v. Wainwright*, 477 U.S. 399 (1986). *Atkins*, at 317. *Ford* recognized that the Eighth Amendment required insane defendants be given an opportunity to seek its protection, and that "the lodestar of any effort to devise a procedure [to determine sanity] must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination." *Ford*, 477 U.S. at 417.

However, *Atkins* "did not give the States unfettered discretion" in determining which defendants received the Eighth Amendment's protections." *Hall*, 572 U.S. at 719. This Court noted "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.* at 719-720.

As explained, in *Montgomery v. Louisiana*, "when the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class." 577 U.S. 190, 210 (2016) (citing *Atkins*). When creating this procedural entitlement, "this Court is careful to limit [its] scope... to avoid intruding *more than necessary* upon the States' sovereign administration of their criminal justice systems...Fidelity to this important principle of federalism, however, should not be construed to demean the substantive character of the federal right at issue." *Id.* at 211. By prohibiting the cruel and unusual execution of intellectually disabled defendants, such as Mr. Johnson, *Atkins* imposed on the States the requirement to enact procedural mechanisms necessary to safeguard its holding.

Because *Atkins* stands for the proposition that death is *never* the "appropriate" punishment for those who are intellectually disabled, the Eighth Amendment requires, at a minimum, that the determination of a defendant's intellectual ability be subject to heightened procedural scrutiny. *Atkins,* 536 U.S. at 319. Procedures employed pursuant to *Atkins* that are likely to result in inaccurate, arbitrary, or capricious findings of intellectual ability are repugnant to the Eighth Amendment. It follows that the execution of a defendant based on a non-unanimous eligibility finding—where it is impossible to know what the jury actually found on the intellectual disability question, other than that at least one juror did *not* find Johnson to be intellectually disabled— results in a violation of the Eighth Amendment. Consonant with these principles, in cases where the procedure is inadequate to

reliably result in the appropriate punishment, this Court has repeatedly held rules of criminal procedure in violation of the Eighth Amendment. See, e.g., *McKoy v. North Carolina*, 494 U.S. 433, 435 (1990) (State's procedure failed to allow jurors to "give effect to mitigation evidence" violated Eighth Amendment).

"The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing." *Mills v. Maryland*, 486 U.S. 367, 383–84 (1988). Here, as in *McKoy*, "[t]he unanimity requirement thus allows one holdout juror to prevent the others from giving effect to evidence that they believe calls for a sentence less than death." 494 U.S. at 439 (internal quotations omitted). Under Jury Instruction Nos. 6 and 11, 16, and 21 (MAI-CR 3d 313.38) *eleven* jurors may have thought that Mr. Johnson was ineligible for the death penalty, yet could have been prevented from considering and ultimately submitting the death penalty because of the capriciousness of one juror. An eligibility determination cannot be made with fewer procedural safeguards than a selection determination.

The Missouri Supreme Court's misguided approach permits the intellectually disabled to be executed so long as a single juror believes he is not intellectually disabled. Thus, Missouri creates an unacceptable risk that the intellectually disabled will be executed under its current instructions. This Court should grant review to

correct a ruling that reduces *Atkins* to a nullity. Because the Missouri Supreme Court has decided an important federal question in a way that conflicts with relevant decision of this Court, this Court grant certiorari pursuant to Sup. Ct. R. 10(c).

CONCLUSION

Because the Missouri Supreme Court decided Mr. Johnson's intellectual disability in a way that conflicts with this Court's holding in *Atkins* and its progeny, certiorari should be granted, and the lower court's opinion should be vacated and the case remanded for further proceedings consistent with *Moore I* and *Moore II*. In addition, the jury instructions on intellectual disability violate the Sixth Amendment by allowing a single juror to deny him the protections of *Atkins*, and therefore this Court should grant certiorari.

Respectfully Submitted,

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