IN THE SUPREME COURT OF THE UNITED STATES

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| RONALD JOHNSON, | ) | |
| | ) | |
| *Petitioner*, | ) | |
| | ) | |
| vs. | ) | NO. _____ |
| | ) | |
| STATE OF MISSOURI, | ) | |
| | ) | |
| *Respondent*. | ) | |

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

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1) Whether counseling an intellectually disabled client to plead to life without parole to avoid the death penalty is ineffective assistance, when plea counsel was unaware of both *Atkins v. Virginia*, 536 U.S. 304 (2002) and the definition of intellectual disability?

2) Does counsel's failure to inform an intellectually disabled client of his ineligibilty for the death penalty before pleading him to life without parole constitute effective assistance, as held by the Supreme Court of Missouri, or is such failure ineffective, violating basic standards of capital representation, as held by the Tenth Circuit Court of Appeals?

## LIST OF PARTIES

Ronald Johnson is the petitioner, and was the movant for post-conviction relief seeking to vacate a sentence of life without parole for murder below. The State of Missouri is the respondent. There are no other parties to this action.

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## JURISDICTIONAL STATEMENT

Ronald Johnson pleaded guilty on August 10, 2010, to first degree murder and a sentence of life without parole and three concurrent 10-year sentences for armed criminal action, and first degree robbery. He was sentenced to life without parole on December 19, 2012. Ronald moved for post-conviction relief on June 6, 2013, which was denied after an evidentiary hearing. After Ronald's appeal was denied in the court of appeals without a published opinion, it was transferred to the Supreme Court of Missouri on discretionary review. That Court issued its 4-3 opinion on July 16, 2019, denying Ronald's appeal with a published dissent. A motion for rehearing was filed within 15 days as required by state law. That motion was denied, and the mandate issued, on October 1, 2019.

## CONSTITUTIONAL PROVISIONS IMPLICATED

This case implicates the Fourteenth Amendment to the United States Constitution which states, in pertinent part: "no state shall…deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV. It also involves the Sixth Amendment which states, in pertinent part, that "In all criminal prosecutions, the accused shall…have the Assistance of Counsel for his defence." It also implicates the Eighth Amendment, which prevents the infliction of "cruel and unusual punishments."

## STATEMENT OF THE CASE

Ronald Johnson was diagnosed as having mild mental retardation[1] when he was ten years old. (Pcr Tr 31).[2] His IQ was 53. (Pcr Tr 33). He would spend the rest of his schooling in special classes due to this disability, until he dropped out in the tenth grade. (Pcr Tr 73; Lf 39). He would never score above 64 on an IQ test. (Pcr Tr 54; Exhibit 3).

Ronald's intellectual limitations were not his only disability. He also suffered from a seizure disorder. (Pcr Tr 60-2). Additionally, he developed schizophrenia as a young adult, and without medication he suffered from active hallucinations and repeated hospitalizations. (Pcr Tr 60-2; Exhibit 3). Ronald was on disability for his cognitive issues, and had been since childhood. (Lf 39).

Ronald began dating a man by the name of Cleophus King when Ronald was in his late teens. (Pcr Tr 50, H. Tr 46-8). Cleophus was larger than Ronald, and significantly older. Ronald was scared of Cleophus. (Pcr Tr 50; H. Tr 46-8). Eventually, Cleophus used Ronald as a lure for a murder and robbery, wherein a local attorney was strangled, beaten and stabbed. (Lf 29, 40-1). Ronald would admit to being a participant in the killing during

[1] The term mental retardation is now universally viewed as offensive. Throughout most of the pendency of Ronald's case the official term in Missouri for what is now "intellectual disability" was "mental retardation" and it is the term used throughout Ronald's medical records.

[2] The record below is referenced as follows: plea and sentencing transcript (TR); hearing to withdraw the plea (H. Tr); post-conviction transcript (Pcr Tr); underlying legal file (Lf.); and post-conviction legal file (Pcr Lf).

court proceedings. (Lf 40-1). Audio of the incident captured the victim shouting for help from Ronald, and then anyone else, and Ronald not responding. (Pcr Tr 37). Ronald's attorney noted the fact that Ronald did not leave was one of the worst pieces of evidence. (Pcr Tr 45). Ronald went with Cleophus to hide the body, and used the decedent's credit cards. (Lf 40-41).

Both Ronald and Cleophus were charged with murder in the first degree. (Lf 29, 41). The State announced its intent to seek the death penalty against both men. (Exhibit 1, Pcr Tr 5-6). Ronald retained private counsel, Cleveland Tyson. Mr. Tyson became concerned that Ronald might not be competent after interacting with him. (Pcr Tr 44). A psychiatric examination performed by the Missouri Department of Mental Health stated that Ronald had an IQ of 53, and diagnosed him "Mild Mental Retardation v. Borderline Intellectual Functioning." (Pcr Tr 30-1). Mr. Tyson also requested Ronald's school records, which showed that Ronald had a diagnosis of mental retardation, and that he had been in special education from the age of 10, until he dropped out early in high school. (Pcr Tr 34-35). Mr. Tyson noted, during the evidentiary hearing in the matter, that he "… had concerns about his mental ability to understand what's going on or his mental ability." (Pcr Tr 44). However, it did not occur to Mr. Tyson, despite the mental examination and school records showing a diagnosis of mental retardation

and an IQ of 53, that Ronald might have mental retardation and as such be ineligible for the death penalty. (Pcr Tr 44).

At the later evidentiary hearing in this case, Mr. Tyson summarized his knowledge of the interaction between Ronald's intellectual disability and the death penalty as follows:

> Q. Are you familiar with *Atkins vs. Virginia*?
>
> A. Vaguely.
>
> Q. Do you know the [holding of][3] *Atkins vs. Virginia*?
>
> A. Not offhand.
>
> Q. Are you familiar with *Hall vs. Florida*?
>
> A. No.
>
> Q. Is someone who suffers from mental retardation eligible for the death penalty?
>
> A. I do not believe so.
>
> Q. Did you discuss this with Mr. Johnson?
>
> A. I did not believe that Mr. Johnson was found to be mentally -- have mental retardation. Close to it, but not mental retardation.
>
> Q. What is the definition of mental retardation?

[3] A scrivener's error in the transcript renders this as "whole."

A. I'm not a doctor. I don't know. I just know that in my -- my relationship with Mr. Johnson and in speaking with him, that I did not believe that he suffered from mental retardation.

Q. Are you familiar with the standards that have been used by the U.S. Courts?

A. I don't know what -- I don't understand the question.

Q. What standard of the definition of mental retardation was used?

A. I don't know. If you provide me with it, I could tell you.

Q. Did you know at the time?

A. I did not believe he was mentally retarded.

Q. But you did not know what the definition was?

A. It was -- just never even occurred to me to look.

(PCR Tr 31-3).

Ronald pleaded guilty to murder in the first degree to avoid the possibility of the death penalty. (Pcr Tr 75, Lf at 38). Avoiding the possibility of the death penalty was the sole reason he pleaded guilty to a sentence of life without parole. (Pcr Tr 75). As a condition of being spared from the threat of death, Ronald was also to testify against Cleophus King. (H.Tr 4). On March 7, 2012, the court held a hearing upon the state's motion to withdraw Ronald's plea (H. Tr 4). The State moved to withdraw the plea

because Ronald would no longer testify. *Id.* Ronald testified that he was afraid that his co-defendant, Cleophus King, would kill him if he did not do what Cleophus wanted him to do (H. Tr 46-48). Through a series of letters with Cleophus, Ronald agreed to commit suicide and let Cleophus put the entire case on him (H. Tr 56). Ronald thought that if he did not do what Cleophus told him to, that Cleophus would murder Ronald. The court determined that Ronald was "intellectually slow and under the influence of Cleophus King." (Order dated June 19, 2012). The court further found that Ronald's lack of cooperation was a result of intimidation by his co-defendant and he did not breach his plea agreement. (Order dated June 19, 2012).

Ronald then filed for post conviction relief. His motion raised three points of error: That Ronald's attorney coerced him to plead guilty through the threat of the possibility of the death penalty, since Ronald was never death eligible; that Ronald was not competent to plead guilty, and never would be competent; and that Ronald's attorney was ineffective for not challenging the state mental examination in his case, because it failed to meet professional minimums on its face. (Lf 95-97). Ronald's post-conviction relief attorney had the mental examination performed by the State analyzed by Dr. Patricia Zapf. (Exhibit 1, Pcr Tr 5-6). Dr. Zapf is a professor at the John Jay College of Criminal Justice at the City University of New York. She is licensed in Missouri, Florida, New York and Alabama as a psychologist

and has been a Certified Forensic Examiner since 2001. (Exhibit 1). She has been involved in training forensic psychologists since 2002 and has been the Director of Clinical Training and the Deputy Director for the PhD program in forensic psychology at John Jay College of Criminal Justice. (Exhibit 1, Pcr Tr 5-6). Dr. Zapf has completed numerous forensic evaluations. She has also been involved in writing and publishing manuals and books about the proper method to evaluate individuals in the forensic assessment of competence and responsibility. (Exhibit 1, Pcr Tr 5-6). She had conducted training on best practices in conducting mental evaluations in Missouri at the request of the head of the Missouri Department of Health. (Pcr Tr 6).

Dr. Zapf found the competency examination did not meet basic professional standards. (Pcr Tr 11-12). At the evidentiary hearing, she testified that the examination showed a failure to include any independent testing, failed to gauge rational understanding, failed to control for the dangers of the over-acquiescence of people with intellectual disabilities, and included irrelevant material. (Pcr Tr 12-19).

Post-conviction counsel also had Ronald evaluated by Dr. Robert Fucetola, a neuro-psychiatrist. Dr. Fucetola determined that Ronald's present full scale I.Q. is 63 (Pcr Tr 55). He also suffers from schizophrenia among other impairments. (Pcr Tr 55-9). According to Dr. Fucetola, the intelligence score alone indicates severe deficits in all areas of understanding

and ability in Ronald's daily life. (Pcr Tr 55-9). Dr. Fucetola testified Ronald suffers from impairments in his reasoning ability and his understanding of the legal process. (Pcr Tr 55-60). He also would struggle with any abstract thought or acting in his own interest. (Pcr Tr 55-60). He had the receptive vocabulary of an 8 year old. (Pcr Tr 67). Ronald's IQ was in the bottom first percentile of intellectual functioning. (Pcr Tr 55-9).

Furthermore, Dr. Fucetola concluded that Ronald did not have an ability to assist his attorneys in his own defense. (Pcr Tr 55-60). He could not meet the legal standard for competency and suffered from mental retardation. (Exhibit 3). Dr. Fucetola also opined that the mental examination he reviewed in the case did not meet the basic standards of the field of psychiatry. (Pcr Tr 63).

Ronald's first post-conviction attorney withdrew, and undersigned counsel entered. After an evidentiary hearing where plea counsel and the two psychiatric experts testified, the petition was denied. (Lf 160-7). The Circuit Court reasoned that a jury could have believed that Ronald was not suffering from mental retardation, and that only a plea of guilty would remove the threat of the death penalty. (Lf 165). The circuit court further ruled that Ronald was competent, and that there was no reason to challenge the report by the Department of Mental Health. (Lf 166). The Court of Appeals for the Eastern District affirmed this decision without opinion. The

Supreme Court of Missouri ruled, in a 4-3 decision that Ronald received effective assistance of counsel. *Johnson v State*, 580 S.W.3d 895 (Mo. banc 2019).

## REASONS THE PETITION SHOULD BE GRANTED

1) **Missouri flaunts this court's ruling in *Atkins* when it allows the threat of the death penalty to be used to induce pleas of guilty to life without parole for individuals with intellectual disabilities.**

Missouri has ruled that it is permissible to use the threat of the death penalty to induce a plea of guilty to life without parole from a man with an IQ between 53 and 64. It did so in a case where the plea attorney admitted that he did not know what mental retardation or intellectual disability and that he was unfamiliar with this Court's established precedent on these issues. Missouri's ruling makes a mockery of this Court's precedent regarding the role of intellectual disability in death eligibility, and the requirement of reasonably effective assistance of plea counsel. It places vulnerable, disabled, defendants at risk of pleading based on unfounded fear born of unprepared and ignorant counsel.

In 2002 this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). This Court barred the states from condemning to death individuals who suffer

from mental retardation or intellectual disability. 536 U.S. at 306. This court held that the Eighth Amendment prohibition against cruel and unusual punishment prohibits putting to death persons who, "because of their disabilities in areas of reasoning, judgment, and control of their impulses, … do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* The Missouri Supreme Court initially embraced this decision: "The state has a clear legal duty not to execute a person who is mentally retarded." *In re Competency of Parkus*, 219 S.W.3d 250, 254 (Mo. banc 2007).

And yet, by 2019, the Missouri Supreme Court had moved away from this Court's clear dictates. By 2019 Missouri would allow the threat of death to be used by a lawyer who is utterly and completely uninformed.

Ronald Johnson was denied effective assistance of counsel, due process of law, and was subjected to cruel and unusual punishment in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Ronald was denied these rights when his plea counsel, Cleveland Tyson, coerced him into pleading guilty by the threat of the state seeking the death penalty if he were to take the case to trial. And Ronald was again denied these rights when the Supreme Court of Missouri left him to die in prison on a plea of guilty based on fear and the ignorance of his counsel, not reasoned decision-making.

Intellectual disability (still termed "mental retardation" in Missouri law at the time of Ronald's plea of guilty and subsequent proceedings) is viewed as an intellectual impairment, with commensurate deficits in adaptive behavior, with an onset prior to 18 years of age. In the context of death penalty law, it has been presumed to occur in those with an IQ under 70, or, those with an IQ over 70 who show severe deficits in functioning that would otherwise qualify them as disabled. *See, e.g.*, Diagnostic and Statistical Manual of Mental Disorders IV (DSM–IV), *Atkins v. Virginia*, 536 U.S. 304 (2002). It is in the second category that there has been the most litigation and controversy. *See, e.g., Hall v. Florida*, 572 U.S. 701 (2014). Although an IQ consistently below 70 generally shows intellectual disability, as it is more likely to be accompanied by the second prong of adaptive behavior deficits, it is always more difficult to prove that someone with a higher IQ is so impaired that they would not be able to function. *Id.*

It is undisputed that Ronald Johnson is intellectually disabled, or more archaically, has mental retardation. Every doctor has agreed. The Social Security Administration and the school system have agreed. The only party that has disputed that Ronald has an intellectual disability is the criminal justice system. He was first diagnosed as a ten-year old in elementary school. (Pcr Tr 30-4). He was in special education throughout his schooling. He received disability payments, and could not complete high school. Even the

State Psychiatric examination shows a finding of "mild mental retardation v. borderline intellectual functioning" and an IQ of 53. (Armour Report, p 17). He has notable and pervasive deficits in his adaptive behavior, has never been able to be in a regular class room, has been on disability, and struggles to engage in abstract reasoning or act in his own interest. (Pcr Tr 55-9, 73, Lf 39). His attorney noticed he had difficulty understanding what was going on in his case. Even the judge who denied the amended motion in this case noted Ronald was "intellectually slow and under the domination of his codefendant." He has never scored above a 63 on any IQ test. (Pcr Tr 54, Exhibit 3). A full neuro-psychiatric examination reaffirmed what has been well established since Ronald was first diagnosed with mental retardation as a 10 year old-- Ronald has an intellectual disability. (Pcr Tr 55, Exhibit 3). He has never been eligible for the death penalty. (Pcr Tr 55, Exhibit 3).

But Ronald's plea attorney did not know that. Ronald's plea attorney in fact did not recognize what mental retardation was. He offered the following at hearing:

> Q. Are you familiar with *Atkins vs. Virginia*?
>
> A. Vaguely.
>
> Q. Do you know the [holding of][4] *Atkins vs. Virginia*?
>
> A. Not offhand.

[4] A scrivener's error in the transcript renders this as "whole."

Q. Are you familiar with *Hall vs. Florida*?

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Q. Is someone who suffers from mental retardation eligible for the death penalty?

A. I do not believe so.

Q. Did you discuss this with Mr. Johnson?

A. I did not believe that Mr. Johnson was found to be mentally -- have mental retardation. Close to it, but not mental retardation.

Q. What is the definition of mental retardation?

A. I'm not a doctor. I don't know. I just know that in my -- my relationship with Mr. Johnson and in speaking with him, that I did not believe that he suffered from mental retardation.

Q. Are you familiar with the standards that have been used by the U.S. Courts?

A. I don't know what -- I don't understand the question.

Q. What standard of the definition of mental retardation was used?

A. I don't know. If you provide me with it, I could tell you.

Q. Did you know at the time?

A. I did not believe he was mentally retarded.

Q. But you did not know what the definition was?

A. It was -- just never even occurred to me to look.

(PCR Tr 31-3).

Ronald's attorney admitted he had gone through the Court's psychiatric exam, and had seen Ronald's school records which labeled him as having mental retardation. (Pcr Tr 29-30). Despite this it "just never occurred to [him] to look" at what the definition of mental retardation was. (Pcr Tr 31-3). Instead he *sua sponte* decided Ronald was not suffering from an intellectual disability or mental retardation, and should plead guilty to life without the possibility of parole to avoid the death penalty.

Despite this record, the Supreme Court of Missouri ruled that Ronald received effective assistance of counsel. *Johnson v. State*, 580 S.W.3d 895, 903 (Mo. *banc* 2019), opinion modified on reh'g (Oct. 1, 2019). Missouri ruled that it was reasonable to advise Ronald to plead guilty because until there was an official adjudication of intellectual disability in the case at bar, Ronald remained death-eligible. *Id.* Despite all of the uncontroverted evidence in this case-- including the report by Dr. Armor which was explicitly credited by the court—it held that there was a chance that Ronald would be found to not be mentally disabled. *Id.*

The legal analysis of a slim majority of the Supreme Court of Missouri erodes the basic due process rights for the intellectually disabled facing the death penalty. Out of 50 states, Missouri ranks 5th for the number of people

executed. https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976. Allowing such an erosion of rights in Missouri will impact a substantial portion of individuals facing execution, and risk influencing the law of other states.

It also risks real and irreparable harm to Ronald, a mentally disabled defendant, who was reliant on his attorney for help. Ronald was not eligible for the death penalty because of his vulnerability, and he had real defenses to murder in the first degree under Missouri law, but his attorney used fear, ignorance and coercion to induce his plea to avoid death. This Court should grant a writ of certiorari.

**2) Missouri's method of determining intellectual disability for purposes of determining death eligibility in the event of a plea is at odds with this Court's demands in *Moore v. Texas,* 581 U.S. ___, 137 S.Ct. 1039 (2017) and the Due Process clause**

According to the logic used by the Supreme Court of Missouri, it would never be ineffective, no matter how overwhelming the evidence of a client's intellectual disability, for an attorney to recommend that such client plead guilty to avoid the death penalty. The Supreme Court of Missouri ruled that because there was no hearing on intellectual disability before the plea, and that evidence was not before the plea court, there was no prejudice. The dissenting opinion dealt with that allegation succinctly:

> Finally, the principal opinion states that the issue of whether Mr. Johnson is intellectually disabled was not tried below in the underlying criminal case and, therefore, is not properly before this Court. **That is the whole point.** The very reason Mr. Johnson argues defense counsel was ineffective is that he failed to inform Mr. Johnson of the likelihood he would be found to be intellectually disabled and let him decide whether to put that before a fact finder. Yet the principal opinion appears to seriously contend that the very failure which made defense counsel ineffective itself precludes Mr. Johnson from raising the issue of ineffective assistance of counsel.

*Johnson v. State*, 580 S.W.3d 895, 913 (Mo banc 2019), opinion modified on reh'g (Oct. 1, 2019) (Emphasis in original).

This Court has consistently stepped in to strike down state schemes which risk a person with intellectual disability being subject to the death penalty. Most recently, this court did just that in *Moore v. Texas*, 581 U.S. ___, 137 S.Ct. 1039 (2017). In *Moore*, the Court overturned the finding of the ultimate finder of fact under Texas law because the standard for what constituted mental retardation or intellectual disability that it employed was unconstitutionally narrow, and risked the possibility that an intellectually disabled person could face execution. *Id*. This Court has continually struck

down any procedural scheme which risks an intellectually disabled person being executed. *Id; Hall v. Florida*, 572 U.S. 701 (2014). Missouri now has such a procedural scheme.

As the dissent opinion pointed out, every piece of evidence in this case shows Ronald is intellectually disabled. But because Missouri has ignored this Court's dictates in *Moore* and *Hall* Ronald is unable to prove that his attorney was ineffective for doing nothing to show that he is not death eligible. The majority stated that Ronald was death eligible until the finding that he had mental retardation or intellectual disability—a finding that, in Missouri, is not reached until trial. As such no plea attorney could ever be ineffective, no matter how profoundly disabled the client, for failing to advise him that he was not death eligible.

This Court should not allow Missouri's system, which permits faulty advice on death eligibility to the intellectually disabled, to stand. It abrogates this Court's demands for procedural due process in *Moore*, *supra*, and it assails the duty to effectiveness at the plea bargaining stage established in *Missouri v. Frye*, 566 U.S. 134 (2012). The writ should issue, and this Court should intercede to protect the rights of the intellectually disabled facing the death penalty in Missouri.

**3) Missouri's approach conflicts with the Tenth Circuit on whether reasonably effective counsel would be required to**

**protect an intellectually disabled client by taking every opportunity to avoid a death sentence.**

The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases require that "[counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client." ABA Guidelines Sec. 10.11(L). One appropriate opportunity is making an argument pretrial about the existence of an intellectual disability. *Harris v. Sharp*, 941 F.3d 962 (2019). In *Harris*, the Tenth Circuit held that counsel was ineffective in making the pretrial showing that Harris was intellectually disabled, because he then would have been ineligible for the death penalty. *Id.* at 977. The Court noted that "no downside existed" and such argument had "considerable upside." *Id.* Indeed, Mr. Harris, like Mr. Johnson here, had already been diagnosed as intellectually disabled. *Id.* at 978. The failure of Harris' counsel to show Mr. Harris' intellectual disability at a pretrial hearing "fell outside the acceptable range of reasonable performance." *Id.* (citing *Williamson v. Ward*, 110 F.3d 1508, 1517-18 & n.12 (10th Cir. 1997) (concluding that petitioner's counsel was ineffective in failing to seek a competency hearing given the existing evidence of incompetency and the lack of any strategic advantage.)

As the Tenth Circuit noted, defense counsel had nothing to lose in making the pretrial argument about Harris' intellectual disability because "prevailing would have eliminated the possibility of the death penalty, and losing would have left Mr. Harris precisely where he would be anyway, free to urge acquittal and a life sentence upon a conviction." *Harris*, 941 F.3d at 978. Given the evidence that was already developed about Harris' intellectual disability, any reasonable attorney would have made the pretrial showing about the existence of his intellectual ability. *Id.* By failing to do so, "Mr. Harris's attorney bypassed a risk-free opportunity to avoid the death penalty" which "constituted a deficiency in the representation." *Id.*

The three dissenting Missouri Court judges in Mr. Johnson's case would agree with the Tenth Circuit's analysis. These three judges found that Mr. Johnson's counsel was ineffective in failing to counsel Mr. Johnson that the uncontested evidence and all expert testimony showed that he was intellectually disabled. *Johnson v. State*, 580 S.W.3d 895, 908 (Mo. banc 2019). "Mr. Johnson needed to be informed that if the jury agreed with all of the experts that he was intellectually disabled, the death penalty would be off the table. Only then could he make an informed and voluntary decision to plead guilty or go to trial." *Id.* Indeed, it "just never occurred to [him] to look" at intellectual disability as a defense, and he was not familiar with the law regarding intellectual disability or the fact it made the death penalty

unavailable. *Id.* at 909. The dissent recognized that this was more than a failure to investigate or uncover Mr. Johnson's intellectual disability; he had evidence of it, yet failed to recognize the defense or inform Mr. Johnson about it. *Id.* Like the Tenth Circuit, these three judges would have reversed Mr. Johnson's case because he received ineffective assistance of counsel.

The four-judge majority opinion, however, found that Mr. Johnson's counsel was not ineffective for informing Mr. Johnson that he *was* at risk of receiving the death penalty when he was actually ineligible for such a sentence. It is noteworthy that the majority did not, and could not, dispute that Mr. Johnson is intellectually disabled. *Id.* at 906. Rather, acknowledging that its analysis focused on form rather than the substance, the majority found that counsel could not be ineffective for giving such advice because Mr. Johnson would have technically remained eligible for the death penalty until he accepted the State's plea offer and entered his guilty plea, because there had not yet been an affirmative finding of intellectual disability by a judge or jury, and the State had not yet waived the death penalty. *Id.* at 907. At the same time, the majority acknowledged the concerns raised by the dissenting opinion, and admitted that considerable evidence of Mr. Johnson's intellectual disability exists. However, the majority opinion excused counsel's failure to know what intellectual disability is and the defense it

provides. Such a holding is contrary to the holding of the Tenth Circuit, which held capital counsel to the ABA standards of representation.

The Supreme Court of Missouri's opinion conflicts with federal circuit case law and flouts this Court's opinion in *Atkins* by allowing incompetent counsel to use the threat of the death penalty to induce a plea of guilty for an intellectually disabled client. This Court should grant Mr. Johnson's petition.

Respectfully submitted,

*/s/ Amy M. Bartholow*

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ATTORNEYS FOR PETITIONER

## CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that two true and correct copies of Petitioner's "Petition for Writ of Certiorari" on petition for writ of certiorari to the Supreme Court of Missouri, and the appendix thereto in the case of *Johnson v. Missouri*, No. _____ were forwarded pursuant to Supreme Court Rule 29.5(b), postage prepaid, this 30th day of December, 2019, to:

Mr. Daniel McPherson
Assistant Attorney General
P.O. Box 899
Jefferson City, MO

Ten copies of Petitioner's "Petition for Writ of Certiorari" and the appendix thereto were forwarded to:

William Suter, Clerk
United States Supreme Court
One First Street N.E.
Washington, DC 20543

Pursuant to Supreme Court Rule 39.4, this 30th day of December, 2019.

*/s/ Amy M. Bartholow*

Amy M. Bartholow, * #47077
Counsel for Petitioner