No. 19-7153

IN THE SUPREME COURT OF THE UNITED STATES

RONALD JOHNSON,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

BRIEF IN OPPOSITION

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INTRODUCTION

Ronald Johnson (Petitioner) and an accomplice targeted and robbed a local attorney. They beat him, stabbed him repeatedly with several different weapons, and murdered him by strangling him with an extension cord. Pet. App. A3-A4. Johnson admitted to all this and pled guilty in exchange for the State dropping the death penalty and recommending life without parole. *Id.*

Johnson appealed from the denial of his post-conviction motion for relief, but he never raised or preserved the claims he now makes in his petition. The Missouri Supreme Court relied on this procedural bar and did not address those arguments on the merits. In state court, Johnson raised and preserved the claims that his plea was coerced by counsel, that Johnson was incompetent to enter the plea, and that counsel should have had Johnson independently examined for competency. But the motion court found Johnson's testimony about coercion not credible. It explained that Johnson had been examined for competency and found to be competent prior to entering his plea. And the court held that plea counsel had no reason to doubt the competency exam and rejected the post hoc criticisms leveled against the competency finding. Importantly, all of this evidence focused on competency, not intellectual disability, and the motion court credited the State's evidence on competency.

Johnson's petition does not dispute any of these holdings. Instead, Johnson's petition attempts to re-cast as a coercion claim his claim that Johnson's counsel should have investigated the availability of intellectual disability as a defense to the death penalty and advised Johnson of that defense's availability. But the Missouri

Supreme Court explicitly held that Johnson failed to preserve those arguments as required under Missouri law, and that ruling provides an adequate and independent state procedural ruling that forecloses this Court's review.

Even if Johnson had preserved his current claims, his claims are fact-bound and meritless, and the split of authority alleged in the petition does not exist. First, the defendant in *Harris v. Sharp* was convicted of murder and sentenced to death. The Tenth Circuit held that counsel should have pursued a pretrial hearing regarding intellectual disability under *Atkins* because it might have allowed his client to avoid the death penalty. *Harris v. Sharp*, 941 F.3d 962, 971 (10th Cir. 2019). That same consideration supports counsel here, where counsel allowed Johnson to take a plea deal specifically because Johnson wanted to avoid going to trial and risking the death penalty. Second, *Harris* turns on a provision of Oklahoma law that allows a defendant to seek an *Atkins* ruling prior to trial. Johnson does not cite to any provision of Missouri law providing for a similar procedure. Third, *Harris* shows why Johnson's counsel did not act ineffectively when he allowed Johnson to accept the plea deal. The death penalty would have remained on the table until Johnson was able to prove his *Atkins* defense, and there is no reason to think that was a sure thing. In fact, to this day, no court has found Johnson to be intellectually disabled. Johnson decided to plead guilty in order to eliminate the not-insignificant risk that he would receive the death penalty. Counsel was not ineffective for allowing him to make that decision.

Finally, the petition suggests Missouri's whole system is unconstitutional because a defendant sometimes must make a decision on a plea deal before he or she has a chance to obtain a ruling on an *Atkins* defense. This argument is not preserved and there is no split of authority. Moreover, this Court, left implementation of *Atkins* to the States. Nothing in *Atkins* or the Constitution requires that States institute the kind of pretrial hearing provided for in Oklahoma.

STATEMENT OF THE CASE

On August 10, 2010, Petitioner Ronald Johnson pled guilty to charges of murder in the first degree, robbery in the first degree, and armed criminal action. L.F. 12, 38.[1] Prior to the plea hearing, a psychologist, Dr. Michael Armour, "performed a competency exam on Johnson . . . and concluded he was competent to stand trial." Pet. App. A15. Johnson told the court at the plea hearing that he understood the charges against him and that he had had sufficient time to discuss the case with his attorney. L.F. 39. Johnson told the court that he was twenty-two years old and had a tenth grade education. L.F. 39. Since leaving school, Johnson had done "temp service" work and had also received a disability check for "slow learning." L.F. 39. Johnson said that he fully understood the proceedings. L.F. 40. He denied having any mental problems other than slow learning. L.F. 40. Johnson reiterated that he understood the proceedings and that he understood what he was doing. L.F. 40.

The court explained the rights attendant to trial and informed Johnson that his guilty plea waived those rights. L.F. 40. Johnson said that he understood and that he still wished to plead guilty. L.F. 40. The prosecutor then gave the following summary of the State's evidence:

> Judge, had this matter gone to trial, the state would have proven beyond a reasonable doubt, with readily available witnesses and competent evidence that between March 6, 2008, and March 8, 2008, here in the City of St. Louis, specifically at the home of Cleophus King

[1] "L.F." refers to the Legal File in the Missouri appellate courts that contains the record of the plea hearings and pleadings below. "Tr." refers to the transcript of the hearing on the post-conviction motion.

> at 5726 Waterman, the defendant, acting with Cleophus King, knowingly caused the death of Luke Meiners, a friend and acquaintance of Ronald Johnson, that they caused Mr. Meiner's death by strangling, stabbing, and beating him, and that they used a knife, multiple knives, weapons, and an extension cord on Mr. Meiners.
>
> In the course of that, that the defendant, acting with Cleophus King, stole and robbed Mr. Meiners of his wallet, keys to his jeep, and that they subsequently went and took those items and the victim's jeep and used the victim's credit cards contained within his wallet to purchase items.
>
> And that after killing Mr. Meiners that night, they took his body, wrapped him up and dumped him over in Illinois.

L.F. 41. Johnson agreed that the facts recited by the prosecutor were correct. L.F. 41.

Johnson denied that any threats or promises had been made to induce him to plead guilty. L.F. 41. He told the court that he was pleading guilty of his own free will. L.F. 41.

The prosecutor explained the range of punishment for the offenses. L.F. 41. Johnson said that he understood those ranges. L.F. 41. The prosecutor announced that the plea deal was for the State to recommend concurrent sentences of life without parole for murder and ten years each on the remaining counts. L.F. 41. The State also agreed not to seek the death penalty in exchange for Johnson's agreement to testify against Cleophus King in any court cases involving the death of Luke Meiners. L.F. 41. Johnson said that he understood the agreement and did not have any questions about it. L.F. 41

When asked whether he was satisfied with trial counsel, Johnson said that there was much that counsel could not do because he was waiting to see what was going to happen. L.F. 41. Johnson added, "[B]ut I was just rushing him." L.F. 41.

Johnson said that counsel had done what he had been asked to do, and he expressed satisfaction with counsel's services. L.F. 41.

When asked if he had any further questions, Johnson replied in the negative. L.F. 41. The court accepted the plea of guilty, finding that it had been made voluntarily and with understanding. L.F. 41. Sentencing was deferred until after Cleophus King's trial because the State's agreement not to seek the death penalty was contingent on Johnson testifying in that case. L.F. 41-42.

Later, on September 17, 2010, and December 7, 2010, Johnson sent requests to withdraw his guilty plea to the plea court. L.F. 11, 12. He appeared at a hearing on February 22, 2011, and said that he did not want to testify against King. L.F. 8-9. The State then filed an oral motion to withdraw the plea agreement. L.F. 9.

At a subsequent hearing on that motion, the State presented evidence of a plan by King to convince Johnson to change his testimony at trial. L.F. 47. Johnson testified that he was still willing to testify against King in compliance with the plea agreement. L.F. 56. The court denied the motion to withdraw the plea. L.F. 4.

Johnson was sentenced on December 19, 2012, to concurrent sentences of life without parole for murder in the first degree, and ten years each on the count of robbery in the first degree and on the two counts of armed criminal action. L.F. 36.

Johnson filed a post-conviction motion to vacate his guilty plea that raised three claims for relief. L.F. 74-82. Among other things, Johnson claimed that he was coerced to plead guilty based on a threat of receiving the death penalty when he was

ineligible for that punishment because he suffers from an intellectual disability. L.F. 95.

The motion alleged that Johnson and his family informed plea counsel Cleveland Tyson that Johnson suffered from an intellectual disability.[2] L.F. 98. The motion further alleged that Tyson informed Johnson that he would likely get the death penalty if he took his case to trial, and that Johnson believed that he could receive the death penalty. L.F. 98. The motion went on to allege that Johnson was not eligible to be sentenced to death because an IQ test administered when he was ten years old showed that he had an IQ of 53. L.F. 99. The motion alleged that Johnson was misled, misinformed, and coerced into accepting a life without parole sentence when that was the maximum sentence that he could have received at trial. L.F. 100. The motion alleged that Johnson would have taken his case to trial if he had known that life without parole was the maximum sentence that he could have received. L.F. 100.

Plea counsel Tyson testified that he had practiced criminal law since 1998. Tr. 29. Tyson said that he requested a medical examination because he had received some educational records which indicated that Johnson might have some developmental issues. Tr. 29-30. Those records and the report from the competency examination mentioned that Johnson had a full scale IQ of 53 when he was ten years old. Tr. 30-

[2] "Intellectual disability" is now used instead of "mental retardation," a term that still appears in some statutes and court opinions. Respondent will use the term "intellectual disability" with the understanding that it is synonymous with the term "mental retardation." *See Hall v. Florida*, 572 U.S. 701, 704 (2014).

31. Tyson reviewed the competency report and noted that it diagnosed Johnson with "mild mental retardation V borderline intellectual functioning." Tr. 32.

Tyson said he did not believe that someone who is intellectually disabled is eligible for the death penalty. Tr. 32. He said that he did not discuss that issue with Johnson because he had been found to have below-average intellectual functioning but was not actually intellectually disabled. Tr. 32. Tyson also said that he did not believe Johnson to be intellectually disabled based on his interactions with him. Tr. 33. When talking to Johnson, Tyson asked him if he could understand what was being said to him, and had Johnson repeat in his own words what Tyson was saying. Tr. 38. Tyson said that the school records containing the IQ score from when Johnson was ten years old did not state that he suffered from an intellectual disability. Tr. 34. Tyson said that his impression was that Johnson was developmentally slow. Tr. 35.

Tyson denied advising Johnson to plead guilty. Tr. 35-36. He said that he explained the charges and sentencing options to Johnson, including the possibility that he could be found eligible for the death penalty. Tr. 36. But Tyson denied ever telling Johnson that he would get the death penalty if he were found guilty. Tr. 37. Tyson said that it would have been extremely difficult to obtain a not guilty verdict in light of the fact that Johnson made a full confession and that the homicide was captured on an audio recording. Tr. 36-37. Tyson said that Johnson made the decision to plead guilty after having lengthy discussions with Tyson and with Johnson's family. Tr. 37.

On cross-examination, Tyson said he did not have any problems communicating with Johnson, nor did he have concerns that Johnson did not understand what he was being told. Tr. 40-41. Tyson noted that Johnson was able to clearly articulate his position about various issues, including through numerous letters he wrote from jail, some of which were addressed to the court. Tr. 41. Tyson agreed that many of those letters reflected that Johnson was weighing decisions and rationally deciding the best option. Tr. 41. Tyson acknowledged that a judge or a jury had to make a finding of intellectual disability and that such a finding was not automatic. Tr. 42.

Washington University neurology professor and clinical psychologist Robert Fucetola assessed Johnson in March of 2014 and diagnosed him with mild intellectual disability, with an IQ score of 63. Tr. 51-54. Dr. Fucetola testified that IQ scores measured in childhood would not be as stable as IQ scores measured in an adult. Tr. 65. Dr. Fucetola seems to have improperly relied on IQ scores to measure adaptive functioning. Pet. 14-15.

Johnson testified that he had been given a mental health diagnosis, but could not recall what it was. Tr. 72. When asked if he had discussed that subject with Tyson, Johnson responded that Johnson had "explained everything to my family and also explained some things to him also." Tr. 73. Johnson could not recall a doctor calling him intellectually disabled. Tr. 73. Johnson said that Tyson told him that he would get the death penalty if he stood trial. Tr. 74. He said Tyson did not talk to him about the effect on the death penalty of having an intellectual disability. Tr. 74. Johnson

said that he pled guilty to avoid the death penalty and would not have pled guilty if he had been told that being intellectually disabled meant he could not get the death penalty. Tr. 74. Johnson acknowledged on cross-examination that even if the death penalty was not an option, he was serving the same sentence of life without parole that he would have received following a guilty verdict at trial. Tr. 75.

The motion court determined that Johnson's claim was without merit. L.F. 165. The court found that the plea agreement was the only guarantee that the death penalty was off the table, and that it was sound trial strategy to avoid the risk of a death sentence. L.F. 165. The court noted that the murder was exceptionally brutal and the State's evidence was considerably strong. L.F. 165. The motion court found Tyson to be a credible and competent attorney. L.F. 166.

Johnson filed a notice of appeal in the Missouri Court of Appeals, Eastern District. L.F. 170-73. After that court affirmed the judgment, Johnson successfully applied to have the case transferred to the Missouri Supreme Court. *Johnson v. State*, 2018 WL 2925369 (Mo. App. E.D., Jun. 12, 2018); Pet. App. A6. The Missouri Supreme Court issued its opinion affirming the judgment on July 16, 2019. Pet. App. A2. The court issued a modified opinion on October 1, 2019, at which time it denied Johnson's motion for rehearing. Pet. App. A2, A73.

REASONS FOR DENYING THE PETITION

I. The Missouri Supreme Court held that Johnson failed to preserve the claims he advances here, and it credited the State's evidence on the coercion and competency claims that he did preserve.

The Missouri Supreme Court expressly held that Johnson's post-conviction motion and appeal failed to preserve the *Atkins*-related arguments Johnson now raises before this Court. Pet. App. A18-A22. This state-law procedural bar means this Court cannot consider those questions on direct appeal from the Missouri Supreme Court. The narrower grounds actually addressed and preserved in state court—coercion and competency—are not raised in the petition before this Court, and were correctly decided on fact-bound grounds in any event.

A. The Missouri Supreme Court held that Johnson failed to raise or preserve the *Atkins*-related issues presented in the petition.

Under Missouri law, Johnson has not preserved the questions presented, so this Court has no path to review those questions on the merits through direct review of the Missouri Supreme Court. In Missouri, a post-conviction motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). Accordingly, any allegations or issues that are not raised in the post-conviction motion are waived on appeal. *Shockley v. State*, 579 S.W.3d 881, 899 (Mo. 2019); Mo. R. Crim. P. 24.035(d). Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal. *Shockley*, 579 S.W.3d at 899. In addition, on appeal, any claim

of error not specifically raised in the "Points Relied On" in the appellant's brief is waived. *See* Mo. Sup. Ct. R. 84.04(d); *State v. Lammers*, 479 S.W.3d 624, 637 n.13 (Mo. 2016) ("Errors raised in the argument portion of a brief but not raised in the points relied on need not be considered by this Court.") *McClain v. Mo. Dep't of Corr.*, 8 S.W.3d 210, 211 (Mo. App. W.D. 1999) ("Arguments not raised in a point relied on are not presented for review."); *Holliday Invs., Inc. v. Hawthorn Bank*, 476 S.W.3d 291, 297 n.5 (Mo. App. W.D. 2015) ("Claims of error raised in the argument portion of a brief that are not raised in the point relied on are not preserved for our review.").

Here, Johnson's post-conviction motion and appeal focused on coercion and competency, not whether he was ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 317 (2002). *See* Pet. App. A19 (explaining that the "only issues" preserved were one argument about coercion and two about competency). The Missouri Supreme Court rejected each of these arguments on the narrow ground that he had failed to introduce sufficient evidence to prove those claims. Pet. App. A6-A18.

The court then turned to the questions raised by the dissent and now raised in the Petition. Pet. App. A18-A22. It explained:

> The issue in this case is not whether Johnson was intellectually disabled. Nor is the issue whether his plea counsel was ineffective for failing to investigate Johnson's intellectual disability or whether his counsel should have informed him of or pursued this defense. *Johnson either did not seek post-conviction relief on these grounds or failed to preserve the ground for appeal.*

Pet. App. A18-A19 (emphasis added). The court then carefully explained why Johnson had not preserved these two issues. Pet. App. A20 (analyzing Johnson's

appellate briefing and explaining "[a]bsent . . . is any claim Johnson's counsel was ineffective for failing to inform him of or implement any defense based on intellectual disability"). This Court does not review or address claims rejected by state courts on independent and adequate state-law grounds. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (holding that "we will not review judgments of state courts that rest on adequate and independent state grounds").

In an attempt to evade this jurisdictional hurdle, Johnson attempts to shoehorn the claims in his Petition into the coercion claim that he did preserve. But Johnson repeatedly characterizes the claim he advances here as a claim that his trial counsel should have investigated the availability of intellectual disability as a defense against the death penalty and should have advised Johnson of its availability before he accepted the plea deal, yet counsel failed to do so out of ignorance. *See* Pet. at 16 (arguing that Johnson's "plea counsel admitted that he did not know what mental retardation or intellectual disability [was] and that he was unfamiliar with this Court's established precedent on these issues"); *id.* at 17 (arguing that Johnson's attorney coerced him into pleading guilty because he was "utterly and completely misinformed"); *id.* at 19 (arguing that Johnson' plea attorney "did not know that," *i.e.*, that he was supposedly ineligible for the death penalty due to intellectual disability); *id.* at 19-21 (quoting an excerpt of the attorney's cross-examination to argue that the attorney's ignorance of the law led him to fail to investigate and advise Johnson of the defense of intellectual disability); *id.* at 22 (arguing that the attorney used "ignorance" to coerce Johnson to accept the plea offer). Likewise, the dissenting

opinion in the Missouri Supreme Court—which Johnson repeatedly cites—characterized Johnson's coercion claim in terms of the failure to investigate and advise Johnson of the availability of intellectual disability as a defense to the death penalty. *See* Pet. App. A25 (dissenting op.) (stating that plea counsel "misinformed and misled Mr. Johnson of the availability of a defense that would preclude imposition of the death penalty").

Thus, the entire logical predicate of the claim that Johnson advances here—*i.e.*, that his counsel, due to ignorance of the law, failed to investigate intellectual disability and failed to advise him of the availability of intellectual disability as a defense to the death penalty—consists of arguments that the Missouri Supreme Court explicitly held that Johnson had failed to preserve under Missouri's procedural rules. *See* Pet. App. A4, n.3 (holding that Johnson had failed to preserve the claim that "Johnson's counsel was ineffective for failing to inform him of all available defenses" because Johnson failed to raise that claim in his motion for post-conviction relief); Pet. App. A5, n.4 (holding that, "[a]lthough Johnson raised counsel's failure to investigate his perceived intellectual disability as grounds for post-conviction relief in his Rule 24.035 motion, Johnson failed to raise this argument on appeal"); Pet. App. A13, n.8 (holding that "[e]ven if Johnson's counsel should have investigated more thoroughly Johnson's intellectual disabilities, Johnson abandoned his failure to investigate claim in this appeal"). Thus, the Missouri Supreme Court declined to address the merits of the claim Johnson advances here because the Court concluded that Johnson had failed to preserve the very arguments that form the basis for this

claim. Pet. App. A18-A22. Johnson may disagree with the Missouri Supreme Court's application of Missouri's procedural rules in his case, but this Court does not review alleged errors of state law. Johnson's disagreement with the Missouri Supreme Court does not confer jurisdiction on this Court to review a judgment resting on an adequate and independent state procedural ground.

Faced with a hearing record that did not support the claim that was actually pled in the post-conviction motion, Johnson attempted to introduce new claims on appeal to the Missouri Supreme Court to fit the evidence that was adduced at the hearing. He is attempting to press that same revised claim before this Court. In so doing, he is asking this Court to pass on an issue that was not presented to the motion court for determination, and that was not properly before the Missouri Supreme Court. The Court should decline that invitation.

B. The only claims Johnson did preserve are fact-bound and meritless.

The Petition does not raise any of the three claims raised and addressed by the Missouri Supreme Court. Pet. App. A6-A14. Moreover, the Missouri Supreme Court correctly rejected each of these claims, and did so on fact-bound grounds that do not warrant this Court's review.

First, the court held that defense counsel had not threatened or coerced Johnson into pleading guilty. Pet. App. A8-A11. "The record in this case refutes Johnson's assertion that his counsel made any threats that caused him to plead guilty." Pet. App. A8. On this point, the motion court "did not find Johnson's

allegation credible" and specifically found credible the testimony of Johnson's counsel. Pet. App. A8-A9.

Nor was it error for defense counsel Tyson to advise Johnson that he was eligible for the death penalty. Pet. App. A11-A14. A "finding of intellectual disability is not automatic." Pet. App. A12. "The burden of proving intellectual disability is on the defendant." *Id.* "Until a capital defendant is adjudged to be intellectually disabled, he remains eligible for the death penalty unless the State waives" it. *Id.* (citing Mo. Rev. Stat. §§ 565.005.1, 565.020.2). That is, intellectually disability is a defense raised at the sentencing stage (and far from a certain defense in this case).[3] Until then, defense counsel had "'an obligation to inform his client of the possible range of punishment.'" Pet. App. A13 (quoting *Rice v. State*, 585 S.W.2d 488, 493 (Mo. 1979)). Thus, "the advice of Johnson's counsel," advising him that he was at least eligible for the death penalty given the charges against him, was well within the "range of competence" demanded by the Constitution. Pet. App. A14 (quoting *Hill v. Lockhart*, 479 U.S. 52, 56 (1985)). At the hearing on the motion, plea counsel denied

[3] The State has only put on evidence as to Johnson's competence, not as to his intellectual disability, because that is the only claim Johnson has ever raised. But it is noteworthy that the Petition and Johnsons' expert rely almost exclusively on Johnson's IQ scores, *see, e.g.*, Pet. 14-15, despite this Court's warning that IQ should never be taken as "final and conclusive evidence" of intellectual disability. *Hall*, 572 U.S. at 712. Prior examinations had found "mild mental retardation" at age 10 and borderline intellectual functioning at the time of the plea hearing. *See* Pet. at 10-11. As Johnson's plea counsel rightly understood, neither of these diagnoses compels a finding that Johnson was intellectually disabled. *Id.* ("I did not believe that Mr. Johnson was found to . . . have mental retardation. Close to it, but not mental retardation.").

that he had advised Johnson to plead guilty. He said that he explained the charges and sentencing options to Johnson, including the possibility that he could be found eligible for the death penalty. But Tyson denied ever telling Johnson that he would get the death penalty if he were found guilty. Again, the motion court found Tyson to be credible. The Missouri Supreme Court deferred to this credibility finding and upheld the motion court's holding that plea counsel did not threaten Johnson. Pet. App. A8-A9.

Second, the court held that Johnson was competent to plead guilty. Pet. App. A15-16. Dr. Michael Armour, a psychologist "performed a competency exam on Johnson . . . and concluded he was competent to stand trial." Pet. App. A15. Based on Dr. Armour's report, the trial court rightly accepted Johnson's knowing and voluntary plea. *Id.* Moreover, the post-conviction motion court expressly found that "Dr. Armour was a proficient psychologist, whose exam was reliable, and Johnson's evidence was inadequate to undermine Dr. Armour's conclusion." Pet. App. A15-16. This Court does not grant review to reweigh a factfinder's credibility determinations, and the Petition does not ask it to do so. "[D]efense counsel is not ineffective for failing to request a second evaluation solely because the first exam found the defendant competent to proceed." Pet. App. A17. "Dr. Armour concluded Johnson did not suffer any mental disease or defect and that he was not intellectually disabled to an extent that limited his ability to understand the proceedings against him or to assist in his own defense." *Id.* The motion court expressly rejected Johnson's

evidence attempting to undermine Dr. Armour's report and instead stated that the report was "persuasive." *Id.*

II. No conflict exists between the Missouri Supreme Court and the Tenth Circuit in analyzing ineffective assistance of counsel claims.

Johnson argues that "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." Pet. at 24-25. The alleged conflict is illusory because Johnson overlooks at least three fundamental procedural and substantive differences between his case and the Tenth Circuit case that he relies on.

First, the defendant in *Harris v. Sharp* was tried and convicted of first-degree murder, and sentenced to death. *Harris v. Sharp*, 941 F.3d 962, 971 (10th Cir. 2019).[4] He filed a habeas petition alleging that counsel was ineffective for not seeking a pretrial hearing on the existence of an intellectual disability, which would have precluded the death penalty. *Id.* at 973. Against this procedural background, the Tenth Circuit emphasized that counsel had not done enough to make sure his client *did not receive the death penalty*. *Harris*, 941 F.3d at 978 ("the ABA guideline required him to take advantage of every opportunity"). Here, by contrast, Johnson alleges that his counsel acted improperly by allowing Johnson to plead guilty in order to avoid any risk of the death penalty. The rationale weighing against counsel in

[4] Oklahoma has asked this Court to reverse the Tenth Circuit. *See Sharp v. Harris*, No. 19-1105 (petition pending).

Harris (avoiding the death penalty) weighs in favor of counsel here, because Johnson's plea enabled him to avoid the death penalty entirely.

Second, *Harris* turned on details of Oklahoma law that are different than Missouri law. Oklahoma law gave the defendant a choice between a pretrial evidentiary hearing before a judge, or having the jury determine the existence of an intellectual disability. *Id.* at 977. Under the latter option, the judge could revisit the issue after trial if the jury found the existence of an intellectual disability. *Id.* The Tenth Circuit found that the defense would have lost nothing if a judge or jury had made a finding of no intellectual disability, and that the death penalty would have been excluded had there been a finding of an intellectual disability. *Id.* Therefore, the court concluded that defense counsel had a risk-free opportunity to avoid the death penalty and should have taken it. *Id.* Johnson points to no parallel provision of Missouri law that allows a defendant to seek a similar pretrial evidentiary hearing on intellectual disability. Pet. App. A12-A13.

Third, *Harris* demonstrates why Johnson's counsel did not act ineffectively when he allowed Johnson to accept the plea deal. The evidence of intellectual disability was stronger in *Harris* than it is here. *Harris*, 941 F.3d at 977 ("The evidence of an intellectual disability was ready-made."). Many people take special education classes or exhibit some level intellectual slowness, but an intellectual-disability diagnosis is, by definition, rare. Here, the choice confronting Johnson was to accept a plea deal that would protect him from the death penalty entirely, or go to trial with the possibility that a jury could find that Johnson did not have an

intellectual disability and impose the death penalty. That was far from a risk-free choice. Johnson's argument that there was no risk again turns on his mistaken argument that the post-conviction hearing conclusively established that he is intellectual disabled. But, as explained above, that was not the claim at issue in the post-conviction hearing, so the evidence presented at that hearing was not all of the evidence that could have been presented had an intellectual disability defense been advanced. Neither the post-conviction court nor the Missouri Supreme Court has ever found that Johnson is intellectually disabled. Here, in contrast to *Harris*, rejecting the plea deal meant risking the death penalty down the road, since there was no guarantee that the plea offer would be renewed or that the jury would find that the defense applied.

In short, the Missouri Supreme Court's opinion in this case involved different issues than did the Tenth Circuit's opinion in *Harris*. There is no conflict.

III. Johnson is wrong on the merits.

Ultimately, Johnson's unpreserved claim comes down to one question: whether Missouri was constitutionally required to determine Johnson's intellectual disability prior to trial and before Johnson decided whether to take a plea deal. Under Missouri law, neither Johnson nor Johnson's counsel could have known whether he would later be found eligible or ineligible for the death penalty under *Atkins*. That determination is not made until later. When the jury finds a defendant guilty of first-degree murder in a case where the death penalty is not waived, it then proceeds to a second stage of the trial where the only issue is the punishment to be assessed and declared. Mo. Rev.

Stat. § 565.030.4 (2016). The jury is to assess and declare punishment at life imprisonment without the possibility of parole if it finds by a preponderance of the evidence that the defendant is intellectually disabled. *Id.* Johnson's criticism of the statute is that the death-eligibility finding based on intellectual disability is not reached until later in the process, at the penalty phase of trial.

Johnson never raised this constitutional challenge to Missouri's statutory procedure in any court below and no court has passed on the issue. This Court generally does not grant certiorari when the question presented was not pressed or passed on below. *United States v. Williams*, 504 U.S. 36, 41 (1992).

In any event, Johnson's argument that the statute unconstitutionally risks subjecting a person with an intellectual disability to the death penalty is not convincing. This Court has not provided any definitive guidance for determining *when* eligibility for the death penalty due to intellectual disability must be determined in the course of capital proceedings. *Bobby v. Bies*, 556 U.S. 825, 831 (2009). The Court has instead left to the States the task of developing appropriate ways to enforce the constitutional restrictions. *Id.*; *Atkins v. Virginia*, 536 U.S. 304, 317 (2002). Johnson relies on two cases where this Court overturned substantive methods for determining intellectual disability. *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017); *Hall v. Florida*, 572 U.S. 701, 724 (2014). Johnson levels no criticism of Missouri's statutory definition of intellectual disability. *See* Mo. Rev. Stat. § 565.030.6 (2016). *Moore* and *Hall* thus do not aid him.

Moreover, Johnson's claim that Missouri's statutory scheme increases the risk that the death penalty will be erroneously imposed is not justiciable because no finding has ever been made that Johnson is, or is not, intellectually disabled. (Pet. App. A19 n.9). Even if a State law might be subject to a constitutional challenge as applied, the State must be given the chance to apply that procedure before such a challenge is entertained. *Schriro v. Smith*, 546 U.S. 6, 8 (2005).

Ultimately, Johnson's argument to this Court suffers from the same flaw as the argument he presented to the Missouri Supreme Court—he asserts that he is categorically ineligible for the death penalty based on the evidence presented at the post-conviction hearing, but he had to accept or reject the plea deal *before* he could know whether a later factfinder would agree with his assertions. Indeed, Johnson *still* does not have an *Atkins* ruling. Moreover, Johnson "cannot predict what evidence, if any, the State would have presented in opposition to his position if he would have raised the defense of intellectual disability, and, as the dissenting opinion acknowledges, the trier of fact would have been free to believe or disbelieve the evidence of Johnson's disability." Pet. App. A21.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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