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

Nos. 21-5854, 21A-51

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT.

This is not a close case. Ernest Johnson is intellectually disabled. To permit the State of Missouri to execute Mr. Johnson undermines this Court's authority, and precedent and would represent a fundamental miscarriage of justice.

Evidence supporting Mr. Johnson's intellectual disability diagnosis is credible and consistent throughout his 61 years of life. Mr. Johnson's IQ has been tested repeatedly over the last 5 decades (beginning at the age of 8), and his scores have shown a remarkable consistency. He has a lifetime adjusted average full-scale IQ score of **67.4,** well within the range for intellectual disability, and indicating he satisfies the first prong of the intellectual disability diagnosis. (App. E, p.30) (noting that the consistency of scores indicates a case of convergent validity on IQ). Included in this lifetime average is the full-scale score of the State's own expert, 67–the exact same score found by the Mr. Johnson's trial expert. Mr. Johnson's full-scale IQ scores are supported by objective data from the developmental period.

Educators in Mr. Johnson's segregated school identified Mr. Johnson from an early age as someone requiring substantial educational supports and placed him in special education classes beginning in the fourth grade. The local school system tested Mr. Johnson's IQ for the first time just a few months in triggered by his initial standardized testing showing his deficiencies in every academic area. Mr. Johnson was held back three times, in second and third grade and in his freshman year in high school, for poor academic performance. Academic achievement testing placed Mr. Johnson universally at the bottom in all areas. Every teacher reported his

intellectual shortcomings. He could not use a ruler to draw a straight line in the ninth grade. A correction's officer long-before this crime described Mr. Johnson as "very childlike and unintelligent," and that he had an IQ of 70. (App. O, p. 2). Ernest Johnson is intellectually disabled.

Respondent attempts to dispute Mr. Johnson's evidence but does so without a single citation to the record or expert testimony. Indeed, this case is an outlier in the intellectual disability realm because the state failed to call an expert to rebut Mr. Johnson's evidence. Every testifying expert that conducted an *Atkins v. Virginia*, 536 U.S. 304 (2002) examination testified Mr. Johnson meets the criteria for intellectual disability and that it is not a close case.

The Missouri Supreme Court's approach to Mr. Johnson's *Atkins* claim marks a radical departure from this Court's jurisprudence. The court deviated from well-established clinical standards that this Court has recognized undergird *Atkins*. In particular, the Missouri Supreme Court imposed additional criteria – above and beyond those relied on by clinicians and this Court – to the definition of intellectual disability. These included a requirement of an intellectual disability diagnosis prior to the age of 18 and a requirement for Mr. Johnson to establish a causal relationship between the intellectual disability and the deficits in adaptive functioning. These additional criteria serve only to frustrate this Court's *Atkins* inquiry and result in the execution of the intellectually disabled in Missouri. As noted by Respondent, relief is appropriate "where a state court dramatically departed from the three-part test by imposing a state-specific approach." Resp. at p. 13.

Respondent choose not to defend against Mr. Johnson's arguments related to the Missouri Supreme Court's requirement of diagnosis in the developmental period. Mr. Johnson agrees the Missouri Supreme Court's on-set determination is indefensible. While a GVR is appropriate, alternatively, this Court should enter a stay and hold Mr. Johnson's case for consideration in conjunction with a similar on-set question pending before this Court in *Coonce v. United States*, Case No. 19-7862 (Question #1).

REPLY TO RESPONDENT'S ARGUMENTS

I. RESPONDENT RELIES ON FALSE AND MISLEADING ARGUMENTS TO AVOID THIS COURT'S REVIEW.

Respondent argues this claim has been raised and rejected numerous times by the state and federal courts. *See* Resp. at p. 6-7. That simply is not true. During the direct appeal, Mr. Johnson's direct appeal attorney raised the *Atkins* claim as a sufficiency of the evidence claim and not as a constitutional challenge. The Missouri Supreme Court, therefore, only considered whether the prosecution "introduced sufficient evidence from which a reasonable juror could have found each element of the crime beyond a reasonable doubt." *State v. Hunt*, 451 S.W.3d 251, 257 (Mo. 2014). The court did not consider, as it did in the instant case, whether the evidence admitted and relied on by the factfinder is consistent with clinical and constitutional requirements. Therefore, Respondent misleads.

Respondent erroneously alleges this Court should decline to accept jurisdiction of this case on the basis that the Missouri Supreme Court's decision represents an independent and adequate state law ground for relief. Resp. at p. 11. Inconsistent

with this argument, Respondent admits that the Missouri Supreme Court's addressed the merits of the intellectual disability claim. It is not what the Missouri Supreme Court could have done – but what it did – and having addressed the merits, there can be no allegation of a default. Respondent's argument has no merit here, was made to the Missouri Supreme Court, and was rejected by the court when it conducted a merits review.

At another point, Respondent harangues about Petitioner challenging Missouri's intellectual disability statute. Resp. at p. 11. Mr. Johnson made no such argument. He simply has asserted that the Missouri Supreme Court's judicial activism in creating the "*Johnson* Factors" marked a departure from how Missouri previously defined intellectual disability, and, more importantly for the matter before this Court, a circumvention of this Court's rulings in *Atkins*, *Moore v. Texas*, 137 S.Ct. 1039 (2017) ("*Moore I*") and *Moore v. Texas*, 139 S.Ct. 666 (2019) ("*Moore II*").

II. THE MISSOURI SUPREME COURT IGNORED WELL-ESTABLISHED CLINICAL APPROACHES IDENTIFIED AND APPLIED BY THIS COURT TO EVALUATE AN *ATKINS* CLAIM.

This Court cited with approval clinical criteria in *Atkins*, 536 U.S. at 317.[1] While not dictating how to define intellectual disability, the Court has consistently placed guardrails for those states that stray from what is clinically acceptable. Missouri has so strayed.

[1] Respondent wrongly suggests that Mr. Johnson improperly argues clinical guidelines as governing the Eighth Amendment inquiry while simultaneously noting that in *Atkins*, at 317, "that the states could look to clinical norms" to determine intellectual disability. Resp. at p. 12.

The Missouri Supreme Court's approach to *Atkins* and its progeny starkly diverged from the constitutional protections *Atkins* sought to ensure.[2] First, the Missouri Supreme Court plainly misapplied the DSM-5 definition of intellectual disability to create a fourth criterion and when confronted with the error – as noted by the DSM-5 Steering Committee – the court doubled-down. Second, the Missouri Supreme Court engaged in a weighing of Mr. Johnson's deficits against his strengths (by looking to the crime facts) which is at odds with the clinical and constitutional approach to the identification of intellectual disability. Finally, the Missouri Supreme Court ignored Mr. Johnson's lifetime consistency in full-scale IQ scores within the range of intellectual disability in favor of and instead favored an unsupported and refuted allegation of malingering, undermined by the very testing data proffered by the State.

Respondent alludes to *Atkins*, 536 U.S. at 318, as a basis to justify many of the Missouri Supreme Court's actions, particularly as it relates to reliance on the facts of the crime. Mr. Johnson must correct this mis-citation. At this point in *Atkins*, this Court was discussing policy reasons for its decision – **not diagnostic criteria**. In so doing, this Court recognized that executing the intellectually disabled 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

[2] While it could be included, Mr. Johnson does not address the on-set error because Respondent did not defend the Missouri Supreme Court's error.

an unconstitutional punishment." *Atkins*, 536 U.S. at 318 (internal quotations omitted).

A. The Missouri Supreme Court misapplied the DSM-5 to reject Mr. Johnson's evidence of intellectual disability.

Respondent suggests the Missouri Supreme Court could have committed no error because the DSM-5 was confusing, and just changed. This does not hold water. 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," noting:

> 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 has 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). There has been no change – the diagnostic criteria remained the same until the Missouri Supreme Court's radical departure.

There is no longer a question about whether the Missouri Supreme Court misapplied the intellectual disability definition from the DSM-5 because the American Psychological Association, the publisher of the DSM-5, have removed the

language specifically relied on by the court. App. D. The Missouri Supreme Court was made aware of its mistake with the filing of Mr. Johnson's rehearing petition and again in the reply in support, yet the court held firm and denied rehearing even though their opinion is fundamentally flawed.

Respondent misleads by asserting the Missouri Supreme Court expressly disavowed the DSM-5 language implying a causal connection. Resp. at p. 9, n.2. The court's footnote instead specifically required Mr. Johnson to "provide enough evidence to prove the alleged deficits are related to his alleged deficits in intellectual functioning." App. A. n. 9 (citing DSM-5 at p. 38). Rather than "disavow" the causal relationship, the Missouri Supreme Court required Mr. Johnson to establish some relation to the deficits in adaptive functions.

Respondent's mischaracterization of the Missouri Supreme Court's opinion is borne out by the repeated application of a causal requirement. 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's reliance on the language in the DSM-5 to require a causal relationship provides substantial justification for this Court to grant certiorari, reverse the Missouri Supreme Court opinion, and remand the matter for further consideration to apply the DSM-5's three-criteria definition of intellectual disability.

This Court has consistently looked to the medical community to inform the judiciary on the definition of intellectual disability under the Eighth Amendment. In *Hall v. Florida*, 572 U.S. 701 (2014), this Court was presented with the question of "how intellectual disability must be defined in order to implement these principles and the holding of *Atkins*." *Id. Hall* further noted that 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.* This approach has been reinforced in this Court's opinions in *Brumfield v. Cain*, 576 U.S. 305 (2015), *Moore I*, and *Moore II.* This Court cautioned that a state that supersedes its own definitions of intellectual disability that are outside the bounds of the medical field violate the Eighth Amendment. *See Moore I,* 137 S.Ct. at 1053. The Missouri Supreme Court's opinion, like that of the Texas state court, superseded its own definition of intellectual disability and ignored the latest clinical definition of intellectual disability.

B. The Missouri Supreme Court ignored this Court's decisions in Moore I and Moore II.

Respondent seems to willfully mischaracterize Mr. Johnson's arguments about the Missouri Supreme Court's over-reliance on the facts of the crime. Resp. at pp. 13-14. Respondent argues the Missouri Supreme Court may consider the facts of the crime when evaluating the evidence of intellectual disability. *Id.* Mr. Johnson agrees, but the issue is not consideration of the facts of the crime, but the Missouri Supreme Court's decision to weigh the evidence of Mr. Johnson's perceived strengths against his weaknesses. The Missouri Supreme Court engages in this very exercise even though this Court repeatedly emphasized in *Moore I and Moore II* that this approach is contrary to the Eighth Amendment.

Just as this Court rejected the Texas "*Briseno* Factors," this Court should reject the Missouri "*Johnson* Factors." In *Moore I*, 137 S. Ct. at 1046 n. 6 [3], this Court considered a *Briseno* factor which posited: "did the commission of the offense require forethought, planning, and complex execution of purpose." This Court condemned the *Briseno* factors and described them as "an outlier" because they deviated so substantially from the accepted clinical practices. *Moore I*, 137 S. Ct. at 1052.

While there were dissents in *Moore I, Moore II* noted the Court **unanimously rejected reliance on such factors**:

> Three Members of this Court dissented from the majority's treatment of Moore's intellectual functioning and with aspects of its adaptive-functioning analysis, but all agreed about the impropriety of the *Briseno* factors. As THE CHIEF JUSTICE wrote in his dissenting opinion, the *Briseno* factors were "an unacceptable method of enforcing the

[3] 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.

> guarantee of *Atkins*" and the Texas Court of Criminal Appeals "therefore erred in using them to analyze adaptive deficits." *Moore*, 581 U. S., at ___, 137 S. Ct. 1039, 197 L. Ed. 2d 416, at 431-432 (opinion of ROBERTS, C. J.).

139 S. Ct. at 669-70. *Moore II* again reversed the state court for its continued reliance on the facts of the crime *Briseno* factor. *Id.* at 671. This Court noted "[e]mphasizing the *Briseno* factors over clinical factors, we said, '"creat[es] an unacceptable risk that persons with intellectual disability will be executed."' *Id.* at 669 (citation omitted). This Court previously unanimously rejected reliance on such in *Moore I* and *Moore II*, and thus, Mr. Johnson has shown a likelihood of success. As noted in *Moore II*, this Court should intercede otherwise a "person[] with intellectual disability will be executed."

In this case, the Missouri Supreme Court repeatedly considered the crime facts as a counterweight to the evidence of adaptive deficits. *See, e.g.,* Slip Op. 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."). The court found adaptive strengths rather than what the clinical approach required; crediting Mr. Johnson's adaptive deficits. The Missouri Supreme Court weighed the lifetime of evidence of subaverage intellectual functioning as evidenced by 8 full-scale IQ tests in the range of intellectual disability, childhood grades, standardized tests, and testimony from teachers confirming the accuracy of the testing completed during the developmental period against the facts of the crime in a manner at odds with the clinical and legal precedent. The court therefore engaged in a process that results in

"an unacceptable method of enforcing the guarantee of *Atkins*" *Moore*, 137 S.Ct., at 1053 (opinion of Roberts, C.J.).

C. The Missouri Supreme Court errors related to IQ scores.

Respondent fails to address the merits of Mr. Johnson's argument as it relates to the Missouri Supreme Court's treatment of the IQ scores asserting, they are not worthy of this Court's consideration. Resp. at p. 14. Respondent misses the import of Mr. Johnson's claim, and the impact the failure to accurately report and consider scores by the Missouri Supreme Court opinion has on the evaluation of intellectual disability in Missouri.

Mr. Johnson has taken nine full-scale IQ tests over the course of his life and has shown remarkable consistency in his overall scores. Eight of the nine IQ scores fall within the range of intellectual disability and support the testifying expert opinions that Mr. Johnson is intellectually disabled. The Missouri Supreme Court, though, mischaracterizes many of the testing scores indicating they were not in the range for intellectual disability. This is both a factual mistake and a departure from the clinical norms for interpreting and contextualizing IQ scores.

Mr. Johnson's lifetime scores provide convergent validity to the clinical diagnosis and undermine any assertion Mr. Johnson's faked his scores to avoid the death penalty. "[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, indicate 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).

III. MISSOURI'S FLAWED INTELLECTUAL DISABILITY JURY INSTRUCTIONS.[4]

Respondent neither disputes the merit of the claim nor the fact that the Missouri Supreme Court addressed the merits. Thus, Respondent's allegation of procedural default is unwarranted.

Regardless, the nature of the claim, and the Missouri's determination that *Atkins* is an eligibility requirement under Missouri law is critical. Because there was not a unanimous determination as required by *Atkins*, *Ring*, and *McCoy*, as argued in *Dynes v. Hoover*, 61 U.S. 65, 67 (1857), "[t]he subject-matter of the sentence, the punishment inflicted, was not within their jurisdiction, and is a punishment which they had no sort of permission or authority of law to inflict. (See Hickman, p. 149, 152, and 1 McArthur, 158.)"

A rule is jurisdictional '[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.' *Arbaugh v. Y & H Corp.,* 546 U.S. 500 (2006)." *Gonzalez v. Thaler*, 565 U.S. 134, 141–42 (2012). Missouri's

[4] An Amicus has been submitted in support of the stay application in *Johnson v. Blair*, Case No. 21A-51.

Legislature made that determination. Without a unanimous verdict, this Court may act. "But we repeat, if a court martial has no *jurisdiction over the subject-matter of the charge* it has been convened to try, or shall inflict a punishment *forbidden by the law*, though its sentence shall be approved by the officers having a revisory power of it, *civil courts* may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction, and give him redress." *Dynes*, 61 U.S. at 82–83.The Missouri Supreme Court noted this was an edibility finding. Contrary to this Court's authority, the court then a single hold-out juror could subvert the will of the jury on an eligibility question and render someone subject to the death penalty. This raises a constitutional question worthy of consideration.

IV. MR. JOHNSON TIMELY PURSUED HIS REMEDIES IN COURT.

Respondent wrongly argues this Court should deny relief and a stay of execution because he unreasonably delayed in seeking relief from the courts. Resp. at pp. 17-19. In fact, Mr. Johnson timely pursued his remedies in the courts, Respondent argued the same thing below and the Missouri Supreme Court rejected the allegations and addressed the merits.

Mr. Johnson filed his original state habeas action in the Missouri Supreme Court **prior to the setting of his execution date.** After the setting of a date, the Missouri Supreme Court rejected Respondent's timeliness arguments and considered the merits of Mr. Johnson's petition, issuing an opinion until August 31, 2021. Mr. Johnson then timely filed a rehearing petition and complied with the court's deadlines for submitting a reply in support. The Missouri Supreme Court delayed a

decision on the rehearing petition until October 1, just 4 days prior to the scheduled execution date.

Mr. Johnson complied with all time and scheduling requirements as dictated by the Missouri Supreme Court and applicable rules. In fact, Mr. Johnson sought to have this matter resolved prior to setting an execution date, but the Missouri Supreme Court – supported by Respondent – set a date prior to the resolution of the instant case. This Court should defer to the Missouri Supreme Court's rejection of those same arguments when they were presented to that court.

There is no tangible harm to the State. A simple delay to accurately determine whether Mr. Johnson's intellectually disability was constitutionally considered by the Missouri Supreme Court, in accordance with this Court's precedent, prevents the State from committing an illegality. The State cannot claim harm for having to follow the law. This Court has said states simply cannot execute the intellectually disabled.

CONCLUSION

Because the Missouri Supreme Court contravened this Court's *Atkins* line of cases 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*. Certiorari should also be granted because the jury instructions permitted a single juror to deprive Mr. Johnson of his *Atkins* protections.

Because Mr. Johnson meets the *Hill v. McDonough*, 547 US. 573 (2006) standard, this Court should grant a stay of execution. Alternatively, this Court should enter a stay of execution to permit due consideration of Mr. Johnson's Petition

for Writ of Certiorari and to hold the matter for this Court's consideration of *Coonce v. United States*, Case No. 19-7862 (Question #1), which raises an on-set question undefended herein.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and a true and correct copy of the foregoing pleading was filed through the Electronic Case Filing and forwarded pursuant to Supreme Court Rule 29.5(b), postage prepaid, this 5th day of October, 2021:

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