No. 21A-51

In the
Supreme Court of the United States

ERNEST JOHNSON,

Petitioner,

v.

PAUL BLAIR,

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF FOR *AMICI CURIAE* RETIRED MISSOURI JUDGES IN SUPPORT OF PETITIONER'S APPLICATION FOR STAY OF EXECUTION AND MOTION FOR LEAVE TO FILE BRIEF ON 8 ½ BY 11-INCH PAPER

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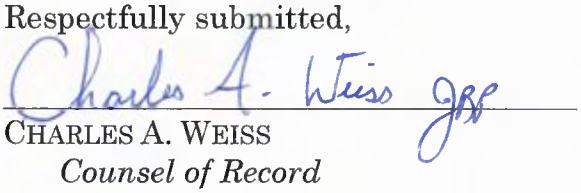
MOTION FOR LEAVE TO FILE TO FILE BRIEF FOR *AMICI CURIAE* RETIRED MISSOURI JUDGES IN SUPPORT OF PETITIONER'S APPLICATION FOR STAY OF EXECUTION

Amici curiae are retired Missouri judge who respectfully move for leave under Supreme Court Rule 37.2 to file a brief as *amici curia*e in support of Petitioner Ernest Johnson's application for a stay of execution without 10 days' advance notice to the parties. The underlying case was docketed on October 4, 2021, in advance of an execution scheduled for 6 p.m. on October 5, 2021. *Amici curiae* have, however, received both parties' consent to file a brief in support of Johnson. *Amici curiae* are experienced former trial and appellate judges in Missouri committed to the fair administration of justice who seek to address a grievous error contained in Missouri's standardized jury instructions that govern claims of intellectual disability. That error allows intellectually disabled defendants to be executed without a unanimous jury finding on their eligibility for the death penalty, in clear violation of the Sixth Amendment to the U.S. Constitution.

MOTION FOR LEAVE TO FILE TO FILE BRIEF FOR *AMICI CURIAE* ON 8 ½ by 11 INCH PAPER

Because *amici curiae* seek to file on an emergency basis, they further seek to file the attached brief on 8 ½ by 11-inch paper. The state court overruled Johnson's motion for rehearing on October 1, 2021. Johnson then filed his petition for a writ of certiorari and application for a stay of execution on October 4, 2021. Johnson's execution is currently scheduled for October 5, 2021. In light of the compressed timeline to prepare these motions and this briefing, *amici curiae* respectfully move for leave to file their brief on 8 ½ by 11-inch paper instead of in booklet form.

Respectfully submitted,



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INTEREST OF *AMICI CURIAE*

Amici curiae are the following retired Missouri Circuit Court, Court of Appeals, and Supreme Court judges who are interested in the fair administration of justice within their State: the Hon. Jon R. Gray (ret.), Circuit Judge, Sixteenth Judicial Circuit; the Hon. Gary Oxenhandler (ret.), Circuit Judge, Thirteenth Judicial Circuit; the Hon. Lisa S. Van Amburg (ret.), Missouri Court of Appeals, Eastern District; and the Hon. Michael A. Wolff (ret.), Supreme Court of Missouri. *Amici* seek to preserve the fundamental right to trial by jury within Missouri, which includes the assurance that criminal defendants in Missouri who raise colorable claims of intellectual disability will be found death-eligible by a unanimous jury of their peers.[1]

SUMMARY OF ARGUMENT

The Eighth Amendment categorically forbids the execution of intellectually disabled offenders. As explained by the Supreme Court of Missouri, in this case "reasonable minds could differ" as to whether Petitioner Ernest Johnson suffers from a disqualifying intellectual disability. Therefore, during the penalty phase of Johnson's first-degree murder trial, his jury needed to make an affirmative finding – one way or the other – whether Johnson was intellectually disabled. The Sixth Amendment to the U.S. Constitution required that finding to be unanimous.

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[1] No counsel for either party has authored this brief in whole or in part, and no other counsel or party has made a monetary contribution to fund the preparation or submission of this brief. All monetary contributions came from the undersigned law firm.

Johnson's jury instructions failed to live up to that standard because they suffered from a fatal flaw in logic. The instructions wrongly directed the jury that ***any*** non-unanimous vote had identical consequences to a unanimous finding that Johnson was ***not*** intellectually disabled.

The jury instructions began correctly enough. Using Missouri Approved Instructions ("MAI"), the trial court first instructed the jury: "If you unanimously find by a preponderance of the evidence that the defendant is mentally retarded," Johnson must receive a sentence of life without the possibility of parole. That instruction was accurate, as it made clear that a vote of 12-to-0 in favor of Johnson rendered him ineligible for the death penalty.

The error, however, lies in the trial court's next instruction, which charged: "***If you did not unanimously find by a preponderance of the evidence that the defendant is mentally retarded***," Johnson's jury "***must***" begin consideration of statutory aggravating circumstances. In other words, any non-unanimous vote on intellectual disability allowed the jury to skip an affirmative finding altogether. By way of example, if the jury "did not unanimously find" – but found 9-to-3 – "by a preponderance of the evidence that [Johnson] is mentally retarded," then Johnson became subject to execution. The instruction thus failed to instruct the jury of the need to reach a unanimous finding that Johnson was ***not*** intellectually disabled. The instruction needed to read: "If you unanimously found by a preponderance of the evidence that the defendant is ***not*** mentally retarded," the jury "must" begin consideration of statutory aggravating circumstances. It did not.

Thus, the instructions presented the jury with two options, one correct and one incorrect: either (1) unanimously find that Johnson was intellectually disabled (correct); or (2) ***not*** unanimously find that Johnson was intellectually disabled (incorrect). Combined, these instructions meant that 12 out of 13 possible jury votes led to the same result: Johnson would be eligible for the death penalty notwithstanding his contested claim of intellectual disability. A vote of 6-to-6, much less 11-to-1 in favor of the defendant, is not an affirmative "finding" by a jury. It is the absence of a finding.

Today, there is no record of the jury's vote. As a result, there is no evidence that Johnson's jury ever made the unanimous finding required by the U.S. Constitution. For that reason, Johnson's death sentences must be reversed.

FACTS

Johnson was convicted of three counts of first-degree murder in connection with a convenience store robbery. On direct appeal, the Supreme Court of Missouri affirmed Johnson's guilt on all three murder counts, but vacated Johnson's death sentences due to ineffective assistance of counsel during the penalty phase. *State v. Johnson (Johnson I)*, 968 S.W.2d 686 (Mo. banc 1998). At the time of Johnson's original trial, Missouri's capital sentencing scheme did not single out claims of intellectual disability[2] as a stand-alone finding for the jury under R.S. Mo. § 565.030

[2] For consistency, *amici* generally use the phrase "intellectual disability" instead of "mental retardation" except in direct quotations because R.S. Mo. §565.030, as revised, now uses this terminology. For purposes of this brief, the phrases are interchangeable.

or list intellectual disability as a statutory mitigating circumstance. *See* 1993 Mo. Legis. Serv. H.B. 562 (most recent changes to §565.030 at that time).

In 2000, after a retrial of the penalty phase resulting in three death sentences, the Supreme Court of Missouri affirmed. *State v. Johnson (Johnson II)*, 22 S.W.3d 183 (Mo. banc 2000). The following year, Missouri's General Assembly revised §565.030.4 to add that the punishment for first-degree murder shall be life without the possibility of parole "[i]f the trier finds by a preponderance of the evidence that the defendant is mentally retarded." 2001 Mo. Legis. Serv. S.B. 267. A year later, this Court held that intellectually disabled offenders are categorically ineligible for the death penalty under the Eighth Amendment. *See Atkins v. Virginia*, 536 U.S. 304 (2002).

As a result, in 2003, the Supreme Court of Missouri again reversed Johnson's death sentences. *See Johnson v. State (Johnson III)*, 102 S.W.3d 535, 537 (Mo. banc 2003). The court explained that Johnson's "jury instructions treated mental retardation as a mere mitigating circumstance – not the outright bar to punishment dictated by *Atkins*." *Id.* at 540. The court noted that Johnson "was able to articulate specific facts indicating his mental deficiency, given that he has a long history of significantly subaverage intellectual functioning and poor adaptive skills." *Id.* at 541. This evidence "show[ed] that reasonable minds could differ as to [Johnson's] mental abilities." *Id.* at 540. Until that point, however, "[t]he evidence necessary in light of *Atkins* was not presented adequately to a finder of fact." *Id.* at 541.

Johnson's retrial on penalty took place in May 2006. At trial, the jury received "a substantial amount of conflicting evidence as to Johnson's claim that he is mentally retarded." *State v. Johnson (Johnson IV)*, 244 S.W.3d 144, 155-56 (Mo. banc 2008). Among other evidence, Johnson's childhood IQ had been measured as low as 63, and more recently two experts measured his IQ as 67. *Id.* at 152-53. Two experts opined to the jury that Johnson was, in fact, "mentally retarded." *Id.* at 152-53, 156. The State challenged the credibility of these experts, claimed Johnson was malingering, presented witnesses on Johnson's adaptive behaviors, and proposed alternative IQ scores. *Id.*

On this conflicting evidence, the question of intellectual disability was submitted to the jury. The State tendered MAI-CR 3d 313.38 as Instruction No. 6:

> In determining the punishment to be assessed under Counts I, II and III against the defendant for the murders of Fred Jones, Mary Bratcher and Mable Scruggs, you must first consider whether or not the defendant is mentally retarded.
>
> …
>
> ***If you unanimously find by a preponderance of the evidence that the defendant is mentally retarded***, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole. As used in this instruction, "preponderance of the evidence" means that it is more likely true than not true that the defendant is mentally retarded.

The State then tendered MAI-CR 3d 313.40 (as modified) as Instruction No. 7, which provided in relevant part:

> ***If you did not unanimously find by a preponderance of the evidence that the defendant is mentally retarded,*** as submitted in Instruction No. 6, under Count I against the defendant for the murder

> of Fred Jones, you ***must*** first consider whether one or more of the following statutory aggravating circumstances exists:….

Critically, Instruction No. 7 thus stated that ***anything less than a unanimous determination that Johnson was intellectually disabled*** meant that the jury "***must***" now consider the existence of statutory aggravating circumstances. *See id.*

Instruction No. 7 separately prompted the jury that "all twelve of you must agree" on the existence of an aggravating circumstance and instructed the jury that the consequence of a non-unanimous jury finding will be a life-without-parole sentence:

> You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, ***all twelve of you must agree as to the existence of that circumstance***.
>
> Therefore, ***if you do not unanimously find*** from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exists, ***you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole***.

There was no similar prompt in Instruction No. 6 that "all twelve of you must agree" on the absence of an intellectual disability. There was also no prompt in Instruction No. 6 that the consequences of a non-unanimous jury finding will be a life-without-parole sentence.

Next, the State tendered Instruction No. 8, to "decide whether there are facts and circumstances in aggravation of punishment which, taken as a whole, warrant the imposition of a sentence of death upon the defendant"; Instruction No. 9, to decide "whether there are facts or circumstances in mitigation of punishment which are

sufficient to outweigh the facts and circumstances in aggravation of punishment"; and Instruction No. 10, to decide whether the exhibit mercy under all the circumstances.

Finally, the State tendered Instruction No. 11. This final instruction again singled out the possibility of non-unanimous findings regarding the subsequent issues set forth Instruction Nos. 7, 8, 9, and, by implication, 10, by instructing the jury that if the jury was "unable to unanimously" make findings or agree on these issues, Johnson's punishment would be fixed at life without parole or would be fixed by the court.

Intellectual disability, however, was still treated differently. Instruction No. 11 does ***not*** contemplate the possibility of a jury that is "unable to unanimously" make findings or agree on intellectual disability. Instead, the instruction only states:

> If you unanimously find by a preponderance of the evidence that the defendant is mentally retarded, as submitted in Instruction No. 6, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

The identical instructions were repeated with respect to Counts II and III, respectively, in Instruction Nos. 12-16, and 17-21, respectively.

The jury purported to return a verdict sentencing Johnson to death on all three counts. There is no record of the jury's vote on the question of intellectual disability. Even presuming that the jury correctly followed instructions, the only inference is that the jury did not vote 12-to-0 that Johnson had an intellectual disability. Therefore, there are twelve possible voting outcome for each of the three counts:

No. 6 **Intellectual Disability**	**Nos. 7, 12, 17** **Existence of Aggravating Circumstance**	**Nos. 8, 13, 18** **Aggravating Circumstance Warrants Death**	**Nos. 9, 14, 19** **Weighing Mitigating Factors**	**Nos. 10, 15, 20** **Mercy**
11-1	0-12	0-12	0-12	0-12
10-2				
9-3				
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ARGUMENT

I. The Court Should Grant a Stay Because Johnson Has a High Likelihood of Success on the Merits With Respect to the Second Question Presented.

Under common-law tradition, juries have played the central fact-finding role in criminal cases:

> [T]he English jury's role in determining critical facts in homicide cases was entrenched. As a fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established. Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendants' state of mind.

Ring v. Arizona, 536 U.S. 584, 599 (2002) (quoting *Walton v. Arizona*, 497 U.S. 639, 710- 11 (1990) (Stevens, J., concurring) (quoting White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 Notre Dame L. Rev. 1, 10-11 (1989))). The United States also continues to follow the common-law tradition of requiring "a jury of twelve men ***all concurring in the same judgment***." *Thompson v. Utah*, 170 U.S. 343, 349 (1898) (quoting 1 Hale, P.C. 33) (emphasis added). This "requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury." *Andres v. United States*, 333 U.S. 740, 748 (1948). In short, the Sixth Amendment not only enshrines the right to jury ***findings***, but also jury ***unanimity*** on those findings. *Ibid.*

Although the right to trial by jury is always fundamental, the right carries special importance for criminal defendants who raise legitimate claims of intellectual disability because executing an intellectually disabled offender also violates the Eighth Amendment's prohibition of cruel and unusual punishment. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002). As set forth below, Johnson has a high likelihood of success on the merits in this case on the second Question Presented because there is no evidence that his jury ever reached a unanimous decision on Johnson's intellectual disability. Given the highly contested nature of his intellectual disability claim, a stay of execution is warranted.

A. Johnson's Death Sentences Violate the Sixth Amendment Because His Jury Instructions Failed to Require a Unanimous Jury Finding on Intellectual Disability.

Last year, the Court confirmed that the Sixth Amendment guarantees a criminal defendant's right to a unanimous jury verdict in State courts. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020). The Court overruled the highly fractured decisions in *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972), which had upheld non-unanimous verdicts in non-capital cases. In both *Apodaca* and *Johnson*, however, the underlying state laws continued to require unanimous verdicts in death penalty cases. *See Apodaca*, 406 U.S. 404, 406 n.1 (Oregon constitution); *Johnson*, 406 U.S. at 358 n.1 (Louisiana constitution). This Court has ***never*** approved a non-unanimous verdict in a capital case.

The error in Johnson's case is unprecedented. We do not know whether Johnson's jury split evenly on his intellectual disability, voted 1-to-11, voted 11-to-1, or voted anything in between. Yet Johnson's jury instructions treated ***any*** non-unanimous vote as a jury "finding" that Johnson was not intellectually disabled and thereby eligible for the death penalty. Even putting aside the touchstone of jury unanimity, there is no rational argument why all of these unresolved votes that favor ***Johnson*** should be treated as a finding in favor of the ***State***. At most, the result would be a hung jury. In fact, we do not even know whether Johnson's jury fully deliberated over his intellectual disability instead of just "moving on" to the existence of aggravating circumstances, as directed in the erroneous jury instructions. The jury may have just conducted what should have been a preliminary vote on intellectual

disability, realized there was not a unanimous finding, and dutifully addressed the next issue required by the jury instructions. As a result, there is no evidence that the jury's supposed "finding" on intellectual disability met basic constitutional standards for jury trials.

1. Johnson's Intellectual Disability Was a Finding of Fact for the Jury to Render Him Eligible for the Death Penalty.

"The death penalty is the gravest sentence our society may impose." *Hall v. Florida*, 572 U.S. 701, 724 (2014). Before imposing a death sentence, the Sixth Amendment requires a jury "to find each fact necessary to impose a sentence of death." *Hurst v. Florida*, 577 U.S. 92, 94 (2016).

Missouri law explicitly places the question of intellectual disability in the hands of the jury. Since 2001, Missouri's death penalty scheme has specifically assigned fact-finding about a defendant's intellectual disability to a jury sitting as the trier of fact. *See* R.S. Mo. §565.030.4(1). Missouri's legislative shift thus presaged this Court's implementation of a nationwide prohibition a few years later in *Atkins*. Under *Atkins*, there is now "a categorical rule making such offenders ineligible for the death penalty" under the Eighth Amendment. 536 U.S. at 320.

"Under section 565.030.4(1), a finding of mental retardation is made by the jury and, if such a finding is made, the potential punishment for a capital defendant is limited to life imprisonment." *Johnson IV*, 244 S.W.3d at 151; *see also* R.S. Mo. §565.030.5 (confirming the "right to have the issue [of the defendant's intellectual disability] submitted to the trier of fact" instead of reserving this question for

the trial court); *see also Johnson III*, 102 S.W.3d at 541 (the jury, as the fact finder, was required to make a determination whether Johnson is intellectually disabled).

Missouri's scheme is consistent with settled precedent recognizing that a death sentence requires two distinct determinations: the eligibility decision and the selection decision. *See Tuilaepa v. California*, 512 U.S. 967, 971 (1994). When an offender like Johnson raises a colorable claim of intellectual disability, Missouri's death penalty statutes pose four questions to the jury: (1) whether the defendant is intellectually disabled; (2) whether at least one statutory aggravating circumstances exists; (3) whether evidence in mitigation of punishment is sufficient to outweigh the evidence in aggravation of punishment; and (4) whether the jury wishes to exhibit mercy "under all of the circumstances," notwithstanding any prior findings and weighing. *See* R.S. Mo. §§565.030.4(1)-(4). The first two questions, including the question of intellectual disability, concern eligibility; the latter two questions concern selection.

The eligibility decision is based on factual findings that the defendant has a conviction for which the death penalty is a proportionate punishment and the existence of an aggravating circumstances at either the guilt or penalty phase. *Tuilaepa*, 512 U.S. at 971-72. The purpose of the eligibility phase is for the jury to "narrow[] the class of defendants eligible for the death penalty." *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998). In this respect, intellectually disabled offenders are categorically ***ineligible*** for the death penalty because, although harsh punishment is appropriate, execution would be disproportionate to their culpability.

See Atkins, 536 U.S. at 306, 316 (intellectually disabled offenders "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct" and "our society views [intellectually disabled] offenders as categorically less culpable than the average criminal").

Selection, however, is different from fact-finding and presumes a prior eligibility finding. "In the selection phase, the jury determines whether to impose a death sentence ***on an eligible defendant***." *Buchanan*, 522 U.S. at 275 (emphasis added). Unlike the factual findings underlying the eligibility decision, the selection decision requires the sentence to consider the character of the individual and the circumstances of the crime and relevant mitigating evidence. *Tuilaepa*, 512 U.S. at 972. For these reasons "[t]he selection decision is fundamentally different than the eligibility decision," such that the "ultimate question [of] whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy[.]" *Ibid.* (quoting *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016)). The answer is thus not subject to a burden of proof, like a preponderance of the evidence or proof beyond a reasonable doubt. *Compare* R.S. Mo. § 565.030.4(1) (preponderance of the evidence), *and id.* § 565.030.4(2) (beyond a reasonable doubt), *with id.* § 565.030.4(3) (no burden of proof), *and id.* § 565.030.4(4) (same).

Intellectual disability is not part of the "selection" decision. By design, a finding of intellectual disability is not, and cannot be, "weighed" against other considerations. It is not a matter of "discretion" or even "mercy." Rather, the jury must decide, as a factual matter, whether the offender is intellectually disabled. This prior decisions

in Johnson's own case, and §565.030.4(1) itself, thus correctly recognize that intellectual disability is a stand-alone factual finding. Under *Atkins*, the existence of an intellectual disability ***must*** be assessed independently. *See Johnson III*, 102 S.W.3d at 540 (reversing Johnson's death sentences because the "jury instructions treated mental retardation as a mere mitigating circumstance – not the outright bar to punishment dictated by *Atkins*"); *see also Bobby v. Bies*, 556 U.S. 825, 836 (2009) ("Mental retardation as a mitigator and mental retardation under *Atkins* … are discrete legal issues."). Indeed, *Atkins* spun off intellectual disability into a separate eligibility inquiry precisely ***because*** "reliance on mental retardation as a mitigating factor can be a two-edged sword that may ***enhance*** the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U.S. at 321 (emphasis added).

Accordingly, consistent with Missouri's capital sentencing scheme and the guarantees of the Sixth Amendment, Johnson's jury needed to make an express finding under §565.030.4(1) that Johnson was intellectually disabled, or that he was not, before the jury could turn to other eligibility and selection determinations under §§565.030.4(2)-(4).

2. Johnson's Jury Instructions Not Only Failed to Require Jury Unanimity on the Issue of Intellectual Disability, But Wrongly Instructed an Equally Divided Jury or Even a Jury That Favored Johnson to Treat Johnson as Eligible for the Death Penalty.

Jury Instruction Nos. 7, 12, and 17, read alone or in combination with Jury Instruction Nos. 6 and 11, 16, and 21, not only violated Johnson's basic constitutional

guarantee of jury unanimity, but allowed ***any*** non-unanimous vote on intellectual disability to result in Johnson's death-eligibility. Such a rule erroneously benefits the State (which is not protected by the Sixth and Eighth Amendments), at the expense of criminal defendants such as Johnson (who ***are*** protected by the Sixth and Eighth Amendments).

To render Johnson eligible for the death penalty, the jury should have made a conclusive finding regarding his intellectual disability, but there is no record of any such finding. All that can be inferred from Johnson's three death sentences is a presumption that the jury did not unanimously ***agree*** that Johnson is intellectually disabled. Based on the plain language of the instructions, the verdict fails to establish that the jury voted unanimously against Johnson.

In sequence, Instruction No. 6 told the jury that, if they "unanimously find by a preponderance of the evidence that the defendant is mentally retarded," the jury needed to return a sentence of life without probation or parole. Fair enough. But, on the other hand, if the jury "did ***not*** unanimously find by a preponderance of the evidence that the defendant is mentally retarded" then they "***must*** … consider whether one or more of the following statutory aggravating circumstances exists." Thus, when the 12-person jury voted on Johnson's intellectual disability, there were 13 possible outcomes. While we can presume that all 12 jurors did not find Johnson intellectually disabled, we do not know whether 0, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, or 11 jurors voted in Johnson's favor.

The jury instructions, including the verdict form, did not request this tally; the State did not request special interrogatories; and the jury was not polled. It is impossible to know whether the jury was evenly divided 6-to-6 or even whether the jury voted in favor of Johnson 11-to-1. And even if the jury in favor of the State by a vote of 11-to-1, a "verdict, taken from eleven, [is] no verdict at all." *Ramos*, 140 S. Ct. at 1395 (internal quotations omitted). The same principle necessarily holds true of a verdict taken from 10, 9, 8, 7, 6, 5, 4, 3, 2, or 1.

The State cannot demonstrate that this error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). No less than 11 of the 12 possible voting outcomes would mean that Johnson's death sentences are unconstitutional because each of these outcomes would be "no verdict at all." *Ramos*, 140 S. Ct. at 1395. On Johnson's direct appeal, every member of the Supreme Court of Missouri fully recognized that there was conflicting evidence that made Johnson's intellectual disability a legitimate, and perhaps difficult, question for the jury to resolve. *See Johnson IV*, 244 S.W.3d at 155-56 (the record "present[ed] a substantial amount of conflicting evidence as to Johnson's claim that he is mentally retarded."); *id.* at 167 (Wolff, J., dissenting) ("The evidence in this case will support either conclusion. A reasonable jury, considering all the evidence, may be in equipoise."); *see also Johnson III*, 102 S.W.3d at 540 ("[R]easonable minds could differ as to [Johnson's] mental abilities."). In short, there is no doubt that Johnson's jurors may have held differing views of the evidence presented during the penalty phase.

An equally concerning aspect of these defective instructions that the jury may not have deliberated fully about Johnson's intellectual disability to the point of reaching a final vote. Based on the prompt in Instruction Nos. 7, 12, and 17 that a non-unanimous vote meant that the jury "must" proceed to consider statutory aggravating circumstances, the jury may have only conducted an initial vote and then determined that they "must" immediately proceed to the next instruction simply ***because*** that vote was not unanimous. As a result, Johnson's jury might not have even engaged in the expected level of deliberations because jurors believed the exercise would be futile or even forbidden.

This Court's decision in *Andres* illuminates the defect. The trial court had instructed the jury that "***before you may return a qualified verdict*** of murder in the first degree without capital punishment, … your decision must, like your regular verdict, be unanimous." *Andres*, 333 U.S. at 751. (The term "qualified verdict" is a redundancy, referring to a non-capital sentence.) In other words, the *Andres* jury was instructed that a unanimous vote was required to ***spare*** the defendant from the death penalty, but not the other way around. This Court held that the instructions were unconstitutional, stating:

> It seems to us … that where a jury is told first that their verdict [on guilt] must be unanimous, and later, in response to a question directed to the particular problem of qualified verdicts, that if their verdict is first-degree murder and they desire to qualify it, they must be unanimous in so doing, ***the jury might reasonably conclude that, if they cannot all agree to grant mercy, the verdict of guilt must stand unqualified*** [*i.e.*, imposing a death sentence].

Id. at 752. In other words, although the death penalty should never be the default, a reasonable juror might have understood the instructions to mean that any non-unanimous vote for mercy would still result in the imposition of the death penalty. As a result, the juror would consider the issue closed instead of trying to persuade his or her fellow jurors to change their minds or at least hold out for deadlock.

The same principles apply here, except the instructional error is more egregious. The gap in Instruction No. 6 is similar to the instruction in *Andres*, directing that a unanimous vote that Johnson was intellectually disabled was necessary to avoid the death penalty without the converse instruction that a unanimous vote was also necessary to make Johnson death-eligible. But then Instruction Nos. 7, 12, and 17 magnified the error by ***specifically*** instructing the jury that, if they "***did not unanimously find by a preponderance of the evidence that the defendant is mentally retarded***" then the jury "***must***" proceed to determine the existence of statutory aggravating circumstances. This was an explicit, unambiguous directive to jurors that any divided vote was insufficient to spare Johnson's life.

The absence of a unanimous determination by Johnson's jury defeats the essential purpose of that jury, which is the 'interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination." *Burch v. Louisiana*, 441 U.S. 130, 135 (1979). Johnson should not be executed based on defective jury instructions when his jury may not have reached any decision at all.

B. Allowing a Single Juror to Control Whether to Impose the Death Penalty on an Intellectually Disabled Person Is Arbitrary.

Viewed another way, Johnson's instructions erroneously allowed a single juror in favor of the death penalty to override the rest of the jury's vote. The authority of a lone juror to render a defendant death-eligible is exactly the "height of arbitrariness" that the Court prohibited in *Mills v. Maryland*, 486 U.S. 367 (1988). Reiterating the principles set forth in *Andres,* the Court struck down Maryland's capital sentencing procedure because of the risk that jurors may have believed that they were barred from considering a particular mitigating circumstance unless all 12 jurors agreed to its existence. *Id.* at 370. In its decision, the Court noted the possibility of disturbing outcomes. *Ibid.* For example, if 11 jurors agreed that a particular mitigating circumstance existed, they would still be unable to consider it in the weighing stage. *Id.* at 374. Thus, a defendant could face the death penalty even though 11 jurors thought the death penalty was inappropriate. *Ibid.* The same concept holds true here: Johnson may be facing the death penalty even if 11 jurors concluded he was intellectually disabled. This too is the "height of arbitrariness." *Ibid.*

The arbitrariness does not end there. In the guilt phase of a capital trial, a 6-to-6 vote results in a mistrial. In rest of the penalty phase of a capital trial, a 6-to-6 vote results in a life-without-parole sentence (as Johnson's other instructions clearly provided). But a 6-to-6 vote on intellectual disability permits execution of a vulnerable, potentially intellectually disabled person, with or without a hopelessly deadlocked jury.

Even worse, an 8-to-4 vote in favor of a defendant in a Missouri civil trial results in a verdict ***in the defendant's favor***. *See* Mo. Const. art. I, § 22(a); R.S. Mo. §494.490. In a death penalty case, however, the same 8-to-4 vote in the intellectually disabled defendant's favor results in his eligibility for the death penalty. Such an outcome is not only arbitrary, but perverse.

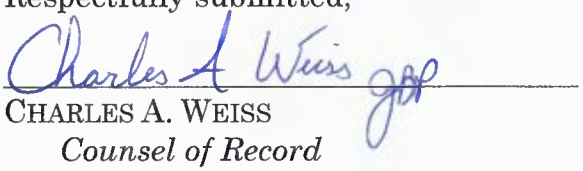
Johnson's instructions were particularly unfair in light of the other obstacles facing criminal defendants who have legitimate claims of intellectual disability. As *Atkins* observed, the risk of unjustly imposing the death penalty "is enhanced … by the lesser ability of mentally retarded defendants," who "may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." 536 U.S. at 320-21. *Atkins* thus recognized that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution." *Id.* at 321.

For this reason, special deference is warranted. The entire point of *Atkins* is that intellectual disability must be a stand-alone factual finding on eligibility that cannot be blended with the jury's separate selection decision. *See Johnson III*, 102 S.W.3d at 540; *Atkins*, 536 U.S. at 321. Accordingly, Johnson's three death sentences are plainly unconstitutional.

CONCLUSION

The Court should stay Petitioner Ernest Johnson's execution pending a disposition on the merits. Upon full consideration, Johnson's death sentences should be vacated.

Respectfully submitted,



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