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

No. 21-A_____

In The Supreme Court Of The United States

ERNEST JOHNSON,

Petitioner,

v.

PAUL BLAIR,

Respondent.

On Petition for Writ of Certiorari to Missouri Supreme Court

APPLICATION FOR STAY OF EXECUTION

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To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

The State of Missouri has scheduled the execution of Ernest Johnson for **October 5, 2021**, **at 6:00 p.m., central time**. Mr. Johnson respectfully requests a stay of execution pending consideration and disposition of the petition for a writ of certiorari filed along with the application for stay.

PROCEDURAL BACKGROUND

Mr. Johnson respectfully requests that this Court stay his execution, pursuant to Supreme Court Rule 23. On June 21, 2021, after his federal proceedings concluded on May 24, 2021, Mr. Johnson presented his claim that he is ineligible to be executed due to his intellectual disability to the Missouri Supreme Court in a Rule 91 state habeas corpus petition. On June 29, 2021, the Missouri Supreme Court set his execution date for October 5, 2021. Mr. Johnson filed a motion for a stay of execution on July 12, 2021.

On August 31, 2021, the Missouri Supreme Court denied on the merits his intellectual disability claim and a stay of execution. (Attachment A). Mr. Johnson filed a Motion for Rehearing on September 15, 2021, pointing out errors in the opinion and again requesting a stay of execution. The Missouri Supreme Court ordered the State to respond to that motion and Mr. Johnson filed his reply regarding rehearing on September 27, 2021. The Missouri Supreme Court denied the Motion for Rehearing and request for a stay of execution on October 1, 2021. (Attachment B).

REASONS FOR GRANTING THE STAY

To decide whether a stay of execution is warranted, the federal courts consider the petitioner's 1) likelihood of success on the merits, 2) the relative harm to the parties, and the 3) extent to which the prisoner has delayed his or her claims. *See Hill v. McDonough*, 547 US. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). Mr. Johnson meets the relevant standards for this Court to grant a stay of execution.

I. LIKELIHOOD OF SUCCESS ON THE MERITS

Applying established clinical standards, Mr. Johnson's life history documents that he is a man with intellectual disability pursuant to *Atkins v. Virginia*:

- Mr. Johnson's mother was intellectually disabled, as was a brother who was so disabled that he had to be institutionalized;
- Mr. Johnson was born with Fetal Alcohol Spectrum Disorder (FASD), the #1 risk factor for intellectual disability, due to his mother's ingestion of alcohol during her pregnancy;
- Mr. Johnson was always described by those around him as "very slow," and peers called him names like "dummy," "crazy," and "stupid";
- Mr. Johnson could not draw a straight line with a ruler in ninth grade;
- Mr. Johnson was held back twice in second and third grade because of his intellectual shortcomings;
- Mr. Johnson was placed in special education and singled out for IQ testing due to the recognition of his teachers that he needed special services;
- Mr. Johnson was placed into the lowest track of regular school classes in ninth grade and immediately fell behind again and ultimately dropped out during the second attempt at ninth grade;

- Mr. Johnson has 8 of 9 full-scale IQ scores over fifty years of testing that are within range of intellectual disability, including 3 of 4 before the crime, with a lifetime adjusted average score of **67.4**;

- Mr. Johnson scores in the bottom 1% for verbal fluency and in the bottom 2% for expressive and receptive language skills;

- Mr. Johnson's achievement test scores were consistently at the lowest percentile in the second through ninth grades;

- Mr. Johnson failed to comprehend that he would not be executed after receiving a stay in 2015. "On November 5, 2015 around 9 am, Ernest called me again asking me if he could go to sleep now. He did not understand that the execution was called off";

- Mr. Johnson operates at the equivalent of a 12-year-old boy for his level of independence and at an age of 4 years and 8 months for his daily living skills;

- Mr. Johnson's prison records show that in 1979, a corrections case worker described Mr. Johnson as "very childlike and unintelligent," and noted that he could barely read the simple materials provided to him.

Every professional that has assessed Mr. Johnson under accepted clinical standards has found him to be intellectual disabled.

The Missouri Supreme Court gave short-shrift to both the applicable standards of clinical practice and the holdings of this Court in multiple ways, by: 1) relying heavily on the facts of the crime to deny Mr. Johnson the constitutional protections in *Atkins*, 2) relying on a statement made in the DSM-5 that is taken out of context to require Mr. Johnson to prove a causative relationship between the intellectual functioning prong of the diagnosis and the adaptive behavior prong, thereby adding additional elements to the diagnosis of intellectual disability contrary to the clinical standards and practice, 3) failing to recognize the consistent history of IQ scores that

fall within the range for prong 1 of the diagnosis, and 4) finding it significant that Mr. Johnson was not diagnosed with intellectual disability before the age of 18, even though it is common for the intellectually disabled not to be diagnosed in this time frame. The opinion of the Missouri Supreme Court represents a substantial departure from this Court's holding in *Atkins* and its progeny, as recently emphasized in *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*), and *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*).

a. The evidence is overwhelming that Ernest Johnson is intellectually disabled.

Regarding the likelihood of showing success on the merits, this factor is fully addressed in the concurrently filed Petition for Writ of Certiorari. In short, Mr. Johnson has presented overwhelming evidence that he is a person with intellectual disability. Over the span of 51 years of IQ testing, beginning when Mr. Johnson was just eight years old, he has demonstrated a history of consistent scores within the range of intellectual disability on eight of nine tests of IQ: a score of 71 at age 8, a score of 55.8 at age 12, a score of 72.9 at age 35, a score of 64.6 at age 43, a score of 64.3 at age 44, a score of 66.1 at age 48, a score of 66.8 at age 49, and a score of 66.4

at age 59. (App.[1] J, at 13; App. E p. 29).[2] In addition, he consistently scored at the lowest percentile for his grade level in all areas on standardized achievement tests during his developmental period. (App. J, p. 29). The consistency of scores over time establish that Mr. Johnson has subaverage intellectual functioning.

Mr. Johnson was held back three times, in second and third grade and in his freshman year in high school for poor academic performance. (App. E, p. 39; App. L, p. 3). The school district realized he needed additional supports and placed him in special education classes from fourth through eighth grades. (App. L, p. 2). Mr. Johnson dropped out of school during his second attempt at his freshman year of high school. *Id*. at 3.

A 1979 report from the Missouri Department of Corrections notes that on their own testing, Mr. Johnson was "barely able" to read the sixth-grade reading level material provided. (App. O, p. 1). The corrections case worker documented that Mr. Johnson "attended special education classes in school and was measured to have an IQ of 70." *Id.* The corrections case worker described Mr. Johnson as "very childlike and unintelligent." *Id*. at 2.

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[1] App. is citing the appendix to the Petition for Writ of Certiorari. This citation will continue throughout the motion for stay.

[2] The sole outlier score of 84 was noted by the court-appointed competency expert to "be tainted somewhat by the fact that 5 to 6 months prior to that testing, he was also given the same test." 3rd PCR Exh. 57 at 6; *see also Wiley v. Epps*, 625 F.3d 199, 222 n.1 (5th Cir. 2010)(explaining that the practice effect occurs "when a subject who is tested more than once generally will do better on subsequent tests than on the first test.)

In his state habeas corpus petition, Mr. Johnson submitted a report from Dr. Daniel Martell, which diagnosed Mr. Johnson with intellectual disability by applying the latest clinical standards. (App. E). After considering objective measures of adaptive behavior, and administering another full-scale test of IQ, Dr. Martell opined that Mr. Johnson meets the criteria for the diagnosis of intellectual disability when considering his lifetime history of full-scale IQ scores. *Id.* at 62. Also notable to Dr. Martell in making his clinical diagnosis is the fact that Mr. Johnson's mother and brother were also intellectually disabled, with his brother's intellectual disability of such severity he was institutionalized most of his life. *Id.* at 12. Intellectual disability runs in families. Having a parent or sibling with the disorder significantly increases the likelihood of the disorder. *Id.* Mr. Johnson also has FASD, which is the leading risk factor for intellectual disability. *Id.* at13.

Mr. Johnson also presented testimony from several of Mr. Johnson's teachers regarding their observations of his deficits in adaptive functioning during the developmental period. Robin Seabaugh was hired by the Charleston school district as the teacher for the intellectually disabled. (App. L, p. 2). She taught Mr. Johnson at age 15, in a freshman developmental reading class "specifically for students who couldn't read and students who struggled in the regular classroom." *Id.* Because Mr. Johnson was Black, school districts at that time were put under pressure due to federal mandates to "only have a certain percentage of the enrollment in the special education classes and a certain percentage of blacks in special education classes." *Id.* at 3. At the time Mr. Johnson was in school, the school districts were also under

pressure to "mainstream" special education kids by putting them in regular classes. *Id*. at 5. Mr. Johnson was still placed on the "basic track" for "slower-ability kids" once he entered his freshman year of high school, and "didn't do well at all." *Id*. at 3. When Ms. Seabaugh attempted to characterize Mr. Johnson as a "mentally retarded" child, the court sustained the prosecutor's objection. *Id*. Mr. Johnson's reading level at age 15 was at 2.1, between the second and third grade level. *Id*. at 3-4. As an educator for the intellectually disabled, she characterized his overall intelligence as "very low." *Id*. at 4.

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

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

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

The State has never called an expert to testify in any proceeding that Mr. Johnson is not intellectually disabled even though they retained a psychologist who undertook a process to evaluate Mr. Johnson and he was listed on the State's trial witness list. In denying Mr. Johnson relief in his state habeas petition, the Missouri Supreme Court relied upon the report of the State's non-testifying expert even though the report itself was not admitted into evidence and the only references to the expert's findings were made by way of cross-examination of Mr. Johnson's expert. The State's expert has never been presented to any factfinder in any adversarial proceeding despite the outsized role the state court has placed on his work. (Attachment A, pp. 11-12, 18).

b. The Missouri Supreme Court Improperly Over-emphasized the Facts of the Crime.

The Missouri Supreme Court relied heavily on the facts of the crime to reach its finding that Mr. Johnson was not a person with intellectual disability. (Attachment A, p. 12 (noting the facts of the crime "illustrate Johnson's ability to plan, strategize, and problem solve – contrary to a finding of substantial subaverage intelligence."). However, this reliance mirrors the errors committed by the Texas state courts in applying the "*Briseno* factors." *Moore I*, 137 S. Ct. at 1046 n.6 (the final *Briseno* factor posed was "did the commission of the offense require forethought, planning, and complex execution of purpose.").

This Court has condemned the *Briseno* factors and described them as "an outlier" because they deviated so substantially from accepted clinical practices. *Moore I*, 137 S. Ct. at 1052. *Moore II* again reversed the state court for its continued reliance on the facts-of-the-crime *Briseno* factor. 139 S. Ct. at 671. This Court noted that emphasizing the *Briseno* factors over clinical factors "'creat[es] an unacceptable risk that persons with intellectual disability will be executed.'" *Id.* at 669 (citation omitted). This risk has come to fruition in Mr. Johnson's case.

Criminal behavior is considered irrelevant maladaptive behavior and because there are no objective norms for its consideration, it should not be considered in the diagnostic process. *See Brumfield v. Cain*, 808 F.3d 1041, 1047 (5th Cir. 2015) (in upholding the lower court's finding of intellectual disability, the court credited expert testimony explaining that the presence or absence of maladaptive behavior "is not

relevant to the diagnosis of intellectual disability."). The *Atkins* ban exists because the intellectually disabled commit crimes, including violent crimes. The diagnostic manuals specifically warn against using "past criminal behavior or verbal behavior to infer [a] level of adaptive behavior." *Brumfield*, 808 F.3d at 1053 (citation omitted).

The facts of the crime in *Moore* closely resemble Mr. Johnson's crime – a botched robbery that resulted in the fatal shooting of a store clerk. *Moore I*, 137 S. Ct. at 1044. In *Moore I*, the Texas court relied upon Moore's ability to commit "the crime in a sophisticated way." *Id.* at 1047. After the remand from this Court, the Texas courts again relied heavily on the facts of the crime to justify its finding that Moore was not intellectually disabled. *Moore II*, 139 S. Ct. at 671. This Court again reversed this finding because it was based so heavily on lay stereotypes about what the intellectually disabled can do, in contrast with established science. *Id.* at 672.

Thus, Mr. Johnson has demonstrated sufficiently a likelihood of success on the merits with the proper application of clinical standards, as opposed to lay stereotypes.

c. The Missouri Supreme Court Misinterpreted the DSM-5.

The Missouri Supreme Court misinterpreted the DSM-5, at 38, to require Mr. Johnson to prove causation between his intellectual disability and his adaptive deficits: "[i]n essence, adaptive deficits must be caused by intellectual functioning." Attachment A, p. 13; *see also id.* at 14 (finding that Mr. Johnson's claim "suffers 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."). The Missouri Supreme Court's misinterpretation of the DSM-5 definition for ID is central to their entire opinion and negates any attempt to separate the overall DSM-5 analysis from the other evidence presented by Mr. Johnson.

Neither the DSM-5 nor the AAIDD support the creation of a fourth diagnostic criterion for intellectual disability. As noted in the AAIDD Mental Retardation: Definition, Classification, and Systems of Supports 33 (12th ed. 2021), "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." The AAIDD described requiring a causal connection as a "thinking error." *Id* at 34.

After examining the Missouri Supreme Court's opinion, counsel contacted the head of the Steering Committee for the revisions to the DSM-5-TR, provided him with the court's opinion, and obtained a letter explaining that the sentence this Court relied upon is being removed because of the confusion it has caused in the diagnostic process. App. C. The next day the APA publicly announced the change to the language of the DSM-5 on its website. The language relied upon by the state court no longer appears or has effect and will not appear in the DSM-5-TR when it is published in 2022. App. D.[3] The change was made because this phrase "appears to inadvertently

[3] *see also* https://www.psychiatry.org/psychiatrists/practice/dsm/updates-to-dsm-5/updates-to-dsm-5-criteria-text (last visited September 30, 2021).

change the diagnostic criteria for Intellectual Disability to add a fourth criterion." (Attachment A, p. 2).

Adding a fourth diagnostic criterion for intellectual disability by grafting on a causal/related to requirement also conflicts with *Moore I* and *Moore II*. *Moore I* noted that the Briseno factors "incorporated" an outdated version of the AAIDD imposing a "related to" requirement. *Moore I*, 137 S. Ct. at 1046. Thereafter, this Court found that the analysis of the "related to" requirement violated "clinical practice," and rather than being used to refute intellectual disability, the facts the Texas court found at odds with the diagnosis should instead be considered as risk factors for intellectual disability. *Id*. at 1051. When the Texas court again applied the "related to" requirement, this Court found the lower court repeated the previous error (*see Moore II*, 139 S.Ct. at 669), and again reversed, noting:

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

Moore II, 139 S.Ct. at 671. By requiring Mr. Johnson to show causation between the first and second prongs of the diagnosis, the Missouri Supreme Court required him to prove more than clinical standards require, in violation of *Moore I* and *Moore II*.

d. The Missouri Supreme Court Ignored Objective Evidence Proving the Validity of Mr. Johnson's IQ Scores, which Consistently Fell in the Intellectual Disability Range.

In finding that Mr. Johnson did not to meet the intellectual functioning prong, the Missouri Supreme Court proceeded from a flawed premise. It discounted the later testing and noted that on IQ testing conducted prior to the offense, "only one (out of four valid scores) . . . would indicate significant subaverage intelligence." (Attachment A, p. 11). This was a dramatic substantive error. Under clinical standards, only one of these four scores **do not** indicate significant subaverage intelligence. Rather, three out of the four tests the Missouri Supreme Court relied on fully fall within the range of intellectual disability. The three misdescribed tests are as follows:

- The Missouri Supreme Court referenced the 77 in 1968. Due to the Flynn Effect, this score should be adjusted downward to a 71. With the standard error of measurement of 5, the IQ range for this score is 66-76, which falls within the range for intellectual disability.

- The Court referenced the 63 in 1971. This score safely falls within the range of intellectual disability.

- The Court referenced the 78 in 1994. Due to the Flynn Effect, this score is adjusted downward to 72.9. With the standard error of measurement of 5, the IQ range for this score is 67.9-77.9, which falls within the range for intellectual disability.

Contrary to the Missouri Supreme Court's findings, Mr. Johnson's IQ scores have been remarkably consistent throughout his life, with eight of the nine full-scale IQ tests resulting in scores falling within the subaverage intellectual functioning range. The court also failed to consider or discuss the remarkable consistency of Mr. Johnson's IQ scores with the results of academic achievement test scores, consistently

at the lowest percentile in the second-ninth grades. To reiterate, the consistency of all this testing shows that evidence of intellectual disability was established long before the crime. Furthermore, the childhood IQ scores, and achievement test scores were supported by the testimony of teachers noting Mr. Johnson's significant cognitive and adaptive shortcomings.

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

The objective measures of validity on the IQ test Mr. Bradshaw gave, as well as Mr. Johnson's consistency in IQ scores over the years, rebuts any subjective assertion of malingering. As noted in *United States v. Nelson*, 419 F.Supp.2d 891, 903 (E.D. La. 2006), "It is simply impossible for the Court to conclude that Nelson has been malingering since age 11 and has been able to manufacture the identical testing

pattern for all those years." *see also Lambert v. State*, 126 P.3d 646, 651 (Okla. 2005) (experts "noted that it is difficult to fake mental retardation over a period of years.").

e. The Missouri Supreme Court Misinterpreted a Missouri Statute to Require a Diagnosis of Intellectual Disability Prior to Age 18.

The Missouri Supreme Court cited MO. REV. STAT. § 565.030.6 (2006), which states that the components of the intellectual disability condition, the subaverage intellectual functioning and deficits in adaptive behavior, "manifested and documented before eighteen years of age." (Attachment A, p. 15). Immediately after this citation, the Missouri Supreme Court asserted that "[b]ecause Johnson is now over 60 years old, reports of Johnson's alleged and current mental ability are not given much weight." *Id.* This violates *Atkins* and its progeny because they require retrospective determinations of intellectual disability. Intellectual disability is a lifelong, chronic condition and, therefore, evidence of "intellectual disability from one point in life is relevant to an examination of intellectual disability in another." *Williams v. Mitchell,* 792 F.3d 606, 619 (6th Cir. 2015); *see also Oats v. State*, 181 So.3d 457, 469 (Fla. 2015) (examining a Florida statute with similar language to that of Missouri, and finding that it was error to discount additional evidence of intellectual disability that was offered after the age of 18).

It is common for the intellectually disabled to go undiagnosed during the developmental time frame and in Mr. Johnson's case, his status as a minority had a direct effect on the failure of the school system to identify him as intellectually disabled. AAIDD, *The Death Penalty and Intellectual Disability* (Edward A. Polloway,

ed. 2015), at 222 (noting that many *Atkins* petitioners are never labeled intellectually disabled in school and this is especially true of poor minority children); (App. L, pp. 3, 5) (noting that at the time Mr. Johnson was in school, due to federal mandates, school districts were under pressure to "mainstream" special education students and only a certain percentage of African-American students were allowed to be placed in special education).

Mr. Johnson's intellectual disability manifested itself in childhood and is documented in both childhood IQ scores, achievement testing, and reports regarding his adaptive behaviors during childhood. In the developmental period and long before this crime, disinterested Missouri correctional workers noted that Mr. Johnson "very childlike and unintelligent," and noted that he could barely read the simple materials provided to him. (App. O, p. 1). Mr. Johnson's history of IQ scores demonstrate overwhelmingly that he meets the first prong of the diagnosis, with eight out of nine scores falling within the range for the diagnosis, including scores on two childhood IQ tests of 71 and 55.8.

Requiring a diagnosis during the developmental period and ignoring the consistency of IQ scores and reports regarding his adaptive behavior during the developmental period led the Missouri Supreme Court to reach an unreliable result regarding Mr. Johnson's intellectual disability. His teachers and peers saw him as special and "very slow" in all his years of schooling, with some calling him "dummy," "crazy," and "stupid." The lack of diagnosis was more a function of Mr. Johnson's poverty and status as a minority, and not due to a lack of evidence.

f. The Numerous Errors in the Missouri Supreme Court's Analysis Demonstrate a Likelihood of Succession the Merits.

Mr. Johnson has set forth multiple errors in the Missouri Supreme Court opinion that are at odds with the constitutional ban against the execution of the intellectually disabled. The Missouri Supreme Court's opinion is directly at odds with the clinical science this Court has repeatedly endorsed in *Atkins v. Virginia*, 536 U.S. 304 (2002); *Hall v. Florida*, 572 U.S. 701 (2014); *Brumfield v. Cain*, 576 U.S. 305 (2015); *Moore I*, 137 S. Ct. 1039, and *Moore II*, 139 S. Ct. 666.

II. HARM TO THE PARTIES

Irreparable harm will occur to Mr. Johnson if the execution is not stayed until the petition for writ of certiorari is considered. If this Court does not stay Mr. Johnson's execution, he will be executed without the opportunity to fully litigate his meritorious constitutional claim: that he is a person with intellectual disability who cannot be constitutionally executed. That is an "irremediable" harm because an "execution is the most irremediable and unfathomable of penalties.". *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *See also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (recognizing that irreparable injury "is necessarily present in capital cases")..Allowing the government to execute Mr. Johnson while his petition is pending risks "effectively depriv[ing] this Court of jurisdiction to consider the petition for writ of certiorari." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (Burger, C.J., in chambers). Because "'the normal course of appellate review might otherwise cause the case to become moot,' . . . issuance of a stay is warranted." *Id.* at 1302 (quoting *In re Bart*, 82

S. Ct. 675, 676 (1962) (Warren, C.J., in chambers)); *see also Chafin v. Chafin*, 568 U.S. 165, 178 (2013) (suggesting that the threat of mootness warrants "stays as a matter of course").

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.

Where an individual's claim underlying his desire for a stay of execution could mean further proceedings – as here, a grant and remand for further proceedings in state court – that weighs heavily against a State's interest in the person's imminent execution. *See, e.g., In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) (in a case alleging intellectual disability, noting that "contrary to the State's contention that its interest in executing Holladay outweighs his interest in further proceedings, we perceive no substantial harm that will flow to the State of Alabama or its citizens from postponing petitioner's execution to determine whether that execution would violate the Eighth Amendment."). The public has no interest in executing the intellectually disabled, as this practice has been constitutionally forbidden by this Court in *Atkins*.

III. THERE HAS BEEN NO UNNECESSARY DELAY IN THE PRESENTATION OF THIS CLAIM.

Mr. Johnson instituted state habeas corpus proceedings on June 21, 2021, after his federal proceedings on lethal injection concluded on May 24, 2021. On June 29, 2021, the Missouri Supreme Court subsequently set Mr. Johnson's execution for October 5, 2021. The Missouri Supreme Court initially denied the claim on the merits on August 31, 2021. (Attachment A, p. 7). After the Motion for Rehearing was filed on September 15, 2021, the Missouri Supreme Court issued a scheduling order the next day. Pursuant to the schedule set by the court, the State filed its response, and Mr. Johnson filed a reply on September 27, 2021. Mr. Johnson complied with the court's scheduling order. The Missouri Supreme Court denied the Motion for Rehearing on October 1, 2021. (Attachment B). Thus, there have been no unnecessary delays in bringing this issue to this Court in a timely manner.

Mr. Johnson suspects that Respondent will claim a lack of diligence on the part of Mr. Johnson for not presenting his claims to the Missouri Supreme Court earlier. However, this Court should defer to the Missouri Supreme Court's rejection of those same arguments when they were presented to that court.

Rejecting timeliness arguments raised below, the Missouri Supreme Court noted the legal propriety of raising the claim in the manner that Mr. Johnson pursued: "A petition for writ of habeas corpus is the appropriate avenue to raise claims of intellectual disability. *See State ex rel. Strong v. Griffith*, 462 S.W.3d 732, 739 (Mo. banc 2015)." (Attachment A, p. 7). The Missouri Supreme Court then

proceeded to the merits of Mr. Johnson's claims. Comity requires this Court to provide deference to the available Missouri procedure Mr. Johnson pursued and the Missouri Supreme Court's acceptance of the same. Having lost this argument below, this Court should defer to that ruling because it is intertwined with Missouri procedures and the Missouri Supreme Court's application of those procedures to which this Court must accord appropriate deference and comity.

CONCLUSION

The State of Missouri is set to execute an intellectually disabled man who has presented overwhelming evidence of that condition to the state court. In its opinion, the Missouri Supreme Court ignored the established science on intellectual disability, in violation of this Court's emphasis on clinical standards in *Atkins* and its progeny. This Court should stay Mr. Johnson's execution so that his petition for certiorari can be fully and fairly considered by this Court. There is no state interest in executing people with intellectual disabilities. The balance of equities weighs in Mr. Johnson's favor.

Respectfully Submitted,

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