**IN THE SUPREME COURT OF MISSOURI**

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| **ERNEST JOHNSON,** | ) | |
| | ) | |
| ***Petitioner,*** | ) | |
| | ) | |
| **v.** | ) | **Case No. SC99176** |
| | ) | |
| **ANNE PRECYTHE, Director, Missouri Dept. of Corrections,** | ) | **THIS IS A DEATH PENALTY CASE** |
| | ) | |
| | ) | **EXECUTION DATE – OCT. 5, 2021** |
| ***Respondent.*** | ) | |

**PETITIONER ERNEST JOHNSON'S MOTION FOR REHEARING OF THE RULE 91 PETITION AND REQUEST FOR STAY OF EXECUTION**

COMES NOW Ernest L. Johnson, Petitioner herein, and moves this Honorable Court for rehearing of his Rule 91 petition and his request for a stay of execution. In this motion, Mr. Johnson sets forth the material matters of law and fact that have been overlooked or misinterpreted by the Court, in accordance with Mo. S.Ct. Rule 84.17(a). Mr. Johnson requests this case be remanded to a Special Master pursuant to Rule 8.03 so credibility determinations can be reliably made, and any State witnesses and evidence relied on by this Court may be subjected to cross-examination. The appointment of a Special Master is a necessary step in having a meaningful adversarial process to determine Mr. Johnson's intellectual disability claim. *Panetti v. Quarterman*, 551 U.S. 930, 952 (2007) (by failing to provide a hearing on a competency claim, the state court prevented the petitioner from "obtaining a constitutionally adequate opportunity to be heard."). This process would allow the Special Master to appoint independent experts, hear evidence subject to the adversarial process, and provide for a reliable determination of Mr. Johnson's

intellectual disability claim. Mr. Johnson also requests that his execution be stayed while these factual determinations are made by the Special Master.

## I. INTRODUCTORY STATEMENT.

The Court's August 31, 2021, opinion is replete with legal and factual errors that compel Mr. Johnson to file this motion and to renew his request for immediate relief. Mr. Johnson's motion is focused on Claims I and II of his Rule 91 petition. This Court's opinion should be withdrawn and relief granted for the following reasons:

- This Court's overemphasis of the facts of the crime is counter to the clinical approach and was applied in manner inconsistent with Supreme Court precedent.
- This Court deviated from the clinical standards adopted by the United States Supreme Court and utilized by experts throughout the world by applying legal and factual hurdles that reach an unreliable intellectual disability determination.
- This Court credited Dr. Heisler's report even though it was never admitted into evidence, Dr. Heisler did not testify and subject his conclusions to the adversarial process, and Dr. Heisler failed to abide by accepted clinical practices calling into question his overall assessment of Mr. Johnson.
- This Court misapprehends the statement in the DSM-5, at p. 38, which discusses the relation between the intellectual functioning prong and the

adaptive behavior prong. This language is in the process of being removed from the DSM-V-TR because of the danger it is being misused in contexts such as this, to prevent recognition of the disability in individuals who meet the diagnostic criteria.

- This Court held the jury made a factual finding regarding intellectual disability even though the verdict form merely indicates the jury could not reach a unanimous conclusion whether Mr. Johnson was intellectually disabled. *See* Slip Op. p. 5. [1]

These issues provide substantial justification for this Court to withdraw its August 31, 2021 opinion and to order immediate relief to avoid executing an intellectually disabled man in violation of the Eighth and Fourteenth Amendments to the constitution.

[1] Mr. Johnson notes that if the Court is correct there must have been an *Eddings v. Oklahoma*, 438 U.S. 586 (1978) error. If the finding of non-ID meant the jury did not find it to exist, then it could not then have been considered as mitigation. The instructions did not distinguish the consideration as an eligibility factor versus a mitigating factor.

## II. ARGUMENT IN SUPPORT OF REHEARING

### A. THIS COURT OVEREMPHASIZED THE FACTS OF THE CRIME IN DIRECT CONTRAVENTION OF THE SUPREME COURT'S DECISION IN *ATKINS V. VIRGINIA, MOORE v. TEXAS (I), AND MOORE V. TEXAS (II)*

In this Court's opinion, it relies heavily on the facts of the crime to reach its finding that Mr. Johnson is not a person with intellectual disability. *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."). However, this reliance mirrors the error 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.") The United States Supreme 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 was unanimous in rejecting 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 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. "Emphasizing 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).

Criminal behavior is considered 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, sometimes violent crimes. However, overemphasis on the facts of the crime is at odds with established clinical science. *See Van Tran v. Colson*, 764 F.3d 594, 608-609 (6th Cir. 2014) ("[T]he sophistication of the crime and Van Tran's role in it are mostly irrelevant to the very narrow, clinically defined question of whether Van Tran suffers a deficit in the area of functional academics."); *see also Hooks v. State*, 126 P.3d 636, 644 (Okla. Ct. Crim App. 2005) ("individual acts of violent crime, such as armed robbery or rape, require little or no abstract thought or complex planning.")

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 courts relied upon Moore's ability to commit "the crime in a sophisticated way." *Id.* at 1047. After the remand from the United States Supreme 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. The Supreme 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.

In the original district court proceedings in *Brumfield v. Cain*, 854 F.Supp.2d 366 (M.D. La. 2012), in which the district court found Brumfield to be intellectually disabled, the court ably noted why a heavy reliance on the facts of the crime is at odds with the clinical science:

> The reasons for not using maladaptive criminal behavior to assess adaptive skills are several: (1) the defendant may have gullibly acted under the direction or training of a confederate during the crime; (2) there may not be available enough accurate details about the facts of the crime from which to draw adaptive conclusions; and (3) in any event, there is a lack of normative information about actions during and following crimes to be able to meaningfully assess whether and how much a defendant's actions deviated from the mean adaptive behavior during criminal acts.

*Id.* at 394. Although these findings were overturned by the Fifth Circuit Court of Appeals in *Brumfield v. Cain*, 744 F.3d 918 (5th Cir. 2014), that decision was itself overturned by

the United States Supreme Court in *Brumfield v. Cain*, 576 U.S. 305 (2015). On remand, the Fifth Circuit upheld the grant of habeas relief based upon intellectual disability.. *See Brumfield v. Cain,* 808 F.3d 1041 (5th Cir. 2016).

This Court relied on evidence of Mr. Johnson's crime to rebut his claim of intellectual disability, Slip Op. p. 11, but there is nothing in the facts of this crime that are at odds with a finding of intellectually disability and this Court's overreliance on these facts violate well-established clinical standards. *See* TASSE, MARC J. AND BLUME, JOHN H., *Intellectual Disability and the Death Penalty: Current Issues and Controversies*, p. 101 (2018). The concern among clinical practitioners is that prosecutors will cherry pick the facts of the crime to "feed into misconceptions and misunderstandings of judges and jurors." *Id.* This Court engaged in this sort of cherry picking of facts to undermine Johnson's diagnosis of intellectual disability.

This Court relied on Johnson's acquisition of a firearm to infer he had a premeditated plan for the crime. Slip Op. p. 2. While Mr. Johnson did obtain a firearm prior to robbing the store, the crime was committed with three different weapons, but only the firearm was brought to the scene in advance. *Id.* The other two weapons were grabbed in the frenzy of the moment and undermine efforts to characterize the crime as well-planned. *Id.* This Court also neglects to mention the firearm was provided by Rod Grant, Ernest's drug dealer, and that Grant had to show Mr. Johnson how to use the weapon and provided him with only a single bullet. (Tr. Vol. 10, pp. 2148-2154). These facts demonstrate Johnson's lack of sophistication as well as how easily he was led by others. The crime itself at best demonstrates, as this Court held, a plan to rob to support a drug habit, and nothing

else. Slip Op. p. 2 ("confided to Rodriquez his plans to hold up a convenience store, locking all but one employee in the back room and having the remaining employee open the safe"); Slip Op. 12 ("…rob the Casey's because he needed more money to purchase cocaine…").

This Court also describes a plan, "wearing layers of clothing," in order to escape detection upon fleeing the scene. Slip Op. pp. 2, 12. But Mr. Johnson then walked a well-worn path from Casey's to his home and walked in the home with the same clothes in front of witnesses. *Id.* Thus, the clothing and the evidence was brought home; and the purpose of escaping detection was unquestionably thwarted. As this Court notes, Johnson was arrested a day later and immediately contradicted his own alibi. Slip Op. p. 3.

Thus, even if the crime were to be considered, it should be assessed for what it is – a botched robbery that led to murders to fuel a drug habit. *See, e.g., Black v. Bell*, 664 F.3d 81 (6th Cir. 2011) and *State v. Black*, 815 S.W.2d 166, 173 (Tenn. 1991) (intellectually disabled defendant convicted of triple homicide; hid the firearm to avoid detection); *Hughes v. Epps*, 694 F.Supp.2d 533, 536-37 (N.D. Miss. 2010) (intellectually disabled defendant sought to hide the body of his victim and the clothing worn during the murder). Even if it was proper to consider the facts of the crime, and it is not, this crime at best illustrates a "difficult[y] in planning **and implementation**" of a plan to rob that tragically went awry. *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports* at p. 26 Table 3.1 (12th ed. 2021) (emphasis added). It is also important to contextualize Johnson's conduct in relation to a child with the same level of intellectual functioning. Most adults with intellectual disabilities can achieve reading, arithmetic, and writing skills equivalent to a 5th or 6th Grader. *See* Tasse, M.J., p. 102. A child of that age

"has the ability lie, hide, plot, and deceive to get out of trouble." *Id.* It is not, therefore, surprising or indicative of special skills, that Mr. Johnson would be capable of committing a crime even with his significant limitations. The Supreme Court recognized these issues in twice reversing the Fifth Circuit in *Moore I and II* for overreliance on the facts of the crime when assessing Moore's intellectual disability.

### B. THIS COURT'S RELIANCE ON DR. HEISLER'S CLINICALLY INCORRECT ASSERTION, MADE OUTSIDE THE ADVERSARIAL PROCESS, THAT JOHNSON WAS MALINGERING ON THE IQ TEST.

This Court ignored its own evidentiary rules to credit references to a clinical report that has never been admitted into evidence and authored by a clinician who the State chose not to call as a witness to defend his conclusions. Slip Op. 11. Dr. Gerald Heisler was retained by the State to conduct a clinical exam of Mr. Johnson in preparation for a sentencing hearing. Dr. Heisler authored a report, but the State chose not to call him as a witness. Instead, the State merely asked questions of Mr. Johnson's retained expert, Dr. Keyes, about Heisler's conclusions. This approach allowed the State to avoid subjecting Dr. Heisler to cross-examination while injecting his conclusions into the trial court record. But Heisler's report was not introduced as evidence and the prosecutor's questions were not substantive evidence. This Court, though, treated the Heisler's report and its untested conclusions as substantive evidence and as though it had been admitted and subjected to the same scrutiny given to Dr. Keyes report. This approach violated this Court's own long-held evidentiary standards and, most importantly, relied on a report that rejected nearly every clinically accepted practice for the diagnosis of intellectual disability. *See Bruflat v. Mister Guy, Inc.*,

933 S.W.2d 829, 833 (Mo. App. W. D. 1996), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) ("a testifying expert cannot be a mere conduit for another non-testifying expert. The testimony of the expert who merely acts as a conduit for another expert's opinion is hearsay and inadmissible.")(citations omitted). This Court credited Heisler's untested conclusions while at the same time rejecting the conclusions of Dr. Keyes and Martell who offered different conclusions. Slip Op. pp. 12, 14-15. There is no legal or rational basis for the Court to accept one opinion while immediately discrediting the others. This Court's approach is in error; Mr. Johnson satisfied the pleading requirement and given the conflicting clinical reports, this Court should order an evidentiary hearing.

Dr. Heisler's conclusion that Mr. Johnson was malingering is inconsistent with his own data and based solely on the subjective opinion of a technician. Dr. Heisler did not administer an IQ test to Mr. Johnson and instead relied on another individual, Sonny Bradshaw, to conduct the testing. Mr. Bradshaw reported to Dr. Heisler he believed Mr. Johnson was malingering, but his opinion was based solely on his subjective impression and not on an objective testing instrument. More importantly, Mr. Bradshaw's data from the IQ test – a test that included an imbedded test to measure the test taker's effort – objectively demonstrated Mr. Johnson was giving sufficient effort to validate the testing data. *See* Attachment H to Rule 91, p. 31. Thus, Bradshaw's subjective opinion about Mr. Johnson's malingering – a conclusion adopted by Heisler and this Court – was without any support in the record and should not have been relied on to invalidate the IQ test results.

Both Dr. Heisler and Mr. Bradshaw either failed to recognize there was an embedded test of effort in the test or completely failed to mention it in their assertion that Mr. Johnson was malingering. *See* Att. Y to Rule 91 at 14 (noting that Mr. Bradshaw had never taken a course on administering or interpreting the WAIS or any other IQ test); Anne L. Shandera, et. all, *Detection of Malingered Mental Retardation*, PSYCHOLOGICAL ASSESSMENT, Vol. 22, No. 1, 50 (2010) ("Psychologists conducting evaluations in forensic settings must address the possibility of malingered symptoms using objective procedures."). Thus, it was error for this Court to even reference malingering – when in fact the scientific evidence was that no malingering occurred.

One of the reasons Mr. Johnson requested this case be remanded for additional factual findings by a Special Master is that Dr. Heisler's conclusions were never subjected to cross-examination. The **objective** measures of validity on the IQ test Bradshaw gave, as well as Mr. Johnson's consistency in IQ scores over the years, rebuts any **subjective** assertion of malingering. *See 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."). Further, the **objective** measures then and now, universally rebut any failure of effort on Mr. Johnson's behalf.

A remand for factual finding is appropriate so Dr. Heisler's credibility, and Dr. Martell's and Dr. Adler's credibility,[2] can be reliably judged by a factfinder and their testimonies can be challenged through the rubric of cross-examination. Dr. Heisler has never been challenged with the fact that the embedded validity testing given by Mr. Bradshaw belies any assertion of malingering.

For those practitioners who have little or no clinical experience with the intellectually disabled, "[m]alingering may be suspected because of confusion related to a combination of psychiatric symptoms, neurological symptoms, and cognitive deficits. . ."

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[2] This Court rejected Dr. Adler's testimony in a sentence due to Mr. Johnson's "incentive to produce results indicating intellectual disability." Slip Op. 15. The State of Missouri never argued this point because there is no factual basis to support such a conclusion. Indeed, it is hard to imagine how Mr. Johnson could manipulate the results of a ***brain scan*** to demonstrate he suffers from intellectual disability. The data obtained from a QEEG is inherently objective. While the State might attempt to object to Dr. Adler's conclusions based on his reading of the data, this has nothing to do with Mr. Johnson's alleged incentive to produce specific results from the QEEG. Similarly, Dr. Martell administered specific testing to measure effort and those tests demonstrated proper effort by Mr. Johnson and validated the overall data. *See* Attachment H at 25. To the extent this Court credits Heisler's conclusions, the data from Drs. Adler and Martell represent clinically significant data warranting the appointment of a special master to assess the credibility of the conflicting evidence.

Edward Polloway, ed., *The Death Penalty and Intellectual Disability*, (AAIDD) (2015), at 270. "[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) (citation omitted). 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 Dr. Keyes: "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." Rule 91 Pet, Att. H at 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).

### C. THIS COURT MISAPPREHENDS THE IQ SCORES IN THE CONSIDERATION OF THE INTELLECTUAL FUNCTIONING PRONG.

In finding that Mr. Johnson did not to meet this prong, this Court proceeded from a flawed premise. This Court noted that on the previously acceptable IQ scores, "only one (out of four valid scores) that would indicate significant subaverage intelligence." Slip Op. 11. While a simple math error, it is a dramatic substantive error. Applying science, only one of these four scores **does not** indicate significant subaverage intelligence. Stated another way, three out of four tests administered fully fall within the range of intellectual disability.

1. The Court references the 77 in 1968. This was adjusted downward to a 71 due to the Flynn Effect. With the standard error of measurement

of 5, the IQ range is 66-71, and falls within the range of intellectual disability;

2. The Court references the 63 in 1971, this score safely falls within the range of intellectual disability; and,
3. The Court references the 78 in 1994, This is adjusted downward to a 72.9 due to the Flynn Effect. With the standard error of measurement of 5, the IQ range is 67.9-77.9, and falls within the range of intellectual disability.

Contrary to this Court's finding, Mr. Johnson's IQ scores have been remarkably consistent throughout his life with eight of the nine[3] full-scale IQ tests within the subaverage intellectual functioning range. In focusing on IQ scores (incorrectly noting the significance of the same) and the facts of the crime, this Court failed to consider or discuss the remarkable consistency of Mr. Johnson's IQ scores with the results of Achievement Test Scores. To reiterate, they reflect cognitive shortcomings that also are evidence of adaptive deficits in the Conceptual category, established long before the crime:

| **Grade** | **Date** | **Reading** | **Math** | **Language Arts** |
|---|---|---|---|---|
| Grade 2 | April 1969 | 1% (1.0) | * | * |
| Grade 3 | April 1970 | 2% (1-5) | 4% (2-4) | 9% (2-4) |
| Grade 4 | April 1971 | 1% (1-6) | * | 2% (2-4) |

[3] This Court did not address that the ninth score, given its dramatic variance from all the other scores, may be some sort of error. Attachment H to Rule 91, pp. 32-33. Mr. Johnson has pursued the raw data from that testing, but the clinician died years prior to undesigned counsel's appointment and the data is no longer available.

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| Grade 3[4] | April 1972 | 29% (3-1) | * | 13% (2-5) |
| Grade 5 | April 1973 | 2% (2-8) | 2% (3-4) | 2% (2-9) |
| Grade 7 | April 1974 | 7% | 8% | 2% |
| Grade 9 | October 1975 | 2% | 21% | 6% |

Attachment M to Rule 91, p. 29 ("*" designates untested subjects). The above scores were supported by the testimony of teachers noting Mr. Johnson's significant cognitive shortcomings.

Thereafter, the Court held that Dr. Adler "does not make a finding as to whether Johnson is intellectually disabled." Slip Op. 15. This is incorrect. As noted in his most recent report, Dr. Adler noted:

Mr. Johnson was examined by me on August 7, 2008. On August 14, 2008, I issued a 28-page report, in which I made the following diagnoses (DSM-IV):

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|---|---|
| Axis I: | Cognitive Disorder, NOS |
| | Learning Disorder, NOS |
| Axis II: | Mild Mental Retardation |

Rule 91 Attachment I p. 2. That opinion was not retracted and was admitted as substantive evidence in Mr. Johnson's post-conviction hearing.

[4] First year where his transcript is designated as "Special Education."

### D. THE COURT'S CREATION OF A CAUSATION REQUIREMENT BETWEEN ADAPTIVE DEFICITS AND INTELLECTUAL FUNCTIONING IS AT ODDS WITH CLINCIAL PRACTICE AND JUDICIALLY MODIFIES MISSOURI'S INTELLECTUAL DISABILITY STATUTE.

This Court commits a grievous error in stating "[i]n essence, adaptive deficits must be caused by impaired intellectual functioning." Slip Op. 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 Court has misapprehended this language from the DSM-5 and improperly modified the statutory definition of intellectual disability. In short, this violates clinical practice and runs afoul of *Moore I* and *Moore II* that require an adherence to clinical guidelines.[5] The DSM-5 itself

[5] It also runs contrary to *Jackson v. Payne,* --- F.4th ----, 2021 WL 3573012, at *7 (8th Cir. Aug. 13, 2021) (in discussing the direct relation language from the DSM-5 at 38, the court notes *Moore I* does not require a petitioner to demonstrate a specific connection between the first and second prongs of the diagnosis) and *Johnson v State*, 580 S.W.3d 895, 916

recognizes the danger that their wording will be misinterpreted in the forensic context: "When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic criteria will be misused or misunderstood." *DSM-5*, at 25. This risk has come to bear in this Court's opinion.

Further, the State of Missouri never raised this as a basis to deny the adaptive behavior prong of the intellectual disability standard. Setting aside the waiver, this Court also did not entertain oral argument. If raised at argument or notice of this had been given as a consideration, Mr. Johnson could have firmly challenged this misapplication of the intellectual disability definition from the DSM-5.

Initially, this Court should be guided by the Missouri Statute and the Legislature's determination that the intellectual functioning prong and the adaptive behavior prong be treated as separate co-equal factors required to be proven. This Court effectuates a rewriting of the intellectual disability by imposing or inserting a causation requirement. That remains the province of the Legislature, not this Court. [6]

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(Mo. banc 2019) (Stith, J., dissenting, joined by Draper, C.J. & Breckenridge, J.) ("*Atkins,* as clarified by *Hall*, *Moore I*, and *Moore II*, set out clearly how states are limited by clinical guidance in determining intellectual disability.") The above discussions were neither addressed nor distinguished by the per curiam decision.

[6] This Court applied the onset prior to age 18 decided by Missouri's Legislature even though the AAIDD 12th Edition has an onset prior to age 22. This Court should treat

Grafting on a causal/related to requirement 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, the Supreme Court found that the analysis of the "related to" requirement to violate "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 (noting the state court violated clinical practice by finding that childhood abuse and a personality order detracted from a determination that the intellectual and adaptive deficits were related). When the Texas court again applied the "related to" requirement, the Supreme Court reiterated 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).

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Missouri Legislature's adaptive definition with the same respect and deference accorded the onset provision.

*Moore II*, 139 S.Ct. at 671.

As noted in AAIDD, 12th Edition, p. 33 "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 describes requiring a causal connection as a "thinking error."

> 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 as **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 (emphasis added) (citations omitted from original).

This Court misinterprets the statement in the DSM-5 that "deficits in adaptive functioning must be directly related to the intellectual impairments described in [prong one]." DSM-5 at 38. This statement does not require Mr. Johnson to prove causation. In *United States v. Wilson*, 170 F.Supp.3d 347 (E.D. N.Y. 2016), the court directly addressed the government's assertion that this language from the DSM-V requires the defendant to prove causation:

> With respect to the DSM-V's effect on the legal standard for prong two, the court finds that this single sentence is insufficient to impose a requirement

for a defendant to prove specific causation. By requiring that adaptive functioning deficits "directly relate" to intellectual functioning deficits, the DSM-V appears simply to have clarified the most logical approach to a diagnosis of intellectual disability. The court assumes that a clinician would not diagnose intellectual disability on the basis of adaptive functioning deficits that were related to something else entirely, such as a physical disability or traumatic event. However, where an individual has demonstrated significantly subaverage intellectual functioning, along with significant adaptive deficits that relate to such intellectual impairment, that individual has satisfied the first two diagnostic criteria for intellectual disability. **To require this individual to further prove that he satisfies these criteria because he is intellectually disabled would render the criteria meaningless. Indeed, the Government's approach would transform the standard for intellectual disability into an impossible test**: **In order for a defendant to show that he was intellectually disabled, he would need to prove that he satisfied the criteria because he was intellectually disabled.** As though trapped on an M.C. Escher staircase, the defendant would climb to the top only to find he had returned to the bottom. Likewise, the court finds that a defendant is not required to rule out other contributing causes of his adaptive deficits in order to meet the standard for intellectual disability. The APA has clearly stated as much: "**The diagnosis criteria for [intellectual disability] do not include an exclusion criterion**;

> therefore, the diagnosis should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder." DSM-IV at 47.

*Id.* at 370-371 (emphasis added).

The Eighth Circuit has held the same. Rejecting the basis accepted by this Court, in *Jackson v. Kelley*, 898 F.3d 859, 865 (8th Cir. 2018), the Eighth Circuit held:

> Furthermore, the Supreme Court also found in *Moore* that "[t]he existence of a personality disorder or mental-health issue, in short, is not evidence that a person does not also have intellectual disability." *Moore*, 137 S. Ct. at 1051 (internal quotation marks omitted) (finding that the court of appeals erred when it used academic failure and childhood abuse to detract from a determination that the defendant's intellectual and adaptive behaviors were related); *see also United States v. Wilson*, 170 F. Supp. 3d 347, 371 (E.D.N.Y. 2016). The Court stated that "many intellectually disabled people also have other mental or physical impairments" and the medical community actually uses those experiences as "risk factors," causing clinicians to further explore the possibility of intellectual disability rather than "counter[ing] the case for a disability determination." *Moore*, 137 S. Ct. at 1051; *see also Wilson*, 170 F. Supp. 3d at 371.
>
> Like the court of appeals in *Moore*, **the district court found that Jackson's diagnosis of anti-social personality disorder, coupled with his untreated childhood ADHD, conduct disorders, and communications**

> **disorders, indicated that his adaptive deficits were not related to subaverage intellectual functioning. However, prior to issuing its order, the district court did not have the benefit of the Supreme Court's finding that the existence of additional personality disorders or mental-health issues is not evidence weighing against an intellectual disability determination.** In light of the Court's decision in *Moore*, we believe the district court erred by placing too much emphasis on the existence of other diagnosed disorders to find that Jackson was not intellectually disabled.

*Id.* (emphasis added).

Instead of utilizing an objective measure of adaptive behavior, Dr. Heisler attributed Mr. Johnson's poor academic record to his "impoverished background" and "substance abuse before age 10." Dr. Heisler report at 4 (Attached as Rehearing Att. 1). Dr. Heisler's statement demonstrates his lack of knowledge about clinical assessments of intellectual disability and undermines his qualifications to provide a reliable opinion. There is no requirement that Mr. Johnson prove that his deficits are caused by his intellectual disability and the circumstances of his background are risk factors for intellectual disability – they do not detract from it. *See Moore I*, 137 S.Ct. at 1047, 1051 (noting that alternative causes for adaptive deficits cited by the State included drug abuse and "an abuse-filled childhood"; however academic failure and a traumatic childhood experiences are risk factors for intellectual disability). If Mr. Johnson had been properly diagnosed and cared for as a child it is more than likely he would not have formed maladaptive coping mechanisms, like drug addiction, that fueled this crime.

This court's misapprehension of the DSM-5 is another reason that this case should be remanded for factual development. The language from the DSM-5 that this Court relied on will be removed in the DSM-5-TR, which is the process of publication. *See* Letter of Appelbaum, MD (attached as Att. 2). The DSM-5-TR is set to be published in 2022. *Id.* The language is being taken out because of a recognition of the "confusion this sentence caused in the diagnostic process, appearing to add a diagnostic criterion beyond the official criteria set. That was not the intent of the sentence and thus, to avoid such confusion, the sentence was removed." *Id.*

This Court's confusion in applying the DSM-5 is understandable given the complexity of the subject matter and the degree of expertise required. The DSM-5 is published by the American Psychological Association (APA) and the text states in the introduction, "Clinical training and experience are needed to use the DSM for determining a diagnosis. The diagnostic criteria identify symptoms, behaviors, cognitive functions, personality traits, physical signs, syndrome combinations, and durations that require clinical expertise to differentiate from normal life variation and transient responses to stress." DSM-5, p. 5. Despite these admonitions, this Court undertook the task of determining whether Mr. Johnson met the DSM-5 definition of intellectual disability without the benefit of clinical expertise, or an adversarial process informed by competent

clinicians relying on sound clinical practices.[7] This Court should remand this case so that proper clinical standards, explained by testifying experts, can be followed in determining Mr. Johnson's intellectual disability.

### E. THE VERY NATURE OF ADAPTIVE BEHAVIOR ASSESSMENT REQUIRES RELIANCE ON FAMILY MEMBERS WHO KNEW MR. JOHNSON DURING THE DEVELPMENTAL PERIOD. THIS COURT ALSO IGNORED OBJECTIVE TESTIMONY FROM TEACHERS WHICH FULLY SUPPORT A FINDING THAT JOHNSON HAS EVIDENCED ADAPTIVE BEHAVIOR DEFICITS SINCE CHILDHOOD.

Assessing adaptive behavior requires assembling information from people who had extended contact with Mr. Johnson during the developmental period. The obvious people

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[7] This Court's struggles with applying the DSM-5 further highlight the challenges posed to the jury in attempting to make a similar judgment based solely on the jury instructions provided. As this Court is aware, the jury instructions provided only the statutory elements of intellectual disability without providing without defining any of the terms relied on by clinicians. As a result, the jury was left to its own devices to define "subaverage", "deficits", "intellectual functioning", and "adaptive functioning". These issues are challenging even in a clinical setting, much less so than an emotionally charged jury room in the middle of a capital murder trial where unreliable outcomes result in the wrongful execution of an intellectually disabled man.

who have had this extended contact will be friends and family members. This Court erred in categorically excluding such people in its assessment.[8] The United States Supreme Court relied on family in *Moore I*, 137 S. Ct. at 1045 and *Moore II*, 139 S. Ct. at 667.

This Court unreasonably discounted the testimony of Mr. Johnson's family members based upon the fact they "knew Johnson would not be sentenced to death if it was determined he was intellectually disabled." Slip Op. 16-17. This is a determination of credibility that cannot be made on a paper record, it can only be made in a courtroom where the factfinder can assess the witnesses on Mr. Johnson's behalf in person. *See Anderson v. State*, 564 S.W.3d 592, 600 (Mo. banc 2018) (noting that appellate court should defer to a lower court's "superior opportunity" to make credibility determinations); *Barton v. State*, 432 S.W.3d 741, 760 (Mo. banc 2014) (quoting *State v. Twenter*, 818 S.W.2d 628, 635 (Mo. banc 1991)). This is why a remand to a Special Master is in order.

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[8] This Court also disparaged previous lawyers as universally biased and rejected any consideration of their interactions with Mr. Johnson. Each of these members of the bar signed the affidavits under penalty of perjury and there is nothing before this Court that would render their first-hand interactions with Mr. Johnson unreliable or untruthful. *See Moore I*, 137 S. Ct. at 1045 (discussing testimony of former counsel). This Court, as the purported factfinders, must at least meet the fair and impartial standards this Court demands of its citizens serving on a jury. *See State v. Brandolese*, 601 S.W.3d 519, 526–27 (Mo. banc 2020) ("To be sure, a juror who cannot be fair and impartial should be stricken for cause to ensure a fair and just trial.") (citation omitted).

In addition, this Court completely ignored the testimony of Mr. Johnson's teachers during the developmental period that support the finding of intellectual disability. Robin Seabaugh taught Mr. Johnson in a developmental reading class in ninth grade. (Record on Appeal, Vol. II, p. 1219, *State v. Johnson*, SC87825 (Mo. 2008)). In ninth grade, Mr. Johnson was reading between a second and third grade level. (*Id.* at 1225). He failed ninth grade and Seabaugh characterized his intelligence as extremely low, which is also supported by his consistently low achievement scores during the developmental period. (*Id.* at 1226, Attachment M to Rule 91, p. 29).

Steve Mason taught Mr. Johnson in art after he had to repeat the ninth grade. (Record on Appeal, Vol. II, p. 1239). Mr. Johnson could not accomplish even basic tasks such as using a ruler to draw a straight line, he failed to complete any project, and received an F in art. (*Id.* at 1243-44). When Mr. Mason recommended that Mr. Johnson be placed in special education, he was told by school officials that this was not possible. (*Id.* at 1247). Mr. Johnson dropped out of school halfway through his second attempt at ninth grade. (*Id.* at 1257).

Having found every other person in Mr. Johnson's life to be incredible, this Court should not ignore testimony from historical reporters such as teachers who knew Mr. Johnson during the developmental period. This Court should remand this matter to a Special Master so that credibility can be judged in person by a trial court, after the opportunity for cross-examination.

## F. INTERPRETING MISSOURI STATUTE TO REQUIRE A DIAGNOSIS OF INTELLECTUAL DISABILITY PRIOR TO AGE 18 VIOLATES THE EIGHTH AMENDMENT.

For various reasons, many of those who suffer from intellectual disability are not diagnosed as such during the developmental period. *See* Polloway, at 222 (noting that many *Atkins* petitioners have a clear history of school failure but were never labeled ID in school). In Mr. Johnson's case, he was born into the poverty of the Missouri bootheel as a child of a sharecropper, at a time where people with his skin color were shipped to separate, but not equal, schools. When finally integrated, the unrefuted evidence is that requests for special education by concerned teachers were ignored. The reality is that the impoverished school districts Mr. Johnson attended simply did not provide the opportunity for diagnosis regardless of the apparent need.

This Court cited the Missouri statute for the proposition of requiring intellectual disability to be "manifested and documented before eighteen years of age." Slip Op. 15. On this basis, this Court concluded that "[b]ecause Johnson is now over 60 years old, reports of Johnson's alleged current mental ability are not given much weight." *Id.* This Court also noted that Johnson did "not provide any evidence of a formal evaluation or diagnosis of intellectual disability during the developmental period." Slip Op. 16.

To the extent this Court requires intellectual disability to be diagnosed during the developmental period, its opinion violates the Eighth Amendment. *See Oats v. State*, 181 So.3d 457, 469 (Fla. 2015) (reversing a lower court's finding that the defendant was not intellectually disabled based upon a misperception that a lack of diagnosis prior to age 18

was fatal to the claim). In *Oats,* the Florida Supreme Court noted that it would be at odds with the Supreme Court's decision following *Atkins* to require diagnosis prior to age 18 before the protection of *Atkins* is given: "[t]hat inflexible view would not be supported by the United States Supreme Court's recent enunciations in *Hall* and *Brumfield*." *Id.* at 469; *see also United States v. Wilson*, 170 F.Supp.3d 347, 391 (E.D. N.Y. 2016) (noting that the age of onset requirement does not require diagnosis before the age of 18).

It is error to give Mr. Johnson's later IQ scores little weight in determining his intellectual disability when assessing functional academics. His IQ scores, from childhood to now, have been consistently within the range of intellectual disability, something even this Court acknowledged. *See* Slip Op. 11 (noting that adjusting for the margin of error and the Flynn effect, Mr. Johnson's test scores "are within the range that could be indicative of intellectual disability"). The fact that Mr. Johnson may not have been diagnosed as intellectually disabled during the developmental time frame is more a function of the paucity of services available to him during his childhood in rural Missouri.

As the Court notes, Mr. Johnson also suffered an abusive childhood. Rather than proving there is an alternate cause to his deficits, this fact further supports that the lack of diagnosis before a18 is more a function of the failure of Mr. Johnson's parental figures and school to identify and properly accommodate his disability. As Mr. Johnson's art teacher testified, when he recommended that Mr. Johnson be placed in special education, he was told that the school simply could not do anything about that. (Record on Appeal, Vol, II, p. 1247, *State v. Johnson*, SC 87825 (Mo. 2008)). Mr. Johnson had no other adults in his life to advocate for him.

Furthermore, IQ scores remain relatively consistent over a person's lifetime, as illustrated by Mr. Johnson's consistency in IQ scores over time. *See Muncy v. Apfel*, 247 F.3d 728, 734 (8th Cir. 2001) ("a person's IQ is presumed to remain stable over time in the absence of any evidence of a change in a claimant's intellectual functioning."). Mr. Johnson should not be exempted from the protection of *Atkins* simply because of the absence of diagnosis during the developmental time period.

## G. THE JURY DID NOT MAKE A FINDING REGARDING INTELLECTUAL DISABILITY.

The jury in Ernest's Johnson's third sentencing hearing did not make a specific finding regarding Mr. Johnson's intellectual disability. Mr. Johnson's jury was instructed that before he could qualify for a life sentence under the protection of *Atkins*, they must "unanimously find" that he had proven that he was intellectually disabled by a preponderance of the evidence. (Attachment S to Rule 91, p. 6). This requirement of unanimity was again reiterated in Jury Instructions #7, 11, 12, 16, 17 and 21: "[i]f you did not unanimously find by a preponderance that the defendant is mentally retarded. . . ." (Attachment S to Rule 91, pp. 7, 12, 14, 19, 21, 25).

The verdict forms again reiterated that the jury must find unanimously that Mr. Johnson had proven intellectual disability. (Attachment S to Rule 91, pp. 31, 35, 39). The signed verdict forms reflecting the findings of the resentencing jury only lay out their findings in aggravation. (Attachment T to Rule 91, pp. 1-3). There is no signed verdict form directly addressing their finding on the intellectual disability question or on

mitigation. Instead, the only thing that may be said about the jury's decision is that at least one juror did not find Mr. Johnson to be intellectually disabled. No other findings were required or made by the jury with respect to this issue.

This Court seemingly adopts the State's version of a jury finding without evidence supporting this factual finding. The State argued in its response this Court should not undermine the jury's verdict by reweighing the evidence. (Resp. p. 15). The State also argued the jury "found he was not mentally retarded." (*Id*). Similarly, this Court stated, "the jury found Johnson is not intellectually disabled . . ." Slip Op. p. 5. As noted above, the jury never made these findings, but this Court's opinion perpetuates the State's unsupported arguments and provides greater weight and significance to the jury's consideration of the evidence of intellectual disability than is legally or factually warranted.

## H. A STAY WITH A SCHEDULE FOR A SPECIAL MASTER IS IN ORDER.

"One of the crucial functions of the Court in deciding an *Atkins* claim is to determine the credibility of witnesses presented at the evidentiary hearing." *Wilson*, 170 F.Supp. 3d at 379. The evidence herein when properly assessed by applicable clinical standards establishes Mr. Johnson's intellectual disability.

This Court summarily denied a stay without analysis premised upon the Court's intellectual disability ruling. As noted above, Mr. Johnson respectfully suggests errors are manifest in this Court's ruling. This Court should reconsider, and appoint a Special Master and issue a stay similar to the stays granted by many other state courts in the recognition of the changes wrought by *Moore I* and *Moore II*, as cited in Johnson's stay motion. This

Court can provide guidance on the process to be implemented and set forth a finite timeframe for the consideration of the evidence. This is an issue that cannot be decided on the basis of a paper record . Witnesses need to be called to the stand and their credibility fairly assessed by a factfinder in person. Otherwise, the risk is too great that *Atkins* will be violated and an intellectually disabled person will be executed.

## CONCLUSION

This Court's opinion does not fairly account for the changes wrought by *Moore I* and *Moore II* in making reliable and constitutional determinations of intellectual disability. This case should be remanded to a Special Master so that proper clinical practice is applied and any State expert opinions can be subjected to cross-examination. Mr. Johnson's intellectual disability question remains unfairly determined by any factfinder guided by clinical standards.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2021, this writ petition and all attachments were filed via the Missouri e-filing system, and a true and correct copy was served on all parties of record.

*/s/ Jeremy S. Weis*
Attorney for Petitioner