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The Honorable Michael Parson
Governor of Missouri
Governor Capitol Building
Rm. 216
Jefferson City, MO 65101

Re: October 5, 2021, Scheduled Execution of Ernest Johnson

Dear Governor Parson,

I am writing today on behalf of the American Bar Association ("ABA") concerning the case of Missouri death-row prisoner Ernest Johnson, who is scheduled to be executed on October 5, 2021.[1] While the ABA does not take a position for or against the death penalty *per se*, we have long been concerned with ensuring the highest levels of substantive and procedural fairness in those jurisdictions where the ultimate punishment is carried out. This includes ensuring that individuals with intellectual disability[2] are protected from execution. **In Mr. Johnson's case, we are deeply concerned that a flawed process has failed to properly determine that Mr. Johnson is a person with intellectual disability and thus ineligible for the death penalty, despite significant evidence supporting this diagnosis.**

To avoid a possible miscarriage of justice—the unconstitutional execution of a person with intellectual disability—we urge you to consider exercising your authority under the Missouri Constitution to grant Mr. Johnson clemency and re-sentence him to life in prison without the possibility of parole. In the alternative, we urge you to convene a Board of Inquiry tasked with making the determination whether Mr. Johnson is a person with intellectual disability governed by modern diagnostic standards.

ABA Policy Regarding Intellectual Disability & Mental Illness

The ABA has a robust history of advocating in favor of increased legal protections for persons with intellectual and other disabilities. The ABA first adopted policy condemning the

[1] The ABA transmitted a letter to you regarding Mr. Johnson's case in December 2020, when the Missouri Attorney General's Office indicated it would pursue an execution date for Mr. Johnson during the COVID-19 pandemic. *See Ernest Johnson and Other Execution Dates During the COVID-19 Crisis*, Letter from Am. Bar Ass'n Pres. Patricia Refo to MO Gov. Michael Parson (Dec. 30, 2020), available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/aba-letter-ernest-johnson-covid-19.pdf. In that letter, we also noted our concerns regarding Mr. Johnson's longstanding claims that he is a person with intellectual disability. *Id*. at 3-4.

[2] Citing modern clinical practice, the U.S. Supreme Court has used the term "intellectual disability" to refer to what was previously called "mental retardation" since 2014. *See Hall v. Florida*, 572 U.S. 701, 704 (2014).

imposition of the death penalty on persons with intellectual disability in 1989,[3] thirteen years before the U.S. Supreme Court concluded in *Atkins v. Virginia* that the execution of people with intellectual disability violates the Eighth Amendment's prohibition against cruel and unusual punishment.[4] In 2001, the ABA Section of Individual Rights and Responsibilities[5] issued a set of recommended protocols to improve the administration of the death penalty in jurisdictions that maintain it.[6] The protocols include an exhortation that the death penalty not be imposed upon "individuals who have [intellectual disability]," and that "[w]hether the definition is satisfied in a particular case should be based upon a clinical judgment."[7]

In 2003, the ABA established a Task Force on Mental Disability and the Death Penalty, composed of lawyers, mental health practitioners, and academics, to examine the imposition of the death penalty on persons with intellectual disability and other mental or psychiatric conditions and limitations. Based in large part on the work of the Task Force, the ABA adopted policy in 2006 once again urging jurisdictions that impose the death penalty to implement policies and procedures to exempt defendants who have intellectual disability from execution.[8] Importantly, this policy goes further than the rule announced by the U.S. Supreme Court in *Atkins*, and recommends that death penalty jurisdictions also exempt individuals with serious mental illness and other neurological and cognitive deficits present at the time of the crime from the death penalty.[9]

Over the last decade, the ABA has also filed amicus briefs with the U.S. Supreme Court in numerous cases concerning intellectual disability and the death penalty, including in *Hall v. Florida*,[10] *Moore v. Texas*,[11] and *Moore v. Texas*,[12] explaining respectively that Florida's and Texas's schemes for determining intellectual disability violated clinical standards and the exclusionary rule announced in *Atkins.* The fundamental concern underpinning the ABA's many policies on and contributions to the discussion of intellectual disability and the death penalty are

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[3] ABA Recommendation 110 (1989) available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/dp-policy/1989_my_110.pdf.

[4] 536 U.S. 304, 317 (2002).

[5] Now called the Section of Civil Rights and Social Justice ("CRSJ").

[6] *See* ABA, Section of Individual Rights & Responsibilities, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (June 2001).

[7] *Id.* at 63.

[8] ABA Recommendation 122A (2006) available at: https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/dp-policy/2006_am_122a.pdf.

[9] *Id*. The Report accompanying the 2006 Policy explains the inclusion of individuals with serious mental illness and other cognitive deficits as exempt from the death penalty as based on the same rationale used by the Court in *Atkins*. "In reaching its holding in *Atkins*, the Court emphasized that execution of people with mental retardation is inconsistent with both the retributive and deterrent functions of the death penalty. More specifically, as noted above, it held that people with mental retardation who kill are both less culpable and less deterrable than the average murderer, because of their 'diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.'…The same reasoning applies to people who, in the words of the Recommendation, have a 'severe mental disorder or disability' that, at the time of the offense: 'significantly impaired their capacity (1) 'to appreciate the nature, consequences, or wrongfulness of their conduct;' (2) 'to exercise rational judgment in relation to the conduct'; or (3) 'to conform their conduct to the requirements of law.'" Report at 5-6.

[10] 572 U.S. 701 (2014).

[11] 137 S. Ct. 1039 (2017) (*Moore I*).

[12] 586 U.S. __ (2019) (*Moore II*).

(1) the enhanced risk that individuals with intellectual disability will be wrongfully convicted or sentenced to death in violation of their constitutional rights, and (2) that the execution of a person with intellectual disability "is disproportionate to the individual's level of personal culpability and serves no valid penological purpose."[13]

Missouri's Process for Determining Intellectual Disability

Based on the ABA's significant experience in this area of the law, the Association in 2010 issued a series of recommendations for capital jurisdictions to ensure due process in capital cases. Several of these addressed the procedure and standards for assessing intellectual disability. One recommendation noted that "the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, **preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a tria**l."[14] Another protocol advised that "[**t]he burden of disproving mental retardation should be placed on the prosecution**, where the defense has presented a substantial showing that the defendant may have mental retardation."[15]

Missouri's process for assessing intellectual disability—the process through which Ernest Johnson was found to be eligible for the death penalty despite his mental impairments—fails to comply with either of these recommendations. In Missouri, although the intellectual disability determination may be presented to the trial judge in pretrial proceedings, both parties have to consent for it to take place at this stage. Mr. Johnson made this request to the trial court, and the prosecutor objected. As a result, Mr. Johnson's case for intellectual disability was only presented to the jury at the penalty phase of trial, once he had already been found guilty. And critically, rather than placing the burden of *disproving* intellectual disability with the State, as the ABA recommends, the trial judge ordered that Mr. Johnson persuade the jury that he *is* intellectually disabled to take the death penalty off the table. Additionally, the jury was instructed that it must make this finding of intellectual disability unanimously. The jury instructions did not require a unanimous finding that Mr. Johnson *is not* intellectually disabled, however; so a single dissenting voice on the jury may have been sufficient to expose Mr. Johnson to execution.

In 2012, when the ABA published its Missouri Death Penalty Assessment Report,[16] it noted precisely these issues in Missouri's death penalty process. The Report advises, "**Missouri law should be amended to grant capital defendants a right to a pretrial hearing on the issue of mental retardation**."[17] The Report then went on to note that given the way in which the instructions on intellectual disability are given in Missouri capital trials, "Missouri law is unclear…as to the outcome when the jury is not unanimous on the mental retardation issue."[18]

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[13] ABA Recommendation 110 (1989), Report at 1.
[14] *See* ABA Death Penalty Moratorium Implementation Project: *Jurisdictional Assessments Chapters and Recommendations – January 2010*, 16, available at https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/2010protocols.pdf (emphasis added).
[15] *Id*. at 16 (emphasis added).
[16] *See* Am. Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Missouri Death Penalty Assessment Report*, https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_missouri_assessment_report.pdf (2012).
[17] *Id*. at vii (emphasis added).
[18] *Id*. at 359.

The ABA's recommendations are written to ensure a reliable and fair determination of intellectual disability in death penalty cases. Where state protocols deviate, there is a greater risk that a person who is actually intellectually disabled will be erroneously found to be eligible for execution and put to death in violation of the Constitution. There is significant reason to be concerned that this very scenario is currently unfolding in the case of Ernest Johnson.

Procedural History & Past Evidence of Intellectual Disability

At the time of Mr. Johnson's first trial in 1996, before the U.S. Supreme Court categorically barred the death penalty for persons with intellectual disability, counsel for Mr. Johnson developed evidence supporting such a diagnosis.[19] Additionally, evidence was developed post-trial and raised on appeal that Mr. Johnson's brain functioning "was within the brain damaged range" and the "impairment manifested itself in Johnson's everyday life in slow-thinking, a short attention span, problems with verbal comprehension, a poor memory, and difficulty in responding to complex situations."[20] As a result of trial counsel's failure to present this and other evidence to the jury, in 1998 the Supreme Court of Missouri afforded Mr. Johnson a new penalty phase trial to consider the impact his mental disabilities may have had on the jury's assessment of his culpability.[21]

Mr. Johnson was again sentenced to death, and in 2003, following the U.S. Supreme Court's 2002 decision in *Atkins v. Virginia*, the Missouri Supreme Court once again reversed his sentence to allow the jury to consider evidence of his intellectual disability.[22] Mr. Johnson was then tried in 2006, where counsel presented evidence from two defense witnesses who testified that he is a person with intellectual disability.[23] The State did not present testimony from any expert witnesses that Mr. Johnson was not intellectually disabled; their diagnostic assessments were presented solely through the cross-examination of defense witnesses.[24] The evidence was submitted to the jury, which was instructed it must unanimously find that Mr. Johnson *is* a person with intellectual disability to conclude that he was not eligible for the death penalty.[25] As the jury went on to return a death sentence, it is reasonable to conclude that the jury did not reach a unanimous determination that Mr. Johnson is a person with intellectual disability. The jury was not polled and, because it was not asked to submit its votes on the matter of intellectual disability on a verdict sheet, it is unclear how exactly the jury voted on the question of whether Mr. Johnson is intellectually disabled.[26]

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[19] *See State v. Johnson*, 968 S.W.2d 686, 696 (Mo. 1998) ("[One of the defense witnesses] was able to conclude from IQ testing, however, that Johnson was in the first or second percentile—the borderline mentally retarded range—meaning that ninety-eight percent of those tested perform at a higher level. She suspected that his reading ability was below the sixth-grade level.").

[20] *Id* at 696.

[21] *State v. Johnson*, 968 S.W.2d 686, 702 (Mo. 1998) ("While this Court does not presume to know the precise effect Dr. Parwatikar's testimony would have had on the jurors who served on Johnson's trial, this Court is left with the definite and firm impression that the record before us demonstrates that Dr. Parwatikar's testimony would have altered the jurors' deliberations to the extent that a reasonable probability exists that they would have unanimously recommended life imprisonment without eligibility of probation or parole.").

[22] *Johnson v. State*, 102 S.W.3d 535, 539 (Mo. 2003).

[23] *State v. Johnson*, 244 S.W.3d 144, 152 (Mo. 2008), as modified on denial of reh'g (Feb. 19, 2008).

[24] *Id*.

[25] *See* Brief of *Amici Curiae* Retired Missouri Judges and Harvard Law School's Fair Trial Class, *Johnson v. Precythe*, No. SC99176 10-11 (Mo. June 21, 2021).

[26] Pet. for a Writ of Habeas Corpus, *Johnson v. Precythe*, No. SC99176, 45 (Mo. June 21, 2021).

An affidavit from a juror at Mr. Johnson's 2006 trial suggests that the jury did not understand how to answer the question of intellectual disability. This affidavit demonstrates that at least one juror held the mistaken belief that to show that Mr. Johnson was intellectually disabled, the defense had to prove that Mr. Johnson "did not know right from wrong."[27] Neither clinical diagnostic criteria nor the legal standard for determining intellectual disability requires a finding that the defendant did not know right from wrong.[28] In addition to the overarching problems with Missouri's protocol for determining intellectual disability, therefore, significant additional unreliability was injected into Mr. Johnson's trial by at least one juror who was not assessing intellectual disability according to constitutionally required standards. Allowing the importation of subjective standards for determining intellectual disability into this determination is contrary to substantial authority, including numerous policies of the ABA and recent decisions of the U.S. Supreme Court.[29]

The Missouri Supreme Court upheld Mr. Johnson's third penalty phase verdict by a 4-3 vote in 2008.[30] Three justices dissented, finding the allocation of the burden of proof to the defense to demonstrate intellectual disability was improper.[31] Although Mr. Johnson has continued to press the issue that he is categorically ineligible for the death penalty on account of his intellectual disability—and despite more recent evidence developed also supporting this diagnosis[32]—he has been unable to prevail in the courts. As a result, he is now vulnerable to execution in spite of significant evidence showing that he is a person who meets the clinical and Missouri statutory criteria for intellectual disability.

Clemency is Appropriate Where Significant Evidence of Intellectual Disability Has Been Established

Mr. Johnson has amassed nearly three decades of evidence in support of his claim that he is a person with intellectual disability, including numerous IQ scores squarely within the range for intellectual disability and voluminous evidence from his past suggesting that he has long suffered from adaptive deficits. Numerous medical experts who have evaluated Mr. Johnson have concluded that he meets all the clinical criteria for a diagnosis of intellectual disability. Against the weight of this evidence, it is little reassurance that the jury did not unanimously find that Mr. Johnson's execution would violate the Eighth Amendment, particularly given the unique aspects

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[27] Pet. for a Writ of Habeas Corpus, *Johnson v. Precythe* at 33.

[28] *See Hall*, 572 U.S. at 710 ("As the Court noted in *Atkins*, the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period.").

[29] *See*, *e.g.*, *Moore*, 137 S. Ct. at 1052 ("[t]he medical profession has endeavored to counter lay stereotypes of the intellectually disabled.…Those stereotypes, much more than medical and clinical appraisals, should spark skepticism.") (internal citations omitted).

[30] *State v. Johnson*, 244 S.W.3d 144, 168 (Mo. 2008), as modified on denial of reh'g (Feb. 19, 2008).

[31] *Id*. ("In other words, the evidence favoring Johnson establishes at least prima facie that he is retarded. Where that is the case, the burden should be on the state to prove that he is subject to the death penalty by bearing the burden of proving that he is not retarded.").

[32] In 2019, counsel for Mr. Johnson once again had him tested for intellectual disability and evaluated by a forensic psychiatrist. Dr. Daniel Martell, the State's expert in *Atkins v. Virginia*, reviewed the extensive records of intellectual function already developed in Mr. Johnson's case, and conducted his own evaluation. Based on his "examination, testing, and review of the background materials," Dr. Martell concluded that "Mr. Johnson…meets all of the current criteria for Intellectual Disability pursuant to *Atkins v. Virginia*." Pet. for a Writ of Habeas Corpus, *Johnson v. Precythe* at 36.

of Missouri's system for determining intellectual disability, and information developed on post-conviction review that the jurors who undertook this assessment misunderstood the clinical question they were being asked to answer.

As the singular clemency decision maker in Missouri, you may determine based on your own review of the evidence presented to you in support of clemency that a commutation of sentence is warranted in Mr. Johnson's case. If, however, you determine that further evaluation is needed, we urge you to convene a Board of Inquiry to determine whether Mr. Johnson meets the clinical criteria for this diagnosis. Where there is meaningful evidence that a capital prisoner may be intellectually disabled and there is concern that the procedures for making that determination are lacking in fairness and reliability, there need to be additional steps taken to prevent a possible unconstitutional execution and protect the integrity of the justice system.

Sincerely,

Patricia Lee Refo

Patricia Lee Refo
President