Nos. 21-5854 & 21A51

IN THE

Supreme Court of the United States

ERNEST JOHNSON,
Petitioner,

v.

PAUL BLAIR, WARDEN,
Respondent.

On Petition for a Writ of Certiorari
to the Missouri Supreme Court

BRIEF IN OPPOSITION AND SUGGESTIONS IN OPPOSITION TO MOTION FOR STAY

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CAPITAL CASE

Questions Presented

1. Did the Missouri Supreme Court violate the Eighth Amendment when Johnson failed to present enough credible evidence to convince the court that Johnson is intellectually disabled?
2. Did the Missouri Supreme Court violate the Eighth Amendment when it applied the DSM-V, as Johnson requested, instead of an unpublished, future edition of the DSM?
3. Did the Missouri Supreme Court violate the Sixth Amendment even though it required a unanimous jury verdict at Johnson's trial?
4. Did Missouri violate the Eighth Amendment when the jurors were instructed that Johnson could not be sentenced to death if the jury found he was intellectually disabled, and then the jury unanimously sentenced Johnson to death?

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Constitutional Provisions Involved

Constitution of the United States, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Constitution of the United States, Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Statement of the Case

Ernest Johnson is scheduled to be executed at 6:00 p.m. October 5, 2021 for three first-degree murders. This is Johnson's third petition for writ of certiorari in six years—and his second petition on this exact issue. This Court denied certiorari on this claim in 2015, and it should do so again now. The family members of Johnson's victims have waited 27 years for justice; they should have to wait no longer.

I. Factual Background

On February 12, 1993, Mary Bratcher, Fred Jones, and Mable Scruggs were working at a Missouri gas station. Ms. Bratcher was a single mother to three children and she was only working that night so another employee could go to a birthday party Tr. 993–98.[1] Mr. Jones lived at home with his mother and cared for his twin brother Ted, who was confined to a wheelchair and needed constant care after suffering a stroke. Tr. 986–990. Ms. Scruggs was a single mother and had two jobs in addition to working at the gas station. Tr. 980–83.

Johnson, meanwhile, decided he wanted to rob the gas station. In order to commit the robbery, Johnson murdered the employees. Op. 2. Johnson used considerable violence: he beat Mary Bratcher, Fred Jones, and Mable Scruggs to death with a claw hammer. *Id.* at 3. As part of the killings, Johnson also stabbed Ms. Bratcher ten times with a screw driver and he shot Mr. Jones in the face with a .25

[1] Although Johnson did not submit the trial transcript with his appendix, Respondent will provide a copy upon request.

caliber pistol. *Id.* Johnson was arrested, tried, convicted, and sentenced to death. *Id.* at 4–5.

II. Proceedings Below and at this Court

The Missouri Supreme Court rejected Johnson's intellectual disability claim on direct appeal. *State v. Johnson*, 244 S.W.3d 144, 156 (Mo. 2008). Then, the United States District Court for the Western District of Missouri rejected the claim and denied a certificate of appealability in *Johnson v. Steele*, No. 11-8001-CV-W-DGK, 2013 WL 625318, at *4–7 (W.D. Mo. Feb. 20, 2013). Johnson next raised the claim in a motion to recall the mandate in the Missouri Supreme Court. *State v. Johnson*, SC87825 (Mo.). After completing direct review, post-conviction relief, and federal habeas review, the Missouri Supreme Court issued an execution warrant directing that Johnson's sentence be carried out on November 3, 2015. Johnson then filed a habeas corpus petition in the Missouri Supreme Court again raising an intellectual disability claim. The Missouri Supreme Court denied relief. In the days before November 3, 2015, Johnson sought this Court's review of the Missouri Supreme Court's denial of his intellectual disability claim. *Johnson v. Griffith*, 15-6782 (2015). On the day of the execution, this Court issued a stay on a different claim. *Johnson v. Griffith*, 15A473 (2015). Later, this Court declined to review that claim or Johnson's intellectual disability claim. *Johnson v. Griffith*, 15-6782 (2015); *Johnson v. Griffith*, 15-6773 (2015). For more than five and a half years after that, Johnson made no effort to litigate his alleged intellectual disability.

Johnson now seeks a fifth round of litigation over the same claim that has been denied time and time before. Only days before the Missouri Supreme Court set the October 5, 2021 execution date, Johnson finally returned to the Missouri Supreme Court and sought state habeas review—again—of his claims that he is intellectually disabled. *Johnson v. Blair*, SC99176 (Mo. 2015). The Missouri Supreme Court denied Johnson's claims in a written opinion after consideration of all the record evidence Johnson submitted. *Id.*; Op. 1–28. On the last day allowed under the rule, Johnson filed a motion for rehearing. *Id.* The Missouri Supreme Court requested a response, which the State filed the next day. *Id.* Johnson then waited ten days to reply, and the Missouri Supreme Court denied rehearing on October 1. *Id.* Johnson then waited three more days to file this petition for certiorari review.

Summary of the Argument

This Court's extraordinary intervention is not warranted today just as it was not warranted when the Court rejected the same claim from Johnson in 2015, or when the lower courts rejected the claim the previous four times Johnson has raised it.

Rule 10 provides the common bases for this Court's decision to grant certiorari, and Johnson does not satisfy any of those reasons. Contrary to Johnson's arguments, the Missouri Supreme Court's decision does not conflict with any of this Court's prior decisions. Nor does the Missouri Supreme Court's decision conflict with the decisions of another state court of last resort or any decisions of the United States Court of Appeals. Instead, the Missouri Supreme Court's decision turns on its role as fact finder and its determination that Johnson failed to produce credible evidence to meet his burden of proof. Such a decision is outside the scope of this Court's normal review. What Johnson is really doing is complaining that, in his view, the Missouri Supreme Court reached the wrong answer. But the Missouri Supreme Court's decision was correct. Though allegedly "erroneous factual findings" or the alleged "misapplication of a properly stated rule of law" is "rarely" enough for certiorari review, this is not that rare case. Rule 10.

On top of all of that, Johnson's nearly six-year delay makes this case an extraordinarily poor vehicle for considering the questions. Johnson's contemporaneous request for a stay should be denied because of his inexcusable five-and-one-half-year delay in bringing this claim, and because he has not demonstrated a likelihood of success on the merits.

Reasons for Denying the Petition

I. Certiorari review is unwarranted because the Missouri Supreme Court's decision is based on its factual findings and Johnson's failure to present credible evidence.

When it denied Johnson's claim that he is intellectually disabled, the Missouri Supreme Court made several factual findings in its capacity as the fact-finder in an original habeas petition. Op. 9. The Missouri Supreme Court found that Johnson had failed to prove deficits in intellectual functioning. *Id.* at 11. From the evidence presented, the Missouri Supreme Court determined Johnson had the ability to plan, strategize, and solve problems. *Id.* at 11–12. While it utilized some evidence surrounding the murders to make this factual finding, *Id.* at 12, it did so based on this Court's pronouncement in *Atkins* that those with intellectual disability "often act of impulse rather than pursuant to a premeditated plan . . . ." *Id.*, *citing Atkins*, 536 U.S. at 318. The Missouri Supreme Court also found that Johnson failed to demonstrate deficits in adaptive functioning. *Id.* at 13–19.[2] The Missouri Supreme Court reached that conclusion after finding—as the fact finder—that Johnson's "arguments regarding his alleged deficits in adaptive behaviors are largely not credible . . . ." *Id.* at 14. Johnson provided seven affidavits. *Id.* The Missouri Supreme Court found that six of them were issued by witnesses with a motive or bias to offer favorable testimony to Johnson, and were "otherwise not persuasive";

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[2] In his petition to this Court, Johnson alleges that the Missouri Supreme Court erred by creating a fourth element to the intellectual disability test: a causal link between the alleged adaptive deficits and the alleged intellectual impairment. Pet. 14, 15, 17. But that is not what the Missouri Supreme Court did. In fact, the Missouri Supreme Court affirmatively disclaimed that analysis. *Id.* at 13 n.9.

and the seventh affidavit was not "germane to the determination . . . ." *Id.* The Missouri Supreme Court did not find Dr. Martell's report to be credible because the Missouri Supreme Court had already rejected the reports that Dr. Martell relied upon. *Id.* at 15. Finally, the Missouri Supreme Court, as fact finder, disregarded Dr. Adler's report because "Dr. Adler does not make a finding as to whether Johnson is intellectually disabled." *Id.*

At bottom, the Missouri Supreme Court denied relief because Johnson failed to present credible, reliable evidence to meet his burden of proof. Johnson asked for the Missouri Supreme Court to sit as a fact finder over his petition. The Missouri Supreme Court agreed and found Johnson's evidence not to be credible, not persuasive, and issued by those with obvious bias and motive to offer favorable testimony. In other words: the fact finder found Johnson's evidence was insufficient under Missouri law. That is not a reason to grant certiorari review. Just the opposite; the unusually fact-bound nature of this decision makes it an exceptionally poor candidate for this Court's consideration.

II. Certiorari review is unwarranted because the holding of the Missouri Supreme Court did not conflict with the authority of this Court.

A. The Missouri Supreme Court's holding is based on an independent and adequate state law ground.

The Missouri Supreme Court's decision rests upon an independent and adequate state law ground: the strong presumption against granting relief in a state habeas petition when the claims have already been presented and decided. Op. 8, *citing State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 217 (Mo. 2001). Under Missouri

state law, this presumption functions less like a state evidentiary rule and more like a procedural barrier that governs the standards applied to a claim. Although Missouri's state habeas system is unique, this standard is similar to plain-error review, which is the process whereby a state court can review an unpreserved claim of constitutional error, albeit under a standard that is not favorable to the offender. This Court has explained that plain-error review—which is a state law standard—is an independent and adequate state-law ground for a decision that prevents this Court from acquiring Article III jurisdiction over the federal question. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989). This doctrine helps preserve the state's interest in "finality, federalism, and comity." *Id.* These concerns are near their zenith when, as here, a state prisoner is seeking a second eleventh-hour stay of a lawful criminal sentence.

B. The Missouri Supreme Court's holding does not violate the Eighth Amendment.

Johnson asserts that the Missouri Supreme Court's holding violates the Eighth Amendment because, in Johnson's view, the holding below conflicts with this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore II*), and *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*), and because Johnson believes that a Missouri statute is unconstitutional. Pet. 10–30. These arguments are wrong.

Taking Johnson's last argument first, his claim that Mo. Rev. Stat. § 565.030.6 is unconstitutional was never presented to the court below, so it cannot be properly before this Court. Tellingly, Johnson's petition for certiorari review here does not even cite or specifically name the statute. Pet. 28–30. So, all that remains is Johnson's

repeated argument that the Missouri Supreme Court failed to properly apply *Atkins*, *Moore I*, and *Moore II*, based on Johnson's belief that clinical guidelines, not the Constitution, govern Eighth Amendment claims.

Johnson misunderstands *Atkins*, *Moore I*, and *Moore II*, to hold that a court's decision should be governed by clinical norms and not the Constitution. In *Atkins*, this Court held just the opposite: that the Constitution—not clinical norms—prohibited the execution of those who are "mentally retarded." *Atkins*, 536 U.S. at 321.[3] In reaching its decision, this Court explained that the prohibition on executing the "mentally retarded" comes from the Eighth Amendment, and that States could look to clinical norms to determine whether an offender who claims to be "mentally retarded" falls within the group of "mentally retarded offenders about whom there is a national consensus." *Id.* at 317. This is because "not all people who claim to be mentally retarded will be so impaired" that their execution would be prohibited by the Eighth Amendment. *Id.* Upon reviewing the professional literature, this Court determined that those who are "mentally retarded" are those who demonstrate "subaverage intellectual functioning" and adaptive deficits before age 18. *Id.* at 318. That definition, although not identical, was generally contained within the statutory definitions of many states. *Id.* at 317 n.22.

This Court's decisions in *Moore I* and *Moore II*, did not alter that approach. *See, e.g., Moore II*, 139 S. Ct. at 668 (defining the test as (1) deficits in intellectual

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[3] At the time *Atkins* was decided, the proper clinical term was "mental retardation." Now, the clinical term is "intellectually disabled." But neither meaning nor the text of the Eighth Amendment has changed.

functioning—primarily a test-related criterion, *see* DSM–5, at 37; (2) adaptive deficits, "assessed using both clinical evaluation and individualized . . . measures," *ibid.*; and (3) the onset of these deficits while the defendant was still a minor, id., at 38"). *Moore I* and *Moore II* represented instances where a state court dramatically departed from that three-part test by imposing a state-specific approach. *Moore II*, 139 S. Ct. at 672.

Unlike what Texas did in *Moore I* and *Moore II*, the Missouri Supreme Court identified and applied the three-part test from *Atkins*. Op. 8. The Missouri Supreme Court went further still and "recognize[d] the DSM-5 as the proper framework. . . ." *Id.* at 9. That is all the Eighth Amendment requires.

Johnson's next arguments—that the Missouri Supreme Court imposed a fourth element (Pet. at 14–21) and that it relied on the facts of the offense (Pet. at 21–25)—do not state a constitutional violation. To be clear: the Missouri Supreme Court expressly disavowed any notion that its opinion was creating a "fourth" element found outside of *Atkins*. Op. 13 n.9. If there is confusion on that point, it comes from the "professional norms" not the Constitution.[4] And the Missouri Supreme Court's limited use of the facts of Johnson's offense comes directly from this Court's decision in *Atkins*. Op. 12, *citing Atkins*, 536 U.S. at 318. In other words, this Court has held that the Eighth Amendment prohibits the execution of those who are actually intellectually disabled, not those who merely claim they are intellectually disabled.

[4] Indeed, Johnson admits as much by his act of contacting the DSM-V steering committee and obtaining a letter that states that confusion over the DSM-V's language (not the Constitution) required a text revision.

Id. at 317. Courts may, therefore, look at the facts of the offense in order to assist in that determination, especially where, as here, the facts of the offense plainly reflect the offender's ability to plan, strategize, calculate, and scheme effectively. *Id.*

Johnson's final argument that the Missouri Supreme Court's decision violates the Eighth Amendment rests on a contention that the court below "misapprehended" Johnson's IQ scores. Pet. 25–28. But that is not a constitutional claim worthy of this Court's review. That is a claim that the court below committed a factual error.[5] Such claims do not merit this Court's extraordinary review. Rule 10.

C. The Missouri Supreme Court's holding regarding the jury instructions rests upon an independent and adequate state-law ground that precludes review.

In his final claim for this Court's review, Johnson asserts that the decision below regarding the jury instructions conflicts with the Sixth and Eighth Amendments. Pet. 30–37. Johnson is mistaken, but more importantly, this Court does not have Article III jurisdiction to consider the claim. The Missouri Supreme Court found the jury instructions in this case did not violate the Constitution but also found that the claim was "procedurally barred because he did not raise it at trial, on direct appeal, or during post-conviction relief proceedings." Op. 20. Under Missouri law, an offender cannot bring a claim in state habeas that could have been—but was

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[5] Johnson's claims of factual error are, themselves, erroneous. For instance, Johnson tries to make much of the Missouri Supreme Court's alleged reliance on the State's claim that Johnson was malingering during testing. Pet. 27. But the Missouri Supreme Court did not rely on that claim when it denied relief. Op. 11 ("Regardless of whether Johnson has been malingering during his recent IQ tests, his test scores are not dispositive. . . ."). This Court has been clear that States cannot rely *only* on tests scores. *Hall v. Florida*, 572 U.S. 701, 711–12 (2014).

not—raised on direct appeal or post-conviction relief. *State ex rel. Strong v. Griffith*, 462 S.W.3d 732, 738 (Mo. 2015). As a result, the claim was not properly before the Missouri Supreme Court, and the Missouri Supreme Court denied the claim based on that reason. Op. 20. When a state court decision rests upon an independent and adequate state-law ground, there is no Article III jurisdiction. *Michigan v. Long*, 463 U.S. 1032, 1038–39 (1983). That is precisely what happened here, so there is no Article III jurisdiction to consider this question.

III. Johnson's extreme delay makes this case an exceptionally poor vehicle to consider the claims.

Both the State and crime victims have a strong interest in the timely enforcement of a sentence. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019), *citing Hill*, 547 U.S. at 584. A last-minute stay should be "the extreme exception, not the norm," because "[t]he people of Missouri, the surviving victims of [Johnson's] crimes, and others like them deserve better." *Id.*

Johnson has not timely and diligently pursued his claim that he is intellectually disabled as explained in point I, *supra*. For more than five and a half years, Johnson raised no claims related to his alleged intellectual disability.

This history shows that Johnson has engaged in a litigation strategy of extreme delay. Johnson could have, and should have, brought fifth assertion of his alleged intellectual disability claim five and a half years ago. *See, e.g., Smith v. Murray*, 477 U.S. 527, 537 (1986) ("the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all."). But Johnson did not bring his claim years ago.

Instead, he unreasonably delayed bringing the claim to the Missouri Supreme Court, asserting it only at the last minute, shortly before his scheduled execution, in a transparent attempt to delay that execution. And, in turn, he delayed bringing the claim to this Court. Johnson's strategy of delay is an independent and adequate ground to deny a stay and the Court should deny a stay on that ground. *Hill*, 547 U.S. at 584.

When this Court was confronted with a similar history of delay, the Court lamented the deleterious effect the delay had even while the Court addressed the merits of the claim. *Bucklew*, 139 S. Ct. at 1133. The result is no different in this case. The families of Mary Bratcher, Fred Jones, and Mable Scruggs have waited more than 27 years for justice. In that time, a whole generation has grown up without their loved ones. This delay is repugnant to the state's strong interest in the timely enforcement of its criminal judgments. It is repugnant to the victims' rights to a "proceeding free from unreasonable delay." 18 U.S.C. § 3771(a)(7). And it makes this case an exceptionally poor vehicle for this Court to consider the questions presented.

Reasons for Denying the Motion for Stay

I. Johnson does not satisfy any of the elements necessary for a stay, and even if he did, Johnson's delay is an independent and adequate reason to deny a stay.

A pending petition for writ of certiorari does not automatically entitle a condemned murderer to a stay of execution. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). In order to receive a stay, a condemned murderer must establish all the elements necessary for a stay, which are that "he is likely to succeed on the merits,

that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." *Glossip v. Gross*, 576 U.S. 863, 876 (2015), *quoting Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). On top of that, a condemned murderer's unreasonable delay is an independent and adequate reason to deny a stay. *Bucklew*, 139 S. Ct. at 1133, *citing Hill*, 547 U.S. at 584.

A. Johnson has unreasonably delayed.

Both the States and crime victims have a strong interest in the timely enforcement of a sentence. *Id.*, *citing Hill*, 547 U.S. at 584. Last-minute applications for stay are disfavored, there is a presumption against granting them, and a last-minute stay should be "the extreme exception, not the norm" because "[t]he people of Missouri, the surviving victims of [Johnson's] crimes, and others like them deserve better." *Id.*

Johnson has not timely and diligently pursued his claim that he is intellectually disabled. When the Missouri Supreme Court issued an execution warrant in 2015, Johnson started his fourth round of litigation where he raised a claim that he was intellectually disabled. *State ex rel. Johnson v. Griffith*, SC95316 (Mo. 2015). But just like the claim was rejected by the Missouri Supreme Court before, the federal district court, and the United States Court of Appeals for the Eighth Circuit, the Missouri Supreme Court rejected the claim and denied relief. *Id.* Then, Johnson sought relief in this Court along with a motion for a stay. *Johnson v.*

Griffith, 15-6782 (2015). This Court denied that application for stay and denied Johnson's petition for certiorari review on December 7, 2015. *Id.*

At any time between 2015 and 2021, Johnson could have re-presented his intellectual-disability claim to the Missouri courts, but he did not do so. For more than five and a half years, Johnson raised no claims related to his alleged intellectual disability. That is, until this May, when Missouri asked the Missouri Supreme Court to set an execution date. *See, e.g., State v. Johnson*, SC87825 (Mo. May 24, 2021). Only then did Johnson file his latest original habeas petition with the Missouri Supreme Court alleging that he was intellectually disabled. *State ex rel. Johnson v. Blair*, SC99176 (Mo. Jun. 21, 2021). A few days later, the Missouri Supreme Court issued its execution warrant. *State v. Johnson*, SC87825 (Mo. June 29, 2021). After briefing, the Missouri Supreme Court denied Johnson's habeas petition in a written order. *State ex rel. Johnson v. Blair*, SC99176, 2021 WL 3887574 (Mo. Aug. 31, 2021). This litigation pattern shows that Johnson has strategically held this claim in reserve until an execution date was pending, and then Johnson raised the claim at the eleventh hour in an attempt to delay the execution.

Even after the Missouri Supreme Court denied relief in 2021, Johnson filed a motion for rehearing in the Missouri Supreme Court on the last day allowed under the rule instead of seeking certiorari review in this Court. The next day, the Missouri Supreme Court requested a response from the State, likely because Johnson's motion for rehearing had requested a stay of execution. The State filed its suggestions in opposition hours later on September 17. Johnson waited 10 more days to file his reply.

Then, the Missouri Supreme Court denied the motion for rehearing on October 1. Thereafter, Johnson waited until October 4 to file his petition for certiorari review in this Court.

This litigation timeline demonstrates that Johnson has engaged in a litigation strategy of extreme delay. Johnson could have, and should have, brought his alleged intellectual disability claim five and a half years ago. *See, e.g., Smith*, 477 U.S. at 537 ("the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all."). But Johnson did not bring his claim years ago. Instead, he unreasonably delayed bringing the claim to the Missouri Supreme Court. Then he delayed that Court's resolution of the claim. And, in turn, he delayed bringing the claim to this Court. But "[t]he people of Missouri, the surviving victims of [Johnson's] crimes, and others like them deserve better." *Bucklew*, 139 S. Ct. at 1133. Johnson's strategy of delay is an independent and adequate ground to deny a stay and the Court should deny a stay on that ground. *Hill*, 547 U.S. at 584.

B. Johnson cannot demonstrate a likelihood of success on the merits.

Johnson cannot show a significant likelihood of success on the merits justifying a stay in this case under *Hill*. As set forth in the brief in opposition, *supra*, Johnson cannot show that the Missouri Supreme Court's adjudication of his claim violates federal law. The Missouri Supreme Court's stay denial was predicated on an independent and adequate state-law ground. And the Missouri Supreme Court's fact-

bound decision further precludes this Court's review. But more than all of that, Johnson has failed to show he is intellectually disabled.

Johnson's complaint with the Missouri Supreme Court's finding that he did not meet his burden, like his complaints with the jury's verdict, is not a colorable claim that would entitle him to relief. What Johnson was really asking the Missouri Supreme Court to do was to disregard the jury's verdict and reweigh the evidence because Johnson received a result he did not like. The Missouri Supreme Court correctly refused to do so, as this Court has refused to the same thing. *See, e.g., Norfolk and Western Ry. Co. v. Ayers*, 538 U.S. 135, 155 n. 15 (2003) ("We do not sit to reweigh evidence based on information not presented at trial."), *citing Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35 (1944) ("Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."). Johnson, unlike the petitioners in *Atkins*, *Hall*, and *Brumfield*, presented his evidence to a jury, which rejected his argument. And, unlike the petitioner in *Lane*, the Missouri Supreme Court, on direct appeal, reviewed the jury's verdict for sufficiency of the evidence, and found not only that both sides presented evidence, but also that there was sufficient evidence to support the jury's verdict. *Johnson*, 244 S.W.3d at 152. Further, Johnson does not mention that he already litigated the issue in federal habeas corpus and that the district court and the Eighth Circuit found the claim was meritless and did not warrant a certificate of appealability.

Because the Missouri Supreme Court acts a fact-finder in original habeas petitions, the Missouri Supreme Court also considered the evidence Johnson presented in his 2021 habeas petition and found it insufficient to meet his burden of proof. The Missouri Supreme Court's ruling is supported by its finding that much of Johnson's evidence was incredible or biased. This Court would not review of a state court conviction when the petitioner claimed there was insufficient evidence. Yet that is precisely what Johnson has asked this Court to do. And even if this Court were inclined to do so, which it should not, Johnson has failed to present sufficient evidence to show that he is intellectually disabled. *Supra.*

Johnson's claim is meritless so he cannot demonstrate a substantial likelihood of success. Because his claim lacks merit, all other equitable factors favor the State. Johnson suffers no cognizable injury from this Court's refusal to consider a meritless claim. The State suffers *per se* irreparable injury from any further delay before it can effect its judgment. Another last-minute stay will inflict ongoing injuries on the families of victims who have waited almost three decades for justice. And the public interest favors permitting Missouri to carry out its just and lawful sentence.

CONCLUSION

This Court should deny the petition for writ of certiorari and decline to issue a stay of execution.

Respectfully submitted,

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