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# The Unappealing Nature of Guilty Plea Agreements: Johnson's Restrictions on Appeals of Intellectual Disabilities

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# NOTE

# The Unappealing Nature of Guilty Plea Agreements: *Johnson*'s Restrictions on Appeals of Intellectual Disabilities

*Johnson v. State, 580 S.W.3d 895 (Mo. 2019) (en banc).*

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## I. INTRODUCTION

In 2008, Ronald Johnson was charged with the murder of Luke Meiners, a St. Louis attorney.[1] On the advice of his appointed defense counsel, Johnson pleaded guilty to the charge of first-degree murder to avoid the death penalty.[2] Johnson was ineligible, however, for the death penalty because he was intellectually disabled.[3] After his conviction, Johnson appealed for post-conviction relief.[4] Johnson received a mental evaluation, which concluded he was competent to stand trial.[5] Thus, the court upheld his guilty plea.[6] In an appeal to the Supreme Court of Missouri, Johnson argued that his conviction should be set aside because he received ineffective assistance of counsel and was coerced into accepting his plea.[7] The Supreme Court of Missouri avoided the merits of Johnson's appeal because of its technical deficiencies.[8] The court further confused the established standards for competency to stand trial and intellectual disability in a way that will affect the rights of intellectually disabled individuals.[9]

Part II of this Note examines the pertinent facts and holding of the case. Part III analyzes the legal standards for competency to stand trial, the death penalty in relation to intellectual disability, and claims of ineffective

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1. Johnson v. State, 580 S.W.3d 895, 898 (Mo. 2019) (en banc).
2. *Id.*
3. *Id.* at 899.
4. *Id.*
5. *Id.* at 899–900.
6. *Id.*
7. *Id.*
8. *Id.* at 908.
9. *Id.* at 914 (Stith, J., dissenting).

assistance of counsel. Finally, Part IV considers how the court's rulings in this case caused injustice to Ronald Johnson and how it will affect the plea-bargaining process for individuals with intellectual disabilities in Missouri moving forward.

## II. FACTS AND HOLDING

Ronald Johnson was diagnosed with mild mental retardation at ten years old when he was found to have an Intelligence Quotient ("IQ") of fifty-three.[10] For the rest of his school career, he was in special education classes until he dropped out in the tenth grade.[11] Additionally, Johnson suffered from a seizure disorder and developed schizophrenia, which caused hallucinations for which he was repeatedly hospitalized and placed on disability.[12] Johnson began a long-term romantic relationship with a man named Cleophus King in his late teens.[13] In 2008, Johnson and King were charged with murder in St. Louis, Missouri.[14] Johnson and his accomplice were recorded on audio killing a local attorney, a friend of Johnson, and then robbing the victim.[15] The State offered not to pursue the death penalty if Johnson would agree to plead guilty to the murder.[16] Johnson's counsel advised him to accept the State's offer because the evidence against him was strong, and the violent nature of the crime would have been damaging at trial.[17] Johnson accepted the plea agreement.[18] At the plea hearing, Johnson affirmed that he had discussed the case with his attorney, understood the charges, and desired to plead guilty.[19] Johnson further affirmed that he did not have any mental disability that would affect his participation in his defense or his understanding of the proceedings

10. Appellant's Substitute Statement, Brief and Argument at 20, Johnson v. State, 580 S.W.3d 895 (Mo. 2019) (en banc) (No. SC97330).

11. Appellant's Substitute Statement, *supra* note 10 at 5.

12. Appellant's Substitute Statement, *supra* note 10 at 34.

13. Appellant's Substitute Statement, *supra* note 10 at 5.

14. *Johnson*, 580 S.W.3d at 895.

15. *Id.* The attorney, Luke Meiners, had befriended Johnson, age 25. Johnson and his lover/accomplice Cleophus King conspired to rob Meiners. On the night of the murder, Johnson asked Meiners for a ride to King's house so he could do laundry. Once they arrived, Johnson and King attempted to rob Meiners, who resisted. Over the course of a fourteen-minute struggle, Johnson and King beat, stabbed, and ultimately strangled Meiners to death. The two then stole cash and electronics from Meiners before using his Jeep to dump his body. Jennifer Mann, *Man who admitted killing St. Louis County Lawyer gets life without parole*, ST. LOUIS POST DISPATCH (March 22, 2013), https://www.stltoday.com/news/local/crime-and-courts/man-who-admitted-killing-st-louis-county-lawyer-gets-life/article_0f13770d-442c-5719-ab36-9b4530d1152a.html [https://perma.cc/LH2S-D6TK].

16. *Johnson*, 580 S.W.3d at 898.

17. The State was in possession of a recording of the murder. *Id.*

18. *Id.*

19. *Id.*

and that he understood the guilty plea would forfeit any rights to trial.[20] After these affirmations, the State provided this factual basis to support Johnson's guilty plea:

> Judge, had this matter gone to trial, the state would have proven beyond a reasonable doubt, with readily available witnesses and competent evidence that between March 6, 2008, and March 8, 2008, here in the City of St. Louis, specifically at the home of Cleophus King at 5726 Waterman, [Johnson], acting with Cleophus King, knowingly caused the death of [Victim], a friend and acquaintance of [Johnson], that they caused [Victim's] death by strangling, stabbing, and beating him, and that they used a knife, multiple knives, weapons, and an extension cord on [Victim]. In the course of that, that [Johnson], acting with Cleophus King, stole and robbed [Victim] of his wallet, keys to his jeep, and that they subsequently went and took those items and the victim's jeep and used the victim's credit cards contained within his wallet to purchase items. And that after killing [Victim] that night, they took his body, wrapped him up and dumped him over in Illinois.[21]

Johnson affirmed the facts as recited by the State and his satisfaction with his counsel's performance and denied that any threats were made to induce his guilty plea.[22] The circuit court accepted Johnson's guilty plea and imposed a life sentence without the possibility of parole, as recommended in the plea agreement.[23]

Johnson then filed a motion for post-conviction relief and raised three issues at his post-conviction relief hearing.[24] First, Johnson claimed that he was illegally coerced into accepting his plea deal because the State threatened him with death, despite the fact that his intellectual disability precluded him from receiving that sentence.[25] Second, Johnson alleged he was not competent to plead guilty and will never be competent.[26] Third, Johnson argued that his counsel was ineffective because his attorney failed to request an independent competency evaluation to which he was entitled.[27] Johnson introduced evidence regarding his low IQ and the "threats" of the death penalty made by his plea.[28]

Additionally, Johnson blamed his counsel for failing to challenge the State's competency evaluation by not seeking an independent evaluation.[29]

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20. *Id.*
21. *Id.* at 899.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* Johnson was threatened by the possibility of the death penalty as a sentence. *Id.*
29. *Id.*

Johnson's counsel testified that, although he realized Johnson was "slow," he did not know that Johnson had an intellectual disability.[30] Johnson's attorney also denied threatening or encouraging Johnson to accept the plea agreement.[31] Rather, Johnson's plea counsel testified that Johnson made his decision to accept the plea agreement after discussing it with his family.[32] The court rejected Johnson's allegations that he was threatened by his plea counsel and overruled Johnson's motion for post-conviction relief.[33] Johnson appealed, and the Supreme Court of Missouri ordered transfer.[34]

Johnson appealed his sentence on the grounds that he was coerced into accepting the State's plea agreement,[35] he was not competent to plead guilty,[36] and his plea counsel was ineffective for failing to challenge the State's competency evaluation and failing to seek a second competency evaluation.[37] The majority opinion, written by Judge W. Brent Powell, agreed with the trial court that (1) Johnson was not coerced into accepting the State's plea agreement, (2) Johnson was competent to stand trial, and (3) Johnson's plea counsel was not ineffective for failing to request a second competency evaluation.[38] Consequently, the judgment of the trial court was affirmed.[39]

The dissent, written by Judge Laura Denver Stith, found that (1) Johnson was coerced, (2) even if competent to stand trial, he was not eligible for the death penalty, and (3) his plea counsel was ineffective.[40] In particular, the dissent found that the evidence presented to the trial court showed that Johnson was intellectually disabled, that this intellectual disability made him incompetent to accept a plea agreement, and that his counsel was ineffective for failing to investigate the extent of his intellectual disability.[41] Judge Stith would have reversed the judgment of the motion court and either remanded the case for trial or held an evidentiary hearing to determine the issue of intellectual disability.[42]

30. *Id.* at 900.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* The transfer was ordered pursuant to MO. R. CIV. P. 83.04. *Id.*

35. *Johnson*, 580 S.W.3d at 900.

36. *Id.* at 904.

37. *Id.*

38. *Id.* at 902, 904. Because this was an appeal from a Mo. Sup. Ct. R. 24.035 motion for postconviction relief from a guilty plea decided by a motion court as the factfinder, the Court reviewed the appeal on a "clearly erroneous" standard. *Id.* at 900 (citing Latham v. State, 554 S.W.3d 397, 401 (Mo. 2018) (en banc)).

39. *Johnson*, 580 S.W.3d at 908.

40. *Id.*

41. *Id.* at 914–21, 923–24.

42. *Id.* at 928.

## III. LEGAL BACKGROUND

The issues surrounding intellectual disability, competency, the death penalty, and ineffective assistance of counsel are complex. When these problems are combined with a plea agreement, the analysis becomes even more complicated. To understand how the law has developed around each of these issues, it is important to examine them individually. First, this Part examines Missouri competency law and explains its development in state and federal law. Next, this Part examines the Supreme Court of the United States cases and Missouri cases addressing death penalty issues in similar contexts. Finally, this Part examines the law regarding claims of ineffective assistance of counsel.

### *A. Competency to Stand Trial*

To understand the history of the death penalty and the state of the law it is first essential to understand the role competency plays in determining the efficacy of a death sentence. The Supreme Court of Missouri has defined competency to stand trial as "[the] defendant [having] the sufficient ability to consult with his lawyer with a reasonable degree of rational understanding and having a rational as well as factual understanding of the proceedings against him."[43] The standards for competency to stand trial are codified by statute.[44] This statute proscribes conviction or sentencing of any individual who does not have the capacity to understand the trial process or adequately assist in his or her defense.[45] When a judge has reason to believe that a defendant lacks capacity, or a motion is filed by either party, the court is required to order an examination to determine the issue. [46] Failure of a judge to order an examination to determine competency has been held by the Supreme Court of the United States to be a violation of a defendant's constitutional right to a fair trial.[47] In Missouri, if neither party requests a second examination, the court may make a finding of competency based on the report of the examiner or impanel a jury of six to make a finding of fact on the issue.[48] Upon a finding that an individual is incompetent to stand trial, the court is required to suspend the criminal proceedings and commit the individual to the Department of Mental Health.[49]

43. State v. Baumruk, 85 S.W.3d 644, 648 (Mo. 2002) (en banc).

44. MO. REV. STAT. § 552.020.1 (2019).

45. *Id.*

46. MO. REV. STAT. § 552.020.2 (2019).

47. Drope v. Missouri, 420 U.S. 162, 172 (1975) (citing Pate v. Robinson, 383 U.S. 375 (1966)).

48. MO. REV. STAT. § 552.020.7 (2019).

49. MO. REV. STAT. § 552.020.9 (2019).

In the event that incompetency is established before a plea, the incompetent individual is also found to be incompetent to plead guilty.[50] A defendant is presumed to be competent, and the burden of showing incompetency is on the defendant.[51] A presumption of incompetency cannot be created, even if some evidence exists that a defendant suffers from an intellectual disability.[52] Although defense counsel is allowed to request a second examination to determine competency, counsel is not ineffective for deciding not to request a second evaluation.[53] This presumption of competency has been upheld by the Supreme Court of the United States in multiple decisions.[54] The only exception to this general rule regarding competency is if a mental evaluation report appears deficient or a non-reported mental defect becomes apparent to defense counsel. In that case, counsel is compelled to seek a further evaluation.[55] Rather, sufficient evidence of an intellectual disability is only enough to compel defense counsel to seek a second mental evaluation.[56] A mental defect that would trigger this exception is evidence of an intellectual disability.[57]

The applicable Missouri statute gives a three-prong test to determine whether an individual suffers from an intellectual disability.[58] The individual must display: (1) a subaverage IQ; (2) extensive deficits in adaptive behaviors

50. Hubbard v. State, 31 S.W.3d 25 (Mo. Ct. App. 2000) (holding that the trial court's findings regarding competency of defendant to plead guilty were not clearly erroneous because they were based on a sufficient medical report).

51. MO. REV. STAT. § 552.020.8 (2019).

52. Baird v. State, 906 S.W.2d 746, 750 (Mo. Ct. App. 1995).

53. Goodwin v. State, 191 S.W.3d 20, 30 n.6 (Mo. 2006) (en banc); *see also* Bass v. State, 950 S.W.2d 940, 947 (Mo. Ct. App. 1997) (reviewing multiple cases with this holding).

54. Medina v. California, 505 U.S. 437, 448 (1992) ("If a defendant is incompetent, due process considerations require suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him."); Dusky v. United States, 362 U.S. 402, 480 (1960) (per curiam).

55. Gooden v. State, 846 S.W.2d 214, 218 (Mo. Ct. App. 1993) (citing Sidebottom v. State, 781 S.W.2d 791, 797 (Mo. 1989) (en banc)) ("Absent a perceived shortcoming in a mental evaluation report or a manifestation of a mental disease or defect not identified by a prior report, an attorney representing a defendant in a criminal case is not compelled to seek further evaluation.").

56. *Id.*

57. MO. REV. STAT. § 565.030.1 (2019).

58. MO. REV. STAT. § 565.030.6 (2019) (stating "a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors … which conditions are manifested and documented before eighteen years of age."). State v. Johnson, 244 S.W.3d 144, 153 (Mo. 2008) (en banc) ("According to the Diagnostic and Statistical Manual of Mental Disorders IV (DSM—IV), a person with an I.Q. of 70 or lower has significantly subaverage intellectual functioning, but it is possible for an individual with an I.Q. between 70 and 75 to be diagnosed as mentally retarded ….").

that stem from his or her subaverage IQ; and (3) both of the prior prongs must have manifested and been documented before the individual reached eighteen years of age.[59] The Supreme Court of Missouri has adopted these standards for determining intellectual disability from the medical community.[60]

In *Goodwin v. State*, the Supreme Court of Missouri addressed which types of evidence are sufficient to show that an individual suffers from an intellectual disability.[61] The court examined the language of the applicable statute, which requires "significantly subaverage intellectual functioning" as that term is defined by the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV").[62] Analyzing the DSM-IV, the court found that IQ tests are the standard procedure for determining whether an individual suffers from an intellectual disability.[63] Using this standard, the *Goodwin* court found that the defendant did not meet the standard for "intellectually disabled," although his IQ was in the mid-seventies to eighties.[64] Because Goodwin was not "intellectually disabled," the court did not consider the second prong of the statute's test.[65]

While the *Goodwin* court found the defendant's IQ score too high to be considered intellectually disabled, the court has found slightly lower scores to meet the standard.[66] Although evidence establishing an intellectual disability creates a duty on the part of defense counsel to move for a second mental evaluation, intellectual disabilities do not automatically make a defendant

59. *Johnson*, 244 S.W.3d at 153.

60. *See* Goodwin v. State, 191 S.W.3d 20, 30–31 (Mo. 2006) (en banc).

61. *Id.* at 26.

62. MO. REV. STAT. § 565.030.6; *Goodwin*, 191 S.W.3d at 30 (Mo. 2006) (en banc). DSM-IV is the abbreviation for the Diagnostic and Statistical Manual IV of the American Psychiatric Association. This manual contains the standards for defining psychological disorders in the United States medical community and was updated in 2013 to the DSM-V. CENTER FOR BEHAVIORAL HEALTH STATISTICS AND QUALITY, *2014 National Survey on Drug Use and Health: DSM-5 Changes: Implications for Child Serious Emotional Disturbance*, June 2016, https://www.ncbi.nlm.nih.gov/books/NBK519708/pdf/Bookshelf_NBK519708.pdf [https://perma.cc/ZW9G-L9KX].

63. *Goodwin*, 191 S.W.3d at 30 (Mo. 2006) (en banc).

64. *Id.* at 31.

65. MO. REV. STAT. § 565.030.6; *Goodwin*, 191 S.W.3d at 31 (Mo. 2006) (en banc) ("Without evidence that Goodwin's intellectual functioning is 'significantly subaverage,' there is no need to move on to a discussion of his adaptive behaviors."); *but see Goodwin*, 191 S.W.3d at 31 n.7 (recognizing that IQ test scores are not applied mechanically because IQ scores are only one part of the statutory definition).

66. W.J.K. v. K.S.G. (In the Interest of T.T.G.), 530 S.W.3d 489, 496 (Mo. 2017) (en banc) (finding an IQ score of 65 sufficient to indicate an intellectual disability); State ex rel. Lyons v. Lombardi, 303 S.W.3d 523, 526 (Mo. 2010) (en banc) (holding an IQ between 65 and 70 to establish an intellectual disability).

incompetent to stand trial.[67] However, a finding of intellectual disability or defect does make an individual ineligible for the death penalty.[68]

### *B. Death Penalty*

Application of the death penalty to intellectually disabled individuals has been declared unconstitutional since the Supreme Court of the United States's decision in *Atkins v. Virginia*.[69] The Court came to that decision by considering whether the death penalty violated the Eighth Amendment's prohibition of cruel and unusual punishment.[70] The ruling was codified in Missouri Revised Statute Section 565.030.1, which states, "Where murder in the first degree is charged but not submitted or where the state waives the death penalty, the submission to the trier and all subsequent proceedings in the case shall proceed as in all other criminal cases."[71] The statute further states that the trier of fact must determine by a preponderance of the evidence whether the defendant is intellectually disabled, with the defendant carrying the burden of proof.[72] Importantly, these rules apply only during the trial process, and the jury makes a finding of intellectual of disability under these rules.[73] The Supreme Court of Missouri has ruled that prior to a trial for murder, the court is not required to determine whether the defendant has an intellectual disability unless there is a question as to the defendant's competence to stand trial, even when the defendant is facing the possibility of the death penalty.[74]

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67. State v. Hunter, 840 S.W.2d 850, 863 (Mo. 1992) (en banc) ("The standard for determining a defendant's competence to plead guilty is essentially the same as that for determining if a defendant is competent to proceed to trial."); *see also* Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991) ("Some degree of intellectual disability does not automatically render a defendant incapable of knowingly and voluntarily pleading guilty."); Bryant v. State, 563 S.W.2d 37, 46 (Mo. 1978) (holding that a defendant can be found competent to stand trial while suffering from a mental disease or defect); Pulliam v. State, 480 S.W.2d 896, 904 (Mo. 1972); Evans v. State, 467 S.W.2d 920, 923 (Mo. 1971); State v. Lowe, 442 S.W.2d 525, 529–30 (Mo. 1969).

68. Atkins v. Virginia, 536 U.S. 304, 318 (2002).

69. *Id.* at 321 (holding that the death penalty is excessive punishment for individuals with intellectual disabilities and the U.S. Constitution "places a substantive restriction on a state's power to take the life" of an intellectually disabled offender).

70. *Id.* at 352.

71. MO. REV. STAT. § 565.030.1.

72. MO. REV. STAT. § 565.030.4(1).

73. MO. REV. STAT. § 565.030.1.

74. Davis v. State, 517 S.W.2d 97, 104 (Mo. 1974) (en banc). Although this decision occurred before the Supreme Court of the United States declared the death penalty unconstitutional for individuals with intellectual disabilities, subsequent appellate decisions have upheld it. *See* Cole v. State, 218 S.W.3d 551 (Mo. Ct. App. 2007).

Additionally, the Supreme Court of the United States has found that the threat of the death penalty during plea agreements does not violate any constitutional rights of the defendant because it is not coercive.[75] The Supreme Court of Missouri adopted and expanded upon this ruling.[76] The court has repeatedly found that to prove a defendant was coerced into pleading guilty, he or she must show that his or her counsel gave ineffective advice or misled him or her as to the nature of the case.[77] Thus, in determining whether a defendant has been coerced into pleading guilty to a crime, it is essential to analyze the elements of a claim of ineffective assistance of counsel.

### *C. Ineffective Assistance of Counsel*

In general, to prevail on a claim of ineffective assistance of counsel, a defendant must show "(1) counsel's performance did not conform to the degree of skill, care[,] and diligence of a reasonably competent attorney and[,] (2) he was thereby prejudiced."[78] If the movant is unable to prove one element of the test then the court need not consider the other element.[79] While this general rule remains the same for claims of ineffective assistance of counsel that arise from a guilty plea,[80] the Supreme Court of Missouri has changed the focus of the factual analysis.[81] When an ineffective assistance of counsel claim arises following a guilty plea, the defendant must show that, but for counsel's actions, he or she would have insisted on going to trial and refused to plead guilty.[82]

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75. North Carolina v. Alford, 400 U.S. 25, 39 (1970) (holding the mere fact that appellee would not have pleaded guilty, except for the opportunity to limit the possible penalty, did not show that the plea had not resulted from a free and rational choice – especially where appellee was represented by competent counsel who advised the plea would be to appellee's advantage due to the great weight of the evidence against him); *see also* Brady v. United States, 397 U.S. 742, 755 (1970); Jackson v. State, 585 S.W.2d 495, 497 n.2 (Mo. 1979) (en banc) ("a threatening [potential punishment] is insufficient to render [a] plea involuntary."); Rice v. State, 585 S.W.2d 488, 493 (Mo. 1979) (en banc); Burks v. State, 490 S.W.2d 34, 35 (Mo. 1973).

76. Beeman v. State, 502 S.W.2d 254, 256 (Mo. 1973); Richardson v. State, 470 S.W. 2d 479, 484 (Mo. 1971); Wilson v. State, 459 S.W.2d 298, 301 (Mo. 1970).

77. *Beeman*, 502 S.W.2d at 256; *Richardson*, 470 S.W. 2d at 484; *Wilson*, 459 S.W.2d at 301.

78. Webb v. State, 334 S.W.3d 126, 128 (Mo. 2011) (en banc).

79. Johnson v. State, 5 S.W.3d 588, 590 (Mo. Ct. App. 1999).

80. Boyd v. State, 205 S.W.3d 334, 338 (Mo. Ct. App. 2006) (quoting Cupp v. State, 935 S.W.2d 367, 368 (Mo. Ct. App. 1996)) ("To prevail on a claim of ineffective assistance of counsel where a movant has entered a plea of guilty, a 'movant must show his counsel's representation fell below an objective standard of reasonableness and that, as a result, he was prejudiced.'").

81. *Cupp*, 935 S.W.2d 367, 368 (Mo. Ct. App. 1996).

82. *Id.*; Cooper v. State, 356 S.W.3d 148, 153 (Mo. 2011) (en banc).

In *Cooper v. State*, the defendant's counsel advised him to plead guilty to charges of theft totaling over $500.[83] During the plea hearing, the defendant repeatedly stated he was making the plea voluntarily and of his own free will.[84] After this hearing, the defendant waived his right for post-conviction relief in exchange for a reduced sentence of probation.[85] When the defendant later violated the terms of his probation, he brought an appeal claiming ineffective assistance of counsel based on his attorney's recommendation to plead guilty.[86] In analyzing his claim, the court looked first to the general rule for claims of ineffective assistance of counsel.[87] The court held that, because the claim arose from a guilty plea, "any claim of ineffective assistance of counsel is immaterial to the extent that it impinges upon the voluntariness and knowledge with which the plea was made."[88] Based on this analysis, and the defendant's statement in his plea hearing that he was making the plea voluntarily, the court rejected his claim of ineffective assistance of counsel.[89]

After *Cooper*, Missouri courts must focus on the defendant's knowledge of the plea terms and the voluntariness of the plea.[90] Additionally, *Cooper* indicates that evidence of knowledge and voluntariness can be found from the statements of the defendant during the plea hearing.[91] While this standard of analysis is straightforward in cases involving most defendants, the knowledge portion of the analysis becomes more complex when the defendant suffers from a mental disease or defect.[92] An attorney can be found ineffective for failing to investigate an alleged mental disease or defect if there is evidence tending to show that the defendant suffered from a mental incapacity at the time of his or her plea.[93]

The Supreme Court of the United States has held that a defendant's Fourteenth Amendment due process rights are violated when an attorney fails to investigate an alleged mental defect or disease.[94] In *Strickland v. Washington*, the Court stated that "[c]ounsel has a duty to make reasonable investigations [of possible mitigating evidence] or to make a reasonable decision that [such] investigations [are] unnecessary,"[95] and the

83. *Cooper*, 356 S.W.3d at 150.

84. *Id.* at 150–51.

85. *Id.* at 152.

86. *Id.*

87. *Id.*

88. *Id.* at 153 (citing State v. Roll, 942 S.W.2d 370, 375 (Mo. 1997) (en banc)); *see also* Matthews v. State, 501 S.W.2d 44, 47 (Mo. 1973); Barylski v. State, 473 S.W.2d 399, 402 (Mo. 1971) (per curiam).

89. *Cooper*, 356 S.W.3d at 157.

90. *Id.* (citing *Roll*, 942 S.W.2d at 375); *see also Matthews*, 501 S.W.2d at 47; *Barylski*, 473 S.W.2d at 402.

91. *Cooper*, 356 S.W.3d at 155.

92. *See Roll*, 942 S.W.2d at 376.

93. *Id.*

94. Strickland v. Washington, 466 U.S. 668, 680 (1984).

95. *Id.*

reasonableness of the investigation is "based on whether defense counsel's performance conformed to the degree of skill, care, and diligence of a reasonably competent attorney."[96] Additionally, the Supreme Court of the United States has held that defendants have a Sixth Amendment right to have effective counsel in plea negotiations.[97]

Missouri appellate courts have held that a defendant's counsel is not ineffective for advising a defendant to take a plea agreement to avoid the death penalty, even when he or she could be ineligible for the death penalty, unless there is evidence showing that this was not a "reasonable strategy."[98] Appellate courts reviewing a claim that defense counsel or a trial court erred in failing to move for a mental evaluation prior to a guilty plea are governed by Missouri Supreme Court Rule 24.035.[99] This rule sets the standard of review for ineffective assistance of counsel claims as clearly erroneous.[100] This means the appellate court must accept the lower court's finding of facts unless there is clear evidence of a mistake.[101]

96. *Johnson*, 580 S.W.3d at 913 (citing *Strickland*, 466 U.S. at 687–88).

97. Missouri v. Frye, 566 U.S. 134, 145 (2012) (holding that failure to inform a defendant of a plea offer constitutes ineffective assistance of counsel); *see* Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (holding that failure to inform a defendant of the potential immigration consequences of a plea agreement constitutes ineffective assistance of counsel).

98. Thurman v. State, 424 S.W.3d 456, 461 (Mo. Ct. App. 2014) (holding defendant's counsel was not ineffective because counsel's advice to plead guilty to remove the death sentence as a possible punishment was a reasonable strategy). Even if defendant obtained a pre-trial determination that he suffered from mental retardation under Mo. Rev. Stat. § 565.030, life imprisonment without probation or parole was the only sentence available under Mo. Rev. Stat. § 565.020. *Id. See also* Baird v. State, 906 S.W.2d 746, 751 (Mo. Ct. App. 1995) (holding counsel was not ineffective for failure to request another mental examination to determine mental competence because counsel had nothing to put him on notice that defendant was mentally incompetent).

99. MO. R. CRIM. P. 24.035(a) ("A person convicted of a felony on a plea of guilty claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 24.035.").

100. MO. R. CRIM. P. 24.035(k).

101. In addition to Rule 24.035, appellate review in Missouri is covered by Rule 84.04. This rule creates specific requirements for how an appeal should be structured. MO. R. CIV. P. 84.04(d)–(e). Typically, if an issue is incorrectly raised by the parties according the procedural requirements of this rule, it will not be considered by a Missouri appellate court.

## IV. INSTANT DECISION

In *Johnson v. State*, the Supreme Court of Missouri affirmed the lower court's ruling and held in favor of the State by one vote.[102] It was a hotly contested four-to-five decision. Judges Wilson, Russell, and Fischer joined Judge Powell's majority opinion, with Judge Stith dissenting, joined by Chief Justice Draper and Judge Breckenridge.[103] This Part analyzes the decision in *Johnson* in two main parts: Subpart A reviews the majority and Subpart B examines the dissent.

### *A. Majority*

On appeal to the Supreme Court of Missouri, Johnson alleged that: (1) his counsel threatened him to plead guilty by telling him he would receive the death penalty even though he was ineligible; (2) he was incompetent to plead guilty; and (3) his counsel was ineffective for failing to request a second competency evaluation.[104] Because Johnson's appeal arose out of a motion for post-conviction relief, the court limited its review to a "clearly erroneous" standard.[105] In examining the first issue of whether Johnson was coerced into accepting the State's plea agreement, the majority's analysis focused on the standards for guilty plea coercion announced by the court in *McMahon v. State* and *Drew v. State*.[106] In *McMahon,* the court held that a guilty plea is not coerced if it is "intelligently and voluntarily made."[107] Because Johnson claimed that his attorney coerced him through the use of threats, the court found the standard from *Drew* applicable.[108] The majority found that the record does not support any allegations that Johnson was threatened.[109]

Specifically, the majority focused on the fact that Johnson felt threatened by his attorney's statement that he would face the death penalty if he were to go to trial.[110] While Johnson characterized his counsel's explanation of the death penalty as threatening, counsel testified that he had simply explained the possibility to Johnson.[111] The majority deferred to the trial court's finding

102. Johnson v. State, 580 S.W.3d 895 (Mo. 2019) (en banc).

103. *Id.* at 908.

104. *Id.* at 899.

105. *Id.* at 900.

106. *Id.* at 901 (citing Drew v. State, 436 S.W.2d 727, 729 (Mo. 1969)); McMahon v. State, 569 S.W.2d 753, 758 (Mo. 1978) (en banc).

107. *McMahon*, 569 S.W.2d at 758.

108. *Johnson*, 580 S.W.3d at 901 (quoting *Drew*, 436 S.W.2d at 729) (explaining that Johnson must show he was "induced to plead guilty by fraud or mistake, by misapprehension, fear, persuasion, or the holding out of hopes which prove to be false or ill founded.").

109. *Id.*

110. *Id.* at 902.

111. *Id.* at 924–25.

that counsel's testimony was credible.[112] Citing multiple prior decisions, the court found that informing a defendant of the possible punishments he might face does not amount to coercion.[113] Based on this analysis, the court held that Johnson's trial counsel had not coerced him into pleading guilty through the use of a threat.[114]

Next, the court discussed Johnson's second argument that his counsel advised him he was eligible for the death penalty when he was, in fact, ineligible.[115] The majority acknowledged that had Johnson been found to be intellectually disabled, he would have been ineligible for the death penalty under the Supreme Court of the United States's ruling in *Atkins*.[116] Judge Powell, however, pointed out that a finding of intellectual disability is not automatic, but rather, must be determined by the factfinder, with the burden of proof resting on the defendant.[117] Thus, because no factfinder had yet found Johnson to be intellectually disabled, his counsel was required to inform him of the possibility of the death penalty.[118] Moreover, because the State was not required to waive the death penalty, death was still "on the table" until Johnson entered a guilty plea.[119] The majority stressed that despite evidence that Johnson may have been intellectually disabled, the jury may have rejected such a finding.[120] Although the court concluded that there was no clear error, the majority did find that "Johnson's counsel could have more fully investigated Johnson's intellectual capacity and advised Johnson of this defense, any additional investigation or advice by counsel bears no direct correlation to Johnson's decision to accept the State's offer and plead guilty."[121]

After settling the issue of intellectual disability, the majority next addressed Johnson's argument that he was incompetent to plead guilty.[122] The majority first considered the evidence presented by Johnson at his post-conviction motion hearing that "he had an IQ of 63," and "while . . . capable of conversing with his attorney, he did not possess the intellectual capacity to meaningfully assist his attorney in his defense."[123] However, the court again deferred to the testimony of Johnson's plea counsel, who stated that

112. *Id.* at 901.

113. *Id.* (citing State ex rel. Simmons v. Roper, 112 S.W.3d 397, 406 (Mo. 2003) (en banc)); *see also Jackson*, 585 S.W.2d at 497 n.2; *Rice*, 585 S.W.2d at 493; *Burks*, 490 S.W.2d at 35.

114. *Johnson*, 580 S.W.3d at 901.

115. *Id.* at 902.

116. *Id.* (citing Atkins v. Virginia, 536 U.S. 304, 321, (2002)).

117. *Id.* at 902–03 (citing State v. Johnson, 244 S.W.3d 144, 150 (Mo. 2008) (en banc)).

118. *Id.* at 903.

119. *Id.*

120. *Id.* at 907.

121. *Id.* at 903.

122. *Id.* at 904.

123. *Id.*

"[Johnson] was able to repeat and rephrase information . . . demonstrating [that he] understood the nature of the proceedings and could assist in his defense."[124] In addition to this, the majority pointed out that a competency exam conducted pursuant to Section 552.020 concluded Johnson was competent to stand trial.[125] The majority found the weight of the evidence indicated that Johnson was competent to enter a guilty plea.[126]

Next, the majority turned to the last issue Johnson raised on appeal, whether his plea counsel was ineffective for declining to seek a second competency evaluation.[127] Citing the relevant statute, the majority reiterated that determining competency is a preliminary question for the judge to address.[128] The majority found that, although a second evaluation of competency is allowed, defense counsel is not ineffective for failing to request a second exam when there are no other extenuating factors.[129] In Johnson's case, there had been a competency evaluation performed pursuant to Section 552.020 in which Doctor Armour ". . . concluded Johnson did not suffer any mental disease or defect and that *he was not intellectually disabled* to an extent that limited his ability to understand the proceedings against him or to assist in his own defense."[130] In addition to this, at his post-conviction motion hearing, Johnson's plea counsel had testified that he was capable of participating in his defense.[131] The majority held these facts show there were no extenuating circumstances that would have required Johnson's plea counsel to seek a second competency evaluation.[132] The majority affirmed the denial of post-conviction relief for three reasons. First, the motion court found that Johnson's plea counsel was not ineffective for failing to request a second competency examination. Second, Johnson's plea counsel believed he was competent to stand trial. Third, an experienced psychologist evaluated Johnson and found him to be competent..[133]

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124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* (citing MO. REV. STAT. § 552.020 (2019)).

129. *Id.* at 905.

130. *Id.* (emphasis added). In this instance, the court's assertion that Dr. Armour found Johnson not to be intellectually disabled when, in the prior section of the opinion, the court explicitly stated that intellectual disability is a question that is to be determined by the fact finder, points to a confusion of the standards for competence and intellectual disability. *See id.* at 903, 905. Furthermore, Judge Stith's dissent pointed out that Dr. Armour *did* find that Johnson suffered from "mild mental retardation" in his report. *Id.* at 922.

131. *Id.* at 905.

132. *Id.*

133. *Id.* at 905–06.

### *B. Dissent*

In her dissent, Judge Stith asserted that the majority opinion failed to analyze the merits of the case because it did not address all the issues raised in Johnson's appeal.[134] In its first point of analysis, the dissent argued that Johnson successfully preserved the issue that his counsel failed to inform him of an intellectual disability defense.[135] The dissent found that the arguments raised by Johnson in the post-conviction relief hearing were sufficient to preserve the argument for appellate review.[136] Thus, the dissent established that Johnson had preserved his claim on appeal, or that the court was allowed to look past the point relied on and decide the case on the merits.[137] The dissent next argued that the majority opinion misunderstood the difference between intellectual disability and competency to stand trial.[138]

At the time of Johnson's plea, the Supreme Court of the United States and the Supreme Court of Missouri had held that an incompetent person could not go to trial or be convicted.[139] Competency is described as an individual having sufficient ability to consult with counsel.[140] Intellectual disability is based on clinical standards and disqualifies an individual from receiving the death penalty.[141] Competency is governed by state laws, but the Supreme Court has held that states are limited by clinical guidance in determining there definition of intellectual disability..[142] The determinations of competency and intellectual disability are made by the court and based on separate types of evidence.[143] Although definitionally and functionally different, these two concepts may overlap.[144] The evidence Johnson offered at his post-conviction relief hearing showed that Johnson's IQ was between fifty-three and sixty-

134. *Id.* at 908 (Stith, J., dissenting).

135. *Id.* at 909–10.

136. *Id.* at 912. The dissent justified its finding that Johnson's argument is preserved for review by citing relevant case law and language found in MO. R. CRIM. P. 24.035(k). *Id.* at 910 (citing MO. R. CRIM. P. 24.035(k)). The dissent claimed the issue should have been examined by the court even if not raised or preserved because Rule 84.12(c) allows the court to review an issue under the plain error standard discretionarily. *Id.* at 913 (citing MO. SUP CT. R. 84.13(c)). However, the majority addressed Judge Stith's analysis and found no reason to read past the issue raised in the appellate brief because no argument was readily apparent. *Id.* at 906–08 (majority opinion). The argument based on appellate procedure will not be further discussed as it is outside the scope of this note.

137. *Id.* at 914 (Stith, J., dissenting).

138. *Id.*

139. *See id.* (citing State v. Wise, 879 S.W.2d 494, 507 (Mo. 1994) (en banc)); Dusky v. United States, 362 U.S. 402 (1960).

140. *Johnson*, 580 S.W.3d at 914 (citing *State,* 879 S.W.2d at 507).

141. *Id.* at 902 (majority opinion) (citing *Atkins*, 536 U.S. at 318).

142. *Id.* at 916 (Stith, J., dissenting).

143. *Id.* at 914–17.

144. *Id.* at 914.

three.[145] The dissent concluded that he met the definition of "intellectually disabled" under Missouri case law, and that his counsel, apparently ignorant of the law, only moved for a finding of incompetency.[146]

In addition to this, both Dr. Armour and Dr. Fucetola diagnosed Johnson with "mild mental retardation" in addition to multiple non-adaptive behaviors.[147] Because these findings – when viewed in light of Missouri case law – show that a factfinder would have likely found Johnson to be intellectually disabled, the dissent found that the majority opinion and the post-conviction relief court used the wrong test for assessing counsel's mishandling of intellectual disability issues.[148] Judge Stith concluded that the findings of the post-conviction relief court regarding Johnson's intellectual disability were clearly erroneous.[149]

Finally, the dissent examined the record regarding the plea counsel's understanding of intellectual disability.[150] The dissent noted that Johnson's plea counsel is on record as using the terms "competency" and "intellectual disability" interchangeably.[151] His interchangeable use of the terms indicates that he did not understand what "intellectual disability" means.[152] The dissent further state that because plea counsel did not understand the significance of Johnson's intellectual disability, he did not properly advise Johnson about the defense of intellectual disability to the death penalty.[153] Therefore, Johnson was misinformed and coerced into accepting a life sentence through his plea counsel's failure to completely inform him of a possible defense to the death penalty.[154] Had Johnson been properly informed, he would not have pleaded guilty and, therefore, he was prejudiced by counsel's inept performance.[155] Based on these findings, the dissent concluded that the court should sustain Johnson's motion for post-conviction relief on the grounds of ineffective assistance of counsel, vacate his sentence to life without the possibility of parole, and grant him a new trial, or alternatively, remand for a new evidentiary hearing.[156]

145. *Id.* at 908.

146. *Id.* at 909, 919.

147. Dr. Armour made this finding during his initial competency evaluation, and Dr. Fucetola later made the same finding during the admission of post-trial evidence. *Id.* at 917. The dissent asserted that these two facts could be found in the post-conviction plea hearing record. *Id.* at 917–19.

148. *Id.* at 919.

149. *Id.* at 909.

150. *Id.* at 921–23.

151. *Id.* at 921.

152. *Id.* at 922–23.

153. *Id.* at 923–24.

154. *Id.* at 924.

155. *Id.* at 925–26.

156. *Id.* at 928.

## V. COMMENT

The majority's holding in *Johnson* condemns an intellectually disabled defendant to a life sentence without parole – a sentence he did not deserve.[157] The majority in *Johnson* held that an individual can only be found intellectually disabled by a factfinder during trial.[158] In effect, this subjects a person who is truly intellectually disabled to the death penalty unless he or she decides to take the case to trial and allow a factfinder to determine the issue.[159] While the Supreme Court of the United States has held that the threat of the death penalty during plea negotiations is not unduly coercive,[160] it has also held that defendants have a Sixth Amendment right to effective assistance of counsel during plea negotiations.[161] The majority's decision fails to follow the Sixth Amendment's requirements given by the Supreme Court of the United States by finding Johnson's attorney effective even when his testimony indicated that he did not perceive Johnson to be intellectually disabled – even though two separate experts found that he was – and he failed to investigate any additional relevant law.[162]

The ruling in *Johnson* will have a negative effect on intellectually disabled individuals in criminal proceedings by lowering the standard for effective assistance of counsel for criminal defense attorneys and by changing the nature of plea negotiations in Missouri criminal law. Subpart A of this Part analyzes the inherent unfairness of this ruling to Ronald Johnson. Subpart B looks at the effect this ruling will have on the law in Missouri regarding individuals with intellectual disabilities.

### *A. The Court's Ruling in* Johnson *Creates Dangerous Precedent for Proving Intellectual Disability*

The court's interpretation for the requirements of proving intellectual disability creates an illogical burden on intellectually disabled individuals during the guilty plea stage. In *Johnson*, the court found that only a factfinder can make a determination of intellectual disability.[163] Interpreting applicable Missouri law, the court found that the burden of proof for intellectual

157. *Id.* at 928.

158. *Id.* at 902–03 (majority opinion).

159. *Id.* (citing State v. Johnson, 244 S.W.3d at 150.); *see also* MO. REV. STAT. §§ 565.005.1, 565.020.2.

160. North Carolina v. Alford, 400 U.S. 25, 39 (1970).

161. Missouri v. Frye, 566 U.S. 134, 145 (2012) (holding that failure to inform a defendant of a plea offer constitutes ineffective assistance of counsel); *see* Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (holding that failure to inform a defendant of the potential immigration consequences of a plea agreement constitutes ineffective assistance of counsel).

162. *See Johnson*, 580 S.W.3d at 906.

163. *Id.* at 902–03.

disability is on the defendant.[164] Thus, until a defendant proceeds to trial and raises the issue of intellectual disability, and then receives a ruling on that issue, he is not considered intellectually disabled.[165] Because the Supreme Court of the United States has ruled executions of intellectually disabled individuals unconstitutional, this leaves defense counsel whose client's IQ is on the margin of what constitutes an intellectual disability in a difficult situation during plea negotiations.[166] In cases like this one, where a defendant's IQ is well below the standard for intellectual disability, the prosecutor's coercive power is even more pronounced unless defense counsel is required to investigate his or her client's intellectual abilities or be extremely well versed in the law.

The prosecutor can threaten the defendant with the death penalty unless he or she pleads guilty, and defense counsel cannot convince the client that the death penalty would not be allowed. This, in turn, provides an unfair advantage to the prosecution in plea negotiations, where defense counsel are already notoriously disadvantaged.[167] If the prosecution knows or has reason to know that a defendant is intellectually disabled, they can still push for the death penalty.[168] Defense counsel in this case must tell the client that he or she might face the death penalty if he or she is not found to be intellectually disabled. Although defense counsel with proper time and resources would properly investigate, find evidence that the defendant does qualify as intellectually disabled, and advise the defendant accordingly, a rushed or overworked public defender might not. For most criminal defense attorneys who already suffer from a lack of training when dealing with mentally impaired defendants,[169] this ruling requires more time and expense to provide an adequate defense which only furthers a criminal defendant's disadvantages.[170] Furthermore, because a finding of intellectual disability is to be made by the court, in close cases, a defense counsel utilizing a cost-benefit analysis would have to advise their client about the dangers of proving intellectual disability versus taking the plea agreement. Thus, the prosecution

164. *Id.* at 903; *see* MO. REV. STAT. §§ 565.005.1, 565.020.2.

165. *Johnson*, 580 S.W.3d at 903.

166. *See Atkins*, 536 U.S. at 355 (holding that the death penalty is excessive punishment for individuals with intellectual disabilities and the U.S. Constitution places a substantive restriction on a state's power to take the life of an intellectually disabled offender).

167. Gregory G. Sarno, *Adequacy of defense counsel's representation of criminal client regarding plea bargaining*, 8 A.L.R. 4TH 660 (Originally published in 1981, updated weekly); Joseph L. Hoffman, Mary L. Kahn & Steven W. Fisher, *Plea Bargaining in The Shadow of Death*, 68 FORDHAM L. REV. 2313 (2001).

168. *See Johnson*, 580 S.W.3d at 903.

169. *See* Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65, 74 (1988).

170. *See* Evan G. Hall*, The House Always Wins: Systemic Disadvantage for Criminal Defendants and the Case against the Prosecutorial Veto*, 102 CORNELL L. REV. 1717 (2017).

gains the advantage of being able to use an inapplicable penalty to procure a plea agreement when defense counsel is not aware of the law regarding intellectual disability. While the court's interpretation creates a paradox for intellectually disabled individuals during the plea negotiation stage of a trial, it also muddles the law of competency.

It is settled law in Missouri that a finding of intellectual disability does not prevent a finding of competency to stand trial or plead guilty.[171] In its examination of the evidence of Johnson's mental evaluation for competency, the court deferred to the finding of the lower court that, although Johnson produced evidence that he had an IQ of between fifty-three and sixty-three and suffered from schizophrenia, a psychologist found him competent to stand trial.[172]

This same psychologist, however, also made a finding that Johnson would qualify as "mentally retarded" under the applicable medical diagnostic criteria.[173] Even so, the court found this evidence to apply only to a finding of competency.[174] While Johnson's counsel reviewed enough of his client's records to determine that there may have been some question of his ability to plead guilty, he had no knowledge of the implications of intellectual disability or the possible defenses it could provide and failed to ask for a determination on the issue.[175] Not only did the majority opinion not consider this, but it made an explicit finding that Johnson's attorney's testimony that he felt Johnson was just "a little slow" was more persuasive than the medical reports that Johnson offered to show his intellectual disability.[176]

By confusing the standards for competency and intellectual disability, the court in *Johnson* established a system for analysis in Missouri in which a defendant may be declared intellectually disabled but competent to plead guilty and then also be required to go to trial to determine that he or she is, in fact, intellectually disabled.[177] This paradox could be prevented by allowing a competency hearing to also function as a hearing on intellectual disability. Alternatively, the rules should be changed to allow a judge to decide intellectual disability before the beginning of the trial. In addition to preventing this paradox, either of these options would also speed up the trial process by allowing a finding on both issues in one hearing. While a single hearing on both of these issues would require different types of evidence, the experts used for either of these examinations would be proficient in providing both. The fundamental problem in this case, however, is that Johnson's counsel was ignorant of the law regarding intellectual disability.[178]

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171. *See* State v. Hunter, 840 S.W.2d 850, 863 (Mo. 1992) (en banc); Wilson v. State, 813 S.W.2d 833, 835 (Mo. 1991) (en banc).

172. *Johnson*, 580 S.W.3d at 904.

173. *Id.* at 917 (Stith, J., dissenting).

174. *Id.* at 904 (majority opinion).

175. *See id.* at 919 (Stith, J., dissenting).

176. *Id.* at 905, 909 (majority opinion).

177. *See id.* at 914 (Stith, J., dissenting).

178. *See Johnson*, 580 S.W.3d at 909 (majority opinion).

By rejecting Johnson's other claim on appeal that his counsel was ineffective for failing to request a second competency evaluation, the court creates a problematic precedent on two separate issues.[179] Based on the plea counsel's testimony that he did not think Johnson was slow, the trial court found counsel not ineffective.[180] The majority then held that this ruling was not clearly erroneous.[181] Finding this evidence sufficient creates a dangerous precedent for two reasons. First, the Supreme Court of the United States has held that, when facing the death penalty, a defendant has a constitutional right to expert testimony in determining whether they have an intellectual disability.[182] By accepting the testimony of Johnson's attorney as sufficient to show that he was ineffective, this constitutional standard is ignored.[183] Second, in this case, there is evidence to show that counsel should have reasonably suspected that Johnson was disabled and that he did not understand the law regarding intellectual disability.[184]

These two issues create a precedent that not only ignores constitutional law but allows courts to ignore the relevant facts of the case. This holding places considerable difficulties on an appeal based on ineffective assistance of counsel for intellectually disabled individuals because they will need to overcome any statements of their prior counsel that they were competent.[185] Additionally, allowing a finding that this kind of self-serving evidence is persuasive encourages an attorney to lie, even if they know they have been ineffective. This type of pressure on attorneys encourages them not only to act unethically, but also to put their own professional well-being over the freedom of a client.

Considering the findings of the court in *Johnson*, it is clear that defendants with intellectual disabilities in Missouri must now overcome more hurdles than ever before. First, a defendant's counsel must engage in unfair plea negotiations and advise their clients based on uncertainties in sentencing that could mean life or death.[186] Second, an intellectually disabled individual must convince his or her counsel to request specific hearings into both competency and intellectual disability, while hoping that the court is able to discern a difference between the two.[187] Third, if his or her counsel does fail to request the proper hearings, an intellectually disabled individual must make an exaggerated showing of his or her intellectual disability on appeal to prevail in a claim of ineffective assistance of counsel. Finally, appellate attorneys must be technically precise in their drafting of points relied on or, regardless

179. *Id.* at 908.
180. *Id.* at 905.
181. *Id.* at 905–06.
182. Hall v. Florida, 572 U.S. 701, 723–24 (2014).
183. *See Johnson*, 580 S.W.3d at 900, 902.
184. *See id.* at 917–19 (Stith, J., dissenting).
185. *See id.* at 900, 902 (majority opinion).
186. *See id.* at 902–03.
187. *See id.* at 914, 920–21 (Stith, J., dissenting).

of the merits or injustices of the case, the Supreme Court of Missouri will not consider the issue.[188]

### *B. The Court's Ruling in* Johnson *was Inherently Unfair to the Defendant*

The court's ruling in *Johnson* is unfair because it misinterpreted, misapplied, and ignored the relevant law, thereby denying Johnson the opportunity to have his case heard on the merits. In Johnson's first issue raised on appeal, he claimed that he was coerced by his plea counsel into pleading guilty by threat of death penalty.[189] The majority analyzed this issue on the basis that a plea bargain is valid as long as it was voluntarily and intelligently made.[190] While the court determined that, based on the evidence provided at the post-conviction relief hearing by plea counsel, Johnson made the plea voluntarily.[191] However, their legal analysis of what constitutes "voluntary" in giving a plea is flawed. In determining whether a plea agreement is coercive, the court found that "the fact that the maximum authorized punishment for a certain crime may be a threatening alternative in itself does not render a plea involuntary."[192] Referring to prior decisions, the court held that voluntariness of a plea cannot be attacked on a basis that the defendant feared the death penalty.[193] Thus, Johnson's claim of coercion had to fail because the death penalty was the maximum authorized punishment for the crime of first-degree murder.[194]

While this analysis seems straightforward, the court's flawed holding of what evidence is required to prove that a defendant suffers from an intellectual disability, as discussed above, changes the analysis. During Johnson's two mental evaluations for competency, both psychologists found Johnson to be "mentally retarded."[195] Additionally, Johnson introduced evidence at his post-conviction relief hearing that he had an IQ of between fifty-three and sixty-three.[196] Although the court refused to consider this evidence, it clearly indicates that Johnson is intellectually disabled under Missouri case law.[197] Because of this, Johnson would have been ineligible for the death penalty.[198]

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188. *See id.* at 908.

189. *Id.* at 900.

190. *Id.* at 901.

191. *Id.*

192. *Id.* (citing *Jackson*, 585 S.W.2d at 497 n.2).

193. *Id.* at 902 (citing *Jackson*, 585 S.W.2d at 497 n.2).

194. *Id.*

195. *Id.* at 917 (Stith, J., dissenting).

196. *Id.* at 908.

197. *W.J.K.*, 530 S.W.3d at 496 (finding an IQ score of 65 sufficient to indicate an intellectual disability); State ex rel. Lyons v. Lombardi, 303 S.W.3d 523, 526 (Mo. 2010) (en banc) (holding an IQ between 65 and 70 to establish an intellectual disability).

198. *Atkins*, 536 U.S. at 321.

Therefore, the death penalty would not have been the "maximum authorized punishment."[199] Thus, when Johnson's counsel told him that he was eligible for the death penalty during the plea-bargaining process, it would have been coercive.[200]

Additionally, even if the plea-bargaining process was not coercive, it violated Johnson's Sixth Amendment right to effective assistance of counsel. The majority in this case failed to consider the claim of ineffective assistance of counsel in relation to Johnson's intellectual disability based on technical failures of his appellate counsel.[201] However, they admitted in their opinion that Johnson's plea counsel could have done more to investigate Johnson's potential intellectual disability.[202] Moreover, there is ample evidence from competency evaluations and plea counsel's own testimony that he was ignorant of the law regarding intellectual disability.[203] Thus, by refusing to consider the merits of the issue raised in the direct appeal because of a technical deficiency, the majority violates Johnson's constitutional rights.[204]

Based on the analysis above, it is clear that because the court misinterpreted, misapplied, and ignored the relevant law, it incorrectly found that Johnson's appeal failed, thereby treating Johnson unfairly.

## VI. CONCLUSION

The Supreme Court of Missouri's ruling in *Johnson* substantially affects the rights of the intellectually disabled in Missouri. By finding that Johnson, a man who is undoubtedly intellectually disabled, did not receive ineffective assistance of counsel when his attorney failed to consider or advise him of a diminished capacity offense or of his ability to use his disability as a defense to the death penalty, the court lowered the standard of competency required by defense counsel.[205] While the evidence at his post-conviction hearing clearly showed him to be intellectually disabled, the court focused instead on the technical faults in his appellate brief and confused the law of competency and intellectual disability to uphold the rulings of the lower courts.[206] While this particular decision affects only one man, its misstatement of law will affect the intellectually disabled and their counsel for years to come.

199. *Id.*
200. *See Johnson*, 580 S.W.3d at 898, 901.
201. *See id.* at 908.
202. *Id.* at 903.
203. *See id.* at 909 (Stith, J., dissenting).
204. *See id.* at 908.
205. *See id.* at 903 (majority opinion); *see also id.* at 917–19 (Stith, J., dissenting).
206. *See id.* at 910, 914, 917–21 (Stith, J., dissenting).