

URGENT ACTION

INTELLECTUAL DISABILITY CLAIM AS EXECUTION SET

Ernest Johnson, aged 55, is due to be executed in Missouri on 3 November. He was convicted of three murders committed during a robbery in 1994. There is evidence that he has intellectual disability, which would render his execution unconstitutional.

In the early hours of 13 February 1994, a police officer found the bodies of Mary Bratcher, age 46; Fred Jones, age 58, and Mabel Scruggs, age 57, in a convenience store in Columbia, Missouri, where the three worked. Each had died of head injuries. **Ernest Lee Johnson**, a regular customer in the shop, was arrested and charged with the murders. He was brought to trial in May 1995, convicted and sentenced to death.

In 1998, the Missouri Supreme Court ordered a new sentencing due to the lawyer's failure to present the testimony of a psychiatrist who had examined Ernest Johnson. The Court said it was "left with the definite and firm impression" that his testimony "would have altered the jurors' deliberations" and may have resulted in a vote for life imprisonment.

At his resentencing in 1999, Ernest Johnson was again condemned to death. In 2002, the US Supreme Court ruled that the execution of people with intellectual disability (previously referred to as "mental retardation") was unconstitutional. In 2003, the Missouri Supreme Court again ordered a new sentencing, this time because evidence of Ernest Johnson's intellectual disability had not been adequately presented. He has had several IQ assessments during his life, including one of 77 at the age of eight, and one of 63 when he was 12 years old. He struggled in school and was placed in special education classes. He has also been diagnosed with Fetal Alcohol Syndrome, which is associated with impaired intellectual functioning, and suffered two serious head injuries as a child.

In 2006, Ernest Johnson was sentenced to death for a third time after the jury found that he had not proved that he had intellectual disability. The defence had argued that the burden should have been on the state to prove that he did not have intellectual disability. The defence presented two experts who testified that he did have intellectual disability, with one assessing his IQ at 67 and both finding that he had adaptive skill deficits in a number of areas, and that the disability had manifested before the age of 18. A psychometrist working for the state's expert also assessed his IQ at 67, but the state expert asserted that Ernest Johnson was malingering. The main defence expert disagreed, having tested for malingering. The prosecutor argued to the jury that "to decide it's more likely true than not that this guy is mentally retarded is an insult, an insult to these victims." The state Supreme Court upheld the death sentence in 2008, ruling that "deference should be given to the jury" but three of the seven judges dissented arguing that "allocating the burden to the defendant to prove that he is mentally retarded makes the decision – whether Johnson should receive the death penalty – seem capricious" and that the conflicting facts in this case "show that the result – life or death – may well depend on which party has the burden of proof."

Please write immediately in English or your own language:

- Calling for Ernest Johnson's execution to be stopped and for his death sentence to be commuted;
- Noting evidence that he has intellectual disability, which would render his execution unconstitutional;
- Explaining that you are not seeking to downplay the seriousness of the crime or the suffering caused.

PLEASE SEND APPEALS BEFORE 3 NOVEMBER 2015 TO:

Office of Governor Jay Nixon

P.O. Box 720, Jefferson City, MO 65102, USA

Fax: +1 573 751 1495

Email: via website <http://governor.mo.gov/contact/>

Salutation: Dear Governor

Also send copies to diplomatic representatives accredited to your country. Please insert local diplomatic addresses below:

Name Address 1 Address 2 Address 3 Fax Fax number Email Email address Salutation Salutation

Please check with your section office if sending appeals after the above date.

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ADDITIONAL INFORMATION

The US Supreme Court ruled in *Atkins v. Virginia* on 20 June 2002 that the execution of people with intellectual disability contravened a national consensus and was unconstitutional. Among other things, the Court pointed to the “consistency of the direction of change” of state-level legislation on this issue, and pointed out that in 2000 and 2001 alone, six states, including Missouri, had “joined the procession” by enacting bills against such use of the death penalty. The *Atkins* ruling pointed to clinical definitions of “mental retardation” as a disability, manifested before the age of 18, characterized by significantly sub-average intellectual functioning, and with limitations in two or more adaptive skill areas. It left it to states to develop “appropriate ways to enforce the constitutional restriction”, resulting in a degree of inconsistent application across the country.

At Ernest Johnson’s third sentencing in 2003, the judge instructed the jurors that if they unanimously found “by a preponderance of the evidence” that Ernest Johnson had intellectual disability, then they would have to return a verdict for life imprisonment without parole. The defence objected to this instruction, arguing that it should have been the prosecution’s burden to prove Ernest Johnson did not have intellectual disability.

In addition to the evidence of his intellectual disability, Ernest Johnson has been diagnosed with Fetal Alcohol Syndrome, the most serious condition on the group of conditions known as Fetal Alcohol Spectrum Disorders (FASDs). According to Ernest Johnson’s lawyers, his mother abused alcohol and drugs from around the age of 10, and by the time she was pregnant with Ernest at the age of 18 she was reported to be drinking large quantities of gin and whisky, as well as taking sedatives. According to the lawyers, as well as turning to prostitution herself to earn money to support her addiction, Ernest Johnson’s mother prostituted him too, with the child rewarded with alcohol and drugs, leading to his own substance abuse problems.

In or around 2008, it was discovered that Ernest Johnson had a meningioma brain tumour. He underwent surgery on 28 August 2008 to remove part of the tumour (it could not be removed in its entirety). Since the surgery, Ernest Johnson has suffered from seizures and has been prescribed anti-seizure medication on death row. His lawyer has filed a complaint in federal court seeking an injunction against the execution, arguing that his lethal injection could cause him to have violent seizures which would render his execution unconstitutional. In an affidavit signed on 22 October 2015, filed with the complaint, an expert in anaesthesiology and surgery states: “In the setting of lethal injection, Mr Johnson will be physically restrained on a gurney. If Mr Johnson should have a seizure, and this is a significant possibility, it will be observed as a violent struggle against his restraints; he will likely urinate as well. As a result of Mr Johnson’s brain tumor, brain defect, and brain scar, a substantial risk of serious harm will occur during his execution as a result of a violent seizure that may be induced by Pentobarbital injection. Generalized seizures, such as the one that would occur in Mr Johnson, are severely painful. Pentobarbital is a drug in the barbiturate class... Pharmacologically, barbiturates like Pentobarbital are known to actually exaggerate pain. That is, they make pain worse... I am of the medical opinion that Mr Johnson faces a significant risk for a serious seizure as the direct result of the combination of the Missouri lethal injection protocol and Mr Johnson’s permanent and disabling neurologic disease”.

The US Supreme Court overturned the USA’s death penalty laws in 1972, but upheld revised laws in 1976. Since 1976, there have been 1,418 executions in the USA, 86 of them in Missouri. There have been 24 executions in the USA this year, six of them in Missouri. Amnesty International opposes the death penalty in all cases, unconditionally. Today, some 140 countries are abolitionist in law or practice.

Name: Ernest Lee Johnson
Gender m/f: m

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