CASE NO._____

IN THE
Supreme Court of the United States

KEVIN JOHNSON,

Petitioner,

v.

TROY STEELE,
WARDEN, POTOSI CORRECTIONAL CENTER,

Respondent.

Petition for Writ of Certiorari to
the United States Court of Appeals for the Eighth Circuit

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does the Eighth Circuit's practice of issuing unexplained blanket denials of certificates of appealability in capital habeas cases conflict with 28 U.S.C.§ 2253, and this Court's decisions in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Hohn v. United States*, 524 U.S. 236 (1998), by preventing a condemned prisoner from obtaining meaningful appellate review on a first habeas corpus petition?

2. Was the denial of a COA proper on Petitioner's claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), when the state court reasoned that St. Louis County's history of *Batson* violations was irrelevant without a specific connection to Petitioner's case?

3. Was the denial of a COA proper on Petitioner's claim that trial counsel performed ineffectively by failing to investigate and present evidence of the impact of pervasive community violence, including that perpetrated by the police – a claim that the district court said was not "substantial" under *Martinez v. Ryan*, 566 U.S. 1 (2012), simply because trial counsel presented unrelated evidence of child abuse and neglect suffered by Petitioner?

PARTIES TO THE PROCEEDING

Petitioner KEVIN JOHNSON was the appellant in the court below and is an indigent death-sentenced prisoner within the Missouri Department of Corrections. Respondent TROY STEELE is the warden of the Potosi Correctional Center, where Petitioner is incarcerated.

No party is a corporation.

RELATED PROCEEDINGS

United States Court of Appeals for the Eighth Circuit:

Kevin Johnson v. Troy Steele, No. 18-2513

United States District Court for the Eastern District of Missouri, Eastern Division:

Kevin Johnson v. Troy Steele, No. 4:13-CV-2046-SNLJ

Supreme Court of Missouri:

State of Missouri v. Kevin Johnson, No. SC89168 (direct appeal)

Kevin Johnson v. State of Missouri, No. SC92448 (post-conviction appeal)

Circuit Court of St. Louis County, Missouri:

State of Missouri v. Kevin Johnson, No. 05CR-2833 (trial)

Kevin Johnson v. State of Missouri, No. 09SL-CC04252 (post-conviction)

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PETITION FOR WRIT OF CERTIORARI

Kevin Johnson respectfully petitions for a writ of certiorari to review a judgment and decision of the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The June 1, 2021, opinion of the Eighth Circuit Court of Appeals affirming the district court's order denying Petitioner's motion for recusal, and summarily denying a certificate of appealability (COA), is published as *Johnson v. Steele*, 999 F.3d 584 (8th Cir. 2021), and appears in the Appendix at App. 1. The Eighth Circuit's July 14, 2021, order denying panel and en banc rehearing is unpublished and appears in the Appendix at App. 7. The Eighth Circuit's June 6, 2019, order denying a COA is unpublished and appears in the Appendix at App. 8.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eighth Circuit declined to issue a COA on June 1, 2021, and denied a petition for panel and en banc rehearing on July 14, 2021. App. 1, 7. Pursuant to this Court's Miscellaneous Order of July 19, 2021, the instant petition is due for filing within 150 days of the Eighth Circuit's order denying rehearing.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 28 United States Code § 2253(c)(1) provides, in part: "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from ·(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." Section 2253(c)(2) provides: "A [COA] may issue under paragraph (1) only if the applicant

has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

Petitioner was convicted of first degree murder and sentenced to death by the Circuit Court of St. Louis County for the killing of Sgt. William McEntee of the Kirkwood Police Department on July 5, 2005, when Petitioner was just nineteen years old. The incident occurred in the troubled Meacham Park neighborhood shortly after Petitioner learned that his twelve-year-old brother had died. Sgt. McEntee was one of the officers who responded to the scene after Petitioner's brother collapsed. Then-Prosecuting Attorney Robert McCulloch personally tried the case, during his tenure as St. Louis County's elected chief prosecutor that lasted from 1991 until 2019. *See* Cleve R. Wootson, Jr., *Voters Oust Prosecutor Accused of Favoring Ferguson Officer Who Killed Michael Brown*, Wash. Post, Aug. 8, 2018. Petitioner's first trial resulted in a hung jury, with the jurors deadlocked at 10-2 in favor of non-premeditated second degree murder instead of first degree murder. *See* PCR Tr. 453, 491-92.[1] A subsequent jury found Petitioner guilty of first degree murder and sentenced him to death.

The trial evidence showed that Kirkwood officers were patrolling the neighborhood, searching for Petitioner in order to arrest him on an alleged probation violation when Petitioner's twelve-year-old brother – Joseph Long, known to the family and neighborhood as "Bam Bam" – suddenly collapsed in his

[1] Petitioner cites the transcript from his initial trial as "Tr. I," the transcript from the retrial as "Tr. II," and the transcript from the state post-conviction hearing as "PCR Tr." Petitioner notes that his testimony from the first trial was presented at the retrial by videotape.

grandmother's ("Grandma Pat's") home. Bam Bam "had thrown up black or red sputum, pretty large quantity" and was gasping for air. Tr. II 1182-85, 1236-37. Petitioner, who was staying at his great-grandmother's house next door to Grandma Pat's and had been caring for his two-year-old daughter that day, was watching the officers from the house when Bam Bam collapsed. App. 19; Tr. II 1833-36, 1847-48; Tr. I 772-88. From Petitioner's vantage, later confirmed by other observers, the responding police appeared indifferent to Bam Bam's welfare and were more interested in arresting Petitioner than in attempting to save Bam Bam's life. Tr. I 776; 778-87; Tr. II 1273-76, 1844-46, 1848-49. The officers "immediately made everybody get out of the house." Tr. I 779-80. Petitioner's mother, Jada Tatum, tried to tend to Bam Bam, but Sgt. McEntee blocked Jada's way and refused to let her in. Jada "stopped trying to get through the door" and "went to look through the window." Tr. I 784-85. Sgt. McEntee then shoved Jada away from the window. Tr. I 785. Eventually Jada went into the yard and cried. Tr. I 785.

Paramedics arrived on the scene, and about 30 minutes later, they removed Bam Bam on a stretcher. Petitioner soon learned that his brother had died at a nearby hospital from what turned out to be a congenital heart defect. App. 19; Tr. II 1220-33, 1299, 1364, 1857-58; Tr. I 788. Petitioner, in an outpouring of grief, kicked a bedroom door off of its hinges. Tr. I 788.

About two hours later, Sgt. McEntee returned to the neighborhood in response to a fireworks disturbance. App. 19. Eyewitnesses testified that Petitioner approached Sgt. McEntee in his patrol car, squatted down to the passenger window, said "You killed my brother," and then shot Sgt. McEntee about five times, hitting

him in the head and upper torso areas. *Id.* Sgt. McEntee's car rolled down the street and hit a parked car, after which Sgt. McEntee managed to get out of the car but could not stand up. *Id.* Next door to Sgt. McEntee's location was the home where Petitioner's young daughter lived, and Petitioner had run there to see his daughter "one last time." Tr. I 800-05, 833-36; Tr. II 925-53, 1693-94; Dist. Dkt. #35 at 92-94. Petitioner emerged from behind his daughter's house, by way of a "gangway" that ran between his daughter's house and the house where Sgt. McEntee's car had crashed. Tr. II 1485-88. He noticed Sgt. McEntee, approached him, and fatally shot him in the head. App. 19-20; Tr. II 1809-10. The medical examiner testified that the fatal shot could have been fired from as close by as two feet away or from as far away as ten feet or more. Tr. II 1821. Petitioner fled the scene but surrendered to police three days later. App. 20. At Petitioner's second trial, the jury convicted him of first degree murder and sentenced him to death, which the trial court imposed.

Petitioner's appellate and post-conviction remedies were unavailing in the state courts. *State v. Johnson*, 284 S.W.3d 561 (Mo.), *cert. denied*, 558 U.S. 1054 (2009) ("*Johnson I*") (App. 101); *Johnson v. State*, 406 S.W.3d 892 (Mo. 2013), *cert. denied*, 571 U.S. 1240 (2014) ("*Johnson II*") (App. 78). Among the claims raised by Petitioner was that prosecutor McCulloch excluded Black jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). In support of his claim, which involved the strike of venireperson Debra Cottman, Petitioner pointed to a pattern involving numerous *Batson* violations in St. Louis County under McCulloch's leadership, including the recent death penalty cases of *State v. McFadden*, 191 S.W.3d 648 (Mo. 2006) ("*McFadden I*"), and *State v. McFadden*, 216 S.W.3d 673 (Mo. 2007)

("*McFadden II*"). In rejecting the *Batson* claim, the Missouri Supreme Court dismissed St. Louis County's historical pattern as irrelevant: "A previous *Batson* violation by the same prosecutor's office does not constitute evidence of a *Batson* violation in this case, absent allegations relating to this specific case." *Johnson I*, 284 S.W.3d at 571 (App. 111).

The state court also upheld McCulloch's primary rationale for striking Juror Cottman: that she hosted children on weekends as a "visiting foster parent" for Annie Malone Children's Home, where Petitioner had spent one week as a teenager. App. 111; Tr. II 1003-04, 1010-11, 1051, 2112-13, 2270. The prosecutor did not, however, ask Cottman any questions about her experiences with Annie Malone's or how those experiences might affect her consideration of Petitioner's case. Moreover, the prosecutor accepted four White jurors with similar experiences in the foster care system. Juror Bayer served as a "weekend foster parent" at the St. Vincent Home for Children (where Petitioner's sister had stayed); Juror Georger served as a mentor in the Family Court and worked with children "all over the place" during the time that Petitioner was in the court's custody; Juror Duggan worked as a teacher and repeatedly contacted the Division of Family Services in order to "hotline" the parents of troubled children; and Juror Boedeker worked with "new moms and babies" and would consult DFS when either tested positive for drugs. Tr. II 1003-10, 2088, 2096, 2107; Dist. Dkt. #88-1 at 702. All the while, the parties disputed whether child welfare agencies bore partial responsibility for Petitioner's troubles and for a crime he committed at age nineteen. *See* Tr. II 2321 (per prosecutor: "Of course he had a lousy life . . . But . . . there were plenty of people

there offering him help . . . The State put him in many different situations."); Tr. II 2329 (defense counsel arguing that a DFS psychologist warned, three years before the crime, "If you don't get him help, this kid is going to blow.").

The Missouri Supreme Court nevertheless rejected Petitioner's comparison of Juror Cottman to the others. It reasoned that the other jurors were not "similarly situated" to Cottman, because none had worked with the Annie Malone center itself. *Johnson I*, 284 S.W.3d at 571 (App. 111).

Judge Teitelman dissented. He described "two critical flaws" in the prosecution's explanation that it struck Juror Cottman because of her involvement with the Annie Malone center. *Id.* at 590 (App. 130). First, the relevance of that association "applies with equal force to any other juror who was associated with an agency or organization that provided services to appellant," including at least four White jurors who had "substantial contacts" with the Division of Family Services. *Id.* Second, the prosecutor failed even to ask those White jurors whether they had any association with organizations that had assisted Petitioner, which indicated to Judge Teitelman that the state's claimed concern was not genuinely race-neutral. *Id.* Judge Teitelman also rejected the prosecution's alternative explanation, i.e., that Cottman was "not all that willing to answer the questions regarding the death penalty." Tr. II 1051. Cottman was no different from other jurors who provided "short and direct answers to the questions posed," Judge Teitelman observed, and the prosecution did not raise any issue about her demeanor or the completeness of

her answers at the time of voir dire. *Johnson I*, 284 S.W.3d at 590 (App. 130).[2] All told, the circumstances left Judge Teitelman with "a definite and firm conviction that the trial court erred in overruling appellant's *Batson* challenge to the state's peremptory strike of Ms. Cottman." *Id.*

Petitioner later sought habeas corpus relief, which the district court denied. As relevant here, the district court upheld the Missouri Supreme Court's ruling as a reasonable application of *Batson* for purposes of 28 U.S.C. § 2254(d)(1). App. 45-46. The district court reasoned that the record "fully supports" the state court's ruling that no White jurors were similarly situated to Cottman, since "[n]one had any connection with Annie Malone's Children's Home and only had connections with the Division of Family Services in other contexts." *Id.* The district court also rejected Petitioner's argument that the state court had contradicted and unreasonably applied *Batson* by refusing to consider "all evidence" bearing on the prosecutor's explanation for a strike, including historical evidence of the type that this Court has itself considered. *See Miller-El v. Dretke*, 545 U.S. 231, 252, 266 (2005) ("*Miller-El II*"). The district court described the facts of *Miller-El II* as uniquely "egregious" and "altogether distinguishable from the case at hand." App. 46. The court adhered to its reasoning when it denied a COA on the claim. App. 13-14. It added an observation that some of the St. Louis County-based *Batson* findings on which Petitioner had relied were not cited to the state courts. App. 13.

[2] Having credited the "race-neutral reason" concerning the Annie Malone Children's Home, the majority found it "unnecessary" to consider the pretextuality of the prosecutor's explanation concerning Cottman's voir dire responses. *Id.* at 571 (App. 111).

The district court also denied an evidentiary hearing, habeas corpus relief, and a COA on four claims of ineffective assistance of trial counsel. The ineffective-assistance claims are as follows:

First, trial counsel failed to investigate and present evidence of pervasive police brutality within the impoverished and overwhelmingly Black community of Meacham Park, which was annexed by the affluent and largely White suburb of Kirkwood in 1992. "Living in Meacham Park meant living in fear of the police," said one resident. Dist. Dkt. #88-1 at 144. Kirkwood police officers referred to Meacham Park residents as "niggers" or "monkeys" and often resorted to excessive force. *Id.* at 38, 97-98, 103, 171, 188, 247, 277-78, 289, 293. Among those officers was Sgt. McEntee. Sworn witness declarations state that Sgt. McEntee maced Petitioner and a group of his friends for sitting in a car and listening to music after a football game, threw a pregnant woman onto the ground, knocked a teenage boy unconscious for playing dice at a park, shattered people's taillights so he would have an excuse to pull them over, tried to hit a man with his car, and referred to the young Black men in the community as "monkeys sitting on a corner." *Id.* at 103, 171, 188, 276-78.

Second, trial counsel failed to investigate and present evidence describing the violent and crime-ridden community in which the offense occurred and in which Petitioner was raised. "[G]rowing up in Meacham Park meant that you or someone you love might die young," reported one witness. *Id.* at 274. Indeed, Petitioner's father, brother, and twenty-four of his uncles and cousins spent time in prison before Petitioner turned 18. *Id.* at 1251-1357.

Third, trial counsel failed to develop evidence that Petitioner's childhood was plagued by physical and sexual abuse as well as chronic neglect. "Kevin was whipped, beaten, and maced by various caregivers; directed by uncles and cousins to join in sex acts as a prepubescent child; and left home alone as a toddler for days without food or heat." *Id.* at 3 (per psychiatrist Richard G. Dudley, Jr.).

Fourth, trial counsel failed to obtain a mental health evaluation of Petitioner despite his history of institutionalization, suicide attempts, and hearing voices. In the process, counsel failed to discover and present evidence that Petitioner suffers from a frontal lobe impairment that diminishes his capacity for planning, response inhibition, and impulse control; that Petitioner displays "prominent dissociative symptoms;" and more broadly, that Petitioner's "moral compass was effectively 'offline' at the time of the instant offense." *Id.* at 10-11, 32-34.

The district court recognized that the first three of the above-described ineffective-assistance claims were procedurally defaulted because they were not asserted in state post-conviction proceedings. The court nevertheless declined to excuse the defaults under *Martinez v. Ryan*, 566 U.S. 1 (2012), concluding that the claims were not "substantial." App. 10-12, 29-30, 32-34; *see also Martinez*, 566 U.S. at 14 (holding that a claim is "substantial" if it has "some merit").

On the claim concerning Petitioner's brain damage and longstanding dissociative symptoms, the district court simply denied a hearing and refused to consider the evidence. App 17, 69-73. The court pointed to a different claim brought by Petitioner and rejected on the merits by the Missouri Supreme Court, which is that trial counsel failed to develop evidence that Petitioner suffered from "acute

stress disorder" at the time of the offense, based on his brother's sudden death hours earlier. App. 69-73. The district court concluded that the state court "reasonably" rejected the "acute stress disorder" claim for purposes of 28 U.S.C. § 2254(d). *Id.* The court credited the state court's ruling that trial counsel reasonably chose to focus on the effects of Bam Bam's sudden death instead of offering a mental health diagnosis. *Id.* The district court also ruled that *Cullen v. Pinholster*, 563 U.S. 170 (2011), barred evidence of any additional mental illnesses. App. 73. The court did not address Petitioner's argument that Mr. Johnson's longstanding neurological deficiencies and mental illness – as distinguished from *acute* stress disorder – gave rise to a separate and procedurally defaulted claim of trial counsel's ineffectiveness, and that the claim should be heard on the merits under *Martinez*. *Id.*; *see also* Dist. Dkt. #138 at 5-10.

Petitioner next sought a COA from the Eighth Circuit, advancing his *Batson* claim and the four ineffective-assistance claims described above (among others). *See* Appellant's Application for COA at 6-70, *Johnson v. Steele*, No. 18-2513 (8th Cir. Mar. 1, 2019). The Eighth Circuit denied a COA on all claims, and without providing any explanation:

> The court has carefully considered the application, the respondent's response and the district court record, and the application for a certificate of appealability is denied.

App. 8.

The court allowed the appeal to proceed only on the non-merits question of whether the district judge should have disqualified himself. *Id.* Petitioner had sought the recusal of United States District Judge Stephen N. Limbaugh because of

his earlier service on the Missouri Supreme Court. In his previous capacity, Judge Limbaugh dissented from both of the *McFadden* opinions in which the Missouri Supreme Court found *Batson* violations, and on which Petitioner had relied in both state and federal court. As a member of the Missouri Supreme Court, Judge Limbaugh was "quite unwilling to convict the prosecutor and the [trial] judge of racial prejudice," and he accused his colleagues of misstating the evidence and "cherry-pick[ing]" the facts. *McFadden II*, 216 S.W.3d at 684 (Limbaugh, J., dissenting); *McFadden I*, 191 S.W.3d at 659-60 (Limbaugh, J., dissenting).

Alongside his briefing on the recusal question, Petitioner renewed his request for a COA. Among other arguments, Petitioner urged that this Court's intervening decision in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), justified reconsideration of the earlier panel's denial of a COA on the *Batson* claim. *See* Appellant's Br. at 20-23, *Johnson v. Steele*, No. 18-2513 (8th Cir. Nov. 26, 2019); *see also Flowers*, 139 S. Ct. at 2245 (explaining that a *Batson* claim may rely on "historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction"). The Eighth Circuit affirmed the district court's recusal ruling. *Johnson v. Steele*, 999 F.3d 584, 587-87 (8th Cir. 2021) (App. 4-6). And it denied Petitioner's renewed request for a COA without explanation:

> Having reviewed Johnson's application for a COA, we decline to disturb the administrative panel's denial of the application for a COA. Accordingly, we again deny the application for a COA.

Id. at 589 (App. 6). The court later denied rehearing and rehearing en banc. App. 7. This timely petition follows.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S COA PRACTICE DIVERGES FROM THAT OF OTHER COURTS OF APPEALS AND VIOLATES THIS COURT'S PRECEDENTS.

In order to obtain a COA, the petitioner need only make "a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) ("*Miller-El I*") (quoting 28 U.S.C. § 2253(c)(2)). That showing is satisfied when "jurists of reason could disagree with the district court's resolution of [any] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.*; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The standard is not burdensome: "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El I*, 537 U.S. at 338. In a capital case, "the nature of the penalty is a proper consideration" to weigh in favor of granting a COA. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *see also Slack,* 529 U.S. at 483-84 (holding that the COA requirement codified the pre-AEDPA *Barefoot* standard).

The court below twice denied a COA in this capital case without explanation. App. 6, 8. To the extent of counsel's research, the Eighth Circuit has not explained its reasons for wholly denying a COA in any first-petition capital habeas case since 1997. *See Cox v. Norris*, 133 F.3d 565, 569-74 (8th Cir 1997) (reasoned denial); *cf. Dansby v. Hobbs*, 691 F.3d 934, 936 (8th Cir. 2012) (declining to expand COA and stating that the Court need not "publish a statement of reasons when it denies a certificate of appealability"). The Eighth Circuit's practice is contrary to statute.

"The COA determination under Sec. 2253(c) *requires* an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El I*, 537 U.S. at 336 (emphasis added). A court cannot provide a "general assessment" of the merits without even mentioning them. *See*, *e.g.*, *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (remanding because district court's "blanket denial" did not comport with "the standards set forth by the Supreme Court in *Slack*").

Recent years have seen the complete and unexplained denial of appellate review in the majority of first-petition capital habeas cases that reach the Eighth Circuit without a COA from the district court.[3] The practice of other circuits is to the contrary. *See*, *e.g.*, *Swisher v. True*, 325 F.3d 225 (4th Cir. 2003); *Chanthakoummane v. Stephens*, 816 F.3d 62 (5th Cir. 2016); *Smith v. Mays*, No. 18-5133, 2018 WL 7247244 (6th Cir. Aug. 22, 2018); *Dickens v. Ryan*, 552 F. Appx 770 (9th Cir. 2014); *Lafferty v. Benson*, 933 F.3d 1237 (10th Cir. 2019); *Woods v. Holman*, No. 18-14690, 2019 WL 5866719 (11th Cir. Feb. 22, 2019) (all providing reasons for denying COA); *cf. Woods v. Buss*, 234 F. Appx 409 (7th Cir. 2007) (reasoned denial in successive posture). To be sure, other circuits occasionally issue summary orders when denying appellate review in first-petition capital cases. *See*

[3]*See* Order, *Deck v. Steele*, No. 18-1617 (8th Cir. Aug. 20, 2018); Order, *Barton v. Griffith*, No. 18-2241 (8th Cir. Dec. 21, 2018); Order, *McLaughlin v. Precythe*, No. 18-3628 (8th Cir. Apr. 22, 2019); Order, *Tisius v. Blair*, No. 21-1682 (8th Cir. Nov. 9, 2021); Order, *Johnson v. Steele*, No. 18-2513 (App. 6, App. 8); *see also* Order, *Montgomery v. United States*, No. 17-1716 (8th Cir. Jan. 25, 2019) (section 2255 case). The Eighth Court recently granted COAs in three other cases. *See* Order, *Marcyniuk v. Kelley*, No. 19-1943 (8th Cir. Mar. 24, 2020); Order, *Dansby v. Payne*, No. 19-3105 (8th Cir. Jan. 28, 2020); Order, *Dorsey v. Vandergriff*, No. 20-2099 (8th Cir. Feb. 1, 2021).

Order, *Ritchie v. NeaI*, No. 15-1925 (7th Cir. Feb. 24, 2016); Order, *Grayson v. Comm'r Ala. Dept. of Corr.*, No. 10-13409 (11th Cir. Oct. 13, 2010); *but see Grayson v. Comm'r Ala. Dept. of Corr.*, No. 10-13409 (Order, 11th Cir. May 13, 2011) (reasoned panel order denying reconsideration of single judge's denial). But the Eighth Circuit stands alone in *never* stating its reasons for denying review.

Aside from violating section 2253, the Eighth Circuit's practice disables further proceedings. In *Hohn v. United States*, 524 U.S. 236 (1998), this Court held that it has jurisdiction to review the denial of a COA by certiorari. But the availability of review presupposes something for the Court to review in the first place. By omitting any reasoning on the merits of any claim, the Eighth Circuit's practice insulates a conviction and death sentence from the additional review to which the petitioner is entitled. That review is essential on a first habeas petition in capital cases, in which subsequent federal remedies have become disfavored as the prisoner's execution draws near. *See*, *e.g.*, *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (urging courts to "dismiss or curtail suits that are pursued in a 'dilatory' fashion or based on 'speculative' theories") (quoting *Hill v. McDonough*, 547 U.S. 573, 584-85 (2006)). That disfavor, of course, rests on the availability of meaningful habeas corpus remedies during earlier stages of review. By defying the plain language of this Court's COA standard and taking refuge under a cloak of secrecy, the Eighth Circuit's practice allows potentially unconstitutional convictions and sentences to evade judicial scrutiny. The Court should grant certiorari to decide the legality of the Eighth Circuit's COA practice under section 2253 and the precedents applying it.

II. THE EIGHTH CIRCUIT WRONGLY DENIED A COA ON PETITIONER'S *BATSON* CLAIM.

In addition to demonstrating that the prosecutor's "race neutral" reasons for striking a Black venireperson applied equally to accepted White jurors, and that the prosecutor misrepresented the record in defense of his strikes, Petitioner argued to the state court that four recent *Batson* violations by the same prosecutor's office provided further evidence of pretext. Notwithstanding *Batson*'s admonition a court must consider "all relevant circumstances," 476 U.S. at 96, the state court held that "[a] previous *Batson* violation by the same prosecutor's office does not constitute evidence of a *Batson* violation in this case, absent allegations relating to this specific case." *Johnson I*, 284 S.W.3d at 571 (App. 111). The state court's ruling is manifestly wrong, and the district court's order upholding it as "reasonable" under AEDPA is debatable among reasonable jurists.

A. The Missouri Supreme Court's opinion violates the plain letter of binding precedent.

The state court's reasoning squarely conflicts with this Court's longstanding *Batson* jurisprudence. *See Batson*, 476 U.S. at 96 (court must consider "all relevant circumstances"); *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) ("all of the circumstances that bear upon the issue of racial animosity must be consulted"); *Miller-El II*, 545 U.S. at 252 (judge must "assess the plausibility of [the prosecutor's] reason in light of all evidence with a bearing on it"). Even while "break[ing] no new legal ground," the Court's more recent opinion in *Flowers* explained that "all relevant evidence" includes "historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction." 139 S. Ct. at 2235, 2245.

Justice Kavanaugh's opinion in *Flowers* summarized, in list form, the factors or evidence that judges should consider in evaluating whether a *Batson* violation has occurred:

- statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
- relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination.

Id. at 2243.

The requirement to consider *all* relevant circumstances was lost on the Missouri Supreme Court. The state court ruled that historical discrimination could not be taken as "evidence of a *Batson* violation," short of showing that prior infractions somehow related to the "specific case" in issue. *Johnson I*, 284 S.W.3d at 581 (App. 111). The court seemingly grafted a nexus requirement as a prerequisite to the relevance of prior discrimination. But there is no historical predicate for such a requirement. *Swain v. Alabama*, 380 U.S. 202 (1965), itself spoke simply of the proponent's burden to show the prosecutor engaged in a case-after-case pattern of peremptory challenges to exclude Blacks from the petit jury. *Id.* at 222-28. There was no requirement that the proof of prior discrimination somehow related to the current dispute. In *Batson*, Justice Powell's opinion observed that unchecked

peremptory challenges allowed "those to discriminate who are of a mind to discriminate" and thus, faced with allegations of purposeful discrimination, "the trial court should consider all relevant circumstances" bearing on the question. 476 U.S. at 96. Justice White's concurrence observed that the "presumption of legitimacy with respect to the striking of black venire persons could be overcome by evidence that over a period of time the prosecution had consistently excluded blacks from petit juries." *Id.* at 101 (White, J., concurring).

Subsequent decisions of this Court reinforced the requirement that "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. 478. The *Miller-El* cases relied on a twenty-year old prosecution manual as evidence that "the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection." *Miller-El I*, 537 U.S. at 335, 347; *accord Miller-El II*, 545 U.S. at 266 ("If anything more is needed for an undeniable explanation of what was going on, history supplies it."). In *Flowers*, the Court explicitly reiterated that, "In [overruling *Swain*], however, *Batson* did not preclude defendants from still using the same kinds of historical evidence that *Swain* had allowed defendants to use to support a claim of racial discrimination." 139 S. Ct. at 2245. *Flowers* drew on existing precedent and twice emphasized that its enumeration of factors "break[s] no new legal ground ... [but] simply enforce[s] and reinforce[s] *Batson*." *Id.* at 2235, 2251. Nothing this Court has ever said about proof of discrimination, explicitly or impliedly, conditions the relevance of local history upon a specific connection to the case at hand.

Leaving aside the state court's unsustainable reasoning, the court itself was

divided. Judge Teitelman dissented from the Missouri Supreme Court's opinion, based on his "definite and firm conviction that the trial court erred in overruling appellant's *Batson* challenge to the state's peremptory strike of Ms. Cottman." *Johnson I*, 284 S.W.3d at 589-91 (Teitelman, J., dissenting) (App. 139-31). The issuance of a COA "should ordinarily be routine" when, as here, the state court is divided on the constitutional question. *Rhoades v. Davis*, 852 F.3d 422, 429 (5th Cir. 2017); *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011).

Judge Teitelman found "two critical flaws" in the prosecution's explanation that it struck Juror Cottman because of her involvement with the Annie Malone Children's Home. *Johnson I*, 284 S.W.3d at 590 (App. 130). First, the relevance of that association "applies with equal force to any other juror who was associated with an agency or organization that provided services to appellant," including at least four White jurors who had "substantial contacts" with the Division of Family Services. *Id.* The prosecution's failure "to strike similarly situated white jurors severely undermines the race-neutrality of the state's strike." *Id.* (citing *Miller-El II*, 545 U.S. at 247). Second, the prosecutor failed even to ask those White jurors whether they had any association with organizations that had assisted Petitioner, which indicates that the prosecutor's claimed concern was not genuinely race-neutral. *Id.* Judge Teitelman also rejected the prosecution's argument about Cottman's voir dire responses. Cottman was no different from other jurors who provided "short and direct answers to the questions posed." *Id.*

The record amply supports Judge Teitelman's assessment. As to the prosecutor's primary justification for striking Cottman, her association with the

Annie Malone Children's Home was nominal. Cottman served only as "visiting foster parent," which meant that children would "come visit at my home, stay at my home for the weekend." Tr. II. 1010. Cottman did not work at the Annie Malone home and did not know anyone from there who was associated with the case, including Kevin Johnson. Tr. II 1011. The prosecutor nevertheless seized on this supposed link. McCulloch said, "I don't want anyone associated with Annie Malone," because Petitioner had been placed there through DFS. Tr. II 1051. In fact, Petitioner had spent one week there at age seventeen. Tr. II 2270. But more troublingly, McCulloch did not strike other White jurors who had experience with DFS. Like Cottman, Juror Bayer had served as a "weekend foster parent," but for a different home, St. Vincent Home for Children (where Petitioner's sister had stayed). Trial Tr. 1009-10; Dist. Dkt. #88-1 at 702. Three other jurors – Duggan, Georger, and Boedeker – had substantial contacts with, or responsibility for, children coming under the auspices of DFS, and yet they also were not struck. Tr. II 1003-08, 2088, 2096, 2107. The Court has made clear that a stricken and non-stricken juror need not be identical in order for disparate strikes to support an inference of discrimination: "A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Miller-El II*, 545 U.S. at 247 n.6.

The record also supports Judge Teitelman's observation that the prosecution did not meaningfully inquire about the jurors' experiences with state-affiliated agencies, shelters, group homes, or other foster-care facilities. *See Johnson I*, 284

S.W.3d at 590 (Teitelman, J., dissenting) (Ap p. 130). If the prosecutor were genuinely concerned about the issue, he would have asked about it. "The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El II*, 545 U.S. at 246 (quoting *Ex parte Travis*, 776 So.2d 874, 881 (Ala. 2000)). The prosecutor's stated concern contradicted his trial strategy in any event. *See id.* at 247. On the one hand, the prosecutor expressed a worry that Juror Cottman "probably" and "rightly" had a "very high opinion of Annie Malone" and of "anything that went on there." Tr. II 1051. On the other, the prosecutor argued during the penalty phase that the state had put Petitioner "in many different situations" with "plenty of people there offering him help," and that Petitioner failed "to take advantage of the opportunities that are there." Tr. II 2321-22. If indeed she had a "very high" opinion of a foster care organization that served Petitioner, Debra Cottman "should have been an ideal juror in the eyes of a prosecutor seeking a death sentence." *Miller-El II*, 545 U.S. at 247 (concerning Juror Fields' views about the death penalty).

Equally dubious was the prosecutor's claim that he struck Cottman on account of her terse voir dire responses. As Judge Teitelman observed, Cottman's responses were indistinguishable from those of other veniremembers who were not struck. *See Johnson I*, 284 S.W.3d at 590 (Teitelman, J., dissenting) (App. 130). The prosecutor questioned almost every juror about the death penalty, and each gave

comparably brief responses.[4] There is no principled way to distinguish Cottman's responses from the others. *See* Tr. II 406-07.

The exclusion of even a single juror on account of race requires a new trial. *See Foster v. Chatman*, 578 U.S. 488, 514 (2016); *Snyder*, 552 U.S. 478. The prosecutor's strike of Debra Cottman, together with the surrounding circumstances, give rise to a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

B. The district court's ruling is debatable among reasonable jurists.

A COA should issue when "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Although the Eighth Circuit did not provide reasons for denying a COA, the district court addressed the merits of Petitioner's *Batson* claim. In doing so, it failed to afford due weight to this Court's pronouncements that reviewing courts must assess claims of discriminatory jury selection "in light of all evidence with a bearing on it." *Miller-El II,* 545 U.S. at 252.

While the state court found the evidence irrelevant, the district court took a less narrow view and acknowledged that *Miller-El* considered Dallas County's

[4] *See*, *e.g.*, Tr. II 100-20, 168-210, 279-316, 391-418, 516-47. Jurors Haber, Blakely, Broome, Schlenk, Kidane, Grant, Hecker, Ostmann, Kaveler, and Stack gave one- or two-word answers to these questions. Tr. II 90-94, 97-98, 118-19, 171-77, 184-86, 524-26, 529-33. Jurors Cottman, Dalba, Gleason, Morrow, Duggan, Stenslokken, Georger, Hunt, Fredericks, Jackson, Peters, Knoepfel, Becherer, Munger, Stasiak, Oster, Fenton, Molnar, and Desloge occasionally modified their "yes" or "no" answers with a simple sentence such as, "I could," "I would," "I do," or "I can." Tr. II 112- 14, 177-80, 197-200, 203-06, 279-85, 302-16, 397-99, 404-12, 546-47, 635-37, 640-43. Jurors Gibbons, Alexander, Queen, Aikman, Boedeker, Niebrugge, Lehman, and Nunez further modified their responses by repeating the prosecutor's question in their answers. Tr. II 120-21, 168-71, 180-83, 191-93, 194-97, 206-10, 415-19.

"troubling history of excluding black jurors." App. 46. The district court simply mouthed the words and moved on, stating, "Suffice it to say that *Miller-El*, with its egregious facts, is altogether distinguishable from the case at hand." *Id.* Yet, Petitioner's historical evidence is *more* compelling than the twenty-year old policy manual in *Miller-El*. St. Louis County prosecutors weren't simply given license to discriminate; they actually discriminated multiple times in the recent past. Previous infractions make any supposedly race-neutral justification more susceptible to a finding of pretext. For that matter, nothing in *Miller-El* limits the duty to consider "all evidence" to the specific circumstances of *Miller-El*. The district court, then, afforded undue deference to a state court that got it wrong. *See* App. 46 ("[N]othing suggests the state court unreasonably applied *Batson*"). At the very least, "reasonable jurists would find the district court's assessment of the constitutional claims debatable." *Slack*, 529 U.S. at 484.

In its post-judgment COA ruling, the district court tacked on another rationale, stating that "Johnson relied mainly on appellate cases and newspaper articles that were not before the trial court, and many that were not in front of the Missouri Supreme Court on appeal." App 13. But the Missouri Supreme Court considered the evidence – four recent *Batson* violations – and did not find a default for failure to cite them in the heat of trial. *See Cone v. Bell*, 556 U.S. 449, 468 (2009) ("When a state court declines to find that a claim has been waived by a petitioner's alleged failure to comply with state procedural rules, our respect for the state-court

judgment counsels us to do the same.").[5] The state court simply found no place for that evidence in its analysis because of the court's erroneous belief that a "previous *Batson* violation by the same prosecutor's office does not constitute evidence of a *Batson* violation in this case, absent allegations relating to this specific case." *Johnson I*, 284 S.W.3d at 571 (App. 111). The district court's suggestion of a default is wrong because the state court did not actually "rel[y] on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). A COA is warranted, as reasonable jurists would debate "whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

III. THE EIGHTH CIRCUIT WRONGLY DENIED A COA ON THE INEFFECTIVE-ASSISTANCE CLAIM CONCERNING PETITIONER'S VIOLENT COMMUNITY.

The prosecutor argued that Petitioner's "lousy childhood" should not lessen his punishment, because Petitioner "got knocked down" and never "got back up" as others had done. Tr. II 2324. But chronic exposure to community violence is known to have devastating consequences among those who cannot escape it. *See*, *e.g.*, Emily Badger, *Have You Ever Seen Someone Be Killed?*, N.Y. Times May 25, 2018. This case arises from the in-the-street murder of a police officer in Meacham Park.

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[5] On direct appeal to the Supreme Court of Missouri, Petitioner identified four prior instances of where the St. Louis County Prosecutor's Office had violated *Batson*. *See* Appellant's Br. at 57-58, *State v. Johnson*, No. SC 89168 (Mo. Oct. 14, 2008), available at 2008 WL 5480945 ("'Known evidence' of discriminatory practices of the prosecutor's office may be considered in reviewing a *Batson* claim. *Miller-El* at 2332-33, 2338-40. No less than four times, recently, this prosecutor's office has been found to discriminate in jury selection. *See State v. McFadden,* [191 S.W.3d 648 (Mo.banc 2006)]; *State v. McFadden*, [216 S.W.3d 673 (Mo.banc 2007)]; *State v. Hampton*, 163 S.W.3d 903 (Mo.banc 1995); *State v. Hopkins*, 140 S.W.3d 143 (Mo.App.E.D.2004)").

Police reports, social service records, and newspaper articles described street fights, gang warfare, prostitution, drug sales, child abuse, and murders in the area, and numerous witnesses attested to police aggression and misconduct. *See* Section A, below. It was inexcusable for trial counsel to fail to investigate the troubled community in which Petitioner was raised and the crime occurred.

A. Trial counsel and post-conviction counsel unreasonably failed to investigate the pervasive violence in Meacham Park.

From his earliest years, when Petitioner's father went to prison for murder when Petitioner was about sixteen months old, Petitioner repeatedly saw and heard about members of his community killing and being killed. A reasonable investigation would have informed trial counsel that "Meacham Park has a lot of killings [and] … a lot of fist fights," that "[t]here's bodily harm done out there pretty much every day," and that "growing up in Meacham Park meant that you or someone you love might die young." Dist. Dkt. #88-1 at 84, 274. Children "got used to hearing about … murders," fell asleep to the sound of gunshots, and carried guns for protection around the neighborhood from a young age. *Id.* at 144, 303, 323. Gangs had a "gargantuan" impact at school and coerced students to join, and fearful students expected to be "dead by 21." *Id.* at 207-08. Murder and gun violence were epidemic in Petitioner's neighborhood. *See id.* at 51-52, 987-1020 (news articles). Had Petitioner's attorneys investigated the family's history, they would have learned that Petitioner's father, brother, and *twenty-four* of his uncles and cousins spent time in prison before Petitioner turned eighteen. *Id.* at 1251-1357 (dockets).

Some of the violence on Meacham Park's streets came from law enforcement, and specifically, the largely White membership of the Kirkwood Police Department.

"Living in Meacham Park meant living in fear of the police." *Id.* at 144 (per Emmanuel Johnson). Racism was common, and officers often referred to Black residents as "niggers." *Id.* at 97, 295 (per Myron Hodges, Florence Sloan). "Children saw how their parents were treated, without respect or dignity, and this was their impression of the police," explained one resident." *Id.* at 343 (per Jane Von Kaenel). "This helped perpetuate these tensions through multiple generations." *Id.*

Petitioner's relatives and neighbors would have told counsel that prostitution in Meacham Park "would happen right in the middle of the street, in the kids' parks, on community steps," and that "[y]ou could look over, and there would be one girl on her knees in front of a line of 20 guys." *Id.* at 304. Police extorted sexual favors from prostitutes by threatening them with arrest. *Id.* at 248. Many girls began having sex by age 7 or 8, and "[i]t was nothing to go through the back streets of Meacham Park and see a little 11- or 12-year-old girl riding a grown man right out in the open in their cars." *Id.* at 304. Women on drugs "would perform oral sex on 10- and 11-year-old boys just to get the boys' pocket change to go buy more drugs." *Id.* Petitioner's extended family has a generations-long history of incest and sexual abuse, which he witnessed from the age of four. *Id.* at 318-19, 380.

Well-defined norms require capital counsel to seek out "*all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Counsel must explore "all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). Because this case involved an in-the-street shooting of a police officer,

evidence of community violence and police aggression – or at least of the residents' widespread perceptions thereof – is among "the circumstances of the offense" that had uniquely mitigating potential. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The evidence also helps to explain an aspect of Petitioner's character by providing insight into his state of mind at the time of the crime, which was a crucial issue at trial. Tr. II 1909, 1920-42, 1952-57, 1966-77, 1984-85, 1992-97, 2316-19, 2332-33. Numerous courts have recognized counsel's duty to investigate and develop evidence of this kind. *See*, *e.g.*, *Simmons v. Luebbers*, 299 F.3d 929, 936 (8th Cir. 2002) (among other evidence, defendant grew up in a "neighborhood frequented by street violence"); *Doss v. State*, 19 So. 3d 690, 704 & n.4 (Miss. 2009) (noting that defendant's family "lived in a very poor, bad, drug-infested neighborhood where gangs were prevalent in Chicago"); *Johnson v. Mitchell*, 585 F.3d 923, 943 (6th Cir. 2009) ("Johnson was further exposed to violence both in elementary school where he often engaged in fights, and in his predominately white neighborhood where the African-American petitioner was forced to defend himself in numerous skirmishes").

Trial counsel's investigation was critically incomplete. Counsel did not speak to Petitioner's father or anyone from his side of the family, and they spoke to his mother only briefly by telephone. PCR Tr. 458. They did not request and review many of the available social service and criminal records about Petitioner's family and home, and they did not interview willing relatives who lived in St. Louis County, some of whom had lived with Petitioner as children. PCR Tr. 465; Dist. Dkt. #88-1 at 45, 54-57, 61-64, 71-93, 96-98, 111-29, 299-310, 333-36, 348-51. (Carmen Cooper-Crenshaw, Joyce Coleman, Charisse Clark, Shawn Fields,

Lawanda Franklin, Aaron Harris, Tausha Harris, Myron Hodges, Syl Jackson, Candace Tatum, Roscoe Tatum, Cameron Ward). And it appears that counsel did not ask *any* witnesses about Petitioner's exposure to shootings, stabbings, gang violence, prostitution or child sex. Dist. Dkt. #88-1 at 36-195, 200-360 (declarations).

The information was readily available to trial counsel. Police files in counsel's possession revealed Meacham Park as an open-air market for crack cocaine. *See id.* at 1023. In one police report, Petitioner himself told an officer "there was going to be a street fight." *Id.* at 1359. DFS records for Petitioner and his siblings report gang fights, prostitution, drug sales, and child sex in Meacham Park. *Id.* at 643, 647, 670, 784, 822, 897, 1023. The *St. Louis Post-Dispatch* wrote about the murders that occurred near Petitioner's home and published multiple stories about gang warfare at Kirkwood High School. *Id.* at 999, 1003, 1010, 1014. It was unreasonable for counsel not to follow up on this information.

That deficiency prejudiced the defense. In a trial that lacked evidence explaining the community in which Petitioner was raised and in which the shooting took place, the prosecution argued that Petitioner merely had a "lousy childhood." Tr. II 2324. The prosecutor argued that Petitioner repeatedly failed to "live by the rules" and failed to take advantage of the "opportunities" and support from his Aunt Edythe and the child protective system. Tr. II 2320-25. Petitioner "passed and did nothing to help himself in this situation." Tr. II 2323.

As a result of counsel's failure, the prosecution offered its unrebutted and untrue theory that it was Petitioner who made Meacham Park a violent place. "[T]hey're scared to death of this guy," the prosecutor argued. Tr. II 2335. "And they

deserve to be able to walk the streets of their neighborhood and your neighborhood and anybody else's neighborhood without fear of guys like Kevin Johnson who reign in terror over this neighborhood." *Id.* Had counsel performed even a basic investigation, they could have presented overwhelming evidence that, in truth, Petitioner had walked the streets of Meacham Park "in terror" his entire life.

There is no dispute that Petitioner's claim is procedurally defaulted because it was not asserted on post-conviction review. App. 33-34. Petitioner has "cause" to overcome the default if (a) he brings a "substantial" claim of trial counsel's ineffectiveness, (b) his post-conviction proceedings under Mo. Sup. Ct. R. 29.15 were the exclusive and "initial" avenue in which to present the claim, and (c) post-conviction counsel performed ineffectively with respect to the claim. *Martinez*, 566 U.S. at 14. Petitioner has already explained above why his claim is "substantial," and the Rule 29.15 proceedings were the exclusive and "initial" avenue in which to present the claim. *Martinez*, 566 U.S. at 14; Mo. Sup. Ct. R. 29.15(a).

For purposes of *Martinez*, Rule 29.15 counsel were deficient in their investigation and claim development. Post-conviction counsel must conduct "an aggressive investigation of all aspects of the case," *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, § 10.15.1(E)(4) (2003), paralleling trial counsel's duty to seek out "all reasonably available mitigating evidence." *Id.* § 10.7(A). Post-conviction counsel in this case found it "apparent that trial counsel had not done a thorough job of investigating the family." Dist. Dkt. #88-1 at 355. Failing to "investigate and interview more witnesses about the community in which Kevin lived" is among post-conviction

counsel's "chief regrets about Kevin's case." *Id.* at 357-59. "Meacham Park would have been the ideal place to develop this type of evidence." *Id.* at 192. Post-conviction counsel acknowledge that they "did not specifically investigate … the criminal history of Kevin's relatives," or "violent crimes near where Kevin was living." *Id.* at 357-58.

Post-conviction counsel declined to pursue even low-hanging fruit. Counsel failed to interview many of the family members living in the neighborhood. *Id.* at 45, 54-57, 71-81, 96-98, 111-29 (Joyce Coleman, Charisse Clark, Shawn Fields, Lawanda Franklin, Myron Hodges, Syl Jackson). Counsel interviewed Petitioner's brother Marcus once, but they did not ask him about violence, gangs, child sex, or drugs. *Id.* at 1243-44 (memorandum). They did not interview Petitioner's uncles Wayne Wayne, Roscoe, Aaron, or Keith, his aunts Candace or Tausha, or his numerous cousins (except for Jermaine Johnson, who was a witness to the initial shooting of Sgt. McEntee). *See id.* at 36-195, 200-360.

B. The district court's ruling is debatable among reasonable jurists.

The district court reasoned that trial counsel introduced "substantial evidence" describing Petitioner's "childhood experiences of abuse and neglect." App. 33. It then concluded that counsel are not ineffective simply because other attorneys might choose to present "different or additional details," that the defaulted ineffective-assistance claim is not "substantial" under *Martinez*, and that Petitioner was not entitled to an evidentiary hearing. App. 33-34.

The district court's ruling is readily debatable among reasonable jurists. *See Slack*, 529 U.S. at 484. The court failed to grasp the distinction between evidence

describing Petitioner's personal history and evidence describing his community and family. Petitioner's lifelong experience of community violence had mitigating force over and above the details of his *personal* abuse and neglect, and the community itself was a salient issue at trial. Counsel must "explore *all avenues* leading to facts relevant to the merits of the case and the penalty in the event of conviction." *Rompilla*, 545 U.S. at 387 (emphasis added). The district court's ruling, by contrast, allows counsel to explore *some* avenues, even when counsel has ample reason to believe that an investigation of additional avenues would be fruitful. Evidence that gangs had a "gargantuan" influence in the hallways where Petitioner went to school, that children in Meacham Park fell asleep to the sound of gunshots, and that thirteen-year-olds carried guns for protection (Dist. Dkt. #88-1 at 144, 207-08, 303, 323), for example, would convey the hopelessness, destitution, and unrelenting violence on the streets where Petitioner's crime occurred – a crime committed by a nineteen-year-old whose younger brother had collapsed and died only hours before.

The prosecutor faulted Petitioner because he never "got back up" after getting "knocked down" at home. Tr. II 2324-25. But Petitioner's violent community made it exceedingly difficult to "get back up" or otherwise recover from the abuse and neglect that he suffered, in light of the community's "rampant" illegal activity and its troubling and pervasive "pattern of sex and violence." Dist. Dkt. #88-1 at 4. Among other problems, Petitioner lacked the "nurture and support that might have mitigated the impact of the repeated exposure to violence." *Id.* at 3 (per psychiatrist Richard G. Dudley). Counsel's deficient investigation left the jury ignorant of the community for whom the prosecutor sought justice: "Should the people of Meacham

Park not get justice in this case because he didn't take advantage of all the opportunities that were there for him?" Tr. II 2325.

Also erroneous was the district court's surmise that trial counsel reasonably selected which details to present from their client's background. App. 33-34 (citing *Ringo v. Roper*, 472 F.3d 1001, 1007 (8th Cir. 2007)). Counsel must first investigate the facts before making a "reasonable" decision of which ones to present. *Wiggins*, 539 U.S. at 527-28; *cf. Ringo*, 472 F.3d at 1007 (having obtained a report from a childhood development specialist, counsel decided not to call her because she would contradict other witnesses and disrupt the "flow" of the mitigation defense). Counsel could not make a reasonable decision to forgo testimony describing the community and neighborhood because they did not speak with the people who lived there. The issue is not merely that "the evidence was not as detailed as it could have been." *Ringo*, 472 F.3d at 1007. It is that counsel abandoned an entire category of readily available mitigating evidence. Petitioner was entitled to further review of his claim.

CONCLUSION

This Court should grant certiorari to review the important issues presented.

Respectfully Submitted,

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