CASE NO._____

In The
Supreme Court of the United States

KEVIN JOHNSON,

***Petitioner*,**

v.

STATE OF MISSOURI,

***Respondent*.**

Petition for Writ of Certiorari to the Supreme Court of Missouri

THIS IS A CAPITAL CASE
EXECUTION SCHEDULED NOVEMBER 29, 2022

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CAPITAL CASE

QUESTIONS PRESENTED

Nineteen years old at the time of the offense, Petitioner Kevin Johnson was charged with first degree murder for fatally shooting a White police officer in the troubled and impoverished Black neighborhood of Meacham Park in St. Louis County, Missouri. The killing occurred about two hours after the sudden collapse and later death of Johnson's twelve-year-old brother. Johnson believed that the police at the scene – including the victim, Sgt. William McEntee – were negligent in attending to his collapsed brother. The evidence was that Johnson yelled "You killed my brother" before firing the first of several shots at Sgt. McEntee.

A mistrial ended Johnson's first trial, with jurors divided 10-2 in favor of second degree murder over first degree murder, which includes the element of deliberation or "cool reflection." Mo. Rev. Stat. § 565.002(5). During the jurors' heated discussions, two White jurors "kept loudly repeating that they couldn't vote for 2nd degree because Kevin would get out and hunt them down," and one of them "kept yelling things about 'your neighborhoods,' and 'you people,' when talking to Black jurors." App. 67. Those same two jurors held out for a verdict of first degree murder to the end. App. 70–71.

The terms "you people" and "your neighborhoods" are familiar "codewords" that reflect an "othering" process through which White people such as the speakers are "generally perceived as superior" while the Black people being described are "perceived as inferior." App. 102–03 (per Prof. Jason Okonofua, Dept. of Psychology, University of California-Berkeley). The jurors' remarks also reflect the "classic negative stereotype" that Black people are "prone to violence and are a threat to white women in particular." App. 103–04. Racial bias, then, prevented Johnson's first jury from reaching a unanimous verdict of second degree murder. A second jury later convicted Johnson of first degree murder and sentenced him to death.

The case presents the following questions for review:

1. In light of a court's duty to issue a remedy that "neutralize[s] the taint of a constitutional violation" while avoiding the grant of "a windfall to the defendant," *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), did Johnson's retrial before a second jury that convicted him of first degree murder and sentenced him to death remedy the constitutional violation from the first trial, at which two racist jurors prevented a unanimous verdict on a lesser offense?

2. Does the Eighth Amendment forbid the death penalty for crimes committed by offenders under the age of 21, or, at the least, in the case of a 19 year old offender who suffered from significant mental impairments?

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 STATE OF MISSOURI was the appellee in the court below.

No party is a corporation.

RELATED PROCEEDINGS

United States Court of Appeals for the Eighth Circuit:

Kevin Johnson v. Troy Steele, No. 18-2513 (habeas corpus appeal)

United States District Court for the Eastern District of Missouri:

Kevin Johnson v. Troy Steele, No. 4:13-cv-02046-SNLJ (habeas corpus)

Supreme Court of Missouri:

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

Kevin Johnson v. State of Missouri, No. SC92248 (post-conviction appeal)

Circuit Court of St. Louis County, Missouri:

State of Missouri v. Kevin Johnson, No. 05CR-02833-01 (trial)

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kevin Johnson respectfully requests that a writ of certiorari issue to review the order and judgment of the Missouri Supreme Court, which overruled Johnson's motion to recall the mandate from its earlier judgment affirming Johnson's conviction and sentence on direct appeal, and which denied his petition for writ of habeas corpus. App. 1.

OPINIONS BELOW

The Missouri Supreme Court's order overruling Johnson's motion to recall the mandate and denying his petition for writ of habeas corpus is unpublished and appears in the Appendix at App. 1.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a). The Missouri Supreme Court overruled Johnson's motion to recall the mandate and denied his petition for writ of habeas corpus on August 30, 2022. App. 1. This petition is timely under Rule 13.1.

The state court's summary ruling must be construed as a ruling on the merits. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011); *accord Harris v. Reed*, 489 U.S. 255, 265 (1989) (presumption of a merits determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis).

Both of the claims at issue in this petition were asserted below in accordance with state procedural law, which supports the presumption of a merits ruling. *See Richter*, 562 U.S. at 99. Johnson's equal protection, due process, and Sixth Amendment claim asserts that jurors from the first of his two trials made racially biased statements during deliberations, that the biased jurors prevented the jury from reaching a unanimous verdict of second degree murder instead of deadlocking 10-2 in favor of that offense over the charged offense of first degree murder, and that Johnson's retrial did not remedy the violation. That claim was brought on habeas corpus, which lies in Missouri when the prisoner's conviction or sentence violates the constitution or laws of Missouri or the United States. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. 2003); *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. 2001). Habeas corpus is available when, among other circumstances, the prisoner demonstrates "cause" for not asserting the claim on direct appeal or initial post-conviction proceedings, and the resulting "prejudice" that accompanies the relevant constitutional claim. *State ex rel. Taylor v. Moore*, 136 S.W.3d 799, 801–02 (Mo. 2004); *Amrine*, 102 S.W.3d at 546; *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. 2010). Missouri courts generally apply the same "cause" and "prejudice" standards that govern on federal habeas corpus review. *Nixon v. Jaynes*, 63 S.W.3d at 210.

In the court below, Johnson demonstrated "cause" for not bringing the racist-jurors claim on direct appeal or initial post-conviction proceedings. It was not until February 9, 2010, that racist statements from jury deliberations became admissible in Missouri. *See Fleshner v. Pepose Vision Inst.*, 304 S.W.3d 81, 87–90 (Mo. 2010).

Johnson's two trials took place in 2007, his direct appeal was decided in 2009, and his amended post-conviction pleading was filed January 6, 2010 – or one day before the jurisdictional deadline. App. 18–19. Johnson had no avenue to bring his claim when the underlying evidence was inadmissible.

In addition, it was not known to Johnson that jurors at the first trial made racist statements until the jurors were interviewed by federal habeas counsel. "Cause" exists when the prisoner's claim "was not known or reasonably discoverable" on appellate or post-conviction review. *Taylor*, 136 S.W.3d at 801. The law presumes that a seated juror is "a fair and impartial juror." *State v. Brandolese*, 601 S.W.3d 519, 527 & n.7 (Mo. 2020). The law also presumes that jurors follow the trial court's instructions, *State v. McFadden*, 391 S.W.3d 408, 424 (Mo. 2013), including the directive in all criminal cases to "perform your duties without prejudice or fear, and solely from a fair and impartial consideration of the whole case." MAI-CR3d § 302.01 (pattern instruction); *Brandolese*, 601 S.W.3d at 527 n.7. Johnson had no notice of any evidence to contradict those presumptions. *See Williams v. Taylor*, 529 U.S. 420, 435, 443 (2000) (defendant lacked notice that a juror was the ex-wife of an investigating police officer or that the prosecutor had represented the juror during her divorce, where the juror disclosed no such relationships on voir dire).

The juror claim also shows prejudice: in addition to the likelihood that the racist statements of the two dissenting jurors deprived Johnson of a lesser conviction and sentence than what he received on retrial, the racist statements themselves prevented a fair trial. "[S]tatements evincing ethnic or religious bias or

prejudice deny the parties their constitutional rights to a trial by 12 fair and impartial jurors and equal protection of the law." *Fleshner*, 304 S.W.3d at 89.

This Court also has jurisdiction to review the Missouri Supreme Court's rejection of Johnson's Eighth Amendment claim. Habeas corpus is available in Missouri when a prisoner's sentence exceeds what the law authorizes. *State v. Whitfield*, 107 S.W.3d 253, 269 (Mo. 2003). Such an error "cannot be waived," even by the prisoner's failure to raise the claim in earlier proceedings. *Id.* If indeed the Eighth Amendment forbids the death penalty, the Missouri Supreme Court has authority to sustain the claim on habeas corpus because the sentence "is in excess of that authorized by law." *Id*. The "usual waiver rules will not apply" when the prisoner's claim, if sustained, would deprive the state of the power to impose the death penalty on him or her. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 400–01 (Mo. 2003), *aff'd sub nom. Roper v. Simmons*, 543 U.S. 551 (2005).

Johnson's showing of "cause" and "prejudice" further demonstrates the procedural soundness of the Eighth Amendment claim. "Cause" exists for the late assertion of a claim that is "so novel that its legal basis [was] not reasonably available" in the usual proceedings. *Whitfield*, 107 S.W.3d at 269 n.19. Johnson relied below on numerous decisions from this Court, including *Moore v. Texas*, 137 S. Ct. 1039 (2017) ("*Moore I*"); *Moore v. Texas*, 139 S. Ct. 666 (2019) ("*Moore II*"); and *Hall v. Florida*, 572 U.S. 701 (2014), which establish that a court is bound by scientific consensus when it bears upon the Eighth Amendment issue of the moral culpability of a particular class of offenders. App. 16–17, 21, 47, 55–56, 63. Those decisions did not issue until years after Johnson's appeal, and well after the

jurisdictional filing deadline for post-conviction relief. *See* Mo. Sup. Ct. R. 29.15(b), (g). Johnson, then, demonstrated "cause" for not raising his claim during the initial appellate and post-conviction proceedings, as well as "prejudice" because he is under a sentence of death even though intervening law forbids that punishment under the circumstances of his case.

Johnson's Eighth Amendment claim was also cognizable below on a motion to recall the mandate. That relief is available when "the decision of a lower appellate court directly conflicts with a decision of the United States Supreme Court upholding the rights of the accused." *Whitfield*, 107 S.W.3d at 265. As explained, Johnson relied below on *Moore I*, *Moore II*, and *Hall* to urge that courts must defer to scientific consensus when assessing the moral blameworthiness of any particular class of offenders under the Eighth Amendment. App. 16–17, 21, 47, 55–56, 63. In order to seek recall of the mandate, Johnson need not have advanced such a death-eligibility claim on direct appeal. *See*, *e.g.*, *Whitfield*, 107 S.W.3d at 276 (Limbaugh, J., dissenting) (lamenting that mandate was recalled "merely because it is later determined that the conviction or sentence should not have been affirmed in light of a constitutional claim that was not asserted").

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Johnson 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 Johnson was just 19 years old. The trial evidence showed that Kirkwood officers were patrolling the neighborhood, searching for Johnson in order to arrest him on an alleged probation violation, when Johnson's 12-year-old brother – Joseph Long, known to the family and neighborhood as "Bam Bam" – suddenly collapsed in his 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.[1]

[1] Johnson 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." Johnson's testimony from his first trial was presented via videotape by the

Johnson, 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. Tr. II 1833–36, 1847–48; Tr. I 772–88. From Johnson's vantage, later confirmed by other observers, the responding police appeared indifferent to Bam Bam's welfare and were more interested in arresting Johnson 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. When Johnson's mother, Jada Tatum, tried to tend to Bam Bam, 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 they removed Bam Bam on a stretcher about 30 minutes later. Johnson learned that his brother had died at a nearby hospital from what turned out to be a congenital heart defect. Tr. II 1220–33, 1299, 1364, 1857–58; Tr. I 788. Johnson, in an outpouring of grief, kicked a bedroom door off of its hinges. Tr. I 788. About two hours after Bam Bam's collapse, Sgt. McEntee returned to the neighborhood in response to a fireworks disturbance. Tr. II 1165, 1170, 1383. Eyewitnesses testified that Johnson approached Sgt. McEntee in his patrol car, squatted down to the passenger window, yelled "You killed my brother,"

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prosecution at the second trial. The videotape was admitted as State's Exhibit 80 and was played to the jury with minor redactions. Tr. II 1293. For clarity's sake, counsel have cited to the first trial transcript when referring to Johnson's testimony, rather than to the videotape that was played at the retrial.

and then shot Sgt. McEntee about five times, hitting him in the head and upper torso. Tr. II 1299–1300, 1320–22, 1346–49, 1384–88, 1442–43, 1790–91.

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. Tr. II 1349, 1668–75. Next door to Sgt. McEntee's location was the home where Johnson's young daughter lived, and Johnson had run there to see his daughter "one last time." Tr. I 800–05, 833–36; Tr. II 925–53, 1693–94. Johnson 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. Tr. I 804, 835–36; Tr. II 1353–55, 1677–78, 1809–10. The medical examiner testified that there was no "stippling" around the fatal head wound, so that the shot was fired from at least two feet away or from as far away as ten feet or more. Tr. II 1821.

Johnson's initial trial began on March 26, 2007. The parties' chief dispute was whether Johnson killed Sgt. McEntee after deliberation, "which means cool reflection upon the matter for any length of time no matter how brief." MAI-CR3d § 314.02; Mo. Rev. Stat. § 565.002(5). The prosecutor argued that Johnson deliberated during the process of firing his gun six times, and then deliberated again when shooting Sgt. McEntee a second time in order to "finish the job." Tr. I 878–79, 888, 894. Defense counsel pointed out that Johnson had not gone to the hospital and did not learn of his brother's death until about 7 p.m., and the evidence was that Sgt. McEntee was shot at about 7:30. Tr. I 146, 907–08. Counsel urged that Johnson made a quick and "hotheaded decision" after seeing Sgt. McEntee "smirk" at him,

only a couple of hours after seeing Sgt. McEntee at the scene of his brother's death: "You can imagine the degree of frustration to see someone doing something to your mother and knowing that your brother is on the ground dying, and these folks are stepping over him like he's just some trash discarded." Tr. I 905, 909–10, 913. Johnson "turned, he saw him, there his face was, and the only thing he could see was that same smile, and he started shooting." Tr. I 913. As for the second shooting, counsel emphasized that Johnson ran to his girlfriend's house rather than in the direction that Sgt. McEntee's car rolled down the street. Tr. I. 923–24. Johnson turned his direction, saw Sgt. McEntee by surprise, and "just shot him" without "thinking this thing through." Tr. I 925–26.

Unknown to the trial jurors was Johnson's significant mental illness at the time of the offense, as well as his documented history of suicidality, psychiatric hospitalizations, a major depressive disorder, auditory hallucinations, and severe impulsivity. App. 228–31, 241–44. Neuropsychologist Daniel Martell evaluated Johnson during federal habeas corpus proceedings. App. 223. Dr. Martell noted a "focal deficit in frontal lobe executive functioning," which impairs planning, response inhibition, and impulse control. App. 242. Focal frontal lobe dysfunction is associated with "aggressive dyscontrol," intermittent explosive disorder, and a tendency for subjects to be "oblivious to the future consequences of their actions" and to be "guided by immediate prospects only." App. 242–43. The combination of Johnson's psychiatric disorders, frontal lobe impairment, and pathological impulsivity "greatly contributed" to the crime. App. 244. Johnson's "moral compass was effectively 'offline' at the time of the instant offense." *Id.*

Forensic psychiatrist Richard Dudley described Johnson's history of abuse and neglect as "among the most extreme cases that this psychiatrist has ever seen in his 40 years of practice and 30+ years of performing psychiatric evaluations in connection with capital litigation." App. 142. On the day of the crime, Johnson faced the emotionally triggering event of seeing one of the officers whom he blamed for his brother's death from two hours earlier. According to Dr. Dudley, Johnson was so "overwhelmed by and unable to cope with all of the traumas" he had endured that he "lost control," and experienced a "dissociative episode" in which his "normal integration of consciousness, memory, identity, emotion, perception, body representation, motor control, and behavior was disrupted." App. 150–51.

Even without the benefit of mental health evidence, jurors at the first trial struggled with the issue of "cool reflection" during their deliberations. They wanted to consult a dictionary or additional guidance beyond the court's instructions, but no such guidance was available. App. 66, 70, 74–77. At the end of the first day, the jurors voted seven to five in favor of second degree murder. App. 70. Deliberations became tense after the first day, and the jurors were largely divided along racial lines. App. 66–67, 69–70, 73. At one point a White juror accused a Black juror of trying to intimidate her. App. 66, 74. The Black juror was summoned to chambers, but the judge allowed her to remain on the jury. App. 74. At another point, after deliberations became "loud and heated," the bailiff entered the room and told the jurors to "calm down" and "use [y]our common sense." App. 67, 71, 80. As the second day of deliberations continued, the jurors made progress toward a unanimous vote for second degree murder. App. 70–71, 74, 80. The initial vote that morning was 8-4,

with subsequent votes of 9-3 and 10-2. App. 70–71.

Racial tensions grew as the dissenters' numbers diminished. "Two white women kept loudly repeating that they couldn't vote for 2nd degree because Kevin would get out and hunt them down, which just seemed racist to me," one of the jurors reported. App. 67. That juror believed that the dissenters "weren't listening and [were] only voting for 1st degree because a young Black man killed a cop." *Id.* Another juror argued just the opposite: that Black jurors were voting for second degree murder only "because Kevin is Black too." *Id.* Another dissenter "kept yelling things about 'your neighborhoods,' and 'you people,' when talking to Black jurors." *Id.* A White juror "said she did not believe police harassed Black people or that there could be bad relationships between Black communities and police." App. 70.

After about an hour and a half of deliberations on the second day, the jurors sent a note advising the court that they were deadlocked. App. 82–83. The note stated, "We all agree on the first two rules, law, under Instruction Number 5, but not the third," App. 83, which is consistent with the jury dividing over the element of "cool reflection" under the jury's instructions. The note asked, "Is there any additional instruction or information?" App. 83. The parties agreed that the court should order the jury to continue deliberating, that the court should refrain from giving a "hammer" instruction, and that the jurors should be referred to the written instructions. App. 83–84. The court so instructed the jury. App. 84.

One juror switched her vote to second degree murder after the court's directive, leaving a split of 10-2. App. 67, 71. Multiple jurors believed that the jury would be able reach a unanimous verdict. App. 67, 71, 74. The jury did not send any

additional notice of a deadlock. Nevertheless, some four and a half hours after ordering more deliberations, the court summoned the jurors to the courtroom and observed that "I've heard nothing from you." App. 84. The record does not reflect what event, if any, prompted the court to inquire of the jurors. The court asked each juror whether "there's any reasonable likelihood that the jury would ever be able to reach a unanimous verdict in this case," and all twelve answered "no." App. 85–87. The court declared a mistrial, with neither party objecting. App. 87–89.

Numerous jurors state that they were taken aback that the court had summoned them, that they did not understand the court's question when they were polled, that they were surprised to be dismissed, and that they believe the jury could have reached a unanimous verdict with more deliberation. App. 68, 71–72, 79. One juror "felt frustrated and angry that the process had been halted so suddenly." App. 80. Two jurors felt pressured by the presence of uniformed police officers in the courtroom. App. 71, 75. "We were aware from the beginning of the trial that cops were going to be heavily packing the courtroom," one of them explained. App. 75. "There were many police in the courtroom the day we were polled, and I believe it had an impact on the jurors' answer to the poll." *Id.*

Following the court's grant of a mistrial, a second jury trial began about seven months later. The prosecution exploited the racism-induced mistrial by substantially modifying, and refining, its case the second time around:

●*First*, the prosecution obtained a less racially balanced jury than at the initial trial, with a split of nine White and three Black jurors as compared to six and six. App. 31–32. About two and a half weeks after the retrial, a former St. Louis

County prosecutor who frequently visited the office stated that "everyone" in the office believed that the "verdict was split because there were six black members on the jury." App. 32. A divided Missouri Supreme Court later denied Johnson's *Batson* claim on direct appeal. *See State v. Johnson*, 284 S.W.3d 561, 570–71 (Mo.) ("*Johnson I*") (principal opinion), *cert. denied*, 558 U.S. 1054 (2009); *id.* at 589–91 (Teitelman, J., dissenting).

●*Second*, the prosecutor watered down the standard for first degree murder, arguing on 14 separate occasions that the evidence established deliberation and cool reflection because Johnson made a "conscious decision" to kill Sgt. McEntee. Tr. II 1908–09, 1913, 1920–21, 1977, 1988, 1995; *see also Johnson I*, 284 S.W.3d at 573–74 (finding no plain error in the "conscious decision" argument).

●*Third*, the prosecution created a reenactment video for the retrial, in which a detective portrayed the initial shooting of Sgt. McEntee in the manner described by Johnson's trial testimony. Tr. II 1747–48. Johnson's testimony was that he stood near the passenger side window of the police car, saw Sgt. McEntee smile, and "I just started shooting." Tr. I 823–24. The prosecutor stopped the tape at several different points and had the detective describe how he could not see who the driver was until he was crouched down with his arm all the way into the car – even though the detective is five inches taller than Johnson (and thus, had to bend down farther to see across the inside of the car), and even though Johnson testified that he shot Sgt. McEntee from outside the car rather than by reaching through the window. Tr. I 827; Tr. II 1750–52, 1756. The prosecutor nevertheless argued that the reenactment video showed Johnson's deliberation. "He can't possibly see him smile

at him unless he is squatting down and looking inside that car," the prosecutor argued. Tr. II 1992. "What he's doing is making sure that that's the guy he wants to kill inside that car. That is cool reflection before he shoots the guy." *Id.*

●*Fourth*, the prosecution offered a video-taped version of Johnson's initial trial testimony as part of its case-in-chief, eliminating the opportunity for the defense to adjust its case to the modified state's presentation in the second trial. Tr. II 1281–93; State's Ex. 80. The prosecutor's maneuver surprised defense counsel, whose opening statement pledged that the defense would call Johnson as a witness. Tr. II 1093. The defense rested without calling Johnson. Tr. II 1889.

The second jury ultimately found Johnson guilty of first degree murder and sentenced him to death. The Missouri Supreme Court affirmed the conviction and sentence on direct appeal, and it later affirmed the trial court's denial of post-conviction relief. *See Johnson I*, 284 S.W.3d at 568–89; *Johnson v. State*, 406 S.W.3d 892, 899–909 (Mo. 2013) ("*Johnson II*"), *cert. denied*, 571 U.S. 1240 (2014). The federal courts thereafter denied habeas corpus relief. *See Johnson v. Steele*, No. 4:13-CV-2046-SNLJ, 2018 WL 3008307 (E.D. Mo. June 15, 2018) (amended memorandum and order denying petition); *Johnson v. Steele*, 999 F.3d 584 (8th Cir. 2021) (denying certificate of appealability and affirming district court's refusal to recuse), *cert. denied*, 142 S. Ct. 1376 (2022).

On July 12, 2022, Johnson asserted the two claims at issue here by petitioning the Missouri Supreme Court for a writ of habeas corpus and moving that court to recall its mandate of affirmance from direct appeal. App. 4. About six weeks later, the court below scheduled Johnson's execution for November 29, 2022. App.

2–3 (order dated Aug. 24, 2022). The court then denied Johnson's motion and petition on August 30, 2022. App. 1. This petition follows.

REASONS FOR GRANTING THE PETITION

The jurors at Kevin Johnson's initial trial were split along racial lines between the charged offense of first degree murder and the lesser offense of second degree murder. Two White jurors "kept loudly repeating that they couldn't vote for 2nd degree because Kevin would get out and hunt them down," and one of them "kept yelling things about 'your neighborhoods,' and 'you people,' when talking to Black jurors." App. 67, 70. Those same two jurors were the two who insisted on a first degree murder verdict until the court declared a mistrial. App. 70–71. There is little question that racial bias infected the first jury's decision-making. The issue, then, is whether a new trial before a new jury cured the error at the first trial, at which all ten of the non-racist jurors voted for the lesser offense. But, rather than neutralizing the racism-induced mistrial that prevented a lesser conviction for which ten non-racist jurors had voted, Johnson's retrial allowed a different jury to convict him of the greater offense and sentence him to death. "Far from curing the error, the trial caused the injury from the error." *Lafler v. Cooper*, 566 U.S. 156, 166 (2012) (holding that an otherwise fair trial did not cure counsel's deficient performance in plea bargaining).

Aside from the events of his first trial, Johnson cannot constitutionally be executed in light of his age at the time of the offense (19) as well as his mental impairments. Newly available scientific evidence conclusively proves that the brain does not complete its development until after a person is beyond the age of 21. App.

121–22 (per neuropsychologist Dr. Erin Bigler). A late adolescent of 18 to 20 years has the intellectual maturity of an adult but the emotional maturity and response inhibition of a younger teenager. App. 134–35 (per developmental psychologist Laurence Steinberg). Concurrent with these recent scientific developments are legal developments more strictly enforcing the requirement that courts follow scientific consensus when assessing the blameworthiness of any particular class of defendants under the Eighth Amendment. *See*, *e.g.*, *Moore I*, 137 S. Ct. at 1049–53 (requiring judicial adherence with numerous clinical standards governing intellectual disability); *Hall*, 572 U.S. at 712 (Florida method of determining intellectual disability "disregards established medical practice").

Just as late-adolescent offenders lack the capacity to be deserving of the law's greatest punishment, Johnson himself has impairments that limit his capacity for "planning, response inhibition, cognitive flexibility and impulse control." App. 242 (per neuropsychologist Dr. Martell) at 20. As a result of those impairments, Johnson's "moral compass was effectively 'offline' at the time of the instant offense." App. 244. Johnson's death sentence offends the Eighth Amendment.

I. The Court should grant certiorari to clarify that a retrial was not an adequate remedy for the constitutional violation from Johnson's first trial, when two racist jurors prevented him from receiving a lesser conviction and sentence.

The dissenting jurors' racist statements violated Johnson's fundamental constitutional rights by depriving him of a lesser conviction and sentence than those imposed by a second jury on retrial. "It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017).

Due process requires a fair trial, which itself requires the participation of twelve "fair and impartial" jurors who are "free from bias or prejudice." *Fleshner*, 304 S.W.3d at 87 (quotations omitted). Statements of ethnic or religious bias from even a single juror during deliberations "deny the parties their constitutional rights to a trial by 12 fair and impartial jurors and equal protection[.]" *Id.* at 89. Our law "punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). That duty is all the more important when the state seeks the ultimate punishment. Because of the qualitative difference between death and any other permissible form of punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Faced with a crime in which a Black defendant killed a White police officer in a troubled Black neighborhood, the jurors themselves divided along racial lines in their view of the case. App. 67, 69–71, 73. Tempers flared, with two White jurors "loudly repeating that they couldn't vote for 2nd degree because Kevin would get out and hunt them down." App. 67. A White juror "kept yelling things about 'your neighborhoods,' and 'you people,' when talking to Black jurors." *Id.* One juror explained that "The white jurors came in with their mind already made up that it was 1st degree murder and were ready to go home before we even started discussing the evidence . . . . with the Black jurors believing it was not 1st degree murder because of what happened with Kevin's little brother's death." App. 73.

Terms such as "you people" and "your neighborhoods" are familiar "codewords" that "divide people into groups of us versus them," explains University

of California psychology professor Dr. Jason Okonofua. App. 91, 102. The terms reflect a process of "othering," which "underlies racism in general and was present in deliberations in Mr. Johnson's case." App. 102. Within the context of Johnson's case and the events of trial, the terms "you people" and "your neighborhoods" reflect negative stereotypes about Black people – dangerous, prone to violence, lazy – that the speakers applied to specific individuals "including Black jurors and a Black defendant." App. 103. Through the "othering" process, "People like the speaker (white people) are generally perceived as superior, while people being described by the speaker (in this case Black people) are perceived as inferior." *Id.*

Through the act of holding out for a verdict of first degree murder, the dissenting jurors meant to keep in their subordinated place "you people" and "your neighborhoods"—descriptions that apply to the Black jurors, Kevin Johnson, and the community of Meacham Park alike. Such bias is also reflected in the holdouts' stated concern they could not vote for second degree murder because "Kevin would get out and hunt them down," or "get out and find [them] at the Wal-Mart." App. 67, 70. Those concerns reflect "classic negative stereotypes" about Black people, specifically, that they are "prone to violence and are a threat to white women in particular." App. 103–04. Dr. Okonofua concludes that "stereotypic associations between Black males and violent crime were likely activated during the trial and adversely influenced the votes of some White jurors." App. 114.

By wholly denying relief despite Johnson's prima facie showing of racial bias from the two mistrial-inducing jurors, App. 1, the court below presumably believed that Johnson's retrial cured the error. But that belief is misguided under this

Court's precedents. Remedies for any constitutional injury "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). A proper remedy must "neutralize the taint of a constitutional violation" but without awarding a "windfall" to the defendant or "needlessly squandering" the State's resources. *Lafler*, 566 U.S. at 170 (quotations omitted). The appropriate remedy is one that "as much as possible restores the defendant to the circumstances that would have existed had there been no constitutional error." *United States v. Stein*, 541 F.3d 130, 146 (2d Cir. 2008) (quotation omitted); *Ewing v. Horton*, 914 F.3d 1027, 1033 (6th Cir. 2019) (same). A court should "put the defendant back in the position he would have been in if the . . . violation had not occurred." *United States v. Blaylock*, 20 F.3d 1458, 1468 (9th Cir. 1994).

The grant of a new trial will not always cure a constitutional error or restore the defendant to the previous status quo. The Court's ruling in *Lafler* illustrates the point. The defendant in *Lafler* rejected a plea bargain based on counsel's deficient advice. He was subsequently convicted at an otherwise error-free trial and received a sentence that was more than three-and-a-half times longer than the one offered in the plea. *See* 566 U.S. at 161–62. The "fair" trial itself did not make the defendant whole. "Far from curing the error, the trial caused the injury from the error," the Court explained. *Id.* at 166. The Court, then, rejected a rigid and all-encompassing rule that "a fair trial wipes clean" any constitutional injury that preceded it. *Id.* at 169–70. The Court restored the defendant to the position he occupied before counsel's error: it held that the prosecution must reoffer the agreement on remand,

but the trial court need not accept its terms (just as it would not have been obligated to do so at the time of the original offer). *Id.* at 174–75.

Notwithstanding *Lafler*, a fair trial will cure most prejudicial constitutional errors in most cases. In the Sixth Amendment context, for example, "the presumptively appropriate remedy for a trial with an ineffective lawyer is a new trial with an effective one." *United States v. Bergman*, 746 F.3d 1128, 1133 (10th Cir. 2014) (per Gorsuch, J.). But that general rule does not limit an aggrieved defendant to a trial or retrial that cannot cure the actual constitutional harm suffered. *See*, *e.g.*, *Stein*, 541 F.3d at 144–46 (dismissal of indictment affirmed, where prosecution pressured defendants' employer into withholding the funding of defense counsel, leaving defendants without counsel of choice going forward).

In Johnson's case, the only make-whole remedy is to reduce his conviction to second degree murder. That, after all, is the verdict favored by the ten jurors who did not express racist sentiments and whose verdict was thwarted by the two White dissenters. App. 67, 70–71, 73. At the end of the first trial, the non-racist jurors favored second degree murder by a vote of ten-to-zero. Far from remedying the violation, the retrial reset the score as zero-to-zero.

The retrial also aided the prosecution in numerous respects. When the government reprosecutes, "[I]t gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own." *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980). A retrial "affords the Government the opportunity to re-examine the weaknesses of its first presentation in order to strengthen the second." *United States v. Scott*, 437 U.S. 82, 105 n.4 (1978)

(Brennan, J., dissenting). The prosecution seized that advantage at Johnson's retrial, and did so with a less racially balanced jury. Knowing that the initial jury had struggled over the element of deliberation and "cool reflection," App. 83, the prosecutor changed his strategy. On retrial the prosecutor repeatedly argued that Johnson made a "conscious decision" to kill Sgt. McEntee, and that the "conscious decision" showed cool reflection. Tr. II 1908–09, 1913, 1920–21, 1977, 1988, 1995. The prosecutor made a reenactment video of Johnson's testimony, arguing that the initial shooting of Sgt. McEntee could not have occurred as Johnson described. Tr. II 1992. And the prosecutor offered Johnson's own trial testimony as the videotaped admission of a party-opponent, thereby hamstringing the defense from enhancing and refining its most important evidence at the second trial.

The retrial, then, left Johnson considerably worse off for having had two racist jurors at the initial trial. The Court should grant certiorari to clarify that a second trial did not "wipe clean" the constitutional injury from Johnson's first trial, *Lafler*, 566 U.S. at 169, which would have ended in a verdict of second degree murder but for the holdout jurors' racist sentiments. The Court should then remand the case for further proceedings, to include an evidentiary hearing as Johnson requested below. App. 37–39.

II. The Court should determine whether the Eighth Amendment permits the imposition and carrying out of a death sentence on a defendant who was 19 years old at the time of the crime and whose culpability is diminished by significant mental impairments.

Kevin Johnson was 19 years old when he shot and killed Sergeant William McEntee, believing that police indifference contributed to his brother's death earlier that day. There is no longer any debate about what the science says: at age 19,

Johnson lacked the behavioral regulation tools that do not develop before the age of 21 to 25. Late adolescent offenders (age 18–20) lack the "extreme culpability mak[ing] them the most deserving of execution." *Roper v. Simmons*, 543 U.S. 551, 568 (2005). Johnson's mental impairments, in addition to his youth, diminished his ability to cope with emotion-arousing triggers such as the death of his younger brother. Under the circumstances, the Court should decide and sustain Johnson's Eighth Amendment challenge.

Two guiding principles follow from the Court's decision in *Simmons* and subsequent cases. First, the Eighth Amendment forbids the execution of those who, due to age or disability, lack the moral culpability that would justify such a harsh punishment. *Simmons*, 543 U.S. at 571; *Atkins v. Virginia*, 536 U.S. 304, 306 (2002). Second, where a categorical exemption to the death penalty sits at the intersection of law and science, courts are duty-bound to heed the science. *Moore I*, 137 S. Ct. at 1044 (exemption from the death penalty due to intellectual disability should be "informed by the views of medical experts.").

Circumstances have materially changed in the intervening years since the Court decided *Simmons*—changes that raise important issues of federal law that should be settled by this Court. For one thing, the Court's decisions since *Simmons* have strengthened the requirement that courts follow scientific consensus when deciding questions of death-eligibility. *See Moore I*, 137 S. Ct. at 1049–53 (requiring judicial adherence with numerous clinical standards governing intellectual disability); *Moore II*, 139 S. Ct. at 668–72 (same). For another, a large body of intervening scientific developments, which Johnson relied on below, demonstrate a

consensus that the brain's capacity for emotional regulation and impulse control do not mature until the age range of 21 to 25. Finally, national trends have seen the near-elimination of executions and death sentences for offenders who committed their crimes between the ages of 18 and 20.

A. The consensus of the medical community is that the brain is not fully developed until well after age 18.

The last several years have seen significant advances in developmental neuroscience, with much of the new evidence coming from neuroimaging. [2] This

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[2]Laurence Steinberg & Grace Icenogle, *Using Developmental Science to Distinguish Adolescents and Adults Under the Law*, 1 Ann. Rev. Developmental Psych. 21 (2019) (summarizing imaging strategies to measure of whole brain connectivity, and white and grey matter development); Catherine Lebel et al., *A Review of Diffusion MRI of Typical White Matter Development from Early Childhood to Young Adulthood*, 32 NMR Biomedicine E3778 (2019) (development of white matter continues throughout the twenties and into the thirties); Eveline Crone & Nikolaus Steinbeis, *Neural Perspectives on Cognitive Control Development During Childhood and Adolescence*, 21 Trends Cognitive Sci. 205 (2017) (discussing how prefrontal maturation supports the development of executive functioning); Christian Tamnes et al, *Development of the Cerebral Cortex Across Adolescence: A Multisample Study of Inter-Related Longitudinal Changes in Cortical Volume, Surface Area, and Thickness*, 37 J. Neuroscience 3402 (2017); AE Lyall et al., *Insights into the Brain: Neuroimaging of Brain Development and Maturation*. J Neuroimaging Psychiatry Neurol. (2016) (noting advent of structural neuroimaging has contributed critical information about the developmental trajectories of brain development that would otherwise not have been possible); Budhachandra Khundrakpam et al, *Brain Connectivity in Normally Developing Children and Adolescents*, 134 Neuroimage 192 (2016) (discussing how development result in greater brain efficiency and specialization); Kathryn Mills et al, *Structural Brain Development Between Childhood and Adulthood: Convergence Across Four Longitudinal Samples*, 141 Neuroimage 273 (2016); (summarizing research that demonstrates grey matter thinning continues throughout the twenties); Hugo Schnack et al, *Changes in Thickness and Surface Area of The Human Cortex and Their Relationship with Intelligence*, 25 Cerebral Cortex 1608 (2015); Anders Fjell et al, *Development and Aging of Cortical Thickness Correspond to Genetic Organization Patterns*, 112 Proc. Nat'l Acad. Sci. 15462 (2015) (cortical thinning (grey matter) begins to plateau between ages 25 and 30); Kathryn Mills et al, *The Developmental Mismatch in Structural Brain Maturation During Adolescence*, 36 Developmental Neuroscience 147 (2014) (cortical thinning, associated with grey matter volume, continues through age 26); Daniel Simmonds

data allows researchers to model how the brain changes across the developmental period. This highly sensitive imaging can measure the shape, surface area, and contours of the brain including the volumes of white and grey matter.[3]

Grey matter (neuronic brain cells) and white matter (myelinated connections between neurons) represent different aspects of neuron structure. White matter is associated with brain connectivity, and the abundance of white matter relative to grey is a key measure of maturation.[4] White matter connections are critically important to emotional regulation and impulse control.[5] The degree and accuracy of the neurotransmission, or connectivity, is dependent on the developmental stage of the brain; the greater the percentage of white matter the greater the connectivity. App. 116–17 (report of neuropsychologist Erin Bigler). The relatively undeveloped white matter of a late adolescent brain reflects the comparative inability of these youths to modulate their conduct when confronted with emotional triggers, and thus, their limited capacity for effective decision-making, self-control, and emotional processing. App. 122.

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et al, *Developmental Stages and Sex Differences of White Matter and Behavioral Development Through Adolescence: A Longitudinal Diffusion Tensor Imaging*, DTI Study, 92 Neuroimage 356 (2014) (demonstrating white matter connectivity is associated with improved self-control).

[3] Erin Bigler, *Charting Brain Development in Graphs, Diagrams, and Figures from Childhood, Adolescence, to Early Adulthood: Neuroimaging Implications for Neuropsychology*, 7 Journal of Pediatric Neuropsychology 27 (2021).

[4] *Id.*

[5] Scott, Elizabeth, Natasha Duell, and Laurence Steinberg, *Brain Development, Social Context, and Justice Policy*, Washington University Journal of Law and Policy 57 (2018).

In terms of the developing brain, although "all lobular areas mature at different rates, they all distinctly extend well beyond 20 years of age." *Id.* Dr. Bigler observes that, of the lobular areas, the "frontal lobe is the last to develop," which is important because the frontal and temporal lobes govern "emotional and impulse control, memory, intellectual and cognitive ability, including executive functioning." *Id. See also* Alexandra O. Cohen et al., *When is an Adolescent and Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 Psychol. Sci. 549–62 (2016) (results demonstrate diminished cognitive performance under brief and prolonged negative emotional arousal in 18- to 21-year-olds relative to adults over 21).

Dr. Bigler concludes, "The youngest age then for which one can make a reasonable scientific argument for maturity of brain function would be 21." App. 122. Recent neuroscientific research confirms that "brain development continues well into a person's twenties, meaning that young adults have more psychological similarities to children than to older adults." Vincent Schiraldi et al., *Community-Based Responses to Justice-Involved Young Adults, New Thinking in Community Corrections* (National Institute of Justice, Washington, D.C.), Sept. 2015, at 1, 3.

Those same scientific developments have led to a change in the diagnostic criteria for intellectual disability. To qualify as intellectually disabled, an individual must manifest the relevant intellectual and adaptive deficits before he or she turns 22, as opposed to 18. *See* American Association for Intellectual and Developmental Disabilities ("AAIDD"), *Intellectual Disability: Definition, Classification, and Systems of Supports* 1 (12th ed. 2021). The change reflects "recent research that has

shown that important brain development continues into our 20s." R.L. Shalock et al., *Twenty Questions and Answers Regarding the 12th Edition of the AAIDD Manual* (2021). Advanced brain-imaging techniques demonstrate "that a number of critical areas of the human brain continue their growth and development into early adulthood, including cortical gray matter volume, corpus callosum, and white matter." *Id.* The point is not that Johnson is intellectually disabled. It is that neuroscientists in the field of intellectual disability and elsewhere recognize that critical brain functions remain undeveloped during late adolescence.

It is not just the chemistry of brain maturation that demonstrates the immaturity of those under 21; an ever-growing body of psychological research confirms this as well. "Sensation-seeking" encompasses a wide array of risky behaviors and tends to peak at around the age of 19. For example, "as a general rule, adolescents and young adults are more likely than adults over 25 to binge drink, smoke cigarettes, have casual sex partners, engage in violent or other criminal behavior, and have fatal or serious automobile accidents, the majority of which are caused by risky driving or driving under the influence of alcohol."[6] Self-regulation, by contrast, refers to the ability to "modulate one's thoughts, feelings, or actions in the pursuit of planned goals"—including "impulse control, risk assessment, resistance to coercive influence, and attentiveness to the future consequences of one's decisions."[7] Research consistently shows that impulse control

[6] Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-taking*. 28 Dev Rev. 78 (2008).

[7] Steinberg, et al., *Around the World, Adolescence Is a Time of Heightened Sensation Seeking and Immature Self-regulation*, Developmental Science (March 2018) at 3, 28.

continues to develop into the early to mid-twenties. Developmental psychologist Laurence Steinberg and his colleagues have found that, under circumstances of emotional arousal, the brain of an 18- to 21-year-old functions in ways that are comparable to that of a 16- or 17-year old. *See* App. 135.[8] A late adolescent may be mature in logical reasoning but immature in emotional development, including "the ability to exercise self-control, rein in sensation-seeking, properly consider the risks and rewards of alternative courses of action, and resist coercive pressure from others." App. 134.

B. Johnson's mental impairments further diminish his culpability.

Research shows that brain development can be adversely affected by socio-economic factors such as poverty, neglect, and abuse. Joan Luby et al, *Association Between Early Life Adversity and Risk for Poor Emotional and Physical Health in Adolescence: A Putative Mechanistic Neurodevelopmental Pathway*, 171 JAMA Pediatrics 1168, 1168–1175 (2017). Late adolescent offenders have experienced childhood neglect and trauma at higher rates than average. Jessica Craig et al., *A Little Early Risk Goes a Long Bad Way: Adverse Childhood Experiences and Life-Course Offending in the Cambridge Study*, 53 J. Crim. Just. 34 (2017); Michael Baglivio et al., *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives*

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[8] *See also* Cohen, et al, *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, Psychological Science, 4, 549–62 (2016); Rudolph, M., Miranda-Dominguez, O., Cohen, A., Breiner, K., Steinberg, L., Fair, D. *At Risk Of Being Risky: The Relationship Between "Brain Age" Under Emotional States And Risk Preference*. Developmental Cognitive Neuroscience, *24*, 93–106 (2017).

of Juvenile Offenders, 3 J. Juv. Just. (2014). Exposure to community violence is associated with increased risks of learning difficulties, impulse regulation, conduct problems, and other adverse outcomes. Suzanne Estrada, et al., *Individual And Environmental Correlates of Childhood Maltreatment and Exposure to Community Violence: Utilizing a Latent Profile and a Multilevel Meta-Analytic Approach*, 51 Psychol. Med. 1 (2021); Emily Badger, *Have You Ever Seen Someone Be Killed?,* N.Y. Times May 25, 2018. Adverse Childhood Experiences (ACEs) have a direct connection to brain development. The research shows "frontal and temporal lobe regions and neural pathway connections ... are physically altered in brain development, when the brain is exposed to ACE factors." App. 113 at 5; s*ee also* Bigler, E.D., *Charting Brain Development in Graphs, Diagrams, and Figures from Childhood, Adolescence, to Early Adulthood: Neuroimaging Implications for Neuropsychology*, Journal of Pediatric Neuropsychology, 7, 27, 48–49 (2021).

Risk factors and adverse events feature prominently in Johnson's development. Forensic psychiatrist Richard Dudley observed that Johnson's entire childhood was defined by abuse and neglect. His father was incarcerated until he was about 13 years old. App. 142. Johnson's mother has a long history of mental illness and substance abuse and was unable to raise him and his siblings. App. 141. When Johnson was about four years old, he and his siblings were separated and sent to live with various family members, none of whom were able to adequately provide for him or his siblings. App. 141–42. Johnson was beaten by multiple caregivers; was directed by uncles and cousins to join in sex acts as a prepubescent child; and was left home alone as a toddler for days without food or heat. App. 142.

This physical abuse was followed by neglect in the form of rejection and abandonment. Johnson was sent to live with a maternal great-aunt, who was emotionally detached and over time became extremely physically and psychologically abusive. He was shunted among various other family members including his maternal grandmother. However, these caretakers also were often overwhelmed by the sheer number of children living in their homes. *Id.* Johnson was placed in numerous group homes from the age of 13. App. 143–44.

Community violence was pervasive in Johnson's life. His neighborhood of Meacham Park "ha[d] a lot of fist fights [and] … a lot of killings," with "bodily harm done out there pretty much every day," so that "growing up in Meacham Park meant that you or someone you love might die young." App. 154 (per Aaron Harris), 160 (per Dameion Pullum). 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. App. 165–66 (per Jason Clark), 169 (per Emmanuel Johnson), 176 (per Candace Tatum), 196 (per Marcus Tatum). Gangs had a "gargantuan" impact, and many young people expected to be "dead by 21." App.213–14 (per Franklin McCallie).

Dr. Dudley concludes that Johnson "lost control" on the day of the crime, following his brother's sudden death and a lifetime of traumas. App. 150–51. Johnson experienced a full-fledged "dissociative episode" in which his "normal integration of consciousness, memory, identity, emotion, perception, body representation, motor control, and behavior was disrupted." *Id.* Making matters worse, Johnson has a "focal deficit in frontal lobe executive functioning," which

impairs planning, response inhibition, and impulse control. App. 242 (per neuropsychologist Dr. Martell). Johnson's psychiatric disorders, frontal lobe impairment, and pathological impulsivity "greatly contributed" to the crime of shooting and killing Sgt. McEntee. App. 244. Johnson's "moral compass was effectively 'offline' at the time of the instant offense." *Id.*

C. The execution of any person for a crime committed while under the age of 21 offends common standards of decency as reflected in scientific consensus about the developing brain as well as prevailing court practices in Missouri and elsewhere.

Science has played an indispensable role in a comparable Eighth Amendment context: the categorical exemption from the death penalty of those with intellectual disability. Nine years after *Atkins*, the Court was again concerned with the "unacceptable risk" that a defendant lacking the requisite culpability could be subject to execution. *Hall v. Florida*, 572 U.S. 701, 704 (2014). *Hall* held that where scientific consensus supports a defendant's lesser culpability, "[p]ersons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Id.* at 724. *Hall* relied upon the most recent versions of leading diagnostic manuals in concluding that Florida violated the Eighth Amendment by "disregard[ing] established medical practice." *Id.* at 712.

In *Moore I*, this Court held that courts must apply the "medical community's current standards" in making an *Atkins* determination. 137 S. Ct. at 1053. Citing manuals from the AAIDD and the American Psychiatric Association, *Moore I* held that "[r]eflecting improved understanding over time . . . current manuals offer the best available description of how mental disorders are expressed and can be recognized by trained clinicians." *Id.* (quotations omitted). In assessing whether an

individual's IQ qualifies him or her as intellectually disabled, the Court instructed that lower courts must employ the clinically accepted standard error of measurement, or range of scores on either side of the reported score. *Id.* at 1049. In assessing an individual's adaptive functioning, courts must also adhere to the medical community's focus on adaptive deficits, as opposed to lay misconceptions about the compensating effect of adaptive strengths. *Id.* at 1051.

As explained above, the consensus of scientific evidence demonstrates that the human brain does not stop maturing until the mid-twenties, particularly in the brain's capacity to regulate emotion and impulses. The Eighth Amendment limits the death penalty "to those offenders who commit a narrow category of the most serious crimes and whose *extreme culpability* makes them the most deserving of execution." *Simmons*, 543 U.S. at 568 (emphasis added). It necessarily exempts those offenders who categorically lack extreme culpability, as 18- to 20-year-olds do.

Another key measure in the Court's assessment of evolving standards of decency has been the actual practices of states. *See Atkins*, 536 U.S. at 316 (noting only five executions of low-IQ offenders since 1989); *Simmons*, 543 U.S. at 564–65 (noting that only three states had executed juvenile offenders in the prior 10 years); *Graham v. Florida*, 560 U.S. 48, 62 (2010) (noting the "most infrequent" use of life without parole sentences for juvenile nonhomicide offenders). Since *Simmons* there has been a marked decline in death sentences and executions in the 18–20 age group. For example, the year 2006 (one year after *Simmons* was decided) witnessed 18 new death sentences against offenders between the ages of 18 and 20. *See* App. 247 (Baumgartner Table). But the last several years have witnessed few or none –

specifically, there were seven in 2017, one on 2018, two in 2019, zero in 2020, and zero in 2021. *Id.* Executions have followed a similar decline. The years 2006–2011 averaged just under 11 executions of late-adolescent offenders per year. *Id.* Recent years have seen only a handful of such executions, with eight in 2017, two in 2018, three in 2019, four in 2020, and one in 2021. *Id.*

Missouri has shown an even more pronounced trend. Since *Simmons* was decided in 2005 there have been 30 executions conducted in Missouri; only one offender was in the 18–20 age group (Mark Christeson, whose 1999 sentence predates *Simmons*). Where the penalty for a discrete group has fallen into virtual disuse, it can be said the execution of a member of that group is disproportionate.

Other developments within the criminal justice system reflect a consensus against executing late adolescent offenders. In 2018, the American Bar Association House of Delegates called on all death penalty jurisdictions to ban capital punishment for any offender who committed a crime at the age of 21 or younger. *See* ABA, Resolution 111 (Feb. 2018). In doing so, the ABA considered both the newfound scientific understanding of adolescent brain development and legislative developments in the legal treatment of individuals in late adolescence. *See id.* at 6–10. It recognized "a consistent trend toward extending the services of traditional child-serving agencies, including the child welfare, education, and juvenile justice systems, to individuals over the age of 18." *Id*. at 10.

States and the federal government have been responding to the science and case law by affording greater protections to offenders into their early twenties. In 2016, a report was prepared for the Department of Justice "to identify those

programs addressing the developmental needs of young adults involved in the criminal justice system." Connie Hayek, *Environmental Scan of Developmentally Appropriate Criminal Case Justice Responses to Justice-Involved Young Adults*, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, June 2016 at 1. In the report, young adults were identified as "persons between the ages of 18 to 25 years." *Id.* at 2. The report identifies a variety of initiatives and innovations nationwide, designed to protect late adolescents—for example, Young Adult Courts in San Francisco, California (begun in 2015 for ages 18–25), Omaha, Nebraska (begun in 2004 for up to age 25), Kalamazoo County, Michigan (begun in 2013 for ages 17–20), Lockport City, New York, and New York, New York (begun in 2016 for ages 18–20). *Id.* at 25–29. The report also details probation/parole programs, programs led by prosecutors, community-based programs, hybrid programs, and prison programs. *Id.* at 30–40. The report is exhaustive and demonstrates a nationwide, growing, and nonpartisan recognition of the need to protect late adolescents from the full brunt of criminal penalties.

Other specialized approaches for individuals who commit crimes before they have reached their early to mid-twenties are rapidly developing. The Brooklyn District Attorney's Office, in partnership with the Center for Court Innovation, is piloting a separate court system, with a variety of alternatives to incarceration for persons who commit misdemeanors between the ages of 16 and 24. *See* http://www.broklynda.org/young-adult-bureau/. In 2015, California expanded the requirement of a parole hearing for prisoners who were under age 23 at the time of committing specified offenses (up from age 18 under previous law). S.Bill 261,

Chapter 471, codified at Cal. Penal Code § 3051 (eff. Jan. 1, 2016). These reforms have not yet been extended to youthful offenders subjected to the death penalty, but they evidence a growing consensus that youthful offenders have a diminished culpability and need greater protection from the criminal law's harshest sanctions.

More generally, people under the age of 21 are a protected class for a wide variety of purposes under state and federal laws that recognize their diminished capacities. Missouri law, for example, prohibits furnishing, purchasing, or attempting to purchase alcohol, knowingly possessing alcohol, misrepresenting one's age to illegally obtain alcohol, and misrepresenting one's identity or using false identification to purchase or obtain alcohol if the individual in question is under 21. Mo. Rev. Stat. §§ 311.310, 311.320, 311.325, 311.329. Because younger drivers are considered to be more likely to engage in risky behavior than adults, state law requires a person who accompanies a driver holding a "temporary instruction permit" to be at least 21 years old, to be a licensed driver, and to sit in a seat beside the driver. Mo. Rev. Stat. § 302.130.1. Missouri includes students up to age 21 in its provisions for general and special public education. Mo. Rev. Stat. §§ 162.670, 162.675. Missouri's "Transfers to Minors Act" defines people under the age of 21 as minors. Mo. Rev. Stat. § 404.007(14). An adult is "an individual who has attained the age of 21 years." Mo. Rev. Stat. § 404.007(1). The Act provides for transfer of property to a minor by means of transfer to his or her custodian. Mo. Rev. Stat. § 404.011. Had Johnson been prosecuted for a crime in a juvenile court, he could have remained in the court's custody until the age of 21. Mo. Rev. Stat. § 211.041. Missouri's rule setting out the procedures for juvenile and family court

defines "juvenile" as a person under age 21. Mo. R. Juv. P. Rule 110.04(a)(12). A Missouri statute forbids anyone under age 21 from witnessing an execution, Mo. Rev. Stat. § 546.740, including Johnson's now 19-year-old daughter.

D. Johnson's death sentence violates the Eighth Amendment in light of his age and mental impairments.

The key question underlying an Eighth Amendment claim is the culpability of the relevant type of offender. The Court in *Simmons*, for example, observed that intellectual disability "diminishes personal culpability even if the offender can distinguish right from wrong." 543 U.S. at 563 (citing *Atkins*, 536 U.S. at 318). Intellectual disability justified a categorical exemption because that group's impairments "make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect." *Id.* (citing *Atkins*, 536 U.S. at 319–20). Turning to juveniles, the Court identified three common traits implicating culpability: juveniles have an "underdeveloped sense of responsibility;" they are "more vulnerable or susceptible to negative influences and outside pressures;" and the "personality traits" and "character of a juvenile [are] not as well formed as that of an adult." *Id.* at 569.

Due to his youth and mental impairments, Kevin Johnson lacks the moral culpability to warrant a death sentence. At age 19, Johnson's brain was still not fully developed, particularly the portions of the brain that regulate impulses in the face of emotionally triggering events. Johnson's frontal lobe impairment and mental illness diminish his culpability even further. App. 122 (per Dr. Bigler, "if there is a deficit in white matter integrity and interactive relations with the rest of the brain . . . executive function is compromised"). Retribution and deterrence mean little

when, as here, the offender's "moral compass was effectively 'offline' at the time of the instant offense." App. 244 (per Dr. Martell).

Simmons was decided by this Court over 15 years ago—a span comparable to that between *Stanford v. Kentucky*, 492 U.S. 361 (1989), and this Court's decision in *Simmons* (2005). The intervening period has seen a dual evolution in law and science. The Court's post-*Atkins* rulings have established science's pre-eminence in the culpability calculus. The science has developed as well; advances in neuroimaging now demonstrate that those aged 18–21 have more in common with 16- and 17-year-olds than with fully mature adults. Moreover, death sentencings against late-adolescent offenders have become all but absent around the country. *See* App. 247. The Court should grant certiorari in order to harmonize *Simmons* with the scientific and legal developments that have followed it.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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