CASE NO._____

IN THE
Supreme Court of the United States

KEVIN JOHNSON,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

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

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APPENDIX Volume I of II

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APPENDIX CONTENTS

Volume I

Volume II

Supreme Court of Missouri

en banc

SC89168

State of Missouri, Respondent,
vs.
Kevin Johnson, Appellant.

☐ Sustained

☐ Overruled

☐ Denied

☐ Taken with Case

☐ Sustained Until

☒ Other

Order issued: Appellant's motion to recall the mandate and, in the alternative, petition for writ of habeas corpus overruled and denied.

By: _____ August 30, 2022
Chief Justice Date

SUPREME COURT OF MISSOURI
en banc

August 24, 2022

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC89168
	)	
	)	
KEVIN JOHNSON,	)	
	)	
Appellant.	)	

PER CURIAM

BE IT REMEMBERED, on February 1, 2008, the St. Louis County circuit court entered its judgment fixing punishment at death; and

Thereafter, on March 14, 2008, Kevin Johnson's notice of appeal from said judgment and sentence was filed in this Court; and

Thereafter, on May 26, 2009, this Court affirmed the judgment and sentence; and

Thereafter, on June 30, 2009, this Court overruled his motion for rehearing; and

Thereafter, on March 23, 2012, Kevin Johnson's notice of appeal from the judgment overruling his postconviction relief motion was filed in this Court; and

Thereafter, on July 16, 2013, the Court affirmed the overruling of his postconviction relief motion; and

Thereafter, on October 1, 2013, this Court overruled his motion for rehearing; and

Thereafter, Kevin Johnson sought relief in various federal courts; and

Thereafter, on March 21, 2022, the Supreme Court of the United States denied Kevin Johnson's petition for writ of certiorari;

Thereafter, on May 11, 2022, the state filed a motion to set execution date and, on July 11, 2022, Kevin Johnson filed a response thereto;

NOW, THEREFORE, it is ordered that Kevin Johnson's sentence be executed during the twenty-four hour period beginning at 6:00 p.m. on November 29, 2022.

A warrant of execution is directed to issue accordingly.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the order of said Supreme Court, entered of record at the May Session thereof, 2022, and on the 24th day of August, 2022, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 24th day of August, 2022.

SEAL OF THE SUPREME COURT OF MISSOURI

Clerk

Deputy Clerk

IN THE SUPREME COURT OF MISSOURI

Case No. SC89168

STATE OF MISSOURI,

Respondent,

v.

KEVIN JOHNSON,

Appellant.

APPELLANT KEVIN JOHNSON'S MOTION TO RECALL THE MANDATE, AND ALTERNATIVELY, PETITION FOR WRIT OF HABEAS CORPUS

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Dated: July 11, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Court Rules

Other Authorities

INTRODUCTION

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. The killing occurred about two hours after the sudden collapse and later death of Johnson's twelve-year-old brother, and Johnson believed that the police at the scene – including the victim, Sgt. William McEntee – were more interested in arresting Johnson on an outstanding probation warrant that in aiding 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. PCR Tr. 453, 491–92. Deliberations became heated, with jurors dividing along racial lines. 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." Ex. 1 (Declaration of Allen McCarter) at 2. Those same two jurors held out for a verdict of first degree murder to the end. Ex. 2 (Declaration of Omar Simms), at 2–3. The terms "you people" and "your neighborhoods," especially when considered within the context of Johnson's trial, 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."

Ex. 9 (report of Jason Okonofua, Ph.D.), at 3–4.

The White jurors' racial prejudice during deliberations violated Johnson's fundamental rights. When even a single juror makes a statement "evincing ethnic or religious bias or prejudice during deliberations," it "den[ies] the parties their constitutional rights to a trial by 12 fair and impartial jurors and equal protection of the law." *Fleshner v. Pepose Vision Institute*, 304 S.W.3d 81, 89 (Mo. banc 2010). That violation was not cured by Johnson's second trial. At the end of the first trial, the non-racist jurors favored second degree murder over first degree murder by a vote of ten-to-zero. Far from remedying the violation, the retrial reset the score as zero-to-zero. Because the two White holdout jurors caused a mistrial in a case that would have otherwise ended in a verdict of second degree murder, their actions deprived Johnson of a lesser conviction. The Court should "neutralize[s] the taint of a constitutional violation," *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), by reducing Johnson's conviction to second degree murder.

If the Court does not vacate Johnson's conviction, it should reduce his sentence to life imprisonment. Ten jurors determined that Johnson did not commit first degree murder, which means that ten jurors did not find the existence of any aggravating circumstances. *See* Mo. Rev. Stat. § 565.032.2(3) ("The offender by his or her act of *murder in the first degree* knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person"); Mo. Rev. Stat. § 565.032.2(7)

("*The murder in the first degree* was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind"); Mo. Rev. Stat. § 565.032.2(8) ("*The murder in the first degree* was committed against any peace officer, or fireman while engaged in the performance of his or her official duty"). When even one juror finds a complete absence of aggravators, the defendant cannot be sentenced to death. Mo. Rev. Stat. § 565.030.4(2); *State v. Thompson*, 85 S.W.3d 635, 639 (Mo. banc 2002). Otherwise stated, Johnson was acquitted of the death penalty by multiple jurors' "complete failure to find that any aggravating circumstance exists." *State v. Storey*, 40 S.W.3d 898, 915 (Mo. banc 2001).

Johnson also seeks relief under the Eighth Amendment and Mo. Const. Art. I, § 21, because he 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. *See* Ex. 10 (report of neuropsychologist Erin Bigler), at 7. A late adolescent of 18 to 20 years, then, has the intellectual maturity of an adult but the emotional maturity and response-inhibition of a younger teenager. *See* Ex. 11 (report of developmental psychologist Laurence Steinberg) at 11–12. 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 v.*

Texas, 137 S. Ct. 1039, 1049–53 (2017) ("*Moore I*") (requiring judicial adherence with numerous clinical standards governing intellectual disability).

Just as late-adolescent offenders lack the capacity to be deserving of the law's greatest punishment, Johnson himself has additional brain impairments that diminish his capacity for "planning, response inhibition, cognitive flexibility and impulse control." Ex. 20 (report of neuropsychologist Daniel Martell) at 20. As a result of those impairments, Johnson's "moral compass was effectively 'offline' at the time of the instant offense." *Id.* at 22. Johnson's death sentence offends the Eighth Amendment and is "excessive [and] disproportionate to the penalty imposed in similar cases." Mo. Rev. Stat. § 565.035.3(3).

STATEMENT OF JURISDICTION

Habeas corpus relief may issue 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. banc 2003); *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001). Habeas is available when, among other circumstances, the prisoner demonstrates "cause" for not asserting the claim on direct appeal or through Rule 29.15, and the resulting "prejudice" that accompanies the relevant constitutional claim. *State ex rel. Taylor v. Moore*, 136 S.W.3d 799, 801–02 (Mo. banc 2004); *Amrine*, 102 S.W.3d at 546; *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. banc 2010). This Court has original jurisdiction under Rule 91.02(b) because Johnson is under a sentence of death.

The Court may recall its mandate "in order to remedy a deprivation of the federal constitutional rights of a criminal defendant." *State v. Thompson*, 659 S.W.2d 766, 769 (Mo. banc 1983). A motion to recall the mandate is appropriate "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." *Id.* at 769; *State v. Whitfield*, 107 S.W.3d 253, 265 (Mo. banc 2003).

All of Johnson's claims are properly before the Court:

Claim I – Johnson's first 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. Johnson has "cause" for not bringing the claim on direct appeal or in Rule 29.15 proceedings. It was not until February 9, 2010, that racist statements from jury deliberations became admissible in Missouri. *See Fleshner v. Pepose Vision Institute*, 304 S.W.3d 81, 87–90 (Mo. banc 2010). Johnson's two trials took place in 2007, his direct appeal was decided in 2009, and his amended Rule 29.15 motion was filed January 6, 2010 – or one day before the jurisdictional deadline under Rule 29.15(b) and (g). *See* Post-Conviction Legal File in *Johnson v. State*, Case No. SC92448 at 18–21, 72. There was simply no mechanism for Johnson to bring a claim involving racism during jury deliberations on retrial, direct appeal, or

under Rule 29.15. "Cause" exists when, as here, the prisoner's claim is "so novel that its legal basis [was] not reasonably available to counsel." *Whitfield*, 107 S.W.3d at 269 n.19 (quoting *Reed v. Ross*, 468 U.S. 1, 16 (1984)). Johnson need not have anticipated *Fleshner*, which created an exception to Missouri's longstanding adherence to the Mansfield Rule. *See Fleshner*, 304 S.W.3d at 87.

In addition, it was not known to Johnson that jurors at the first trial made racist statements until the jurors were interviewed during federal habeas proceedings. "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. banc 2020). The law also presumes that jurors follow the trial court's instructions, *State v. McFadden*, 391 S.W.3d 408, 424 (Mo. banc 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; *Brandolese*, 601 S.W.3d at 527 n.7. Johnson had no notice of any evidence to contradict these 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).

Claim I 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 deprived Johnson of 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." *Flesher*, 304 S.W.3d at 89.

Claim II – Johnson's second claim asserts that his initial jury necessarily found the absence of any aggravating circumstances when it could not unanimously find that Johnson committed the offense of first degree murder. *See* Mo. Rev. Stat. §§ 565.032.2(3), (7), and (8) (aggravating circumstances concerning "the murder in the first degree"). When jurors do not unanimously find any aggravating circumstances, the defendant cannot be sentenced to death. *State v. McLaughlin*, 265 S.W.3d 257, 267 (Mo. banc 2008) (unanimity "clearly" required); Mo. Rev. Stat. § 565.030.4(2). Habeas corpus relief is available because Johnson's death sentence "is in excess of that authorized by law." *Whitfield*, 107 S.W.3d at 269 n.19; *State ex rel. Osowski v. Purkett*, 908 S.W.2d 690, 691 (Mo. banc 1995). Claim II is also supported by a double jeopardy component: the first jury's finding of no aggravators "acquitted" Johnson of the death penalty. *State v. Anderson,* 306 S.W.3d 529, 537 (Mo. banc 2010). A double jeopardy claim is not waivable when, as here, "[T]he defect is evident on the face of the record." *State ex rel Green v. Moore*, 131 S.W.3d 803, 805–06 (Mo. banc 2004).

Claim III – This claim asserts that Johnson is ineligible for execution under

the Eighth Amendment and its Missouri counterpart because of his age (19) and mental impairments at the time of the offense. The claim is cognizable on a motion to recall the mandate, which lies 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. Johnson relies on numerous intervening decisions from the United States Supreme Court, including *Moore I*; *Moore v. Texas*, 139 S. Ct. 666 (2019) ("*Moore II*"); and *Hall v. Florida*, 572 U.S. 701, 704 (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. In order to seek recall of the mandate, Johnson need not have advanced such a death-eligibility claim on direct appeal. *See 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").

Claim III is also cognizable on habeas corpus. Johnson has "cause" for not asserting the present issue on direct appeal or through Rule 29.15, because the decisions in *Moore I*, *Moore II*, and *Hall* did not issue until years after this Court's ruling on direct appeal and well after the jurisdictional deadline for Johnson's amended Rule 29.15 motion. The death-eligibility claim is "so novel that its legal basis [was] not reasonably available" in the usual proceedings. *Whitfield*, 107 S.W.3d at 269 n.19. Additionally, Johnson shows prejudice because the trial court

sentenced him to death even though intervening law forbids that punishment under the circumstances of this case. *See* Claim III, below.

FACTUAL AND PROCEDURAL HISTORY

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]

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

[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 Rule 29.15 hearing as "PCR Tr." Johnson's testimony from his first trial was presented via videotape by the 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.

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. Johnson'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 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," 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 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. Johnson fled the scene but surrendered to police three days later. Tr. I 806–08, 813–14; Tr. II 1355–56, 1597–99, 1680.

At Johnson's first trial, a St. Louis County jury deadlocked 10-2 in favor of second degree murder over the charged offense of first degree murder. PCR Tr. 453, 491–92; *see also Johnson v. State*, 406 S.W.3d 892, 914 (Mo. banc 2013) ("*Johnson II*") (Breckenridge J., dissenting), *cert. denied*, 571 U.S. 1240 (2014). A second jury found Johnson guilty of first degree murder and sentenced him to death. This Court affirmed the conviction and sentence on direct appeal, and it later affirmed the Circuit Court's denial of post-conviction relief under Rule 29.15. *See State v. Johnson*, 284 S.W.3d 561 (Mo. banc) ("*Johnson I*"), *cert. denied*, 558 U.S. 1054 (2009); *Johnson II*, 406 S.W.3d at 899–909. 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 May 11, 2022, the State moved the Court to set a date for Johnson's execution. This pleading follows.

CLAIMS FOR RELIEF

I. Racist statements infected jury deliberations during Johnson's initial trial and prevented the jury from reaching a unanimous verdict instead of finishing with a 10-2 deadlock favoring second degree murder, and the error was not cured by a retrial at which a second jury convicted Johnson of first degree murder and sentenced him to death.

When a juror makes a statement "evincing ethnic or religious bias or prejudice during deliberations," that juror is "not fair and impartial" as a matter of law. *Fleshner*, 304 S.W.3d at 89. Such statements themselves "deny the parties their constitutional rights to a trial by 12 fair and impartial jurors and equal protection of the law." *Id.* In this case the evidence shows that ten jurors from the initial trial voted to convict Johnson of second degree murder, while two jurors favored a verdict of first degree murder. PCR Tr. 453, 491–92. Deliberations became heated before the court declared a mistrial. 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." Ex. 1 (Declaration of Allen McCarter) at 2; Ex. 2 (Declaration of Omar Simms) at 2

("One white lady from Chesterfield said she did not believe police harassed Black people or that there could be bad relationships between Black communities and police . . . Even other white people could not believe she thought this."). Those same two jurors were the two who insisted on a first degree murder verdict until the court declared a mistrial. Ex. 2 at 2–3 (per Juror Simms).

Because two jurors relied on racial prejudice to cause a mistrial, and altered the course of votes and deliberations that otherwise would have resulted in a conviction on the lesser offense, their actions deprived Johnson of a lesser conviction. A proper remedy is one that "neutralize[s] the taint of a constitutional violation." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). The Court should vacate the first degree murder conviction imposed by the retrial jury and reduce it to the second degree murder conviction that the initial jury would have reached but for constitutional error.

A. Facts relevant to Claim I

1. *The first trial*

Johnson's initial trial began with voir dire on March 26, 2007, and the case was argued and submitted on April 2. Tr. I 949. 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 denied that Johnson ambushed Sgt. McEntee. *Compare* Tr. I 937 ("Nobody talked about this being an

ambush of him laying in wait for this officer, that he was hiding and waiting for the police to come around the corner."), *with* State's "Motion to Set an Execution Date" (May 11, 2022) ¶ 1 ("On July 5, 2005, Kevin Johnson ambushed and shot Sgt. William McEntee, an officer in the Kirkwood Police Department."). Nevertheless, the prosecutor argued that Johnson deliberated during the process of firing his gun six times. Tr. I 888 ("He knows exactly what he's going to do, and every shot that he fires into that car is deliberation. Six times, there's deliberation at that car right there."). After the initial shooting, the prosecutor argued, Johnson knew where Sgt. McEntee's car had crashed and he went there and shot him again in order to "finish the job." Tr. I 878–79, 894. The state emphasized that the "cool" reflection required for deliberation can last "for any length of time, no matter how brief." Tr. I 883, 891, 938–39, 943.

Defense counsel conceded the elements of second degree murder. He admitted that Johnson caused Sgt. McEntee's death and that his conduct was "practically certain" to do so. Tr. I 906. But 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.

The jurors struggled with the concept of "cool reflection" during deliberations. They wanted to consult a dictionary or additional guidance beyond the court's instructions, but no such guidance was available. *See* Ex. 1 at 1 (per Juror McCarter); Ex. 2 at 2 (per Juror Simms); Ex. 3 (Declaration of Keisha Reeves-Davis) at 2–3; Ex. 4 (Declaration of Kathryn Mills) at 1–2; Ex. 5 (Declaration of John Stimpson) at 1. At the end of the first day, the jurors voted seven to five in favor of second degree murder. *See* Ex. 2 at 2 (per Juror Simms).

Deliberations became tense after the first day, and the jurors were largely divided along racial lines. Ex. 2 at 1–2 (per Juror Simms); Ex. 1 at 1–2 (per Juror McCarter); Ex. 3 at 1 (per Juror Reeves-Davis). At one point a White juror accused a Black juror of trying to intimidate her. Ex. 1 at 1 (per Juror McCarter); Ex. 3 at 2 (per Juror Reeves-Davis). The Black juror was summoned to chambers, but the judge allowed her to remain on the jury. *See* Ex. 3 at 2 (per Juror Reeves-Davis). 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." Ex. 2 at 3 (per Juror Simms); Ex. 1 at 2 (per Juror McCarter); Ex. 6 (Declaration of Anitra Mahari) at 1. As the second day of deliberations continued, the jurors made progress toward a unanimous vote. Ex. 6 at 1 (per Juror Mahari); Ex. 3 at 2 (per Juror Reeves-Davis). The initial vote that morning was 8-4, with subsequent votes of 9-3 and 10-2. Ex. 2 at 2–3 (per Juror Simms).

But racial tensions grew as the dissenters' numbers diminished. Ex. 1 at 2 (per Juror McCarter). "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," reports Juror McCarter. *Id.* Juror McCarter 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.* And one White juror "said she did not believe police harassed Black people or that there could be bad relationships between Black communities and police." Ex. 2 at 2 (per Juror Simms).

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. *See* Ex. 7 (Transcript of April 3, 2007), at 2–3. The note stated "We all agree on the first two rules, law, under Instruction Number 5, but not the third," *id.* at 3, which is consistent with the

jury dividing over the element of "cool reflection" under MAI-CR3d § 314.02. The note asked "Is there any additional instruction or information?" *Id.* at 3. 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. *Id.* at 3–4. The court so instructed the jury. *Id.* at 4.

One juror switched her vote to second degree murder after the court's directive, leaving a split of 10-2. *See* Ex. 1 at 2 (per Juror McCarter); Ex. 2 at 3 (per Juror Simms). Multiple jurors were confident that the jury would be able reach a unanimous verdict. *See* Ex. 1 at 2 (per Juror McCarter); Ex. 2 at 3 (per Juror Simms); Ex. 3 at 2 (per Juror Reeves-Davis). 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 back into the courtroom and observed that "I've heard nothing from you." Ex. 7 at 4. 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." *Id.* at 5–7. The court declared a mistrial, with neither party objecting. *Id.* at 7–9.

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. *See* Ex. 1 at 3 (per Juror McCarter); Ex. 2 at 3–4 (per Juror Simms); Ex. 5 (per Juror Stimpson) at 2. Juror Mahari, for example, "felt frustrated and angry that the process had been halted so suddenly." Ex. 6 at 1.

Two jurors felt pressured by the presence of uniformed police officers in the courtroom. *See* Ex. 2 at 3 (per Juror Simms) ("If they took us in a room by ourselves, away from the other jurors, the victim's family, Kevin Johnson, and the cops in the court room, I would not have said 'No,' in response to that poll."); Ex. 3 at 3 (per Juror Reeves-Davis). "We were aware from the beginning of the trial that cops were going to be heavily packing the courtroom," Juror Reeves-Davis explained. Ex. 6 at 3. "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.*[2]

2. *The second trial*

The prosecution exploited the mistrial induced by the racist jurors 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

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[2] The jurors' observations vindicate Judge Breckenridge's dissent on Johnson's post-conviction appeal. According to Judge Breckenridge, the uniformed officers' presence in the courtroom was "an unmistakable symbol of state authority" that "reasonably may have created an outside influence on the jury, affecting the presumption of innocence necessary for a fair trial and impacting the harshness of the sentence imposed." *Johnson II*, 406 S.W.3d at 913–14 (Breckenridge, J., dissenting). Judge Breckenridge would have remanded for a hearing on Johnson's claim that trial counsel performed ineffectively by failing to object to the officers' "obvious show of support for their fallen comrade." *Id.* at 910, 914.

split of nine White and three Black jurors as compared to six and six. Legal File 516–31 (jurors Alexander, Kidane, and Morrow designated as "B"). 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." *See* Affidavit of Joseph W. Luby, *State ex rel. Cole v. Steele* (No. SC94604; Pet'n for Writ of Habeas Corpus, Ex. 2, ¶ 7, Nov. 19, 2014 (per attorney Dan Diemer)). Whether or not Johnson can separately prove a *Batson* claim based on the retrial – *compare Johnson I*, 284 S.W.3d at 570–71 (principal opinion), *with id.* at 589–91 (Teitelman, J., dissenting) – the prosecutors felt disadvantaged by the first jury's racial composition.

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 ("you make a conscious decision to go after somebody and kill them, that is cool reflection"), 1913, 1920–21, 1977, 1988, 1995. On direct appeal, this Court found no "plain error" despite Johnson's showing that a "conscious decision" means only a knowing or intentional second degree murder. *Johnson I*, 284 S.W.3d at 573–74.

Third, in order to buttress its marginal case of first degree murder, the prosecution created a reenactment video for the retrial, in which St. Louis County

Detective Paul Neske portrayed the initial shooting of Sgt. McEntee in the manner described by Johnson's trial testimony. Tr. II 1747–48. The clear objective was for the prosecution to have its actor overtly "deliberate," but the role played by Detective Neske diverged significantly from the trial testimony. 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. Tr. II 1750–52.

One obvious problem with the video is that Detective Neske is five inches taller than Johnson, and thus, he had to bend down farther to see across the inside of the car. Tr. II 1756 (Detective Neske is six feet tall; Kevin Johnson is five foot seven). Another problem was that Johnson testified that he shot Sgt. McEntee from outside the car rather than reaching through the window, so that the video was not an accurate portrayal of Johnson's testimony. Tr. I 827. 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*. This Court later ruled that the reenactment video was admissible. *See Johnson II*, 406 S.W.3d at 903 (counsel not ineffective for failing

to object). But that is all the more reason why its availability helped the prosecution on retrial.

Fourth and finally, 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 (greatly 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 explained that the defense would call Johnson as a witness. Tr. II 1093. The defense rested without calling Johnson to testify. Tr. II 1889.

B. Racist statements expressed during deliberations violated Johnson's right to a fair and impartial jury, to due process, and to equal protection of the laws.

The dissenting jurors' statements violated Johnson's fundamental constitutional rights. "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 and overwhelmingly Black neighborhood, the jurors themselves divided along racial lines in their view of the case. *See* Ex. 2 at 1–2 (per Juror Simms); Ex. 1 at 2 (per Juror McCarter); Ex. 3 at 1 (per Juror Reeves-Davis). 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." Ex. 1 at 2 (per Juror McCarter). 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." Ex. 3 at 1 (per Juror Reeves-Davis).

Terms such as "you people" and "your neighborhoods" are familiar "codewords" that are used in order to "divide people into groups of us versus them," explains University of California psychology professor Jason Okonofua. Ex. 8 (Okonofua curriculum vitae); Ex. 9 (Okonofua report), at 3. The language

employed reflects a process of "othering," which "underlies racism in general and was present in deliberations in Mr. Johnson's case." Ex. 9 at 3. 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." *Id.* a 4. 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.*

By 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. Considering the context surrounding the jurors' statements, it is apparent that one or more jurors "ma[de] statements evincing ethnic or religious bias or prejudice during deliberations." *Fleshner*, 304 S.W.3d at 89.

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." Ex. 1 at 2 (per Juror McCarter); Ex. 2 at (per Juror Simms). 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." Ex. 9 (Okonofua report) at 4–5. 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." *Id.* at 15.

C. The Court should appoint a special master to make necessary factual findings.

Because this action is an original proceeding in habeas corpus, this Court serves as the factfinder. *See State ex rel. Cole v. Griffith*, 460 S.W.3d 349, 358 (Mo. banc 2015). Rule 68.03 allows the Court to appoint a special master, who would take live testimony and issue a report reflecting the master's findings of fact and conclusions of law. The Court, in turn, would review those findings and conclusions as it would a bench-tried case from the circuit court. *See State ex rel. Clemons v. Larkins*, 475 S.W.3d 60, 75–76 (Mo. banc 2015). This Court has repeatedly appointed a special master when needed in habeas corpus actions. *See*, *e.g.*, *id.* at 63; *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 333 (Mo. banc 2013); *State ex rel. Lyons v. Lombardi*, 303 S.W.3d 523, 526 (Mo. banc 2010).

The Court in *Fleshner* contemplated that a hearing may be necessary in order to determine whether jurors have made racially biased statements or whether particular statements reflect such bias. *See Fleshner*, 304 S.W.3d at 89 ("[T]he trial court should hold an evidentiary hearing to determine whether any such statements occurred."). A case in point is *State v. Perkins*, 600 S.W.3d 838 (Mo. App. E.D. 2020). In *Perkins*, the trial court heard post-verdict evidence that a juror found the defendant guilty of murder and other offenses because he had "come into town to

kill our people." *Id.* at 849. The defendant in *Perkins* lived in O'Fallon but committed various crimes in St. Louis. After conducting a hearing, the circuit court found that the juror's comments did not relate to race or ethnicity, and the Court of Appeals deferred to that factual determination. *See id.* at 851 ("The comments can reasonably be interpreted as the jurors taking issue with people from other communities coming into the city to commit crimes, irrespective of the races of anyone involved.").

In Johnson's case one of the White jurors "kept yelling things about 'your neighborhoods,' and 'you people,' when talking to Black jurors," among other problematic statements. Ex. 1 at 2. Unlike the race-neutral comments in *Perkins*, the comments at issue here give rise to a reasonable inference of racial animus. As explained above by Dr. Okonofua, "[T]he phrases 'you people' and 'those people' are exclusive and divisive, because they divide people into groups of us versus them." Karen Stollznow, *On the Offensive: Prejudice in Language Past & Present*, 27 (2020).

An illustration of such "othering" is described in *Kirt v. Fashion Bug 3253, Inc.*, 479 F. Supp. 2d 938 (N.D. Iowa 2007). In that case a Black customer was wrongly suspected of shoplifting at a retail store. A sales clerk remarked "I get sick and tired of *you people*" and commented "every time *you people* come we find hangers and beeper tags." *Id.* at 943 (emphases added). The customer survived summary judgment on the relevant portion of her race-based "right to contract"

claim under 42 U.S.C. § 1981. *See id.* at 950–51. A reasonable jury could find, under all of the circumstances, that the clerk's comments "directed at two African-Americans, suggest a discriminatory intent to accuse African-Americans generally of tending to engage in or invariably engaging in shoplifting and tending to make or invariably making messes in the store." *Id.* at 951.

The Equal Employment Opportunity Commission has brought and resolved numerous employment discrimination cases under similar circumstances. *See*, *e.g.*, *EEOC v. R.T.G. Furniture Corp.*, No. 8:04-cv-T24-TBM (M.D. Fla. May 16, 2006) (hostile work environment case settled for $275,000 based in part on store manager's racially offensive references to African Americans as "you people"); *EEOC v. Gonnella Baking Co.*, No. 15-cv-4892 (N.D. Ill. consent decree filed Jan. 10, 2017) (manufacturer settled lawsuit alleging racial harassment including persistent coded references to Black employees as "you people" for $30,000, and company agreed to train employees and hold managers accountable for stopping harassment); *EEOC v. GMRI*, 1:08-cv-2214 (N.D. Ohio Dec. 11, 2009) (racial harassment lawsuit settled for $1.26 million, based in part on allegations that managers addressed Black staff with slurs, including "you people"). In those cases as here, the term "you people" refers to Black people in a derogatory manner.

D. The retrial did not cure the error from the first trial, and Johnson's conviction should be reduced to second degree murder.

Johnson asks that the Court "neutralize the taint of [the] constitutional violation." *Lafler*, 566 U.S. at 170. In order to do so, 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). Habeas corpus is "at its core an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319 (1995). The writ operates "to relieve defendants whose convictions violate fundamental fairness." *Clemons*, 475 S.W.3d at 76. To that end, a court granting the writ "should aim to restore [the petitioner] to the position he would have occupied, had the first trial been constitutionally error-free." *Bittaker v. Woodford*, 331 F.3d 715, 722 (9th Cir. 2003).

Under the circumstances here, the only make-whole remedy is for the Court to reduce Johnson's conviction to second degree murder. For one thing, that is the verdict favored by the ten jurors who did not express racist sentiments and whose verdict was thwarted by the two White dissenters. *See* Ex. 2 at 2–3 (per Juror Simms); Ex. 1 at 2 (per Juror McCarter); Ex. 3 at 1 ("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.") (per Juror Reeves-Davis). 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," *see* Ex. 7 at 3, 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. By reducing Johnson's conviction to second degree murder, the Court would remove the fundamentally unfair effect of the racist jurors' participation.

E. Alternatively, the Court should reduce Johnson's sentence to life imprisonment under its ongoing appellate review.

When reviewing a sentence of death, this Court considers not only whether

the sentence is "excessive and disproportionate to the penalty imposed in similar cases" but also whether the sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor." Mo. Rev. Stat. § 565.035.3. That duty of review is ongoing and continues on habeas corpus. *See Amrine*, 102 S.W.3d at 547 (principal opinion); *id.* at 549–50 (concurring opinion of Wolff, J.); *id.* at 552 (dissenting opinion of Price, J.). The evidence here shows that the initial jury failed to reach a unanimous verdict on account of two dissenting jurors who made racially biased statements. *See* Ex. 2 at 2–3 (per Juror Simms); Ex. 1 at 2 (per Juror McCarter); Ex. 3 at 1 (per Juror Reeves-Davis). But for the resulting mistrial and retrial, Johnson would not have been convicted of first degree murder or sentenced to death. Johnson's death sentence, then, is the direct result of the first jury's race-based mistrial, which is itself an "arbitrary factor" reflecting "passion [and] prejudice" from the dissenting White jurors. Mo. Rev. Stat. § 565.035.3. The resulting sentence should be vacated.

II. The initial jury's non-unanimous decision on first degree murder precludes the existence of any death-qualifying aggravating circumstances under the statutory sentencing framework as well as double jeopardy principles.

The initial jury was divided on the question of whether Johnson committed first degree murder. *See* Ex. 7 at 3–5; PCR Tr. 453, 491–92. That division itself precludes a death sentence, the entry of which requires jurors to find at least one aggravating circumstance unanimously – even though all of the proposed aggravators require a finding of first degree murder. *See* Mo. Rev. Stat. §

565.030.4(2); *State v. McLaughlin*, 265 S.W.3d 257, 267 (Mo. banc 2008). The hung jury extinguishes Johnson's death-eligibility for the reasons that follow:

First, all of the aggravating circumstances alleged by the prosecution and found by the second jury rest on a finding of first degree murder. Section 565.032.2(3) provides that "[t]he offender *by his or her act of murder in the first degree* knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." (emphasis added). Section 565.032.2(7) provides that *"[t]he murder in the first degree* was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind." (emphasis added). And Section 565.032.2(8) provides that "*[t]he murder in the first degree* was committed against any peace officer, or fireman while engaged in the performance of his or her official duty." (emphasis added). No other aggravating circumstances were alleged or found at the retrial. Legal File 499, 515; *Johnson I*, 284 S.W.3d at 568.

Second, all statutory aggravating circumstances must be found unanimously and beyond a reasonable doubt. *See* Mo. Rev. Stat. § 565.030.4(2); *McLaughlin*, 265 S.W.3d at 267. The Court in *McLaughlin* reasoned that a mere majority vote in favor of a statutory aggravator would violate the rule of *Ring v. Arizona*, 536 U.S. 584 (2002), requiring "that all facts necessary to increase punishment must be found by the jury." *McLaughlin*, 265 S.W.3d at 267. The retrial jury was thus instructed that any of the three statutory aggravators had to be found, if at all, by a

unanimous vote and beyond a reasonable doubt. Legal File 499 ("On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance."); MAI-CR3d § 314.40 (same).

Third, if the jurors do not unanimously find at least one statutory aggravating circumstance, the defendant is not eligible for the death penalty. Mo. Rev. Stat. § 565.030.4(2). The law makes no provision for a mistrial or retrial when the jurors are not unanimous on that question: "Any lack of unanimity regarding [the aggravation step] mandates a verdict of life imprisonment without possibility of probation or parole." *Thompson*, 85 S.W.3d at 639 Here as elsewhere, Johnson's retrial jury was so instructed. *See* Legal File 499–500 ("[I]f you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exist, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole."); *accord* MAI-CR3d § 314.40 (same). A finding of zero aggravating circumstances by one or more jurors *per se* precludes the death penalty.

Fourth, Johnson's initial jury reached such a finding when it split 10-2 in favor of second degree murder over first degree murder. By failing to find first degree murder unanimously, the jurors were necessarily non-unanimous on the question of aggravating circumstances – all of which require a finding of first degree murder. *See* Mo. Rev. Stat. §§ 565.032.2(3), 565.032.2(7), 565.032.2(8).

The initial jurors effectively found the absence of any statutory aggravating circumstances, and Johnson is ineligible for the death penalty as a result of their split verdict.

Double jeopardy principles lend further support to Johnson's claim. Those principles prohibit a death-sentencing trial when the defendant has already been "acquitted" of the death penalty under the relevant state law. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 107–08 (2003). An "acquittal" operates when the first jury makes "findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt," so that the defendant has "a legal entitlement to [a] life sentence." *Anderson*, 306 S.W.3d at 537. Such findings are present within the deadlock of Johnson's first jury, unlike Anderson's jury that found three aggravators unanimously and beyond a reasonable doubt. A majority of jurors found that Johnson did not commit first degree murder, and thus, a majority rejected an essential element of any and all statutory aggravating circumstances. *See* Mo. Rev. Stat. § 565.032.2 ("Statutory aggravating circumstances *for a murder in the first degree offense* shall be limited to the following.") (emphasis added). Johnson has a "legal entitlement" to be exempt from the death penalty under Missouri law. By splitting on the question of first degree murder, the initial jury made a preclusive and "complete failure to find that any aggravating circumstance exists." *Storey*, 40 S.W.3d at 915. The State was not entitled to seek death at Johnson's retrial.

III. Under the Eighth Amendment and its Missouri counterpart, Kevin Johnson is exempt from the death penalty in light of his age and significant mental impairments that diminish his moral culpability.

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 sentence is cruel and unusual under the federal and state constitutions – *see* Mo. Const. Art. I, § 21 – as well as disproportionate under Mo. Rev. Stat. § 565.035.3. Even if the Eighth Amendment does not erect a categorical bar to death sentences for those under 21, Johnson's mental impairments diminished his ability to cope with emotion-arousing triggers such as the death of his younger brother. A death sentence is cruel and unusual under the circumstances, and the Court should sustain Johnson's as-applied Eighth Amendment challenge.

Three guiding principles follow from *Simmons* and subsequent decisions. 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."). Third, the Eighth Amendment's protections extend beyond categorical exemptions for the death penalty, and "demand individualized sentencing when imposing the death penalty." *Miller v. Alabama*, 567 U.S. 460, 475 (2012).

Johnson acknowledges that he brought a similar claim to this one in 2016, which the Court denied. *See* Motion to Recall Mandate and Petition for Writ of Habeas Corpus (Oct. 28, 2016), at 45–63. But circumstances have materially changed in the intervening years. The law has 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). Moreover, Johnson relies on a large body of intervening scientific developments, which reflect a consensus that the brain's capacity for emotional regulation and impulse control do not mature until the age of 21 to 25. Finally, the years since 2016 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. [3] This data allows researchers to model how the brain changes across the developmental period. This highly sensitive imaging can measure the shape, surface area, and

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[3] 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. 1(1): 10–19 (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 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).

contours of the brain including the volumes of white and grey matter.[4]

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.[5] White matter connections are critically important to emotional regulation and impulse control.[6] The degree and accuracy of the neurotransmission, or connectivity, is dependent upon the developmental stage of the brain; the greater the percentage of white matter the greater the connectivity. Ex. 10 (report of neuropsychologist Erin Bigler) at 5–6. 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. *Id.* at 8.

In terms of the developing brain, "while all lobular areas mature at different rates, they all distinctly extend well beyond 20 years of age" *Id.* at 8. Dr. Bigler notes that, of the lobular areas, "frontal lobe is the last to develop," which is important because these lobes govern "emotional and impulse control, memory,

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[4] 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).
[5] *Id.*
[6] Elizabeth Scott et al., *Brain Development, Social Context, and Justice Policy*, Washington University Journal of Law and Policy 57 (2018).

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." Ex. 10 at 8. 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 from age 18 to age 22 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 reveal that "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."[7] 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." [8] Research consistently shows that impulse

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

[8] Laurence 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.

control continues to develop into the early to mid-twenties. Developmental psychologist Lawrence 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* Ex. 11 (Steinberg report) at 11–12. [9] 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." *Id.* at 11.

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, T*he Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3 J. Juv. Just. (2014). Exposure to community violence

[9] *See also* Cohen, *supra* at 549–62; Marc D. Rudolph et al., *At Risk Of Being Risky: The Relationship Between "Brain Age" Under Emotional States And Risk Preference*. Developmental Cognitive Neuroscience, 93–106 (Apr. 24, 2017).

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). 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." Ex. 10 at 5; s*ee also* Bigler, *Charting Brain Development*, *supra*, at 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. Ex. 12 (Dudley report) at 3. Johnson's mother has a long history of mental illness and substance abuse and was unable to raise him and his siblings. *Id.* at 2. 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. *Id.* at 2–3. Johnson was beaten by multiple 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. 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. *Id*. at 4–5.

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." Ex. 13 (Aaron Harris Dec.) at 3; Ex. 14 (Dameion Pullum Dec.) at 2. 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. Ex. 15 (Jason Clark Dec.) at 1–2; Ex. 16 (Emmanuel Johnson Dec.) at 1; Ex. 17 (Candace Tatum Dec.) at 5; Ex. 18 (Marcus Tatum Dec.) at 13. Gangs had a "gargantuan" impact, and many young people expected to be "dead by 21." Ex. 19 (Franklin McCallie Dec.) at 9.

Dr. Dudley characterized Johnson's background 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." Ex. 12 at 3. On the day of the crime, Johnson faced the emotionally triggering event of seeing Sgt. McEntee in the aftermath of his brother's death. 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." *Id.* at 11–12.

Neuropsychologist Daniel A. Martell has further documented Johnson's deficits. Dr. Martell noted a "focal deficit in frontal lobe executive functioning," which impairs planning, response inhibition, and impulse control. Ex. 20 (Martell Report) at 20. 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." *Id.* at 20–21. The combination of Johnson's psychiatric disorders, frontal lobe impairment, and pathological impulsivity "greatly contributed" to the crime for which he was sentenced to death. *Id.* at 22. 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—and guiding—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*, the Supreme 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, courts must employ the clinically accepted standard error of measurement, or range of scores on either side of the reported score. *Moore I*, 137 S. Ct. at 1049. In assessing an individual's adaptive functioning, courts must 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.

This Court, too, must consider the science when addressing Johnson's claims. As explained above, the overwhelming consensus of scientific evidence demonstrates that the human brain does not stop maturing until the mid-twenties,

particularly in the brain's capacity for emotional regulation and impulse control. 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 by definition lack "extreme" culpability, as 18- to 20-year-olds do.

Another key measure in the Supreme 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* Ex. 21 (Table from Prof. Frank R. Baumgartner) at 2. But the last several years have witnessed few or none – specifically, there were seven in 2017, one in 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 by this Court in 2003 there have been 32 executions conducted in Missouri; only one offender was in the 18–20 age group (Mark Christeson, whose 1999 sentence predates *Simmons*). From among Missouri's 18 current death row prisoners, only Johnson and two others (Terrance Anderson and Michael Tisius, both age 19 at the time of their crimes) are in the late adolescent age group. Where the penalty for a discrete group has fallen into virtual disuse, it can be fairly 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 their 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).

Although these reforms have not yet been extended to youthful offenders subjected to the death penalty, they evidence a growing consensus that youthful offenders have a diminished culpability and need greater protection from the criminal law's harshest sanctions.

D. The death penalty violates the Eighth Amendment as applied to Johnson.

The Eighth Amendment has as much force when applied to the unique circumstances of an individual as when applied to an entire category of offenders, as the same "substantive rule of law" governs both claims. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). An as-applied claim differs only in the remedy, resulting in relief to the litigant rather than an entire category of offenders. *Id.*

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. In *Miller*, the Court held that the "mitigating qualities of youth" are a constitutional imperative for a sentencer to consider. 567 U.S. at 476.

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 responsible for controlling impulses in the face of emotionally triggering events. Johnson's frontal lobe impairment and mental illness diminish his culpability even further. Ex. 10 (Bigler Report) at 8 ("if there is a deficit in white matter integrity and interactive relations with the rest of the brain, regardless of etiology, 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." Ex. 20 (Martell Report) at 22.

The relief requested herein, resentencing to life imprisonment without parole, reflects the evolution of our communal standards and is fully consistent with prior decisions of this Court. In *Simmons*, Judge Stith concluded that the Eighth Amendment prohibits the execution of individuals who were 17 or younger

at the time of their capital crime, notwithstanding that *Stanford v. Kentucky*, 492 U.S. 361 (1989), which authorized the death penalty for 16- and 17-year-olds, had yet to be overruled. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 399–400 (Mo. banc 2003). Judge Stith emphasized that the constitutional limits of cruel and unusual punishment evolve over time, which requires that courts make decisions in accordance with "current standards, not ones of years ago." *Id.* at 400. Thus, she concluded that *Stanford*, issued in 1989, did not bind this Court; rather she noted the national trend away from executing juveniles and concluded that carrying out Simmons' execution would violate "evolving standards of decency that mark the progress of a maturing society." *Id.* at 413.

This case stands in a similar posture. *Simmons* was decided by the Supreme Court over 15 years ago, a span comparable to that between *Stanford* (1989) and this Court's decision in *Simmons* (2003). That period has seen a dual evolution in law and science. The Supreme 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. In addition, death sentencings against late-adolescent offenders have become all but absent in Missouri, with no such cases since that of Johnson himself.

The Court can also revisit Johnson's death sentence under its statutory proportionality review. Section 565.035.3 requires the Court to determine whether

a death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the offense, the strength of the evidence and the defendant." Much has changed since the Court last took measure of our communal sensibilities regarding execution of young offenders in 2003. The law now requires the Court to heed the science; the science says that the delayed brain maturation of late adolescents leaves them to function more like children than adults; and the community's consensus against executing such offenders is overwhelming. By any measure, when taking into account the characteristics of the "defendant" in "similar" cases, Johnson's death sentence is disproportionate.

Johnson acknowledges *State v. Barnett*, 598 S.W.3d 127 (Mo. banc 2020), which held that the Eighth Amendment does not forbid a life-without-parole sentence against a 19-year-old offender. But nothing in *Barnett* precludes the relief that Johnson seeks. First and most importantly, death is a "different kind of punishment" requiring greater reliability in sentencing. *Woodson*, 428 U.S. at 305; *Gardner v. Florida*, 430 U.S. 349, 357 (1977). Second, although Barnett asserted that science supported his claim, the opinion is silent about the role of science when courts are called upon to make essentially scientific determinations in applying the Eighth Amendment. *See Moore I*, 137 S. Ct. at 1049–53; *Moore II*, 139 S. Ct. at 668–72. Third, Barnett relied on cases from four states as evidence that the trend was moving away from mandatory life sentences for this group – evidence this Court found uncompelling. *Barnett*, 598 S.W.3d at 131–32. Johnson

relies on a stronger trend: executions of late-adolescent offenders have come to a virtual standstill in Missouri and throughout the country. The Court should allow that standstill to continue by reducing Johnson's sentence to life imprisonment.

CONCLUSION

WHEREFORE, for all the foregoing reasons, appellant Kevin Johnson respectfully suggests that the Court recall its mandate, grant the petition for writ of habeas corpus, vacate Johnson's illegal and unconstitutional conviction and sentence, appoint a special master to determine material issues of fact, and grant such other and further relief as is just and equitable, including if necessary a stay of any scheduled execution in order to complete the litigation of the above claims.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing pleading electronically with the clerk of the court to be served by operation of the court's electronic filing system upon all attorneys of record on July 11, 2022.

/s/ Joseph W. Luby
Joseph W. Luby

Counsel for Appellant

DECLARATION OF ALLEN McCARTER
PURSUANT TO 28 U.S.C. § 1746

I, Allen McCarter, hereby swear, affirm and verify as follows:

1. My name is Allen McCarter. I was a juror in the case of State of Missouri vs Kevin Johnson. I served on the first jury in that case which was in the spring of 2007. It was at the second jury trial later in the year that Kevin Johnson was convicted and sentenced to death.

2. We were sequestered the entire trial. We could only watch old movies and sports channels. That year for my birthday, I spent the evening in my hotel room by myself. This was the first birthday I spent without my family or friends.

3. Jurors in this case read the Bible because I told them to. Every hotel has a Bible. I read from the book of Judges one night of the trial and then I told all of the jurors to read the scripture to guide us. I wanted them to think about what a good Christian would do. This did change some of the jurors' minds and they told me that it had an impact. One lady even hugged me one morning after she read the Bible the night before. She said in deliberations that she read the scripture I told her to and now she agreed with me. Slowly but surely, others came in and said that reading the Bible changed their point of view.

4. The main argument during deliberations was around the "cool reflection" instruction. We all wanted a dictionary to better understand and have more clarity, but they refused to give it to us. They just repeated the instructions. I didn't think that Kevin could have "cooled down" after what happened to his little brother.

5. One white lady accused a Black woman of intimidating her. The Black woman had to go talk to the judge because the white lady tried to get her kicked off. The Black woman didn't do anything to her. We had intense arguments at times, but this Black lady did nothing except for state her opinion. The white lady just didn't like that the Black lady disagreed with

her. Some of the white jurors dismissed any arguments Black jurors made in defense 2nd degree murder.

6. Racial tensions grew during the last hour of deliberations before the judge called us out. 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. They weren't considering the "cool deliberation" instruction. The one white woman kept yelling things about "your neighborhoods," and "you people," when talking to Black jurors. Someone said something about how Black jurors were only for 2nd degree because Kevin is Black, too.

7. I couldn't take it anymore, I started yelling back, "You're just trying to kill him!" It felt like they weren't listening and only voting for 1st degree because a young Black man killed a cop. The one Black lady had to pull me aside and calm me down.

8. The bailiff was very nice in the beginning but seemed annoyed as the deliberations went on. He was sitting outside of the door and must have heard us getting heated in our discussions because he came in and told us to calm down and use our common sense. I would not be surprised if the judge even heard us because of how loud it got.

9. When we got called into the courtroom for the final time that afternoon, we had not sent another note or anything to the judge. When we sent the note in the morning and the judge told us to keep deliberating, we listened and we even took another vote and someone who voted for 1st degree before voted for 2nd degree now. We did not send another note in the afternoon when the judge called us back in. I was confused because there was change, and I thought we were going to continue into the next day and reach a verdict of 2nd degree. I really believed that it was possible because one juror changed their mind that morning. It wasn't even that much time. I was mad because it felt like the judge cut us short, and he seemed like he made up his mind that this was over.

10. The bailiff seemed mad. The Judge seemed mad. At first, they were warm and appreciative towards the jurors, but they became cold towards us. When the judge brought us back into the courtroom, he looked frustrated and tired.

11. The judge polled each of us about if we felt we were unable to reach a verdict. I said "No" because I didn't understand that it meant the entire trial. It all happened so fast. I thought they meant that they were just asking if we were stuck for that day. I believed that we could have reached a verdict the next day because several people had already changed their minds in favor of 2nd degree.

12. I never believed that Kevin Johnson deserved the death penalty for what he did that day. I do not believe he was able to really reflect and understand what he was doing after what happened to his little brother right in front of his eyes.

13. No one from Kevin's trial or post-conviction defense teams has ever contacted me before the investigators from the Federal Community Defender Office. If they had I would have told them everything that is presented in this affidavit, and I would have been willing to testify at any hearings.

I hereby verify under penalty of perjury, subject to 28 U.S.C. § 1746, that the foregoing is true and correct.

Date: 07/25/2021

Allen L McCarter

ALLEN McCARTER

DECLARATION OF OMAR SIMMS

PURSUANT TO 28 U.S.C. § 1746

I, Omar Simms, hereby swear, affirm and verify as follows:

1. My name is Omar Simms. I was a juror in the case of State of Missouri vs Kevin Johnson. I served on the first jury in that case which was in the Spring of 2007. It was at the second jury trial later in the year that Kevin Johnson was convicted and sentenced to death.

2. We were sequestered for the whole trial. It was difficult. I wrote things down in a notebook in my hotel every night and still have them to this day. I was shocked I was even picked because my sister works for the sheriff's office and The DA, Bob McCulloch was her boss at the time.

3. Allen McCarter and I met early on in jury selection and connected right away. Another juror, Keisha and I connected, too. They were older than me and provided guidance. Keisha reminded us to keep an open mind. Allen told us to read the Bible in our hotel room for guidance.

4. The defendant, Kevin Johnson's, testimony was a shock to us all. We came back from a recess and there he was on the stand. He handled himself well, and he wasn't coldhearted. This wasn't a case of a coldblooded killer. A lot happened that day that led up to him shooting Sgt. McEntee. And his little brother's death had a big impact. When he finished, and admitted to shooting the police officer, I wondered what it was that we would even be deliberating. He was obviously guilty. Then I found out we had to decide between 1st and 2nd degree.

5. Things were tense during deliberations. Before deliberations, we all sort of got along regardless of race. But after the first day of deliberations, things became really divided by race. On the first day, it did not go over well with the white women. That's just how society

is. They see a Black man shot a police officer, that means he did it, no matter what. It's almost impossible to convince older white women that it wasn't premeditated.

6. The way the two white female jurors looked at police was not how many of us saw police. One white lady from Chesterfield said she did not believe police harassed Black people or that there could be bad relationships between Black communities and police. When this white woman said this, we were shocked. Even other white people could not believe she thought this. She did not back down and was very pro-police. The lady from Chesterfield impacted me so much that I told my supervisor at my job at UPS that I could not deliver to Chesterfield after the trial. They just treat you different out there if you're Black, and I need to stay safe.

7. Another older white lady said that she didn't want 2nd degree because Kevin could get out and find her at the Wal-Mart or something. That was her only reason for going with 1st degree murder. She did not even consider "cool deliberation." Two of the white ladies came in with their mind made up and we had a challenge to convince to convince them otherwise.

8. Most of the arguing was about "cool deliberation." We wanted more clarity and the court would not give it to us. By the end of the day one of deliberations, the vote was 7 to 5 in favor of 2nd degree. We were stuck that day when court concluded.

9. The next morning we took a vote again. To our surprise, someone changed their vote. It was now 8 to 4 in favor of 2nd degree murder. One white lady named Carol said that she had too much doubt in her mind about the "cool deliberation" to go with 1st degree murder.

10. We saw that it was our job to persuade the others that it was 2nd degree so we could give a unanimous verdict. All hell broke loose at one point. Allen McCarter came back from the bathroom and lost it. He said, "You're just trying to kill him!" I agreed with him, but worried that things were getting too loud and heated. The white ladies that were holding out

for 1st degree went right back at him. Keisha had to pull Allen aside and get him to calm down because he was getting so upset with the white women. The white women did not seem to care how serious this was and that we were deciding a young man's life. They seemed to get more upset and vocal about their opinions when they realized that a few of the other white jurors agreed with the Black jurors.

11. Things got so loud that the bailiff came in and told us we needed to calm down and use our common sense. We took another vote and we persuaded another juror. The vote was now 9 to 3 for 2nd degree. After some more discussion, we felt we were deadlocked. We told the judge in a note, and he told us to keep going. That was around late morning.

12. It's possible the judge heard us, too. Anyone who was within an earshot would have heard how heated it was. The arguments to try to get the final 3 white women to listen to us about 2nd degree were intense. We deliberated some more and voted again. It was 10 to 2. Another white lady changed her mind. I did not expect this. When she changed her mind, I was hopeful we were going to get the other two to agree to 2nd degree. I think the two final white female jurors could have come along. Their reasons for 1st degree were not in line with the instructions that the court gave us so if we could have had more time to talk to them about the instructions more, I think we could have reached a unanimous verdict for 2nd degree.

13. We were still deliberating when the judge pulled us into the courtroom around 3. He said he hadn't heard from us in a while, so he polled all of the jurors one by one. It all happened so fast, and I said "No" because everybody else said no before me. I was number 10, so 9 people before me said "No." If they took us in a room by ourselves, away from the other jurors, the victim's family, Kevin Johnson, and the cops in the court room, I would not have said "No," in response to that poll. When they asked, I thought they were asking to see where we were at. I didn't know that if I said "Yes" they would have sent us back. I was

shocked when they ended the trial just like that. Before I knew it, we were dismissed to go home.

14. I never believed and do not believe that Kevin Johnson deserves the death penalty for what happened that day. With seeing his little brother die like that, he could not have fully understood what he was doing.

15. No one from Kevin Johnson's trial or post-conviction defense teams has ever contacted me until the investigators from the Federal Community Defender Office. If they had I would have told them everything that is presented in this affidavit, and I would have been willing to testify at any hearings.

I hereby verify under penalty of perjury, subject to 28 U.S.C. § 1746, that the foregoing is true and correct.

Date: July 25, 2021

Omar Simms

DECLARATION OF KEISHA REEVES-DAVIS

PURSUANT TO 28 U.S.C. § 1746

I, Keisha Reeves-Davis, hereby swear, affirm and verify as follows:

1. My name is Keisha Reeves-Davis. I was a juror in the case of State of Missouri vs Kevin Johnson. I served on the first jury in that case which was in the Spring of 2007. It was at the second jury trial later in the year that Kevin Johnson was convicted and sentenced to death.

2. We were sequestered the entire time at a hotel in Clayton, MO. The only time we were allowed out of the hotel or court was when the officers took us to a local park on a field trip. It felt like we were little kids.

3. 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. We were divided by race, with the Black jurors believing it was not 1st degree murder because of what happened with Kevin's little brother's death. We felt Kevin could not have been "cool, calm, and collected" when he shot Sgt. McEntee after what happened to his brother that day. Even Kevin's testimony was solemn and remorseful when he testified. He was despondent. I remember thinking that he had an out-of-body experience when he shot the officer.

4. The main issue we deliberated about was that idea of "cool, calm and collected." We asked for clarification because the instruction was very confusing and unclear. We never got any further explanation, but just a re-reading of the instructions. The

conversations around this got heated at times and the bailiff must have been able to hear us. He told us to calm down.

5. There was a white woman who had a connection to the police in Kirkwood. She was very much defending the police and was very pro-police. She was one of the people that had her mind up before we even started deliberating, and it was clear she decided Kevin was guilty of 1st degree murder because a police officer was the victim.

6. I had one issue that I had to talk to the judge about. A white woman communicated to the bailiff that I was "intimidating" her because I wouldn't stop staring at her. I didn't do or say anything to her, but I was called in to talk to the judge. I went back to the judge's chambers. He asked me if I was deliberately intimidating this woman and I said no. I was allowed to stay on the jury after that. She never said anything to me, but just went to the bailiff to try to get me kicked off.

7. There was some movement as we deliberated. One white guy was really open to listening to those of us who did not want to go with 1st degree. He could've come along to agree with us if we were able to continue to deliberate. I did not believe we were deadlocked to the point of not being able to reach a verdict. That afternoon, we did not relay to the bailiff or the judge that we would never be able to reach a verdict. When they called us out, I thought we were going to get more clarity on the instructions we asked about. But instead, they polled us all to ask if we were deadlocked.

8. When they polled us individually, I agreed that we were deadlocked for two reasons. One reason was because of the lack of clarity and further explanation of "cool, calm and collected." If they would've given us more help on that instruction, I would not have said "No." I believe we would have reached a verdict if they would have clarified

that instruction. The other reason was because of the police presence in the courtroom. We were aware from the beginning of the trial that cops were going to be heavily packing the courtroom. I even had my neighbor drive me because someone warned me that cops would run my plates if I parked in the garage. 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.

9. I did not then and do not believe now that Kevin Johnson should be executed. In light of his brother's death earlier that day and his testimony about what happened, I've always believed that the death penalty was too extreme of a punishment for Kevin.

10. No one from Kevin's trial or post-conviction defense teams has ever contacted me. If they had I would have told them everything that is presented in this affidavit, and I would have been willing to testify at any hearings.

I hereby verify under penalty of perjury, subject to 28 U.S.C. § 1746, that the foregoing is true and correct.

Date: July 23, 2021

Keisha Reeves-Davis

AFFIDAVIT/DECLARATION OF Kathryn D. Mills
PURSUANT TO 28 U.S.C. § 1746

I hereby swear, affirm and verify as follows:

1. My name is Kathryn Mills. I was a juror in the case of State of Missouri vs. Kevin Johnson. I served on the first jury in that case during the Spring of 2007. Later that year, during his second trial, Kevin Johnson was convicted and sentenced to death.

2. We were sequestered at a hotel during the entire trial. We had guards with us at all times, even if we went to the restroom. It was a very hard time for me.

3. During the deliberations, I remember feeling frustrated and confused. There was a phrase that I don't exactly remember — cool reflection or cool waters — that we were supposed to consider about Kevin

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

[PAGE 1 of 2]: KM

AFFIDAVIT/DECLARATION OF Kathryn D. Mills
PURSUANT TO 28 U.S.C. § 1746

[PAGE 2]

Johnson's state of mind. I knew it was important to the case, but I didn't understand it. I asked the officer supervising us at the hotel for a definition of the phrase, or a dictionary, or help understanding it. He told me that it was a legal term that he couldn't explain and I wouldn't understand. I felt that this was important, but I didn't want to rock the boat, so I dropped it.

4. The next day we resumed deliberations. Before the day was over, as deliberations continued, we were called into the courtroom by the Judge, and the next thing we knew we were excused.

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

09-20-2021 Kathryn D Mills

DECLARATION OF John Stimpson
PURSUANT TO 28 U.S.C. § 1746

I, John Stimpson, hereby swear, affirm and verify as follows:

1. My name is John Stimpson. I was a juror in the case of the State of Missouri vs. Kevin Johnson. I served on the fist jury in that case in the Spring of 2007. It was at the second jury trial later that year that Kevin Johnson was convicted and sentenced to death. In the first jury, I was chosen as the foreperson.

2. The atmosphere in the jury deliberation room was tense. The tension seemed to build throughout the day, especially as the smokers on the jury were not allowed to leave for a cigarette break. Eventually, the level of disagreement among some jurors got so loud that it could be heard outside the jury room.

3. At the heart of the debate was the meaning of the term "cool reflection" and whether Mr.

Page 1 JS 2/9/2022

AFFIDAVIT/DECLARATION OF John Stimpson
PURSUANT TO 28 U.S.C. § 1746

Johnson be found guilty of first or second degree murder. Some jurors became very fixated on whether he would get the death penalty based on what we convicted him of.

4. The afternoon of the second day of deliberations, without our asking a qestion or contacting the judge, we were called into the courtroom. The judge questioned each of us as to whether we believed we could reach a verdict, starting with me. The judge did not explain to us that the answers to his question would determine the outcome of the trial. I was surpised when we were immediately dismissed and the judge declared a mistrial.

// END //

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

2/9/2022 John Stimpson

DECLARATION OF ANITRA MAHARI
PURSUANT TO 28 U.S.C. §1746

I, Anitra Mahari, hereby swear, affirm and verify as follows:

1. My name is Anitra Mahari. I was a juror in the case of State of Missouri v. Kevin Johnson. I served on the first jury in that case which was during the Spring of 2007. Our jury resulted in a hung jury. It was at his next jury trial later that year that Kevin Johnson was convicted and sentenced to death.
2. We were sequestered throughout the trial. We weren't allowed to have our phones or watch the news or other live TV. We were escorted constantly, even to the restroom at the courthouse.
3. In our second day of deliberation, I felt we were slowly making progress. From watching people's body language, my feeling was that some people were willing to listen, and that one individual was potentially coming around to those of us who felt a second degree conviction was appropriate.
4. At one point during these discussions, the bailiff came in the room and told us to quiet down. After that, we were told that the Judge had stopped deliberations and called us back into the courtroom.
5. In the courtroom, we were asked whether we had been able to reach agreement, which we had not yet. I remember an attorney trying to object. Next thing I knew, we were being dismissed. I felt frustrated and angry that the process had been halted so suddenly.

I hereby verify under penalty of perjury, subject to 28 U.S.C. §1746, that the foregoing is true and correct.

Date: 3·11·22

By: Anitra Mahari
Anitra Mahari

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI
Honorable Melvyn Weisman, Judge

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
v.	)	Cause No. 05CR-2833
	)	
KEVIN JOHNSON,	)	
	)	
Defendant.	)	

TRANSCRIPT OF JURY DELIBERATION QUESTIONS
April 3, 2007

MR. ROBERT MCCULLOCH
Prosecuting Attorney
on behalf of the Plaintiff;

MS. KAREN KRAFT
MR. ROBERT STEELE
Assistant Public Defenders
on behalf of the Defendant.

JENNIFER A. DUNN, RPR, CCR #485
OFFICIAL COURT REPORTER
CITY OF ST. LOUIS CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT

APRIL 3, 2007

(The following proceedings were had in open court:)

THE COURT: Good morning, ladies and gentlemen. I hope you're doing better this morning than you were last night.

Ladies and gentlemen of the jury, we put your notebooks back so they're available for you now. I have the instructions, I'm going to be giving those to the bailiff for you to take back. The exhibits that you had previously requested will be brought to your jury room as soon as you've been placed in the jury room.

And Jurors 13 and 14, you'll be seated in the separate jury room during the deliberation. I hereby resubmit the case to the jury. Kindly follow the bailiff.

The court will remain in order until the jury's had a chance to exit the courtroom.

(The jury retired to resume their deliberations at 9:10 a.m. At 10:35 a.m., a question was received from the jury, and the following proceedings were had in chambers:)

THE COURT: Let the record reflect we're in chambers conference at 10:35, on Tuesday, April the 3rd.

The Court received the following note: We are deadlocked. People have their minds decided and we keep

arguing the same points with no new information. We are deadlocked between first degree and second degree.

Is there any additional instruction or information? We all agree on the first two rules, law, under Instruction Number 5, but not the third.

That's the note from the jury. Any thoughts on what you desire?

MR. MCCULLOCH: I'd say let them keep going back and continue their deliberations.

THE COURT: Response?

MR. STEELE: Let them go. We agree, let them go.

THE COURT: I'm going to send them a note saying continue your deliberations. Okay. The issue is whether we give them 312.10.

MR. MCCULLOCH: The hammer just yet.

THE COURT: That's the hammer, or whether we just give them the note: Continue deliberations.

MS. KRAFT: I would suggest just give them a note and if they still are, at that point, maybe give it to them after lunch.

MR. MCCULLOCH: I mean, they've only been out a total of about six hours, seven total if you take lunch out yesterday. I mean, this is a major case, after six hours, and maybe they are, I don't know, but at least I

think it's too early to give it to them at this point.

THE COURT: Okay. Then I will type it up here now.

MR. MCCULLOCH: Put on it be guided by the evidence and the instructions already given to you.

THE COURT: You will be bound by the evidence as you remember it and the instructions already submitted to you. Continue your deliberations.

Any objection to that?

MR. MCCULLOCH: No.

MS. KRAFT: No.

THE COURT: Okay. Let the record reflect that that will be given to the jury at 10:55.

(The following proceedings were had in open court at 3:25 p.m.)

THE COURT: Ladies and gentlemen of the jury, the last communication I had with you was at about 11 o'clock this morning. And since that time I've heard nothing from you.

The question is whether or not anything has changed since 11 o'clock this morning.

Let me ask the foreperson: Has anything changed since this morning?

FOREPERSON: No, sir.

THE COURT: Okay. Do you believe that in the

event that you continue to deliberate there's any reasonable likelihood that the jury would ever be able to reach a unanimous verdict in this case?

FOREPERSON: No, sir.

THE COURT: Okay. I'm going to ask the same question of every member of the jury, and I'm going to go by your numbers. So, one, two, three, all the way through Number 12.

Let me ask Juror Number 2, in the event that the jury were to continue to deliberate, do you believe there's any reasonable likelihood that the jury would ever be able to reach a unanimous verdict in this case?

JUROR NUMBER 2: No.

THE COURT: Okay. Juror Number 3, do you believe that in the event the jury were allowed to continue to deliberate, there's any reasonable likelihood that the jury would ever be able to reach a unanimous verdict in this case?

JUROR NUMBER 3: No.

THE COURT: Juror Number 4, in the event that the jury were to continue to deliberate, do you believe there's any reasonable likelihood that the jury would ever be able to reach a unanimous verdict in this case?

JUROR NUMBER 4: No.

THE COURT: Juror Number 5, in the event that

the jury were allowed to continue to deliberate, do you believe -- there's any reasonable likelihood to believe that the jury would ever be able to reach a unanimous verdict in this case?

JUROR NUMBER 5: No, sir.

THE COURT: Juror Number 6, in the event that the jury were allowed to continue to deliberate, do you believe there's any reasonable likelihood the jury would ever be able to reach a unanimous verdict in this case?

JUROR NUMBER 6: No.

THE COURT: Juror Number 7, in the event that the jury were allowed to continue to deliberate, do you believe that the jury would ever be able to reach a unanimous verdict in this case?

JUROR NUMBER 7: No.

THE COURT: Juror Number 8, in the event the jury were allowed to continue to deliberate, do you believe there's any reasonable likelihood to believe that the jury would ever be able to reach a unanimous verdict in this case?

JUROR NUMBER 8: No.

THE COURT: Juror Number 9, in the event that the jury were allowed to continue to deliberate, do you believe there is any reasonable likelihood to believe that the jury would ever be able to reach a unanimous verdict in

this case?

JUROR NUMBER 9: No.

THE COURT: Juror Number 10, in the event that the jury were to continue to deliberate, do you believe there's any reasonable likelihood to believe that the jury would ever be able to reach a unanimous verdict in this case?

JUROR NUMBER 10: No.

THE COURT: Juror Number 11, in the event that the jury were allowed to continue to deliberate, do you believe there is any reasonable likelihood to believe that the jury would be able to reach a unanimous verdict in this case?

JUROR NUMBER 11: No.

THE COURT: Juror Number 12, in the event that the jury were allowed to continue to deliberate, do you believe there's any reasonable likelihood to believe that the jury would ever be able to reach a unanimous verdict in this case?

JUROR NUMBER 12: No.

THE COURT: Would counsel approach the bench, sidebar, please?

(Counsel approached the bench, and the following proceedings were had:)

THE COURT: Based upon the responses given,

the Court believes there's no reasonable likelihood to believe this jury will ever able to reach a unanimous verdict.

Does either party have an objection to the Court declaring a mistrial at this time?

MR. MCCULLOCH: No, sir.

MS. KRAFT: No.

THE COURT: The Court will declare a mistrial, and I'll see counsel in my office at 1:30 tomorrow afternoon and we'll try to find another date. Okay.

MR. MCCULLOCH: Judge, for the record, you probably did, but that note came out at 11 o'clock this morning where they made it perfectly clear they were not going to be able to reach a verdict.

THE COURT: The note said we are deadlocked. People have their minds decided and we keep arguing the same points. No new information. We are deadlocked between first degree and second degree. Is there any additional instruction, information. We all agreed to the first two rules of law under Instruction Number 5, but not the third, and it's now 3:30.

So they've had a substantial amount of time to try to change their positions and, obviously, they're not going.

MR. MCCULLOCH: Nothing has changed. You made that clear. Nothing has changed and no further

deliberations will benefit them.

THE COURT: I don't believe further deliberations would have any benefit in reaching a resolution in this matter, so the Court's declaring a mistrial and the cause will be reset for trial at a later date, and we'll try to determine that tomorrow.

(The proceedings returned to open court.)

THE COURT: Ladies and gentlemen of the jury, the Court is declaring a mistrial in this case. I'm releasing you as jurors in this matter. I will ask, however, that you go back to your jury room so we can formally process you out as jurors for the two weeks that you've been here. And then I will see counsel in my office tomorrow for purposes of trying to identify a future date for retrial of this case. And that in mind, the Court's adjourned.

(Court was adjourned.)

CERTIFICATE

I, Jennifer A. Dunn, Registered Professional Reporter and Certified Court Reporter, do hereby certify that I am an official court reporter for the Circuit Court of the City of St. Louis; that on April 3, 2007, I was present and reported all the proceedings had in the case of STATE OF MISSOURI, Plaintiff, vs. KEVIN JOHNSON, Defendant, Cause No. 05CR-2833.

I further certify that the foregoing pages contain a true and accurate reproduction of the proceedings.

"/s/JENNIFER A. DUNN, RPR, CCR #485"

Dr. JASON OKONOFUA, PhD

Curriculum Vitae - 2022

CONTACT INFORMATION

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Primary e-mail: okonofua@berkeley.edu

ACADEMIC APPOINTMENTS

Assistant Professor, Psychology Department
University of California-Berkeley, Berkeley, CA 2016-present

Post Doctoral Researcher, Psychology Department
Stanford University, Stanford, CA 2015-2016

EDUCATION

2015 Ph.D. in psychology, Stanford University (PI: Gregory Walton)
2008 B.A. in psychology and Af-Am studies, Northwestern University (PI: Jennifer Richeson)

HONORS AND AWARDS

Since UC-Berkeley hire in 2016

2022 Janet Taylor Spence Award for Transformative Early Career Contributions, Association for Psychological Science
2022 Rising Star Award, Association for Psychological Science
2022 Foundations for Change: Thomas I. Yamashita Prize
2017 Cialdini Award, Society for Personality and Social Psychology

Before UC-Berkeley hire in 2016

2015 People's Choice Award, TheRoot 100,
2015 Distinguished Scholar Award, Stanford University, Vice Provost of Graduate Education
2015 Dean's Award for Academic Excellence, Stanford University
2013 Graduate Research Opportunity Award, Stanford University
2013 Diversity Travel Award, Society for Personality and Social Psychology (SPSP)
2011 Outstanding Graduate Teaching Award, Stanford University, Psychology One Program
2011 Ford Foundation Pre-Doctoral Fellowship, Honorable Mention
2010 First Runner-up Graduate Research Poster Award, Society for Personality and Social Psychology
2010 National Science Foundation Graduate Research Fellowship, Honorable Mention

2010 Ford Foundation Pre-Doctoral Fellowship, Honorable Mention

CURRENT GRANT AND FELLOWSHIP SUPPORT

Internal:

July 2019-present	Hellman Fellowship, Research Fellowship Grant, PI: Jason Okonofua	*Total costs: $60,000*

External:

May 2021	California Department of Education, Grant, PI: Jason Okonofua	*Total costs: $250,000*
February 2020	Chan Zuckerberg Initiative, Collaboration Grant, PI: Jason Okonofua	*Total costs: $5,000*
August 2019-present	Bill & Melinda Gates Foundation, Research Grant, PI: Jason Okonofua	*Total costs: $100,000*
January 2019-present	New Teachers Center, Research Grant, PI: Jason Okonofua	*Total costs: $70,000*
January 2019-present	Natomas School District, Research Grant, PI: Jason Okonofua	*Total costs: $100,000*
August 2018-present	Jobs for the Future, Research Grant, PI: Jason Okonofua	*Total costs: $180,000*
August 2017-present	Character Lab, Research Grant, PI: Jason Okonofua	*Total costs: $50,000*
January 2017-present	Google & Tides Foundation, Research Grant, PIs: Jason Okonofua	*Total costs: $600,000*

PENDING MANUSCRIPTS AND PUBLICATIONS
(note: asterisk [*] denotes student collaborator at UC Berkeley)

Perez, A.* & **Okonofua, J. A.** (invited revision, Journal of Experimental Social Psychology). [The Good and Bad of a Reputation: Race and the Punishment in K-12 Schools].

Semko, S.* & **Okonofua, J. A.** (under review, Psychological Science). [Cues About a Student's Social Class Matter When Pandemic Meets School Discipline].

Okonofua, J. A., Jarvis, S. N.*, & Eberhardt, J. L. (In Prep, *Proceedings of the National Academy of Sciences*). [The Sins of Their Brothers: How Teachers' Disciplinary Responses Can Escalate from One Black Male Student to Another]

Darling-Hammond, S.*, Eberhardt, J. L., & **Okonofua, J. A.** (In Prep, *Proceedings of the National Academy of Sciences*). [The Hopeful and Daunting in Discipline Measurement: Discipline Begets Discipline and Disparities Beget Disparities].

MANUSCRIPTS AND PUBLICATIONS
(note: asterisk [*] denotes student collaborator at UC Berkeley)

Since UC-Berkeley hire in 2016

Okonofua, J. A., Goyer, J. P., Lindsay, C. A., Haugabrook, J., & Walton, G. M. (2022). A scalable empathic-mindset intervention reduces group disparities in school suspensions. *Science advances*, *8*(12), eabj0691.

Okonofua, J. A., Harris, L. T., & Walton, G. M. Sidelining bias: A situationist approach to reduce the consequences of bias in real-world contexts. *Current Directions in Psychological Science, In Press*

Okonofua, J. A. (In Press, Behavioral and Brain Sciences). [Controlled lab experiments are one of many useful scientific methods to investigate bias].

Okonofua, J. A., Goyer, J. P., Lindsay, C. A., Haugabrook, J., & Walton, G. M. (2022). A scalable empathic-mindset intervention reduces group disparities in school suspensions. *Science advances*, *8*(12), eabj0691.

Walton, G. M., **Okonofua, J. A.**, Remington Cunningham, K., Hurst, D., Pinedo, A., Weitz, E., Ospina, J. P., Tate, H., & Eberhardt, J. L. (2021). Lifting the Bar: A Relationship-Orienting Intervention Reduces Recidivism Among Children Reentering School From Juvenile Detention. *Psychological Science*. https://doi.org/10.1177/09567976211013801

Bookser, B. A.*, Ruiz, M.*, Olu-Odumosu, A.*, Kim, M.*, Jarvis, S. N.*, & **Okonofua, J. A.** (2021). Context matters for preschool discipline: Effects of distance learning and pandemic fears. *School Psychology*.

Okonofua, J. A., Saadatian, K.*, Ocampo, J.*, Ruiz, M.*, & Oxholm, P. D.* (2021). A scalable empathic supervision intervention to mitigate recidivism from probation and parole. *Proceedings of the National Academy of Sciences*, *118*(14).

Okonofua, J. A., Perez, A. D.*, & Darling-Hammond, S.* (2020). When policy and psychology meet: Mitigating the consequences of bias in schools. *Science Advances*, *6*.

Okonofua, J. A., & Ruiz, M.* (2020). The Empathic-discipline intervention. To appear in G. M. Walton & A. J. Crum (Eds.). *Handbook of Wise Interventions: How Social Psychology Can Help People Change*, Guilford Press: New York.

Jarvis, S. N.*, & **Okonofua, J. A.** (2020). School deferred: When bias affects school leaders. *Social Psychological and Personality Science*, *11*(4), 492-498.

Goyer, P., Walton, G. M., Cook, J., Master, A., Apfel, N., Garcia. J., **Okonofua, J. A.,** & Cohen, G. L. (2019). A brief middle school social-belonging intervention reduces discipline incidents among Black boys through the end of high school. *Journal of Personality and Social Psychology*

Before UC-Berkeley hire in 2016

Okonofua, J. A., Paunesku, D., & Walton, G. M. (2016). Brief intervention to encourage empathic discipline cuts suspension rates in half among adolescents. *Proceedings of the National Academy of Sciences*, *113*(19), 5221-5226. DOI: https://doi.org/10.1073/pnas.1523698113

Okonofua, J. A., Walton, G. M., & Eberhardt, J. L. (2016). A vicious cycle: A social–psychological account of extreme racial disparities in school discipline. *Perspectives on Psychological Science*, *11*(3), 381-398. DOI: https://doi.org/10.1177/1745691616635592

Okonofua, J. A., & Eberhardt, J. L. (2015). Two strikes: Race and the disciplining of young students. *Psychological Science*, *26*(5), 617-624.
DOI: https://doi.org/10.1177/0956797615570365

INVITED CONFERENCE TALKS AND PRESENTATIONS

Since UC-Berkeley hire in 2016

Okonofua, J. A. (2020, August). A case for empathy: Application of psychological science in real-world contexts. Distinguished Speaker, American Psychological Association, Virtual

Waxman, S., Sabol, T., Rogers, L. O., & **Okonofua, J. A.** (2020, May). Examining Implicit and Explicit Biases in Individual Children, Schools, and Communities: Implications for Racial Disparities in School Discipline. Invited Symposium, Association for Psychological Science, Slated for Chicago, IL

Griffiths, C., Brady, L., Kroeper, K., & **Okonofua, J. A.** (2020, May). Advancing Equity By Changing Teachers' Psychological Frameworks. Invited Symposium, Association for Psychological Science, Slated for Chicago, IL

Okonofua, J. A. (2019, February). Process Approach to Combat Implicit Bias. Symposium, Learning and the Brain Conference, San Francisco, CA

Okonofua, J. A. (2019, January). A Holistic Approach to Combat Effects of Stereotyping. Symposium, Society for Personality and Social Psychology, Portland, OR

Okonofua, J. A. (2018, October). Mitigating the Effects of Stereotyping in Teacher-Student Relationships. Symposium, Society for Experimental Social Psychology Annual Conference, Seattle, WA

Okonofua, J. A. (2018, May). The Black Escalation Effect and Real-World Solutions. Symposium, Equal Justice Society Annual Conference, Oakland, CA

Jarvis, S., **Okonofua, J. A.,** Eberhardt, J., & Walton, G. (2017, May). Two-Strikes and the Reentry of Youth Offenders. Poster Presentation, Association for Psychological Science Annual Conference, Boston, MA

Okonofua, J. A., Mendoza-Denton, R., & Tropp, L. (2017, June). Resilience of Racism.

Symposium, Equal Justice Society Annual Conference, Oakland, CA

Bruneau, E., **Okonofua, J. A.,** Kteily, N., & Camp, N. (2017, May). The Forces That Divide, and How to Transcend Them. Symposium, Association for Psychological Science Annual Conference, Boston, MA

Smith, T., **Okonofua, J. A.,** Shaw, S., & Cheung, C. (2017, May). Mindset inside and Outside the Classroom: The Implications of Mindset on Students' Holistic Educational Experiences and Subsequent Impacts on Academic Achievement. Symposium, Association for Psychological Science Annual Conference, Boston, MA

Okonofua, J. A. (2017, April). Labeling Processing and Mitigating Effects of Empathy. Symposium, Learning and the Brain Conference, Arlington, VA

Brady Jones, **Okonofua, J. A.,** Rothenberg, W., & McKee, L. (2017, April). Points of entry: Building social/emotional strengths through targeting students, teachers, and parents. Symposium, Society for Research on Child Development, Austin, TX

Okonofua, J. A., Côté, S., Muscatell, K. A., & Norton, M. (2016, September). Poverty and Inequality. Symposium, Society of Experimental Social Psychology, Santa Monica, CA

Before UC-Berkeley hire in 2016

Burnette, J. L., **Okonofua, J. A.,** Boucher, K. A., & Lacosse, N. (2016, May). New Directions in Mindset Research. Symposium, Association of Psychological Science Conference, Chicago, IL

Okonofua, J. A. (2016, April). Combating Implicit Bias to Reduce Racial Disparities in the Juvenile Justice System. Symposium, Federal Death Penalty Conference, New Orleans, LA

Okonofua, J. A. (2016). A Brief Intervention to Encourage Empathic Discipline Halves Suspension Rates Among Adolescents. Data Blitz Presentation, Society for Personality and Social Psychology, San Diego, CA

Okonofua, J. A., Harris, M., & Benton, H. (2015). Improving Legal Advocacy for Children by Addressing Implicit Bias. Symposium, National Legal Aid and Defender Association, New Orleans, LA

Okonofua, J. A., Harris, M., & Benton, H. (2015). Combating Implicit Bias to Reduce Racial Disparities in the Juvenile Justice System. Symposium, American Bar Association's Center on Children and the Law Conference, Washington, DC

Okonofua, J. A., Harris, M., & Briscoe-Smith, A. (2015). Combating Implicit Bias to Reduce Disparities in the School to Prison Pipeline. Symposium, Equal Justice Society's Mind, Science Conference, Oakland, CA

Okonofua, J. A., Harris, M., & Benton, H. (2014). Combating Implicit Bias to Reduce Racial

Disparities in the School to Prison Pipeline. Symposium, National Legal Aid and Defender Association, Arlington, VA

Okonofua, J. A., Harris, M., & Benton, H. (2014). Combating Implicit Bias to Reduce Racial Disparities in the Juvenile Justice System. Symposium, National Partnership For Juvenile Services, Greensboro, NC

Okonofua, J. A. (2013). Disproportionate discipline: How the effects of stereotypes escalate. Poster, 14th annual meeting of the Society for Personality and Social Psychology (SPSP), New Orleans, LA

Okonofua, J. A. (2011). Race in school settings: Subtle cues and disciplinary activity. Poster, 12th annual meeting of the Society for Personality and Social Psychology (SPSP), San Antonio, TX

INVITED NON-CONFERENCE TALKS AND PRESENTATIONS

Since UC-Berkeley hire in 2016

Okonofua, J. A. (2020, October). Mitigating Racial Inequality in School Discipline. Keynote Address, Relay Graduate School of Education Leadership Program, Virtual

Okonofua, J. A. (2020, July). Mitigating Racial Inequality in School Discipline. Keynote Address, Relay Graduate School of Education Summit, Virtual

Okonofua, J. A. (2020, May). Black Escalation Effect and Mitigating Effects of Empathy. Guest Speaker/Lecturer, Princeton University's Psychology Department and Woodrow Wilson School for Public and International Affairs, Virtual

Okonofua, J. A. (2020, February). Mitigating Racial Inequality in School Discipline. Speaker, Oakland Unified School District Early Childhood Education Department, Oakland, CA

Okonofua, J. A. (2019, October). Measuring Empathic-Mindset Effects Based on Educators and Learning Environments. Presentation, Bill & Melinda Gates Foundation's Mindset Science Network, Seattle, WA

Okonofua, J. A. (2019, July). When Bias and Threat Persistently Interact. Presentation, Raikes Foundation's, Seattle, WA

Okonofua, J. A. (2019, June). Summer Learning Session. Symposium, Chan Zuckerberg Initiative, Redwood City, CA

Okonofua, J. A. (2019, June). Shifting Teacher Mindsets: Combat the Effects of Bias if De-Biasing Strategies Are Not Viable. Presentation, Bill & Melinda Gates Foundation's Mindset Science Network, Washington, DC

Okonofua, J. A. (2019, January). Disproportionate School Outcomes in the United States and Science-based Remedies, City Town Hall Convening, Portland, OR

Okonofua, J. A. (2018, December). Story-telling: Childhood Development and Trajectory. Invited Talk, Chan Zuckerberg Initiative, Menlo Park, CA

Okonofua, J. A. (2018, November). Mitigating the Effects of Stereotyping in Teacher-Student Relationships. Invited Presentation, Minority Student Achievement Network, Chicago, IL

Okonofua, J. A. (2018, November). Mindset Science Network on Empathic Mindset. Presentation, Bill & Melinda Gates Foundation, Seattle, WA

Okonofua, J. A. (2018, October). A Holistic Approach to Combat Effects of Stereotyping. Colloquium, Northwestern University, Evanston, IL

Okonofua, J. A. (2018, October). Agentic-Mindset: Overcoming Bias with Agency. Invited Talk, Jobs for the Future, Providence, RI

Okonofua, J. A. (2017, December). A Holistic Approach to Combat Effects of Stereotyping. Invited Talk, Center for Employment Opportunities, Oakland, CA

Okonofua, J. A. (2017, November). The Effects of Stereotypes on Teacher-Student Relationships and Best Means to Combat It. Invited Talk, Schusterman Foundation Education Convening, Washington, DC

Okonofua, J. A. (2017, October). The Effects of Implicit Bias on Real-world Settings and Best Means to Combat It. Invited Talk, City Government of Philadelphia

Okonofua, J. A. (2017, April). Black Escalation Effect and Mitigating Effects of Empathy. Colloquium, University of California, Irvine, CA

Okonofua, J. A. (2017, January). Black Escalation Effect and Mitigating Effects of Empathy. Colloquium, Michigan State University, East Lansing, MI

Okonofua, J. A. (2016, October). Black Escalation Effect and Mitigating Effects of Empathy. Colloquium, Brown University, Providence, RI

Okonofua, J. A. (2016, October). Black Escalation Effect and Mitigating Effects of Empathy. Colloquium, University of Chicago, Chicago, IL

Before UC-Berkeley hire in 2016

Okonofua, J. A. (2016, February). Implicit Bias in Education. Lecture, St. Helena Public Library, St. Helena, CA

Okonofua, J. A. (2016, February). New Directions in Mindset Intervention: A Brief Intervention

to Encourage Empathic Discipline Cuts Suspension Rates in Half Among Adolescents. Colloquia, The Institute of Personality & Social Research Speaker Series at University of California, Berkeley, Berkeley, CA

Okonofua, J. A. (2016). Implicit Bias in School Discipline and a Brief Intervention to Mitigate Suspensions. Colloquium, Seneca, Oakland, CA

Okonofua, J. A. (2015). Implicit Bias in School Discipline and a Brief Intervention to Mitigate Suspensions. Colloquium, Seneca, Oakland, CA

Glaser, J. & **Okonofua, J. A.** (2015). Combating School Suspensions with Science. Invited talk, National Association for Advancement of Colored People's Legal Defense Fund's Perspectives on Race and Ethnicity for Capital and Non-Capital Defense Lawyers, New York, NY

Okonofua, J. A. (2015). Combating School Suspensions with Science. Invited talk, Californians for Justice's Race & Education Webinar, Oakland, CA

Okonofua, J. A. (2015). Bias and Disciplinary Action: An Intervention to Combat School Suspensions. Invited talk, American Civil Liberties Union, San Francisco, CA

Okonofua, J. A. (2015). Two-strikes: Race and the Disciplining of Young Adults. Invited talk, MSNBC's Melissa Harris-Perry Show, New York, NY

Okonofua, J. A. (2015). Implicit Bias and the School to Prison Pipeline. Invited talk, National Center for Youth Law, Oakland, CA

Okonofua, J. A. (2014).) How stereotypes contribute to the school-to-prison pipeline. Invited talk, National Association for the Advancement of Colored People's and Black Psychology Students Association' Walking Targets Colloquia, Stanford, CA

INTERNAL SERVICE

(DEPARTMENTAL) Member, Lectureship Committee, 2019-present
(DEPARTMENTAL) Member, Space Committee, 2018-2019
(DEPARTMENTAL) Member, Faculty Lectures Committee, 2017-2018

EXTERNAL SERVICE

Director, Stanford Alumni Association, Stanford, CA, 2021-present
President, Board of Directors, National Center for Youth Law, 2020-present
Director, Board of Directors, National Center for Youth Law, 2020-present
Member, Mindset Scholars Network, Bill & Melinda Gates Foundation, 2018-present
Advisory Board Member, Project for Education Research that Scales, 2018-present

COURSES

Spring 2020	Intervention Sciences (PSYCH 209J) Graduate (seminar)
Fall 2019	Stigma and Prejudice (PSYCH 167AC) Undergraduate (survey lecture course)
Spring 2019	Intervention Sciences (PSYCH 209J) Graduate (seminar)
Fall 2018	Stigma and Prejudice (PSYCH 167AC) Undergraduate (survey lecture course)
Fall 2017	Stigma and Prejudice (PSYCH 167AC) Undergraduate (survey lecture course)

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TO: Joseph W. Luby
Assistant Federal Defender
Federal Community Defender Office
Capital Habeas Unit
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106

FR: Dr. Jason Okonofua Ph.D.

RE: Summary Evaluation of Racial Bias and Tension in Kevin Johnson Case Proceedings, Juror Affidavits

DT: July 7, 2022

Background

My name is Dr. Jason Okonofua. I earned my bachelors degree in Psychology from Northwestern University. I then earned my masters degree and doctorate of Psychology from Stanford University. Now, I am an assistant professor at University of California, Berkeley. My research program examines social-psychological processes that contribute to inequality. My research emphasizes the on-going interplay between processes that originate among bias (explicit and implicit, how stereotyping can influence decision-making and behavior) and identity threat (how apprehension to bias can affect decision-making and behavior) to examine causes for inequality, broadly. The intersection of these processes, I have evidenced, undermines intergroup contact over time and contributes to inequality. I have been thoroughly trained in these forms of psychology.

My research has been published in premier journals, including *Science Advances* and the *Proceedings of the National Academy of Sciences*; it has been funded by organizations such as the National Science Foundation; and it has been featured on a variety of international popular media,

including *Wall Street Journal, New York Times, MSNBC*, *Reuters, Daily Mail, Pacific Standard, Education Week,* and the *Grio*.

Abstract

I have been asked to review juror affidavits and trial transcripts in Mr. Johnson's case to determine if and how racial bias may have been operated in the proceedings and if such bias may have affected jury deliberations. I have received affidavits from jurors that may involve descriptions relevant to racial tension and negative racial stereotypes being applied in their perceptions of Mr. Johnson due to the proceedings of the case. This constitutes my report regarding the content of those documents. In short, I find that racial bias was likely activated during the trial and applied during jury deliberations and the poll of jurors that concluded the trial.

Introduction

In this report, I will first describe how negative racial stereotypes were likely activated during the trial and applied in a manner that fundamentally affected the jury deliberations, and I will show how conformity affected the poll given to jurors that concluded the first trial of Kevin Johnson. I will also detail how fear of police retaliation may have further influenced the polling responses of the Black jurors.

Racial stereotypes likely shaped decision-making in jury deliberations

During jury deliberations, negative stereotypes about Black people likely shaped jurors' decision-making. This is apparent in language used to describe the defendant in the trial proceedings and in jurors' descriptions of the deliberation. During the trial, Kevin Johnson was described as indiscriminately violent, a description that activates the stereotypic association

between Black males and violence. For example, decades of research show that people, especially White people, tend to automatically (implicit bias) or deliberately (explicit bias) associate Black people with violence and crime and this is especially true in jury deliberations for court cases that involve the death penalty. In turn, the activation increased the likelihood of the stereotype being applied in individuals' perception, judgment, and decision-making. For example, research on capital sentencing shows the application increases the likelihood that Black defendants are sentenced to death.[1]

The Black-Violence stereotype was likely applied during jury deliberations and caused tensions along racial lines.[2] This is evident in jurors' affidavits which relate blatant examples of the use of "codewords" or divisive/exclusive phrases that divide people into groups of us versus them. This alienating process, sometimes known as "othering," underlies racism in general and was present in jury deliberations in Mr. Johnson's case:

> "Racial tensions grew during the last hour of deliberations before the judge called us out. 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. They weren't considering the 'cool deliberation' instruction. The one white woman kept yelling things about 'your neighborhoods,' and 'you people,' when talking to Black jurors. Someone said something about how Black jurors were only for 2nd degree because Kevin is Black, too."

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[1] Eberhardt, Jennifer L.; Davies, P G.; Purdie-Vaughns, Valerie J.; and Johnson, Sheri Lynn, "Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes" (2006). Cornell Law Faculty Publications. Paper 41. http://scholarship.law.cornell.edu/lsrp_papers/41

[2] Juror Simms stated, "Before deliberations, we all sort of got along regardless of race. But after the first day of deliberations, things became really divided by race." Namely, "…it did not go over well with the white women."

Declaration of Omar Simms.

Within the context of the events described by the materials I have reviewed, the phrases "you people" and "your neighborhoods" reflect the formation and application of stereotypes about Black people, as well as the assignment of those stereotypes to specific individuals, including Black jurors and a Black defendant. The stereotypes were then activated, so that the juror who made the statements is less likely to allow her own views to be questioned or changed by the views of the Black jurors she has stereotyped as dangerous, prone to violence, lazy, or having other traits with which Black people are adversely associated. Phrases like "you people" and "your neighborhoods" are typical examples of the "othering" process at work. 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. Such comments evidence a racial divide where the views of those on the disfavored (Black) side can be readily discounted.

The jurors' racial tensions were described by Juror Simms, who stated, "Before deliberations, we all sort of got along regardless of race. But after the first day of deliberations, things became really divided by race." Namely, "…it did not go over well with the white women." He then goes on to describe how one of the white jurors exhibited racial bias, declaring:

> "One white lady from Chesterfield said she did not believe police harassed Black people or that there could be bad relationships between Black communities and police. When this white woman said this, we were shocked. Even other white people could not believe she thought this. She did not back down and was very pro-police."

The expression of fear that Mr. Johnson could one day "get out and hunt them down" or "could get out and find [the juror] at the Wal-Mart or something" similarly reflects a fear borne in classic

negative stereotypes about Black men that were being associated with the individual defendant. This was a fear that Black people are prone to violence and are a threat to white women in particular. This stereotypic association was likely activated when the defendant was framed during the trial proceedings as a stereotypic Black male who intended to harm anyone who stood in his way.

The stereotype activation and application likely caused divisiveness according to race during jury deliberations. For example, in his affidavit, Juror Simms describes how,

> "Allen McCarter came back from the bathroom and lost it. He said, 'You're just trying to kill him!' I agreed with him, but worried that things were getting too loud and heated. The white ladies that were holding out for 1st degree went right back at him. Keisha had to pull Allen aside and get him to calm down because he was getting so upset with the white women. The white women did not seem to care how serious this was and that we were deciding a young man's life. They seemed to get more upset and vocal about their opinions when they realized that a few of the other white jurors agreed with the Black jurors."

McCarter did not specifically indicate race when making his declaration about trying to kill the defendant. However, it was understood as such by Simms and potentially "Keisha". By the end, Simms is describing the situation in terms of ingroups and outgroups, White jurors versus Black jurors, even when divisions were no longer along racial lines.

Another indication of division along racial lines is found in Keisha Reeves's affidavit. Namely, she says,

> "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.

> We were divided by race, with the Black jurors believing it was not 1st degree murder because of what happened with Kevin's little brother's death."

Here, she specifically states they were "divided by race" and explains the nature of the difference. This indicated that racial tensions had emerged. She also indicates suspicion of racial bias, such that the white jurors had made knee-jerk judgments and decision-making that is consistent with explicit or implicit bias.

There may have been racial bias at play such that a juror was extending a general belief about Black people (i.e., dangerous) and applying it not only to the defendant in the case, who was described in such terms, but also applying it to a fellow juror. This possibility is raised in Reeves' affidavit when she declares,

> "I had one issue that I had to talk to the judge about. A white woman communicated to the bailiff that I was "intimidating" her because I wouldn't stop staring at her. I didn't do or say anything to her, but I was called in to talk to the judge. I went back to the judge's chambers. He asked me if I was deliberately intimidating this woman and I said no. I was allowed to stay on the jury after that. She never said anything to me, but just went to the bailiff to try to get me kicked off."

Thus, it is apparent that the views of some White jurors not only negatively affected their assessment of the facts, but permitted them to ignore their duty to deliberate with an open mind by rejecting out of hand the positions of the Black jurors.

Conformity in jury poll

Research shows that jurors may be prone to conformity in response to ambiguous situations, a risk enhanced in this case by the racial tensions experienced in deliberations. In one

well-known case, in the Spring of 1992, four white L.A. police officers were acquitted of using unreasonable and excessive force in the beating of Rodney King. One of the jurors in the case, Virginia Loya, stated shortly after the trial that she initially believed the case against the officers was as clear as the videotape of the beating. But when the jury deliberated, her convictions waned. Put simply, the other jurors believed King deserved the beating he received. Loya said, "The tape was the big evidence for me. They couldn't see. To me, they were people who were blind and couldn't get their glasses clean. If anything, I wish these people weren't so blind." Despite her belief that the other jurors were incorrectly assigning blame in this incident, Loya conformed to their judgment and changed her vote from guilty to not guilty on all counts but one. This was an example of the power of social influence and how group pressure can cause us to go against what our eyes tell us about social reality.

Conformity is likely to shape judgment and decision-making under particular conditions or when certain parameters have been met in a given situation. Well-accepted scientific research categorizes such parameters as normative social influence versus informational social influence.[3]

- **Normative social influence: The need to be accepted**
  - When a person conforms, complies, or obeys in order to gain rewards or avoid punishments from another person or group.
- **Informational social influence: the need to know what's "right".**
  - When an individual looks to another person or group to gain accurate information.

[3] Deutsch, M., & Gerard, H. B. (1955). A study of normative and informational social influences upon individual judgment. *The journal of abnormal and social psychology*, *51*(3), 629.

Research establishing normative social influence. In 1951, scientists used a lab experiment to study what has since been understood as classic evidence of conformity.[4] Fifty students from Swarthmore College participated in a 'vision test.' There were two experimental conditions. In the control condition, each participants followed the procedure on their own while participants were part of a group in the experimental condition. Each participant in the experimental condition was placed in a group with seven actors. The participant was led to believe the seven actors were real participants like himself. This group of eight people were brought to a room where they viewed lines on a chart and were asked to state aloud which lines were identical. The correct answer was always obvious and the real participant was always seated in a position to be one of the last participants asked for their answer. The procedure was repeated multiple times. The scientists then measure how often the real participants conformed to the majority view (i.e., responding to the poll with an obviously incorrect answer because the participant heard actors before him respond with the same wrong answer). Approximately 75% of real participants in the experimental condition went along and conformed and gave at least one incorrect answer to conform to the incorrect answer other supposed participants gave. Less that 1% of participants in the control group, not exposed to actors one-by-one stating aloud an incorrect answer, gave an incorrect answer. When interviewed after the experiment, participants in the experimental group stated they had gone along with the group for fear of being ridiculed or treated as an odd ball. The findings of this "line judgment task" has been replicated several times since the original study was published and has now been cited more than 7,000 times by other scientists.

[4] Asch, S. E. (1951). Effects of group pressure upon the modification and distortion of judgments. *Organizational influence processes*, *58*, 295-303.

Research establishing informational social influence. In 1935, scientists used a lab experiment to determine the extent to which group dynamics could cause people to conform in response to an ambiguous or unclear situation.[5] To do so, the scientists utilized the autokinetic effect, a visual illusion whereby a stationary small spot of light is projected onto a screen in a dark room and appears to move. Indeed, when individually tested, participants' estimates of the light's movement considerably varied. However, when tested in groups of three that had to state their estimate aloud in front of the group, the group converged to a common estimate. The scientists concluded that when unclear about a public poll, individuals will look to others' responses for guidance. They want to give the correct answer but lack appropriate information. Observing others' responses provides this information. This phenomenon is referred to as informational conformity and has been cited by other scientists over 2,000 times.

In both ways, normative social influence, and information social influence, the procedure of polling individual jurors in open court likely caused several jurors to conform to jurors responses that came before their own, as opposed to stating their true response.

Jurors were put in a position where normative social influence was likely to shape their responses to the poll. Specifically, the jurors were asked one by one in open court. Even if a juror knew their personal response differed from that of other jurors who answered "no" before them, they would have likely felt compelled to conform or not deviate from group.

Affidavits from some jury members in Mr. Johnson's case are consistent with normative social influence causing jurors to conform in their responses to the poll. For example, Omar Simms

[5] Sherif, M. (1935). A study of some social factors in perception. Archives of Psychology (Columbia University).

mentioned that he believed the correct answer was "yes" but said "no" because other jurors had done so. This is apparent when he states:

> "He said he hadn't heard from us in a while, so he polled all of the jurors one by one. It all happened so fast, and I said 'No' because everybody else said no before me. I was number 10, so 9 people before me said 'No."

Simms is explaining the social influence that is indicative of conformity shaping his response to the poll. Similar to the line test experiments, Simms was aware that several other people responded "No" which led him to conform and also to respond "No".

Informational social influence may have also been at play by polling individual jurors in open court. If a juror did not feel confident in their response, they would look to others' response as an indication of what the "right" answer was. This is especially likely when individuals are put in a position where they need to answer an ambiguous question, one in which there is no clear "right" answer. Racial tensions on the jury contributed to this lack of confidence, where the deliberations were at times sidetracked by comments evincing racist views.

Affidavits from some jury members are also consistent with informational social influence causing jurors to conform in their responses to the poll. For example, Allen McCarter mentioned that he was confused by the instructions in the poll and would have answered differently if he better understood the question posed in the poll. In his affidavit, McCarter declared,

> "I was confused because there was change, and I thought we were going to continue into the next day and reach a verdict of 2nd degree. I really believed that it was possible because one juror changed their mind that morning. It wasn't even that much time. I was mad because it felt like the judge cut us short, and he seemed like he made up his mind that this was over."

Here, McCarter is explaining how he was confused by the question that was posed in the poll. Indeed, McCarter goes on to state, "I said 'No' because I didn't understand that it meant the entire trial." Also, Keisha Reeves, in her affidavit, states that she was confused by the process and would not have responded "no" to the poll if there was more clarity about the meaning of the poll. She stated,

> "I did not believe we were deadlocked to the point of not being able to reach a verdict. That afternoon, we did not relay to the bailiff or the judge that we would never be able to reach a verdict. When they called us out, I thought we were going to get more clarity on the instructions we asked about. But instead, they polled us all to ask if we were deadlocked."

She then goes on to specifically explain how the lack of clarity about the meaning of the poll was directly connected to why her response to the poll was the opposite of her true thoughts. She stated,

> "When they polled us individually, I agreed that we were deadlocked for two reasons. One reason was because of the lack of clarity and further explanation of 'cool, calm and collected.' If they would've given us more help on that instruction, I would not have said 'No.' I believe we would have reached a verdict if they would have clarified that instruction."

Another juror, Anitra Mahari, also mentioned this lack of clarity and surprise with the outcome of the poll. In her affidavit, she declared,

> "In the courtroom, we were asked whether we had been able to reach agreement, which we had not yet. I remember an attorney trying to object. Next thing I knew, we were being dismissed. I felt frustrated and angry that the process had been halted so suddenly."

As described, when uncertain about the nature of the poll, she mistakenly assumed the poll was about whether the jury had reached a unanimous decision *yet.* And when she finally learned the nature or outcome of the poll, she felt "frustrated and angry".

Last, a pivotal aspect of the context that brings both normative social influence and informational social influence together, is that the foreman, the first person to respond to the poll, also mentions in his affidavit that he was uncertain about what the poll meant and that this influenced his response to the poll. John Stimpson stated,

> "The afternoon of the second day of deliberations, without our asking a question or contacting the judge, we were called into the courtroom. The judge questioned each of us as to whether we believed we could reach a verdict, starting with me. The judge did not explain to us that the answers to his question would determine the outcome of the trial. I was surprised when we were immediately dismissed and the judge declared a mistrial."

This means the first person to individually respond aloud to the poll in open court was likely influenced by informational social influence, setting the rest of the jurors to face both the same informational social influence and the normative social influence that came from this first person giving a wrong answer – similar to the aforementioned "line judgment task" that evidenced conformity due to social normative influence in an experimental paradigm.

Taken together, with a reasonable amount of scientific certainty, the jurors were put in an uncertain situation where they likely gave inaccurate responses to the poll due to conformity.

Fear of police retaliation likely shaped jurors' poll responses.

There are also indications that another factor influenced jurors' responses to the poll, namely, a fear of police retaliation exacerbated by the overt presence of police officers in the courtroom. The logic was that these police officers will know my individual, not anonymous, response and direct their angst at me specifically, especially since the victim in the case was a police officer. This is a well-documented fear and one that disproportionately affects Black people. For example, studies found that Black teens hold fear and distrust toward police due to witnessing their Black and Brown peers in the media being harassed, beaten, or lose their lives to police with impunity.[6] Research suggests Black people are more likely to fear and distrust the police due to Black peoples' historical and current disproportionately negative treatment by police. For example, data from the Surveillance for Violent Deaths National Violent Death Reporting System shows police killings were the third leading cause of violence-related deaths in 2014, accounting for 24.4% of the more than 16,000 violent-related deaths in 16 states. In this data, Black males were 21 times more likely to be killed by police than White males.[7]

The perception of police mistreatment of Black people was likely activated during the trial. On multiple occasions the idea of police harboring malice toward and potentially abusing Black people was activated. First, Kevin Johnson mentioned it during his testimony,

> "Q And you tell us that knowing you're on video, that's why you were worried that the police were going to shoot you?

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[6] Staggers-Hakim, R. (2016). The nation's unprotected children and the ghost of Mike Brown, or the impact of national police killings on the health and social development of African American boys. *Journal of Human Behavior in the Social Environment*, *26*(3-4), 390-399.

[7] Gilbert, K. L., & Ray, R. (2016). Why police kill black males with impunity: Applying public health critical race praxis (PHCRP) to address the determinants of policing behaviors and "justifiable" homicides in the USA. *Journal of urban health*, *93*(1), 122-140.

A From what my father told me, he said they going to shoot you If they catch you. And basically from watching the news coverage and police chief on TV.

Q Let me ask you, did they catch you?

A Did who catch me?

Q The police.

A No, I turned myself in.

Q Did anybody shoot you? —-

A They said, that's not, they didn't shoot me, but when we were In the car, he was, the guy that testified earlier, he was like, I'm surprised you're not dead yet.

Q He said that?

A Yeah."

The perception of police mistreatment of Black people was also likely activated by closing arguments:

> "What black man is not going to worry about it? You're at the station, and I'm going to tell them I killed a white man, an officer, he's going to be worried, but when he got up here in the hope, amongst all of us, what he did not have to be afraid that a stick might come across his head if he said something on that stand under oath in front of all of you, In front of Mr. McCulloch, in front of us, he said I did it."

The same fear of police mistreatment of Black people was prominent during the polling procedure. Indeed, this is how Keisha Reeves describes the poll context in her affidavit, where she specifically discusses how fear of police affected her response to the poll:

> "When they polled us individually, I agreed that we were deadlocked for two reasons… The other reason was because of the police presence in the courtroom. We were aware from the beginning of the trial that cops were going to be heavily packing the courtroom. I even had my neighbor drive me because someone warned me that cops would run my plates if I parked in the garage. 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."

Juror Reeves specifically discussed how fear of police affected her response to the poll.

Conclusion

Based on a reasonable amount of scientific certainty, stereotypic associations between Black males and violent crime were likely activated during the trial and adversely influenced the votes of some White jurors. The stereotype was also likely applied in ways that fundamentally affected group dynamics during jury deliberations and the final poll posed, one-by-one, to jurors in open court. Additionally, the apparent reluctance of some jurors to resume deliberation can be fairly ascribed to fear of police retaliation, prompted in significant part by the disproportionate presence of police in the courtroom.

April 26, 2022

David Zuckerman, Assistant Defender
Federal Community Defender Office
For the Eastern District of Pennsylvania
Capital Habeas Unit
Suite 545 West – The Curtis Center
601 Walnut Street
Philadelphia, PA 19106

RE: KEVIN JOHNSON

Dear Mr. Zuckerman:

Thank you for asking me to review the following records involving your client, Kevin Johnson:

- 2016-07-16 Martell Final Report
- Background Packet Vol. I (Mental Health Records, 1995-2010)
- Background Packet Vol. II (Social History Records, Part A)

You have asked me to comment on my research and clinical experience concerning brain development, especially with regards to biologic, social, emotional and cognitive maturation. I have not seen nor evaluated Mr. Johnson and therefore, the comments and statements that I make are based on my background, education, training, and the fact that I have been a professor for 47 years in the field of cognitive neuroscience and neuropsychology. I have published extensively on this topic, summarized in my vita, which is attached.

With the advent of magnetic resonance imaging (MRI) in the early 1980s, one of the first objectives of MRI research was to study the developing brain. The reason for this was that computed tomography (CT) imaging, which pre-dated the development of MRI, was x-ray-based and therefore would expose the infant/child/adolescent to radiation. The quality of current MRI technology is that the image generated by an MRI scan mirrors the visualization of gross brain anatomy at post-mortem and current technology permits scientific quantification of all kinds of metrics associated with brain development and size. This is demonstrated in Figure 1, which shows a post-mortem coronal section of a cadaver brain compared to my MRI. The excellent convergence of brain tissue based on an MRI scan compared to an actual post-mortem brain is visually obvious.

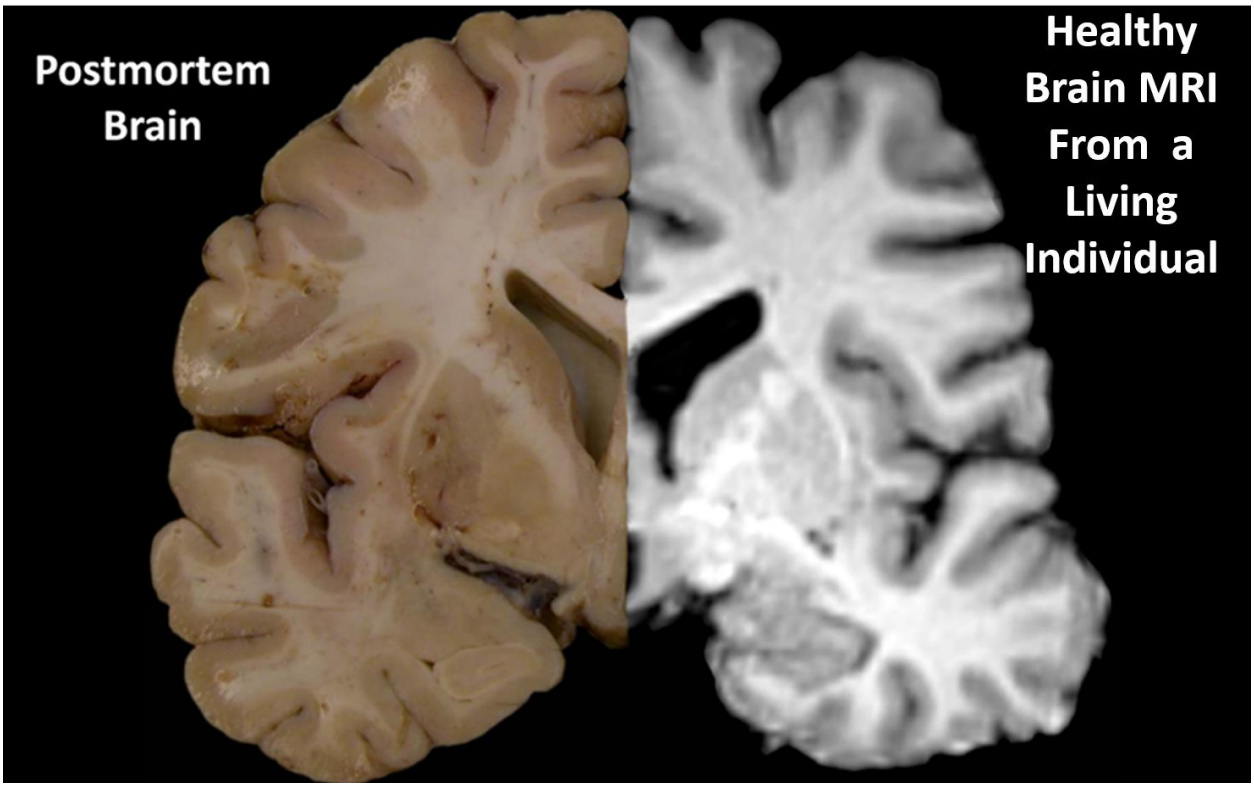


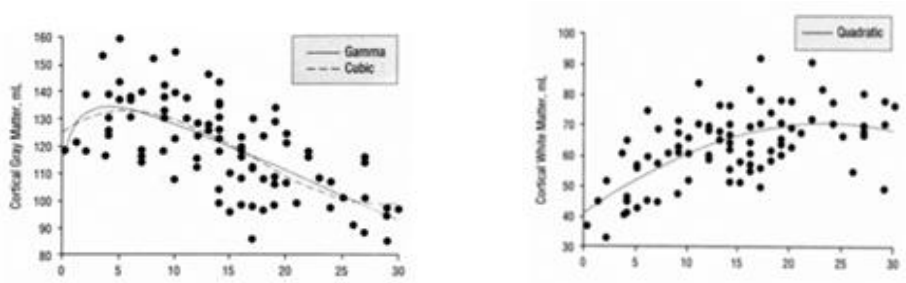
Figure 1

These MRI investigations of brain development have, therefore, been going on for nearly 40 years. They clearly demonstrate a wide variety of maturational changes in the brain that go on throughout the lifetime, but in regard to when the brain reaches maturity, from a neuroimaging and neurobiological standpoint, maturity is not reached until the mid-20s. MRI methods not only demonstrate the structural, physical development of the brain, but also the metabolic, neural network/connectivity and functional development. These different types of MRI methods are fully explained in *Neuropsychological Assessment,* a textbook of which I am an author (Lezak, M.D., Howieson, D.B, Bigler, E.D. & Tranel, D. 2012: Oxford University Press).

The brain is comprised of 300 billion cells and approximately one-third of those are neurons. Neurons have a structure where the cell body has one protruding element that communicates with the next cell(s) in line. That protruding element is referred to as the axon, which is akin to a phone cable connecting two phones and transmitting the information. The majority of axons in the brain are myelinated, which means that there is a fatty coating that forms a sheath around the axon that facilitates neurotransmission, just as phone cables have insulation. The "fatty" sheath coating of the axon gives its white appearance, referred to as brain "white matter." The cell bodies of a neuron are tightly compacted, creating the gray matter of the brain, arrayed in organized layers of the cerebral cortex and within deep regions of the brain, referred to as subcortical nuclei. As shown in Figure 1, in the coronal image of my MRI-derived brain image, gray matter is "gray" and white matter is "white" as is readily distinguished in Figure 1. Cerebrospinal fluid-filled areas are black.

Also, it should be emphasized that all aspects of brain function are mediated by electrochemical reactions in the brain, with the electrical impulse initiated in the gray matter, transmitted down the axon, white matter, to interface at the synaptic level with a dendrite of the next cell, and thereby activating the next cell in the neural network. Accordingly, anything that alters or affects cell body function or white matter integrity alters how the brain functions.

From a maturation standpoint, the ~100 billion neurons "mature" in two different ways: (1) cell body growth combined with cellular pruning and (2) increased myelination including axonal collateral development. The developing brain is an experience-dependent organ, under genetic control that interacts with its environment in multiple domains: physically, exposure to and response to pathogens, nutritionally, cognitively and in various ways of age-mediated social-emotional function. In this process, the brain establishes primary neural cells that carry out specific functions through myelinated axons, but also interact with all other neural functions to generate human behavior. In this process some neurons that create the gray matter of the brain are "pruned" back, which results in reduced gray matter volume, but the remaining cells within the gray matter become more efficient in neural communication via increased myelination, resulting in greater white matter volume as shown in Figure 2. Accordingly, gray matter volume decreases while white matter volume increases as the brain matures. This will be elaborated further in a following paragraph. From a neuroimaging perspective this was first shown by Pfefferbaum, A. et al. [1994. A quantitative magnetic resonance imaging study of changes in brain morphology from infancy to late adulthood. Archives of Neurology, 51(9), 874–887] as depicted below. Note the steady decline in gray matter volume (left image) associated with the steady increase in white matter volume (right image) that plateaus between 20-30 years of age. The limitation of this early work on MRI-based brain development, was that it all involved cross-sectional participants rather than just following the same individuals over their lifespan.



Gray Matter Volume **White Matter Volume**

Figure 2

However, all of this has been refined with large, within subject prospective designed studies. For example, one of the large prospective, longitudinal studies of brain development that I am involved in recently published developmental growth plots over a 16-year time span in the same individuals. Below is the maturation plot of the corpus callosum, the largest white matter interhemispheric

connector pathway in the brain and a brain region that has been an index brain structure of maturation. The importance of the corpus callosum is that the major neural communications between the two hemispheres of the brain and all lobes occurs via the corpus callosum. As shown below, in this study with a focus on comparing those who were typical developing, healthy control participants to those with persistent autism spectrum disorder (ASD) with those who have remitted (no longer meeting the criteria for ASD), regardless of the clinical classification, the corpus callosum volume does not plateau until somewhere between 20 to 30 years of age. This is shown in Figure 3.

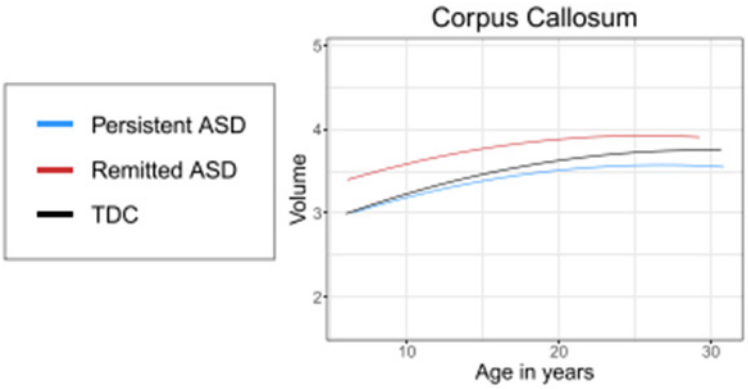


Figure 3

The immaturity of brain cells at birth, despite their number, essentially representing the cell count for the life of that brain, are probably more numerous than what is needed as functional connectivity and neural networks develop and become specialized. In reviewing Figure 1, note that there is a rapid increase in overall gray matter volume because of cell body maturation but also that the gray matter pruning process also begins early in life, around ~8years of age. At that point gray matter volume begins to decrease. Simultaneously, because of increased myelination which enhances neural transmission time and efficiency, white matter progressively increases. So, despite having basically the full complement of brain cells that will serve that individual for a lifetime within the first year of life, the growth of neural cells result in a brain volume at birth that is ~25% of its adult stage; but by one year is approaching 85-90% of adult volume. But what occurs during this rapid expansion of head-brain size is the beginning of the pruning back of some neurons but offset with massive expansion of brain connectivity via myelination of the axon along with axon collateral growth to facilitate multifaceted network development and synaptic complexity. What this means is while both white and gray matter changes occur with maturation, plotting white matter growth curves is particularly sensitive to brain development and relates to behavior.

As such, *ALL* behavioral responses only occur via brain connectivity, requiring multiple levels of brain integration, especially involving the frontal lobes, which are the largest of the four lobes and last to mature. Connectivity (in both degree and accuracy) in the brain is dependent upon the developmental stage of the brain, as human maturation has a very lengthy period of development

that spans the first three decades of life. The timing of when maturation reaches an asymptote is also dependent on the behavioral domain (motor, sensor-perceptual, language, memory, executive functioning, etc.) and the neural system being assessed, and the brain-behavior-environmental interactions that have occurred in that individual.

As indicated above, one of the records that you sent was from Daniel A. Martell, Ph.D., ABPP. Dr. Martell performed a neuropsychological assessment on Mr. Johnson back in 2016, with the date of his report being July 16, 2016, which summarizes his findings. He reviews the significant background history, which is voluminous. In a synopsis, it is evident that there are many adverse childhood experiences (ACEs), along with head injuries. On page 19, he concluded that "Kevin Johnson is a man who was born into a violent, abusive, and regretful environment, with a genetic predisposition to mental illness. It is very likely that he was drug exposed as an infant, based on his mother's history and the extant records. These facts placed him at increased risk for psychiatric and behavioral disorders from birth."

From a brain development standpoint, the brain should be, as stated above, considered as an experienced dependent organ that only develops in a normal fashion in response to the interface between the environment, nutritional, psychosocial, learning/educational opportunities. Furthermore, no aspect of cognition, emotion or behavior occurs independent of the brain. When I was full-time at the University and directing the Brain Imaging & Behavior lab, as students would enter the lab the first thing they would see was the lab motto: "Every Behavior has an Anatomy," a phrase first spoken by Norman Geschwind, M.D. in the early 1970's, as brain imaging methods were emerging. The neural mechanisms that generate behavior are extremely complex that begins as a neural process dependent upon the integration of neural systems working in concert to generate behavior; thus, it is critical to understand that the neurosciences recognize the brain as an interdependent systematic network and not a group of independent silos each acting without interplay from the other.

Because of this complexity and the interplay between the environment in which the brain is developing, that is why ACE exposure is so critical to brain development. The review by Teicher et al. (The effects of childhood maltreatment on brain structure, function and connectivity. Nature Reviews-Neuroscience. 2016, 17, 652 – 666), provides an excellent review. There are two illustrations from the Teicher et al. article. The first shows where changes have occurred in the brain of individuals exposed to ACE factors. Note the influence on frontal and temporal lobe regions and neural pathway connections that are physically altered in brain development, when the brain is exposed to ACE factors, as shown in Figure 4.

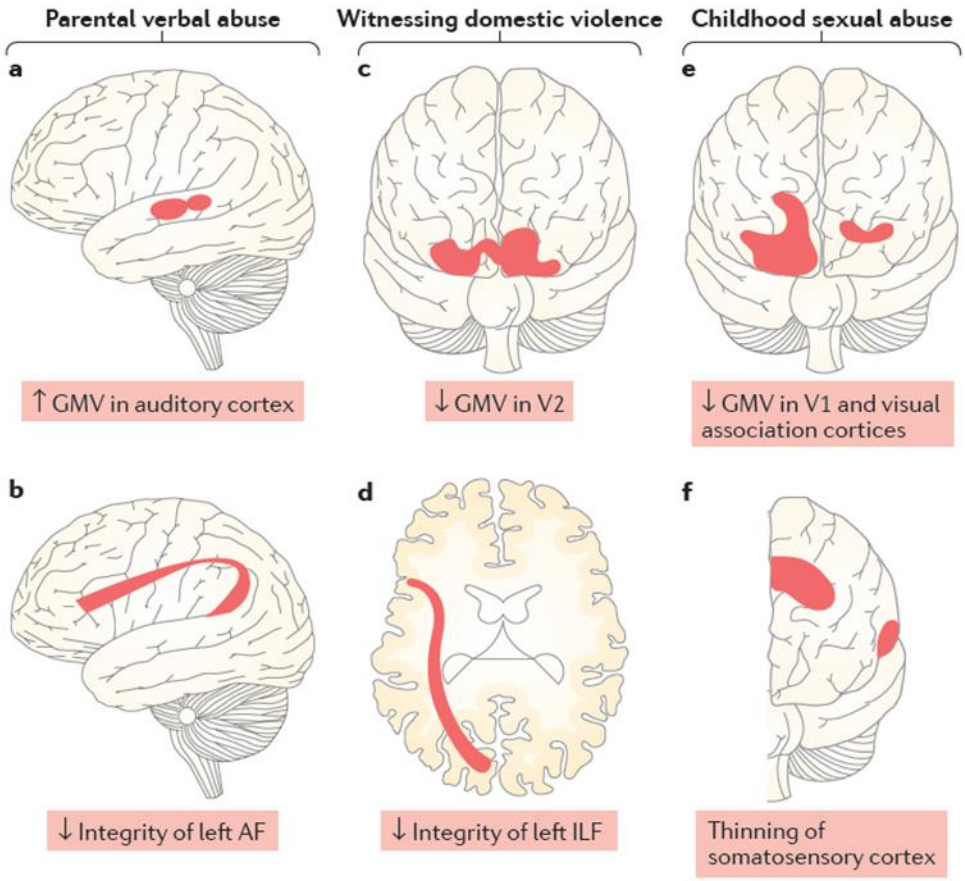


Figure 4

Dr. Martell also found deficits in executive function and discusses all of these findings in terms of the neurobiology of the ventral medial prefrontal cortex. ACE factors, as well as repetitive head injury (see Dr. Martell's report on page 6), damage these neural systems. In his report, Dr. Martell shows a mid-sagittal (side) view of an MRI colored in, but the diagram below from Teicher et al. not only shows the location of the ventromedial prefrontal cortex, but all of the white matter pathways associated with regions including the neurotransmitters (see the MRI illustration in Dr. Martell's report and compare to the schematic presented in Figure 5).

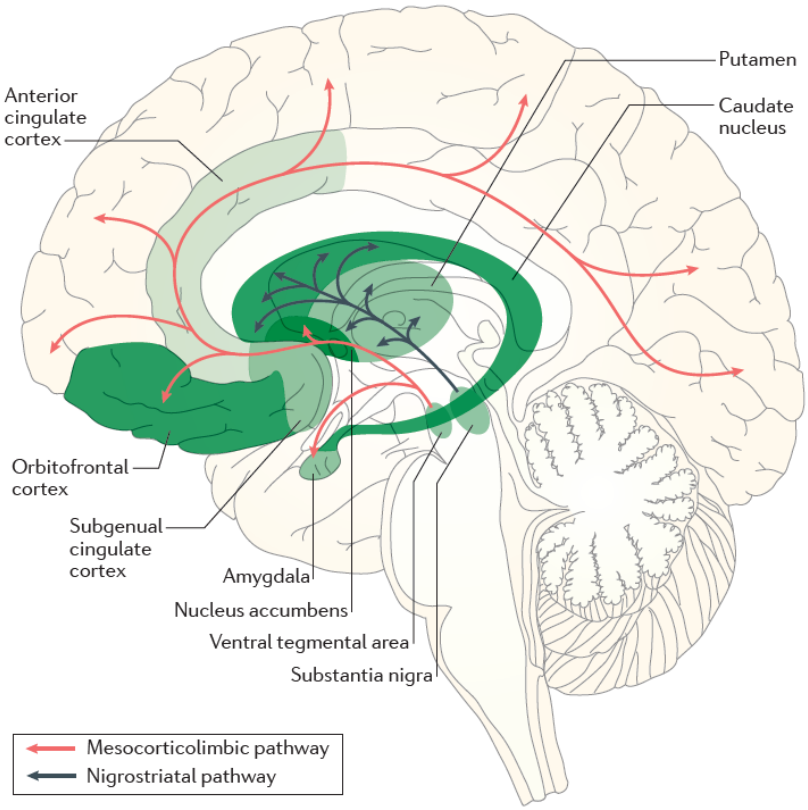


Figure 5

There are numerous other studies that demonstrate this same principle and a summary of them can be found in a recent publication of mine [see 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*, 2021, 7, 27-54. https://doi.org/10.1007/s40817-021-00099-6]. The Bigler 2021 article reviews a variety of different neuroimaging, all explained in the article that is attached, showing that brain development from a maturation perspective continues to develop throughout the 20's. For example, the study by Somerville from 2016 [Searching for signatures of brain maturity: What are we searching for? Neuron, 92(6), 1164–1167. https://doi.org/10.1016/j.neuron.2016.10.059], as shown below in Figure 6:

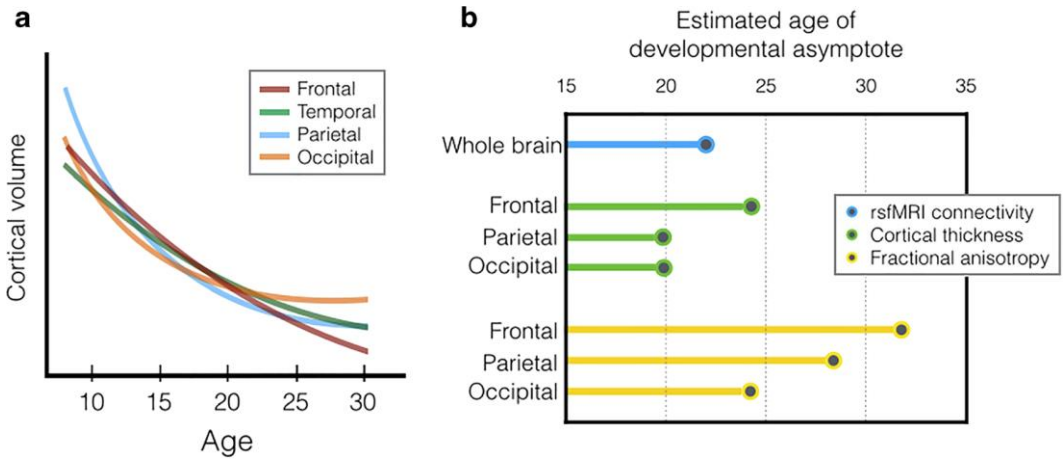


Figure 6

As shown in "a" above in Figure 6, while all lobular areas mature at different rates, they all distinctly extend well beyond 20 years of age. Note that the occipital and parietal areas plateau before the frontal and temporal lobes. Parietal and occipital regions are especially involved in visuospatial processing whereas the frontal and temporal lobes are especially important for maturational processes involved in emotional and impulse control, memory, intellectual and cognitive ability, including executive functioning.

As highlighted by Dr. Martell, the frontal lobe is the last to develop, as clearly demonstrated above. Although structural development, meaning size, may reach its apex by the mid 20's, functional maturation and integration of frontal functioning extends into the 30's. The frontal lobe is critical for executive function, through its connectivity with all other aspects of the brain. Accordingly, if there is a deficit in white matter integrity and interactive relations with the rest of the brain, regardless of etiology, executive function is compromised as inferred by Dr. Martell in his report.

Using the scientific principles as extracted from neuroimaging methods to study brain maturation, there can only be one conclusion – an adult brain is not fully achieved, on average, until the individual is in their mid-to-late 20 years of age. Given the objective quantitative structural and functional neuroimaging findings discussed in this report, including individual differences, the youngest age then for which one can make a reasonable scientific argument for maturity of brain function would be 21, though because of the numerous variables that interrelate with brain maturation, many would continue to argue, as I would, that on an individual basis, it is indefinite but clearly between ages 21 and 25.

If needed, I can expand on any of the points raised in this review letter addressing brain maturation.

Sincerely,

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