No. 22-5947

IN THE SUPREME COURT OF THE UNITED STATES

Kevin Johnson,

Petitioner,

v.

State of Missouri,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Missouri and Response Opposing Motion to Stay Execution

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ERIC S. SCHMITT
Missouri Attorney General

D. John Sauer
Solicitor General
Shaun J. Mackelprang
Deputy Attorney General, Criminal Litigation
Andrew J. Crane
Assistant Attorney General
Counsel of Record
P.O. Box 899
Jefferson City, MO 65102
Telephone: (573) 751-0264
Andrew.Crane@ago.mo.gov

Attorneys for Respondent

Capital Case

Questions Presented

1. Does the Constitution require the Missouri Supreme Court to reopen a capital inmate's final direct appeal to examine whether jurors who could not reach a verdict in a prior mistrial might have reached a verdict if the inmate were allowed to discount the votes of any jurors who voted to convict him of first-degree murder?
2. Does the Constitution require the Missouri Supreme Court to reopen a capital inmate's final direct appeal to decide whether to expand this Court's holding in *Roper v. Simmons,* 534 U.S. 551 (2005), to murderers who are over the age of eighteen even though *Roper* said that the Constitution does not require such an expansion?

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Statement of the Case

Kevin Johnson ambushed and shot Sgt. William McEntee, an officer in the Kirkwood, Missouri Police Department. After Johnson's initial shots wounded Sgt. McEntee, leaving him kneeling and helpless, Johnson executed him. A Saint Louis County jury found Johnson guilty of first-degree murder and sentenced him to death.

Around 5:20 p.m. on July 5, 2005, Kirkwood police began searching the Meacham Park neighborhood for Johnson or his vehicle because they were attempting to serve Johnson with an outstanding arrest warrant. Tr. at 1220–21, 1225–27, 1272. The investigation was interrupted at 5:30 p.m. when Johnson's younger brother, Joseph Long, had a seizure in the house next door to where Johnson stayed. Tr. at 1232–35. Long's family sought help from the officers, who assisted until an ambulance and backup, including Sgt. McEntee, arrived. Tr. at 1184–85, 1190–91, 1232, 1240. Johnson was next door as police and paramedics tried to save Long's life. Tr. 1225, 1232–35, 1287. Long was taken to the hospital, where he passed away from a preexisting heart condition.

Tr. at 1197–99, 1780–83. Meanwhile, the police did not find Johnson, suspended their search, and left the area.

Despite several officers' efforts to save his brother's life, Johnson blamed the police for Long's death. Tr. at 1424–26. After the police had left, Johnson told a friend that he believed the police were not trying to help Long because they were too busy looking for Johnson. Tr. 1424–26.

Later that evening, Sgt. McEntee responded to a call relating to fireworks in the area. Tr. at 1127–28, 1294–96, 1318–19, 1380–83. As Sgt. McEntee was questioning three children, Johnson approached Sgt. McEntee's patrol car, put his gun through the open passenger side window, and shot at Sgt. McEntee and the children. Johnson's shots injured one child and hit Sgt. McEntee in the leg, head and torso. Tr. at 1299–1303, 1441–45; Johnson entered the patrol car and took Sgt. McEntee's gun. Tr. at 1181–21.

Johnson walked down the street and spoke to his mother and her boyfriend. Tr. at 1654. Johnson told his mother that Sgt. McEntee "let my brother die, he needs to see what it feel[s] like to die." Tr. at 1654. She responded, "that's not true." Tr. at 1654. Johnson left his mother, and eventually returned to the scene of the shooting. Tr. at 1351–52, 1672–75.

While Johnson was gone, Sgt. McEntee's patrol car rolled down the street, hit a parked car, and then hit a tree before coming to rest. Tr. at 1349, 1668–72. When Johnson returned, Sgt. McEntee was alive and on his knees

near the patrol car. Tr. at 1351–52, 1672–75. Sgt. McEntee was bleeding from the mouth and could not speak. Tr. at 1673–74. Johnson approached Sgt. McEntee, who helplessly knelt in the street. Tr. at 1353–54. Johnson shot Sgt. McEntee in the back and in the head, killing him.

The jury convicted Johnson of first-degree murder and found three statutory aggravating circumstances: 1) in killing Sgt. McEntee, Johnson acted in a way that created a great risk of death to other individuals; 2) the murder of Sgt. McEntee involved depravity of the mind making the murder wantonly vile, horrible, and inhumane; and 3) Sgt. McEntee was a peace officer performing his official duties at the time of the murder. The jury returned a verdict recommending a sentence of death. The trial court agreed with the jury's recommendation and sentenced Johnson to death.

This Court's review of a state conviction should be informed by AEDPA, which limits federal review to the evidence presented in state court and presumes that the facts found by state courts are correct. 28 U.S.C. § 2254(e); *Shinn v. Ramirez,* 142 S. Ct. 1718, 1732 (2022); *Cullen v. Pinholster,* 563 U.S. 170, 180 (2011). Johnson's statement of the case fails to recount the facts of his crime as they were found by the jury, so this Court should rely on Respondent's statement instead. *See* Rule 15.2. Further, Johnson's statement includes discussion of events never presented or proven in state court including

allegations about his mental health and the deliberations of jurors in his first trial. This Court should treat those statements as unproven allegations.

Reasons for Denying the Petition

I. This Court lacks jurisdiction because the Missouri Supreme Court's order below is supported by a host of adequate and independent state-law grounds.

Both of Johnson's certiorari questions fail to properly invoke this Court's jurisdiction because the record gives no reason to believe that the Missouri Supreme Court finally decided a federal question below. Instead, it is much more likely that the state court denied Johnson's petition for one of several adequate and independent state-law reasons.

This Court should deny Johnson's petition under the "well-established principle of federalism" that state-court decisions resting on state law principles are "immune from review in the federal courts." *Wainwright v. Sykes,* 433 U.S. 72, 81 (1977). This rule applies "whether the state law ground is substantive or procedural." *Coleman v. Thompson,* 501 U.S. 722, 729 (1991) (citing *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935)).

Citing *Harrington v. Richter,* 562 U.S. 86, 99 (2002), Johnson wrongly argues that the Missouri Supreme Court's summary denial must be viewed as a decision on the merits of his claims. Pet. at 1–5. The presumption discussed in *Harrington* only applies "*in the absence of any indication or state-law procedural principles to the contrary.*" *Harrington,* 526 U.S. at 86 (emphasis

added). Missouri's procedural rules prohibit late-coming post-conviction challenges that could have been raised earlier as well as "duplicative and unending challenges to the finality of a judgment. *State ex rel. Strong v. Griffith,* 462 S.W.3d 732, 733–34 (2015). The Eighth Circuit recognizes that Missouri's procedural rules often require summary denial of defaulted post-conviction claims, so a summary denial does not "fairly appear to rest primarily on federal law, or to be interwoven with federal law." *Byrd v. Delo,* 942 F.2d 1226, 1231 (8th Cir. 1991) (alteration and ellipsis omitted).

The same is true here. Johnson's petition below failed on several state substantive and procedural grounds. Because adequate and independent state-law grounds support the Missouri Supreme Court's order below, this Court has "no power to review" the order and "resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman,* 501 U.S. at 729.

A. State Limits on Motions to Recall Mandate

Johnson asked the Missouri Supreme Court to recall its mandate in his direct appeal, but that remedy has a narrow function that does not apply to Johnson's claims. The Missouri Supreme Court has "never fully delineated the scope of an appellate court's power to recall its mandate[,]" but it has only recognized two instances where a motion to recall the mandate is appropriate, and one is no longer appropriate. *See State v. Whitfield,* 107 S.W.3d 253, 264–

65 (Mo. 2003) (abrogated on other grounds by *State v. Wood,* 580 S.W.3d 566, 587 (Mo. 2019)). First, a motion to recall the mandate used to permit petitioners to raise claims that appellate counsel was constitutionally ineffective but that is no longer correct. *Whitfield,* 107 S.W.3d at 265 n.10. Second, a mandate will be recalled "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 (emphasis added).

Johnson did not raise a colorable claim below that the Missouri Supreme Court's direct appeal decision conflicted with this Court's precedent. This Court has never held that the Constitution requires the conviction or acquittal of a defendant when the jury fails to reach a verdict, and all available precedent suggests that racially-biased jury deliberations are properly cured by a mistrial and a retrial before a fair jury. *See Blueford v. Arkansas,* 566 U.S. 599, 606 (2012) (initial report of juror deliberations could not constitute an acquittal where the jury ultimately failed to reach a verdict); *see also Arizona v. Washington,* 434 U.S. 497, 509–10 (1978) (trial judge's decision to declare a mistrial when the jury is deadlocked is entitled to "great deference" and does not bar retrial); *Pena-Rodriguez v. Colorado,* 580 U.S. 206, 870–71 (2017) (declining to decide when evidence of racial bias justifies a new trial); *Shillcut v. Gagnon,* 827 F.2d 1155, 1159–60 (6th Cir. 1987); *United States v. Henley,*

238 F.3d 1111, 1123 (9th Cir. 2001). Johnson received exactly this remedy; the state courts did not violate the federal constitution by following this Court's precedent.

And in this Court's juvenile death penalty jurisprudence, this Court has drawn "the line at 18 years of age." *Roper v. Simmons,* 543 U.S. 551, 574 (2005). Like this Court, the federal courts of appeals have declined to extend *Roper* to murderers older than eighteen based on social-science evidence. *United States v. Tsarnaev,* 968 F.3d 24, 96–97 (1st Cir. 2020) (reversed on other grounds); *United States v. Dock,* 541 F. App'x. 242, 245 (4th Cir. 2013); *Doyle v. Stephens,* 535 F. App'x 391, 395 (5th Cir. 2013); *United States v. Marshall,* 736 F.3d 492, 500 (6th Cir. 2013); *Melton v. Fla. Dep't. of Corr.*, 778 F.3d 1234, 1235, 1237 (11th Cir. 2015). There is no conflict between Johnson's sentence and this Court's cases, so there was no proper state-law basis to recall the mandate in Johnson's direct appeal.

Further, no federal law requires the Missouri Supreme Court to recall its mandate under any circumstances. *See Griffin v. Illinois,* 351 U.S. 12, 18 (1956) (citing *McKane v. Durston,* 153 U.S. 684, 687–88 (1894)). States are not constitutionally required to provide appeals, and they are not constitutionally required to entertain endless requests to reopen final appeals long after they are concluded. *Id.* The state-law limits on motions to recall the mandate protect "the State's significant interest in repose for concluded litigation." *Shinn,* 142

S. Ct. at 1731. Respecting those limits and those interests, this Court should deny the petition for lack of jurisdiction.

B. State Requirements for Habeas Petitions

Though Johnson asked the Missouri Supreme Court to alternatively treat his motion as a petition for a writ of habeas corpus, the court was not required to do so and Johnson's motion failed to comply with state-court rules governing habeas corpus petitions. *State ex rel. Hawley v. Midkiff,* 543 S.W.3d 604, 608 (Mo. 2018) (citing Mo. Sup. Ct. R. 91.04(a)(1)). The Missouri Supreme Court has held that "there must be a named respondent on a petition for a writ of habeas corpus" and the petition "must include "[t]he name or description of the person who is restraining the person's liberty." *Id.* Under state law, a named respondent is required because it is necessary for the purpose and operation of the writ. *Id.* Because Johnson's motion failed to comply with the mandatory rules governing habeas corpus petitions, those grounds are sufficient to deny the motion.

Johnson's petition also failed to conform to other state court rules for writ filings in appellate courts. Mo. Sup. Ct. R. 84.24(a). Specifically, Johnson's petition did not include a petition and writ summary, suggestions in support, or docket fee (or a motion for leave to file in forma pauperis). Mo. Sup. Ct. R. 84.24(a). As with the previous rule, the Missouri Supreme Court could have excused Johnson's compliance with these rules, but it was not required to do

so. Johnson's failure to properly petition for a writ of habeas corpus justified its denial. *See Artuz v. Bennet,* 531 U.S. 4, 9 (2000) ("an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings" including "the form of the document" and "the requisite filing fee.") Johnson's violations of the Missouri Supreme Court's procedural rules provides an independent state ground to deny his petition, which deprives this Court of jurisdiction to review the Missouri Supreme Court's order denying the alternative request for habeas relief.

C. Procedural Default

Missouri's procedural rules require litigants to raise claims "at each step of the judicial process in order to avoid default." *Arnold v. Dormire,* 675 F.3d 1082, 1087 (8th Cir. 2012) (quotations and citations omitted). Claims of constitutional error are waived if not made "at the first opportunity with citation to specific constitutional sections." *State v. Driskill,* 459 S.W.3d 412, 426 (Mo. 2015). Johnson's convictions were affirmed on direct appeal to the Missouri Supreme Court, after post-conviction collateral review in the sentencing court, and on appeal from the denial of post-conviction relief. Throughout those processes, Johnson did not raise a claim that a prior mistrial barred his retrial for first-degree murder. Nor did he argue that his age at the time of the offense made him ineligible for the death penalty. Pet. at 2–5.

Although Johnson now argues that he "demonstrated cause for not bringing'" his claims during the normal course of review, there is no evidence in the record to show that the Missouri Supreme Court agreed with him. Pet. at 2–3. With some exceptions not relevant here, Missouri's doctrine of procedural default is nearly identical to its federal counterpart. *See State ex rel. Nixon v. Jaynes,* 63 S.W.3d 210, 215–16 (Mo. 2001) (adopting federal cause-and-prejudice standards); *but see Barton v. State,* 486 S.W.3d 332, 336 (Mo. 2016) (declining to adopt an exception similar to *Martinez v. Ryan,* 566 U.S. 1 (2012)).

No cause exists to excuse the default of Johnson's claims because he could have discovered the factual and legal bases for his claims through due diligence in time to present them during state proceedings. To provide cause for the default, Johnson must show that the factual bases for his claims were unavailable or that the legal bases for his claims were "so novel" that he could not "reasonably be expected to have raised it." *Reed v. Ross,* 468 U.S. 1, 9 (1984).

Johnson could have discovered his juror-bias claim by interviewing the jurors after the mistrial was declared on April 3, 2007. App. 81. Johnson then could have tried to raise the claim before his trial, on direct appeal, or during post-conviction collateral proceedings. Whether the juror evidence was admissible is irrelevant because Johnson must show that the factual and legal

bases for his claim were *unavailable*—not just that the claim was unlikely to succeed. *See Engle v. Isaac,* 456 U.S. 107, 131 n.37 (1982).

As Johnson acknowledges, juror statements evidencing racial bias likely would have been admissible at the time of his post-conviction evidentiary hearing if he had raised a related claim in his post-conviction motion. Pet. at 3 (citing *Fleshner v. Pepose Vision Inst.,* 304 S.W.3d 81, 87–90 (Mo. 2010)). The *Fleshner* opinion proves the legal basis for Johnson's juror claim was available to him in January of 2010 when he filed his amended motion for post-conviction relief, if not earlier. *Fleshner,* 304 S.W.3d at 88–89. The right to an impartial jury is enshrined in the Constitution and has been well-established by this Court's precedent. U.S. Const. amend. VI; *see also Stilson v. United States,* 250 U.S. 583, 586 (1919). Though the Missouri Supreme Court had "never [previously] considered whether the trial court may hear testimony about juror statements during deliberations evidencing ethnic or racial bias or prejudice," other jurisdictions have held that such evidence was admissible since at least 1982. *Fleshner,* 304 S.W.3d at 88 (citing *After Hour Welding, Inc., v. Laneil Mgmt.t Co.,* 108 Wis.2d 734 (1982)). In Missouri, the *Fleshner* case was concluded in the circuit court in 2007, decided by the Missouri Court of Appeals in 2009, and pending with briefing before the Missouri Supreme Court when Johnson was investigating his post-conviction claims. Judgment, *Fleshner v. Institute,* 2007 WL5432741, 04CC-002668 (St. L. Cir. Ct. Oct. 9, 2007);

Fleshner v. Pepose Vision Inst., P.C., 2009 WL113867, ED90853 (Mo. App. E.D. 2009). If the litigants in those civil cases alleged and raised similar allegations of juror misconduct, Johnson offers no reason he failed to do so.

Johnson's argument that *Roper* provides relief fares no better because that claim has been available since Johnson was sentenced. Indeed, *Roper* noted that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18," but found that those arguments would not justify moving "the line for death eligibility." *Roper*, 543 U.S. at 574. Johnson could have argued on direct appeal that the reasoning of *Roper* required the Missouri Supreme Court to expand its holding to apply to him, but chose not to. As a result, the claim is waived. *Driskill,* 459 S.W.3d at 426; *Strong,* 62 S.W.3d at 733–34. Missouri also allows for review of defaulted claims if the sentence imposed exceeds the sentence authorized by law. *State ex rel. Zinna v. Steele,* 301 S.W.3d 510, 517 (Mo. 2012). But Johnson could not meet that exception because his death sentence was appropriate under *Roper* and Missouri Supreme Court precedent. *Tisius v. State,* 519 S.W.3d 413, 430–31 (Mo. 2017).

In addition, Missouri's rules also prohibited Johnson's *Roper* argument because it is duplicative of a motion to recall the mandate that Johnson made and the Missouri Supreme Court denied in 2017. App. 47. Missouri law does not allow for "duplicative and unending challenges to the finality of a

judgment." *Strong,* 462 S.W.3d at 733–34. Even where duplicative claims are not explicitly barred, Missouri courts employ a "strong presumption . . . against claims that have already once been litigated." *State ex rel. Johnson v. Blair,* 628 S.W.3d 375, 382 (Mo. 2021) (citations and quotations omitted). Because Johnson's claim is duplicative, the Missouri Supreme Court could have denied it on that basis alone.

D. State Evidentiary Requirements

Johnson also failed to follow the rules for gathering and presenting evidence supporting his claim. The Saint Louis County Circuit Court's rules provide that "Attorneys and parties to an action shall not, directly or indirectly, communicate with any petit juror, except with leave of Court." St. L. Cnty. Cir. Ct. R. 53.3. Johnson's motion in the Missouri Supreme Court provides no evidence that he had the trial court's leave to interview jurors from his first trial. The Missouri Supreme Court has noted similar circuit-court concerns about the "problematic conduct" of attorneys who engage in "improper contact with jurors" from criminal trials. *State v. Johnson,* 617 S.W.3d 439, 443 (Mo. 2021). Johnson's failure to follow the trial court's local rule is sufficient to deny his juror misconduct claim.

Further, the declarations Johnson submitted to the Missouri Supreme Court do not comply with Missouri's evidentiary rules for affidavits. *State ex rel. Nixon v. McIntyre,* 234 S.W.3d 474, 477–78 (Mo. App. W.D. 2007). Unless

properly verified, written statements like affidavits are not competent evidence. *Id.* at 477 (citing *Mueller v. Bauer,* 54 S.W.3d 652, 657 (Mo. App. E.D. 2001)). To be properly verified, an affidavit must be signed, sworn, and acknowledged by someone who may administer oaths. *Id.* at 477–78 (citing *Garzee v. Sauro,* 639 S.W.2d 830, 831–32 (Mo. 1982)).

In petitioning for post-conviction review, Johnson "ha[d] the burden of proof to show that he [was] entitled to habeas corpus relief." *Jaynes,* 73 S.W.3d 623, 624 (Mo. 2002) (citing *McIntosh v. Haynes,* 545 S.W.2d 647, 654 (Mo. 1977)). That burden of proof "has two components—the burden of production and the burden of persuasion." *White v. Director of Revenue,* 321 S.W.3d 298, 304 (Mo. 2010) (citing *Kenzenbaw v. Director of Revenue,* 62 S.W.3d 49, 53 (Mo. 2001)). The burden of production gives Johnson the "duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling." *Id.*

The Missouri Supreme Court was not required to hold a hearing before denying habeas relief. *See State ex rel. Cole v. Griffith*, 460 S.W.3d 349, 358 (Mo. 2015) (denying relief without a hearing). Missouri habeas courts may preserve their "resources for holding hearings [in] those cases where the petition asserts valid grounds for habeas corpus relief." *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 217 (Mo. 2001). Pleadings and exhibits ordinarily

comprise the entire record in habeas corpus. *McMilian v. Rennau*, 619 S.W.2d 848, 850 (Mo. App. W.D. 1981).

Johnson's juror misconduct claim was based on exhibits attached to his pleadings that did not meet state-law standards. Johnson's "declarations," purportedly written by jurors from his first trial, appear to be formatted for the requirements of a federal statute. App. 66–80. But they violate Missouri's evidentiary rules because they are not sworn before someone authorized to administer oaths. *McIntyre,* 234 S.W.3d at 477 (citing *Garzee,* 639 S.W.2d at 831–32); Mo. Rev. Stat. § 492.010. The Missouri Supreme Court could have declined further review of the claim on that basis alone.

For all of these independent and adequate state-law reasons, this Court lacks jurisdiction to review the Missouri Supreme Court's order denying Johnson's motion to recall the mandate.

II. Even if this Court had jurisdiction, Johnson's petition is a poor vehicle to review his claims.

Even if the state-law problems below did not directly preclude this Court from exercising jurisdiction, there are even more reasons that this Court should decline to review Johnson's petition.

A. This Court's should deny certiorari to respect our system of dual sovereignty.

Even presuming the Missouri Supreme Court's order below can be read to pass on a federal question, this Court should not grant certiorari review of

state post-conviction claims because this Court has found federal habeas proceedings provide a more appropriate avenue to consider federal constitutional claims. *Lawrence v. Florida,* 549 U.S. 327, 328 (2007), *Kyles v. Whitley,* 498 U.S. 931, 932 (1990) (Stevens, J., concurring in the denial of certiorari).

"To respect our system of dual sovereignty," this Court and Congress have "narrowly circumscribed" federal habeas review of state convictions. *Shinn,* 142 S. Ct. at 1730 (citations omitted). The States are primarily responsible for enforcing criminal law and for "adjudicating constitutional challenges to state convictions." *Id.* at 1730–31 (quotations and citations omitted). Federal intervention intrudes on state sovereignty, imposes significant costs on state criminal justice systems, and "inflict[s] a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* at 1731 (quotations and citations omitted).

To avoid the harms of unnecessary federal intrusion, "Congress and federal habeas courts have set out strict rules" requiring prisoners to present their claims in state court and requiring deference to state-court decisions on constitutional claims. *Id.* at 1731–32; 28 U.S.C. § 2254(d), (e). Johnson petitioned for federal habeas review, his claims were denied, and that denial was affirmed by the United States Court of Appeals for the Eighth Circuit and

this Court. There is no basis for this Court to afford Johnson successive federal habeas review by granting certiorari here.

Johnson's habeas petition presented a *Roper* claim similar to the one he presses now. *Johnson v. Steele,* 4:13-CV-02046-CEJ, Doc. 35 at 199 (E.D. Mo.). Federal law specifically prohibits successive review of a state prisoner's federal habeas claims that were presented in a prior petition. 28 U.S.C. § 2244(b)(1). Johnson either strategically decided not to investigate and present the juror misconduct claim or he failed to exercise due diligence. *Johnson v. Steele,* 4:13-CV-02046-CEJ, Doc. 35. Johnson argues he did not know of the claim until "the jurors were interviewed by federal habeas counsel[,]" but that statement is a plain admission that Johnson could have learned of the claim at any earlier time by interviewing the jurors. Pet. at 3.

AEDPA prohibits successive review of a claim by a federal court, like the alleged juror misconduct claim, unless the petitioner can show that the claim "relies on a new rule of constitutional law" that applies retroactively or that "the factual predicate of the claim could not have been discovered previously through the exercise of due diligence" and that the claim shows "by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Johnson] guilty of the underlying offense." § 2244(b). Johnson cannot make either showing.

AEDPA's one-year statute of limitations in § 2244(d) renders both claims untimely. Johnson has known the factual and legal bases for the *Roper* claim for more than a decade, and even if Johnson did not learn of the alleged juror misconduct claim until July 23, 2021 (the day he collected the first juror declaration, App. 75), more than a year has passed even if the statute of limitations were tolled while the motion to recall the mandate was pending. § 2244(d)(2).

Even if Johnson's claims could properly be presented in a new federal habeas petition, they do not warrant relief. As discussed in point I, there are several adequate and independent state law grounds that require denial of the claims. And if, as Johnson argues, the Missouri Supreme Court denied his claims on the merits and not on procedural grounds, then federal habeas relief would be precluded under § 2254(d)(1). Both of Johnson's claims require an expansion of, or departure from, this Court's precedent. AEDPA prohibits that too. § 2254(d)(1); *White v. Woodall*, 572 U.S. 415, 426 (2014) (state courts need not extend this Court's precedent in adjudicating constitutional claims).

Johnson's conviction and sentence have been exhaustively reviewed and affirmed in state and federal court. A grant of certiorari now would allow Johnson an end-run around the rules that Congress and federal courts have crafted to maintain our federalist system of government. To respect "Our Federalism," "finality, comity, and the orderly administration of justice," this

Court should enforce the limits on federal review of state convictions and deny Johnson's petition. *Younger v. Harris,* 401 U.S. 37, 44 (1971) (first quote); *Shinn,* 142 S. Ct. at 1733 (quoting *Dretke v. Haley,* 541 U.S. 386, 388 (2004)) (second quote).

B. This Court should deny certiorari because Johnson has delayed bringing his claims.

Johnson's years of delay in failing to bring his claims strongly counsel against certiorari here. This Court has often said that "well-worn principles of equity" advise this Court to deny clams where offenders have "slept upon [their] rights" and delayed litigation until the last minute. *Ramirez v. Collier,* 142 S. Ct. 1264, 1282–83 (2022) (quoting *Gildersleeve v. New Mexico Mining Co.,* 161 U.S. 573, 578 (1896)). "[L]ate-breaking changes in position, last-minute claims arising from long-known facts, and other 'attempt[s] at manipulation' can provide a sound basis for denying equitable relief in capital cases. *Id.* at 1282 (quoting *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam)). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). So courts should not delay an execution where "a claim could have been brought at such a time as to allow consideration

of the merits without requiring entry of a stay." *Id.* (citing *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)).

Here, the record shows Johnson delayed years in bringing his claims. Johnson could have discovered and presented both of his claims in time for his direct appeal, state post-conviction proceedings, and federal habeas review. Pet. at 1–5. App. 81. Johnson could have discovered his juror misconduct claim by interviewing jurors following his mistrial on April 3, 2007, and Johnson must have known about his *Roper* claim when he was sentenced. Instead, he waited years to present his claims.

Even in his most recent round of litigation, Johnson waited months before presenting his claims to the Missouri Supreme Court. Johnson began collecting declarations to support his juror misconduct claim in July 2021, and likely knew the basis for the claim sooner. App. 75. Yet Johnson did not present the claim in any court until July 11, 2022, after the State had moved to set Johnson's execution date. App. 4. Johnson's delay in bringing his claim is a transparent, eleventh-hour attempt to delay his execution. "The people of Missouri, the surviving victims of [Johnson's] crimes, and others like them deserve better."[1] *Bucklew,* 139 S. Ct. at 1134. The Court should deny Johnson's petition.

[1] Undersigned counsel has spoken with Sgt. McEntee's surviving family members, under 18 U.S.C. § 3771(a)(7), they strongly object to further delay.

III. There is no support for Johnson's argument that he could not be retried for first-degree murder after the first jury failed to reach a verdict.

In his first question presented, Johnson argues that the Constitution requires the Missouri Supreme Court to reopen his direct appeal and set aside his conviction for first-degree murder even though there was no constitutional error at the trial that resulted in his conviction and death sentence. Pet. at 16. Instead, Johnson challenges the result of a prior mistrial based on declarations purportedly signed by half of the jurors in that case and asks for a remedy this Court has never approved or intimated. App. at 66–80.

Those declarations allege that the jury in the first trial was split ten to two, with ten jurors in favor of second-degree murder when the jurors unanimously agreed they were deadlocked and could not reach a verdict. App. at 15. The declarations also allege that the two jurors who favored first-degree murder were white and used "codewords" like "your neighborhoods" and "you people" when talking to black jurors. Pet. at 15; App. at 67, 70. Johnson argues that these declarations prove that "racial bias infected the first jury's decision-making." Pet. at 15.

Federal and state courts have found that proof of racial bias during juror deliberations can be grounds for a new trial. *Pena-Rodriguez,* 580 U.S. at 870; *Shillcutt,* 827 F.2d at 1159; *Henley,* 238 F.3d at 1120; *Fleshner,* 304 S.W.3d at 88–89 (collecting state cases). But Johnson is not satisfied with that remedy

because, in his second trial, the jury found him guilty of first-degree murder and sentenced him to death. Hoping to avoid that sentence, Johnson asks this Court to impose a new constitutional requirement that, when a jury fails to reach a verdict, States must sort jurors into "racist" and "non-racist" jurors, discount the votes of the "racist" jurors, and then enter a judgment based on the votes of the "non-racist" jurors. Pet. at 20. And Johnson asks the Court to apply that remedy retroactively to his first trial even though there were no allegations or evidence of juror misconduct at the time. Johnson's request finds no support in the Constitution or this Court's precedent.

The Court should deny Johnson's first question for at least three reasons. First, the first-trial court properly declared a mistrial when the jurors deadlocked and that mistrial cured any alleged juror misconduct. Second, the jury's failure to reach a verdict in the first trial was not an acquittal that precluded Johnson's retrial. And third, any new Constitutional rule about the procedure of mistrials could not retroactively apply to Johnson's first trial.

A. Any alleged juror misconduct at Johnson's first trial was cured by the mistrial.

The declaration of a mistrial is a drastic remedy used in extraordinary circumstances when there is no other adequate way to cure error. *State v. Shockley,* 410 S.W.3d 179, 190 (2013); *Washington,* 434 U.S. at 505–06; s*ee also United States v. Gunderson,* 195 F.3d 1035, 1037–38 (8th Cir. 1999). Because

the Constitution prevents a criminal defendant from being tried twice for the same offense, a mistrial in a criminal case should be granted only at the defendant's request or on a showing of "manifest necessity." *Washington,* 434 U.S. at 505–506.

The "classic basis for a proper mistrial" is the "trial judge's belief that the jury is unable to reach a verdict." *Id.* at 509. Courts have uniformly held that "the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial." *Id.* This rule recognizes "society's interest in giving the [State] one complete opportunity to convict those who have violated its laws." *Id.*

In Johnson's case, the jury genuinely deadlocked. App. at 84–89. The jury reported that they were "deadlocked between first degree and second degree [murder]" and even further deliberations made clear that "[n]othing ha[d] changed and no further deliberations [would] benefit them." App. at 88–89. The court asked each individual juror if there was "any reasonable likelihood to believe that the jury would be able to reach a unanimous verdict" after further deliberation, and each juror answered, "No." App. at 88. The court then asked if either party objected to the court declaring a mistrial, and both the prosecutor and Johnson's counsel stated they had no objection. App. at 88. With no objection, the court declared a mistrial and excused the jury. App. at 89.

This record presents no issue for this Court's review—instead it presents the "classic example" of a properly declared mistrial. *Downum v. United States,* 372 U.S. 734, 735–36 (1963) (citing *United States v. Perez,* 22 U.S. 579, 579–80 (1824)). Johnson did not object to the mistrial, and he has never argued that the mistrial resulted from prosecutorial or judicial error or bad faith. *See Oregon v. Kennedy,* 456 U.S. 667, 674–75 (1982).

Though Johnson now complains about alleged juror misconduct during deliberations, those claims are moot because, even if they were discovered at the time of the first trial, the proper remedy would have been a mistrial or other, less drastic relief. *See, e.g., Al-Mahdi v. United States,* 867 A.2d 1011, 1018–19 (D.C. Cir. 2005); *United States v. Cox,* 324 F.3d 77, 86 (2d Cir. 2003); *United States v. Resko,* 3 F.3d 684 (3d Cir. 1993); *State v. Christeson,* 50 S.W.3d 251, 268 (Mo. 2001). Even as more jurisdictions have allowed the admission of jurors' statements as evidence of racial bias during deliberations, the only available remedy is a new trial. *Pena-Rodriguez,* 580 U.S. at 870; *Shillcutt,* 827 F.2d at 1159; *Henley,* 238 F.3d at 1120; *Fleshner,* 304 S.W.3d at 88–89 (collecting state cases). Therefore even under Johnson's theory of injury, he has already received the relief required: a new trial.

With no basis in law or fact, Johnson argues that he had a right to have the trial court discover and discount the so-called "racist jurors." No court has ever held that the Constitution requires such a remedy, so Johnson's

arguments rest on years-old hindsight in unverified declarations from six of the twelve first-trial jurors. Pet. at 20. Assuming they are truthful, the declarations contain nothing but incomplete information, degraded memories, statements that conflict with the transcript and with each other, and vague allegations of racism missing context or any explanation from the jurors accused of misconduct. App. at 66–80. The declarations are highly suspect, but even if they could be believed, nothing in them would allow the trial court to divine the "racist" from "non-racist" jurors to allow the trial court to disqualify the "racist jurors" and enter a conviction based on the verdict of the remaining ones.

At bottom, Johnson asks this Court to find that the Constitution requires Missouri to cast aside a valid conviction and sentence entered by the unanimous decision of a fair jury after a fair process that was repeatedly upheld throughout state and federal appeals. Instead, he would have this Court enter a conviction based on, *at best*, hearsay from half of the jurors in a fourteen-year-old mistrial from a jury deliberations that Johnson insists were infected by racial bias. Johnson's arguments in this vein are a transparent request for a "windfall" unrelated to any actual, prejudicial error. *See* Pet. at 19 (quoting *Lafler v. Cooper,* 566 U.S. 156, 170 (2012)). There is no basis for further review from this Court.

B. The mistrial was not an acquittal that precluded retrial.

In his petition to this Court, Johnson does not repeat his argument to the Missouri Supreme Court that the Double Jeopardy Clause barred retrial following the jury's failure to reach a verdict in the first trial. *See* App. 20. Still, there was no basis to preclude the State from retrying Johnson after the jury failed to reach a verdict in the first trial.

The Fifth Amendment bars retrial when a charge is dismissed because the State failed to present sufficient evidence or when the defendant is acquitted by the factfinder. Below, Johnson argued that his "initial jury necessarily found the absence of any aggravating factors when it could not unanimously find that Johnson committed the offense of first-degree murder." App. 20. That argument is squarely precluded by this Court's case law. *Poland v. Arizona,* 476 U.S. 147, 154–55 (1986); *Blueford,* 566 U.S. at 606.

Double jeopardy only bars a second prosecution where the factfinder or reviewing court has "decided that the prosecution has not proved its case." *Poland,* 476 U.S. at 154. In capital cases, a defendant is acquitted of the death penalty *only if* the factfinder returns a verdict that finds no aggravating circumstances are present. *Poland v. Arizona,* 476 U.S. 147, 156 (1986). Here, the first jury did not return a verdict at all. *See Blueford,* 566 U.S. at 605–06. Even accounting for Johnson's juror declarations, the jury's deliberations and preliminary positions were not a formal judgment or a final decision on

Johnson's guilt or innocence. *Id.* There was no legal basis to bar the State from retrying Johnson.

C. Any new procedural rule cannot apply retroactively to Johnson's first trial.

As a final matter, Johnson's first question presented cannot be a basis for certiorari because even if this Court announced the new Constitutional rule he invites, it would not apply retroactively to his first trial or require his death sentence to be reversed. *Edwards v. Vannoy,* 141 S. Ct. 1547, 1560 (2021). In order to gain the benefit of a new rule, Johnson must show that the rule was "*dictated* by precedent existing at the time the defendant's conviction became final." *Id.* at 1555 (citing *Teague v. Lane,* 489 U.S. 288, 301 (1989) (plurality opinion)). Johnson does not even attempt to make that showing because there is no case that requires the result he requests. But many cases he does cite, like *Pena-Rodriguez, Lafler,* and *Buck v. Davis,* 137 S Ct. 759, 778 (2017), were decided after his conviction became final. (Pet. at 16–21). So any rule like the one Johnson asks this Court to adopt would be a new rule under *Edwards*.

The rule would also be procedural. *Edwards,* 141 S. Ct. at 1562. A rule about the proper remedy for Johnson's alleged juror misconduct claim would not alter "the range of conduct or the class of persons that the law punishes." *Id.* (citing *Schiro v. Summerlin,* 542 U.S. 348, 353 (2004)). Instead, such a rule would alter "only the manner of determining the defendant's culpability." *Id.*

Any new procedural rule would apply only to "cases pending in trial courts and on direct review" and would not apply to collateral review proceedings like the one below. *Id.* Thus, Johnson's first question presents no basis for certiorari review because no matter how this Court decided the claim, that would not apply to Johnson.

IV. The Constitution does not require the Missouri Supreme Court to expand this Court's decision in *Roper*.

In his second question presented, Johnson argues that this Court should expand its decision in *Roper*. But one core flaw pervades Johnson's argument: nothing has changed since *Roper* that would justify expansion. As this Court noted in *Roper,* society has drawn the line between juveniles and adults at 18 years old even though that distinction has long been subject to "the objections always raised against categorical rules." *Roper,* 543 U.S. at 574. The research available then suggested that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Still, the Court established a bright-line rule based on the traditional age of majority. *Id.*

Johnson's arguments against that categorical rule are the same objections the *Roper* Court rejected. Like death row inmates in other federal cases, Johnson argues that "the factors *Roper* considered relevant . . . apply equally to persons under 21." *Tsarnaev,* 968 F.3d at 96 (reversed on other grounds). But he fails to show that research about brain maturation is

"substantially different from the research available at the time of *Roper*." *See id.* at 97. For example, Johnson points to "recent neuroscientific research," but only to say that it "confirms" conclusions that have been widespread for more decades Pet. at 25 ("brain development continues well into a person's twenties"); *Cf.* Sarah Johnson, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45.3 J. Adolesc. Health, 216, 216 (2009) ("in the last decade, a growing body of longitudinal neuroimaging research has demonstrated that" some areas of the brain "may not be fully developed until halfway through the third decade of life.").

More importantly, there is no legal disagreement among courts or states about the line this Court drew in *Roper*. As the Federal Government argued in *Tsarnaev*, "not a single state with an active death penalty scheme bans the execution of 18–20 year olds." 968 F.3d at 97. And federal courts have uniformly declined to expand *Roper* to apply to offenders at the age of majority, regardless of arguments about their "mental age." *Tsarnaev,* 968 F.3d at 96–97 (reversed on other grounds); *Dock,* 541 F. App'x. at 245; *Doyle,* 535 F. App'x at 395; *Marshall,* 736 F.3d at 500; *Melton,* 778 F.3d at 1235. There is no conflict that would demand reexamining *Roper,* especially here where Johnson delayed raising his claim for years resulting in waiver below. The Court should deny certiorari.

Reasons to Deny Johnson's Request for a Stay

For many of the same reasons above, the Court should deny Johnson's motion to stay his execution. A stay of execution is an equitable remedy that is not available as a matter of right. *Hill,* 547 U.S. at 584. Johnson's request for a stay must meet the standard required for all other stay applications, including a showing of significant possibility of success on the merits. *Id.* In considering Johnson's request, this Court must apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* (citing *Nelson,* 541 U.S. at 650). The "last-minute nature of an application" may be reason enough to deny a stay. *Id.* Johnson's request fails on all four traditional stay factors.

Johnson cannot meet any of the traditional factors required for stay of execution. Johnson has little possibility of success because, as discussed above, Johnson's claims here do not warrant further review. This Court has no jurisdiction because the decision below rests on a host of procedural and evidentiary state-law bases for denial. This Court should decline certiorari in the interests of comity and federalism and because Johnson delayed in bringing his claims. And Johnson's claims fail on their merits under this Court's case law.

Johnson, likewise, will not be injured without a stay. Johnson murdered Sgt. McEntee in 2005, and has had ample time to seek review of his convictions in state and federal court. As this Court knows, "the long delays that now typically occur between the time an offender is sentenced to death and his execution are excessive." *Bucklew,* 139 S. Ct. at 1134. This Court's role is to ensure that Johnson's challenges to his sentence are decided "fairly and expeditiously," so he has no interest in further delay while the Court considers his petition. *Id.* Johnson has long delayed in bringing his claims, which amount to "little more than an attack on settled precedent." *See id.* Given the strong state and federal precedent that require the denial of his claims, Johnson has no more legitimate interest in delaying the lawful execution of his sentence.

And, a stay would irreparably harm both the State and Johnson's victims. "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew*, 139 S. Ct. at 1133 (quoting *Hill*, 547 U.S. at 584). Now that Johnson has exhausted his state and federal remedies, further litigation of his long-delayed, meritless claims "disturbs the State's significant interest in repose for concluded litigation. *Shinn,* 142 S. Ct. at 1731. The surviving victims of Johnson's crimes have waited long enough for justice, and every day longer that they must wait is a day they are denied the chance to finally make peace with their loss. *Id.* ("[O]nly with real finality can the victims of crime move forward knowing the moral judgment will be

carried out.") (quotations and citations omitted). For these same reasons, the public interest weighs against further delay.

Conclusion

This Court should deny the petition for writ of certiorari and the motion for a stay of execution.

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

D. John Sauer
Solicitor General
Shaun J. Mackelprang
Deputy Attorney General, Criminal Litigation

/s/Andrew J. Crane
Andrew J. Crane
Assistant Attorney General
Counsel of Record
Missouri Bar No. 68017
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-0264
Andrew.Crane@ago.mo.gov

Attorneys for Respondent