CASE NOS. 22-5947, 22A414

In The
Supreme Court of the United States

KEVIN JOHNSON,

***Petitioner*,**

v.

STATE OF MISSOURI,

***Respondent*.**

Reply Brief in Support of
Petition for Writ of Certiorari to
the Supreme Court of Missouri
and Application for Stay of Execution

THIS IS A CAPITAL CASE
EXECUTION SCHEDULED NOVEMBER 29, 2022

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REPLY ARGUMENT

I. The ruling below does not rest on any adequate and independent state law ground.

The state recites a litany of procedural objections, none of which it advanced below, and none of which impair the Court's jurisdiction. In order to bar this Court's review, a state procedural rule must be "firmly established and regularly followed." *James v. Kentucky*, 466 U.S. 341, 348–49 (1984). Even then, the state court must have actually relied on the state-law ground in the case at hand. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). The habeas corpus rules cited (and misapplied) by respondent do not meet these requirements.

Respondent contends that Johnson failed to comply with various rules governing habeas corpus petitions in Missouri, such as the need to name a prison warden as respondent, to pay a separate filing fee, and to file a "writ summary" accompanying the petition. Opp. 14–15. This argument fails because the Missouri courts routinely consider habeas corpus petitions and motions to recall the mandate as alternative remedies within the same pleading. *See*, *e.g.*, *In re Competency of Parkus*, 219 S.W.3d 250, 253 (Mo. 2007); *State v. Whitfield*, 107 S.W.3d 253, 269 n.19 (Mo. 2003). That is what Johnson filed in the court below, which accepted the pleading for filing because it reflects common post-conviction practice. App. 4; *see also* Order, *State v. Johnson*, No. SC89168 (Mo. Oct. 31, 2016) (requesting state to file opposition to combined motion to recall mandate and petition for writ of habeas corpus).

The state fares no better invoking "state evidentiary requirements" that it imputes to Missouri habeas corpus procedure. Opp. 19–21. It argues that Johnson

violated the trial court's rule against interviewing jurors, but the rule applies only to attorneys or parties to "an action" that is pending in the trial court. St. L. Cnty. Cir. Ct. R. 53.3(2). By its own terms, the rule does not apply during federal habeas proceedings, years after the trial court's jurisdiction has ended. *See Cole v. Roper*, 579 F. Supp. 2d 1246, 1270 n.11 (E.D. Mo. 2008) ("The Court notes that although Petitioner's trial counsel was prohibited from contacting the petit jurors after denial of its motion requesting such relief, Petitioner's current habeas counsel is not so prohibited[.]"). Nothing in *State v. Johnson*, 617 S.W.3d 439 (Mo. 2021), is to the contrary. *Johnson* notes that the trial court voiced concern about "improper contact" with jurors, but the opinion does not specify what the "contact" was or whether it was actually improper. *Id.* at 443.

Neither does the Court's jurisdiction depend on whether Johnson presented notarized affidavits from the jurors, as opposed to sworn declarations. *See* Opp. 19–21. For one thing, Missouri courts frequently excuse a party's failure to present notarized affidavits even when the law requires them. *See*, *e.g.*, *State ex rel. Trans World Airlines, Inc. v. David*, 158 S.W.3d 232, 235 (Mo. 2005) (proper remedy is leave to amend rather than dismissal); *State v. Ellis*, 637 S.W.3d 338, 351–52 (Mo. Ct. App. 2021) (prosecution's business records affidavit was not timely notarized, but defendant not prejudiced); *State ex rel. Cole v. Griffith*, 460 S.W.3d 349, 356 & n.9 (Mo. 2015) (considering non-notarized statement of overseas witness). More fundamentally, though, habeas corpus petitions do not require documentary proof of any kind, whether by affidavit or otherwise. Habeas petitions are governed by the rules of civil pleading, which require only "a short and plain statement of the facts

showing that the pleader is entitled to relief." *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 216–17 (Mo. 2001); Mo. Sup. Ct. R. 55.05. It is irrelevant that Missouri law requires affidavits on summary judgment, as in *State ex rel. Nixon v. McIntyre*, 234 S.W.3d 474, 477–79 (Mo. Ct. App. 2007), and that a habeas petitioner bears the ultimate burden of proof. Opp. 20. No authority requires notarized affidavits within the petition itself. Johnson did not violate state law by offering more evidence than it requires.

Equally meritless is the state's argument that Johnson could have presented his claim about racist jurors at trial in 2007, on direct appeal in 2008, or on post-conviction review in 2010, so that he lacks "cause" for failing to assert it during those proceedings. Opp. 16–18. As the state would have it, Johnson was required (a) to anticipate that state law might abandon the centuries-old Mansfield rule and allow the admission of racist statements from jury deliberations, and (b) to interview the first-trial jurors even though he lacked any reason to suspect that such racist statements were uttered (or that such utterances would be admissible) – and even though the trial court's rules prohibited such interviews by the "parties" to an "action" at trial or on post-conviction. St. L. Cnty. Cir. Ct. R. 53.3(2). To state such an argument is to refute it. "Cause" does not depend on whether a petitioner "could" have unearthed his claims through all-encompassing efforts, but rather, on whether the petitioner has made a "reasonable attempt, in light of the information available at the time, to investigate and pursue [his] claims." *Williams v. Taylor*, 529 U.S. 420, 435, 443 (2000) (also equating "cause" standard with the inquiry of whether a petitioner has "failed to develop the factual basis of a claim in State court

proceedings" under 28 U.S.C. § 2254(e)(2)).

The state goes on to argue that Johnson waived his Eighth Amendment claim by failing to argue at trial or on direct appeal that his age and mental illness preclude his death sentence. Opp. 18. But Missouri law does not recognize such a waiver when, as here, the prisoner claims that his sentence exceeds what the law allows – as it would if the Eighth Amendment forbids Johnson's execution. *See Whitfield*, 107 S.W.3d at 269 & n.19; *see also State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 400–01 (Mo. 2003) (sustaining such a claim on habeas), *aff'd sub nom. Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment prohibits the death penalty against juvenile offenders). The state concedes that Missouri law "allows for review of defaulted claims if the sentence imposed exceeds the sentence authorized by law." Opp. 18. Even a procedural denial below, then, would reflect the state court's view that Johnson's sentence complies with the Eighth Amendment. *See Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983) (procedural ruling is not independent of federal law when it "fairly appears . . . to be interwoven with the federal law").

Respondent next complains that the Eighth Amendment claim is successive because it repeats a claim from an earlier motion to recall the mandate. Opp. 18–19. Once again the state is wrong: "[S]uccessive habeas corpus petitions are, as such, not barred" under Missouri law, *State ex rel. Johnson v. Blair*, 628 S.W.3d 375, 381 (Mo. 2021), especially when the prisoner relies on intervening legal and factual developments, as Johnson does here. *See*, *e.g.*, *id.* at 381–88 (reviewing merits of intellectual disability claim under "current medical diagnostic standards," despite

jury's earlier finding that petitioner was not intellectually disabled); *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. 2010) (habeas relief on *Brady* claim despite earlier *Brady* petition on narrower evidence).

II. The Court should accept review of Johnson's claim that a retrial did not cure the constitutional violation from his first trial, at which two racist jurors prevented a unanimous verdict on the lesser offense of second degree murder.

The state insists that Johnson's retrial did not violate double jeopardy principles. Opp. 28–29, 32–33. That is beside the point. Johnson does not advance a double jeopardy claim, and in any event, double jeopardy is not the only circumstance under which a retrial will fail to remedy a constitutional violation. *See United States v. Bergman*, 746 F.3d 1128, 1133 (10th Cir. 2014) (Gorsuch, J.) ("[C]ertain double jeopardy problems can prevent the government from retrying a successful § 2255 petitioner. But from this it doesn't follow that a district court granting relief under § 2255 may preclude a retrial only in the presence of a double jeopardy problem.").

Respondent argues that a retrial is the standard cure for prejudicial trial errors, including juror misconduct. Opp. 30–31. Johnson does not disagree with that premise, but rather with the broader suggestion that a fair trial will always make the defendant whole. This Court's authorities reject that suggestion. *See Lafler v. Cooper*, 566 U.S. 156, 166 (2012) ("Far from curing the error, the trial caused the injury from the error."); *United States v. Morrison*, 449 U.S. 361, 364 (1981) (noting "the general rule that remedies should be tailored to the injury suffered from the constitutional violation").

Neither is the requirement of a make-whole remedy a "new" rule of criminal

procedure, so as to be barred by *Teague v. Lane*, 489 U.S. 288 (1989). *See* Opp. 33–34. *Lafler* itself was a habeas corpus case – and thus, subject to *Teague* – and the Court applied the longstanding principle that a remedy must "neutralize the taint of a constitutional violation" to hold that a fair trial did not cure counsel's ineffective assistance during plea negotiations. *Lafler*, 566 U.S. at 170–73 (quoting *Morrison*, 449 U.S. at 364).

III. The Court should decide whether the Eighth Amendment prohibits the death penalty for crimes committed when the defendant was under the age of 21.

Respondent disputes that the science has materially changed since *Roper*'s issuance in 2005. The state quotes a scientific journal article from 2009, which stated that some areas of the brain "*may not be* fully developed until halfway through the third decade of life." Opp. 35 (quoting Sarah Johnson, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. Adolesc. Health, 216, 216 (2009)) (emphasis added). Today's consensus, though, lacks any such uncertainty. As Professor Erin Bigler reports from a review of the prevailing science:

> 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.

App. 122 (emphasis added).

The state also points to *Roper*'s categorical rule exempting only those under 18 from the death penalty. Opp. 34. To be sure, the Court was aware that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. But we now know that those same qualities

categorically remain until at least age 21: "The youngest age … 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 … that on an individual basis, it is indefinite but clearly between ages 21 and 25." App. 122 (per Bigler). The Court should account for that scientific consensus, as it must when deciding which classes of offenders are sufficiently culpable to be subject to execution. *See Hall v. Florida*, 572 U.S. 701, 704 (2014); *Moore v. Texas*, 137 S. Ct. 1039, 1049, 1053 (2017).

IV. Johnson has not delayed the assertion of his claims.

Aside from its misguided argument that Johnson "waived" his Eighth Amendment claim in state court, *see* Argument I, above, the state contends that Johnson delayed his juror misconduct claim by failing to assert it alongside the earliest of the juror declarations, which date from July 2021. Opp. 26, 36; App. 69–75. But it was reasonable for Johnson to continue investigating his claim. Subsequent to the initial declarations, Johnson obtained statements from additional jurors on September 20, 2021 (Kathryn Mills) and March 11, 2022 (Anitra Mahari), as well as from the foreperson on February 9, 2022 (John Stimpson). App. 76–80. Even now the state complains that Johnson's evidence is incomplete. It urges that the claim rests on "years-old hindsight in unverified declarations from six of the twelve first-trial jurors," and that Johnson's "highly suspect" declarations "contain nothing but incomplete information, degraded memories, statements that conflict with the transcript and with each other." Opp. 31. Doubtless the state's criticisms would be even more strident if Johnson had gone forward on narrower evidence at

an earlier time.

All told, Johnson brought his claim below on July 12, 2022, or some three months after the last of the declarations, and six weeks before the Missouri Supreme Court set an execution date. App. 2–4. The fact that Johnson undertook a professionally reasonable investigation does not mean that he has "long delayed in bringing his claims." Opp. 37.

CONCLUSION

The petition for writ of certiorari should be granted, and the Court should stay Johnson's execution in order to address the questions presented in the usual course.

Respectfully Submitted,

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